



When the European Court of Human Rights refers to external instruments

Mapping and justifications

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Summary of the PhD in English

The European Convention on Human Rights (ECHR) – supervised by the European Court of Human rights (ECtHR) – coexists with other normative (human rights) instruments that have been created at the national, regional, and international level, both by State and non-State actors. The ECHR represents one legal piece of this normative ‘jungle’, characterized by legal ‘fragmentation’. Whereas a lot is said about the negative aspects of this diverse world, this doctoral thesis aims to focus on its positive sides.

To support its interpretation and application of the ECHR, the Strasbourg Court makes reference to a diverse range of instruments other than the ECHR, which we call *external instruments*. The Grand Chamber-case of *Demir and Baykara v. Turkey* of 12 November 2008 provides a rare overview of the characteristics of this ‘referencing practice’. In this judgment, the Court included a separate heading to specifically explain its interpretative use of international law, discussing the legal basis as well as the type of instruments that it considers relevant. Two major conclusions follow from the Court’s explanations: *firstly*, it puts external referencing in the light of some rules on interpretation provided in the Vienna Convention on the Law of Treaties (VCLT) (particularly in Article 31 paragraph 3 (c) VCLT); *secondly*, it stresses that soft and non-ratified external instruments might equally offer support for (evolutively) interpreting the ECHR. These statements are controversial; the Court has been criticized for misinterpreting the rules of the VCLT, for not well justifying its references as well as for exceeding its powers by incoherently relying on (non-binding) external materials for interpretative purposes.

The case of *Demir and Baykara v. Turkey* left many questions open in respect of the importation of external instruments. There is some confusion about the functions and the weight of (non-binding) external instruments in legal reasoning. In addition, the justificatory arguments developed in this case lack precision and persuasiveness. Addressing these gaps, this study *firstly* offers an elaborate ‘mapping’ of the usage of external instruments by the ECtHR. For that purpose, all references in each Grand Chamber-case since *Demir and Baykara v. Turkey* of 12 November 2008 (until the end of 2015) have been analyzed and categorized. *Secondly*, this work develops arguments to better justify the Court’s practice of using external instruments. Both from a legality and a users’ perspective, this thesis demonstrates how external referencing may (under certain conditions) be a valid method to give meaning to the provisions in the ECHR.

The ‘mapping’ of the referencing practice demonstrates that, to support the interpretation and application of the Convention in the ‘law’-section of the decision, external instruments have been invoked by the Grand Chamber in almost 70 percent of the examined cases. This interpretative technique covers a wide variety of instruments, diverging according to their origin as well as to their scope *ratione materiae*, *ratione personae* and *ratione loci*. The legal status of the instruments constitutes an additional root of diversity; the ECtHR imports legal instruments that have been ratified by the Member States, instruments that have not been ratified by some of the Member States and/or by the respondent State, soft instruments created by politically (non-)representative bodies, and finally, case law developed by other (*quasi*-)judicial bodies. The Grand Chamber references these instruments for different purposes: to dismiss their content, to establish interpretative rules, to support the interpretation of notions and requirements of the Convention, to enable the creation of harmony between the Convention and external legal requirements, or to consider a State’s freedom of manoeuvre when applying the ECHR. An example of a contested – but rather rare – usage of external instruments consists of comparing a mixture of binding and non-binding instruments in order to progressively evolve (and change) the Court’s case law. Overall, however, the Grand Chamber adopts a rather traditional approach to its

interpretative ‘sources’, not according to non-binding instruments an independent decisive weight.

In the Grand Chamber cases issued after *Demir and Baykara v. Turkey*, the Court did not undertake efforts to further justify and explain its referencing practice. In our view, two provisions might nonetheless operate as valuable vehicles to enhance the *legality* of some references. It concerns, more particularly, Article 31 paragraph 3 (c) VCLT, inciting the Court to take into account external applicable norms, and Article 53 ECHR, offering a ‘safeguard’ for human rights.

Article 31 paragraph 3 (c) VCLT is regularly used by the Court in connection to the method of ‘harmonious interpretation’, accommodating the obligations of the ECHR with external obligations (that risk to conflict with the Convention). We agree that Article 31 paragraph 3 (c) VCLT – covering a principle of ‘systemic integration’ – offers a legal basis for a coordinative integration of external applicable requirements. Some caution is nonetheless required; the creation of convergence between the ECHR and external legal domains should not supersede the aim of effective and progressive human rights protection. Therefore, when a conflict arises between the ECHR and an external provision, this should be clearly acknowledged instead of being artificially ignored under a pretext of ‘harmonisation’ and ‘anti-fragmentation’. Subsequently, the conflict should be solved by means of ‘hierarchical integration’ (giving precedence to human rights law) rather than by ‘coordinative integration’.

Although the Court references Article 31 paragraph 3 (c) VCLT to support harmonious interpretation between the ECHR and external instruments *outside* the human rights domain, this case law study demonstrates that it does generally not cite this provision in respect of references to *human rights* catalogues other than the ECHR. For that reason, a criticism claiming that the Court misuses Article 31 paragraph 3 (c) VCLT to expand the ECHR on the basis of external higher human rights provisions, largely misses ground. This does not mean, however, that Article 31 paragraph 3 (c) VCLT has no relevance in respect of the importation of other human rights catalogues. Although this does not accord with the Court’s general practice, we are of the opinion that Article 31 paragraph 3 (c) VCLT mandates the Court to integrate (higher) protection standards applicable in all Member States of the Council of Europe. In other words, the ideal of ‘systemic integration’ is not only relevant in relation to the landscape of (general) international law, but should also permeate the domain of human rights law. As a harmonizing principle, it is supposed to encourage the Court to take account of ratified external human rights catalogues, including their authoritative interpretation by external monitoring bodies.

Article 53 ECHR supports this argument too. This provision offers a human rights safeguard ensuring peaceful coexistence between the ECHR and higher protection standards. The message of Article 53 ECHR towards the Strasbourg judges is twofold. In its *procedural* dimension, the Court should use it directly, to sanction a State that, on the national level, did not give precedence to the highest applicable human rights standard. In its *substantive* dimension, this provision has effects similar to those of Article 31 paragraph 3 (c) VCLT. When higher and binding human rights standards are applicable in *all* Member States, Article 53 ECHR obliges the Court to substantively integrate them into its interpretation of the ECHR. In addition, we argue that Article 53 ECHR offers a *symmetric* human rights safeguard, preventing a downward evolution of the ECHR on the basis of external human rights instruments offering lower standards. The proposed interpretation of Article 53 ECHR is innovative, yet controversial; so far, the Court has not used it in this manner.

In line with Articles 31 paragraph 3 (c) VCLT and 53 ECHR, we argue that external instruments, under certain conditions, exercise a *binding* authority. Apart from that, referencing could be exercised in an *optional* manner, for instance in order to support argumentative purposes such as ‘evolutive’, ‘practical and effective’, and ‘autonomous’ reasoning and/or the establishment of a ‘margin of appreciation’. Essentially, these

interpretation principles are covered by a holistic reading of the rules of the VCLT. A concept that catches well a combined reading of the rules of the VCLT, without losing sight of the specificity of human rights law, is the search for '*opinio juris* under the treaty'. Under this interpretative framework, an emerging or an ambiguous State consensus may suffice to develop a dynamic interpretation of the ECHR, provided that the incomplete consensus is confirmed by an *opinio juris*. To establish an emerging or ambiguous State consensus, 'hard' and ratified legal instruments (of national or international origin) are of particular relevance. In addition, a wide variety of (non-binding) external instruments might be useful to demonstrate the *opinio juris*.

Besides legal provisions, some other, less formal, *users'* arguments may validate some aspects of the referencing practice. The usage of external human rights catalogues – possibly containing higher protection standards, rights of other 'generations', or more specialized and specific provisions – contributes to the creation of human rights that are effective, universal and indivisible. This serves the rights holders who have an interest in equal treatment by a law that operates as a '*ius gentium*', and in an adjudication process that does justice to all specificities of their identity and lived experiences. In addition, referencing could contribute to progressively evolve the protection of human rights. The referencing practice also enhances the coherence of the system, which is beneficial for 'legal certainty' *vis-à-vis* all users of human rights. Moreover, external referencing may contribute to a more nuanced and 'shared' decision-making, inspired by the positions and insights of various actors. Indeed, by means of comparative law, judges can build a dialectic network of mutual influences and communicative enrichment on a global scale. When we acknowledge that it is the Court's task to translate pluralism in balanced outcomes and to canalize the different interests underlying a case, the importation of external views from across the globe may help the Court in assuming that responsibility. The Strasbourg judges find particularly valuable tools in external instruments. Not only could their usage enhance the procedural economy and the deformalization of the decision-making process, external citations may also make a reasoning more convincing and authoritative towards the audience. However, these benefits only play to the extent that external referencing is transparent, consistent and systematically relies on a solid legal framework.

To optimize the justification of the referencing practice, this doctoral thesis recommends the Court to better embed its external citations in both formal and informal arguments. We have done several suggestions as to how such arguments might be developed in practice. Their use could boost the valid usage of external instruments, which, under certain conditions, offers good opportunities for a persuasive interpretation and application of the ECHR.

We started our research with a sketch of the present normative environment; it is disordered and can be metaphorically compared to a jungle. The Strasbourg judges walk through this area and use lianas to make connections between all elements that compose this forest. Through their referencing practice, they communicate, learn, and argue. In an ecosystem, all organisms are dependent on one another; they cannot survive in isolation. Following the rules of nature, the organisms mutually profit from each other's existence and finally, provide each other with oxygen. In order to be good rangers in this jungle, the Strasbourg judges should recognize and acknowledge the existence and the value of all the other organisms. In addition, to ensure a high degree of balance in the ecosystem, they should keep an eye both on the system's rules (legality) and on the views and interests of those that benefit from the system (the users of human rights). By handling the lianas in such manner, the Court contributes to more coherence of the system (combating 'fragmentation') and caters for the users' needs. This does not mean that one day, the jungle will be turned into a nicely organized cornfield. Some diversity in global times is inevitable and necessary. After all, it is the chaotic context that offers us tools to advance the law, to persuade the public, *etc.* The art is not to replace pluralism by unity, but to find a balance between divergence and convergence by creating a form of justice that is shared by all.

Résumé de la thèse en français

La Convention européenne des droits de l'homme (CEDH) – dont le respect est assuré par la Cour européenne des droits de l'homme (Cour EDH) – coexiste avec d'autres instruments normatifs (de protection des droits fondamentaux) qui, au niveau national, régional et international, ont été créés par des Etats et par des acteurs non-étatiques. La CEDH constitue une pièce juridique de cette « jungle » normative, qui est caractérisée par la fragmentation du droit. Alors que la discussion se concentre généralement sur les aspects négatifs de ce monde diversifié, la présente thèse de doctorat vise également à en soutenir les côtés positifs.

La Cour de Strasbourg se réfère à divers instruments autres que la CEDH, que nous appelons « instruments externes », pour appuyer son interprétation et son application de la CEDH. L'arrêt de Grande Chambre *Demir et Baykara c. Turquie* du 12 novembre 2008 offre un des rares aperçus des caractéristiques de cette « pratique de références ». Dans ce jugement, la Cour a inclue une section spécifique afin d'expliquer l'usage interprétatif qu'elle fait du droit international, discutant de la base juridique ainsi que du type d'instruments qu'elle considère pertinents. Deux conclusions importantes peuvent être tirées des explications de la Cour : *premièrement*, elle éclaire la pratique de références à l'aide de certaines règles sur l'interprétation issues de la Convention de Vienne sur le droit des traités (CVDT) (particulièrement, l'article 31, 3 (c) CVDT) ; *deuxièmement*, elle insiste sur le fait que des instruments externes de *soft law* et des instruments non ratifiés peuvent également soutenir une interprétation (évolutive) de la CEDH. De telles positions sont sujettes à controverses ; la Cour a été critiquée à plusieurs titres ; pour sa mauvaise interprétation des règles de la CVDT, pour ne pas bien justifier ses références ainsi que pour outrepasser les limites de ses compétences en se fondant de manière incohérente sur des « sources » (non-contraignantes) pour les besoins de l'interprétation.

L'affaire *Demir et Baykara c. Turquie* a laissé de nombreuses questions concernant l'importation de références externes. Il règne encore une certaine confusion sur les fonctions et le poids des instruments (non-contraignants) dans le raisonnement juridique. De plus, les arguments justificatifs développés dans ce cas manquent de précision. En adressant ces lacunes, ce travail offre tout d'abord un recensement détaillé des usages des références externes par la CEDH. À cette fin, toutes les références de chaque affaire présentée à la Grande Chambre depuis *Demir et Baykara c. Turquie* du 12 novembre 2008 (jusqu'à la fin de 2015) ont été analysées et classées. Deuxièmement, ce travail développe des arguments pour mieux justifier l'utilisation des instruments externes que fait la Cour. En se fondant aussi bien sur une perspective qui met l'emphasis sur des questions de légalité qu'une perspective de l'utilisateur, cette thèse démontre comment la pratique de référence peut (sous certaines conditions) être une méthode appropriée pour éclairer le sens des dispositions de la CEDH.

Le 'recensement' de la pratique de référence démontre qu'afin d'appuyer l'interprétation et l'application de la Convention, les références externes apparaissent dans presque 70 pour cent des cas examinés. Cette technique d'interprétation couvre une importante variété d'instruments, qui divergent quant à leur origine ainsi que leur champ d'application matériel, personnel et géographique. Le statut juridique des instruments offre des terrains additionnels de diversité ; la Cour EDH importe des instruments juridiques qui ont été ratifiés par les États membres, des instruments qui n'ont pas été ratifiés par certains d'entre eux et/ou qui n'ont pas été ratifiés par l'État défendeur, des instruments de *soft law* créés par des organes de représentation politique (ou non) et, finalement, de la jurisprudence développée par d'autres organes (*quasi*-)juridictionnels. La Cour référence ces instruments à différentes fins : rejeter leur contenu, établir des règles d'interprétations, appuyer l'interprétation de notions et d'exigences de la Convention, permettre la création d'une harmonie entre la Convention et les références externes, et prendre en considération la marge de manœuvre de l'État en appliquant la CEDH. Un exemple d'usage contesté – mais rare – de références externes consiste à comparer une série d'instruments contraignants et non-contraignants afin de faire évoluer (et changer) progressivement la jurisprudence de la

Cour. En général, cependant, la Cour adopte une perspective plutôt traditionnelle sur ses sources d'interprétation, en n'accordant pas spécifiquement de poids décisif aux instruments non-contraignants.

Dans les arrêts de Grande Chambre rendus après *Demir et Baykara c. Turquie*, la Cour n'a pas fourni les efforts pour mieux justifier et expliquer sa pratique de référence. Selon nous, deux instruments pourraient cependant servir de véhicules appropriés pour renforcer la légalité de certaines références. Cela vaut particulièrement pour l'article 31, 3 (c) de la CVDT, invitant la Cour à prendre en considération certaines normes externes applicables, et l'article 53 de la CEDH, offrant une « sauvegarde » des droits de l'homme reconnus.

L'article 31, 3 (c) de la CVDT est souvent mobilisé par la Cour en lien avec la méthode d'« interprétation harmonieuse » aménageant les obligations de la CEDH avec les obligations externes (qui risquent d'entrer en conflit avec la Convention). Nous défendons que l'article 31, 3 (c) de la CVDT intégrant un principe d'« intégration systémique » – offre un fondement juridique pour intégrer les exigences externes de manière coordonnée. Une certaine prudence est cependant requise ; la création de la convergence entre la CEDH et d'autres domaines juridiques ne devrait pas supplanter l'objectif de protection effective et progressive des droits fondamentaux. Ainsi, lorsqu'un conflit survient entre la CEDH et une disposition externe, celui-ci devrait être clairement reconnu et non pas ignoré de manière artificielle sous couvert « d'harmonisation » et d'« anti-fragmentation ». Ensuite, le conflit devrait être résolu au moyen de l'« intégration hiérarchique » (donnant priorité aux droits fondamentaux).

Bien que la Cour cite l'article 31, 3 (c) de la CVDT pour appuyer l'interprétation harmonieuse entre la CEDH et les instruments externes relevant d'un domaine étranger à celui des droits fondamentaux, cette étude de jurisprudence démontre qu'elle cite à peine cette disposition en référence à d'autres catalogues de droits fondamentaux que la CEDH. Pour cette raison, une critique défendant que la Cour fait un mauvais usage de l'article 31, 3 (c) de la CVDT pour étendre la CEDH sur le fondement de dispositions externes de protection de droits fondamentaux supérieures, manque largement de fondement. Cela ne signifie pas, cependant, que l'article 31, 3 (c) de la CVDT n'est pas pertinent pour l'importation d'autres catalogues de protection des droits fondamentaux. Bien que cela ne reflète pas la pratique habituelle de la Cour, nous défendons l'opinion selon laquelle l'article 31 paragraphe 3 (c) de la CVDT oblige la Cour à intégrer les standards (plus élevés) applicables dans tous les États membres du Conseil de l'Europe. En d'autres termes, l'idéal d'« intégration systémique » ne devrait pas être pertinent pour le seul paysage du droit international général, mais aussi lorsqu'il s'agit du droit des droits fondamentaux lui-même. En tant que principe d'harmonisation, il devrait obliger la Cour à prendre en considération les catalogues externes de protection des droits fondamentaux qui sont ratifiés, dont l'interprétation qui en est faite par les organes externes de supervision.

L'article 53 de la CEDH soutient également cet argument. Cette disposition offre la sauvegarde des droits fondamentaux assurant la coexistence harmonieuse entre la CEDH et les standards plus élevée de protection. Le message de l'article 53 pour les juges de Strasbourg est double. Dans sa dimension processuelle, la Cour devrait l'utiliser directement, pour sanctionner un État, qui, au niveau national, n'a pas accordé la priorité au standard plus élevé de protection des droits fondamentaux applicable. Dans sa dimension matérielle, cette disposition a des effets similaires à l'article 31, 3 (c) de la CVDT. Lorsque des standards de protection des droits fondamentaux plus élevés et contraignants sont applicables dans *tous* les États membres, l'article 53 de la CEDH oblige la Cour à les intégrer matériellement dans son interprétation de la CEDH. De plus, nous défendons que l'article 53 de la CEDH offre une sauvegarde *symétrique* des droits fondamentaux, empêchant l'évolution régression de la CEDH sur le fondement des instruments de protection des droits fondamentaux offrant des standards plus bas en termes de protection. L'interprétation que nous proposons de l'article 53 est novatrice et sujette à controverses; jusqu'à présent la Cour ne l'a pas mobilisé de cette manière.

Conformément aux articles 31, 3 (c) de la CVDT et 53 de la CEDH, nous défendons que les instruments externes, sous certaines conditions, revêtent une autorité *contraignante*. Par ailleurs, la pratique de référence pourrait être exercée de manière *optionnelle*, par exemple, pour appuyer certains objectifs d'argumentation tels que le raisonnement évolutif et « concret et effectif », « autonome » et/ou l'établissement de la « marge d'appréciation ». Ces principes d'interprétation dérivent d'une lecture holistique des règles de la CVDT. La recherche de l'« *opinio juris* du traité » est un concept qui saisit bien une lecture combinée des règles de la CVDT, sans perdre de vue la spécificité du droit des droits fondamentaux. Selon ce cadre d'interprétation, un consensus étatique émergeant ou ambigu suffit à une interprétation dynamique de la CEDH, à condition que le consensus incomplet soit confirmé par l'*opinio juris*. Pour établir un consensus étatique émergeant ou ambigu, des instruments ratifiés de « droit dur » (de droit national ou international) sont particulièrement pertinents. Une importante diversité d'instruments externes (non-contraignants) peut être utile pour démontrer l'*opinio juris*.

Hormis les dispositions juridiques, d'autres arguments de l'*utilisateur*, moins formels pourraient valider certains aspects de la pratique de référence. L'usage des catalogues de protection des droits fondamentaux – pouvant contenir des standards plus élevés de protection, les droits d'autres « générations », ou plus spécialisés et d'autres dispositions – contribuent à la création des droits fondamentaux qui sont effectifs, universels et indivisibles. Cela sert les détenteurs de droits qui ont un intérêt dans l'égalité de protection par un droit qui opère comme un '*ius gentium*' tout comme à une procédure de décision qui fait justice à leur identité et expériences vécues. De plus, la pratique de référence pourrait contribuer à faire évoluer progressivement la protection des droits fondamentaux. La pratique de référence sert aussi la cohérence du système, ce qui est bénéfique à la « sécurité juridique » pour tous les utilisateurs des droits fondamentaux. Les références externes devraient, par ailleurs contribuer à une prise de décision plus nuancée et « partagée », inspirée par des positions de différents acteurs. En effet, au travers des exercices de comparaison, les juges construisent un réseau de dialectique d'influences mutuelles et d'enrichissement communicatif au niveau global. Lorsqu'il est affirmé qu'il revient à la Cour de traduire le pluralisme pour aboutir à des résultats équilibrés et canaliser les intérêts sous-jacents, l'importation de différentes perspectives du monde entier peut contribuer à cette responsabilité. Les juges de Strasbourg trouvent ainsi de précieux outils dans les instruments externes. Leur usage pourrait non seulement servir l'économie procédurale et la déformalisation de leur prise de décisions, les citations externes pourraient aussi rendre leur raisonnement plus convaincant et autoritaire, exigences importantes pour persuader l'audience extérieure. Ces derniers bénéfices fonctionnent cependant seulement dès lors que la pratique de références est transparente, cohérente et se fonde systématiquement sur un cadre juridique solide.

Afin d'optimiser la justification de la pratique de référence, les citations externes de la Cour devrait se loger de meilleure manière dans des arguments formels et informels. Cette thèse fait plusieurs propositions sur la façon dont ces arguments pourraient être construits. Cela devrait stimuler l'usage des instruments externes de manière valide. C'est important car, sous certaines conditions, cette technique d'interprétation de « références externes » offre de bonnes opportunités pour une interprétation persuasive de la CEDH.

Nous avons commencé notre recherche avec une esquisse de l'environnement normatif d'aujourd'hui : il est chaotique et ressemble à une jungle. Les juges de Strasbourg traversent cette région et utilisent des lianes pour établir des connexions entre tous les éléments qui composent cette forêt. Avec leurs pratiques de référencement, ils communiquent, apprennent et argumentent. Dans un écosystème, tous les organismes sont dépendants les uns des autres, ils ne peuvent survivre en isolation. Conformément aux règles de la nature, les organismes profitent mutuellement de l'existence de l'autre et, finalement, offrent de l'oxygène à tous. Si les juges de Strasbourg veulent être de bons gardes dans cette jungle, ils devraient reconnaître l'existence de tous les autres organismes. De plus, pour garder un équilibre élevé de l'écosystème, ils devraient garder l'œil à la fois sur les règles du système

(légalité) et sur les opinions et intérêts de ceux qui bénéficient du système (les utilisateurs des droits de l'homme). En maniant les lianes de la sorte, la Cour contribue à une plus grande cohérence du système (en combattant la « fragmentation ») et aux besoins des utilisateurs. Cela ne signifie toutefois pas que la jungle sera un jour transformée en un champ de blé bien organisé. La diversité est inévitable et nécessaire à l'époque globale. Après tout, c'est ce contexte chaotique qui nous offre les instruments pour faire progresser le droit, pour convaincre le public, etc. Il ne s'agit pas d'effacer le pluralisme avec l'unité, mais de trouver un équilibre entre divergence et convergence, en créant une forme de justice qui est partagée par tous.

List of abbreviations

ACHR - American Convention on Human Rights
AComHR - Inter-American Commission on Human Rights
ACtHR - Inter-American Court of Human Rights
AfCHPR - African Charter on Human and Peoples' Rights
AU - African Union
CAT - United Nations Convention (or Committee) against Torture
CEDAW - United Nations Convention (or Committee) on the Elimination of All Forms of Discrimination against Women
CERD - United Nations Convention (or Committee) on the Elimination of Racial Discrimination
CoE - Council of Europe
COM - Council of Europe Committee of Ministers
CPT - European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC - United Nations Convention (or Committee) on the Rights of the Child
CRPD - United Nations Convention on the Rights of Persons with Disabilities
ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols
ECRI - European Commission against Racism and Intolerance
ECSR - European Committee of Social Rights
ECJ - European Court of Justice
ECtHR - European Court of Human Rights
EFTA - European Free Trade Association
EU - European Union
EU Charter - European Union Charter of Fundamental Rights
HRC - United Nations Human Rights Committee
ICCPR - United Nations International Covenant on Civil and Political Rights
ICESCR - United Nations International Covenant on Economic, Social and Cultural Rights
ICJ - International Court of Justice
ICPPED - United Nations International Convention for the Protection of All Persons from Enforced Disappearance
ICRC - International Committee of the Red Cross
ICTR - International Criminal Tribunal for Rwanda
ICTY - International Criminal Tribunal for the former Yugoslavia
IDP - Internally displaced person
IHL - International humanitarian law
ILC - United Nations International Law Commission
ILI - International Law Institute
ILO - United Nations International Labor Organization
IMO - United Nations International Maritime Organization
MOA - Memorandum of Understanding
NGO - non-governmental organization
OAS - Organisation of American States
PACE - Council of Europe Parliamentary Assembly
PCIJ - Permanent Court of International Justice
SFRY - Socialist Federal Republic of Yugoslavia
UDHR - United Nations Universal Declaration of Human Rights of December
UNESCO - United Nations Educational, Scientific and Cultural Organization
UNHCR - United Nations Refugee Agency
UNODC - United Nations Office on Drugs and Crime
VCLT - Vienna Convention on the Law of Treaties of 1969
Venice Commission - European Commission for Democracy through

Introduction

1. The central judicial actor in European human rights protection is the European Court of Human Rights (hereafter: 'ECtHR' or 'Court'). It monitors the human rights instrument developed within the context of the Council of Europe (hereafter: CoE), *i.e.* the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereafter: 'ECHR' or 'Convention').¹ The Strasbourg Court and the human rights catalogue it supervises exist next to other institutions and texts that hold a relevant position within human rights protection. They also coexist with other international instruments and actors, outside the area of human rights protection. On a global scale, today's normative (human rights) landscape is complex; it witnesses normative and judicial 'inflation' or 'proliferation'.²
2. Glimpses of diversity inside the human rights domain appear in the three categories that often classify human rights. The first category comprises civil and political rights and freedoms. The second category embodies social, economic and cultural rights and the third category covers so-called 'solidarity' rights.³ The varying nature of instruments of human rights protection add to this diversity. These instruments differ in their scope *ratione materiae*⁴ and *ratione personae*⁵, their legal force⁶, their geographic scope⁷ and their governing and

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe, 4 November 1950, ETS 5, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited on 8 May 2016).

² E. Roucouas, "Engagements parallèles et contradictoires", R.C.A.D.I. 1987, tome 206, p. 201; R. Garreton, "La valeur juridique de la Déclaration universelle dans le système des Nations Unies", in Commission consultative des Droits de l'homme (ed.), *La Déclaration universelle des droits de l'homme 1948-98, Avenir d'un idéal commun*, La documentation française, Paris, 1999, p. 275, both referred to by S. Turgis and J. Dhommeaux, *Les interactions entre les normes internationales relatives aux droits de la personne*, Pedone, Paris, 2012, p. 30.

³ This categorization has not escaped criticism and loses relevance in light of the principles of the universality, indivisibility and interdependence of human rights. See *The Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN doc A/CONF. 157/24 (1993), 32 ILM 1661, para. 5, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (visited on 21 September 2016).

⁴ The substantive focus is diverse as comprehensive rights catalogues (addressing several 'generations' of human rights) exist next to categorical texts (for example texts focusing only on economic, social and cultural rights) and next to single-issue texts addressing a specific type of human rights violation (such as torture for example). Some of the single-issue human rights catalogues address human rights violations that were not recognized as such in previous (comprehensive or categorical) texts and all of the single-issue texts imply new obligations which did not necessarily derive from earlier more general texts including the same or similar rights. E. Brems, "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *E.J.H.R.-E.J.H.R.* 2014, vol. 4, p. 449.

⁵ Human rights instruments generally apply to all human beings within the jurisdiction of the State parties (universal application) but some instruments apply to a specific target group (a 'personal focus') addressing all human beings within a jurisdiction who also fall within a certain group (such as all persons with a disability). Generally, the instruments applying to specific target groups contain more detailed obligations than the ones that are provided for in the (prior) universal instruments. E. Brems, *op. cit.*, pp. 449-450.

⁶ Binding provisions (such as those appearing in constitutions, treaties and customary law) exist next to those found in instruments that are non-binding (such as declarations or resolutions). *Ibidem*, p. 450.

supervising mechanisms.⁸ Also, the human rights monitoring mechanisms, whose number has known an exponential growth since the second World War, differ as to their nature, composition, procedures, power, and so on.⁹ The multiplication and diversification of actors that elaborate, supervise and use human rights is an additional generator of what is an increasingly diverse human rights environment. State actors are the central and traditional creators of the heterogeneous normative instruments in the international setting. In addition, in (human rights) adjudication processes, judicial actors fulfill an important position too. They lie at the origin of judicial decisions and judgments, which might influence the development of human rights law. Moreover, in a globalizing world, we note the rise of actors such as (non-governmental) expert organs and organizations.

3. Thus, human rights law, as a specific segment of international law, consists of ‘parts and pieces’.¹⁰ It reflects a heterogeneous picture of rather autonomous and isolated mechanisms and bodies that “...developed in parallel rather than in inter-institutional unison”.¹¹ This complexity does not necessarily imply that human rights instruments are incoherent. Human rights instruments generally offer a homogeneous content because they are drawn on shared underlying values and on a common root: the United Nations Universal Declaration of Human Rights of December 10th of 1948 (UDHR).¹² The latter instrument has, for that matter, been explicitly cited in the Preamble to the ECHR.¹³
4. The contextual setting of human rights protection is not only complex within its own ‘borders’; there is also a wide and diverse landscape of normative instruments that lie

We note that, besides the diversity within ‘human rights law’, other materials (that do not fall under the traditional understanding of ‘law’) might equally be relevant in relation to human rights protection such as, for instance, guidelines in NGO reports.

⁷ Human rights law, for instance, does not only correspond to a particular segment of international law; it might equally be included into national constitutions and national human rights acts or bills. The interpretations by national constitutional courts are of particular relevance in this regard. There are also universal and regional human rights catalogues. Within a certain regional geographic area, human rights might be further ‘fragmented’ in diverse specialized legal (sub-)systems. S. Turgis and J. Dhommeaux, *op. cit.*, p. 34 (footnote 99) and p. 38.

⁸ Monitoring mechanisms are diverse. Some, for instance, exercise judicial control while others perform a quasi-judicial control, expert control or some kind of political control (such as reporting procedures and ‘Special Rapporteurs’). These mechanisms and their bodies have different types of output (including judgments, views, reports, general comments, concluding observations, and so on), all with their own format and style. E. Brems, *op. cit.*, pp. 450-451.

⁹ S. Turgis and J. Dhommeaux, *op. cit.*, p. 45.

¹⁰ For an overview of these ‘parts and pieces’, see for instance: E. Brems, *op. cit.*, pp. 448-450 and S. Turgis and J. Dhommeaux, *op. cit.*, pp. 37-45.

¹¹ A. Buyse, “Tacit Citing – The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases”, in T. McGonagle and Y. Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives*, Cambridge University Press, Cambridge, 2015, p. 2 of the book chapter as it is available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279350 (visited on 15 September 2016).

¹² F. Tulkens and S. Van Droogenbroeck, “The domestic courts’ response to divergent views among international human rights bodies: thoughts prompted by the *Singh v. France* cases”, in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds), *Liberae Cogitationes. Liber Amicorum Mark Bossuyt*, Intersentia, Antwerp, 2013, p. 740.

¹³ The Preamble provides that the signatory Governments have considered the UDHR and that they, sharing a “...common heritage of political traditions, ideals, freedom and the rule of law”, have – by signing the ECHR – resolved “...to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [the UDHR]”. See Preamble to the ECHR, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited on 8 May 2016).

outside the human rights area.¹⁴ The area of human rights exists next to general international law and next to more specific branches of international law including environmental law, humanitarian law, refugee law, and so on.¹⁵ As a specialized and (relatively) autonomous set of rules and institutions, human rights law reflects one of the many segments of the ‘fragmented’ picture of international law and is often referred to as a specialized subsystem within the broader picture of international law.¹⁶

5. Since the proliferation of international legal standards, legal instruments and bodies elaborating and supervising norms brought about a number challenges (and opportunities), the ‘fragmentation’ of international law has become a popular field of study.¹⁷ Fragmentation describes “...the unavoidable plurality of rules and regimes of today’s world”¹⁸ and the division of international law “...into highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law”.¹⁹ Generally, the term carries a negative connotation of being a threat to the unity of the law, creating malfunctions and disorder in the international system.²⁰

¹⁴ There has for instance been an almost explosive expansion of independent courts, quasi-courts and conflict-resolving bodies. See A. Fischer-Lescano and G. Teubner, “Regime-Collisions: The Vain Research for Legal Unity in the Fragmentation of Global Law”, *Michigan Journal of International Law* 2004, vol. 25, p. 1000. To address diversity within and outside the human rights domain, we could speak respectively of *internal* and *external* diversity. Such terminology would be consistent with concepts described by Desmet, who speaks of internal and external legal pluralism to refer to the plurality of subsystems within or outside a certain normative system. See E. Desmet, “Human Rights Law and Legal Pluralism: a Multifaceted Relationship”, paper presented at the workshop ‘How does legal pluralism interplay with the promotion of human rights?’ International Institute for the Sociology of Law, Oñati, Spain, 2-3 May 2013. We decided not to introduce the notions of *internal* diversity and *external* diversity when addressing the diversity ‘within’ and ‘outside’ the human rights domain. Although this terminology might be useful, it would be prone to create confusion with regard to the notion of ‘external instruments’. The latter notion includes both instruments that are part of the so-called *internal diversity* (diversity within the human rights domain) and documents that are part of the *external diversity* (diversity outside the human rights domain).

¹⁵ These domains other than human rights law might, in turn, also be internally diverse. Koskenniemi frames this in the following manner: “[l]ike any social phenomenon, international law is a complex set of practices and ideas, as well as interpretations of those practices and ideas,...”. M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge, 2001, p. 7.

¹⁶ F. Vanneste, *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Intersentia, Antwerp, 2010, p. 6 and references there. See also: T. Treves, “The Fragmentation of International Law: The Judicial Perspective”, *Agenda Internacional* 2009, vol. 27, p. 234.

¹⁷ See, among others: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 (13 April 2006), (hereafter: ‘ILC Koskenniemi Report’); A.-C. Martineau, *Le débat sur la fragmentation du droit international. Une analyse critique*, Bruylant, Brussels, 2016, 584 p.; B. Simma, “Fragmentation in a Positive Light”, *Mich. J. Int’l L.* 2003-2004, vol. 25, pp. 849-863; J. Pauwelyn, “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands”, *Mich. J. Int’l L.* 2004, vol. 25, pp. 903-917; G. Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks”, *N.Y.U. J. Int’l L. & Pol.* 1999, vol. 31, pp. 919-933; T. Treves, *op. cit.*, pp. 213-253; T. Buergenthal, “Proliferation of International Courts and Tribunals: Is it Good or Bad?”, *Leiden J. Int’l L.* 2001, vol. 14, pp. 267-271; A. Fischer-Lescano and G. Teubner, *op. cit.*, p. 1000; G. Hafner, “Pros and Cons Ensuing from Fragmentation of International Law”, *Mich. J. Int’l L.* 2004, vol. 25, pp. 849-863; K. Wellens and R. Vainia (eds), *L’influence des sources sur l’unité et la fragmentation du droit international*, Brussels, Bruylant, 2006, 280 p.; M. Koskenniemi and P. Leino, “Fragmentation of International Law? Postmodern Anxieties”, *LJIL* 2002, vol. 25, pp. 903-917; V.P. Tzevelekos, “The Use of Article 31 (3) (c) of the VCLT in the Case Law of the ECtHR: An effective Anti-fragmentation tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between evolution and systemic integration”, *Michigan Journal of International Law* 2010, vol. 31, pp. 621-690.

¹⁸ T. Treves, *op. cit.*, p. 227.

¹⁹ ‘ILC Koskenniemi Report’, *op. cit.*, para. 13.

²⁰ The notion of ‘fragmentation’ implies “...the factual premise, that indeed, before it was fragmented, something unitary existed and the value judgment that fragmentation is bad while unity is good” and debates on the

6. The best known study on fragmentation of international law is probably the report of the United Nations International Law Commission (hereafter: ILC) *on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*.²¹ This instrument sheds light on both positive and negative sides of the phenomenon of fragmentation. On the one hand, it points out that "...it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques".²² On the other hand, the report stresses the concern that "...specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law".²³ As such, there might be conflicts between rules or rule-systems of the multiple treaty regimes, possibly leading to deviating institutional practices and a loss of an overall perspective on the law.²⁴ Such dangers of inconsistency had also been a major concern of the former President of the International Court of Justice (hereafter: ICJ), Judge Gilbert Guillaume, who spoke about "...the dangers of legal fragmentation, and of inconsistency in the case-law, as a result of the quasi-anarchic proliferation of international courts".²⁵ In this respect, Koskenniemi and Leino speak about "post-modern anxieties" connected to the loss of unity of international law.²⁶
7. While initially the multiple mechanisms and instruments were developed in relative isolation, the borders have gained permeability over the last decades, hand in hand with tendencies of globalization. The creation of mutual relationships among diverse instruments and (judicial) actors have attracted attention in legal and sociological circles. Focusing on such inter-normative and inter-institutional interactions, academic writers have

fragmentation of international law "...saw fragmentation with concern, as a risk to be avoided". T. Treves, *op. cit.*, p. 214. When the International Law Commission decided in 2000 to consider the subject, it chose as a title 'Risks ensuing from fragmentation of international law' which demonstrates that also by the ILC, the phenomenon was perceived as a threat (in light of the unity of international law) (*ibidem*). See also V.P. Tzevelekos, *op. cit.*, p. 632 and M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford, Oxford University Press, 2010, pp. 399-402. The latter author highlights that negative influences of fragmentation of international law are starting to be felt and that therefore, preventive measures should be taken (such as judicial cooperation) to combat fragmentation and to ensure that this phenomenon no longer damages the Strasbourg human rights system by allowing the existence of conflicting rules and a lack of coordination between different regimes.

²¹ 'ILC Koskenniemi Report', *op. cit.*

²² *Ibidem*, para. 14.

²³ *Ibidem*, para. 8.

²⁴ *Ibidem*.

²⁵ G. Guillaume, President, ICJ, "The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order", Address before the G.A. of the UN (27 October 2000), available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> (visited on 21 September 2016). President Guillaume in this address for instance criticized the ECtHR for having ignored ICJ case law and having adopted different views than the ICJ in the decision on the preliminary objections of the case of ECtHR (GC), *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Appl. No. 15318/89, which concerned the issue of territorial observations. The subject of fragmentation also featured in annual speeches by some ICJ presidents to the UN General Assembly. See E. Voeten, "Borrowing and Nonborrowing among International Courts", *Journal of Legal Studies* 2010, vol. 39, p. 548, footnote 2.

²⁶ M. Koskenniemi and P. Leino, *op. cit.*, p. 553.

demonstrated an increasing interest in topics such as ‘dialogues between judges’,²⁷ ‘transjudicial communication’,²⁸ ‘interactions between norms’,²⁹ ‘horizontal circulation of case law’,³⁰ ‘transnational judicial conversations’,³¹ ‘cross-fertilization’,³² ‘judicial or legal borrowing’,³³ ‘legal transplants’,³⁴ ‘importation of case law’,³⁵ ‘the migration of constitutional ideas’,³⁶ ‘convergence in international human rights law’³⁷, etc.

²⁷ Authors using this notion include, *inter alia*, A.-M. Slaughter, “Typology of Transjudicial Communication”, *U. Rich. L. Rev.* 1994, vol. 29, pp. 99-137; A. Watson, “Legal Transplants and European Private Law”, *Electronic Journal of Comparative Law* 2000, vol. 4, no. 4, ejcl.org/ejcl/44/44-2.html (visited on 8 May 2014); J. F. Flauss, “La Présence de la Jurisprudence de la Cour Suprême des États-Unis d’Amérique dans le Contentieux européen des Droits de l’Homme”, *RTDH* 2005, vol. 62, pp. 313-331; J. Allard, “Le Dialogue des Juges à la Cour européenne des Droits de l’Homme et à la Cour Suprême des États-Unis: Constats et Perspectives philosophiques”, in J. Allard, G. Haarscher, L. Hennebel and G. Lewkowicz (eds), *Juger le droit de l’homme. Europe et États-Unis face à face*, Bruylant, Brussels, 2008, pp. 94-137; J. Allard and L. Van den Eynde, “Le Dialogue des Juges comme Source de Droit: Arguments entre Idéalisation et Scepticisme”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les Sources du Droit revisitées. Volume 3: Normativités concurrentes*, Publications de l’Université Saint-Louis, Limal/Anthemis/Brussels, 2013. Cesare P.R. Romano speaks of ‘international jurisprudential dialogue’, see C.P.R. Romano, “Deciphering the Grammar of International Jurisprudential Dialogue”, *International Law and Politics* 2009, vol. 41, pp. 755-787. Political scientists rather use the notion of ‘judicial bargaining’ instead of ‘judicial dialogue’. See *inter alia* J.R. Law and C.M. Cameron, “Bargaining and opinion assignment on the US Supreme Court”, *Journal of Law, Economics, and Organization* 2007, vol. 23, pp. 276-302. While referencing practice is an important aspect of ‘judicial dialogue’, this dialogue is larger than this practice alone. It alludes to the wider network of exchanges and relationships between courts including shared trainings, the creation of transnational associations, clubs and syndicates of judges, requests for information and advice, and so on. One should thus realize that ‘judicial cooperation’ includes more than external referencing practice. See J. Pauwelyn, “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands”, *Mich. J. Int’l L.* 2003-2004, vol. 25, p. 916. A notion that catches well this broader spectrum of exchanges between judges is a ‘commerce between judges’. See E. Dubout and S. Touzé, “La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques”, in *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, Pedone, Paris, 2009, p. 12; J. Allard and A. Garapon, *Les juges dans la mondialisation*, Seuil, Paris, 2005, pp. 6-9. Hennebel and Van Waeyenberge speak of a ‘commerce transjudiciaire transnational’ or a ‘commerce transnational entre juges’. See L. Hennebel and A. Van Waeyenberge, “Reflexions sur le Commerce transnational entre Juges”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les Sources du Droit revisitées. Volume 2: Normes internes infraconstitutionnelles*, Anthemis - Publications de l’Université Saint-Louis, Brussels, 2013, pp. 1-2 of the chapter available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211183 (visited on 20 September 2016). External referencing reflects one particular type of ‘communication’ (Cf. E. Voeten, *op. cit.*, p. 549).

²⁸ See A.-M. Slaughter, *op. cit.*, pp. 99-137; I. Rorive, “Le dialogue des juges, un phénomène aux facettes multiples”, in E. Bribosia, L. Scheeck and A. Ubeda de Torres (eds), *L’Europe des cours. Loyautés et résistances*, collection ‘Penser le droit’, Bruylant, Brussels, 2010, pp. 281-286; L.R. Glas, “Dialogue in the European Convention on Human Rights System: inspiration, added-value and means”, *E.J.H.R.-J.E.D.H.* 2015, no. 3, p. 252.

²⁹ See S. Turgis and J. Dhommeaux, *op. cit.*, 642 p.

³⁰ This notion had been used by M. Ubéda-Saillard, who wrote a commentary on the *Diallo*-case (ICJ, case of 30 November 2010, Case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*)), in which the International Court of Justice ascribes great weight to the case law of the Human Rights Committee. See M. Ubéda-Saillard, “La diversité dans l’unité: l’arrêt rendu par la Cour internationale de Justice le 30 novembre 2010 dans l’affaire *Ahmadou Sadio Diallo*”, *Revue générale de droit international public* 2011, vol. 115, no. 4, pp. 897-922.

³¹ See C. McCrudden, “Common Law of Human Rights? Transnational Conversations on Constitutional Rights”, *Oxford Journal of Legal Studies* 2000, vol. 20, no. 4, p. 529.

³² See J.-F. Flauss, *op. cit.*, pp. 159-182; S. Jaquement, “The Cross-fertilization of international humanitarian law and international refugee law”, *R.I.C.R.* 2001, pp. 651-673; F.G. Jacobs, “Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice”, *Texas International Law Journal* 2003, vol. 38, pp. 547-556; D. Inman, “The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond”, *The International Indigenous Policy Journal* 2014, vol. 5, issue 4, p. 16, as available at <http://ir.lib.uwo.ca/iipj/vol5/iss4/5/> (visited on 27 September 2016).

³³ See A. Watson, *op. cit.*; E. Voeten, *op. cit.*, pp. 547-576.

³⁴ See A. Watson, *op. cit.*

³⁵ See G.L. Neuman, “Import, Export, and Regional Consent in the Inter-American Court of Human Rights”, *EJIL* 2008, vol. 19, no. 1, pp. 101-123.

³⁶ See S. Choudry, *The Migration of Constitutional Ideas*, Cambridge University Press, Cambridge, 2006, 460 p.

³⁷ A. Donald, C. Buckley, and P. Leach (eds), *Towards Convergence in International Human Rights Law. Approaches of Regional and International Systems*, Brill/Nijhoff, Leiden, 2017, 646p.

8. The ECtHR did not escape such tendencies of inter-connectivity between norms and monitoring bodies. While the Court's central focus lies on the supervision of the ECHR and its Protocols, it does not act as an isolated actor when interpreting and applying these instruments. The Strasbourg Court does not ignore the existence of other – external – normative mechanisms, nor the rules, principles and decisions these mechanisms produce. On the contrary, it regularly imports these materials in its argumentation process.
9. The latter phenomenon brings us to the topic of our research, *i.e.* the Strasbourg Court's 'external referencing practice'. This concept covers all importations by the Court of external normative instruments in order to interpret and to apply the Convention and its Protocols.³⁸ This practice has attracted a growing academic interest in the Strasbourg context.³⁹ Even the Court devoted two recent case-law reports to the theme of references; one on the use of case law of the Inter-American Court of Human Rights (hereafter: ACtHR) and one on references to treaties of the CoE.⁴⁰

³⁸ For a definition of the notion of 'external referencing practice', see *infra* under Part I, paras. 78 *et seq.*

³⁹ See *inter alia* J.F. Flauss, "Du Droit international comparé des Droits de l'Homme dans la Jurisprudence de la Cour européenne des Droits de l'Homme", in *Le Rôle du Droit comparé dans l'Avènement du Droit européen*, Schulthess, Zürich, 2002, pp. 159-182; J.F. Flauss, *op. cit.*, 2005, pp. 313-331; G. Gonzalez, "Les Sources internationales dans la Jurisprudence de la Cour européenne des Droits de l'Homme", in *Cahiers de l'Institut de Droit Européen des droits de l'Homme de l'Université de Montpellier* 2007, vol. 7, pp. 307-317; F. Tulkens and S. Van Drooghenbroeck, "Le Soft Law des Droits de l'Homme est-il vraiment si Soft?: Les Développements de la Pratique interprétative récente de la Cour européenne des Droits de l'Homme", in *Liber amicorum Michel Mahieu*, Larcier, Brussels, 2008, pp. 505-526; J. Allard, *op. cit.*, pp. 93-138; M. Forowicz, *op. cit.*, 456 p.; T. Barkhuysen and M.L. van Emmerik, "Ongebonden Binding: Verwijzing naar Soft Law Standaarden in Uitspraken van het EHRM", *Nederlands Juristen Comité voor de Mensenrechten (NJCM) Bulletin* 2010, vol. 35, pp. 827-835; E. Voeten, *op. cit.*, pp. 547-576; F. Vanneste, "Droit international général et droit international des droits de l'homme: l'apport de la Cour européenne des droits de l'homme", *RTDH* 2011, no. 88, pp. 807-838; F. Tulkens, S. Van Drooghenbroeck and F. Krenç, "Le Soft Law et la Cour européenne des Droits de l'Homme: Questions de Légitimité et de Méthode", *RTDH* 2012, vol. 91, pp. 434-489; C. Pitea, "Interpreting the ECHR in the Light of 'Other' International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation", in N. Boschiero et al. (eds), *International Courts and the Development of International Law*, T.M.C. Asser Press, The Hague, 2013, pp. 545-559; C. Pitea, "Interpretation and Application of the European Convention on Human Rights in the Broader Context of International Law: Myth or Reality?", Chapter 1 in Y. Haeck and E. Brems (eds), *Human Rights and Civil Liberties in the 21st Century*, Series: Ius Gentium. Comparative Perspectives on Law and Justice vol. 30, Springer, Dordrecht/Heidelberg/New York/London, 2014, pp. 1-14; L.R. Glas, *op. cit.*, pp. 247-277; M. Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law", *Erasmus Law Review* 2009, vol. 2, no. 3, pp. 353-371; C. Zoethout, "The European Court of Human Rights and Transnational Judicial Dialogue. References to Foreign Law and the Quest for Justification", *Vienna Journal on Int'l Const. Law* 2015, no. 9, pp. 398-415; G. Cohen-Jonathan and J.-F. Flauss, "La Cour européenne des droits de l'homme et le droit international", *Annuaire français de droit international* 2008, vol. 54, pp. 529-546; A. Farahat, "Enhancing Constitutional Justice by Using External References: the European Court of Human Rights' Reasoning on the Protection against Expulsion", *Leiden Journal of International Law* 2015, vol. 28, issue 2, pp. 303-322; F.J. Hampson, "The Use Made By the Organs of the European Convention on Human Rights of Reference to the Views of Other Human Rights Bodies in Addressing the Scope of the Extraterritorial Applicability of the Convention", in A. Donald, C. Buckley, and P. Leach (eds.), *Towards Convergence in International Human Rights Law. Approaches of Regional and International Systems*, Brill/Nijhoff, Leiden, 2017, pp. 407-434.

⁴⁰ In respect of references to case law of the ACtHR up to August 2012, twenty-five Chamber and Grand Chamber cases were listed in which such references appear, regardless whether the reference appeared under the 'facts'-section, the 'law'-section or the separate opinions of the case. In respect of references to CoE-treaties, the report consists of a list of 202 CoE Conventions that had been used within the Court's Chamber and Grand Chamber case law (in the 'facts'-section and/or in the 'law'-section of the case) in cases up to 30 June 2011. See Council of Europe, "Research report: references to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights", prepared by the Research and Library Division of the Court, 2012, 20 p., http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf (visited on 12 April 2016), and "Research report: the use of Council of Europe Treaties in the case-law of the European Court of Human Rights", prepared by the Research and Library Division of the Court, 2011, http://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf (visited on 12 April 2016). For an

10. The practice of external referencing is not exclusive to the ECtHR; other regional human rights courts have been known to use it too. The African Commission has extensively been exercising such a referencing practice for more or less a decade and the ACtHR also includes external instruments as major references.⁴¹ The UN Treaty Bodies, the International Court of Justice (hereafter: ICJ), and the European Court of Justice (hereafter: ECJ), are familiar with it as well.⁴²
11. We might wonder why Strasbourg referencing recently attracted a great deal of interest. After all, the practice is not new.⁴³ Two major phenomena are of importance here.
12. A *first* phenomenon is the ongoing tense relationship between human rights law on one side, and general international law as well as specific international law (outside the human rights area), on the other side.⁴⁴ When should the Court refer to such external rules of international law? What happens when a conflict between these rules and human rights law is inevitable? The Court does not offer a straightforward answer to those questions. The international context, admittedly, does not offer a lot of guidance here. It lacks a general systematization as well as largely accepted conflict-resolving rules. This gap, and the fragmentation that results from it, was the very stimulus for the ILC to issue a large report on the issue,

overview of all issued case-law research reports, see <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis> (visited on 12 April 2016).

⁴¹ The African Commission for instance referred to United Nations treaties, Human Rights Committee jurisprudence, regional human rights instruments and decisions, and instruments of 'soft' law. For concrete examples, see D. Inman, "The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond", *The International Indigenous Policy Journal* 2014, vol. 5, issue 4, p. 16, as available at <http://ir.lib.uwo.ca/iipj/vol5/iss4/5/> (visited on 27 September 2016). This Commission has been given a formal and explicit competence with regard of some uses of external instruments, see *ibidem*. More elaborate on referencing by the ACtHR, see G.L. Neuman, *op. cit.*, pp. 101-102 and M. De Pauw, "The Inter-American Court of Human Rights and the Interpretive Method of External Referencing: Regional Consensus v. Universality", in Y. Haeck (ed.), *The Inter-American Court of Human Rights: theory and practice, present and future*, Intersentia, Antwerp, 2015, pp. 3-22.

⁴² On references of the Treaty Bodies, see B. 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*, Cambridge University Press, Cambridge, 2012, p. 280. In the recent case of the *Republic of Guinea v. Democratic Republic of the Congo* (the *Ahmadou Sadio Diallo* case) for instance, the ICJ made use and ascribed great weight to the interpretation of the ICCPR by the UN HRC. See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *ICJ Reports* 2010, p. 639, para. 66. Example taken from F. Tulkens and S. Van Droogenbroeck, "The domestic courts' response to divergent views among international human rights bodies: thoughts prompted by the *Singh v. France* cases", in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds), *Liberæ Cogitationes. Liber Amicorum Mark Bossuyt*, Intersentia, Antwerpen, 2013, p. 752. On references of the ECJ, for instance, to case law of the ECHR, see *i.a.*, *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights*, Study of the European Parliament Directorate General for Internal Policies, PE462.446, 2012, pp. 97-99, available at <http://www.statewatch.org/news/2012/may/ep-study-ecj-echr.pdf> (visited on 28 March 2017).

⁴³ As early as 1975, in the *Golder*-case (ECtHR, 21 February 1975, *Golder v. the United Kingdom*, Appl. No. 4451/70), the ECtHR made use of external instruments to interpret and apply the Convention. See also the case of *Demir and Baykara v. Turkey* (ECtHR (GC), *Demir and Baykara v. Turkey*, 12 November 2008, Appl. No. 34503/97, paras. 96 *et seq.*, in which the Court mentions several examples of precedents including external references. See, more general: B. Frydman, Conclusions on "Le dialogue international des juges et de la perspective idéale d'une justice universelle", p. 2, available at http://www.philodroit.be/IMG/pdf/B._FRYDMAN_-_Conclusion_-_Le_dialogue_international_des_juges_-_30_mars_2007.pdf (visited on 19 January 2017).

⁴⁴ See, more generally, F. Vanneste, *op. cit.*, 2010; S.P. Sheeran, "The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint or Pushing the Boundaries?", in S.P. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law*, Routledge, London, 2013, pp. 79-108.

including some guidance as to how to deal with the fragmentation of international law. The ILC insisted on prevention of conflicts as well as on 'systemic integration'⁴⁵ (Article 31 paragraph 3 (c) of the Vienna Convention on the Law of Treaties of 1969 – hereafter: VCLT) between human rights law and the wider body of general international law. How did the Court react to these recommendations? Did it take into account that areas other than human rights law do not necessarily share the ECHR's aims and purposes? While integrity of the system might serve a valuable theoretical ideal, it also risks fading out some specificities inherent to the area of human rights protection, which is universal and focused on individuals' inherent dignity. What price is the Court willing to pay for the sake of creating a more integrated system of international law?

13. A *second* phenomenon is the use of non-binding instruments for dynamic interpretations.

The current normative landscape is heterogeneous, including materials of varying legal status and origin, such as 'soft' legal instruments or instruments created by non-governmental organizations (hereafter: NGOs). When they are used in legal reasoning, thus influencing the development of the law, this unsettles the traditional positivist theories of legal sources.⁴⁶ Instead, the usage of non-binding instruments fits more global pluralist approaches that have no State-centric view and recognize that law can equally emanate from non-formal sources.⁴⁷ The Strasbourg Court, in the landmark case of *Demir and Baykara v. Turkey* of 12 November 2008⁴⁸, which is the only case so far that largely elaborated on the referencing practice, explicitly acknowledged that non-binding instruments (including 'soft' law and non-ratified 'hard' law) could be used in legal argumentation, even for 'evolutive' purposes. This issue relates to the question as to whether the Court (should?) substantively integrate(s) (higher) external human rights standards, especially when they emanate from instruments that are strictly speaking not legally binding.

14. The statements in *Demir and Baykara* opened the debates on the referencing practice even further. Admittedly, the Court in this case aimed to systematize and clarify its referencing

⁴⁵ For authors using this notion and addressing its meaning and effects, see among others: V.P. Tzevelekos, *op. cit.*, pp. 621-689; C. Pitea, *op. cit.*, 2014, p. 4; L. Gradoni, "Regole di interpretazione difficile da interpretare e frammentazione del principio di integrazione sistemica", *Rivista di diritto internazionale* 2010, vol. 93, no. 3, pp. 809-817; N. Matz-Lück, "Harmonization, Systemic Integration, and 'Mutual Supportiveness' as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation", *Finnish Y.B. Int'l L.* 2006, vol. 37, pp. 45-47. See also 'ILC Koskenniemi Report', *op. cit.*, paras. 37 *et seq.*

⁴⁶ H.L.A. Hart, "Positivism and the Separation of Law and Morals", *Harv. L. Rev.* 1955, vol. 71, pp. 593-629; H.L.A. Hart, *The Concept of Law*, Clarendon Law Series, Oxford, 1961; H. Kelsen, *Théorie pure du droit*, transl. Ch. Eisenmann, Bruylant, L.G.D.J., Brussels and Paris, 1999 (originally from 1953).

⁴⁷ See, *i.a.*, P.-S. Berman, *Global Legal Pluralism*, Cambridge University Press, Cambridge, 2012, pp. 61 *et seq.*; B. Frydman, "Comment penser le droit global?", in J.-Y. Cherot and B. Frydman (eds), *La science du droit dans la globalisation*, coll. Penser le droit, Bruylant, Brussels, 2012, pp. 26 *et seq.*; W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009, p. 225. See also, more generally, M. Baumgärtel, D. Staes and F.J. Mena Parras, "Hierarchy, Coordination or Conflict? Global Law Theories and the Question of Human Rights Integration", *E.J.H.R.-J.E.D.H.* 2014, vol. 3, pp. 345-348.

⁴⁸ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*. For the Chamber case, see ECtHR (2nd Section), *Demir and Baykara v. Turkey*, 21 November 2006, Appl. No. 34503/97. Both cases will be elaborately discussed further in this work, under Part I, *infra* paras. 21 *et seq.*

practice, but these efforts were insufficient.⁴⁹ It also addressed the issue of references to 'general international law', however without taking a stance on the relationship between this area and the ECHR. Generally speaking, the Court's explicative and justificative efforts were imprecise and questions about the validity of the referencing practice were left unanswered. In the aftermath of this case, legal doctrine has expressed more firmly than before its concerns about the use of (non-binding) instruments in legal reasoning and has pointed in particular at problems of State sovereignty, at the inconsistent methodology of 'picking and choosing' external instruments, and at difficulties of interpretation inherent to comparative and harmonizing efforts.⁵⁰

15. There is confusion and concern about how the Court is using the external context of normative diversity. Our thesis addresses these issues. It aims to bring more clarity to the phenomenon of the referencing practice as recently exercised by the Grand Chamber. Subsequently, it aims to develop arguments in order to enhance the validity of this referencing practice. These goals correspond to two research questions, respectively, 'What are the characteristics of the Strasbourg external referencing practice?' and 'Which arguments might enhance the justification of this practice?'.
16. The thesis addresses these questions in three main parts. **Part I** elaborates on the starting point and the design of our research. In Chapter 1, we extensively discuss the key case of *Demir and Baykara v. Turkey*, in which the Court deployed external instruments and attempted to explain this practice. In the light of this case, we will discuss the state of the art of the challenging aspects of the referencing practice. The insufficiency of the Court's explanations in *Demir and Baykara* together with the problems that the references might pose, operate as a trigger for our research. Against this background, we move to the second Chapter of Part I, which encompasses an elaborate discussion of the research objectives, the research questions, and the methodology of this thesis.
17. **Part II** aims to erase the vagueness that surrounds the phenomenon of importing external instruments to interpret and apply the ECHR. It focuses on our first research question and creates a 'map' of the referencing practice by analyzing the Court's legal discourse through an examination of the text of its decisions and judgments. The approach is comprehensive: the importation of each and every external instrument in recent legal argumentations of the Grand Chamber is included. The mapping is also exhaustive: all Grand Chamber cases over a certain period of time are looked at (including all Grand Chamber since *Demir and Baykara v. Turkey* of 12 November 2008 until the end of 2015). The analysis allows us to make quantitative observations about external references (Chapter 1) as well as qualitative

⁴⁹ See *infra*, paras. 28 *et seq.*

⁵⁰ More elaborate, see *infra*, paras. 48-60.

statements about the nature of the external instruments (Chapter 2). Based on an examination of the cases, we will also map the different functions external instruments fulfill in a legal reasoning (Chapter 3). This enables us to situate and canalize some criticism which is often tied to very particular types of references. On the one hand, this overview brings out more precise information about challenging aspects of external importations. For instance, this study aims to uncover, over a certain period of time, how the Grand Chamber followed up on the the *Demir and Baykara* case law which offered an explicit 'green light' for the usage of non-binding instruments for 'evolutive' interpretation. On the other hand, the comprehensive analysis reminds us not to lose sight of the broader picture: the referencing practice occurs in many, often less challenging forms and functions.

18. The insights obtained in Part II operate as a stepping-stone for the final part of our research, which is deployed under **Part III** and frames arguments to boost the validity of the referencing practice. Our thesis aims to move beyond an enumeration of the challenging aspects of the referencing practice by demonstrating how it could enlarge its justificative basis. Our perspective is twofold. It firstly adopts a lens that is strictly internal to the law by addressing the question: How could the Court better justify its referencing practice within the existing legal framework? The answers to this question might increase the legal validity of the external importations. Secondly, it includes a lens that focuses on the users of human rights, including the judges (judicial users), the parties (the rights holders and the duty bearers), and the third party interveners (the third party users).⁵¹ Putting their strategic interests in the spotlight, what could the referencing practice offer and what are the missed opportunities in this regard? A referencing practice that does justice to the practical needs of the users gains validity 'from the ground'. In a more interdisciplinary way, a users' assessment approaches the phenomenon of external referencing within its wider social context, taking account of players who have a relevant position in the global judicial context (judges, rights holders, duty bearers, third party users,...)⁵², paying attention to the actors that nourish these interests (the audience)⁵³, and also including the relationships that are built among them (the networks)⁵⁴. This wide focus opens up the conceptual space to "...a global interplay of plural voices, many of which are not associated with the state", and thus

⁵¹ On the method of adopting a users' perspective to the study of human rights law, see: E. Desmet, "Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and Research Agenda", *HR&ILD* 2014, no. 2, pp. 121-141.

⁵² Since this also includes non-State actors, this accords with some theories that point at the relevance of "...a plurality of legal systems encompassing groups transcending State borders, but not necessarily comprised in international law". A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Research for Legal Unity in the Fragmentation of Global Law", *Mich. J. of Int'l L.* 2004, vol. 25, p. 1004.

⁵³ This notion is based on the concept 'universal audience' (*auditoire universel*), as used by Chaïm Perelman: Ch. Perelman and L. Olbrechts-Tyteca, *La nouvelle rhétorique. Traité de l'argumentation*, Editions de l'Université de Bruxelles, Brussels, 1992, 752 p.

⁵⁴ On the concept of a 'network' in legal theory and in analyzing legal phenomena, F. Ost and M. van de Kerchove, *De la pyramide au réseau?: pour une théorie dialectique du droit*, F.U.S.L., Brussels, 2002. See also A. Bailleux, "Human Rights in Network", *E.J.H.R.-J.E.D.H.* 2014, vol. 3, p. 301.

to "...a wide variety of communities" that "...end up having important impact in actual practice, regardless of the degree of coercive power those communities wield".⁵⁵

19. For many years now, the ECtHR imports external instruments in order to interpret and apply the Convention. It references external legal decisions, 'soft' recommendations, external treaties, and so on. The thesis will explore this phenomenon, based on a large amount of empirical data and will present ways to justify the practice both by using legal and pragmatic arguments. The combination of these legal and other perspectives will offer fertile ground to boost the validity of the external referencing practice.

⁵⁵ P. Berman, "A Pluralist Approach to International Law", *Yale Journal of International Law* 2007, vol. 32, p. 308.

PART I - Design of the research

20. The Strasbourg case of *Demir and Baykara v. Turkey* is the starting point of the research. Both the Chamber and Grand Chamber judgment – of respectively 21 November 2006 and 12 November 2008 – illustrate the main concerns of judicial importations of external instruments.¹ The Grand Chamber case of *Demir and Baykara* further comprises the Court's first (and most complete) attempt to justify and clarify – what we call – 'external referencing practice'. This attempt has, however, been confusing and incomplete. The case law of *Demir and Baykara* and the challenges that it poses (**Chapter 1**) will be our guideline when defining the aims and method of our thesis research (**Chapter 2**).

¹ ECtHR (2nd Section), *Demir and Baykara v. Turkey*, 21 November 2006, Appl. No. 34503/97; ECtHR (GC), *Demir and Baykara v. Turkey*, 12 November 2008, Appl. No. 34503/97. Within the Court, there are several Chambers and there is one Grand Chamber of judges. For the composition of the Court, see <http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=> (visited on 12 April 2016).

CHAPTER 1 – DEMIR AND BAYKARA. V. TURKEY: A TRIGGER FOR RESEARCH

21. Both the Chamber and the Grand Chamber case of *Demir and Baykara* offer illustrations of the Strasbourg Court making use of external normative instruments in its legal reasoning (§ 1). Especially the Grand Chamber-case is of the utmost importance.² Although it was not the first Strasbourg case to take account of (non-binding) external instruments to interpret the Convention³, it was the first doing a serious attempt to explain and systematize this practice⁴ (§ 2), most probably because of the presence of controversy about the use of external instruments in the Chamber-case, and in legal doctrine more generally (§ 3).

§ 1. The use of external instruments

22. *Demir and Baykara* concerned the absence of a right for civil servants to form a trade union and to enter collective agreements.⁵ Did a lack of such right violate Article 11 ECHR on the right to freedom of association? In the Chamber judgment, the ECtHR unanimously

² For a discussion of this case law, including on its use of external instruments, see C. Pitea, "Interpreting the ECHR in the Light of "Other" International Instruments: Systemic Integration or Fragmentation of Rules of Treaty Interpretation?", in N. Boschiero et al. (eds), *International Courts and the Development of International Law*, T.M.C. Asser Press, The Hague, 2013, pp. 548-550; H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: an Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Intersentia, Cambridge/Antwerp/Portland, 2011, pp. 224-226; J. Arato, "Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law", *Brook. J. Int'l L.* 2012, vol. 37, no. 2, pp. 349-388; S. Van Drooghenbroeck, "Les frontières du droit et le temps juridique: la Cour européenne des droits de l'homme repousse les limites. En marge de l'arrêt de Grande Chambre du 12 novembre 2008 rendu en l'affaire *Demir et Baykara c. Turquie*", *Rev. trim. dr. h.* 2009, vol. 79, pp. 811-850; J.-P. Marguenaud and J. Mouly, "L'avènement d'une Cour européenne des droits sociaux (à propos de CEDH, 12 novembre 2008, *Demir et Baykara c. Turquie*)", *Editions Dalloz* 2009, pp. 739 et seq.; F. Sudre, "L'interprétation constructive de la liberté syndicale, au sens de l'article 11 de la Convention européenne des droits de l'homme", *J.C.P.*, II 10018; J.-P. Marguenaud and J. Mouly, "Le droit à la négociation collective, 'partie inséparable' de la liberté syndicale", *J.C.P.* 2007, II 10037-10038; G. Cohen-Jonathan and J.-F. Flauss, "La Cour européenne des droits de l'homme et le droit international", *Annuaire français de droit international* 2008, vol. 54, p. 529-538.

³ To say it in the words of Cohen-Jonathan and Flauss, in *Demir and Baykara*, "...l'option méthodologique retenue n'est, contrairement au point de vue exprimé par une partie de la doctrine, ni révolutionnaire, ni même inédite". G. Cohen-Jonathan and J.-F. Flauss, *op. cit.*, p. 530. As early as 1975, in *Golder-case* (*op. cit.*), the ECtHR made use of external instruments to interpret and apply the Convention. In the latter case, the Court stressed the importance of taking the broader context of international law into account when interpreting the ECHR. It made use of Article 31 paragraph 3 (c) of the VCLT in that respect. It was however not until the *Demir and Baykara*-judgment that the Grand Chamber did an effort to systematize the 'scattered practice' of external referencing. See C. Pitea, *op. cit.*, p. 546 and C. Pitea, "Interpretation and Application of the European Convention on Human Rights in the Broader Context of International Law: Myth or Reality?" in Y. Haack and E. Brems (eds), *Human Rights and Civil Liberties in the 21st Century*, Series: Ius Gentium: Comparative Perspectives on Law and Justice, vol. 30, Springer, Dordrecht/Heidelberg/New York/London, 2014, p. 2; S. Van Drooghenbroeck, *op. cit.*, pp. 817-822.

⁴ A similar observation was made by H. Senden, *op. cit.*, p. 223.

⁵ The Turkish Court of Cassation had argued that civil servants' freedom to join a trade union and bargain collectively could not be exercised. It specified that at the time the union in question was established, the Turkish legislation did not permit civil servants to form trade unions and therefore, the union had no legal personality since its foundation. As a consequence, according to the Court of Cassation, the collective agreement, which had already been applied for two years, had to be annulled *ex tunc*.

concluded that there was a breach of Article 11 ECHR.⁶ The Grand Chamber upheld this outcome.⁷

23. The Court first considered the issue of civil servants and the right to form trade unions. The Chamber stated that municipal servants have the right to engage in union activities.⁸ The Grand Chamber upheld this statement and treated the issue more elaborately, including references to external instruments. It said that municipal servants who are not engaged in the administration of the State as such, do in principle not belong to the group of “members of the administration of the State” (to whom restrictions could be allowed under paragraph 2 of Article 11 ECHR)⁹. Accordingly, they cannot be subjected on that basis to a limitation of their right to organise and to form trade unions.¹⁰ The Court concluded that municipal civil servants are not excluded from the scope of Article 11 ECHR, that they can legitimately rely on this provision and that the State, *in casu*, failed to show that the municipal servants should be regarded as “members of the administration of the State”.¹¹

24. This conclusion – which was said to be of a ‘radical’ nature¹² – was supported by “... the majority of the relevant international instruments and ... the practice of European States”.¹³ More precisely, the Grand Chamber referred to several specific international instruments including the International Covenant on Civil and Political Rights (hereafter: CCPR), the International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR)¹⁴, the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize¹⁵, observations of the ILO Committee of Experts¹⁶, the European Social Charter¹⁷, the CoE

⁶ ECtHR (2nd Section), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 29 and 46.

⁷ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 128 and 169-170.

⁸ ECtHR (2nd Section), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 28-29.

⁹ Paragraph 2 of Article 11 ECHR goes as follows: “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”.

¹⁰ The Court was of the opinion that “...members of the administration of the State” are not excluded from the scope of Article 11 ECHR, but that national authorities could impose “lawful restrictions” on them in accordance with Article 11 paragraph 2 ECHR. Turkey had nonetheless failed to demonstrate that the nature of the duties performed by the applicants required them to be considered as “members of the administration of the State”. The applicants could therefore legitimately rely on the rights of Article 11 ECHR and could not be subjected to restrictions on the basis of the second paragraph of that provision. See ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 96 *et seq.*

¹¹ *Ibidem*, paras. 107-108.

¹² S. Van Drooghenbroeck, *op. cit.*, p. 841.

¹³ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 98.

¹⁴ Paragraph 99 goes as follows: “While Article 8 § 2 of the International Covenant on Economic, Social and Cultural Rights, which concerns the same subject matter, includes members of the administration of the State among the categories of persons who may be subject to restrictions, Article 22 of the International Covenant on Civil and Political Rights, the wording of which is similar to that of Article 11 of the Convention, provides that the State is entitled to restrict the exercise of the right to freedom of association only of members of the armed forces and of the police, without referring to members of the administration of the State”. *Ibidem*, para. 99.

¹⁵ Ratified by Turkey in 1993 and internationally recognizing that all workers, without distinction whatsoever, have the right to establish and to join organizations of their own choosing. *Ibidem*, para. 100.

¹⁶ See *ibidem*, paras. 101-102. This Committee *inter alia* considered that the only admissible exception to the right to organize as contemplated by that instrument concerned the armed forces and the police.

Committee of Ministers (hereafter: COM) Recommendation No. R (2000) 6 on the Status of Public Officials in Europe¹⁸, and the European Union Charter of Fundamental Rights (hereafter: EU Charter).¹⁹ The Court also took into account the developments in international law to conclude that Turkey's interference with the trade-union rights was not "necessary in a democratic society" within the meaning of the second paragraph of Article 11 of the Convention.²⁰

25. Secondly, the Court reconsidered its earlier case law by stating that Article 11 includes a right to collective bargaining and to enter collective agreements.²¹ The Chamber used external instruments as argumentative support and ruled more particularly that

"...the organic link between freedom of association and freedom to bargain collectively has been referred to by the Social Charter's Committee of Independent Experts, according to whom, when a Contracting Party does not ensure full freedom of association for workers, under Article 5 of the Social Charter, it cannot fully ensure respect for the right to bargain collectively under Article 6 either (see Conclusions XIV-1, p. 419 [Ireland], *ibid.* p. 179 [Denmark] and p. 530 [Malta]; Turkey has not yet agreed to apply Articles 5 and 6 of the Social Charter)".²²

26. The Grand Chamber upheld this line of reasoning. Having particular regard to the developments in international labor law and in the practice of European States²³ and taking account of the ECHR as a 'living instrument'²⁴, it acknowledged that the right to bargain collectively, in principle, had become an essential element of the right to form and join trade unions.²⁵ To demonstrate international developments, the Grand Chamber referred to several external instruments including ILO Convention No. 98 on the Right to Organize and to

¹⁷ Reference was made to Article 5 of the European Social Charter, which guarantees the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations. *Ibidem*, para. 103.

¹⁸ Principle 8 of which declares that public officials should, in principle, enjoy the same rights as all citizens, and that their trade-union rights should only be lawfully restricted in so far as that is necessary for the proper exercise of their public functions. *Ibidem*, para. 104.

¹⁹ This Charter declares in Article 12 paragraph 1 that "everyone" has the right to form and to join trade unions for the protection of his or her interests. *Ibidem*, para. 105.

²⁰ *Ibidem*, paras. 119-127.

²¹ ECtHR (2nd Section), *Demir and Baykara v. Turkey*, *op. cit.*, para. 33.

²² *Ibidem*, para. 35.

²³ The Grand Chamber mentioned that "...the right of public servants employed by local authorities and not holding State powers to engage in collective bargaining in order to determine their wages and working conditions has been recognized in the majority of Contracting States" (ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 151). The Court also pointed at internal evolutions in the Turkish situation (*ibidem*, para. 152).

²⁴ Paragraph 146: "...In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights".

²⁵ *Ibidem*, paras. 146-154. Other essential elements, as recognized under the Court's prior case law, are: the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek persuade the employer to hear what it had to say on behalf of its members. This list was however not considered to be finite but required flexibility in order to accommodate developments in labor relations.

Bargain Collectively and the interpretation of this Convention by the ILO Committee of Experts²⁶, ILO Convention No. 151 on the Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service²⁷, Article 6 paragraph 2 of the European Social Charter²⁸, and Article 28 of the EU Charter.²⁹ The Court stressed that, in the light of these developments, it should reconsider its previous case law, "...so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems".³⁰

27. To argue that the Turkish interference with the right to collective bargaining under Article 11 ECHR was unnecessary in a democratic society, the ECtHR made use of external instruments once again. The Chamber, in that respect, took account of ILO Convention No. 98 (as interpreted by the ILO Committee of Experts), which ensures the right to bargain collectively and to enter into collective agreement.³¹ The Grand Chamber, for its part, pointed out that a right to collective bargaining had been recognized in several instruments of international law.³²

²⁶ Paragraph 147: "The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively. Adopted in 1949, this text, which is one of the fundamental instruments concerning international labor standards, was ratified by Turkey in 1952. It states in Article 6 that it does not deal with the position of "public servants engaged in the administration of the State". However, the ILO Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the State. With that exception, all other persons employed by government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No. 98 in the same manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages" (*ibidem*, para. 147).

²⁷ Paragraph 148: "The Court further notes that ILO Convention No. 151 (which was adopted in 1978, entered into force in 1981 and has been ratified by Turkey) on labor relations in the public service ("Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service") leaves States free to choose whether or not members of the armed forces or of the police should be accorded the right to take part in the determination of working conditions, but provides that this right applies everywhere else in the public service, if need be under specific conditions. In addition, the provisions of Convention No. 151, under its Article 1 § 1, cannot be used to reduce the extent of the guarantees provided for in Convention No. 98" (*ibidem*, para. 148).

²⁸ Paragraph 49: "As to European instruments, the Court finds that the European Social Charter, in its Article 6 § 2 (which Turkey has not ratified), affords to all workers, and to all trade unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to the meaning attributed by the ECSR to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations" (*ibidem*, para. 149).

²⁹ Paragraph 150: "As to the European Union's Charter of Fundamental Rights, which is one of the most recent European instruments, it provides in Article 28 that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels" (*ibidem*, para. 150).

³⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 153.

³¹ ECtHR (2nd Section), *Demir and Baykara v. Turkey*, *op. cit.*, para. 44.

³² ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 165 *et seq.*

§ 2. The Court clarifying the use of external instruments

28. The Court's Chamber decided *Demir and Baykara* by unanimity. As appears from the Grand Chamber-case, it was nonetheless heavily contested by the respondent State. The Turkish Government particularly objected to the use of external instruments in the Chamber-reasoning. Its concerns were centered around three issues: the issue of non-ratification, the issue of 'evolutive' interpretation, and the issue of taking into account guarantees belonging to the so-called 'second generation' of human rights.
29. The Turkish Government first objected to the methodology of the ECtHR that consists in referring to non-ratified external international provisions. In its view, the Grand Chamber should have concluded to 'inadmissibility' because the arguments relied on "...international instruments other than the Convention, particularly instruments that Turkey had not ratified"³³ and "...could not create for Contracting States new obligations that were not provided for in the Convention".³⁴ Turkey considered the Court's interpretative reliance on provisions that it had not ratified (*in casu*, articles 5 and 6 of the European Social Charter on the right to organize and the right to bargain collectively) as incompatible with the scope *ratione materiae* of the Convention and with the Court's competence.³⁵ On the one hand, Turkey accepted that the Court had always taken into account, where necessary, "...any relevant rules of international law applicable in the relations between the parties", but, on the other hand, it considered this approach only legitimate in so far as it accorded with the interpretative rules of the VCLT³⁶, which implied, in the view of the Turkish Government, that account should only be taken of those instruments to which the State was *bound*.³⁷
30. By stating "...that the ILO Conventions ratified by Turkey were not pertinent in light of article 11 ECHR and that the Court should not use these Conventions to create new rights under the ECHR", the Turkish government did not only express its concern about the use of

³³ *Ibidem*, para. 53.

³⁴ *Ibidem*, para. 54.

³⁵ *Ibidem*. The Turkish Government added that an interpretation that rendered Articles 5 and 6 of the European Social Charter "...binding on an indirect basis was even more problematic where, as in the present case, the absence in the Convention of an express provision guaranteeing the right to enter into collective agreements was counterbalanced by consideration of other instruments to which the State concerned was not a party". *Ibidem*, paras. 61-62. The applicant's defense on this matter was that the Court did not *apply* the (non-ratified) external instruments (*in casu* the provisions of the European Social Charter) but only used the opinion of the Committee of Independent Experts to interpret the ECHR. The applicants saw no problem in such a use (*ibidem*, para. 63).

³⁶ *Vienna Convention on the Law of Treaties*, United Nations, 23 May 1969, Treaty Series, vol. 1155, p. 331, available at <http://www.refworld.org/docid/3ae6b3a10.html> (visited on 8 May 2016). The VCLT entered into force on 27 January 1980 and has been ratified by 108 parties (see http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty_1.asp) (visited on 8 May 2016). For the use of this instrument as a legal basis for external referencing practice, see the statements of the Grand Chamber in *Demir and Baykara* (*infra*, para. 34) and see also our elaborate discussion of this instrument in light of external referencing practice under Part III, Chapter I, §§ 3-4.

³⁷ *Ibidem*, para. 61.

non-ratified instruments.³⁸ In addition, it resisted the use of (both binding or non-binding) external instruments to dynamically interpret the Convention in an ‘evolutive’ manner.

31. As a final matter, the Turkish Government challenged references to instruments generally associated with the so-called ‘second generation’ of human rights such as the European Social Charter. It more particularly stressed that the promotion of such ‘second generation’ rights lacks the political support of the Member States. The Government aimed to ‘prove’ the latter statement by stressing that there had not been any agreement among the Member States about the creation of an additional protocol that would extend the Convention system to economic and social rights.³⁹
32. The case of *Demir and Baykara* also created some commotion in legal doctrine, mostly in respect of its reference to Articles 5 and 6 of the Social Charter, which had not been ratified by Turkey. Van Drooghenbroeck summarizes the doctrinal debates. On the one hand, as he notes, some authors – such as Renucci and Birsan – have criticized the Court’s mobilization of the Social Charter since it creates an illegitimate impression that States could be bound to engagements against their will. Authors such as Marguénaud and Mouly, on the other hand, care less about the condition of ‘ratification’ and, instead, acknowledge the need to give effective strength to instruments that aim to create a more ‘social’ Europe.⁴⁰
33. In the wake of the latter discussions, the Grand Chamber decided to elaborate on the interpretative technique of referencing international instruments.⁴¹ At the start of its reasoning in *Demir and Baykara*, it included a heading: “Interpretation of the Convention in the light of other international instruments”.⁴² As a part of the merits of the case, this heading responded to the Turkish submission that “...it was impossible to rely against Turkey on international instruments other than the Convention, particularly instruments that Turkey had not ratified”.⁴³ The ECtHR aimed to clarify some aspects of its referencing practice, including its ‘basis’ (§ 2.1.) and the different kind of instruments that could be used (§ 2.2.).

³⁸ *Ibidem*, para. 137.

³⁹ *Ibidem*, para. 84.

⁴⁰ S. Van Drooghenbroeck, *op. cit.*, pp. 815-816 with reference to J.-F. Renucci and C. Birsan, “La Cour européenne des droits de l’homme et la Charte sociale européenne: les liaisons dangereuses”, *Receuil Dalloz*, 2007, no. 6, p. 410, commentary to ECtHR 21 November 2006, *Demir and Baykara/Turkey*, Appl. No. 34503/97 and to J.-P. Marguénaud and J. Mouly, *op. cit.*, 2007, p. 38.

⁴¹ See also S. Van Drooghenbroeck, *op. cit.*, pp. 811-849.

⁴² ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 60 *et seq.*

⁴³ *Ibidem*, para. 60.

§ 2.1. The basis of the Court's referencing practice

34. Firstly, the ECtHR addressed the legal basis of importing international materials by referring to the VCLT; it said it is *mainly* guided by Articles 31-33 of the VCLT to determine the meaning of the terms and phrases used in the Convention.⁴⁴ Against that background, the Court stressed the importance to ascertain the 'ordinary meaning' to be given to the words "...in their context and in the light of the object and purpose of the provision...".⁴⁵ The Court added that in line with the VCLT, "[R]ecourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable".⁴⁶ The Grand Chamber referred particularly to Article 31 paragraph 3 (c) of the VCLT⁴⁷ to support its statement that it "...has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein".⁴⁸ "[O]n the contrary", the Court continued, "...it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties".⁴⁹
35. The specific character of the ECHR, which is "...first and foremost a system for the protection of human rights..."⁵⁰, also contributed to explaining the basis of using external international instruments in legal reasoning. The ECtHR added that the Convention has to be interpreted and applied "... in a manner which renders its rights practical and effective, not theoretical and illusory" and which does justice to its "...internal consistency and harmony".⁵¹
36. The Court discerned a final element of the basis of its referencing practice in the 'living' nature of the ECHR. This instrument, the Court acknowledged, should be interpreted in the light of present-day conditions, taking account of "...evolving norms of national and international law...".⁵²

⁴⁴ *Ibidem*, para. 65.

⁴⁵ *Ibidem*.

⁴⁶ *Ibidem*.

⁴⁷ As a general rule of interpretation, Article 31 (3) c VCLT provides that "[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties".

⁴⁸ *Ibidem*, para. 67. The Court itself is thus also aware of the fact that its 'referencing practice' is no new method introduced by the *Demir and Baykara*-case.

⁴⁹ *Ibidem*. The Court referred here to some precedents such as ECtHR (GC), *Saadi v. the United Kingdom*, 29 January 2008, Appl. No. 13229/03, para. 62; ECtHR (GC), *Al-Adsani v. the United Kingdom*, 21 November 2001, Appl. No. 35763/97, para. 55, and ECtHR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 23 June 2005, Appl. No. 45036/98, para. 150.

⁵⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 66.

⁵¹ *Ibidem*.

⁵² *Ibidem*, para. 68, with references to Strasbourg precedents.

§ 2.2. A diversity of instruments

37. After addressing the basis of interpreting the Convention in the light of international instruments, the Court explicitly drew attention to the diversity of instruments it could mobilize for this purpose. It mentioned that it used general international law (§ 2.2.1.) as well as instruments issued in the CoE-framework (§ 2.2.2.).⁵³ The Court also included some general considerations on the issue (§ 2.2.3.).

§ 2.2.1. References to general international law

38. In respect of the use of general international law⁵⁴, the ECtHR stressed that the precise obligations that the Convention imposes on the Member States “...may be interpreted, firstly, in the light of relevant international treaties that are applicable in the particular sphere”.⁵⁵ As an example, the Court mentioned the interpretation of Article 8 ECHR (on the right to private and family life) in light of the UN Convention on the Rights of the Child of 1989 (hereafter: CRC) and the European Convention on the Adoption of Children of 1967.⁵⁶ It also included illustrations of references to ‘universal international treaties’ to establish a State’s positive obligations (including the ILO Forced Labor Convention, the CRC, and the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery).⁵⁷ The Court stressed the importance of an interpretation that is consistent with international instruments “...specifically concerned with this issue...” with a view to rendering the ECHR provisions ‘effective’.⁵⁸

39. About the use of ‘general international law’, the Court added that “...the relevant rules of international law applicable in the relations between the parties include ‘general principles of law recognized by the civilized nations’ (see Article 38 § 1 (c) of the Statute of the International Court of Justice)”.⁵⁹ The ECtHR quoted in this respect the Legal Committee of the Consultative Assembly of the CoE, stating in August 1950 that “...the Commission and the Court [would] necessarily [have to] apply such principles” in the execution of their duties and that it would therefore be ‘unnecessary’ to insert a specific clause to this effect in the Convention.⁶⁰

⁵³ *Ibidem*, paras. 69 *et seq.*

⁵⁴ *Ibidem*, paras. 69-73.

⁵⁵ *Ibidem*, para. 69.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*, para. 70.

⁵⁸ *Ibidem*.

⁵⁹ *Ibidem*, para. 71, with reference to ECtHR, *Golder v. the United Kingdom*, *op. cit.*, para. 35.

⁶⁰ *Ibidem*.

40. The ECtHR dedicated the final paragraphs on references to general international law to two of its precedents. It first mentioned the *Soering*-case⁶¹ in which the ECtHR took into consideration external instruments (*inter alia* the ICCPR, the American Convention on Human Rights (hereafter: ACHR⁶²), and the UN Convention against Torture (hereafter: CAT)) to develop its case law under Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment).⁶³ The Court also mentioned the example of *Al-Adsani v. the United Kingdom*⁶⁴ in which it referred to ‘universal instruments’ (such as the UDHR, the ICCPR, and the CAT) and international case law to conclude that “...the prohibition of torture had attained the status of a peremptory norm of international law, or *jus cogens*, which it incorporated into its case-law in this sphere...”.⁶⁵

§ 2.2.2. References to Council of Europe instruments

41. After elaborating on references to general international instruments, the Court addressed the use of (‘soft’) CoE instruments.⁶⁶ It said that, for the purposes of interpretation, the Court had used in a number of judgments “...intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly”.⁶⁷ The Court acknowledged that even instruments of Council of Europe organs having no function to represent the Member States (like supervisory mechanisms or expert bodies) could be taken into account.⁶⁸ The ECtHR mentioned a few examples of precedents which “...to interpret the exact scope of the rights and freedoms guaranteed by the Convention”, made use of instruments of the European Commission for Democracy through Law (hereafter: Venice Commission), the European Commission against Racism and Intolerance (hereafter: ECRI) and of reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT).⁶⁹

§ 2.2.3. Additional considerations and conclusions

42. When elaborating on the diversity of instruments used to interpret the Convention, the Grand Chamber made some additional – and rather divergent – considerations and conclusions in respect of its referencing practice.

⁶¹ ECtHR (GC), *Soering v. the United Kingdom*, 7 July 1989, Appl. No. 14038/88.

⁶² *American Convention on Human Rights*, signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969, available at https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (visited on 25 September 2016).

⁶³ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 72.

⁶⁴ ECtHR (GC), *Al-Adsani v. the United Kingdom*, *op. cit.*

⁶⁵ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 73.

⁶⁶ *Ibidem*, paras. 74 *et seq.*

⁶⁷ *Ibidem*, para. 74.

⁶⁸ *Ibidem*, para. 75.

⁶⁹ *Ibidem*.

43. Firstly, to address the relevance of external referencing, the Grand Chamber made the connection to the object and purpose of Convention provisions. To consider the object and purpose, the Court said it "...also takes into account the international law background to the legal question before it".⁷⁰

44. Then, concerning the 'weight' of international instruments, the Grand Chamber acknowledged that a referencing practice in search for common standards operates as a subsidiary means of interpretation. The Court used the following words:

"Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty".⁷¹

45. Besides a 'subsidiary means' to 'clarify the scope of a Convention provision', the Court in its conclusions alludes to another function of international law: defining notions and clarifying provisions in specific cases. The Grand Chamber said in particular that the Court

"...in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases".⁷²

46. Regarding the 'legal status' of external instruments, the Grand Chamber acknowledged references to non-binding instruments. It mentioned a few cases in which it referred to the EU Charter and stressed that it did so, "...even though this instrument was not binding".⁷³ Besides the use of non-binding materials, the ECtHR elaborated on the mobilization of non-ratified instruments. The Grand Chamber observed that "...in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State".⁷⁴ What seems to ultimately count ultimately is "...a growing measure of agreement on the

⁷⁰ *Ibidem*, para. 76.

⁷¹ *Ibidem*.

⁷² *Ibidem*, para. 85.

⁷³ *Ibidem*, para. 80. When the *Demir and Baykara* Grand Chamber case came out (in 2008), the EU Charter did not yet have a status of a binding instrument. The EU Charter became binding as a result of the adoption of the Treaty of Lisbon, which entered into force on 1 December 2009.

⁷⁴ *Ibidem*, para. 78.

subject at international level”.⁷⁵ The Court stressed that already in the case of *Marckx v. Belgium* (concerning the legal status of children born out of wedlock), it based its interpretation on two international conventions that Belgium, like other States Parties to the Convention, had not ratified.⁷⁶ Among many other examples of external references to non-ratified instruments,⁷⁷ the Court mentioned precedents using the European Convention on State Immunity (ratified at the time by eight of the Member States of the CoE)⁷⁸ and the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997 (not ratified by all Member States).⁷⁹ Regarding the ratification record of the relevant external instruments, the Court added in its conclusion that

“[I]n this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies”.⁸⁰

47. Finally, the Grand Chamber reflected on the Court’s references to human rights of the ‘second generation’. The Turkish Government had challenged such openness since there had not been any agreement among the Member States about the creation of an additional protocol that would extend the Convention system to economic and social rights.⁸¹ While Turkey interpreted the absence of such agreement as a lack of political support among the Member States for the promotion of economic and social rights, the Grand Chamber argued that the absence of an agreement about an additional protocol went hand in hand with the Member States’ wish to strengthen the mechanism of the European Social Charter, which according to the Court, could be interpreted as “...an argument in support of the existence of a consensus among Contracting States to promote economic and social rights”.⁸² According

⁷⁵ *Ibidem*, para. 77.

⁷⁶ *Ibidem*, para. 79. See ECtHR (GC), *Marckx v. Belgium*, 13 June 1979, Appl. No. 6833/74, para. 41. It concerns the following two Conventions: the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children and the European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock.

⁷⁷ Like its reference to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998) in order to determine the criteria for State responsibility under article 2 ECHR in respect of dangerous activities (*ibidem*, para. 78), and its reference to principles of the United Nations Economic Commission for Europe’s Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (UN Doc. ECE/CEP/43) in matters of environmental protection (as an aspect of private life) in a case against Turkey while that State had not ratified the Aarhus Convention. *Ibidem*, paras. 81 *et seq.*

⁷⁸ *Ibidem*, para. 80.

⁷⁹ *Ibidem*, para. 81.

⁸⁰ *Ibidem*, para. 86, with reference, *mutatis mutandis*, to ECtHR, *Marckx v. Belgium*, 13 June 1979, Appl. No. 6833/74, para. 41.

⁸¹ *Ibidem*, para. 84. See *supra*, para. 31.

⁸² *Ibidem*.

to the Court, this “...general wish of Contracting States...” had to be taken “...into consideration when interpreting the provisions of the Convention”.⁸³

§ 3. Concerns relating to the referencing practice in *Demir and Baykara* and beyond

48. In the Grand Chamber-case of *Demir and Baykara*, the ECtHR made use of external instruments, it shed light on the ‘methodology’ of interpreting the ECHR in light of other international instruments, it provided some arguments clarifying and justifying the practice, and it categorized some precedents in which it had used a variety of external instruments, including ‘soft’ instruments.

49. Both the Chamber and the Grand Chamber case of *Demir and Baykara* were decided unanimously. The use of external instruments and its explanation by the Court, therefore, did not appear to be a highly contested issue among the Strasbourg judges.⁸⁴ Some judicial actors nonetheless uttered certain doubts, e.g. Judge Zagrebelsky in his separate opinion to the Grand Chamber case.⁸⁵ In addition, several writings of legal doctrine have been critical in relation to the *Demir and Baykara*-cases as well as in relation to external importations in (Strasbourg) legal reasoning more generally. This brings us to the main challenges facing the Court’s external referencing practice arising in the context of the *Demir and Baykara*-cases and beyond.⁸⁶ These challenges relate in particular to issues of State power and sovereignty (§ 3.1.), to the inconsistent method used by the ECtHR (§ 3.2.) and to difficulties in interpretation (§ 3.3.)

§ 3.1. Issues of State power and sovereignty

50. The cases of *Demir and Baykara* illustrate how the Court does not shy away from importing non-binding instruments for interpreting the Convention. In this case, the ECtHR, for instance, referred to Articles 5 and 6 of the European Social Charter on the right to organize and the right to bargain collectively to offer support for ‘evolutive’ interpretation of Article 11 ECHR. While Turkey ratified the European Social Charter, it explicitly refused to ratify

⁸³ *Ibidem*.

⁸⁴ See H. Senden, *op. cit.*, pp. 223 *et seq.*

⁸⁵ Separate opinion of Judge Zagrebelsky to the case of ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*. One of the two separate opinions attached to the case of *Demir and Baykara* comprised some criticism that – although not directed to the interpretative technique of using external instruments as such – touched upon ‘evolutive’ interpretation and the references to external instruments done for that purpose.

⁸⁶ Note that several texts of legal doctrine that will be cited for this purpose do not particularly focus on the *Demir and Baykara*-cases but on (some aspects of) external referencing practice more generally. Nonetheless, the concerns that have been expressed in more general terms (or in relation to other cases), also count in relation to the *Demir and Baykara*-cases.

both articles in question.⁸⁷ The ECtHR is explicit about the use of non-binding instruments. In the *Demir and Baykara* Grand Chamber case it held “...it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State” when it looks for “...a common ground among the norms of international law”.⁸⁸ In its conclusion on the referencing practice, the ECtHR added: “...it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned”.⁸⁹ In addition, the Court explicitly acknowledged the use of ‘intrinsically non-binding’ instruments such as recommendations of the CoE.⁹⁰

51. Although the Court itself does not seem unduly concerned about the use of non-binding instruments for argumentative purposes, opposition arrived from other voices. The Turkish government, as explained earlier, expressed worries regarding the lack of State consent in respect of the interpretation – and corresponding development – of the Convention. This brings us to what is often heard as the main criticism of the referencing practice, *i.e.* the loss of power and sovereignty of the Member States in respect of the content and development of human rights law. This criticism was echoed in legal doctrine; external referencing – and references to non-binding instruments in particular – was criticized because the ‘link’ with the Member States’ legal systems was considered to be too flexible and too optional, for instance because external instruments were imported that only have a narrow democratic basis.⁹¹

52. The importation of non-binding instruments attracts most criticism when it serves a purpose of ‘evolutive’ interpretation.⁹² This is not surprising; such references imply an impact of non-binding instruments on the establishment of ‘new’ or ‘enlarged’ standards under the Convention. Several authors associate the latter with a form of ‘judicial activism’, blurring the boundaries between law-making and legal interpretation and affecting the separation of powers and the sovereignty of the national authorities *vis-à-vis* the Strasbourg judicial

⁸⁷ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 45, 49, 77, 84, 103 and 149.

⁸⁸ *Ibidem*, para. 74. The Court stressed that already in *Marckx v. Belgium* (concerning the legal status of children born out of wedlock), it based its interpretation on two international conventions that Belgium, like other States Parties to the Convention, had not ratified. The Court adds that “the small number of ratifications of these instruments could not be relied on in opposition to the continuing evolution of the domestic law of the great majority of the member States, together with the relevant international instruments”. *Ibidem*, para. 75, with reference to ECtHR, *Marckx v. Belgium*, *op. cit.*

⁸⁹ *Ibidem*, paras. 85-86.

⁹⁰ *Ibidem*, para. 74.

⁹¹ See B. 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*, Cambridge University Press, Cambridge, 2012, p. 302; Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, “Le soft law et la Cour européenne des Droits de l’Homme: questions de légitimité et de méthode”, *RTDH* 2012, no. 91, pp. 455 *et seq.*

⁹² See F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 455 *et seq.* For such criticism in relation to external referencing practice by the ACtHR, see G.L. Neuman, “Import, Export, and Regional Consent in the Inter-American Court of Human Rights”, *EJIL* 2008, vol. 19, no. 1, pp. 114-116.

branch.⁹³ Arato, for instance, holds that while the case of *Demir and Baykara* may, from a judicial point of view, simply appear as an expansive, but not outlandish, 'evolutive' interpretation, from a political perspective, it appears as a "...critical shift in the powers of the Court to hold the States Parties to legal instruments beyond their control".⁹⁴ Also, Bailleux points at the risk of external referencing blurring the boundaries "...between the law's empire and the provinces of politics and morals".⁹⁵ Some authors even consider the practice as the ultimate stadium of a 'government of judges' (*'gouvernement des juges'*) with negative effects on national interests and democratic legitimacy.⁹⁶ On the other hand, for commentators as Letsas⁹⁷ and Benvenisti⁹⁸, who put great emphasis on the moral nature of human rights protection (rather than on the will of Member States), such loss of sovereignty does not appear as a challenging issue.

53. Further political concerns relate to the allegation that external referencing puts the ECtHR and the Member States under 'foreign' influence, to the detriment of their power and sovereignty. Authors such as Flauss warn that the Court's openness to external instruments could go hand in hand with criticism of placing the law of the ECHR under external guardianship of foreign instruments and institutions.⁹⁹ From a geopolitical perspective, external referencing might thus entail the risk of diminishing the Courts sphere of influence, to the benefit of the power of some external 'privileged partners' with whom the Court communicates.¹⁰⁰ Some voices point out that the ECtHR, by extensively treating some external instruments as privileged sources of inspiration, could put itself under the influence – or even under the 'colonization' – of those instruments.¹⁰¹ Therefore, from a point of view

⁹³ See on this matter: J. Allard and A. Garapon, *Les juges dans la mondialisation*, Seuil, Paris, 2005, pp. 71 *et seq.*; A. Bailleux, "Human Rights in Network", *E.J.H.R.-J.E.D.H.* 2014, vol. 3, pp. 289 *et seq.*; K. Istrefi, "R.M.T. v. The UK: Expanding Article 11 of the ECHR Through Systemic Integration", 12 May 2014, available at <http://www.ejiltalk.org/r-m-t-v-the-uk-expanding-article-11-of-the-echr-through-systemic-integration/> (visited on 7 June 2016).

⁹⁴ J. Arato, *op. cit.*, p. 353.

⁹⁵ A. Bailleux, *op. cit.*, p. 303.

⁹⁶ See J. Allard and A. Garapon, *op. cit.*, p. 7.

⁹⁷ G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2007, pp. 120-131.

⁹⁸ E. Benvenisti, "Margin of Appreciation, Consensus and Universal Standards", *New York University Journal of International Law and Politics* 1998-1999, vol. 31, p. 843.

⁹⁹ J.-F. Flauss, "La Présence de la Jurisprudence de la Cour Suprême des Etats-Unis d'Amérique dans le Contentieux européen des Droits de l'Homme", *RTDH* 2005, vol. 62, pp. 325-327. Flauss mentioned this as one of the reasons why the ECtHR at first did not open its jurisprudence to American influences.

¹⁰⁰ Similar observations mostly connect to referencing practice in constitutional courts. Allard, for instance, considers unilateralism and the protection of the proper sphere of influence as one of the main underlying reasons of the contested character of referencing practice by the US Supreme Court. See J. Allard, "Le dialogue des juges à la Cour européenne des droits de l'homme et à la Cour Suprême des Etats-Unis. Constats et perspectives philosophiques", in J. Allard, G. Haarscher, L. Hennebel and G. Lewkowicz (eds), *Juger les droits de l'homme. Europe et Etats-Unis face à face*, Collection 'Penser le Droit', Bruylant, Brussels, 2008, pp. 120-122 and p. 128.

¹⁰¹ Cf. J.-F. Flauss, *op. cit.*, 2005, p. 330. Flauss notices that the rise in power of references by the ECtHR to the US Supreme Court and to the Canadian Supreme Court could possibly lead to an 'Americanisation' of the law of the Convention.

that gives a prominent place to ‘autonomy’ and ‘cultural identities’, external referencing is not always welcomed by applause.¹⁰²

§ 3.2. An inconsistent method of ‘cherry picking’

54. In the case of *Demir and Baykara*, the ECtHR aims to explain the basis of its external referencing practice and, at the same time, to elaborate on some aspects of its methodology. The latter efforts however do not erase the often-heard criticism about the deficiency of the method of Strasbourg referencing, posing challenges to matters of procedural legitimacy.¹⁰³
55. Legal doctrine highlights, for instance, that the ECtHR, in respect of its reliance on external materials, uses an interpretative framework that is too flexible and too broad, and that the criteria for their use are not sufficiently clear.¹⁰⁴ Therefore, the practice is said to carry procedural challenges tied to its lack of justification, consistency, coherence, transparency and objectivity.¹⁰⁵ Forowicz, for instance, conceives the Strasbourg referencing practice as a non-systemized phenomenon.¹⁰⁶ Senden stresses that the justifying arguments included in *Demir and Baykara v. Turkey*, such as ‘evolutive’ interpretation and/or interpretation in line with Article 31 paragraph 3 (c) of the VCLT, do not reflect sufficient elements to justify the use of all types of external instruments. According to the latter author, there is a need for more explicit and precise justifications.¹⁰⁷ In a similar line of reasoning, Bailleux concludes that the ECtHR’s frantic openness to external instruments is “...likely to undermine legal certainty” and feeds the impression of chaos and arbitrariness.¹⁰⁸

¹⁰² Cf. J. Allard, *op. cit.*, p. 135; A.M.L. Coccu Ortu, “La comparaison en tant que méthode de détermination du standard de protection des droits dans le système CEDH”, *Revista Telematica Giuridica dell AIC* 2011, no. 4, pp. 34-36. Allard acknowledges that these concerns are somehow out-dated as a result of today’s globalization processes in which judges are more and more confronted with facts and situations that, both from a rational and practical point of view, can no longer be solved within a strict national context. See J. Allard, *op. cit.*, pp. 135-136.

¹⁰³ Procedural criticism contrasts to substantive criticism. The latter only focuses on the normative value of referencing practice and its appropriateness in human rights adjudication. On the difference between procedural – and substantive criticism, see K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge University Press, Cambridge, 2015, p. 115.

¹⁰⁴ See B. Schlütter, *op. cit.*, p. 302; Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 455 *et seq.*

¹⁰⁵ C. McCrudden, “Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights”, *Oxford journal of legal studies* 2000, vol. 20, no. 4, pp. 506-507; Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 463 *et seq.*; J. Allard, *op. cit.*, p. 133 *et seq.*; T. Barkhuysen and M. L. van Emmerik, “Ongebonden binding: verwijzing naar soft law standaarden in uitspraken van het EHRM”, *NJCM-Bulletin* 2010, vol. 35, issue 7, p. 834.

¹⁰⁶ M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford, Oxford University Press, 2010, p. 2.

¹⁰⁷ H. Senden, *op. cit.*, p. 241.

¹⁰⁸ A. Bailleux, *op. cit.*, p. 303. Also in relation to external referencing practice more generally (not specifically in relation to referencing practice in the Strasbourg context), authors expressed concerns in respect of legal certainty: See C. Rosenkrantz, “Against borrowings and nonauthoritative uses of foreign law”, *I.J.Const.L.*, vol. 1, 2003, pp. 292-293; M.D. Ramsey, “International materials and domestic rights: reflections on Atkins and Lawrence”, *AJIL* 2004, vol. 98, p. 77.

56. Against the background of such allegations, the Strasbourg Court has been accused of ‘cherry picking’ or of ‘picking and choosing’ external elements ‘à la carte’, in an opportunistic, arbitrary and non-consistent manner.¹⁰⁹ There is said to be a lack of well-established selection standards indicating which (type of) external instruments are relevant and when they should be used.¹¹⁰ Connected to the latter accusations, there seems to be a risk that the Court, without following a clear pattern, picks up (and simply reproduces) the content of external instruments that fit the judges’ (pre-established) opinions. For some commentators, this could give the (wrong) impression that the substance of the law could be found within randomly chosen instruments.¹¹¹ The separate opinion to the Grand Chamber-case of *Demir and Baykara v. Turkey* is relevant in this respect. Judge Zagrebelsky doubts the existence of a real evolution internationally tending to enlarge the scope of Article 11 of the Convention to a right to collective bargaining and entering into collective agreement. The Judge – although he does not say so in explicit words – seems to allude to the presence of some opportunism and unjustified selectivity; he had “...the feeling that the Court’s departure from precedent represents a correction of its previous case-law rather than an adaptation of case-law to a real change...”¹¹²
57. The lack of a clear methodology is considered particularly worrisome in connection to the use of non-binding instruments. There appears to be inadequate (legal) justification for external referencing when the imported instruments are intrinsically ‘soft’ or when they are not ratified by the respondent State in question. Authors such as Van Emmerik and Barkhuysen allege that references to non-binding instruments by the Strasbourg Court are not well motivated and lack a clear line.¹¹³ Also Tulkens, Krenc and Van Drooghenbroeck

¹⁰⁹ See J. Allard, *op. cit.*, p. 133 *et seq.*; J. Allard and A. Van Waeyenberge, “De la bouche à l’oreille? Quelques réflexions autour du dialogue des juges et de la montée en puissance de la fonction de juger”, *Revue Interdisciplinaire d’Etudes Juridiques* 2008, vol. 61, no. 2, p. 18; B. Schlütter, *op. cit.* pp. 261-320; C. McCrudden, *op. cit.*, p. 507; Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 464; J. Gerards, “Rechtsvinding door het Europees Hof voor de Rechten van de Mens”, *NJCM Bulletin* 2006, no. 1, p. 834; T. Barkhuysen and M. L. van Emmerik, *op. cit.*, p. 834; H. Senden, *op. cit.*, p. 261. The use of the notion of ‘à la carte’ is taken from: C. Pitea, *op. cit.*, 2014, p. 14; A. Buyse, “Tacit Citing – The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases”, in T. McGonagle and Y. Donders, *The United Nations and Freedom of Expression and Information: Critical Perspectives*, Cambridge University Press, Cambridge, 2015, p. 15 of the book chapter as it is available at SSRN: <http://ssrn.com/abstract=2279350> (visited on 15 September 2016).

¹¹⁰ H. Senden, *op. cit.*, pp. 245 and 261.

¹¹¹ Cf. F. Ost and M. van de Kerchove, “La doctrine entre ‘faire savoir’ et ‘savoir-faire’”, chapter in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les sources du droit revisitées, volume 3 – normativités concurrentes*, Publications de L’Université Saint-Louis, Anthemis, Limal, 2012, p. 34.

¹¹² Separate opinion of Judge Zagrebelsky to the case of ECtHR, *Demir and Baykara*, *op. cit.*, para. 2. Judge Zagrebelsky pointed at challenges of ‘evolutive’ interpretation by saying that “...the act of departing from precedent raises a particular problem” because it “...will give rise to a new ‘law’”, which might be “...problematic with regard to the requirements of foreseeability and legal certainty...” (*ibidem*, para. 4) In light of the latter, the separate Judge added the following: “...I would have preferred it if the Court had stipulated the time from which the right in question “became” ...one of the essential elements of the right set forth in Article 11. In my own opinion, it would seem legitimate to doubt that this could already have come about by 1995, when the Turkish Court of Cassation disposed of the case at domestic level. Moreover, I find it regrettable that the Court has once again allowed the “natural” retrospectiveness of judicial interpretation to impugn an approach that, at the material time, was (probably) not in breach of the Convention” (*ibidem*, para. 8).

¹¹³ T. Barkhuysen and M. L. van Emmerik, *op. cit.*, p. 834.

draw attention to the dangers of the Strasbourg method of using non-binding instruments because of its lack of consistency and transparency.¹¹⁴ These accusations challenge legal certainty; when the instruments are non-binding *vis-à-vis* the respondent State, their use, in absence of a clear method, might come ‘as a surprise’ for the actors involved.¹¹⁵

§ 3.3. Interpretation difficulties

58. External instruments are often embedded in specific and/or ‘foreign’ mechanisms and normative domains. When the ECtHR refers to external instruments, as demonstrated by *Demir and Baykara v. Turkey*, these instruments are ‘lifted’ out of their ‘normal’ context to be implemented in a context of Strasbourg adjudication. The latter practice gives rise to concerns of ‘legal particularism’, alluding to difficulties of comparing instruments and provisions that are too distinct and too unique to be compared.¹¹⁶ According to Bailleux, cross-references might impoverish the human rights ‘network’ because they risk disregarding the specificity of human rights, which are “...imbued with cultural values and rooted in constitutional traditions which far exceed the black-letter law of a unified international bill of rights”.¹¹⁷ He adds that “[s]tripping off these specificities undoubtedly ... decreases the level of protection of human rights”.¹¹⁸ Difficulties regarding the importation of external instruments might thus arise from the specific context in which these instruments are originally embedded. Therefore, legal doctrine has recommended the ECtHR to always consider the specific characteristics, background and practices of the external setting.¹¹⁹

59. External instruments, with their own particular character, might also conflict with the ECHR, having its proper specificity as an instrument of human rights protection. Does external referencing – for example because of the importation of provisions of general international law – risk to blur particularities of human rights protection? Under such circumstances, interpretation difficulties might arise, particularly since there is no clarity about which rules the ECtHR will apply when such conflicts appear.¹²⁰

60. A factor that adds to the difficulties of interpretation is the uncertainty about the interpretation of external instruments; their meaning might not be clear and subject to

¹¹⁴ Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 463 *et seq.*

¹¹⁵ T. Barkhuysen and M. L. van Emmerik, *op. cit.*, p. 834.

¹¹⁶ On issues of ‘particularism’, see L. Van den Eynde, “Interpreting Rights Collectively. Comparative Arguments in Public Interest Litigants’ Briefs on Fundamental Rights Issues”, doctoral thesis defended in November 2015, ULB, unpublished, pp. 136-139.

¹¹⁷ A. Bailleux, *op. cit.*, p. 303.

¹¹⁸ *Ibidem.*

¹¹⁹ See J. Allard, *op. cit.*, p. 134; C. McCrudden, *op. cit.*, p. 508; M. Rosenfeld, “Constitutional Migration and the Bounds of Comparative Analysis”, *NYU Ann. Surv. Am. L.* 2001, vol. 58, issue 1, p. 73; F.F. Stone, “The End to Be Served by Comparative Law”, *Tulane Law Review* 1951, vol. 25, p. 332.

¹²⁰ M. Forowicz, *op. cit.*, p. 394.

debate. Therefore, Strasbourg judges might not be able to find a precise answer in the external normative context.¹²¹ Nonetheless, uncertainties about the exact meaning of external instruments could also serve the ECtHR; they could be ‘exploited’ for opportunistic motives. Some authors blamed the Court for having ‘misused’ uncertainties about the interpretation of external instruments, for instance to pursue an expansive interpretation. Arato, for example, blames the ECtHR of interpreting Article 31 paragraph 3 (c) of the VCLT too broadly in the case of *Demir and Baykara*. Arato noted in this respect that the Grand Chamber-case of *Demir and Baykara v. Turkey*

“...entails a dramatic evolutive treaty interpretation, whereby ... the Court gives VCLT 31(3)(c) ... an astonishingly broad construction to justify considering an extraordinary array of external sources ... thereby reflexively transforming its own material competence to develop the Convention on the basis of developments outside of the Convention”.¹²²

§ 4. Research incentive: an unclear and contested referencing practice

61. The Grand Chamber case of *Demir and Baykara* reflects an attempt to systematize, explain and justify the external referencing practice. Was this attempt sufficient to close debates about the use of external instruments? It does not seem so. Whereas the practice does not seem very controversial from the viewpoint of the Court, its method and explanation have been criticized, also – and especially – in the context of the *Demir and Baykara* cases. We conclude from the foregoing that the Court’s external referencing practice faces a ‘validity crisis’.
62. Regardless of whether one is in favor of rigid or of flexible interpretation methods, it is important, under all circumstances, that the ECtHR develops insights into the rationale and characteristics of its interpretation process and to share such knowledge with its audience, for the sake of transparency. Admittedly, in the Grand Chamber case of *Demir and Baykara*, the Court makes an attempt to clarify the use of external instruments, but it does not offer a comprehensive understanding of the referencing practice including its underlying method. The Grand Chamber case of *Demir and Baykara* does not provide much more than a disjointed enumeration of interpretation principles and scattered illustrations of instruments that had been imported in the Court’s earlier decisions. In our estimation, the reader is not able to distil from this case a true method of referencing. Several elements particularly stimulate some confusion.

¹²¹ *Ibidem*, p. 358. According to Forowicz, external uncertainties inhibit Strasbourg referencing practice because then, the external context is not able to assist the Court.

¹²² J. Arato, *op. cit.*, p. 353. See also, and more elaborate: *infra*, para. 605.

- 63.*Firstly*, the basis of the external referencing practice is imprecise. The ECtHR mentions the general rules of treaty interpretation of the VCLT, but it does not specify how these general rules stimulate or inhibit external referencing. The Court further notes the specificity of the Convention as a human rights instrument. Again, it does not specify how this particular human rights character has an effect on the external referencing practice, one way or another. As this specific character might conceivably operate as an impediment to the referencing practice (what to do when external instruments go against the specific object and purpose of the Convention?) rather than as a stimulating factor, it is not clear why this consideration is relevant in respect of the phenomenon it intends to clarify. Subsequently, the Court mentions the relevance of Article 31 paragraph 3 (c) of the VCLT. While this article seems to have potential to clarify references to ‘rules applicable between the parties’, the Court does neither elaborate on the type of references this provision could explain, nor on what rules it considers as ‘applicable between the parties’. Is the Court of the opinion that the VCLT could also offer a legal justification for the use of non-binding instruments? The ECtHR is not unambiguous about the issue. In addition, it only searches for a justification in legal provisions of the VCLT, and does not make any attempt to find a justification for external referencing in its own Convention. Are there relevant legal provisions in this respect or not?
- 64.Subsequent to invoking the VCLT, the Grand Chamber frames some further principles underlying its referencing practice, but again in a vague manner. For instance, the ECtHR stresses the need of ‘practical and effective’ interpretation of the Convention, without clarifying how (and which) external instruments could contribute to that aim. The Court underlines the importance of the Convention’s internal harmony, but here too, the link with the use of external instruments is not clear. And what about the relevance of the creation of external harmony between the Convention and other instruments? The ECtHR did not explicitly elaborate on that matter. As a further ‘basis’ for referencing international law, the Court points at the ‘living’ character of the Convention and the relevance of evolving norms of international law. It mentions the principle of ‘evolutive’ interpretation only in a general manner, without elaborating on any specific characteristics and criteria external instruments have to fulfill to contribute to the establishment of such a principle.
- 65.*Secondly*, the Court’s categorization of references to instruments of ‘general international law’ and to ‘Council of Europe instruments’ lacks precision and comprehensiveness. ‘General international law’ is often considered as that area of law that is part of the general regime of international law. Therefore, it covers instruments of ‘general scope’ that are generally accepted by States and that should in principle be binding on all States.¹²³ One of the

¹²³ For norms to become norms of general international law, there is a need to proof their general acceptance (or *opinio juris*) by States as being binding norms. Although this is contested, ‘general international law’ is therefore often said to be customary international law only. What is certain, however, is that a (multilateral) treaty can

constitutive elements of 'general international law' is also that the content of its norms is 'subject to generalisation' and 'aspires to permeate all subsystems of international law'.¹²⁴ The manner in which the ECtHR approaches this category is somewhat confusing. As an example of references to 'general international law', the Court includes the European Convention on the Adoption of Children of 1967, the ACHR and case law of the international criminal courts. Does the Court consider the latter instruments to be a part of 'general international law'? Since this would not be a common approach, the Court is advised to, at least, elaborate more precisely on the issue. In its motivation on the merits of *Demir and Baykara v. Turkey*, the Grand Chamber includes specific international (human rights) instruments: ILO-Conventions, the ACHR, the EU Charter, *etc.* The Court adds that the ratification of such instruments is not a necessary condition for taking them into account. Here again, it is not clear how the imported instruments could be brought under the notion of 'general international law'. Neither do they fit the other main category of instruments that the ECtHR mentioned next to 'general international law', namely 'Council of Europe instruments'.

66. A *third* confusing element arises when the Court addresses the category of references to CoE instruments. The Court holds that it does not shy away from references to instruments stemming from expert organs which, although they are embedded in an international organization (the CoE), are not politically representative. The latter category of instruments (as well as those not ratified by the respondent State) have been mobilized by the Court as examples of "Interpretation of the Convention in the light of other international instruments". It is unclear whether such instruments could actually be considered as 'international' in a literal reading of the term. Maybe the Court has a more open perspective, but it would serve transparency if it would acknowledge and explain this matter more explicitly.

67. *Fourthly*, the Grand Chamber is not very specific about the impact of the external instruments' legal status on the referencing practice. Admittedly, the ECtHR suggests that also non-binding instruments might be 'applicable' and that such instruments can equally be relevant in the search of a 'common ground' or a 'continuous evolution'. Therefore, the Grand Chamber gives the message that the non-binding status of external instruments could

does not constitute 'general international law' but that the norms should in principle be binding upon all States. Thus, there is a strong support in legal literature to say that, in principle, the rules of general international law bind all States but that States are nonetheless able to opt out from it, if certain conditions are met (except for norms of *jus cogens* which cannot be derogated from and therefore form a special category of 'general international law'). See F. Vanneste, "Relationship between International Human Rights Law and General International Law: Assessing the Specialty Claims of International Human Rights Law", doctoral thesis, KULeuven, December 2008, pp. 20 *et seq.*, available at <https://lirias.kuleuven.be/bitstream/123456789/233805/1/Relationship+between+general+international+law+and+human+rights+law.pdf> (visited on 26 September 2016); G. Tunkin, "Is General International Law Customary Law Only?", *EJIL* 1993, vol. 4, pp. 534-541; I. Bronwlie, *Principles of Public International Law*, Oxford University Press, Oxford, 2003, p. 4.

¹²⁴ F. Vanneste, *op. cit.*, 2008, p. 24.

be no hurdle to importation. However, when and how could such non-binding instruments play a role in the interpretation process? Should non-binding instruments be accompanied by binding instruments to arrive at the conclusion of a 'common ground' or an 'evolution'? Could non-binding instruments independently receive a status of 'applicable law'? Could one single non-binding instrument serve as the sole support for a reasoning? The ECtHR did not elaborate on such issues.

68. The Grand Chamber, when addressing the practice of referencing international instruments, sometimes adopts obligatory language and sometimes not. This is a *fifth* root of confusion. Obligatory statements are used in the light of Article 31 paragraph 3 (c) of the VCLT (in respect of which the Court says that "...it *must* also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (own emphasis)"¹²⁵) and also in light of the relevance of common international standards (in respect of which the ECtHR says that they "...reflect a reality that the Court *cannot* disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty (own emphasis)"¹²⁶). Obligatory statements are equally made in the light of defining the meaning of terms and notions in the text of the Convention (in respect of which the Court says that it "...*can and must* take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values (own emphasis)"¹²⁷). Non-obligatory statements appear about references to general international law (in respect of which the Court stressed that the precise obligations that the ECHR imposes on the Member states "...*may* be interpreted, firstly, in the light of relevant international treaties that are applicable in the particular sphere (own emphasis)"¹²⁸) and about an emerging consensus derived from international instruments (in respect of which the Court says that this consensus "...*may* constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (own emphasis)"¹²⁹).

69. *Finally*, the Grand Chamber is not very systematic in defining the functions of the referencing practice. To find out what kind of argumentative functions the Grand Chamber has in mind for external instruments, we can only rely on some scattered information. The Grand Chamber, for instance, puts external referencing in the context of a search for a 'continuous evolution' or for a 'common ground in modern societies'. It also notes the relevance of international law to find out the object and purpose of the Convention. Furthermore, it

¹²⁵ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 67.

¹²⁶ *Ibidem*, para. 76.

¹²⁷ *Ibidem*, para. 85.

¹²⁸ *Ibidem*, para. 69.

¹²⁹ *Ibidem*, para. 85.

acknowledges the usefulness of external instruments to determine the scope of the Convention, as a subsidiary means of interpretation. Besides, the Court touches on the relevance of external instruments to define the meaning of terms and notions of the Convention. The ECtHR equally acknowledges the relevance of other specialized international instruments to establish a consensus on a certain issue and/or interpretation.

70.If it was the purpose of the Grand Chamber case of *Demir and Baykara* to offer a clear explanation and a comprehensive justification of the Court's referencing practice, we can conclude from the foregoing that this aim has not been achieved. It does not succeed to describe well the characteristics and aims of its referencing practice, nor does it convince the public of its underlying justifications. The efforts fall short in clarity and precision. Admittedly, the ECtHR addresses the diversity of the imported instruments but this does not allow developing a good understanding about when, how and why such instruments could be used. In *Demir and Baykara*, the Grand Chamber mainly describes how it has been exercising external referencing in the past, but it omits establishing transparent guiding principles and criteria for the future. Clear-cut explanations as to the justifications, functions and boundaries of external referencing lack, and it remains obscure what the inciting (legal) factors of the referencing practice are. Against that background, we cannot shake off the impression that the Court has difficulties to explain how and why it is using external instruments in its legal argumentation. This lack of clarity might be interpreted as an indication of the Court not being entirely comfortable about the inclusion of external references or at least, not being entirely comfortable as to how to explain this practice in a convincing manner. The Grand Chamber case of *Demir and Baykara* includes some methodological guidelines, but it still leaves many questions open. As a consequence, the Court has afforded itself a large freedom in respect of external referencing, without real transparency.

71.Since the use of external instruments in Strasbourg human rights adjudication is not clearly explained in the Court's case law itself, we might ask ourselves whether we find more comprehensive analyses in legal academic works. On the one hand, the relationship between general international law and human rights law has gained increasing attention by legal scholars over the last two decades.¹³⁰ This development, as Vanneste observes, coincides with

¹³⁰ See, *inter alia*: T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 213 p.; B. Simma, "International Human Rights and General International Law: a comparative analysis", *Collected Course of the Academy of European Law*, vol. IV, 1995, pp. 153-263; J.-F. Flauss and G. Cohen-Jonathan, "La Cour européenne des droits de l'homme et le droit international", *Annuaire français de droit international* 2008, vol. 54, pp. 529-546; L. Wildhaber, "The European Convention on Human Rights and International Law", *I.C.L.Q.* 2007, vol. 56, pp. 217-227; F. Vanneste, "Droit international général et droit international des droits de l'homme: l'apport de la Cour européenne des droits de l'homme", *Rev. trim. dr. h.* 2011, no. 88, pp. 807-838; J.-P. Costa and M. O'Boyle, "The European Court of Human Rights and International Humanitarian Law", in D. Spielmann, M. Tsirli and P. Voyatzis (eds), *The European Convention on Human Rights: A Living Instrument—Essays in Honour of Christos L. Rozakis*, Bruylant, Brussels, 2011, pp. 107-129; R.E. Vinuesa, "Interface, Correspondence and

the increased references by human rights courts, including the ECtHR, to general international law and thus their creation of a more “international law-oriented case law”.¹³¹ However, systematic case law analysis addressing the importation by the Strasbourg Court of general international law as well as the importation of other domains of international law (including external human rights law) was, and is, still rare. Some academic literature, e.g. books of Vanneste (*General International Law Before Human Rights Court* of 2010)¹³², Forowicz (*Reception of International Law in the European Court of Human Rights* of 2010)¹³³, Turgis and Dhommeaux (*Les interactions entre les normes internationales relatives aux droits de la personne* of 2012)¹³⁴, and Dzehtsiarou (*European Consensus and the Legitimacy of the European Court of Human Rights* of 2015)¹³⁵, fill up some elements of this research gap. Academic contributions on the issue also relate to specific Strasbourg cases that include external instruments in a contested, often ‘evolutive’, manner (as in the case of *Demir and Baykara*)¹³⁶, or to the ECtHR’s importation of specific branches of law (such as international humanitarian law)¹³⁷. However, to our knowledge, there is no doctrine mapping and evaluating the recent use of external instruments by the Court in all its forms of appearances.¹³⁸

72. Based on *Demir and Baykara*, it is, therefore, difficult to say what ‘external referencing practice’ precisely entails. One of the only matters that can be clearly derived from the case is that in principle, *every* ‘international’ instrument can be used as a source of inspiration or as a kind of precedent and that the Court feels strongly encouraged to do so (being the reason why they often use ‘obligatory’ language in respect of the referencing practice). Because of the importance the Court gives to external referencing and because of the large discretion it

Convergence of Human Rights and International Humanitarian Law”, *Yearbook of International Humanitarian Law* 1998, vol. 1, pp. 69-110; S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart, Oxford, 2007, 488 p.; R. Higgins, “The International Court of Justice and Human Rights”, in K. Wellens (ed.), *International Law: Theory and Practice: essays in honour of Eric Suy*, Martinus Nijhoff Publishers, the Hague, 1998, pp. 691-705; L. Hennebel, “La Cour internationale de Justice face au droit international des droits de l’homme”, in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds), *Liberiae Cogitationes. Liber Amicorum Mark Bossuyt*, Intersentia, Antwerp, 2013, pp. 299-316.

¹³¹ F. Vanneste, *op. cit.*, 2008, p. 4. Vanneste observed that the topic of the relationship between international human rights law and general international law, “...is currently one of the main issues of international law” (*ibidem*, p. 6).

¹³² F. Vanneste, *General International Law before Human Rights Courts*, Antwerp/Oxford, Intersentia, 2010, 625 p. This book is a publication of Vanneste’s doctoral thesis: “Relationship between International Human Rights Law and General International Law: Assessing the Speciality Claims of International Human Rights Law”. F. Vanneste, *op. cit.*, 2008.

¹³³ M. Forowicz, *op. cit.*, 421 p.

¹³⁴ S. Turgis and J. Dhommeaux, *op. cit.*, 642 p.

¹³⁵ K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge University Press, Cambridge, 2015, 229 p.

¹³⁶ See, for example: S. Van Drooghenbroeck, *op. cit.*; J.-P. Marguenaud and J. Mouly, *op. cit.*; F. Sudre, *op. cit.*

¹³⁷ See, for example: S. Hartridge, “The European Court of Human Rights’ Engagement With International Humanitarian Law”, in D. Jinks et al. (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, Springer, London, 2014, pp. 257-287; J. d’Aspremont, “Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution”, in M. Fitzmaurice and P. Merkouris (eds), *The European Convention on Human Rights and the UK Human Rights Act*, Brill/Martinus Nijhoff, Leiden, 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950151 (visited on 31 March 2017).

¹³⁸ However, Forowicz comprehensively studied the reception of international law by the Strasbourg Court in different substantive areas such as child rights, refugee rights, international humanitarian law, etc. See M. Forowicz, *op. cit.*, 421 p.

has in this respect, there is a need for a comprehensive analysis and a convincing motivation and justification of external referencing.¹³⁹

¹³⁹ Cfr. H. Senden, *op. cit.*, p. 10.

CHAPTER 2 - AIMS AND METHOD

73. The context in which external referencing occurs is one of a 'heterogeneity' of instruments and actors in the field of human rights protection and in other legal areas. The Court makes use of this external context in its legal reasoning, but this is not without concerns. Admittedly, in the case of *Demir and Baykara*, the Grand Chamber made an effort to clarify and explain the Court's referencing practice. Even after this case, however, obscurity and criticism remain. To our estimation the Court's explanation is incomplete and imprecise, and, therefore, does not suffice as a comprehensive analysis and justification of the external referencing practice. In the light of the latter observations, we will frame the research objectives (§ 1.) and elaborate on the methodology of the thesis research (§ 2.).

§ 1. Objectives of the research

74. In the context of *Demir and Baykara* and beyond, the controversial aspects of the referencing practices have clearly come to light.¹⁴⁰ Approaching the phenomenon in a nuanced manner requires to also have an eye for its advantages. The main focus of our research will be what potential the referencing practice has or might have, without *a priori* discarding it because of a controversial application in some very specific – but possibly not representative? – Strasbourg cases. Such an approach requires, on the one hand, the creation of a comprehensive picture of the recent Strasbourg referencing practice. This will, for instance, enable us to verify whether the challenges mentioned in legal doctrine only appear on an *ad hoc* basis – tied to specific uses of external instruments in limited cases – or whether they are a strongly rooted problem in Strasbourg reasoning. On the other hand, it requires keeping our eyes open to the opportunities that external referencing might offer. Moving beyond the challenges, what are the benefits of this argumentative technique in all its different aspects? Does it have additional value too? A lot was said about the negative aspects of using (some) external instruments, but more seldom we hear positive notes about what this technique could imply for human rights adjudication. Only recently, authors allude more and more often to positive aspects of the context of 'heterogeneity' in general¹⁴¹, and of the referencing practice – that developed in such a context – in particular.¹⁴²

¹⁴⁰ See *supra*, paras. 48-60.

¹⁴¹ G. Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", *N.Y.U. J. Int'l L. & Pol.* 1999, vol. 31, p. 925; B. Simma, "Fragmentation in a Positive Light", *Mich. J. Int'l L.* 2003-2004, vol. 25, pp. 849-863. Tzevelekos, in addition to paying attention to the negative aspects of fragmentation, e.g. a lack of unity of international law, also stresses that "...the proliferation of international judicial fora has had a beneficial effect on both the development and the effective application and enforcement of international rules". V.P. Tzevelekos, "The Use of Article 31 (3) (c) of the VCLT in the Case Law of the ECtHR: An effective Anti-fragmentation tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between evolution and systemic integration", *Michigan Journal of International Law* 2010, vol. 31, p. 628. Tzevelekos summarizes both sides as follows: "For the optimists, fragmentation can be understood as an expression of maturity; it is nothing more than a rather painful

75. Keeping in mind the latter observations, we establish two general hypotheses. The first hypothesis is that a lot more – and in a more systematized manner – is to be said about external referencing than what the Strasbourg Court mentioned when addressing this practice in the *Demir and Baykara* Grand Chamber case. The second hypothesis is that external referencing – in all its diversity – can be justified in a more specific, comprehensive and convincing manner, which would boost its validity.
76. These main hypotheses lead to two research questions, which determine the focus and further development of this research. The first question aims at a comprehensive understanding of the Strasbourg referencing practice: ‘What are the characteristics of external referencing as exercised by the ECtHR?’. The second question concerns the justification of the practice: ‘Which arguments could enhance the justification of the Strasbourg referencing practice?’. For now, these questions are framed in very general terms. They will gain more substance and specificity when we elaborate on the research methodology.

§ 2. Research methodology

77. To delineate the field of research, we elaborate on the notion of ‘external referencing practice’ and explain its underlying theoretical ideas and assumptions (§ 2.1.). Subsequently, we explain the research methods going from an empirical case law analysis (§ 2.2.) to the development of justifying arguments from a legal and a users’ perspective (§ 2.3.).

§ 2.1. Demarcation of the research: what is ‘external referencing practice’?

78. To clarify the scope and focus of our research, we will first explain what we understand under the concept of ‘external referencing practice’. Generally speaking, it alludes to the importation by the Strasbourg Court of external instruments in order to interpret and apply the Convention. To demarcate the field of research and to justify the methodological choices that were made in this regard, we will elaborate on the type of documents that fall under the

step towards the *telos* (end/scope/objective) of the systemic integration of the international legal order. On the other hand, the pessimists conceive of this same trend towards fragmentation as evidence of disintegration, incoherence, and disunity, bringing general international law closer to a status of inefficiency and shrinkage, if not to its *telos* (end/termination)”. *Ibidem*, p. 630.

¹⁴² See for instance: E. Brems, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *E.J.H.R.-E.J.H.R.* 2014, vol. 4, pp. 447-470; Separate opinion of Judge Cançado Trindade to International Court of Justice, case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 30 November 2010.

notion of *instruments* (§ 2.1.1), on the instruments that are considered as *external* (§ 2.1.2.) and finally, on *references* (or *uses*) that are envisioned (§ 2.1.3.). In order to gain a comprehensive understanding of ‘external referencing practice’, we aim to approach these concepts in a broad manner.

§ 2.1.1. References to ‘instruments’

79. The ECtHR interprets and applies the ECHR and its Protocols. These instruments, the ‘primary sources’, are international treaties and reflect formal sources of positive law. Our research examines the Court’s references to external normative instruments. Why do we not speak of the Court’s references to ‘external *sources*’, like some other authors do?¹⁴³
80. The notion of a (formal) ‘source’, in a positivist understanding¹⁴⁴, refers to the origin (the author) of the legal rules or refers to the technical procedures in which legal rules are produced.¹⁴⁵ The use of this notion would attract our attention to what is defined as a formal ‘source of law’ and what is thus formally considered as ‘law’.¹⁴⁶ For scholars with a rather traditional view on (international) law, sources only exist “...in the acts of official governmental bureaucratic entities [having coercive power], such as treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations (UN) or affiliated bodies, and the rulings of international courts and tribunals”.¹⁴⁷

¹⁴³ Authors as Voeten, Pitea, Schauer, Brems and Senden use the terminology of referring to *external sources* without putting this notion between quotation marks. See E. Voeten, “Borrowing and Nonborrowing among International Courts”, *Journal of Legal Studies* 2010, vol. 39, p. 548; C. Pitea, *op. cit.*, 2013, p. 549, footnote no. 27; C. Pitea, *op. cit.*, 2014, p. 2; F. Schauer, “Authority and Authorities”, *Virginia Law Review* 2008, vol. 94, no. 8, pp. 1931-1961; S. Van Drooghenbroeck, *op. cit.*, p. 822. E. Brems, *op. cit.*, pp. 447-470. Tulkens, Van Drooghenbroeck and Krenc use the notion of ‘external sources’ and – in my view correctly – put the notion between quotation marks (see F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 433-489). Senden rather speaks of references to ‘external materials’. See H. Senden, *op. cit.*, p. 260.

¹⁴⁴ H.L.A. Hart, “Positivism and the Separation of Law and Morals”, *Harv. L. Rev.* 1955, vol. 71, pp. 593-629; H.L.A. Hart, *The Concept of Law*, Clarendon Law Series, Oxford, 1961; H. Kelsen, *Théorie pure du droit*, transl. Ch. Eisenmann, Bruylant, L.G.D.J., Brussels and Paris, 1999 (originally from 1953). According to legal positivism, law is considered as a system of rational autonomous norms, existing independently from morals, politics, or social contingency. On this issue, see J. Ringelheim, “Le rôle de la doctrine dans l’émergence du droit international des droits de l’homme. Regards sociologiques sur un facteur de création du droit”, chapter in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les sources de droit revisitées, volume 3 – normativités concurrentes*, Publications Université Saint-Louis, Anthemis, Limal, 2012, pp. 48-49.

¹⁴⁵ See I. Hachez, “Balises conceptuelles autour des notions de “source du droit”, “force normative” et “soft law”, *R.I.E.J.* 2010, vol. 65, pp. 7-9, and references there. Hachez notes that the notion of ‘a source’ could also be used in a documentary or a heuristic manner, which goes beyond the notion of ‘formal sources’ and encompasses all sources that can provide useful information for the examination of a legal theme (like doctrine for example). Other ways in which the notion of a ‘source’ can be used are: the (singular) constituting source of a legal order (such as ‘the human nature’, ‘God’ or ‘the state’), the organs or actors that produce the law (such as the Parliament) and create legal rules (which in a classic conception means: legal rules with obligatory force). See *ibidem*, pp. 9-10.

¹⁴⁶ I. Hachez, *op. cit.*, p. 17.

¹⁴⁷ This explanation is taken from Berman, who is not himself a traditional international scholar but pleads in favor of a global view on the law. P.S. Berman, “From International Law to Law and Globalization”, *Colum. J. Transnat’l L.* 2005, vol. 43, p. 492, and references there. Law books, when elaborating on the sources of (public) international law, often make an enumeration of formal legal sources. Such enumerations might differ; there is no general agreement on which instruments exactly count as ‘legal sources’ within an international context. Corten makes an enumeration of formal sources of international law in line with the formal sources of international law mentioned in article 38 of the Statute of the ICJ. He distinguishes *direct formal sources of positive public international*

81. Making use of the notion of 'external sources' would limit our perspective since it would probably be associated with, and hence restricted to, formally recognized sources of law. Our aim, however, is to widen the focus to include non-traditional instruments that might, for instance by means of the referencing practice, have some normative relevance or effects. Therefore, what we consider as a 'source' – or, to avoid confusion, as an 'instrument' – is broader than the view of traditional scholars, and less formalistic. Global law perspectives on the multilayered context of legal 'diversity' (or 'fragmentation') have inspired this methodological choice. Some 'global law theories'¹⁴⁸ embrace various forms of normativity and, by advancing a pluralist and non-formalist conception of the law, do no longer put a State model in the centre of attention, but acknowledge the existence of a plurality of regimes and 'sources', including those of a (inter)national, supranational and/or non-state kind.¹⁴⁹ They go beyond a positivist idea that 'law' can be equated with a national coercive 'government'¹⁵⁰, and point at the relevance of "...a plurality of legal system encompassing groups transcending State borders, but not necessarily comprised in international law"¹⁵¹.
82. The thesis pays attention to the concrete use, throughout the argumentative practice, of a wide amalgam of external instruments not necessarily associated with traditional legal players. In line with this 'practical' viewpoint, it is the concrete role of external instruments that counts and not their predefined status. An instrument that falls outside the traditional view of what is a 'legal source' could possibly – throughout the referencing practice – have similar effects to traditional sources. What attracts our attention is the 'legal status'

law including treaties, customary rules, unilateral engagements, obligatory decisions of international organizations, general principles of law and equity from *indirect formal sources of public international law* including jurisprudence (a certain number of decisions – of an institution that has the power to judge and issue binding decisions – going in the same direction) and doctrine (see O. Corten, *Méthodologie du droit international public*, Editions de l'Université libre de Bruxelles, Brussels, 2009, pp. 138 *et seq.*). There might thus be discussion on which instruments exactly fall under the notion of 'legal sources'. The outcome of such discussions always rests upon a certain ideology regarding the desired position of the State or the models of desirable social relations. Therefore, it is said that a theory of sources reflects 'an idea', 'a choice' or a 'doctrinal construction' (distinguishing legal norms from social norms) that varies according to the view one has on the most adequate production methods of norms in order to regulate social relations. See I. Hachez, *op. cit.*, pp. 11-15 and references there. Some theories put for instance more stress on 'State consent' (voluntarist views) than others (objectivist views). See, for this distinction, O. Corten, *op. cit.*, pp. 45-51.

¹⁴⁸ Including *i.a.*: global law scholars from 'pragmatic schools', from 'ordered legal pluralism', and from 'systems theory'. For a general overview of various global law theories and their vision on the phenomenon of human rights integration, see M. Baumgärtel, D. Staes and F.J. Mena Parras, "Hierarchy, Coordination or Conflict? Global Law Theories and the Question of Human Rights Integration", *E.J.H.R.-J.E.D.H.* 2014, vol. 3, pp. 345-348.

¹⁴⁹ M. Rosenfeld, "Rethinking constitutional ordering in an era of legal and ideological pluralism", *I-Con* 2008, vol. 6, nos. 3 and 4, p. 415; P.-S. Berman, *Global Legal Pluralism*, Cambridge University Press, Cambridge, 2012, pp. 61 *et seq.*; B. Frydman, "Comment penser le droit global?", in J.-Y. Cherot and B. Frydman (eds), *La science du droit dans la globalisation*, coll. Penser le droit, Bruylant, Brussels, 2012, pp. 26 *et seq.*; W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009, p. 225; H.H. Koh, "Transnational Legal Process", *Nebraska Law Review* 1996, vol. 75, no. 1, p. 184.

¹⁵⁰ P.S. Berman, *op. cit.*, 2005, pp. 492-493. Berman is in favor of going beyond such an approach. See P.S. Berman, *op. cit.*, 2012, p. 97. He adds that "...because international law is generally not backed up by coercive force, it of course often does not literally bind state actors. But international law may nevertheless have a large impact by slowly changing attitudes in large populations, effecting shifts in ideas of appropriate state behavior" (*ibidem*).

¹⁵¹ A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Research for Legal Unity in the Fragmentation of Global Law", *Mich. J. of Int'l L.* 2004, vol. 25, p. 1004, as quoted by T. Treves, "The Fragmentation of International Law: The Judicial Perspective", *Agenda Internacional* 2009, vol. 27, p. 227.

instruments receive through the process of interpretation. It is not because an instrument does not fit within a more traditional enumeration of 'legal sources' that it cannot be legally relevant and influence the process of legal reasoning and interpretation (and development) of formal legal sources (like the ECHR). External referencing could even offer insights in what some actors conceive as a 'source' of law from their own viewpoint, rather than from a certain theoretical perspective.¹⁵² Hence, we avoid to *a priori* step into a discussion on what could theoretically be considered as 'law' and as a 'source' of law. The use of external instruments 'on the ground' matters and the idea of 'law in action' is central.¹⁵³ As a consequence, the origin of instruments is no reason to exclude them from the research; they could be produced by a third State, a Member State, an international organization, a private body, a judicial actor, a public expert body, and so on.¹⁵⁴ The legal status of the instruments does not matter either; both binding and non-binding instruments are included.

83. The open view on the 'instruments' that we consider to be part of the 'external referencing practice' does not mean that every single document imported by the ECtHR will be taken into account. Then, what are the requirements to speak of an 'instrument' in the context of this research? *Firstly*, 'instruments' must be identifiable as *written* documents. The field of research does not include references to the external context in a general manner, such as when the Court refers to notions as 'general principles', 'customary law', or 'international law' without specifying concrete written instruments in that respect. The situation is different when the Court, in order to identify 'general principles', 'customary law', 'international law', *etc.* refers to concrete external instruments. Then, such external instruments are considered part of the 'external referencing practice'. *Secondly*, as regards the content of the instruments, the thesis considers 'normative' instruments only. This implies that press articles, witness statements, reports of non-governmental organizations, sociological or historical research, *etc.* that only offer descriptive or explicative (factual) input are not included to be elements of the 'external referencing practice'.¹⁵⁵ Admittedly, these (empirical) documents might be relevant in legal reasoning, for instance to establish or to prove the circumstances¹⁵⁶, to contribute to informed decision-making,¹⁵⁷ or to add

¹⁵² Cf. F. Schauer, *op. cit.*, p. 1960.

¹⁵³ It is interesting to read Berman in this respect. He draws attention to the lack of focus of traditional classic scholars on the multifaceted ways legal norms operate in practice 'on the ground' and he demonstrates how law operates in a more complex manner than how traditional scholars see it. Berman notices that international scholars increasingly recognize law outside formal governmental acts and thus depart from the idea that 'law' is synonymous with 'government' and can only be found at the level of a nation State with coercive power. There is thus more and more attention for 'law in action' (which for instance stresses the importance of non-governmental actors). P.S. Berman, *op. cit.*, pp. 492-493.

¹⁵⁴ Our research thus goes beyond what is considered as a 'judicial dialogue' (of judges citing other judicial bodies).

¹⁵⁵ Therefore, we do not include references, for example, by the ECtHR to other courts in relation to factual findings. On this issue, see A. Bailleux, "Human Rights in Network", *E.J.H.R.-J.E.D.H.* 2014, vol. 3, p. 301.

¹⁵⁶ In *M.S.S. v. Greece and Belgium* for example (ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011, Appl. No. 30696/09), the Court refers to various reports of international bodies and NGOs that include factual findings on the widespread practice in Greece of systematic placement of asylum-seekers in detention in facilities without informing them of the reason for their detention (para. 226). In this case, the Court, in addition, uses numerous

(empirical) strength to an argument, but we do not perceive them as being ‘normative’ in substance.¹⁵⁸ This means that the content of the instrument, to fall under the notion of ‘external instruments’, should prescribe a certain act or omission (in the form of norms, rules, standards, guidelines, recommendations, or judicial orders), or contain a normative evaluation of a certain phenomenon or rule (in the form of an interpretation of legal provisions, or in the form of an assessment of a certain situation in the light of such provisions).

§ 2.1.2 ‘External’ instruments

84. The Court examines cases that are covered by the ECHR and its Protocols.¹⁵⁹ These instruments are the ones that the Strasbourg court interprets and applies to the circumstances. Accordingly, they are central in the internal context of the Strasbourg adjudication system and we call them the primary ‘internal’ sources of the Court. Also internal institutional rules that regulate the functioning of Court (‘the Rules of the Court’), and documents that are issued in respect of (following-up) the implementation of case law, are treated as ‘internal’ instruments.¹⁶⁰ Are also considered to be ‘internal’ instruments, the Strasbourg case law that results from the interpretation and application of the primary sources; the so-called Court’s ‘precedents’.¹⁶¹ Finally, normative instruments that do not have cross-border characteristics from the perspective of a certain complaint (such as national

witness statements collected by international organizations (para. 227). It also takes account of factual findings of the CPT about cases of ill-treatment by police officers (*ibidem*). Such documents concern the circumstances that underlie the complaint and they are not considered as ‘normative’ and, as a consequence, they are not a part of the referencing practice.

¹⁵⁷ External documents might fulfill a valuable role in respect of an informed decision-making process. For instance, one can think of scientific studies (probably including statistics) on social phenomena, characteristics of certain groups of persons, and so on, that can inform the judges about particular circumstances and about the broader social, political or historical context. Brems and Lavrysen (E. Brems and L. Lavrysen, “Procedural Justice in Human Rights Adjudication: The European Court of Human Rights”, *Human Rights Quarterly* 2013, vol. 35, p. 187) illustrate this issue by mentioning several cases in which they think the Strasbourg Court was not sufficiently informed in order to issue a balanced decision. *Ibidem*, p. 188.

¹⁵⁸ Admittedly, some authors put stress on the ‘normative’ potential of instruments that are generally not considered as ‘normative’ but rather as ‘descriptive’ or ‘empirical’, like for example instruments containing statistics or indicators, see D. Restrepo Amariles, “Legal Indicators, Global Law and Legal Pluralism: an Introduction”, *The Journal of Legal Pluralism and Unofficial Law* 2015, vol. 47, issue 1, pp. 9-21; B. Frydman and W. Twining, “A Symposium on Global Law, Legal Pluralism and Legal Indicators”, *The Journal of Legal Pluralism and Unofficial Law* 2015, vol. 47, issue 1, pp. 1-8.

¹⁵⁹ See Article 32 ECHR (about the ‘jurisdiction of the Court’) that provides: “1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47. 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide”. For more on this provision in relation to Strasbourg referencing, see *infra* Part III, Chapter I, § 1.

¹⁶⁰ The Committee of Ministers’ Rules for the supervision of the execution of judgments and of the terms of friendly settlements are thus not treated as ‘external’ instruments.

¹⁶¹ Therefore, references to prior case law of the ECtHR (and the principles, insights and understandings that the Court derives from it) are not considered as references to ‘external’ instruments. Note that the Strasbourg decision-making process does not include a formal doctrine of precedent and that the ECtHR does not consider itself bound by its own previous judgments; overruling is allowed. However, the Court considers it to be “...in the interest of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases” (ECtHR (GC), *Beard v. the United Kingdom*, 18 January 2001, Appl. No. 24882/94, para. 81). See P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford, 2005, p. 165; H. Senden, *op. cit.*, p. 9.

(case) law of the respondent State, used to establish the facts and circumstances of the case) fall outside the scope of this work.

85. *External* instruments are part of the ‘external’ normative context of the Strasbourg protection system. To this external context belong, *inter alia*, instruments of international law with a universal or regional scope, case law or national law of third States, case law of international courts (other than the ECtHR), instruments stemming from other regional human rights protection instruments, instruments stemming from public or private expert bodies (like expert teams of the CoE or of NGOs), *etc.* As to the substantive legal domain, instruments both within and outside the human rights field are taken into account as ‘external’. Instruments of the CoE or national instruments of a particular Member State of the CoE (other than the respondent State) might also be covered by the notion of ‘external’.¹⁶² The notion ‘external’ does thus not only have a territorial connotation and does not entirely overlap with the notion ‘foreign’.¹⁶³

86. It might seem confusing to use the notion ‘external’ in relation to instruments that are produced within the borders and context of the CoE. There are, however, particular reasons to support this methodological choice. Firstly, such instruments are *external* to the Strasbourg adjudication (and argumentative) context; generally speaking, the judges are not formally compelled to take them into account. In addition, some instruments of the CoE are not ratified by all Member States, some contain ‘soft’ law, some cover substantive issues other than human rights law, *etc.* The use of these instruments might thus pose challenges that are similar to international instruments issued outside the context of the CoE.¹⁶⁴ In addition, also

¹⁶² There are, for example, more than 200 CoE-treaties other than the ECHR, many of them addressing human rights issues (such as torture, minorities, human trafficking, sexual exploitation of children, *etc.*). For a full list, see <http://www.coe.int/en/web/conventions/full-list> (visited on 31 May 2016).

¹⁶³ The notion of ‘foreign law’ (*droits étrangers*) is often used in an American context, to designate external references made by the US Supreme Court. See, *i.a.*, F. Schauer, “Authority and Authorities”, *Virginia Law Review* 2008, vol. 94, no. 8, p. 1932; J.L. Larsen, “Importing Constitutional Norms from a ‘Wider’ Civilization: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation”, *Ohio State Law Journal* 2004, vol. 65, pp. 1283-1327. Van Waeyenberge and Hennebel use this notion to address references to national law, practices and case law of third States, and references to international law. See L. Hennebel and A. Van Waeyenberge, “Reflexions sur le Commerce transnational entre Juges”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les Sources du Droit revisitées. Volume 2: Normes internes infraconstitutionnelles*, Anthemis - Publications de l’Université Saint-Louis, Brussels, 2013, p. 3 footnote 14 of the chapter available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211183 (visited on 20 September 2016). Of course, when the Strasbourg judges refer for example to case law of the US Supreme Court, this can be considered as a reference to a foreign instrument. But when they for example refer to an instrument of the CoE or the EU, this is less obvious. The latter reference is not necessarily ‘foreign’ because it is closely related to the territory of (some of) the Member States. The notion of ‘foreign’, contrary to the notion of ‘external’ has a strong territorial connotation. To avoid that instruments that have a strong territorial link with the ECHR escape the focus of our research, we decided not to use the term ‘foreign’. The term ‘external’ goes beyond a territorial meaning and seems preferable. Some authors speak of ‘extraneous’ legal material, which – like the notion of ‘external’ – does not carry a strong territorial connotation. French, for instance, uses the notion of ‘extraneous’ legal material to address references by international tribunals to international law other than a tribunals’ primary texts. See D. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules”, *ICLQ* 2006, vol. 55, pp. 281-314.

¹⁶⁴ The Strasbourg Judges often refer to the instruments of the CoE. See M. Forowicz, *op. cit.*, p. 3. This is confirmed by our case law analysis, see, for example, *infra* para. 158.

in the case law of the Strasbourg Court itself, the use of instruments of the CoE is considered to be part of an ‘external comparative method’ (thus going beyond an inter-Member State comparison).¹⁶⁵

87. What about references to the law and practices in several CoE Member States? A purely *internal* comparative exercise, only built on comparing national laws, case law¹⁶⁶, and practices of the Member States, does escape the focus of the thesis.¹⁶⁷ Such a comparison is mainly used to ‘objectify’ and establish (the absence of), for instance, a ‘European consensus’ or ‘a common ground’, and is associated with the *internal* context.¹⁶⁸ When the Court includes such internal comparisons, the Court most often does not at all mention specific *instruments*. Instead, it rather refers in general terms to (case) law and practices in certain Member States.
88. This does not mean that we leave out completely the Court’s search for a consensus or a common ground. Firstly, when such comparative exercise includes (sometimes in addition to references to national law and practices) specific instruments that are situated outside a purely domestic Member State’s context¹⁶⁹, we do consider them as part of the external referencing practice. Our work distinguishes between both phenomena because comparisons including external instruments, as opposed to purely internal comparative exercises, do not *per se* maintain a ‘link’ with the Member States. They might therefore be indicative of a different phenomenon, and require other justifications and/or face distinct concerns and advantages.¹⁷⁰ Offering such additional justification for external comparisons is exactly what the Grand Chamber aimed to do in the case of *Demir and Baykara*.¹⁷¹ Secondly, we examine internal comparisons, not as a part of the external referencing practice but as a means to better understand the dynamics of the phenomenon of external importations. Comparing internal consensus-building to consensus-building on the basis of external instruments could serve our comprehension as to when and why the Court considers internal comparisons

¹⁶⁵ The case of *Demir and Baykara v. Turkey* considered the category of CoE-instruments to be part of the phenomenon of interpreting the Convention in the light of international instruments (see ECtHR (GC), *Demir and Baykara*, *op. cit.*, paras. 74 *et seq.*). See also H. Senden, *op. cit.*, pp. 223 *et seq.*

¹⁶⁶ A dialogue between the Court and courts of the Member States can be called an ‘internal dialogue’. See on this topic, L.R. Glas, “Dialogue in the European Convention on Human Rights System: inspiration, added-value and means”, *E.J.H.R.-J.E.D.H.* 2015, no. 3, p. 249.

¹⁶⁷ These statements had been inspired by Hanneke Senden, who makes a distinction between ‘external comparative interpretation’ and ‘internal comparative interpretation’. Internal comparative interpretation takes domestic materials and practices of the Member States into account and is almost exclusively used to establish a State consensus. External comparative interpretation refers to the inclusion of external instruments into the comparison. Such an external comparative interpretation is often mobilized for more diverse purposes. See H. Senden, *op. cit.*, pp. 394 *et seq.*. Note that Senden, contrary to our approach, includes CoE and EU instruments as elements of internal comparative interpretation. For the purposes of our thesis, we do not consider EU and CoE instruments as ‘internal’ instruments. Further in our analysis, however, we will make clear how such EU and CoE materials can be imported by the Court within an internal logic, rather serving internal comparative exercises to establish a European common ground. For more on this issue, see *infra*, Part II, §§ 9.1., 9.2. and 9.4.

¹⁶⁸ Senden has done extensive research on the use of internal comparisons in Strasbourg reasonings. On her conclusions, see H. Senden, *op. cit.* pp. 393 *et seq.*

¹⁶⁹ See, including references to examples of Strasbourg case law, A.M.L. Coccu Ortu, *op. cit.*, p. 16.

¹⁷⁰ H. Senden, *op. cit.*, p. 115.

¹⁷¹ See *ibidem*, p. 260. On the Court’s explanation, in *Demir and Baykara*, about the legal basis of references to international law, see *supra*, paras. 34-36.

sufficient, compared to when and why it deems it necessary to replace or complement such internal comparisons with external instruments.

89. Although we do not consider ‘internal comparisons’ (which do mostly not refer to specific national instruments) as an element of external referencing, we do not exclude the use of particular national instruments of a Member State (other than the respondent State). This implies firstly that references to specific national instruments of Member States are included when they appear in a comparison together with other external instruments. This could happen for instance – and hypothetically – when the Court includes in a comparative exercise the laws of the US, of South Africa, of Namibia, of Spain and of Ireland. Secondly, the field of study includes particular, and rather self-standing, references to national instruments of a Member State to interpret or apply the Convention (without that (case) law being part of a larger comparison). In a hypothetical example, this could happen when the Court in a case against France finds inspiration in a case of the German Constitutional Court. Such a reference, picking out a single (or only some) Member State instrument(s), could be conceived as *external* from the perspective of other Member States. It might also pose concerns similar to those related to importations of international instruments or of national instruments of a third State. Indeed, why is the case law of the German Constitutional Court, which has no connection with other national legal systems, used as a supportive factor for the interpretation of the Convention? Why do only Spain and Ireland appear as relevant Member States in a comparison that also includes references to the US, South-Africa, *etc.*? Leaving out references to rather isolated ‘internal’ Member States’ instruments would thus be incoherent and without clear methodological justification.

§ 2.1.3 ‘References’

90. What exactly falls under the notion of ‘references’ or ‘uses’ will only be known in detail after studying the referencing practice in concrete Strasbourg cases. After such examination, it will be feasible to create an overview of all different ‘uses’ the Court makes of external instruments or, in other words, of all different ‘functions’ external instruments fulfill within the Strasbourg argumentations. As a point of departure, we understand the notion of ‘references’ broadly, without alluding to the specific functions such references might have. Within such a large approach, the research includes all the Strasbourg Court’s references to external normative instruments that are used in order to *interpret and apply* the Convention (and its Protocols).¹⁷² This means we will consider any occasion in which external normative

¹⁷² Also Pitea’s writings about Strasbourg referencing touch on the Court’s references to ‘interpret and apply’ the Convention, see C. Pitea, *op. cit.*, 2014, p. 2. The focus mainly lies on the action of ‘receiving’ external instruments and not on the study of reciprocal dialogues between courts. The issue of the use by other courts of case law of the ECtHR (‘exportation’ of Strasbourg case law) is not covered by this study.

instruments serve as some kind of inspirational or helpful factor for the interpretation and application of the Convention.¹⁷³

91. In the course of the Strasbourg Court's adjudication process, three main phases can be distinguished: first, the Court will consider its competence or jurisdiction in relation to the circumstances of the case and in light of the Convention,¹⁷⁴ then it will define the applicable law (which are in the first place the primary sources, *i.e.* the ECHR and its Protocols), and, finally, comes the phase of the interpretation and application of the law.¹⁷⁵ The Court does not only interpret its primary sources, it also applies them to the circumstances. These different phases can intermingle. For instance, when the ECtHR considers its competence in respect of the Convention, this might equally encompass an interpretation of the scope of certain Convention provisions.¹⁷⁶ Also, the phase of interpreting and applying the Convention is not always easy to discern. Generally, one could distinguish a process of interpretation in a narrow sense, and a process of interpretation in a broad understanding. A broad understanding of the interpretation process also includes the application phase.
92. The process of interpretation in a narrow sense and the process of application have a different aim and methodology. The process of interpretation in its narrow sense envisions the elucidation, the safeguard and the development of the understanding of provisions of the ECHR and its Protocols.¹⁷⁷ It refers to the attribution of a meaning to a semantic expression and thus to defining the scope and meaning of a certain right. The latter process, which mostly reflects the first phase of the decision-making activity, is a rather abstract judicial exercise that, in the Strasbourg context, often mobilizes interpretative aids such as textual, teleological, 'evolutive' or autonomous interpretation.¹⁷⁸
93. The process of application (or observance) aims at applying the rules to the concrete circumstances.¹⁷⁹ During this second phase, the Court determines how the rule should be understood in the particular case and whether the respondent State *in concreto* respected the rule.¹⁸⁰ To arrive at a violation of the ECHR, it is normally not sufficient that the facts can be

¹⁷³ The term of 'application' can also be used in a sense of the application of a treaty *ratione personae, ratione materiae, etc.* This work treats the latter as elements of jurisdiction and competence, see *infra* Part III, Chapter 1, § 1. See F. Vanneste, *op. cit.*, 2010, p. 215.

¹⁷⁴ The ECtHR has jurisdiction for matters concerning the interpretation and application of the ECHR and its Protocols. For a discussion of the practice of importing external instruments in the light of the Court's jurisdiction and competences, see *infra* Part III, Chapter 1, § 1.

¹⁷⁵ See J. Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands", *Mich. J. Int'l L.* 2003-2004, vol. 25, pp. 906-910.

¹⁷⁶ Indeed, interpreting whether a certain situation falls under the scope of a provision can be a precondition to consider the Convention to be applicable and the Court to be competent.

¹⁷⁷ F. Vanneste, *op. cit.*, 2010, p. 215.

¹⁷⁸ See H. Senden, *op. cit.*, pp. 7 *et seq.*; C. Pitea, *op. cit.*, 2013, p. 549, footnote no. 27.

¹⁷⁹ F. Vanneste, *op. cit.*, p. 215.

¹⁸⁰ The goal of the 'application' process is to apply the rules to the facts in order to assess the complaint on its merits.

brought under the scope of the Convention; the Convention should also be applied to these facts, demonstrating a violation in case there is an ‘unjustified’ interference.¹⁸¹ Within Strasbourg human rights adjudication, the application phase often includes a balancing test focusing on the issue of proportionality (balancing an infringement of human rights with the protection of other human rights or other interests). In the application process, the facts of the case in combination with criteria such as ‘legality’, ‘necessity in a democratic society’, and a State’s ‘margin of appreciation’¹⁸² are of particular importance.

94. Although the application phase is not included in a narrow understanding of ‘interpretation’, it may be considered as constitutive of a process of interpretation in a broader sense.¹⁸³ By applying the Convention, the Court often gives substance to the rule, in light of particular circumstances. The boundaries between both phases might thus be blurred and difficult to draw.¹⁸⁴ It happens, for instance, that the Court remains rather vague when explaining a rule in the interpretation process but clarifies the precise content and scope of a provision in the course of the application process. Under these circumstances, the content of the rule, consequently, only becomes apparent when the Court assesses the rule in light of the facts and/or balances the rule with other provisions.¹⁸⁵ Because of the blurred lines between ‘interpretation’ and ‘application’ in the Court’s reasoning, the research encompasses references to external instruments in both phases. If we would only focus on the first phase, we will not gain a comprehensive understanding of the role of external instruments in the entire argumentative process. In addition, external instruments used in the application process might clarify the scope of the Convention or they might have substantive influence on the outcome of a particular case.¹⁸⁶

95. This analysis of the usage of external instruments in legal reasoning zooms in on the *de jure* reasoning, developed under the ‘law’ section of the case.¹⁸⁷ The ECtHR has the power to give

¹⁸¹ J.H. Gerards, *EVRM - algemene beginselen*, Sdu Uitgevers, The Hague, 2011, p. 13.

¹⁸² A lot has been written on the use of the ‘margin of appreciation’. The underlying idea of this technique is that State authorities are in principle in a better position to decide on the necessity of an interference. There are several factors that might influence the width of the margin. See P. Leach, *op. cit.*, pp. 163-164. For an elaborate discussion and analysis of the Strasbourg Court’s use of the margin of appreciation-doctrine and the relation of this doctrine to the use of external instruments, see *infra* Part III, § 4.2.4.

¹⁸³ See H. Senden, *op. cit.*, pp. 7 *et seq.*; C. Pitea, *op. cit.*, 2013, p. 549, footnote no. 27.

¹⁸⁴ T. Barkhuysen and M.L. van Emmerik, *op. cit.*, pp. 828-829. See also D. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules”, *ICLQ* 2006, vol. 55, p. 290. The latter author makes a similar remark in relation to the adjudication process of the ICJ. Vanneste acknowledges the difficulty to distinguish between both phases. Because the application-phase often influences the interpretation-phase, he deals with both in his study of the use of general law by the Strasbourg Court. See F. Vanneste, *op. cit.*, 2010, p. 217.

¹⁸⁵ Especially in cases concerning positive obligations, the distinction between both phases is difficult to make. For more information on this issue, see *ibidem*.

¹⁸⁶ For authors that, to examine the referencing practice, only focus on the first phase (of interpretation in a narrow sense), see H. Senden, *op. cit.*, pp. 7 *et seq.*; C. Pitea, *op. cit.*, 2013, p. 549, footnote no. 27.

¹⁸⁷ The Strasbourg Court generally divides its judgments into two parts: one concerning the ‘facts’ and one concerning the ‘law’. It is under the latter section that the Court develops its legal reasoning. In the thesis, we refer to both different parts as the ‘facts’ section and the ‘law’ section.

a legal qualification to a case and to characterize the facts of the case ‘in law’.¹⁸⁸ External normative instruments solely mentioned under the ‘facts’ section or under the section addressing the ‘circumstances’ of the case, fall outside the scope of research. To analyze the ‘external referencing practice’, we will thus limit our focus to those external instruments having an explicit function in ‘legal discourse’, as an argumentative support within the *de jure* reasoning.¹⁸⁹ The latter does not exclude a mobilization – as part of the referencing practice – of normative instruments (in the *de jure*-phase of the legal reasoning) as if they were ‘facts’, thus offering empirical material rather than exercising a substantive influence on the abstract interpretation of the Convention.¹⁹⁰ However, instruments mentioned in the ‘facts’ section without them being explicitly used in the legal reasoning, escape ‘legal discourse’ and, hence, do not fall under the notion of ‘external referencing’ as we conceive it.

96. External referencing will be analyzed only on the basis of ‘explicit’ uses of external instruments in Strasbourg case law. An *explicit* use contrasts with an *implicit* use. The latter refers to the phenomenon that the Court is inspired by an external instrument, without mentioning it as such.¹⁹¹ Implicit references affect the transparency of Strasbourg reasoning, and legal certainty more generally.¹⁹² They are difficult to trace. It is also challenging to find out whether implicit references have been a result of coincidence, or not. Addressing the issue of implicit references by the Strasbourg Court requires a methodology that *inter alia* includes an examination of documents prepared by the Court’s ‘Research Division’¹⁹³ (which

¹⁸⁸ Normally, in the light of its subsidiary nature, the Strasbourg Court does not behave as a ‘tribunal of fact’. As it acknowledged itself, “[t]he Court is generally sensitive to the subsidiary nature of its role and cautious in taking on the role of a first-instance tribunal of fact” (ECtHR (GC), *Hassan v. the United Kingdom*, 16 September 2014, Appl. No. 29750/09, para. 47). There might however be exceptional circumstances whereby it becomes unavoidable that the Court makes “...some findings of facts of its own on the basis of the evidence before it” (*ibidem*, para. 47). When the Court assesses evidence, “...it has adopted the standard of proof ‘beyond reasonable doubt’” and it starts from the idea of a “...free evaluation of evidence” (*ibidem*, para. 48). The Court however notes that “...its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention” (*ibidem*, para. 48). This task “...conditions the Court’s approach to the issues of evidence and proof” (*ibidem*, para. 48). In addition, “...Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio* (the principle, that is, that the burden of proof lies on the person making the allegation in question)” (*ibidem*, para. 49).

¹⁸⁹ Such an explicit function does not necessarily imply that the Court follows the substantive content of the external instrument imported in the *de jure* reasoning. Also a ‘dismissive use’ constitutes one of the functions of referencing practice, see *infra*, paras. 211-240.

¹⁹⁰ As explained above, the notion of ‘instruments’ only addresses instruments with a normative character, excluding instruments that historically, sociologically, statistically, or politically describe certain phenomena or circumstances. This does not mean, however, that external normative instruments could not be used as a kind of ‘legal facts’ with a potential influence the understanding of the Convention in a particular case. For example, the contested State actions might result from an obligation contained in an external instrument. Then, it will be interesting to examine how the Court takes account of this external instrument in interpreting and applying the Convention.

¹⁹¹ A different type of ‘implicit’ reference potentially occurs when the Court picks up an external instrument that had been inspired by another – not imported – external instrument. Then, the Court becomes implicitly (and indirectly) inspired by external instruments other than the ones that had been introduced in the decision. For more information on this phenomenon, see C. McCrudden, *op. cit.*, pp. 510 *et seq.*; J. Allard, *op. cit.*, pp. 102 *et seq.* The latter author notes that the case law of the ECtHR often enters US Supreme Court’s jurisprudence indirectly through the Supreme Court’s references to national case law of common law countries such as Canada or the United Kingdom.

¹⁹² S. Turgis and J. Dhommeaux, *op. cit.*, pp. 65-66, and references there.

¹⁹³ Article 25 ECHR provides: “The Court shall have a registry, the functions and organization of which shall be laid down in the Rules of Court”. The task of the Registry, which is composed of lawyers, administrative,

might include an external instrument of which the content is taken up by the ECtHR without the Court mentioning the name of the instrument) and an analysis of interviews with judges of the ECtHR.¹⁹⁴ Documents of the Research Division are not accessible and interviews with the Strasbourg judges – although they might be part of a follow-up research – are not included into the current thesis project. Since our research is interested in those external instruments that clearly contribute to legal reasoning as part of the ‘legal discourse’, implicit references escape our focus.

§ 2.2. Empirical analysis through an exhaustive study of Grand Chamber cases

97. In the Grand Chamber case of *Demir and Baykara*, the Court made an attempt to analyze and explain its referencing practice. As explained above, we consider these efforts to be incomplete and imprecise. The aim of this research is to fill this gap and to undertake a similar – but more comprehensive – exercise as envisioned by the Court in *Demir and Baykara*. This brings us to the first central research question of the thesis: ‘What are the characteristics of the external referencing practice as practiced by the ECtHR?’. This research question will be addressed in **Part II** of this work.

98. More particularly, since the Grand Chamber in *Demir and Baykara v. Turkey* did not take a stand on the issue, we are interested in the quantitative prevalence of external importations. In addition, the Court, in *Demir and Baykara*, only mentioned two main categories of external references (references to ‘general international law’ and to ‘Council of Europe instruments’). Therefore, our objective is to make a precise and exhaustive mapping of the nature of the normative instruments imported by Strasbourg. Subsequently, we aim to shed light on the different functions that external instruments fulfill in the Court’s legal reasoning. These

technical staff, and translators, is to provide legal and administrative support to the Court. The members are independent and impartial. The Registry processes and prepares for adjudication applications lodged by individuals with the Court and the lawyers of the Registry also prepare files and analytical notes for the Judges. They do not themselves decide cases. The Registry has several divisions of which the research-division is one. See ECtHR, “Role of the Registry”, at http://www.echr.coe.int/Documents/Registry_ENG.pdf (visited on 12 April 2016).

¹⁹⁴ Admittedly, interviews could, mainly from a sociological point of view, add insights into the rationale of referencing practice. The research will not lose sight of sociological studies but instead of doing such research itself, it will rather build on existing sociological research about judicial behavior and about human rights holders’ interests (see *infra*, Part III, Chapter 2). When examining external references by the ECtHR, we – in a spirit of ‘every man to his trade’ – tempered our ambitions in respect of tracing causal links (rather than ‘correlations’) between the traits and the sociopolitical background of the Strasbourg judges and the usage of external instruments for argumentative purposes, which would require elaborate data gathering (including interviews) and familiarity with methods of qualitative or quantitative data analysis. This would have brought me beyond both my skills and domains of expertise. On these methodological reflections, see D. Staes, “Examining Strasbourg Case Law and Judicial Behavior: a View across Disciplines”, Blogpost on ‘Strasbourg Observers’, 26 August 2015, <https://strasbourgobservers.com/2015/08/26/examining-strasbourg-case-law-and-judicial-behavior-a-view-across-disciplines> (visited on 18 April 2016).

functions could afterwards serve as indicators of possible ‘justifications’ with regard to external references.¹⁹⁵

99. The mapping of the practice of external referencing will be done on the basis of empirical findings derived from case law studies. Focusing on legal discourse and on ‘law in action’¹⁹⁶, the aim is to analyze how the Court uses external instruments in interpretative practice. The research more particularly explores an exhaustive group of Strasbourg cases, *i.e.* all Grand Chamber cases since the Grand Chamber case of *Demir and Baykara v. Turkey* of 12 November 2008 until the end of 2015.¹⁹⁷ Concretely, this encompasses 136 Grand Chamber decisions and judgments of the ECtHR.¹⁹⁸ We will call the entire collection of these cases our ‘pool’ of case law. It does not come as a surprise that the Grand Chamber case of *Demir and Baykara* is the starting point of research: as demonstrated above, this is the first case in which the Court made an elaborate attempt to systematize its referencing practice. The issues and challenges rising from this case have been the driving factor behind our research questions.
100. The importance of starting from an *exhaustive* sample of case law is fuelled by some methodological techniques from the field of comparative law and from the social sciences. Such techniques highlight the need for a *systematic* selection of judicial cases serving as empirical foundation for certain claims. A systematic working method prevents the risk of – whether consciously or not – picking and choosing those judicial decisions that illustrate and fit pre-established ideas, and of building conclusions on hand-selected exemplary cases (ignoring contradictory cases). Such conclusions might be distorted or incomplete, and might therefore affect a researcher’s credibility.¹⁹⁹ An excellent option for studying case law systematically, is working with an exhaustive sample considering all cases that fall within certain pre-defined parameters. This method equally enables us to make quantitative observations and conclusions.
101. The exhaustive study opts to include Grand Chamber cases only, no Chamber cases. This firstly allows to keep the characteristics of the examined cases as similar as possible to the ‘key’-case, used as the starting point of our research. This approach enhances the

¹⁹⁵ If the Court uses external instruments to exercise certain argumentative functions, these functions (combined with their purposes and impact) might illuminate underlying justificatory factors of referencing practice.

¹⁹⁶ The distinction between ‘law in action’ and ‘law in the books’ was already raised by D. R. Pound, “Law in Books and Law in Action”, *Am. L. Rev.* 1910, vol. 44, pp. 12-36. For the importance of studying law ‘in action’ and of doing empirical research in that respect, see also: W. Twining, “Globalisation and Legal Scholarship”, Montesquieu Lecture 2009, pp. 16-17, available at https://lapa.princeton.edu/sites/default/files/2011-0210_Twining_Paper.pdf (visited on 19 January 2017).

¹⁹⁷ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*

¹⁹⁸ For an overview of all these cases, see Annex 1.

¹⁹⁹ See R.C. Black and L. Epstein, “(Re-)Setting the Scholarly Agenda on Transjudicial Communication”, *Law & Social Inquiry* 2007, vol. 32, no. 3, pp. 793 and pp. 796 *et seq.*; R. Hirschl, “The Question of Case Selections in Comparative Constitutional Law”, *The American Journal of Comparative Law* 2005, vol. 53, no. 1, pp. 125-155; R. Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law*, Oxford University Press, Oxford, 2014, 320 p.

credibility of the comparison between the Grand Chamber *Demir and Baykara*-case and the subsequent cases of our pool as well as between all cases of our pool mutually. In addition, the choice for Strasbourg Grand Chamber-cases is valuable because these cases often decide serious questions affecting the interpretation or application of the ECHR, because they often address complex and controversial issues of major importance (possibly leading to the overruling of precedents), and because they generally contain a more abstract and more largely motivated reasoning than Chamber cases (see Articles 30 and 43 of the Convention²⁰⁰). Because Grand Chamber cases regularly concern ‘serious interpretation of the Convention’, they include more frequently comparative studies (possibly including external instruments).²⁰¹ Such cases are, therefore, expected to offer particularly rich information on techniques of legal reasoning (such as external referencing) as well as on the impact of decision-making with regard to the understanding (and development) of human rights.²⁰²

102. The choice of studying solely Grand Chamber cases has its shortcomings, too. It would be incorrect to say that only the Grand Chamber decides relevant cases in relation to the phenomenon of external referencing. Moreover, the criteria for relinquishment of jurisdiction by the Chamber in favor of the Grand Chamber (Article 30 ECHR) as well as the criteria on the basis of which the Grand Chamber accepts a request of reference (Article 43 ECHR) are not always applied in a transparent manner and sometimes might be influenced by political motivations. Opting for a limited pool of Grand Chamber cases thus entails a risk of missing out some cases that might be relevant for the study of the Court’s external referencing practice. Therefore, the perimeter of examining an exhaustive amount of recent Grand Chamber cases will only be applied in a rigid manner under Part II, which aims to give a general overview of the characteristics of this referencing practice. The 136 cases of our pool suffice for this purpose.

²⁰⁰ Article 30 ECHR is about ‘relinquishment of jurisdiction to the Grand Chamber’ and provides the following: “Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favor of the Grand Chamber, unless one of the parties to the case objects”. Article 43 ECHR touches on the referral of cases to the Grand Chamber and says that: “1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. 2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. 3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment”.

²⁰¹ K. Dzehtsiarou, *op. cit.*, p. 21, footnote 67.

²⁰² See H. Senden, *op. cit.*, pp. 16 *et seq.*

§ 2.3. Justification from different perspectives

103. The study of various Strasbourg cases will lead to a mapping, in a comprehensive manner, of ‘external referencing’ in the recent interpretative practice of the Grand Chamber. Addressing these characteristics enables us to, under Part III of the thesis, reflect on the justification of the referencing practice. This relates to the second central research question of the thesis: ‘Which arguments enhance the validity of the Strasbourg external referencing practice?’. When reflecting on the validity of importing external instruments, we will make a case for a better (legal) justification of referencing as well as for some improvements closing validity gaps.
104. On the one hand, the recent Grand Chamber cases of our pool, as analyzed under Part II, will remain the central objects of our attention. On the other hand, the spotlight that guides Part III might also cover Chamber and Grand Chamber case law outside our pool, under the condition that they deliver additional relevant information. These cases will mainly come under our attention by writings of legal doctrine focusing on (some particular aspects of) Strasbourg external importations.
105. Not only the decision itself but also the opinions of separate judges might include interesting information about the referencing practice. Strasbourg judges who do not agree with the motivation or the outcome of a case have the possibility to write a separate opinion, serving the transparency of the adjudication process. Here, judges often speak in a more ‘personal’ and ‘open’ manner. These opinions deserve particular attention as they might reveal some criticism and controversial issues.²⁰³ In search of relevant judicial positions on the referencing practice, we have read every separate opinion attached to the cases of our pool. When separate opinions attached to cases outside the pool offer valuable information, they will also be included.
106. Our reflections on justifying arguments (and missed opportunities of the ECtHR to do justice to such arguments) are guided by two angles, corresponding to the following perspectives: the legality perspective (§ 2.3.1.) and the perspective of the users of human rights (§ 2.3.2.). These viewpoints follow the ideals of, respectively, respect for the legal framework and serving human rights users’ interests.

²⁰³ H. Senden, *op. cit.*, pp. 20 *et seq.*

§ 2.3.1. The legality perspective

107. Reflections from a legality perspective start from conventions and other legal texts. They aim to assess external referencing *de lege lata* (according to the law), rather than *de lege ferenda* (according to proposed law).²⁰⁴ This approach encompasses a legal positivist viewpoint ‘internal’ to the law and, as a consequence, is concerned with adherence to the law and with the place of the external referencing within positive law.²⁰⁵ The question of legality implies an assessment of the referencing practice against the common legal framework, on the basis of criteria and values that are derived from the legal system itself.²⁰⁶ The legal model guides our focus to the relationship between decision-making and the rules and aims to rationalize and legitimate the practice by a genuine application of traditional and authoritative legal sources.²⁰⁷ This does not mean, however, that such a legal measure of examination is objective, straightforward or clear at first sight. We do not conceive the Judge as a mechanical ‘*bouche de la loi*’.²⁰⁸ Law is subject to interpretation and does not speak for itself. It is not entirely scientifically neutral and free from values. As a result, views on the meaning and relevance of legal provisions might differ.²⁰⁹
108. The legal perspective first bring us to an assessment of external referencing under the Convention itself. At first sight, the role of the Convention to justify or explain external referencing seems limited; it does not provide elaborate guidance for a legal evaluation. Neither the ECHR nor its Protocols offer a general mandate or authorization to refer to external instruments for interpretative purposes. On the other hand, neither do they contain a general prohibition. The limited relevance of the Court’s primary sources already appears from the key case of *Demir and Baykara v. Turkey*; the Grand Chamber did not once refer to the Convention to explain or justify external references.

²⁰⁴ J. Ringelheim, *op. cit.*, pp. 47-48.

²⁰⁵ H. Kelsen, *op. cit.*; L.A. Hart, *Le concept de droit* (transl. Michel van de Kerchove), F.U.S.L., 2nd edition, Brussels, 2005, pp. 99 *et seq.*. We will particularly focus on, what Hart calls, ‘secondary legal norms’ including law concerning the interpretation of (primary) norms. See also H. Dumont and A. Bailleux, “Esquisse d’une théorie des ouvertures interdisciplinaires accessibles aux juristes”, *Droit et société* 2010, vol. 2, no. 75, pp. 277-278; B. Schlütter, *op. cit.*, p. 268.

²⁰⁶ This goes further than what is allowed under Kelsen’s strict positivist view; to this author, a legal professional should not take a position with regard to different possible interpretations of a norm since this would move legal sciences towards legal politics. H. Kelsen, *op. cit.*, p. 77, as cited and interpreted by J. Ringelheim, *op. cit.*, p. 48.

²⁰⁷ Gillman notices the relevance of an internal point of view to understanding and evaluating empirical studies of judicial decisionmaking. H. Gillman, “What’s Law has to Do With It? Judicial Behaviorists Test the ‘Legal Model’ of Judicial Decision Making”, *Law & Soc. Inq.* 2001, vol. 26, pp. 471-472, as cited by C.L. Barzun, “Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship”, *Public Law and Legal Theory Research Paper Series 2014-16*, University of Virginia School of Law, October 2014, p. 35, and see also p. 68, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507260 (visited on 19 January 2017).

²⁰⁸ Montesquieu used this metaphor in his famous book *De l’esprit des lois*. C.L. Montesquieu, *De l’esprit des lois*, Barillot & Fils, Geneva, 1748.

²⁰⁹ B. Frydman, *Le sens des lois: histoire de l’interprétation et de la raison juridique*, Bruylant, Brussels, 2nd edition, 2007; H. Dumont and A. Bailleux, *op. cit.*, p. 286; B. Schlütter, *op. cit.*, p. 268.

109. Does the lack of a general authorization or a general ban imply that external referencing is *a priori* illegal or legal under the Convention? No, there is a need for further examination. We do not erase *a priori* all relevance of the Convention in respect of external referencing.²¹⁰ Maybe some Convention provisions are incompatible with certain aspects of the referencing practice? Or, on the contrary, maybe some provisions could serve as a justificatory basis of (certain aspects of) external referencing?
110. The legal perspective does not only direct us towards the legal provisions of the Convention. We will also focus on the international rules of treaty interpretation that operate under general international law. A central instrument in this respect is the VCLT. As demonstrated by the case of *Demir and Baykara*, the Court gave this instrument a prominent place in the context of its external referencing practice. At least from the viewpoint of the Court itself, some provisions of the VCLT thus have potential as a legal basis for (some functions of) the referencing practice.
111. Our evaluation, inspired by multi-dimensional theories of validity²¹¹, will not be limited to assessing whether the judges can rely on a legal authorization allowing external referencing. The legal character of a judicial phenomenon does not necessarily imply that it is justified from other perspectives, and *vice versa*.²¹² In addition to legal provisions, we include criteria of usefulness for the legal practitioner. Doing so, we depart from the strict legality question by envisioning the phenomenon in its wider (legal and social) context and by injecting the assessment with practical and 'metapositive' arguments.²¹³ Note, however, that the different perspectives could interact. For instance, the interests or identities of the users might inject the interpretation of the law with arguments *de lege ferenda*, or the users themselves might be concerned with the issue of legality (for instance, an 'illegal' interpretation technique might affect the judges' interest of delivering credible decisions).

²¹⁰ *A contrario*: H. Senden, *op. cit.*, p. 135. She argued that the text of the ECHR itself (besides the Preamble) does not provide any basis for relying on external instruments. Senden however conceives external referencing in a narrow manner; she focuses mainly on comparisons made between a mixture of external instruments in order to sustain a (dynamic) position of the Court.

²¹¹ François Ost and Michel van de Kerchove offer a three-dimensional framework of validity. Admittedly, their analytical grid is not specifically tailored to the evaluation of argumentative techniques, but had been developed in a context of assessing the validity of a 'legal rule' or a 'legal source'. We realize that the validity-theory created by Ost and van de Kerchove is not directly and unambiguously transposable to external referencing practice. Nonetheless, we draw inspiration from their concept of 'validity', in a sense of not only focusing on the question of 'legality', but to equally include more practical or value-driven arguments. In the view of these authors, the question of 'validity' refers to the criterion of legality (or formal validity), alluding *inter alia* to the identification and the sources of a rule, to the procedural question, to the observance of higher legal norms, *etc.* Secondly, the concept of 'validity' relates to the criterion of 'effectiveness' or empirical validity, alluding to realist and sociological approaches whereby the acceptance and the approval by the addressees are crucial elements. A rule can be considered as 'effective' when legal subjects treat the rule as a model guiding their practice. Under the third dimension of the theory, validity depends on the criterion of 'legitimacy', which alludes to an evaluation against meta-positivist values. Fr. Ost and M. van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, F.U.S.L., Brussels, 2002, pp. 324 *et seq.*. See also I. Hachez, *op. cit.*, p. 28-38.

²¹² Cf. B. Schlütter, *op. cit.*, p. 269.

²¹³ Cf. J. Ringelheim, *op. cit.*, p. 49.

§ 2.3.2. The users' perspective

112. The context in which the external referencing practice takes place, and which is said to accompany globalization processes, is one characterized by diverse social and political actors. Judges do not act in a legal no man's land.²¹⁴ When reasoning from a users' perspective, the actors that practically engage with human rights are put in the center of attention.²¹⁵ These actors might be called 'human rights users', alluding to "...any individual or composite entity who engages with (uses) human rights"²¹⁶ and thus to "...those individuals and entities whose interest in human rights law is not of a scholarly nature, but of a utilitarian one: human rights law is something they need to, or want to work with".²¹⁷ Our evaluative research aims to introduce this context.²¹⁸ As Hirschl stresses, voluntary foreign citation practice "...cannot be understood in isolation from the sociopolitical context within which these decisions are made, and more specifically in isolation from the positions, preferences, and beliefs of those who make these choices".²¹⁹
113. Our users' view does not imply that we mainly address the justification of references by how the users themselves describe their value. Our emphatic perspective, instead, covers an ideal of human rights adjudication serving the needs of human rights users. It thereby builds on some pre-established users' interests.²²⁰ Such evaluation takes account of users' identities and experiences, and starts from the specific situation, relationships and characteristics of the actors involved.²²¹ This brings us to the core questions of our users' analysis: 'How can we justify external referencing taking account of human rights users' identities, experiences and interests, and what are the Court's missed opportunities in this respect?' Judges might, for instance, pursue a need of upholding credibility in the eyes of

²¹⁴ A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur*, Bruylant and F.U.S.L., Brussels, 2009, pp. 353-354.

²¹⁵ Such a perspective might be called 'internal' as it addresses those people who actually engage in legal argumentations. C.L. Barzun, *op. cit.*, p. 27, with reference to Dworkin.

²¹⁶ See E. Desmet, "Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and Research Agenda", *HR&ILD* 2014, no. 2, p. 125. For reflections on external referencing and the application of a users' perspective, see Staes, D., "The Use of Documents Other than the European Convention on Human Rights and Its Protocols in Cases Before the European Court of Human Rights: Reflections from and upon a Users' Perspective", *HR&ILD* 2014, no. 2, pp. 186-215.

²¹⁷ E. Brems, *op. cit.*, 2014, p. 451.

²¹⁸ For the importance of studying law 'in context' by, for instance, taking account of the conscience of legal actors and other extra-legal elements, see *i.a.* W. Twining, *Law in Context. Enlarging a Discipline*, Clarendon Press, Oxford, 1997, 372 p.; D. Nelken, *Beyond Law in Context. Developing a Sociological Understanding of Law*, Routledge, Abingdon, 2009, 348 p. Although Nelken has been one of the promoters of studying law in context, he has also criticized this approach. In the cited book, both the advantages and disadvantages of studying law in context are addressed. The book also demonstrates why it is important not to lose sight of the legal question (besides more social factors). To Nelken's view, law in context is relevant to (re)shape legal practices, but not without a further argument that pays heed to law's specificity.

²¹⁹ R. Hirschl, *op. cit.*, 2014, p. 76.

²²⁰ We embrace the idea that the interests of certain actors might have an impact on the validity assessment. Cf. K. Dzetsiarou, *op. cit.*, p. 145.

²²¹ See E. Brems, *op. cit.*, p. 465. Our approach is partly overlapping with, and had been inspired by, Eva Brems' integrative approach to human rights. Brems primarily considers human rights integration from the perspective of the rights holder, which includes the necessity to avoid a 'race-to-the-bottom', to give priority to the highest protection and to do justice to the lived experiences, see *ibidem*, pp. 464 *et seq.*

others. In their perspective, the referencing practice could be justified when it contributes to the achievement of that goal. Against that background, we then ask the question: could external referencing contribute to that interest and/or does it miss opportunities in that respect?²²²

114. In connection to Strasbourg human rights adjudication processes, we distinguish between the following relevant human rights ‘users’: judicial users (being the Strasbourg judges), rights holders (including the applicants), rights ‘realizers’ (including the respondent States), and third party users (alluding to parties such as NGOs, trade unions, or academic research centers²²³).²²⁴ The latter notions move away from the traditional dichotomy of State versus non-State actors.²²⁵ The concept of ‘human rights users’ is not based on an institutional or organizational capacity but is rooted in the relationship between a certain actor and human rights and/or in the manner some actors engage and interact with human rights.²²⁶ In human rights law, the category of the rights holders is central; the whole project of human rights is focused on their wellbeing and dignity.²²⁷ This is why we approach the issue of the validity of external referencing mainly from their perspective, and from the experiences of the alleged victims of human rights violations in particular. Nevertheless, when certain aspects and consequences of external referencing also strongly connect to interests of other categories of human rights users, e.g. the Strasbourg judges, their perspective will be treated as well.

115. Addressing the justification of external referencing from a users’ perspective is subjective; interests and needs differ depending on which ‘users’ one has in mind. For example, judicial users might benefit from external referencing when it offers them additional argumentative tools, or when it increases their credibility and authority. From the eyes of human rights holders, on the other hand, external referencing might be of value

²²² Also Brems alludes to ‘missed opportunities’. She stresses that the development of an integrated view on rights holders by the Strasbourg Court is far from complete and that therefore, the total experience of rights holders is still too often ignored. Note that Brems also pays attention to challenges of external referencing. See *ibidem*, p. 454 and pp. 468 *et seq.*

²²³ According to article 36 of the ECHR, the President of the Court may authorize any person concerned (State, individual or organization) other than the applicant, or another State Party to the Convention other than the State against which the application had been lodged, to intervene in the proceedings. Such third party interveners can be permitted to file pleadings and/or to take part in public hearings. See also Rule 44 (2) of the Rules of the Court. The written submissions of the third party interveners are sent to the parties of the case who will be entitled to submit observations in reply, or, where appropriate, to reply at any hearing. The replies will be sent to the interveners but, normally, the intervener does not have the chance to give any further comments.

²²⁴ This typology had for some part been inspired by the categorization of human rights users created by Ellen Desmet. See E. Desmet, *op. cit.*, 2014, pp. 129 *et seq.* In the typology of Desmet, *direct users* form a first category, representing those who invoke or give effect to human rights. *Indirect users* include those who support (or not) or impose human rights. The former category represents *rights claimants* (who invoke human rights to their own situation, also when this claim does not seem to be supported by the current state of human rights law) and *rights realisers* (who give effect to human rights such as the duty bearers). The latter category – the indirect users – include *supportive users* (who assist in the realization of human rights, including human rights bodies such as the UN TB’s) and *judicial users* (who impose the implementation of human rights).

²²⁵ P.S. Berman, *op. cit.*, pp. 488 *et seq.*

²²⁶ E. Desmet, *op. cit.*, p. 126.

²²⁷ See *ibidem*, pp. 121-141.

when this leads to higher protection standards and/or to higher procedural satisfaction. Interests within users' categories equally vary. Third party interveners, for example, might be supportive users who promote the realization of a human right but they might equally be non-supportive users resisting the further evolution of certain human rights. Think, for instance, of a situation in which a third party pleads in favor of elaborately protecting the right to freedom of religion, to the detriment of an elaborate protection of the right to freedom of expression. Under such circumstances, the third party is 'supportive' of one human right, but not of the other and, as a consequence, we could not without confusion speak of a 'supportive' human rights user.²²⁸

116. When evaluating external referencing from a users' viewpoint, we connect our approach to strategic thinking. Alluding to the importance of fulfilling certain interests, we start from the idea that human rights users are strategic actors who could in practice benefit from the context of normative heterogeneity. External references might be valuable to serve argumentative strategies.²²⁹ The latter approach is partly inspired by Erik Voeten's work which is based on sociological research methods. This author demonstrates a link between the Court's referencing practice and Strasbourg judges' strategy or ideology.²³⁰ Also some theoretical models explaining judicial behavior draw particular attention to judges as strategic actors pursuing actions that maximize the achievements of conscious goals, such as increasing credibility and authority.²³¹ Users other than judges might equally have strategic preferences. Frydman and Hennebel, for instance, acknowledge that "...le contentieux transnational des droits de l'homme est fortement marqué par les visées stratégiques des acteurs qui s'y affrontent".²³² The relevance of strategic behavior integrates the idea of Holmsonian men who are using rules in an instrumental manner.²³³ From such an intentional account, external referencing has 'value' when it contributes to the achievement of certain (commonsense or proven) goals or preferences.²³⁴

²²⁸ Hence the reason why we speak of 'third' users instead.

²²⁹ See B. Frydman, Conclusions on "Le dialogue international des juges et de la perspective idéale d'une justice universelle", p. 9, available at http://www.philodroit.be/IMG/pdf/B._FRYDMAN_-_Conclusion_-_Le_dialogue_international_des_juges_-_30_mars_2007.pdf (visited on 19 January 2017).

²³⁰ E. Voeten, *op. cit.*, p. 552. See also: R. Hirschl, *op. cit.*, 2014, pp. 8, 14 and 41-42; M. Forowicz, *op. cit.*, pp. 367-368; P.S. Berman, *op. cit.*, pp. 485-556.

²³¹ L. Baum, "Motivation and Judicial Behavior: Expanding the Scope of Inquiry", prepared for the Workshop on Exploring the Judicial Mind, University of Virginia, 30-31 March 2007, available at www.faculty.virginia.edu/judging/Documents/motivation.lb.pdf (visited on 30 July 2014); M. Forowicz, *op. cit.*, pp. 367-368; R.C. Black and L. Epstein, *op. cit.*, p. 805. A legal researcher might thus clearly benefit from having an eye for the (strategic) behavior of legal actors, as influenced by the sociopolitical environment.

²³² B. Frydman and L. Hennebel, "Le contentieux transnational des droits de l'homme: une analyse stratégique", *RTDH* 2009, vol. 77, p. 97.

²³³ Hart distinguishes Genuine Rule Followers, who are legal actors who use rules as genuine guides for behavior, from Holmsonian Bad Men, who use them only instrumentally. H.L.A Hart, *The Concept of Law*, *op. cit.*, 1961, as cited and interpreted by C.L. Barzun, *op. cit.*, pp. 33 *et seq.*

²³⁴ This connects to the idea that actors use or apply rules not because they feel genuinely constrained, but because they can manipulate them for the sake of attaining some instrumental benefit, such as the avoidance of unpleasant consequences, or to satisfy some preferences. Cf. *ibidem*, pp. 35-36 and p. 56.

117. As a final methodological note, we highlight that a users' viewpoint does not imply that we *causally explain* and *predict* the referencing practice by considering the characteristics and socio-legal environment of human rights users. Admittedly, any referencing practice might be stimulated by the personal background (like the education and legal specialization) of the 'users', by their political preferences, by psychological processes, and so on.²³⁵ Other scholars have proven that such factors play a role in explaining (variation in) decision-making patterns in general, and external referencing in particular.²³⁶ For instance, judges with an international and comparative law background are more prone to relying on external instruments.²³⁷ Also Dzehtsiarou observes the following in respect of comparative research in Strasbourg decision-making:

"...the human element should not be ignored: some judges are more inclined towards comparative research than others. The judge-rapporteur is empowered to request the comparative survey from the Research Division. If the judge-rapporteur is not inclined towards comparative research, it is less likely that European consensus will appear in the final judgment. For example, one of the judges interviewed by the author has stated that he does not consider European consensus to be a compelling argument and that he was never requested comparative law research".²³⁸

118. Adopting a users' lens to a phenomenon like external referencing does not mean that we undertake sociological research and put forward social explanations, having a point of view entirely 'external' to the law.²³⁹ We will not verify 'causal relations' – which is not the same as 'correlations' – between the personal, social, political or psychological characteristics or environment of the users and the referencing practice. Such causal relations can only be established with statistical methods tracing links between variables. We do not introduce such a research methodology in our work. Our users' perspective implies comprehending and evaluating the practice in a more inter-disciplinary manner. This means that insights originating in other disciplines and touching upon the social and political environment of human rights adjudication will not be ignored.²⁴⁰ They could offer valuable information

²³⁵ Senden for instance draws attention to the relevance of the personal background of the judges in explaining external references, like for instance their individual knowledge and education (but she does not examine this herself). See H. Senden, *op. cit.*, p. 135.

²³⁶ E. Voeten, 2010, *op. cit.*, p. 552. See also: R. Hirschl 2014, *op. cit.*, 2014, pp. 8 and 14, and pp. 41-42. Voeten's research, which includes variables and statistics, supports the idea that referencing practice is influenced by Strasbourg judges' strategy or ideology.

²³⁷ *Ibidem*.

²³⁸ K. Dzehtsiarou, *op. cit.*, 2015, p. 23.

²³⁹ Dworkin calls the viewpoint of the sociologist or the historian, who ask why certain forms of argument develop in particular times or places, the 'external point of view'. R. Dworkin, *Law's Empire*, Harvard University Press, Harvard, 1988, as cited and interpreted by C.L. Barzun, *op. cit.*, pp. 26-28. This point of view mainly describes the law genetically. For a distinction between, what are called, 'internal' and 'external' perspectives on the law, and for more information about how both could be combined in an interdisciplinary legal science, see H. Dumont and A. Baillieux, *op. cit.*, pp. 275-293.

²⁴⁰ Thus, while we take account of extra-legal explanations that originate in the social sciences, we will reason fwithin the internal viewpoint of those actors who engage with the law. Our openness to the social sciences will thus be limited. See *ibidem*, pp. 284 and 287.

about the social and political context of the referencing practice and about human motivations, and thus about some preferences and needs of the human rights users.²⁴¹

²⁴¹ Cf. C.L. Barzun, *op. cit.*, p. 56. With some pre-established human motivations we will ask ourselves the question: Could external referencing serve these motivations and interests? Does it have value as an instrument in the light of users' aims and preferences? For instance, if we assume a users' motivation to progressively develop human rights, we will ask ourselves: Does referencing contribute to such a progressive protection? In other words, on the basis of the case law study, we will examine whether there is a correlation between external referencing and progressive human rights protection. Although we might conceive a link between both phenomena, this does not necessarily imply a causal relation. Only a causal relation has the ability to explain and predict an outcome of a case by focusing on its inclusion of external instruments (neutralizing possible intermediate factors).

PART II – Mapping the characteristics of external referencing

119. Part II gives an overview of the most important characteristics of external referencing as recently exercised by the Grand Chamber of the ECtHR. It covers prevalence and patterns of the referencing practice over time (**Chapter 1**), the type of instruments used by the Strasbourg Court to interpret and apply the Convention (**Chapter 2**), and the different functions of their use (**Chapter 3**). All three chapters build on elaborate empirical material, namely on *all* Grand Chamber cases since *Demir and Baykara v. Turkey* of 12 November 2008 until the end of 2015, covering 136 cases. Each case of the pool is analyzed in its entirety and every single example of ‘external referencing practice’ is included.

CHAPTER 1 - PREVALENCE AND PATTERNS

120. Taking account of all functions for which they might be used¹, external instruments appear in almost three quarters of examined cases, with an average of serving more or less one argument per case (§ 1.) and with a rather constant pattern over time (§ 2.). Finally, we will have a look at the substance of those cases *not* importing external instruments (§ 3.).

§ 1. Quantitative prevalence of the referencing practice

121. From the pool of 136 Grand Chamber cases, 95 refer to one or more external instrument within the *de jure* reasoning under the ‘law’-section of the case. This means that about 70 percent of the examined Grand Chamber cases mention one or more external instruments when interpreting and applying the Convention.² External instruments taken into account to arrive at this percentage, are those that the Court directly cites ‘by name’ in the ‘law’-section as well as those that only appear ‘by name’ in a paragraph of the ‘facts’-section under the condition that the Court in the ‘law’-section explicitly refers to that paragraph (thus redirecting the reader to the instrument in question).³ To ensure a good understanding of the prevalence rate of 70 per cent, it should be clear that this percentage does not include internal comparisons that are built solely on national laws and practices.⁴
122. If we also take account of external instruments solely included in the ‘facts’-section (without a direct or indirect reference to these instruments in the ‘law’-section), the number of references rises; the amount of cases that refer to external instruments then increases to 78 percent of all examined Grand Chamber cases.⁵ The latter implies that there are quite some cases in which the Grand Chamber considers external instruments relevant as ‘facts’ of

¹ For an overview of all functions external instruments exercise in legal reasoning, see Chapter 3 of Part II.

² This percentage covers only those cases referring to *external normative instruments*. For the instruments that are covered by this notion, see *supra* Part I, Chapter 2, § 2.1.1. and § 2.1.2.

³ The prevalence rate only gives indications about the quantitative appearance of external instruments in the cases. It does not inform us about the number of arguments that contain external instruments in each case separately, nor does it inform us about the functions these instruments fulfill.

⁴ For more information about this methodological choice, see *supra* Part I, Chapter 2, § 2.1.2. When cases including an ‘internal comparison’ would be listed under ‘external referencing practice’ too, 106 of the examined cases make external references in the ‘law’-section of the case. This means that 12 Grand Chamber cases of our pool only contain an internal comparison, without there being references to what we consider to be ‘external instruments’. There are thus 30 Grand Chamber cases in which the Court does not use an internal comparison *or* does not use external instruments. In these 30 cases, there is no reference to a specific external instrument in the ‘law’-section of the case, nor is there a reference to an internal comparative study. ‘Internal comparisons’ will not entirely escape attention in our research. The dynamics of purely ‘internal’ comparisons are mentioned when they are relevant in contrast and compared to comparisons equally including external instruments.

⁵ When talking about the citations under the ‘facts’-section of the case, we point at references to external instruments mentioned under headings such as “Relevant European and international material”, “Relevant domestic and international law and practice”, “Relevant international materials”, *etc.* External instruments that had been cited under the ‘facts’-section as part of the heading “circumstances of the case” had not been included. Such instruments are only part of the analysis in case they are explicitly mentioned as relevant in respect of interpreting and applying the Convention *de jure* (in the ‘law’-section of the case).

the case while it does not take them into account – or, at least not explicitly – in the second part of the case, when it develops the argumentation in ‘law’. In addition, among the cases that *do* refer to external instruments in the ‘law’-section, often, many more external instruments appear under the ‘facts’ (not taken up in the ‘law’-section).

123. The prevalence rate of external referencing becomes higher when we include instruments mentioned by the (third) parties or by the separate judges. In our pool of cases, there are 20 cases in which (third) parties or separate judges refer to external instruments while the Grand Chamber, in the ‘law’-section, does not explicitly use these instruments. When we also count the references to external instruments by (third) parties and separate judges (as far as they references appear in the text of the judgments and decisions), the number of cases that import external instruments rises to 115. In other words, in 85 percent of the studied cases, *or* the (separate) judges *or* the (third) parties mention external instruments in order to interpret and apply the Convention. This implies that in several cases, despite the introduction of external instruments by (third) parties, the judges do not – or, at least not explicitly – pick up these instruments. Also, it happens that the judges of the majority do not explicitly mention external instruments whereas some separate judges rely on them in their legal arguments.

124. To obtain a more precise image, we will also look at the number of arguments in which external instruments are used in the *de jure* reasoning. For that purpose, each argument that has a specific function (like establishing a definition, creating an ‘evolutive’ or ‘harmonious’ interpretation, shaping positive requirements under the Convention, *etc.*)⁶ and that uses external instruments to exercise that function, is included. This calculation leads to the establishment of another prevalence rate, which does not allude to the number of cases in which external referencing appears, but to the number of arguments (corresponding to a certain argumentative function) that (partly) build on external instruments. Doing so, it appears that in the pool of cases, 175 arguments include external instruments. When we put this number in the light of the total amount of examined cases, we can conclude that each Grand Chamber case, on average, contains 1,3 arguments including external instruments. Of course, this quantitative number seems odd in a context of legal reasoning: judges do not make ‘a half’ or ‘a quarter’ of an argument. This number nonetheless gives us an idea of the average prevalence of the external referencing practice in each case separately. In addition, it offers a better understanding of the prevalence of external referencing over time.⁷

⁶ For an overview of all argumentative functions that external instruments fulfill, see *infra*, Part II, Chapter 3.

⁷ It is not always easy to determine when a certain argument begins and when another starts. Therefore, the reader should address these prevalence rates with some caution. It concerns ‘approximate’ numbers (rather than exact ones) because the exercise of demarcating an intellectual argumentative exercise is difficult to grasp in an exact ‘mathematical’ approach. We have counted each argumentative use that, according to us, corresponds to a

§ 2. A constant pattern over recent years

125. The case law study covers several full calendar years; all Grand Chamber cases of 2009, 2010, 2011, 2012, 2013, 2014 and 2015 are included in the analysis. Do we, over recent times, notice – considering each calendar year as a frame of comparison – striking fluctuations in the total number of cases in which external references occur?
126. As represented in the table on the following page, in 2009, thirteen out of eighteen Grand Chamber cases refer to external instruments in the Grand Chamber's *de jure* reasoning in order to apply or interpret the Convention. This amounts to 72 percent of all Grand Chamber cases in 2009.⁸ In 2010, thirteen out of nineteen Grand Chamber cases include external instruments in the 'law'-section (which amounts to 68 percent of all cases in 2010).⁹ In 2011, external references appear in twelve out of fifteen cases (80 percent)¹⁰; in 2012, they are present in seventeen out of twenty-six cases (65 percent)¹¹; in 2013, in ten out of thirteen cases (77 percent)¹²; in 2014, in twelve out of nineteen cases (63 percent)¹³; and finally, in 2015, external references appear in fifteen out of twenty-three Grand Chamber cases (65 percent).¹⁴

certain argumentative function. For example, when some (one or more) external instruments are used to develop a definition, this had been considered as 'one' argument in which external instruments have been integrated.

⁸ In 2009, five cases neither included an internal comparison nor made any other use of external instruments. In one case, an internal comparison was included without there being references to other external instruments in the Grand Chamber's legal reasoning.

⁹ In 2010, three cases referred neither to an internal comparison nor to any other external instruments. In another three cases, an internal comparison was included without there being any references to other external instruments in the Grand Chamber's legal reasoning.

¹⁰ In 2011, there was not a single Grand Chamber case in which there was neither an internal comparison nor any other use of external instruments in the 'law'-section of the case. In three cases, an internal comparison was included without there being references to other external instruments.

¹¹ In 2012, seven Grand Chamber cases neither include an internal comparison nor any other use of external instruments in the 'law'-section of the case. In two cases, an internal comparison appeared without there being references to other external instruments.

¹² In 2013, two Grand Chamber cases neither used an internal comparison nor any other external instruments in the 'law'-section of the case. In one case, an internal comparison was included without there being references to other external instruments.

¹³ In 2014, six Grand Chamber cases contain neither an internal comparison nor any other use of external instruments. In one case, an internal comparison was included without there being references to other external instruments.

¹⁴ In 2015, six Grand Chamber cases contain neither an internal comparison nor any other use of external instruments. In one case an internal comparison had been included without there being references to other external instruments in the Grand Chamber's legal reasoning.

	2009	2010	2011	2012	2013	2014	2015
Amount of Grand Chamber cases referring to external instruments	13	13	12	17	10	12	15
Percentage of Grand Chamber cases referring to external instruments	72 %	68 %	80 %	65 %	77 %	63 %	65 %

127. We conclude from these numbers that there are no large waves of fluctuation in respect of the overall referencing practice in recent Grand Chamber cases. The percentages of Grand Chamber cases making use of external instruments remain rather constant over the last years; they range between 63 and 80 percent on an annual basis (from the beginning of 2009 until the end of 2015).

128. When we consider the amount of arguments that include external instruments, there are again no striking peaks or troughs.¹⁵ In 2009, there is an average of 1,1 argument, per case, using external instruments.¹⁶ In 2010, 2012 and 2014, this number is 1,2.¹⁷ In 2011, 2013 and 2015, there is an average of 1,4 argument per case.¹⁸ From these average numbers, we note that external referencing in order to interpret and apply the Convention is a rather constant practice over recent years: averages of the external referencing practice, per case, range between 1,1 and 1,4 argument. Thus, external instruments, on average, support one argument in each Grand Chamber case.

	2009	2010	2011	2012	2013	2014	2015
Average amount of arguments referring to external instruments, per Grand Chamber case	1,1	1,2	1,4	1,2	1,4	1,2	1,4

¹⁵ See Annex 2 for an overview, for each case, of the argumentative functions of the referencing practice.

¹⁶ In 2009, we observe the introduction of external instruments in 20 arguments over 18 cases in total.

¹⁷ In 2010, we observe external referencing in 23 arguments spread out over 19 cases; in 2012, we observe the introduction of external instruments in 31 arguments spread out over 26 cases in total; and in 2014, we observe the introduction of external instruments in 23 arguments over 19 cases in total.

¹⁸ In 2011, we observe the use of external instruments in 21 arguments over 15 cases in total. In 2013, we observe this in 18 arguments spread out over 13 cases. And finally, in 2015, there is a referencing practice in 32 arguments spread over 23 cases.

129. While the prevalence rates of external references do not show large peaks or troughs, stronger fluctuations might appear when isolating certain functions of the referencing practice. For instance, as will be demonstrated further, some particular uses of external instruments appear less in the most recent years than that they appeared before.¹⁹

§ 3. Cases without external references

130. In 95 out of 136 examined Grand Chamber cases, the references practice appears in one or several arguments of the ‘law’-section of the case. External instruments are imported to support various argumentative functions in order to interpret several Convention provisions. Cases and arguments that include external instruments are elaborately discussed in the following chapter.²⁰ For now, we will focus on some ‘patterns’ in respect of cases that do *not* use external instruments.²¹

131. Looking at the substance of the cases of our pool that do not import external instruments in the ‘law’ section, we observe one clear pattern: cases that do not include the referencing practice – compared to cases that do make use of external instruments – more often concern ‘procedural aspects’ of human rights protection. Indeed, cases without external references mostly touch upon national procedural aspects (relating to the interpretation and application of Article 6 on the right to a fair trial and of Article 13 on the right to an effective remedy, to procedural aspects of Article 5 on the right to liberty and security of person, to procedural aspects of Article 2 on the right to life, *etc.*) and Strasbourg procedural rules (for instance relating to Article 41 ECHR on just satisfaction, to Article 35 ECHR on the six-month time limit and exhaustion of domestic remedies, to Article 37 ECHR concerning the ‘striking out’ of applications, *etc.*).

132. More particularly, when we take account of all Grand Chamber cases that do not refer to external instruments (41 out of the 136 examined cases), we note that around 60 per cent of these cases clearly concern procedural aspects of human rights protection.²² To

¹⁹ See, for example, *infra*, paras. 292-293.

²⁰ Chapter 2, *infra* p. 67 *et seq.*

²¹ We do only examine here those cases that do not refer *at all* to external instruments to interpret and apply the Convention. We did thus not examine the arguments not using external instruments in those cases that *do* build at some point (in one of the other arguments) on external instruments.

²² ECtHR (GC), *Bykov v. Russia*, 10 March 2009, Appl. No. 4378/02; ECtHR (GC), *Gorou v. Greece (No. 2)*, 20 March 2009, Appl. No. 12686/03; ECtHR (GC), *Léger v. France (striking out)*, 30 March 2009, Appl. No. 19324/02; *Mooren v. Germany*, 9 July 2009; ECtHR (GC), *Kart v. Turkey*, 3 December 2009, Appl. No. 8917/05; ECtHR (GC), *McFarlane v. Ireland*, 10 September 2010, Appl. 31333/06; ECtHR (GC), *Sakhnovskiy v. Russia*, 2 November 2010, Appl. No. 21272/03; ECtHR (GC), *Taxquet v. Belgium*, 16 November 2010, Appl. No. 926/05; ECtHR (GC), *Nejdet Şahin and Perihan Şahin v. Turkey*, 20 October 2011, Appl. No. 13279/05; ECtHR (GC), *Creangă v. Romania*, 23 February 2012, Appl. No. 29226/03; ECtHR (GC), *Van der Heijden v. the Netherlands*, 3 April 2012, Appl. No. 42857/05; ECtHR (GC), *Idalov v. Russia*, 22 May 2012, Appl. No. 5806/03; ECtHR (GC), *De Souza Ribeiro v. France*, 13 December 2012, Appl. No. 22689/07; ECtHR (GC), *Fabris v. France (just satisfaction)*, 7 February 2013, Appl. No. 16574/08; ECtHR (GC), *Del Rio Prada v. Spain*, 21 October 2013, Appl. No. 42750/09; ECtHR (GC), *Kurić and Others v. Slovenia*, 12

compare, of the cases that do refer to external instruments (95 out of the 136 examined cases), around 50 per cent of the cases touches upon procedural aspects. Admittedly, there is not much difference between both percentages, but in the decisions that *do* make use of external referencing, the procedural issues are often accompanied with substantive issues on the merits. *A contrario*, among the cases that *do not* refer to external instruments, procedural aspects are often the sole or main issue under discussion. In addition, the difference between the percentages becomes larger when we exclude the cases that include internal comparative law of national law and practices. When we look at the cases that neither refer to external instruments nor include an internal comparison (31 out of 136 examined cases), around 75 per cent touches upon procedural human rights issues.²³ To compare, from the group of cases that refers to external instruments or that includes an internal comparison (105 out of 136 examined cases), only a little more than 50 per cent concerns procedural aspects.

133. When we take into consideration the cases that include substantive issues that go beyond procedural matters, we arrive at similar observations. From the cases that *do not* refer to external instruments, around 25 per cent touches upon substantive human rights issues (thus going beyond national and Strasbourg procedural questions).²⁴ This percentage drops to 15 when we exclude cases containing an internal comparison from the cases referring to external instruments. Thus, from the cases that neither refer to external instruments nor include an internal comparison, only 15 per cent goes beyond procedural matters.²⁵ From the cases that *do* refer to external instruments, about 50 per cent includes more substantive questions of human rights.

March 2014, Appl. No. 26828/06; ECtHR (GC), *Vučković and Others v. Serbia*, 25 March 2014, Appl. Nos. 17153/11, 17157/11, etc.; ECtHR (GC), *Vistiņš and Perepjolkins v. Latvia* (just satisfaction), 25 March 2014, Appl. No. 71243/01; ECtHR (GC), *Georgia v. Russia (No.1)*, 4 July 2014, Appl. No. 13255/07; ECtHR (GC), *Gross v. Switzerland*, 30 September 2014, Appl. No. 67810/10; ECtHR (GC), *S.J. v. Belgium* (striking out), 19 March 2015, Appl. No. 70055/10; ECtHR (GC), *W.H. v. Sweden* (striking out), 8 April 2015, Appl. No. 49341/10; ECtHR (GC), *M.E. v. Sweden* (striking out), 8 April 2015, Appl. No. 71398/12; ECtHR (GC), *Mustafa Tunç and Fecire Tunç v. Turkey*, 14 April 2015, Appl. No. 24014/05; ECtHR (GC), *Răzvan Mihai Gherghina v. Romania*, 9 July 2015, Appl. No. 42219/07; ECtHR (GC), *Dvorski v. Croatia*, 20 October 2015, Appl. No. 25703/11.

²³ ECtHR (GC), *Bykov v. Russia*, op. cit.; ECtHR (GC), *Gorou v. Greece (No.2)*, op. cit.; ECtHR (GC), *Leger v. France*, op. cit.; ECtHR (GC), *Mooren v. Germany*, 9 July 2009, Appl. No. 11364/03; ECtHR (GC), *McFarlane v. Ireland*, op. cit.; ECtHR (GC), *Sakhnovskiy v. Russia*, op. cit.; ECtHR (GC), *Creangă v. Romania*, op. cit.; ECtHR (GC), *Idalov v. Russia*, op. cit.; ECtHR (GC), *De Souza Ribeiro v. France*, op. cit.; ECtHR (GC), *Fabris v. France* (just satisfaction), op. cit.; ECtHR (GC), *Del Rio Prada v. Spain*, op. cit.; ECtHR (GC), *Kurić and Others v. Slovenia*; ECtHR (GC), *Vučković and Others v. Serbia*, op. cit.; ECtHR (GC), *Vistiņš and Perepjolkins v. Latvia* (just satisfaction), op. cit.; ECtHR (GC), *Georgia v. Russia (No.1)*, op. cit.; ECtHR (GC), *Gross v. Switzerland*, op. cit.; ECtHR (GC), *S.J. v. Belgium* (striking out), op. cit.; ECtHR (GC), *W.H. v. Sweden* (striking out), op. cit.; ECtHR (GC), *M.E. v. Sweden* (striking out), op. cit.; ECtHR (GC), *Mustafa Tunç and Fecire Tunç v. Turkey*, op. cit.; ECtHR (GC), *Răzvan Mihai Gherghina v. Romania*, op. cit.; ECtHR (GC), *Dvorski v. Croatia*, op. cit.

²⁴ ECtHR (GC), *Adrejeva v. Latvia*, 18 February 2009, Appl. No. 55707/00; ECtHR (GC), *Sanoma Uitgevers B.V. v. the Netherlands*, 14 September 2010, Appl. No. 38224/03; ECtHR (GC), *Şerife Yiğit v. Turkey*, 2 November 2010, Appl. No. 3976/05; ECtHR (GC), *Paksas v. Lithuania*, 6 January 2011, Appl. No. 34932/04; ECtHR (GC), *Lautsi and Others v. Italy*, 18 March 2011, Appl. No. 30814/06; ECtHR (GC), *Mouvement raëlien suisse v. Switzerland*, 13 July 2012, Appl. No. 16354/06; ECtHR (GC), *Söderman v. Sweden*, 12 November 2013, Appl. No. 5786/08; ECtHR (GC), *Georgia v. Russia (No. 1)*, op. cit.; ECtHR (GC), *Hämäläinen v. Finland*, 16 July 2014, Appl. No. 37359/09; ECtHR (GC), *Centre of Legal Resources v. Romania*, 17 July 2014, Appl. No. 47848/08.

²⁵ ECtHR (GC), *Adrejeva v. Latvia*, op. cit.; ECtHR (GC), *Sanoma Uitgevers B.V. v. the Netherlands*, op. cit.; ECtHR (GC), *Mouvement raëlien suisse v. Switzerland*, op. cit.; ECtHR (GC), *Georgia v. Russia (No. 1)*, op. cit.; ECtHR (GC), *Centre of Legal Resources v. Romania*, op. cit.

134. The least we can say, based on the latter consideration, is that there is some correlation between the use of external instruments and the issues under consideration; the more the Grand Chamber cases treat aspects of human rights beyond procedural questions, the more the Court considers it useful to rely on external instruments for the interpretation and application of the Convention.

§ 4. Concluding observations

135. The mobilization by the Grand Chamber of external instruments to interpret and apply the Convention is no marginal phenomenon; it is often present. External references appear in about 70 percent – or a great majority – of the Grand Chamber cases of our pool. The practice is present on quite a constant basis; over recent years, we do not notice great fluctuations or changes with regard to the overall prevalence rate. When we consider the prevalence in the light of the issues of the case, chances are higher that external references appear in legal reasoning about substantive human rights questions, compared to arguments on procedural aspects of national- or Strasbourg judicial cases.

136. The quantitative outcome of our analysis gives an idea of prevalence and patterns of the referencing practice in its general appearance. The latter observations do not yet offer an idea of the characteristics of the mobilized external instruments and the particular functions they exercise in legal argumentations. These topics are addressed in the following chapters.²⁶

²⁶ Throughout the following sections, we will not lose sight of quantitative prevalence and patterns, for instance by having a look at the amount (and quantitative patterns) of references that serve a particular argumentative function. The exhaustive character of the case law study allows such quantitative approaches.

CHAPTER 2 - A MIX OF EXTERNAL INSTRUMENTS

137. In a globalized world, we note a normative context that consists of a diversity of (human rights) instruments exists, varying in scope, origin, and legal status. When examining our pool of cases, it appears that the Grand Chamber of the Strasbourg Court takes account of this heterogeneous context in all its diversity when interpreting and applying the Convention. For argumentative purposes, the Court thus acknowledges, in comprehensive or holistic way, the diversity of instruments that surrounds the ECHR and its Protocols. More particularly, the Court references instruments that vary as to their scope *ratione materiae* (§ 1.), *ratione personae* (§ 2.), *ratione loci* (§ 3.), to their origin (§ 4.), and to their legal force (§ 5.).²⁷

§ 1. Diversity *ratione materiae*

138. Throughout the examined Grand Chamber cases, the ECtHR refers to external instruments that address diverse normative domains *ratione materiae*. References are made to instruments with a general content (§ 1.1.) as well as to instruments that are part of specific normative branches, including human rights (§ 1.2.).

§ 1.1. References to instruments of ‘general content’

139. With normative instruments with a ‘general content’, we mean instruments containing provisions that – internationally speaking – are subjected to generalisation and that therefore, are “...susceptible of being used in different international legal contexts when specific norms are lacking or are inadequate”.²⁸ It thus concerns carriers of norms of a general nature determining the structure and the functioning of international law. Carriers with a ‘general content’ contrast to carriers of norms with a ‘particular’ scope.²⁹

²⁷ The categorization of instruments on the basis of their scope, governance level, force and monitoring mechanism had been inspired by Eva Brems who uses a comparable (though not identical) division when analyzing the multilayered and fragmented nature of human rights law. See E. Brems, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *E.J.H.R.-E.J.H.R.* 2014, vol. 4, pp. 448 *et seq.*

²⁸ F. Vanneste, F. “Relationship between International Human Rights Law and General International Law: Assessing the Specialty Claims of International Human Rights Law”, doctoral thesis, KULeuven, December 2008, p. 24, available at <https://lirias.kuleuven.be/bitstream/123456789/233805/1/Relationship+between+general+international+law+and+human+rights+law.pdf> (visited on 26 September 2016).

²⁹ *Ibidem.*

140. The importation of instruments of ‘general scope’ often coincides with the importation of instruments of ‘general international law’.³⁰ Indeed, one of the constitutive elements of ‘general international law’ is that the content of its norms, as Vanneste says, is “...subject to generalization” and “...aspires to permeate all subsystems of international law”.³¹ Vanneste considers this as the ‘substantial aspect’ of the definition of ‘general international law’. Substantively, the norms of general international law have the ambition to “...impact on the whole international system”.³²
141. Instruments with a general content have the potential to be of importance in various international subsystems, such as human rights protection systems.³³ How were they of importance to the Strasbourg Court? Did this Court make use of them? The answer is affirmative. Within our pool of Strasbourg case law, we notice references to external instruments that have a general substantive scope *ratione materiae*. Throughout these references, the use of certain instruments is particularly noteworthy, namely those that concern the topic of treaty interpretation and of State responsibility for international wrongful acts as well as, to a lesser extent, those relating to issues of jurisdictional immunities of States and diplomatic protection.
142. Concerning the topic of treaty interpretation, the Court attaches particular importance to the interpretative rules of the VCLT.³⁴ With regard to State responsibility for international wrongful acts, the Court mainly refers to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001.³⁵ The ILC Draft Articles on

³⁰ For norms to become norms of general international law, there is a need to proof their general acceptance (or *opinio juris*) by States as being binding norms.

³¹ F. Vanneste, *op. cit.*, 2008, p. 24.

³² *Ibidem*.

³³ *Ibidem*, p. 26. Note that also human rights norms, *a fortiori* when they have gained the status of customary law, might be of general scope.

³⁴ On an exhaustive basis, references to the VCLT appear in the following cases of our pool of cases: ECtHR (GC), *Šilih v. Slovenia*, 9 April 2009, Appl. No. 71463/01, para. 154; ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2), 30 June 2009, Appl. No. 32772/02, para. 87; ECtHR (GC), *Varnava and Others v. Turkey*, 18 September 2009, Appl. Nos. 16064/90, 16065/90, *et seq.*, para. 130; ECtHR (GC), *Cudak v. Lithuania*, 23 March 2010, Appl. No. 15869/02, para. 56; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, 6 July 2010, Appl. No. 41615/07, para. 131; ECtHR (GC), decision of *Chiragov and Others v. Armenia*, 14 December 2011, Appl. No. 13216/05, para. 93; ECtHR (GC), *Sabeh El Leil v. France*, 29 June 2011, Appl. No. 34869/05, para. 48; ECtHR (GC), decision of *Sargsyan v. Azerbaijan*, 14 December 2011, Appl. No. 40167/06, para. 80; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09, para. 129, paras. 170-171; ECtHR (GC), *Nada v. Switzerland*, 12 September 2012, Appl. No. 10593/08, para. 169; ECtHR (GC), *Janowiec and Others v. Russia*, 21 October 2013, Appl. Nos. 55508/07 and 29520/09, paras. 128 and 211; ECtHR (GC), *X v. Latvia*, 26 November 2013, Appl. No. 27853/09, para. 92; ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), 12 May 2014, Appl. No. 25781/94, para. 23; ECtHR (GC), *Marguš v. Croatia*, 27 May 2014, Appl. No. 445/10, para. 129; ECtHR (GC), *Hassan v. the United Kingdom*, 16 September 2014, Appl. No. 29750/09, para. 100; ECtHR (GC), *Perinçek v. Switzerland*, 15 October 2015, Appl. No. 27510/08, para. 149; ECtHR (GC), *Vasiliauskas v. Lithuania*, 20 October 2015, Appl. No. 35343/05, para. 183.

³⁵ On an exhaustive basis, in our pool of cases, references to this instrument appear in: ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2), *op. cit.*, para. 86; ECtHR (GC), decision of *Chiragov and Others v. Armenia*, *op. cit.*, para. 82; ECtHR (GC), decision of *Sargsyan v. Azerbaijan*, para. 73; ECtHR (GC), *El Masri v. “the former Yugoslav Republic of Macedonia”*, 13 December 2012, Appl. No. 39630/09, para. 240; ECtHR (GC), *Jaloud v. the Netherlands*, 20 November 2014, Appl. No. 47708/08, para. 151. In the cases of *Chiragov and Others* and *Sargsyan* the Court also refers to the ‘Cairo case’, General Claims Commission (1929) Reports of International Awards 5

Jurisdictional Immunities of States and their Property of 1991 and the UN Convention on Jurisdictional Immunities of States and their Property of 2004 are the instruments introduced when the Court considers jurisdictional immunities of States.³⁶ The ILC Draft Articles on Diplomatic Protection of 2006 is the most important mobilized instrument when the Court elaborates on the topic of diplomatic protection.³⁷

143. In respect of references to instruments with a 'general content', the Court relies often on instruments of the ILC, which are by themselves not binding, but which might nonetheless reflect binding customary law. This is not suprising. The ILC had been established by the UN General Assembly in 1947 to "...initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification", often codifying general rules and rules of custom.³⁸

§ 1.2. References to instruments of 'specific content'

144. The Strasbourg Court, besides importing instruments with a general content, also refers to specialized rules that belong to specific domains of international law, including human rights law.³⁹ For categorization purposes, references to instruments of 'human rights law' are treated separately from references to instruments belonging to subsystems that *ratione materiae* fall outside the human rights domain. In doing so, we follow a positivistic approach that considers rights as human rights in so far as the instruments that contain the rights reflect formal legal sources and that recognize themselves as being sources of 'human rights'.⁴⁰

(RIAA), p. 516. All external references in the cases of *Chiragov and Others* and *Sargsyan* are done in an indirect manner since they are included in an explicit citation of a Strasbourg precedent (namely the case of ECtHR (GC), *Ilaşcu and Others v. Moldova and Russia*, 8 July 2004, Appl. No. 48787/99). In the case of *Al-Jedda v. the United Kingdom*, also in respect of international responsibility, the Court refers to the ILC Draft Articles on the Responsibility of International Organisations (ECtHR (GC), *Al-Jedda v. the United Kingdom*, 7 July 2011, Appl. No. 27021/08, para. 84).

³⁶ These instruments, on an exhaustive basis, appear more particularly in ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 64, and ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, para. 49. The case of *Sabeh El Leil v. France* also refers to a commentary of the ILC on these Articles (in para. 49).

³⁷ ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), *op. cit.*, paras. 45-46. The court also refers to the Vienna Convention on Consular Relations in ECtHR (GC), *El-Masri v. "the former Yugoslav Republic of Macedonia"*, *op. cit.*, para. 236.

³⁸ This is part of the mandate of the Assembly under Article 13 (1) (a) of the Charter of the United Nations. The ILC is not politically representative and its members are persons chosen on the basis of their recognised competence in international law (Article 2, paragraph 1 of the Statute of the ILC). See for more information: <http://legal.un.org/ilc/> (visited on 19 October 2016).

³⁹ When human rights have acquired the status of *jus cogens* (i.e. rules that can not be derogated from by an agreement *inter partes*), they are binding on all States and therefore, can be considered as 'general international law'. F. Vanneste, *op. cit.*, 2008, p. 23.

⁴⁰ See H.L.A Hart, *The Concept of Law*, Clarendon Law Series, 1961. On this topic, see also P. Allott, *The Health of Nations: Society and Law Beyond the State*, 2002, p. 47 and V. Mantouvalou, "Are Labour Rights Human Rights?", *European Labour Law Journal* 2012, pp. 151 *et seq.*

145. The adoption of a positivistic approach for categorization purposes does however not prevent, at a further stage of research, to abandon this strict division between human rights instruments and other specific instruments; we want to leave open the idea that rights, even though not formally recognized as ‘human rights’ by their instrumental carrier, might gain a status of ‘human rights’, as a result, for instance, of the referencing practice. This idea fits a more instrumental approach to human rights law, focusing on the functions human rights have, rather than on the kind of instruments that carry them.⁴¹ Inspired by authors as Buergenthal, Shelton and Stewart, human rights law is then understood as “...the law that deals with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights”.⁴² However, for now, and for categorization purposes, we remain close to a positivist approach separating *ratione materiae* classic human rights instruments from other instruments with a ‘specific content’.⁴³
146. With respect to references to human rights instruments, the Grand Chamber regularly refers to *comprehensive* human rights catalogues covering rights of the first and/or second generation of human rights, such as the UDHR⁴⁴, the AfCHR⁴⁵, the ACHR⁴⁶, the EU Charter⁴⁷, the ICCPR⁴⁸, the ICESCR⁴⁹, and the (Revised) European Social Charter⁵⁰.⁵¹ In

⁴¹ See V. Mantouvalou, *op. cit.*, p. 151 and pp. 156 *et seq.*

⁴² T. Buergenthal, D. Shelton, and J. Stewart, *International Human Rights in a Nutshell*, 3rd ed., West, St. Paul, 2002, 450 p. See also Vanneste, *op. cit.*, 2008, p. 14.

⁴³ The categorization *ratione materiae* of the matters that are covered by the imported instruments is exhaustive, meaning that it is based on all case studies that are part of our pool of case law. To give a comprehensive overview of the substantive domains of the imported instruments, it covers *all* imported external instruments elaborated by States, international and hybrid organizations, academics and NGOs. However, external instruments of (*quasi*-) judicial origin including case law, opinions, views, general recommendations, and concluding observations of (*quasi*-) judicial monitoring bodies (such as the ACHR, the ECJ, the UN Treaty Bodies, the ICTY, the ICJ, *etc.*) will not be mentioned for the purpose of demonstrating the diversity of references *ratione materiae*. Including (*quasi*-) judicial instruments (offering viewpoints on the interpretation and application of those normative instruments that had been included in the overview) would not add relevant information in demonstrating the material diversity of the instruments referred to. Instruments issued by (*quasi*-) judicial actors will of course be mentioned when elaborating on the diverse origin, status, *etc.* of the imported instruments.

⁴⁴ All cases of our pool of case law that refer to the UDHR are: ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, 19 October 2012, Appl. Nos. 43370/04, 8252/05 and 18454/06, para. 136; ECtHR (GC), *O’Keeffe v. Ireland*, 28 January 2014, Appl. No. 35810/09, para. 147 and ECtHR (GC), *Bouyid v. Belgium*, 28 September 2015, Appl. No. 23380/09, para. 89.

⁴⁵ All cases of our pool of case law that refer to the AfCHR are: ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012, Appl. No. 42202/07, para. 72; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89.

⁴⁶ All cases of our pool of case law that refer to the ACHR, see ECtHR (GC), *Sergey Zolotukhin v. Russia*, 10 February 2009, Appl. No. 14939/03, para. 79; ECtHR (GC), *Scoppola v. Italy (No. 2)*, 17 September 2009, Appl. No. 10249/03, para. 105; ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 72; ECtHR (GC), *Scoppola v. Italy (No. 3)*, 22 May 2012, Appl. No. 126/05, para. 95; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89. For cases that take account of case law of the ACHR, see *infra* para. 146.

⁴⁷ All cases of our pool of case law that refer to the EU Charter are: ECtHR (GC), *Demir and Baykara v. Turkey*, 12 November 2008, Appl. No. 34503/97, paras. 105 and 150; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Scoppola v. Italy (No. 2)*, *op. cit.*, para. 105; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 135; ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011, Appl. No. 23459/03, para. 107; ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 135; ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 97; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89. For cases that refer to case law of the ECJ (possibly covering aspects of the EU Charter), see *infra* para. 159.

⁴⁸ All cases of our pool of case law that refer to the ICCPR are: ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 99; ECtHR (GC), *Salduz v. Turkey*, 27 November 2008, Appl. No. 36391/02, para. 53; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, para. 135; ECtHR (GC), *Bayatyan v. Armenia*, para. 105; ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 72; ECtHR (GC), *Scoppola v. Italy (No. 3)*, *op. cit.*, paras. 82 and 95; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 205; ECtHR (GC), *Vinter and Others v. the United Kingdom*, 9 July 2013, Appl. Nos.

addition, the Court also refers to more *specialized* human rights instruments that cover specific human rights areas, such as the protection and prohibition of discrimination in respect of certain groups or situations (in our pool of cases, it concerns *nota bene* references to the UN Convention on the Elimination of All Forms of Discrimination against Women (hereafter: CEDAW)⁵², the UN International Convention on the Elimination of All forms of Racial Discrimination (hereafter: ICERD)⁵³, the CRC⁵⁴ and the UN Convention on the Rights of Persons with Disabilities (hereafter: CRPD⁵⁵), the protection of particular human rights such as the prohibition of torture or other forms of inhuman or degrading treatment, and the protection from enforced disappearances (in our pool of cases, we observe in this respect references to the CAT⁵⁶ and to the UN International Convention for the Protection of All Persons from Enforced Disappearance (hereafter: ICCPR)⁵⁷).

66069/09, 130/10 and 3896/10, para. 116; ECtHR (GC), *Allen v. the United Kingdom*, 12 July 2013, Appl. No. 25424/09, paras. 105 and 133; ECtHR (GC), *O’Keeffe v. Ireland*, *op. cit.*, para. 147; ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 101; ECtHR (GC), *Khoroshenko v. Russia*, 30 June 2015, Appl. No. 41418/04, para. 143; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 89 and 109; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 265. For all cases that refer to views and opinions of the HRC (without necessarily mentioning the ICCPR), see *infra* para. 162 and the footnotes to this paragraph.

⁴⁹ All cases of our pool of case law that refer to the ICESCR are: ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 99; ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136; ECtHR (GC), *O’Keeffe v. Ireland*, *op. cit.*, para. 147; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 89 and 109.

⁵⁰ All cases of our pool of case law that refer to the (Revised) European Social Charter are: ECtHR (GC), *Demir and Baykara v. Turkey*, paras. 103 and 149; ECtHR (GC), *Konstantin Markin v. Russia*, 22 March 2012, Appl. No. 30078/06, para. 140; ECtHR (GC), *O’Keeffe v. Ireland*, *op. cit.*, para. 147.

⁵¹ On the one hand, we consider these instruments as ‘comprehensive’ as they include a comprehensive spectrum of human rights (without content-wise focusing on a very narrow aspect of human rights protection such as the right to be free from torture or other inhuman or degrading treatment). On the other hand we treat these instruments under the heading of ‘specific normative instruments’ as they focus on the area of ‘human rights’ specifically.

⁵² All cases of our pool of case law that refer to the CEDAW: ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 135; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89.

⁵³ All cases of our pool of case law that refer to the ICERD: ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009, Appl. Nos. 27996/06 and 34836/06, para. 43; ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 260 *et seq.* For all cases that refer to views and comments of the CERD (quasi-judicial Committee), without necessarily mentioning the CERD (as a legal instrument), see *infra* para. 162 and the footnotes to this paragraph.

⁵⁴ All cases of our pool of case law that refer to the CRC, are: ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60; ECtHR (GC), *S. and Marper v. the United Kingdom*, 4 December 2008, Appl. Nos. 30562/04 and 30566/04, para. 124; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, para. 132; ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136; ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 96; ECtHR (GC), *O’Keeffe v. Ireland*, *op. cit.*, para. 147; ECtHR (GC), *Tarakhel v. Switzerland*, 4 November 2014, Appl. No. 29217/12, para. 99; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 89 and 109. For all cases that refer to views and comments of the CRC (quasi-judicial Committee), without necessarily mentioning the CRC (as a legal instrument), see *infra* para. 162 and the footnotes to this paragraph.

⁵⁵ All cases of our pool of case law that refer to the CRPD: ECtHR (GC), *Stanev v. Bulgaria*, 17 January 2012, Appl. No. 36760/06, para. 244; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89. For all cases that refer to views and comments of the CRPD (quasi-judicial Committee), without necessarily mentioning the CRPD (as a legal instrument), see *infra* para. 162 and the footnotes to this paragraph.

⁵⁶ All cases of the pool of case law that refer to the CAT: ECtHR (GC), *Gäfgen v. Germany*, 1 June 2010, Appl. No. 22978/05, paras. 90 and 108; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 197; ECtHR, *Marguš v. Croatia*, *op. cit.*, para. 132; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89. For all cases that refer to views and comments of the CAT (quasi-judicial Committee), without necessarily mentioning the CAT (as a legal instrument), see *infra* para. 162 and the footnotes to this paragraph.

⁵⁷ All cases of the pool of case law that refer to the ICCPR: ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 163; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 240; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89.

147. Besides the more classic human rights instrument, the Grand Chamber refers to other instruments that have a specific content.
148. In several cases of the pool, the Grand Chamber refers to instruments of international humanitarian law.⁵⁸ More particularly, references occur to one or more of the Geneva Conventions and their Protocols⁵⁹, to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity⁶⁰, to the Convention on the Prevention and Punishment of the Crime of Genocide⁶¹, to the Nuremberg Charter and the Nuremberg Principles⁶², to several military codes and manuals of war (such as the Lieber Code, Field Manuals, the Oxford Manual, the Brussels' Declaration,...)⁶³, to the Hague Convention on Land Warfare and their annexed Regulations,⁶⁴ to international agreements and UN Resolutions⁶⁵, and to doctrine, expert studies, diplomatic letters and case law on international humanitarian law.⁶⁶
149. Also, the Grand Chamber refers on several occasions to instruments generally associated with labor law (and related issues of social security). The case of *Demir and Baykara v. Turkey* already offered an example in this respect, including several references to ILO conventions.⁶⁷ Also other Grand Chamber cases refer to instruments concerning labor

⁵⁸ When this legal domain contains customary norms, one could also conceive it as law with a 'general content'.

⁵⁹ Such as the 1949 Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and at Sea, on the Treatment of Prisoners of War, and for the Protection of Civilian Persons in Time of War. For all cases of the pool referring to this instrument, see: ECtHR (GC), *Varnava and Others v. Turkey*, op. cit., para. 185; ECtHR (GC), *Al-Jedda v. the United Kingdom*, op. cit., para. 107; ECtHR (GC), *Maktouf and Damjanović v. Bosnia and Herzegovina*, 18 July 2013, Appl. Nos. 2312/08 and 34179/08, para. 74; ECtHR (GC), *Hassan v. the United Kingdom*, op. cit., paras. 101 et seq.; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 231; ECtHR (GC), *Marguš v. Croatia*, op. cit., para. 132.

⁶⁰ This instrument dates from 1974. For all cases of the pool referring to this instrument, see: ECtHR (GC), *Kononov v. Latvia*, 17 May 2010, Appl. No. 36376/04, para. 232; ECtHR (GC), *Marguš v. Croatia*, op. cit., para. 133. ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., para. 170.

⁶¹ This instrument dates from 1948. For all cases of the pool referring to this instrument, see: ECtHR (GC), *Marguš v. Croatia*, op. cit., para. 132; ECtHR (GC), *Perinçek v. Switzerland*, op. cit., para. 238; ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., paras. 170 et seq.

⁶² For all cases of our pool referring to these instruments, see: ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 186 and 205; ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., paras. 172 et seq..

⁶³ ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 207 et seq.

⁶⁴ For all cases of our pool referring to these instruments, see: *ibidem*, paras. 200 et seq.; ECtHR (GC), *Al-Jedda v. the United Kingdom*, op. cit., para. 107; ECtHR (GC), *Jaloud v. the Netherlands*, op. cit., para. 142; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 144.

⁶⁵ ECtHR (GC), *Al-Jedda v. the United Kingdom*, op. cit., para. 106; ECtHR (GC), *Hassan v. the United Kingdom*, op. cit., para. 78; ECtHR (GC), *Jaloud v. the Netherlands*, op. cit., paras. 144 et seq.; ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., para. 167; ECtHR (GC), *Nada v. Switzerland*, op. cit., paras. 172 et seq.

⁶⁶ For cases referring to doctrine, expert studies, letters, and/or case law relating to international humanitarian law: ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 194 et seq.; ECtHR (GC), *Al-Jedda v. the United Kingdom*, paras. 105 et seq.; ECtHR (GC), *Hassan v. the United Kingdom*, op. cit., para. 132; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 232; ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., para. 174.

⁶⁷ There are references to: ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (also imported in ECtHR (GC), *Sindicatul "Păstorul cel Bun" v. Romania*, 9 July 2013, Appl. No. 2330/09, para. 142), ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively and ILO Convention No. 151 concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service. See ECtHR (GC), *Demir and Baykara v. Turkey*, op. cit., paras. 100, 102 and 123-125.

law such as ILO conventions and recommendations⁶⁸, CoE codes, initiatives, resolutions and recommendations⁶⁹, and EU Council Directives.⁷⁰

150. In our pool of Grand Chamber cases, references to other ‘specific’ substantive normative areas, cover on an exhaustive basis:

- prevention and punishment of crimes⁷¹;

⁶⁸ In our pool of examined cases the Court, on an exhaustive basis, refers to Convention No. 29 of 1930 on Forced Labour (ECtHR (GC), *Stummer v. Austria*, 7 July 2011, Appl. No. 37452/02, paras. 117 *et seq.*); ILO Convention of 1952 on Social Security (ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 85); ILO Convention No. C111 of 1958 on Discrimination in Respect of Employment and Occupation (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 148); ILO General Conference Recommendation No. 143 of 1971 on Workers’ Representatives (ECtHR (GC), *Palomo Sánchez and Others v. Spain*, 12 September 2011, Appl. Nos. 28955/06, 28957/06, *etc.*, para. 56); ILO Convention No. 156 of 1981 on Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, and Recommendation No. 165 supplementing that Convention (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140); ILO Convention of 1982 on the Establishment of an International System for the Maintenance of Rights in Social Security (ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, paras. 85-88); Principles of the ILO Committee on Freedom of Association as summarised in the fifth edition (revised) of ‘the Digest of Decisions and Principles of the Committee on Freedom of Association of the Governing Body of the International Labour Office’ of 2006 (ECtHR (GC), *Palomo Sánchez and Others v. Spain*, *op. cit.*, para. 56); ILO Recommendation No. 198 of 2006 on the Employment Relationship (ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, *op. cit.*, para. 142).

⁶⁹ In the pool of examined cases and on an exhaustive basis, there are references to: the 1990 CoE European Code of Social Security (ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 85); the CoE Initiative of April 2008 to draw up a New Framework Agreement for the Coordination of Social Security Schemes within Member States CM(2008)71 (ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 88); CoE PACE Res.1274(2002) on Parental Leave; CoE PACE Rec. 1769(2006) on the Need to Reconcile Work and Family Life; CoE COM Rec.No.R(96)5 on Reconciling Work and Family Life (the latter three instruments had been referred to by: ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140).

⁷⁰ In the pool of examined cases and on an exhaustive basis, there are references to EU Council Directive 78/2000/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation (ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, *op. cit.*, para. 142; ECtHR (GC), *Fernández Martínez v. Spain*, 12 June 2014, Appl. No. 56030/07, para. 138). References also appeared to ECJ case law, see ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140.

⁷¹ It concerns the following instruments: CoE COM Rec(2003)20 on New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice, 24 September 2003, and CoE COM Rec No.R(87)20 on Social Reactions to Juvenile Delinquency, 17 September 1987 (both referred to by ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60); CoE COM Rec No.R(92)1 on the Use of Analysis of DNA within the Framework of the Criminal Justice System (ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 103, 105 and 110); the Rome Statute of the ICC (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Scoppola v. Italy* (no. 2), *op. cit.*, para. 105; ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 163; ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 107 *et seq.*; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118, ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 136; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 238; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 170); the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ECtHR (GC), *Medvedyev and Others v. France*, 29 March 2010, Appl. No. 3394/03, para. 83), International Convention on the International Validity of Criminal Judgments (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 107); the ICC rules on Procedure and Evidence (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118); Statutes of international criminal tribunals other than the ICC (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, para. 211; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 170); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 or 1974 (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, para. 232; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 133; ECtHR (GC), *Vasiliauskas v. Lithuania*, para. 170); doctrine on the issue of war crimes (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 194, 207 and 209 *et seq.*; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 174); CoE COM Guidelines of 20 March 2011 on Eradicating Impunity for Serious Human Rights Violations (ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 192); 1948 Convention on the Prevention and Punishment of the Crime of Genocide (ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 132; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 238; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, paras. 167 *et seq.*); the European Parliament Res. A3-0056 on Human Rights in the World and Community Human Rights Policy of 12 March 1993 (ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134); UN Commission on Human Rights Res.2002/79 of 25 April 2002 and Res.2003/72 of 25 April 2003 on Impunity (ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134); CoE COM Convention on Preventing and Combating Violence against Women and Domestic Violence (ECtHR (GC), *Rohlena v. Czech Republic*, 27 January 2015, Appl. No. 59552/08, para. 71); CoE Convention on Action against Trafficking in Human Beings of 16 May 2005 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89); CoE COM CM/Rec(2008)11 on the European Rules for Juvenile Offenders subject to Sanctions or Measures (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); EU materials like Framework Decision 2008/913/JHA of 28 November 2008 of the Council of the EU on Combating certain Forms

- use and protection of personal data and privacy matters⁷²;
- immigration and refugee matters⁷³;
- detention, imprisonment, prison administration and the execution of sentences⁷⁴;

and Expressions of Racism and Xenophobia by means of Criminal Law (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 255); European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and 2000 (ECtHR (GC), *Schatschaschwili v. Germany*, 15 December 2015, Appl. No. 9154/10, para. 139); EU Council Regulation 96/C 329/01 of 17 January 1995 on the Lawful Interception of Telecommunications (ECtHR (GC), *Roman Zakharov v. Russia*, 4 December 2015, Appl. No. 47143/06, para. 269); CoE Convention ETS. No. 172 on the Protection of the Environment through Criminal Law of 1998 (ECtHR (GC), *Mangouras v. Spain*, 28 September 2010, Appl. No. 12050/04, para. 86); EU Directive 2005/35/EC of the European Parliament and of the Council on Ship-source Pollution and on the Introduction of Penalties for Infringements (ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86); Amnesty International Fair Trials Manual (ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, 17 July 2014, Appl. Nos. 32541/08 and 43441/08, para. 132); CoE COM Rec(2003)13 on the Provision of Information through Media in relation to Criminal Proceedings (ECtHR (GC), *Axel Springer AG v. Germany*, 7 February 2012, Appl. No. 39954/08, para. 96).

⁷² CoE Convention of 1981 on the Protection of Individuals with regard to Automatic Processing of Personal Data; CoE COM Rec.No.R(87)15 on the Use of Personal Data in the Police Sector; CoE COM Rec.No.R(92)1 on the Use of Analysis of DNA within the Framework of the Criminal Justice System (the latter instruments are all imported in: ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 76, 103, 105, and 107 *et seq.*); EU Council Regulation 96/C 329/01 of 17 January 1995 on the Lawful Interception of Telecommunications (ECtHR (GC), *Roman Zakharov v. Russia*, *op. cit.*, para. 269); CoE PACE Res.1165(1998) on the Right to Privacy (ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 91; ECtHR (GC), *Von Hannover v. Germany* (No. 2), 7 February 2012, Appl. Nos. 40660/08 and 60641/08, paras. 106 and 110; ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France*, 10 November 2015, Appl. No. 40454/07, para. 120).

⁷³ CoE Convention on Nationality (ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 163); Convention implementing the Schengen Agreement of 14 June 1985 (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79); the 1951 Geneva Convention ('Refugee Convention') (ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011, Appl. No. 30696/09, paras. 216 and 251; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 97); EU Council Directive 2003/9/EC of 27 January 2003 on Minimum Standards for the Reception of Asylum Seekers ('Reception Directive') (ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, paras. 251 and 263; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, paras. 96-97) and many reports, including from NGOs on the situation of refugees (ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 300); UNHCR Note on International Protection of 13 September 2001, A/AC.96/951 and a letter written by Mr Jacques Barrot, Vice-President of the European Commission (ECtHR (GC), *Hirsi Jamaa and Others*, *op. cit.*, paras. 134-135); Dublin Regulation applicable to Switzerland under the terms of the association agreement of 26 October 2004 between the Swiss Confederation and the European Community (ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88); Regulation no. 604/2013 of the European Parliament and the Council of 26 June 2013 ('the Dublin III Regulation') (ECtHR, *Tarakhel v. Switzerland*, *op. cit.*, para. 88); UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 184), CoE PACE Res1708(2010) on Solving Property Issues of Refugees and Displaced Persons (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 237; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, 16 June 2015, Appl. No. 13216/05, paras. 198 *et seq.*); UN Principles on Housing and Property Restitution for Refugees and Displaced Persons ('Pinheiro Principles') of 28 June 2005, E/CN.4/Sub.2/2005/17 (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 238; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, paras. 136 and 199); CoE PACE Rec.799(1977) on Political Rights and Position of Aliens (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 121).

⁷⁴ CoE COM Res.(73)5 on Standard Minimum Rules for the Treatment of Prisoners of 1973 (ECtHR, *Salduz v. Turkey*, *op. cit.*, para. 53); CoE COM Rec(2006)2 on the European Prison Rules, adopted in 2006 (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 53; ECtHR (GC), *Enea v. Italy*, 17 September 2009, Appl. No. 74912/01, para. 101; ECtHR (GC), *Stummer v. Austria*, *op. cit.*, paras. 107 and 130-132; ECtHR (GC), *Boulois v. Luxembourg*, 3 April 2012, Appl. No. 37575/04, para. 103; ECtHR (GC), *Vinter and Others v. the United Kingdom*, paras. 115 *et seq.*; ECtHR (GC), *Khoroshenko v. Russia*, 30 June 2015, Appl. No. 41418/04, paras. 134 and 145); country reports of the European Committee for the Prevention of Torture (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, paras. 53-54); CoE COM Rec.No.R(82)16 on Prison Leave of 1982 (ECtHR (GC), *Boulois v. Luxembourg*, *op. cit.*, para. 103); CoE COM Res.76(2) of 1976 on the Treatment of Long Term and Life Sentence Prisoners (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133-134); CoE COM Rec.2003(23) on the Management by Prison Administrations of Life Sentence and other Long-term Prisoners (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116; ECtHR (GC), *Khoroshenko v. Russia*, paras. 133 and 143); CoE COM Rec.2003(22) on Conditional Release (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116); CPT Working Document on Actual/Real Life Sentences and some of its country reports (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, paras. 53-54; ECtHR (GC), *A. and Others v. the United Kingdom*, 19 February 2009, Appl. No. 3455/05, para. 132; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133-134; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); UN Standard Minimum Rules for the Treatment of Prisoners of 1957 approved by Resolutions of the ECOSOC (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118; ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 143); Report of the UN Special Rapporteur (P. Alston) of 8 March 2006 on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2006/53

- the regulation of science (biomedical science in particular)⁷⁵;
- architectural heritage⁷⁶;
- internal organization and external relations of international institutions, unions and systems⁷⁷;
- regulation of democracy, political power, and elections⁷⁸;
- environmental matters⁷⁹;

(ECtHR (GC), *Al-Skeini and Others v. the United Kingdom*, 7 July 2011, Appl. No. 55721/07, para. 164); COM Commentary Rec(2006)2 on the European Prison Rules by the European Committee on Crime Problems; Standards of the CPT of 2002 revised in 2011; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment approved by the UN GA on 9 December 1988 (A/RES/43/173); UN Basic Principles for the Treatment of Prisoners (the latter instruments were imported by: ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133 *et seq.*).

⁷⁵ Principles of 1989 adopted by Ad Hoc Committee of Experts on Progress in the Biomedical Sciences; Additional Protocol of 2002 to the Convention on Human Rights and Biomedicine of 1997 on Transplantation of Organs and Tissues of Human Origin; EU Directive 2004/23/EC of the European Parliament and the Council of 31 March 2004 on the Setting of Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells (the latter instruments were imported in: ECtHR (GC), *S.H. and Others v. Austria*, 3 November 2011, Appl. No. 57813/00, para. 107); World Medical Association Declaration of Helsinki on Ethical Principles for Medical Research involving Human Subjects of 1964 (ECtHR (GC), *Gillberg v. Sweden*, 3 April 2012, Appl. No. 41723/06, para. 89); CoE Committee on Bioethics Guide on the Decision-making Process regarding Medical Treatment in End-of-life Situations (ECtHR (GC), *Lambert and Others v. France*, 5 June 2015, Appl. No. 46043/14, paras. 143, 155 and 178); European Group on Ethics in Science and New Technologies, Opinion No. 15 to the European Commission of 14 November 2000; CoE PACE Res.1352(2003) on Human Stem Cell Research; Regulation (EC) No. 1394/2007 of the European Parliament and the Council of 13 November 2007 on Advanced Therapy Medicinal Products (the latter examples were imported by: ECtHR (GC), *Parrillo v. Italy*, 27 August 2015, Appl. No. 46470/11, paras. 176 and 181 *et seq.*); 'Oviedo Convention' (ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, paras. 181-182; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89).

⁷⁶ Namely, the CoE Convention for the Protection of the Architectural Heritage of Europe. The latter instrument had been imported in: ECtHR (GC), *Kozacıoğlu v. Turkey*, 19 February 2009, Appl. No. 2334/03, para. 54.

⁷⁷ Stabilisation and Association Agreement between Bosnia and Herzegovina and the EU of 2008 (ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina* *Sejdic*, *op. cit.*, para. 49); UN Charter of 6 June 1946 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89; ECtHR (GC), *Nada v. Switzerland* para. 174, 176 and 197); Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1 August 1975 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89); Maastricht and the Lisbon Treaty (ECtHR (GC), *A, B, C v. Ireland*, 16 December 2010, Appl. No. 25579/05, para. 255); CoE PACE Opinion no. 221 (2000) on Armenia's application for membership of the Council of Europe (ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 127); the Rome Statute of the ICC (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Scoppola v. Italy* (No. 2), *op. cit.*, para. 105; ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 163; ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 107 *et seq.*; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118, ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 136; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 238; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 170); Statutes of international criminal tribunals other than the ICC (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, para. 211; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 170); CoE COM Rec No. R(2000)2 on the Re-examination or Reopening of certain Cases at Domestic Level following Judgments of the European Court of Human Rights (ECtHR (GC), *Bochan v. Ukraine* (No.2), *op. cit.*, para. 58).

⁷⁸ European Commission for Democracy through Law ('Venice Commission') Code of Good Practice in Electoral Matters of the Venice Commission of the Council of Europe (CDL-AD (2002)23 rev) (ECtHR (GC), *Tănase v. Moldova*, 27 April 2010, Appl. No. 7/08, para. 168; ECtHR (GC), *Scoppola v. Italy* (No. 3), *op. cit.*, para. 95); CoE PACE Res.1619(2008) on the State of Democracy in Europe (ECtHR (GC), *Tănase v. Moldova*, *op. cit.* para. 168); CoE PACE Res.1459(2005) and Rec.1714(2005), both on the Abolition of Restrictions on the Right to Vote (ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 73); Venice Commission' report on Out-country Voting (Study no. 580/2010) (ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 73); CoE PACE Rec.799(1977) on the Political Rights and the Position of Aliens (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 121); UN Independent Expert report on the Promotion of Democratic and Equitable International Order of 1 July 2013 (UN Doc. A/HRC/24/38) (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 267 and 271); Venice Commission Opinion CDL-AD(2005)004 on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative of 11 March 2005 and CDL-AD(2006)004 on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina of 20 March 2006 (both referred to in ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.*, para. 48).

⁷⁹ CoE COM Rec. No.R(97)9 on a Policy for the Development of Sustainable Environment-friendly Tourism in Coastal Areas, 2 June 1997, the European Code of Conduct for Coastal Zones, and a decision of the CoE COM taken at its 678th meeting (8-9 September 1999) taking note of the Model Law on Sustainable Management of Coastal Zones (all three referred to in: ECtHR (GC), *Brosset-Triboulet and Others v. France*, 29 March 2010, Appl. No. 34078/02, para. 84; ECtHR (GC), *Depalle v. France*, 29 March 2010, Appl. No. 34044/02, para. 81); CoE Convention ETS. No. 172 on the Protection of the Environment through Criminal Law of 1998; CoE PACE

- aspects of freedom of expression including regulation of the media⁸⁰;
- execution of police tasks⁸¹;
- status and exercise of professions of members of the armed forces, the military (service) and public officials⁸², as well as some other professional standards⁸³
- maritime issues and regulations at sea⁸⁴;
- property issues⁸⁵;

Committee on the Environment, Agriculture and Local and Regional Affairs' Report on Sea Pollution of 30 March 2005; EU Directive 2005/35/EC of the European Parliament and the Council on Ship-source Pollution and on the introduction of Penalties for Infringements; EU Directive 2005/35/EC of the European Parliament and the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage; the International Convention for the Prevention of Pollution from Ships of 2 November 1973 and the Protocol thereto of 17 February 1978; the International Convention on Civil Liability for Oil Pollution Damage of 1992 (the latter instruments had been referred to in: ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, paras. 86 and 91).

⁸⁰ CoE COM Rec.(2007)2 on Media Pluralism and Diversity of Media Content (ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, 7 June 2012, Appl. No. 38433/09, para. 156; ECtHR (GC), *Animal Defenders International v. the United Kingdom*, 22 April 2013, Appl. No. 48876/08, para. 101; CoE COM Rec.(2007)15 on Measures concerning Media Coverage of Election Campaigns (ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123); CoE COM Rec.(2011)7 on a New Notion of Media (ECtHR, *Delfi AS v. Estonia AS*, 16 June 2015, Appl. No. 64569/09, paras. 113 and 128); CoE COM Rec.(2003)13 on the Provision of Information through Media in Relation to Criminal Proceedings (ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.* para. 96); CoE PACE Res.1165(1998) on the Right to Privacy (ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 91; ECtHR (GC), *Von Hannover v. Germany* (No. 2), *op. cit.*, paras. 106 and 110; ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France*, *op. cit.*, para. 120); CoE COM Rec.(1999)15 on Freedom of Expression and its Revision by Rec.(2007)15, including the Explanatory Memoranda (ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123); EU Framework Decision 2008/913/JHA of 28 November 2008 of Council on Combating certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 255); UN Special Rapporteur' report on the Promotion and Protection of the Right to Freedom of Opinion and Expression of 2012, UN Doc. A/67/357 (ECtHR, *Perinçek v. Switzerland*, *op. cit.*, para. 267).

⁸¹ CoE COM No.R(87)15 on the Use of Personal Data in the Police Sector (ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 103 and 107 *et seq.*); UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (ECtHR (GC), *Giuliani and Gaggio v. Italy*, 24 March 2011, Appl. No. 23458/02, paras. 177 and 209); CoE COM Rec(2001)10 on a European Code of Police Ethics of 19 September 2001 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 108 and 110).

⁸² CoE COM Rec.No.R(2000)6 on the Status of Public Officials in Europe (ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 104); CoE PACE Res.337(1967) on the Right of Conscientious Objection; CoE PACE Rec.478(1967) on the Right of Conscientious Objection; CoE PACE Res.816(1977) on the Right to Conscientious Objection to the Military Service; CoE PACE Res.1518(2001) on the Right to Conscientious Objection to the Military Service in Council of Europe Member States; CoE COM Rec.No.R(87)8 on the Right to Conscientious Objection; CoE COM Rec.(2010)4 on Human Rights of Members of the Armed Forces (the latter instruments were imported in: ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 107); CoE PACE Rec.1742(2006) concerning the Human Rights of Members of the Armed Forces (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140; ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 107).

⁸³ The Council of Bars and Law Societies of Europe' (CCBE) Charter of Core Principles on the European Legal Profession, adopted on 24 November 2006 (ECtHR (GC), *Morice v. France*, 23 April 2015, Appl. No. 29369/10, para. 134).

⁸⁴ The Montego Bay Convention or the UN Convention on the Law of the Sea (UNCLOS) of 10 December 1982 (ECtHR (GC), *Medvedyev and Others v. France*, *op. cit.*, para. 79; ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86), diplomatic notes on the matter (ECtHR (GC), *Medvedyev and Others v. France*, *op. cit.*, para. 96), Report of the Committee on the Environment, Agriculture and Local and Regional Affairs of the CoE PACE on Sea Pollution; Report of the Baltic and International Maritime Council (BIMCO) of 23 March 2009; Guidelines of the IMO of Fair Treatment of Seafarers in the Event of a Maritime Accident, adopted in April 2006; International Convention for the Prevention of Pollution from Ships of 2 November 1973; London Protection and Indemnity Rules set up by shipowners themselves; International Convention of 1992 on Civil Liability for Oil Pollution Damage (the latter instruments were referred to in: ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86).

⁸⁵ UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 184); CoE PACE Res.1708(2010) on Solving Property Issues of Refugees and Displaced Persons (ECtHR, judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 237; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, paras. 198 *et seq.*); UN Principles on Housing and Property Restitution for Refugees and Displaced Persons ('Pinheiro Principles') of 28 June 2005, E/CN.4/Sub.2/2005/17 (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 238; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, paras. 136 and 199); Institute of International Law' Resolution on State Succession in Matters of

- (the prevention of) torture⁸⁶,
- family matters and children (in particular, adoption⁸⁷, children's legal status⁸⁸ and child abduction⁸⁹)
- the protection (against discrimination) of vulnerable groups, including women, children, disabled persons, and refugees^{90 91}.

Property and Debts of 2001 (ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, 16 July 2014, Appl. No. 60642/08, para. 120).

⁸⁶ In the Court's case law (and in the external instruments that are imported in that respect), this issue often relates to prison circumstances and prison standards. The imported instruments are (besides the earlier mentioned human rights catalogues of the CAT and ICCPR): various (country) reports of the CPT (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, paras. 53-54; ECtHR (GC) *A. and Others v. the United Kingdom*, *op. cit.*, para. 132; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133-134; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); CPT Working Document on Actual/Real Life Sentences (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133-134); CPT Standards of 2002 (ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133-134); CoE PACE Res. 1463 on Enforced Disappearances of 3 October 2005 (ECtHR (GC), *El-Masri v. "the former Yugoslav Republic of Macedonia"*, *op. cit.* para. 240); UN Special Rapporteur on Torture, 5th report, 24 December 1997, UN Doc. E/CN.4/1998/38 (ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134).

⁸⁷ The 2008 CoE Convention on the Adoption of Children (ECtHR (GC), *X and Others v. Austria*, 19 February 2013, Appl. No. 19010/07, paras. 148 *et seq.*).

⁸⁸ CoE COM Draft Recommendation CM/Rec 2012 on the Rights and Legal Status of Children and Parental Responsibilities (ECtHR (GC), *Fabris v. France*, 7 August 2013, Appl. No. 16574/08, para. 58).

⁸⁹ The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (and the Explanatory Report of this Convention prepared by Elisa Pérez-Vera, published by the Hague Conference on Private International Law in 1982), imported by: ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, paras. 99 *et seq.* and 131 *et seq.*; ECtHR (GC), *X v. Latvia*, *op. cit.*, paras. 59, 93-97, 100-119. The latter case also refers to the Brussels II bis Regulation (EU Council Regulation (EC) No. 2201/2003 of 27 November 2003 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility (ECtHR (GC), *X v. Latvia*, *op. cit.*, paras. 59 and 97).

⁹⁰ Besides references to the earlier mentioned human rights catalogues of the CRC, CEDAW, ICERD, and the CRPD, references also appear to the UN Convention against Discrimination in Education (ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136); CoE PACE Res.1728(2010) on Discrimination on the Basis of Sexual Orientation and Gender Identity and CoE COM Recommendation CM/Rec(2010)5 on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity (both referred to by: ECtHR (GC), *Vallianatos and Others v. Greece*, 7 November 2013, Appl. Nos. 29381/09 and 32684/09, para. 92); CoE PACE Res.1743(2010) and Rec.1927(2010) on Islam, Islamism and Islamophobia in Europe (ECtHR (GC), *SAS v. France*, 1 July 2014, Appl. No. 43835/11, para. 147); CoE COM Rec(2003)20 on New Ways of dealing with Juvenile Delinquency and the Role of Juvenile Justice of 24 September 2003 and CoE COM Rec.No.R(87)20 on Social Reactions to Juvenile Delinquency, 17 September 1987 (both referred to by ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60); CoE COM Convention on Preventing and Combating Violence against Women and Domestic Violence (ECtHR (GC), *Rohlena v. Czech Republic*, *op. cit.*, para. 71); CoE PACE Rec. 561 on the Protection of Minors against ill-treatment and CoE COM Rec.No.R(79)17 on the Protection of Children against ill-treatment (both referred to by ECtHR (GC), *O'Keeffe v. Ireland*, *op. cit.*, para. 147); CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); CoE Commissioner for Human Rights' publication on "Human Rights in Europe: no grounds for complacency. Viewpoints of Thomas Hammarberg" of 2011 (ECtHR (GC), *SAS v. France*, *op. cit.*, para. 147); CoE COM Recommendation CM/Rec(2009)10 on Integrated National Strategies for the Protection of Children from Violence of 18 November 2009 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); CoE COM Rec.No.R(99)4 on Legal Protection of Incapable Adults; Conclusions, and reports and recommendations of the CoE ECRI (ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina* *Sejdic*, *op. cit.*, para. 43; ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, paras. 176-177; ECtHR (GC), *Aksu v. Turkey*, 15 March 2012, Appl. Nos. 4149/04 and 41029/04, paras. 75 and 85; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 267); CoE COM Resolution 68 (30) on Measures taken against Incitement to Racial, National and Religious Hatred (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 267); EU Framework Decision 2008/913/JHA of 28 November 2008 of the Council on Combating certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law of 6 December 2008 (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 255); UN Declaration on the Elimination of All Forms of Racial Discrimination (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89); CoE PACE Rec.No.1203(1993) on Gypsies in Europe and Rec.No.1557(2002) on the Legal Situation of Roma in Europe (both referred to in ECtHR (GC), *Oršuš and Others v. Croatia*, 16 March 2010, Appl. No. 15766/03, para. 147); Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities on Croatia of 2001 and 2004 (ECtHR (GC), *Oršuš and Others v. Croatia*, *op. cit.*, paras. 159 and 174); UNHCR Guidelines determining the Best Interests of the Child (ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 138); explanatory reports regarding rights of the child and child abduction (ECtHR, *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 137); Geneva Declaration of the Rights of the Child of 1924 and UN GA Declaration on the Rights of the Child extending the Geneva Declaration of the Rights of the Child of 1924 (both referred to in ECtHR (GC), *O'Keeffe v. Ireland*, *op. cit.*, para. 147); CoE COM Rec.

§ 2. Diversity *ratione personae*

151. The diversity of imported instruments *ratione personae* is a subsequent characteristic of the external referencing practice; the Court integrates external instruments of different scopes. Some of the instruments are of a general scope *ratione personae*; they apply to human beings generally, without being tied to specific characteristics of these human beings. Other imported instruments apply to particular categories of persons, or address other actors such as States, international organisations, courts, media, *etc.*
152. To a certain extent, heterogeneity in scope *ratione personae* coincides with the categorisation of instruments *ratione materiae*. Indeed, instruments that *substantively* touch upon a particular situation, often apply also *ratione personae* to a particular group of persons. For example, instruments *ratione materiae* touching upon the issue of imprisonment, mostly address prisoners as a particular group of human beings. When we *ratione materiae* think of comprehensive human rights instruments that do not cover one particular theme (like the ICCPR, for example), these instruments generally concern *all* human beings and not only those who correspond to certain characteristics.
153. We notice in our pool of cases that references to instruments with a general scope *ratione personae*, often reflect references to more classic and general human rights catalogues⁹², of which the main are: the ACHR⁹³, the EU Charter⁹⁴, the ICCPR⁹⁵, the ICESCR⁹⁶, the (revised) European Social Charter⁹⁷, the UDHR⁹⁸, the African Charter on Human and Peoples' Rights (hereafter: AfCHPR)⁹⁹, the CAT¹⁰⁰, the ICPPED¹⁰¹, and the CERD¹⁰². Other imported instruments with a general scope *ratione personae* also include instruments of international humanitarian law¹⁰³ and some other instruments that are not considered as

(2007)17 on Gender Equality Standards and Mechanisms (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140). Several instrument categorized earlier under the substantive domain of labor rights, prisoners rights and the protection of refugees and aliens also touch upon the protection of vulnerable groups. For an enumeration of these instruments see *supra*, para. 149.

⁹¹ Some of these categories might be partly overlapping.

⁹² These instruments have all human beings as their addressees (not a particular group of human beings).

⁹³ For an enumeration of all examined Grand Chamber cases that refer to this instrument, see *supra*, para. 146.

⁹⁴ *Ibidem*.

⁹⁵ *Ibidem*.

⁹⁶ *Ibidem*.

⁹⁷ *Ibidem*.

⁹⁸ *Ibidem*.

⁹⁹ *Ibidem*.

¹⁰⁰ *Ibidem*.

¹⁰¹ *Ibidem*.

¹⁰² *Ibidem*.

¹⁰³ For an enumeration of all studies Grand Chamber cases that refer to instruments of international humanitarian law, see *supra*, para. 148.

main ‘classic’ human rights catalogues (but that nonetheless have *all* human beings as their addressees of protection).¹⁰⁴

154. Besides these instruments containing general rights, we notice that the Court, *ratione personae*, imports instruments that concern (rights and responsibilities) of various particular groups of persons, of which the most noticeable are: workers¹⁰⁵, criminal suspects and offenders¹⁰⁶, migrants and refugees¹⁰⁷, prisoners¹⁰⁸, persons exercising a certain profession such as members of the police, lawyers, military forces, public officials and seafarers¹⁰⁹, children and juveniles¹¹⁰, women¹¹¹, disabled persons¹¹², certain religious or ethnic groups¹¹³, and persons with a particular sexual or gender identity¹¹⁴. The Court also refers to instruments that are not directed to human beings as subjects of rights and protection. Some regulate the actions of and the relationships between States, or regulate the internal and external organization of institutions and unions.¹¹⁵

§ 3. Diversity *ratione loci*

155. The Grand Chamber of the Strasbourg Court imports instruments with a narrow geographic focus as well as instruments with a broad geographic focus. The coverage *ratione loci* of the external instruments that are used in the Court’s legal reasoning ranges from (sub) national level to (sub)regional and universal level.

¹⁰⁴ Some examples, amongst many others, of such instruments are: CoE Convention of 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 76 and 103); Amnesty International Fair Trials Manual (ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132); CoE PACE Resolution 1165 (1998) on the Right to Privacy (ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 91; ECtHR (GC), *Von Hannover v. Germany* (No. 2), *op. cit.*, paras. 106 and 110; ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France*, *op. cit.*, para. 120); UN Special Rapporteur Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression of 2012, UN Doc. A/67/357 (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 267).

¹⁰⁵ See for all references to instruments concerning labor law, see *supra* para. 149.

¹⁰⁶ For examples of such references, see *supra* para. 150, on references concerning the prevention and punishment of crimes.

¹⁰⁷ For examples of such references, see *supra* para. 150, on references regarding the regulation of immigration and refugee matters.

¹⁰⁸ For examples of such references, see *supra* para. 150, on references regarding imprisonment, prison administration and the execution of sentences.

¹⁰⁹ For examples of such references, see *supra* para. 150, on references regarding the status and exercise of the professions of members of the armed forces, the military (service) and public officials, and concerning the execution of some other professions.

¹¹⁰ For examples of such references, see *supra* para. 150, on references regarding adoption, child abduction, children’s legal status and protection of children.

¹¹¹ For examples of such references, see *supra* para. 150, on references regarding the protection of women.

¹¹² For examples of such references, see *supra* para. 150, on references regarding the protection of disabled person.

¹¹³ For examples of such references, see *supra* 150, on references regarding the protection of religious or ethnic groups.

¹¹⁴ For examples of such references, see *supra* para. 150, on references regarding the protection of these persons.

¹¹⁵ For examples of such references, see *supra* paras. 139-143, 148 and 150, on references regarding the internal organisation and external relations of international institutions, unions and systems as well as the instruments of general scope *ratione materiae* including instruments of general international law.

156. Firstly, some of the imported instruments geographically have a (sub)national reach. In our pool of case law, we encounter references to instruments of the following (sub)national courts of both CoE Member States and third States¹¹⁶: the French Court of Cassation¹¹⁷, the Aix-en-Provence Court of Appeal¹¹⁸, the Finnish Supreme Court¹¹⁹, the German Federal Constitutional Court¹²⁰, the Italian Constitutional Court¹²¹, the UK House of Lords¹²², the UK Supreme Court¹²³, the Polish Supreme Court¹²⁴, the Canadian Supreme Court¹²⁵, the US Supreme Court¹²⁶, the Supreme Court of South Africa¹²⁷, the Federal Court of Australia¹²⁸, and the High Court of Australia¹²⁹. In addition, references appear to national law, to recommendations and reports of national law commissions, and to national declarations done in respect of international treaties.¹³⁰
157. Secondly, the Strasbourg Court introduces instruments with *regional* focus *ratione loci*. The most noticeable references to regional instruments are references to instruments of the Council of Europe and of the European Union. In addition, the Grand Chamber occasionally imports instruments of other regional human rights protection mechanisms, and other regional instruments of State and private origin.
158. In respect of references to instruments of the CoE, we notice that the Strasbourg Court, in our pool of cases, often relies on the following materials in its legal argumentation¹³¹: CoE agreements and conventions¹³²; CoE recommendations that are issued

¹¹⁶ When demarcating the field of study, we have explained that legal instruments which do not have cross-border characteristics in the light of the particular case (such as national laws of the respondent State, used to establish the facts and circumstances of the case) fall outside the scope of this work. Also national instruments included in internal comparisons (of national law and practices of the Member States) are not included.

¹¹⁷ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 137.

¹¹⁸ *Ibidem*.

¹¹⁹ *Ibidem*.

¹²⁰ ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 113.

¹²¹ *Ibidem*.

¹²² ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 137.

¹²³ ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 103.

¹²⁴ ECtHR (GC), *Vasiliauskas v. Lithuania v. Lithuania*, *op. cit.*, para. 172.

¹²⁵ ECtHR (GC), *Al-Khawaja and Tahery v. the United Kingdom*, 15 December 2011, Appl. Nos. 26766/05 and 22228/06, para. 136; ECtHR (GC), *Scoppola v. Italy* (no. 3), *op. cit.*, para. 95. The case of *A. and Others v. the United Kingdom* also refers to Canadian case law but, because it concerns a general reference to 'Canadian case law' without referring to a particular judgment (or any other instrument), this example is not considered as an 'external reference'. For the general reference to Canadian case law, see ECtHR (GC), *A. and Others v. the United Kingdom*, *op. cit.*, para. 210.

¹²⁶ ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 174; ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, para. 85; ECtHR (GC), *Al-Kwahaja and Tahery v. the United Kingdom*, *op. cit.*, para. 136.

¹²⁷ ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 174; ECtHR (GC), *Al-Kwahaja and Tahery v. the United Kingdom*, *op. cit.*, para. 136; ECtHR (GC), *Scoppola v. Italy* (No. 3), *op. cit.*, para. 95.

¹²⁸ ECtHR (GC), *Al-Kwahaja and Tahery v. the United Kingdom*, *op. cit.*, para. 136.

¹²⁹ ECtHR (GC), *Scoppola v. Italy* (No. 3), *op. cit.*, para. 95.

¹³⁰ In our pool of cases, we find, more particularly, references to Scottish criminal law, to US law, to South-African law, to Australian law, to recommendations of the Irish Law Reform Commission, to a report of the Law Reform Commission of Hong Kong, to a report of the New Zealand Law Commission (all these references appear in: ECtHR (GC), *Al-Kwahaja and Tahery v. the United Kingdom*, *op. cit.*, para. 136), and to (third) State declarations in respect of the ICCPR, namely the declarations of Nicaragua, Azerbaijan and Israel to the ICCPR (ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 101).

¹³¹ The following footnotes contain *all* references in our pool of cases to such kind of instruments, on an exhaustive basis.

by the COM or by the Parliamentary Assembly (hereafter: PACE)¹³³; resolutions of the PACE (and sometimes of the COM)¹³⁴; guidelines, opinions, reports and decisions of the PACE, of

¹³² The (Revised) European Social Charter (ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 103 and 149; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140; ECtHR (GC), *O'Keeffe v. Ireland*, *op. cit.*, para. 147), European Code of Social Security (ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 85), Convention for the Protection of the Architectural Heritage of Europe (ECtHR (GC), *Kozacioğlu v. Turkey*, *op. cit.*, para. 54), Convention on the Calculation of Time-Limits of 16 May 1972 (ECtHR (GC), *Sabri Güneş v. Turkey*, 29 June 2012, Appl. No. 27396/06, para. 58), Convention on Preventing and Combating violence against Women and Domestic Violence (ECtHR (GC), *Rohlena v. Czech Republic*, *op. cit.*, para. 71), Convention on Action against Trafficking in Human Beings (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89), Convention on the Protection of the Environment through Criminal of 1998 (ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86), Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 (ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 76 and 103), Convention on Nationality (ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 163), 'Oviedo Convention' of 4 April 1997 (ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, paras. 181-182; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89), Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin of 2002 (ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, para. 107), Convention on the Adoption of Children of 2008 (ECtHR (GC), *X and Others v. Austria*, *op. cit.*, paras. 148 *et seq.*), Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109), International Convention on the International Validity of Criminal Judgments (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 107).

¹³³ CoE PACE Rec.1769(2006) on the Need to Reconcile Work and Family Life; CoE COM Rec.No.R(96)5 on Reconciling Work and Family Life; CoE COM Rec(2007)17 on Gender Equality Standards and Mechanisms; CoE COM Rec(2010)4 on the Human Rights of Members of the Armed Forces (latter instruments were imported in: ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140); CoE COM Rec No. R(2000)2 on the Re-examination or Reopening of certain Cases at Domestic Level following Judgments of the European Court of Human Rights (ECtHR (GC), *Bochan v. Ukraine* (No.2), *op. cit.*, para. 58); CoE COM Rec(2003)20 on New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice; CoE COM Rec.No.R(87)20 on Social Reactions to Juvenile Delinquency (both referred to by ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60); CoE COM Rec.No.R(92)1 on the Use of Analysis of DNA within the Framework of the Criminal justice System (ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 103, 105 and 110); CoE COM CM/Rec(2008)11 on European Rules for Juvenile Offenders subject to Sanctions or Measures (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); CoE COM Rec(2003)13 on Provision of Information through Media in Relation to Criminal Proceedings (ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 96); CoE COM Rec.No.R(87)15 on the Use of Personal Data in the Police Sector (ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 103 and 107); CoE PACE Rec.799(1977) on Political Rights and the Position of Aliens (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 121); CoE PACE Rec.1714(2005) on Abolition of Restrictions on the Right to Vote (ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 73); CoE COM Rec.No.R(97)9 on a Policy for the Development of Sustainable Environment-friendly Tourism in Coastal Areas of 2 June 1997 (ECtHR (GC), *Brosset-Triboulet and Others v. France*, *op. cit.*, para. 84; ECtHR (GC), *Depalle v. France*, *op. cit.*, para. 81); CoE COM Rec(2007)2 on Media Pluralism and Diversity of Media Content (ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, para. 156; ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 101); CoE COM Rec(2007)15 on Measures concerning Media Coverage of Election Campaigns (ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123); CoE COM Rec(2011)7 on a New Notion of Media (ECtHR (GC), *Delfi AS v. Estonia*, *op. cit.*, paras. 113 and 128); CoE COM Rec(1999)15 on Freedom of Expression and its Revision by Rec(2007)15 including the Explanatory Memoranda (ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123); CoE PACE Rec.478(1967) on the Right of Conscientious Objection; CoE PACE Rec.1518(2001) on the Right to Conscientious Objection to the Military Service in Council of Europe Member States; CoE PACE Rec.1742(2006) on the Human Rights of Members of the Armed Forces; CoE COM Rec.No.R(87)8 of 1987 on the Right to Conscientious Objection and CoE COM Rec.(2010)4 on Human Rights of Members of the Armed Forces (all referred to in ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 107); CoE COM Rec(2006)2 on the European Prison Rules (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 53; ECtHR (GC), *Enea v. Italy*, *op. cit.*, para. 101; ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 107 and 130-132; ECtHR (GC), *Boulois v. Luxembourg*, *op. cit.*, para. 103; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 115 *et seq.*; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 134 and 145); CoE COM Rec.No.R(82)16 on Prison Leave of 1982 (ECtHR (GC), *Boulois v. Luxembourg*, *op. cit.*, para. 103); ECtHR (GC), CoE COM Rec.2003(23) on the Management by Prison Administrations of Life Sentence and other Long-term Prisoners (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133 and 143); CoE COM Rec.2003(22) on Conditional Release (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 116); CoE COM Rec(2006)2 Commentary on the European Prison Rules by the European Committee on Crime Problems (ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, paras. 133 *et seq.*); CoE PACE Rec.1927(2010) on Islam, Islamism and Islamophobia in Europe (ECtHR (GC), *SAS v. France*, *op. cit.*, para. 147); CoE COM Draft Recommendation CM/Rec 2012 on the Rights and Legal Status of Children and Parental Responsibilities (ECtHR (GC), *Fabris v. France*, *op. cit.*, para. 58); CoE COM Rec.(2010)5 on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity (ECtHR (GC), *Vallianatos and Others v. Greece*, *op. cit.*, para. 92); CoE PACE Rec.561 on Protection of Minors against Ill-treatment and CoE COM Rec.No.R(79)17 on Protection of Children against Ill-treatment (both referred to by ECtHR (GC), *O'Keeffe v. Ireland*, *op. cit.*, para. 147); CoE COM Rec(2009)10 on Integrated National Strategies for the Protection of Children from Violence of 18 November 2009 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109); CoE COM

the COM, or of other intergovernmental CoE committees¹³⁵; CoE expert reports, standards, guides, principles or codes of conduct (namely, instruments of the ‘Venice Commission’¹³⁶, the European Committee of Social Rights (hereafter: ECSR)¹³⁷, the CPT¹³⁸, the ECRI¹³⁹, the Ad

Rec.No R(99)4 on Legal Protection of Incapable Adults; CoE PACE Rec.No.1203(1993) on Gypsies in Europe; Rec. No.1557(2002) on the Legal Situation of Roma in Europe (the latter instruments were imported by: ECtHR (GC), *Oršuš and Others v. Croatia*, op. cit., para. 147); CoE COM Rec. No.R(2000) 6 on the Status of Public Officials in Europe (ECtHR (GC), *Demir and Baykara v. Turkey*, op. cit., para. 104); CoE COM Rec(2001)10 on the European Code of Police Ethics of 19 September 2001 (ECtHR (GC), *Bouyid v. Belgium*, op. cit., paras. 108 and 110).

¹³⁴ CoE PACE Res. 1274(2002) on Parental Leave (ECtHR (GC), *Konstantin Markin v. Russia*, op. cit., para. 140); CoE PACE Res. 1165(1998) on the Right to privacy (ECtHR (GC), *Axel Springer AG v. Germany*, op. cit., para. 91; ECtHR (GC), *Von Hannover v. Germany* (No. 2), op. cit., paras. 106 and 110; ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France*, op. cit., para. 120); CoE PACE Res.1619(2008) on the State of Democracy in Europe (ECtHR (GC), *Tănase v. Moldova*, op. cit., para. 168); CoE PACE Res.1459(2005) on the Abolition of Restrictions on the Right to Vote (ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, op. cit., para. 73); CoE PACE Res.1708(2010) on Solving Property Issues of Refugees and Displaced Persons (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 237; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, op. cit., paras. 198 et seq.); CoE PACE Res.1352(2003) on Human Stem Cell Research (ECtHR (GC), *Parrillo v. Italy*, op. cit., para. 176 et seq.); CoE PACE Res.337(1967) on the Right of Conscientious Objection; CoE PACE Res. 816 (1977) on the Right to Conscientious Objection to the Military Service (ECtHR (GC), *Bayatyan v. Armenia*, op. cit., para. 107); CoE COM Res.(73)5 on Standard Minimum Rules for the Treatment of Prisoners of 1973 (ECtHR (GC), *Salduz v. Turkey*, op. cit., para. 53); CoE PACE Res.1463 on Enforced Disappearances of 3 October 2005 (ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, op. cit., para. 240); CoE PACE Res.1728(2010) on Discrimination on the Basis of Sexual Orientation and Gender Identity (ECtHR (GC), *Vallianatos and Others v. Greece*, op. cit., para. 92); CoE PACE Res.1743(2010) on Islam, Islamism and Islamophobia in Europe (ECtHR (GC), *SAS v. France*, op. cit., para. 147); CoE COM Res.68(30) on Measures taken Against Incitement to Racial, National and Religious Hatred (ECtHR (GC), *Perinçek v. Switzerland*, op. cit., para. 267); CoE COM Res.76(2) of 1976 on the Treatment of Long Term and Life Sentence Prisoners (ECtHR (GC), *Vinter and Others v. the United Kingdom*, op. cit., para. 119; ECtHR (GC), *Khoroshenko v. Russia*, op. cit., paras. 133-134).

¹³⁵ CoE PACE Opinion no. 221 (2000) on Armenia’s application for membership of the Council of Europe (ECtHR (GC), *Bayatyan v. Armenia*, op. cit., para. 127); CoE COM decision taken at its 678th meeting (8-9 September 1999) taking note of the Model Law on sustainable management of coastal zones (ECtHR (GC), *Brosset-Triboulet and Others v. France*, op. cit., para. 84; ECtHR (GC), *Depalle v. France*, op. cit., para. 81); CoE COM Guidelines of 20 March 2011 on Eradicating Impunity for Serious Human Rights Violations (ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, op. cit., para. 192); CoE COM CM(2008)71 meeting report of 17 April 2008 on Drawing up a New Framework Agreement for the Coordination of Social Security Schemes within Member States (ECtHR (GC), *Carson and Others v. the United Kingdom*, op. cit. para. 88); CoE PACE on the Environment, Agriculture and Local and Regional Affairs’ report on the topic of Sea Pollution of 30 March 2005 (ECtHR (GC), *Mangouras v. Spain*, op. cit., para. 86); COM Committee for the Activities of the CoE in the Field of Biological and Landscape Diversity (CO-DBP) European Code of Conduct for Coastal Zones (CO-DBP (99) 11) of 19 April 1999 (ECtHR (GC), *Brosset-Triboulet and Others v. France*, op. cit., para. 84; ECtHR (GC), *Depalle v. France*, op. cit., para. 81); the Committee on Bioethics (DH-BIO) Guide on the Decision-making Process regarding Medical Treatment in End-of-life situations (ECtHR (GC), *Lambert and Others v. France*, op. cit., paras. 143, 155 and 178).

¹³⁶ Venice Commission’ Code of Good Practice in Electoral Matters of 2003 (ECtHR (GC), *Tănase v. Moldova*, op. cit., para. 168; ECtHR (GC), *Scoppola v. Italy* (No. 3), op. cit., para. 95); Venice Commission on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina, CDL-AD(2006)004, 20 March 2006 (both referred to in ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, op. cit., para. 48); Venice Commission’ Report on Out-Country Voting, Study no. 580/2010 of 2011 (ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, op. cit., para. 73).

¹³⁷ ECtHR (GC), *Demir and Baykara v. Turkey*, op. cit., para. 149.

¹³⁸ CoE CPT Working Document on Actual/Real Life Sentences (ECtHR (GC), *Vinter and Others v. the United Kingdom*, op. cit., para. 116; ECtHR (GC), *Khoroshenko v. Russia*, op. cit., paras. 133-134); standards of the CPT of 2002 revised in 2011 (ECtHR (GC), *Khoroshenko v. Russia*, op. cit., paras. 133-134); various (country) reports of the CPT (ECtHR (GC), *Salduz v. Turkey*, op. cit., paras. 53-54; ECtHR (GC), *A. and Others v. the United Kingdom*, op. cit., para. 132; *Vinter and Others v. the United Kingdom*, op. cit., para. 116; ECtHR (GC), *Khoroshenko v. Russia*, op. cit., paras. 133-134; ECtHR (GC), *Bouyid v. Belgium*, op. cit., para. 109). The CPT was set up under the Council of Europe’s “European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, which came into force in 1989. It builds on Article 3 of the ECHR on the prohibition of torture or other inhuman or degrading treatment. This body is not an investigative body, but provides a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment. It thus complements the judicial work of the European Court of Human Rights. See <http://www.cpt.coe.int/en/about.htm> (visited on 2 March 2016).

¹³⁹ ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, op. cit., para. 43; ECtHR (GC), *Tănase v. Moldova*, op. cit., paras. 176-177; ECtHR (GC), *Aksu v. Turkey*, op. cit., paras. 75 and 85; ECtHR (GC), *Perinçek v. Switzerland*, op. cit., para. 267.

Hoc Committee of Experts on Progress in the Biomedical Sciences¹⁴⁰, the Advisory Committee on the Framework Convention for the Protection of National Minorities¹⁴¹, and instruments of the CoE Human Rights Commissioner¹⁴²).

159. In the examined pool of Grand Chamber cases, there are also regular references to instruments of another regional inter-governmental body, namely to instruments of the EU. We notice, on an exhaustive basis, references to the following instruments operating at EU-level: the EU Charter¹⁴³, case law of the ECJ¹⁴⁴, directives and regulations of the EU Council (and the EU Parliament)¹⁴⁵, resolutions of the EU Parliament¹⁴⁶, EU framework decisions¹⁴⁷,

¹⁴⁰ Principles of 1989 adopted by Ad Hoc Committee of Experts on Progress in the Biomedical Sciences, set up by the CoE (ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, para. 107).

¹⁴¹ Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities on Croatia of 2001 and 2004 (ECtHR (GC), *Oršuš and Others v. Croatia*, *op. cit.*, paras. 159 and 174). The Advisory Committee is the independent expert committee responsible for evaluating the implementation of the Framework Convention in State Parties and advising the COM. For more information, see <http://www.coe.int/en/web/minorities/advisory-committee> (visited on 2 March 2016).

¹⁴² CoE Commissioner for Human Rights, publication on “Human Rights in Europe: no grounds for complacency. Viewpoints of Thomas Hammarberg” of 2011 (ECtHR (GC), *SAS v. France*, *op. cit.*, para. 147). There are also references to recommendations and a letter of 2002 of the CoE Commissioner for Human Rights (ECtHR (GC), *Kurić and Others v. Slovenia*, *op. cit.*, para. 411).

¹⁴³ For an enumeration of all examined Grand Chamber cases referring to this instrument, see *supra*, para. 146.

¹⁴⁴ All cases of our pool referring to case law of the ECJ: ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Scoppola v. Italy* (No. 2), *op. cit.*, para. 105; ECtHR (GC), *Micallef v. Malta*, 15 October 2009, Appl. No. 17056/06, para. 78; ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86; ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, paras. 151-154 and paras. 174-176; ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 175 and 212; ECtHR (GC), *Jeunesse v. the Netherlands*, 3 October 2014, Appl. No. 12738/10, paras. 110-111; ECtHR, *Tarakhel v. Switzerland*, *op. cit.*, para. 103; ECtHR (GC), *Delfi AS v. Estonia*, *op. cit.*, para. 147; ECtHR, *Parrillo v. Italy*, *op. cit.*, para. 180; ECtHR (GC), *Kudrevičius and Others v. Lithuania*, 15 October 2015, Appl. No. 37553/05, para. 183.

¹⁴⁵ On an exhaustive basis in our pool or case law: EU Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE [Union of Industrial and Employers' Confederations of Europe], CEEP [European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest] and the ETUC [European Trade Union Confederation] (the Council Directive gave effect to the latter Framework Agreement) (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140); EU Council Directive 2010/18/EU of 8 March 2010 on the application of the revised Framework Agreement on Parental Leave between BUSINESSEUROPE, UEAPME, CEEP and the ETUC (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140); EU Council Directive 78/2000/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation (ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, *op. cit.*, para. 142; ECtHR (GC), *Fernández Martínez v. Spain*, *op. cit.*, para. 138); EU Council Regulation EEC, Euratom of 3 June 1971 (ECtHR (GC), *Sabri Güneş v. Turkey*, *op. cit.*, para. 58); EU Council Regulation 96/C 329/01 on the Lawful Interception of Telecommunications of 17 January 1995 (ECtHR (GC), *Roman Zakharov v. Russia*, *op. cit.*, para. 269); EU Directive 2005/35/EC of the European Parliament and of the Council on Ship-source Pollution and on the Introduction of Penalties for Infringements (ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86); EU Directive 2005/35/EC of the European Parliament and the Council on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage of 21 April 2004 (ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86); EU Council Directive 2003/9/EC laying down Minimum Standards for the Reception of Asylum Seekers of 27 January 2003 (‘Reception Directive’) (ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, paras. 251 and 263; ECtHR, *Tarakhel v. Switzerland*, *op. cit.*, para. 88); the ‘Dublin III Regulation’ (ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88); EU Directive 2004/23/EC of the European Parliament and the Council of 31 March 2004 on the Setting of Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells (ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, para. 107); Regulation (EC) No. 1394/2007 of the European Parliament and the Council of 13 November 2007 on Advanced Therapy Medicinal Products (ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, para. 166 and paras. 181 *et seq.*); the ‘Brussels II bis Regulation’ (ECtHR (GC), *X v. Latvia*, *op. cit.*, paras. 59 and 97).

¹⁴⁶ European Parliament Resolution A3-0056 on Human Rights in the world and Community Human Rights Policy of 12 March 1993 (ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134).

¹⁴⁷ Framework Decision 2008/913/JHA of the Council of the EU on Combating certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law of 28 November 2008 (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.* para. 255).

EU conventions¹⁴⁸, a letter by the Vice-President of the European Commission¹⁴⁹, and instruments of EU independent advisory bodies¹⁵⁰.

160. The Strasbourg Grand Chamber also occasionally refers to instruments of other regional human rights protection mechanisms, including those of the Organisation of American States (hereafter: OAS), with references to the ACHR¹⁵¹ and to case law and advisory opinions of the ACtHR and of Inter-American Commission on Human Rights (hereafter: AComHR)¹⁵², and those of the African Union (hereafter: AU), with some – but rare – references to the AfCHPR¹⁵³ and case law in that respect¹⁵⁴.

161. Finally some references appear to other regional instruments of State, judicial and private origin, including bilateral and multilateral treaties, agreements, codes or declarations (concluded outside the EU or the CoE)¹⁵⁵ and judicial decisions having a regional coverage. The latter category includes references to instruments of (and about) regional crimes tribunals like the (statutes of the) International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY) and the International Criminal Tribunal for Rwanda (hereafter: ICTR)¹⁵⁶, the statute and decisions of the Special Court for Sierra Leone,¹⁵⁷ the IMT Nuremberg trials (including its Charter and Principles¹⁵⁸), the Tokyo Trials,¹⁵⁹ and the Extraordinary Chambers

¹⁴⁸ European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and 2000 (ECtHR (GC), *Schatschaschwili v. Germany*, *op. cit.*, para. 139); Maastricht and the Lisbon Treaty (ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, para. 255).

¹⁴⁹ ECtHR (GC), *Hirsi Jamaa and Others*, *op. cit.*, para. 135.

¹⁵⁰ There is a reference to the European Group on Ethics in Science and New Technologies, Opinion No. 15 to the European Commission, adopted on 14 November 2000 (ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, paras. 176 *et seq.*). The latter is "...an independent advisory body of the President of the European Commission. Since its inception in 1991, the EGE has provided the Commission with high quality and independent advice (opinions) on ethical aspects of science and new technologies in connection with EU legislation or policies" (see for more information: <https://ec.europa.eu/research/ege/index.cfm>, accessed on 1 March 2016).

¹⁵¹ For an enumeration of all examined cases referring to this instrument, see *supra* para. 146.

¹⁵² ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Šilih v. Slovenia*, *op. cit.*, para. 160; ECtHR (GC), decision of *Demopoulos and Others v. Turkey*, 1 March 2010, Appl. Nos. 46113/99, 3843/02, 13751/02, *etc.*, para. 70; ECtHR (GC), *Palomo Sánchez and Others v. Spain*, *op. cit.*, para. 56; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, paras. 131 and 138; ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 72; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 143.

¹⁵³ For an enumeration of all the cases of our pool of case law that refer to this instrument, see *supra* para. 146.

¹⁵⁴ ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 72.

¹⁵⁵ Stabilisation and Association Agreement between Bosnia and Herzegovina and the EU of 2008 (ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.*, para. 49); Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79); Association agreement of 26 October 2004 between the Swiss Confederation and the European Community (ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88); the Lieber Code, Field Manuals, and the Brussels' Declaration (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 207 *et seq.*); Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1 August 1975 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89). Remember that the Court sometimes also takes account of diplomatic notes that have been exchanged between countries (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 194 *et seq.*; ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 105 *et seq.*).

¹⁵⁶ ECtHR (GC), *Scoppola v. Italy* (No. 2), *op. cit.*, para. 105; ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 211 and 215; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 264-266; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, paras. 170, and 176-177.

¹⁵⁷ ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 135; ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, para. 211. The Statute of this Court had been developed pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

¹⁵⁸ ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 215, 223, and 231; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, paras. 172.

in the Courts of Cambodia^{160 161}. There is also an example of reference to regional professional standards, namely to the Charter of Core Principles of the Council of Bars and Law Societies of Europe.¹⁶²

162. Thirdly, the Strasbourg Court refers to instruments that operate, geographically speaking, on a *universal* level. This category includes instruments that operate at the level of the UN. Instruments that operate on this level and to which the Court has referred in our pool of cases, are: the ‘classic’ UN human rights treaties (including the UDHR¹⁶³, the ICCPR¹⁶⁴, the ICESCR¹⁶⁵, the CAT¹⁶⁶, the CEDAW¹⁶⁷, the CRPD¹⁶⁸, the CRC¹⁶⁹, the ICERD¹⁷⁰, and the ICPED¹⁷¹), and instruments originating from the bodies monitoring these treaties (including *quasi*-judicial Views of the UN Treaty Bodies on individual complaints¹⁷², their General Comments¹⁷³, and their Concluding Observations¹⁷⁴).

¹⁵⁹ ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 203, 211, and 215.

¹⁶⁰ ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 135.

¹⁶¹ To be exhaustive, we should note that in the examined cases there appears twice a reference to a Decision of the General Claims Commission (settling claims of citizens of both Mexico and the US). The Court, in the case of *Chiragov* and in the case of *Sargsyan* (indirectly) refers to this case as the ‘Cairo’-case. Although not clear in the Strasbourg cases, some further research on the internet brings us to the observation that the ‘Cairo’-case in fact concerns the following case: *Estate of Jean-Baptiste Caire v. the United Mexican States* of 7 June 1929. See ECtHR (GC), decision of *Chiragov and Others v. Armenia*, *op. cit.*, para. 82; ECtHR (GC), *Sargsyan v. Azerbaijan*, *op. cit.*, para. 73. In the case of *Ališić and Others*, the Court also refers to an EFTA Court judgment of 28 January 2013 (judgment E-16/11), see ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 94.

¹⁶² Charter of Core Principles on the European Legal Profession of 24 November 2006 (ECtHR (GC), *Morice v. France*, *op. cit.*, para. 134).

¹⁶³ For an enumeration of all cases of our pool that refer to this instrument, see *supra* para. 146.

¹⁶⁴ *Ibidem*.

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem*.

¹⁶⁷ *Ibidem*.

¹⁶⁸ *Ibidem*.

¹⁶⁹ *Ibidem*.

¹⁷⁰ *Ibidem*.

¹⁷¹ *Ibidem*.

¹⁷² References to Communications of the HRC appear, on an exhaustive basis, in the following cases of our pool: ECtHR (GC), *Šilih v. Slovenia*, *op. cit.*, para. 154; ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, paras. 138 and 147; ECtHR (GC), *Scoppola v. Italy (No. 3)*, *op. cit.*, para. 95; ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132. References to Communications of the CAT appear, on an exhaustive basis, in the following cases of our pool: ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 205.

¹⁷³ UN CAT General Comment No. 3 (2012) on the Implementation by States parties of Article 14 of the CAT (ECtHR (GC), *Mocanu and Others v. Romania*, 17 September 2014, Appl. Nos. 10865/09, 45886/07, 32431/08, para. 274); UN CRC General Comment No. 10 of 25 April 2007 (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60); UN CRC General Comment No. 7 of 2005 on Implementing Child Rights in Early Childhood (ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 96); UN CERD General Recommendation No. 35 of 26 September 2013 on Combating Racist Hate Speech (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 261). For references to General Comments of the HRC, see ECtHR (GC), *A. and Others v. the United Kingdom*, *op. cit.*, para. 178; ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 147; ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 174; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 135; ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 105; ECtHR (GC), *Scoppola v. Italy (No. 3)*, *op. cit.*, para. 95; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118; ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 143; and *Perinçek v. Switzerland*, *op. cit.*, para. 265.

¹⁷⁴ CRC Concluding Observations on Turkey of 9 July 2001 (ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60); CAT Concluding Observations on Germany (ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 174); CAT Concluding Observations on the Russian Federation (ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 143); CAT Concluding Remarks of 20 June 2011 (ECtHR (GC), *Kurić and Others v. Slovenia*, *op. cit.*, para. 411; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134); CERD Concluding observations on Bosnia and Herzegovina of 11 April 2006 (ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.*, para. 43); CERD Concluding Observations of 24 August 2010 (ECtHR (GC), *Kurić and Others v. Slovenia*, *op. cit.*, para. 411).

163. Besides the ‘classic’ human rights treaties, the Strasbourg Court also refers to other universal conventions or treaties concluded in the context of the UN and its Specialized Agencies and Programmes (including the ILO, the International Maritime Organization (hereafter: IMO), the UN Refugee Agency (hereafter: UNHCR), the UN Educational, Scientific and Cultural Organization (hereafter: UNESCO), and the UN Office on Drugs and Crime (hereafter: UNODC). In our pool of Grand Chamber cases, we – exhaustively – came across references to the following of such treaties: the UN Charter¹⁷⁵, the VCLT¹⁷⁶, the Rome Statute of the ICC¹⁷⁷, the Convention on the Law of the Sea¹⁷⁸, the Vienna Convention on Consular Relations¹⁷⁹, the Convention on Jurisdictional Immunities of States and their Property¹⁸⁰, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity¹⁸¹, the Convention on the Prevention and Punishment of the Crime of Genocide¹⁸², UNHCR Conventions,¹⁸³ ILO Conventions¹⁸⁴, IMO Conventions¹⁸⁵, and UNESCO Conventions¹⁸⁶.

164. Again situated at universal UN-level, the Strasbourg cases examined make reference to instruments of UN Committees of experts such as the ILC¹⁸⁷; to reports of individual

¹⁷⁵ UN Charter of 6 June 1946 (ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89; ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 174, 176, 197).

¹⁷⁶ For an overview of all cases of our pool referring to this instrument, see *supra* para. 142.

¹⁷⁷ ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Scoppola v. Italy* (no. 2), *op. cit.*, para. 105; ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 163; ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 107 *et seq.*; ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 136; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 238; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 170. There are also references to the ICC rules on Procedure and Evidence (ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 118).

¹⁷⁸ Montego Bay Convention (UNCLOS) of 10 December 1982 (ECtHR (GC), *Medvedyev and Others v. France*, *op. cit.*, para. 79; ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86).

¹⁷⁹ ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 236.

¹⁸⁰ This instrument dates from 2 December 2004. It appears in ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 64; ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, para. 49. The latter case also refers to a commentary of the ILC on these Articles (*ibidem*).

¹⁸¹ This is an instrument of 1974. It had been referred to in: ECtHR (GC), *Konakov v. Latvia*, *op. cit.*, para. 232; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 133; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 170.

¹⁸² This is an instrument of 1948. It had been referred to in: ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 132; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 238; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, paras. 167 *et seq.*

¹⁸³ Geneva ‘Refugee Convention’ of 1951 (ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, paras. 216 and 251; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 97).

¹⁸⁴ For all references to ILO-conventions, see *supra* para. 149.

¹⁸⁵ International Convention for the Prevention of Pollution from Ships of 1973 and the Protocol thereto adopted in 1978 and the International Convention on Civil Liability for Oil Pollution Damage of 1992 (both referred to in ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, paras. 86 and 91).

¹⁸⁶ UNESCO Convention against Discrimination in Education, referred to by ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136.

¹⁸⁷ ILC Koskenniemi Report (ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 92 citing the case of *Nada v. Switzerland*; ECtHR (GC) *Nada v. Switzerland*, *op. cit.*, para. 170); the ILC Draft Articles on Diplomatic Protection of 2006 (ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), *op. cit.*, paras. 45-46); Draft Articles of the ILC on the Responsibility of States for Internationally Wrongful Acts of 2001 (ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2), *op. cit.*, para. 86; ECtHR (GC), decision of *Chiragov and Others v. Armenia*, *op. cit.*, para. 82; ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, para. 84; ECtHR (GC), decision of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 73; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 240; ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 151); ILC Draft Articles on Jurisdictional Immunities of States and their Property of 1991 (ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 64; ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, para. 49).

mandate holders within the UN ‘Special Procedures’ mechanism¹⁸⁸; to UN declarations, reports, resolutions, principles and rules¹⁸⁹; to recommendations, notes, guidelines and principles of UN Specialized Agencies and Programmes such as from the ILO¹⁹⁰, the IMO¹⁹¹, the UNODC¹⁹², and the UNHCR¹⁹³; to case law of the Permanent Court of International Justice (hereafter: PCIJ) and the ICJ¹⁹⁴; and to case law of the International Tribunal for the Law of the Sea.¹⁹⁵

¹⁸⁸ UN Independent Expert on the promotion of democratic and equitable international order: a report submitted to the UN Human Rights Council on 1 July 2013, UN Doc. A/HRC/24/38 (ECtHR (GC), *Perinçek v. Switzerland*, op. cit., para. 267); UN Special Rapporteur report on the promotion and protection of the right to freedom of opinion and expression of 2012, UN Doc. A/67/357 (ECtHR (GC), *Perinçek v. Switzerland*, op. cit., paras. 267); Report of the UN Special Rapporteur (P. Alston) of 8 March 2006 on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2006/53 (ECtHR (GC), *Al-Skeini and Others v. the United Kingdom*, op. cit., para. 164); UN Special Rapporteur on Torture, 5th report of 24 December 1997, UN Doc. E/CN.4/1998/38 (ECtHR (GC), *Marguš v. Croatia*, op. cit., para. 135).

¹⁸⁹ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August to 7 September 1990 (ECtHR (GC), *Giuliani and Gaggio v. Italy*, op. cit., paras. 177 and 209); UN Standard Minimum Rules for the Treatment of Prisoners of 1957 approved by resolutions of the ECOSOC (ECtHR (GC), *Vinter and Others v. the United Kingdom*, op. cit., para. 118; ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, op. cit., para. 132; ECtHR (GC), *Khoroshenko v. Russia*, op. cit., para. 143); UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment approved by the UN GA on 9 December 1988, A/RES/43/173 (ECtHR (GC), *Khoroshenko v. Russia*, op. cit., paras. 133 et seq); UN Geneva Declaration of the Rights of the Child of 1924; UN GA Declaration on the Rights of the Child extending the Geneva Declaration of the Rights of the Child of 1924 (both referred to in ECtHR (GC), *O’Keeffe v. Ireland*, op. cit., para. 147); UN Commission on Human Rights Resolutions 2002/79 of 25 April 2002 and Resolution 2003/72 of 25 April 2003 on impunity (ECtHR (GC), *Marguš v. Croatia*, op. cit., para. 134); ‘Pinheiro Principles’ (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 238; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, op. cit., paras. 136 and 199); the UDHR of 1948 (ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, 19 October 2012, Appl. Nos. 43370/04, 8252/05 and 18454/06, para. 136; ECtHR (GC), *O’Keeffe v. Ireland*, 28 January 2014, Appl. No. 35810/09, para. 147 and ECtHR (GC), *Bouyid v. Belgium*, 28 September 2015, Appl. No. 23380/09, para. 89); UN Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (ECtHR (GC), *Bouyid v. Belgium*, op. cit., para. 89); the Statute of the ICTY (which had been established under United Nations Security Council Resolution 827 of 25 May 1993) and the Statute of the ICTR (which had been established under Security Council resolution 955 of 8 November 1994) (ECtHR (GC), *Scoppola v. Italy* (No. 2), op. cit., para. 105; ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 211 and 215; ECtHR (GC), *Perinçek v. Switzerland*, op. cit., paras. 101, 264-266; ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., paras. 170, and 176-177); UN Commission on Human Rights, “Question of the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity: Study Submitted by the Secretary-General” of 1966, UN Doc. E/CN.4/906 (ECtHR (GC), *Kononov v. Latvia*, op. cit., para. 232).

¹⁹⁰ ILO General Conference Recommendation No. 143 of 1971 on Workers’ Representatives (ECtHR (GC), *Palomo Sánchez and Others v. Spain*, op. cit., para. 56); Recommendation No. 165 supplementing ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities of 1981 (ECtHR (GC), *Konstantin Markin v. Russia*, op. cit. para. 140); ILO Recommendation No. 198 of 2006 on the Employment Relationship (ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, op. cit., para. 142); Observations of the ILO Committee of experts on the Application of Conventions and Recommendations, Individual Observation to the Turkish government concerning ILO Convention No. 87, adopted in 2005 (ECtHR (GC), *Demir and Baykara v. Turkey*, op. cit., para. 101); ILO Committee of Experts’ interpretation of Convention No. 98, *General Survey 1994, Freedom of Association and Collective Bargaining, on Conventions Nos. 87 and 98* [ILO, 1994a] (*ibidem*, paras. 147 and 166); Recommendations and principles of the ILO Committee on Freedom of Association (*ibidem*, para. 102 and 126-127; ECtHR (GC), *Palomo Sánchez and Others v. Spain*, op. cit., para. 56). The Committee on Freedom of Association had been established for the purpose of examining complaints about violations of freedom of association within the ILO-framework. For more information, see <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm> (accessed on 1 March 2016).

¹⁹¹ International Maritime Organisation Guidelines of fair treatment of seafarers in the event of a maritime accident, adopted in April 2006 (ECtHR (GC), *Mangouras v. Spain*, op. cit., para. 86).

¹⁹² UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ECtHR (GC), *Medvedyev and Others v. France*, op. cit., para. 83).

¹⁹³ UNHCR Guidelines determining the best interests of the child (ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, op. cit., paras. 138); UNHCR Note on International Protection of 13 September 2001, A/AC.96/951 (ECtHR (GC), *Hirsi Jamaa and Others*, op. cit., para. 134 and 23).

¹⁹⁴ This is the principal judicial organ of the UN established by the Charter of the UN. References to its case law appear in ECtHR (GC), *Paladi v. Moldova*, 10 March 2009, Appl. No. 39806/05, para. 91; ECtHR (GC), *Cudak v. Lithuania*, op. cit., para. 64; ECtHR (GC), *Kononov v. Latvia*, op. cit. para. 203; ECtHR (GC), *Al-Jedda v. the United Kingdom*, op. cit., paras. 76 and 107; ECtHR (GC), *Nada v. Switzerland*, op. cit., paras. 175-176; ECtHR (GC), *Catan*

165. Moving beyond the UN level, there are other multilateral instruments that often operate, at least theoretically¹⁹⁶, on a universal level. The Court in our pool of cases, for instance, refers to the Hague Convention on the Civil Aspects of International Child Abduction¹⁹⁷, and to several universal instruments tied to the domain of international humanitarian law.¹⁹⁸
166. Considering instruments with a universal scope, we also include importations of instruments of non-governmental institutions, which could – at least theoretically – be said to strive for universal coverage. Also references to doctrine are brought under this umbrella since, again theoretically speaking, academic contributions are universal in their reach. References by the Strasbourg Court in our pool of cases to instruments of non-governmental institutions with a theoretical universal scope include references to the World Medical Association Declaration of Helsinki on Ethical Principles for Medical Research involving Human Subjects¹⁹⁹, to the Amnesty International Fair Trials Manual²⁰⁰, to a study of the International Committee of the Red Cross (hereafter: ICRC)²⁰¹, to reports of several NGOs on the assessment of the situation of refugees²⁰², to the International Law Institute (hereafter: ILI) Resolution on Guiding Principles on State Succession in Matters of Property and Debts²⁰³, to the ILI Oxford Manual²⁰⁴, to a report of the Baltic and International Maritime Council²⁰⁵, and to the London Protection and Indemnity Rules.²⁰⁶ The Court also refers to academic doctrine, mainly in the area of international humanitarian law.²⁰⁷

and Others v. the Republic of Moldova and Russia, *op. cit.*, para. 115; ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), *op. cit.*, paras. 24-26, 41, 45, and 46; ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, paras. 77, 101 and 111; ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 151; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, para. 177; ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 150 and 266; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, paras. 167 and 172; ECtHR (GC), *Demopoulos and Others v. Turkey*, *op. cit.*, paras. 93-94.

¹⁹⁵ ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, paras. 86 and 89.

¹⁹⁶ In practice, however, their coverage can be narrower due to a lack of ratifications of some (or many) States.

¹⁹⁷ The Hague Convention from 25 October 1980 is a multilateral treaty developed by the Hague Conference on Private International Law (HCCH) that provides an expeditious method to return a child internationally abducted by a parent from one member country to another. There are also references to the Explanatory Report to this Convention prepared by Elisa Pérez-Vera and published by the Hague Conference on Private International Law in 1982. See ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, paras. 99 *et seq.* and 131 *et seq.*; ECtHR (GC), *X v. Latvia*, *op. cit.*, paras. 59, 93-97, 100-119).

¹⁹⁸ For references to instruments of international humanitarian law, see *supra*, para. 148.

¹⁹⁹ This is an instrument of 1964 covering professional standards and emanating from an independent confederation of medical associations. It was imported in ECtHR (GC), *Gillberg v. Sweden*, *op. cit.*, para. 89.

²⁰⁰ ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132.

²⁰¹ ICRC Study on “Customary International Humanitarian law” (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, para. 232; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134).

²⁰² ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 300.

²⁰³ This instrument was issued in 2001. It had been imported in: ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 120. The ILI is an independent, non-political and non-profit educational institute devoted to the study and development of international law. The membership comprises the world’s leading public international lawyers. For more information on this institute, see <http://www.ili.org/> (visited on 1 March 2016).

²⁰⁴ ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 207 *et seq.*

²⁰⁵ This instrument dates from 23 March 2009. It was imported in: ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86. BIMCO is the world’s largest international shipping association, with more than 2,200 members globally. They provide a wide range of services to our global membership – which includes shipowners, operators, managers, brokers and agents. BIMCO’s core objective is to facilitate the commercial operations of its members by

§ 4. Diversity of origin

167. The focus of the research lies on the Strasbourg Court's references to 'external instruments'. These instrumental 'carriers' of human rights or other norms are understood in a broad sense; not only formal legal sources issued by state actors or politically representative organs are envisioned. From the moment the instrument on which the Court relies contains a normative standpoint and from the moment it is used for the interpretation and application of the ECHR, we enter a situation of 'external referencing practice', *irrespective of the origin of the instrument*. When taking such a broad view on the notion of 'instruments', it does not come as a surprise that the origins of the imported normative instruments are widely diverse.
168. The Grand Chamber of the Strasbourg Court refers to instruments of State origin. Instruments of State origin include instruments that are issued by representatives of States in national or international political forums, such as national instruments²⁰⁸, multilateral treaties and agreements²⁰⁹, and international instruments issued within inter-governmental institutional contexts of politically representative organs (*inter alia* within the political bodies of the UN²¹⁰, the CoE²¹¹, the EU²¹², the OAS²¹³, or the AU²¹⁴).
169. Instruments can also be of a 'mandated' State origin. We thereby allude to public instruments that are not issued by (entirely) politically representative organs, but, for instance, by (*quasi*-)judicial bodies or independent expert committees. These often consist of members functioning in an independent capacity, not representing the State.²¹⁵ Nonetheless – and that being the reason of why we speak of instruments of 'mandated' State origin – these institutions have received their original mandate from States (by means of democratic international instruments like a treaty, a protocol, or a resolution).²¹⁶ Therefore, these bodies

developing standard contracts and clauses, and providing quality information, advice and education" (see https://www.bimco.org/About/About_BIMCO.aspx, visited on 1 March 2016).

²⁰⁶ These rules were set up by ship owners themselves. ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86.

²⁰⁷ Doctrine in the area of international humanitarian law had been referred to in: ECtHR (GC), *Konokov v. Latvia*, *op. cit.*, paras. 194 *et seq.*; ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 132; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, paras. 144 and 232; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 174.

²⁰⁸ For references in the examined cases to external national law, see *supra*, para. 156, footnote 130.

²⁰⁹ For examples of references to multilateral treaties and agreements (concluded outside the institutional context of the EU, the CoE, the OAS, or the AU,...), see *supra*, para. 161, para. 165.

²¹⁰ For all such references in our pool to such instruments, see *supra*, para. 163.

²¹¹ For all references in our pool to such CoE instruments (including instruments originating from the COM and the PACE), see *supra* paras. 158, footnotes 131-134.

²¹² For all references in our pool to such instruments, see *supra*, para. 159, footnotes 145-148.

²¹³ For all references in our pool to such instruments, see *supra*, para. 160, footnote 151.

²¹⁴ For all references in our pool to such instruments, see *supra*, para. 160, footnote 153.

²¹⁵ The Member States might sometimes appoint individual members. All ECRI members, for example, act independent and impartial but are appointed by the Member States.

See https://www.coe.int/t/dghl/monitoring/ecri/about/intromembers_en.asp (visited on 7 March 2016).

²¹⁶ For example, the ECtHR is an international human rights court, and thus a judicial body created by (or joined by) States through the elaboration of political instruments.

and the instruments they create, could be considered as part of the ‘international community’ in a broad understanding.²¹⁷

170. The Grand Chamber of the ECtHR regularly refers to instruments of a ‘mandated’ State origin as evidenced by its importations of decisions, interpretations and opinions originating from law- or treaty-based bodies operating as (*quasi*-)judicial actors. The most relevant examples of external references of such kind are: importations of national case law²¹⁸, of decisions and opinions of the ACtHR and the ACommHR²¹⁹, of case law and opinions of the ECJ²²⁰, the PCIJ and the ICJ²²¹, of the ICTY, the ICTR, and other (war) crimes tribunals²²², of decisions of the International Tribunal for the Law of the Sea²²³, and of UN Treaty Bodies’ Views on individual cases and their General Comments²²⁴.

171. In addition, references to instruments of a ‘mandated’ State origin occur in the form of importations of instruments originating from independent expert forums, which are anchored in national or in inter-governmental organizations. Such forums often exercise tasks of expert or political monitoring control. In respect of this category of instruments, the Strasbourg Court – in our pool of cases – refers to recommendations of national law commissions²²⁵, to instruments from several CoE independent expert bodies (namely, the Venice Commission, the ECSR²²⁶, the CPT, the ECRI, the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences, the Advisory Committee on the Framework Convention for the Protection of National Minorities, and instruments of the CoE Human Rights Commissioner)²²⁷, to UN instruments issued by individual experts and expert bodies (such as the ILC, Special Rapporteurs and Independent Experts, and Specialized Agencies and Programmes)²²⁸, and to instruments from EU independent advisory bodies (such as the European Group on Ethics in Science and New Technologies)²²⁹. Also Concluding Observations of the UN Treaty Bodies are considered under this category and thus as expert – rather than as *quasi*-judicial – instruments.²³⁰ The issuing of Concluding Observations is a

²¹⁷ Cfr. B. Schlütter, “Aspects of Human Rights Interpretation”, in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, Cambridge, Cambridge University Press, 2012, pp. 291-292.

²¹⁸ For all references in our pool to external national case law, see *supra*, para. 156.

²¹⁹ For all references in our pool to opinions and case law of these bodies, see *supra*, para. 160, footnote 152.

²²⁰ For all references in our pool to case law and opinions of the ECJ, see *supra*, para. 159, footnote 143.

²²¹ For all references in our pool to decisions and opinions of the PCIJ and the ICJ, see *supra*, para. 164, footnote 194.

²²² For all references in our pool to instruments of (war) crimes tribunals, see *supra*, para. 161.

²²³ For all references in our pool to this tribunal, see *supra*, para. 164, footnote 195.

²²⁴ For all references in our pool to views and general comments of the UN TB’s, see *supra*, para. 162, footnotes 172-174.

²²⁵ For all references in our pool to reports of national law commissions, see *supra*, para. 156.

²²⁶ When this body issues decisions on individual or collective complaints, we could consider it as a *quasi*-judicial organ.

²²⁷ For all references in our pool to instruments of these bodies, see *supra*, para. 158.

²²⁸ For all references in our pool to instruments of these bodies, see *supra*, para. 164.

²²⁹ For all references in our pool to instruments of this kind, see *supra*, para. 143.

²³⁰ For all references in the examined cases to UN TB’s Concluding Observations, see *supra*, para. 162, footnote 174.

typical example of ‘political monitoring’ rather than an example of judicial assessment of individual complaints (which is done under the Treaty Bodies’ Communications procedure) or of judicial opinions (in the form of the Treaty Bodies’ General Comments) on the interpretation of the treaties.

172. The Grand Chamber equally includes instruments that are elaborated by non-political organs that lack a State-based mandate. It concerns instruments that have not been created by official organs and that are not (directly or indirectly) tied to executive, legislative or judicial public branches. Some cases import instruments that originate from NGOs, from academics, from law institutes and associations, and from associations of professions and sectors (such as unions of lawyers, medical professions, the maritime sector, ...).²³¹

§ 5. Diversity of legal status

173. The Strasbourg Court refers to a broad spectrum of binding and non-binding normative instruments to interpret and apply the Convention. The Court thus not only takes account of instruments that fall under a traditional state-centric notion of a ‘legal source’.²³² To classify the imported external instruments as to their diverging legal status, we will, on the one hand, create a typology along the lines of what are formal sources of international law, based on the Statute of the ICJ and on legal doctrine in this respect. On the other hand, the typology will move beyond the inclusion of formal sources of law. The latter connects to the assumption that also instruments outside the traditional categorization can have – similar to formal legal sources – effects both on the adjudication process and on the development of law in judicial practice.
174. Let us explain this more precisely. The Strasbourg Court has one main formal legal source that it interprets and applies, *i.e.* the ECHR and the Protocols thereto.²³³ The ECtHR does not have at its disposal a formal list of other legal sources it can use and apply to solve a

²³¹ Under this category, we include references to the Charter of Core Principles of the Council of Bars and Law Societies of Europe (CCBE) (ECtHR (GC), *Morice v. France*, *op. cit.*, para. 134); the World Medical Association Declaration of Helsinki on ethical principles for medical research involving human subjects (ECtHR (GC), *Gillberg v. Sweden*, *op. cit.*, para. 89); the Amnesty International Fair Trials Manual (ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132); a study of the ICRC (ECtHR, judgment of *Sargsyan v. Azerbaijan*, para. 232; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134); reports of NGOs assessing the situation of refugees (ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 300); ILI Resolution on Guiding Principles on State Succession in Matters of Property and Debts of 2001 (ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, *op. cit.*, para. 120); ILI Oxford Manual (ECtHR, *Kononov v. Latvia*, *op. cit.*, paras. 207 *et seq.*); a report of the Baltic and International Maritime Council (ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86); the London Protection and Indemnity Rules (*ibidem*); and academic doctrine, which appears mainly in the area of international humanitarian law (ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 194 *et seq.*; ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 132; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, paras. 144 and 232; ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 174).

²³² As explained Part I of the thesis, the notion of ‘instruments’ goes beyond those instruments considered as formal legal sources of international law. See *supra* Part I, Chapter 2, § 2.1.

²³³ This is supported by Article 32 of the ECHR which provides that “The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto...”.

case, comparable to the list that appears in the Statute of the ICJ.²³⁴ Admittedly, external referencing is in the first place not a debate about the use of external instruments as ‘sources of law’. It is about the use of external instruments to interpret and apply a source of law, namely the ECHR and its Protocols.

175. That being so, then why is the (formal) legal status of the imported instruments a relevant issue in respect of external referencing? This is relevant because it enables to study the integration of binding as well as non-binding instruments in legal reasoning, and therefore, to contextualize certain challenges of the referencing practice. Because, also when normative instruments have no formal binding status, we assume that they might operate – as a result of the Strasbourg referencing practice – ‘as if’ they would have such a status, and that they might lie at the basis of the creation of ‘new rules’ under the ECHR. There is no doubt that the latter is controversial from an international point of view that puts large stress on ‘State consent’ as a prerequisite to create or develop the law. An overview of the status of the imported instruments will be helpful to better understand some criticism of the referencing practice as well as to, at a later stage of this research, demonstrate how the practice could gain more (legal) validity.

§ 5.1. Binding instruments

176. The category of references to formal external instruments covers references to obligatory ‘hard’ applicable sources.²³⁵ However, when the Court refers to a treaty that *in abstracto* contains hard law *vis-à-vis* the parties to that treaty, but that, *in concreto*, had not been ratified by the respondent State, that treaty does not reflect an obligatory source in the context of the conflict, and will not be considered as ‘binding’.
177. In the pool of Grand Chamber case law, external references appear to binding sources of State origin, in the form of references to ratified treaties. Those references cover instruments that, *vis-à-vis* the respondent State, can be considered as a traditional legal

²³⁴ Article 38 paragraph 1 of the Statute of the ICJ provides: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

²³⁵ The typology of hard instruments has mainly been inspired by the enumeration of formal sources of international law by Olivier Corten, who himself largely relies on the enumeration of formal sources of international law mentioned in Article 38 of the Statute of the ICJ. The notion of ‘formal hard instruments’ is thus guided by a state-centric view of international law. See O. Corten, *Méthodologie du droit international public*, Editions de l’Université de Bruxelles, Brussels, 2009, pp. 138 *et seq.* See also: S. Goltzberg, *L’argumentation juridique*, Dalloz, Paris, 2013, 119 p.

source. In the pool of cases, the Grand Chamber refers more often to ratified conventions than it refers to non-ratified conventions.²³⁶

178. When the Court refers to a non-ratified convention or another kind of a non-binding instrument (such as, for instance, draft articles of the ILC), such a reference can nonetheless be conceived as a reference to a formal ‘hard’ legal instrument provided that the instrument in question reflects a codification of international customary law.²³⁷

179. Strasbourg references to ‘hard’ legal sources of State origin also appear in the form of references to obligatory decisions of international organisations of which the respondent State is a member. This happens, for instance, when the Court refers to EU directives and EU regulations in a case where the respondent State is a member of the EU.²³⁸

§ 5.2. Non-binding instruments

180. In addition to references to instruments that are ‘hard’ and binding legal sources, the Strasbourg Court also imports instruments that are legally non-binding. A first category of non-binding instruments concerns ‘hard’ legal instruments that did not yet enter into force, that are not ratified by the respondent State, or that are issued by bodies of which the respondent State is not a member.²³⁹ A second category of non-binding instruments include ‘soft’ instruments developed with the intention not to be legally binding (by organs representing the States or not), including non-obligatory recommendations or guidelines.²⁴⁰

²³⁶ The next section, about references to non-binding instruments, contains an exhaustive enumeration of all the imported treaties (in our pool of cases) that had *not* been ratified by the respondent State to the case (see *infra*, § 5.2.1.).

²³⁷ In the case of *Cudak*, for example, the Court considers the ILC Draft Articles on Jurisdictional Immunities of States and their Property of 1991 as applicable under customary law. See ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 64. Also in the *Sabeh el Leil*-case, the Court said that Convention of Jurisdictional Immunities of 2004 applied under customary international law “...even if the State in question has not ratified that Convention, provided it has not opposed it either”. Since the respondent State has not ratified the Convention in question but did not oppose it either, the external provisions thus applied to it under customary international law and the Court took them into consideration in its legal argumentation. ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, paras. 54 and 57-58. Establishing the existence of a rule of customary law is not always an easy undertaking and also depends on the theoretical lens one adopts, ranging from more ‘voluntarist’ to more ‘objectivist’ perspectives on the law. Generally, the establishment of a custom requires two constitutive elements: a ‘practice’ (by official organs of the States or by international organizations) and the ‘believe’ that this practice expresses a legal rule. For more information in this respect, see O. Corten, *op. cit.*, pp. 149 *et seq.*

²³⁸ The following section, about references to non-obligatory instruments, contains an exhaustive enumeration of all EU regulations and directives (in our pool of cases) that were imported *vis-à-vis* a respondent State that is *no* member of the EU. All other obligatory EU instruments had been imported in cases against EU Member States. Of the twelve EU regulations and directives that had been imported in our pool of cases, only seven of them were invoked in a case against an EU Member State.

²³⁹ Note that we focus on the status of the instruments at the moment of their importation (and thus at the moment the ECtHR delivers its decision or judgment). The interpretation process itself – after importation – might also have *effects* on the status of the instruments, for instance by giving obligatory effects to what are traditionally considered to be non-binding instruments. This aspect will not be considered for now, but under *infra* Part III, Chapter 2, § 6.

²⁴⁰ For authors who, quite uncommonly, also use the notion of ‘soft’ law in connection to binding treaties invoked against a non-party, or in connection to binding treaties that did not yet enter into force, see T. Barkhuysen and

181. In the case of *Demir and Baykara* and in the Grand Chamber cases that followed since then (until the end of 2015), the Court, on many occasions, has used non-binding instruments in its legal reasoning. We notice references to non-binding instruments of (direct or indirect) State origin (which we call: ‘political’ non-binding instruments) (§ 5.2.1.), and to non-binding instruments originating from politically non-representative expert organs (§ 5.2.2.).

§ 5.2.1. ‘Political’ non-binding instruments

182. The Grand Chamber of the Strasbourg Court imports several instruments of *State origin* without obligatory effect.²⁴¹ A *first category* of references to ‘political’ non-binding instruments includes international conventions that had not been signed or ratified by the respondent State, or that were not in force when the Court decided the case. These instruments are not applicable on a conventional basis.²⁴²
183. In the key case of *Demir and Baykara*, the Grand Chamber alludes to the use of this category of instruments. It holds that when it looks for “...a common ground among the norms of international law”, that “...it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State”.²⁴³ In its conclusion on the referencing practice, the ECtHR adds that “...it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned”.²⁴⁴ When elaborating on the referencing practice, the Court thus expresses its confidence in importing non-binding instruments in search for a common ground or in search for applicable instruments in respect of the subject matter. The merits of the case of *Demir and Baykara* demonstrate how a Court’s ‘evolutive’ reasoning can be partly influenced by international instruments that had not been ratified by the respondent State such as, *in casu*, by Articles 5 and 6 of the (revised) European Social Charter²⁴⁵, which Turkey did not ratify although it had the possibility to do so.

M.L. van Emmerik, “Ongebonden binding: verwijzing naar soft law standaarden in uitspraken van het EHRM”, *NJCM-Bulletin* 2010, vol. 35, issue 7, p. 828; F. Tulkens, S. Van Drooghenbroeck and F. Krenc, “Le soft law et la Cour européenne des Droits de l’Homme: questions de légitimité et de méthode”, *RTDH* 2012, no. 91, pp. 434-489.

²⁴¹ Tulkens, Van Drooghenbroeck and Krenc speak of ‘political soft law’. See *ibidem*.

²⁴² Some academics put the treaties that did not yet enter into force (in general or *vis-à-vis* a certain state) not under the notion of ‘soft law’ or of ‘non-binding law’ but under the notion of ‘non-law’. See, in this sense: D. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules”, *ICLQ* 2006, vol. 55, p. 308. This author also puts *i.a.* environmental principles and scientific developments under the category of ‘non-law’.

²⁴³ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 74.

²⁴⁴ *Ibidem*, para. 86.

²⁴⁵ *Ibidem*, paras. 103 and 149. Turkey did not ratify the specific articles to which the decision referred. The European Social Charter treaty system is one of the most widely accepted human rights set of standards within the CoE. The widespread support for social rights is assured by the fact that 43 out of the 47 Member States of the CoE are parties to either the 1961 Charter or the Revised Charter. Only Liechtenstein, Monaco, San Marino and Switzerland have not ratified either of these treaties. The Charter is based on a ratification system, enabling

184. In the Grand Chamber cases that followed *Demir and Baykara*, the Court seemed, to some extent, to throttle back on the issue. The Grand Chamber did not explicitly repeat the phrases about the use of non-binding instruments in the way that they were framed in *Demir and Baykara*. It also did not develop new phrases to explain or justify the use of non-binding instruments. Admittedly, in the cases of our pool, the Court sometimes redirected the reader to statements made in the *Demir and Baykara*, but these references mostly concerned statements other than those addressing the use of non-binding instruments. For instance, the Grand Chamber cited a few times paragraphs of the *Demir and Baykara*-case to support the general argument that the Court cannot interpret the ECHR in a vacuum and that it must take into account rules and principles of international law in a harmonious manner²⁴⁶, or to support the idea that a ‘consensus’ that emerges from specialized international instruments may constitute a relevant consideration to interpret the provisions in specific cases.²⁴⁷ Actually, only very few Grand Chamber cases of our pool cited *Demir and Baykara v. Turkey* in a particular connection to the use of non-binding instruments in legal reasoning.²⁴⁸
185. The absence of explanatory statements in relation to the use of ‘political’ non-binding instruments does not mean that the Court does no longer use such materials to support its reasoning. References to instruments that had not been ratified by the respondent State or that had not yet entered into force remained after the *Demir and Baykara*-case.
186. Indeed, the Court, on an exhaustive basis in our pool of cases, has referred to several CoE conventions that had not been signed or ratified by the respondent State. Examples of such references are²⁴⁹: the European Code of Social Security²⁵⁰, the Convention on Preventing

States, under certain conditions, to choose the provisions they are willing to accept as binding international legal obligations. They are encouraged to progressively accept all the Charter’s provisions. See <http://www.coe.int/en/web/turin-european-social-charter/about-the-charter> (visited on 6 March 2016).

²⁴⁶ On an exhaustive basis, see: ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136; ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 71; ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 93; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 129; ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), *op. cit.*, para. 23. The Court in the latter cases redirects the reader to paragraph 67 of the *Demir and Baykara*-case (which does not explicitly touch on the use of soft instruments).

²⁴⁷ On an exhaustive basis, see: ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 102. The Court in the latter cases redirects the reader to paragraph 85 of the *Demir and Baykara*-case (which does not explicitly touch on the use of non-binding instruments).

²⁴⁸ See ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 176; ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, *op. cit.*, para. 142; ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136. Only in the case of *Tănase v. Moldova*, the Court redirects the reader to paragraph 86 of the GC *Demir and Baykara*-case which explicitly touches upon the use of non-binding instruments. In the case of *Sindicatul*, the Court cites paragraph 85 of the GC *Demir and Baykara*-case but nonetheless ties this statement directly to the introduction of some non-binding instruments. In the case of *Catan*, the Court refers to paragraph 67 of the GC *Demir and Baykara*-case, (which is the paragraph that mentions Article 31 paragraph 3 (c) VCLT), to justify a reference to the ‘soft’ UDHR (together with references to ‘hard’ treaties).

²⁴⁹ The examples that follow concern – on an exhaustive basis – those CoE conventions that had been introduced in a case while the respondent State did not ratify the instrument in question. It is possible, however, that these instruments – on other occasions – had been introduced in cases against a State that *did* ratify the instrument. The examples are thus always case-specific.

²⁵⁰ ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 85.

and Combating Violence against Women and Domestic Violence²⁵¹, the Convention on the Protection of the Environment through Criminal Law²⁵², the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of 4 April 1997 (“Oviedo Convention”)²⁵³, the Convention on the Adoption of Children of 2008²⁵⁴, the International Convention on the International Validity of Criminal Judgments²⁵⁵, and the European Convention on the Calculation of Time-Limits of 16 May 1972²⁵⁶.

187. The Grand Chamber has regularly imported UN human rights instruments in the pool of cases (including the ICCPR, the ICESCR, the CEDAW, the ICERD, the CRC, the CRPD, the CAT, and the ICPPED). When it did so in our pool of cases, it almost never occurred that the imported instruments were not signed or ratified by the respondent State in question. Only in the cases of *Varnava* and *El Masri*, the Grand Chamber has cited a UN treaty that had not been ratified by the respondent State, namely the ICPPED.²⁵⁷

188. In addition, referencing practice has covered UN conventions other than human rights treaties. When the Court makes references of such kind, the instruments are mostly signed or ratified by the respondent State. In our pool of cases, there are references to UN conventions other than human rights treaties on fifty-three occasions.²⁵⁸ Only seven of this references include a convention that was not ratified by the respondent State: two times, the Court referred to the VCLT while this instrument was not ratified by the respondent State,²⁵⁹ once, it referenced the Rome Statute of the ICC in a case against a State that is no party to that Statute;²⁶⁰ and three times, it cited the Convention on Jurisdictional Immunities of States and their Property in a case against a State that did not sign or ratify that convention.²⁶¹ In respect of conventions of UN Specialized Agencies, we found one reference to a non-ratified ILO Convention (the ILO Convention of 1982 on the Establishment of an International System for the Maintenance of Rights in Social Security).²⁶²

²⁵¹ ECtHR (GC), *Rohlena v. Czech Republic*, op. cit., para. 71.

²⁵² ECtHR (GC), *Mangouras v. Spain*, op. cit., para. 86.

²⁵³ ECtHR (GC), *Parrillo v. Italy*, op. cit., paras. 181-182; ECtHR (GC), *Bouyid v. Belgium*, op. cit., para. 89.

²⁵⁴ ECtHR (GC), *X and Others v. Austria*, op. cit., paras. 148 et seq.

²⁵⁵ ECtHR (GC), *Sergey Zolotukhin v. Russia*, op. cit., para. 107.

²⁵⁶ ECtHR (GC), *Sabri Güneş v. Turkey*, op. cit., para. 58.

²⁵⁷ ECtHR (GC), *Varnava and Others v. Turkey*, op. cit., para. 163; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, op. cit., para. 240.

²⁵⁸ For an exhaustive enumeration, see *supra*, para. 163.

²⁵⁹ ECtHR (GC), *Varnava and Others v. Turkey*, op. cit., para. 130; ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), op. cit., para. 23. Note however that most of the provisions of the VCLT reflect rules of customary law. On the latter issue, see more elaborate *infra*, Part III, Chapter 1, § 3.2.

²⁶⁰ ECtHR (GC), *Varnava and Others v. Turkey*, op. cit., para. 163.

²⁶¹ ECtHR (GC), *Cudak v. Lithuania*, op. cit., para. 64; ECtHR (GC), *Sabeh El Leil v. France*, op. cit., para. 49; ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 196 et seq.

²⁶² ECtHR (GC), *Carson and Others v. the United Kingdom*, op. cit., paras. 85-88. In total, there were nine references to ILO-Conventions in our pool of examined Strasbourg case law. In eight of these nine references, the respondent State did ratify the ILO-Conventions in question.

189. Generally, a lack of ratification of the imported instruments is far less noticeable in respect of UN (human rights) conventions than in respect of conventions of the CoE and the EU. This observation, however, does not necessarily mean that the Court attaches more importance to the ratification of UN instruments than to the ratification of other external instruments. A more plausible explanation seems that these instruments generally know high ratification records among CoE Member States.
190. The Grand Chamber also imported conventions that *could* not be ratified by the respondent State because they are developed by institutions or unions to which it is no party. In our pool of cases, references appear to EU instruments in cases against States that are no EU Members. For instance, eight of the examined cases referenced the EU Charter.²⁶³ In half of these cases, the respondent State is no member State of the EU.²⁶⁴ In addition, the Court imported twelve times EU regulations and EU directives.²⁶⁵ Four of these twelve times, this happened in a case against a State that is no EU Member State.²⁶⁶ References to external instruments that cannot be ratified by the respondent State equally occur by means of importations of external regional human rights instruments, such as the ACHR and the AfCHR.²⁶⁷
191. When the Court refers to treaties other than UN, EU, or CoE treaties, also then, there are references to instruments that had not been ratified by the respondent State. In our pool of cases, we note such a reference in respect of the Convention implementing the Schengen Agreement²⁶⁸, the Protocols to the Geneva Conventions²⁶⁹, the Hague Convention on Land

²⁶³ For all cases of the pool referring to the EU Charter, see *supra*, para. 146, footnote 143.

²⁶⁴ This happened more particularly in the following cases of the pool: ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 105 and 150; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 135; ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 107.

²⁶⁵ For all references to EU directives and regulations, see *supra*, para. 159.

²⁶⁶ All references in the pool to EU Directives and Regulations in respect of non-EU Member States: EU Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140); EU Council Directive 2010/18/EU of 8 March 2010 on the application of the revised Framework Agreement on Parental Leave between BUSINESSEUROPE, UEAPME, CEEP and the ETUC (ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140); EU Council Regulation EEC, Euratom of 3 June 1971 (ECtHR (GC), *Sabri Güneş v. Turkey*, *op. cit.*, para. 58); and EU Council Regulation 96/C 329/01 on the Lawful Interception of Telecommunications of 17 January 1995 (ECtHR (GC), *Roman Zakharov v. Russia*, *op. cit.*, para. 269). Although Switzerland is no party to the EU, it is bound by the Dublin Regulations imported in the case of *Tarakhel v. Switzerland*. The latter results from the existence of the Association Agreement of 26 October 2004 between the Swiss Confederation and the European Community. The Court mentioned this Association Agreement in the *Tarakhel*-case (ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88).

²⁶⁷ For all cases of the pool referring to the ACHR and the AfCHR, see *supra*, para. 160. The case of *Demir and Baykara* does not make a direct use of the ACHR to argue the issue but it, when explaining referencing practice, refers to the case of *Soering v. the United Kingdom*, which is a case that relied on the ACHR. ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 68, with reference to ECtHR (GC), *Soering v. the United Kingdom*, 7 July 1989, Appl. No. 14038/88.

²⁶⁸ ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79.

²⁶⁹ ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 185 (Protocols I, II and III).

Warfare and its annexed Regulations²⁷⁰, and the Treaty of Versailles.²⁷¹ On a very few instances, there were also references to conventions that were still in their drafting process.²⁷²

192. A second category of references to ‘political’ non-binding instruments includes references to ‘soft’ instruments of State origin. It more particularly concerns ‘soft’ recommendations, guidelines, standards, and so on, issued by politically representative bodies, such as the General Assembly of the United Nations or the political organs – the COM and the PACE – of the CoE. Such recommendations are part of ‘soft governance’²⁷³ rather than of ‘hard government’²⁷⁴.²⁷⁵ In several of the examined Grand Chamber cases, the Court made a reference this kind of instruments in its legal reasoning. The most noticeable were importations of ‘soft’ materials of the COM and/or PACE.²⁷⁶ There were also regular references to UN resolutions as well as to UN principles, declarations, or rules that were approved by international congresses or resolutions.²⁷⁷

193. These ‘soft’ instruments equally appeared in decisions against a State that is not a party to (the constitutive act of) the institution from which they emanate, or that did not vote in favor of the instrument in question. Examining the latter is however not easy; especially in respect of older resolutions and recommendations, information about which State representatives voted in favor or against the adoption of certain ‘soft’ instruments is not always accessible.²⁷⁸ For instance, in respect of CoE-recommendations, there is, as far as we know, no information about voting results available on the Internet. In respect of CoE-resolutions imported in the pool, we find voting results ‘on-line’ of only two of them.²⁷⁹ In

²⁷⁰ ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 200 et seq.; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 144. Note that in the case of *Sargsyan*, the respondent State was not yet an independent State at the moment the Convention was issued.

²⁷¹ ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 196 et seq.

²⁷² See for example: *ibidem*, paras. 201, 202, 204, 207, 216, 219, and 225.

²⁷³ Governance rests upon diverse authorities (which are not necessarily public).

²⁷⁴ Government reflects the traditional system of command and control.

²⁷⁵ See U. Mörtz, Chapter “Introduction” in U. Mörtz (ed.), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, Edward Elgar, Cheltenham UK, 2004, p. 1. World politics differs considerable from nation-State politics because of its rather horizontal networks and authority relationships based on flexibility and voluntary rules. It is therefore a lot more familiar with rules of a soft nature. See *ibidem* and references there.

²⁷⁶ For all references in our pool to these instruments, see *supra*, para. 158, footnotes 133-135. The Court, in *Demir and Baykara*, mentioned a few cases in which it made use of soft external instruments, such as the Charter of the EU on Fundamental Rights. ECtHR (GC), *Demir and Baykara v. Turkey*, op. cit., para. 76. At the time the *Demir and Baykara*-judgment came out, the EU Charter was not yet a binding instrument (since not yet incorporated in the treaty of the EU). This changed under the Treaty of Lisbon, which entered into force on 1 December 2009.

²⁷⁷ For all references in our pool to these instruments, see *supra*, para. 164. The category of political non-binding instruments also includes international agreements that do not take the form of a treaty. The Court refers to such agreements on very few occasions only. See: Association agreement of 26 October 2004 between the Swiss Confederation and the European Community (ECtHR (GC), *Tarakhel v. Switzerland*, op. cit., para. 88); Stabilisation and Association Agreement between Bosnia and Herzegovina and the EU of 2008 (ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, op. cit., para. 49).

²⁷⁸ The voting results of PACE Resolutions and Recommendations can be searched for online but generally, the results are only available in relation to instruments that had been issued recently, in the last decade. In respect of COM-instruments, we do not find, by doing an online web-search, any clear information about the voting results.

²⁷⁹ Namely on the CoE PACE Resolution 1619 (2008) on the State of Democracy in Europe (ECtHR (GC), *Tănase v. Moldova*, op. cit., para. 168) and CoE PACE Resolution Res.1708(2010) on Solving Property issues of Refugees and

respect of both resolutions, it appears that of the three times that they were imported by the Grand Chamber in our pool, twice the country official of the respondent State did not vote ‘in favor’ of the resolution in question (once there was an ‘abstention’²⁸⁰, and once there was a ‘vote against’²⁸¹). We conclude from the latter that the ECtHR in principle does not shy away from referring to ‘soft’ CoE-instruments that are not backed up by any State consent.

§ 5.2.2. Expert instruments

194. To the category of imported non-binding instruments finally belong importations of (public) expert instruments²⁸², and thus of recommendations and opinions issued by bodies that are politically not representative, such as importations of instruments of (legal) expert and other specialized bodies.²⁸³ Some expert writings could constitute ‘a doctrine’ in international law.²⁸⁴
195. In the case of *Demir and Baykara*, the Court acknowledged – by mentioning examples of references in some precedent cases – that it imports instruments stemming from CoE-organs that do not politically represent the Member States, such as instruments of the Venice Commission.²⁸⁵ In Grand Chamber cases issued after *Demir and Baykara*, the Court again

Displaced Persons (ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 237; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, paras. 198 *et seq.*).

²⁸⁰ The Deputy of the Republic of Moldova did not vote in favor, but made an abstention in respect of the adoption of CoE PACE Res.1619(2008) on the State of Democracy in Europe (see <http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=958&DocID=12428>) (visited on 7 March 2016). In total, there were 4 abstentions, 54 votes in favor and 5 against.

²⁸¹ The Azerbaijan Deputy issued one of three votes against the PACE Resolution Res.1708(2010) on Solving Property Issues of Refugees and Displaced Persons. Another Azerbaijan Deputy decided not to vote (among 3 abstentions in total).

See <http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=1830&DocID=12923> (visited on 7 March 2016).

²⁸² Also Van Drooghenbroeck, Krenc and Tulkens use the notions of ‘expert’ and ‘private’ soft law. See F. Tulkens, S. Van Drooghenbroeck, and F. Krenc, *op. cit.*, p. 474.

²⁸³ The inclusion of ‘private and expert soft instruments’ in this categorisation illustrates the additional value of speaking of ‘soft normative instruments’ (with normative potential) and not of ‘soft law’.

²⁸⁴ A legal doctrine – thus the discourse that jurists have developed on the law – generally takes a marginal position within the theory of sources; it does not stem from an authority that is supposed to elaborate valid legal norms and it is thus not a formal legal source. In rather exceptional circumstances, a doctrine that pronounces itself on positive international law (*de lege lata*), can serve as ‘indirect’ legal source. This means that, from an international theoretical perspective, such a doctrine can serve as a supporting supplementary ‘source’ for that what had been concluded on the basis of direct formal sources. O. Corten, *op. cit.*, pp. 203-206; J. Ringelheim, “Le rôle de la doctrine dans l’émergence du droit international des droits de l’homme. Regards sociologiques sur un facteur de création du droit”, chapter in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérards, F. Ost and M. van de Kerchove (eds), *Les sources de droit revisitées, volume 3 – normativités concurrentes*, Publications Université Saint-Louis, Anthemis, Limal, 2012, p. 46, with reference to Ph. Jestaz and Ch. Jamin, *La doctrine*, Dalloz, Paris, p. 5. Mostly, and certainly when a reference is made to a single (or a few) academics, these instruments are considered as a ‘non-formal’ source of international law. J. Ringelheim, *op. cit.*, p. 46, with reference to C. Thibierge, “Sources du droit, sources du droit: une cartographie”, in *Libres propos sur les sources du droit. Mélanges en l’honneur de Philippe Jestaz*, Dalloz, Paris, 2006, p. 540.

²⁸⁵ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 75: “These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through Law (“the Venice Commission”)..., of that of the European Commission against Racism and Intolerance

included external instruments of CoE-expert bodies in its legal reasoning. In addition to references to the Venice Commission, there are importations of instruments of the CPT, the ECRI, the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences, the Advisory Committee on the Framework Convention for the Protection of National Minorities, and the CoE Human Rights Commissioner.²⁸⁶ The Grand Chamber also refers to instruments of expert bodies of other international organisations. Examples in this respect are: instruments of the ILC²⁸⁷, reports of individual mandate holders within UN 'Special Procedures'²⁸⁸, and recommendations, notes, guidelines and principles of UN Specialized Agencies and Programs.²⁸⁹ References to 'jurisprudential' outcomes such as recommendations and decisions of surveillance organs that do not reflect '*res judicata*' ('*autorité du chose jugée*'), are also considered as references to non-binding 'expert' material (rather than as instruments of judicial origin). The most pertinent examples of such references are importations of general comments or conclusions of the UN Treaty Bodies²⁹⁰ and conclusions of the ECSR.²⁹¹

196. We distinguish instruments issued by expert bodies of the CoE and of the UN from instruments originating in non-governmental bodies. The CoE and UN expert bodies are not entirely disconnected from the State; they operate on the basis of a public mandate. These expert organs are embedded in international public organisations and therefore, we could say they are (indirectly) created by States. As a consequence, the instruments they elaborate, in contrast to instruments that are issued by non-governmental expert bodies, have an 'indirect' or 'mandated' State connection.²⁹² This does not mean, however, that these instruments are backed up by democratic political representation. After all, independent experts lie at the basis of their elaboration.

197. Examples in our pool of imported opinions or guidelines issued by non-governmental organizations – sometimes described as instruments without legal normative

...and of the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment...".

²⁸⁶ For all references to these instruments in our pool, see *supra*, para. 158.

²⁸⁷ For all references to these instruments in our pool, see *supra*, para. 164, footnote 187. Corten says that a study of the ILC to which a large numbers of legal experts contribute, reflects an authoritative doctrine (O. Corten, *op. cit.*, p. 206). The ILC is a legal organ of the UN General Assembly that consists of independent lawyers acting in their 'personal' capacity (but who are nominated by States). The instruments of the ILC do not have a formal or official status but they are doctrine with particular authority (F. Tulken, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 437). The statute of the ICJ, in Article 38, provides that highly qualified doctrine ('teachings of the most highly qualified publicists') can be used as 'subsidiary means' for the determination of rules of law. In our view, a similar observation could for instance be made in respect of studies of the ILI (for references to ILI-instruments, see *infra*, para. 197, footnotes 299-300).

²⁸⁸ For references to these instruments in our pool, see *supra*, para. 164.

²⁸⁹ *Ibidem*.

²⁹⁰ For all references to these instruments in our pool, see *supra*, para. 162, footnotes 173-174.

²⁹¹ Referred to in: ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 149.

²⁹² Which does not mean, however, that non-governmental bodies might not be partly State-funded. Sometimes, they indeed receive some public funding. This does not go against their non-governmental statute, but it might nonetheless raise questions about the neutrality of such bodies.

value²⁹³ – include the World Medical Association Declaration of Helsinki on ethical principles for medical research involving human subjects²⁹⁴, the Charter of Core Principles of the CCBE²⁹⁵, the Amnesty International Fair Trials Manual²⁹⁶, a study of the ICRC²⁹⁷, reports of NGOs on the assessment of the situation of refugees²⁹⁸, the ILI Resolution on Guiding Principles on State Succession in Matters of Property and Debts of 2001²⁹⁹ and its Oxford Manual³⁰⁰, a report of the Baltic and International Maritime Council³⁰¹, and a report of the London Protection and Indemnity Rules³⁰². In addition, the Court also refers to writings of academic doctrine.³⁰³

§ 5.3. (Quasi-)judicial instruments

198. References to external judicial decisions occur regularly, including references to case law of other human rights courts such as the ACtHR³⁰⁴ and the AfCtHR³⁰⁵, references to national case law (of third States)³⁰⁶, and references to other regional and international courts³⁰⁷, such as references to the ECJ, the ICJ, criminal (war tribunals), *etc.*³⁰⁸ The Grand

²⁹³ See F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 475. These authors, to demonstrate Strasbourg external references to instruments without legal normative value include the case law example of *Makharadze and Sikharulidze v. Georgia*, and more particularly the reference in this case to principles of the World Medical Association: “However, the Court, sharing the principles expressed by the World Medical Association (“the WMA”)...also considers that the prison authorities may not be totally absolved of their positive obligations in such difficult situations..., passively contemplating the fasting detainee’s demise” (ECtHR, *Makharadze and Sikharulidze v. Georgia*, 22 November 2011, Appl. No. 35254/07, para. 82).

²⁹⁴ Referred to in: ECtHR (GC), *Gillberg v. Sweden*, *op. cit.*, para. 89.

²⁹⁵ Referred to in: ECtHR (GC), *Morice v. France*, *op. cit.*, para. 134.

²⁹⁶ Referred to in: ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132.

²⁹⁷ Referred to in: ECtHR, judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 232; ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 134.

²⁹⁸ Referred to in: ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 300.

²⁹⁹ Referred to in: ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia*, *op. cit.*, para. 120.

³⁰⁰ Referred to in: ECtHR, *Kononov v. Latvia*, *op. cit.*, paras. 207 *et seq.*

³⁰¹ Referred to in: ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86.

³⁰² *Ibidem*.

³⁰³ References to doctrine mainly appear in the area of international humanitarian law, see, for instance: ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, paras. 194 *et seq.*

³⁰⁴ For all references in our pool to this instrument, see *supra*, para. 160, footnote 152.

³⁰⁵ For all references in our pool to this instrument, see *supra*, para. 160, footnote 154.

³⁰⁶ For all references in our pool to this instrument, see *supra*, para. 156.

³⁰⁷ For references in our pool to these instrument, see *supra*, para. 159 footnote 144, para. 164 footnote 194, para. 161, *etc.*

³⁰⁸ From an international law perspective, a ‘clear line of jurisprudence’ might serve as an indirect (or subsidiary) legal source because it is focused on how to *interpret* the law (that emanates directly from other sources). A clear line of jurisprudence requires the citation of a certain number of motivations and decisions that go in a similar direction. The more a reasoning is abstract, general and not linked to the concrete circumstances of the case, the more ‘force’ it has as an indirect source (O. Corten, *op. cit.*, pp. 201 *et seq.*). Article 38 of the Statute of the ICJ provides that judicial decisions can be used as ‘subsidiary means’ for the determination of rules of law. Corten therefore notices that “[u]n juge, ou un auteur, qui ferait appel à la jurisprudence en prétendant créer une nouvelle règle serait dès lors critiquable, sur le plan méthodologique tout au moins” (*ibidem*, p. 198). An exception exists when the respondent State is a party of the constitutive act of the organ or organisation that delivers the decision. Then, the *dispositive* of the decision can be considered as a direct source of international law with a ‘conventional’ status *vis-à-vis* all the Member States of that international organisation. See *ibidem*, p. 201. It is not always easy to say whether a certain decision reflects ‘case law’ or not. Some bodies (like the OSCE or arbitral organs) solve conflicts but whether their ‘outcomes’ can be considered as ‘case law’ is food for discussion. See *ibidem*, pp. 199-200. Decisions of national courts may be considered as indirect formal sources of international law when their case

Chamber thus inserts references to judicial bodies regardless of whether the respondent State is a member of that body or not. For instance, out of the twelve cases in which the Court imports case law of the ECJ³⁰⁹, there are four cases in which the respondent State is no member of the EU.³¹⁰ Also references to case law of the ACtHR and the AfCtHR reflect examples of such kind.

199. Views on individual cases issued by *quasi-judicial* UN Treaty Bodies³¹¹ and decisions on individual cases issued by the ECSR³¹² are also referenced by the Grand Chamber.³¹³ Although being an issue under discussion, outcomes of these bodies are generally not considered as strictly binding. They might nonetheless reflect an ‘authoritative’ value.³¹⁴

§ 6. Concluding observations

200. The Court, when it explained the referencing practice in the Grand Chamber case of *Demir and Baykara*, categorized external instruments into ‘general international law’ and ‘CoE instruments’. It also touched upon references to ‘soft’ instruments. This section aimed to make the typology more precise and comprehensive. From the mapping of the recent external references, we conclude that the Grand Chamber approaches the external normative context comprehensively: it imports instruments of a large variety *ratione materiae, personae*, and *loci*, and different as to their origin and their legal status.

law is pertinent because the examined topic is one of international law and when it is treated as such (like state immunity, interpretation of the ECHR,...). *Ibidem*, p. 200.

³⁰⁹ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Scoppola v. Italy* (No. 2), *op. cit.*, para. 105; ECtHR (GC), *Micallef v. Malta*, 15 October 2009, Appl. No. 17056/06, para. 78; ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86; ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, paras. 151-154 and paras. 174-176; ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 175 and 212; ECtHR (GC), *Jeunesse v. the Netherlands*, *op. cit.*, paras. 110-111; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 103; ECtHR (GC), *Delfi AS v. Estonia*, *op. cit.*, para. 147; ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, para. 180; ECtHR (GC), *Kudrevičius and Others v. Lithuania*, *op. cit.*, para. 183.

³¹⁰ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79; ECtHR (GC), *Nada v. Switzerland*, paras. 175 and 212; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 103. Note that in the latter judgment, the ECJ-case law concerns the rebuttable presumption of Dublin States complying with the EU Charter and that Switzerland, although it is no member of the EU, is bound by the Dublin-regulations under the Association Agreement of 26 October 2004 between the Swiss Confederation and the European Community. Through this Agreement, Switzerland is linked to the Dublin-acquis. See for more information: F. Filliez, “Schengen/Dublin: the Association Agreements with Iceland, Norway and Switzerland”, in B. Martenczuk and S. van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations*, VUBpress, Brussels, 2008, pp. 169 *et seq.*

³¹¹ For all references to views on individual cases issued by UN Treaty Bodies in our pool, see *supra*, para. 162, footnote 172.

³¹² For all such references in our pool, see *supra*, para. 195, footnote 290.

³¹³ Even though the UN Treaty Bodies are considered as *quasi-judicial* actors, the thesis uses the notion of ‘case law’ in respect of their decisions and considers the references to their views as part of a jurisprudential or judicial dialogue. The term ‘judicial’ is thus understood in a large sense including ‘judges’ operating in *quasi-judicial* organs. Cf. L. Hennebel and A. Van Waeyenberge, “Reflexions sur le Commerce transnationale entre Juges”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerckhove (eds), *Les Sources du Droit revisitées. Volume 2: Normes internes infraconstitutionnelles*, Anthemis - Publications de l’Université Saint-Louis, Brussels, 2013, chapter available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211183 (visited on 20 September 2016), pp. 1-20.

³¹⁴ For more information on this issue, see *infra* Part III, Chapter I, § 3.3.4.

201. *Ratione materiae*, the Grand Chamber in the most recent years, integrates diverse instruments of general and specific content into its legal reasoning. References occur to instruments of general international scope including instruments of public international law that mostly do not – like human rights instruments do – concern individuals directly. In addition, the Court refers to instruments of specific content encompassing human rights instruments as well as instruments that are – to a greater or lesser extent – removed from human rights protection. On the one hand, with respect to references to external human rights catalogues, the Grand Chamber imports instruments with a material scope similar to the ECHR (here, references to the ICCPR take a prominent place) and instruments with another or a more specific scope, such as instruments containing ‘second generation’-human rights or focusing on particular human rights issues and/or protected groups. On the other hand, with respect to instruments dealing with specific issues or rights that – strictly taken – lie outside the human rights domain, regular references appear to labor law, criminal law, and international humanitarian law. It remains to be seen how and why the Court has found support in these instruments, and how it has dealt with their different levels of generality as well as with their potentially diverging and/or conflicting content or levels of protection.³¹⁵
202. *Ratione personae*, the Strasbourg Grand Chamber integrates instruments with a wide variety of focus including instrument that are – like the ECHR – general in scope, as well as instruments that are more precise and specialized because of protecting a particular group of human beings. The latter instruments often, in contrast to the ECHR, contain a considerable number of very specific rights. For example, the ECHR does, *ratione personae*, not particularly address children’s rights,³¹⁶ but it sometimes refers to the CRC, which contains dozens of rights tailored to children.³¹⁷ The Grand Chamber also imports instruments that do not focus on human beings but concern the organization of States and inter-governmental organizations.
203. *Ratione loci*, it appears from the exhaustive case law study that the imported instruments cover diverse geographic areas. Both instruments with a national and a regional,

³¹⁵ See *infra*.

³¹⁶ The only article of the ECHR that mentions the interests of children is Article 5 on the equality of spouses, which provides that “Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children”. The ACHR, being another regional general human rights catalogue, is somewhat more specific in this respect than the ECHR as the ACHR ensures in Article 19 that “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”

³¹⁷ Such as survival rights (including the child’s right to life and the needs that are most basic to existence, such as nutrition, shelter, an adequate living standard, and access to medical services), protection rights (ensuring children are safeguarded against all forms of abuse, neglect and exploitation, including special care for refugee children; safeguards for children in the criminal justice system; protection for children in employment; protection and rehabilitation for children who have suffered exploitation or abuse of any kind), development rights (including the right to education, play, leisure, cultural activities, access to information, and freedom of thought, conscience and religion), and participation rights (encompassing children’s freedom to express opinions, to have a say in matters affecting their own lives, to join associations and to assemble peacefully).

as well as instruments with a universal focus are imported by the Strasbourg judges. Instruments that are referenced the most often, are those operating at the level of the CoE and the United Nations. However, also references appear to instruments of geographical areas having no (or only a limited) connection with the European territory.

204. As to the *origin* of the imported instruments, references occur to instruments that originate from (third) States, international organizations, judicial actors, expert bodies, *etc.* If external referencing is conceived as a form of communication with external actors, the least we can say is that – by means of the referencing practice – conversations are held with actors of a wide diverse nature. Particular are references to instruments of (*quasi*-)judicial origin. Importations of the latter kind are considered as a component of a ‘judicial dialogue’³¹⁸ (or a ‘jurisprudential dialogue’³¹⁹), which is a popular issue of study in legal doctrine.
205. Regarding the *legal status* of imported instruments, we observe that the Court, in our pool of Grand Chamber cases, refers to both binding and non-binding instruments. External references to non-binding materials are no isolated phenomenon. In relation to certain types of instruments, it happens quite often. The Court, already in *Demir and Baykara*, was explicit about the practice of referencing non-binding instruments. Also subsequent to the case of *Demir and Baykara*, notwithstanding criticism in legal doctrine in respect of such references, non-binding instruments have been regularly imported, usually without such references being accompanied by explanatory or justificatory phrases. Sometimes, the Grand Chamber is transparent about its references to non-binding materials by explicitly mentioning that the instrument had not been ratified or that it did not yet enter into force. This is however no general tendency. The limited transparency and the lack of explanation with regard to the importation of non-binding instruments gives us the impression that the issue, from the perspective of the Court, is a topic on which it avoids elaborating (for instance because it is a complex issue or because the Court wants to keep as much freedom as possible *vis-à-vis* the referencing practice), *and/or* a topic of little importance on which the Court does not find it worth elaborating. It remains to be seen, when discussing the different ‘uses’ of external instruments, which precise role non-binding instruments fulfill within legal reasoning. The

³¹⁸ See *inter alia*: F.G. Jacobs, *op. cit.*; A. Buyse, *op. cit.*; J. Allard and L. Van den Eynde, “Le Dialogue des Juges comme Source de Droit: Arguments entre Idéalisation et Scepticisme”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les Sources du Droit revisitées. Volume 3: Normativités concurrentes*, Publications de l’Université Saint-Louis, Limal/Anthemis/Brussels, 2013; A.-M. Slaughter, “A Typology of Transjudicial Communication”, *U. Richmond L. Rev.* 1994, vol. 29, pp. 99-137.

Hennebel and Van Waeyenberge distinguish three ‘degrees’ of mutual engagement being a ‘direct dialogue’ (addressing interactions for instance between the ECJ and national courts), a ‘monologue’ (addressing the phenomenon of borrowing of jurisprudence) and ‘indirect dialogue’ (addressing, for instance, the interactions between national courts through interference of the ECtHR). See L. Hennebel and A. Van Waeyenberge, *op. cit.*, 2013.

³¹⁹ The thesis *i.a.* focuses on a particular aspect of judicial dialogue: Judges referring to instruments emanating from other judicial actors. This is a very visible aspect of judicial dialogue and might be more precisely grasped by the notion of ‘*dialogue des jurisprudences*’ or ‘jurisprudential dialogue’. See J. Allard and L. Van den Eynde, *op. cit.*, p. 286.

latter is of importance to uncover the specific impact and challenges of the imported non-obligatory instruments in legal reasoning. A ‘dynamic impact’ (making the scope of the Convention evolve) built on non-binding instruments, is the most controversial, especially from a duty bearers’ perspective.

206. As a final concluding note, we connect the different characteristics of the imported instruments with various ‘degrees of externality’. *Firstly*, in relation to the material scope of the instruments, the degree of externality is higher in respect of references to instruments that lie outside the human rights domain compared to instruments that are developed within a human rights context. *Secondly*, from the point of view of the personal scope of the instruments, references have a higher degree of externality if they do not have (specific groups of) individuals as their subjects, like human rights law does. *Thirdly*, from a geographical dimension, references are of higher externality when they cover external instruments that are *ratione loci* not (or only partly) anchored in the respondent State, or in CoE Member States. *Fourthly*, references to instruments of non-State origin reflect references with a high degree of externality, at least from a States’ point of view. The same can be said about other non-binding instruments. But also within this group, degrees of externality may vary, depending on whether the non-binding instrument was ratified or not (when the State explicitly refused to ratify a certain instrument, the degree of externality is very high); on whether the provisions are ‘soft’; on whether the instrument originates in a political body; on whether it has a precise content; on whether it is recent or not, *etc.*³²⁰ Thus, for instance, when a ‘hard’ external human rights convention, ratified by all respondent States, is used to interpret or apply the Convention, the degree of externality is almost negligible. However, when the Grand Chamber takes account, for instance, of national case law of third States or of the ACHR, the degree of externality is higher, from a geographical point of view as well as from a point of view that puts stress on the requirement of ‘State consent’.

207. While the degree of externality – linked to the characteristics of the external instruments – will be a relevant factor in addressing questions of the validity of external referencing³²¹, the same can be said about the functions that external instruments fulfill in legal reasoning and, in that connection, about the ‘impact’ external instruments have on the

³²⁰ See Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 22, where Judge Pinto pleads in favor of hardening ‘soft’ law on the basis of some objective criteria. Merkouris talks in this respect of a ‘proximity criterion’ (that he finds relevant for understanding and utilizing Article 31 paragraph 3 (c) VCLT), based on linguistic proximity (how similar the terms/provisions used are in the two treaties), subject-matter proximity (how similar their object of regulation), actor (parties) proximity (how many parties are common between them), and temporal proximity (how much time has lapsed between their respective entry into force). See P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave*, Leiden, Martinus Nijhoff/Brill, 2015, cited by S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, “Questions of Method: the Use of “External Sources” in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*”, p. 11 of the draft version. Van Drooghenbroeck, Krenc, and Tulkens speak in this context of a “distinguishing *pondéraux*” in order to give weight to external instruments. See F. Tulkens, S. Van Drooghenbroeck, and F. Krenc, *op. cit.*, 2008, p. 469. See also *infra* Part III, Chapter 1, § 4.

³²¹ See *infra*, Part III.

interpretative process. The functions of the external referencing practice or – said otherwise – the ‘argumentative uses’ of external instruments, are discussed in the chapter that follows.

CHAPTER 3 - DIVERSE ARGUMENTATIVE USES

208. The case of *Demir and Baykara v. Turkey* did not give a clear idea of the functions external instruments exercise when interpreting and applying the Convention. The Court only provided desultory and scattered information whereby it alluded to the possibility of using external instruments for ‘evolutive interpretation’, for clarifying the object and purpose of the Convention, for considering the scope of the Convention as a subsidiary means of interpretation, for searching a ‘common ground’ or a ‘consensus’ between the Member States, and for defining the meaning of the terms and notions of the Convention.
209. The aim of this Chapter is to offer – based on an exhaustive empirical analysis of Grand Chamber cases – a more comprehensive and structured overview of the argumentative functions of external instruments.³²² The categorization is mainly based on our own understanding and perception of how the Court uses external instruments³²³; the Court itself is only seldom explicit about the reason why it refers to external instruments and – in that connection – about the function that these instruments exercise within its legal argumentation.³²⁴ A schematic overview of the presence of each argumentative function per case, is present in Annex 2 to the thesis.³²⁵
210. The argumentative functions of external instruments in the recent Grand Chamber cases include: dismissive uses (§ 1.), the establishment of rules about the interpretation and execution of treaties (§ 2.), the use to allow or resist ‘evolutive’ interpretation (§ 3.), the importation and clarification of notions and their definitions (§ 4.), the use to shape requirements of positive action (§ 5.), to generally support the interpretation of the Convention (§ 6.), to demonstrate of a (missing) connection between an external obligation

³²² This overview covers all functions external instruments have exercised in Grand Chamber cases from *Demir and Baykara v. Turkey* until the end of 2015.

³²³ The comprehensive categorisation as we present it, is innovative: as far as we know, no other author has made an exhaustive overview in this respect and no other author has put together all functions of external instruments in Strasbourg legal reasoning. Some (aspects) of the functions have nonetheless been inspired by the following academic contributions: M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford, Oxford University Press, 2010, pp. 352-369; H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: an Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Intersentia, Cambridge/Antwerp/Portland, 2011, pp. 117 *et seq.* and pp. 245-259; J.L. Larsen, *op. cit.*, pp. 1288-1298; J. Allard and L. Van den Eynde, “Le Dialogue des Juges comme Source de Droit: Arguments entre Idealization et Sceptisme”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerckhove (eds), *Les Sources du Droit revisitées. Volume 3: Normativités concurrentes*, Publications de l’Université Saint-Louis, Limal/Anthemis/Brussels, 2013, pp. 290 *et seq.*; A. Buyse, *op. cit.*, pp. 7-10.

³²⁴ Although we realize that sometimes a reference might fulfill several functions, double categorizations are avoided as much as possible. Hence, each different ‘use’ of external instruments is usually brought under one single category of ‘argumentative use’. The latter is achieved by focusing on the *main* purpose or function that the external instruments fulfill, which enables having better insight in what the primordial functions of referencing practice are. Only exceptionally, some external references will be included twice in our categorization, such as, for example, when a certain instrument is used to define a notion and, at the same time, to establish ‘evolution’ in the definition of that notion. Then, this instrument functions both as a tool to construct a notion and as a tool to enable ‘evolutive’ interpretation.

³²⁵ *Infra.*

and a State's behavior (§ 7.), to create an harmonious interpretation (§ 8.), and to establish the States' freedom of discretion (§ 9.).

§ 1. Dismissive use

211. A dismissive reference appears when the Court mentions an external instrument and, subsequently, puts it in contrast with (the interpretation of) the ECHR and its Protocols, or (partly) disregards its content.³²⁶ A dismissive reference does not fully ignore the existence of an external instrument, but, in a particular cases, disassociates it from the ECHR. It means that the Court explicitly mentions the instrument in its legal reasoning, but refuses to take it duly into account, or refuses to follow it.³²⁷
212. Based on our pool of cases, dismissive references cover two specific scenarios: one of contrast (or opposition) and one of disregard. Under the first scenario, the Court puts an external instrument in unfavorable contrast with the scope and interpretation of the ECHR.³²⁸ In a situation of disregard, the Court does not put the imported instrument in flagrant opposition to the ECHR, but leaves aside its content. The border between both phenomena is not always easy to draw. Both types are therefore put under the umbrella of 'dismissive references'.
213. When an external instrument is put in contrast with the ECHR or when the content is disregarded, how may the instrument exercise an *argumentative function*? Thus, why is a dismissive use of external instruments considered as *a use*? We include these references as argumentative functions because the Court, when it cites and dismisses a certain instrument, does not ignore its existence.³²⁹ Hence, we assume that it fulfills a certain use in the motivation. Furthermore, a scenario of opposition may serve as an *a contrario*-argument. Then, the external instrument influences the argumentative process in a contrasting manner and serves as an example of how the meaning of the ECHR should *not* be understood. This scenario supports the Court's interpretative process, too. Moreover, the least we can argue about dismissive references is that they fulfill an informative or an ornamental (decorative)

³²⁶ Cf. M. Rosenfeld, *op. cit.*, p. 70.

³²⁷ Instead of the terminology of 'constructive' and 'dismissive' references, we notice that in academic literature, the terminology of 'positive' and 'negative' references is more common. These terms might however be confusing: they give the impression to contain a value judgment. Moreover, the notion of a 'negative' reference mainly covers the use of external instruments to 'contrast' them with the Convention, while we use the term of 'dismissive' references in a broader sense. For academics using the terminology of 'positive' and 'negative' references, see: M. Forowicz, *op. cit.*, p. 3; J.L. Larsen, *op. cit.*, pp. 1288-1289; M. Rosenfeld, *op. cit.*, p. 70; Cf. R. Hirschl, "The Question of Case Selection in Comparative Constitutional Law", *The American Journal of Comparative Law* 2005, vol. 53, no .1, p. 130.

³²⁸ Cf. M. Rosenfeld, "Constitutional Migration and the Bounds of Comparative Analysis", *NYU Annual Survey of American Law* 2001, vol. 58, p. 70.

³²⁹ Therefore, we decided not to use the notion of 'supportive uses', but to use instead the term of 'constructive uses'. Indeed, also a dismissive reference might *support* a certain argumentation.

argumentative purpose (without a real normative weight).³³⁰ When the Court does the effort to explain *why* it neglects the external instrument, this serves the motivation and the transparency of a legal reasoning. When the disregarded instrument had been introduced by one of the (third) parties, the Court's citation (possibly accompanied by an explanation about why it is not used) exercises the argumentative function of responding to (third) parties' arguments.

214. There are different types of dismissive uses. Based on our case law study, we distinguish between: a non-clarified dismissive use (§ 1.1.); a dismissal because of distinguishing the circumstances or the legal questions (§ 1.2.); because of the Court's limited mandate (§ 1.3.); because of prioritizing internal law and practices (§ 1.4.); or because the Court considers it too soon to give effects to the external instrument (§ 1.5.).³³¹ All cases of our pool in which the Court has put external instruments in an explicit contrast to the ECHR and in which the Court, in a rather transparent manner, has disregarded the external instruments, are included in this categorization. Implicit opposition or disregard is more difficult to detect.³³²

§ 1.1. Without clarification

215. In *A. and Others v. the United Kingdom*, the Grand Chamber ignored an external instrument without explaining why. The Court in this case examined some conditions of detention under Article 3 ECHR (prohibition of torture and of inhuman and degrading treatment). The Court explicitly mentioned reports of the CPT that qualified the conditions in question as "...amounting to inhuman or degrading treatment". Without explaining why, the Court did not follow the qualification of the CPT.³³³ In addition, in the same case, the Court mentioned a position of the HRC saying that measures derogating from the ICCPR must be of "...an exceptional and temporary nature".³³⁴ Again without an explanation, the Court took distance from the external opinion; it pointed out that the non-temporary

³³⁰ E. Özü, *The Enigma of Comparative law, Variations on a theme for the 21st Century*, Springer, Dordrecht, 2004, p. 88: "...comparativism may be used solely to further a particular cause. This use is 'ornamental', with the aim of having a particular 'effect' on a target audience. Judges would have reached the same conclusion without comparativism.

³³¹ Another relevant scenario is the Court's disregard of external instruments when applying the Convention because of the different character of the external monitoring process as compared to the Court's adjudication process. An important case in this respect is the Chamber case of *R.M.T. (ECtHR, National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 8 April 2014, Appl. No. 31045/10). Since this case is not part of our pool of case law (it is not a Grand Chamber case), we will not include it under Part II, which provides an overview of characteristics of referencing practice in Grand Chamber cases over the most recent years. Given the relevance of the case, it will nonetheless be largely discussed under Part III, which reflects on issues of validity of referencing practice.

³³² Indeed, it may happen that the Court cites certain instruments but, in a more hidden manner, does not give any weight to them. Finding such uses is difficult and therefore, one should realize that not all (implicitly) disregarded external references are mentioned here.

³³³ ECtHR (GC), *A. and Others v. the United Kingdom*, *op. cit.*, para. 132.

³³⁴ *Ibidem*, para. 178.

character of derogating measures does not make such measures invalid.³³⁵ Acknowledging that derogations from the Convention for reasons of public emergency (under Article 15 of the Convention) could continue for many years, the ECtHR avoided an analogous reasoning with the HRC.

§ 1.2. Distinguishing the circumstances or the legal question

216. A lack of comparable factual circumstances or legal questions leads to a distinction between the ECHR and other instruments. Such dismissive references, generally, respond to the importation of external instruments by the (third) parties to the case. By mentioning the instrument in its legal reasoning, the ECtHR informs the parties that they are aware of the existence of the instrument and explains why it will not exercise any normative weight. Several examined Grand Chamber cases demonstrate this phenomenon.

217. A first case is *Catan v. the Republic of Moldova and Russia*.³³⁶ In this judgment, the Grand Chamber addressed the general principles of State ‘jurisdiction’ under Article 1 of the Convention.³³⁷ The Court concluded that individuals of a certain region³³⁸ (outside Russian territory) fell within the Russian’s jurisdiction because Russia was exercising ‘effective control’ over the regime³³⁹. The Russian Government did not share this view. It argued that it could not exercise jurisdiction over a region that was controlled *de facto* by another government. To support that argument, Russia used a judgment of the ICJ³⁴⁰ on State responsibility for an international wrongful act.³⁴¹ The Court, however, did not give effect to that judgment, explaining that the ICJ-case concerned a different question. More particularly, the Strasbourg Court pointed out that it had never equated the test for establishing a State’s responsibility for an internationally wrongful act under international law with the test for establishing State’s jurisdiction under Article 1 of the Convention.³⁴²

218. The Court in the previous case alluded to the specificity and non-similarity of human rights law, as compared to general international law.³⁴³ In a similar spirit, the Grand Chamber in the case of *Jaloud v. the Netherlands* (which referred *inter alia* to the precedent of

³³⁵ *Ibidem*.

³³⁶ ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*

³³⁷ Article 1 of the Convention provides that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

³³⁸ More particularly, the region of Transdnistria, which is on Moldovan territory.

³³⁹ More particularly: the MRT- regime (‘Moldavian Republic of Transdnistria’).

³⁴⁰ ICJ-case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43.

³⁴¹ ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 96.

³⁴² *Ibidem*, para. 115.

³⁴³ In our pool of examined cases, we find a similar reasoning *inter alia* in the case of *Chiragov*. However, since the Court here did not mention a particular external instrument (in relation to that reasoning), we did not take up this case. ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, para. 168.

Catan and Others), which again touched upon the issue of ‘jurisdiction’ under Article 1 ECHR, argued *vis-à-vis* the international law background, that “...the status of the “occupying power” within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative”.³⁴⁴

219. Another case of our pool in which the Court distinguishes external instruments in a more implicit manner, is *SAS v. France*. This case concerned a French law introducing a ban on the wearing in public of clothing designed to conceal one’s face and the subsequent complaint of a French practising Muslim who could no longer wear the full-face veil in public. When the Court considered the proportionality of the interference, it took account, together with other arguments, that “...a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban [on wearing the burqa or niqab] to be disproportionate”, including “...the French National Advisory Commission on Human Rights..., non-governmental organizations such as the third-party interveners, the Parliamentary Assembly of the Council of Europe...and the Commissioner for Human Rights of the Council of Europe”.³⁴⁵

The Court however, did not give a real effect to the latter instruments since in the end, it accepted that the interference was proportionate for achieving aims such as ‘public safety’ and ‘living together’.³⁴⁶ Although the Court cited the external instruments pointing in the opposite direction, the Court did not give a large weight to their message, *i.e.* that a blanket ban disproportionately affects human rights. Instead, the Court concluded to a wide ‘margin of appreciation’ and a non-violation of the Convention.³⁴⁷

A possible explanation for the dismissal of these instruments is that the Court did not conceive the national legislation as a situation of a *blanket ban on wearing the full-face veil*, which was the situation addressed by the external instruments. Instead, the Court held that the national ban was not expressly based on the religious connotation of the clothing but solely on the fact that it concealed the face.³⁴⁸ Although the Court did not argue this

³⁴⁴ ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 142. Nonetheless, the Court in that same paragraph also offered examples of precedents in which it did attach importance to the notion of ‘occupying power’: “Although it found that concept relevant in *Al-Skeini and Others v. the United Kingdom* (cited above, § 143) and in *Al-Jedda v. the United Kingdom v. the United Kingdom* [GC], no. 27021/08, § 77, ECHR 2011, the Court did not need to have recourse to it in finding that the responsibility of Turkey was engaged in respect of events in northern ECtHR, *Cyprus v. Turkey (just satisfaction)* (see, *inter alia*, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, and ECtHR, *Cyprus v. Turkey (just satisfaction) v. Turkey* [GC], no. 25781/94, ECHR 2001-IV), or that of Russia in respect of the situation in Moldovan territory east of the Dniester (see, *inter alia*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012 (extracts))” (*ibidem*, para. 142).

³⁴⁵ ECtHR (GC), *SAS v. France*, *op. cit.*, para. 147.

³⁴⁶ As to the “protection of the rights and freedoms of others”, the Government referred to the need to ensure “respect for the minimum set of values of an open democratic society”, listing three values in that connection: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (or of “living together”). The three values mentioned do not expressly appear as a ground for justification in the second paragraphs of Articles 8 and 9 of the Convention. See *ibidem*, para. 114.

³⁴⁷ According to the Court, the ban was thus not in breach of Article 8, not in breach of Article 9 and not in violation of Article 14 ECHR taken together with Articles 8 and 9.

³⁴⁸ *Ibidem*, para. 151.

explicitly, it seemed to disregard the external instruments because they address different circumstances. Therefore, it did not follow the external instruments' conclusion of 'disproportionality' of national measures imposing a general ban on wearing a full-face veil.

220. In *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, the Court again disregarded external instrument because of the absence of comparable circumstances. Here, the Court considered a national obligation to recover 'old' currency savings following the dissolution of the former Socialist Federal Republic of Yugoslavia (hereafter: SFRY)³⁴⁹, and it distinguished between a situation of insolvency of a *State* bank and insolvency of a *private* bank. Because a case of the Surveillance Authority of the European Free Trade Association (hereafter: EFTA-Court)³⁵⁰, imported by the government to support its argument that it had a "...wide margin of discretion"³⁵¹, concerned a *private* bank and not a *State* bank (like *in casu*), the Court decided not to take the EFTA-case into account. The case of *Ališić and Others* offered another example of 'disregard' because of non-similarity of circumstances. Indeed, while some respondent States had found support in international law on State succession to argue for the application of a 'principle of territoriality' for the recovery of 'old' currency savings,³⁵² the Court did not follow this argument.³⁵³ The Court thereby disregarded the 2001 ILI Resolution on State Succession in Matters of Property and Debts. As a reason for this neglect, the Court held that this Resolution only put forward a territoriality principle in respect of 'local debts' and that the case of *Ališić* did not concern such a category of debts.³⁵⁴

221. A final case is *Sargsyan v. Azerbaijan*, which touched upon Azerbaijan's failure to take measures to secure property rights (under Article 1 of Protocol 1 to the Convention) of an Armenian citizen displaced in the context of conflict. The Court observed international humanitarian law and stressed that Article 49 of the Fourth Geneva Convention under certain conditions allows for the evacuation of a given area (with a right to return as soon as the hostilities are over). However, the Court added that the latter rules were *in casu* not applicable "...as they only apply in occupied territory", while the geographic area in question was "...situated on the respondent Government's own internationally recognised territory."³⁵⁵

³⁴⁹ Under paragraph 1 of Protocol 1 of the Convention on the right to property.

³⁵⁰ Judgment E-16/11 of 28 January 2013. See ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, *op. cit.*, paras. 70 *et seq.*

³⁵¹ *Ibidem*, paras. 94 and 118.

³⁵² *Ibidem*, para. 120. According to that principle, these governments argued, they did not carry responsibility.

³⁵³ In its view, the 'equitable proportion'-principle should have been the governing principle in international law on State succession. The Court, in this case, did thus also find support in international law.

³⁵⁴ *Ibidem*, para. 121.

³⁵⁵ ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 231.

§ 1.3. Outside the Court's mandate

222. It falls outside the mandate of the Court to apply external instruments directly to the facts. Hence, the Court – for reasons of its competence and jurisdiction – refuses to take account of external instruments in order to examine whether States' actions or omissions are in conformity with those instruments. According to the Court, its mandate is limited to examining the national effects of external instruments in the light of the Convention.³⁵⁶ The latter observations follow from three particular cases in the pool of case law, namely *Jeunesse v. the Netherlands*, *Kudrevičius and Others v. Lithuania* and *Perinçek v Switzerland*.
223. In the case of *Jeunesse v. the Netherlands*, the Court elaborated on its competence *vis-à-vis* EU-law. The applicant to this case argued that a national decision refusing to grant a residence permit on the ground of family life was contrary to EU rules and the interpretation of these rules by the ECJ.³⁵⁷ The Court, however, refused to directly apply and supervise these EU instruments and cited them only to explain that it has no competence to express itself on the conformity of the national act with EU-law. Relying on Articles 19 and 32 of the Convention³⁵⁸, the Court respected the autonomy of EU law and did not consider it within its terrain to assess the circumstances under EU rules. The Court nonetheless considered itself competent to apply the Convention to the effects of national decisions taken to comply with EU law.³⁵⁹
224. Similar observations can be made in respect of *Kudrevičius and Others v. Lithuania*, which addresses under the right to freedom of assembly (Article 11 ECHR) a situation of farmers who had been sanctioned criminally for blocking traffic on major roads. Based on several considerations, the Court concluded that the interference was necessary in a democratic society and that the State's margin of appreciation was not overstepped. According to the Court, the latter conclusion dispensed it

“...from addressing the arguments put forward by the parties in order to determine whether the measures adopted by the Lithuanian authorities could be justified in the light of the case-law of the ECJ (...). In this connection, the Court confines itself to observing that the role of the ECJ was to

³⁵⁶ When external instruments reflect the roots of State behavior, this does not erase the applicability of the Convention. For the use of external instruments because they are the 'root' of States' actions or omissions, see *infra*, § 7 of this Chapter.

³⁵⁷ More particularly, contrary to Article 20 of the TFEU (regarding the EU citizens and their rights including the right of free movement within the territory of the EU Member States). See ECtHR (GC), *Jeunesse v. the Netherlands*, *op. cit.*, para. 83.

³⁵⁸ Article 19 provides that “...there shall be set up a European Court of Human Rights” in order to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”, and Article 32 provides that “[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto...”.

³⁵⁹ ECtHR (GC), *Jeunesse v. the Netherlands*, *op. cit.*, para. 110.

establish whether the EU member States had complied with their obligation to ensure the free movement of goods, while the Court's task in the present case is to determine whether there has been an infringement of the applicants' right to freedom of assembly".³⁶⁰

225. Similar to its reasoning on its competence *vis-à-vis* EU instruments, the Court elaborated on its mandate *vis-à-vis* other branches of international law in the case of *Perinçek v Switzerland*. This case is about the right to freedom of expression in the light of a criminal conviction for rejecting the legal characterization as 'genocide' of the atrocities committed by the Ottoman Empire against the Armenian people in 1915. Building on Articles 19 and 32 of the Convention, the Court stressed that "[U]nlike the ICTY, the ICC or the ICJ, it does not have penal or other jurisdiction under the Genocide Convention or another international law instrument relating to such issues".³⁶¹ Therefore, the Court, in the present case, is "...not required to determine whether the massacres and mass deportations suffered by the Armenian people...can be characterised as genocide within the meaning of that term under international law", and that it has "...no authority to make legally binding pronouncements, one way or another, on this point".³⁶²

§ 1.4. (Absence of) internal consensus

226. The Grand Chamber dismisses external instruments because of the observation of an internal consensus that goes in a same direction than the external position. Then, the Court has considered it unnecessary to give effect to the external instruments, exactly because the outcome of the internal comparison was already sufficiently clear.³⁶³ In addition, the ECtHR dismisses external instruments because they are not supported by an internal (binding) consensus. On another occasion, the Grand Chamber disregards external instruments because they are not supported by internal practices.³⁶⁴ Also, the Grand Chamber ignores external instruments because of their non-binding character³⁶⁵. Most of these findings offer illustrations of the Court attaching a great importance to the internal (respondent) States' support for its interpretation, to the detriment of constructively considering external instruments. Some cases of our pool are particularly relevant in this respect.

³⁶⁰ ECtHR (GC), *Kudrevičius and Others v. Lithuania*, *op. cit.*, para. 183.

³⁶¹ ECtHR (GC), *Perinçek v Switzerland*, *op. cit.*, para. 101.

³⁶² *Ibidem*, para. 102.

³⁶³ See the case of *A, B, C v. Ireland*, which is discussed more elaborately under this section, see para. 227.

³⁶⁴ See the case of *Stummer v. Austria*, which is discussed more elaborately under this section, see paras. 228-229.

³⁶⁵ See the cases of *Sabri Güneş v. Turkey*, of *X and Others v. Austria* and of *Perinçek v. Switzerland*, which will be discussed more elaborately under this paragraph, see paras. 230-231. Note that also on other occasions, these considerations (like a lack of ratification) might have influenced the Court in giving much, little or no effect to the external instruments. Here, we only include those cases in which the Court expressed explicit statements on the issue.

227. The case of *A, B, C v. Ireland* is about restrictions on obtaining abortion and about whether they amounted to a violation of Article 8 of the Convention on the right to privacy. To approach Ireland's 'margin of appreciation', the Court observed a consensus amongst a substantial majority of Member States towards allowing abortion on broader grounds compared to Ireland.³⁶⁶ The Court considered this consensus as sufficiently clear and did not feel urged to rely on international instruments to empower that conclusion. It said that "...it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favor of broader access to abortion".³⁶⁷ Note that the Court did not, like it usually does³⁶⁸, allow the internal and external consensus (both going in another direction than the respondent State's position), to narrow the State's margin of appreciation.³⁶⁹

228. The case of *Stummer v. Austria* illustrates how the Court takes account of national practices in respect of the implementation of external instruments. In this case, the central question was whether Austria violated the Convention by not allowing working prisoners to be affiliated to the social security system, and more particularly, by not including that work in the calculation of pension rights. The Court first assessed this question in the light of Article 14 of the Convention (prohibiting discrimination) in conjunction to Article 1 of Protocol 1 (right to property). The Court examined whether the difference in treatment was proportionate and verified whether there was a common ground between the Member States which would limit the width of the State's 'margin of appreciation'.³⁷⁰ The Court observed a lack of European consensus, but – based on the external instrument of the 2006 European Prison Rules – held that there was an 'evolving trend' that "...[as] far as possible prisoners who work shall be included in national security systems".³⁷¹

The Court, however, mitigated the relevance of this trend, which did not narrow the 'margin' of the respondent State.³⁷² Why? According to the Court, the wording of the Prison rules was too cautious ("[a]s far as possible") and not elaborately followed in national practices of the Member States. The internal comparison demonstrated that only a small majority affiliated prisoners to their old-age pension system.³⁷³ The Court observed that it was "...only gradually that societies are moving towards the affiliation of prisoners to their

³⁶⁶ *Ibidem*, para. 235.

³⁶⁷ *Ibidem*.

³⁶⁸ *Ibidem*, para. 232.

³⁶⁹ *Ibidem*, para. 236. An important factor was that "...the question of when the right to life begins came within the State's margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life..." (*ibidem*, para. 237). For a more critical analysis of this case, see *infra*, paras.

³⁷⁰ ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 104.

³⁷¹ *Ibidem*, para. 105.

³⁷² The Court – mainly based on the subject of the matter under scrutiny – stressed that the State's margin of appreciation is a wide one (*ibidem*, paras 89-89 and para. 101). The evolution the Court observed in the external instrument of the 2006 European Prison Rules did not alter this conclusion.

³⁷³ *Ibidem*, para. 105. To stress the lack of a common ground, the Court also referred to the 1987 European Prison Rules, "...which did not contain any provision in this regard" (*ibidem*, para. 106).

social security systems in general and to their old-age pension systems in particular”.³⁷⁴ In the Court’s view such a gradual evolution of ‘changing standards’ was not sufficient to reduce the margin of appreciation.³⁷⁵ Internal practices therefore received particular weight, more than the message of the Prison Rules. Against that background, the Grand Chamber concluded that Austria “...by not having affiliated working prisoners to the old-age pension system to date, it has not exceeded the margin of appreciation afforded to it in that matter”³⁷⁶ and that there was no violation of the Convention.³⁷⁷

229. Furthermore, in the case of *Stummer v. Austria*, the Court assessed the circumstances in the light of Article 4 of the Convention on the prohibition of forced and compulsory labor. Also here, we noticed that the Court put large weight on national practices (to the detriment of giving weight to external evolving trends). The Court observed that neither the wording of the Convention, nor its precedents, nor the 1987 European Prison Rules shed light on the issue.³⁷⁸ The ECtHR subsequently acknowledged that there are significant developments that “...have taken place in the field of penal policy”³⁷⁹ and more particularly in the 2006 European Prison Rules “...which contain the principle of normalisation of prison work” and which “...provides that “[a]s far as possible, prisoners who work shall be included in national social security systems”.³⁸⁰ By mentioning the latter external developments, the Court, at first sight, seemed willing to give effect to their content. However, the Court casted doubt on the relevance of the developments because they were not generally supported by the internal practice of the Member States.³⁸¹ The Court concluded that there was no “...sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system”, and that while “...the 2006 European Prison Rules reflects an evolving trend, it cannot be translated into an obligation under Article 4 of the Convention”. The obligatory work in prison without affiliation to the pension system could thus not be understood as ‘forced or compulsory labor’.³⁸² The lack of common internal practice withheld the Court from giving more weight to the 2006 Prison Rules.

³⁷⁴ *Ibidem*.

³⁷⁵ *Ibidem*, paras. 106-109.

³⁷⁶ *Ibidem*, para. 109.

³⁷⁷ *Ibidem*, para. 110.

³⁷⁸ The Court, when applying the relevant principles under Article 4 of the Convention (prohibition of forced or compulsory labor), first stressed that it did not find a solution or indication in the wording of the Convention. *Ibidem*, para. 128. Then it stressed that in earlier case law Article 4 of the Convention “...did not require working prisoners to be affiliated to the social security system” and that the “1987 European Prison Rules remained silent on the issue of working prisoners’ affiliation to the social security system” (*ibidem*, para. 129).

³⁷⁹ *Ibidem*, para. 130.

³⁸⁰ *Ibidem*.

³⁸¹ *Ibidem*, para. 131. To support a lack of state practice, the Court says that “...while an absolute majority of Contracting States affiliate prisoners in some way to the national social security system or provide them with some specific insurance scheme, only a small majority affiliate working prisoners to the old-age pension system” and that “Austrian law reflects the development of European law in that all prisoners are provided with health and accident care and working prisoners are affiliated to the unemployment insurance scheme but not to the old-age pension system”.

³⁸² *Ibidem*, para. 133.

230. In several cases of our pool, the Court dismissed the potential of external instruments because of their non-binding character. A first case in which this happens is *Sabri Gunes v. Turkey*, which reflects on a preliminary objection under Article 35 of the Convention, providing that the Court may deal with matters that are brought to them within a period of six months from the date on which the final domestic decision was taken. The Court addressed the question of the *dies ad quem*, being the day on which the six-month time limit expired, which *in casu* was a Sunday. The Chamber of the Court acknowledged that in the latter circumstances, the applicant could still lodge the application on the first subsequent working day. The Grand Chamber, on the contrary, considered that the Convention's sixth month rule is an 'autonomous rule' and that a non-working day can be taken into account when determining the expiry date, irrespective of the position under domestic law. The Court here invoked an instrument of the EU³⁸³ and one of the CoE³⁸⁴, which were both in line with the Chamber's approach. The Grand Chamber, however, held that it would not follow these instruments (and that it was *not* willing to depart from its earlier case law) because of the requirements of legal certainty, because of the low levels of ratification of these instruments, and because of the lack of general consensus on the issue.³⁸⁵

231. The issue of non-ratification was also taken into account in *X and Others v. Austria*. This case concerned the impossibility under Austrian law of second-parent adoption by a same-sex couple. Not finding its final solution to the case in an internal comparison³⁸⁶, the Grand Chamber referred to the 2008 Convention on the Adoption of Children but it casted doubt on the relevance of this convention because it was not ratified by the respondent State and because it in general had a low number of ratifications. The ECtHR said in this respect that "...it may be open to doubt whether the Convention [on the Adoption of Children] reflects common ground among European States at present".³⁸⁷ Thus, at first, because of a lack of ratification, the Court seemed to neglect the relevance of the 2008 Convention on Adoption. Nonetheless, the Strasbourg Court took note of some of its provisions.³⁸⁸ Subsequently, because there was some uncertainty about the interpretation of that article, the ECtHR said it was in any case not bound by it since "... States retain Convention liability in

³⁸³ Turkey was no party to this instrument.

³⁸⁴ Turkey did not sign this instrument. In the 'facts'-section, where this instrument had been cited, the Court said explicitly that "...only four of the ten signatory States have ratified that Convention. Turkey has neither signed it nor acceded to it". ECtHR (GC), *Sabri Güneş v. Turkey*, *op. cit.*, para. 21.

³⁸⁵ *Ibidem*, paras. 58-59.

³⁸⁶ ECtHR (GC), *X and others v. Austria*, *op. cit.*, para. 149. The Court said that "...no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States".

³⁸⁷ *Ibidem*, para. 150.

³⁸⁸ Namely, Article 7 § 1 of the 2008 Convention which provides that "...provides that States are to permit adoption by two persons of different sex (who are married or, where that institution exists, are registered partners) or by one person", and Article 7 § 2 which point out that "...States are free to extend the scope of the Convention to same-sex couples who are married or have entered into a registered partnership, as well as 'to different-sex couples and same-sex couples who are living together in a stable relationship'". According to the Court the latter article "... does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently" (*ibidem*).

respect of treaty commitments subsequent to the entry into force of the Convention”.³⁸⁹ The Court thus suggested that, regardless of the precise result of the interpretation of the 2008 Convention (which was not clear), the final outcome of the case remained the same. By this suggestion, the Court indicates the irrelevance of the message of the external convention. The latter reminds us of what we observed earlier about the Court dismissing the supervision of external instruments for reasons of its mandate.³⁹⁰ Here, the Court – comparably to what it said in respect of EU law – indicated a lack of competence to apply and examine external instruments (including the 2008 adoption Convention), but acknowledged its ability to consider under the Convention the effects of a ‘subsequent treaty commitment’.³⁹¹

232. Furthermore, the existence of national ratifications has played a role in *Perinçek v. Switzerland*. In this case, the Grand Chamber verified whether the contested actions, being a criminal conviction for a denial of genocide, had a basis in external obligations. First, the Court enumerated some international instruments that did *not* oblige such a conviction.³⁹² Subsequently, it noted instruments that *did* require penal sanctions, such as the Additional Protocol to the Convention on Cybercrime.³⁹³ It added that also the ECRI “... unequivocally called for the criminalization of genocide denial”.³⁹⁴ The Grand Chamber mitigated the importance of the Convention on Cybercrime because the respondent State did not sign nor ratify that Convention.³⁹⁵ It also minimalized the relevance of the viewpoint of the ECRI since it was only “...a policy recommendation which, however important, is not binding international law.”³⁹⁶ Against that background, the Court concluded that “[I]t cannot therefore be said that the interference with the applicant’s right to freedom of expression was required under, and could hence be justified by, Switzerland’s international law obligations”.³⁹⁷

³⁸⁹ *Ibidem*.

³⁹⁰ *Supra*, § 1.3 of this section.

³⁹¹ Under this heading, we could also mention the Grand Chamber case of *Couderc and Hachette Filipacchi Associés v. France and Hachette Filipacchi Associés v. France* (*op. cit.*), in which the Court introduced an argument related to its competence to support its disregard of a comparative argument. This case concerned a ruling of a French Court against *Paris Match* for publishing information about Prince Albert of Monaco’s private life. In light of the circumstances of the case, the Court concluded to a violation of the right to freedom of expression. The respondent State (France) stressed that it had a tradition of being more protective than German Courts with regard to private life (the German Courts had dismissed the Prince’s claim when he brought proceedings against the weekly magazine *Bunte* for an article comparable to that published in *Paris Match*), but that the Convention was not there to harmonize national laws. The Court blocked this comparative argument by stressing that: “...its role in this case consists primarily in verifying whether the domestic courts whose decisions are contested by the applicants struck a fair balance between the rights at stake and ruled in accordance with the criteria established by it for that purpose...” and that, as a consequence “...its assessment of the circumstances of the present case cannot be based on a comparative examination of the decisions reached by the French and German courts respectively with regard to the information disclosed (para. 95)”. We mention this case only in a footnote because the Court, in this case, does not refer to a *specific* external instrument. Therefore, this argument does not fall under our research, which is demarcated by references of the Strasbourg Court to ‘external instruments’ and not to external bodies or general normative domains.

³⁹² ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 262, and 264-266.

³⁹³ *Ibidem*, para. 263.

³⁹⁴ *Ibidem*, para. 267.

³⁹⁵ *Ibidem*, para. 263.

³⁹⁶ *Ibidem*, para. 267.

³⁹⁷ *Ibidem*, para. 268.

233. Finally, in the case of *Sitaropoulos and Giakoumopoulos v. Greece*, several external instruments had been dismissed, preventing to broaden the scope of Article 3 of Protocol 1 on a right to free elections. This case was about the absence of a national procedure to enable Greek nationals resident overseas to vote in parliamentary elections. The Court did not consider the latter situation as a violation of the right to free elections. With reference to *Demir and Baykara* and other precedents, the Court stressed that the right to free vote "...should be interpreted with reference to the relevant international and comparative law...and to the domestic law of the country concerned".³⁹⁸ When examining relevant international and comparative law, the Court, on the one hand, noted a lack of 'evolution' in the external normative context (including the ACHR, the ICCPR and the AfCHR).³⁹⁹ On the other hand, the Court admitted that other external instruments recommended to increase protection standards in respect of the right free elections and the right to vote for citizens living abroad, including a resolution and recommendation of the PACE⁴⁰⁰ and recommendations of the Venice Commission. For the Court, it was important that the latter instruments did not include *obligations*, but instead, presented the facilitation of the exercise of expatriates' voting rights as a *possibility*.⁴⁰¹ Thus, the CoE-recommendations (of the PACE and the Venice Commission), which point at an evolution of granting higher levels of protection in respect of voting rights of nationals living abroad, did not change the position of the Court. Thereby, the ECtHR attached relevance to the non-obligatory character of these instruments and, instead, gave large weight to the ICCPR, the ACHR and the AfCHR (and their external interpretations), which did not include an obligation of making arrangements for enabling the exercise of voting rights abroad.⁴⁰²

§ 1.5. Too soon to give effects to external instruments

234. In one of the Grand Chamber cases examined, the Court disregarded external instruments because it considered it too soon to take account of external opinions in light of the circumstances of the case. This happened in the case *Kurić and Others v. Slovenia*, which concerned a State's failure to regulate the residence of persons who had been 'erased' from the permanent residents register following Slovenian independence. In the Court's

³⁹⁸ ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 71.

³⁹⁹ *Ibidem*, para. 72.

⁴⁰⁰ PACE Resolution 1459 (2005) and PACE Recommendation 1714 (2005) both on the Abolition of Restrictions on the Right to Vote.

⁴⁰¹ *Ibidem*, para. 73. The latter references, although not stressed explicitly by the Court, have not gained large effect on its reasoning. They remind us of 'dismissive' references. They had nonetheless not been included into the category of 'dismissive' uses because the Court did not explicitly disregard them.

⁴⁰² *Ibidem*, para. 72. In addition, it also attached importance to an internal comparative study between its Member States in respect of which it said that there is no legal basis to conclude that "...States are under an obligation to enable citizens living abroad to exercise the right to vote" and that also in respect of the "...arrangements for exercising that right put in place by those Council of Europe Member States that allow voting from abroad, there is currently a wide variety of approaches". *Ibidem*, para. 75.

consideration of Article 46 ECHR (on the execution of judgments and the individual measures of redress taken by the State), the Court took account of a 2010 national legal act on legal status (of the erased) which was delivered after the Chamber judgment and in regard to which, as the Court noted, “...some international monitoring bodies have underlined certain of its shortcomings”, including the CoE Commissioner for Human Rights, the UN Committee on the CERD in its Concluding Observations, and the CAT Committee in its Concluding Remarks. The Court, however, did not give weight to these external observations of shortcomings to the national law because it, “in the absence of any settled domestic practice”, considered it “premature” to “...examine whether the reforms outlined above and the various steps taken by the Government have achieved the result of satisfactorily regulating the residence status of the ‘erased’”.⁴⁰³

§ 1.6. Concluding observations

235. On occasions, the Grand Chamber puts external instruments in contrast to the Convention, or disregards their content. This offers examples of – what we call – dismissive references. Although the substance of these instruments is not supervised or followed by the Court, such external mobilizations fulfill certain argumentative functions: they distinguish the case from other cases or viewpoints, inform the reader about the existence of other instruments, serve ornamental purposes, *etc.*

236. Often, the Grand Chamber (modestly) motivates a dismissive use, which serves the transparency of the reasoning. Generally, these motivations do not reveal a substantive disagreement between the Grand Chamber’s view and the message of the external instruments. Instead, the Court justifies the dismissive references by other, non-substantive, reasons, such as a lack of comparability (between the issues of the case and the issues covered by the external instrument), a lack of competence of the Court to directly examine and apply external instruments, the fact that it is too soon to take account of the external normative opinions, *etc.*

237. An explicit and flagrant disagreement between the Court’s vision and the message of external instruments barely exists.⁴⁰⁴ Thus, a situation in which the Court openly admits a divergence between the ECHR and other instruments, is rare.⁴⁰⁵ In our pool, there is one clear exception, *i.e.* in the case of *A. and Others v. the United Kingdom*. Here, the Court did explicitly

⁴⁰³ ECtHR (GC), *Kurić and Others v. Slovenia*, *op. cit.*, para. 411.

⁴⁰⁴ In a similar sense, Forowicz noted that in the Strasbourg case law (from before 2010), ‘negative’ references to external international instruments – whereby the Strasbourg Court disagreed with external international law – are rare. See M. Forowicz, *op. cit.*, p. 2.

⁴⁰⁵ Of course, a disagreement might play at a more hidden and implicit level, but, here, we address a situation in which the Court openly opposes external instruments.

not follow the opinions of the CPT and the HRC, without further explanation. These references demonstrate the occasional unwillingness of the Court to include under the ECHR some explicitly cited external viewpoints.

238. Nonetheless, even when the Court explains a dismissive use by arguments that, at first sight, do not root in a substantive disagreement between the ECtHR's viewpoint and the external positions (for instance, when the Court argues that the circumstances are not sufficiently comparable for giving effect to an external instrument, or when it argues that there is not enough national support for the external position), we wonder whether there is not a deeper, and a more substantive, disagreement behind those arguments. If that is the case, the arguments justifying some dismissive references actually disclose a spirit of '*faire semblant*': then, a seemingly adequate justification may serve as a pretext to avoid following external views or norms. Several cases at least give us that impression.

In *SAS v. France*, the Court's seems of the idea that the French law, since it does not particularly address religious clothing, does not constitute a *blanket ban* on wearing the burqa. It seems that, for that reason, the Courts disregards the external instruments that attack a blanket ban. Since, in our view, it is difficult to deny that the national French law *de facto* includes a blanket ban on wearing the full-face veil, the Court's argumentation is debatable. Actually, we have the impression that the Court is circumventing the information of the external instruments by insinuating that the circumstances were not comparable.

Moreover, in several cases, the Court disregards external instruments because of their lack of support in State practice and/or because of their lack of ratification. Here, the Court, in a more traditional approach, attaches importance to the legal status of the instruments and to whether the States have consented to their applicability. This could be interpreted as a sign of opportunism. Indeed, did the Court, in *Demir and Baykara*, not argue that in search "...for a common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State"?⁴⁰⁶ Consistency in the Court's approach seems absent. This feeds the impression that the Court was actually invoking 'a lack of national support' as a pretext to ignore the message of some external instruments, especially when these instruments do not fit the Court's view or when they might guide the Court in a direction that would be controversial in the eyes of the respondent State.

In a more formal view on the (interpretative) sources, it is understandable that the Court hesitates to give large weight to non-binding instruments in its reasoning. However, even then, the Court's audience deserves a better explanation about why the absence of a binding national agreement or consensus is relevant in one case, and not so much in the other. A systematized method is lacking. In addition, in light of the Court competence, it is

⁴⁰⁶ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 78.

reasonable that the Court opposes a direct supervision of external instruments. On the other hand, and *Demir and Baykara* has demonstrated this clearly, this competence does not stand in the way of the Court's importations of external instruments to interpret the ECHR. The Court's arguments on this issue are confusing. Indeed, in a case as *X and Others v. Austria*, the Court seems to oppose the referencing practice by reasons of its competence. In order to be consistent on the matter, the Court is advised to clearly separate the issue of competence from the issue of interpretation.⁴⁰⁷

239. Under some scenarios of dismissive uses, the Grand Chamber acknowledges its autonomous position *vis-à-vis* the external instruments: it avoids bringing the Convention and its monitoring mandate under the influence of external instruments or actors. The underlying rationale of such judicial behavior might be to highlight the specific character of human rights and to defend it against external influences that might possibly contradict the Convention's objects and purposes. Are dismissive references defending the *lex specialis*-character of human rights protection against detrimental influences from the outside world?⁴⁰⁸ On the one hand, the Court holds that its specific mandate covers an examination of national effects of external instruments (for instance, in the case of *Jeunesse v. the Netherlands*). Also, it avoids blindly following concepts from (public) international law (for instance, in *Catan v. the Republic of Moldova and Russia*). In these examples, the Court seems willing to protect the specific character and importance of human rights law. On the other hand, our analysis demonstrates that the dismissal of certain external instruments may hinder furthering the protection of some human rights (for instance, in the cases of *SAS v. France*, *A. and Others v. the United Kingdom*, and *Stummer v. Austria*). These examples show missed opportunities for achieving a stronger human rights protection built on external instruments. Thus, dismissive references – maintaining divergences between the Convention and the imported instruments – cannot be fully explained by a wish to defend Convention standards against detrimental influences from the external context.

240. As a final note, we clarify that a phenomenon of dismissive referencing is not the same as a phenomenon of entirely *ignoring* external instruments. We did not address the latter situation of a 'non-use', which happens when there is no external reference at all, when there is an external reference in the 'facts'-section that had not explicitly been taken up in the 'law'-section, and/or when the (third) parties imported an external instrument that had not been explicitly picked up by the judges in the 'law'-section. Such an ignorance might implicitly point at a dismissive use. In our analysis, we have included the examples in which the Court *did* import external instruments in the 'law'-section but, nonetheless, opposed or

⁴⁰⁷ For more on this issue, see *infra*, Part III, Chapter 1, § 1.

⁴⁰⁸ For more about what this '*lex-specialis*'-character of human rights entails and what this means for (the validity of) referencing practice, see *infra*, Part III, Chapter 1, § 2 and § 3.2.2., C.2.2..

disregarded them. Then, the Court at least demonstrates some measure of transparency. On the contrary, in a situation of a ‘non-use’, the Court does not even mention the name of the instrument and, *a fortiori*, avoids explaining *why* it had been ignored. This is less transparent, but is it problematic? What is wrong with the Court not importing external instruments at all? Nothing, at first sight. However, we could imagine a situation in which (third) parties include external instruments into their arguments while the Court does not respond to these elements of their submissions. Or, we could imagine a situation in which the Court mentions an external instrument in the ‘facts’-section, without picking it up in the legal reasoning (while the instrument could have shed another light on the issue at stake). In addition, it might happen that the Court is inconsistent and makes use of external instruments in some cases, and not in others. All these scenarios are at least confusing. They might moreover reflect missed opportunities of the referencing practice.⁴⁰⁹

§ 2. Use of the VCLT to clarify the interpretation and execution of treaties

241. In the case of *Demir and Baykara v. Turkey* the Court held that, to determine the meaning of terms and phrases of the Convention, it “...is guided mainly by the rules of interpretation provided for in Articles 31-33 of the Vienna Convention on the Law of Treaties”.⁴¹⁰ In accordance with the VCLT, the Court recalled several principles of interpretation including the requirement “...to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provisions from which they are drawn”⁴¹¹, and the possibility of recourse to “...supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable”.⁴¹²

242. We treat the use of external instruments for treaty interpretation and application as a separate ‘function’ of external referencing. Why? Firstly, because of the prominent presence of the VCLT in the Court’s citation, compared to other references to international treaties. A second and even more important reason is that the interpretative rules of the VCLT may be

⁴⁰⁹ For some examples of what we consider as missed opportunities of referencing practice, see *infra*, Part III, Chapter 2, § 2.3.

⁴¹⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 61. For another case in our pool that refers in general terms to the relevance of Articles 31 to 33 of the VCLT for the interpretation of the Convention, see ECtHR, *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 170.

⁴¹¹ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 61.

⁴¹² *Ibidem*.

relevant for the justification of the external referencing practice itself.⁴¹³ A final reason why the use of the VCLT is special, is because it addresses the Strasbourg Court itself. Thus, when importing rules of the VCLT, the judges of the Court import external rules that are directed towards them, and that are offering them guidance in relation to the application and interpretation of the ECHR, and in relation to the execution of that instrument.

243. What follows gives a detailed overview of how the Court makes use of external instruments to clarify the manner in which a treaty, such as the Convention, should be executed and interpreted. This overview is exhaustive; it includes all references in our pool to external instruments in the area of the execution and the interpretation of treaties. External instruments are introduced to support a principle of executing treaties in good faith (§ 2.1.); to stress that no internal rule can be invoked as an excuse for a non-observance of international law (§ 2.2.); to highlight the non-retroactivity of treaties (§ 2.3.); to establish general rules of interpretation (§ 2.4.) and finally, to stress the relevance of *travaux préparatoires* as a supplementary means of interpretation (§ 2.5.).

§ 2.1. Execution of treaties in good faith (Article 26 VCLT)

244. By using Article 26 of the VCLT, the Grand Chamber has emphasized the principle of *pacta sunt servanda* and the execution of treaties in good faith. In our pool of cases, this happened once to stress that States are required to provide the CoE COM with detailed, up-to-date information on the developments in the process of executing judgments that are binding upon them (*in casu*, the judgments of the ECtHR).⁴¹⁴ This principle had also been imported in respect of supporting the State's obligation to furnish all necessary facilities, including copies of domestic court decisions, to the Strasbourg Court (Article 38 of the Convention).⁴¹⁵

§ 2.2. An internal rule cannot excuse the non-observance of international law (Article 27 VCLT)

245. With the support of Article 27 of the VCLT which provides that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", the Court considered in the case of *Janowiec and Others v. Russia* that "...the respondent Government may not rely on domestic legal impediments ... to justify a failure to furnish all

⁴¹³ The interpretative rules of the VCLT play a large role when addressing the Court's justifications of referencing practice as well as when addressing, from our own point of view, the legal validity of external references. See *infra*, Part III, Chapter 1, § 3.2. and § 4.3.

⁴¹⁴ ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), *op. cit.*, para. 87.

⁴¹⁵ ECtHR (GC), *Janowiec and Others v. Russia*, *op. cit.*, para. 211.

the facilities necessary for the Court's examination of the case" (which is an obligation under Article 38 of the Convention).⁴¹⁶

§ 2.3. Non-retroactivity of treaties (Article 28 VCLT)

246. The Grand Chamber occasionally relied on Article 28 of the VCLT on the non-retroactivity of treaties to support the interpretation of its competence *ratione temporis*.

247. A first relevant case in this respect is *Šilih v. Slovenia*, touching upon the Court's temporal jurisdiction in respect of Article 2 ECHR (the right to life) when the death occurred prior to the entry into force of the Convention. Explicitly using the general rule of international law in Article 28 VCLT, the Court reiterated that

"...the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party or, as the case may be, prior to the entry into force of Protocol No. 11, before the date on which the respondent Party recognized the right of individual petition, when this recognition was still optional ("the critical date")".⁴¹⁷

While the Court found support in the VCLT to establish the latter principle, it subsequently softened it with regard to procedural complaints under Article 2 of the Convention (related to a lack of investigation of the death by the Government). On the basis of evolutions in several external instruments, the Court considered the procedural aspect as a separate and autonomous State duty that continued after the death took place.⁴¹⁸

248. Another case that touches upon the Court's temporal jurisdiction in respect of deaths that occurred before the Convention entered into force, is *Janowiec and Others v. Russia*. In this case, the Grand Chamber again cited Article 28 of the VCLT⁴¹⁹ and repeated the criteria as developed in the *Šilih*-case and clarified them.⁴²⁰ The Court concluded that in the light of a principle of non-retroactivity of treaties, it had no competence *ratione temporis* because the Court's jurisdiction for procedural acts or omissions in the period subsequent to the Convention's entry into force only counted as far as there was a 'genuine connection' between the death (as the triggering event) and the entry into force of the Convention.⁴²¹ For a 'genuine connection' to be established, the period between the death and the entry into

⁴¹⁶ *Ibidem*.

⁴¹⁷ ECtHR (GC), *Šilih v. Slovenia*, *op. cit.*, para. 140.

⁴¹⁸ *Ibidem*, paras. 159-160. The use of these external instruments cover another argumentative function, namely one of 'evolutive' interpretation, which will be addressed further. See *infra*, § 3 of this Chapter.

⁴¹⁹ ECtHR (GC), *Janowiec and Others v. Russia*, *op. cit.*, para. 128.

⁴²⁰ *Ibidem*, paras. 128, 131 *et seq.*, and 140 *et seq.*

⁴²¹ *Ibidem*, para. 141.

force needed to be reasonably short and a major part of the investigation had or ought to have been carried out after the date of entry into force.⁴²² According to the Court, there was no such ‘genuine connection’ in the case of *Janowiec and Others* and as a consequence, it had no competence to examine the complaint under Article 2 of the Convention on the right to life.⁴²³

249. The case of *Varnava and Others v. Turkey* is about disappearances of persons that occurred prior to the ‘critical date’ and the alleged lack of subsequent investigation into the fate of the disappeared persons and prosecution of those responsible for the disappearances. The Grand Chamber repeated the general principle of Article 28 VCLT on the non-retroactivity of treaties but it also softened this principle by applying *mutatis mutandis* the arguments made in the case of *Šilih* and *Janowiec* (stressing that the procedural obligation of ‘investigation’ into deaths or disappearances is an independent and substantive obligation).⁴²⁴

250. The decision of *Sargsyan v. Azerbaijan* is another case that uses Article 28 of the VCLT to establish a principle of non-retroactivity of treaties. Again, however, the ECtHR softened the principle. The decision of *Sargsyan v. Azerbaijan* is about the denial of access to properties and homes. The Court considered a deprivation of property as being a non-instantaneous continuing act when it results from a legal act that is invalid. A deprivation of property that took place before the ‘critical date’ might therefore create a situation of a lack of access to property that did not cease to exist before the critical date.⁴²⁵ In respect of such a continuing situation, the ECtHR ruled it has competence *ratione temporis*, even when the deprivation itself took place before the ‘critical date’.⁴²⁶ In the case of *Chiragov and Others v. Armenia* the general principle of Article 28 VCLT was used in a similar manner.⁴²⁷

⁴²² *Ibidem*, para. 148.

⁴²³ *Ibidem*, paras. 159 and 161.

⁴²⁴ ECtHR, *Varnava and Others v. Turkey*, *op. cit.*, paras. 130 and 147. The Court more particularly held that “...the procedural obligation under Article 2 arising from disappearances operates independently of the substantive obligation”. *Ibidem*, para. 147. Again the Court to support the softening of the principle of ‘non-retroactivity of treaties’ used external instruments, this time to build a consensus regarding the issue of prosecuting the perpetrators of such crimes even many years after the events (*ibidem*, para. 163).

⁴²⁵ ECtHR (GC), decision of *Sargsyan v. Azerbaijan*, *op. cit.*, paras. 80 *et seq.*

⁴²⁶ *Ibidem*, paras. 91-92.

⁴²⁷ ECtHR (GC), decision of *Chiragov and Others v. Armenia*, *op. cit.*, para. 93.

§ 2.4. General rules of interpretation (Article 31 VCLT)

§ 2.4.1. Interpretation in good faith (Article 31 paragraph 1 VCLT)

251. The first paragraph of Article 31 VCLT provides a ‘general rule of interpretation’ stating that a treaty shall be interpreted “...in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In the pool of cases, the Court uses this rule four times.
252. The Court stressed the importance of interpretation in ‘accordance with the ordinary meaning to be given to the terms of the treaty’ in the case of *Hirsi Jamaa v. Italy*, which is a case that *inter alia* touches upon the return of migrants intercepted on the high seas to their country of departure. The Court in this case concluded to a violation of Article 4 of Protocol 4 on the prohibition of collective expulsion of aliens.⁴²⁸ When considering this prohibition, the Court reflected upon the notion of ‘expulsion’ by saying that “...the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application”.⁴²⁹
253. The principle of interpretation in good faith also appears in the case of *Sabri Güneş v. Turkey*, in which the Court addressed the issue of the *dies ad quem* (that is, the day on which the six-month time limit to lodge a complaint before the Court expires) falling on a non-working day. Here, as mentioned earlier, the Court dismissed relevant external instruments for reasons of their lack of ratification.⁴³⁰ In connection to the latter, the Court mentioned Article 30 paragraph 1 of the VCLT.⁴³¹ Although it does not say so explicitly, the Court thus seemed to disregard poorly ratified external instruments (and thus to exclude their relevance for the interpretation of the Convention) as a matter of interpreting the Convention in good faith. Therefore, the Court gives the impression that the principle of treaty interpretation ‘in good faith’ can be used to resist a constructive consideration of poorly ratified external instruments.

⁴²⁸ The Court in this case also concluded to a violation of Article 3 of the Convention (on the prohibition of torture or inhuman or degrading treatment) as well as to a violation of Article 13 because of a lack of remedies available for migrants intercepted on the high seas and returned to country of departure.

⁴²⁹ ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 173. The Court took account of the fact that the relevant provision, contrary to some other provisions of the Convention, does not include the notion of ‘territory’ and that such wording “...cannot be ignored”. Indeed, as the Court said, the wording of Article 3 of the same Protocol “...specifically refers to the territorial scope of the prohibition on the expulsion of nationals” and that likewise, “...Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State” (*ibidem*).

⁴³⁰ ECtHR (GC), *Sabri Güneş v. Turkey*, *op. cit.*, para. 58. See *supra*, para. 230.

⁴³¹ Indeed, the Court in paragraph 58 of the Convention (between brackets and without mentioning explicitly the provision of the VCLT) refers to paragraph 20 of the ‘fact-section’ of the case in which Article 30 paragraph 1 of the VCLT is cited.

254. A third case citing Article 30 paragraph 1 VCLT is *Vasiliauskas v. Lithuania*, which concerns the conviction in 2004 for alleged ‘genocide’ of Lithuanian partisans in 1953 in the light of the adagium ‘*nullum crimen sine lege*’. In this case, the Court reflected on some terms important to define ‘genocide’ under the Genocide Convention. By saying that “...the ordinary meaning is to be given to the terms of the treaty”⁴³², an external instrument (the VCLT) guided the Court to consider a definition appearing in another external instrument (the Genocide Convention).⁴³³ On the basis of the ‘ordinary meaning of the terms’, the Court came to the conclusion that the interpretation of the domestic courts of ‘genocide’ did not accord to the Genocide Convention and that therefore, the conviction of the applicant by the domestic courts was ‘unforeseeable’.⁴³⁴

255. Also, the Court relied on Article 31 paragraph 1 VCLT on the ‘interpretation in good faith’ in *Perinçek v. Switzerland*, which established a violation of the right to freedom of expression (Article 10 of the Convention) because of a criminal conviction for rejecting the legal characterization of the atrocities committed against the Armenian people from 1915 as ‘genocide’. The Court, to clarify the grounds for interference of ‘the prevention of disorder’ and ‘*la défense de l’ordre*’ in the English and French texts of Article 10 paragraph 2 of the Convention, found support in Article 33 paragraphs 3 and 4 of the VCLT on the ‘interpretation of treaties authenticated in two or more languages’. The Court considered these paragraphs of Article 33 VCLT as specific aspects of Article 31 paragraph 1 of the VCLT, which were, *inter alia* with a reference to case law of the ICJ, held to reflect “...generally accepted principles of international law ... that have already acquired the status of customary law”. This urged the ECtHR “...to interpret the relevant texts [the English and French version] in a way that reconciles them as far as possible and is most appropriate to realise the object and purpose of the Convention”.⁴³⁵ According to the Court, such reconciliation could be done best by endorsing the less extensive meaning to the grounds for interference with human rights.⁴³⁶

§ 2.4.2 Take account of ‘subsequent agreement between the parties’ and ‘subsequent practice’ (Article 31 paragraph 3 (a) and (b) VCLT)

256. Also In the pool of examined Grand Chamber cases, only the case of *Hassan v. the United Kingdom* mentions Article 31 paragraph 3 (a) of the Vienna Convention that provides that “...there shall be taken into account, together with the context...any *subsequent agreement*

⁴³² ECtHR (GC), *Vasiliauskas v. Lithuania*, *op. cit.*, para. 183.

⁴³³ This offers an indication that when the Court imports external instruments, that it might also *interpret* such instruments (*in casu*, with the help of the VCLT).

⁴³⁴ *Ibidem*.

⁴³⁵ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 150.

⁴³⁶ *Ibidem*, para. 151.

between the parties *regarding the interpretation* of the treaty or the application of its provisions (own emphasis)". It is also the only case that mentions Article 31 paragraph 3 (b) of the VCLT which says: "...there shall be taken into account, together with the context...any *subsequent practice in the application* of the treaty which establishes the agreement of the parties regarding its interpretation (own emphasis)".⁴³⁷

257. The *Hassan*-case concerned the internment of an Iraqi national by armed forces in Iraq. When the Court established its general principles under Article 5 of the Convention (the right to liberty and security of person), the Court stressed that the starting point for the examination must be 'its constant practice' to interpret the Convention in the light of the VCLT.⁴³⁸ Then, it cited Article 31 paragraph 3 (a) of the VCLT and concluded that, *in casu*, there was no 'subsequent agreement' regarding the interpretation of Article 5 ECHR in situations of armed conflict. In the light of Article 31 paragraph 3 (b) VCLT, the Court held that a subsequent 'State practice' could also be considered as 'agreement' between the parties, and that this could even modify the text of the Convention.⁴³⁹ The Court observed a 'constant practice' of the Member States "...not to derogate [under Article 15 ECHR] from their obligations under Article 5 in order to detain persons on the basis of the Third and the Fourth Geneva Conventions during international armed conflicts". The latter, the Court observed, was equally mirrored by 'State practice' in relation to the ICCPR.⁴⁴⁰

258. The *Hassan*-case seems exceptional among Grand Chamber cases. It is the only case in our pool in which the Court explicitly looked for a 'subsequent agreement' and a 'subsequent practice' of the Member States in respect of a Convention provision. The Court went even further than that: it did not only consider relevant the subsequent agreement and practice in relation to the ECHR, but also in relation to comparable external provisions, such as the provisions in the ICCPR. Although the Court did not explicitly say so, it seemed that Article 31 paragraph 3 (a) and (b) of the VCLT indirectly served as a justification for the Court taking into account external instruments in its search for subsequent State agreement or subsequent State practice.

259. Surprisingly, there was no other case in the pool in which the Court justifies the use of external instruments in the light of the establishment of a 'subsequent State agreement' or

⁴³⁷ ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 100.

⁴³⁸ *Ibidem*, para. 100.

⁴³⁹ *Ibidem*, para. 101.

⁴⁴⁰ *Ibidem*, para. 101. Also in respect of the ICCPR, the State did not make derogations regarding detentions exercised in times of armed conflict, not even after the ICJ said that "...States' obligations under international human rights instruments to which they were parties continued to apply in situations of international armed conflict...". The latter statements have been subject to criticism in a sense of giving too much weight to international humanitarian law and in a sense of offering a 'false' comparison with the ICCPR. For more on the latter issues, see *infra*, Part III, Chapter 2, § 2.2.1.

of a 'subsequent State practice', which could, in turn, be taken into account when interpreting the Convention.⁴⁴¹

§ 2.4.3. Take account of 'any relevant rules and principles of international law applicable in relations between the Contracting Parties' (Article 31 paragraph 3 (c) VCLT)

260. The Court in several Grand Chamber cases refers to Article 31 paragraph 3 (c) of the VCLT. This article provides that "...there shall be taken into account, together with the context: ...(c) any relevant rules of international law applicable in the relations between the parties".

261. As demonstrated by *Demir and Baykara*, the Strasbourg Court makes use of this provision as a relevant element in the explanation of the referencing practice. In this case, the Court when it addressed the 'basis' of the "practice of interpreting Convention provisions in the light of other international texts and instruments", paid, among other arguments, particular attention to Article 31 paragraph 3 (c) of the VCLT.⁴⁴² In connection to that provision, the Court held that it "...has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein" but, on the contrary, that "...it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties".⁴⁴³ After *Demir and Baykara*, until the end of 2015, we did not notice striking fluctuations in the Grand Chamber's use of Article 31 paragraph 3 (c) of the VCLT in a context of the referencing practice. The Court kept on mobilizing the specific provision on a constant, but not on a very regular basis. Out of a total of 136 examined cases, only 10 cases refer to it in the Court's legal reasoning.⁴⁴⁴

262. Since the interpretative principle of Article 31 paragraph 3 (c) VCLT is of a particular relevance with regard to the argumentative function of referencing for 'harmonious

⁴⁴¹ This issue will be discussed more elaborately when reflecting on the 'legal validity' of referencing practice, see *infra*, Part III, Chapter 1, § 4.3.2.

⁴⁴² ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 65 *et seq.*

⁴⁴³ *Ibidem*, para. 67.

⁴⁴⁴ It more particularly concerns the following cases: ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 56; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 131; ECtHR (GC), decision of *Chiragov and Others v. Armenia*, *op. cit.*, para. 93; ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, para. 48; ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 169-170; ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 92; ECtHR (GC), *Cyprus v. Turkey*, *op. cit.*, para. 23; ECtHR (GC), *Margus v. Croatia*, *op. cit.*, para. 129; ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 100. Some of these cases, namely the case of *Chiragov, Sabeh El Leil*, and *X*, only refer to Article 31 paragraph 3 (c) VCLT in an indirect manner, through an explicit citation of a precedent case. Note that *Catan and Others* includes an implicit reference to the provision since the Court refers to paragraph 67 of the GC *Demir and Baykara*-case which mentions Article 31 paragraph 3 (c) VCLT (ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136). In one case, the Grand Chamber refers to the provision but, in that same part of the reasoning, does not mention any external instrument. It seems here that the provision had been cited without any further purpose. See ECtHR (GC), *Hirsi Jamaa v. Italy*, *op. cit.*, para. 171.

interpretation', the Court's importation of this provision will be discussed in detail when addressing the use of external instruments to enable an harmonious interpretation, as a separate category of an argumentative use.⁴⁴⁵

§ 2.5. The *travaux préparatoires* as supplementary means of interpretation (Article 32 VCLT)

263. In the case of *Hirsi Jamaa*, the Court did not only import the VCLT-principle about the interpretation of treaties in good faith, it also, when it considered the prohibition of collective expulsion of aliens under Article 4 of Protocol No. 4, referred to Article 32 of the VCLT to point out that it could "...have recourse to supplementary means of interpretation, notably the *travaux préparatoires* of the Convention" to confirm an interpretation obtained on the basis of other means, or to clarify a meaning that "...would otherwise be ambiguous, obscure or manifestly absurd and unreasonable".⁴⁴⁶

§ 2.6. Concluding observations

264. On a regular basis, the Grand Chamber of the Court makes use of the VCLT in order to establish rules and principles to interpret and execute treaties. Usually, the Court mobilizes these rules and principles to address the interpretation and execution of its own source instrument, being the ECHR and its Protocols.

265. While the Court encounters constructive support in the VCLT, it does not always follow these rules blindly. For instance, in respect of the principle of the non-retroactivity of treaties, the Grand Chamber afforded itself some flexibility in its approach. Regarding the principle of 'non-retroactivity', for example, the Court allows the judgment of facts that took place before the entry into force of the ECHR. This means that the Court does not shy away from giving the VCLT-principles a particular meaning, inspired by the specificities of human rights interpretation. Note that the Court also relies on the VCLT in cases in which the respondent State did not ratify that Convention (like in *Varnava and Others v. Turkey*). The latter is however not very controversial since most of the rules of the VCLT are applicable as international customary law.⁴⁴⁷

⁴⁴⁵ See *infra*, § 8 of this Chapter.

⁴⁴⁶ ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 171. When the Court subsequently developed its reasoning about the question of collective expulsion, it indeed relied on the *travaux préparatoires* for instance to demonstrate that "...the aliens to whom the Article refers are not only those lawfully resident on the territory but 'all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality'" (*ibidem*, para. 174).

⁴⁴⁷ See *infra*, paras. 598 and 740.

266. References to the VCLT are of a particular kind because some of its provisions are relevant in motivating the referencing practice itself. The case of *Demir and Baykara* has mentioned the particular value of Article 31 paragraph 3 (c) VCLT, which provides that “...there shall be taken into account, together with the context: ...(c) any relevant rules of international law applicable in the relations between the parties”. The Court’s use of the latter provision is however not common. Generally, it cites it to justify a harmonious interpretation, which will be discussed as a separate function of the referencing practice.⁴⁴⁸ In one of the examined cases, Article 31 paragraph 3 (a) and (b) of the VCLT seemed to operate as a justification for the Court taking note of external instruments to prove the existence of a subsequent State agreement or a subsequent State practice in relation to the interpretation of the ECHR.

267. Besides, no other VCLT-provisions have been invoked by the Grand Chamber to justify the use of external instruments to interpret and apply the Convention. On the contrary, the Court, by referring to the VCLT-principle of interpreting treaties in ‘good faith’, resisted the importation of poorly ratified external instruments for interpretative purposes. In our view, the interpretative rules of the VCLT have more potential to legally explain and justify the referencing practice, which will be addressed under Part III of this work.⁴⁴⁹ For now, we move to the third argumentative function of the referencing practice, which is the use of external instrument in order to establish an ‘evolutive’ interpretation.

§ 3. External instruments demonstrating a (lack of) evolution to allow or resist an ‘evolutive’ interpretation

268. In our pool of Grand Chamber cases, the Court ties the utility of the referencing practice to a disclosure of evolution enabling ‘evolutive’ interpretation (§ 3.1.), or to the acknowledgement of a lack of evolution, which may prevent an ‘evolutive’ interpretation (§ 3.2.).

§ 3.1. External instruments to establish evolution allowing an ‘evolutive’ interpretation

269. The mobilization of external instruments to uncover an evolution for the purpose of ‘evolutive’ interpretation was acknowledged in our key Grand Chamber case of *Demir and Baykara v. Turkey*. When explaining the basis of the referencing practice, this case stressed that the Convention has a ‘living’ nature and should be interpreted in the light of present-

⁴⁴⁸ See *infra*, § 8 of this chapter

⁴⁴⁹ *Infra*, Part III, Chapter 1, § 3.2. and § 4.3.

day conditions. In that connection, the case pointed out that the Court in previous cases had “...taken account of evolving norms of national and international law in its interpretation of Convention provisions”.⁴⁵⁰ The *Demir and Baykara* judgment equally elaborated on the relevance of a consensus – including a consensus found in specialised international instruments – in the light of ‘evolutive’ interpretation.⁴⁵¹ It moreover said in that respect that “...it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned”, but that it “...will be sufficient for the Court that the relevant international instruments denote a continuous evolution”. According to the Court, this ‘continuous evolution’ demonstrates, in a precise area, a ‘common ground in modern societies’ and can be found in the norms and principles applied in international law or in the domestic law of the majority of Member States.⁴⁵²

270. In its arguments on the merits of the *Demir and Baykara* case, the Court entered into ‘evolutive’ interpretation largely supported by external instruments. It stressed in its legal reasoning that, in line with the observation that the ECHR is a ‘living instrument’, it must interpret the Convention

“...in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights”.⁴⁵³

Subsequently, the Court concluded the case of *Demir and Baykara* with a revision of its case law to the effect that Article 11 ECHR now covers a right to bargain collectively and to enter into collective agreements. This revision took account “... of the perceptible evolution in such matters, in both international law and domestic legal systems”.⁴⁵⁴ Considering such a ‘perceptible evolution’, the Court acknowledged that, having regard to the developments in

⁴⁵⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 68.

⁴⁵¹ *Ibidem*, paras. 85-86. The Court stated in that respect that “[T]he consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases” (*ibidem*, para. 85). In its consideration of the substantive issues that rise under Article 11 of the Convention, however, the Court in *Demir and Baykara* did not explicitly build on the observation of a consensus, a development or a trend to argue its ‘evolutive’ interpretation. The latter interpretation in this case took place by generally referring to external instruments on the matter.

⁴⁵² *Ibidem*, para. 86.

⁴⁵³ *Ibidem*, para. 146.

⁴⁵⁴ *Ibidem*, paras. 147-150. To come to this conclusion, the Court, together with an examination of the practice of European States and internal evolutions in the Turkish situation (see *ibidem*, paras. 151-152) referred to several external instruments such as ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively and the interpretation of this Convention by the ILO Committee of Experts, ILO Convention No. 151 concerning the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, Article 6 paragraph 2 of the European Social Charter and Article 28 of the EU Charter of Fundamental Rights (*ibidem*, paras. 147-150).

labor law both internationally and nationally, the right to bargain collectively in principle became an essential element of the right to form and join trade unions.⁴⁵⁵ The case of *Demir and Baykara* thus dynamically revised previous case law on the basis of external instruments, to the effect of extending the scope of the Convention. Such a transformative effect, particularly because it was partly built on ‘soft’ instruments, was a source of controversy.⁴⁵⁶

271. Did an evolutive interpretation based on (‘soft’) external instruments occur again since our key case? The answer to this question is affirmative. To demonstrate the latter, we include – in what follows – all arguments of the pool of cases in which the Court *explicitly* mentions that it establishes an ‘evolutive’ interpretation and in which the Court, in light of that ‘evolutive’ interpretation, made use of external instruments to change its previous case law. In addition, we also include those cases in which the Court did not explicitly acknowledge the idea or aim of ‘evolutive’ interpretation, but where that evolution appears *clearly* from the Court’s reasoning, for example, because the Court refers to the idea that the ECHR is a ‘living instruments’ or the importance of ‘present-day conditions’ (without mentioning explicitly the principle of ‘evolutive’ interpretation). We note two types of Grand Chamber-cases: those that do not contain a specific ‘comparative terminology’ to help disclosing an ‘evolution’ on the basis of external instruments (§ 3.1.1.), and those that do make use of some specific terms triggering the observation of an ‘evolution’ in external instruments, such as a ‘consensus’, a ‘trend’, *etc.* (§ 3.1.2.).

§ 3.1.1. Evolution without indicating the phenomenon triggering dynamism

272. In three of the examined cases, we notice that the Court used external instruments to establish certain developments and to pave the way for ‘evolutive’ interpretation without referring to a ‘consensus’, a ‘trend’, ... or other specific notions triggering this interpretation. All three cases were issued in 2009, soon after the Grand Chamber case of *Demir and Baykara v. Turkey*.

273. The case of *Sergey Zolotukhin v. Russia* on 10 February 2009 examined an alleged violation of Article 4 of Protocol 7 on the right not to be punished twice for the same offence.⁴⁵⁷ Thereto, the Court had to verify whether the offences for which the applicant was prosecuted were ‘the same’.⁴⁵⁸ In that respect, it noted that in international instruments there

⁴⁵⁵ *Ibidem*, para. 154.

⁴⁵⁶ See *supra*, under Part I, paras. 51-52.

⁴⁵⁷ Paragraph 1 of Article 4 of Protocol 7 provides that “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.

⁴⁵⁸ This example will also included as an illustration of how the Court has used external instruments in order to clarify certain notions, see *supra*, para. 307.

are various approaches to interpret the notion of ‘same offence’, which could, according to the Court, lead to legal uncertainty. Therefore, the Court pointed out, there was a need for harmonization and, in that connection, for ‘evolutive’ interpretation. The lack of such dynamic approach, the Court acknowledged, would risk establishing bars to reform or improvement.⁴⁵⁹ The Court supported its ‘evolutive’ approach with external instruments, including case law of the ECJ and the ACtHR (embracing an approach to interpret the notion of a ‘same offence’ based strictly on the identity of the material acts and not on the legal qualification of such acts).⁴⁶⁰ Besides stressing the importance of reading the Convention as a ‘living instrument’, the Court also mentions here the need to construe the Convention in the light of its object and purpose and in accordance with the principle of effectiveness.⁴⁶¹

274. Not long after the *Sergey Zolotukhin* case, the Court again entered into ‘evolutive interpretation’ with support of external instruments. In the case of *Šilih v. Slovenia* of 9 April 2009 the Court interpreted its temporal jurisdiction (in respect of the right to life when the death occurred prior to the entry into force of the Convention) in a dynamic manner. By stating that “...the procedural obligation to carry out an effective investigation under Article 2 has *evolved* into a separate and autonomous duty (own emphasis)” and thus into a ‘detachable obligation’ arising from the right to life⁴⁶², the Court reviewed its case law on the matter. The Court stressed that this revision, which resulted from several precedents as well as from the idea of ‘practical and effective’ interpretation⁴⁶³, had also been supported by case law of the HRC and the ACtHR.⁴⁶⁴ In some other cases of our pool of Grand Chamber case law, the ECtHR redirected the reader to this new approach established in the case of *Šilih v. Slovenia*.⁴⁶⁵

275. Still within a year after the judgment of *Demir and Baykara*, the Court took a decision in the case of *Micallef v. Malta* on 15 October 2009 about the application of Article 6 ECHR to interim measures. The Court, in the ‘law’-section of the reasoning, explicitly included the following title: “Whether there is a need for a development of case law”. To answer this question, the Court, in addition to establishing ‘internal consensus’⁴⁶⁶, took account of case

⁴⁵⁹ ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 78.

⁴⁶⁰ *Ibidem*, paras. 79-81. The Court hence stressed that an approach that emphasizes the legal characterization of the two offences is too restrictive on the rights of the individual.

⁴⁶¹ *Ibidem*, para. 80.

⁴⁶² ECtHR (GC), *Šilih v. Slovenia*, *op. cit.*, para. 159.

⁴⁶³ *Ibidem*, paras. 153 *et seq.*

⁴⁶⁴ *Ibidem*, para. 160. The latter (*quasi*-) judicial bodies accepted jurisdiction *ratione temporis* over the procedural complaints concerning investigations into deaths even where the lethal acts had taken place before the critical date.

⁴⁶⁵ See the case of *Janowiec and Others* (repeating and clarifying the criteria developed in *Šilih v. Slovenia*) and the case of *Varnava and Others* (citing the arguments made in *Šilih v. Slovenia*). See ECtHR (GC), *Janowiec and Others v. Russia*, *op. cit.*, paras. 131 *et seq.* and ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 147.

⁴⁶⁶ It concluded that “...there is a widespread consensus among Council of Europe member States, which either implicitly or explicitly provide for the applicability of Article 6 guarantees to interim measures, including injunction proceedings”. ECtHR (GC), *Micallef v. Malta*, *op. cit.*, para. 78.

law of the ECJ (saying that provisional measures must be subject to the guarantees of a fair trial).⁴⁶⁷ Against this background, the Court stressed the importance of a ‘dynamic and evolutive approach’ (as well as the protection of rights that are ‘practical and effective’) and deemed necessary a change of Strasbourg case law.⁴⁶⁸ Hence, its conclusion that “...the fact that interim decisions which also determine civil rights or obligations are not protected by Article 6 under the Convention calls for a new approach”.⁴⁶⁹

§ 3.1.2. Evolution indicating the phenomenon triggering dynamism

276. On some occasions, when the Court used external instruments for ‘evolutive’ interpretation, the Court also specified the phenomenon triggering the observation of evolution (on the basis of external instruments), including the phenomenon of a ‘consensus’, a ‘development’, a ‘trend’, and ‘evolution of society’. Four cases of the pool offer illustrations in this respect.

277. The first case is *Scopolla v. Italy (No.2)*, which established under Article 7 of the Convention (no punishment without law) a principle of ‘non-retrospectiveness’ of a more stringent criminal law and, implicitly, a principle of ‘retrospectiveness’ of a more lenient criminal law.⁴⁷⁰ The latter conclusions signified a departure from the Court’s previous case law.⁴⁷¹ Previously, the Court, contrary to what is guaranteed by the ICCPR⁴⁷², did not provide a right to a more lenient penalty provided for in a law subsequent to the offence.⁴⁷³ Until *Scopolla*, there thus was a divergence between the ICCPR and the views of the ECtHR. The Court supported the revision in question by stressing that it must “...have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved” and

⁴⁶⁷ *Ibidem*.

⁴⁶⁸ *Ibidem*, para. 81.

⁴⁶⁹ *Ibidem*, para. 82.

⁴⁷⁰ ECtHR (GC), *Scopolla v. Italy (no.2)*, *op. cit.*, para. 109.

⁴⁷¹ *Ibidem*, paras. 103 and 109.

⁴⁷² Article 15b paragraph 1 *in fine* of the ICCPR. Article 15 paragraph 1 of the ICCPR provides: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”.

⁴⁷³ *Ibidem*, para. 103. The Court in *Scopolla (No. 2)* mentioned the (until then) divergence between the Convention and the ICCPR explicitly in paragraph 103: “In 1978 the European Commission of Human Rights expressed the opinion that, unlike Article 15 § 1 *in fine* of the United Nations Covenant on Civil and Political Rights, Article 7 of the Convention did not guarantee the right to a more lenient penalty provided for in a law subsequent to the offence (see *X v. Germany*, no. 7900/77, Commission decision of 6 March 1978, *Decisions and Reports* (DR) 13, pp. 70-72). It accordingly declared manifestly ill-founded the complaint of an applicant who alleged that, after their commission, some of the offences he had been charged with had been decriminalised. That ruling has been repeated by the Court, which has reiterated that Article 7 does not afford the right of an offender to application of a more favorable criminal law (see *Le Petit v. the United Kingdom* (dec.), no. 35574/97, 5 December 2000, and *Zaprianov v. Bulgaria* (dec.), no. 41171/98, 6 March 2003)”.

that not adopting “...a dynamic and evolutive approach would risk rendering it a bar to reform or improvement”.⁴⁷⁴ To support the observations of ‘important developments internationally’⁴⁷⁵ and a ‘consensus’ which has ‘emerged in Europe and internationally’⁴⁷⁶, the Court referred to the ACHR⁴⁷⁷, the EU Charter⁴⁷⁸, case law of the ECJ⁴⁷⁹, the Statute of the ICC, and case law of the ICTY.^{480 481} The Court also stressed the principle of effectiveness saying that it is “...of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory”.⁴⁸²

278. The second case is *Bayatyan v. Armenia*, in which the Grand Chamber revised its established case law on conscientious objection against the military service by allowing opposition to military services when it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs.⁴⁸³ Such opposition was considered to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to fall under the protection of the right to freedom of religion (Article 9 ECHR).⁴⁸⁴ External instruments allowed for this important evolution in the Court’s reasoning. The Grand Chamber not only relied on a comparative exercise between internal positions of the Member States (pointing at a ‘growing consensus’), but equally – referring to the principles developed in *Demir and Baykara v Turkey*⁴⁸⁵ – took account of “...important developments concerning recognition of the right to conscientious objection in various international fora”.⁴⁸⁶ The Court found evidence of these developments in HRC General Comment No. 22⁴⁸⁷, in the EU Charter, and in a number of instruments emanating from the CoE PACE and COM.⁴⁸⁸ The Court proceeded by stating that “ ...the domestic law of the overwhelming majority of Council of Europe Member States, along with the relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the

⁴⁷⁴ *Ibidem*, para. 104.

⁴⁷⁵ *Ibidem*, para. 105.

⁴⁷⁶ *Ibidem*, para. 106.

⁴⁷⁷ Article 9 of which guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence. *Ibidem*, para. 105.

⁴⁷⁸ Article 49 paragraph 1 of the Charter states: “[i]f, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable”. *Ibidem*.

⁴⁷⁹ The Court referred to the case of *Berlusconi and Others* of the Court of Justice of the European Communities, which held that this principle formed part of the constitutional traditions common to the Member States. *Ibidem*.

⁴⁸⁰ Both the Statute of the ICC and the case law of the ICTY confirmed the applicability of the more lenient criminal law. *Ibidem*.

⁴⁸¹ *Ibidem*, para. 104.

⁴⁸² *Ibidem*.

⁴⁸³ The Court in the *Bayatyan*-case said explicitly that it digs into the question whether case law should be revised and included the following heading into its decision: ‘whether there is a need for a change of case-law’.

⁴⁸⁴ Therefore, the criminal conviction of the applicant who refused to perform military service (and wished to perform an alternative civilian service) amounted to interference by the state with the right to manifest a religion to an extent that is not necessary within a democratic society. See *ibidem*, paras. 109–11, 124, and 128.

⁴⁸⁵ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 85.

⁴⁸⁶ ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 105.

⁴⁸⁷ In particular regarding the interpretation by the HRC of Articles 8 and 18 of the ICCPR.

⁴⁸⁸ *Ibidem*, paras. 105–107.

question in Europe and beyond”.⁴⁸⁹ Against that background, the Court added that, in line with the ‘living instrument’ approach, it is not possible to confirm its earlier case law.⁴⁹⁰ The importation of external elements to establish a ‘consensus’ led to a dynamic interpretation in line with the ‘living instrument doctrine’ and as such, to an important development in the scope of Article 9 ECHR.⁴⁹¹ The Court in this case also stressed the principle of ‘effectiveness’.⁴⁹²

279. Thirdly, the case of *Stanev v. Bulgaria* established a “...trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity”.⁴⁹³ The Court felt obliged “...to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible”.⁴⁹⁴ In this connection, the Court referred to the CRPD and to a Recommendation of the CoE COM⁴⁹⁵, both urging to put in place adequate safeguards to protect legally incapacitated persons, to ensure periodic reviews of their status and to make appropriate remedies available.⁴⁹⁶ Against the background of this trend emerging in relevant international instruments as well as in trends emerging in national legislation, the Court concluded that Article 6 includes a principle that “ ... anyone who has been declared partially incapable ... has direct access to a court to seek restoration of his or her legal capacity”.⁴⁹⁷

280. Finally, in our pool, we observe ‘evolutive’ interpretation with the help of external instruments in the case of *Konstantin Markin v. Russia*. In this case, the ECtHR examined Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to family life) and concluded to a violation of the Convention because of a difference in treatment between male and female military personnel regarding rights to parental leave. In its argumentation, the Court took account of ‘evolution of society’, based on international and internal comparative law material.⁴⁹⁸ The international materials the Court considered relevant to establish evolution included UN conventions, recommendations, the European Social Charter, CoE resolutions and recommendations, and EU (case) law instruments.⁴⁹⁹

⁴⁸⁹ *Ibidem*, para. 108.

⁴⁹⁰ *Ibidem*, para. 109.

⁴⁹¹ Muzny says that an interpretation based on the ‘living instrument’-doctrine does not always reflect a ‘daring’ interpretation. Also the refusal to recognize a new right can be creative and proactive. P. Muzny, “Bayatyan v. Armenia: the Grand Chamber renders a Grand Judgment”, *Human Rights Law Review* 2012, vol. 12, no. 1, p. 143.

⁴⁹² *Ibidem*, para. 89.

⁴⁹³ ECtHR (GC), *Stanev v. Bulgaria*, *op. cit.*, para. 243.

⁴⁹⁴ *Ibidem*, para. 244.

⁴⁹⁵ CoE COM Rec.No.R(99)4 on Principles Concerning the Legal Protection of Incapable Adults.

⁴⁹⁶ ECtHR (GC), *Stanev v. Bulgaria*, *op. cit.*, para. 244.

⁴⁹⁷ *Ibidem*, para. 245.

⁴⁹⁸ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140.

⁴⁹⁹ More precisely, it concerned the following instruments: CEDAW, ILO Convention No. C111 concerning Discrimination in Respect of Employment and Occupation 1958, ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, adopted in 1981, Recommendation No. 165 supplementing that Convention No. 156, Revised European Social

§ 3.2. External instruments to establish the absence of evolution

281. Sometimes the Court, looking at external instruments, comes to the conclusion that there is *no* evolution in respect of a certain issue. We distinguish a situation in which such absence of evolution prevents the establishment of more progressive human rights protection (§ 3.2.1.) from a situation in which the absence of a backward evolution in human rights protection prevents a degressive human rights protection (§ 3.2.2.).

§ 3.2.1. Absence of evolution preventing the advancement of human rights

282. When the Court used external instruments to enable ‘evolutive’ interpretation, as discussed in the previous paragraph, it mirrored the ‘external situation’ with a following underlying message: “What others require or ask, we require or ask as well’. In our pool of case law, some cases also reflect the other side of this coin. The implicit message then is: “What others do *not* ask or require, we do not ask or require that either”. Here, the external context slows down human rights development, leading to some ‘inertia’. We notice this phenomenon in three cases of our pool.

283. In the case of *Gäfgen v. Germany*, the Court concluded that the use in trial of evidence obtained under duress did not necessarily amount to a violation of Article 6 of the Convention on the right to a fair trial. The Court took into account that there was “...no clear consensus among the Contracting States to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule”.⁵⁰⁰ In that context, it referred to the US Supreme Court, the Court of Appeal of South Africa, General Comments of the HRC⁵⁰¹ and Concluding Observations of the CAT.⁵⁰² Although the Court did not say this explicitly, it seemed that the absence of

Charter, Resolution 1274(2002) of the Parliamentary Assembly, Recommendation 1769(2006) of the Parliamentary Assembly on the need to reconcile work and family life, Recommendation No. R (96) 5 of the Committee of Ministers on reconciling work and family life, Recommendation Rec(2007)17 of the Committee of Ministers to member States on gender equality standards and mechanisms, Recommendation Rec(2010)4 of the Committee of Ministers on the human rights of members of the armed forces, EU Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE [Union of Industrial and Employers’ Confederations of Europe], CEEP [European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest] and the ETUC [European Trade Union Confederation] gave effect to that agreement, which had been entered into on 14 December 1995 between those cross-industry representative organizations, EU Council Directive 2010/18/EU of 8 March 2010 on the application of the revised Framework Agreement on parental leave between BUSINESSEUROPE, UEAPME, CEEP and the ETUC replaced Directive 96/34/EC, ECJ case law (case of *Joseph Griesmar v. Ministre de l’Economie, des Finances et de l’Industrie, Ministre de la Fonction publique, de la Réforme de l’Etat et de la Démocratisation*, of 29 November 2001; case of *Roca Álvarez v. Sesa Start España* of 30 September 2010).

⁵⁰⁰ ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 174.

⁵⁰¹ A General Comment of 1982 on Article 7 ICCPR.

⁵⁰² *Ibidem*, paras. 70-74

consensus – on a scale going beyond a comparison among the Member States – influenced the Court in not evolutively interpreting the Convention.

284. Also in the case of *Boulois v. Luxembourg*, the Grand Chamber seems to refrain from evolutive interpretation because of the lack of ‘consensus’ demonstrated by external instruments. The case of *Boulois* was about a prison board’s repeated refusal with no right of appeal to grant a prisoner temporary leave. The Court decided that there was no violation of Article 6 of the Convention. To arrive at this conclusion, the Court firstly observed that the Convention and its Protocols did not expressly provide a right to prison leave. Not finding support in the wording of the Convention, the Court subsequently took account of the absence of consensus among Member States regarding the status of prison leave and the arrangements for granting it, as well as of the absence of any principle of international law in this respect.⁵⁰³

285. Thirdly, in the case of *Sitaropoulos and Giakoumopoulos v. Greece* external instruments (and the lack of evolution that they demonstrated) seemed to prevent broadening the scope of Article 3 of Protocol 1 on a right to free elections. This case was about the absence of a national procedure to enable Greek nationals resident overseas to vote in parliamentary elections. The Court did not consider the latter situation as a violation of the right to free elections. With reference to *Demir and Baykara* and other precedents, the Court stressed that the right to free vote “...should be interpreted with reference to the relevant international and comparative law...and to the domestic law of the country concerned”.⁵⁰⁴ When examining relevant international and comparative law, the Court, on the one hand, noted a lack of ‘evolution’ in the external normative context by observing that

“...neither the relevant international and regional treaties – such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights – nor their interpretation by the competent international bodies provide a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they are nationals extend so far as to require the State concerned to make arrangements for their exercise abroad...”.⁵⁰⁵

On the other hand, and this had been considered as a ‘dismissive use’⁵⁰⁶, the Court excluded the relevance of several external instruments (including from the PACE and the Venice Commission) recommending to increase protection standards in respect of the right free elections and the right to vote for citizens living abroad. Instead, the ECtHR gave large

⁵⁰³ ECtHR (GC), *Boulois v. Luxembourg*, *op. cit.*, para. 102.

⁵⁰⁴ ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 71.

⁵⁰⁵ *Ibidem*, para. 72.

⁵⁰⁶ See *supra*, para. 233.

weight to the ICCPR, the ACHR and the AfCHR (and their external interpretations), which did not evidence any evolution, and which did not include an obligation of making arrangements for enabling the exercise of voting rights abroad.⁵⁰⁷

§ 3.2.2. Absence of a backward ‘evolution’ preventing a downward human rights protection

286. In one of the cases of our pool, the Court mobilized external instruments to prove there had not been a backward evolution in human rights protection in the external normative context. Such a ‘proof’ supported the Court in maintaining the current level of protection.

287. We observed the latter phenomenon in the case of *Scoppola v. Italy* (No. 3), which is about a ban on prisoner voting imposed automatically as a result of a sentence. The Court concluded this case with a violation of Article 3 of Protocol 1 of the Convention (right to free elections). The *Scoppola*-case was comparable to the previous case of *Hirst (No. 2) v. the United Kingdom*⁵⁰⁸, which considered a blanket ban of exercising the right to vote on British prisoners to be in violation with the Convention. This case was used as an important precedent in the *Scoppola* (No. 3)-case. The Court, when addressing the proportionality of the interference, followed the principles of the *Hirst*-case and considered relevant that, since that precedent, nothing had changed on a European- and a Convention-level. In addition, it highlighted external developments endorsing the principles established in *Hirst* (No. 2).

288. In respect of interpreting voting rights for prisoners, the Court thus suggested taking account of a lack of a (backward) evolution. The Court ruled in the following words:

“[I]t does not appear, however, that anything has occurred or changed at the European and Convention levels since the *Hirst* (no. 2) judgment that might lend support to the suggestion that the principles set forth in that case should be re-examined. On the contrary, analysis of the relevant international and European documents ... and comparative-law information ... reveals the opposite trend, if anything – towards fewer restrictions on convicted prisoners’ voting rights”.⁵⁰⁹

The Court, as ‘relevant international and European documents’ included the ICCPR, a HRC General Comment⁵¹⁰ and HRC Views⁵¹¹, the ACHR, and the Venice Commission Code of

⁵⁰⁷ *Ibidem*, para. 72. In addition, it also attached importance to an ‘internal’ comparative study between its Member States in respect of which it said that there is no legal basis to conclude that “...States are under an obligation to enable citizens living abroad to exercise the right to vote” and that also in respect of the “...arrangements for exercising that right put in place by those Council of Europe Member States that allow voting from abroad, there is currently a wide variety of approaches”. *Ibidem*, para. 75.

⁵⁰⁸ ECtHR (GC), *Hirst v. the United Kingdom* (No. 2), 6 October 2005, Appl. No. 74025/01.

⁵⁰⁹ ECtHR (GC), *Scoppola v. Italy* (no. 3), *op. cit.*, para. 95.

⁵¹⁰ General Comment no. 25 of 1996 on Article 25 of the ICCPR.

Good Practice in Electoral Matters of 2002.⁵¹² As relevant ‘comparative law information’ the Court included references to internal legislative frameworks as well as to case law of the Supreme Court of Canada, the Constitutional Court of South Africa, and the High Court of Australia.⁵¹³

289. While the Grand Chamber, built on external instruments, argued against a revision of its previous case law and prevented devolving standards, it also – in our view – opened the door to a controversial *a contrario* reasoning. It gave the impression that a backward external evolution could potentially lead to a reconsideration of precedents (like the case of *Hirst (No. 2)*) in a degressive manner, which may result in a race-to-the bottom in human rights protection. These unusual statements should be read against the exceptional context of the *Hirst (No. 2)*-case, which provoked very strong criticism in the United Kingdom.⁵¹⁴ Successive UK governments, for many years now, have refused to comply with the case law. “Prisoners will not get the vote”, said David Cameron⁵¹⁵, long after the *Hirst (No.2)* case had been issued. The Court’s pilot judgment in 2010⁵¹⁶ threatening to reopen about 2000 proceedings against the United Kingdom did not alter the government’s stance on the issue.⁵¹⁷

§ 3.3. Concluding observations

290. Sometimes external instruments are used to establish certain developments allowing for ‘evolutive’ interpretation. On other occasions, they have served to confirm absence of evolution, preventing a (backward) ‘evolutive’ interpretation. External references are then (explicitly or implicitly) connected to the ‘living nature’ of the Convention and its Protocols, which have to be read in the light of present-day conditions.

⁵¹¹ HRC views on *Yevdokimov and Rezanov v. Russian Federation*, 21 March 2011, no. 1410/2005.

⁵¹² See *ibidem*, under paragraphs 40-44 of the ‘facts’-section.

⁵¹³ See *ibidem*, under paragraphs 45-60 of the ‘facts’-section. The Court also included an internal comparison from which it observed that “...arrangements for restricting the right of convicted prisoners to vote vary considerably from one national legal system to another, particularly as to the need for such restrictions to be ordered by a court” (*ibidem*, para. 101). The Court used the latter statement to, with a reference to the *Hirst (no.2)*-case, underline “...the importance of the principle that each State is free to adopt legislation in the matter in accordance with “historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision”, and to stress, as a consequence, that it is “...for the legislature itself to balance the competing interests in order to avoid any general, automatic and indiscriminate restriction. It will then be the role of the Court to examine whether, in a given case, this result was achieved and whether the wording of the law, or the judicial decision, was in compliance with Article 3 of Protocol No. 1” (*ibidem*, para. 102).

⁵¹⁴ See A. Le Sueur, M. Sunkin, and J.E. Kushal Murkens, *Public Law: Text, Cases, and Materials*, 2nd edition, Oxford University Press, Oxford, 2013, pp. 196 etc.

⁵¹⁵ <http://www.bbc.com/news/uk-politics-20053244> (accessed on 10 January 2017), BBC News 24th October 2012.

⁵¹⁶ ECtHR, *Greens and M.T. v. the United Kingdom*, 23 November 2010, Appl. Nos. 60041/08 and 60054/08.

⁵¹⁷ G. Cowie, ‘Prisoners to Devolved Fortune? The Right to Vote and the Scotland Act 2016’, U.K. Const. L. Blog, 18th May 2016, available at <http://ukconstitutionallaw.org> (visited on 10 January 2017).

291. In respect of referencing external instruments to enable ‘evolutive’ interpretation, our key case of *Demir and Baykara* offered a first example. After the case of *Demir and Baykara* and until the end of 2015, such a phenomenon appears in seven more cases. In all these cases, references contributed to a dynamic creation of higher or broader protection standards, leading toward more progressive human rights standards.

292. Three of these seven cases offered examples of ‘judicial dialogue’, referring to external (*quasi*-)judicial external instruments as a ‘proof’ for evolution. The latter cases all created ‘evolutive’ interpretation without specification of the phenomenon (a ‘consensus’, or a ‘trend’, or ...) that triggered the dynamism. The ECtHR thus seemed to be concerned keeping up with its ‘colleagues’ from external (*quasi*-)judicial bodies, and not with establishing a shared position, based on various instruments, in Europe or beyond. Here, the viewpoints of judicial external actors (occasionally completed with an ‘internal’ consensus) triggered ‘evolutive’ interpretation. This phenomenon exists mainly in respect of procedural judicial issues such as the Court’s temporal jurisdiction, questions of just satisfaction, interim measures, *etc.* The ECtHR, to evolve on these issues, communicates with several of its ‘colleagues’, such as the judges of the ECJ (even when the respondent State was no member to that Court), the ACtHR, and the HRC. What is remarkable in respect of this ‘judicial dialogue’, is that it no longer occurred in recent years. From all Grand Chamber cases examined between the end of 2008 and the end of 2015, the three cases illustrating the phenomenon were all issued in 2009. The latter makes us assume that ‘evolutive’ interpretation inspired by a ‘judicial dialogue’, and thus by developments in external judicial instruments, is losing relevance in Grand Chamber case law.

293. The other cases that have included the referencing practice to enable ‘evolutive’ interpretation (four of the seven cases), were built on a mix of external instruments. This variety, together with internal comparisons, allowed the Court to arrive at observations such as an ‘emerging consensus in Europe and internationally’⁵¹⁸, a ‘virtual general consensus in Europe and beyond’⁵¹⁹, ‘emerging trends in national legislation and the relevant international instruments’⁵²⁰, and an ‘evolution of society based on international and internal comparative law material’⁵²¹. In order to provide evidence for these observations, the Court has generally included a combination of two or more binding and non-binding instruments (including external case law and ‘soft’ recommendations of political organs, but not including ‘soft’ instruments of politically non-representative expert organs). In the case of *Scopolla* (No. 2), the Court referred to the ACHR, the EU Charter, case law of the ECJ, the ICC Statute, and

⁵¹⁸ ECtHR (GC), *Scopolla v. Italy* (No. 3), *op. cit.*

⁵¹⁹ ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*

⁵²⁰ ECtHR (GC), *Stanev v. Bulgaria*, *op. cit.*

⁵²¹ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*

ICTY case law. In the case of *Bayatyan*, the Court included a HRC General Comment, the EU Charter, and ‘soft’ instruments of the CoE PACE and COM. In *Stanev*, the Court included the CRPD and a recommendation of the CoE COM, and finally, in *Konstantin Markin* the Court referred to multiple external instruments, including *inter alia* the ESC, CoE resolutions and recommendations, EU Council Directives, ECJ case law, the CEDAW, and ILO-Conventions. Doing so, the Grand Chamber did not shy away from including EU instruments in cases in which the respondent State was no Member State of the EU.⁵²² Thus, the Grand Chamber, to establish ‘evolution’, is not only interested in instruments backed up by (binding) State consent. Note however that also this phenomenon is going into decline. The last case in which the Grand Chamber built on large comparative exercises to establish a ‘consensus’, a ‘trend’, ... in order to justify ‘evolutive’ interpretation dates from 22 March 2012. Since that date (and until the end of 2015) no more of such argumentative uses appeared in our pool.

294. It is interesting to compare cases that use external instruments for ‘evolutive’ interpretation to cases that attach the observation of ‘evolution’ only to internal comparisons of national laws and practices. In a large majority of all Grand Chamber cases examined, the ECtHR, when it observes an evolution in a certain field, based this conclusion on external instruments rather than on an internal comparison only. Admittedly, in almost all cases in which the Court explicitly developed an ‘evolutive’ interpretation, the Court made use of both external instruments and internal comparisons.⁵²³ In almost none of the case, however, the Court concluded to an evolution solely on the basis of internal law and practices of the Member States. In our pool of cases, the Court has included an internal comparison that ‘stands on its own’ in almost twenty-five cases.⁵²⁴ With an internal comparison that ‘stands on its own’ we mean an internal comparison that is not accompanied by external instruments. Of all of these cases, the internal comparison was almost never used to clearly enable ‘evolutive’ interpretation. In fact, the only case in which we observed explicit

⁵²² This was more particularly (and exhaustively) the case in the judgment of *Bayatyan v. Armenia* (with respect to the reference to the EU Charter) and in the judgment of *Konstantin Markin v. Russia* (with respect to the importation of ECJ case law and EU Council Directives).

⁵²³ Like in the case of: ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 146-154; ECtHR (GC), *Scoppola v. Italy* (No. 2), *op. cit.*, para. 106; ECtHR (GC), *Micallef v. Malta*, *op. cit.*, para. 78; ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 103; ECtHR (GC), *Stanev v. Bulgaria*, *op. cit.*, para. 243; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140.

⁵²⁴ ECtHR (GC), *Kozacıoğlu v. Turkey*, *op. cit.*, paras. 71-72; ECtHR (GC), *Kart v. Turkey*, *op. cit.*, paras. 54-55; ECtHR (GC), *Brosset-Triboulet and Others v. France*, *op. cit.*, para. 92; ECtHR (GC), *Depalle v. France*, *op. cit.*, para. 89; ECtHR (GC), *Taxquet v. Belgium*, *op. cit.*, para. 83; ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, para. 235; ECtHR (GC), *Paksas v. Lithuania*, *op. cit.*, para. 106; ECtHR (GC), *Lautsi and Others v. Italy*, *op. cit.*, para. 70; ECtHR (GC), *Palomo Sánchez and Others v. Spain*, *op. cit.*, para. 75; ECtHR (GC), *Nejdet Şahin and Perihan Şahin v. Turkey*, *op. cit.*, para. 82; ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, paras. 94-96 and 106; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 147; ECtHR (GC), *Van der Heijden v. the Netherlands*, *op. cit.*, para. 61; ECtHR (GC), *Herrmann v. Germany*, 26 June 2012, Appl. No. 9300/07, para. 78; ECtHR (GC), *X and others v. Austria*, *op. cit.*, para. 102; ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, *op. cit.*, paras. 133 and 171; ECtHR (GC), *Söderman v. Sweden*, *op. cit.*, para. 105; ECtHR (GC), *SAS v. France*, *op. cit.*, paras. 129 *et seq.*; ECtHR (GC), *Hämäläinen v. Finland*, *op. cit.*, paras. 74-75 and 80; ECtHR (GC), *Rohlena v. Czech Republic*, *op. cit.*, para. 72; ECtHR (GC), *Bochan v. Ukraine* (No.2), 5 February 2015, Appl. No. 22251/08, para. 57; ECtHR (GC), *Lambert and Others v. France*, *op. cit.*, paras. 145-147 and 165; ECtHR (GC), *Kudrevičius and Others v. Lithuania*, *op. cit.*, para. 18; ECtHR (GC), *Pentikäinen v. Finland*, 20 October 2015, Appl. No. 1182/10, para. 109.

‘evolutive’ interpretation on the basis of a purely internal comparison is the case of *Herrmann v. Germany* of 26 June 2012.⁵²⁵ Generally, an internal comparison that ‘stands on its own’ is not mobilized to support ‘evolution’, but to serve as an argumentative support for the establishment of the width of a State’s margin of appreciation.⁵²⁶ Accordingly, we can conclude that when the Grand Chamber, in light of ‘evolutive’ interpretation, takes account of other instruments (sometimes inspired by the observance of a ‘consensus’, a ‘trend’, ...), the Grand Chamber usually looks beyond national law and practices only: almost in every case in which an ‘evolutive’ interpretation occurs, the Grand Chamber proves the existence of such an evolution by external instruments, too.

295. External instruments are also used to establish the absence of evolution resisting a (backward) ‘evolutive’ interpretation. In our pool of cases, this happened four times. On three occasions, the Grand Chamber has searched for external developments without finding them. As a consequence, the Court did not feel motivated to enter into an ‘evolutive’ interpretation and to broaden the scope of the Convention provisions accordingly. Unsurprisingly, the Court in all three cases did not conclude to a violation of human rights law. These cases demonstrate the flipside of making an ‘evolutive’ interpretation (partly) dependent of external normative developments: in the absence of such developments, the ECtHR becomes more prudent in creating an ‘evolutive’ interpretation. Thus, connecting an evolution in human rights law to the acknowledgment of external tendencies has the potential to inhibit progressive evolution of the Convention. It entails a risk of upholding the ‘lowest common denominator’ in human rights protection and on slowing down the progressive development of human rights. Admittedly, in one of the cases (*Scoppola v. Italy* (No. 3)), the lack of a backward external evolution served to uphold the level of protection offered by the Strasbourg Court. However, even the latter reasoning, from a human rights’ point of view, carried challenges with it. Does this mean – in an *a contrario* reasoning – that a downward crumbling of human rights is allowed from the moment external actors do so as well?

296. Entering (or resisting) an ‘evolutive’ interpretation on the basis of external instruments is controversial and contested, especially when non-binding instruments are involved in this process.⁵²⁷ It therefore requires more thorough theoretical considerations.⁵²⁸

⁵²⁵ ECtHR (GC), *Herrmann v. Germany*, *op. cit.*, para. 78. The Court referred in relation to this statement to the precedent of ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 98. The case of *Herrmann* is about an obligation of a landowner who is opposed to hunting on ethical grounds to tolerate hunting on his land and to join a hunting association. In its assessment as to whether the conditions under paragraph 2 of Article 1 protocol 1 of the Convention were complied with, the Court stressed that “...since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved”.

⁵²⁶ On the establishment of the ‘margin of appreciation’ and the use of external instruments (and internal comparisons), see *infra*, § 9.1. of this Chapter.

⁵²⁷ *Supra*, Part I, paras. 51-52.

Is it valid to build ‘evolutive’ interpretation on external instruments and if yes, what kind of external instruments are suitable in that respect? Such questions will be addressed more elaborately when reflecting on the validity of (dynamic) references in part III of our work.⁵²⁹

§ 4. External instruments to (import and) define notions

297. In the case of *Demir and Baykara* the Court, when concluding on the ‘interpretation of the Convention in the light of other international instruments’, clarified that it

“... in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values”.⁵³⁰

The Court holds that to clarify certain notions, it could make use of international law, international case law and the common practices of European States. Examples of such references appear in the merits of *Demir and Baykara*. Here, the Court argued that municipal civil servants do in principle not fall under the notion of ‘members of the administration of the State’ to whom restrictions could be allowed under Article 11 ECHR. The Court supported this notion by references to the practice of European States⁵³¹ and to several external instruments including the ICCPR, the ICESCR, an ILO Convention, observations of the ILO Committee of Experts, the European Social Charter, and the EU Charter.⁵³² External instruments thus helped the Court to fill in notions that had not been clearly defined in the Convention or the Protocols, also when these instruments (such as the EU Charter) are not binding *vis-à-vis* the respondent State.

298. In this section, admittedly, we are not talking about the use of (non-binding) instruments to explicitly ‘evolve’ the Convention. Nonetheless, importing external instruments to define notions and terms is not as neutral and straightforward as it might seem at first sight. Words do not speak for themselves and definitions could vary in scope (from broad to narrow meanings). Thus, defining *de jure* a certain term or notion might have dynamic consequences for the determination of the elements and factors that are required for the legal establishment of a certain term or notion. The meaning of certain concepts and the constitutive elements that should necessarily be fulfilled, may exercise a considerable impact on the scope of some Convention provisions.

⁵²⁸ See more generally, I. Rorive, *Le revirement de jurisprudence. Etude de droit anglais et de droit belge*, Bruylant, Brussels, 2003, 565 p.

⁵²⁹ *Infra*, Part III.

⁵³⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 81.

⁵³¹ With regard to European practice, the Court holds that all Member States recognize the right of public servants to join trade unions.

⁵³² ECtHR, *Demir and Baykara v. Turkey*, paras. 99-106.

299. Also in the subsequent Grand Chamber cases to *Demir and Baykara*, we note that the referencing practice regularly occurs in order to clarify the meaning of terms and notions, not only in respect of terms and notions of the Convention (§ 4.1.), but also in respect of concepts not enshrined in the Convention (§ 4.2.).

§ 4.1. Give substance to notions of the Convention

300. In our pool of cases, we find examples of the use of external instruments to give more substance to terms and concepts of the Convention, such as ‘jurisdiction’ (§ 4.1.1.), ‘torture’ (§ 4.1.2.), ‘(racial) discrimination’ (§ 4.1.3.), ‘*non bis in idem*’ (§ 4.1.4.), ‘forced labor’ (§ 4.1.5.), and ‘miscarriage of justice’ (§ 4.1.6.).

§ 4.1.1. Jurisdiction

301. There are several cases in which the Court, addressing the issue of State ‘jurisdiction’, gave substance to this notion by referring to public international law.⁵³³ The ‘jurisdiction’ of a State is a notion under Article 1 of the Convention and is closely linked to the engagement of a State’s responsibility under the Convention. In some of the cases of our pool, when the issue of ‘jurisdiction’ was at stake, the Court acknowledged the use of public international law to clarify the concept, thereby citing the precedent Chamber-case of *Ilasçu and Others v. Moldova and Russia* of 8 July 2004, in which the Court observed that “...the concept of ‘jurisdiction’ for the purposes of Article 1 of the Convention must be considered to reflect the term’s meaning in public international law” and that “[F]rom the standpoint of public international law, the words ‘within their jurisdiction’ in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial”, although “[T]his presumption may be limited in exceptional circumstances”.⁵³⁴

302. The Court, when clarifying the term of ‘jurisdiction’ of Article 1 of the Convention, most often referred to the relevance of ‘public international law’ in general terms, without referring to a specific external instrument. In the case of *Sargsyan v. Azerbaijan*, however, the Court was specifically inspired by external instruments, namely by the ILC Draft Articles on the responsibility of States for internationally wrongful acts and the *Cairo* case heard by the

⁵³³ ECtHR (GC), *Andrejeva v. Latvia*, op. cit., para. 56; ECtHR (GC), decision of *Chiragov and Others v. Armenia*, op. cit., para. 82; ECtHR (GC) decision of *Sargsyan v. Azerbaijan*, op. cit., para. 73; ECtHR (GC), *Nada v. Switzerland*, op. cit., para. 119; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 128.

⁵³⁴ ECtHR (GC), *Ilasçu and Others v. Moldova and Russia*, 8 July 2004, Appl. No. 48787/99, para. 312. The Court mentioned or cited this case in ECtHR (GC), *Andrejeva v. Latvia*, op. cit., para. 56; ECtHR (GC), decision of *Chiragov and Others v. Armenia*, op. cit., para. 82; ECtHR (GC) decision of *Sargsyan v. Azerbaijan*, op. cit., para. 73; ECtHR (GC), *Nada v. Switzerland*, op. cit., para. 119; ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, op. cit., para. 128.

General Claims Commission (1929)⁵³⁵, to stress that “[a] State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions” and that “[u]nder the Convention a State’s authorities are strictly liable for the conduct of their subordinates”.⁵³⁶ Also in the case of *Jaloud v. the Netherlands*, the Court made use of the above mentioned ILC Draft Articles and of case law of the ICJ to clarify that whether a State has ‘jurisdiction’ equally depends on which State had at its disposal or under its direction or control the actors who executed the contested acts.⁵³⁷

§ 4.1.2. Torture

303. To give more specific meaning to the notion of ‘torture’ and to the criteria that should be fulfilled in this respect, the Court was guided by external human rights instruments, particularly by instruments of the CAT, specialized in the domain of the prohibition of torture.⁵³⁸ Under influence of these instruments, the Court came to two specific observations.
304. *Firstly*, the Court – after acknowledging that the severity of treatment is a relevant criteria to distinguish torture from inhuman and degrading treatment – stressed that there is also a purposive element to torture, namely an intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating. In including the latter elements into the definition, the Court not only referred to earlier case law, but also to the definition of torture under Article 1 of the CAT.⁵³⁹
305. *Secondly*, the Court said that also a threat to torture could amount to torture “...as the nature of torture covers both physical pain and mental suffering”.⁵⁴⁰ The Court acknowledged that latter statement was in accordance with its own previous case-law which “...refers to the definition of torture in Article 1 of the United Nations Convention against

⁵³⁵ Reports of International Arbitral Awards 5 (RIAA), p. 516.

⁵³⁶ ECtHR (GC), decision of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 73.

⁵³⁷ ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 151. Article 6 of the ILC Articles indeed stresses that “[T]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed”. See also the reasoning of the ICJ in its case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43. This case had been cited in ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 97.

⁵³⁸ In our pool of examined cases, this happened twice: in the case of ECtHR (GC), *Gäfgen v. Germany* (*op. cit.*) and in the case of ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”* (*op. cit.*).

⁵³⁹ ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 90; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 197. See also: ECtHR (GC), *Selmouni v. France*, 28 July 1999, Appl. No. 25803/94, para. 97. The Court concluded in *Gäfgen* that the respondent State had acted in violation of Article 3 ECHR because of threats of physical harm issued by the police in order to establish the whereabouts of a missing child. The case of *El Masri* is about torture and inhuman and degrading treatment during and following the applicant’s extraordinary rendition to the CIA.

⁵⁴⁰ ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 108.

Torture” as well as with the “...views taken by other international human rights monitoring bodies”.⁵⁴¹

§ 4.1.3. (Racial) discrimination

306. The term of ‘discrimination’ is particularly relevant in the light of Article 14 of the ECHR (prohibition of discrimination) and Article 1 of Protocol 12 to the ECHR (a general prohibition of discrimination). When clarifying the more specific notion of ‘racial discrimination’, which was a relevant term in light of considering the (general) prohibition of discrimination in a case of inability of Jew and Roma to stand for election, the Court concluded that “[D]iscrimination on account of a person’s ethnic origin is a form of racial discrimination”.⁵⁴² To arrive at this conclusion, the Court was guided by definitions adopted in two specific external instruments (one ‘hard’ and one ‘soft’): the ICERD⁵⁴³ and a policy recommendation of the ECRI.⁵⁴⁴

§ 4.1.4. *Non bis in idem*

307. Although the Convention does not contain the concept of ‘*non bis in idem*’ literally, the idea is covered by Article 4 of Protocol 7 to the Convention on the right not to be punished twice for the same offence.⁵⁴⁵ In explaining the notion of ‘same offence’ in the case of *Sergey Zolotukhin v. Russia*, the Court was inspired by an analysis of various external instruments (including the ICCPR, the EU Charter, the ACHR, the Convention implementing the Schengen Agreement and the Statute of the ICC).⁵⁴⁶ In that respect, the Court explicitly stressed that it was its aim to harmonize the variety of approaches in favor of legal certainty

⁵⁴¹ *Ibidem*. The Court cited in this respect (through a reference to some paragraphs in the ‘facts’ of the case): case law of the ACtHR of 2003, a report of a UN Special Rapporteur of 2001, and views of the HRC in the case *Estrella v. Uruguay* of 29 March 1983. See *ibidem*, paras. 66-68.

⁵⁴² ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.*, para. 43. This case law was not new. The Court made a similar statement in the previous case of *Timishev v. Russia*. Also here, the Court referred to the ECRI and the ICERD. ECtHR, *Timishev v. Russia*, 13 December 2005, Appl. Nos. 5576200 and 55974/00, para. 56.

⁵⁴³ This instrument was adopted under the auspices of the United Nations on 21 December 1965 and entered into force in respect of Bosnia and Herzegovina on 16 July 1993.

⁵⁴⁴ General Policy Recommendation No. 7, adopted on 13 December 2002, in which ECRI defines racism as “...the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons”.

⁵⁴⁵ Paragraph 1 of Article 4 of Protocol 7 provides: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.

⁵⁴⁶ Some of these instruments use the notion ‘same cause’ or ‘same acts’ while other – like Protocol 7 itself – refer to the term ‘same offence’. Regarding the impact of the difference of these terms, the Court drew inspiration from case law of the ECJ and the ACtHR. The latter courts considered “...the difference between the terms “same acts” or “same cause” (“*mêmes faits*”) on the one hand and the term “[same] offence” (“*[même] infraction*”) on the other” as “...an important element in favor of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant”. ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 79. The EU Charter, ECJ case law, the Convention Implementing the Schengen Agreement, and the European Convention on the International Validity of Criminal Judgments, are not binding upon the respondent State.

and in light of ‘evolutive’ and ‘effective’ reasoning.⁵⁴⁷ The Court, supported by external instruments, came to the conclusion “...that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same”.⁵⁴⁸ The Court also addressed the notion of a ‘final’ decision, which is an important notion to answer the question as to whether there was a duplication of the proceedings (the *bis*-element). When doing so the Court imported the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, to stress that “...a decision is final ‘if, according to the traditional expression, it has acquired the force of *res judicata*’”.⁵⁴⁹

§ 4.1.5. Forced labor

308. The case of *Stummer v. Austria* concerns the prohibition of discrimination and a refusal to take work performed in prison into account in the calculation of pension rights. When assessing whether there was a violation of Article 4 of the ECHR on the prohibition of slavery and forced labor, the Court relied explicitly on ILO-instruments to establish the definition of ‘forced or compulsory labor’ (a term that also appears in Article 4 ECHR).⁵⁵⁰ The Court took account, as a starting point of its own interpretation, of the ILO-definition that says that ‘forced or compulsory labor’ means “...all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁵⁵¹ At the same time, the Court also pointed out that “... sight should not be lost of the Convention’s special features or of the fact that it was a living instrument to be read ‘in the light of the notions currently prevailing in democratic States’ ...”.⁵⁵² How the Court precisely gave effect to the ‘special features’ of the ECHR – and thus what the relevance of the latter statement was – is not very clear. Probably, the Court here aimed to stress that it is not supposed to blindly and statically follow ILO instruments, which do not always share a human rights approach.

⁵⁴⁷ *Ibidem*, para. 78. Although stressing the issue of ‘legal certainty’, the Court, however, in this same case did not shy away from dynamically approaching the notions in question (in the light of external instruments together with principles as an ‘effective’ and ‘evolutive’ reading of the Convention), see *ibidem*, paras. 78-80.

⁵⁴⁸ *Ibidem*, paras. 81-82. According to the Court, the approach that emphasizes the legal characterisation of both offences is thus too restrictive on the rights of the individual.

⁵⁴⁹ *Ibidem*, para. 107. The Court added that “[T]his is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”. The latter was not a new approach of the Court; it was already well entrenched in its previous case law.

⁵⁵⁰ ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 117: “Article 4 § 2 of the Convention prohibits “forced or compulsory labour”. In interpreting Article 4, the Court has in previous cases taken into account the relevant ILO Conventions, which are binding on almost all of the Council of Europe member States, including Austria, and especially the 1930 Forced Labour Convention (No. 29) (see *Van der Mussele v. Belgium*, 23 November 1983, § 32, Series A no. 70, and *Siliadin*, cited above, § 115)”. From its reference to earlier case law, it appears that it was not the first time that the Court took inspiration from ILO instruments on this issue.

⁵⁵¹ See paragraph 2 of Article 2 of ILO Convention No. 29. ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 118.

⁵⁵² *Ibidem*.

§ 4.1.6. Miscarriage of justice

309. Article 3 of Protocol 7 to the Convention touches on ‘compensation for wrongful conviction’ and says that there should be compensation for a ‘miscarriage of justice’.⁵⁵³ The Court observed that the latter principle is expressed in almost identical words in Article 14 (6) of the ICCPR.⁵⁵⁴ Accordingly, the Court suggested that national judges should construct the meaning of an ‘ambiguous legislative notion’ such as ‘miscarriage of justice’ by looking at international case law and the drafting history of those provisions.⁵⁵⁵ Because the Court talked about ‘provisions’ (and not about ‘a provision’) it thus seemed to suggest to the national judges that they, to understand the notion of ‘miscarriage of justice’, should look at case law and drafting history of both Protocol 7 of the ECHR and the ICCPR. Also here, external instruments thus served to give meaning to a Convention notion.

§ 4.2. Importation of notions not enshrined in the Convention

310. When examining the Grand Chamber-cases of our pool, we notice that the Court also relies on notions that do not literally appear in the Convention but that are imported with the help of external instruments. These external notions (and their explanation) often connect to public international law and to international humanitarian law. In our pool of cases, it more particularly concerns the following terms: ‘war crimes, combatants and war treason’ (§ 4.2.1.), ‘genocide’ (§ 4.2.2.), ‘occupied territory’ (§ 4.2.3.), ‘diplomatic protection’ (§ 4.2.4.), ‘child best interest’ (§ 4.2.5.), medical ‘treatment’ in end-of-life situations (§ 4.2.6.), ‘dignity’ (§ 4.2.7.), the ‘Namibia-principle’ (§ 4.2.8.), ‘enforced disappearance’ (§ 4.2.9.), ‘reasonable bond’ (§ 4.2.10), ‘*restitutio in integrum*’ (§ 4.2.11.), ‘*non refoulement*’ (§ 4.2.12.), and ‘employment relationship’ (§ 4.2.13.)

§ 4.2.1. War crimes, combatants and war treason

311. The case of *Kononov v. Latvia* concerned a conviction under legislation introduced in 1993 for war crimes committed during the Second World War. In this judgment, the Court stressed that Article 7 ECHR (on the prohibition of retroactive criminal laws) does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes. The second paragraph of Article 7 of

⁵⁵³ Article 3 of Protocol 7 of the ECHR provides: “When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him”.

⁵⁵⁴ ECtHR (GC), *Allen v. the United Kingdom*, *op. cit.*, para. 105.

⁵⁵⁵ *Ibidem*, para. 133.

the Convention indeed provides that it "...shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations". The Court thus had to dig into the definition of 'war crimes' and it relied for that purpose on the Charter of the IMT Nuremberg.⁵⁵⁶ In light of that definition, the Court also examined the legal status of the affected villagers. It made a distinction between 'combatants' and 'civilians', inspired by several external instruments such as the Lieber Code of 1863 and the Oxford Manual of 1880.⁵⁵⁷ Since the factual evidence was disputed, the Court endorsed the hypothesis that was most favorable to the applicant, namely that the villagers were not ordinary civilians, but 'combatants' who exercised acts of 'war treason'. Also in filling in the latter notion, the Court was guided by external instruments and by legal doctrine in particular, which it cited in a footnote to its judgment.⁵⁵⁸

§ 4.2.2. Genocide

312. The Court sometimes made use of external instruments to clarify the notion of 'genocide', now or historically. Two of the examined cases are relevant in this respect: one on a criminalization of rejecting the classification of the atrocities in Armenia in 1915 as being a 'genocide' (in the light of Article 10 ECHR on the freedom of expression), and one about an applicant's conviction in 2004 for alleged genocide of Lithuanian partisans in 1953 (in the light of Article 7 of the Convention and the adagio of *nullum crimen sine lege*).

313. The first case is the case of *Perinçek v. Switzerland*, the Court examined the definition of genocide in international law and found support thereto in the Convention on the

⁵⁵⁶ ECtHR (GC), *Kononov v. Latvia*, *op. cit.*, para. 186. The definition was found to be "...declaratory of international laws and customs of war as understood in 1939" as acknowledged by a Judgment of the IMT Nuremberg (*ibidem*, para. 186). The definition goes as follows: "(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

⁵⁵⁷ The Court considers the Lieber Code of 1863 (which are instructions for the Government of Armies of the United States in the Field) as part of "the laws and customs of war prior to the Second World War" (*ibidem*, para. 64). Article 22 of the Lieber Code contains a principle of distinction between "combatants" and "civilians".

⁵⁵⁸ *Ibidem*, para. 194. Note that in the case of *Janowiec and Others v. Russia and Others* (another case of our pool) the Court addressed the character and the seriousness of certain crimes while mentioning the relevance of international instruments in general terms (and thus without mentioning a specific external instrument). More precisely, in light of an alleged violation of Article 2 of the Convention, the Court in this case considered it relevant whether the alleged crime was an ordinary criminal offence or a serious crime under international law, such as war crimes, genocide or crimes against humanity. The Court explicitly said (but without mentioning precise instruments) that to fill in these notions, it used the definitions given to them in the relevant international instruments. (ECtHR (GC), *Janowiec and Others v. Russia*, *op. cit.*, para. 150).

Prevention and Punishment of the Crime of Genocide⁵⁵⁹ and the Rome Statute of the International Criminal Court^{560, 561}. While the Court took account of the definition of 'genocide' in international law, it also touched on the limits of its mandate by saying that the Court is "...not required to determine whether the massacres and mass deportations suffered by the Armenian people at the hands of the Ottoman Empire from 1915 onwards can be characterised as genocide within the meaning of that term under international law" and that it "...has no authority to make legally binding pronouncements, one way or the other, on this point".⁵⁶²

314. In the second case, the case of *Vasiliauskas v. Lithuania*, the ECtHR considered it clear "...that the applicant's conviction was based upon legal provisions that were not in force in 1953 and that such provisions were therefore applied retroactively" which amounted to a violation of Article 7 of the Convention "...unless it can be established that this conviction was based upon international law as it stood at the relevant time".⁵⁶³ According to the Court, the applicant's conviction must thus be examined from an international perspective.⁵⁶⁴ Thereto, the Court verified, historically, whether in 1953 the crime of genocide was clearly recognized as a crime under international law and thus whether it was foreseeable that the act could have been qualified as genocide.

In this case, the Court equally elaborated on the scope of the notion 'genocide', *inter alia* by verifying whether 'political groups' were included into its definition, and by reflecting on the notions 'national', 'ethnic' and 'in part' that appears in Article II of the Genocide Convention, which provides that "...genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". When reflecting on the latter issues, several external instruments supported the Court's legal reasoning, including international (case) law, customary law, and legal doctrine.⁵⁶⁵ The ECtHR subsequently verified whether the interpretation in domestic courts

⁵⁵⁹ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 52: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

⁵⁶⁰ *Ibidem*, para. 54: "For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

⁵⁶¹ *Ibidem*, para. 238.

⁵⁶² *Ibidem*, para. 102. The Court concluded this case by finding a violation of Article 10 of the Convention on freedom of expression.

⁵⁶³ ECtHR (GC), *Vasiliauskas v. Lithuania v. Lithuania*, *op. cit.*, para. 166.

⁵⁶⁴ *Ibidem*.

⁵⁶⁵ For the examination of the definition of the crime of genocide, the Court referred to the Charter of the International Military Tribunal, UN Resolution No. 96 (I) of 11 December 1946 of the GA, the Genocide Convention of 1948 (signed by the Soviet Union in 1949 and it came into force after the required ratifications in 1951), and the Advisory Opinion of the ICJ (*ibidem*, para. 167). To address the question of

(that led to the conviction of the applicant) was in accordance with this (historical) understanding of the concept of 'genocide'.⁵⁶⁶ In addition, the Court, with reference to a case of the ICJ, highlighted that the crime of genocide is of such gravity that it requires the satisfaction of stringent criteria before such conviction can be imposed.⁵⁶⁷ The Court concluded the case with a violation of the principle of *nullum crimen sine lege*.⁵⁶⁸

'foreseeability' '(by verifying whether it was foreseeable under international law as it stood in 1953 that the act for which the applicant was convicted, could be qualified as 'genocide'), the Court imported: Article II of the Genocide Convention of 1948, its *travaux préparatoires*, and its interpretation by the ICJ. It also mentioned subsequent international law instruments such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, the ICTY Statute of 1993, the ICTR Statute of 1994 and the ICC Statute of 1998. See *ibidem*, para. 170. The Court equally verified whether, next to the 1948 Convention, there existed broader customary norms of international law concerning 'genocide', potentially relevant to provide a valid basis for the applicant's conviction for genocide. To verify this, the Court had regard to several external instruments (namely, the indictment of October 1945 before the Nuremberg IMT and the submissions done in this context, the UN General Assembly Resolution 96(1) of December 1946, several post-Nuremberg national trials, and case law of the ICJ). See *ibidem*, paras. 171-172. Regarding the inclusion of 'political groups' in the definition of 'genocide', the Court observed that there are views pro and contra such inclusion. The Court favored the views that prevailed in 1953, which did not include political groups. The 1948 Convention contained a narrow definition of genocide which was "...retained in all subsequent international law instruments...". According to the Court there was "... no sufficiently strong basis for finding that customary international law as it stood in 1953 included 'political groups' among those falling within the definition of genocide". See *ibidem*, para. 175. To answer the question of what the notion 'in part' means, the Court observed firstly the absence of any international case law on this issue in 1953 and the little guidance that is offered by the *travaux préparatoires* to the Genocide Convention. It then referred to the opinions of commentators of the Genocide Convention and UN General Assembly Resolution 96(1) of December 1946 according to which "...genocide is the denial of the right of existence of entire human groups". It further referred to the ICTY saying that this body "...noted the wide acknowledgment that the intention to destroy must target at least a substantial part of the group". Therefore, the Court considered it "...reasonable to find that in 1953 it was foreseeable that the term 'in part' contained a requirement as to substantiality" (*ibidem*, para. 176). It however immediately added that "...the Court is mindful of the subsequent development in the international case-law on the crime of genocide. Half a century after the events for which the applicant was convicted, judicial guidance as to the interpretation of the phrase "in part" emerged when cases concerning genocide were brought before the ICTY, ICTR and the ICJ. In particular, as transpires from the case-law referred to in paragraphs 97-108 above, the intentional destruction of a "distinct" part of the protected group could be considered as genocide of the entire protected group, provided that the "distinct" part was substantial because of the very large number of its members. Furthermore, in addition to the numerical size of the targeted part, judicial interpretation confirmed that its "prominence" within the protected group could also be a useful consideration. Be that as it may, this interpretation of the phrase "in part" could not have been foreseen by the applicant at the relevant time" (*ibidem*, para. 177). The Court summed up by saying that "...in 1953 international treaty law did not include a "political group" in the definition of genocide, nor can it be established with sufficient clarity that customary international law provided for a broader definition of genocide than that set out in Article II of the 1948 Genocide Convention" (*ibidem*, para. 178). Regarding the notions of 'national' and 'ethnic' in the definition of the Genocide Convention, the Court said that "...in accordance with Article 31 § 1 of the Vienna Convention on the Law of Treaties, the ordinary meaning is to be given to the terms of the treaty. In this regard, it is not immediately obvious that the ordinary meaning of the terms "national" or "ethnic" in the Genocide Convention can be extended to cover partisans. Thus, the Court considers that the domestic courts' conclusion that victims came within the definition of genocide as part of a protected group was an interpretation by analogy, to the applicant's detriment, which rendered his conviction unforeseeable" (*ibidem*, para. 183). With respect to its references to legal doctrine, the Court *inter alia* referred to: R. Lemkin, *Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress*, Washington, 1944, p. 91; W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, Cambridge University Press 2000, p. 134; B. Van Schaack, "The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot", 106 Yale Law Journal, 1997, p. 2262; G. A. Finch, "Editorial Comment: The Genocide Convention", 43 American Journal of International Law, 1949, p. 734; J. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Houndmills, Basingstoke, Palgrave MacMillan, 2008, p. 154. The Court cited these books and articles in footnotes attached to its legal reasoning, see *ibidem*, para. 174. Lemkin for instance, as the Courts says, "proposed a broad definition of the offence [of genocide]" and "...addressed crimes against national groups but accepted that genocide could comprise acts aimed at destroying the national group by destroying its political institutions, culture and livelihood". The Court also cited the views of other authors on the issue. See *ibidem*, para. 174.

⁵⁶⁶ *Ibidem*, para. 184. The Court said in this respect that it "...accepts that the domestic authorities have discretion to interpret the definition of genocide more broadly than that contained in 1948 Genocide Convention. However, such discretion does not permit domestic tribunals to convict persons accused under that broader definition retrospectively".

⁵⁶⁷ *Ibidem*, para. 185.

⁵⁶⁸ *Ibidem*, para. 186.

§ 4.2.3. Occupied territory

315. In one of the examined cases the Court took external international law into account when considering the notion of ‘occupied territory’; the case of *Sargsyan v. Azerbaijan* observed that

“...under international law (in particular Article 42 of the 1907 Hague Regulations) a territory is considered occupied when it is actually placed under the authority of a hostile army, “actual authority” being widely considered as translating to effective control and requiring such elements as presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign”.⁵⁶⁹

The Court used this definition to verify whether the territory in question could be considered as occupied territory, which was a relevant question for the State’s (territorial) jurisdiction and, in that connection, for the State’s responsibility under Article 1 of the Convention.⁵⁷⁰ To build (and apply) this definition, the Court also included several references to doctrine and to ‘widespread expert opinion’.⁵⁷¹

§ 4.2.4. Diplomatic protection

316. The reference to ‘diplomatic protection’ is another example of the Court importing a notion (and its definition). The Court considered this term in a follow-up case against Turkey concerning the question of ‘just satisfaction’ under article 41 of the ECHR on behalf of the Republic of Cyprus.⁵⁷² In this case, the Court compared a situation whereby a State denounces a violation by another Contracting State of human rights of its nationals to a situation of ‘diplomatic protection’.⁵⁷³ The Court defined the latter notion with the help of

⁵⁶⁹ ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 144.

⁵⁷⁰ *Ibidem*.

⁵⁷¹ Paragraph 144 of the judgment refers to paragraph 94 of the ‘facts’-section of the case which explicitly mentions the importance of doctrine and widespread expert opinion and which contains *inter alia* the following references in a footnote: E. Benvenisti, *The International Law of Occupation*, Oxford, Oxford University Press, 2012; Y. Arai-Takahashi, *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law*, Leiden, Martinus Nijhoff Publishers, 2009; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, Cambridge University Press, 2009; A. Roberts, ‘Transformative Military Occupation; Applying the Laws of War and Human Rights’, *American Journal of International Law* 2006, vol. 100; T. Ferraro, ‘Occupation and other Forms of Administration of Foreign Territory’ Geneva, ICRC, 2012; V. Koutroulis, *Le debut et la fin de l’application du droit de l’occupation*, Paris, Editions Pedone, 2010. See *ibidem*, paras. 94 and 144.

⁵⁷² In 2001, the Court found numerous violations of the ECHR by Turkey arising out of activities, military operations, and the continuing division of the territory in the context of the ‘Turkish Republic of Northern Cyprus (the ‘TRNC’). The Court, in this follow-up case pronounced itself on the award to the applicant State (Cyprus) in respect of its missing and enclaved citizens in northern Cyprus.

⁵⁷³ ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), *op. cit.*, para. 45. The Court defined this notion as being an “...invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility”.

public international law, and more particularly of Article 1 of the ILC Draft Articles on Diplomatic Protection of 2006⁵⁷⁴ and of the ICJ *Diallo*-case⁵⁷⁵.

§ 4.2.5. A child's best interest

317. In the pool of cases, we notice that the Court imports – relying on external instruments – the notion of ‘child best interests’ and stresses the relevance of considering these interests when interpreting and applying Article 8 of the Convention on respect for family life. The Court equally relies on external instruments to establish some of the factors that should be taken into account when assessing whether national authorities took a child’s best interests into account.

318. The first case of this kind is *Neulinger v. Switzerland* which is a case about a Swiss order to return a child (with the mother) to the father’s country of residence (Israel) from which the child had been removed. The Court examined in this case whether the interference with Article 8 of the Convention was justified and thus, whether the State – within its margin of appreciation – observed a fair balance between the competing interests at stake.⁵⁷⁶ In this examination, the Court *inter alia* took account of a current “...broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount”.⁵⁷⁷ Besides this ‘broad consensus’, the Court found additional support in the ‘Hague Convention’⁵⁷⁸ (and its interpretation by external actors)⁵⁷⁹ which is built on the underlying principle of the ‘child’s best interests’.⁵⁸⁰ To establish the relevant factors in considering the child’s best interest (like age, the presence of the child’s parents, the child’s environment and experiences, *etc.*), the Court also relied on UNHCR Guidelines.⁵⁸¹

319. The second case is *X v. Latvia*, about a State’s failure to conduct a detailed examination of all relevant points when returning a child pursuant to the ‘Hague Convention’. Here again, in the light of Article 8 of the Convention (right to family life) and

⁵⁷⁴ See *Official Records of the General Assembly*, Sixty-first Session, Supplement No. 10 (A/61/10).

⁵⁷⁵ ICJ, case of 30 November 2010, Case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), ICJ Rep. 2007, p. 599, § 39.

⁵⁷⁶ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 134.

⁵⁷⁷ *Ibidem*, para. 135. The Court, to support the existence of this ‘broad consensus’ referred to the UN Declaration on Rights of the Child, the CRC, the Working group drafting the CRC, the Committee on the Rights of the Child, doctrine, the UNCHR Guidelines on Determining the Best Interest of the Child, the CEDAW, the ICCPR, a HRC’s General Comments, and in particular, the EU Charter.

⁵⁷⁸ The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

⁵⁷⁹ The Court also took account of the incorporation and interpretation of the Hague Convention, *inter alia* by the Explanatory Report of Ms Elisa Perez-Vera on the drafting of the Hague Convention, a case of the French Court of Cassation, of the Aix-en Provence Court of Appeal, of the Finnish Supreme Court, and of the House of Lords of the United Kingdom.

⁵⁸⁰ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, paras. 58-64.

⁵⁸¹ *Ibidem*, para. 138. It more particularly concerns the ‘Guidelines on Determining the Best Interests of the Child’ issued by the United Nations High Commissioner for Refugees (UNHCR) in May 2008.

in the light of balancing the competing interests at stake, the ECtHR took account of ‘a broad consensus, including in international law’ and of other external instruments having ‘the same philosophy’ to support the idea that in all decisions concerning children, their best interests must be paramount.⁵⁸²

§ 4.2.6. Medical ‘treatment’ in end-of-life situations

320. One of the examined cases, namely *Lambert and Others v. France*, touches upon the complex and ethical issue of a State’s positive obligations under Article 2 of the Convention (the right to life) in the context of medical treatment and end-of-life situations. The national authorities interpreted the concept of ‘treatment’ (that could be withdrawn or limited in respect of a patient) as including all acts aimed at maintaining the patient’s vital functions artificially. Also artificial nutrition and hydration fell into that category of acts.⁵⁸³ The Court, clarify this concept of ‘treatment’ in end-of-life situations, invoked the help of external instruments (such as the CoE ‘Guide on the decision-making process regarding medical treatment in end-of-life situations’⁵⁸⁴).⁵⁸⁵

§ 4.2.7. Dignity

321. In the case of *Bouyid v. Belgium*, which examined police treatment in the light of Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment), the Court did not define a notion with the help of external instruments but it, through the help of various external instruments, stressed the importance of a certain notion and imported it into its reasoning. It more particularly concerned the notion of ‘dignity’ that, as stressed by the Court, is often enshrined in external instruments. The Court more particularly stated that “[T]he word “dignity” appears in many international and regional texts and instruments”⁵⁸⁶

⁵⁸² This consensus was built on: the CRC, the Declaration on the Rights of the Child of 20 November 1959, and HRC General Comment No.7 of 2005 on Implementing Child rights in early childhood. The same philosophy was moreover present in the Hague Convention, the Council Regulation No. 2201/2003 of 27 November 2003 (Brussels bis II), and the EU Charter on Fundamental Rights. See ECtHR (GC), *X. v. Latvia*, *op. cit.*, paras. 96-97.

⁵⁸³ ECtHR (GC), *Lambert and Others v. France*, *op. cit.*, para. 154.

⁵⁸⁴ According to this Guide, ‘treatment’ covers not only interventions whose aim is to improve a patient’s state of health by acting on the causes of the illness, but also interventions which have a bearing only on the symptoms and not on the aetiology of the illness, or which are responses to an organ dysfunction. As to artificial nutrition and hydration, the Guide observes that differences in approach exist between countries: some States regard artificial nutrition and hydration as a form of treatment that may be limited or withdrawn, but in other countries this is a form of care meeting the individual’s basic needs which cannot be withdrawn unless the patient, in the terminal phase of an end-of-life situation, has expressed a wish to that effect. *Ibidem*, para. 155.

⁵⁸⁵ The Court concluded that the national legal framework “...is sufficiently clear and that it, for the purposes of Article 2 of the Convention, is apt to ensure the protection of patients’ lives. *Ibidem*, para. 160.

⁵⁸⁶ ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89. The Court referred in this respect to: Universal Declaration of Human Rights of 10 December 1948, the Charter of the United Nations of 6 June 1946, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963, the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

and that therefore, although the word is not mentioned in the Convention (but only in the Preamble of Protocol No. 13), “...respect for human dignity forms part of the very essence of the Convention”.⁵⁸⁷

§ 4.2.8. Namibia-principle

322. In respect of Article 35 of the Convention on exhaustion of domestic remedies, the Court, in the decision of *Demopoulos and Others v. Turkey*, took account of the ‘Namibia-principle’ of international law, expressed by the advisory opinion of the ICJ in the *Namibia-case*,⁵⁸⁸ which encompasses that

“...even if the legitimacy of the administration of a territory is not recognised by the international community, ‘international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ...the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory’”.⁵⁸⁹

Although the Court agreed that the issue of the *Demopoulos*-case is different than the issue before the ICJ, it “...nonetheless derives support from this source” in respect of the “...view that the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention”.⁵⁹⁰

§ 4.2.9. Enforced disappearance

323. In the case of *El Masri v. “the former Yugoslav Republic of Macedonia”* the Court, considering Article 3 ECHR (on the prohibition of torture and of inhuman and degrading treatment), was of the opinion that the applicant’s abduction and detention “...amounted to ‘enforced disappearance’ as defined in international law”.⁵⁹¹ More particularly, the Court

Punishment of 10 December 1984, the Convention on the Rights of the Child of 20 November 1989, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Rights of Persons with Disabilities, the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty, of 15 December 1989, the Optional Protocol of 19 December 2011 to the Convention on the Rights of the Child on a communications procedure, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 10 December 2008, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of 6 October 1999, the American Convention on Human Rights of 22 November 1969, the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1 August 1975, the African Charter on Human and Peoples’ Rights of 28 June 1981, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of 4 April 1997, the Charter of Fundamental Rights of the European Union of 7 December 2000, and the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005.

⁵⁸⁷ *Ibidem*, para. 89.

⁵⁸⁸ ICJ case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, vol. 16, p. 56, para. 125.

⁵⁸⁹ ECtHR (GC), *Demopoulos and Others v. Turkey*, *op. cit.*, para. 93.

⁵⁹⁰ *Ibidem*, para. 94.

⁵⁹¹ ECtHR (GC), *El Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 240.

imported the definition of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED)⁵⁹² and of the CoE PACE Resolution of 2005 on Enforced Disappearances.⁵⁹³

§ 4.2.10. Reasonable bond

324. The case of *Mangouras v. Spain* assessed Article 5 of the ECHR (on the right to liberty and security of person) in the context of a maritime pollution case and the required level of recognizance to secure a release on bail of a ship's master. The Court, when applying the provision, introduced the notion of a 'reasonable bond' (which is a financial security to allow for release) and found support in external instruments to establish the relevant criteria to be able to speak of such a 'reasonable bond'. It took in particular account of case law of International Tribunal for the Law of the Sea⁵⁹⁴. Despite the Court being "...conscious of the fact that the Tribunal's jurisdiction differs from its own", it "...nevertheless observes that the Tribunal applies similar criteria in assessing the amount of security ...".⁵⁹⁵

§ 4.2.11. 'Restitutio in integrum'

325. In the case of *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, the Court affirmed under Article 46 of the Convention (on the binding force and execution of judgments) that a State Party is under an obligation of 'restitutio in integrum', which means that a State has to

"...pay those concerned the sums awarded by way of just satisfaction, but also take individual and/or appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded".⁵⁹⁶

To support the latter statement, the ECtHR held that these obligations "...reflect the principles of international law" requiring restitution in the form of "...restoring the situation which existed before the wrongful act was committed" under the condition "...that restitution is not 'materially impossible'" and "...does not involve a burden out of all

⁵⁹² Article 2 of this instruments (which was not ratified by the respondent State) provides that "[F]or the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law". *Ibidem*, para. 95.

⁵⁹³ This resolution (CoE PACE res. 1463) provides that "'Enforced disappearances' entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law". *Ibidem*, para. 100.

⁵⁹⁴ Tribunal's judgment of 6 August 2007 in the case of *Hoshinmaru (Japan v. the Russian Federation)*.

⁵⁹⁵ ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 89.

⁵⁹⁶ ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, *op. cit.*, para. 85.

proportion to the benefit deriving from restitution instead of compensation”.⁵⁹⁷ To demonstrate these international obligations, the Court referred to the Draft articles of the ILC on Responsibility of States for Internationally Wrongful Acts of 2001.⁵⁹⁸ The Court also found support in a COM Recommendation⁵⁹⁹ to stress – in the light of achieving *restitutio in integrum* after a violation of Article 6 ECHR on the right to a fair trial – the importance of offering national adequate possibilities of reopening proceedings.⁶⁰⁰

§ 4.2.12. ‘Non refoulement’

326. In the case of *Hirsi Jamaa and Others v. Italy*, the Court assessed Article 3 of the Convention (prohibition of torture and inhuman and degrading treatment) with regard to the return of migrants intercepted on the high seas to their country of departure. The Court, in that context, made use of the notion of ‘*non refoulement*’.⁶⁰¹ To describe what this principle means, the Court referred to the UNHCR Note on International Protection of 13 September 2001⁶⁰² (and indirectly to the UDHR that is mentioned in it), pointing out that *non refoulement* is:

“...a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx.”⁶⁰³

327. The Court, in addition, found support in external instruments to highlight the importance of the *non-refoulement* principle, more particularly by noting that it is also enshrined in the EU Charter (in Article 19) and by mentioning a letter written by Mr Jacques Barrot, Vice-President of the European Commission, which stressed the importance of

⁵⁹⁷ *Ibidem*, para. 86.

⁵⁹⁸ *Ibidem*.

⁵⁹⁹ COM Recommendation No. R (2000) 2 on the Re-examination or Reopening of certain Cases at Domestic Level following Judgments of the European Court of Human Rights.

⁶⁰⁰ *Ibidem*, para. 89 and see also: ECtHR (GC), *Bochan v. Ukraine* (No.2), *op. cit.*, para. 58.

⁶⁰¹ ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, *op. cit.*, paras. 134-135.

⁶⁰² UNHCR Note on International Protection, 13 September 2001, A/AC.96/951, para 16.

⁶⁰³ ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, paras. 23 and 134.

compliance with the principle of *non-refoulement* in the context of operations carried out on the high seas by Member States of the EU.⁶⁰⁴

§ 4.2.13. ‘Employment relationship’

328. In the case of *Sindicatul “Păstorul cel Bun” v. Romania*, the ECtHR, to address the question whether there was an ‘employment relationship’ between members of the clergy and the Church – which would render the right to form a trade union applicable under Article 11 of the Convention – said, with reference to *Demir and Baykara*, that it “...will apply the criteria laid down in the relevant international instruments”.⁶⁰⁵ The Court subsequently referred to ILO Recommendation No. 198 (for instance, to stress that determining whether there is such an ‘employment relationship’ should be guided by the facts relating to the performance of work and the remuneration of the worker), to ILO Convention No. 87 (which holds that workers and employers, without distinction whatsoever have the right to establish organisations of their own choosing), and to EU Council Directive 78/2000/EC (which provides that a heightened duty of loyalty, like that exists between the clergy and the Church, cannot prejudice the right to establish unions).⁶⁰⁶ With support of these ILO and EU instruments, the Court interpreted the field of application of Article 11 and the right to form a trade union that it covers: also members of the clergy who fulfill their mission in the context of an employment relationship fall within the scope of that provision.

§ 4.3. Concluding observations

329. The Grand Chamber refers to instruments that offer specific guidance in respect of the rather vague and undefined notions that are enshrined in the Convention. We notice that the Court, for that purpose, relies on public international law (emanating from expert and judicial bodies such as, respectively, the ILC and the ICJ) in order to give substance to procedural aspects of human rights responsibility (in respect of the notion of jurisdiction), and that it imports external human rights catalogues and their (*quasi*-)judicial interpretations in order to clarify notions typical of human rights protection (such as torture, discrimination, and miscarriage of justice). To define a human rights vocabulary, the Court also includes instruments other than traditional human rights catalogues, such as ILO-conventions (*in casu*, for instance, to give substance to the notion of forced labor). In addition, a reference (to binding and non-binding instruments) appears to clarify the notions of a final and a same offence in the light of the *non bis in idem*-requirement.

⁶⁰⁴ *Ibidem*, para. 135.

⁶⁰⁵ ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, *op. cit.*, para. 142.

⁶⁰⁶ *Ibidem*.

330. The Grand Chamber of the ECtHR also imports external instruments to refine notions and concepts that do not reside under the Convention and its Protocols. Such references are mostly stimulated by the specific circumstances of the case, for instance touching upon a conviction for genocide, complex medical cases, questions of humanitarian law, financial security issues, *etc.* The Court is not that familiar with such kind of issues, which is seemingly one of the reason why it looks for more detailed guidance elsewhere. Here again, the imported instruments are of a various nature, including binding and non-binding instruments from the CoE, the EU, the UN, the ICC, the ICJ, international tribunals, doctrine, expert material, *etc.*

§ 5. External instruments to shape requirements of positive action

331. External instruments have been used to fill in the content of some positive responsibilities or duties relevant to interpret or to apply some Convention provisions. We notice this phenomenon in our pool of cases in relation to positive State action under Articles 2 of the ECHR on the right to life (§ 5.1.), Article 3 ECHR on the prohibition of torture and inhuman and degrading treatment (§ 5.2.), Article 6 ECHR on the right to a fair trial (§ 5.3.), Article 8 on the right to respect for private and family life (§ 5.4.), Article 9 ECHR on the right to freedom of thought, conscience and religion (§ 5.5.), Article 10 ECHR on the right to freedom of thought, conscience and religion (§ 5.6.), Article 1 of Protocol 1 on the right to property (§ 5.7.), and the Strasbourg procedural rules of Article 46 ECHR on the binding force and execution of judgments (§ 5.8.).

§ 5.1. Article 2 ECHR on the right to life

332. With the help of external instruments the Court, in respect of end-to-life situations, established some positive requirements with the help of recommendations of the Guide of the Committee on Bioethics of the CoE on the Decision-making Process regarding Medical Treatment in End-of-life Situations. One of the criteria derived from the latter instrument was that “...the patient should be involved in the decision-making process by means of any previously expressed wishes, which may have been confided orally to a family member or close friend”.⁶⁰⁷

⁶⁰⁷ ECtHR (GC), *Lambert and Others v. France*, *op. cit.*, para. 178.

333. Again to assess a State's compliance with positive obligations under Article 2 of the Convention – but this time in respect of the use of State force – the Court said that States should regulate the use of force in the light of relevant international standards. The Court in that connection referred to the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶⁰⁸ The Grand Chamber, supported by a report of a UN Special Rapporteur, said that when deaths nonetheless occur, an effective investigation should take place that takes account of concrete constraints that "...may compel the use of less effective measures of investigation or may cause an investigation to be delayed".⁶⁰⁹

§ 5.2. Article 3 ECHR on the prohibition of torture and inhuman and degrading treatment

334. The Court, when assessing whether a State had complied with its positive procedural obligation of investigating allegations of torture, took notice of one of the goals of the CoE Guidelines of 30 March 2011 on Eradicating Impunity for Serious Human Rights Violations, which says that "...impunity must be fought as a matter of justice for the victims, as a deterrent to prevent new violations and to uphold the rule of law and public trust in the justice system".⁶¹⁰

335. In some cases, the ECtHR has built on external instruments to stress that, under Article 3 of the Convention, specific attention should go to the protection of children and to the necessity of the State to take special measures to prevent sexual abuse of a pupil by a teacher.⁶¹¹ Regarding the specific needs of children, the Court has used the CRC, which "...encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents".⁶¹² Similarly, in *M.S.S. v. Greece and Belgium*, the Court has invoked external instruments to establish a broad consensus at the international and European level (as evidenced by the Geneva Convention of 1951 relating to the Status of Refugees, the remit and the activities of the UNHCR and the standards set out in the UN Council Reception Directive⁶¹³) regarding the need for special protection under Article 3 of the Convention of asylum-seekers, who are considered an underprivileged and vulnerable

⁶⁰⁸ ECtHR (GC), *Giuliani and Gaggio v. Italy*, *op. cit.*, para. 209.

⁶⁰⁹ ECtHR (GC), *Al-Skeini and Others v. the United Kingdom*, *op. cit.*, para. 164; ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 186.

⁶¹⁰ ECtHR (GC), *El-Masri v. "the former Yugoslav Republic of Macedonia"*, *op. cit.*, para. 192.

⁶¹¹ ECtHR (GC), *O'Keefe v. Ireland*, *op. cit.*, para. 147. It concerned references to the ICCPR and the ICESCR, but also to Recommendations of the PACE and the COM of the CoE on child protection, the European Social Charter, the Preamble of the Geneva Declaration of the Rights of the Child 1924, a few principles of the UN GA Declaration of the Rights of the Child (extending the 1924 Declaration), the UDHR of 1948, and the CRC of 1989.

⁶¹² ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 99.

⁶¹³ This is the Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum-seekers.

group. As a consequence, the Court ruled that the need for special protection should be a relevant factor when assessing Article 3 of the Convention.⁶¹⁴ The Court also highlighted with the help of external instruments the particular vulnerable position of children in combination with their 'status' of being a refugee. It stressed that "[C]hildren have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status". Furthermore, when considering whether a slap administered by a police officer to a suspect amounted to a breach of Article 3 of the Convention, the ECtHR, as one of the relevant observations, cited the European Code of Police Ethics to stress that the police must "...not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances" and that they "...must take due account of the vulnerability inherent in their young age".⁶¹⁵ The statement about the need to take account of the vulnerability of minors had been supported by external instruments, namely by international human rights conventions, CoE conventions and recommendations, and a report of the CPT.⁶¹⁶

336. Also, external instruments have been used to specify positive obligations under Article 3 ECHR in a context of the protection of suspects and prisoners. The Court, for instance, considered relevant that "...there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved".⁶¹⁷ This rehabilitative goal of imprisonment was supported *inter alia* by external instruments, including the European Prison Rules of 2006, CoE Resolutions and Recommendations⁶¹⁸, and views expressed in a CPT report.⁶¹⁹ The Court, when taking account of internal State practice on the issue, paid particular attention to decisions of the

⁶¹⁴ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 251.

⁶¹⁵ ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 108 and 110.

⁶¹⁶ *Ibidem*, para. 109. It more particularly concerned: the Preamble to the International Convention on the Rights of the Child (which emphasises that the need to afford special protection to the child has been recognised in the Universal Declaration of Human Rights), the International Covenant on Civil and Political Rights (particularly in Articles 23 and 24), the International Covenant on Economic, Social and Cultural Rights (particularly in Article 10), the relevant statutes and instruments of the specialised institutions and international organisations concerned with child welfare, the Preamble to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (stating that "every child has the right to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State" (Article 3 (a)), CoE COM Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures of 5 November 2008, CoE COM Recommendation CM/Rec(2009)10 on integrated national strategies for the protection of children from violence of 18 November 2009 (the latter instrument emphasises that "children's fragility and vulnerability and their dependence on adults for the growth and development call for greater investment in the prevention of violence and protection of children on the part of families, society and the State" and the former underlines the extreme vulnerability of juveniles deprived of their liberty), the 24th General Report of the CPT report of January 2015 on juveniles deprived of their liberty under criminal legislation (which highlighted the particular vulnerability of juveniles in the context of detention. *Ibidem*, paras. 52-53.

⁶¹⁷ ECtHR (GC), *Vinter and Others v. the United Kingdom*, *op. cit.*, para. 114.

⁶¹⁸ Like the CoE COM Res 76(2) on the Treatment of Long Term and Life Sentence Prisoners; COM Rec 2003(23) on the Management by Prison Administrations of Life Sentence and Other Long-term Prisoners; COM Rec 2003(22) on Conditional Release (including explanatory reports and memoranda accompanying these CoE instruments).

⁶¹⁹ *Ibidem*, paras. 115-116.

German and Italian Constitutional Court on rehabilitation and life sentences.⁶²⁰ In addition, the Court noted commitments in international law to the rehabilitation of life sentence prisoners, of which it found evidence in the UN Standard Minimum Rules for the Treatment of Prisoners, Article 10 paragraph 3 of the ICCPR and the General Comments of the HRC on this article, and the Rome Statute of the ICC.⁶²¹ The Court, in its conclusion that a life sentence without possibility of review did not measure up to the standards of Article 3 of the Convention, stressed explicitly that it took account of “...the comparative and international law materials before it” which “...show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter”.⁶²²

§ 5.3. Article 6 on the right to a fair trial

337. Some positive requirements under Article 6 of the Convention have been fine-tuned with the help of external instruments. The case of *Salduz v. Turkey* concluded to a violation of Article 6 because of the use of evidence produced by a minor who had been denied access to a lawyer. The Court established as a principle the allowance of the accused to benefit from assistance of a lawyer already at the initial stages of police interrogation.⁶²³ The Court found support for the latter in “...international human rights standards which are the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities”, including the CoE Minimum Rules, recommendations and reports of the CPT, and the ICCPR.⁶²⁴ The young age of the applicant had also been considered as a pertinent factor in considering the case. The relevance of this factor was supported by “...a significant number of relevant international law materials concerning legal assistance to minors in police custody”, such as CoE Recommendations, and (general comments and concluding observations in respect of) the

⁶²⁰ *Ibidem*, para. 117. When citing particular cases of the German Federal Constitutional Court (the *Life Imprisonment* and the *War Criminal* case) which refer *inter alia* to a person’s ‘human dignity’, the Court explicitly says that similar considerations must apply under the Convention system. *Ibidem*, para. 113.

⁶²¹ *Ibidem*, para. 118.

⁶²² *Ibidem*, paras. 120-121. The latter observation seemed to take precedence over the State’s margin of appreciation, which was also taken into account by the Court. *Ibidem*, para. 120.

⁶²³ ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 52.

⁶²⁴ The precise instruments the Court considered relevant as being “the core” and as having a relevant rationale that relates to the protection of the accused against coercion, were: Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73) 5 of the Committee of Ministers of the Council of Europe of 1973), Recommendation of the Committee of Ministers to member States of the Council of Europe on the European Prison Rules (Rec(2006)2), adopted on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies, the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment after it visited Turkey in July 2000 (CPT/Inf(2001)25), the report of 24 April 2002 of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made after it visited Turkey; of 24 April 2002 (CPT/Inf(2002)8), and Article 14 § 3 (b) of the International Covenant on Civil and Political Rights. These instruments are not explicitly mentioned in the ‘law’-section of the case but they are mentioned by referring to the number of the paragraphs under the ‘facts’-section that contain these instruments. See para. 53.

CRC.⁶²⁵ Besides age, also the ‘early stage of criminal proceedings’ was held to be a relevant factor contributing to the particular vulnerable position of the accused, and this vulnerability, according to the Court, had to be compensated by assistance of a lawyer.⁶²⁶ The latter observations were made against a background including, *inter alia*, viewpoints and recommendations of the CPT.⁶²⁷

§ 5.4. Article 8 on the right to private and family life

338. To shape some measures of positive action in a prison regime, the Court has attached “...considerable importance to the recommendations of the CPT, which noted that long-term prison regimes ‘...should seek to compensate for [the desocialising effects of imprisonment] in a positive and proactive way’”.⁶²⁸ This required the States, under Article 8 ECHR, to take measures with a view on the rehabilitation of and reintegration of prisoners and therefore, for instance, to allow family visits.

339. Another element of positive action under Article 8, is combating stereotypes. The Grand Chamber has underlined that negative stereotyping of a group can impact on “...the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group” and that it therefore “...can be seen as affecting the private life of members of the group”.⁶²⁹ In that connection, the Court held that it “...agrees with the conclusions of ECRI...that the Government should pursue their efforts to combat negative stereotyping of the Roma”.⁶³⁰ The Court considered it pertinent to argue in line with a policy recommendation of the ECRI, which stipulates that States should “...[promote] critical thinking among pupils and [equip] them with the necessary skills to become aware of and react to stereotypes or intolerant elements contained in [the] material they use”.⁶³¹

⁶²⁵ References had been made to the following instruments: The Recommendation of the COM concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec(2003)20), adopted on 24 September 2003, Recommendation of the COM on social reactions to juvenile delinquency (Recomm. No. R (87) 20), adopted on 17 September 1987), Article 37 of the CRC, General Comment No. 10 of the Committee on the Rights of the Child of 25 April 2007 (CRC/C/GC/10), and Concluding Observations of the Committee on the Rights of the Child on Turkey of 9 July 2001 (CRC/C/15/Add.152). *Ibidem*, para. 60.

⁶²⁶ *Ibidem*, paras. 54-55.

⁶²⁷ The Court included a report the CPT had issued after it visited Turkey in July 2000 (CPT/Inf(2001)25) and its report of 24 April 2002, also written after a visit to Turkey (CPT/Inf(2002)8). See *ibidem*, para. 54.

⁶²⁸ ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 144.

⁶²⁹ ECtHR (GC), *Aksu v. Turkey*, *op. cit.*, para. 58.

⁶³⁰ *Ibidem*, para. 75. It concerned more particularly the conclusions of ECRI in its fourth report on Turkey (CRI(2011)5), published on 8 February 2011.

⁶³¹ *Ibidem*, para. 85. The Court more particularly said that “...in a dictionary aimed at pupils, more diligence is required when giving the definitions of expressions which are part of daily language but which might be construed as humiliating or insulting”. Therefore, “...it would have been preferable to label such expressions as “pejorative” or “insulting”, rather than merely stating that they were metaphorical”. It added that “[s]uch a precaution would also be in line with ECRI’s General Policy Recommendation No. 10...”. Note that the Court concluded this case without observing a violation of Article 8 of the ECHR.

§ 5.5. Article 9 on freedom of thought, conscience and religion

340. External instruments have been used to support positive obligations under Article 9 ECHR. As a relevant element when considering the necessity of the interference, the Court found that a blanket ban on wearing a full-face veil would “...risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance”. The Court supported such a duty *inter alia* on the viewpoint of the Commissioner for Human Rights of the CoE.⁶³²

§ 5.6. Article 10 on freedom of expression

341. In television and radio broadcasting, the ECtHR has supported a positive obligation to protect and actively promote a pluralistic media by referring to a CoE Recommendation of the COM.⁶³³ States should, to comply with Article 10 ECHR, put in place an appropriate legislative and administrative framework to guarantee effective media pluralism and, for instance, adopt regulatory and financial measures in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed.⁶³⁴ Also, on that issue, the Court found support in case law of the ECJ that had expressed itself on the exact same case (the national judge had referred the case to the ECJ).⁶³⁵

§ 5.7. Article 1 of Protocol 1 on the right to property

342. The Court has received guidance from international standards regarding the measures a State should take in order to protect property rights of person's displaced because of armed conflict. This guidance originated in the UN Pinheiro Principles and the

⁶³² ECtHR (GC), *SAS v. France*, *op. cit.*, para. 149. Note that the Court, in the end, did not conclude to a violation of Article 9 of the Convention and that it actually dismissed the relevance of this viewpoint of the commissioner and other external instruments. See, more elaborate on this dismissive use, *supra*, para. 219.

⁶³³ Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content.

⁶³⁴ ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, paras. 134 and 156. See also ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 101.

⁶³⁵ ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, para. 151. The Court agreed with the ECJ's finding to the effect that: “...Law no. 112/2004...does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged position assigned to those operators and without providing for any obligation to relinquish the radio frequencies in breach of the threshold after the transfer to digital television broadcasting” and that, as mentioned in para. 153, “...these measures by the national legislature had entailed the successive application of transitional arrangements structured in favor of the incumbent networks, and that this had had the effect of preventing operators without broadcasting frequencies, such as *Centro Europa 7 S.r.l. and Di Stefano v. Italy 7 S.r.l.*, from accessing the television-broadcasting market even though they had a licence...”. See also *ibidem*, paras. 176-177 in which the Court again – but this time in respect of an assessment under Article 1 of Protocol 1 of the Convention – said that it agrees on a point of analysis of the ECJ.

CoE PACE Resolution on Solving Property Issues of Refugees and Displaced Persons⁶³⁶ (which also relied on international standards).⁶³⁷ The latter instrument, itself relying on relevant international standards, called on Member States to “...guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs without regard to pending negotiations concerning the resolution of armed conflicts of the status of a particular territory”.⁶³⁸

343. To justify a deprivation of possessions under Article 1 of Protocol 1 of the Convention, the Court has recognized the importance of conserving cultural heritage which *inter alia* aims to preserve historical, cultural and artistic roots of a region and its inhabitants. The Court considers historical, cultural and artistic roots as essential values which must be protected and promoted by public authorities. In support of the latter observations, the Court referred *inter alia* to the Convention for the Protection of the Architectural Heritage of Europe, which sets out tangible measures, specifically with regard to architectural heritage.⁶³⁹

344. In two cases that concerned the obligation on owners to demolish, at their own expense and without compensation, a house they had lawfully purchased on maritime public land, the Court found no violation of Article 1 of Protocol 1. When verifying whether the interference constituted a ‘legitimate aim’ and to stress the importance of the promotion of unrestricted access to the sea shore as a matter of general interest, the Court referred to various external instruments.⁶⁴⁰

§ 5.8. Article 46 on the binding force and execution of judgments

345. The Court stressed that under Article 46 of the Convention on the binding force and execution of judgments, the respondent States are in any event “...required to provide the Committee of Ministers with detailed, up-to-date information on developments in the process of executing judgments that are binding on them”.⁶⁴¹ The Court supported this

⁶³⁶ PACE Resolution 1708 (2010).

⁶³⁷ See ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, paras. 237-238 and 240; ECtHR (GC), judgment of *Chiragov and Others v. Armenia*, *op. cit.*, paras. 198-200.

⁶³⁸ ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 237.

⁶³⁹ ECtHR (GC), *Kozacıoğlu v. Turkey*, *op. cit.*, para. 54.

⁶⁴⁰ ECtHR (GC), *Brosset-Triboulet and Others v. France*, *op. cit.*, para. 84; ECtHR (GC), *Depalle v. France*, *op. cit.*, para. 81. The Court more particularly referred to COM Recommendation No. R (97) 9 on a Policy for the Development of Sustainable Environment-friendly Tourism in Coastal Areas adopted on 2 June 1997 and the appendix thereto, to decision of the COM taken at its 678th meeting (8-9 September 1999) at which the Ministers’ Deputies take note of the Model Law on sustainable management of coastal zones (see Article 40 on Public maritime domain and Article 45 on Pedestrian access to beaches and coasts), and to the European Code of Conduct for Coastal Zones. Further, we will stressed how the Court in some cases uses external international obligations (and the specific purposes that these external obligations pursue) to stress the presence of a ‘legitimate aim’ of the interference with human rights (*infra*, § 7.2. of this Chapter). Then, contrary to these examples, the presence of external international provisions that are directly linked to the State’s actions in question, constitutes the ‘legitimate aim’.

⁶⁴¹ ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, *op. cit.*, para. 87.

obligation by referring to the Committee of Ministers' Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements.⁶⁴²

§ 5.9. Concluding observations

346. In relation to various provisions of the Convention, we notice that the Grand Chamber has used external instruments to specify or to stress the importance of positive actions. To give a few examples, external referencing has contributed to the States' obligation to ensure the rehabilitation of prisoners in a proactive manner, to their duty to promote tolerance and to combat certain stereotypes, and to their responsibility to take measures to guarantee media pluralism, to ensure effective redress for those who lost access to housing, to conserve cultural heritage and access to the sea shore, *etc.*

347. What is remarkable is that the Grand Chamber to refine various positive duties, often relies on non-binding instruments, generally originating from CoE-bodies. There are multiple references to recommendations of the CPT and the ECRI. Also resolutions and recommendations of the COM and the PACE are particularly present. When the Grand Chamber fine-tunes the specific actions that States are supposed to take in order to comply with the Convention, it often relies on 'soft' policy measures, to which the Member States generally gave their consent. In addition, the viewpoints of expert bodies on what constitute relevant actions to achieve certain policy goals, have been of particular relevance to give substance to some positive requirements under the ECHR.

§ 6. External instruments as a general interpretative support

348. Under this category reside all references that serve the Grand Chamber to *inspire or confirm* an interpretation of the Convention without a specific explanation or without, to our view, an explicitly or a clear purpose (like the development of a definition, triggering 'evolutive' or 'harmonious' interpretation, *etc.*).

349. The overarching characteristic of this argumentative use is that the imported external instruments offer information that the Court is willing to pick up. Their content supports the motivation, as an additional argument within the reasoning. Accordingly, the Court adapts its interpretation to these instruments. Unsurprisingly, in connection to external references of this kind, the Court regularly introduces notions such as: 'take account of'⁶⁴³, '*mutatis*

⁶⁴² *Ibidem.*

⁶⁴³ ECtHR (GC), *Lambert and Others v. France*, *op. cit.*, para. 143.

*mutandis*⁶⁴⁴, ‘drawing on’⁶⁴⁵, ‘agrees with’⁶⁴⁶, ‘be in line with’⁶⁴⁷, ‘a similar approach’⁶⁴⁸, ‘keep with’⁶⁴⁹, ‘take cognizance of’⁶⁵⁰, ‘consistent with’⁶⁵¹, *etc.*

350. Here, the Court does generally not give a very large weight to the external instruments since they reside among other arguments and since they are not used for an explicit ‘evolutive’ purpose. This does not mean, however, that their usage may not (dynamically) contribute to the shape and the scope of the Convention. In what follows, we will offer an exhaustive overview of all references of this kind in our pool of cases, categorized by provision.

§ 6.1. Article 3 on the prohibition of torture and inhuman and degrading treatment

351. In a context of the protection of suspects of crimes and prisoners, external instruments have been used, for instance, to conclude that a use of a metal cage to hold defendants during criminal trial violates Article 3 of the Convention. The Court supported this decision, *inter alia*, by quasi-judicial instruments, by ‘soft’ UN instruments, and even by instruments of NGOs (i.e. the Amnesty International Fair Trials Manual).⁶⁵²

352. Another example in which the Court found general support in external instrument to interpret and apply Article 3 ECHR is the case of *El-Masri*. When assessing the circumstances (about torture and inhuman and degrading treatment during and following the applicant’s extraordinary rendition to the CIA) under Article 3 of the Convention, the Court paid attention to external (*quasi*-)judicial statements. In this case, for example, after describing the contested behavior of the State, the Court gave strength to its reasoning by saying that “[T]he same pattern of conduct applied in similar circumstances has already been found to be in

⁶⁴⁴ ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, para. 151; ECtHR (GC), *Chiragov v. Armenia*, *op. cit.*, para. 177; ECtHR (GC), *Paladi v. Moldova*, *op. cit.*, para. 91.

⁶⁴⁵ ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 124.

⁶⁴⁶ ECtHR (GC), *Aksu v. Turkey*, *op. cit.*, para. 75; ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, *op. cit.*, paras. 151 and 177.

⁶⁴⁷ ECtHR (GC), *Aksu v. Turkey*, *op. cit.*, para. 85.

⁶⁴⁸ ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 184; ECtHR (GC), judgment of *Chiragov v. Armenia*, *op. cit.*, para. 136.

⁶⁴⁹ ECtHR (GC), *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, *op. cit.*, para. 89.

⁶⁵⁰ ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 163.

⁶⁵¹ ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 76.

⁶⁵² The Court noted that “...the United Nations Human Rights Committee found recently that keeping a handcuffed defendant in a metal cage during his public trial amounted to his degrading treatment, which also affected the fairness of his trial....The United Nations Standard Minimum Rules for the Treatment of Prisoners and the Rules of Procedure of international criminal tribunals provide, with regard to certain instruments of restraint, that they may be used only as a precaution against escape during a transfer, provided that they are removed once the accused appears before a court....The Amnesty International Fair Trials Manual provides that holding the accused in “a cell within the courtroom” might impact upon the presumption of innocence....”. ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132.

breach of Article 7 of the ICCPR”, in relation to which the Court mentioned two particular individual cases of the UN Treaty Bodies.⁶⁵³

§ 6.2. Article 6 on the right to a fair trial

353. In *Enea v. Italy*, to verify whether Article 6 was applicable to the case, the Grand Chamber had to find out whether the case concerned a dispute over *a right*. In that respect, it observed that most of the alleged applicant’s restrictions “...relate to a set of prisoners’ rights which the Council of Europe has recognized by means of the European Prison Rules, adopted by the Committee of Ministers in 1987 and elaborated on in Recommendation of 11 January 2006 (Rec(2006)2)”.⁶⁵⁴ The Court added that although the Prison Rules are not binding, “...the great majority ... [of Member States] recognize that prisoners enjoy most of the rights to which it refers and provide for avenues of appeal against measures restricting those rights”.⁶⁵⁵ On that basis, the Court concluded that *in casu*, there was a dispute ‘over rights’ and, as a consequence, that Article 6 was applicable.⁶⁵⁶

354. The Court also used external instruments to assess Article 6 of the ECHR in respect of criminal convictions in common-law systems based ‘solely or to a decisive degree’ on the statement of an absent witness. The Court, in the case of *Al-Khawaja and Tahery v. the United Kingdom* stressed that an appellate court in a common-law system, where a jury gives no reasons for its verdict, is “...well-placed to consider whether untested evidence could be considered to be the sole or decisive evidence against the accused...”.⁶⁵⁷ To confirm the latter observation, the Court took into account a comparative study on national common-law courts worldwide and said that “...the comparative materials before it support this conclusion as regards the application of the rule in different common-law jurisdictions”.⁶⁵⁸ Thus, this comparative study was not only internal, but equally included references to jurisdictions and commissions outside the CoE Member States, such as the Federal Court of Australia, the Supreme Court of Canada, the South-African Supreme Court, the US Supreme Court, and legal recommendations by the Law Reform Commission of Hong Kong and of New Zealand.⁶⁵⁹

⁶⁵³ ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 205. The latter paragraph referred to the 2006 Marty Report which discusses a case of the UN Committee against Torture (*Agiza v. Sweden*, Communication No 233/2003, UN Doc. CAT/C/34/D/233/2003), and of the UN Human Rights Committee (*Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005).

⁶⁵⁴ ECtHR (GC), *Enea v. Italy*, *op. cit.*, para. 101

⁶⁵⁵ *Ibidem*.

⁶⁵⁶ *Ibidem*, para. 102.

⁶⁵⁷ ECtHR (GC), *Al-Khawaja and Tahery*, *op. cit.*, para. 135.

⁶⁵⁸ *Ibidem*, para. 136.

⁶⁵⁹ *Ibidem*, paras. 136 and 72 *et seq.*

§ 6.3. Article 8 on the right to respect for private and family life

355. Some cases illustrate the relevance of external instruments in order to interpret and apply Article 8 of the Convention (on the right to respect for private and family life). For instance, the Court – with the help of external instruments – has established elements to be taken into account when considering the necessity of an interference when a State was using personal data like fingerprints and DNA. These elements included safeguards for automatic processing of data.⁶⁶⁰ Restrictions are possible with the aim of preventing crime but there must be careful scrutiny by the Court. The Court supported these observations with references to the CoE Data Protection Convention⁶⁶¹ and to CoE recommendations.⁶⁶² To emphasize the special position of minors in respecting privacy in the criminal justice sphere, the Court also made use of the CRC.⁶⁶³

356. Also, external instruments have served as a support to examine the legitimacy of the aim of an interference under Article 8 ECHR. For example in a case regarding restrictions on abortion, the Court established a legitimate aim by arguing that “...with the Maastricht Treaty in 1992, a special Protocol to the Lisbon Treaty was granted confirming that nothing in the Treaty would affect, *inter alia*, the constitutional protection of the right to life of the unborn”.⁶⁶⁴

§ 6.4. Article 10 and the right to freedom of expression

357. When elaborating on the scope of Article 10 of the ECHR and on relevant elements to apply this provision, the Court has mobilized external instruments as a general interpretative support. This happened, for instance, when the Grand Chamber argued, with support of the CoE PACE Resolution on the Right to Privacy,⁶⁶⁵ that both Articles 10 (on freedom of expression) and 8 (on the right to private life) deserve equal respect.⁶⁶⁶ When balancing both in relation to the publication of photographs of famous persons, the Court underlined the relevance of how well known these persons are, and of the kind of information that

⁶⁶⁰ *Inter alia* to ensure that processed data are not excessive in relation to the purposes, that they are preserved in a form which permits identification of the data subjects for no longer than is required for the purpose of storage, that there are guarantees against misuse and abuse (especially when it concerns sensitive data), etc.

⁶⁶¹ ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, paras. 76 and 103 *et seq.* The ‘Data Protection Convention’ is the Council of Europe Convention of 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

⁶⁶² *Ibidem*, paras. 103 *et seq.* CoE COM Recommendation No. R (87) 15 on the Use of Personal Data in the Police Sector, and COM Recommendation No. R (92) 1 on the Use of Analysis of DNA within the Framework of the Criminal Justice System.

⁶⁶³ *Ibidem*, para. 124.

⁶⁶⁴ ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, para. 225.

⁶⁶⁵ CoE PACE Resolution 1165 (1998) on the Right to Privacy.

⁶⁶⁶ ECtHR (GC), *Von Hannover v. Germany* (No. 2), *op. cit.*, para. 106.

accompanies the photographs. The Court supported the latter considerations with the CoE PACE Resolution on the Right to Privacy.⁶⁶⁷ In that same context, the Grand Chamber stressed that the public, in principle, has an interest in being informed about criminal proceedings under the condition that the presumption of innocence is observed. In connection to these observations, the Court found support *inter alia* in a CoE COM Recommendation on the Provision of Information through Media in Relation to Criminal Proceedings.⁶⁶⁸ The Court also held that it “...subscribes to the analysis of the Parliamentary Assembly of the Council of Europe [in its Resolution on the Right to Privacy⁶⁶⁹], finding that ‘public figures must recognise that the position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy’”.⁶⁷⁰

358. In a case regarding an award of damages against an Internet news portal for offensive comments posted on its site by anonymous third parties, the Court, supported by an external instrument (the CoE COM Recommendation on a New Notion of Media), differentiated between the regulation of traditional print and audiovisual media and Internet-based media operations.⁶⁷¹ As a consequence, the Grand Chamber *inter alia* argued that because of the particular nature of the Internet, the “...duties and responsibilities that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher”.⁶⁷² When considering the necessity of the interference, it also referred to a recent judgment of the ECJ in the case of *Google Spain and Google*, which “...found that the individual’s fundamental rights, as a rule, overrode the economic interests of the search engine operator and the interests of other Internet users ...”.⁶⁷³ The Court concluded the case by finding no violation of Article 10 ECHR on freedom of expression.

359. In addition, external instruments have inspired the assessment of Article 10 ECHR when the Court ruled, with support of case law of the ACtHR, that freedom of expression should be considered as a *conditio sine qua non* for Article 11 of the Convention on the freedom of assembly and association.⁶⁷⁴ In that respect, inspired by ILO Recommendations, the Court addressed the scope of ‘trade-union expression’ (under Article 10 ECHR) by holding that

⁶⁶⁷ CoE PACE Resolution 1165 (1998). ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 91; ECtHR (GC), *Von Hannover v. Germany* (no. 2), *op. cit.*, para. 110.

⁶⁶⁸ CoE COM Recommendation Rec(2003)13. ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 96.

⁶⁶⁹ Point 6 of Resolution 1165 (1998).

⁶⁷⁰ ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France*, *op. cit.*, para. 120.

⁶⁷¹ ECtHR (GC), *Delfi AS v. Estonia*, *op. cit.*, para. 113.

⁶⁷² *Ibidem*.

⁶⁷³ *Ibidem*, para. 147.

⁶⁷⁴ ECtHR (GC), *Palomo Sánchez and Others v. Spain*, *op. cit.*, para. 56: “The Court takes the view that the members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their company. In this respect, the Court notes that the Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85, emphasised that freedom of expression was “a *conditio sine qua non* for the development of...trade unions”...”.

“...the national authorities must ensure that disproportionate penalties do not dissuade trade-union representatives from seeking to express and defend their members’ interests. Trade-union expression may take the form of news sheets, pamphlets, publications and other documents of the trade union whose distribution by workers’ representatives acting on behalf of a trade union must therefore be authorised by the management, as stated by the General Conference of the International Labour Organization in its Recommendation No. 143 of 23 June 1971...”.⁶⁷⁵

360. Furthermore, the Court found support in an instrument developed between ‘private’ parties to elaborate on the bounds of a lawyer’s right to freedom of expression by stressing that these bounds “...lie in the usual restrictions on the conduct of members of the Bar..., as reflected in the ten basic principles enumerated by the CCBE for European lawyers, with their particular reference to “dignity”, “honour” and “integrity” and to “respect for...the fair administration of justice””.⁶⁷⁶ The Court added that “[S]uch rules contribute to the protection of the judiciary from gratuitous and unfounded attacks...”.⁶⁷⁷

361. Another example of external instruments used as a general support for Article 10 ECHR, is when the Court considered the question whether a public employee had an independent negative right under Article 10 not to make research material (which belonged to the university) available. The Court did not answer affirmatively since it ruled that Article 10 of the Convention was not applicable to this case. One of the reasons to arrive at this conclusion was that the public employee, who was a university professor who was not mandated as a medical doctor, did not owe any duty of professional secrecy by virtue of the Helsinki Declaration adopted by the World Medical Association’s General Assembly.⁶⁷⁸

362. Finally, in the case of *Perinçek v. Switzerland*, the Court has acknowledged the removal of some restrictions on human rights, although they were explicitly provided in the text of the Convention. In this case, the Court challenged Article 16 of the Convention which allows restrictions on political activity of aliens.⁶⁷⁹ The Court stressed that this provision “...reflects an outdated understanding of international law”.⁶⁸⁰ In support of the latter, the Court, besides citing a precedent of the former European Commission on Human Rights, invoked point 10 (c) of the CoE PACE Recommendation No. 799 (1977) on the Political Rights and Position of Aliens, which called for Article 16 of the Convention to be repealed.⁶⁸¹ Thus, the

⁶⁷⁵ *Ibidem*, para. 56.

⁶⁷⁶ ECtHR (GC), *Morice v. France*, *op. cit.*, para. 134.

⁶⁷⁷ *Ibidem*.

⁶⁷⁸ ECtHR (GC), *Gillberg v. Sweden*, *op. cit.*, para. 89. The observations of the Court imply, to our estimation, that private external obligations directed towards individuals (and for instance obliging them not to diffuse certain information) could, as empirical material, influence the applicability of Article 10 of the Convention (*in casu*, the negative right not to diffuse certain information).

⁶⁷⁹ This provision provides that “[N]othing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens”.

⁶⁸⁰ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 121.

⁶⁸¹ *Ibidem*.

Court, with the help of an external instrument agreed upon with the context of the CoE, annulled a part of the text. As such, the respondent State could not invoke Article 16 ECHR to justify an interference with Article 10 on the right to freedom of expression.

§ 6.5. Article 13 on the right to an effective remedy

363. In the case of *M.S.S.*, which *inter alia* touched upon deficiencies in asylum procedure in Greece, the Court, when applying the principles under Article 13 ECHR, took account of external opinions that say that Greece did not offer an effective remedy in respect of asylum procedures. The observations and opinions that are taken into account are those of the UNHCR, the CoE Commissioner for Human Rights, as well as many international NGOs.⁶⁸²

§ 6.6. Article 14 on the prohibition of discrimination

364. Also in respect of Article 14 of the Convention, the Court used external instruments as a general support to consider the scope (and the relevant factors) of that provision. For instance, the ECtHR took note of the ILO Convention No. C111 concerning discrimination in respect of employment and occupation to import the argument that “...any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”.⁶⁸³

365. On discrimination based on sexual orientation, the Court, to stress that States are not “...free to treat heterosexual and same-sex couples who live in a stable relationship differently”, found support in a CoE Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity.⁶⁸⁴

366. In respect of different treatment of pensioners residing in overseas countries, the Grand Chamber, in concluding that there was no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol 1, took into account, besides other arguments, that the national character of the social security was recognized by the ILO Convention of 1952 on social security and the 1990 (revised) European Code of Social Security. For the Court, it was of importance that these instruments authorized the suspension of benefits when the person

⁶⁸² ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 300.

⁶⁸³ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 148. At the same time, however, the Court argued that *in casu*, there is no inherent requirement and that the circumstances in question do thus not enter into the contours of the cited ILO-provision (“It is however not convinced that the exclusion from the entitlement to parental leave in the present case may be regarded as being based on an inherent requirement of military service” (*ibidem*, para. 148)).

⁶⁸⁴ ECtHR (GC), *X. and Others v. Austria*, *op. cit.*, para. 150. The Court specified that it “...called on member states to ensure that the rights and obligations conferred on unmarried couples apply in a non-discriminatory way to both same-sex and different-sex couples”.

is not on the territory.⁶⁸⁵ In addition, it took into consideration that States have a right under international law to conclude bilateral social security treaties, which it considers as the preferred mode to secure reciprocity of welfare benefits. To support the latter, the Court referred to ILO Convention of 1982 on the Establishment of an International System for the Maintenance of Rights in Social Security and the Council of Europe initiative of April 2008⁶⁸⁶ to draw up a New Framework Agreement for the Coordination of Social Security Schemes within Member States.⁶⁸⁷

367. Finally, to establish a violation of Article 14 of the Convention because of a placement of children in Roma-only classes owing to their allegedly poor command of the Croatian language, the Court took into consideration the opinion on Croatia of the Advisory Committee on the Framework Convention for the Protection of National Minorities (of 6 April 2001) which says that "...placing children in separate classes should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests".⁶⁸⁸ Also a subsequent opinion of that Advisory Committee (of 1 October 2004) was used to verify whether the interference was justified. The latter opinion said that "...pupils should not be placed in such separate remedial classes on the basis of their affiliation with a national minority but rather on the basis of the skills and needs of the individuals...".⁶⁸⁹ The Court, to stress that Roma require special protection in the sphere of education as a specific type of disadvantaged and vulnerable minority, also references two CoE recommendations.⁶⁹⁰

§ 6.7. Article 1 of Protocol 1 on the right to property

368. On a few occasions in our pool of cases, the Court was guided by external instruments for its arguments in relation to the right to property. With regard to providing evidence by those who have lost their property and home in situations of armed conflict, the Grand Chamber said it has a 'flexible approach', confirmed by a similar approach in Article 15 paragraph 7 of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons ('the Pinheiro Principles').⁶⁹¹ To offer general support to interpret the right to property and displaced persons, the Court has argued, with reference to the ICRC Study on Customary International Humanitarian Law, that there is a "...right of displaced persons

⁶⁸⁵ ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 85.

⁶⁸⁶ CoE CM(2008)71.

⁶⁸⁷ ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 88.

⁶⁸⁸ ECtHR (GC), *Oršuš and Others v. Croatia*, *op. cit.*, para. 159

⁶⁸⁹ *Ibidem*, para. 174.

⁶⁹⁰ *Ibidem*, para. 147. It concerns PACE Recommendation No. 1203 (1993) on Gypsies in Europe and Recommendation No. 1557 (2002) on the Legal Situation of Roma in Europe.

⁶⁹¹ ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 184; ECtHR (GC), judgment of *Chiragov v. Armenia*, *op. cit.*, para. 136.

to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory...”.⁶⁹² The Court also copied one of the relevant elements of the 2007 Madrid Basic Principles, which contains a “...right of all internally displaced persons and refugees to return to their former places of residence”.⁶⁹³ In another case, the Court found support in international law on State succession to establish *inter alia* that “...the ‘equitable proportion’ principle is the governing principle in so far as State debts are concerned”.⁶⁹⁴

§ 6.8. Article 3 of Protocol 1 on the right to free elections

369. When establishing the general principles under Article 3 of Protocol 1 of the Convention, the Grand Chamber highlighted, with the help of external instruments, that the protection offered by this provision is “...crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law”, that “...the right to vote is not a privilege”, that “...the presumption in a democratic State must be in favor of inclusion”, and that “...universal suffrage has become the basic principle”. The Court added argumentative strength to this argument by stressing that “[T]he same rights are enshrined in Article 25 of the International Covenant on Civil and Political Rights”.⁶⁹⁵

370. Also, external instruments have been of general support to cast doubt on the legitimacy of the aim pursued. This happened more particularly when the Court established a violation of Article 3 of Protocol 1 because of restrictions (introduced shortly before the start of the elections) for persons with multiple nationalities to stand as candidates in parliamentary elections. To assess whether there was a legitimate aim, the Court invoked support of the Venice Commission Code of Practice in Electoral Matters, “...which warns of the risk that frequent changes to electoral legislation or changes introduced just before elections will be perceived, rightly or wrongly, as an attempt to manipulate electoral laws to the advantage of the party in power”.⁶⁹⁶ The Court also – again to verify whether there was a legitimate aim – referred to specific concerns about breaches of law by the Moldovan

⁶⁹² ECtHR (GC), judgment of *Sargsyan v. Azerbaijan*, *op. cit.*, para. 232.

⁶⁹³ *Ibidem*, para. 236.

⁶⁹⁴ ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 121. The Court referred to ‘international law’ in general, but subsequently included the 2001 Resolution on State Succession in Matters of Property and Debts of the Institute of International Law. The Court took account of this instrument but also partly ‘ignored’ it because it sometimes talks about ‘local debts’ which is a category of debts to which the savings of the applicant did not belong. Then, there is thus an ‘ignorance’ because of the ‘non-similarity’ of the issue, which had already been discussed *supra*, paras. 216, *et seq.*

⁶⁹⁵ ECtHR (GC), *Scoppola v. Italy* (no. 3), *op. cit.*, para. 82.

⁶⁹⁶ ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 168.

authorities expressed by the Monitoring Committee and the CoE PACE.⁶⁹⁷ Against this background, the Court casted doubt on the aim put forward by the State, namely that the measure secured the loyalty of the MPs to the State.⁶⁹⁸

§ 6.9. Procedural rules of Article 34 (individual applications) and Article 35 (admissibility criteria)

371. In respect of the compliance with interim measures, the Court, to establish a violation of Article 34 of the Convention, made use of an analogous reasoning⁶⁹⁹ with case law of the ICJ⁷⁰⁰ to argue that “[T]he point of departure for verifying whether the respondent State has complied with the measure is the formulation of the interim measure itself”.⁷⁰¹ The Court therefore held that it would “...examine whether the respondent State complied with the letter and the spirit of the interim measure indicated to it”.⁷⁰²

372. Under Article 35 of the Convention on the exhaustion of domestic remedies, the ECtHR acknowledged, with the help of a precedent which cited a judgment and an advisory opinion of the ACtHR, that there is a distribution of the burden of proof in the area of exhaustion of domestic remedies.⁷⁰³ The Court, sharing a position of the CAT⁷⁰⁴, also held that “...psychological effects of ill-treatment inflicted by State agents may...undermine victims’ capacity to complain about treatment inflicted on them, and may thus constitute a significant impediment to the right to redress of victims of torture and other ill-treatment”.⁷⁰⁵ Therefore, according to the Court, “[S]uch factors may have the effect of rendering the victim incapable of taking the necessary steps to bring proceedings against the perpetrator without delay...leading to a certain flexibility with regard to the limitation periods applicable to claims for reparation...”.⁷⁰⁶ In another case, about disappearances of persons before the entry into force of the Convention and the interpretation of the six-month rule in that respect, the

⁶⁹⁷ *Ibidem*, paras. 46 *et seq.* The latter external instruments addressed the specific circumstances and issues under discussion. These instruments are largely descriptive (describing the empirical circumstances in Moldova). We nonetheless brought them under the notion of ‘external instruments’ because they, like a judicial body would do, issue specific concerns about breaches of the law (which implies a formulation of a ‘normative’ opinion).

⁶⁹⁸ *Ibidem*, para. 170. The Court at the end did not find it “...necessary...to reach a conclusion on this question [of legitimacy], in view of its conclusions concerning the proportionality of the prohibition...”. Therefore, as the Court said, it “...leaves open whether the prohibition on multiple nationals taking seats in Parliament pursued a legitimate aim”.

⁶⁹⁹ The Court used the words ‘*mutatis mutandis*’. ECtHR (GC), *Paladi v. Moldova*, *op. cit.*, para. 91.

⁷⁰⁰ ICJ *LaGrand*-judgment of 27 June 2001.

⁷⁰¹ ECtHR (GC), *Paladi v. Moldova*, *op. cit.*, para. 91.

⁷⁰² *Ibidem*.

⁷⁰³ ECtHR (GC), *Demopoulos and Others v. Turkey*, *op. cit.*, para. 70. This case touched upon the failure to seek redress from Immovable Property Commission in respect of deprivation of property in northern Cyprus in 1974 and the requirement of exhaustion of domestic remedies under Article 35 of the Convention.

⁷⁰⁴ In paragraph 38 of its General Comment No. 3 of 2012

⁷⁰⁵ ECtHR (GC), *Mocanu and Others v. Romania*, *op. cit.*, para. 274.

⁷⁰⁶ *Ibidem*.

ICPPED⁷⁰⁷ and the Rome Statute of the ICC⁷⁰⁸, and the ‘consensus’ that followed from both instruments, offered additional support to the Court’s statement “...that it should be possible to prosecute the perpetrators of [international crimes against humanity] even many years after the events”.⁷⁰⁹ The Courts also used the consensus to argue that “...the serious nature of disappearances is such that the standard of expedition expected of the relatives cannot be rendered too rigorous in the context of Convention protection”.⁷¹⁰

§ 6.10. Concluding observations

373. External instruments mobilized as a more general interpretative support have diverse characteristics; they cover binding and non-binding instruments of various origin. They appear in relation to multiple Convention provisions. Their mobilization might, often in a supplementary manner, influence the scope and the interpretation of certain Convention provisions.

374. When external instruments are used as additional arguments in interpreting and applying the Convention, they may demonstrate a rather ‘quantitative’ or a rather ‘qualitative’ approach. In this category of references, we note that the Grand Chamber often looks for support or confirmation in rather specific instruments. A single or a few instruments then suffice to help the Court, often in more technical or specialized cases. This phenomenon is fuelled by a need to find substantive guidance in imported instruments, alluding to a more ‘qualitative’ approach to external referencing. On the other hand, it also happens that the Grand Chamber includes external instruments as part of a larger comparative exercise, used to support or confirm an argument. In that context, the contribution of external instruments rather lies in their ability to establish a shared or common approach. Then, not as much the content of the instruments seems of importance, but the ‘quantitative’ amount of external actors and documents sharing a certain view or position.

⁷⁰⁷ This instrument stipulated that any time-limit on the prosecution of disappearance offences should be of long duration proportionate to the seriousness of the offence.

⁷⁰⁸ This instrument excluded any statute of limitations as regards the prosecution of international crimes against humanity, which includes enforced disappearances.

⁷⁰⁹ ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 163.

⁷¹⁰ *Ibidem*.

§ 7. External instruments to demonstrate a (missing) link between external obligations and the States' actions or omissions

375. The Court sometimes uses external instruments because they have influenced the contested acts or omissions of States. Then, external instruments function to demonstrate the external legal roots of State behavior. When examining our pool of Grand Chamber cases, we encountered four particular scenarios in this respect: a scenario in which the Court uses external instruments to establish whether the State's interference with the Convention has a 'legal basis' (§ 7.1.); a scenario in which external roots of actions or omission help clarifying the 'aim' of interference (§ 7.2.), a scenario in which the search for external legal roots of State behavior is relevant in light of a State's responsibility under the Convention (§ 7.3.); and a scenario whereby the presence or absence of external normative 'requirements' in connection to a State's actions or omissions might 'excuse' or 'aggravate' interference with the Convention (§ 7.4.).⁷¹¹

§ 7.1. External instruments revealing a 'legal basis'

376. External instruments have relevance to examine whether there had been a 'legal basis' for the State's interference with the Convention. Some Convention provisions explicitly require the Court to find a legal basis for an interference, as one of the conditions to justify the State's actions or omissions. When the Court uses external instruments in search for a 'legal basis', the imported external instruments do not influence the interpretation of the Convention.⁷¹² Then, they are only relevant in the process of applying the Convention to the particular case.

377. Examples of provisions mentioning a 'legal basis' ('lawfulness') as one of the necessary elements to justify an interference, include: Article 5 ECHR on the right to liberty and security which requires a deprivation of liberty to be 'prescribed by law' (an arrest or detention should be 'lawful'), Article 7 ECHR on the right not to be punished without law (and thus, not to be punished without a 'legal basis'), Article 8 ECHR on the right to respect

⁷¹¹ It is important to note that also when the Court uses external instruments for another argumentative reason (for instance to 'borrow' a definition, to establish evolution, and so on), these external instruments could have been one of the legal roots of a State's behavior. Among illustrations of external instruments serving other argumentative uses, it is thus possible that the instruments in question also had an influence on the behavior of a State. The latter illustrations can however be distinguished from the argumentative use that will be discussed here. Indeed, in what follows the Court's search for a connection between the respondent State's behavior and the external provisions is central. Here, the external normative roots of the contested State's acts or omissions appear to be *the* rationale behind the importation of external instruments.

⁷¹² Except for instance when this 'legal basis' can be used, for instance, as an excuse for not complying with the Convention or as a relevant element to interpret the responsibility of a State. See on this issue *infra*, under § 7.3. and § 7.4. of this Chapter.

for private and family life, Article 9 ECHR on freedom of thought, conscience and religion, Article 10 ECHR on freedom of expression, and Article 11 ECHR on freedom of association. The second paragraphs of Articles 8 to 11 require that restrictions to these rights are ‘prescribed by law’, thus having a ‘legal basis’.⁷¹³ In the examined Grand Chamber cases, the Court has used external instruments to address the legality of the interference in respect of the application of Articles 5, 7, 8 and 10 of the Convention.

378. In three cases, the Court imported external instruments in the context of Article 5 of the Convention, in order to verify whether a law prescribed the procedure leading to a deprivation of liberty.⁷¹⁴ This happened more particularly in the cases of *Medvedyev and Others v. France*, *Al-Jedda v. the United Kingdom*, and *Hassan v. the United Kingdom*.

379. In *Medvedyev and Others v. France*, the Court considered the issue of a confinement to a ship of crew members of a foreign vessel arrested on high seas. It held that the expression ‘prescribed by law’ refers essentially to national law but that, where appropriate, it could also consider other applicable legal standards, including those having their source in international law.⁷¹⁵ *In casu*, the procedures leading to deprivation of liberty may find their legal basis both under public international and domestic law.⁷¹⁶ The Court examined (and interpreted) various rules of international law to verify this legal basis.⁷¹⁷ The Court noted that the external conventions reflect “a lack of consensus” and a lack of “clear, agreed rules and practices on the matter at the international level”.⁷¹⁸ With regard to the existing diplomatic notes, which the Court considered to be a source of international law⁷¹⁹, the it held that they did not meet the condition of offering a ‘foreseeable’ legal basis.⁷²⁰ Against that background, it concluded that the invoked external instruments were insufficient in providing a ‘legal basis’ for the interference with Article 5 of the Convention and, accordingly, that the deprivation of liberty was unlawful.⁷²¹ Moreover, the Court explicitly evaluated the external instruments: it held that it is regrettable that international efforts are

⁷¹³ Under these provisions, the interference should not only be ‘prescribed by law’, but also pursue a legitimate aim and – in the light of that aim – be necessary and proportionate in a democratic society.

⁷¹⁴ Article 5 paragraph 1 of the Convention provides that “[n]o one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law Everyone has the right to liberty and security of person”.

⁷¹⁵ ECtHR (GC), *Medvedyev and Others v. France*, *op. cit.*, para. 79.

⁷¹⁶ *Ibidem*, para. 84.

⁷¹⁷ *Ibidem*, paras. 82 *et seq.* *In casu*, the Court referred to the UN Convention on the Law of the Sea of 1982 (Montego Bay Convention), the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, and diplomatic notes. According to the government, the ‘justification’ of its acts lies in the Montego Bay Convention (the State thus seeks a legal basis for its behavior in external instruments). According to the Court, however, there was no such justification, *inter alia* because the actions of the government did not fall under the scope of the Montego Bay Convention.

⁷¹⁸ *Ibidem*, para. 92.

⁷¹⁹ The Court said that diplomatic notes can be sources of international law under certain conditions: “Moreover, diplomatic notes are a source of international law comparable to a treaty or an agreement when they formalise an agreement between the authorities concerned, a common stance on a given matter or even, for example, the expression of a unilateral wish or commitment” (*ibidem*, para. 96).

⁷²⁰ *Ibidem*, para. 99.

⁷²¹ *Ibidem*, para. 102.

uncoordinated, and it even formulated recommendations on how the external law may be improved.⁷²²

380. In the case of *Al-Jedda v. the United Kingdom*, the Court again looked for a legal basis of detention in external instruments. It examined UN Security Council Resolutions, agreements between the US and Iraq, and international humanitarian law (and its interpretation by the ICJ) to verify whether these instruments obliged the respondent State to make use of indefinite internment during its operations in Iraq. The ECtHR acknowledged that these external instruments, and, in particular, the UN Security Council Resolutions, did not offer a legal basis for indefinite detention without charge. The State's measures infringing the right to liberty and security were thus not lawful under the UN Resolutions.⁷²³ Therefore, the Court concluded that there was no question about a conflict between obligations under the UN Charter and obligations under the ECHR.⁷²⁴

381. Finally, in the case of *Hassan v. the United Kingdom*, the Grand Chamber, to verify whether a deprivation of liberty was 'lawful', acknowledged *inter alia* that "...the detention must comply with the rules of international humanitarian law...".⁷²⁵ Thus, external instruments, *in casu* of international humanitarian law, could contribute in establishing a legal ground for detention in times of armed conflict.

382. Under Article 7 of the Convention as well, external instruments function to demonstrate whether or not a criminal conviction had been 'prescribed by law'.⁷²⁶ Such an argumentative use is included in the cases of *Kononov v. Latvia* and *Vasiliauskas v. Lithuania*.

383. Firstly, in *Kononov v. Latvia*, the question whether the criminal conviction for war crimes was 'foreseen by law' – and thus, whether the conviction had a clear 'legal basis' – was central. The Court, to answer that question, examined the state of international law in 1944, which was the year when the facts for which the applicant was convicted took place. In doing so, the Court referred to several external instruments of international humanitarian law (including conventions, agreements, declarations, military codes and manuals, *etc.*), to

⁷²² The Court for instance said that it would be of added value if France or Cambodia would conclude bilateral or multilateral agreements. The Court also highlighted that certain developments in public international law are needed in respect of the fight against the illegal trade in narcotics, and it even made a specific recommendation to bring international law on drug trafficking in line with what exists already in international law on piracy. *Ibidem*, para. 101.

⁷²³ ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 101-108.

⁷²⁴ *Ibidem*, para. 109.

⁷²⁵ ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 105.

⁷²⁶ Article 7 provides: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".

case law of the ICJ and military tribunals, to statutes of international criminal courts, to rules of customary law, and to legal doctrine.⁷²⁷ In the light of the state of international law in 1944, the Court concluded that there was a sufficiently clear, foreseeable and accessible legal basis to convict and punish the applicant for war crimes.⁷²⁸ The ECtHR made clear in this case that in order to establish a legal basis for a conviction, it is not necessary that all instruments had been ratified by the relevant State. The Court justified the latter statement by the existence of ‘supreme values’ which an individual could not disregard when obeying military orders.⁷²⁹

384. The question as to whether a certain conviction was ‘foreseen by law’ in the context of Article 7 of the Convention was central in the case of *Vasiliauskas v. Lithuania*, too. This case touched upon a conviction in 2004 of the applicant for alleged genocide of Lithuanian partisans in 1953. The Court considered it clear that the national provisions on which the conviction was based “...were not in force in 1953 and ... were therefore applied retroactively”, which amounted to a “...violation of Article 7 of the Convention unless it can be established that this conviction was based upon international law as it stood at the relevant time”.⁷³⁰ Thus, the Court had to verify how the crime of genocide, at the material time, was defined in international law. To do so, the Court used various international instruments.⁷³¹ It concluded to a lack of a legal basis because it was “...not persuaded that the applicant’s conviction for the crime of genocide could be regarded as consistent with the essence of that offence as defined in international law at the material time...”.⁷³² As a consequence, the domestic tribunals had applied a broader definition of the crime retrospectively and the Court concluded to a violation of Article 7 of the Convention (*nullum crimen sine lege*).

385. In four of the examined cases in the pool, the Court mobilized external instruments as part of its consideration whether an interference with Articles 8 of the Convention on the right to privacy and family life had been ‘prescribed by law’. Firstly, in *Neulinger and Shuruk*

⁷²⁷ ECtHR (GC), *Kononov v. Latvia*, op. cit., paras. 201 et seq.

⁷²⁸ *Ibidem*, paras. 227, 243 and 244.

⁷²⁹ *Ibidem*, para. 236. The Court framed this as follows: “As to whether the qualification of the impugned acts as war crimes, based as it was on international law exclusively, could be considered to be sufficiently accessible and foreseeable to the applicant in 1944, the Court notes that it has previously found that the individual criminal responsibility of a private soldier (a border guard) was defined with sufficient accessibility and foreseeability by, *inter alia*, a requirement to comply with international fundamental human rights instruments, which instruments did not, of themselves, give rise to individual criminal responsibility and one of which had not been ratified by the relevant State at the material time...The Court considered that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights, in particular the right to life, a supreme value in the international hierarchy of human rights...”. The Court added that “[i]t is true that the 1926 Criminal Code did not contain a reference to the international laws and customs of war...and that those international laws and customs were not formally published in the USSR or in the Latvian SSR...However, this cannot be decisive. As is clear from the conclusions...above, international laws and customs of war in 1944 were sufficient, of themselves, to found individual criminal responsibility (*ibidem*, para. 237)”.
⁷³⁰ ECtHR (GC), *Vasiliauskas v. Lithuania*, op. cit., para. 166.

⁷³¹ For a detailed overview as to how the Court, with the use of external instruments, (historically) defined the notion of ‘genocide’, see *supra* under paras. 312-314.

⁷³² *Ibidem*, para. 185.

v. Switzerland the Court, as part of its reasoning under Article 8 of the Convention, took account of the fact that a forced return of a child (to the father's country of residence) was largely based on the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. The Court verified whether the Hague Convention offered a sufficient legal basis for the order to return the child.⁷³³ The Court concluded that the Hague Convention was applicable, that the applicant's actions were wrongful in the light of that Convention, and that the ordering of the return of the child by the State had a sufficient legal basis in the Hague Convention.⁷³⁴ Another case about child abduction in which the Court supported the 'legality' of the interference by the Hague Convention, is *X v. Latvia*.⁷³⁵ Thirdly, in the case of *Nada v. Switzerland* the Court, in light of Article 8 ECHR, verified whether there was a 'legal basis' for a measure prohibiting the travelling of a persons linked to terrorism. The Court encountered this basis in resolutions of the UN Security Council (the Swiss measures under discussion were taken to implement these resolutions).⁷³⁶ A final case is *Fernández Martínez v. Spain*. This case was about the refusal to renew the contract of a teacher of Catholic religion after he publicly revealed his position as a 'married priest'. The Court acknowledged the existence of a 'legal basis' for the interference in an Agreement between Spain and the Holy See (which is an agreement integrated in Spanish law).⁷³⁷

386. In one case of the pool, *Delfi AS v. Estonia*, the Grand Chamber mobilized external instruments as part of its consideration on the legality of an interference with Article 10 of the Convention on freedom of expression. This case was about an award of damages against an Internet news portal for offensive comments posted on its site by anonymous third parties. The Court took account of the fact that the State's actions were in line with an approach that was advocated *inter alia* by a CoE Recommendation. The latter observation contributed to the conclusion that it was foreseeable that a media publisher running an Internet news portal could be held liable under domestic law for clearly unlawful comments appearing on its news portal.⁷³⁸

§ 7.2. External instruments to clarify the 'aim' of an interference

387. On some occasions, the connection between the contested State behavior and external obligations is relevant to establish and clarify the legitimacy of the aim of the States' actions or omissions. It happens that the Court 'copies' or 'recuperates' the aim it encountered in the external instruments. Also, the Court's observance that a State follows external provisions,

⁷³³ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 99.

⁷³⁴ *Ibidem*, paras. 104-105.

⁷³⁵ ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 63.

⁷³⁶ ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 173.

⁷³⁷ *Ibidem*, paras. 118-120.

⁷³⁸ ECtHR (GC), *Delfi AS v. Estonia*, *op. cit.*, para. 128.

having a certain aim of their own, might be pertinent in verifying whether the interference with the Convention has pursued a legitimate aim. This latter argumentative function appeared in a few cases of the examined pool.

388. The first is *Cudak v. Lithuania*, which is about State immunity from jurisdiction which prevents a non-national employee of a foreign embassy to challenge a dismissal. The ECtHR concluded this case with a violation of Article 6 of the Convention. To arrive at that conclusion, the Court addressed the question whether limitations for reasons of State immunity in civil proceedings pursued a legitimate aim. It held that the grant of State immunity "...pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".⁷³⁹ Thus, the Court encountered a 'legitimate aim' for a State interfering with the Convention in a State's compliance with external international obligations which themselves pursue a specific – legitimate – purpose. A similar reasoning was present in the case of *Sabeh El Leil v. France*, which is a judgment comparable to the one of *Cudak*.⁷⁴⁰

389. In the case of *Nada v. Switzerland*, the Court, when considering whether the aim pursued was legitimate, stressed that the Swiss interference with the rights of the applicant – who appeared on a list of persons with connections to terrorism – followed from UN Security Council Resolutions that had the aim of combating international terrorism under Chapter VII of the UN Charter.⁷⁴¹ As a result, the Court said that the Swiss measures were "...capable of contributing to Switzerland's national security and public safety".⁷⁴² Also here, external instruments were pertinent to contribute to the legitimacy of the interference with human rights.

§ 7.3. External roots of State behavior influencing the question of 'State responsibility'

390. The Court may mention external instruments as part of its reflections on what an external origin of certain actions or omissions might imply for a State's responsibility under the Convention. Generally, an observation that State behavior results from external obligations does not erase a State's responsibility under the Convention (§ 7.3.1.). This responsibility might nonetheless be softened because of a (rebuttable) presumption of equivalent protection (§ 7.3.2.). The external roots of the contested State behavior could

⁷³⁹ ECtHR (GC), *Cudak v. Lithuania*, op. cit., para. 60.

⁷⁴⁰ ECtHR (GC), *Sabeh El Leil v. France*, op. cit., para. 52.

⁷⁴¹ ECtHR (GC), *Nada v. Switzerland*, op. cit., para. 174.

⁷⁴² *Ibidem*.

equally influence the question of ‘jurisdiction’ under Article 1 ECHR and the State’s responsibility as it is connected to that question (§ 7.3.3.).

§ 7.3.1. External obligations do not erase human rights responsibility

391. The Court stressed that a State entering into bi- or multilateral agreements or treaties creating external obligations does not stop its responsibility under the Convention. Thus, the international ‘roots’ of obligations lying at the basis of the contested actions or omissions do not stand in the way of applying the Convention. In our pool of cases, the case of *Al-Jedda v. the United Kingdom* recalled the Court’s case law “...to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments and other agreements between States *subsequent* to the entry into force of the Convention (own emphasis)”.⁷⁴³ This approach was again confirmed in the case of *Hirsi Jamaa v. Italy*. This case *inter alia* touched upon the return of migrants intercepted on the high seas to their country of departure and the assessment of this issue under Article 3 of the Convention. Admittedly, as the Court stressed, “...Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens”.⁷⁴⁴ Nonetheless, the Court subsequently acknowledged that a State “...cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements...” and that “...the Contracting States’ responsibility continues even after ... having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols...”.⁷⁴⁵ The Court thus issued the message that the creation of subsequent external obligations cannot excuse a violation of the Convention.

392. The case of *Allen v. the United Kingdom* is relevant in this respect, too. Here, the ECtHR stressed that State actions following from external obligations, even human rights obligations, do not erase the responsibility of the State under (other provisions) of the Convention. The case of *Allen* touched upon a refusal of compensation following a reversal of the applicant’s conviction of a criminal offence. The Court here used an external instrument to demonstrate the roots of the State’s actions; the national legislation was enacted

⁷⁴³ *Ibidem*, para. 108.

⁷⁴⁴ ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, *op. cit.*, para. 113.

⁷⁴⁵ *Ibidem*, para. 129. The latter statement was also made in the case of *X and Others v. Austria* (ECtHR (GC), *X and others v. Austria*, *op. cit.*, para. 150). The Court here “...reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention”. The latter observation was quite surprising in this context because Austria did not ratify the CoE Convention in question (CoE Convention on the Adoption of Children), which rendered it, from that country’s perspective difficult to speak of a “subsequent treaty commitment”. The Court here did thus not use the CoE Convention to point at the ‘legal roots’ of the State behavior as it could not represent the real root of Austria’s actions (not being a party to that Convention).

“...to comply with the respondent State’s obligations under Article 14(6) ICCPR”⁷⁴⁶ which are expressed in terms almost identical to Article 3 of Protocol No. 7 of the ECHR. The fact that State actions had been taken in order to comply with other (external) requirements (*in casu* the ICCPR and Article 3 of Protocol No. 7 of the ECHR) does not mean that other Convention provisions (*in casu*, Article 6 of the Convention on a fair trial) no longer apply. The Court thus introduced another instrument (the ICCPR) to demonstrate the ‘roots’ of the contested behavior whereby it suggested that such a ‘root’ does not erase State responsibility in light of all (other) provisions of the Convention.⁷⁴⁷

393. External obligations may also emanate from international organizations to which States transferred aspects of power, such as the UN or the EU. On some occasions, external instruments are thus mentioned because they are necessary to explain that the contested State behavior originates in external institutions (to which the State is a party). A State acting under such external obligations does not lose its responsibility in light of the Convention; the examined case law shows that also when States transfer powers to an international organization, they “...remain responsible under the Convention for all actions and omissions of their bodies ... under their international legal obligations”.⁷⁴⁸ Where States cooperate in an area where there might be implications for the protection of fundamental rights, “...it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned”.⁷⁴⁹

394. The Court’s vision on this issue was not new. Already in the case of *Bosphorus v. Ireland* of 30 June 2005, the ECtHR famously held that Contracting Parties are not prohibited from transferring sovereign power to an international organization but that “...it would be incompatible with the purpose and object of the Convention completely to absolve a Contracting State from its responsibility...under the Convention” in respect of “...obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty”.⁷⁵⁰ States remain responsible for all acts and omissions of

⁷⁴⁶ This provision sounds as follows: “When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him”.

⁷⁴⁷ ECtHR (GC), *Allen v. the United Kingdom*, *op. cit.*, para. 105. The Court concluded the case with no violation of Article 6 of the Convention (presumption of innocence).

⁷⁴⁸ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 338; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88, both with reference to the *Bosphorus*-case.

⁷⁴⁹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 342.

⁷⁵⁰ ECtHR (GC), *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Appl. No. 45036/98, para. 124.

their organs “...regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international legal obligations”.⁷⁵¹

§ 7.3.2. Softened State responsibility resulting from a (rebuttable) presumption of equivalent protection

395. In principle, States maintain Convention responsibility when acts of omissions are rooted in requirements or actions from international organizations to which they transferred part of their powers. Such responsibility is nonetheless tempered by a ‘presumption of equivalent protection’; the ECtHR said that

“[S]tate action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides”.⁷⁵²

When external obligations risk interfering with human rights protection, there is a presumption against conflict under the condition that the organization that lies at the basis of the external obligations offers equivalent human rights protection.⁷⁵³ For instance, the ECtHR, as appears from the examined case law, establishes such a presumption in respect of Community law as it said that the “...the protection of fundamental rights in Community law was equivalent to that provided by the Convention system”.⁷⁵⁴ Also in respect of UN instruments, there is a presumption that these instruments do not impose obligations that infringe human rights.⁷⁵⁵

⁷⁵¹ *Ibidem*, para. 153. For other relevant cases (from before the ‘starting date’ of our pool of case law) on the issue of State obligations resulting from external memberships and of State liability for acts of international organizations to which States gave aspects of their power, see *inter alia*; ECtHR (GC), decision of *Bankovic and others v. Belgium and others*, 12 December 2001, Appl. No. 52207/99; ECtHR (GC), *Matthews v. the United Kingdom*, 18 February 1999, Appl. No. 24833/94; ECtHR (GC), decision of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007, Appl. Nos. 71412/01; ECtHR, decision of *Beric and others v. Bosnia and Herzegovina*, 16 October 2007, Appl. Nos. 36357/04 *et seq.*

⁷⁵² ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 338; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88. Already in the *Bosphorus*-case, the Court held that where Member States act as simple agents of the (then) EC authorities, the restrictions that they impose on fundamental rights can be justified by a necessity to comply with EC obligations insofar the protection of fundamental rights ensured by the EC is equivalent to the protection offered under the ECHR-system.

⁷⁵³ Such a presumption has met some criticism by some commentators and Judges who were of the opinion that the Court had been too generous to consider external actors such as the EU as actors offering ‘equivalent protection’. See on this issue, including references, A. Bailleux, “Human Rights in Network”, *E.J.H.R.-J.E.D.H.* 2014, vol. 3, p. 318.

⁷⁵⁴ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 338, with reference to the *Bosphorus*-case (*op. cit.*). To arrive at the latter conclusion, the Court “...attached great importance to the role and powers of the Court of Justice of the European Union (CJEC) – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance”.

⁷⁵⁵ ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, para. 102; ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 171.

396. The theoretical statements regarding State responsibility in respect of external obligations (in connection to a presumption of equivalent protection) apply as long as the State actions or omissions truly root in the external obligations. The Court said in this respect that "...a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion".⁷⁵⁶ Full responsibility because of a lack of connection between State actions and external obligations is illustrated by three cases of the pool.

397. The first one is *M.S.S. v. Belgium and Greece*, which is a case about the conditions of detention (as well as procedure and remedies in that respect) of an asylum-seeker expelled from Belgium to Greece under the EU Dublin Regulation. The ECtHR in this case examined the content of the Dublin Regulation and figured out what this instrument did and did not require from the States. From this examination followed that the measures taken by Belgium did not strictly fall under the Dublin-obligations and that, as a consequence, the presumption of equivalent protection did not apply to the situation.⁷⁵⁷

398. Another case is *Tarakhel v. Switzerland* which concerned the risk of treatment contrary to Article 3 of the Convention (prohibition of torture and inhuman and degrading treatment) in case the applicants would be expelled from Switzerland to Italy. The Court examined the obligations of Switzerland under the Dublin Regulation (to which Switzerland is bound as a result of the association agreement of 26 October 2004 between the Swiss Confederation and the European Community)⁷⁵⁸ and concluded that this instrument did not oblige transferring the applicants to Italy if this country was not fulfilling its obligations under the Convention.⁷⁵⁹ The Court therefore said that "...the decision to return the applicants to Italy does not strictly fall within Switzerland's international legal obligations in the context of the system established by the Dublin Regulation" and that, as a consequence, "...the presumption of equivalent protection does not apply". Switzerland bared full responsibility under Article 3 of the Convention.⁷⁶⁰

399. A final example is *Al-Jedda v. the United Kingdom* in which the Court examined the respondent State's external obligations established under UN Resolutions and concluded that they did not offer a legal basis for the impugned acts of indefinite detention without charge.⁷⁶¹ Although there was no conflict between the UN obligations and the ECHR⁷⁶², the

⁷⁵⁶ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 338; ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88, both with reference to the *Bosphorus-case* (*op. cit.*).

⁷⁵⁷ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, paras. 339-340.

⁷⁵⁸ ECtHR (GC), *Tarakhel v. Switzerland*, *op. cit.*, para. 88.

⁷⁵⁹ *Ibidem*, para. 90.

⁷⁶⁰ *Ibidem*, paras. 90-91.

⁷⁶¹ ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 101-108.

⁷⁶² *Ibidem*, para. 109.

Court gave the impression that, in case such a conflict would occur, provisions of external origin might 'disapply' Convention requirements. According to the Court, there should be a verification as to

"... whether, in the absence of express provisions in Resolution 1546 [of the UN], there was any other legal basis for the applicant's detention which could operate to *disapply* the requirements of Article 5 § 1 of the Convention (own emphasis)".⁷⁶³

In search of 'any other legal basis', the Court examined provisions under international humanitarian law. Also in respect of that body of law, however, the Court noted that it did not place an obligation to use indefinite internment without trial.⁷⁶⁴ Imagine the opposite case of international humanitarian law obliging such internment. Could external obligations take a higher position and offer a reason to disapply the Convention? The Court, in *Al-Jedda*, at least alluded to that option. It seemed to acknowledge the capacity of UN obligations and obligations under international humanitarian law of taking a hierarchical higher position than the ECHR. On the contrary, the agreement between the Iraqi government and the US did not have that capacity. Indeed, while the Court ruled that this agreement could offer a 'legal basis' in respect of Article 5 of the Convention, it added that "...such an agreement could not override the binding obligations under the Convention".⁷⁶⁵

400. When States' actions or omissions truly root in external obligations, the presumption of equivalent protection and absence of conflict normally applies. This does not mean, that the presumption cannot be rebutted in practice. Again in the *M.S.S.*-case, the Court stressed that also when States apply the Dublin Convention, they must ensure the guarantees under Article 3 of the Convention.⁷⁶⁶ At first, there was an assumption that Greece complied with external obligation under the EU Council Directive and that it respected the minimum standards for asylum procedures and the reception of asylum seekers.⁷⁶⁷ However, when the Court examined the concrete situation in Greece, it regarded the presumption rebutted because "...reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".⁷⁶⁸

401. Also in the case of *Tarakhel*, the ECtHR stressed that "...the presumption that a State participating in the 'Dublin' system will respect the fundamental rights laid down by the

⁷⁶³ *Ibidem*, para. 107.

⁷⁶⁴ *Ibidem*.

⁷⁶⁵ *Ibidem*, para. 108.

⁷⁶⁶ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 342.

⁷⁶⁷ *Ibidem*, para. 343. The Court also considered relevant that Greece had external obligations under the Reception Directive and used this to consider "...that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible". *Ibidem*, para. 263.

⁷⁶⁸ *Ibidem*, para. 353.

Convention is not irrebuttable". The latter statement found support in case law of the ECJ since the Court acknowledged that

"...the Court of Justice of the European Union has ruled that the presumption that a Dublin State complies with its obligations under Article 4 of the Charter of Fundamental Rights of the European Union is rebutted in the event of "systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State".⁷⁶⁹

402. A final example of a 'rebutted presumption' in the pool of cases, this time in respect of UN instruments, appears in *Nada v. Switzerland*. This case concerned the assessment of legislation implementing UN Security Council Resolutions in respect of travelling restrictions for people suspected to be involved with terrorism (in the light of Article 8 on the right to family life). The Court elaborated on the relationship between the Convention and UN Security Council Resolutions. The Court stressed the importance of harmonious interpretation, the presumption against conflict and the important role of the UN "...in promoting and encouraging respect for human rights".⁷⁷⁰ It said, as a consequence, that "...clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law."⁷⁷¹ The Court examined the UN Resolutions and it considered that they required States "...to prevent the individuals on the United Nations list from entering or transiting through their territory" and that, therefore, "...the above-mentioned presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights".⁷⁷² This case regularly referred to the principles established in the precedent case of *Al-Jedda v. the United Kingdom*.⁷⁷³

⁷⁶⁹ ECtHR, *Tarakhel v. Switzerland*, para. 103. The Court added in paragraph 104: "In the case of "Dublin" returns, the presumption that a Contracting State which is also the "receiving" country will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing" that the person whose return is being ordered faces a "real risk" of being subjected to treatment contrary to that provision in the receiving country. The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established" (*ibidem*, para. 104). With regard to the latter statements, the Court found support in a particular external instrument, namely in case law of the UK Supreme Court since it noted that "...this approach was followed by the United Kingdom Supreme Court in its judgment of 19 February 2014" (*ibidem*).

⁷⁷⁰ ECtHR, *Nada v. Switzerland*, para. 171, with reference to ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, para. 102.

⁷⁷¹ *Ibidem*.

⁷⁷² *Ibidem*, para. 172.

⁷⁷³ ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 102 and 105. The Court held in this case that "...there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United

403. We have illustrated how the ECtHR sometimes establishes a presumption of equivalent human rights protection and how such a presumption may be rebutted. It also happens that the Court imports an external instrument to reveal the legal roots of the contested States' behavior without mentioning a presumption of equivalent protection. In the pool of cases, we noticed this in *Jeunesse v. the Netherlands*. This case was about a refusal to grant a residence permit on the ground of family life. The Court introduced EU (case) law as it examined the State's obligations under EU law, as interpreted by the ECJ. The State behavior *in casu* (the omission to give a residence permit) resulted from (and could have been justified by) EU law, which did not oblige to grant a residence permit. At the same time, however, the Court added that the ECJ

"...whilst finding no obligation under EU law to admit the third country national, also held that this finding was without prejudice to the question whether, on the basis of the right to respect for family life, a right of residence could not be refused but that this question had to be considered in the framework of the provisions on the protection of fundamental rights".⁷⁷⁴

States, also when they apply external EU norms, remain responsible under the Convention. Also, the Court has confirmed its competence *vis-à-vis* EU rules: it can only apply or examine violations of such rules "...unless and in so far as they may have infringed rights and freedoms protected by the Convention".⁷⁷⁵ It is "...primarily for the national authorities...to interpret and apply domestic law, if necessary in conformity with EU law", but it is the Court's competence to examine whether the effects of these national decisions comply with the Convention.⁷⁷⁶

§ 7.3.3. External roots of State behavior to establish a State's 'jurisdiction' and corresponding responsibility

404. According to the Court, States are only responsible under the Convention in case the alleged acts or omissions are attributable to them and fall under their 'jurisdiction' (in the sense of Article 1 of the Convention). To examine this, the Court may have to take external instruments into account. In our pool of Grand Chamber cases, we notice such references in

Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law" (*ibidem*, para. 102), and added that "[I]n the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multinational Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law" (*ibidem*, para. 105).

⁷⁷⁴ ECtHR (GC), *Jeunesse v. the Netherlands*, *op. cit.*, para. 111.

⁷⁷⁵ *Ibidem*, para. 110.

⁷⁷⁶ *Ibidem*.

the cases of *Al-Jedda v. the United Kingdom*, *Nada v. Switzerland*, *Hassan v. the United Kingdom* and *Jaloud v. the Netherlands*.

405. The case of *Al-Jedda v. the United Kingdom* touched *inter alia* on the State's territorial jurisdiction in relation to the detention of an Iraqi national by the British Armed Forces in Iraq. Whether the United Kingdom had jurisdiction was relevant for establishing whether it carried responsibility under Article 1 of the Convention. For this purpose, the Court interpreted UN instruments (i.a. UN Security Council Resolutions) constituting the framework for the security regime in Iraq.⁷⁷⁷ More particularly, it stated that while "...it is not its role to seek to define authoritatively the meaning of provisions of the Charter of the United Nations and other international instruments", that it must nonetheless "...examine whether there was a plausible basis in such instruments for the matters impugned before it".⁷⁷⁸ In the following paragraphs, the Court examined several UN Resolutions in order to find out to whom the alleged acts were attributable.⁷⁷⁹ Also, the Court made use of the ILC Draft Articles on the Responsibility of International Organisations to stress that "...the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct".⁷⁸⁰ Against that background, the Court concluded that the acts were not attributable to the UN.⁷⁸¹

406. Also, in the case of *Nada v. Switzerland*, the Court considered UN Security Council Resolutions because the implementation of these resolutions constituted the root of the contested acts of the respondent State. Since these resolutions "...required States to act in their own names and to implement them at national level"⁷⁸², the Court considered that violations of the Convention that might follow from this implementation, would be attributable to the State and would fall within this State's jurisdiction under Article 1 ECHR. Thus, the effects of the implementation were capable of engaging the responsibility of the State.⁷⁸³

407. In the case of *Hassan v. the United Kingdom*, the Court addressed under Article 1 of the Convention the question of territorial jurisdiction in relation to internment of an Iraqi national by a coalition of armed forces in Iraq. The Government alleged that it did not carry

⁷⁷⁷ ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, para. 76.

⁷⁷⁸ *Ibidem*, with reference to ECtHR (GC), decision of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, *op. cit.*, para. 122. It added in this respect that "[T]he principles underlying the Convention cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law".

⁷⁷⁹ *Ibidem*, paras. 77-81. The Court, to find out how it should interpret the UN Resolution, relied for guidance on an advisory opinion of the ICJ which indicates that resolutions "...should be interpreted in the light not only of the language used but also the context in which it was adopted". *Ibidem*, para. 76.

⁷⁸⁰ *Ibidem*, para. 84.

⁷⁸¹ *Ibidem*.

⁷⁸² ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 120.

⁷⁸³ *Ibidem*, para. 121.

responsibility and supported this argument by external instruments (including a Memorandum of Understanding (hereafter: MOA) and the Third Geneva Convention). The Court, however, did not follow that argument and held that the interned Iraqi fell under the authority of the forces of the UK. The Court supported the latter conclusion by examining the responsibilities of the UK under the MOA (including the classification and release of detainees).⁷⁸⁴ Based on this external normative roots of the contested behavior, the Court concluded that "...the United Kingdom retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5", rendering this country responsible under the latter Convention provision.⁷⁸⁵

408. Comparably, in the case of *Jaloud v. the Netherlands*, the Court used the content of external instruments to establish a respondent State's territorial jurisdiction in relation to an alleged killing of an Iraqi national by a Dutch serviceman. In its verification whether the Netherlands could be held responsible under Article 1 of the Convention, the Court examined whether the Dutch troops were "...under the exclusive direction or control" of any other State or placed "...at the disposal" of a foreign power. The Court looked for information in this respect (*inter alia* about the exercise of military command, about who issued the orders, *etc.*) in the following external instruments: UN SC Resolution 1483 (2003), Resolution 1511 (2003), and a MOA governing the arrangement between the Netherlands and the United Kingdom.⁷⁸⁶

§ 7.4. External obligations as 'justificative' or 'aggravating' factors

409. The (lack of) a connection between State behavior and external instruments is pertinent to examine whether a State's actions or omissions followed from or respected an external normative framework. Earlier, we have stressed that a State, according to the ECtHR, remains responsible under the Convention for the effects of subsequent treaty commitments.⁷⁸⁷ However, as appears from the Court's case law, whether the contested behavior follows from or respects external requirements, might have a 'justificative' or an 'aggravating' effect when applying the Convention.

410. The recent case of *Perinçek v. Switzerland* offers an illustration of this phenomenon. In this case, the Court considered under the Convention the criminal conviction of a person for rejecting the legal characterization of atrocities committed by the Ottoman Empire against the Armenian people from 1915 as 'genocide'. Some of the third parties to this case argued

⁷⁸⁴ ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 78.

⁷⁸⁵ *Ibidem*.

⁷⁸⁶ ECtHR (GC), *Jaloud v. the Netherlands*, *op. cit.*, paras. 143-152.

⁷⁸⁷ *Supra*, § 7.3.1. of this Chapter.

that the conviction constituted a justified interference with the right to freedom of expression because Switzerland was obliged to criminally convict this person in observance of its external obligations under international law.

411. The Grand Chamber, to address the necessity of the interference, imported external instruments to verify whether the State's contested actions had a basis in external obligations. The Court concluded that this was not the case since neither international law obligations (like those in the CERD, the Genocide Convention as interpreted by the ICTR and those in the ICCPR as interpreted by the HRC), nor customary international law required criminalizing genocide denial as such.⁷⁸⁸ In addition, the Court considered it noteworthy that most international bodies having dealt with the issue (like the HRC, the CERD, and a UN Special Rapporteur) made inconclusive pronouncements.⁷⁸⁹ As a consequence, the Court concluded that "[I]t cannot therefore be said that the interference with the applicant's right to freedom of expression was required under, and could hence be justified by, Switzerland's international law obligations".⁷⁹⁰

412. The absence of external obligations seemed to give more weight to the State's interference, limiting its freedom. It operated as a factor 'aggravating' the State's actions in the light of the Convention. *A contrario*, the Court suggests that the presence of such external requirements could contribute to 'excusing' interference with the Convention. The message the Grand Chamber sends here, is that obligations under external normative (human rights) instruments might justify an interference with the Convention. While the Court observes that States remain responsible for the protection of human rights in respect of subsequent engagements, the consequences of such engagements could thus offer justificative elements.⁷⁹¹

413. This attitude was encouraged by the Court's wish for coordination and the avoidance of opposition. Indeed, in *Perinçek*, the Grand Chamber explicitly referred to various precedents demonstrating that State behavior could be justified when it results from international law obligations. It added that putative conflicts should be avoided by coordinating the effects. The Court framed this in the following paragraph:

"The next point to be determined is whether, as argued by some of the third parties, the interference was justified because it was required under Switzerland's international law obligations (see, *mutatis mutandis*, *Jersild v. Denmark*, 23 September 1994, §§ 28, 30 and 31 *in fine*, Series A no. 298, with regard to an interference said to be required under Article 4 of the CERD; *Al-Adsani v. the United*

⁷⁸⁸ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 262, and 264-266.

⁷⁸⁹ *Ibidem*, para. 267.

⁷⁹⁰ *Ibidem*, para. 268.

⁷⁹¹ On this issue, see *supra*, Part III, Chapter 2, § 2.2.2.

Kingdom [GC], no. 35763/97, §§ 56, 57 and 60-66, ECHR 2001-XI; *Cudak v. Lithuania* [GC], no. 15869/02, §§ 57 and 63-67, ECHR 2010; and *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, §§ 189, 196-98 and 201-15, ECHR 2014, with regard to denial of access to court required under the international law relating to foreign State immunities; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 149-51, ECHR 2005-VI, with regard to obligations flowing from a State's membership in the European Union). The principles that govern the examination of a putative conflict between the obligations that a High Contracting Party has under the Convention and its other international law obligations were set out in detail in *Nada v. Switzerland* ([GC], no. 10593/08, §§ 168-72, ECHR 2012); there is no need to repeat them here, except to emphasise that apparent contradictions should, as far as possible, be avoided by construing the simultaneously applicable provisions in a way that coordinates their effects and avoids opposition between them."⁷⁹²

414. When concluding the necessity of the interference in the case of *Perinçek*, the Court found support in the observation that there was no international law obligation for Switzerland to criminalise the applicant's statements (together with observations about the seriousness of the conviction, and the applicant's statements not having touched on a matter of public interest, not having called for hatred or intolerance, not having been made in a context of heightened tensions or special historical overtones, *etc.*) to stress that "...it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case".⁷⁹³

415. The use of the referencing practice in order to verify whether there exist external requirements and whether the State has observed these requirements, can be further illustrated with other cases of the pool: the cases of *Sejdić and Finci*, *Tănase v. Moldova*, *M.S.S. v. Belgium and Greece*, *Bayatyan v. Armenia*, *El-Masri v. "the former Yugoslav Republic of Macedonia"*, *Maktouf and Damjanović v. Bosnia and Herzegovina*, and *Schatschaschwili v. Germany*.

416. The case of *Sejdić and Finci* touched *inter alia* on the inability of a Roma and a Jew to stand for elections. The Court, when applying Article 14 of the ECHR (prohibition of discrimination) in conjunction with Article 3 of Protocol 1 to the Convention (right to free elections), considered relevant the State's ratification of a Stabilisation and Association Agreement with the European Union in 2008, whereby it "...committed itself to "...amend[ing] electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates...".⁷⁹⁴ These State's external commitments constituted a relevant and 'aggravating' element in arriving at a violation of Article 14 of the Convention.

⁷⁹² *Ibidem*, para. 259.

⁷⁹³ *Ibidem*, para. 280.

⁷⁹⁴ ECtHR (GC), *Sejdić and Finci*, *op. cit.*, para. 49.

417. In *Tănase v. Moldova*, which was a case about the inability of persons with multiple nationalities to stand as candidates in parliamentary elections, the ECtHR included external instruments to stress that the respondent State was submitted to obligations under the ratified CoE Convention on Nationality⁷⁹⁵ and that national laws appeared inconsistent with that external instrument.⁷⁹⁶ Although the Court said that it did “...not find it necessary to resolve the apparent conflict of norms”, it took account of the European Convention on Nationality in “...its examination of the proportionality of the measure...”.⁷⁹⁷ The Court, to conclude the non-proportionality of the national measure, deemed relevant – as a kind of ‘aggravating factor’ – that some requirements of the (ratified) CoE Convention had not been observed by the respondent State.⁷⁹⁸

418. Also *M.S.S. v. Belgium and Greece*, which is about the conditions of detention of an asylum-seeker expelled from Belgium to Greece under the EU Dublin Regulation, is relevant. The Court suggested in this case that when a State does not respect its external obligations, that this could contribute to establishing a violation of the Convention. *In casu*, when considering the merits under Article 3 ECHR, it noted the “...obligations incumbent on the Greek authorities under the Reception Directive”.⁷⁹⁹ *Inter alia* in the light of that external framework (which Greece did not seem to respect), the Court considered “...that the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible...”.⁸⁰⁰ Subsequently, when addressing the general principles under Article 3 of the ECHR in light of the confinement of aliens, the Court highlighted the importance for Member States observing their external international obligations, *in casu* under the 1951 Geneva Convention relating to the Status of Refugees.⁸⁰¹ Also, it stressed – in line with its usual considerations on its competence in respect of external instruments⁸⁰² – that it does not itself “...verify how States honour their obligations under the Geneva Convention”.⁸⁰³

419. In the case of *Bayatyan v. Armenia*, which was about a conviction of a conscientious objector to perform military service in the light of Article 9 of the Convention, the Court stressed that it did not find it necessary to “...rule on the alleged failure of the authorities to

⁷⁹⁵ This instrument is part of the domestic legal order and takes precedence to Moldovan legislation.

⁷⁹⁶ ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 163.

⁷⁹⁷ *Ibidem*.

⁷⁹⁸ *Ibidem*, paras. 177-180. This reasoning had equally been considered as an illustration of how the Court uses external instruments to establish the exceptionality of the State’s position on a certain issue influencing the State’s freedom of discretion. See *infra*, Part II, Chapter 3, § 9.

⁷⁹⁹ ECtHR (GC), *M.S.S. v. Belgium and Greece*, *op. cit.*, para. 263.

⁸⁰⁰ *Ibidem*.

⁸⁰¹ *Ibidem*, para. 216.

⁸⁰² See *supra*, para. 391.

⁸⁰³ *Ibidem*, para. 286.

comply with the provisions of the ICCPR".⁸⁰⁴ Nonetheless, the Court took account of the State's international commitments when it assessed whether the interference was necessary in a democratic society; the observation that the national measures went against the State's international commitments, was relevant for the Court in concluding that there was no 'pressing need' for such measures.⁸⁰⁵ The non-compliance with an external legal framework thus was an 'aggravating' element in the application of the Convention. In addition, the Court stressed that Armenia already when acceding the CoE, internationally committed to introduce alternatives to the military service and to not convict conscientious objectors.⁸⁰⁶ Here again, the Court put the (non-) observance of international commitment in the light of the necessity of the interference.⁸⁰⁷ *Inter alia* against that background, the Court considered the applicant's conviction unnecessary in a democratic society within the meaning of Article 9 of the Convention.⁸⁰⁸

420. In the case of *El-Masri*, about a detention during and following an operation involving extraordinary rendition to the CIA, the Court took account of external requirements as one of the relevant factors when it applied Article 5 of the Convention (right to liberty and security of person). More particularly, the Court – in arguing a violation of that provision – took account of the fact that "...the applicant did not have access to...a representative of the...Embassy in the respondent State, as required by Article 36 § 1 (b) of the Vienna Convention on Consular Relations".⁸⁰⁹ The observation that the State did not observe its external international obligations thus operated as an 'aggravating' factor when applying the Convention.

421. The case of *Maktouf and Damjanović* touched on an assessment under Article 7 of the ECHR (no punishment without law) of retrospective application of criminal law laying down heavier sentences for war crimes than the law that was in force at the moment the offences were committed. The Government, in its defence, argued that it had a duty under international humanitarian law to punish war crimes which required the rule of non-retroactivity to be set aside.⁸¹⁰ The Court countered this argument by referring to the Geneva Conventions and their Additional Protocols and by stressing that these instruments of international humanitarian law also include a rule of non-retroactivity.⁸¹¹ The Court did not

⁸⁰⁴ ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 115.

⁸⁰⁵ *Ibidem*, para. 123.

⁸⁰⁶ *Ibidem*, para. 127. To demonstrate this, the Court relied on CoE PACE Opinion no. 221 (2000).

⁸⁰⁷ The Court more particularly said: "[H]ence, the applicant's conviction for conscientious objection was in direct conflict with the official policy of reform and legislative changes being implemented in Armenia at the material time in pursuance of its international commitment and cannot be said, in such circumstances, to have been prompted by a pressing social need". *Ibidem*.

⁸⁰⁸ *Ibidem*, para. 128.

⁸⁰⁹ ECtHR (GC), *El-Masri v. "the former Yugoslav Republic of Macedonia"*, *op. cit.*, para. 236.

⁸¹⁰ ECtHR (GC), *Maktouf and Damjanović*, *op. cit.*, para. 74.

⁸¹¹ *Ibidem*.

uphold the existence of a conflict of norms, as it was argued by the Government to ‘excuse’ the interference.⁸¹²

422. A final example is the case of *Schatschaschwili v. Germany*, in which the Court applied Article 6 of the Convention (right to a fair trial) to a case about an inability to examine absent witnesses whose testimonies carried considerable weight in the conviction. The Court took into account the external ‘existing legal framework’⁸¹³ to stress that the national court had made all reasonable efforts to secure the attendance of the witnesses. This was relevant to conclude that, in line with the principle *impossibilium nulla est obligatio*, the witnesses’ absence was not imputable to the domestic court.⁸¹⁴ The Court thus used the external legal framework to establish a connection between the external requirements and the actions of the national courts, which was relevant in ‘excusing’ the interference.

§ 7.5. Concluding observations

423. Regularly, the Grand Chamber imports external instruments because these instruments are connected with contested States’ actions or omissions. Used for such a purpose, the external instruments are not relevant in interpreting the scope of Convention provisions, but rather serve as relevant factors and information when applying the provisions, potentially influencing the Court’s competence (in the light of Article 1 ECHR) or the Court’s consideration of whether there is a justification for a State’s interference.

424. Firstly, external instruments may serve to evidence a ‘legal basis’ of a State’s interference with the Convention. The instruments then operate as ‘empirical proof’ for the legality of the States’ actions or omissions. For instance, the Court has looked at external instruments to verify whether there had been a ‘legal basis’ for a contested detention or for a conviction, or to verify whether interferences with the rights to family life and to freedom of expression were ‘foreseen by law’. In one case, the Court even complained about the characteristics of the external international framework, regretting that no sufficient efforts were done to provide the necessary ‘legal basis’.

425. The link between States’ behavior and external bodies of law might also influence the existence of a ‘legitimate aim’ for an interference with human rights. In order to establish

⁸¹² In absence of such conflict, the Court could avoid answering the following question: if international humanitarian law would have required setting aside the rule of non-retroactivity, would it then receive priority above the Convention? For more on this issue of conflict, see *infra*, Part III, Chapter 1, § 3.2.2., C.2.2.

⁸¹³ ECtHR (GC), *Schatschaschwili v. Germany*, *op. cit.*, paras. 139 and 64-66. The ‘existing legal framework’ included the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, supplemented by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.

⁸¹⁴ *Ibidem*, para. 139.

whether an interference pursued a 'legitimate aim', the Court may be inspired by the aim of the international instrument that had stimulated the States' actions or omissions.

426. External instruments that are connected to States' actions and omissions are also pertinent to address questions of State responsibility under human rights law. The general principle is that obligations deriving from subsequent treaties concluded by a Member States do not erase responsibility under the Convention. Thus, the ECtHR upholds its autonomy and power as a human rights supervising authority, including in respect of external commitments. This counts also when the contested acts or omissions originate in international organisations to which the States transferred aspects of their power. The human rights supervision, however, is softened in the light of a rebuttable 'presumption of equivalent protection'. Such a presumption applies when the national measures are taken to respond to obligations of external organizations, such as the EU and the UN. Moreover, when the contested acts result from complying with certain external obligations that conflict with human rights, the ECtHR has given the impression that such external obligations could 'disapply' the Convention, prioritizing external commitments over human rights law. Finally, external instruments may serve as informative elements to verify whether a State has jurisdiction in light of Article 1 of the Convention, for example in order to verify whether a State exercised 'effective control' or 'authority' in respect of certain persons or territories.

427. When the Court imports external instruments as part of a co-existing external framework (which the respondent State is supposed to observe), the State's (non-)observance of this external normative framework may be a relevant factor to apply the Convention. Thus, whether a States' actions or omission 'root in' or 'observe' external requirements, has an influence on the rigidity of the Court's supervision. A State's non-observance of an applicable external framework (like the ICCPR, or other obligations under (public) international law) may 'aggravate' the State's interference and, for instance, contribute to the non-proportionality of the interference. *Vice versa*, when a State's interference with human rights is in conformity with an external framework of (general) international law, the Court gives the impression that this may serve as a relevant factor in 'excusing' that interference. Therefore, the absence of an external obligation to interfere with human rights (for instance, the absence of an obligation to interfere with Article 10 ECHR by criminalizing denial of genocide) could be a factor 'aggravating' a State's interference with the Convention. Thus, while the national consequences of external requirements do not escape a human rights supervision, the Court nonetheless acknowledges that the (non-)observance of external obligations might be relevant to consider the proportionality of the interference. The Court's (implicit) underlying rationale seems to be the avoidance of conflicts between the ECHR and external instruments. Instead, it aims at coordinating the effects and at a harmonious co-

existence. In some cases, this aim of ‘harmonious interpretation’ is pursued in a more explicit manner, as will be demonstrated by the following section.

§ 8. The creation of an harmonious interpretation

428. In *Demir and Baykara*, the Strasbourg Court elaborated on the ‘practice of interpreting Convention provisions in the light of other international texts and instruments’.⁸¹⁵ In that connection, the ECtHR gave a prominent place to Article 31 paragraph 3 (c) VCLT, by stating that it “...has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein”, and that it “...must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties”.⁸¹⁶

429. To demonstrate how the Court includes external references with the argumentative aim of creating ‘harmony’ between the imported instruments and the Convention, we devote particular attention to Article 31 paragraph 3 (c) of the VCLT. This follows from the observation that the Grand Chamber, when it highlights the importance of an harmonious interpretation, most often cites that provision.⁸¹⁷ Thus, when the Grand Chamber uses Article 31 paragraph 3 (c) of the VCLT, it usually aims to read the Convention in harmony with external instruments.⁸¹⁸ In addition, legal doctrine connects Article 31 paragraph 3 (c) of the VCLT with harmonisation tendencies, and more particularly with the principle of ‘systemic integration’, which implies a process of interpretation that takes account of the wider normative environment.⁸¹⁹ Although there is discussion in legal doctrine on the exact scope and meaning of Article 31 paragraph 3 (c) of the VCLT⁸²⁰, the Court has sometimes used it as

⁸¹⁵ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 65 *et seq.*

⁸¹⁶ *Ibidem*, para. 67.

⁸¹⁷ This does not mean, however, that the Court in its case law always explicitly mentioned the words ‘harmony’ or ‘harmonious interpretation’ when it cited Article 31 paragraph 3 (c) of the VCLT. Nonetheless, the aim of creating harmony appears from the other phrases that the Court uses in that context (such as the obligation not to read the Convention in ‘a vacuum’) and from the (implicit) ‘harmonizing’ considerations (and effects) that are connected to a citation of Article 31 paragraph 3 (c) of the VCLT.

⁸¹⁸ An exceptional case, in which the Court does not tie the citation of Article 31 paragraph 3 (c) VCLT to the use of external instruments, is *Hirsi Jamaa* (ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, *op. cit.*). This case *inter alia* touched upon the return of migrants intercepted on the high seas to their country of departure, and concluded to a violation of Article 4 of Protocol 4 about the collective expulsion of aliens. When considering this prohibition of collective expulsion of aliens, the Court, *inter alia* by referring to the case of *Demir and Baykara*, said it draws on Article 31 to 33 of VCLT when interpreting its provisions (*ibidem*, para. 170) and that Article 31 paragraph 3 (c) VCLT implies that its must “...take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties” (*ibidem*, para. 171). However, in this case, it was not clear how the Court gave effect to this particular VCLT-provision in the subsequent paragraphs. In these paragraphs, there will be no use of such ‘relevant rules and principles of international law’. Under the subsequent part of the reasoning, the Court did not include external instruments. It the Court only used the VCLT (Articles 31 paragraph 1 and Article 32) as an explanation to focus on the ordinary meaning of the terms and on the *travaux préparatoires* of Protocol No. 4.

⁸¹⁹ For more information about the principle of ‘systemic integration’ (in the Strasbourg context) and for references to doctrine on the issue, see *infra*, Part III, Chapter 1, § 3.2.1.

⁸²⁰ More elaborate, see *infra*, Part III, Chapter 1, § 3.2.

an entry gate to take into account the external context when interpreting the Convention, and to read the Convention ‘in harmony’ with that context.

430. To illustrate external references enabling an harmonious interpretation, we will include all Grand Chamber cases of our pool that make use of external instruments in the context of Article 31 paragraph 3 (c) of the VCLT. In addition, also cases that explicitly mention the principle of harmonious interpretation in connection to the external referencing practice, but without citing the VCLT, are included.⁸²¹ Thus, when the use of an external instrument supports another argumentative function, such as an ‘evolutive’ interpretation, and when the Court, in that respect, does *not* cite the VCLT or does *not* explicitly mention the aim of harmonization, this is not considered as an example of a referencing practice that aims for an harmonious interpretation. This does not mean, however, that the referencing practice used for other functions does not have a ‘harmonizing effect’. In fact, most of the argumentative functions of external instruments (such as defining notions, establishing an ‘evolutive’ interpretation, framing positive actions under the Convention, *etc.*) inherently and indirectly lead to tendencies of harmonization.

431. In several cases, external instruments serve the explicit aim of harmonizing external provisions with the Convention. Then, the ECtHR exercises a harmonious interpretation in the light of co-existing (applicable) external instruments. Based on the analysis of the pool of cases, there are two central situations ‘triggering’ the Court to establish such an interpretation: harmonization with (public) international law (as a response to a State invoking external obligations in its defence) (§ 8.1.) and harmonization because of the existence of (evolving) external positions (§ 8.2.).

§ 8.1. Harmonization with (public) international law

432. The Court sometimes develops a harmonious interpretation when the contested States’ actions or omissions were influenced by an external legal framework. This generally happens when the respondent State points at the existence of – possibly conflicting – external requirements to defend its contested actions. Then, the Court approaches the ‘risk’ of conflict (between Convention and external requirements) by reading the external obligations in harmony with the Convention.

⁸²¹ This is in line with our intention to shed light, mostly, on the *principal* argumentative rationale of each reference.

433. In our pool of examined decisions and judgments, this phenomenon appears in seven cases.⁸²² The cases of *Cudak v. Lithuania* and *Sabeh El Leil v. France* are treated together since they both concern harmonization with public international law on State immunity (§ 8.1.1.). Subsequently, the cases of *Neulinger and Shuruk v. Switzerland* and *X. v. Latvia* are discussed to illustrate harmonization with international law on child abduction (§ 8.1.2.). The case of *Nada v. Switzerland* serves as an example of harmonization between the Convention and requirements directly following from UN Resolutions (§ 8.1.3.) and the case of *Hassan v. the United Kingdom* illustrates harmonization with international humanitarian law (§ 8.1.4.). The case of *Cyprus v. Turkey* illustrates how harmonization with public international law was relevant in the context of an inter-State case (§ 8.1.5.).

§ 8.1.1. Public international law on State immunity

434. The case of *Cudak v. Lithuania* concluded to a violation of Article 6 of the Convention (right to a fair trial) because of a State making use of State immunity from jurisdiction in respect of a claim of a person who alleged to be unfairly dismissed by an embassy. The Government justified the lack of access to a court by relying on external instruments on State immunity.⁸²³ With a reference to Article 31 paragraph 3 (c) of the VCLT, the Court stressed that the Convention, including Article 6 of the Convention, cannot be interpreted in a vacuum.⁸²⁴ The Court said in that respect that it remains "...mindful of the Convention's special character as a human rights treaty", but that it also must "...take the relevant rules of international law into account, including those relating to the grant of State immunity".⁸²⁵ While the Court here did not explicitly use the notion of 'harmonious interpretation', it nonetheless pointed out the importance of considering the external context of international law when interpreting the Convention. In respect of this external context of public international law, the Court even established some presumption that this context, in principle, does not disproportionately interfere with human rights protection. This more particularly appeared from the following phrases:

"It follows that measures taken by a High Contracting Party which reflect generally recognised

⁸²² ECtHR (GC), *Cudak v. Lithuania*, op. cit.; ECtHR (GC), *Neulinger and Shuruk v. Switzerland* op. cit.; ECtHR (GC), *Sabeh El Leil v. France*, op. cit.; ECtHR (GC), *Nada v. Switzerland*, op. cit.; ECtHR (GC), *X v. Latvia*, op. cit.; ECtHR (GC), *Hassan v. the United Kingdom*, op. cit.; ECtHR (GC) *Turkey v. Cyprus (just satisfaction)*, op. cit.

⁸²³ ECtHR (GC), *Cudak v. Lithuania*, op. cit., para. 50: "As regards the proportionality of the restriction, the Government observed that international legal instruments and the case-law of a certain number of States considered that, in employment-related disputes, State immunity was not limited when the employer was a foreign embassy. Both in Lithuania and Poland, questions of State immunity were governed by customary international law, such questions not having been resolved by any bilateral agreements. In support of their argument, the Government relied on Article 32 of the Basle Convention, Article 38 § 2 of the Vienna Convention on Diplomatic Relations and Article 11 § 2 (c) of the United Nations Convention on Jurisdictional Immunities of States and their Property. They contended that States enjoyed a discretionary power of appointment to official posts. The same applied to the "dismissal" or "termination of contract" of civil servants after an inquiry or an investigation as part of the supervisory or disciplinary powers exercised by the employer State".

⁸²⁴ *Ibidem*, para. 56.

⁸²⁵ *Ibidem*.

rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity ...".⁸²⁶

435. The ECtHR, in a spirit of 'harmonious interpretation', accepts that public international law (generally accepted by the community of nations), inherently includes some restrictions to human rights law, but holds that these restrictions are only allowed when they constitute a proportional interference. To examine *in concreto* the proportionality, the Court took account of international law regarding State immunity, with particular attention for the ILC Draft Articles of 1991 and the UN Convention on Jurisdictional Immunities of States and their Property of 2004 (based on the Draft Articles). The Court concluded from these instruments that "...the application of absolute State immunity has, for many years, clearly been eroded".⁸²⁷ The Court subsequently assessed the circumstances of the case in light of the exceptions to State immunity, which *inter alia* include staff of diplomatic missions.⁸²⁸ It paid attention to the issue of 'State consent' because it considered it relevant that the external rules, as demonstrated by the ILC Yearbook of 1991, "...appeared to be consistent with an emerging trend in the legislative and treaty practice of a growing number of States".⁸²⁹ Because Lithuania was no member to the external convention establishing exceptions to State immunity, the Court, with support of a ICJ judgment⁸³⁰, acknowledged that "...it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law...".⁸³¹ The Court considered the external framework to be applicable (the ILC Draft Articles and the UN Convention apply to the respondent State under customary international law)⁸³² and concluded that the applicant fell under the exceptions on State immunity. The latter contributed to the non-proportionality of the interference and a violation of Article 6 of the Convention.⁸³³

⁸²⁶ *Ibidem*, para. 57.

⁸²⁷ *Ibidem*, para. 64.

⁸²⁸ *Ibidem*, para. 65: "The 1991 Draft Articles, on which the 2004 United Nations Convention (and Article 11 in particular) was based, created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contracts with the staff of its diplomatic missions abroad. However, that exception was itself subject to exceptions whereby, in substance, immunity still applied to diplomatic and consular staff in cases where: the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; the employee was a national of the employer State; or, lastly, the employer State and the employee had otherwise agreed in writing".

⁸²⁹ *Ibidem*, para. 66.

⁸³⁰ The Court referred more particularly to the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 41, para. 71.

⁸³¹ *Ibidem*, para. 66. In that connection, the Court noted that the respondent State did not object to (nor voted against) the exceptions that appear in international law regarding State immunity.

⁸³² *Ibidem*, para. 67.

⁸³³ *Ibidem*, paras. 74-75.

436. The issue of *Sabeh El Leil v. France* was similar and the Grand Chamber used Article 31 paragraph 3 (c) of the VCLT in a comparable manner.⁸³⁴ In light of the idea of harmonious interpretation, it again said that restrictions to access to court are inherent to rules of State immunity⁸³⁵, that these rules – nonetheless – also contain exceptions to State immunity, and that State immunity had been eroded for many years.⁸³⁶ The Court reiterated that the Convention of Jurisdictional Immunities of 2004 applied under customary international law “...even if the State in question has not ratified that Convention, provided it has not opposed it either”.⁸³⁷ Since France has not ratified the Convention in question but did not oppose it either⁸³⁸, the provisions of that Convention thus applied under customary international law.⁸³⁹ Also in this case, the applicant fell under the exceptions to State immunity.⁸⁴⁰ Hence, the Court was of the opinion that the French courts, “...by upholding in the present case an objection based on State immunity and dismissing the applicant’s claim without giving relevant and sufficient reasons...”, did not “...preserve a reasonable relationship of proportionality”.⁸⁴¹ Like in the case of *Cudak*, the domestic negligence of observing rules of customary international law constituted a pertinent and ‘aggravating’ element in the conclusion of non-proportionality of the interference. In a spirit of harmonious interpretation, and with a citation of Article 31 paragraph 3 (c) of the VCLT, the Court ‘sanctioned’ the State for not having observed its obligations under customary law, as they were reflected in external international instruments.

437. In the forementioned referencing practice, the ECtHR verifies whether the State complied with an external framework. *In casu*, the State’s interference with human rights was not obliged under general international law.⁸⁴² The latter constituted an ‘aggravating’ factor *vis-à-vis* the State’s actions and contributed to the non-proportionality of the national measures.⁸⁴³ *A contrario*, this suggests that when international law requires a certain behavior

⁸³⁴ ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, paras. 48 and 49.

⁸³⁵ *Ibidem*, para. 41.

⁸³⁶ *Ibidem*, para. 53.

⁸³⁷ *Ibidem*, para. 54.

⁸³⁸ The Court stressed that France signed the Convention and that the ratification was pending before the French Parliament.

⁸³⁹ *Ibidem*, paras. 57-58.

⁸⁴⁰ *Ibidem*, paras. 60 and 66.

⁸⁴¹ *Ibidem*, para. 67.

⁸⁴² The law on State immunity might possibly interfere with Article 6 ECHR, but, *in casu*, the applicant fell under the exceptions to State immunity.

⁸⁴³ Such a use is considered as a separate argumentative function, and had been discussed earlier, in detail (*supra*, § 7.4. of this Chapter). The difference between the cases of *Cudak* and *Sabeh El Leil*, when compared to the cases that are discussed under § 7.4. is that the Court, in these two cases, explicitly argued within a rationale of harmonious interpretation, combined with a citation of Article 31 paragraph 3 (c) of the VCLT. Note that in the case of *Perinçek v. Switzerland* (mentioned as an example under *supra*, § 7.4.), the Court referred to the aim of harmonious interpretation to avoid a conflict and to coordinate the effects of the Convention with external obligations. In the latter case, the Court considered that the criminalisation of denial of genocide, *inter alia* because this criminalisation was not required under international law, was not necessary in a democratic society (ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 262 *et seq.*). The *Perinçek* case, although it refers to the aim of harmonious interpretation, had not been included under this paragraph because in this case, there is no need to create harmony with international law: because there is no international legal obligation to criminalize the denial of genocide, there is no question about reconciling Article 10 ECHR (on the freedom of speech) with such an

and when harmonization (between general international law and the ECHR) may *not* be possible, that external obligations may (partly) justify an interference with the Convention, not because of offering a 'legal basis' or a 'legitimate aim', but because of contributing to the proportionality of the interference.

§ 8.1.2. International law on child abduction

438. The cases of *Neulinger and Shuruk* and *X v. Latvia* both use Article 31 paragraph 3 (c) VCLT in respect of harmonious interpretation with international law on child abduction.
439. The case of *Neulinger and Shuruk* concerned an order from Switzerland for a return of a child with the mother to the father's country of residence (Israel) from which the child had been removed. This allegedly conflicted with Article 8 of the Convention on the right to family life. Switzerland argued that its order of return followed from its obligations under the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (hereafter: "Hague Convention on Child Abduction"). The Government thus explained and justified the child's return in light of how it interpreted the requirements of the Hague Convention.⁸⁴⁴
440. In its argumentation of the case, the Court examined whether the interference that resulted from the return order was justified in a democratic society. The Court used Article 31 paragraph 3 (c) of the VCLT to stress that the Convention "...cannot be interpreted in a vacuum..." and explicitly said in this respect that it "...must be interpreted in harmony with the general principles of international law" and that "...account should be taken ... of any relevant rules of international law applicable in relations between the parties", in particular the rules concerning the international protection of human rights.⁸⁴⁵ The Court 'connected' the latter statement to the Hague Convention on Child Abduction and to the CRC.⁸⁴⁶ More particularly, in line with Article 31 paragraph 3 (c) VCLT, it that

"[I]n matters of international child abduction, the obligations that Article 8 imposes on the Contracting States must...be interpreted taking into account, in particular, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980...and the Convention on the

external obligation. Nonetheless, the Court, in this case, gave the impression that in case such an external obligation exists, that this – stimulated by an ideal of harmonization – may contribute to justifying an interference with the Convention. More elaborate on this case, see *supra*, paras. 410-414.

⁸⁴⁴ ECtHR (GC), *Neulinger and Shuruk*, *op. cit.*, paras. 98 and 118.

⁸⁴⁵ *Ibidem*, para. 131.

⁸⁴⁶ *Ibidem*, para. 132.

Rights of the Child of 20 November 1989.⁸⁴⁷ The Court adds in respect of the Hague Convention that it has "...espoused the provisions of the Hague Convention on a number of occasions".⁸⁴⁸

Besides the Hague Convention and the CRC, the Court took account of multiple other external (non-binding) instruments offering information on the incorporation and interpretation of the Hague Convention, such as the Explanatory Report of Ms Elisa Perez-Vera on the drafting of the Hague Convention, a case of the French Court of Cassation, of the Aix-en Provence Court of Appeal, of the Finnish Supreme Court, and of the House of Lords of the UK.⁸⁴⁹

441. By making use of the principle of Article 31 paragraph 3 (c) of the VCLT, the ECtHR considered it as an obligation ("account *should* be taken") to interpret the Convention harmoniously with States' external obligations. Nonetheless, it implicitly acknowledged its competence to have 'the last word' about these external obligations in light of the Convention, as a special instrument of human rights protection. The Court indeed suggested that harmonious interpretation cannot be used as 'excuse' for not observing human rights by stressing the "...special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings" and the Court's own mission, as set out in Article 19, "...to ensure the observance of the engagements undertaken by the High Contracting Parties...".⁸⁵⁰

442. Thus, in respect of harmonious interpretation, and even when the domestic courts applied and interpreted an external instrument (like *in casu*, the Hague Convention), the Court stressed its competence "...to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8".⁸⁵¹ Although it is "...not the Court's task to take the place of the

⁸⁴⁷ *Ibidem*.

⁸⁴⁸ *Ibidem*.

⁸⁴⁹ *Ibidem*, paras. 58-64.

⁸⁵⁰ *Ibidem*, para. 133.

⁸⁵¹ *Ibidem*. As a subsequent step in the reasoning on the justification of the interference, the Court considered whether the State – within its margin of appreciation – found a fair balance between the competing interests at stake (*ibidem*, para. 134). In this examination, the Court *inter alia* found support in the existence of a "broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount" (*ibidem*, para. 135). The Court, to support the existence of this "broad consensus" referred to the UN Declaration on Rights of the Child, the CRC, the Working group drafting the CRC, the Committee on the Rights of the Child, doctrine, the UNCHR Guidelines on Determining the Best Interest of the Child, the CEDAW, the ICCPR, a HRC's General Comment, and in particular, the EU Charter). This aspect of the legal reasoning, however, did not seem attached to the VCLT. The Court thus tied to Article 31 paragraph 3 (c) of the VCLT the principle of 'harmonious interpretation' in respect of which account should be taken of "any relevant rules of international law applicable in relations between the parties" (*in casu*, the Hague Convention and the CRC), but it did not attach a search for a 'broad consensus, including in international law' to it. Indeed, the Court, after citing Article 31 paragraph 3 (c) of the VCLT, said in the subsequent paragraph that *therefore* the Hague Convention and the CRC should be taken into account when interpreting the Convention (*ibidem*, para. 132). A similar deduction from the VCLT was not present in respect of the 'broad consensus'-argument (*ibidem*,

competent authorities...”⁸⁵², the Court is competent to verify whether they secured the Convention guarantees.⁸⁵³ The Court *in casu* arrived at a violation of Article 8 of the Convention on the respect to family life.

443. The case of *X v. Latvia* was about a State’s failure to conduct a detailed examination of all relevant points when deciding whether to return a child pursuant to the Hague Convention on Child Abduction. The Court concluded with a violation of Article 8 of the Convention on the right to family life. Some argumentative aspects of this case differ from *Neulinger and Shuruk*. Firstly, the Court, in *X v. Latvia*, elaborately cited the case of *Nada v. Switzerland*, which was a case issued after *Neulinger and Shuruk*.⁸⁵⁴ The Court literally included the relevant paragraphs of the *Nada*-case about how the Convention should not be interpreted in a vacuum by giving account to “...any relevant rules of international law applicable in the relations between the parties...” and especially, about how there is an ‘assumption of harmonization’ (because of the need to avoid any opposition) when “... a number of apparently contradictory instruments are simultaneously applicable...”.⁸⁵⁵ Accordingly, like in *Neulinger and Shuruk*, the Court stressed that Article 8 of the ECHR must be interpreted in the light of the Hague Convention and the CRC.⁸⁵⁶

444. In *Neulinger and Shuruk* the Court highlighted the “...special character of the Convention as an instrument of European public order”⁸⁵⁷ as well as its competence to exercise a human rights review on national decisions applying and interpreting external instruments.⁸⁵⁸ In the case of *X v. Latvia*, the Court did not very much stress its special role as a human rights body, but rather highlighted its role as a harmonizing body. According to the Court, however, this role does not stand in the way of its human rights observance. The Court, indeed, subsequent to acknowledging that the Convention should be read in light of the Hague Convention, the CRC and the relevant rules applicable between the parties⁸⁵⁹, said explicitly:

para. 135). The use of external instruments to establish a broad consensus in respect of the importance of ‘child best interests’ had been mentioned as an illustration of the argumentative function of importing a certain concept and its definition, see *supra*, § 4.2.5. of this Chapter. That the VCLT, according to the Court, is obliging it to take account of the Hague Convention and the CRC, is one thing. Whether it also ‘obliges’ to take account of all other external instruments (including non-binding law), is another. One should note that the Court, in this case, did not explicitly attach the use of such non-binding instruments to Article 31 paragraph 3 (c) VCLT.

⁸⁵² It was not the task of the Court, for example, to examine whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention.

⁸⁵³ *Ibidem*, para. 141.

⁸⁵⁴ *Ibidem*, para. 92.

⁸⁵⁵ ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 92, with reference to ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 169-170.

⁸⁵⁶ *Ibidem*, para. 93.

⁸⁵⁷ *Ibidem*, para. 133.

⁸⁵⁸ *Ibidem*.

⁸⁵⁹ *Ibidem*, para. 93.

"This approach involves a combined and harmonious application of the international instruments, and in particular in the instant case of the Convention and the Hague Convention, regard being had to its purpose and its impact on the protection of the rights of children and parents. Such consideration of international provisions should not result in conflict or opposition between the different treaties, provided that the Court is able to perform its task in full, namely 'to ensure the observance of the engagements undertaken by the High Contracting Parties' to the Convention...., by interpreting and applying the Convention's provisions in a manner that renders its guarantees practical and effective".⁸⁶⁰

445. Subsequently, the Grand Chamber took account of the relevant provisions of the Hague Convention.⁸⁶¹ Here, we noticed that the Court, compared to the case of *Neulinger and Shuruk*, gave particular attention to its subsidiary nature: it stressed that national courts in fulfilling their tasks under Article 8 enjoy a 'margin of appreciation'⁸⁶², that the Court "...does not propose to substitute its own assessment for that of the domestic courts", and that its findings in the previous *Neulinger and Shuruk*-judgment did not "...in itself set out any principle for the application of the Hague Convention by the domestic courts".⁸⁶³ Also, the Court stressed the importance of avoiding a conflict with external instruments.

§ 8.1.3. Requirements directly following from UN Resolutions

446. The case of *Nada v. Switzerland* is about Swiss legislation implementing several UN Security Council Resolutions and preventing the applicant, who is an Egyptian national, from travelling through Switzerland due to the fact that his name appeared on a list of the UN Security Council's Sanctions Committee of persons suspected of being associated with terrorism. In its preliminary remarks, the Government argued that the application should be considered inadmissible *ratione personae* (and *ratione materiae*) with the Convention because the contested actions were the result of UN instruments which are binding to the State and which prevail over any other international agreement.⁸⁶⁴

⁸⁶⁰ *Ibidem*, para. 94.

⁸⁶¹ *Ibidem*, paras. 98 *et seq.* The Court in *X v. Latvia*, with reference to *Neulinger and Shuruk*, explained how an harmonious interpretation between the ECHR and the Hague Convention could be achieved: the exceptions to a child's immediate return as proved in the Hague Convention should "...genuinely be taken into account by the requested court" and "...must be evaluated in the light of Article 8 of the Convention (*ibidem*, para.105). The Court concluded in respect of both the ECHR and the Hague Convention by saying that the national decisions "...would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention" (*ibidem*, para. 107). In respect to the latter statement the Court referred to its specific role by saying that the latter conclusion enabled the Court, "...whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it" (*ibidem*).

⁸⁶² *Ibidem*, para. 101.

⁸⁶³ *Ibidem*, para. 105.

⁸⁶⁴ ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 102-103. For this argument of 'hierarchy', the Government looked for interpretative support in case law of the ICJ.

447. The Grand Chamber did not follow this argument.⁸⁶⁵ It did not give blind priority (and a hierarchical higher position) to UN instruments, nor did it disapply the Convention. Instead, it stressed the aim of harmonious interpretation (including an assumption of equivalent protection and of absence of conflict⁸⁶⁶). Indeed, when the Court examined whether the interference with Article 8 of the Convention was justified, it stressed that the Convention "...cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law", and that, in the light of Article 31 paragraph 3 (c) of the VCLT, account should be taken of "...any relevant rules of international law applicable in the relations between the parties", in particular the rules concerning the international protection of human rights.⁸⁶⁷ In addition, the Court, in respect of subsequent treaty obligations, pointed out that "[S]tates are assumed not to derogate from their previous obligations".⁸⁶⁸ The Court in the judgment took account of the fact that the State only became a member of the UN in 2002, thus at a moment it was already bound by the ECHR.⁸⁶⁹

448. In line with a principle of harmonization (also when external instruments seem to be 'contradictory' to the ECHR), the Court *in casu* established a presumption that the UN Resolutions do not impose obligations that infringe upon the Convention.⁸⁷⁰ It held that where

"...a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law".⁸⁷¹

To arrive at the latter statement, the Court did not only refer to precedents, but also to the report of the ILC on the issue of 'fragmentation'.⁸⁷²

449. When applying the latter principles to the case, the Court again suggested an aim of harmonious interpretation by saying that it must "... choose the interpretation which is most

⁸⁶⁵ *Ibidem*, paras. 198-199. Earlier in this work, we have demonstrated that external instruments had been used to establish a connection between State behavior and external obligations (*in casu* emanating from the UN) in relation to the question of State responsibility. The *Nada*-case was relevant in that respect. In this case, indeed, the Court elaborated on the relationship between the Convention and UN Security Council Resolutions. It thereby highlighted the (rebuttable) 'presumption of equivalent protection' offered by UN instruments. For more on this issue, see *supra*, para. 402. See also *ibidem*, paras. 171-172.

⁸⁶⁶ On this presumption, see *supra*, § 7.3.2. of this Chapter.

⁸⁶⁷ *Ibidem*, para. 169.

⁸⁶⁸ *Ibidem*, para. 170.

⁸⁶⁹ *Ibidem*, para. 176.

⁸⁷⁰ *Ibidem*, para. 171.

⁸⁷¹ *Ibidem*, para. 170.

⁸⁷² *Ibidem*, with reference to *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 (13 April 2006), ('ILC Koskenniemi Report').

in harmony with the requirements of the Convention and which avoids any conflict of obligations".⁸⁷³ In a spirit of reading the different instruments together, the UN external obligations did, at first sight, not escape the radar of human rights supervision.⁸⁷⁴ Since the UN instrument in clear and explicit words opened the door to infringements of human rights, the Court pointed out that the presumption of equivalent protection had been rebutted.⁸⁷⁵ States should therefore, without circumventing the binding nature of UN obligations, have done the effort to implement the obligations without circumventing the Convention.⁸⁷⁶ Also in the final consideration of this case, the Court argued in a spirit of 'harmonization', by acknowledging that the previous finding

"... dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court's view, the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent..."⁸⁷⁷

According to the Grand Chamber, there was no real question of a 'conflict of norms' and therefore, there was no real question about solving that conflict. If the national authorities had created harmony, there would have been no conflict between the ECHR and the external obligations. The States' actions could in principle have been in compliance both with the UN norms and with the ECHR. Therefore, the interference was not justified under the Convention.

450. The Court concluded on the merits, *inter alia* because the applicant experienced travel restrictions and could no longer visit his friends and family, that Article 8 of the Convention had been violated. Regarding the applicant's right to an effective remedy (Article 13 ECHR) in respect of the human rights violations, the Court held, with argumentative support of the

⁸⁷³ *Ibidem*, para. 171. The Court took account of the United Nations' important role in promoting and encouraging respect for human rights, which led to the expectation that "...clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law". The Court subsequently entered into precise examinations of the content and requirements of the UN resolutions. The Court more particularly examined whether the States had freedom when implementing the UN obligations whereby it looked at the precise wording and the context of the resolutions as well as their pursued objectives in light of their preamble and the purpose and principles of the UN (*ibidem*, para. 175). In support of the statements as to how the Court should examine UN resolutions, the Court referred to ICJ-case law and to the ECJ *Kadi*-case. Subsequently, the Court, again with reference to the *Kadi*-case stressed that resolutions are binding but nonetheless leave states a free choice among possible models for transposition since the Charter imposes an obligation of result leaving the States free "...to choose the means by which they give effect to the resolutions" (*ibidem*, para. 176). The Court accordingly concluded that the resolutions afforded the national authorities a certain flexibility in the mode of implementation (*ibidem*, para. 177-178).

⁸⁷⁴ For a more critical discussion of this case, arguing that the external obligations actually *did* escape the radar of human rights supervision, see *infra*, para. 876. See also paras. 472, 643, and 837 *et seq.*

⁸⁷⁵ *Ibidem*, para. 172. See also *ibidem* para. 196. The Court ruled that *in casu*, "...the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation".

⁸⁷⁶ *Ibidem*, para. 195.

⁸⁷⁷ *Ibidem*, para. 197.

ECJ *Kadi*-judgment⁸⁷⁸, that the principles governing the international legal order under the UN should not result in excluding any judicial review of internal lawfulness of the contested regulation (implementing UN obligations under a Security Council resolution).⁸⁷⁹ Having regard to the foregoing, the ECtHR also concluded to the infringement of the applicant's right to an effective remedy.⁸⁸⁰

§ 8.1.4. International humanitarian law

451. The case of *Hassan v. the United Kingdom* concerned the internment of an Iraqi national by armed forces in Iraq. *Vis-à-vis* the merits under Article 5 of the Convention, the Government stressed the need for interpreting and applying the Convention in harmony with international humanitarian law, "...which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention".⁸⁸¹ The Government added in this respect that

"... it had been the consistent approach of the International Court of Justice that international humanitarian law applied as *lex specialis* in the context of an international armed conflict in circumstances where a given human rights treaty also applied. This view was supported by the Report of the Study Group of the International Law Commission on the "Fragmentation of International Law" (see paragraph 38 above) and by academic writers, such as the authors of Fleck's "The Handbook of International Humanitarian Law" and Gill and Fleck's "The Handbook of the International Law of Military Operations".⁸⁸²

Therefore, the United Kingdom held that "Article 5 was displaced by international humanitarian law as *lex specialis*, or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Conventions...".⁸⁸³ This pointed at the Government's wish to resolve the possible conflict of norms by giving (hierarchical) priority to the *lex specialis* of international humanitarian law. The Government, by using support of ICJ case law and of "...seemingly universal State practice", stressed "...that the application of international humanitarian law

⁸⁷⁸ In the *Kadi*-judgment of 3 September 2008 (Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the EU and Commission of the European Communities*, ECJ Reports 2008 I-06351), the ECJ had to decide whether the UN SC Resolutions should enjoy primacy over EU law. It held that it could review the lawfulness of the EU regulation transposing the UN Resolutions. For more on this case, see *i.a.*: J. Kokott and C. Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?", *EJIL* 2012, vol. 23, no. 4, pp. 1014-1024.

⁸⁷⁹ *Ibidem*, para. 212.

⁸⁸⁰ *Ibidem*, para. 213.

⁸⁸¹ ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 87.

⁸⁸² *Ibidem*, para. 87.

⁸⁸³ *Ibidem*, para. 88.

as *lex specialis* was a general principle, and not one that depended on whether there had been a derogation under an applicable human rights treaty”.⁸⁸⁴

452. According to the Government, only under the condition that the Court was not willing to give priority to international humanitarian law as a *lex specialis*, a ‘compatible’ interpretation of both instruments should be pursued. It said that “...if the Court were to find that Article 5 applied and was not displaced or modified in situations of armed conflict,...the list in Article 5 § 1 [ECHR] of permissible purposes of detention had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis*, namely international humanitarian law”.⁸⁸⁵ The Government stressed that such harmonious interpretation should lead *in casu* to conclusion that “[T]he taking of prisoners of war pursuant to the Third Geneva Convention, and the detention of civilians pursuant to the Fourth Geneva Convention, had to be a lawful category of detention under Article 5...”.⁸⁸⁶

453. The Grand Chamber noted that “[T]his is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law”.⁸⁸⁷ It did not agree with ‘disapplying’ the Convention, but preferred an harmonious interpretation. The Court reiterated that human rights law and international humanitarian law may apply concurrently⁸⁸⁸, and that, in line with Article 31 paragraph 3 (c) of the VCLT, the Convention had to be interpreted in harmony with other rules of international law, including the rules of international humanitarian law.⁸⁸⁹ For the Grand Chamber, it was relevant that the four Geneva Conventions of 1949 intended to mitigate the horrors of war and “...were drafted in parallel to the European Convention on Human

⁸⁸⁴ *Ibidem*, para. 90. Article 15 ECHR is about derogation in times of emergency and provides: 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

⁸⁸⁵ *Ibidem*, para. 89.

⁸⁸⁶ *Ibidem*.

⁸⁸⁷ *Ibidem*, para. 99. The Court in this paragraph also elaborated on its precedent case of *Al-Jedda v. the United Kingdom* (equally part of our pool of cases) and pointed at the difference between that case and the one of *Hassan* by saying that “...in *Al-Jedda*, cited above, the United Kingdom Government did not contend that Article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions. Instead they argued that the United Kingdom was under an obligation to the United Nations Security Council to place the applicant in internment and that, because of Article 103 of the United Nations Charter, this obligation had to take primacy over the United Kingdom’s obligations under the Convention. It was the Government’s case that an obligation to intern the applicant arose from the text of United Nations Security Council Resolution 1546 and annexed letters and also because the Resolution had the effect of maintaining the obligations placed on occupying powers under international humanitarian law, in particular Article 43 of the Hague Regulations (see *Al-Jedda*, cited above, § 107). The Court found that no such obligation arose...” (*ibidem*, para. 99).

⁸⁸⁸ *Ibidem*, para. 77.

⁸⁸⁹ *Ibidem*, para. 102.

Rights and enjoy universal ratification”.⁸⁹⁰ It held that already in the case of *Varnava and Others*, the Court ruled on reading Article 2 of the Convention (right to life) in the light of international humanitarian law.⁸⁹¹ These observations, the Court says in the *Hassan*-case, “...apply equally in relation to Article 5”.⁸⁹²

454. The Grand Chamber supported the idea of ‘harmonious interpretation’ by citing case law of the ICJ: “...the International Court of Justice has held that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict”.⁸⁹³ The Grand Chamber put forward that it *must* interpret and apply the ECHR consistent with the framework under international law delineated by the ICJ.⁸⁹⁴ Thus, relying on ICJ case law and in a spirit of ‘harmonization’, it ruled that the Convention did not had to set a step aside, but continued to apply even in situations of international armed conflict, “...albeit interpreted against the background of the provisions of international humanitarian law”.⁸⁹⁵ The safeguards of the Convention and the safeguards of international humanitarian law thus ‘co-exist’ in times of armed conflict. The Court in this respect introduced the idea of ‘accommodation’:

“...the grounds of permitted deprivation of liberty [in the ECHR]... should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions”.⁸⁹⁶

⁸⁹⁰ *Ibidem*.

⁸⁹¹ *Ibidem*. The case of *Varnava and Others v. Turkey* of 18 September 2009 (which is also part of our pool) offered an example of ‘implicit’ harmonious interpretation with international humanitarian law. In this case the Court, without explicitly referring to the Article 31 paragraph 3 (c) of the VCLT and without explicitly referring to the notion of ‘harmonization’, stressed that “...article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law...” (ECtHR (GC), *Varnava and Others v. Turkey*, *op. cit.*, para. 185). The latter body of law, indeed, plays “...an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict” (*ibidem*).

⁸⁹² *Ibidem*, para. 102.

⁸⁹³ In its judgment of *Armed Activities on the Territory of the Congo*, the International Court of Justice observed, with reference to its advisory opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that “[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”. See ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 102. See also *ibidem*, para. 77, in which the Court in considering the State’s territorial jurisdiction under Article 1 of the Convention equally stressed that “...to accept the Government’s argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently... As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part... This applies equally to Article 1 as to the other articles of the Convention”.

⁸⁹⁴ *Ibidem*, para. 102.

⁸⁹⁵ *Ibidem*, para. 104.

⁸⁹⁶ In the same paragraph the Court adds that it “...is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15...” and that “It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers” (*ibidem*, para. 104).

Against the latter background, the ECtHR acknowledged that “...deprivation of liberty pursuant to powers under international humanitarian law must be ‘lawful’ to preclude a violation of Article 5 § 1”.⁸⁹⁷ Therefore, the detention had to comply with the rules of international humanitarian law and with the fundamental purpose of Article 5 § 1: the protection of individuals from arbitrariness.⁸⁹⁸ The procedural safeguards in relation to detention taking place during an international armed conflict must thus be “...interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law”.⁸⁹⁹

455. The Court ruled that the lack of a formal derogation under Article 15 of the Convention does thus not stand in the way of the Court taking account of the context and the provisions of international humanitarian law in order to interpret and apply the Convention. It added that this is only so “...where this is specifically pleaded by the respondent State”.⁹⁰⁰ Thus, when a State did not plead to take into account international humanitarian law, the Court will not consider it. The Court added that “[I]t is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect”.⁹⁰¹

456. When applying the above-mentioned principles to the case, the Court held that, since “...all parties involved were High Contracting Parties to the Four Geneva Conventions”..., it was clear that “...the four Geneva Conventions were applicable”.⁹⁰² The Court then considered the circumstances under the Geneva Conventions and concluded that the contested detention was “...consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary”.⁹⁰³ Accordingly, it did not find a violation of Article 5 of the Convention in the present case.⁹⁰⁴

457. Note that, apart from the case of *Hassan*, also other cases of our pool took account of instruments of international humanitarian law, for instance, the cases of *Varnava and Others v. Turkey*, *Maktouf and Damjanović v. Bosnia and Herzegovina*, and *Sargsyan v. Azerbaijan*. While the creation of ‘harmony’ might have been an implicit inspirational factor in all these cases, they are not included in this section because the Court did not refer to Article 31 paragraph 3 (c) of the VCLT and did not explicitly stress the aim of harmonious interpretation.

⁸⁹⁷ *Ibidem*.

⁸⁹⁸ *Ibidem*, para. 105.

⁸⁹⁹ *Ibidem*, para. 106.

⁹⁰⁰ *Ibidem*, para. 107.

⁹⁰¹ *Ibidem*.

⁹⁰² *Ibidem*, para. 108.

⁹⁰³ *Ibidem*, para. 110.

⁹⁰⁴ *Ibidem*, para. 111.

§ 8.1.5. 'Just satisfaction' in an inter-State case

458. Various cases in the context of harmonious interpretation with (public) international law have offered examples of how certain Governments have 'used' their external obligations to defend some contested behavior. In the inter-State case of *Cyprus v. Turkey*, on the contrary, the respondent Government preferred the application of the provisions of the Convention to the detriment of the application of public international law.
459. This case touched upon the question of 'just satisfaction' on behalf of the Republic of Cyprus (the applicant Government) in the light of Article 41 of the Convention and more particularly, on whether the satisfaction claims had been lodged out of time. The respondent Turkish Government "...insisted that the specific temporal provisions of the Convention...should have precedence over the general principles of international law" in order to allow establishing a time-bar to the claims and thus in order to avoid reviving claims in an application for just satisfaction submitted nearly nine years after the merits-judgment.⁹⁰⁵
460. The Grand Chamber did not follow the arguments of Turkey and did not give straightforward precedence to the provisions of the Convention over public international law. Instead, the Court aimed at an harmonious interpretation. As part of its arguments, the Court brought into mind that the provisions of the Convention cannot be interpreted and applied in a vacuum and that, "[D]espite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law...". With a reference to Article 31 paragraph 3 (c) of the VCLT and to some precedents (including the case of *Demir and Baykara*), the Court repeated its well-know phrase that "...it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties".⁹⁰⁶
461. Against that background, the ECtHR considered provisions of general international law in respect of just satisfaction claims in inter-State cases and drew from it general criteria. It endorsed that also general international law, in principle, recognized the obligation of the applicant Government in an inter-State dispute to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State.⁹⁰⁷ Inspired by an ICJ-judgment, the Court considered it of importance

⁹⁰⁵ ECtHR (GC), *Turkey v. Cyprus (just satisfaction)*, *op. cit.*, para. 22.

⁹⁰⁶ *Ibidem*, para. 23.

⁹⁰⁷ *Ibidem*, para. 24. The Court argued more precisely that general international law, as demonstrated by a case of the ICJ (*Nauru v. Australia*, Preliminary Objections, 1992 ICJ Rep. 240), recognised that the applicant Government in an inter-State dispute has the obligation to act without undue delay in order to uphold legal certainty and not

that the delay (for requests of just satisfaction) did not cause any prejudice to Turkey but that it was for Turkey itself to prove convincingly the imminence or the likelihood of such prejudice. According to the Court, there was however no such proof delivered.⁹⁰⁸

462. Still in a spirit of harmonious interpretation with public international law on 'just satisfaction', the Court, with reference to the PCIJ, stressed that the most important principle of international law relating to a violation by a State is "...that the breach of an engagement involves an obligation to make reparation in an adequate form".⁹⁰⁹ Again with references to ICJ case law, it added:

"Despite the specific character of the Convention, the overall logic of Article 41 is not substantially different from the logic of reparations in public international law, according to which "it is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (see the judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, p. 81, § 152). It is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered (see the judgment of the International Court of Justice in the *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, ICJ Reports 1974, pp. 203-205, §§ 71-76)".⁹¹⁰

463. While the Court endorsed a principle of harmonious interpretation with public international law on the matter, it equally highlighted the specific character of the Convention by noting that

"...it must be always kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims. In this respect, the Court notes that Article 19 of the aforementioned Articles on Diplomatic Protection recommends "[t]ransfer[ring] to

to cause disproportionate harm to the legitimate interests of the respondent State. The ICJ indeed considered that, "...even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible", but it also noted that "...international law does not lay down any specific time-limit in that regard" and that it is thus "...for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible". The ICJ also drew attention to the importance to ensure that the delay "...will in no way cause prejudice...with regard to both the establishment of the facts and the determination of the content of the applicable law". In the light of the ICJ-judgment, the Court *inter alia* considered that "...in this context, the 'prejudice' element is first and foremost related to the procedural interests of the respondent Government ("the establishment of the facts and the determination of the content of the applicable law"), and that it was for the respondent Government to prove convincingly the imminence or the likelihood of such a prejudice". According to the Court, no such proof was delivered in the present case. See *ibidem*, para. 26.

⁹⁰⁸ *Ibidem*.

⁹⁰⁹ *Ibidem*, para. 41, with reference to a judgment of the PCIJ, *Factory at Chorzów (Jurisdiction)*, Judgment No. 8, 1927, PCIJ, Series A, No. 9, p. 21.

⁹¹⁰ *Ibidem*, para. 41.

the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions” (*ibid.*). Moreover, in the abovementioned *Diallo* case the International Court of Justice has expressly indicated that “the sum awarded to [the applicant State] in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter’s injury” (see *Diallo (Guinea v. Democratic Republic of the Congo) (Compensation)*, ICJ Rep. 2012, § 57).⁹¹¹

§ 8.2. Harmonization with (evolving) external positions

464. Only in very few cases in the pool, the ECtHR explicitly mentioned Article 31 paragraph 3 (c) VCLT in connection to the use of external instruments to establish an (evolved) ‘shared position’. This only happened in the cases of *Marguš v. Croatia* (explicitly noticing an evolved common ground) and *Catan v. the Republic of Moldova and Russia* (without observing an *evolved* shared position).

465. The case of *Marguš* was about a conviction for war crimes of a soldier who had previously been granted amnesty. The Court examined this case under Article 4 of Protocol No. 7 on the right not to be tried or punished twice (*non bis in idem*). In arguing the case, the Grand Chamber included its well-known phrase that the Convention “...cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part”.⁹¹² It referred in this respect to Article 31 paragraph 3 (c) of the VCLT and stressed that account should be taken of “...any relevant rules of international law applicable in the relations between the parties”, and in particular of the rules concerning the international protection of human rights. When phrasing the latter statements, the Court referred *inter alia* to the precedents of *Demir and Baykara* and *Nada v. Switzerland*.⁹¹³

466. Subsequently, the ECtHR examined the position on the issue under international law.⁹¹⁴ To develop this argumentation, it made use of several external instruments, namely of case law of the ACtHR and several other international courts, of international conventions of humanitarian law, of resolutions and recommendations from international bodies, the Statute of the ICC, *etc.*⁹¹⁵ On that basis, the Court, despite its observation that “...so far no international treaty explicitly prohibits the granting of amnesty in respect of grave breaches of fundamental human rights”⁹¹⁶, concluded that there is a “growing tendency in

⁹¹¹ *Ibidem*, para. 46.

⁹¹² ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, para. 129.

⁹¹³ *Ibidem*.

⁹¹⁴ ‘The position under international law’ is a separate heading under the Grand Chamber’ assessment about the ‘applicability of Article 4 of Protocol No. 7’. See *ibidem*, paras. 129 *et seq.*

⁹¹⁵ *Ibidem*, paras. 131-138.

⁹¹⁶ *Ibidem*, para. 131. The Court for instance observed that: “Article 6 § 5 of the second Additional Protocol to the Geneva Conventions, relating to the protection of victims of non-international conflicts, provides that “[a]t the

international law”⁹¹⁷ to consider amnesties granted for acts which amounted to grave breaches of fundamental human rights as unacceptable.⁹¹⁸ Against this background, the Court concluded that Article 4 of Protocol No. 7 of the Convention was not applicable.⁹¹⁹

467. In this case, unlike most other Grand Chamber cases, the Court did not use Article 31 paragraph 3 (c) VCLT to harmonize with instruments that lie at the direct basis of the contested State behavior. Instead, the Court stressed the aim of ‘harmonization’ to justify why it adapts its viewpoint to external normative developments. By referencing Article 31 paragraph 3 (c) of the VCLT, the Court explained its search for (and use of) a ‘growing tendency in international law’, partly built on non-binding instruments. It is questionable whether such instruments can be brought under the scope of Article 31 paragraph 3 (c) of the VCLT, which speaks of rules “...applicable in the relations between the parties”.⁹²⁰

468. Another case in which the Court builds on comparative materials to highlight the existence of an external position and to harmoniously ‘adapt’ to this position, is the case of *Catan v. the Republic of Moldova and Russia* which *inter alia* touches on the harassment of pupils who wish to be educated in their national language. The Court concluded this case with a violation of Article 2 of protocol 1 to the Convention regarding respect for parents’ philosophical conviction and the right to education. As part of its arguments, the Grand Chamber stressed that – without citing Article 31 paragraph 3 (c) of VCLT but by clearly taking up its content –when interpreting and applying the Convention, “...account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties”. With a reference to *Demir and Baykara*, it added that “...the Convention should so far as possible be interpreted in harmony with other rules of

end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict ...”. Nonetheless, the Court seemed to give large weight to the interpretation of the Inter-American Court of Human Rights of that provision which “...excludes its application in respect of the perpetrators of war crimes and crimes against humanity (see above, paragraph 66, judgment in the case of *The Massacres of El Mozote and Nearby Places v. El Salvador*, § 286). The basis for such a conclusion, according to the Inter-American Court of Human Rights, is found in the obligations of the States under international law to investigate and prosecute war crimes. The Inter-American Court found that therefore “persons suspected or accused of having committed war crimes cannot be covered by an amnesty.” The same obligation to investigate and prosecute exists as regards grave breaches of fundamental human rights and therefore the amnesties envisaged under Article 6 § 5 of the second Additional Protocol to the Geneva Conventions are likewise not applicable to such acts”. *Ibidem*, para. 131.

⁹¹⁷ The Court in this respect also took note of the Chamber-observations “...to the effect that “[g]ranting amnesty in respect of ‘international crimes’ – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law” and that “[t]his understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.” *Ibidem*, para. 130.

⁹¹⁸ *Ibidem*, para. 139. This notion of a ‘growing tendency’ alludes to the observance of ‘evolution’ (although the Court did not explicitly speak of an ‘evolution’ or of ‘evolutive interpretation’). Therefore, we did not treat this case under the argumentative function of using external instruments to establish ‘evolution’. Indeed, in this case, the main aim and concern of the Court seemed to be ‘harmonious interpretation’.

⁹¹⁹ *Ibidem*, para. 141.

⁹²⁰ More elaborate on this provision, see *infra*, Part III, Chapter 1, § 3.2.

international law of which it forms part”.⁹²¹ Therefore, the Court considers of relevance the provisions relating to the right to education, as set out in the UDHR, the Convention Against Discrimination in Education, ICESCR, ICERD, and the CRC.⁹²² In this case, Article 31 paragraph 3 (c) VCLT was not used to harmonize with an applicable external framework invoked by the Government in order to justify its interference with the Convention. Instead, the Court connected the principle of harmonious interpretation to external norms ‘supporting’, rather than potentially ‘contradicting’ the ECHR. In this case, the Court is not concerned with the prevention of a conflict between the ECHR and external obligations (of public law), but with coherence with external human rights obligations.

469. We did also observe this phenomenon in the case of *Sergey Zolotukhin v. Russia*, in which the Court, based on various external instruments, defined the notion of a ‘same offence’ (under the *non bis in idem*-principle) with the specific aim of creating harmony and creating legal certainty, however, without citing Article 31 paragraph 3 (c) VCLT.⁹²³

§ 8.3. Concluding observations

470. The Court puts large stress on the importance of reading human rights provisions together with and against the background of other provisions. It thereby avoids reading the Convention in a vacuum but instead, interprets it in harmony with simultaneously applicable (general principles of) international law. Article 31 paragraph 3 (c) of the VCLT, stressing that account should be taken of any relevant rule applicable between the parties, serves as the Court’s main legal incentive. In connection to harmonious interpretation, the Court also introduces ideas and concepts such as ‘accommodation’, ‘coordination’ of effects, ‘avoiding opposition’, ‘combined application’, *etc.* It even cites the famous study of the ILC, putting the interpretative aim of harmonization in a context of fighting the fragmentation of international law. The Court feels *obliged* to enter such a fight; when explaining harmonious interpretation, it often uses a mandatory vocabulary noting that it *should* take account of the relevant rules of international law, or that the Convention *cannot* be interpreted in a vacuum.

471. In the examined Grand Chamber cases, harmonious interpretation appears in respect of public international law on State immunity and on just satisfaction, international rules on child abduction, international humanitarian law, and requirements rooting in UN Resolutions. When external obligations risk interfering with the Convention, the Grand

⁹²¹ *Ibidem*, para. 136, with reference to ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 67.

⁹²² *Ibidem*.

⁹²³ ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, paras. 78-80. This case had been included also as an example of a use of external instruments to define and import notions and to establish an ‘evolutive’ interpretation, see *supra*, paras. 273 and 307 (which includes a more elaborate discussion of this case).

Chamber does generally not set aside the Convention. Instead, it strives for creating harmony, avoiding to *a priori* step into a hierarchical ordering of precedence from one legal field over another. The Court encourages the Member States to harmonize ‘as far as possible’ their obligations under the ECHR with their external obligations. They should accommodate, and therefore, give effect both to the ECHR and to external obligations in their national measures. When States omit to do so, an unjustified interference with the Convention becomes probable. Thus, the relevance of an harmonious interpretation often plays on the level of the application of the Convention: an interference should not be justified by ‘a conflict’ of obligations, but instead, a ‘conflict’ should be avoided. If not, the interference is prone to be ‘unnecessary in a democratic society’.

472. When developing an harmonious interpretation, the ECtHR often highlights the specific character of human rights protection. Accordingly, in most of the cases, the creation of harmony with the external framework does is not detrimental for the standards of human rights protection. However, sometimes the States’ external obligations appear difficult to reconcile with human rights. In the *Hassan*-case, for example, the effects of the instruments of international humanitarian law seem to put the Convention under considerable external influence, erasing specificities of the Strasbourg protection mechanism. Here, the external obligations actually conflict with human rights and the Court’s harmonizing efforts look somewhat artificial. Thus, the Court, in its attempt to give effect to both areas of law, seems to soften the human rights protection to a more procedural check-up, limited to the question as to whether the detention took place in an arbitrary manner, or not.⁹²⁴

473. Article 31 paragraph 3 (c) VCLT and its aim of ‘systemic integration’ serves the Court in order to respond to States that justify their interference by referring to external obligations and in order to prevent a potential conflict between co-existing legal frameworks. In addition, the Grand Chamber has used the principle of harmonious interpretation in a more independent manner, attaching it to the observance of a shared position. The latter only happens on rare occasions. In one case, the Court mobilizes Article 31 paragraph 3 (c) VCLT to justify why it takes account of an external ‘growing tendency’ observed in a mix of binding and non-binding instruments. In another case, the Grand Chamber mentions the content of Article 31 paragraph 3 (c) of the VCLT (without explicitly including the ‘name’ of the provision) in order to take account of several, mainly ‘hard’, external human rights catalogues.

474. To sum up, the Court generally uses the principle of harmonious interpretation and the underlying idea of ‘systemic integration’ in order to respond to States that excuse their

⁹²⁴ For more on this issue, see *infra* in Part III, paras. 839-840.

behavior with a reference to external obligations. Under these circumstances, referencing external instruments is part of the Court's wish for a harmonious interpretation between the Convention and an external binding and applicable legal framework. Here, the use of Article 31 paragraph 3 (c) VCLT is very much connected to the facts and circumstances of the case, and to the exercise of applying the Convention to the particular circumstances. However, this process of harmonious interpretation might have an impact on the interpretation of the Convention, too. It might even put the scope of the ECHR under pressure, namely when external obligations are difficult to reconcile with human rights (such as in the *Hassan*-case and in the case of *Nada*).⁹²⁵ In addition, but rarely, the aim of an harmonious interpretation is attached to a shared external position, expressed by a mix of binding and non-binding external instruments. Here, the Court, by invoking Article 31 paragraph 3 (c) VCLT, takes the outside normative context into account not because this context had directly influenced the behavior of the State, but in order to establish a shared position that gives shape to the interpretation of the Convention.⁹²⁶

§ 9. External instruments to demonstrate a (lack of a) shared position influencing the States' freedom of discretion

475. External instruments may operate as relevant factors in assessing the width of the 'margin of appreciation' of the Member States. It is a well-known (but sometimes contested) interpretative technique of the Court to – on the basis of comparative law – consider whether or not there is a common approach in respect of a certain legal issue and to connect the width of the States' discretion to that observation.⁹²⁷ When the Court acknowledges an absence of a common approach, this is usually a pertinent factor in establishing a *large* 'margin of appreciation' for the State in relation to applying and balancing human rights (and State interests). *Vice versa*, the observation of a common approach generally narrows the State's appreciation margin.⁹²⁸

⁹²⁵ For a further discussion of these cases in this context, see *infra*, paras. 839-840 and 876.

⁹²⁶ The validity of importing 'soft' instruments under Article 31 paragraph 3 (c) VCLT as well as other evaluative reflections on the use of this provision in connection to external referencing practice, will be largely discussed when addressing questions of legal validity of external references. See *infra*, Part III, Chapter 1, § 3.2.

⁹²⁷ For literature on the doctrine of the 'margin of appreciation', see *i.a.*: R.St.J. Macdonald, "The Margin of Appreciation", in R.St.J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht/Boston/London, 1993, pp. 83-124; P. Mahoney *et al.*, "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice", *Human Rights Law Journal* 1998, vol. 19, pp. 1-36; E. Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights", *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 1996, vol. 56, pp. 240-341; E. Brems, "The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe", in D.P. Forsythe, P.C. McMahon (eds), *Human Rights and Diversity: Areas Studied Revisited*, University of Nebraska Press, Lincoln, 2003, pp. 81-110; S. Greer, "The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?", *UCL Human Rights Review* 2010, vol. 3, pp. 1-14; F. Mena Parras, "Democracy, Diversity and the Margin of Appreciation: a Theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights", *Revista Electronica de Estudios Internacionales* 2015, vol. 29, pp. 1-18.

⁹²⁸ See for example the case of *A, B, C v. Ireland* in which the Court mentions its commonly used phrase: "[o]ne of the relevant factors to determine the breadth of the margin is the existence or absence of a consensus within the

476. Thus, in the application phase of the decision-making process, comparisons are used to verify whether or not the respondent State holds an isolated position. Generally (but there are exceptions), the Court's message to the States is: when there is a common approach and when you behave differently than others, your actions or omissions demand a more rigid supervision and, accordingly, demand stronger arguments to justify an interference with human rights. On the contrary, when there is no common approach, this often leads to a larger margin and a less rigid scrutiny of the Court.

477. One of the factors that are relevant to establish a 'margin of appreciation', is the existence of a shared European approach evidenced by an internal comparison of national laws and practices. In our pool of cases, we have observed this on several occasions (in eight Grand Chamber-cases to be particular⁹²⁹). Occasionally, besides only comparing national materials, the Court, as demonstrated by our pool of cases, adds external instruments to the comparison. Here, we distinguish a situation in which the Court looks for a common ground in external instruments in order to *explicitly* determine the width of the States' 'margin of appreciation' (§ 9.1.) from a situation in which the external instruments *implicitly* influence the States' freedom of manoeuvre (§ 9.2.). It also happens that a State's margin is not influenced by the (non-)exceptionality of its position, but by a specific external instrument that highlights a certain measure of State discretion in its content (§ 9.3.).

Member States; where there is no consensus, the margin will be wider". ECtHR, *A, B, C v. Ireland*, *op. cit.*, para. 232. See also, among many others: ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 102; ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, para. 169; ECtHR (GC), *Fernández Martínez v. Spain*, *op. cit.*, para. 125.

⁹²⁹ In the case of *A, B, C v. Ireland*, the Court observed "...a consensus amongst a substantial majority towards allowing abortion on broader grounds as in Ireland" (ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, para. 235). The latter case is unusual since the observed consensus, contrary to the Court's common approach, did not narrow the 'margin of appreciation'. A subsequent case of our pool that builds on an internal comparison in light of the margin-doctrine is the case of *Lautsi*, in which the Court said that "...there is no European consensus on the question of the presence of religious symbols in State schools" and therefore, it concluded that the issue falls within the State's 'margin of appreciation' (ECtHR (GC), *Lautsi and Others v. Italy*, *op. cit.*, paras. 26-28). In the case of *S.H. and Others v. Austria*, the Court considered that the question of ova and sperm from donors for in vitro fertilization "...touches on areas where there is not yet clear common ground among the member States" and therefore established a wide 'margin of appreciation' (ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, para. 97). In the case of *Van der Heijden*, the Court noted a "...wide variety of practices among Council of Europe States relating to the compellability of witnesses", which "...mitigates in favor of a wide margin of appreciation in this matter" (ECtHR (GC), *Van der Heijden v. the Netherlands*, *op. cit.*, para. 61). In the case of *X and Others v. Austria*, the Court observed – referencing a precedent case – that there was little common ground about treating differently adoption by same-sex couples, and therefore decided that "...national authorities should enjoy a wide margin of appreciation when ruling on such matters" (ECtHR (GC), *X and Others v. Austria*, *op. cit.*, para. 102). However, in the latter case, the Court did not rely on the internal comparison as it concluded that, in respect of the particular issue at stake, the sample of comparison was too narrow (see *ibidem*, para. 149). In the case of *Sindicatul "Păstorul cel Bun" v. Romania*, the Court observed a "...high degree of divergence between the domestic systems" and a wide 'margin of appreciation' in respect of how trade-union freedom and protection of the occupational interests of union members may be secured (ECtHR (GC), *Sindicatul "Păstorul cel Bun" v. Romania*, *op. cit.*, para. 133). In the case of *Hämäläinen v. Finland*, the Court noted absence of European consensus on allowing same-sex marriages and therefore afforded a wide 'margin of appreciation' in that respect (ECtHR (GC), *Hämäläinen v. Finland*, *op. cit.*, paras. 73-75). Finally, in *Kudrevičius and Others v. Lithuania*, the Court did not observe a uniform approach "...as to the legal characterization of the obstruction of traffic on a public highway" and therefore established a wide discretion in that respect (ECtHR (GC), *Kudrevičius and Others v. Lithuania*, *op. cit.*, para. 180).

§ 9.1. The (non-)exceptionality of the position with *explicit* influence on the ‘margin of appreciation’

478. Examples of references that function as relevant factors to establish a (wide or narrow) ‘margin of appreciation’ are found in four cases of our pool.
479. The *first* case, *S. and Marper v. the United Kingdom*, is about the retention of fingerprints and DNA information in the light of the right to privacy under Article 8 of the Convention. When considering whether the interference was necessary in a democratic society, the Court said it “... will consider this issue with due regard to the relevant instruments of the Council of Europe and the law and practice of the other Contracting States”.⁹³⁰ Thereto, the Court cited the following CoE instruments: the Data Protection Convention and subsequent Recommendations of the CoE COM.⁹³¹ The latter observations – together with specific positions in national practices⁹³² – allowed the Court to establish a ‘strong consensus’ regarding the need for carefully balancing the potential benefits of the extensive use of modern techniques in criminal-justice systems against important private-life interests. Relying on this ‘strong consensus’ encountered in both national and CoE instruments, the Court acknowledged a narrowed margin of appreciation to be “...left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere”.⁹³³
480. The *second* case is *Stummer v. Austria* which concerned the prohibition of discrimination and a refusal to take work performed in prison into account in calculating pension rights. To assess the prohibition of discrimination (Article 14 ECHR) in conjunction with the right to property (Article 1 of Protocol 1 to the ECHR), the Court examined whether the difference in treatment was proportionate. To do so, the Court stressed that a common ground between laws of Contracting Parties would be a relevant factor to define the width of the margin of appreciation.⁹³⁴ In searching for such a shared position, the Grand Chamber did not only consider purely national instruments but it also took account of the 2006 European Prison Rules demonstrating the ‘evolving trend’ that “...[as] far as possible prisoners who work shall be included in national security systems’”.⁹³⁵ Although the ECtHR

⁹³⁰ ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 107.

⁹³¹ *Ibidem*. The Data Protection Convention is the Council of Europe Convention of 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which entered into force for the United Kingdom on 1 December 1987. The imported recommendations are: COM Recommendation No. R (92) 1 on the Use of Analysis of Deoxyribonucleic Acid (DNA) within the Framework of the Criminal Justice System (adopted on 10 February 1992) and COM Recommendation No. R (87) 15 regulating the Use of Personal Data in the Police Sector (adopted on 17 September 1987).

⁹³² *Ibidem*, paras. 108 *et seq.*

⁹³³ *Ibidem*, para. 112.

⁹³⁴ ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 104.

⁹³⁵ *Ibidem*, para. 105.

noticed some convergence, it mitigated the relevance of the ‘evolving trend’. Thereby, it considered of relevance the ‘caution’ in which the European Prison Rules were framed (“[a]s far as possible”) as well as the observation that in practice – based on an internal comparison – only a small majority of Member States affiliate prisoners to their old-age pension system.⁹³⁶ To further support the arguments (and the lack of a common ground), the Court referred to the older CoE European Prison Rules of 1987, “...which did not contain any provision” about the inclusion of prisoners in the social security system.⁹³⁷ On the basis of several factors, the Court thus – despite observance of a recent ‘evolving trend’ – established a wide margin on the issue.⁹³⁸ Hence, the Court suggested that the establishment of a certain trend is *an sich* not sufficient to reduce the margin of the State.⁹³⁹

481. The *third* case is *Animal Defenders International v. the United Kingdom*, about the refusal to give permission for an NGO to place a television advert owing to a statutory prohibition of political advertising. In concluding that there was no violation of Article 10 of the Convention (freedom of expression), external instruments served to confirm the absence of a European consensus and, thereby, to broaden the margin of appreciation. More particularly, the Court – based on a purely internal comparison – established the lack of a ‘European consensus’ on the regulation of paid political advertising in broadcasting and, with the help of two CoE recommendations, added that “[S]uch is the lack of consensus in this area that the Committee of Ministers of the Council of Europe, in considering the issue ... in 1999 and 2007, declined to recommend a common position on the issue...”.⁹⁴⁰ The absence of consensus, confirmed by external instruments, broadened the margin of appreciation on regulating public interest expression.⁹⁴¹

482. A *final* case is *Perinçek v. Switzerland*, in which the Grand Chamber included a EU framework decision as an element of ‘internal’ comparison.⁹⁴² On that basis, the it concluded there was no consensus among Member States on the issue of criminalizing the denial of

⁹³⁶ *Ibidem*, As a consequence, the Court observed that “...only gradually...societies are moving towards the affiliation of prisoners to their social security systems in general and to their old-age pension systems in particular” and that there is a context of ‘changing standards’. *Ibidem*, paras. 106-109.

⁹³⁷ *Ibidem*, para. 107.

⁹³⁸ *Ibidem*, paras. 89 and 101.

⁹³⁹ Against the latter background, the Court concluded that the State “...by not having affiliated working prisoners to the old-age pension system to date, it has not exceeded the margin of appreciation afforded to it in that matter” (*ibidem*, para. 109) and that “...there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1” (*ibidem*, para. 110).

⁹⁴⁰ ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123. The Court more precisely referred to the CoE COM Rec(1999)15 and Rec(2007)15 (which is the revised R(1999)15) on Measures concerning Media Coverage of Election Campaigns, and their Explanatory Memoranda.

⁹⁴¹ *Ibidem*.

⁹⁴² EU Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (OJ L 328/55, 6.12.2008, pp. 55-58), which provides for the approximation of the laws of the Member States of the European Union on offences involving racism and xenophobia. ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 82 *et seq.*

genocide.⁹⁴³ The Court thus used a EU instrument as part of its verification whether there was an internal common position, *quod non*. Subsequently, however, the Court mitigated the importance of the lack of consensus for the consideration of the width of the margin; it noted that the Swiss criminalization of a denial of any genocide (without the requirement that it be carried out in a manner likely to incite to violence or hatred) stood at one end of the diverse comparative spectrum.⁹⁴⁴ Because of that reason (in addition to other factors having significant impact on the breadth of the ‘margin of appreciation’), the Court ruled that comparative law (including the external instrument of the EU) “...cannot play a weighty part in the Court’s conclusion”.⁹⁴⁵

§ 9.2. The (non-)exceptionality of the States’ position with *implicit* influence on the freedom of discretion

483. It happens that the Grand Chamber – often together with an internal comparison – verifies with the help of external instruments whether there exists a common approach on a certain issue and whether or not the respondent State respects that common approach. The outcome of such a verification may, in turn, implicitly influence a State’s freedom of manoeuvre in observing the Convention.⁹⁴⁶ In the judgment of *Demir and Baykara v. Turkey*, for example, the Grand Chamber did not include external instruments to establish the width of the ‘margin of appreciation’ (here, the narrow width had been decided on other grounds), but it used the common position in external instruments to argue that the State, by not behaving in accordance with that position, overstepped the boundaries of its discretion.⁹⁴⁷

484. It appears from the Grand Chamber’s case law that States with a rather isolated viewpoint should come forward with particularly convincing and strong arguments to justify their contested behavior. *Vice versa*, the observation that the State’s position respects the shared viewpoint, usually supports the Court in less rigorously applying the Convention. Then, the States’ freedom of discretion becomes wider and the justification of the interference more easy to achieve. In our pool, seven cases demonstrate such an argumentative use of external instruments.

485. The *first* case is *Tănase v. Moldova*, assessing the inability of a person with multiple nationalities to stand as a candidate in parliamentary elections under the right to free elections (Article 3 of Protocol 1 to the ECHR). The Court, when applying the latter

⁹⁴³ *Ibidem*, para. 256.

⁹⁴⁴ *Ibidem*, para. 257.

⁹⁴⁵ *Ibidem*.

⁹⁴⁶ There are also cases of this kind that include *only* an internal comparison. See for instance: without using any external instrument. In the pool of cases, we encountered this in: ECtHR (GC), *Pentikäinen v. Finland*, 20 October 2015, Appl. No. 1182/10, para. 109.

⁹⁴⁷ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 119 *et seq.*

provision, had a closer look at the proportionality of the measures. It stressed that, despite the internal consensus that holding more than one nationality should not be a ground for ineligibility to sit as an MP, "...a different approach might be justified where special historical or political considerations exist which render a more restrictive practice necessary".⁹⁴⁸ The Court subsequently put these considerations in the broader context of the obligations of the CoE Convention on Nationality, which Moldova had freely undertaken by ratifying the instrument. Moldova, stressing the limited Court's competence *ratione materiae*, challenged the latter reference.⁹⁴⁹ The Grand Chamber responded to this argument, *inter alia* by citing its concluding remarks in *Demir and Baykara* about the use of international instruments.⁹⁵⁰ More particularly, it held that to interpret the Convention and to establish whether there is a common ground, it "...must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs...".⁹⁵¹ It added that it

"...is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them. Where there is a common standard which the respondent State has failed to meet, this may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases...".⁹⁵²

In line with this statement, the Court assessed the proportionality of the interference by verifying whether there was a common standard. The following external instruments had been imported for that purpose: the CoE Convention on Nationality, conclusions and reports of ECRI and the Venice Commission, and resolutions of the CoE PACE.⁹⁵³ The Court considered it of importance that these instruments were "...unanimous in their criticism of the prohibition" and that they expressed particular concerns on the (discriminatory) impact of the Moldovan situation. In addition, the Grand Chamber took note of Moldova's undertaking pursuant to the CoE Convention on Nationality to ensure that nationals in possession of another nationality have the same rights and duties as other Moldovan

⁹⁴⁸ ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 172.

⁹⁴⁹ Paragraph 124 is particularly relevant: "[i]n their submissions to the Grand Chamber, the Government raised for the first time an objection *ratione materiae* following references to the European Convention on Nationality ("the ECN") in the Chamber's judgment. In their view, the Chamber did not consider the right to stand for elections, protected by Article 3 of Protocol No. 1, but instead examined the right to multiple nationalities and the right to acquire a nationality, which were not rights guaranteed by the Convention. The Government challenged the significance accorded by the Chamber to ratification and non-ratification of the ECN. They pointed out that Moldova could simply denounce the ECN and, if it wished, re-ratify it subject to a reservation in respect of Article 17" (*ibidem*, para. 124).

⁹⁵⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 85-86.

⁹⁵¹ ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 176.

⁹⁵² *Ibidem*.

⁹⁵³ *Ibidem*. The Court also stressed that "[I]n particular, in making reference to the ECN, the Court is not seeking to examine the applicant's right to hold dual nationality but rather the right of the respondent State to introduce restrictions on his right to take his seat following his election as a result of his dual nationality and the compatibility of any such restriction with Article 3 of Protocol No. 1".

nationals.⁹⁵⁴ Against that background, the Court concluded that, notwithstanding the special historical and political context of Moldova, the national law preventing elected MPs with multiple nationalities from taking seats in Parliament, was disproportionate.⁹⁵⁵ Thus, the observation that a State goes against a certain trend, does not constitute by itself a violation of the Convention. Nonetheless, a common approach on the issue might receive weight when applying the Convention and contribute to the non-proportionality of the interference.

486. In the *second* case of *Mangouras v. Spain*, the Grand Chamber examined a high level of recognizance to secure release on bail under Article 5 of the ECHR (the right to liberty and security). The bail concerned a Master of a ship who faced criminal charges in an oil pollution case. In its judgment, the Court held that it

“...cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States’ powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them (see “Relevant domestic and international law” above). A tendency can also be observed to use criminal law as a means of enforcing the environmental obligations imposed by European and international law.”⁹⁵⁶

The Court attached relevance to external normative developments (expressed by various external instruments⁹⁵⁷) in the area of environment law in order to point at the interest of preventing and (criminally) prosecuting pollution cases. The observation of this external approach seemed to have guided the Court towards a more flexible reading of the Article 5 ECHR. By acknowledging that the “...new realities have to be taken into account in

⁹⁵⁴ *Ibidem*, para. 177.

⁹⁵⁵ *Ibidem*, para. 180.

⁹⁵⁶ ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86.

⁹⁵⁷ It more particularly referred to a Council of Europe convention and report (1998 Council of Europe Convention on the Protection of the Environment through Criminal Law (ETS No. 172); report of the PACE Committee on the Environment, Agriculture and Local and Regional Affairs on sea pollution of 30 March 2005), European Union directives and case law of the ECJ (Directive 2005/35/EC of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties for infringements, ECJ judgment of 3 June 2008 in Case C-308/06 *Intertanko and Others*, ECJ judgments of 13 September 2005 and 23 October 2007, Directive 2008/99/E, Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage), the United Nations Convention on the Law of the Sea of 1982 (‘UNCLOS’), case law of the International Tribunal for the Law of the Sea (Judgment of 6 August 2007 in the case of *Hoshinmaru, Japan v. the Russian Federation*), a report of the Baltic and International Maritime Council of 2009, Guidelines on Fair Treatment of Seafarers, the International Convention for the Prevention of Pollution from Ships of 1973 and the Protocol thereto of 1978, and the International Convention on Civil Liability for Oil Pollution Damage of 1992. With support of the London P&I Rules (which are the general conditions that govern the Protection and Indemnity Clubs set up by ship-owners themselves to provide cover against various risks), the Court also observed that there was “...a tendency...to use criminal law as a means of enforcing the environmental obligations imposed by European and international law”. *Ibidem*, para. 86. It is not very clear whether the Court also finds support for this statement under “relevant domestic and international law” as cited in the ‘facts’-section. There is no specific support attached to the observation of this “tendency”. The Court was also inspired by the latter Rules and by the 1992 International Convention on Civil Liability for Oil Pollution Damage when establishing the obligations of ship-owners and insurers. *Ibidem*, para. 91.

interpreting the requirements of Article 5 paragraph 3⁹⁵⁸, the Court allowed the State a considerable freedom in the measures taken to respond to the new demands of efficiently combating environmental offences. Thus, *inter alia* because the State was acting in a spirit similar to a shared external approach in environmental law, its actions fell within its freedom of manoeuvre under the Convention and, as a consequence, there was no violation of Article 5 ECHR.

487. The *third* case, *Vallianatos and Others v. Greece*, was about the prohibition of discrimination (Article 14) in relation to the exclusion of same-sex couples from 'civil unions'. When assessing the proportionality of this exclusion, the Court pointed at the absence of an internal consensus, which is usually a relevant element in establishing a large discretion. However, despite the absence of an internal consensus, the Court recognized an emerging trend among the Member States "...with regard to the introduction of forms of legal recognition of same-sex relationships".⁹⁵⁹ The Court confirmed this trend by referring to 'soft' external instruments: "...this trend is reflected in the relevant Council of Europe materials".⁹⁶⁰ On the one hand, the Court held, a State not following such a trend is not necessarily violating the Convention: "...the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention...". On the other hand, the Court held – and here, we notice the influence of the State's isolated position – that Greece had not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from 'civil unions'.⁹⁶¹ The message of the Court seemed to be that when a State goes against a certain trend towards higher human rights protection (observed *inter alia* in external instruments), it should justify its position firmly and with particularly good reasons. Here, the Court gave more weight to the existence of an external trend than to the absence of an internal consensus; the external trend diminished the freedom of manoeuvre of the State (while usually, a lack of internal consensus would enlarge the State's freedom).

488. In a similar line, the Grand Chamber, in a *fourth* case of *Fabris v. France*, pointed at the existence of a common ground to argue that "...very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the Convention".⁹⁶² In establishing this 'uniform approach', the Court, besides a more classic internal comparison, took note of the CoE Draft Recommendation to Member States on the

⁹⁵⁸ *Ibidem*, para. 87.

⁹⁵⁹ ECtHR (GC), *Vallianatos and Others v. Greece*, *op. cit.*, para. 91.

⁹⁶⁰ *Ibidem*. The Court more particularly referred to: CoE PACE Resolution 1728(2010) and CoE COM Recommendation CM/Rec(2010)5.

⁹⁶¹ *Ibidem*, para. 92. Accordingly, the Court concluded that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention in the present case.

⁹⁶² ECtHR (GC), *Fabris v. France*, *op. cit.*, paras. 58-59. The Court also referred to its own precedents on this issue.

Rights and Legal Status of Children and Parental Responsibilities.⁹⁶³ The Court equally endorsed the fact that “European case-law and the national legislative reforms showed a clear tendency towards eliminating all discrimination regarding the inheritance rights of children born outside marriage”.⁹⁶⁴

489. A *fifth* case, of *Roman Zakharov v. Russia*, examined under the right to privacy shortcomings in the Russian legal framework governing secret surveillance of mobile telephone communications. The Court, when addressing whether the interference was justified, observed that Russian law was not in line with a EU Council Resolution⁹⁶⁵ on the issue.⁹⁶⁶ Although the exact pertinence of this statement is not explicitly clear, it seems that the Russian ‘isolated’ position (compared to the EU Member States) was relevant in limiting the Russian freedom of manoeuvre. The Court concluded the case with a violation of Article 8 on the right to privacy.

490. In a *sixth* case, of *Rohlena v. Czech Republic*, the Court, when applying Article 7 of the Convention (*nullum crimen sine lege*), has mentioned the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence of 2011 to stress that violence against women is “...still a matter of grave concern in contemporary European societies”, which seemed to give the State more freedom regarding the conviction of the applicant, who was charged with physically and mentally abusing his wife.⁹⁶⁷ Thus, the observance that the State’s actions did justice to a shared concern seemed to contribute to the State not exceeding its measure of discretion.

491. In a *seventh* case, *Khoroshenko v. Russia*, the ECtHR has used external instruments to examine the proportionality under Article 8 of various restrictions on family visits for a life prisoner during the ten years of his detention. To allow that examination, the Grand Chamber held explicitly that it “...will consider this issue with due regard to the relevant instruments of the Council of Europe”.⁹⁶⁸ To address the relevant elements in regulating

⁹⁶³ CoE COM Draft Recommendation CM/Rec(2012) of which the Court noted the following (in *ibidem*, para. 35): “The Committee of Ministers Rapporteur Group (GR-J) is still examining the draft recommendation [CM/Rec (2012)] to member states on the rights and legal status of children and parental responsibilities (with the explanatory memorandum) which has been presented to the Committee of Ministers. The draft recommendation seeks to replace the obsolete standards of the European Convention of 1975 on the Legal Status of Children Born out of Wedlock (Convention which France has not ratified), which are no longer in conformity with the Court’s case-law...”.

⁹⁶⁴ *Ibidem*, para. 69.

⁹⁶⁵ EU Council Resolution of 17 January 1995 on the Lawful Interception of Telecommunications (96/C 329/01).

⁹⁶⁶ ECtHR (GC), *Roman Zakharov v. Russia*, *op. cit.*, para. 269.

⁹⁶⁷ ECtHR (GC), *Rohlena v. Czech Republic*, *op. cit.*, para. 71. This Convention of 2011 entered into force in 2014.

⁹⁶⁸ ECtHR (GC), *Khoroshenko v. Russia*, *op. cit.*, para. 133. The Court said that it would in addition have a look at the internal comparison of the “law and practices of the other Contracting State”. See *ibidem*, para. 135, in which the Court concluded that “...Russia appears to be the only jurisdiction within the Council of Europe to regulate the prison visits of all life-sentence prisoners as a group by combining an extremely low frequency of prison visits and the lengthy duration of such a regime”.

visiting rights, the Court referred to the European Prison Rules, to CoE Recommendations⁹⁶⁹ and to

“...the position of international-law instruments and the practice of international courts and tribunals..., which invariably recognize as a minimum standard for all prisoners, without drawing any distinction between life-sentence and other types of prisoners, the right to an “acceptable” or “reasonably good” level of contact with their families”.⁹⁷⁰

The Court attached “...considerable importance to the recommendations of the CPT, which noted that long-term prison regimes ‘...should seek to compensate for [the desocialising effects of imprisonment] in a positive and proactive way’”.⁹⁷¹ To stress the need for rehabilitation and reintegration, the Court found even more support in external instruments by saying that this goal ‘is consonant’ with Article 10 paragraph 3 of the ICCPR (which provides that the essential aim of the treatment of prisoners is their reformation and social rehabilitation) and with other international instruments (including the 2006 European Prison Rules and resolutions and recommendations of the CoE).⁹⁷² The Court concluded that the strict regime, as imposed by the respondent State (going against the shared positions on the issue), was disproportionate to the aims pursued, amounting to a violation of Article 8 of the ECHR.

§ 9.3. The content of external instruments alluding to States’ discretion

492. In the above-mentioned cases, external instruments were used as part of a comparison, which (implicitly) influenced the States’ discretion when applying the Convention. In the cases that follow, the States’ margin was not influenced because of (a lack of) a shared ground or a shared interest, but because of the existence of an external instrument of which the content itself alludes to a (lack of) flexibility or discretion. There are seven of such arguments in the pool of case law.

⁹⁶⁹ The Court considered relevant in this respect that the principles (of the European Prison Rules and the CoE Recommendation) “...appear to have been consistently applied by the Contracting States in accordance with the Recommendations of the Committee of Ministers...and the Committee on the Prevention of Torture...”. *Ibidem*, para. 134.

⁹⁷⁰ The Court more particularly referred to Rules 37 and 57 of the UN Standard Minimum Rules for the Treatment of Prisoners in paragraph 73, Principle 19 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in paragraph 74, Rule 61 (A) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal of the International Criminal Tribunal for the former Yugoslavia, and the case-law of the Inter-American Court of Human Rights and Inter-American Commission of Human Rights. *Ibidem*, para. 143.

⁹⁷¹ *Ibidem*, para. 144.

⁹⁷² *Ibidem*, para. 145. Noting that “...several other international instruments...emphasise that efforts need to be made by the prison authorities for the reintegration and rehabilitation of all prisoners, including those serving life sentences”, the Court referred more particularly to: Rules 6, 102.1 and 102.2 of the 2006 European Prison Rules, points 6 and 11 of Resolution 76 (2) of the COM, and paragraphs 2 *in fine*, 5, 22 and 33 of Recommendation 2003 (23) on the Management by Prison Administrations of Life-sentence and other Long-term Prisoners.

493. The first case, of *Sejdić and Finci*, reflected *inter alia* on the inability of a Roma and a Jew to stand for parliamentary elections. The Court, to arrive at a violation of Article 14 of the ECHR (prohibition of discrimination) in conjunction with Article 3 of Protocol 1 to the ECHR (right to free elections), referred to opinions of the Venice Commission, which "... clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities".⁹⁷³ For the Court, the latter "...possibility of alternative means achieving the same end" was "...an important factor in this sphere".⁹⁷⁴ The case of *Sejdić and Finci* thus imported a 'soft' expert instrument that pointed at the possibility to take alternative measures – less intrusive to human rights protection – to achieve similar aims. Because of the acknowledgment of alternative measures, the State's discretion had been reduced.

494. The second case, *S.H. and Others v. Austria*, touched upon a prohibition under domestic law on the use of ova and sperm from donors for *in vitro* fertilization, which the applicants alleged to be in conflict with Article 8 ECHR (the right to private and family life). The Court, when considering whether the interference was necessary in a democratic society established a wide margin of appreciation, built *inter alia* on an internal comparison.⁹⁷⁵ When considering whether the State overstepped this margin, the ECtHR, among other arguments, took account of external instruments. The Court pointed out that these instruments did not offer clear guidance to the State⁹⁷⁶ and have given the State some freedom in the regulation of the matter in question.⁹⁷⁷ The only instrument at European level dealing with the matter⁹⁷⁸, the Court noted, provides that "...in principle, *in vitro* fertilisation shall be effected using the gametes of the members of the couple".⁹⁷⁹ *In casu*, the external instruments had not been used to establish a margin, but they supported the argument that the respondent State – not encouraged by external instruments to act differently than it did – had some freedom of action under the external normative context. Accordingly, the Court concluded that the State did not overstep its margin of appreciation.

⁹⁷³ ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.*, para. 48.

⁹⁷⁴ *Ibidem*.

⁹⁷⁵ ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, para. 96. The Court observed that there was an 'emerging consensus' towards allowing gamete donation for the purpose of *in vitro* fertilization but this emerging consensus did not narrow the margin as it was not "...based on settled and long-lasting principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law...". To establish the width of the margin, the Court also took account of the sensitivity of this moral and ethical issue. *Ibidem*, para. 97.

⁹⁷⁶ The Court said this in respect of The Convention on Human Rights and Biomedicine of 1997 and the Additional Protocol to this Convention of 2002, which is silent on the matter at stake. *Ibidem*, paras. 106-107.

⁹⁷⁷ The Court mentioned in this respect Directive 2004/23/EC of the European Parliament and of the Council, which explicitly provided that "[t]his directive should not interfere with decisions made by member States concerning the use or non-use of any specific type of human cells, including germ cells and embryonic stem cells". *Ibidem*, paras. 106-107.

⁹⁷⁸ The principles adopted by the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences in 1989.

⁹⁷⁹ *Ibidem*, para. 107.

495. In the *third* case, *Boulois v. Luxembourg*, the Court drew inspiration from some external instruments to stress some freedom of discretion to achieve the aim of resettlement of prisoners and to take account of different factors when granting prison leave.⁹⁸⁰ *Inter alia* based on the latter considerations, the Court considered that a prison board's repeated refusal to grant a prisoner temporary leave (with no possibility of appeal) did not violate Article 6 of the Convention on a fair trial.
496. In a *fourth* case, *Fernández Martínez v. Spain*, the Court used *inter alia* a EU Directive to acknowledge the existence of a 'heightened duty of loyalty' in respect of a teacher of religion which "...must be taught by a person whose way of life and public statements are not flagrantly at odds with the religion in question, especially where the religion is supposed to govern the private life and personal beliefs of its followers".⁹⁸¹ The existence of this duty of loyalty gave the State more freedom in tolerating interferences with Article 8 ECHR that originated in rules of the Catholic church (such as the prohibition for priests to get married). Thus, because some persons enter this duty voluntarily, they face a softening of some of their rights.
497. In a *fifth* case, *X and others v. Austria*, the Court referenced provisions of the 2008 CoE Convention on Adoption to state that "...States are to permit adoption by two persons of different sex (who are married or, where that institution exists, are registered partners) or by one person" and that "States are free to extend the scope of the Convention to same-sex couples who are married or have entered into a registered partnership, as well as 'to different-sex couples and same-sex couples who are living together in a stable relationship'".⁹⁸² By pointing out that the external instrument leaves the option open to extent adoption to same-sex couples (in addition to stating that this external instrument does not reflect a 'common ground'), the Court alluded to a large freedom of the States in respect of that issue. Nonetheless, the Court tempered the State's freedom by adding that also in such a situation, the Convention still applies: States should not exercise their discretion in a discriminatory manner.⁹⁸³ This observation accords with the Court's established competence to assess the national effects of external instruments.⁹⁸⁴

⁹⁸⁰ ECtHR (GC), *Boulois v. Luxembourg*, *op. cit.*, para. 103. The Court noted, among other arguments, that "...legislation in Luxembourg draws its inspiration from, among other sources, the Recommendation of the Committee of Ministers on prison leave which, while it advocates providing 'the means by which a refusal can be reviewed', also lists different factors which the national authorities may take into consideration when it comes to granting prison leave...".

⁹⁸¹ ECtHR (GC), *Fernández Martínez v. Spain*, *op. cit.*, para. 138.

⁹⁸² ECtHR (GC), *X and Others v. Austria*, *op. cit.*, para. 150.

⁹⁸³ *Ibidem*. According to the Court the latter article "...does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently". The Court, in the same paragraph, also referred to Committee of Ministers' Recommendation of 31 March 2010 on measures to combat discrimination on grounds of sexual orientation or gender identity which, according to the Court, appears to point in the same direction as it "...calls on member states to ensure that the rights and obligations conferred on unmarried couples apply in a non-discriminatory way to both same-sex and different-sex couples". The Court also said that "[I]n any event, even if the interpretation of Article 7 § 2 of the 2008 Convention were to lead to another result, the Court

498. A *final* illustration is the case of *Parrillo v. Italy*, in which the Court noted a lack of internal consensus on the question of donation of embryos not destined for implantation.⁹⁸⁵ Together with its internal comparison, the Court took account of CoE and EU instruments⁹⁸⁶ which "...confirm that the domestic authorities enjoy a broad margin of discretion to enact restrictive legislation where the destruction of human embryos is at stake".⁹⁸⁷ For the ECtHR, it was relevant that the latter instruments contained provisions similar to the Oviedo Convention, "...which provides that none of its provisions should be interpreted as limiting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine".⁹⁸⁸ In line with the Oviedo Convention, which had not been ratified by Italy, the limits imposed by the external instruments aimed to temper excesses in respect of the use of human embryos for scientific research.⁹⁸⁹ *Inter alia* as a result of a broad 'margin of appreciation', confirmed by the content of external instruments, the Court decided that banning a woman from donating embryos obtained from *in vitro* fertilization to scientific research was not contrary to the respect for her private life (no violation of Article 8 ECHR).

§ 9.4. Concluding observations

499. It is a well-known technique of the Court to search for a common ground in the application process of the Convention, to examine, for instance, whether an interference was proportionate and necessary in a democratic society. The presence or absence of such a common position has the ability to influence the width of a State's 'margin of appreciation'. Mostly, in that respect, the Court limits itself to an internal comparison of laws and practices of the Member States. However, in a few examples of our pool, the ECtHR has also used external instruments as a part of the comparison.

reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention". *Ibidem*, with reference to ECtHR, *Al-Saadon and Mufdhi v. the United Kingdom*, Appl. No. 61498/08, 2 March 2010, para 128.

⁹⁸⁴ See *supra*, § 7.3. of this Chapter. The Grand Chamber concluded this case by ruling that "...the Government have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child" and that, accordingly, there had been a violation of the prohibition of discrimination taken in conjunction with the right to respect for the private and family life. *Ibidem*, paras. 151 and 153.

⁹⁸⁵ ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, para. 176.

⁹⁸⁶ The Court more particularly mentioned: the Oviedo Convention, Opinion no. 15 adopted on 14 November 2000 by the European Group on Ethics in Science and New Technologies to the European Commission, CoE PACE Resolution 1352 (2003) on Human Stem Cell Research, and the Regulation (EC) No. 1394/2007 of the European Parliament and of the Council of 13 November 2007 on Advanced Therapy Medicinal Products.

⁹⁸⁷ *Ibidem*, paras. 180-181.

⁹⁸⁸ *Ibidem*, para. 181.

⁹⁸⁹ *Ibidem*, para. 182.

500. On occasions, this comparison explicitly influences the States' 'margin of appreciation'. Generally, the references used for that purpose include CoE-instruments. This makes us assume that they – because of their strong connection with the internal Member States' context – aim at establishing (the absence of) an *internal* European common ground. One case is somewhat different, namely the case of *Perinçek v. Switzerland*. Here, the Court establishes at a lack of consensus, not on the basis of purely internal materials or CoE-instruments, but on the basis of a EU Framework Decision. The fact that Switzerland is not a member of the EU did not seem to disturb the Court. The case of *Stummer v. Austria* demonstrates that the Court sometimes gives more weight to the lack of an internal consensus than to the existence of an external trend (in 'soft' instruments) going in another direction.

501. In addition, external instruments serve to determine the States' discretion in a more implicit manner (without a direct influence on the 'margin of appreciation'). Indeed, in some cases, the Court, with the help of external references, alludes at the existence of a common approach or a shared interest. In this context, the Court generally refers to ('soft') CoE instruments. In one case, however, the Court pays attention to a EU-instrument (*nota bene* in a case against Russia), and, in another case, to diverse instruments on environmental protection (to point at the shared interest of preventing and criminalizing pollution cases and to offer the State some freedom in that respect). Subsequently, the observation of whether the State has respected the common standard, influences the examination of whether the State went beyond its freedom of discretion. When a State goes against a shared approach, the justification of its behavior under the ECHR becomes more difficult and the Court's supervision more strict. In *Tănase v. Moldova*, the Court argues that it decides itself which external ('soft') instruments are relevant and how much weight it gives to them, and that it will take account of a State's failure to meet a common standard, as a relevant element for the interpretation of the ECHR. On one occasion, contrary to *Stummer v. Austria*, the shared approach observed in 'soft' instruments received more weight than the absence of an internal consensus. Indeed, in the case of *Vallianatos and Others v. Greece*, although there was no internal consensus (which would usually increase the State's discretion), a 'soft' external trend limited the State's freedom of manoeuvre.

502. Finally, the rigidity of the Court's supervision is influenced by the text of some external instruments, namely when this text alludes to some discretion States may, or may not, have. External instruments could clarify, for instance, that States are allowed to take less intrusive measures, or that they are offered some freedom when enacting legislation on a specific issue. Also in this context, the Court generally takes account of ('soft') CoE instruments.

§ 10. Concluding observations

503. The mapping of argumentative uses of external instruments represents an exhaustive overview of the functions of the referencing practice in recent Grand Chamber reasonings. This mapping exercise, built on an analytical and empirical study of cases, includes a comprehensive and structured typology, which complements the categorization of the referencing practice as done in the Grand Chamber case of *Demir and Baykara v. Turkey*. It is remarkable that only very few Grand Chamber cases, issued after *Demir and Baykara*, reference the latter precedent in order to shed light on the referencing practice.⁹⁹⁰ Furthermore, it is noteworthy that, although the Court in *Demir and Baykara* explicitly mentioned the VCLT as a legal basis for the referencing practice, only very little cases include the VCLT as a justification for the interpretative uses of external instruments.⁹⁹¹

504. When we have a look at all argumentative uses of external instruments in our pool of cases, we can bring them together into five general categories: dismissive uses; references to clarify the rules of treaty interpretation; references to establish a common ground (in Europe and beyond) or to import specific external instruments in order to *interpret* the ECHR; references to establish a common ground in Europe or to import specific instruments in order to *apply* the ECHR; and references to external obligations that influenced the States' actions or omissions in order to apply (and to harmoniously interpret) the ECHR.

505. The *first* category includes the dismissive uses of external instruments. Here, the Court explicitly mentions the external instrument in its legal reasoning but does not intend to align with it. Instead, it rejects the content of the external instrument as irrelevant for the consideration of the case.

506. The *second* category of references offers guidance to the Court about how treaties should be interpreted and executed under the general rules of international law. In this context, the VCLT serves as the main framework of reference.

507. The *third* category includes the references that evidence a common ground or that serve to import a specific instrument in order to support the *interpretation* of the ECHR.

Sometimes, the Court builds on external instruments to overturn its previous case law in the context of an 'evolutive' interpretation. Generally, there are two scenarios here. In a first scenario, the Court acknowledges a common ground or a trend (in Europe and

⁹⁹⁰ For an exhaustive overview of these cases, see *supra*, para. 184.

⁹⁹¹ For an overview of the uses of the VCLT in relation to referencing practice, see *supra*, Part II, Chapter 3, § 8.

beyond) on the basis of national and international comparative law. In a second scenario, the Court confirms its 'evolutive' approach by referencing international case law.

In addition, external instruments contribute to (a dynamic) interpretation of the Convention, without an explicit aim of 'evolutive' interpretation. Here, external instruments help to clarify positive requirement under the ECHR, to highlight and explain notions not enshrined in the ECHR, or to define the terms of the ECHR. In addition, external instruments inspire or confirm the scope of the Convention. In these contexts, the Court sometimes builds on a common approach evidenced by external instruments, however, most often, it imports one, or very few, specific instruments as sources of inspiration. Here, rather than the existence of a shared position, it is the specialized content of the external instrument that receives weight.

Admittedly, under this category of references, some importations relate to the application phase, rather than to the interpretation phase. For instance, references might clarify notions of international law that are necessary to understand the particular case and to apply the ECHR in a specific context, or references might support some specific observations and criteria that are relevant to apply the ECHR. Nonetheless, because the use of external instruments, here, often influences the Court's legal assessment of the facts and the establishment of the legally relevant criteria in a particular case, we treat these references as aspects of interpretation.⁹⁹²

508. The *fourth* category of references concerns the use of external instruments to establish a common approach (or a shared concern), which influences the freedom of manoeuvre of the States when *applying* the Convention. Here, the Court, most often, makes use of instruments of the CoE (possibly together with a comparison of internal law and practices) to evidence the existence of a shared position at the European (internal) level. Thus, whereas an 'evolutive' interpretation requires a European *and* an international trend or consensus, the freedom of discretion of a State is usually influenced by the existence of a European consensus and by whether the States act in accordance with that consensus, or not. The States' freedom will be restricted when they act differently than the common European approach. Their freedom of manoeuvre will increase when they behave in accordance with a shared position or when there does not exist any common position. It may also happen that the specific content of an external instrument allows the States some discretion, or not.

509. The *fifth* category of the referencing practice covers the importation of external instruments that have influenced the States' behavior. Here, the external legal framework is of relevance because it is, in a national context, simultaneously applicable with the Convention (with a potential risk of conflicting obligations). These references generally

⁹⁹² For the distinction between the process of interpretation and application, see *supra* Part I, Chapter 2, § 2.1.3.

appear in the phase of the application of the ECHR, i.e. to establish the legal basis, the aim or the necessity of an interference with human rights. Compared to the fourth category, here, not a common approach influences the assessment, but the observation whether the State has acted in accordance with external obligations. Thereby, the (non-)observance of external obligations partly influences a potential justification of the State's behavior. A State will have more freedom of manoeuvre when it is observing its external obligations and less freedom when it is neglecting them. While the normative roots of States' behavior mostly have an influence on the application phase, these roots might also have an impact on the interpretation of the Convention through a process of harmonious interpretation. Then, the Convention is read in the light of external requirements, with a possible influence on its understanding.

510. In respect of the latter category, unsurprisingly, mostly binding instruments are imported. Indeed, it is exactly because the external instruments oblige the States to take certain actions, that their importation becomes relevant. In respect of the other categories of argumentative uses, a mix of external instruments is introduced, with different 'levels of externality'⁹⁹³. Indeed, judicial and non-binding instruments, of varying scopes and origin, often contribute to the Court's reasoning. When the Court looks for a European and/or an international common position (for instance, to establish an 'evolutive' interpretation or to influence the 'margin of appreciation'), it most often refers to a mix of instruments of binding law and 'political' soft law.⁹⁹⁴ The Court's approach to a 'trend' or a 'consensus', although it may be evidenced by other materials than national law and practices, is thus largely State-centric. However, a full State consensus is not required and also non-ratified instruments may play a role. Moreover, in some rare examples, the State's freedom of manoeuvre is restricted by a shared view, *i.a.* evidenced by non-binding (expert) instruments. Non-binding instruments of expert origin have relevance in other argumentative functions, too. Although they are usually not imported to establish a common approach, they serve as interpretative tools to frame positive requirements and to inform the interpretation of the Convention more generally (without the presence of an explicit 'evolutive' interpretation). Generally, non-binding instruments are used amongst other external instruments and arguments; they do not operate as legal sources with decisive weight but their value rather lies in *co-determining* an interpretation.⁹⁹⁵

511. When external instruments are used to support the five categories of referencing, it is not always easy to say whether these instruments operate as 'facts' or as 'law' in the

⁹⁹³ On this notion, see *supra*.

⁹⁹⁴ An interpretation such as in the Chamber-case of *Demir and Baykara v. Turkey*, on which the Court heavily relied on non-ratified materials without invoking other relevant instruments, had not been repeated in recent Grand Chamber-cases.

⁹⁹⁵ See also: F. Tulkens, S. Van Drooghenbroeck, and F. Krenck, *op. cit.*, 2008, p. 444.

interpretative process. This question is relevant since the Strasbourg judges are supposed to bring the law *propriu motu* to the case (*iura novit curia*) and since they should communicate their legal arguments to the parties.⁹⁹⁶ It seems to me that the more external instruments have an influence on the abstract level of interpretation, the more they operate as ‘the law’ to the case. In relation to the use of external instruments for ‘evolutive’ interpretation, this is clear. Here, the instruments have a clear normative effect on the development of the ECHR. In my view, the same counts in relation to the use of external instruments to define notions, to frame requirements of positive action under the ECHR, and to offer a more general argumentative support to the interpretation of the Convention. Although here, the use of external instruments only influences a very particular argument of the case, they nonetheless inform the understanding of the broadly framed Convention provisions.⁹⁹⁷

The more we move to the concrete level of adjudication, the more external instruments start operating as empirical material to establish the ‘facts’. When the referencing practice serves to establish the legal basis or the aim of the interference, this is certainly so. However, when the Court uses comparative law to influence the State’s margin of manoeuvre, when it uses external obligations as one of the elements to ‘justify’ or ‘aggravate’ a State’s behavior, or when it uses external instruments in a context of harmonious interpretation, this becomes less clear. Here, the referencing practice exercises weight on the State’s freedom of discretion under the ECHR and on the rigidity of the Court’s supervision, or on the meaning of the Convention in the light of external simultaneously applicable obligations. Because of these normative effects, the external instruments seem to operate as ‘law’, rather than ‘facts’.⁹⁹⁸

512. We conclude that very often, the external instruments that are used in the ‘law’-section of the case, embody a role that goes beyond the establishment of ‘facts’. We therefore plead in favor of introducing a third section in the Court’s decisions and judgments – in between the ‘facts’ and the ‘law’ – with the following heading: “Legally relevant external instruments”. To serve the transparency of the reasoning, the Court is advised to, under this heading, mention all the external instruments that it will import in the ‘law’-section, including some information on their ratification record and legal status. This proposal of adding a new heading to the Court’s judgments, is inspired by one of the cases of our pool, namely by *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”*. In the latter case, the Court, in between the parts on the

⁹⁹⁶ See L. Van Den Eynde, “Iura novit curia...? Une aide externe pour l’interprétation du droit peut néanmoins être bienvenue. La présentation d’arguments de droit comparé au juge par les *amicus curiae*”, forthcoming in *Administration Publique Trimestriel* 2017. See also: F. Tulkens, S. Vandrooghenbroeck, and F. Krenc, *op. cit.*, pp. 471-473.

⁹⁹⁷ Then, external referencing practice is rather independent of the circumstances of the particular case and the initiative to include external instruments, more ‘spontaneous’. On this issue, see M. Forowicz, *op. cit.*, p. 354.

⁹⁹⁸ For a more elaborate argument on whether the doctrine of the ‘margin of appreciation’ could be considered as a matter of interpretation or application, see F. Vanneste, *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Intersentia, Antwerp, 2010, p. 323.

‘facts’ and the ‘law’, had included an additional category: “relevant international law and practice”.⁹⁹⁹ Did the Court attempt to strengthen the transparency of the referencing practice? Or, was the inclusion of this heading only an aberration? In any event, such a separate heading seems useful. It could include all the instruments that will play a normative role in the interpretation and application of the Convention and create more clarity on their precise nature and role.

513. Part II of our thesis has demonstrated that external instruments fulfill various argumentative functions in the Strasbourg legal reasoning. At the beginning of this work, we have stressed that one of the objectives of this work is to shed light on the positive sides of the environment of normative diversity. After mapping all argumentative uses, the least we can argue in this respect, is that the diverse normative context has value because of the concrete argumentative tools that it offers. Thus, pragmatically, the practice seems to be a valid phenomenon.¹⁰⁰⁰ But, can it be justified by other arguments, too?

⁹⁹⁹ ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”*, *op. cit.*, paras. 59 *et seq.*

¹⁰⁰⁰ For more on the pragmatic value of referencing practice as a tool for persuasive reasoning, see *infra*, Part III, Chapter 2, § 9.

Part III – A justification for external referencing

514. The second hypothesis of our research is that external importations can be justified in a more convincing manner, so as to boost its validity. Why is it necessary to enhance justifications of the Court's external referencing practice in legal reasoning? On the one hand, the use of external instruments by the ECtHR has faced several points of criticism.¹ Especially (evolutive) mobilization of non-binding instruments, importations of external instruments not sharing the aims and objects of the ECHR, interpretation difficulties, and an inconsistent and unclear referencing method have raised concerns. On the other hand, the justifying efforts, as the Grand Chamber developed them in *Demir and Baykara v. Turkey*, were scattered and unsystematized. This is regrettable. The referencing practice in the Strasbourg reasoning often occurs and fulfills diverse concrete argumentative functions. Thus it seems to have added value as an argumentative tool. This value could only flourish if the Court succeeds in better structuring and motivating the phenomenon.

515. In all Grand Chamber cases subsequent to *Demir and Baykara*, the insufficient motivation remained. The ECtHR did not add arguments to those developed in *Demir and Baykara*. Generally, references in our pool had not been accompanied by explicit justifications introducing (extra-)legal arguments. Clarity about the (legal) rationale of the practice still is lacking.² Admittedly, the Court sometimes embeds the referencing practice in 'evolutive' interpretation, in an assessment of the 'margin of appreciation', or in an wish for harmonious interpretation. But, also then, the precise techniques and requirements were not elaborately explained, which may affect the consistency of the practice.

516. Against that background, we note a validity gap in the referencing practice. Our aim is to fill that gap. Part III includes evaluative aspects of the external references and addresses the question: "Which arguments could be mobilized to enhance the justifications of the Strasbourg referencing practice"? Different lenses will guide the answers, offering a multifaceted perspective on the question. The first lens focuses on the question of legality (**Chapter 1**) and the second lens includes the viewpoint of the users of human rights (**Chapter 2**).

¹ More elaborate, see *supra*, para.

² Nonetheless, more elaborate explanations and viewpoints regarding referencing practice sometimes appeared in separate opinions to the judgments. When relevant, some of these viewpoints will be taken up when addressing issues of validity under Part III.

CHAPTER 1 - THE LEGALITY PERSPECTIVE

517. The case law analysis shows that the Grand Chamber seldom uses formal legal arguments to explain and justify the referencing practice. When addressing the basis of referencing in *Demir and Baykara v. Turkey*, the Court points at the relevance of Articles 31-33 VCLT and of Article 31 paragraph 3 (c) VCLT, in particular.³ Also in other cases, the latter article was mobilized for that purpose. In addition, the Grand Chamber sometimes attaches the use of external instruments to certain interpretation principles (such as ‘evolutive’ interpretation, or the ‘margin of appreciation’), however without connecting it explicitly to legal provisions. Often, the Court is silent about the precise function of external instruments, which implies a lack of clarity about their legal position and motivation. As a consequence, the Grand Chamber cases of our pool do not allow to speak of external references as a legally well-justified phenomenon. To empower the validity of various functions of this practice, we make suggestions for developing a stronger legal framework.
518. We start from the idea that it is feasible to strengthen the legal guidance of external referencing, rendering its basis firmer than what had been proposed in legal practice so far. Because of the absence in Strasbourg case law of a consistent, broad and transparent legal framework covering the diverse functions of external instruments, we attempt to develop such a framework ourselves. So far in academic doctrine, no comprehensive attempts exist to legally justify the referencing practice connected to its diversity of functions. The creation of such a framework might serve as a guidance for a more clear and systematized use of external instruments in human rights adjudication, which might counterbalance allegations of an ‘illegal’ referencing practice.
519. There is no provision in the Convention that in explicit or clear words compels or authorizes the Strasbourg Court to refer to external instruments to interpret and apply the Convention. A formal and general interpretative mandate is lacking in this respect.⁴ Also in

³ More on the explanation in *Demir and Baykara* of the legal basis of using international instruments, see *supra* Part I, Chapter 1, § 2.1.

⁴ This situation contrasts with the African regional human rights protection mechanisms. The African Commission received in Articles 60 and 61 of the African Charter on Human and Peoples’ Rights a competence to make use of international human rights law as a source of inspiration for the Charter’s interpretation (African Charter or ‘Banjul Charter’, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986). Article 60 of the African Charter provides the following: “The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on Human and Peoples’ Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples’ Rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the Parties to the present Charter are members.” Article 61 on its turn states: “The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organisation of African Unity,

the external normative context, there is no straightforward authorisation for the various forms of the referencing practice. Moreover, the global normative environment does not clearly structure the multiple instruments that it covers; it does not offer an organized mechanism guiding the importation of external instruments or solving possible conflicts among them.⁵ The absence of a global structuring of normative instruments and the lack of formal regulation of the referencing practice does not imply that the importation of external instruments is legally invalid. At the same time, however, it does not mean that external referencing is without legal boundaries.

520. While some provisions on the Court's jurisdiction and competence might, at first sight, resist external importation, we conclude that they offer no stumbling blocks to the referencing practice, even on the contrary (§ 1). Some provisions of the ECHR and of the VCLT oblige (§ 3) or stimulate (§ 4) the referencing practice. Before developing such a legal framework, we will present its central axis, namely that to be legal, the referencing practice should maintain or enhance human rights protection, without lowering the standards (§ 2).

§ 1. The Court's competence: no hurdle for the referencing practice

521. The Strasbourg Court supervises the Member States' engagements under the Convention and its Protocols (Article 19 of the Convention) and, in that connection, considers matters concerning the interpretation and the application of the ECHR and its Protocols (Article 32 of the Convention). These provisions touch upon the Court's jurisdiction and competence.⁶ To be admissible, cases brought to the Court should be covered *ratione materiae* by the Convention and its Protocols, which are the primary legal sources in the internal context of the adjudication system.⁷ When a complaint concerns a

African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine".

⁵ See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 (13 April 2006), para. 486 (hereafter: 'Koskenniemi Report'); B. 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*, Cambridge University Press, Cambridge, 2015, p. 302; J. Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands", *Mich. J. Int'l L.* 2003-2004, vol. 25, p. 908; See also A. Fischer-Lescano and G. Teubner, "Regime-Collisions: The Vain Research for Legal Unity in the Fragmentation of Global Law", *Mich. J. Int'l L.* 2004, vol. 25, p. 1002 and their reference to a study of Hafner that stimulated the creation of the ILC Study Group on Fragmentation: *Risks Ensuing from Fragmentation of International Law*, Study by Gerard Hafner, U.N. GAOR, 55th Sess., Supp. Nr. 10, UN Doc. A/55/10 (2002).

⁶ The issue of jurisdiction or competence *ratione materiae* is another issue than the one of 'applicable law' and the one of 'treaty interpretation'. In principle, a Court might be materially competent to examine a case under a certain legal instrument when subsequently being allowed to apply various normative instruments to decide the case. For a distinction between 'jurisdiction', 'treaty interpretation' and 'applicable law', see J. Pauwelyn, *op. cit.*, pp. 906 *et seq.*

⁷ The matter should also affect persons that fall under the jurisdiction of the member States. Article 1 of the ECHR provides that the Member States "...shall secure to everyone within their jurisdiction the rights and freedoms"

right not covered by the Convention or a right included in a Protocol that was not ratified,⁸ it will normally be inadmissible under Article 35, paragraph 3 of the ECHR for reasons of incompatibility *ratione materiae* with the Convention.⁹

522. The issue of the Court's competence had not been without relevance in discussions about the external referencing practice. It was raised, for instance, in the case of *Demir and Baykara v. Turkey* in which the respondent State argued that "... the Court, by means of an interpretation of the Convention, could not create for Contracting States new obligations that were not provided for in the Convention".¹⁰ Because the Chamber attached great importance to non-ratified external provisions for interpretative purposes, Turkey argued that the Grand Chamber should consider the application inadmissible because incompatible with the scope *ratione materiae* of the Convention. According to the Turkish Government, the use of non-ratified instruments to interpret the Convention was thus not procedurally justified in the light of the Court's competence. Thereby, it seemed to allude to a violation of Article 32 of the ECHR.¹¹ There are scholars who raised similar concerns about the Court's dynamic use of external instruments in *Demir and Baykara v. Turkey*. Arato, for instance, states in respect of the Court's reasoning that it

that are established by the Convention and the Protocols. The issue of jurisdiction under Article 1 of the ECHR (linked to the applicability of the Convention *ratione personae* and *ratione loci*) is another issue than the one of the jurisdiction of the Court *ratione materiae* (mostly related to Article 32 ECHR). For example, the famous case of *Bankovic* concerning a complaint arising out of NAVO bombings in Serbia, touches upon the question of State jurisdiction, and more particularly upon State responsibility for extraterritorial actions and the competence of the Strasbourg Court in this respect. Here, the Court held that a jurisdiction of a State is essentially a territorial notion whereby States should normally not be held accountable under the ECHR for acts and omissions of their agents outside territorial borders (ECtHR (GC), decision of *Bankovic and others v. Belgium and others*, 12 December 2001, Appl. No. 52207/99). More recent case law softens the primarily territorial character of jurisdiction under Article 1 of the ECHR by favoring more expansive approaches to the issue (see for instance in the case of ECtHR (GC), *Öcalan v. Turkey*, 12 May 2005, Appl. No. 46221/99, para. 91). For more on the issue of State jurisdiction (and State responsibility) in the light of Article 1 of the ECHR and the (incoherent) cases of the Court on this issue, see R.C.A. White and C. Ovey, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2010, pp. 89-92; B. Simma, "Universality of International Law from the Perspective of the Practitioner", 2009, vol. 20, no. 2, p. 281; S. Miller, "Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention", *EJIL* 2009, vol. 20, no. 4, pp. 1223-1246, and pp. 1226-1230 in particular.

⁸ Note that the Strasbourg Court does not only examine a grief in respect of the rights of the ECHR and its Protocols that are invoked by the applicant, but also matters of other rights (of the ECHR and the Protocols), which it deems relevant on its own motion. R.C.A. White and C. Ovey, *op. cit.*, pp. 33-34.

⁹ *Ibidem*. Article 35, paragraph 3 ECHR contains admissibility criteria and provides that "...[t]he court shall declare inadmissible any individual application submitted under Article 34 if it considers that a) the application is incompatible with the provisions of the Convention or the Protocols thereto..."

¹⁰ ECtHR (GC), *Demir and Baykara v. Turkey*, 12 November 2008, Appl. No. 34503/97, para. 54.

¹¹ *Ibidem*, which sounds as follows: "As to the first objection, the Government contended that the Court, by means of an interpretation of the Convention, could not create for Contracting States new obligations that were not provided for in the Convention. In particular, considering that the Chamber had attached great importance to the European Social Charter (Articles 5 and 6 of which had not been ratified by Turkey) and to the case-law of its supervisory organ, they requested the Grand Chamber to declare the application inadmissible as being incompatible *ratione materiae* with the Convention, in view of the impossibility of relying against the Government on international instruments that Turkey had not ratified". The Government added that an interpretation that rendered article 5 and 6 of the European Social Charter "...binding on an indirect basis was even more problematic where, as in the present case, the absence in the Convention of an express provision guaranteeing the right to enter into collective agreements was counterbalanced by consideration of other instruments to which the State concerned was not a party". ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 61.

“... entails a dramatic evolutive treaty interpretation, ... thereby reflexively *transforming its own material competence* to develop the Convention on the basis of developments outside of the Convention” (own emphasis). ... From the political perspective ... it represents a critical shift in the powers of the Court to hold the States Parties to legal instruments beyond their control”.¹²

Also in another case of our pool, namely in the case of *Tănase v. Moldova*, the Government raised an objection *ratione materiae* because the Chamber referred to external instruments.¹³

523. In our view, the Court’s competence *ratione materiae* as a procedural matter of admissibility does not reflect the adequate angle to criticize the referencing practice. Firstly, because the boundaries of the Court’s jurisdiction do not resist bringing external instruments under the Court’s *indirect* supervision (§ 1.1.) and, secondly, because the referencing practice does usually not imply that the Court brings external instruments under its *direct* supervision (§ 1.2.).

§ 1.1. Indirect supervision accords with the Court’s competence

524. One of the reasons why external instruments appear in Strasbourg decision-making is because they reflect the ‘roots’ of the contested domestic actions or omissions.¹⁴ Sometimes, States’ measures (or omissions) are connected to obligations under external treaties or memberships, or to acts of international organizations (like the EU or the UN) to which States transferred aspects of their power. Such references are generally not controversial since they are ‘prompted by necessity’¹⁵. When the Court monitors the effects of external obligations, the imported instruments serve as ‘facts’ and as ‘subjects’ of review, rather than as normative rules influencing the interpretation of the Convention. Accordingly, references of this kind do not result in substantive effects of external instruments on the interpretation of the Convention.

¹² J. Arato, “Constitutional Transformation in The ECtHR: Strasbourg’s Expansive Recourse to External Rules of International Law”, *Brook. J. Int’l L.* 2012, vol. 37, no. 2, p. 353.

¹³ ECtHR (GC), *Tănase v. Moldova*, 27 April 2010, Appl. No. 7/08, para. 124: “In their submissions to the Grand Chamber, the Government raised for the first time an objection *ratione materiae* following references to the European Convention on Nationality (“the ECN”) in the Chamber’s judgment. In their view, the Chamber did not consider the right to stand for elections, protected by Article 3 of Protocol No. 1, but instead examined the right to multiple nationalities and the right to acquire a nationality, which were not rights guaranteed by the Convention. The Government challenged the significance accorded by the Chamber to ratification and non-ratification of the ECN. They pointed out that Moldova could simply denounce the ECN and, if it wished, re-ratify it subject to a reservation in respect of Article 17”.

¹⁴ See *supra*, Part II, Chapter 3.

¹⁵ M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford, Oxford University Press, 2010, p. 53.

525. As our case law analysis and earlier case law shows,¹⁶ the Strasbourg Court does usually not resist supervising domestic effects of external instruments. Obligations arising from external instruments do not erase State responsibility under the Convention; the Court allows itself material competence to bring external instruments under its *indirect* supervision.¹⁷ Thus, for example, the Court is not competent under Article 32 paragraph 1 of the ECHR "...to apply or examine alleged violations of EU rules *unless and in so far as they may have infringed rights and freedoms protected by the Convention* (own emphasis)".¹⁸ In line with the principle of subsidiarity, the Court added that "...it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, ... , *the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention* (own emphasis)".¹⁹ In a similar spirit, the Court in the case of *Nada v. Switzerland* did not follow the Government's argument that the application was inadmissible because the contested actions were the result of UN instruments binding to the State and prevailing over any other international agreement.²⁰ Actions that emanate from international external legal obligations (or from organisations to which States transferred parts of their power) do thus generally not escape the Court's jurisdiction and competence.

526. While an indirect supervision of external instruments does not substantively influence the scope and understanding of the ECHR, it tell us something about the position of the ECHR in relation to other normative instruments; it alludes to the idea that external obligations do not necessarily receive priority to Convention obligations.²¹ It implies that effects of external obligations are integrated in human rights adjudication as subjects of review. The Court's competence *ratione materiae* does not hinder that. On the contrary, it prevents as much as possible that the effects of external instruments escape the Court's supervision. Therefore, a case like *Al-Jedda v. the United Kingdom* is problematic since the

¹⁶ ECtHR (GC), *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, 30 June 2005, Appl. No. 45036/98, paras. 124 and 153. The Court in this case held that the Contracting Parties are responsible under Article 1 of the ECHR for all acts and omissions of their organs, regardless of whether they spring from internal law or whether they spring from international law.

¹⁷ As we noted in our case law analysis, State responsibility for actions or omissions having their roots in external instruments might, under some circumstances, be softened because of a (rebuttable) 'presumption of equivalent protection'. In principle, the Court declares itself incompetent when there is an 'equivalent protection' of human rights within international organizations. See *supra*, Part II, Chapter 3, § 7.3.2.

¹⁸ ECtHR (GC), *Jeunesse v. the Netherlands*, 3 October 2014, Appl. No. 12738/10, para. 110.

¹⁹ *Ibidem*.

²⁰ ECtHR (GC), *Nada v. Switzerland*, 12 September 2012, Appl. No. 10593/08, paras. 102-103 and 171-172. In this case, the presumption that the UN is 'human rights friendly' had been rebutted. See also A. Bailleux, "Human Rights in Network", *E.J.H.R.-J.E.D.H.* 2014, vol. 3, pp. 320 *et seq.*

²¹ However, in the case of *Behrami and Saramati*, in which the Court held that operations following from resolutions of the UNSC Chapter VII do not fall under the Court's control and supervision and that complaints in that respect thus are incompatible *ratione personae* with the ECHR. Thus, acts and omissions following from or being part of the UN operations were not imputable to the respondent State. ECtHR (GC), decision of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007, Appl. Nos. 71412/01. The Court in this case gave the member States a 'blanket immunity' when acting under UN mandate. This case is often interpreted as an example of excessive solidarity with the UN-system (see A. Bailleux, *op. cit.*, p. 321). This decision seemed motivated by avoiding a confrontation with the UN and could be criticized for the Court attributing too much weight to general international law. See, F. Vanneste, *op. cit.*, 2011, p. 828. The latter author considers that both the approach in *Bosphorus* (see *supra* under footnote 16 of this section) and the approach in *Behrami* show respect for general international law, but that the *Bosphorus*-approach is preferable.

Grand Chamber in this judgment gave the impression that when an external obligation offers a legal basis for indefinite internment, this could ‘disapply’ the requirements under the Convention (*in casu* under Article 5 paragraph 1 of the Convention on the right to liberty and security of persons).²²

527. When considering external referencing from the angle of the Court’s competence, we conclude that this does not hinder the Court to *indirectly* supervise external instruments. On the contrary, the Court’s monitoring task stimulates supervising domestic actions and omissions that result from external instruments. But, could some appearances of the referencing practice in Strasbourg case law also be considered as a form of direct supervision, possibly going against the Court’s competence?

§ 1.2. No direct supervision of external instruments

528. The Court does not only mobilize external obligations as ‘subjects’ of indirect human rights supervision. External instruments are also used as ‘tools’ influencing the meaning and the scope of the Convention and/or the rigidity of the Court’s supervision. Does the latter go against the Court’s central competence of supervising the Convention and its Protocols?

529. When applying the Convention, the Court, has on occasion taken account of States’ (non-)observance of external normative frameworks as an element influencing the severity of the Court’s supervision.²³ In some cases, the non-observance of external commitments leads to the conclusion that, under the Convention, there is no ‘pressing need’ for the interference, or that the interference is disproportionate.²⁴ The latter does not imply that the Court directly monitors these external frameworks. Their (non-)observance here only plays a role in assessing the interference with the Convention. As a consequence, the examples are not illustrative for the Court interpreting and applying external instruments directly to the facts.

530. A direct substantive supervision of external instruments might be controversial under Articles 19 and 32 of the Convention, especially when the Court would no longer attach the claim to the provisions of the Convention. The latter, as we saw in Part II, does not happen in Strasbourg jurisprudential practice. The ECtHR, ultimately, and possibly with the help of

²² ECtHR (GC), *Al-Jedda v. the United Kingdom*, 7 July 2011, Appl. No. 27021/08, paras. 101-108 and para. 107 in particular.

²³ See *supra* Part II, Chapter 3, § 7.4.

²⁴ See for example ECtHR (GC), *Bayatyan v. Armenia*, 7 July 2011, Appl. No. 23459/03, para. 123. In the latter case the Court took account of the State’s international commitments when it assessed whether the interference was necessary in a democratic society: the observation that the national measures went against international commitments, was relevant for the Court in concluding that there was no ‘pressing need’ for such measures. Another example is the case of *Tănase v. Moldova*, in which the Court considered the non-observance of an external instrument as a relevant element in concluding to the non-proportionality of the national measure. See ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, paras. 177-180.

external instruments, always pronounces itself directly on whether or not the circumstances violate the Convention. The Court even *explicitly* acknowledged the limits of its jurisdiction and competence in order to clarify that external instruments could not serve as directly applicable law. By invoking both Articles 19 and 32 of the ECHR, the Court said that “[U]nlike the ICTY, the ICC or the ICJ, it does not have penal or other jurisdiction under the Genocide Convention or another international law instrument relating to such issues”.²⁵ The Court equally stressed, in decisions about ‘the expulsion of asylum-seekers’, that it does not itself “...verify how the States honour their obligations under the Geneva Convention”.²⁶ In another case, it argued that Article 32 paragraph 1 of the ECHR means that the Court has in principle no competence “...to apply or examine alleged violations of EU rules”.²⁷

531. The Court ensures that external instruments do not receive a status entirely independent and detached from the Convention; alleged violations of external instruments cannot be directly treated before the Strasbourg Court. Claims should *ratione materiae* always fall under the Court’s primary sources. One should realize however that deciding whether a certain issue falls within the scope of the Convention *a priori* implies an interpretation exercise.²⁸ It is not unthinkable that external instruments influence the Court in constructing that interpretation. Under a strict reading of Article 32 of the ECHR, this might be controversial.²⁹ Nevertheless, it still reflects a situation of external instruments influencing the substantive scope of the Convention, and not a situation of directly interpreting and applying external instruments. We do therefore not notice particular concerns of competence. On the basis of the second paragraph of Article 32 of the ECHR, the Court has a large discretion in respect of interpreting its own competence *ratione materiae*,³⁰ and generally does so in an extensive manner.³¹

532. When the Court uses external instruments to give substance to the meaning of the Convention, we argue that there are, in principle, no challenges *vis-à-vis* the Court’s

²⁵ ECtHR (GC), *Perinçek v. Switzerland*, 15 October 2015, Appl. No. 27510/08, para. 101.

²⁶ ECtHR (GC), *M.S.S. v. Belgium and Greece*, 21 January 2011, Appl. No. 30696/09, para. 263.

²⁷ ECtHR (GC), *Jeunesse v. the Netherlands*, *op. cit.*, para. 110. The Court only exercises an indirect human rights control over these norms, see *supra*, para. 223.

²⁸ A judge first establishes the rules and then interprets the rule to find a solution. In practice, however, the distinction between both phases is not always clear and easy and both operations have links. Often the establishment and the interpretation of the rule are part of the same intellectual operation. See O. Corten, *Méthodologie du droit international public*, Editions de l’Université de Bruxelles, Brussels, 2009, p. 213.

²⁹ See S. Van Drooghenbroeck, “Les frontières du droit et le temps juridique: la Cour européenne des droits de l’homme repousse les limites. En marge de l’arrêt de Grande Chambre du 12 novembre 2008 rendu en l’affaire *Demir et Baykara c. Turquie*”, *RTDH* 2009, vol. 79, p. 818.

³⁰ The second paragraph of Article 32 ECHR provides that “[I]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide”. Arato speaks in this connection of a “...broad formal-juridical competence by virtue of Article 32(2) of the ECHR”, which in the eyes of the author however does not mean that this competence is without borders as to its material extent. J. Arato, *op. cit.*, pp. 371-372.

³¹ S. Van Drooghenbroeck, *op. cit.*, 2009, p. 818.

jurisdiction; the Court does not pronounce itself directly on external instruments.³² We are nonetheless aware of the fact that the border between using external instruments as ‘interpretative tools’ and using them as ‘direct applicable law’ might be hazy. In the case of *Demir and Baykara v. Turkey*, for example, external instruments clearly influenced the Court’s position in developing the scope of Article 11 of the Convention.³³ It is not unreasonable to say that the Court here gives an effect to external instruments similar to that of ‘applicable law’. This at least offers the impression that the Court supervises States’ actions directly under some external provisions.

533. Although the approach in *Demir and Baykara* might be controversial on other grounds³⁴, we do not consider it as contrary to the Court’s procedural competence. There is a distinction between ‘jurisdiction’, ‘applicable law’ and ‘treaty interpretation’.³⁵ The procedural conditions of jurisdiction and competence *ratione materiae* are, as admissibility criteria, attached to the question of whether a matter falls under the scope of the Convention. They do not concern the interpretation process (which is governed *inter alia* by the VCLT)³⁶. As an admissibility condition, Article 32 ECHR requires that the matter to be judged should fall *ratione materiae* under the Convention, but it does not legally hinder that external instruments are substantively used for interpretative purposes, not even when they lie at the basis of transforming the Convention.³⁷ Therefore, we do not consider the issue of material competence as a pertinent angle to challenge the Court’s discretion and method of the

³² When a certain issue is already under consideration of an external body, the Court ensures taking a step back. When an issue could both be brought under the scope of the Convention as well as under the scope of an external instrument and when the issue had already been submitted to an external procedure, there is a scenario of ‘overlapping competences’. Article 35, paragraph 2 of the ECHR provides that “[t]he Court shall not deal with any [individual] application that...has already been submitted to another procedure of international investigation or settlement and contains no relevant new information”. This article implies that the Strasbourg Court – when faced with one and the same dispute treated elsewhere – should be open towards alternative external legal procedures by recognizing them. This prevents concurrent – and possibly conflicting – outcomes, and thus avoids fragmentation (T. Treves, “The Fragmentation of International Law: The Judicial Perspective”, *Agenda Internacional* 2009, vol. 27, p. 237). In the view of the Strasbourg Court, both judicial and quasi-judicial proceedings similar to those set up by the Convention might fit the ‘requirements’ to which the alternative procedure should respond. For more on the issue of overlapping competences, see R.C.A. White and C. Ovey, *op. cit.*, p. 39. This thesis does not address the question of overlapping jurisdictions specifically. It will nonetheless pay particular attention to when and how the Strasbourg Court should take account of (higher) protection standards offered in external human rights mechanisms concerning a similar – but not the same – case. Then, it is indeed particularly interesting to see whether the ECtHR becomes (or should become) inspired by such external standards and interpretations. See *infra*, Part III, Chapter 1, § 3.

³³ *Supra*, Part I, Chapter 1, § 1.

³⁴ *Supra*, Part I, Chapter 1, § 3.

³⁵ J. Pauwelyn, *op. cit.*, pp. 910 *et seq.* The issue of external referencing with a potential effect on the understanding of the Convention (whereby external instruments might be perceived as receiving – in practice – the status of ‘applicable law’) is *in se* a matter of treaty interpretation, not of jurisdiction or of applicable law. In principle, a Court might be materially competent to examine a case and declare a case admissible while being allowed applying various normative instruments to decide the case.

³⁶ As a consequence, the VCLT is particularly relevant for legally considering (the limits of) external referencing practice, which is a practice part of the interpretative process. See *infra*, Part III, Chapter 1, § 3.2 and § 4.3.

³⁷ The applicants in *Demir and Baykara* endorsed a similar view. Since the Government attacked referencing practice on the basis of material competence, the applicants held in their defence that the judges of the Chamber-judgment did not (directly) *apply* the (non-ratified) external instruments (*in casu* the provisions of the European Social Charter) but only used the opinion of the Committee of Independent Experts to interpret the ECHR. The latter use, according to the applicants, was not problematic in the light of the Court’s competence. ECtHR (GC) *Demir and Baykara v. Turkey*, *op. cit.*, para. 63.

referencing practice. Using external instruments to fill in and/or develop the meaning of the Convention is a substantive matter, not a procedural one.

534. This view seems in accordance with the Court's vision. In all Grand Chamber cases examined, the ECtHR did not resist external referencing by invoking Article 32 ECHR, not even when the practice had a clear effect on the interpretation of the Convention. The Court does not consider the issue of mobilizing external instruments for argumentative purposes as a procedural issue of competence.³⁸ In the case of *Demir and Baykara*, the Grand Chamber stressed that the Turkish concerns (about the practice being incompatible with the Court's competence *ratione materiae*) could not be considered as 'preliminary' and stated that even when

"... supposing that the Government's objection was well-founded, an application does not become inadmissible solely by the effect of instruments in the light of which a Section of the Court has assessed its merits. In reality, this objection by the Government relates more to the examination of the substantive questions raised by the case and will be dealt with in that context".³⁹

The latter does not mean that the practice of external referencing – as a substantive issue – is without boundaries or in no further need of legal justification.⁴⁰

§ 2. A principle of non-regression as a red line crossing the referencing practice

535. One could argue that human rights provisions are of a *lex specialis*-nature.⁴¹ They are not contained in horizontal reciprocal treaties ('State versus State') but they are granted by the State to serve a common aim of protecting individuals in a spirit of 'vertical relations' ('State versus individual').⁴² The specific character of human rights law is sometimes

³⁸ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 60. In this paragraph, the Court stressed that it "... decided...to examine at the merits stage the Government's submission to the effect that, in adjudicating a case, it was impossible to rely against Turkey on international instruments other than the Convention, particularly instruments that Turkey had not ratified. As it relates more to the methodology to be adopted in an examination of the merits of the complaints submitted under Article 11 of the Convention, the Court considers it necessary to dispose of this submission before turning to any other question".

³⁹ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 57.

⁴⁰ Arato made a similar remark. According to the author, the Court in *Demir and Baykara* tried to find further justification of its competence to refer to external instruments in the VCLT, and in Article 31 paragraph 3 (c) of this Convention in particular. J. Arato, *op. cit.*, pp. 371-372.

⁴¹ Note that the VCLT (in Article 60 paragraph 5, concerning the issue of 'termination or suspension of a treaty as a consequence of its breach') recognizes the existence of instruments with a *specific character* as it mentions "...provisions relating to the protection of the human person contained in treaties of a humanitarian character".

⁴² This is an important reason why Mena Parras conceives the ECHR as a *sui generis* instrument that "...concerns the protection of individuals *vis-à-vis* the State, a field of law traditionally reserved to constitutional law". F.J. Mena Parras, "Democracy, Diversity and the Margin of Appreciation: A Theoretical Analysis from the Perspective of International and Constitutional Functions of the European Court of Human Rights", *Revista Electrónica de Estudios Internacionales* 2015, vol. 29, DOI: 10.17103/reei.29.10, available at https://www.academia.edu/11969134/Democracy_Diversity_and_the_Margin_of_Appreciation_A_Theoretical

mobilized for favoring a so-called ‘(quasi-)constitutional’ role of the Court.⁴³ In addition, and prominent these days, is the idea that the particularity of human rights lies in their moral dimension: they reflect values with a universal scope.⁴⁴ Also, (certain) human rights are related to the canon of ‘*jus cogens*’⁴⁵ or ‘*erga omnes* obligations’⁴⁶.

Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights (visited on 31 May 2016), p. 4, with reference to O. Pollicino, “A Further Argument in Favor of the Construction of a General Theory of the Domestic Impact of Jurisprudential Supranational Law. The Genesis and the First Steps of ECHR and EU Legal Orders”, *Comparative Law Review* 2012, vol. 3, no. 2, pp. 10-11. The Court acknowledges the specific character of human rights law by stressing that “[I]n interpreting..., the Court must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’” (ECtHR (GC), *Mamatkulov and Askarov v. Turkey*, 4 February 2005, Appl. nos. 46827/99 and 46951/99, para. 100, with reference to ECtHR (GC), *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Appl. No. 15318/89, para. 70). See also ECtHR (plenary), *Ireland v. United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 239: “Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States”.

⁴³ The latter is still a contested issue. On the issue of the ECHR as a (quasi-) constitutional mechanism offering constitutional justice and general standard setting (which contrasts to offering ‘individual justice’ and ‘individual relief’), see F.J. Mena Parras, *op. cit.*, pp. 4-6; H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: an Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Intersentia, Cambridge/Antwerp/Portland, 2011, pp. 16 *et seq.* and p. 24; S. Greer and L. Wildhaber, “Revisiting the Debate about ‘Constitutionalising’ the European Court of Human Rights”, *Human Rights Law Review* 2012, vol. 12, pp. 655-687. Note that the Court on occasions described the ECHR as a “constitutional instrument of European public order”, see *inter alia*: ECtHR (GC), *Loizidou v. Turkey* (just satisfaction), 28 July 1998, Appl. No. 15318/89, para. 48; ECtHR (GC), decision of *Bankovic and others v. Belgium and others*, *op. cit.*, para. 80; ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, 21 June 2016, Appl. No. 5809/08, para. 145. Wildhaber, former President of the ECtHR, stressed that interpreting the ECHR is the main task of the ECtHR whereby it fulfills a ‘constitutional’ mission of raising the human rights protection standards and of raising the coherence and quality of judgments, contributing to a Europe-wide human rights jurisprudence. L. Wildhaber, “A constitutional future for the European Court of Human Rights?”, *H.R.L.J.* 2002, vol. 23, pp. 161-165, as quoted by F. Vanneste, *op. cit.*, 2010, p. 215. On the role of some external references to enhance the Court’s constitutional justice (illustrated by the Court’s contribution to an important shift in migration law beginning in the late 1980s and resulting in an enhanced scheme for the protection against expulsion in Europe), see A. Farahat, “Enhancing Constitutional Justice by Using External References: the European Court of Human Rights’ Reasoning on the Protection against Expulsion”, *Leiden Journal of International Law* 2015, vol. 28, issue 2, pp. 303-322.

⁴⁴ See V.P. Tzevelekos, *op. cit.*, p. 641; B. Schlütter, *op. cit.*, p. 264, *inter alia* with reference to: A.A. Cançado Trindade, “La Interpretation de Tratados en El Derecho Internacional y La Especificidad de los Tratados de Derechos Humanos”, in Z. Drnas de Clément (ed.), in *Estudios de Derecho Internacional en Homenaje al Profesor Ernesto J. Rey Caro*, Drnas, Lerner, Cordoba, 2004, pp. 750 *et seq.*, and p. 776; K. Vasak, “Les Principes Fondamentaux d’Interpretation De Droits De L’homme”, in UNESCO (ed.), *Boutros Boutros-Ghali Liber Amicorum Discipulorumque Paix, Développement, Démocratie/Peace, Development, Democracy*, Bruylant, Brussels, 1999, p. 1419.

⁴⁵ Often, this reflects *de lege ferenda* ambitions, rather than the reality. A. Bianchi, “Human Rights and the Magic of Jus Cogens”, *EJIL* 2000, vol. 19, pp. 491-508; S. Breau, “The Constitutionalization of the International Legal Order”, *Leiden Journal of International Law* 2008, vol. 21, pp. 545-561; E. Klein, “Establishing a Hierarchy of Human Rights”, *Israel Law Review* 2008, vol. 41, pp. 477-488; R. Kolb, “Observation sur l’Évolution du Concept de Jus Cogens”, *Revue Générale de Droit International Public* 2009, vol. 113, pp. 837-850; A.A. Cançado Trindade, “Some Reflections on the Reassuring Expansion of the Material Content of Jus Cogens”, in G. Venturini and S. Bariatti (eds), *Diritti Individuali E Giustizia Internazionale*, Liber Fausto Pocar, Giuffrè, Milan, 2009, pp. 65-79. If a provision of the ECHR is said to have a status of *jus cogens*, this means that all contradictory rules of international law would be void: it thus implies an annulment of a rule, rather than a non-application of a contrary rule. See F. Vanneste, “Droit international général et droit international des droits de l’homme: l’apport de la Cour européenne des droits de l’homme”, *Rev. trim. dr. h.* 2011, no. 88, p. 812.

⁴⁶ B. Schlütter, *op. cit.*, p. 264. This author draw attention to ICJ-case law going in this direction: ICJ case concerning the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, *op. cit.*, para. 147 and ICJ case concerning the *Barcelona Traction Light and Power Company* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Reports 1970, p. 3., para. 34.

536. The development of human rights should be done in a 'progressive' manner. Both the Preamble to the Convention and the Statute of the CoE promote that.⁴⁷ Hence, one could meaningfully argue that human rights are characterized by a one-way dynamic, not allowed to evolve in a backward manner.⁴⁸ To do justice to such a principle of non-regression or a standstill-principle⁴⁹, the Court should not reverse cases '*in mala partem*'.⁵⁰ The Convention's Preamble specifically supports this idea by providing that the CoE pursues its aims by "...the maintenance and the further realization of Human Rights and Fundamental Freedoms".⁵¹ Also, the Court held that

"[A]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby *raising* the general standards of protection of human rights and *extending* human rights jurisprudence throughout the community of Convention States" (own emphasis).⁵²

537. The Court does generally not accept that subsequent treaties level down the protection standards of the Convention.⁵³ Also in connection to the referencing practice, the Court seems to observe a principle of non-regression. In the case of *Demir and Baykara v. Turkey*, the Grand Chamber, for instance, points at the aim of progressive human rights protection and of interpreting human rights 'effectively' and, therefore, in a non-restrictive manner. The Court used the following words:

⁴⁷ The Preamble of the Convention explicitly refers to the objective of a "...further realization of human rights". Also the Preamble of the Statute of the CoE says the member States believe that "...for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe (own emphasis)". According to the same Statute (in its Article 1(a)), the aim of the CoE is to "...achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress", and one of the ways to pursue this aim is through the "...maintenance and the further realization of human rights and fundamental freedoms (own emphasis)" (Article 1(b) of the Statute). See Preamble of the Statute of the Council of Europe, London, 5.V.1949, CoE Treaty Series Nos. 1/6/7/8/11, available at http://www.ifa.de/fileadmin/pdf/abk/inter/ec_ets_001.pdf (visited on 31 May 2016).

⁴⁸ In a same sense and using the notion of 'one-way dynamic', see S. Prebensen, "Evolutive interpretation in the European Convention on Human Rights", in P. Mahoney and Others (eds), *Protecting Human Rights: The European Perspective, studies in memory of Rolv Ryssdal*, Karl Heymanns Verlag AG, Cologne/Bonn, 2000, p. 1137.

⁴⁹ See separate opinion of Judge Casadevall to ECtHR (GC), *Gorou v. Greece* (No. 2), 20 March 2009, Appl. No. 12686/03, para. 9: "In this connection I am reminded of the 'standstill' technique. Also known as the 'ratchet mechanism', preventing a cogwheel from turning back once it has moved forward, the principle has been developed, particularly in legal opinion, in connection mainly with acquired social rights. It is the principle whereby the legislature is supposed not to pass laws that would have the effect of lowering a level of social protection already achieved".

⁵⁰ For this terminology, see S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, "Questions of Method: the Use of 'External Sources' in National Union of Rail, Maritime and Transport Workers v. the United Kingdom", p. 16 of the draft version, forthcoming.

⁵¹ See Preamble to the Convention.

⁵² ECtHR, *Karner v. Austria*, 24 July 2003, Appl. No. 40016/98, para. 26. The Court previously already issued the view that "...the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies". ECtHR (GC), *Selmouni v. France*, 28 July 1999, Appl. No. 25803/94, para. 101, referred to by J.H. Gerards, *EVRM - algemene beginselen*, Sdu Uitgevers, Den Haag, 2011, p. 44.

⁵³ In the case of *X. and Others v. Austria*, the Court stressed that "...States have Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention". ECtHR (GC), *X. and Others v. Austria*, 19 February 2013, Appl. No. 19010/07, para. 150. See also: S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 17.

“...in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the *increasingly high standard* being required in the area of the protection of human rights, thus necessitating *greater firmness* in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed *restrictively*, in a manner which gives practical and effective protection to human rights (own emphasis)”.⁵⁴

Forowicz, looking at the reception of international law by the Court, concludes that the specificity of the Convention and the aim of progressively protecting human rights are important factors for the Court not to receive international law in the argumentation process.⁵⁵ Accordingly, she acknowledges that the “...need to better protect ECHR rights constitutes a cornerstone of the Strasbourg reception process”.⁵⁶

538. There exists traditionalist voices that do not agree with this one-way dynamic. They largely stress the importance of ‘State consent’ in respect of human rights obligations and accept that this consent could vary according to the realities and imperatives of the day.⁵⁷ As such, a downward human rights protection – if backed up by State consent – may be a legitimate ‘evolution’.⁵⁸ This position has gained ground in most recent decades⁵⁹, and a few Strasbourg cases seem to follow this direction. The case of *Gorou v. Greece* (No. 2), for example, leveled down human rights protection by overturning earlier case law.⁶⁰ The possibility of reversal *in malam partem* also followed from *Scoppola v. Italy* (No. 3), although this case was embedded in a very particular context.⁶¹

539. An interpretation that lowers human rights standards does not fit the aims and nature of human rights protection.⁶² Rather, we plead in favor of a principle of non-regression functioning as a red line crossing any attempt to create a legal methodology and a

⁵⁴ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 146.

⁵⁵ M. Forowicz, *op. cit.*, p. 378. According to Forowicz, one of the reasons why the Court does not (or non-constructively) refer to external instruments is that external instruments might offer lower protection standards. Then, she observes, the Court highlights the *lex specialis* character of the ECHR and distances itself from other instruments. M. Forowicz, *op. cit.*, p. 365, and see there for examples of case law.

⁵⁶ M. Forowicz, *op. cit.*, p. 378.

⁵⁷ S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 16.

⁵⁸ The discussion about whether the Court should follow higher and/or lower external protection standards is situated in larger discussions about ‘evolutive’ interpretation. Ost calls the ‘backwards-side’ of evolutive interpretation ‘involutive interpretation’ or ‘regressive practices’ (*interprétations involutives* or *pratiques régressives*), see F. Ost, “Le temps, quatrième dimension des droits de l’homme”, *J.T.* 1999, <http://www.dhdi.free.fr/recherches/droithomme/articles/ostdhtemps.pdf> (visited on 29 July 2016), p. 7. More general on this issue: F. Vanneste, *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Intersentia, Antwerp, 2009, p. 257, and references there; S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 15-16.

⁵⁹ *Ibidem*, p. 16.

⁶⁰ See ECtHR (GC), *Gorou v. Greece* (No. 2), 20 March 2009, Appl. No. 12686/03, including the separate opinion of Judge Casadevall. See also S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 16.

⁶¹ ECtHR (GC), *Scoppola v. Italy* (No. 3), 22 May 2012, Appl. No. 126/05, para. 95. On this case and on its particular context, see *supra*, paras. 287-289.

⁶² See the Convention’s preamble, which provides that “Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the *maintenance and further realisation* of Human Rights and Fundamental Freedoms (own emphasis)”.

justification for the external referencing practice. In our view, never the mobilization of external instruments could serve as a legal reason for a backward human rights interpretation of the ECHR. The latter does not imply that the Court should always ‘maximize’⁶³ Convention rights to the highest observable standard. For example, when the Inter-American Court would adopt a higher level of protection, the principle of non-regression does not demand the Court to follow that level. Also, the idea of non-regression does not prevent the Court from taking into account particular circumstances (such as, for instance, some national pressing security issues) to apply the Convention to the concrete case.

540. The principle of non-regression cannot be easily transposed to a situation of balancing human rights because then, increased protection of one human right might imply a lesser protection of another human right, and *vice versa*.⁶⁴ The principle of non-regression does not prevent the influence of external instruments in a proportionality test (balancing a right against another rights or against public interests); they could operate as one of the relevant factors to justify interferences. The principle of non-regression, in our viewpoint, does not play at this level of application of the Convention, but rather at the more abstract level of interpretation. For example, once the Court has interpreted the Convention as covering a certain right (like a right to collective bargaining in an employment context), it could not – because some external instruments do no longer protect that right – move into a backward direction. On the other hand, when external instruments do no longer protect that right for a very strong reason of public interest, the Court may take this, together with all other circumstances, into account when assessing the proportionality of interference.

§ 3. Legal obligations to harmonize with external instruments

541. As a first part of the legal framework, we argue that the Court – under some particular conditions – is legally *obliged* to harmonize with binding external applicable instruments. We justify such an obligation by making use of two legal provisions: Article 53 of the ECHR (§ 3.1.) and Article 31 paragraph 3 (c) of the VCLT (§ 3.2.). We will critically examine the manner in which the Court has made use of these provisions. In addition, we will see how, and to what extent, they could be mobilized more intensively in relation to the referencing practice. Both provisions offer opportunities to enhance the legal validity of

⁶³ For the notion of ‘maximisation’, see C. Van den Heyning, “No Place Like Home: Discretionary space for the domestic protection of fundamental rights”, in P. Popelier, C. Van den Heyning, and P. Van Nuffel (eds), *Human Rights Protection in the European Legal Order: the Interaction between the European and the national courts*, Intersentia, Antwerpen, 2011, p. 95.

⁶⁴ See C. Van den Heyning, *op. cit.*, p. 95; S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 16.

some functions of external references, and will be applied to the illustrative ‘*Singh*-cases’ (§ 3.3.).

§ 3.1. Article 53 of the Convention

542. Article 53 ECHR reads as follows:

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.⁶⁵

The provision touches upon the human rights context external to the ECHR and its Protocols. It demonstrates that the Strasbourg human rights protection system is aware of the existence of other human rights provisions, which it wants to safeguard. Article 53 of the ECHR carries the title of a “safeguard for existing human rights”.⁶⁶

543. In the first place, the provision offers a rule concerning the *interpretation* of the ECHR and its Protocols.⁶⁷ It says how the ECHR should *not* be interpreted: it should not be used to limit or derogate from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party. This interpretative rule becomes particularly relevant when internal law (of national or international origin) offers more elaborate protection than the Convention. It corresponds to the object, purpose and *ratio legis* of the Convention that such internal higher standards are not limited by the interpretation and application of the ECHR.⁶⁸

⁶⁵ Before the entry into force of Protocol 11 to the Convention (on 1 November 1998), Article 53 used to be Article 60 of the ECHR. The EU Charter (Article 52, paragraph 3), the European Social Charter (Article 32) and the UN CESCR and the UN ICCPR (Article 5 paragraph 2 in both Conventions) all contain an analogous provision.

⁶⁶ This is the title the provision receives in the Convention itself.

⁶⁷ Rosoux, arguing on the basis of a textual analysis and on the basis of jurisprudential applications of Article 53 ECHR, considers the provision in the first place as an interpretative rule, rather than a rule to solve conflicts. See G. Rosoux, *Vers une “dématisation” des droits fondamentaux? Convergence des droits fondamentaux dans une protection fragmentée, à la lumière du raisonnement du juge constitutionnel belge*, Bruylant, Brussels, 2015, pp. 520 *et seq.*. In a similar sense: C. Van den Heyning, *op. cit.*, p. 95. Also Velu and Ergec address Article 53 of the ECHR under the heading of ‘interpretation of the Convention’ (*interprétation de la Convention*): J. Velu and R. Ergec, *Convention européenne des droits de l’homme*, in the book series of the judicial encyclopedia: R. Andersen, J. du Jardin, P. A. Foriers and L. Simont (eds), *Répertoire pratique du Droit belge. Législation, Doctrine, Jurisprudence*, Bruylant, Brussels, 2014, p. 60. In the French version of the text of Article 53 ECHR we find the notion of ‘*interprétation*’, which had been translated to ‘construed’ in the English text. The French text goes as follows: “Aucune des dispositions de la présente Convention ne sera interprétée comme limitant ou portant atteinte aux droits de l’homme et aux libertés fondamentales qui pourraient être reconnus conformément aux lois de toute Partie contractante ou à toute Convention à laquelle cette Partie contractante est partie (own emphasis)”.

⁶⁸ J. Velu and R. Ergec, *op. cit.*, p. 60.

544. Article 53 of the Convention is not widely discussed, neither in legal doctrine⁶⁹ nor in jurisprudential practice.⁷⁰ In addition, authors and judges mainly elaborate on what the provision signifies (or could signify) in a national context, rather than what it implies (or could imply) in the context of Strasbourg legal reasoning.⁷¹ To analyze the meaning of Article 53 ECHR, we therefore first address the relevance and understanding of this article in a national interpretative context (§ 3.1.1.). These insights – although often riddled with uncertainties and discussion⁷² – are helpful in developing an argumentation as to how Article 53 of the Convention has the ability to strengthen the legal basis of the Strasbourg referencing practice (§ 3.1.2.).

§ 3.1.1. Article 53 ECHR in a national context

545. In accordance with Article 53 of the Convention – and corresponding to the idea that Convention rights are minimum standards as well as to the principle of ‘substantive subsidiarity’⁷³ – national authorities have the autonomy to offer a more extensive protection

⁶⁹ As far as we noticed, the book on the ECHR of Ovey and White (in its version of 2010) does not mention Article 53 of the Convention at all (notwithstanding the presence of a chapter on the interpretation of the Convention). R. C. A. White and C. Ovey, *op. cit.*, 654 p. Velu and Ergec, who wrote a standard work on the ECHR, only includes a rather small paragraph on Article 53 of the ECHR under the larger heading of “interpretation of the Convention” (*interprétation de la Convention*), J. Velu and R. Ergec, *op. cit.*, p. 60. Renucci address the article only shortly in his elaborate book on human rights in Europe, see J.-F. Renucci, *Droit européen des droits de l’homme*, L.G.D.J. Lextenso editions, Paris, 2012, p. 31. Bering Liisberg, who particularly studies Article 53 of the ECHR, also observed that only few academic articles exist on the article. See J. Bering Liisberg, “Does the EU Charter on Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot”, The Jean Monnet Center for International and Regional Economic Law & Justice, 2001, available at <http://jeanmonnetprogram.org/archive/papers/01/010401-04.html> (accessed on 28 November 2015), p. 26. An extensive chapter on Article 53 ECHR, however, appeared in a recent book of Géraldine Rosoux on the dematerialization of human rights, see G. Rosoux, *op. cit.*, pp. 520 *et seq.*

⁷⁰ The Strasbourg Court itself barely used Article 53 of the ECHR. This had been observed by Van den Heyning, *op. cit.*, pp. 76-77; M. Forowicz, *op. cit.*, p. 391; and J. Bering Liisberg, *op. cit.*, pp. 18 *et seq.* This is also clear from the study of all Grand Chamber cases that are part of our pool. In none of the cases the Court used Article 53 of the ECHR in its argumentation. The case law study only offered us some – although limited – information as to how and why Article 53 ECHR had been mobilized by (third) parties. In some of the cases examined (in nine cases, to be more particular) the (third) parties or the separate judges refer to Article 53 ECHR. It more particularly concerns the cases of ECtHR (GC), *A. and Others v. the United Kingdom*, 19 February 2009, Appl. No. 3455/05; ECtHR (GC), *Micallef v. Malta*, 15 October 2009, Appl. No. 17056/06; ECtHR (GC), *A, B, C v. Ireland*, 16 December 2010, Appl. No. 25579/05; ECtHR (GC), *Axel Springer AG v. Germany*, 7 February 2012, Appl. No. 39954/08; ECtHR (GC), *Von Hannover v. Germany* (No. 2), 7 February 2012, Appl. Nos. 40660/08 and 60641/08; ECtHR (GC), *Fabris v. France*, 7 August 2013, Appl. No. 16574/08; ECtHR (GC), *Mustafa Tunç and Ferice Tunç v. Turkey*, 14 April 2015, Appl. No. 24014/05; ECtHR (GC), *Sargsyan v. Azerbaijan*, 16 June 2015, Appl. No. 40167/06; and ECtHR (GC), *Parrillo v. Italy*, 27 August 2015, Appl. No. 46470/11. The examination of these cases reveals a diversity of arguments having been attached to Article 53 of the ECHR. All the Grand Chamber cases that we examined and that somehow make use of Article 53 of the ECHR will be mentioned under this paragraph. Also other Strasbourg cases, under the condition they are particularly relevant in light of the subject, will be included.

⁷¹ Most doctrine does not offer an examination of what Article 53 of the ECHR could mean for the Strasbourg Judges when arguing their cases; they rather focus on what it allows or requires in a national context. For an overview of references to – mostly Belgian – doctrine, see G. Rosoux, *op. cit.*, p. 518, under footnote 1446. For more information on the use of Article 53 ECHR by the Belgian courts, see *ibidem*, pp. 567 *et seq.*

⁷² As Bering Liisberg says, the very little case law on Article 53 ECHR might indicate that “...there is some confusion about the true meaning and purpose of Article 53 and that the European Court of Human Rights is reluctant to refer to it” (J. Bering Liisberg, *op. cit.*, p. 32). Also Rosoux explains the limited practical applications of the provision by the doubts and uncertainties that surround it. G. Rosoux, *op. cit.*, p. 588.

⁷³ Substantive subsidiarity is about the level and content of human rights protection: States are allowed to offer higher levels of protection. The ECtHR thus, by offering minimum standards, only plays a subsidiary role. Procedural subsidiarity is reflected in the fact that an individual should first exhaust domestic remedies before it can bring a complaint to the Court (see Article 35 (1) of the ECHR). Also Rosoux stresses that Article 53 of the

than the Convention (for instance by ratifying an international instrument external to the Convention).⁷⁴ Article 53 ECHR prevents that national protection standards would be lowered or be set aside by less demanding Strasbourg provisions.⁷⁵

546. In a national context, Article 53 of the Convention also offers guidance when national authorities are faced with diverging protection standards.⁷⁶ *In theory*, Article 53 ECHR organizes ‘harmonious coexistence’⁷⁷ of fundamental rights integrating the provisions of the Convention in the broader framework of applicable human rights.⁷⁸ When the Convention standards offer lower protection standards than elsewhere, the provision thus ensures ‘integration without limitation’.⁷⁹ Article 53 of the Convention is as such situated

“...au niveau de la macroscopie des sources de droits fondamentaux; elles postulent une cohérence globale des textes garantissant des droits fondamentaux en permettant leur coexistence: l’existence d’un droit fondamental ne limite pas, en soi, l’existence d’autres droits fondamentaux”.⁸⁰

547. In practice, ‘harmonious coexistence’ requires national authorities to read together different applicable normative catalogues irrespective of the dates of the catalogues.⁸¹ In line

Convention expresses substantive subsidiarity (*‘subsidiarité substantielle’*) of the ECHR. More elaborate, see *ibidem*, pp. 562-564.

⁷⁴ The dissenting judges in the case of *Mustafa Tunç and Ferice Tunç v. Turkey* stressed that Article 53 of the Convention “...allows the State Parties the possibility of offering to the persons falling under their jurisdiction more extensive protection than that required by the Convention” and that “...the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level, but never limits it”. Joint dissenting opinion of Judges Spielmann, Karakas, Ziemele, López Guerra, and De Gaetano to ECtHR (GC), *Mustafa Tunç and Ferice Tunç v. Turkey*, 14 April 2015, Appl. No. 24014/05, p. 55. Also in the case of *Fabris v. France*, concurring Judge Pinto de Albuquerque referred to Article 53 ECHR to argue that domestic and constitutional courts “...are not precluded from providing a higher degree of protection of the individual’s freedoms and rights”, meaning that “...the Convention standards may be set aside only where the domestic provisions provide for better protection of the applicant’s claim”. Concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Fabris v. France*, 7 August 2013, Appl. No. 16574/08, p. 37. Also in the case of *Parrillo v. Italy*, Judge Pinto de Albuquerque pointed out that article 53 ECHR allows for a wider measure of protection in national law. See concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Parrillo v. Italy*, 27 August 2015, Appl. No. 46470/11, para. 24.

⁷⁵ The case of *Micallef v. Malta* mentioned the issue of national autonomy in human rights protection. This time, it was the Czech Republic intervening as a third-party government that noted that Article 53 ECHR “...was put in place to prevent the standard attained in the protection of human rights from being lowered on the ground that a certain right was not guaranteed by the Convention” and that nothing prevented “...national courts from going beyond the standards by the Convention”. ECtHR (GC), *Micallef v. Malta*, 15 October 2009, Appl. No. 17056/06, para. 73. Article 53 ECHR had also been mobilized in judicial practice to stress that the Government should not challenge the level of human rights protection that is offered by its own courts. In the case of *A. and Others v. the United Kingdom*, the applicant stated that Article 53 of the ECHR is violated when the Government aims to limit the human rights recognized under domestic law by challenging the findings of its own Supreme Court. ECtHR (GC), *A. and Others v. the United Kingdom*, 19 February 2009, Appl. No. 3455/05, para. 142.

⁷⁶ E. Decaux, “Article 60”, in L.E. Pettiti, E. Decaux and P.H. Imbert (eds), *La Convention Européenne des Droits de l’Homme – Commentaire Article par Article*, Economica, Paris, 1995, pp. 897-903.

⁷⁷ G. Rosoux, *op. cit.*, p. 516. This author speaks of ‘une coexistence harmonieuse’.

⁷⁸ *Ibidem*, p. 522.

⁷⁹ It ensures, to say it in the words of Rosoux, a rule of ‘non-restrictive interpretation’ (*‘règle d’interprétation non restrictive’*). *Ibidem*, p. 521.

⁸⁰ *Ibidem*, p. 516.

⁸¹ The latter observations count regardless as to whether the national law or the international agreement (containing the higher protection) dates from before or after the entry into force of the Convention. Article 53 ECHR is ‘time-neutral’. Cf. J. Bering Liisberg, *op. cit.*, p. 21. This is inherent in the wording of Article 53 of the Convention: it does not speak about the human rights that ‘are ensured’ (under the laws of any High Contracting Party or under any other agreement to which it is a party), but about human rights which ‘may be ensured’. This

with Article 53 of the Convention, one catalogue (like the ECHR) should not be used or be interpreted in a manner that puts a limit to other catalogues.⁸² Such a harmonious complementary reading *in concreto* requires giving *priority* to the highest applicable standard.⁸³ In case two human rights catalogues are applicable in a national setting and in case one of both instruments is the Convention offering a lower protection standard, national authorities should give precedence to the other catalogue. By doing so, national authorities do not erase the Convention standards; indeed, the priority-rule does, in theory, not result from hierarchy between catalogues whereby the catalogue with the lowest protection becomes ‘annulled’. Instead, the priority-rule emanates from an harmonious reading of both catalogues. Such process does justice to more protective standards: the provisions of the ECHR should not be misused to escape them.⁸⁴ Although Article 53 of the ECHR does not explicitly reflect the ideal of maximal human rights protection, it implicitly results from it when different standards are simultaneously applicable.⁸⁵

548. This justifies considering Article 53 ECHR as a ‘conflict preventing rule’⁸⁶ rather than as a ‘conflict resolution clause’⁸⁷. Indeed, a situation of catalogues offering different standards

expression alludes to ‘now’ or ‘any given time in the future’. The provision thus covers and safeguards human rights that were already recognized when the ECHR was ratified as well as human rights that have been established after the elaboration of the ECHR. The issue of ‘time-neutrality’ of Article 53 ECHR does not seem to be a disputed. See G. Rosoux, *op. cit.*, pp. 522-524 and p. 547.

⁸² The distinction between the theoretical and practical aspect of Article 53 ECHR and thus, respectively, between Article 53 ECHR as an interpretative rule and as a rule to prevent conflict, had partly been inspired by *ibidem*, pp. 516 *et seq.*

⁸³ L.F.M. Besselink, “Entrapped by the Maximum Standards: on Fundamental Rights, Pluralism, Subsidiarity in the European Union, C.M. L. Rev. 1998, pp. 657-659. See J.-F. Renucci, *op. cit.*, p. 31; G. Cohen-Jonathan, “La fonction quasi constitutionnelle de la Cour européenne des droits de l’homme”, in *Renouveau du droit constitutionnel – Mélanges en l’honneur de Louis Favoreu*, Paris, Dalloz, 2007, p. 1138. This implies that in case the national rule provides higher protection than the international one (*in casu*, the ECHR), that the rule of primacy of international law above internal law will be turned around in a way that the highest protection (also when this protection stems from internal national law) receives precedence over a lower protection. See H. Dumont and S. Van Drooghenbroeck, “La loi”, in M. Troper and D. Chagnollaud (eds), *Traité international de droit constitutionnel – 2. Distributions des pouvoirs*, Paris, Dalloz, 2012, p. 551. In respect of Article 53 ECHR, these authors speak of an ‘inversion de primauté’. See also J. De Meyer, “L’affirmation des droits fondamentaux dans les Constitutions et dans les traits internationaux”, in Fr. Delpérée, S. Marcus-Helmons, F. Reyntjens, and others (eds), *Le nouveau droit constitutionnel*, Brussels, Bruylant, 1987, p. 253. This author says that the principle of primacy of international law “...est primé, à son tour, par un autre principe [...] selon lequel les garanties assurées à ces droits se complètent les unes les autres, le plus favorables prévalant, en cas de conflit, sur les moins favorables”. The latter authors were cited by G. Rosoux, *op. cit.*, p. 533, footnote 1480.

⁸⁴ On the contrary, the aim of Article 53 of the ECHR is that both texts (the ECHR and the one that offers a higher protection) are given a same level of fundamentality and can continue to coexist. In a similar sense, see G. Rosoux, *op. cit.*, p. 522. She alleges that the provision is about ‘coexistence’, ‘complementing’ and ‘correction’, rather than ‘substitution’ (*ibidem*, p. 560). She considers Article 53 ECHR mainly as an invitation for a transversal lecture of human rights provisions of distinct origin and not as a clause that establishes a hierarchy of norms (*ibidem*, p. 546). In the case of *Fabris v. France* of 7 February 2013, concurring Judge Pinto de Albuquerque, when referring to Article 53 of the ECHR, frames it in a different manner, which does not correspond to our understanding. He more particularly stressed that “...the Convention standards *may be set aside* only where the domestic provisions provide for better protection of the applicant’s claim (own emphasis)”. See Concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), case of *Fabris v. France*, *op. cit.*, p. 37.

⁸⁵ Also in the view of Rosoux, the principle of maximal protection is not the principle that is reflected in Article 53 ECHR, but it is nonetheless the consequence of the principle of harmonious coexistence. See G. Rosoux, *op. cit.*, p. 588.

⁸⁶ Rosoux similarly treats Article 53 ECHR as a rule to prevent conflict. See G. Rosoux, *op. cit.*, p. 531. In a same sense: Cl. Sciotti, *La concurrence des traits relatifs aux droits de l’homme devant le juge national*, Bruylant and Nemesis, Brussels, 1997, pp. 40 and 58.

of protection is no synonym for a situation of conflicting standards. When external instruments offer a higher human rights protection than the Convention, these higher levels do not *contradict* the ‘minimum’ levels offered by the ECHR.⁸⁸ Since there is no conflict, there will *a fortiori* be no question about *solving* a conflict. Only when national authorities do *not* give precedence to higher protection standards – thus ignoring Article 53 of the Convention – a conflict between human rights arises. Provisions of the ECHR are then put in conflict with higher guarantees provided in other human rights instruments.⁸⁹ Since Article 53 of the Convention is a conflict-preventing clause, one should realize that we talk about a prevention of conflict between *same or similar* human rights, and not about solving conflicts between *different* human rights.⁹⁰

549. Article 53 ECHR is particularly relevant for the relationship between the ECHR and the ICCPR.⁹¹ Both the ECHR and the ICCPR have a similar scope *ratione materiae*; they address the protection of civil and political rights. Their provisions and objectives often overlap. When both instruments offer different levels of protection, this will be particularly noticeable. It happens that under a similar right, some situations are protected under one instrument but not under the other, for instance because of different approaches or varying definitions.⁹² All Member States are a party to the ICCPR.⁹³ Thus, both the ECHR and the ICCPR apply on the national level of the CoE States, possibly with other approaches and varying protection levels. A CoE study on “Problems Arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human

⁸⁷ M. Forowicz, *op. cit.*, p. 391, and references there. See also E. Brems, “Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration”, *E.J.H.R.-E.J.H.R.* 2014, vol. 4, p. 464 (Brems says the following: “When the normative range is thus enhanced, the question arises as to priority in case of conflict among human rights provisions. The ECHR includes a provision in this sense [Article 53] that gives priority to the most rights-protective provision in case of conflict”); J. Velu and R. Ergec, *op. cit.*, pp. 60-61.

⁸⁸ See G. Rosoux, *op. cit.*, p. 561.

⁸⁹ Tulkens and Van Drooghenbroeck remark that diverging protection standards do not *per se* lead to “the creation of irreconcilable obligations for State Parties to both instruments” and that Article 53 of the ECHR results in an elimination of the “dilemma and the conflict of loyalties”. F. Tulkens and S. Van Drooghenbroeck, “The domestic court’s response to divergent views among international human rights bodies: thoughts prompted by the Singh v. France cases”, in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds), *Liberæ Cogitationes. Liber Amicorum Mark Bossuyt*, Intersentia, Antwerpen, 2013, p. 748.

⁹⁰ Forowicz says that this provision “...has been understood to contain a simple principle, namely that the rights contained in the ECHR are minimum standards and that in case of conflict between the ECHR and a national or international instrument concerning the same right, the most favorable provision to the applicant takes precedence”. M. Forowicz, *op. cit.*, p. 391. Bering Liisberg, with reference to other authors, says that “...the rights contained in the ECHR are minimum standards, and that in case of a conflict between a right in the ECHR with a national or international rule regarding the same right, the individual is entitled to protection under the most favorable provision”. J. Bering Liisberg, *op. cit.*, p. 26 and references there. In a same sense: G. Rosoux, *op. cit.*, pp. 538, 545 and 561; S. Van Drooghenbroeck, “Pour une mise à jour du droit constitutionnel belge des libertés publiques et des droits de l’homme – Réflexions au départ de l’article 22bis de la Constitution garantissant le droit de l’enfant à l’intégrité morale, physique, psychique et sexuelle”, *A.P.T.* 2001, p. 144; P. Ducoulombier, *Les conflits de droits fondamentaux devant la Cour européenne des droits de l’homme*, Brussels, Bruylant, pp. 292 et seq.

⁹¹ J. Velu and R. Ergec, *op. cit.*, p. 31. Rosoux speaks about Article 53 of the ECHR as an article organizing the ‘coexistence harmonieuse’ of fundamental rights and the ‘cohérence de leurs garanties’. G. Rosoux, *op. cit.*, p. 515.

⁹² For some concrete examples of rights that are provided under the ECHR but not under the ICCPR (and *vice versa*), or for examples of similar rights to which both instruments have a different approach, see J.-F. Renucci, *op. cit.*, p. 31.

⁹³ See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (accessed on 10 January 2016).

Rights: Differences as regards the Rights Guaranteed”, which came out soon after the ICCPR had been issued, mentioned the relevance of Article 53 of the ECHR in this respect. It held that the aim of the provision is to ensure that the “...restrictions provided for in one instrument may not be invoked to limit the rights set out in the other”.⁹⁴

550. Besides the ICCPR, the EU Charter and categorical UN human rights treaties⁹⁵ offer other examples of catalogues with provisions comparable to the ECHR. Even instruments of social and economic rights may offer similar rights than those protected by the Convention. Firstly, because the Convention itself provides some rights of the so-called ‘second generation’, such as the right to education (Article 2 of Protocol No. 1) and the right to property (Article 1 of Protocol No. 1), and, secondly, because social and economic rights are sometimes framed as dimensions of civil and economic rights. Also then, national authorities may be faced with a situation of different standards of protection under ‘similar rights’. In such a situation, Article 53 ECHR requires national authorities not to use the ECHR in a manner that would curtail the protection levels offered by external catalogues applicable in their internal context.⁹⁶

§ 3.1.2. Article 53 ECHR in a Strasbourg context

551. Little is written about the relevance of Article 53 ECHR in a Strasbourg context, let alone about its role in relation to external referencing. Therefore, our reflections on this topic will be largely inspired by what Article 53 of the Convention means in a national context.

552. Before discussing the concrete opportunities that Article 53 of the Convention offers for the legal validity of the referencing practice, we address two preliminary remarks (A.). The first one relates to Article 53 ECHR as an additional argument in favor of the principle of non-regression and in favor of resisting references that lead to lowering Convention standards (A.1.). The second preliminary remark illuminates how Article 53 of the Convention should *not* be used, *i.e.* it should not be mobilized to stress national discretion and to block external influences on that ground (A.2.).

553. Subsequently, we develop an argument on how the human rights safeguard of Article 53 ECHR may offer the referencing practice a stronger legal basis in the light of harmonious interpretation (B.). In the first place, we argue that this provision, in its *procedural aspect*, carries an obligation for Strasbourg judges to sanction national authorities

⁹⁴ Council of Europe, *Problems Arising from the Co-existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights: Differences as regards the Rights Guaranteed*, Report of the Committee of Experts on Human Rights to the Committee of Ministers, Doc H (70) 7, September 1970, para. 85, as quoted by M. Forowicz, *op. cit.*, p. 391.

⁹⁵ Including *inter alia* the CRC, the CEDAW, the CRPD, the CAT, and the CERD.

⁹⁶ J. Velu and R. Ergec, *op. cit.*, p. 60.

failing to harmonize human rights standards at the internal level (B.1.). Secondly, we argue that Article 53, in its *substantive aspect*, can (and should) be mobilized by the Strasbourg Court to establish an harmonious interpretation with external human rights provisions that offer higher standards, provided that all parties to the Convention are parties to the external instrument in question (B.2.).

A. Preliminary remarks

A.1. Article 53 strengthening a principle of non-regression

554. A principle of non-regression should function as a red line when creating a legal framework for the referencing practice. In our view, the *lex-specialis* character of human rights law resists the referencing practice when it would level down human rights protection. This argument could be further strengthened by Article 53 of the ECHR.

555. Article 53 of the ECHR is written in a unilateral asymmetric way.⁹⁷ It prevents a mobilization of Convention provisions to curtail rights originating in other human right catalogues. The ideal of safeguarding human rights is thus conceived in one direction: the provision does not explicitly mention a situation in which external norms risk to limit human rights provided by the ECHR and its Protocols. Thus, when interpreting the human rights safeguard of Article 53 literally and narrowly, it does not apply when the Convention offers higher human rights protection than external human rights instruments.⁹⁸

556. We propose a more flexible and symmetric approach to Article 53 of the Convention. It does not only incorporate a protection for human rights in external instruments, but, *mutatis mutandis*, we also read in it a safeguard for Convention rights. Accordingly, this provision offers an additional reason to argue in favor of a principle of non-regression in Strasbourg adjudication. In this approach, Article 53 of the Convention indirectly establishes a standstill-principle⁹⁹, preventing that external human rights guarantees curtail the ECHR. Symmetrically, both in respect of external and Convention rights, Article 53 of the Convention prevents a ‘race-to-the-bottom’ in human rights protection. This offers a green

⁹⁷ G. Rosoux, *op. cit.*, p. 532.

⁹⁸ *Ibidem*.

⁹⁹ We say that Article 53 offers an *indirect* standstill-obligation. Why? Article 53 of the ECHR can in itself not prevent that the Member States adopt another treaty that would limit earlier recognized levels of human rights protection. In principle, States could thus alter the provisions of the ECHR. They can also lower national protection standards as long as they stay in accordance with the ECHR. However, what Article 53 of the ECHR – in a symmetric understanding – prevents is that lower standards are invoked to limit the rights that are offered by the ECHR. Regression in national human rights protection is thus not prevented *an sich*, but the ideal of maximum protection and non-regression in human rights interpretation will be the practical *indirect* result of the application of Article 53 of the ECHR. While Rosoux agrees with the latter observations, she does not consider Article 53 of the ECHR as an (indirect) standstill-obligation. See G. Rosoux, *op. cit.*, pp. 558-559.

light to resist external referencing when this may reduce the Convention standards. A few arguments plead in favor of this approach.

557. *Firstly*, the approach is coherent with the spirit of the Convention as expressed in the Preamble, which is part of the Convention's interpretative context. The Preamble provides that the ECHR "...aims at securing the universal and effective recognition and observance of the Rights therein declared" and that the CoE pursues its aims by "...the maintenance and the further realization of Human Rights and Fundamental Freedoms". Against this background, it seems unacceptable to conceive Article 53 of the ECHR only as a safeguard for external protection standards but not for the proper internal standards of the Convention.

558. *Secondly*, the approach is coherent with arguments developed in other contexts. For instance, Article 53 of the EU Charter, which was inspired by Article 53 of the ECHR, is interpreted as including a standstill-principle.¹⁰⁰ Also the Inter-American human rights mechanism seems to support our view. The ACtHR frequently uses decisions of other international courts (such as decisions of the ECtHR) and other human rights instruments (such as the ICCPR and other UN treaties) to interpret and apply its own source instrument, being the ACHR. The latter instrument contains in Article 29 (b) ACHR a human rights safeguard similar to Article 53 of the ECHR. Article 29 (b) of the ACHR provides that

"...no provision of this convention shall be interpreted as ... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any state Party or by virtue of another convention to which one of the said states is a party".

559. Interestingly, and comparable to our argument, the ACtHR in an advisory opinion of 1985, used this safeguard to resist external referencing that would lead to a 'race-to-the-bottom'. The IACtHR more particularly noted that Article 29 (b) of the ACHR, as an interpretative provision, includes an obligation not to incorporate restrictions from other systems.¹⁰¹ It argued explicitly that external referencing could not reduce the limit of

¹⁰⁰ Article 53 of the EU Charter provides: "[N]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions". See *ibidem*, p. 557 and references there.

¹⁰¹ ACtHR, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, 13 November 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985), available at https://www1.umn.edu/humanrts/iachr/b_11_4e.htm (visited on 3 December 2015) – (hereafter: "Advisory Opinion of the IACtHR of 1985 on Compulsory Membership"). This case had been referred to by D. Shelton, "An Introduction to the History of International Human Rights Law", The George Washington University Law School, Public Law and Legal Theory Working Paper, August 2007, available at <http://ssrn.com/abstract=1010489> (visited on 29 July 2016), p. 26. In the advisory opinion, the IACtHR was confronted with the existence of more generous guarantees regarding the freedom of expression under the ACHR than in other international human rights instruments. Therefore, Costa Rica had argued in favor of interpreting the ACHR "...in relation with the provisions that appear in other treaties that cover the same subject", also when "...a right recognized by the American Convention were regulated in a more restrictive way

protection as offered by the ACHR. The ACtHR thereby implicitly suggested that inspiration sought in external instruments should higher – or at least maintain – the level of human rights protection under the ACHR. This corresponds to the idea of a ‘standstill-principle’ that we conceive as an indirect result of the human rights safeguard under Article 53 of the ECHR.¹⁰²

A.2. No use of Article 53 to resist referencing when balancing human rights

560. In the pool of Grand Chamber cases, (third) parties sometimes mobilize Article 53 of the Convention to highlight their discretion in balancing human rights. Then, the provision is invoked to argue for some margin of manoeuvre in pushing for the protection of a particular right to the detriment of the protection of another (conflicting) right.¹⁰³

561. The arguments of Ireland in the case of *A, B, C* offer an example in this respect. This Grand Chamber judgment concerns restrictions under Irish law on obtaining abortion for

in another international human rights instrument”. It said that in such a situation, “...the interpretation of the American Convention would have to take those additional restrictions into account” (Advisory Opinion of the IACtHR of 1985 on Compulsory Membership, paras. 50-51). The IACtHR did not agree with this point of view and responded to the argument by stating the following: “[I]t is true, of course, that it is frequently useful, -and the Court has just done it- to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty”. Advisory Opinion of the ACtHR of 1985 on Compulsory Membership, *op. cit.*, para. 51.

¹⁰² The Inter-American Court, arguing that external referencing should not limit its own protections standards, attaches this argument to the human rights safeguard in Article 29 (b) of the ACHR, which is similar to Article 53 of the Convention. The Inter-American Court in respect of this provision put forward that “...if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes”. Advisory Opinion of the ACtHR of 1985 on Compulsory Membership, para. 52.

¹⁰³ The provision had been used three times in this respect – twice by a Contracting State (in ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, paras. 180 *et seq.*, and in ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 64) and once by a third party (in ECtHR (GC), *Von Hannover v. Germany* (No. 2), *op. cit.*) – to stress the States’ autonomy and discretion in considering a human rights issue, particular when this issue involves a balancing of human rights. The case of *A, B, C v. Ireland* is elaborately discussed as an example in the full text of the paper. The other examples will be shortly sketched in what follows here. In the case of *Axel Springer AG v. Germany*, a case about a national prohibition on reporting arrest and conviction of a famous actor, the Court concluded to a violation of Article 10 ECHR on the right to freedom of expression. The case involved a balancing of two rights: Article 10 ECHR and Article 8 ECHR on the right to a private life. The government argued that “...the Court should intervene only where the domestic courts had not taken account of certain specific circumstances when undertaking the balancing exercise or where the result of that exercise was patently disproportionate”. The government alleged the latter being confirmed by Article 53 ECHR and added that “...in the relationship between two citizens the fact of attaching more weight to the right of one of the persons concerned restricted the right of the others, which was forbidden under Article 53 Convention” (ECtHR (GC), *Axel Springer AG v. Germany*, *op. cit.*, para. 64). Germany argued that the Court should put a step back when a thorough balancing exercise had been done on the national level. In the case of *Axel Springer AG*, also the third party mobilized Article 53 ECHR to argue in favor of a broad margin of appreciation for the State (*ibidem*, para. 73). Third parties made a similar statement in the case of *Von Hannover v. Germany* (No. 2). This case balances the right to respect for private life and the right to freedom of expression in the context of a publication of photographs of a famous couple taken without their knowledge. The third parties here “...invited the Court to grant a broad margin of appreciation to the Contracting States, submitting that such was the thrust of Article 53 of the Convention”. The third parties thus argued that the ‘thrust’ embedded in Article 53 ECHR grants the states “a broad margin of appreciation” in situations of competing interest. (ECtHR (GC), *Von Hannover v. Germany* (No. 2), *op. cit.*, para. 73).

reasons of health and/or well-being. These restrictions forced the applicants to seek abortion in a private clinic in England, which they described as an unnecessarily expensive, complicated and traumatic procedure. The applicants mobilized Article 8 of the Convention on the right to private life to argue for more liberal abortion rights in Ireland. The Irish Government invoked the protection of pre-natal life as a legitimate goal endorsed by its people. It relied on Article 53 of the Convention to stress the importance of diversity in traditions among Member States and to call for respecting the outcome of national debates through democratic processes. According to Ireland, Article 53 of the Convention requires respect for pluralism and for national autonomy for protecting the right to life of the unborn which emerged from moral values deeply embedded in Irish society.¹⁰⁴ It rejected the applicants' argument to align various more lenient abortion laws across the Member States and therefore – in a spirit of substantive subsidiarity – implicitly and indirectly opposed to put itself in line with external instruments that could point at a 'consensus' or 'trend' on the issue.¹⁰⁵ On the contrary, we argue that Article 53 ECHR should not be used to stress national discretion when balancing human rights, like Ireland did. Two particular arguments support this approach.

562. *Firstly*, Article 53 of the Convention allows for a higher protection at national level. This is something different than allowing for a 'broad margin of appreciation' to a State when balancing human rights. This observation echoes a recent separate opinion of Judge

¹⁰⁴ An earlier case about abortion in which the Irish government invoked Article 53 ECHR in a similar manner is *Open Door v. Ireland* (ECtHR, *Open Door and Dublin Well Women v. Ireland*, 29 October 1992, Appl. Nos. 14234/88 and 14235/88, paragraphs 54, 64, 66, and 78). This case was about the circulation of information on abortion. The Government used article 53 ECHR to argue that Article 10 on the freedom of expression should not be interpreted to limit the right to unborn life. The Strasbourg Court did not follow the latter argument, however without delivering any general interpretation of Article 53 ECHR. Some dissenting judges, on the contrary, said that the Court had not given enough weight to Article 53, as invoked by the Government. Judge Meyer even said that the outcome of the case raised problems in light of this Article. Also *ad hoc* Judge Blayney (from Ireland) said that Article 53 ECHR should have led to the conclusion of a breach of Article 10 ECHR to the benefit of the protection of the right of the unborn to be born. Hence, as Blayney stated: "[U]nder Article [53] nothing in the [ECHR] is to be construed as limiting or derogating from that right".

¹⁰⁵ ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, paras. 180 and 182. The governments says more particularly in paragraph 187: "Indeed, even if there was such a consensus, determining the scope of fundamental rights based on such a consensus was fraught with difficulty. The rights guaranteed by the Convention were not dependent upon the assessment of the popular will at any given time and, indeed, sometimes rights might have to be protected against the popular will. There were serious objections to attempting to deduce from the current position in Contracting States the existence of a controversial Convention right which was not included in the Convention in the first place. Emphasizing the principle of 'subsidiarity' and the respective roles of the State and the Court in such a particular context, the Government further maintained that the international consensus, if at all relevant, in fact pointed the other way, namely, towards supporting a State's autonomy in determining its own abortion laws rather than leaving this to a supranational law-making body (the Cairo ICPD 1994, the Fourth World Conference on Women in Beijing in 1995 and PACE Recommendation 1903 (2010) as well as the Protocols to the Maastricht and Lisbon Treaties). PACE Resolution 1607 (2008), relied on by the applicants, demonstrated the divergence of views in Contracting States as it was a resolution and not a recommendation and it was adopted by a split vote, the Irish members of PACE voting against". On the one hand, the Government thus, backed up with outcomes of referenda (see para. 183), seems to suggest that the popular will in Ireland should be followed whereas, on the other hand, it says that, in light of the existence of a European consensus, the Convention should not be dependent on a more general (external) popular will. ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, paras. 183 and 187.

Pinto de Albuquerque in the case of *Parrillo v. Italy*.¹⁰⁶ Secondly, as we explained earlier, Article 53 ECHR touches upon a situation of different levels of protection under *a same or a similar right*.¹⁰⁷ Article 53 ECHR is not relevant in a situation of conflicting human rights. In such situation, it is not meaningful to speak of 'higher' protection standards since the one right could not be compared to the other.

563. The spirit of Article 53 of the ECHR is one of safeguarding human rights and of allowing and prioritizing higher protection standards. This does not accord with using this provision to stress a State's margin of appreciation. There might be other arguments to defend some State discretion, but Article 53 of the Convention is not one of them. The Court itself seems to agree with this point of view. The Court did not treat Article 53 of the ECHR as a means to offer States a wide margin of appreciation. Bering Liisberg, who studied the Court's use of Article 53 ECHR in situations of conflicting human rights norms¹⁰⁸, concluded that "...the Court confirmed its willingness to give these conflicting interests serious consideration", but that "...there is no indication that Article 53 ECHR plays any role in this connection".¹⁰⁹ On the basis of our analysis of recent Grand Chamber cases, this conclusion remains valid.¹¹⁰

¹⁰⁶ In the case of *Parrillo v. Italy* of 27 August 2015, a case about a national ban from donating to scientific research embryos obtained from an *in vitro* fertilization that were not destined for a pregnancy, the Court concluded that Italy had not overstepped the wide margin of appreciation and that the ban could be considered as "necessary in a democratic society". Consequently, the Court did not conclude to a violation of Article 8 ECHR. Judge Pinto de Albuquerque in his concurring opinion to this case directs its criticism to article 27 of the Oviedo Convention (this is the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, which entered into force on December 1, 1999) which, as Judge Pinto de Albuquerque explicitly says, is a provision similar to article 53 ECHR. In an analogical reasoning, his concern in respect to the Oviedo Convention can thus be considered as a concern in respect of article 53 ECHR. It sounds as follows: "[H]owever, this [article 27 of the Oviedo Convention which is similar to article 53 ECHR] should not be interpreted as affording a "broad" margin of appreciation. The two issues should not be confused, as the majority seems to do...in the present judgment. It is one thing for the possibility of national legislation to provide broader protection to human life, human beings, fetuses and embryos,...and quite another to accept a "broad" margin of appreciation in this field, which could eventually be used, or rather, misused to enact legislation diminishing the protection of human beings, fetuses and embryos". Concurring opinion of Judge Pinto de Albuquerque to See concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Parrillo v. Italy*, 27 August 2015, Appl. No. 46470/11, para. 24. In fact, this separate view was the only explicit information we found in the examined Grand Chamber cases as to how the safeguard for human rights in Article 53 of the ECHR should *not* be understood.

¹⁰⁷ There is however an exception. Sometimes, the Court harmonized certain external human rights with Article 14 ECHR (prohibition of discrimination) through the use of Article 53 of the ECHR. Then, the Court did not 'harmonize' different levels of protection in respect of a similar right, but offered itself a direct supervising role under Article 53 of the Convention by ensuring that higher external standards respect other human rights (for instance by verifying whether external standards had been established without discrimination). It is more particularly in the case of *E.B. v. France* that the Court said that Article 14 of the ECHR does also apply to additional rights that the State decided to protect voluntarily (ECtHR (GC), *E.B. v. France*, 22 January 2008, Appl. No. 43546/02, para. 48). Thus, if a State went further in human rights protection, for instance by ratifying external human rights catalogues, the Court argues that a State cannot discriminate in the application of these rights. Rosoux notes that the Court in the latter case used Article 53 ECHR in order to establish a link between national additional protection standards and the autonomous application of Article 14 ECHR to such standards. In that sense, as Rosoux argues, the Court integrated a substantive requirement (prohibition of discrimination) within the rule of Article 53 ECHR. See G. Rosoux, *op. cit.*, pp. 565-566.

¹⁰⁸ The author studied this issue in Strasbourg cases from before 2001.

¹⁰⁹ J. Bering Liisberg, *op. cit.*, p. 22. Bering Liisberg, also said, based on its case law study, that "...the Court has never explicitly referred to Article 53 as a basis for finding no violation".

¹¹⁰ In all cases of our pool in which the (third) parties invoked article 53 ECHR (the cases of *Von Hannover* (No.2), *Axel Springer AG*, and *A, B, C v. Ireland*), the Court did not explicitly respond to the argument. In the case of *Von Hannover* (No. 2), the third parties argued in favor for a broad margin of appreciation in this situation of

B. An obligation to consider and safeguard external human rights

564. While Article 53 of the ECHR should not be used to inhibit the external referencing practice, we will argue in what follows how that same provision could (and should) be used to legally justify some forms of references. This argumentation is not widely developed, nor in legal doctrine nor in jurisprudential practice. It aims to find a balance between rights holders' and States' interest and distinguishes between procedural and substantive aspects.

B.1. Procedural aspect: a direct sanction for national authorities disregarding harmonization

565. Article 53 of the Convention requires from national authorities to safeguard human rights and to ensure a harmonious coexistence of different human rights catalogues by giving precedence to the highest applicable standards. What does this 'interpretative rule' require from the Strasbourg Court?

566. In our view – which builds on a far-going and innovative mobilization of Article 53 of the ECHR – the Strasbourg Court should ensure that its interpretation and application of the ECHR does not indirectly justify a national refusal to apply more protective external rules (of national or international origin).¹¹¹ The Court may achieve that aim by sanctioning those States that do not act in a spirit of human rights harmonization. Therefore, it should not leave unpunished States which, by internally giving precedence to lower standards of the Convention, curtail external higher applicable standards.¹¹²

567. Admittedly, the Court, as we have demonstrated in our case law analysis, has taken account of States not observing external frameworks as an 'aggravating factor' when considering the proportionality of an interference (without using Article 53 ECHR).¹¹³ Our

competing interests (ECtHR (GC), case of *Von Hannover v. Germany* (No. 2), 7 February 2012, Appl. Nos. 40660/08 and 60641/08, para. 73). Admittedly, in this case the Court established a 'certain margin of appreciation' (*ibidem*, para. 104), and concluded that there was no violation of article 8 ECHR (*ibidem*, para. 126), but Article 53 ECHR was not used for that reason. Similarly, in the case of *Axel Springer AG v. Germany*, the Court did not respond to the arguments of the government and the third party that included Article 53 of the ECHR to argue in favor of a broad margin of appreciation (ECtHR (GC), case of *Axel Springer AG v. Germany*, 7 February 2012, Appl. No. 39954/08, paras. 64, 73 and 85). In the case of *A, B, and C v. Ireland*, the Court did not follow the arguments of Ireland about the existence of a right to life of the unborn. In the eyes of the Court, there was thus no situation of 'conflicting rights'. The Court did thus not explicitly pick up the argument of the Government using Article 53 of the ECHR to defend its autonomy and values (ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, para. 180). Admittedly, the Court in this case established a 'broad margin of appreciation' (not decisively narrowed by external consensus) but it did so on the basis of arguments other than Article 53 ECHR, such as the acute sensitivity of the moral and ethical issues raised (*ibidem*, paras. 233-236).

¹¹¹ Cfr. G. Rosoux, *op. cit.*, pp. 554-555.

¹¹² The procedural aspect of this provision would only play in respect of legal provisions that are *applicable* in the national context. The Strasbourg Court would thus only sanction a State in case it did not give precedence to internal law or to international agreements to which it is a party.

¹¹³ See *supra*, Part II, Chapter 3, § 7.4.

approach, making use of Article 53 ECHR, goes further by arguing that a State violates the Convention when it circumvents external human rights obligations by invoking its compliance with the ECHR. Such an interpretation of Article 53 ECHR implies a direct mobilization of this provision to sanction misuses of the ECHR.

B.1.1.1. Practical relevance

568. In our approach, Article 53 ECHR offers an independent sanctioning mechanism. This means that we treat Article 53 as a direct right that can be invoked by the parties to the case. Although Article 53 of the Convention is in the first place an interpretative rule directed to national authorities, we argue that it is also directed to individuals: it offers them the right that national bodies safeguard the ‘highest’ internal protection and apply the priority rule inherent to Article 53 ECHR.¹¹⁴ This proposal is fuelled by the idea that the ECHR offers rights that are ‘practical and effective’. Indeed, if the Strasbourg Court would allow national authorities to hide behind lower Convention standards to escape external human rights obligations, the ‘safeguard’ of Article 53 ECHR will not be guaranteed in a practical and effective manner.

569. In practice, the ‘sanction’ we propose, plays a role in two particular situations. A *first* situation is when Strasbourg litigants invoke the Convention as an excuse for not giving effect to external higher levels of protection to which the State is bound. The Strasbourg judges should not give effect to such arguments since Article 53 of the ECHR prevents using the loyalty to one protection mechanism (offering lower protection standards) as a justification for not living up to obligations under another protection mechanism (offering higher protection standards). When we require from national authorities to safeguard human rights, it is reasonable to equally require such a behavior from the Strasbourg Court. In one of the cases of our pool, Judge Pinto de Albuquerque, in a footnote to his dissenting opinion, has argued in a comparable manner. When considering concurring obligations under international humanitarian law, he stressed that

“[i]f international humanitarian law provides a higher degree of protection than the Convention, the States parties to the Convention cannot invoke it in order to avoid compliance with international humanitarian law (Article 53 of the Convention)”.¹¹⁵

¹¹⁴ *A contrario*: R. Rosoux who does not conceive Article 53 ECHR as creating rights. See G. Rosoux, *op. cit.*, p. 558.

¹¹⁵ Interestingly, Judge Pinto de Albuquerque added that “[t]his provision [Article 53 ECHR] has major potential for the enforcement of international humanitarian law by this Court, which is in line with Article 31-3 (c) of the Vienna Convention on the Law of Treaties. Unfortunately, in the present case, the majority admitted the applicability of international humanitarian law but concluded that it did not provide a “conclusive answer” ...”. Dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), case of *Sargsyan v. Azerbaijan*, 16 June 2015, Appl. No. 40167/06, p. 120, footnote 23.

Judge Pinto de Albuquerque treats Article 53 of the Convention in an innovative and flexible manner. ‘Innovative’, because Article 53 is seldom used in relation to external instruments (*in casu* instruments of international humanitarian law). ‘Flexible’, because he considers ‘international humanitarian law’ as falling within the scope of Article 53 of the ECHR, while this provision speaks of ‘human rights and fundamental freedoms’. In one of the cases of our pool, the Court stressed itself (making use of the interpretative rule of Article 27 VCLT) that no internal rule can be mobilized to excuse a non-observance with international law.¹¹⁶ *Mutatis mutandis*, we argue that no Convention provision (part of the national legal order) can be mobilized to excuse a violation of other external treaties.

570. A *second* situation in which Article 53 of the Convention may play a direct role is when the parties to the case rely on external human rights obligations to which the respondent State is bound. Then, Article 53 of the Convention – in our view – requires from the Strasbourg Court to take account of the coexisting (national or international) human rights obligations that are binding to the respondent State, and to conclude to a violation of this provision when it appears that the respondent State, on the internal level, has omitted to give precedence to the higher external standards. Accordingly, Article 53 of the Convention may stimulate the Strasbourg litigants to import in their arguments more protective human rights norms applicable on the national level. The provision leaves space for such openness because it does not give the Convention absolute precedence when external instruments offer different protection standards. On the contrary, it safeguards such external instruments and allows external higher provisions to play a role.¹¹⁷

571. Under both situations, the Court is suggested to apply Article 53 of the ECHR directly in a *procedural* manner. In the first situation, the Court does not allow arguments in its legal proceedings that misuse lower Convention standards to excuse a violation of external obligations. In the second situation, the Court applies directly Article 53 to sanction national proceedings that did not safeguard external protection standards. Both sets of circumstances do not push the Court to *substantively* adapt its own levels of protection. The sanction under Article 53 ECHR has no material and dynamic effects for the substantive interpretation of the Convention. It does therefore not affect other Member States than the respondent State itself.

¹¹⁶ See *supra*, Part II, para. 245.

¹¹⁷ There are treaties that do provide such an absolute precedence over other treaties: Article 307 of the Treaty establishing the European Community (EC Treaty) gives absolute precedence to this treaty over other agreements the Member States might have concluded (Consolidated Version of the Treaty on the European Union and the Treaty establishing the European Community, 29 December 2006, [2006] OJ C321E/1). Also Article 103 of the UN Charter provides that the obligations enshrined in the Charter prevail over conflicting obligations of another international treaty (Charter of the United Nations, article 92). Both examples were taken from M. Forowicz, *op. cit.*, p. 391. Forowicz speaks in this sense of Article 53 ECHR being only a ‘limited or weak conflict clause’ which does not give the ECHR absolute precedence over other treaties or which does not in principle let the ECHR prevail over conflicting obligations from other treaties (*ibidem*, p. 391). In Forowicz’ observation, we have found some inspiration *mutatis mutandis*; however, as noted above, we do not – contrary to Forowicz – consider Article 53 ECHR as a ‘conflict resolution clause’.

B.1.2. The concerns do not outweigh the benefits

572. The proposed ‘procedural’ application of Article 53 of the Convention is prone to some legal and political concerns. It might be conceived as allowing a direct judicial supervision of external instruments by the Strasbourg Court and, therefore, as going beyond the Court’s competence. The European Commission of Human Rights, when pronouncing itself on the application of Article 53 of the ECHR, stressed that the Strasbourg Court “...*n’est pas compétente pour examiner des requêtes relatives à des prétendues violations d’autres instruments internationaux ou du droit interne. L’article [53] de la Convention ne confère aucunement aux organes de celle-ci pareille compétence.*”¹¹⁸ When the Court would use sanctioning powers under Article 53, its supervision might enter too much the sovereign national domain, affecting the Court’s subsidiary nature. Furthermore, it risks intensifying ‘fragmentation’ since the Court might interpret external instruments differently than the interpretation they normally receive in the national- or international context from which they emanate.
573. For example, when the applicant would stress that the respondent State is bound on national level to follow the ICCPR, the Court – to concretize the procedural aspect of Article 53 – may have to verify whether or not the ICCPR, under the concrete circumstances of the case, would offer higher protection standards than the ECHR, and whether or not the State has given priority to such standards. Since the latter process implies the ECtHR interpreting the ICCPR in the light of the facts, it stretches the limits of the Court’s competence. Furthermore, it carries a challenge of divergent interpretations, for instance when the Court moves away from how national authorities or how the HRC would conceive the meaning of the ICCPR.¹¹⁹
574. Despite the latter concerns, there are (modest) signs that the Court is not entirely averse from giving Article 53 of the Convention a more independent relevance in Strasbourg human rights adjudication procedures. The case of *Leempoel & S.A. ED. Cine Revue v. Belgium* of 9 November 2006,¹²⁰ which is exceptional in its kind, could be considered as demonstrating some willingness to apply Article 53 ECHR directly. The reactions to this case confirm the controversial character of our proposal.

¹¹⁸ See the following Commission decisions: *Markoupolou et al. v. Greece*, Appl. No. 20665/92, 20666, 20668, 21732, 21991-92, 21991, 21999, and 22219/93, all decided on 6 April 1992, and *M.K. et al v. Greece*, Appl. No. 20723-24/92, 22213-18 and 22220-27/93, all decided on 1 December 1993. These cases are cited by J. Bering Liisberg, *op. cit.*, footnote no. 83.

¹¹⁹ In line with these concerns, the Court for instance said in the case of *Jersild v. Denmark*, that Article 10 ECHR on freedom of expression “...must be interpreted, to the extent possible, so as to be reconcilable with its obligations under [CERD]” but that “...it is not for the Court to *interpret* the “due regard” clause in Article 4 [CERD], which is open to various constructions” (own emphasis). ECtHR (GC), *Jersild v. Denmark*, 23 September 1994, Appl. No. 15890/89, para. 30.

¹²⁰ ECtHR, *Leempoel & S.A. ED. Cine Revue v. Belgium*, 9 November 2006, Appl. No. 64772/01.

575. In the *Leempoel*-case, the applicants blamed the Belgian authorities for not given primacy to Article 25 of the Belgian Constitution, which contrary to article 10 ECHR on the freedom of expression did not allow preventive restrictions to the freedom of expression. Since the Constitution offered a higher protection than the ECHR, the applicants were of the opinion that the national judge should have given priority to their own constitutional standards. Not doing so, the applicants argued, constituted a violation of Article 53 of the ECHR.¹²¹ The Court did not explicitly refuse to examine the grief under Article 53 of the ECHR. However, it argued that the interference did not have a preventive character and thus fell outside the field of application of the Belgian Constitution.¹²²

576. As Velu and Ergec remark, we could derive from the latter reasoning that when the Court would have considered the measures as being of a preventive nature, that it seemed willing to establish a violation of Article 53 for reasons of national authorities disregarding higher national protection standards.¹²³ From that perspective, the Court seemed not to resist the idea of applying Article 53 ECHR directly, as we suggested it. What might have influenced the Court's argumentation in the *Leempoel*-case, is the limited sensitivity of the issue under discussion (touching upon the right to freedom of expression). It seems likely that if the topic would have been more controversial (for instance, touching on issues of physical integrity or freedom of religion), that the Court would not have opened the possibility of involvement into internal interpretative processes (like it did in the *Leempoel*-case). Then, the Court might rather have left a certain 'margin of appreciation' to the State.

577. In the *Leempoel*-case, the Court gave the impression, in the hypothetical situation that the national measures would fall within the field of application of the Belgian Constitution, that Article 53 ECHR may be applied directly and that the Court may integrate some external guarantees (*in casu* the Belgian Constitution) in its supervision. Since this might be conceived as the Court implicitly affording itself competence to supervise external instruments, the *Leempoel*-case was subjected to criticism.¹²⁴ Without neglecting such concerns, some arguments and solutions could – in our view – mitigate their intensity.

578. *Firstly*, it should be stressed that directly applying Article 53 of the ECHR to the case brings with it a mobilization of external instruments applicable in the internal context (of national or international origin) as a question of 'facts' rather than as a question of 'law'. Therefore, at least in theory, a procedural approach to Article 53 of the Convention does not

¹²¹ *Ibidem*, para. 86.

¹²² *Ibidem*, para. 87.

¹²³ J. Velu and R. Ergec, *op. cit.*, p. 60.

¹²⁴ Rosoux is against such approach to Article 53 of the ECHR. She stresses that the Court does not have this competence. She says that she does not understand how the Court could come to a violation of Article 53, which is a rule on interpretation, through a national substantive provision as the Belgian Convention. G. Rosoux, *op. cit.*, pp. 529-530.

mean that the Court would start applying and interpreting the external obligations. In case national authorities did not ensure a harmonious coexistence of different human rights catalogues (and did not give precedence to higher standards), the Court would not directly apply external catalogues to the case, but it would apply the ECHR, *in casu* Article 53. As a consequence, the external law does not serve as the law directly applicable to the case. It rather becomes part of the ‘facts’ of the case to which Article 53 of the ECHR is subsequently applied. Accordingly, the procedural aspect of Article 53 of the ECHR does not give the competence to the Court to treat complaints that are rooted in a violation of external provisions and to apply the latter to the case. Thus, it does not allow the Strasbourg judges to substantively integrate the higher protection standards in its jurisprudence.¹²⁵ Only a procedural sanction would be attached to States not giving priority to their external higher human rights obligations. As a consequence, we argue that our proposal does not lead to very strong problems in the light of the Court’s competence.¹²⁶

579. However – and *secondly* – we should realize that in practice, when applying Article 53 as we suggest it, the border between treating higher external provisions as ‘facts’ and integrating external provisions as part of the ‘applicable law’ may become hazy. Considering whether a State respects external higher protection standards might result, *in concreto*, in the Court both monitoring the Convention and external guarantees. This risks affecting the national sphere of autonomy. In addition, it might lead to diverging interpretations of external instruments. To mitigate the latter concerns, we argue that the Strasbourg Court must only conclude to a violation of Article 53 of the ECHR provided that it is *manifestly clear* that the external provisions offer higher protection standards and provided that it is obvious, at first sight, that the national authorities are not doing justice to these external obligations. Thus, there should be no discussion about the domestic misuse of the Strasbourg system to escape other, more demanding, obligations. Therefore, it is highly recommendable that the Strasbourg Court stays close to the external interpretations issued by the mechanisms that are monitoring the external instruments. For example, when Article 53 would require the ECtHR to verify whether the ICCPR offers higher protection standards in the national context (and whether the State gave precedence to such standards), the Strasbourg Court should stay close to the case law and the general comments of the HRC regarding the interpretation and application of the ICCPR. The latter would avoid Strasbourg entering too much the competence of the external settings and it would soften the risk of diverging interpretations.

¹²⁵ Decaux, when touching upon what Article 53 ECHR could mean in respect of references to international agreements, stresses that the judges can apply only the ECHR and that international agreements, even if the Court might find inspiration in such agreements, are not incorporated by way of Article 53 ECHR. E. Decaux, *op. cit.*, pp. 897-803.

¹²⁶ More elaborate on the Court’s competence *ratione materiae* under Article 32 of the Convention, see above under Part III, Chapter 1, § 1.

580. Generally, our procedural approach to Article 53 of the ECHR prevents national authorities to hide behind the ECHR in case they are not obeying higher standards offered elsewhere. Such an approach corresponds to the spirit of Article 53 of the Convention, which safeguards human rights by ensuring their harmonization. It does justice to the protective and universal purpose of human rights protection and to the Preamble of the Convention (speaking of a ‘universal and effective recognition’ of human rights and of the ‘maintenance and the further realization of Human Rights’)¹²⁷. In addition, it strengthens the presence of Article 53 of the Convention as a ‘practical and effective’ provision. An additional benefit of the procedural approach to Article 53 ECHR, is that it prevents human rights conflicts and contributes to human rights coherence allowing peaceful coexistence of different levels of protection. The latter, under the condition that the Strasbourg Court does not considerably deviate from the meaning external norms generally receive under external protection mechanisms, softens ‘fragmentation’ and avoids its detrimental effects (by avoiding that a State confronted with different applicable human rights opts for the least protective one).

581. If the Court would give effect to the procedural aspect in accordance with the conditions we proposed, the concerns attached to a direct application of Article 53 ECHR would not outweigh the benefits. To sum up, these conditions include: (1) taking account only of external instruments to which the States are *bound* in their national context, (2) concluding only to a violation of Article 53 of the Convention in case a State *manifestly* ignores higher external provisions, (3) attaching the matter to Article 53 of the Convention and not directly to a violation of external provisions, and finally, (4) ‘sanctioning’ States from a procedural angle without substantively integrating the higher external standards.

582. Could the Court ever be compelled, as a result of Article 53 ECHR, to adapt its case law *substantively* to higher protection standards?

B.2. Substantive aspect: progressively harmonizing the content of the ECHR with external applicable human rights standards

583. After arguing for a procedural application, we also support a substantive reading of Article 53 ECHR. The provision could be mobilized to *substantively integrate* in the Convention external human rights guarantees (B.2.1.). Again, several authors seem skeptical to such approach. Rosoux, for instance, holds that Article 53 of the ECHR should not lead to integrating other formal sources of human rights in the text of the Convention.¹²⁸ Also Forowicz points out that “...Article 53 of the ECHR does not entitle the Court to incorporate

¹²⁷ See Preamble to the ECHR.

¹²⁸ G. Rosoux, *op. cit.*, p. 525. This author says that this is confirmed by the Belgian *travaux préparatoires* for the elaboration of the law that gave effect to the ECHR in 1955.

and apply a more favorable provision included in an external instrument as part of its legal framework".¹²⁹ To soften the criticism, we attach two important conditions to the substantive application of Article 53 ECHR: the integrated external human rights norms should be 'higher' and 'applicable' (B.2.2.).

B.2.1. Substantive integration

584. At national level, Article 53 ECHR invites the authorities to have an integrated regard towards all applicable human rights. In practice, this requires a harmonious reading of similar human rights by giving precedence to the most protective level. This prevents Convention provisions to reduce comparable national human rights standards that were established by domestic law or by international agreements to which the State is a party. We transpose *mutatis mutandis* the implications of this provision in the national context to the Strasbourg context.

585. In our view, which goes beyond a literal reading of the provision¹³⁰, Article 53 ECHR is capable of justifying the Strasbourg Court's substantive integration of (higher) external guarantees under the scope of the Convention.¹³¹ Comparably to what Article 53 ECHR requires from the national authorities (to safeguard applicable human rights through an harmonious interpretation), we argue that it also requires from the Strasbourg Court to safeguard external applicable human rights and to ensure their peaceful coexistence with the ECHR.¹³² The latter results in an obligation for the Court to create an harmonious interpretation and therefore, to give precedence to – and to materially align with – more protective external instruments. Then, external instruments receive a substantive effect on the interpretation of the Convention.

586. Our substantive approach to Article 53 ECHR is not inspired by jurisprudential practice. As it appears from our case law analysis, the Strasbourg Court does not use Article 53 of the Convention in this manner. It does not mobilize the provision to justify an harmonious interpretation, neither does it use the article to justify an 'evolutive'

¹²⁹ M. Forowicz, *op. cit.*, p. 391 and references there.

¹³⁰ Rosoux notes that interpreting Article 53 of ECHR as offering a justification for a derogatory interpretation or a revision of case law goes beyond a literal interpretation of that provision. G. Rosoux, *op. cit.*, p. 552.

¹³¹ In legal doctrine, Article 53 ECHR is generally explained by the idea of the 'most strong' or the 'most favorable' protection, by 'the highest' protection, or by the ideal of 'maximisation'. See G. Rosoux, *op. cit.*, p. 554. Brems for example, says that Article 53 offers an illustration of a principle of the clause of the most favorable protection, which is a classic rule of human rights protection. E. Brems, "Vers des clauses transversales en matière de droits et libertés dans la Constitution belge?", *R.T.D.H.* 2007, p. 374. This holds, in our view, in a pure national context. In a Strasbourg context, however, we argue that Article 53 ECHR only addresses the ECtHR under the condition that all Member States have ratified the external instrument.

¹³² Brems argues that Article 53 of the ECHR – in an integrated human rights thinking – binds the ECtHR in a sense that it should adapt its case law to the protection standard offered by the external (*quasi-*) judicial bodies like the HRC. E. Brems, *op. cit.*, p. 465.

interpretation.¹³³ This accords with some findings of Bering Liisberg, who examined the use of Article 53 of the ECHR in multiple Strasbourg cases. He concluded that, in respect of the references to domestic law (as evidence for an evolving European standard) and in respect of the references to international instruments (as a support for the interpretation of the ECHR), the Court "...has never found it warranted, much less necessary, to refer to Article 53 as part of such dynamic interpretations of the ECHR".¹³⁴

587. This does not mean that the substantive aspect of Article 53 of the Convention, which requires an harmonious interpretation, might not result in 'evolutive' interpretation. Since harmonious interpretation requires giving precedence to higher applicable standards by substantively integrating them into the Convention, this interpretation will often be a dynamic one. However, since Article 53 primarily reflects a 'human rights safeguard', we do not consider the ideal of 'keeping up with present-day conditions' as its main goal. As an interpretative rule, Article 53 of the Convention envisions in the first place an harmonious interpretation with external instruments. The creation of 'evolution' – and the development of human rights that this brings – only reflects an implicit side effect (which is not prohibited under Article 53 ECHR).

588. Our suggestion is not unconditional. The Strasbourg judges, in our view, do not have an obligation under Article 53 of the ECHR to always align the interpretation of the Convention with external levels of protection. We argue that Article 53 of the ECHR implies such an obligation only when external provisions are 'higher' and 'applicable'.

B.2.2. Higher and applicable norms

589. *Firstly*, external standards should offer a *higher* protection than the Convention does. Doing justice to the principle of non-regression, Article 53 ECHR does not require giving precedence to external standards when this would lead to a 'race-to-the-bottom' in human rights protection. Thus, although the provision does not explicitly address 'evolutive' interpretation, it could implicitly justify such interpretation provided that the interpretation is progressive.¹³⁵ The creation of a downward evolution on the basis of a provision that aims to 'safeguard' human rights would not be defensible. Furthermore, in light of the Court's

¹³³ Our examination of Grand Chamber cases since the case of *Demir and Baykara v. Turkey* confirms this conclusion: the Court does not seek justification in Article 53 of the Convention for its use of external instruments as support for harmonious or 'evolutive' interpretations.

¹³⁴ J. Bering Liisberg, *op. cit.*, p. 22.

¹³⁵ In a situation of 'evolutive' interpretation based on instruments that had *not* been ratified by all member States, Article 53 of the ECHR, in our view, has no relevance: Article 53 does not envision the aim of absorbing evolving standards and will only implicitly have such effect on the basis of instruments that are binding for all member States. This does not mean, however, that there would be no other legal arguments that might be mobilized to justify the use of (soft) external instruments in the light of evolutive interpretation, see *infra* under Part III, Chapter 1, § 4.3.3.

subsidiary role, we argue that it should be clear, ‘at first sight’, that the external instruments offer a higher protection than the Convention (as interpreted by their external supervising mechanisms). The notion of ‘higher norms’ necessarily relates to comparable external rights, which are of a same (or a similar) nature than the rights of the Convention. Article 53 ECHR does not oblige to integrate rights that could not be attached to provisions of the Convention.¹³⁶ Under the condition that social and economic rights can be perceived as aspects of civil and political rights, the protection levels under this category may be compared to the standards under the Convention.¹³⁷

590. *Secondly*, since Article 53 ECHR demands the national authorities to prioritize the highest *applicable* human rights standards¹³⁸, only *applicable* external provisions activate the substantive aspect of Article 53 ECHR in a Strasbourg context. This condition is fulfilled when an external instrument binds *all* Member States of the CoE.¹³⁹ Only then, the protection level offered by an external instrument reflects the common standard (and the minimum level of protection) on the territory of the CoE. This minimum protection level should be safeguarded under Article 53 of the ECHR.¹⁴⁰ When the Court would not adapt its position to such higher standards, it risks offering a ‘sub-minimum’ protection, below a shared level among the CoE Member States. This implies, for instance, that the Court should take account of a higher level of protection offered by the ICCPR, which is binding in all Member States.¹⁴¹ Indeed, the protection level of the ICCPR permeates the entire CoE system and as a result, compared to what national judges should do when different standards apply, the Strasbourg Court should give precedence to the higher level of protection. On the contrary, for example, the Court should not integrate under Article 53 ECHR the standards of the EU Charter, which are not binding in all Member States.

¹³⁶ Therefore, the ICCPR, largely overlapping with the ECHR, is of particular relevance. This means, for instance, that when the HRC offers a higher protection under the right to a fair trial (Article 14 ICCPR), that the Court should substantively integrate that level of protection under Article 6 of the Convention (right to a fair trial). According to our view, Article 53 ECHR justifies and even obliges such substantive absorption. Also when civil and political rights are offered in applicable human rights catalogues other than the ICCPR, they should be safeguarded by the Court.

¹³⁷ Remember in this connection the case of *Demir and Baykara v. Turkey*, in which the right to collective bargaining was considered as an aspect of freedom of association (Article 11 ECHR). Imagine, hypothetically, that all member States offer a right to collective bargaining and that the Court does not offer such a right. Then, we could argue that the Court does not safeguard the applicable external protection levels under Article 11 ECHR and therefore, that it does not respect Article 53 ECHR.

¹³⁸ Ensured in national law or in agreements to which a State is a party.

¹³⁹ Authors like Fennell and Khaliq argue similarly. They stress that in the Strasbourg context, the priority rule of Article 53 ECHR only applies when all members to the ECHR ratified the external instrument. See P. Fennell and U. Khaliq, “Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law”, *E.H.R.L.R.* 2011, vol. 6, pp. 670 *et seq.* Also Rosoux is of the opinion that Article 53 of the ECHR is not in a general manner linked to all more protective provisions. G. Rosoux, *op. cit.*, p. 562.

¹⁴⁰ This accords to the spirit of Article 53 of the ECHR, which is a safeguard for *existing* human rights standards. In our view, and in a Strasbourg adjudication perspective, external standards ‘exist’ when they are applicable in all member States of the Council of Europe.

¹⁴¹ Among CoE member States, only Switzerland and the United Kingdom are no member to the Optional Protocol of the ICCPR enabling the individual complaint mechanism.

591. The latter observations do not imply that non-binding external instruments are never allowed to influence the interpretation of the Convention.¹⁴² It solely means that there is no obligation for the Court to mobilize such instruments as part of an harmonious interpretation under Article 53 ECHR. The condition of ‘applicability’ does also not prevent that a single Member State ensures higher protection standards than the Convention. In line with the idea of ‘substantive subsidiarity’, the Court allows and accepts such standards (which is something different than being obliged to substantively adapt to them).

592. In our view, there is thus no question about a constant and unconditional obligation of human rights maximization by the Strasbourg Court. Article 53 of the ECHR does not establish a general principle of maximal human rights protection that obliges the Court to always opt for the highest protective rules.¹⁴³ Article 53 ECHR is not about the creation of a ‘hierarchy’.¹⁴⁴ It is about creating harmony between simultaneously applicable protection standards by means of giving priority to the highest ones. This viewpoint prevents an obligatory substantive integration of higher provisions that are binding in the respondent State, but not in all other Member States. As such, it avoids – through the binding force of the case and the use of precedents in Strasbourg reasoning – that external instruments which are not applicable in all Member States, become the norm for future cases. This prevents an exponential effect of certain (not generally shared) protective national policies through the use of Article 53 of the Convention.¹⁴⁵

593. The condition that external standards should be applicable in all Member States finds support in the text of the Convention, which is concerned with the question of ratification. Article 53 ECHR speaks of not limiting or derogating the human rights “...under the laws of any High Contracting Party or under any other *agreement* to which it is a party (own emphasis)”. The article refers only to international agreements and not to international *law* in general.¹⁴⁶ By emphasizing the importance of ‘agreeing’ and thus of State consent, the ECHR attaches importance to the ratification of the external instruments in question.¹⁴⁷ The

¹⁴² See *infra*, Part III, Chapter 1, § 4.3.

¹⁴³ Cfr. G. Rosoux, *op. cit.*, p. 532.

¹⁴⁴ We do not conceive the issue of giving precedence to more protective external obligations as an issue of hierarchy of applicable instruments, but rather as an issue of interpretation. The issue of hierarchy addresses the question as to which obligations of the State prevail when there are conflicting obligations. As we explained earlier, however, Article 53 is not about ‘solving’ conflict but about ‘preventing’ it. When external obligations (and thus external applicable law) starts influencing the interpretation of the Convention substantively, as is suggested here, it no longer solely concerns an issue of hierarchy of sources. Then external instruments are used throughout the interpretative process. See D. French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules”, *ICLQ* 2006, vol. 55, p. 282 and p. 291.

¹⁴⁵ Cfr. G. Rosoux, *op. cit.*, pp. 549-550 and 571.

¹⁴⁶ This is equally noticed by J. Bering Liisberg, *op. cit.*

¹⁴⁷ Admittedly, Article 53 ECHR mentions that nothing in this Convention shall limit or derogate any of the human rights which “...may be ensured under the laws of *any* High Contracting Party (own emphasis)”. It does thus not use the expression of ‘*all* Contracting Parties’. The absence of this expression could be explained by the observation that Article 53 of the ECHR in the first place addresses the national context (see above). Foremost, it offers a national interpretative guide. Therefore, the use of the notion ‘all’ would not make a lot of sense in such

condition finds further support in legal doctrine. Academic opinions obliging the Strasbourg Court to *always* align interpretation with higher protection standards on the basis of Article 53 of the ECHR, are very exceptional.¹⁴⁸

594. Under fulfillment of the forementioned conditions, we argue that Article 53 ECHR obliges the Court to safeguard human rights and to substantively integrate higher applicable human rights norms. Our vision to Article 53 ECHR is both shared and contested by judges of the Court. Judge Pinto de Albuquerque has invoked Article 53 ECHR to stress that the ECHR "...calls for an open-minded approach to international law and soft law...and remains open to other legal instruments, both domestic and international, when these offer better human rights protection".¹⁴⁹ By situating 'soft' law instruments under the scope of Article 53 ECHR, this Judge even went beyond our suggestions. At the other end of the spectrum, we find Judge Wojtyczek. He has invoked Article 53 ECHR to defend a position opposite to our view. By stressing the idea of the ECHR offering minimum standards, this Judge argues that external higher levels of protection do not *per se* change the scope of the Convention rights. In line with Article 53 ECHR, Judge Wojtyczek endorses that "[w]hile there is no doubt that the Convention has to be interpreted in the context of other rules of international law, the scope of its protection does not automatically align on the highest standard set up by other rules of international law binding to the parties to the Convention".¹⁵⁰

§ 3.2. Article 31 paragraph 3 (c) VCLT

595. Article 31 paragraph 3 (c) VCLT, as a general rule of interpretation, provides that "...[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in relations between the parties". We have demonstrated in our case law analysis that the Grand Chamber sometimes mobilizes Article 31 paragraph 3 (c) of the VCLT to legally justify an obligation to 'harmonize' with external instruments. In

context. Comparably, Article 53 ECHR also speaks of "...the laws ...to which it is a party" and not of the laws to which "...they are parties". When considering Article 53 ECHR as addressed to the Strasbourg judges, the absence of the word 'all' or 'parties' could thus not be interpreted as if it would not be necessary for *all* Contracting Member to have ratified the external instrument to which the Court, in line with Article 53 ECHR, is required to substantively adapt its standards.

¹⁴⁸ We found such an exception in writings of Strasbourg Judge De Meyer, who suggested that Article 53 of the Convention aims at a maximal human rights protection that requires reading together *all* the different texts that guarantee human rights and to then choose the most protective one. J. De Meyer, "Brèves réflexions à propos de l'article 60 de la Convention européenne des droits de l'homme", in *Protection des droits de l'homme: la dimension européenne – Mélanges en l'honneur de Gérard J. Wiarda*, Carl Heymanns Verlag KG, Köln, 1988, p. 125, as interpreted by G. Rosoux, *op. cit.*, p. 518.

¹⁴⁹ Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, 20 October 2016, Appl. No. 7334/13, para. 22.

¹⁵⁰ Concurring opinion of Judge Wojtyczek to ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 8 April 2014, Appl. No. 31045/10, para. 3.

addition, but exceptionally, the Court has also used this provision to explain why it has adapted its viewpoint to an (evolved) common ground.¹⁵¹

596. Article 31 paragraph 3 (c) VCLT could serve a ‘harmonizing’ purpose both between the ECHR and external human rights catalogues and between the ECHR and legal domains other than human rights law. The provision includes – under certain conditions – a legal justification for the importation of external instruments with a purpose of harmonious interpretation. This fits the general purpose of the provision, which aims at opening up to the broader normative context and at mitigating ‘fragmentation’ (§ 3.2.1.). In this respect, we argue that Article 31 paragraph 3 (c) VCLT, under some conditions, obliges the Court to develop an harmonious interpretation – but not an ‘evolutive’ interpretation – with external applicable instruments (§ 3.2.2.).

§ 3.2.1. Harmonization to mitigate fragmentation

597. Article 31 paragraph 3 (c) VCLT allows taking account of the broader ‘normative environment’¹⁵² including external instruments relevant to the norm under interpretation.¹⁵³ The provision is built on the idea that a legal rule should be read in its context together with other rules applicable to the parties.¹⁵⁴ It approaches applicable norms based on an ideal of ‘harmonization’, implying that “...when a plurality of norms affects the same subject the interpretation should always attempt to achieve conciliation”.¹⁵⁵ It includes a ‘spatial’¹⁵⁶ perspective focusing on ‘systemic integration’¹⁵⁷ as a manner to achieve a certain degree of coherence.¹⁵⁸ Article 31 paragraph 3 (c) VCLT approaches ‘international law’ as a ‘legal system’ in which potential conflicts should be resolved by taken account of the wider systemic normative environment.¹⁵⁹ The Court confirmed the latter perspective: it said that

¹⁵¹ See *supra*, Part II, paras. 464-469.

¹⁵² V.P. Tzevelekos, “The Use of Article 31 (3) (c) of the VCLT in the Case Law of the ECtHR: An effective Anti-fragmentation tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between evolution and systemic integration”, *Michigan Journal of International Law* 2010, vol. 31, p. 631; E. Brems, *op. cit.*, 2014, p. 454.

¹⁵³ V.P. Tzevelekos, *op. cit.*, p. 631.

¹⁵⁴ B. Simma, *op. cit.*, p. 276.

¹⁵⁵ V.P. Tzevelekos, *op. cit.*, p. 631.

¹⁵⁶ On the ‘spatial aspect’ and the ‘time aspect’ (related to ‘evolution’) of Article 31 paragraph 3 (c) of the VCLT, see B. Schlütter, *op. cit.*, pp. 295-299.

¹⁵⁷ See R. Nordeide, “The ECHR and its normative environment: difficulties arising from a regional human rights court’s approach to systemic integration”, in *The practice of international and national courts and the (de-)fragmentation of international law*, Oxford, Hart Publishing, 2012, pp. 117-138; C. McLachlan, “The Principle of Systemic Integration and Article 31 (3) c of the Vienna Convention”, *ICLQ* 2005, vol. 53, no. 2, pp. 279-320; P. Merkouris, *Article 31 (3) (c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave*, *Queen Mary Studies in International Law*, vol. 17, Martinus Nijhoff/Brill, Leiden, 2015, 350 p.; M. Forowicz, *op. cit.*, pp. 13 *et seq.* and pp. 43 *et seq.*; the ILC Koskenniemi Report, *op. cit.*, pp. 173-205.

¹⁵⁸ Forowicz point out that systemic interpretation is only *one* of the means to deal with a lack of unity and normative conflicts. M. Forowicz, *op. cit.*, pp. 355-356.

¹⁵⁹ ILC Koskenniemi Report, *op. cit.*, para. 413, cited by C. Pitea, “Interpretation and Application of the European Convention on Human Rights in the Broader Context of International Law: Myth or Reality?” in Y. Haecck and E. Brems (eds), *Human Rights and Civil Liberties in the 21st Century*, Series: *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 30, Springer, Dordrecht/Heidelberg/New York/London, 2014, p. 4; M. Forowicz, *op. cit.*, p. 16.

the Convention “...cannot be interpreted in a vacuum”.¹⁶⁰ The latter phrase alludes to the Convention operating in a larger system of international law in which it is embedded and which operates as the background of its interpretation.

598. Article 31 paragraph 3 (c) VCLT, although generally acknowledged as a general rule of interpretation of a customary nature,¹⁶¹ has long been ignored in interpretative practice and legal doctrine.¹⁶² However, because of the principle of ‘systemic integration’ that it covers, it has gained relevance in a context of increased ‘fragmentation’ of international law.¹⁶³ Residing well in a ‘pluralist ethos’¹⁶⁴, Article 31 paragraph 3 (c) VCLT was put forward as an adequate interpretative tool to deal with normative diversity and the challenges of incoherence that this brings.¹⁶⁵ For instance, the work of the ILC addressing challenges of ‘fragmentation’ stressed heavily the role of judicial interpretation and the idea of ‘systemic integration’ inherent to Article 31 paragraph 3 (c) of the VCLT.¹⁶⁶

599. Article 31 paragraph 3 (c) VCLT fits a philosophy that pursues unity in a, often negatively perceived, environment of ‘fragmentation’.¹⁶⁷ Considering human rights law as part of a greater system, Article 31 paragraph 3 (c) of the VCLT implies a ‘presumption against conflict’.¹⁶⁸ Parties, when entering a treaty, are assumed to have no intention to contravene obligations of customary international law, general principles of international

¹⁶⁰ See, among many others, ECtHR (GC), *Cudak v. Lithuania*, 23 March 2010, Appl. No. 15869/02, para. 56 and ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, 6 July 2010, Appl. No. 41615/07, para. 131.

¹⁶¹ See V.P. Tzevelekos, *op. cit.*, p. 631, with several references to ICJ case law in support of this statement. It is also said that this rule has a status of a constitutional norm within the international legal system. See D. French, *op. cit.*, p. 301.

¹⁶² D. French, *op. cit.*, p. 300.

¹⁶³ F. Vanneste, *op. cit.*, 2009, p. 220. For a similar remark, see D. French, *op. cit.*, p. 301 and V.P. Tzevelekos, p. 631. The latter author stresses that after periods of isolation between international regimes and concerns about fragmentation, this provision now ‘haunts’ the international community as an essential tool for promoting harmonization and guaranteeing unity of the international system. Also Forowicz observed that this provision had only recently gained popularity including in the Strasbourg case law. See M. Forowicz, *op. cit.*, p. 25 and pp. 43 *et seq.* For a description of the evolution of the relevance and meaning of Article 31 paragraph 3 (c) VCLT, see also: B. Simma, *op. cit.*, p. 276.

¹⁶⁴ For this notion, see M. Rosenfeld, “Rethinking constitutional ordering in an era of legal and ideological pluralism”, *I-Con* 2008, vol. 6, nrs. 3 & 4, pp. 451-452. This author speaks of other tools relevant in a pluralist ethos such as the principles of ‘subsidiarity’ and ‘proportionality’, the ‘margin of appreciation’, and ‘judicial balancing’.

¹⁶⁵ ILC Koskenniemi Report, *op. cit.*, para. 419. As Pitea says it, the provision “...aims at ensuring that international law achieves the minimum degree of material coherence required to be characterized as a legal system and not, as H.L.A. Hart’s well known definition suggests, a mere ‘set of rules’”. C. Pitea, *op. cit.*, p. 4, with reference to H.L.A. Hart, *The Concept of Law*, Cambridge University Press, Cambridge, 1961, p. 229. It was thus not until when fragmentation became more widespread that legal scholarship and the ILC (re)discovered the usefulness of the method inherent to this article as an anti-fragmentary tool. Before, this provision was not used as such. V.P. Tzevelekos, *op. cit.*, p. 631.

¹⁶⁶ ILC Koskenniemi Report, paras. 484-485. The ILC, when considering how to combat fragmentation, treated Article 31 paragraph 3 (c) VCLT as an ‘autonomous method of interpretation’ and a ‘master-key’ to international law building and to create unity and coherence between different treaty regimes. It considered the VCLT as offering the “professional tool-box” to respond to substantive problems of fragmentation in a flexible manner (*ibidem*, para. 492). See also C. Pitea, *op. cit.*, p. 4; J. Pauwelyn, *op. cit.*, pp. 906-908.

¹⁶⁷ V.P. Tzevelekos, *op. cit.*, p. 624 and pp. 631-633. The latter author says that the provision was upgraded to a constitutional norm which can only be explained by “...(self-)defense of a system threatened to explode into compartmentalized pieces” (*ibidem*, p. 633).

¹⁶⁸ While we rather call it a ‘presumption against conflict’ or a principle ‘preventing’ conflict, Article 31 paragraph 3 (c) VCLT is often conceived as a (non-traditional) conflict resolution mechanism. V.P. Tzevelekos, *op. cit.*, p. 624.

law, and other rules that are applicable between them.¹⁶⁹ Article 31 paragraph 3 (c) VCLT is framed in an obligatory manner: the provision states that there *shall* be taken into account relevant rules of international law applicable in relations between the parties. Thus, Article 31 paragraph 3 (c) VCLT – from the moment it fulfills certain conditions – mandates references to the broader normative context for interpretative purposes.¹⁷⁰ Therefore, we hold that the applicable external instruments covered by this provision, exercise a ‘binding authority’ *vis-à-vis* the Court’s interpretation process.¹⁷¹

§ 3.2.2. Scope and conditions of application

600. The activation of Article 31 paragraph 3 (c) VCLT is, taking account of the text and aim of the provision, subject to four conditions: the external norms should be ‘applicable between the parties’ (A.), the external norms should be ‘relevant’ (B.), their consideration should lead to coordinative (or hierarchical) harmonization (C.), and its mobilization should not be done with an explicit ‘evolutive’ aim (D.).

A. Norms ‘applicable between the parties’

601. The precise meaning and conditions for applying Article 31 paragraph 3 (c) VCLT are subject to discussion in legal doctrine.¹⁷² The issue that attracted most controversy is which rules should be considered as ‘applicable between the parties’.¹⁷³ Which rules should be taken into account as the contextual frame of reference when interpreting the ECHR?¹⁷⁴

602. Clearly included in the frame of reference under Article 31 paragraph 3 (c) VCLT, is the traditional list of formal sources of international law, *i.e.* treaties, customary law, and ‘general principles of law’ (as enumerated by Article 38 of the Statute of the ICJ).¹⁷⁵ Most legal scholars agree that the expression of ‘rules of international law’ does not move beyond

¹⁶⁹ M. Forowicz, *op. cit.*, p. 44; B. Simma, *op. cit.*, p. 276; N. Matz-Lück, “Harmonization, Systemic Integration, and ‘Mutual Supportiveness’ as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation”, *Finnish Y.B. Int’L L.* 2006, vol. 37, p. 45; J. Pauwelyn, *op. cit.*, pp. 906-908.

¹⁷⁰ Van Drooghenbroeck, Krenc and Van der Noot note that the Court “...suggests that the ‘integrated approach’...is made compulsory by this disposition of the VCLT”. S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 6. French stresses that this rule, notwithstanding the flexibility and discretion it offers to the interpreter, is of an ‘obligatory nature’. See D. French, *op. cit.*, p. 301.

¹⁷¹ About the terminology of ‘binding’ and ‘persuasive’ (optional) authority, see F. Schauer, “Authority and Authorities”, *Virginia Law Review* 2008, vol. 94, no. 8, pp. 1931-1961.

¹⁷² See Forowicz, who observes that there are still numerous uncertainties associated with this interpretative rule. M. Forowicz, *op. cit.*, p. 13.

¹⁷³ Also Pitea notes that the expression of ‘rules of international law’ is the most debated issue in respect of the understanding of Article 31 paragraph 3 (c) VCLT. C. Pitea, *op. cit.*, p. 8.

¹⁷⁴ The notion of ‘contextual frame of reference’ is taken from: S. Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System. Theory, Practice and Prospect*, Intersentia, Cambridge/Antwerp/Portland, 2013, p. 27.

¹⁷⁵ B. Simma, *op. cit.*, p. 276; S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 6-7 (with reference to C. McLachlan, *op. cit.*, p. 290). See also: Koskeniemi Report, *op. cit.*, para. 426; C. Pitea, *op. cit.*, p. 551; S. Alemahu Yeshanew, *op. cit.*, p. 27.

¹⁷⁶ V.P. Tzevelekos, *op. cit.*, p. 631; S. Van Drooghenbroeck, *op. cit.*, p. 823.

this classic list of ‘hard’ legal sources.¹⁷⁶ Attaching non-binding instruments to the scope of the provision is thus a controversial phenomenon.¹⁷⁷ Non-binding instruments are generally not conceived as ‘applicable in the relations between the parties’, unless they offer evidence of an established customary rule or principle.¹⁷⁸

603. When we, in line with the general trend in doctrine, follow the idea that Article 31 paragraph 3 (c) of the VCLT only covers ‘formal sources’ of international law, it is still not clear between which *parties* these sources (such as ‘treaties’) should apply to trigger a mandatory harmonious interpretation. Doctrine does also not agree on this point.¹⁷⁹ Generally, there are two approaches: a ‘maximalist’ and a ‘minimalist’ one.¹⁸⁰ In a *maximalist* understanding, account should be taken of external instruments when interpreting a treaty under the condition that ‘every party’ to that treaty (thus, all Member States of the CoE) is also a member to the imported instrument.¹⁸¹ The latter requirement is referred to as ‘duality of membership’.¹⁸² In line with this view, when interpreting the Convention, account should be taken of instruments that bind all Member States. A *minimalist* position is less demanding and requires account to be taken of instruments that bind the litigants to the actual case. In a Strasbourg human rights context, this would mean that it suffices that the instrument used for argumentative purposes binds the defending State.

¹⁷⁶ See, more generally, J. Arato, *op. cit.*, p. 375.

¹⁷⁷ S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 7; C. Pitea, *op. cit.*, p. 7; J. Cazala, “Le rôle de l’interprétation des traités à la lumière de toute autre ‘règle pertinente de droit international applicable entre les parties’ en tant que ‘passerelle’ jetée entre systèmes juridiques différents”, in H. Ruiz Fabri and L. Gradoni (eds), *La circulation des concepts juridiques. Le droit international de l’environnement entre mondialisation et fragmentation*, Société de législation comparée, Paris, 2009, pp. 95-136; C. Pitea, “Interpreting the ECHR in the Light of ‘Other’ International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation”, in N. Boschiero et al. (eds), *International Courts and the Development of International Law*, T.M.C. Asser Press, The Hague, 2013, p. 551, with reference to *Sixth Report on the Law of Treaties*, by H. Waldock, in Yearbook of the International Law Commission, vol. II, UN doc. A/CN.4/SER.A/1966/add.1 (1967), p. 97, para. 10.

¹⁷⁸ D. Rietiker, “The Principle of Effectiveness in the Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis”, *Nordic Journal of International Law* 2010, vol. 79, p. 275, referred to by T. Treves, *op. cit.*

¹⁷⁹ It should be noted that, as a condition for the need of ‘systemic integration’ under the VCLT, the discussion about whether ‘all’ member States should be parties to the imported rules arises only in respect of external treaties and not in respect of ‘general principles’ and ‘customary law’ which are usually – by their nature – applicable to all parties. J. Arato, *op. cit.*, pp. 378-379.

¹⁸⁰ On this distinction and its explanation, see S. Van Drooghenbroeck, *op. cit.*, pp. 825-826. See also B. Simma, *op. cit.*, p. 276.

¹⁸¹ This view had been adopted within decision-making in the WTO. For more on this issue, see ILC Koskeniemi report, *op. cit.*, pp. 223 *et seq.*, paras. 443 *et seq.* and para. 450 in particular. For authors that favor a strict approach of ‘duality of membership’, see *inter alia* D. French, *op. cit.*, p. 305, with reference to McLachlan, *op. cit.*; U. Linderfalk, “Who Are ‘the Parties’? Article 31 § 3(c) of the 1969 Vienna Convention, and the ‘Principle of Systemic Integration’ Revisited”, *Netherlands International Law Review* 2008, vol. 55, pp. 343-364; K. Istrefi, “R.M.T. v. The UK: Expanding Article 11 of the ECHR Through Systemic Integration”, 12 May 2014, available at <http://www.ejiltalk.org/r-m-t-v-the-uk-expanding-article-11-of-the-echr-through-systemic-integration/> (visited on 7 June 2016); O. Corten, *op. cit.*, p. 229. Corten says that therefore, if one wants to invoke external definitions contained in external instruments, it should be verified whether all member States of the external treaty are also member States of the interpreted treaty (*ibidem*). Separate Judge Wojtyczek, in his opinion to the RMT-case, also seems to favor this approach. He says that “...Article 31(3)(c)...may not be understood as an entitlement to align the meaning of a treaty with the content of other rules of international law, especially if those rules are not binding on all the parties to the treaty to be interpreted” (separate opinion of Judge Wojtyczek to the case of ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 8 April 2014, Appl. No. 31045/10, para. 2).

¹⁸² Notion used by D. French, *op. cit.*, p. 305.

604. In a context of human rights adjudication, a *maximalist* view is most often put forward.¹⁸³ A minimalist approach is said to be

“...only suitable for application to synallagmatic treaties not establishing obligations *erga omnes partes*, and thus not to human rights treaties, since otherwise the applicable standard of protection would vary from one party to another, depending on their respective commitment to other treaties”.¹⁸⁴

605. The Strasbourg referencing practice is criticized in respect of its mobilization of Article 31 paragraph 3 (c) of the VCLT. The Court’s position is said to be problematic as it also brings (natural or contextual) ‘soft’ law under the justificative angle of ‘systemic integration’, whereby the notions of ‘rules of international law’ and ‘applicable between the parties’ are interpreted in a very extensive manner.¹⁸⁵ Such extensive approach has been associated with misusing the principle of ‘systemic integration’ to cover ‘judicial activism’¹⁸⁶. Tzevelekos for instance asks himself whether Article 31 paragraph 3 (c) VCLT represents in Strasbourg case law an “effective anti-fragmentation tool” or whether it is a “selective

¹⁸³ The most authors that favor a minimalist approach do not particularly focus on human rights adjudication but on international law adjudication more generally. The most prominent reason for favoring a minimalist understanding in relation to international (multilateral) treaties is of a pragmatic nature: applying a maximalist view would largely decrease the practical relevance of Article 31 paragraph 3 (c) VCLT since it would be very difficult to find a context of ‘duality of membership’ in relation to such treaties. For authors favoring a more lenient approach, for instance for the latter reason, see B. Simma, *op. cit.*, p. 276; D. French, *op. cit.*, p. 306; McLachan, *op. cit.*, pp. 313-315; E. Cannizzaro, “Il rilievo di accordi esterni nell’interpretazione degli accordi OMC”, in A. Ligustro, G. Sacerdoti (eds) *Problemi e tendenze del diritto internazionale dell’economia. Liber amicorum in onore di Paolo Picone*. Editoriale Scientifica, Naples, 2011, p. 522, referred to by C. Pitea, *op. cit.*, 2013, p. 553, footnote 50. The ILC for instance, in the context of the WTO, also pleads in favor of a minimalist viewpoint. The ILC in its study said the solution is “...to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty”. See ILC Koskenniemi report, *op. cit.*, pp. 238-239, para. 472. Also the ILC is against a ‘maximalist’ approach because this approach would nullify the effect of the provision in relations between multilateral regimes, where a perfect coincidence of parties is very unlikely, if not impossible. *Ibidem*, paras. 450 and 470-471.

¹⁸⁴ *Ibidem*, para. 472, at pp. 238-239. Indeed, a similar suggestion had been done by the ILC saying that “[T]he risk of divergence - a commonplace in treaty law - would be mitigated by making the distinction between “reciprocal” or “synallagmatic” treaties (in which case mere “divergence” in interpretation creates no problem) and “integral” or “interdependent” treaties (or treaties concluded *erga omnes partes*) where the use of that other treaty in interpretation should not be allowed to threaten the coherence of the treaty to be interpreted”. Also Simma points at a risk of ‘diverging interpretations’ of one and the same rule and described that, therefore, there had been done suggestions to only apply the minimalist approach to ‘reciprocal’, ‘synallagmatic’ or ‘bipolar’ types of instruments. B. Simma, *op. cit.*, p. 277.

¹⁸⁵ See J. Arato, *op. cit.*, pp. 352, 356, 375 and 382; B. Schlütter, *op. cit.*, pp. 279-280; H. Senden, *op. cit.*, p. 241; C. Pitea, *op. cit.*, 2014, p. 7; C. Pitea, *op. cit.*, 2013, p. 551. S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 7-8; V.P. Tzevelekos, *op. cit.*, p. 631; G. Cohen-Jonathan and J.-F. Flauss, “La Cour européenne des droits de l’homme et le droit international”, *Annuaire français de droit international* 2008, vol. 54, p. 534. The Turkish government in *Demir and Baykara* criticized the Court for this reason. Indeed, it “...accepted that the Court had always taken into account, where necessary, ‘any relevant rules of international law applicable in the relations between the parties’...” but in the respondent state’s view, this approach was only legitimate when it is in accordance with the criteria set out in Article 31 § 3 of the VCLT. In the view of the Government, the Court could only take account of instruments to which the state was bound. ECtHR (GC) *Demir and Baykara v. Turkey*, *op. cit.*, para. 61.

¹⁸⁶ The notion of ‘judicial activism’ and its understanding is not neutral and it is linked to a subjective perception of what should be the role of the judge. H. Senden, *op. cit.*, pp. 102-103. The ‘ideology’ of judges when interpreting normative instruments is sometimes described as ranging between judicial self-restraint and judicial activist ideology. ‘Self-restraint’ endorses the approach that a judge applies the law without making it. ‘Judicial activism’ is associated with judges themselves developing the law. See M. Marochini, *op. cit.*, pp. 65-66.

loophole for the reinforcement of human rights teleology”.¹⁸⁷ Also French, although not in favor of a very strict approach to Article 31 paragraph (3) (c) VCLT, argues for some limitation in order to preserve legal certainty and avoid ‘cherry-picking’.¹⁸⁸ Istrefi expresses concerns as well, for instance, by saying the following:

“[T]here is scant ground for criticism concerning the use of Article 31(3)(c) as long as systemic integration is employed to clarify the meaning of ambiguous terms and to mitigate norm conflicts. However, the parameters of Article 31(3)(c) are clearly overstepped where an international tribunal selectively applies any kind of international instrument without regard to its binding or non-binding nature as a source of inspiration”, and that such “unconstrained form of judicial activism” may undermine the usefulness of this provision as a remedy to soften fragmentation”.¹⁸⁹

606. Such critical voices arised in the context of some specific Strasbourg case law. Particularly the cases of *Demir and Baykara v. Turkey*¹⁹⁰ (A.1.) and of *National Union of Railway, Maritime and Transport Workers v. the United Kingdom*¹⁹¹ (A.2.) have offered food for discussion, which we will evaluate (A.3.).

A.1. Discussions about Article 31 paragraph 3 (c) VCLT in Demir and Baykara v. Turkey

607. In *Demir and Baykara v. Turkey*, the Grand Chamber, when addressing the basis of references to international law, refers to Article 31 paragraph 3 (c) of the VCLT¹⁹² to support its statement that it “...has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein”.¹⁹³ “[O]n the contrary”, the Court holds, “...it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties”.¹⁹⁴

608. Arato held that *Demir and Baykara v. Turkey* encompasses an “...extremely broad construction of the VCLT 31 (3)(c)” which, in the eyes of the Court “...marks and justifies an

¹⁸⁷ V.P. Tzevelekos, *op. cit.*, pp. 621-690.

¹⁸⁸ D. French, *op. cit.*, p. 306.

¹⁸⁹ K. Istrefi, “R.M.T. v. The UK: Expanding Article 11 of the ECHR Through Systemic Integration”, 12 May 2014, available at <http://www.ejiltalk.org/r-m-t-v-the-uk-expanding-article-11-of-the-echr-through-systemic-integration/> (visited on 7 June 2016).

¹⁹⁰ See in particular: J. Arato, *op. cit.*, pp. 353 *et seq.*

¹⁹¹ See in particular: S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 6 *et seq.*

¹⁹² As a general rule of interpretation, Article 31 (3) c VCLT provides that “[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties”.

¹⁹³ *Ibidem*, para. 67. The Court itself is thus also aware of the fact that its ‘referencing practice’ is no new method introduced by the *Demir and Baykara*-case.

¹⁹⁴ *Ibidem*. The Court referred here to some precedents such as ECtHR (GC), *Saadi v. the United Kingdom*, 29 January 2008, Appl. No. 13229/03, para. 62; ECtHR (GC), *Al-Adsani v. the United Kingdom*, 21 November 2001, Appl. No. 35763/97, para. 55, and ECtHR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 23 June 2005, Appl. No. 45036/98, para. 150.

implicit assertion of competence to consider an extraordinary variety of external international and regional sources”¹⁹⁵ ranging from “...universal and binding hard law to external conventions neither signed nor ratified by the respondent State, and even to intrinsically non-binding (or ‘soft’) sources”.¹⁹⁶ *Demir and Baykara*, according to Arato, therefore expands “...the ambit of VCLT 31 (3)(c) – by giving normative weight to standards, recommendations, and non-binding interpretations generated by purely external international organizations in the interpretation of the ECHR”.¹⁹⁷ Arato concludes that this case included a ‘transformative’¹⁹⁸ interpretation of Article 31 paragraph 3 (c) of the VCLT which “... represents an assertion of competence to hold the Member States to norms they did not consent to, and cannot strictly control” and that by “... giving VCLT 31(3)(c) a broad construction, the ECtHR expands its own judicial competence to consider (and give weight to) a variety of extrinsic legal and quasi-legal sources”.¹⁹⁹ Van Drooghenbroeck also criticizes how the case of *Demir and Baykara v. Turkey* uses Article 31 paragraph 3 (c) VCLT to legitimize and to oblige the importation of external instruments to interpret the Convention. To the view of this author, the referencing practice, as exercised by the Court, does not fit the logic of this provision.²⁰⁰

A.2. Discussions about Article 31 paragraph 3 (c) VCLT in R.M.T. v. the United Kingdom

609. In the case of *National Union of Railway, Maritime and Transport Workers v. the United Kingdom* (hereafter: *R.M.T. v. the United Kingdom*), one of the Court’s Chambers used Article 31 paragraph 3 (c) of the VCLT in relation to its reference to ILO Convention no. 87²⁰¹ and to the European Social Charter^{202, 203} The Chamber, to explain this referencing method, reproduced part of the statements of the Grand Chamber in *Demir and Baykara*.²⁰⁴ In *R.M.T.*,

¹⁹⁵ J. Arato, *op. cit.*, p. 356.

¹⁹⁶ *Ibidem*, p. 357.

¹⁹⁷ *Ibidem*.

¹⁹⁸ *Ibidem*, p. 363.

¹⁹⁹ *Ibidem*, p. 357.

²⁰⁰ S. Van Drooghenbroeck, *op. cit.*, pp. 828-829.

²⁰¹ Note that all member States of the Council of Europe are members to this Convention. See http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232 (visited on 27 June 2016).

²⁰² Within the CoE, social and economic rights are mainly addressed by the Social Charter requiring progressive implementation and supervision through periodic reporting on progress. The European Committee of Social Rights monitors compliance by a collective complaints procedure (but not all States accepted this complaint mechanism). R.C.A. White and C. Ovey, *op. cit.*, p. 7.

The Court in the case of *R.M.T.* said explicitly that the relevant provision of the Social Charter had been ratified by the United Kingdom, see ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 8 April 2014, Appl. No. 31045/10, para. 34. However, not all member States of the Council of Europe ratified this instrument. See <http://www.coe.int/en/web/turin-european-social-charter/signatures-ratifications> (visited on 27 June 2016).

²⁰³ ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *op. cit.*, para. 76.

²⁰⁴ The Court in the *RMT*-case quoted paragraph 85 of the *Demir and Baykara*-judgment which says that: “The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values”. ECtHR, *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *op. cit.*, para. 76.

external referencing contributed to the acknowledgement of a right to secondary action under Article 11 ECHR on the freedom of association. Van Drooghenbroeck, Krenc and Van der Noot have argued in respect to the *R.M.T.*-case, that the Court, by using Article 31 paragraph 3 (c) VCLT in relation to the referencing practice, went beyond even the “...most far-reaching [minimalist] interpretations” of this provision.²⁰⁵ According to these authors, the use of external instruments in *R.M.T. v. the United Kingdom* cannot be firmly legitimized by Article 31 paragraph 3 (c) VCLT.²⁰⁶ A same concern is expressed by Istrefi, who holds that the *R.M.T.*-case

“...represents an example of using systemic integration as a tool of judicial activism. In applying Article 31(3)(c) VCLT, the Court expanded rights under Article 11(1) ECHR through international instruments that were not binding on *all* parties to the Convention. This approach adds to the perplexity of the effects of the principle of systemic integration”.²⁰⁷

A.3. Evaluation of the discussions

610. In our view, the Court is only obliged under Article 31 paragraph 3 (c) VCLT to take account of external instruments that are applicable between *all* Member States of the CoE. We plead in favor of such a *maximalist* view based on several arguments. *Firstly*, the controversy in legal doctrine stimulates some prudence in applying the provision. If not, the external referencing practice would be – certainly in a view sensitive to ‘judicial activism’ – very prone to criticism. This would risk the practice, which has several benefits,²⁰⁸ to become a baby thrown out with the bath water. *Secondly*, the text of the Convention literally speaks of rules applicable between the *parties* (in plural). *Thirdly*, Article 31 paragraph 3 (c) VCLT aims at harmonization through ‘systemic integration’. When we force the Court to harmonize between the ECHR and external instruments that are only applicable in some Member States, this would not necessarily serve this aim. On the contrary, this would lead to different solutions in different cases depending on whether the respondent State in question had ratified the external instruments in question.²⁰⁹ *Lastly*, there are alternative (non-

²⁰⁵ S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 6-7.

²⁰⁵ V.P. Tzevelekos, *op. cit.*, p. 631.

²⁰⁶ S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 7. Van Drooghenbroeck, Krenc, and Van der Noot also allude to *Demir and Baykara* (in paragraph 86) implicitly going beyond the requirements of Article 31 paragraph 3 (c) of the VCLT (*ibidem*, p. 8).

²⁰⁷ K. Istrefi, *op. cit.*

²⁰⁸ For instance in light of creating more coherence, offering argumentative tools, strengthening universality and indivisibility of human rights, *etc.* More elaborate on the latter opportunities of referencing practice, see *infra*, Part III, Chapter 2.

²⁰⁹ In the view of an individual human rights user who aims to win his or her case, a lack of normative coherence might be the less of concerns. In a pragmatic view, he or she is most probably not strongly occupied with the question of legal certainty. Thus, in a users’ point of view, a more lenient approach (a minimalist view) might be more defensible than from within a legality perspective. We will come back to this issue under the question of validity from a users’ point of view, *infra*, Part III, Chapter 2, § 5.3.

obligatory) techniques to justify references to ‘soft’ instruments, going beyond a technique that solely makes use of Article 31 paragraph 3 (c) of the VCLT.²¹⁰

611. We approach the notion of ‘applicable’ in a Strasbourg context as an *applicable* norm that covers the entire CoE system.²¹¹ The latter viewpoint does not seem controversial: ‘applicable’ rules could be considered as a natural part of the law that the Court has to take into account.²¹² Article 31 paragraph 3 (c) of the VCLT requires in the first place that both bodies of applicable law (the ECHR and an external body of law) are read together as to prevent a conflict between them.

612. We agree with the problematic character of *R.M.T. v. United Kingdom*. In this case, the Court has justified, with the help of Article 31 paragraph 3 (c) VCLT, the use of instruments that are not binding on all Member States. We consider that, here, the Court has changed the scope of the Convention (*in casu*, of Article 11 ECHR on the freedom of association) on the basis of a legally dubious argument. Echoing concurring Judge Wojtyczek in the case of *R.M.T.*,

“Article 31 § 3 (c) of the Vienna Convention...should not justify referring to rules that bind only some of the States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms in order to align its content with those rules, without duly taking into account the wording of the provisions under interpretation”.²¹³

613. The Chamber, in the *R.M.T.*-case, referred to the precedent of *Demir and Baykara* to justify and explain this argument. In our view, the Chamber did not rightly mobilize this precedent: *Demir and Baykara v. Turkey* does not offer a straightforward permission under Article 31 paragraph 3 (c) VCLT to take account of non-binding instruments for (implicit) ‘evolutive’ purposes.²¹⁴ Admittedly, *Demir and Baykara* stresses that the Court is allowed to make use of non-binding external instruments to enable a dynamic interpretation process, but it does not explicitly put this argument in the sphere of Article 31 paragraph 3 (c) VCLT. In *Demir and Baykara* does not, neither when it explains the legal basis of the referencing

²¹⁰ See *infra*, Part III, Chapter 1, § 4.

²¹¹ Compare: E. Brems, *op. cit.*, 2014, p. 455. According to Brems, this provision obliges ‘human rights integration’ which requires “...at least the integrated reading of all human rights treaties concluded among the same parties (for instance all treaties ratified by all Council of Europe member states)”. However, this author goes further than the latter by stressing that the provision would more likely require the integrated reading of all human rights treaties adhered to by the respondent State (or, in an inter-State dispute, by both States parties).

²¹² Forowicz stresses that the use of the Hague Convention of 1980 is also not that controversial because of its “generally procedural character”. M. Forowicz, *op. cit.*, p. 53.

²¹³ Concurring opinion of Judge Wojtyczek to *R.M.T. v. the United Kingdom*, *op. cit.*, para. 2 For the same reason, this Judge challenged the Grand Chamber case of *Demir and Baykara*. He said: “I regret that in the present case the majority decided to follow the flawed approach adopted in the above-mentioned *Demir and Baykara* judgment, consisting in aligning the Convention with some external rules of international law applicable to some of the Parties to the Convention, without even trying to analyse the wording of Article 11 of the Convention” (*ibidem*, para. 4).

²¹⁴ Contra: S. Van Drooghenbroeck, *op. cit.*, pp. 828-829.

practice nor when it develops the merits of the case, attach the possibility of using non-binding instruments directly to Article 31 paragraph 3 (c) VCLT.

614. The Court in *Demir and Baykara* uses Article 31 paragraph 3 (c) VCLT to support the statement that the Convention is not “...the sole framework of reference for the interpretation of the rights and freedoms enshrined therein”, but that “[O]n the contrary, ... [the Court] must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties”.²¹⁵ The Court did not pronounce itself explicitly on what it understood under that phrase, let alone on whether it allows the use of non-binding materials in that respect. The Grand Chamber did not – or at least not explicitly – give the message that non-binding instruments could be considered as ‘applicable law’ to be mobilized as part of a harmonizing (or transformative) technique under Article 31 paragraph 3 (c) VCLT. The Court in its substantive (‘evolutive’) reasoning in *Demir and Baykara* – which was based *i.a.* on non-binding instruments – did not include any reference to Article 31 paragraph 3 (c) of the VCLT.
615. Other Grand Chamber cases confirm these observations: in almost all Grand Chamber cases issued after *Demir and Baykara* (until the end of 2015), the Court imported under Article 31 paragraph 3 (c) of the VCLT binding instruments only²¹⁶ (or non-binding instruments that have ‘hard’ characteristics because they contain rules of customary law²¹⁷). Thus, the Grand Chamber – contrary to criticism it sometimes faces in this respect²¹⁸ – does generally not apply a minimalist view. Rather, the Court only brings those instruments under the scope of ‘systemic integration’ that are applicable in all Member States (because they are part of general international law, customary law, or because they are ratified by all Member States).
616. Indeed, in the case of *Neulinger and Shuruk v. Switzerland* and *X. v. Latvia*, the Court, in the context of Article 31 paragraph 3 (c) of the VCLT, refers to the Hague Convention on

²¹⁵ ECtHR (GC) *Demir and Baykara v. Turkey*, *op. cit.*, para. 67.

²¹⁶ See the case of *Neulinger and Shuruk v. Switzerland* and *X. v. Latvia* in which the Court harmonizes the Convention with the Hague Convention on Civil Aspects of International Child Abduction of 25 October 1980 and the UN Convention on the rights of the Child. ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, 6 July 2010, Appl. No. 41615/07, paras. 131-132. See also the case of ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 169-172 and para. 196, in which the Court uses Article 31 paragraph 3 (c) VCLT to harmonize with binding UN Resolutions. In the case of *Hassan v. the United Kingdom*, the Court brought under the scope of Article 31 paragraph 3 (c) VCLT the four Geneva Conventions of 1949. ECtHR (GC), *Hassan v. the United Kingdom*, 16 September 2014, Appl. No. 29750/09, paras. 102-106. In the case of *Cyprus v. Turkey*, harmonious interpretation was done with general (principles of) international law as interpreted by established international case law. ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), 12 May 2014, Appl. No. 25781/94, paras. 23-26 and 41. More elaborate on the latter cases, see *supra* Part II, Chapter 3, § 8.

²¹⁷ See the case of *Cudak* and the case of *Sabeh*, in which the Court explicitly pays attention to the customary nature of the instruments of international law (about State immunity) in which light the Court reads the Convention under Article 31 paragraph 3 (c) VCLT. ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, paras. 56 and 64-66; ECtHR (GC), *Sabeh El Leil v. France*, 29 June 2011, Appl. No. 34869/05, paras. 48-49 and 53-54. More elaborate on the latter cases, see *supra*, paras. 434-437.

²¹⁸ See *supra*, para. 60 and para. 605.

Civil Aspects of International Child Abduction and the CRC which are ratified by all Member States.²¹⁹ Also, the Court brings the rules of customary law (on State immunity), the general (principles of) international law and the Geneva Conventions of 1949 (binding on all parties) under the scope of Article 31 paragraph 3 (c) VCLT, namely in the cases of, respectively, *Cudak v. Lithuania* (and *Sabeh El Leil v. France*), *Cyprus v. Turkey* and *Hassan v. the United Kingdom*.²²⁰ Also, in the case of *Catan v. the Republic of Moldova and Russia*, the Court harmonizes with (human rights) instruments applicable in all Member States including the CRC, the ICESCR, and the CERD.²²¹ Thus, in most of the examined cases the Court only brings ‘hard’ instruments under the principle of ‘systemic interpretation’ that are binding on all parties to the ECHR, which corresponds to our suggested approach to Article 31 paragraph 3 (c) VCLT.

617. It is also relevant that the Grand Chamber cases of our pool that include a reference to Article 31 paragraph 3 (c) VCLT, usually do not lead to an ‘evolutive’ interpretation. Instead, the Court uses the instruments (on child abduction, on international humanitarian law, on State immunity or on combating terrorism) because the States did ‘excuse’ their behavior by their external obligations under these instruments. The Court, when it examines the necessity of the interference, includes Article 31 paragraph 3 (c) VCLT to clarify the importance of harmonizing both the Convention and the external obligations. In *Nada v. Switzerland* for example, the Court used Article 31 paragraph 3 (c) VCLT to examine the justification of the interference, and, more particularly, to stress that a State, to prevent any normative conflicts, should reconcile its external obligations with the obligations of the Convention. In this case, and in several other cases, the Court did thus not use Article 31 paragraph 3 (c) VCLT to interpret the scope of the ECHR in the light of external instruments, but to apply the Convention while taking account of the Member States’ external obligations.²²²

618. In our case law analysis, there is one exception: in *Marguš v. Croatia*, the ECtHR put Article 31 paragraph 3 (c) VCLT in a context of ‘evolutive’ interpretation, rather than in a context of harmonious interpretation.²²³ In this case, the Court aimed to keep up with growing external trends, expressed by multiple ‘hard’ and ‘soft’ instruments.²²⁴ Here, by

²¹⁹ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, paras. 131-132.

²²⁰ ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, paras. 56 and 64-66; ECtHR (GC), *Sabeh El Leil v. France*, *op. cit.*, paras. 48-49 and 53-54; ECtHR (GC), *Cyprus v. Turkey* (just satisfaction), *op. cit.*, paras. 23-26 and 41; ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, paras. 102-106.

²²¹ ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, 19 October 2012, Appl. Nos. 43370/04, 8252/05 and 18454/06, para. 136 (with reference to *Demir and Baykara v. Turkey*). However, the Court in this case also includes a reference to the ‘soft’ UDHR.

²²² ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 169-172 and para. 196.

²²³ Outside our pool of cases, we found another reference to Article 31 paragraph 3 (c) VCLT (implicitly) connected to the importance of (consensus in) international law and comparative law for dynamic interpretations. See ECtHR (GC), *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, Appl. No. 18030/11, paras. 138 *et seq.*

²²⁴ ECtHR (GC), *Marguš v. Croatia*, 27 May 2014, Appl. No. 445/10, paras. 131-141.

using of Article 31 paragraph 3 (c) VCLT, the Court imported non-binding instruments for dynamic purposes, which reminds us of the referencing technique in *R.M.T. v. the United Kingdom*. Here, in our view, the Court misinterpreted the statements made in *Demir and Baykara v. Turkey*, which do not put the principle of ‘systemic integration’ in a context of dynamic references to non-binding law. Since the Grand Chamber never offered clear and straightforward guidance in respect of Article 31 paragraph 3 (c) VCLT, this misinterpretation is not surprising.

619. It is possible that uncertainties in legal doctrine about the exact meaning of Article 31 paragraph 3 (c) VCLT have refrained the Court from taking a clear stance on the matter. Nonetheless, to prevent misunderstandings and to improve consistency, we suggest that the Court takes a more transparent and precise position. Either the Court does not use Article 31 paragraph 3 (c) VCLT to dynamically interpret the Convention with the help of non-binding provisions, or, it does use like that, but then, it should specify what the provision entails. As we said, there is no consensus on the meaning of Article 31 paragraph 3 (c) VCLT and whatever position the Court takes on the issue might be subject to criticism. For the sake of clarity and transparency, however, taking a contested position seems better than sending confusing messages about what the position is. In addition, to reduce criticism to a minimum, we recommend the Court not to move beyond a ‘maximalist’ viewpoint, and to *explicitly* stress that, to activate Article 31 paragraph 3 (c) VCLT, all Member States should be parties to the imported instruments.

B. ‘Relevant’ external norms

620. Article 31 paragraph 3 (c) VCLT speaks of an obligation to take into account ‘*relevant* rules of international law’.²²⁵ Are these ‘relevant’ rules *ratione materiae* rules of general international law or does it also address specific rules? Furthermore, if we consider that specific rules fall under the scope, should they be of a similar nature than the rules under interpretation, thus rules of human right law? Or, may also other kinds of specific rules be imported under Article 31 paragraph 3 (c) of the VCLT?

621. In legal doctrine, there are diverging approaches. Some authors stress that Article 31 paragraph 3 (c) of the VCLT only covers the integration of general international law, excluding more specific rules of international (human rights) law. Others suggest it solely concerns harmonization with rules of same or comparable content.²²⁶ The most common

²²⁵ This notion is said to lack substantive clarity. B. Simma and T. Kill, “Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology”, in C. Binder et al. (eds), *International Investment Law for the 21st Century*, 2009, p. 695, quoted by J. Arato, *op. cit.*, p. 373.

²²⁶ B. Schlütter, *op. cit.*, p. 298. Schlütter speaks of rules of ‘the same content’. Yasseen considers that it touches upon ‘pertinent’ rules meaning that these rules should cover a domain that is comparable to the domain covered

approach is a flexible and broad understanding of the notion. This approach includes under ‘relevant rules’ both general international law as well as any other rule that is applicable as a special legal (human rights) obligation binding on the parties.²²⁷ Then, the notion not only refers to external rules touching on the same subject matter as the treaty under interpretation, but also to other rules that might affect the interpretation process.²²⁸ As Corten frames it, there should be a certain flexibility whereby the notion of ‘relevant rules’ points at “...toutes les règles ayant vocation à s’appliquer à une même situation étant à première vue pertinentes, et ce quelque soit le domaine juridique qu’elles recouvrent”.²²⁹

622. In line with the majority position in legal doctrine, we support a flexible view to the notion of ‘relevant’ rules. The latter viewpoint accords with the Court’s own theoretical approach. Indeed, it stresses that – under Article 31 paragraph 3 (c) VCLT – it should not read the Convention in a vacuum but that “...account should be taken ... of any relevant rules of international law applicable in relations between the parties ..., in particular the rules concerning the international protection of human rights (own emphasis)”.²³⁰ In practice, however, the Court, most often, does not mobilize the principle of ‘systemic integration’ to read the Convention in the light of other *human rights* norms. Exceptions in this respect are the cases of *Neulinger and Shuruk v. Switzerland* and *Catan v. the Republic of Moldova and Russia*. In the first case, the Court has connected Article 31 paragraph 3 (c) VCLT to harmonious interpretation between the ECHR and the CRC.²³¹ In the second case, the Court has harmonized the ECHR with the CRC, the ICESCR, and the CERD.²³² In the latter case, the Court used Article 31 paragraph 3 (c) VCLT in a more hidden manner: it mentioned its content, it referred to *Demir and Baykara*, but it did explicitly include the name and number of the provision. This might point at some unease to mobilize Article 31 paragraph 3 (c) VCLT in relation to human rights norms.

by the interpreted instrument. M. Yasseen, “L’interprétation des traits d’après la convention de Vienne sur le droit des traités”, RCADI 1976, tome 151, p. 63, as referred to and interpreted by O. Corten, *op. cit.*, pp. 228-229.

²²⁷ See, generally, J. Arato, *op. cit.*, pp. 373 *et seq.*

²²⁸ V.P. Tzevelekos, *op. cit.*, pp. 624, 631 and 635; F. Vanneste, *op. cit.*, 2009, p. 220; The large view is acknowledged by the ICJ, see J. Arato, *op. cit.*, p. 373 and V.P. Tzevelekos, *op. cit.*, p. 635. According to the ILC-study, the principle of ‘systemic integration’ is built upon the idea that “...whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon the fact (own emphasis)”. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN doc. A/CN.4/L.702 (18 July 2006) (hereafter: “ILC Fragmentation Report”), p. 14, as cited by C. Pitea, *op. cit.*, 2014, p. 4. French highlights that this term is self-explanatory: irrelevant rules are by their nature ‘irrelevant’. As a minimum requirement, he affirmed, the imported rule should be related in some way to the treaty norm being interpreted whereby the concept is in any case ‘much looser’ than the concept of ‘same subject-matter’ under Article 30 VCLT on successive treaties. See D. French, *op. cit.*, p. 304 and references there.

²²⁹ O. Corten, *op. cit.*, p. 229. Economic rules could therefore, for example, be interpreted restrictively taken account of applicable rules protecting human rights since we could assume that a ‘rational legislator’ only enters engagements that form a coherent whole (*ibidem*).

²³⁰ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 131; ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 169.

²³¹ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, paras. 131-132.

²³² ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136 (with reference to *Demir and Baykara*).

623. In general, harmonization with external human rights norms does not seem to be of the Court's highest concern under Article 31 paragraph 3 (c) VCLT.²³³ Rather, it uses the provision to enable harmonious interpretation with external rules of general international law and specific international treaties that are not part of the human rights area. As Arato notes, this is a sign that the Court considers these rules 'relevant' not because of their same subject matter but because, presumably, because they allow to resolve a potential conflict between both regimes.²³⁴

624. While we do not disregard the benefits of such an integration with the larger normative framework (for instance, to prevent normative conflicts), we suggest the Court to more consistently and elaborately make use of Article 31 paragraph 3 (c) VCLT in relation to external *human rights* norms. One of the judges to the Grand Chamber judgment of *Magyar Helsinki Bizotts v. Hungary* of 8 November 2016 explicitly shares this view. In this case, which evolutively recognized a right to receive information under Article 10 ECHR, separate Judge Sicilianos, joined by Judge Raimondi, holds that

"...it will be borne in mind – and this is a particularly important aspect – that Article 19 (2) of the International Covenant on Civil and Political Rights, which explicitly mentions the right to seek information, is binding on all the Contracting States of the Convention. This provision thus amount to a 'relevant rule ... of international law applicable in the relations between the parties' within the meaning of Article 31 § 3 (c) of the Vienna Convention".²³⁵

Article 31 paragraph 3 (c) VCLT requires a harmonious interpretation in relation to all other applicable instruments, including human rights instruments. A more consistent use of this provision would offer a firmer justificative basis for harmonization with external (higher) human rights norms that are applicable in all Member States. This would increase the legal validity of such references.

625. The case of *El-Masri v. "the former Yugoslav Republic of Macedonia"* is an example, but there are many more, of a missed opportunity in this respect. In this case, the ECtHR was guided by the CAT to give content to the notion of 'torture' (including some criteria that should be fulfilled in that regard). According to the CAT, there is also a purposive element to torture, namely an intentional infliction of severe pain or suffering with the aim, *inter alia*, of

²³³ Compare: C. Pitea, *op. cit.*, 2014, p. 5. The latter author says that the Court's methodology of referring to external instruments "may be analyzed as an attempt at preventing the fragmentation of the international legal system, especially in the field of human rights protection (own emphasis)".

²³⁴ J. Arato, *op. cit.*, p. 374. Note that Arato also considers the case of *Demir and Baykara* as an example of a use of external rules in the light of Article 31 paragraph 3 (c). Here, this author says, the Court mobilizes external 'labor law' which, in light of Article 11 on the rights to freedom of association and collective bargaining, can be considered as touching upon the same subject matter. See, J. Arato, *op. cit.*, p. 374.

²³⁵ Judge Sicilianos, the Court, as a general rules, has carefully avoided interpretations '*contra legem*'. See Concurring opinion of Judge Sicilianos, joined by Judge Raimondi, to ECtHR (GC), *Magyar Helsinki Bizotts v. Hungary*, 8 November 2016, Appl. No. 18030/11, para. 30.

obtaining information, inflicting punishment or intimidating.²³⁶ Here, the Court could have relied on Article 31 paragraph 3 (c) VCLT (as well as on Article 53 ECHR) to justify its reference to and harmonization with the CAT, which is applicable between all Member States.

C. 'Take into account'

626. Article 31 paragraph 3 (c) VCLT – as put forward by legal literature and jurisprudential practice – serves 'systemic integration' by reading applicable rules in light of each other.²³⁷ As a consequence, it alludes in the first place to a principle of 'coordinative harmonious interpretation'. The phrase 'taking account of', which appears in the text of the provision, primarily means: 'reading together in a coordinative manner'. In second order, when coordinative harmonization could not be realized without upholding the particular character of human rights law, we will argue that the phrase 'taking account of' should be interpreted as 'reading together in a hierarchical manner'. For a further explanation of these observations, we distinguish between harmonious interpretation of the ECHR with rules within the domain of human rights (C.1.), and harmonious interpretation of the ECHR with general and specific international law outside the domain of human rights law (C.2.).²³⁸

C.1. Coordinative integration of human rights norms

627. The Court only makes little use of the provision to justify the integration of external human rights norms.²³⁹ Article 31 (c) paragraph 3 VCLT mainly serves as a principle to justify an harmonious interpretation with rules outside the human rights domain. From a general viewpoint that conceives Article 31 (c) paragraph 3 VCLT as a tool to integrate specific regimes (such as human rights law) into the system of general international law, this is understandable. However, in a human rights context, the lack of mobilizing Article 31 paragraph 3 (c) VCLT in the light of human rights integration is more surprising, especially given the less challenging mission of coordinating the ECHR with external human rights law as compared to other domains of international law (which possibly serve purposes different to human rights protection).²⁴⁰

628. Interpreting Article 31 paragraph 3 (c) VCLT with respect for the principle of non-regression, requires coordinative and substantive integration of external more specific

²³⁶ ECtHR (GC), *El-Masri v. "the former Yugoslav Republic of Macedonia"*, 13 December 2012, Appl. No. 39630/09, para. 197. See also: ECtHR (GC), *Gäfgen v. Germany*, 1 June 2010, Appl. No. 22978/05, para. 90.

²³⁷ For more on this doctrine and jurisprudential practice, see *supra*, Part III, Chapter 1, § 3.2.1.

²³⁸ Indeed, we have argued that the notion of 'applicable rules' as it appears in Article 31 paragraph 3 (c) of the VCLT covers rules of both general international law and specific international law (including human rights law). See *supra*, Part III, Chapter 1, § 3.2.2., A.

²³⁹ See *supra*, Part III, Chapter 1, § 3.2.2., B.

²⁴⁰ On this issue, see *infra*, Part III, Chapter 1, § 3.2.2., C.2.

and/or more protective human rights provisions.²⁴¹ Admittedly, following our strict approach to the notion of ‘applicable between the parties’, a situation of overlapping or co-existing human rights would only exist in relation to external human rights catalogues (and their external interpretations) that are ratified by all Member States. Nonetheless, in practice, this would cover several instruments, including the ICCPR, the CRC, the CEDAW, the CAT, the CERD and the ICESCR. For the importation of instruments to which the Member States cannot accede, such as the ACHR, or for the importation of human rights catalogues not ratified by all Member States, such as the CRPD, Article 31 paragraph 3 (c) VCLT should not have any binding authority.²⁴²

629. When the Strasbourg Court is confronted with external applicable higher standards under similar human rights, Article 31 paragraph 3 (c) of the VCLT has a comparable effect to the ‘human rights safeguard’ under Article 53 of the Convention. Both provisions may be used together to enhance the legal validity of the importation of higher standards.²⁴³ While Article 53 ECHR serves an aim of ‘safeguarding’ human rights, Article 31 paragraph 3 (c) VCLT serves an aim of ‘systemic integration’. However, when ‘integrating the human rights system’ requires to coordinatively adapt the ECHR to external applicable higher standards, Article 31 paragraph 3 (c) VCLT indirectly turns into a human rights safeguard.

630. In addition, Article 31 paragraph 3 (c) VCLT could fulfill a more independent role, next to Article 53 ECHR. The latter provision only compels the Court to harmonize with similar human rights offering *higher* protection standards. But, what happens when external instruments do not operate as tools to increase human rights protection but as tools to enhance mutual learning and to fill in gaps of the Convention (for instance, because the external instruments offer a specific argument that is particularly tailored to a certain group of persons)? Then, Article 53 ECHR is not of use. Article 31 paragraph 3 (c) VCLT demonstrates additional value in such a situation. It also mandates the Court to read

²⁴¹ We have stressed how this principle should serve as a red line through referencing practice. *Supra*, Part III, Chapter 1, § 2. A risk of a backward human rights interpretation might be at play when external human rights or criteria offer lower protection standards. Then, Article 31 paragraph 3 (c) VCLT could not be mobilized to support a harmonious interpretation. In case of conflicting human rights, the principle of non-regression might become more difficult to assess. Article 31 paragraph 3 (c) VCLT would generally not be of relevance to solve conflicts between conflicting human rights. However, when imported human rights (not provided for in the Convention) conflict with the rights of the Convention, we plead to solve the conflict by giving precedence to the Convention (hierarchical harmonization). Imagine for instance that external rights not covered by the Convention, like some social rights, risk to conflict with civil and political rights. Then, when a coordinative interpretation does not succeed, the external rights should not receive a large weight in the Strasbourg reasoning and they should in any case not affect a clear text of the Convention. Article 31 paragraph 3 (c) VCLT, in line with the principle of ‘non-regression’ should, in our view, not be used to put external human rights norms *in opposition* to the Convention, with the risk of levelling down the Convention standards.

²⁴² More on the convergence and divergence between the ECHR and the CRPD, see D. Staes and J. Damamme, “External Referencing by the ECtHR and Human Rights Integration: (Missed) Opportunities for Rights of Persons with Disabilities”, in E. Bribosia and I. Rorive (eds), *A Global and Multilayered Approach of Human Rights: Promises and Challenges*, Intersentia, accepted for publication in 2017.

²⁴³ On Article 53 of the Convention in light of the referencing practice, see *supra*, Part III, Chapter 1, § 3.1.

together the ECHR with external specific (and applicable) human rights instruments, for the sake of integration and coherence of the human rights system.

631. As demonstrated in our case law analysis, the Court regularly refers to human rights catalogues with different scope *ratione personae* and *ratione materiae*. In the case of *S. and Marper v. the United Kingdom* for example, the Court cites the CRC to emphasize the need to take account of the special vulnerable position of minors in the criminal justice sphere.²⁴⁴ The latter reference does not offer an illustration of the Court referencing external instruments to explicitly level up its protection standards. Rather, it offers an example of the Court finding support in external instruments to (dynamically) specify and fine-tune the interpretation and the application of the Convention in a context of the protection of minors. It is recommendable to give more legal force to such references, for instance by making use of Article 31 paragraph 3 (c) VCLT.

632. One of the characteristics of external referencing, as demonstrated by our case law analysis, is that it covers human rights catalogues containing rights associated with the ‘second generation’. Think, for instance, about our key case of *Demir and Baykara v. Turkey*, in which the Court refers to several instruments of the ‘social sphere’, including *inter alia* the ICESCR and ILO Convention No. 87, in order to support its statement that municipal civil servants do in principle not belong to the group of “members of the administration of the State” (to whom restrictions could be allowed under Article 11 ECHR).²⁴⁵ Also here, in respect of the use of the ICESCR and ILO Convention No. 87, which both apply in all Member States, the Court could have made the references more convincing by including Article 31 paragraph 3 (c) VCLT. Then, the latter provision would have served as a legal obligation and justification to reconcile the Convention as much as possible with the provisions of the ICESCR and the ILO Convention.

C.2. Integrate norms outside human rights law

633. The general idea underlying Article 31 paragraph 3 (c) of the VCLT is one of harmonizing external applicable law in a coordinative manner (C.2.1.). However, when this is not possible without lowering standards or without affecting human rights disproportionately, we argue that such ‘coordination’ should make place for ‘hierarchy’ (C.2.2.).

²⁴⁴ ECtHR (GC), *S. and Marper v. the United Kingdom*, 4 December 2008, Appl. Nos. 30562/04 and 30566/04, para. 124.

²⁴⁵ The applicants could therefore legitimately rely on Article 11 and could not be subjected to restrictions. See ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 99-105.

C.2.1. Coordinative integration

634. The ideal of ‘systemic integration’ requires reading the ECHR in accordance with other rules of international law, also those situated outside the human rights domain. Article 31 paragraph 3 (c) VCLT focuses particularly on an harmonization with the general international context, and more precisely, with general principles of law, customary law and international treaties ratified by all CoE Member States. The specific character of the ECHR, as the Court stresses, does not prevent such coordinating efforts.²⁴⁶ Article 31 paragraph 3 (c) VCLT starts from the idea that States have no intention to establish incoherent obligations.²⁴⁷ The latter leads to a presumption against conflict, which stimulates efforts to read various instruments together in a coordinative manner, enhancing the coherence of the international system. By applying Article 31 paragraph 3 (c) VCLT, the Court prevents normative conflicts and strives for reconciliation. It is therefore not surprising that Article 31 paragraph 3 (c) VCLT is considered as one of the ways to enable ‘concurrence’ or ‘convergence’ between the Convention and other instruments of (general) international law.²⁴⁸ ‘Harmonization through interpretation’ could help the Strasbourg judges to fill gaps and solve uncertainties (for example in respect of issues of public international law) and thus, for instance, to rely on “...customary international law and general principles of law for all questions which the treaty does not itself resolves in express terms”.²⁴⁹
635. In jurisprudential practice, as the pool of case law shows, the Grand Chamber does generally not breach ties with general international law.²⁵⁰ It has generally used the tool of Article 31 paragraph 3 (c) VCLT to create harmony between the requirements of the Convention and those of general international law. In the case of *Sabeh El Leil v. France*, for example, the Court insisted on harmonious interpretation between the Convention and public law on State immunity, which is applicable as part of customary international law.²⁵¹ Making use of Article 31 paragraph 3 (c) VCLT, the Grand Chamber also referred to more specific instruments of international law outside the human rights area. For instance, in the case of *X. v. Latvia*, the Court highlighted its role as a harmonizing body in relation to the Hague Convention on Child Abduction of 25 October 1980 (to which all States of the Coe are

²⁴⁶ ECtHR (GC), *El-Dulimi and Montana Management Inc. v. Switzerland*, 21 June 2016, Appl. No. 5809/08, para. 134: “[d]espite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law”.

²⁴⁷ One could conceive this as a ‘negative presumption’: the States do not have the intention, when entering a new treaty, to contravene general principles of international law, customary international law or other rules that are applicable to them. On this negative presumption, see M. Forowicz, *op. cit.*, 44.

²⁴⁸ V.P. Tzevelekos, *op. cit.*, p. 624 and p. 635.

²⁴⁹ ‘ILC Koskenniemi Report’, *op. cit.*, p. 94, footnote 237, with reference to *Georges Pinson case (France/United Mexican States)* Award of 13 April 1928, UNRIAA, vol. V, p. 422.

²⁵⁰ Also Tzevelekos draws attention on how this provision is a means not to break the traditional ties that the Court has with general international law. V.P. Tzevelekos, *op. cit.*, p. 623.

²⁵¹ ECtHR (GC), *El Leil v. France*, 29 June 2011, Appl. No. 34869/05, paras. 41 *et seq.* Because France did not give effect to the obligations of the law on State immunity in a manner that did justice both to this external domain and to the ECHR, it interfered with the Convention in a disproportionate manner.

a member).²⁵² Here, the Court stressed the importance of a combined and harmonious application of the ECHR and the Hague Convention.²⁵³ Separate Judge Pinto de Albuquerque applauded this approach.²⁵⁴ He stressed that the Court, by verifying whether the national authorities have ensured human rights when applying the Hague Convention (which has no supervisory body to ensure uniformity of interpretation and implementation), fulfills a particular unifying role in creating a better cooperation and a more uniform approach.²⁵⁵

636. There are nonetheless several cases in our pool in which the Court misses an opportunity to explicitly follow the principle of ‘systemic integration’. Also when (general) international law is not closely connected to the facts of the case (thus not reflecting the legal ‘roots’ of the contested actions), the Court has made use of it (for instance, to fill gaps or to solve uncertainties), however, without mentioning Article 31 paragraph 3 (c) VCLT. The Court may enhance the validity of such a reference by explicitly including this provision. For example, the Grand Chamber often relies on instruments of (general) international law to import and define certain ‘notions’ that are relevant to solve the case.²⁵⁶ Under the condition that the external instrument is applicable in all Member States, we recommend the Court to embed such external references in the aim of ‘systemic integration’, as covered by Article 31 paragraph 3 (c) VCLT. Article 31 paragraph 3 (c) VCLT could even serve as a legal justification for the Court using the VCLT. Since this instrument is a part of public international law and since it offers a general framework for treaty interpretation (mostly reflecting general principles of international law and customary law)²⁵⁷, Article 31 paragraph 3 (c) VCLT in fact obliges the Court to integrate the provisions of the VCLT. Albeit the risk of

²⁵² On the status of this Convention, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (visited on 31 August 2016).

²⁵³ ECtHR (GC), *X. v. Latvia*, 26 November 2013, Appl. No. 27853/09, paras. 93-94. The Court in the latter case only mentioned Article 31 paragraph 3 (c) VCLT implicitly: it mentioned the content (without mentioning the number of the provision and the name of the Vienna Convention) and it mentioned it as part of a citation of a precedent Strasbourg case. *Ibidem*, paras. 92-93. A more explicit connection between its statements and Article 31 paragraph 3 (c) VCLT would have been more transparent.

²⁵⁴ Concurring opinion of Judge Pinto de Albuquerque to the case of ECtHR (GC), *X v. Latvia*, 26 November 2013, Appl. No. 27853/09, under the following heading of his opinion: “The articulation between the Convention and the Hague Convention”. He said that the Court could enter the question as to whether the Hague Convention was properly interpreted and applied. He added that, in this respect, the Court has the final word (for instance to allow for an expansive and ‘evolutive’ interpretation of the Hague Convention).

²⁵⁵ *Ibidem*. According to Judge Pinto de Albuquerque, this uniform approach to the Hague Convention prevents practices of ‘forum shopping’.

²⁵⁶ See for example, *supra* paras. 310 *et seq.*

²⁵⁷ About the status of (some of) the provisions of the VCLT as customary law, see ICJ case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 160; ICJ case concerning the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 94. Also authors of legal doctrine stress that the VCLT reflects for a large part a codification of customary law. See *inter alia* F. Vanneste, *op. cit.*, 2009, p. 47; M. Marochini, *op. cit.*, p. 66. Corten nonetheless points at the delicacy to give the interpretation rules of the VCLT the status of customary rules in a strict sense because these rules in fact are not obligatory and their violation does not engage the responsibility of the interpreter, nor does it lead to legal sanctions. The sanction in not following these rules rather lies in affecting the convincing character of an interpretation. O. Corten, *op. cit.*, pp. 217-218.

a circular argument²⁵⁸, the Court could increase the legal validity of references to the VCLT by stressing its obligation under Article 31 paragraph 3 (c) VCLT.

637. The Court takes regularly account of (general) international law. Doing so, it strives for coordinative harmonious interpretation. Vanneste, based on a large case law study, concludes that the Strasbourg Court acknowledges a harmonious relationship between human rights law and general international law. Admittedly, the Court sometimes deviates from rules of general international law in an effort to better frame these rules in a human rights context. Therefore, a stress on the *lex-specialis* character of human rights can "...lead to perceived or real divergences of approach to central questions of international law", for instance between the Strasbourg Court and the ICJ.²⁵⁹ In the Vanneste's view, however, the Court generally does not intensify 'fragmentation'. Also when the Court creates a diverging approach, it rather 'adds' to the framework of general international law than that it contradicts it. There is thus no large evidence of 'human rightism' in the Strasbourg case law.²⁶⁰ Therefore, as Vanneste points out, the relationship between Strasbourg human rights law and general international law is mainly one of harmony (in a coordinative sense).²⁶¹ The Strasbourg judges would not all agree with this conclusion. In our pool of cases, several separate judges have blamed the Court to ignore aspects of external general international law and to sacrifice too much this domain for the sake of expansive human rights protection.²⁶²

²⁵⁸ Because of mobilizing a provision of the VCLT to justify the use of the VCLT.

²⁵⁹ R.C.A. White and C. Ovey, *op. cit.*, p. 18. The ILC, in its study on 'fragmentation', distinguished conflicts of rules of the same system and rules belonging to different systems and said that the latter situation is the one in which the real problems might arise, for instance in respect of the dangers of specialized judges (such as the judges of the ECtHR) considering rules of other systems (outside the 'human rights system'). T. Treves, *op. cit.*, p. 233, with reference to the ILC-Report. Earlier research also demonstrated that references of the ECtHR to the ICJ, brings difficulties because of the differences between both systems whereby the ECtHR refrains from fully integrating the rulings of the ICJ. See M. Forowicz, *op. cit.*, p. 105. Former President Guillaume of the ICJ expected particularly acute risks in case specialized courts (like the ECtHR) are dealing with general international law as such courts are "inclined to favor their own discipline". See T. Treves, *op. cit.*, p. 219, and references there.

²⁶⁰ 'Human rightism' alludes to a particular human rights approach moving away from general international law. The Court for instance deviated from case law of the ICJ but this could be considered as a successful participation of the Court in the debates surrounding general international law and as a contribution of the Strasbourg Court to a judicial dialogue in this respect. Vanneste stresses that international courts have to respect the participation of the Strasbourg Court in the debates and development of general international law, certainly as long as there is no centralized system of international law (for instance through the possibility to ask prejudicial questions to the ICJ). This dialogue could even be considered, as Vanneste notes, as a kind of 'checks and balances' at international level. See F. Vanneste, *op. cit.*, 2011, pp. 832-833.

²⁶¹ *Ibidem*, p. 819. Vanneste develops examples of domains in which the Court's view is in harmony with general international law, including the issues of treaty reservations, territorial competence, temporary competence, State responsibility and the rules of interpretation of the VCLT. See *ibidem*, pp. 820-830.

²⁶² Judge Ziemele in the case of *Andrejeva* blamed the majority, on the basis of Article 31 paragraph 3 (c) VCLT, for not having respected public international law on State succession (which could have led to lesser human rights obligations for the respondent State). See Partly dissenting opinion of Judge Ziemele to the case of ECtHR (GC), *Andrejeva v. Latvia*, 18 February 2009, Appl. No. 55707/00, paras. 19 and 41. In the case of *Mocanu*, separate Judge Wojtyczek regretted that the Court conceived its competence too elaborately and that it had not listened sufficiently to external general international law (*in casu* to rules of the VCLT on the non-retroactivity of treaties), contributing therefore to its fragmentation. To his view, the Court did interpret the Convention too much in a vacuum and did not take sufficiently account of the international context. See partly dissenting opinion of Judge Wojtyczek to the case of ECtHR (GC), *Mocanu and Others v. Romania*, 17 September 2014, Appl. Nos. 45886/07 *et seq.*, paras. 5 and 8. Finally, in the case of *X and Others v. Austria*, several separate Judges were of the opinion that the Court did not give sufficient effect to external treaties, while Article 31 paragraph 3 (c) VCLT required the

638. While the Court often does not lose sight of external (general) international law, it also pays attention to the specific character of human rights protection. Our case law analysis shows that when the Court exercises harmonious interpretation under Article 31 paragraph 3 (c) VCLT, it generally respects human rights standards.²⁶³ The Court, at least in theory, acknowledges that harmonization has its limits. In *Nada v. Switzerland*, it pointed out that when the Convention risks to conflict with commitments under an external instrument, that harmonization should take place “...as far as possible so that they produce effects that are fully in accordance with existing law (own emphasis)”.²⁶⁴ Also Forowicz observes that Strasbourg case law hinders ‘negative’ external influences. According to her findings, the Court resists the referencing practice when this might infringe the specificity of the Convention and the aim to maintain and progressively develop human rights protection.²⁶⁵ In relation to referencing international law, Forowicz concluded that the “...need to better protect ECHR rights constitutes a cornerstone of the Strasbourg reception process”.²⁶⁶

639. Against this background, one could generally conclude that the creation of harmony with the external framework of (general) international law is not detrimental, neither for human rights protection nor for external (general) international law. The Court does usually not neglect external (general) international law and aims to create coherence as far as this does not affect human rights law. The latter picture might however be a bit too rosy. There is case law that unveils how external influences and the Court’s (artificial) coordinative efforts have (or could have) detrimental effects on human rights protection.²⁶⁷ These examples, including the cases of *Al-Adsani v. the United Kingdom*, *Al-Jedda v. the United Kingdom*, *Nada v. Switzerland* and *Hassan v. the United Kingdom*, will be elaborately discussed when pointing at Strasbourg cases hampering progressive human rights protection, or when pointing at how the Court puts the ideal of integrity before the aim of human rights protection.²⁶⁸

C.2.2. Hierarchical integration

640. Coordinative incorporation of general international law and rules of international law is not always an easy and feasible undertaking. It might be a controversial process because it is possible that some external rules do not share the mission and the purposes of the ECHR. Forowicz, for instance, on the basis of a Strasbourg case law analysis, refutes the hypothesis

Court to do so. See Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos to ECtHR (GC), *X and Others v. Austria*, 19 February 2013, Appl. No. 19010/07, paras. 17 *et seq.*

²⁶³ See *supra*, Part II, Chapter 3, § 8.3.

²⁶⁴ ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 170.

²⁶⁵ M. Forowicz, *op. cit.*, p. 378.

²⁶⁶ *Ibidem.*

²⁶⁷ For another example in this respect, see the case of *Behrami and Saramati*, *supra*, footnote 21.

²⁶⁸ See *infra*, paras. 837-840 and 876.

that the importation of general international law is easier than the importation of specific human rights norms. Rather than that the general character of the norms facilitates the referencing practice, the difference of subject matter hinders the referencing practice.²⁶⁹ Harmonization with external human rights instruments (sharing a same purpose, covering similar situations, containing overlapping rights, built on comparable facts and values, *etc.*...) is less controversial.²⁷⁰

641. Human rights norms protect – in a progressive manner – human beings against States. They reflect a ‘*lex specialis*’²⁷¹ focused on the protection and the dignity of human beings and based on common values.²⁷² We have linked this special nature of human rights to a principle of non-regression in human rights protection. Accordingly, it also requires not to blindly integrate instruments of international law. When such instruments affect human rights protection and create a situation of ‘normative conflict’, their influence should be blocked (even when such instruments are ‘applicable’ between the Member States). On the one hand, the idea of ‘systemic integration’ thus reminds us that human rights law should take account of the larger system of (general) international law.²⁷³ On the other hand, we argue that also human rights law, as a *lex specialis*, permeates other instruments of international law.

642. Against that background, a harmonious interpretation under Article 31 paragraph 3 (c) VCLT should not lead to a reconciliation between the ECHR and external norms when this necessarily results in a lowering of the human rights standards or when it leads to a disproportionate interference with human rights.²⁷⁴ When the conflict could not be solved in a proportionate manner, convergence between the ECHR and external instruments should not take place. Then, a ‘hierarchical’ harmonious interpretation – instead of a ‘coordinative’

²⁶⁹ M. Forowicz, *op. cit.*, pp. 370 *et seq.*

²⁷⁰ I. Rorive, “Le dialogue des juges, un phénomène aux facettes multiples”, in E. Bribosia, L. Scheeck and A. Ubeda de Torres (eds), *L’Europe des cours. Loyautés et résistances*, collection ‘Penser le droit’, Bruylant, Brussels, 2010, p. 283. The latter author observes that the phenomenon of a judicial dialogue is particularly observable in the area of human rights. See also E. Dubout and S. Touzé, “La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques”, in *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, Pedone, Paris, 2009, p. 16.

²⁷¹ The Court explicitly advocates the special character of the ECHR already from its early judgments. See for example: ECtHR (plenary), *Ireland v. United Kingdom*, 18 January 1978, Appl. No. 5310/71, para. 239: “Unlike international treaties of the classical kind, the Convention comprises more than mere reciprocal engagements between contracting States”. Also the VCLT, in Article 60 paragraph 5, concerning the issue of ‘termination or suspension of a treaty as a consequence of its breach’, recognizes the existence of instruments with a specific character as it mentions that “...provisions relating to the protection of the human person contained in treaties of a humanitarian character”.

²⁷² For more on this issue, see *supra*, Part III, Chapter 1, § 2.

²⁷³ F. Vanneste, *op. cit.*, 2011, p. 818.

²⁷⁴ Also Forowicz said that a lack of referencing could be justified when the external instruments do not protect human rights to the extent as the ECHR or when they do not accord with the special features of the regime of human rights protection. According to this author, the *lex specialis* character of the ECHR thus weakens and inhibits references to international law. M. Forowicz, *op. cit.*, pp. 364 *et seq.* and pp. 382 *et seq.*

harmonious interpretation – is required.²⁷⁵ This hierarchical interpretation could lead to a justified dismissive reference that upholds divergence by refusing the application of the external conflicting instrument.²⁷⁶ When we consider human rights law as a *lex specialis*, this stance is supported by the phrase '*lex specialis derogat legi generali*'.²⁷⁷

643. The priority of human rights law is nowadays not confirmed, neither in legal practice nor in legal provisions, except for *jus cogens*.²⁷⁸ So far, the Court seems to artificially deny conflicts between the Convention and external obligations, *i.e.* of the UN, in order to avoid addressing the question of how it should be solved.²⁷⁹ The idea of hierarchical interpretation of human rights law (over UN law) goes against a strict application of the primacy rule of Article 103 of the UN Charter²⁸⁰, which offers a 'radical'²⁸¹ solution of precedence of UN law over conflicting law. Nonetheless, the application of the UN primacy rule in relation to a conflict with human rights law, would actually contradict the UN's own mission which, as the Strasbourg Court acknowledged, aims "[t]o achieve international co-operation...in promoting and encouraging respect for human rights and for fundamental freedoms...".²⁸² The UN Charter moreover provides that the UN should respect human rights (Article 24

²⁷⁵ See also F. Vanneste, *op. cit.*, 2011, pp. 818-819. Bergé makes a similar remark in respect of a domestic legal system making constitutional norms prevail over 'foreign' norms "...on the grounds that it does not have a natural place in the hierarchical constructions of the system". J.-S. Bergé, "Legal Application, Global Legal Pluralism and Hierarchies of Norms", *EJLS* 2011, vol. 4, no. 2, p. 249.

²⁷⁶ Forowicz observes that "...ECHR rights, having the character of peremptory norms, usually take precedence over international law". M. Forowicz, *op. cit.*, p. 390. The fact that the Court gives precedence to its human rights norms over contradictory external rules in a Strasbourg adjudication process is not to be confused with the Court declaring such external rules as being 'void' or 'invalid'. See F. Vanneste, *op. cit.*, 2011, pp. 811-812.

²⁷⁷ V.P. Tzevelekos, *op. cit.*, p. 630; ILC Koskeniemi Report, *op. cit.*, pp. 30-34. J. d'Aspremont, "Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution", in M. Fitzmaurice and P. Merkouris (eds), *The European Convention on Human Rights and the UK Human Rights Act*, Brill/Martinus Nijhoff, Leiden, 2011, pp. 17-25, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950151 (visited on 31 March 2017). The relationship between human rights law and international humanitarian law, which can also be considered as a *lex specialis*, is very complex and much debated. Note that, generally, human rights also apply in armed conflict. See J. d'Aspremont, *op. cit.*, pp. 1-2. See there for more references on the relationship between human rights law and international humanitarian law (*ibidem*, footnote 9) and on case law of the ICJ in this respect.

²⁷⁸ In the international environment, there is – except *jus cogens* – no clear hierarchy of norms: there are no criteria that clearly indicate which international norms should receive priority and one might thus say that all international law sources are equal. B. Schlütter, *op. cit.*, p. 302.

²⁷⁹ Examples will be more elaborately discussed further in this work, *i.e.* ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*; *Al-Jedda v. the United Kingdom*, *op. cit.*; *Nada v. Switzerland*, *op. cit.* See *infra*, paras. 837-840 and 876. See also ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, including the separate opinions to these cases. Several of the separate Judges stressed that the majority of the judges in the *Al-Dulimi*-case (as well as in the other cases we just mentioned), denied an existing normative conflict and, as a consequence, avoided the development of an equivalent protection test.

²⁸⁰ Article 103 UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

²⁸¹ Concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, para. 39.

²⁸² ECtHR (GC), *Al-Jedda v. United Kingdom*, *op. cit.*, para. 102. Moreover, as the Court stressed, Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations" (*ibidem*). See also ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, para. 139.

paragraph 2 UN Charter²⁸³).²⁸⁴ The application of the primacy rule of the UN Charter *vis-à-vis* conflicting human rights law would disrespect the need to achieve a balance between the requirements of collective security and the respect for fundamental rights.²⁸⁵ As a result of the lack of specific human rights obligations in the UN Charter as well as of the lack of a strictly binding human rights supervision in the UN system, we argue, in line with Judge Pinto de Albuquerque, that the validity of UN materials could be checked indirectly by a direct supervision of their national follow-up measures by the ECtHR.²⁸⁶ Thus, when the UN requires actions that are disproportionate under the Convention law, the Court should be able to attack these UN requirements by challenging the national follow-up measures.

644. Although not all authors would agree with this position²⁸⁷, the fight to secure human rights surpasses the fight against fragmentation.²⁸⁸ Because of the specific object and purpose of human rights to protect individuals, the latter battle is of primary order. Our approach fits the idea of treating the Convention as ‘a constitutional instrument of European public order’, which is a phrase the Court sometimes uses to describe the ECHR and that recognizes the superior place of human rights in the system of the CoE.²⁸⁹ It acknowledges that the Strasbourg legal order consists “...of a set of shared rules and principles among European nations which are so fundamental that they form the foundation of European society”.²⁹⁰

²⁸³ This provision provides that the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to ‘act in accordance with the Purposes and Principles of the United Nations’.

²⁸⁴ See also concurring opinion of Judge Sicilianos to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, para. 12; concurring opinion of Judge Malinverni to ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 15.

²⁸⁵ Concurring opinion of Judge Malinverni to ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 21.

²⁸⁶ See *ibidem*, para. 20 and Concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, para. 7.

²⁸⁷ Judge Nussberger, for example, is in favor of giving precedence to UN law in case of a conflict with the ECHR. On his stance, see dissenting opinion of Judge Nussberger to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*. Some authors stress how the unity of the international legal order is in danger because of giving human rights a special status whereby ‘*lex specialis derogat generali*’. Pellet for instance points at the dangers of ‘*droit-de-l’hommeisme*’, which covers the idea of a human rights law receiving autonomy as a true independent discipline. Pellet argues that human rights protection searches in an abusive manner for particularism and ‘wishful thinking’ and that ‘*droit-de-l’hommeisme*’ is a dangerous tendency. For an overview of the writings of Pellet and of other authors going in a similar sense, see *ibidem*, pp. 807-808.

²⁸⁸ In a similar sense, see concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, in particular paras. 5, 59, 69, and 71.

²⁸⁹ On the contested idea of the ECtHR functioning as a constitutional court and the ECHR as a constitutional instrument, see *supra*, § 2 of this Chapter, including references to doctrine and case law on the matter. Calling the ECHR a ‘constitutional instrument of public order’ is the most appropriate to describe the special status of the ECHR within the international legal order. F. Vanneste, *op. cit.*, p. 814.

²⁹⁰ K. Dzehtsiarou, *op. cit.*, p. 75. For more on the constitutional character of the Court in a context of conflicting UN instruments, see concurring opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, paras. 59-60 (including the references made there). For this Judge, the ECHR “...has direct, supra-constitutional effect on the domestic legal orders of the member States of the Council of Europe” and is thus “...more than just a multilateral agreement on reciprocal obligations of States Parties.” He adds that the ECHR has a “...transformational role emphatically proclaimed in the preamble as an instrument for building a closer union of European States and developing human rights on a pan-European basis” and that therefore, “...the Convention is subordinated neither to domestic constitutional rules, nor to allegedly higher rules of international law, since it is the supreme law of the European continent”. As a consequence, “[i]n the Council of Europe’s own internal hierarchy of norms, United Nations law is equal to any other international agreement and subordinated to the primacy of the Convention as a constitutional instrument of European public order”. He adds that “[f]rom this derives the nature of the Court as the European Constitutional Court, whose judgments have an *erga omnes res interpretata* effect that goes far beyond its *inter partes res judicata* effect...”.

Therefore, when a conflict appears, the Court should acknowledge it, and not hide behind the fight against fragmentation by creating an artificial sense of coherence (based on a strong presumption against conflict).²⁹¹ By avoiding the issue of precedence and hierarchy, the Court omits to give guidance to States about how to solve normative conflicts.²⁹²

645. Because of the specific character of human rights law, some caution is needed when applying the solutions of the ILC that treat Article 31 paragraph 3 (c) of the VCLT as the 'master key' to combat fragmentation.²⁹³ These proposals do not seem fully tailored to a human rights perspective. A blind 'copy-paste' of these general solutions (which correspond to a spirit of 'systemic integration') in order to deal with fragmentation, does not necessarily reflect the ideal way forward for human rights law. In a similar spirit, Forowicz highlighted that "...an effective strategy to reduce fragmentation can only be carried out in an area of international law where the different special regimes have similar aims and interests".²⁹⁴

C.3. Inherent tension in the idea of 'systemic integration' in a human rights context

646. As a consequence of the ideas of 'coordinative' and 'hierarchical' harmonization, there is a tension inherent to the application of Article 31 paragraph 3 (c) of the VCLT in a human rights context. On the one hand, the provision stimulates openness to rules within and outside the human rights domain and it aims at creating coordinative harmonization, serving a battle against fragmentation. On the other hand, we have argued that Article 31 paragraph 3 (c) VCLT should not deny the particular nature of human rights law, which will make it, on occasions, impossible to erase fragmentation. Therefore, the protection of human rights sometimes demands to seal diversity, rather than to create convergence through

²⁹¹ The ILC, in its writings on the fight against fragmentation, encourages a strong presumption against conflict. On this issue, see concurring opinion of Judge Sicilianos to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, para. 10. About the Court's establishment of a presumption against conflict in relation to UN and EU-law, see *supra*, paras. 395-403.

²⁹² Concurring opinion of Judge Keller to ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*, paras. 26-27.

²⁹³ The ILC does not ignore the existence of a *lex specialis* principle (and a possible priority of human rights law to other branches) but, at the same time, it gives a prominent role to general international law. The ILC report concludes, in accordance with the principle of harmonization, that general law will "...continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter" ("ILC Fragmentation Report", *op. cit.*, pp. 9-10). General law, according to the ILC, should thus play a particular role in light of filling gaps within areas as human rights law. According to the ILC, the idea of *lex specialis* stimulates human rights interpretation to reflect the specific object and purpose of human rights. However, the Commission stresses that completely isolated special regimes do not exist and that, while special regimes might prevail over general law (as *lex specialis*), general rules maintain a role in filling gaps of the special regime or when the special regime fails (*ibidem*, pp. 12 *et seq.*). See also "ILC Koskeniemi Report", *op. cit.*, pp. 30 *et seq.*

²⁹⁴ M. Forowicz, *op. cit.*, p. 400. Forowicz notes that the relationship between general international law and human rights law reflects an old issue of particular relevance as "...international law has increasingly become imbued with human rights standards to the extent that it is no longer limited to regulation between states but also extends to the treatment of individuals within states." As such, the case law of the ICJ, for example, is becoming more sensitive to human rights standards. *Ibidem*, pp. 105-106.

interpretation.²⁹⁵ Accordingly, we do not unconditionally agree with reading into Article 31 paragraph 3 (c) VCLT a ‘positive presumption’ that the ECtHR should rely on general international law applicable between the parties to solve questions that are not answered by the treaty in express terms or otherwise.²⁹⁶

647. Some reflections, nonetheless, soften the tension inherent to Article 31 paragraph 3 (c) VCLT. *Firstly*, interpreting external rules (which are not part of human rights law) in a human rights conform manner is not necessarily an issue of concern. Such an interpretation might *complement* (rather than *contradict*) the meaning of the external rules.²⁹⁷ The central aim is to create coordinative harmonization, which does justice to the identity of both human rights law and the external law. *Secondly*, the ‘divergence’ that results from the Court giving a specific meaning to (general) international law, could be softened by a practice of cross-referencing between human rights bodies. Then, these bodies at least ensure a conform interpretation of (general) international law among the various human rights mechanisms.²⁹⁸ *Thirdly*, the idea of giving priority to human rights would encourage States and other organizations not to issue international law that contradicts human rights law, which – by nature – penetrates all other legal domains.

D. Only indirect or implicit ‘evolutive’ effects

648. Article 31 paragraph 3 (c) VCLT does not explicitly envision an ‘evolutive’ interpretation and most often, the Court does not use it in that connection. In the pool of Grand Chamber cases, the Court only once brought a dynamic position, supported by a common ground (based *inter alia* on non-binding instruments), under the umbrella of Article 31 paragraph 3 (c) VCLT.²⁹⁹ On the one hand, this reflects a misuse of the provision: Article 31 paragraph 3 (c) VCLT does not address external referencing with a purpose of keeping up with present day conditions, but it focuses on the purpose of harmonious ‘systemic integration’. On the other hand, our approach does not prevent that references under Article 31 paragraph 3 (c) VCLT indirectly lead to ‘evolution’ of the Convention and its Protocols.³⁰⁰

²⁹⁵ Forowicz observes that the ECHR is not well-adapted to integrate various international instruments to combat fragmentation since the specific character of the ECHR, which is increasingly constitutional, would in a long run accelerate fragmentation and limit the Court’s ability to contribute to a unified and coherent international legal system. According to her, the *lex specialis* character of the ECHR would weaken and inhibit references to international law that serves other aims and purposes. M. Forowicz, *op. cit.*, pp. 388 *et seq.*

²⁹⁶ On this positive presumption (that exists next to a negative presumption that parties, when entering a treaty, do not intent to contravene general international law) inherent to Article 31 paragraph 3 (c) VCLT, see M. Forowicz, *op. cit.*, p. 44.

²⁹⁷ For a similar philosophy, see F. Vanneste, *op. cit.*, 2011, pp. 836-838. Vanneste, examining into depth the reception of general international law by the Court, concludes that the Court does usually not give this external domain a conflicting meaning that would amount to ‘human rightism’.

²⁹⁸ According to Forowicz, it is necessary that the Court relies on international law in a manner which is consistent with the interpretation of other bodies of the human rights branch. M. Forowicz, *op. cit.*, p. 400.

²⁹⁹ ECtHR (GC), *Marguš v. Croatia*, *op. cit.*, paras 131-141.

³⁰⁰ Also in legal doctrine, the link between systemic interpretation and evolutive interpretation had often been highlighted. See more generally: C. Pitea, *op. cit.*, 2013, p. 554, footnote 58. See also D. French, *op. cit.*, p. 300.

Indeed, the harmony and convergence the Court might create by giving effect to ‘systemic integration’, possibly leads to an implicit transformative dynamism.³⁰¹

649. This indirect evolutive effect is connected to an obligation of harmonization with external instruments applicable at the moment of interpretation. Article 31 paragraph 3 (c) of the VCLT includes a mandatory integration of external applicable standards *at the time of interpretation of the Convention* (and not at the time when the Convention was issued).³⁰² Although not all authors agree with the latter viewpoint³⁰³, it generally corresponds to the Court’s own approach.³⁰⁴ In our view, this position is pertinent *vis-à-vis* Article 31 paragraph 3 (c) VCLT: it reflects a principle of ‘systemic integration’ and a tool to combat fragmentation. Arguing otherwise – thus in a sense that harmonization would only be required with rules that were applicable at the moment the Convention was created – would prevent Article 31 paragraph 3 (c) VCLT to effectively pursue its harmonizing role in practice.

§ 3.3. The *Singh*-cases to illustrate the proposal of mandatory harmonization under Articles 53 of the ECHR and 31 paragraph 3 (c) of the VCLT

650. We illustrate the theoretical framework, developed under Articles 53 of the Convention and 31 paragraph 3 (c) of the VCLT, with a ‘trio’ of *Singh*-cases.³⁰⁵ These cases

³⁰¹ Such possible effect of dynamism when using Article 31 paragraph 3 (c) VCLT exactly explains some authors’ worries when Article 31 paragraph 3 (c) VCLT becomes mobilized in respect of soft law instruments. Arato for instance stressed that Article 31 paragraph 3 (c) VCLT allows for, on the one hand, ‘systemic integration’ and, on the other hand, also enables ‘evolutive interpretation’ (J. Arato, *op. cit.*, p. 354 with reference to the ILC Koskenniemi Report, *op. cit.*, para. 430). He also said that “A dynamic interpretation grounded on VCLT 31 (3) (c) should derive the treaty or treaty provision’s new meaning from the external sources considered”, which he calls “...dynamism in the service of integration” (J. Arato, *op. cit.*, p. 355). Arato does not blindly agree with such dynamism which the Court, to his view, reads in Article 31 paragraph 3 (c) of the VCLT in the case of *Demir and Baykara v. Turkey*. The author is concerned that the latter technique could, *inter alia* by taking account of developments in soft law instruments, imply a ‘auto-transformative effect’ which opens the door for Courts to ‘dramatically expand’ their competence by using the provision “...as a driver of constitutional transformation” (J. Arato, *op. cit.*, p. 356).

³⁰² This concerns the issue of the ‘critical date’ at which the normative environment has to be considered. See C. Pitea, *op. cit.*, 2013, p. 554.

³⁰³ Van Drooghenbroeck, Krenc and Van der Noot point at the controversy in legal doctrine regarding the temporal aspect of the imported provisions under Article 31 paragraph 3 (c) VCLT. They distinguish between a ‘contemporaneist understanding’ (the rules should have been in force at the moment the Convention was concluded) and ‘evolutionist understanding’ (the rules should be in force when the treaty is applied to the case). See S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 7.

³⁰⁴ For an argument in favor of considering the critical date as being the date of interpretation, see ILC Koskenniemi Report, *op. cit.*, as summarized by T. Treves, *op. cit.*, p. 230.

³⁰⁵ There are two ‘trios’ of *Singh*-cases. We will discuss in detail the trio of *Singh*-cases concerning the wearing of conspicuous symbols of religious faith in schools. This discussion has also relevance for another set of *Singh*-cases, which concerns the French obligation to appear bareheaded on official identity photographs. The latter set includes the Strasbourg decision of *Shingara Mann Singh v. France*, which brought under discussion a French regulation that obliged individuals to appear bareheaded on identity photographs used for official documents. According to the French *Conseil d’Etat*, this regulation was not in violation with Articles 9 of the ECHR on freedom of religion and Article 14 of the ECHR prohibiting discrimination (French *Conseil d’Etat* (CE Fr.), no. 289946, 15 December 2006, published in *Recueil Lebon*). Mann Singh, who was confronted with this regulation obliging him to remove his turban for the photographs, lodged an application before the ECtHR. The Court held

relate to a French prohibition to wear conspicuous symbols of religious faith in schools, which resulted in a French secondary school expelling three Sikh boys because of their refusal to remove their 'keski', a mini under-turban covering the hair.³⁰⁶ The French *Conseil d'Etat* in 2007 did not consider the school's decision as reflecting a violation of Articles 9 and 14 of the ECHR on, respectively, the right to freedom of religion and the prohibition against discrimination.³⁰⁷ Two boys (*Jasvir Singh and Ranjit Singh*) brought their case to the ECtHR. The other boy (*Bikramjit Singh*) brought his case to the HRC.

§ 3.3.1. Diverging *Singh*-cases in a Strasbourg and Geneva context

651. The outcome of the latter complaints reveals divergences in decisions on comparable human rights issues between the ECtHR and the HRC.³⁰⁸

that France reasonably justified the interference with mister Singh's freedom of religion and that his application was therefore inadmissible. The Court embedded the regulation within Article 9 paragraph 2 of the ECHR whereby interference with the right to religion was justified because necessary to ensure public safety. See ECtHR, decision of *Shingara Mann Singh v. France*, 13 November 2008, Appl No. 24479/07 (own translation – only available in French; see also: ECtHR). The Strasbourg Court offered a wide margin of appreciation to the national authorities. Accordingly, the Court *allowed* (but not *compelled*) a general and abstract ban on covering the head on identity photographs attached to official documents (F. Tulkens and S. Van Droogenbroeck, "The domestic courts' response to divergent views among international human rights bodies: thoughts prompted by the *Singh v. France* cases", in A. Alen, V. Joosten, R. Leysen and W. Verrijdt (eds), *Liberæ Cogitationes. Liber Amicorum Mark Bossuyt*, Intersentia, Antwerpen, 2013, pp. 741 *et seq.*) This trio of *Singh*-cases also includes the case of Ranjit Singh, who found himself in a similar situation as Shingara Mann Singh but Ranjit Singh did not complain before the ECtHR but before the HRC. The latter pronounced itself on 27 September 2011, three years after the ECtHR decided on the case of *Mann Singh*. The HRC concluded with a 'finding' that Article 18 of the ICCPR on freedom of religion was violated. It argued that it was not clear how covering the top of the head and a portion of the forehead would make identification more difficult and how such covering would reduce the risk of fraud or falsification of residence permits (CCPR, Communication no. 1876/2009, *Ranjit Singh v. France*, Views of 22 July 2011, CCPR/C/102/1876/2009, para. 8.4.). The Human Rights Committee, although it acknowledged that there might be circumstances allowing a restriction on the right to wear religious symbols (for public safety reasons for example), made an evaluation of the 'necessity' of the restriction *in concreto*, taking into account the substantiated needs. Accordingly, the Committee considered non acceptable an absolute and general prohibition to cover the head on identity photographs for residence permits (F. Tulkens and S. Van Droogenbroeck, *op. cit.*, pp. 741 *et seq.*). The HRC, on 26 September 2013 also issued a decision in the case of *Shingara Mann Singh v. France*, which reflects the third case of the 'trio' (CCPR, Communication no. 1928/2010, *Shingara Mann Singh v. France*, Views of 19 July 2013, CCPR/C/108/D/1928/2010). The latter case confirmed the divide between the position of the ECtHR and the HRC. The examples of the *Singh*-cases were inspired by: F. Tulkens and S. Van Droogenbroeck, *op. cit.*, pp. 735-754; E. Brems, *op. cit.*, 2014, p. 462; E. Bribosia, G. Caceres, and I. Rorive, "Les signes religieux au coeur d'un bras de fer entre Genève et Paris: la saga Singh", *RTDH* 2014, no. 98, pp. 495-514; E. Brems, E. Bribosia, I. Rorive and S. Van Droogenbroeck, "Le port des signes religieux dans l'espace public: vérité à Strasbourg, erreur à Genève?", *J.T.* 2012, pp. 602-603.

³⁰⁶ Article L. 141-5-1 of the Code of Education, as resulting from Act 2004-228 of 15 March 2004, *Journal Officiel*, Nr. 65, 17 March 2004, p. 5190. This is the 2004 Act prohibiting the wearing of symbols or clothing by which pupils manifest their religious affiliation in a conspicuous manner in public schools, which says that "In public schools, the wearing of symbols or dress by which the students ostensibly manifest religious membership is prohibited. The school rules must reconfirm that disciplinary procedures are preceded by dialogue with the student" (translation from E. Brems, *op. cit.*, 2014, p. 462). The latter legislation was the cause of all following *Singh*-cases that were arranged by UNITED SIKHS (an international NGO) as part of their strategic litigation. More elaborate: E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, pp. 496-497.

³⁰⁷ CE Fr., no. 285395, judgment of 5 December 2007 (*Jasvir Singh*); CE Fr., no. 285396, judgment of 5 December 2007 (*Bikramjit Singh*).

³⁰⁸ The HRC is one of the six UN Treaty Bodies (the others are the ones observing the implementation of the CERD, CAT, CEDAW, CRPD, and CED) that can, under certain conditions, receive petitions from individuals who claim to have been a victim of a human rights violation by a State Party. For more information, see <http://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx> (visited on 31 December 2015).

652. The Strasbourg Court in the two decisions of *Jasvir Singh v. France* and *Ranjit Singh v. France* of 30 June 2009³⁰⁹ considered the complaints inadmissible because manifestly ill-founded. The Court accepted that there was an interference with the freedom of religion but said that it could be justified by a legitimate aim: the protection of the rights and freedoms of others and preventing disorder. In this context, the Court stressed the protection of the constitutional principle of secularism and noted that "...this aim is in keeping with the values underlying the Convention".³¹⁰ In addition, it highlighted the importance of the role of national decision-making bodies regarding "...questions concerning the relationship between State and religions" and regarding the regulation of "...the wearing of religious symbols in educational institutions".³¹¹ Also the determination of what is conceived as a 'conspicuous' religious symbol compared to a 'discreet' religious symbol fell under the State's margin of appreciation.³¹²

653. Contrary to the ECtHR's decision, the HRC held in its Views of 1 November 2012 (on the case of *Bikramjit Singh v. France*³¹³) that there was a violation of Article 18 ICCPR on the right to freedom of religion.³¹⁴ While the HRC did not call into question the aim of secularism itself (as put forward by the French State)³¹⁵, it nonetheless, when examining the case *in concreto*, argued that "...the State party has not furnished compelling evidence that, by wearing his *keski*, the author would have posed a threat to the rights and freedoms of other pupils or to order at the school".³¹⁶ The measure of expulsion – which has serious effects on the education to which the applicant was entitled – therefore was 'disproportionate'.³¹⁷ The HRC also took account of, *inter alia*, the necessity of the measure, the absence of a consideration of the pupil's 'interests and circumstances', and the absence of a 'concrete risk' posed by the applicant's conduct.³¹⁸ The View of the HRC accorded with an earlier report on the French situation which it issued in 2008 and which stated that the respect for a culture of

³⁰⁹ ECtHR, decision of *Jasvir Singh v. France*, 30 June 2009, Appl. no. 25463/08 and ECtHR, decision of *Ranjit Singh v. France*, 30 June 2009, Appl. No. 27561/08. There are other cases in which the Strasbourg Court took a similar view on headscarf bans in schools (finding no violation of the ECHR), see ECtHR (GC), *Leyla Sahin v. Turkey*, 10 November 2005, Appl. No. 44774/98; ECtHR, *Dogru v. France and Kervanci v. France*, 4 December 2008, Appl. Nos. 31645/04 and 27058/05 (about two students who were not allowed to wear the veil during sports classes at school); and several inadmissible cases of 30 June 2009 (all about students prohibited to wear the *keski* or the veil based on the 2004 French Act): ECtHR, decision of *Aktas v. France*, 30 June 2009, Appl. No. 43563/08; decision of *Ghazal v. France*, 30 June 2009, Appl. No. 29134/08; decision of *Bayrak v. France*, 30 June 2009, Appl. No. 14308/08; decision of *Gamaleddyn v. France*, 30 June 2009, Appl. No. 18527/08. Examples taken from E. Brems, *op. cit.*, p. 463 and E. Bribosia, G. Cáceres, I. Rorive, *op. cit.*, p. 498.

³¹⁰ ECtHR, decision of *Jasvir Singh v. France*, 30 June 2009, Appl. No. 25463/08, para. 1 and ECtHR, decision of *Ranjit Singh v. France*, 30 June 2009, Appl. No. 27561/08, para. 1 (decisions only available in French; own translation).

³¹¹ *Ibidem*.

³¹² *Ibidem*.

³¹³ CCPR, Communication no. 1852/2008, *Bikramjit Singh v. France*, Views of 1 November 2012, CCPR/C/106/D/1852/2008.

³¹⁴ *Ibidem*, para. 8.3. As Tulkens and Van Drooghenbroeck remark, the HRC was aware of the opposite position that the ECtHR had taken earlier. The case of *Jasvir Singh* was expressly referred to in the proceedings before the HRC, in paragraph 6.5. of the Views. F. Tulkens and S. Van Drooghenbroeck, *op. cit.*, p. 741.

³¹⁵ CCPR, Views in *Bikramjit Singh v. France*, *op. cit.*, para. 8.6.

³¹⁶ *Ibidem*, para. 8.7.

³¹⁷ *Ibidem*.

³¹⁸ *Ibidem*.

'laïcité' does not require to forbid in public schools religious symbols such as the turban, the kippah or the head scarf.³¹⁹

654. The divergence between the point of view of the Strasbourg Court and the HRC creates confusion and a lack of legal certainty in the global normative human rights environment. On the one hand, the rights holders, such as the members of the Sikh-community, could strategically profit from this diversity by invoking the outcome that is the most beneficial to their point of view (*in casu*, the one of the HRC). On the other hand, the diversity might also have detrimental effects for these human rights holders on the national level because a State might uphold the international viewpoint that offers the less protection to the individual (*in casu*, the Strasbourg viewpoint). This is exactly what happened in the context of the *Singh*-cases. The French Government, to explain its inertia in the aftermath of the *Singh*-case, responded to the HRC that "...the prohibition on conspicuous religious symbols in State schools has been held to be compatible with the European human rights protection system by the European Court of Human Rights".³²⁰ With exception of some political voices starting to question the French Acts³²¹, the French authorities decided to give effect rather to the Strasbourg's decision than to the views of the HRC.³²² In our view, the national authorities (mis-)used the protection level that resulted from the Strasbourg more abstract reasoning to bypass the higher standards that were put in place by Geneva in its more concrete reasoning. Also other European States decided to disregard the unanimous disapproval of headscarf bans by multiple UN human rights bodies as a consequence of the consistent tolerance of such bans by the Strasbourg Court.³²³

655. Imagine that a new comparable *Singh*-case would be brought to the Strasbourg Court today. In our view, in line with our suggestions on the interpretation of Article 53 of the Convention and Article 31 paragraph 3 (c) of the VCLT, the Court should put an end to the confusing situation of diverging standards. Both provisions – in the manner we interpret them – mandate a formal dialogue between the Court and the HRC. This would increase normative harmonization and progressive human rights protection and would prevent national authorities to hide behind lower protection standards.³²⁴

³¹⁹ CCPR, Final Observations on the fourth periodic report of France (31 July 2008), CCPR/C/FRA/CO/4, para. 23. See also: E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 500.

³²⁰ Quoted by F. Tulkens and S. Van Droogenbroeck, *op. cit.*, p. 746, and by E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 506.

³²¹ Some politicians took initiative in 2013, following the decision of the HRC, to issue a report proposing to, in line with the ICCPR, annul the national provisions regarding the wearing of the veil in schools. This proposal was however not constructively received by the French government. See, more elaborate: E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, pp. 512-513.

³²² Tulkens and Van Droogenbroeck argue in a similar sense by stating that: "Faced with cacophony among the masters, the disciple has thus opted to follow Strasbourg rather than Geneva". F. Tulkens and S. Van Droogenbroeck, *op. cit.*, p. 744.

³²³ E. Brems, *op. cit.*, 2014, p. 463.

³²⁴ Cfr. E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, pp. 512-513.

§ 3.3.2. The impact of Article 53 ECHR for a hypothetical new Strasbourg *Singh*-case

656. The different outcomes of the *Singh*-cases in both human rights supervising mechanisms are no conflicting ‘opposites’; rather, they reflect other degrees of protection caused by another method of supervision. The Strasbourg Court offers the lowest protection standard by exercising a more abstract review of the circumstances (affording the State a margin of appreciation to set the limits to freedom of religion), whereas the HRC establishes a higher protection standard by developing a more concrete supervision (without leaving a large discretion to the national authorities).³²⁵ To say it in the words of Tulkens and Van Drooghenbroeck, there is no ‘manifest discrepancy’ between the approach of the HRC and the approach of the ECtHR.³²⁶ Also Brems holds that “...this is not a real case of contradictory rulings”.³²⁷ The HRC did not say that a consideration *in concreto* could never justify the necessity to restrict the freedom of religion. A general ban, however, is problematic in its view. The ECtHR, on the other hand, *allows* a general and abstract restriction on the freedom of religion because of the State’s margin of appreciation, but it does not *require* such restrictions (it does not *impose* a ban on wearing religious symbols).³²⁸ Only the latter situation would lead to a real conflict between the approach of Geneva and Strasbourg.³²⁹
657. The viewpoint of Strasbourg differs from the viewpoint of the HRC in a sense of offering different protection standards under a similar human right. In order to prevent conflict between both, and in order to safeguard human rights protection, Article 53 ECHR aims at a peaceful coexistence through a process of harmonization. We distinguish between a procedural and a substantive aspect of this interpretative rule.
658. *Firstly*, the procedural aspect of Article 53 ECHR prevents that national authorities rely on compliance with the ECHR to limit or derogate “... from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party

³²⁵ E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 508; E. Brems, E. Bribosia, I. Rorive and S. Van Drooghenbroeck, *op. cit.*, p. 602. Tulkens and Van Drooghenbroeck in this context meaningfully say that it “... would be wrong to attribute the divergent views to which the “Singh cases” gave rise to a fundamental opposition between the values deemed to be relevant on either side. The Human Rights Committee does not in any way deny the importance of public safety, or the role that “French-style secularism” is capable of playing in building a harmonious multi-faith society. If there is any divergence, it is solely at the more pragmatic level of the intensity of the international body’s review of how the national authority attempted to articulate the values at stake and justified the choices it made in the matter” (F. Tulkens and S. Van Drooghenbroeck, *op. cit.*, p. 744). They further stressed that “Where the Strasbourg Court accepts that weighing up the competing interests *in abstracto* may lead to a general ban on wearing a religious symbol (*Jasvir Singh*), the Geneva Committee on the contrary requires a finer calibration, avoiding collateral damage: no general ban is needed if occasional, targeted intervention, justified by practical circumstances and not by mere hypothetical risks, can suffice” (*ibidem*).

³²⁶ *Ibidem*, p. 745.

³²⁷ E. Brems, *op. cit.*, 2014, p. 463.

³²⁸ F. Tulkens and S. Van Drooghenbroeck, *op. cit.*, pp. 747-748; E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 507.

³²⁹ E. Brems, *op. cit.*, 2014, p. 463.

or under any other agreement to which it is a party". Our reading of Article 53 ECHR would have two concrete implications in a context of a new *Singh*-case before the Strasbourg Court.

Firstly, it would mandate the Court not to accept any argument that would refer to earlier Strasbourg case law in order to justify the (still existing) national law prohibiting the wearing of conspicuous symbols of religious faith in schools. In our view, Article 53 ECHR prohibits the French authorities to excuse a violation of the ICCPR by invoking the ECHR.

Secondly, the procedural aspect of Article 53 ECHR allows external obligations to be treated as 'observable facts'. Therefore, the parties, who bring the facts of the case, are recommended to inform the Court about the applicable obligations under the ICCPR. This could stimulate the Court to 'factually' note the ICCPR, which, as interpreted by the HRC, does not allow a general ban on wearing religious symbols in schools. Subsequently, in our approach, the Court is advised to take account of the lack of national implementation of the ICCPR (which is the case in France) and to mobilize Article 53 ECHR directly under the legal considerations.

Subsequently, the Court – in order to safeguard the external applicable norms – is recommended to sanction France directly under Article 53 ECHR (because it did not change its national law and refused to avoid a conflict between human rights norms).³³⁰ This reading of Article 53 of the ECHR does not oblige France to sacrifice its loyalty to Strasbourg, which only offers minimum standards. After all, the Convention's standards and those of the ICCPR are not in opposition but reflect different degrees of protection.³³¹ It would only mandate the national authorities to safeguard and to give precedence to the higher internally applicable human rights standard, preventing a conflict. To sanction France directly on the basis of Article 53 ECHR, would prevent a 'race-to-the-bottom' in human rights protection. It would inhibit the authorities to use the margin they receive from Strasbourg as a prerequisite to disregard other human rights obligations (*in casu*, the ones under the

³³⁰ Although these authors do not explicitly argue for a direct application by the Court of Article 53 of the Convention, Tulkens and Van Drooghenbroeck also argue that Article 53 of the ECHR does not only "...allow States to prefer the Geneva Committee's interpretation where this affords greater protection of the rights in issue than its own guardian body does, but it even goes so far as to *require* them to do so". F. Tulkens and S. Van Drooghenbroeck, *op. cit.*, p. 748. Also Brems –also not explicitly arguing for the Strasbourg directly applying Article 53 of the Convention – stresses that national authorities should have an integrated perspective on human rights law, which requires States from taking into account the more protective position of the UN bodies (compared to the Strasbourg Court). Only then, Brems argued, it will be avoided "...that lower standards get priority over higher standards in the practice of human rights implementation" (E. Brems, *op. cit.*, p. 463). Particularly in respect of the *Singh*-cases, the latter author stressed that "... the French Act banning religious symbols and clothing, it seems that article 53 ECHR provides an additional reason why the French government – as well as the governments of other member states – and French courts, in the face of a contradiction between UN bodies rejecting the law and the European Court tolerating it, should conclude that the law violates human rights" (E. Brems, *op. cit.*, p. 465).

³³¹ As Tulkens and Van Drooghenbroeck equally stress, this situation does not require "...the domestic court to sacrifice loyalty to one international body in favor of the other". F. Tulkens and S. Van Drooghenbroeck, *op. cit.*, p. 747. When we think of the hypothetical and extreme situation in which the ECtHR in an earlier decision had *obliged* the state (a positive obligation) to introduce a ban in order to protect the right to liberty and security (article 5 ECHR). Then, the viewpoint of the ECtHR (obliging for a ban) would be the opposite of the one of the HRC (not allowing a ban). Then, there would be a real conflict in which Article 53 ECHR does not offer guidance. It is about 'preventing' a conflict, not about 'solving' a conflict. Article 53 ECHR would also not be of help when weighing Article 5 ECHR against Article 9 ECHR (on freedom of religion). This reflects a *conflict* between *different* human rights and then, as we stressed, Article 53 ECHR no longer offers a guiding principle as it concerns different levels of protection under a *similar* human right.

ICCPR).³³² In our approach to Article 53 ECHR, we recommend to ‘safeguard’ external applicable standards only when it is clear, at first sight, that they offer higher standards than those of Strasbourg. This condition of a ‘manifest clarity’ seems *in casu* fulfilled.

659. *Secondly*, Article 53 ECHR has a substantive aspect, which demands the Court to align with external higher protection standards in case they are binding on all parties to the CoE. Since all Member States are a party to the ICCPR this would mean, in respect of a hypothetical new Strasbourg *Singh*-case, that the Court should substantively adapt its position to the ICCPR as interpreted by the HRC. This would lead to a material integration of the position of the HRC *Singh*-case in the case law of Strasbourg and thus to the Court’s refusal to allow an abstract ban on wearing religious symbols. Instead, it should prefer examining the concrete circumstances of a ban. All Member States ratified the ICCPR which, interpreted by the HRC, requires such concrete adjudication.

§ 3.3.3. The impact of Article 31 paragraph 3 (c) VCLT for a hypothetical new Strasbourg *Singh*-case

660. Article 31 paragraph 3 (c) VCLT, which aims to systemically integrate human rights mechanisms with the aim of combating fragmentation, has in practice no additional effect to the substantive aspect of Article 53 ECHR. In a hypothetical new *Singh*-case, it could – next to Article 53 ECHR – justify a convergence between the Court’s view and the view of the HRC. Because of the mandatory aspect of Article 31 paragraph 3 (c) VCLT, the Court would even be obliged to do so. The ICCPR is a binding instrument in all CoE Member States and therefore, in a Strasbourg context, reflects what is the ‘applicable law’. This applicable law is supposed to peacefully coexist with the Convention, without any threat of conflict or fragmentation. This requires, in theory, a harmonious reading and a position of priority of the highest protection standard. Such approach creates convergence between human rights catalogues to the benefit of legal certainty and to the benefit of preventing national authorities to mobilize divergences to uphold lower protection standards.

§ 3.3.4. What about the *quasi*-judicial character of the HRC?

661. Could the latter reasoning be challenged because the HRC is a *quasi*-judicial body, which views are strictly speaking of a non-binding character?³³³ The ECtHR issues binding judicial decisions covered by a force of *res judicata* (*‘autorité de la chose jugée’*) while the HRC, as a UN Treaty Body, only has a *quasi*-judicial decision-making process. Since we have

³³² Cf. E. Brems, *op. cit.*, pp. 462-463.

³³³ Regarding this question within the Belgian domestic setting, see F. Tulkens and S. Van Droogenbroeck, *op. cit.*, pp. 750-751.

argued that Article 53 ECHR and Article 31 paragraph 3 (c) VCLT only apply to co-existing *applicable* norms, does the latter observation alter the State's obligations under these provisions?

662. Decisions of the Treaty Bodies are generally perceived as *quasi-judicial* and there is no provision describing their precise legal effect, let alone their binding character.³³⁴ Some States already expressed their refusal to implement decisions of the Treaty Bodies, using the argument that they are not legally binding.³³⁵ Therefore, the Treaty Bodies have "...little leverage to ensure that states comply with recommendations".³³⁶ This "...absence of binding and thus legally enforceable decisions" was considered as the "...major lacuna of UN individual complaints procedures ...".³³⁷ There is still an ongoing debate about the precise legal status of the Treaty Body's decisions and proposals to make its decisions formally binding had so far been without success.³³⁸

663. The lack of a strictly binding character of the views does however not mean that they do not have any legal force. In General Comment no. 33, the HRC stresses that, although "...the views issued by the Committee in considering individual communications is not, as such, that of a judicial body", they "...exhibit some important characteristics of a judicial decision".³³⁹ It adds that "...a duty to cooperate with the Committee arises from an

³³⁴ H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, Oxford University Press, Oxford, 2008, p. 892; Open Society Justice Initiative, *From Judgment to Justice. Implementing International and Regional Human Rights Decisions*, 2010, p. 117, available at http://www.soros.org/initiatives/justice/articles_publications/publications/from-judgment-to-justice20101122 (accessed on 16 April 2015); M. Scheinin, "Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights", in F. Francioni (ed.), *Access to Justice as a Human Right*, Oxford University Press, Oxford, 2007, p. 136. In this context, Steiner notes that the non-binding character of the decisions has been part of the entire political compromise and that the lack of strength of the views is reflected in the terminology, because: "Its principal terms - 'communications' rather than complaints, 'Views' rather than decisions or opinions - express a cautious strategy in defining the Committee's functions and powers by distancing the Protocol from the more direct and forceful language (...) used to describe adjudication." H. J. 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*, Cambridge University Press, Cambridge, 2000, p. 23.

³³⁵ See, for example, State party's response under the follow-up procedure of the CAT, Communication No. 296/2004, *Singh Sogi v. Canada*, Views of 16 November 2007. See for another example: Report of the Committee against Torture to the UN General Assembly, UN Doc. A/66/44, 2011, pp. 164-165, which stressed that "... the State party regretted that it was not in a position to implement the Committee's Views. It did not consider either a request for interim measures of protection or the Committee's Views themselves to be legally binding and is of the view that it has fulfilled all of its international obligations".

³³⁶ M. G. Schmidt, "Follow-Up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond", in A. F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, Kluwer Law, Cambridge, 2000, p. 233.

³³⁷ M. G. Schmidt, *op. cit.*, p. 233. See also G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2007, p. 38.

³³⁸ At the Vienna World Conference on Human Rights in 1993, the proposal to insert a provision stressing that States parties undertake to comply with the Committee's views under the Optional Protocol, had been refused. G. Oberleitner, *Global Human Rights Institutions. Between Remedy and Ritual*, Polity, Cambridge, 2007, p. 99.

³³⁹ Human Rights Committee, General comment No. 33 on *Obligations of State Parties under the Optional Protocol*, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 11. Scheinin underlines the quasi-judicial character of the body but at the same time he, like also the Committee does, suggests the binding effect of the views. See R. Hanski and M. Scheinin, *Leading Cases of the Human Rights Committee*, Åbo Academy Institute for Human Rights, Turku (Finland), 2007, p. 22. For more information on the argument of the Treaty Bodies' decisions as legal obligations, see H. J. Steiner, P. Alston and R. Goodman, *op. cit.*, pp. 915-916. There are moreover examples of

application of the principle of good faith in the observance of all treaty obligations".³⁴⁰ Also the ICJ in its famous *Diallo*-case has confirmed the value of the Human Rights Committee's interpretations, which deserve strong consideration *inter alia* for reasons of coherence in international law and legal certainty.³⁴¹

664. While the decisions of the Treaty Bodies are not strictly binding under international law, they clearly exercise a moral authority. They reflect an 'authoritative interpretation' of the legal obligations under the treaties, similar to the Treaty Bodies' general comments and observations on the interpretation of the UN provisions.³⁴² This is particularly so when these decisions reflect a 'clear line of jurisprudence'.³⁴³ The national authorities of the Members of the CoE, of which a large majority is part of the complaint mechanism of the HRC³⁴⁴, should thus not hide behind the absence of *res judicata*-force of the views and interpretations of the HRC.³⁴⁵ Therefore, in our view, the Strasbourg Court should safeguard *prima facie* higher protections standards under the ICCPR in the manner in which they were interpreted by the *quasi*-judicial HRC, particularly when there is a clear line of jurisprudence.

665. The same cannot be said about the HRC issuing reports and opinions in the context of periodic reviews. Such reports do not express (*quasi*-)judicial opinions on individual communications and neither do they reflect 'authoritative interpretations' of a UN treaty.

cases in which States have implemented a remedy while making clear they did not consider themselves legally bound to do so, which points at the authoritative power of the Views. See, e.g., Human Rights Committee, Views of 20 July 2007, *Shams, Atvan, Shahrooei, Saadat, Ramezani, Boostani, Behrooz, Sefed v. Australia*, Communication Nos. 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004, UN Doc. CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004, 11 September 2007.

³⁴⁰ Human Rights Committee, General comment No. 33 on *Obligations of State Parties under the Optional Protocol*, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 15. A State's failure to implement its views becomes moreover a matter of public record through the publication of the Committee's decisions *inter alia* in its annual reports to the General Assembly, Human Rights Committee, General comment No. 33 on *Obligations of State Parties under the Optional Protocol*, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 17. This general comment, however, faced resistance by a number of State parties. See Open Society Justice Initiative, *op. cit.*, p. 126.

³⁴¹ ICJ, case of 30 November 2010, Case concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), para. 66, available at <http://www.icj-cij.org/doCKET/files/103/16244.pdf?PHPSESSID=458cdec7614468ff4846cc481515ca26> (visited on 6 July 2016).

³⁴² M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, NP Engel Publisher, Kehl, 2005, pp. 894-895. There is also little optimism that the views will ever be granted such force in the future. Open Society Justice Initiative, *op. cit.*, p. 126. Note that on the UN website, the Treaty Bodies were referred to as *quasi-judicial committees* in 2012. Now, however, they are called 'committees' whereby the notion 'quasi-judicial' is left behind. See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (visited on 26 December 2015). Recent initiatives enhance the strength of the Treaty Bodies' system, see Report of the United Nations Human Rights Office of the High Commissioner *Strengthening the United Nations human rights treaty body. A Report of the United Nations High Commissioner for Human Rights*, by N. Pillay, June 2012, available at <http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf> (accessed on 26 December 2015). For more on the Treaty Bodies issue 'general comments' or 'general recommendations' on the interpretation of the provisions of the UN human rights treaties, see <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> (accessed on 26 December 2015).

³⁴³ As stressed in Part II, when there is a clear line of jurisprudence and when all member States are a party of the constituent act of the judicial body, such jurisprudence could be considered as a 'hard' source of international law and accordingly, in our view, as 'applicable law' in the meaning of Article 31 paragraph 3 (c) VCLT.

³⁴⁴ The United Kingdom and Switzerland are the only CoE member which are no party to the first Optional Protocol to the ICCPR, see <http://indicators.ohchr.org/> (visited on 2 November 2016).

³⁴⁵ In a same sense: E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 507.

Therefore, such reports are of a larger degree of externality³⁴⁶, not necessarily 'attached' to the context and interpretation of the ICCPR as a binding instrument. In the light of these recommendations, we argue that the ECtHR in the *Singh*-cases of 30 June 2009 was not legally *obliged* to follow recommendations and comments of the HRC under the periodic review proceedings regarding France in 2008 (in which the HRC already expressed concern on the situation for religious students under the 2004 French Act). The existence of such reports may nonetheless *encourage* the Court to adopt another position (for example, as one of the elements to stimulate 'evolutive' interpretation or to stimulate the establishment of a narrow 'margin', ...).³⁴⁷

666. Notwithstanding the *quasi*-judicial character of the Treaty Bodies, we conclude that the obligations under the UN Treaties, as viewed and interpreted (under the General Comments) by the UN Treaty Bodies, should not be set aside because of lower Strasbourg protection standards. When a country ratifies a treaty such as the ICCPR, there is a legal obligation to implement the rights recognized in that treaty.³⁴⁸ Article 53 of the ECHR, for instance, literally refers to any 'agreement' to which a State is a party. The ICCPR can certainly be considered as such 'agreement'. Also Article 31 paragraph 3 (c) VCLT refers to rules applicable between the parties. A ratifying State, because of the importance of executing treaties in good faith, should cooperate with the HRC by listening to clear lines of authoritative interpretations (reflected in Views and General Comments on this instrument). When a State stays close to the interpretation that the HRC gives to the ICCPR (instead of imposing their own views on what the ICCPR requires), it does justice to an integrated view on human rights, avoiding fragmentary interpretations of a similar right.

§ 3.3.5. Any signs in recent case law that the Court would alter its approach?

667. The Strasbourg Court has not yet have the occasion to rule on similar issues than the ones that were under discussion in the *Singh*-cases. Nonetheless, some cases have been issued during and after the '*Singh*-saga'³⁴⁹ that equally touched upon the wearing of religious clothing. It appears from several of these cases, including *Ahmet Arslan and Others v. Turkey*³⁵⁰, *Eweida and Others v. the United Kingdom*³⁵¹, *SAS v. France*³⁵² and *Ebrahimian v.*

³⁴⁶ On degrees of externality, see *supra* Part II, Conclusions to Chapter 2, and the footnotes there.

³⁴⁷ More on this legal incentives, see *infra* Part III, Chapter 1, § 4.

³⁴⁸ See <http://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx> (visited on 26 December 2015).

³⁴⁹ Notion taken from E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 495.

³⁵⁰ ECtHR, *Ahmet Arslan and Others v. Turkey*, 23 February 2010, Appl. No. 41135/98, in particular, paras. 48-51. See also E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 11.

³⁵¹ ECtHR, *Eweida and Others v. United Kingdom*, 15 January 2013, Appl. Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

³⁵² ECtHR (GC), *SAS v. France*, 1 July 2014, Appl. No. 43835/11.

France³⁵³, that the Court took some – but often still limited – steps in changing aspects of its approach, making it (modestly) more conform to the HRC’s method of control.³⁵⁴

668. On the one hand, the ECtHR in the cases of *Ahmet Arslan and Others v. Turkey* and *Eweida and Others v. the United Kingdom* issued a more serious contextualized proportionality control. Accordingly, its reasoning to arrive at a (non-)violation of the right to freedom of religion, has increasingly gained an *in concreto* character.³⁵⁵ This has led to more convergence between the argumentative approach of the Court and the HRC. Some modest signs of the this tendency could also be distilled from the cases of *Ebrahimian v. France* and *SAS v. France*. In the first case, the Court took account of some concrete aspects of the applicant’s situation.³⁵⁶ In the second case, the Court examined the concrete experiences and worries of women wearing the veil in the light of the contested general French ban on concealing the face in public spaces.³⁵⁷

669. On the other hand, the Court did not truly change its *Singh*-case law; it is still offering a (wide) ‘margin of appreciation’ to the States. It remains responsive to arguments of limiting the rights to freedom of religion for reasons of protecting the rights and liberties of others.³⁵⁸ Offering a ‘wide margin of appreciation’ combined with a ‘careful examination’ of the necessity of the contested measures, seems a *contradictio in terminis*.³⁵⁹ Except from the case of *Eweida*, which required ‘evidence of any real encroachment on the interests of others’³⁶⁰, the Court did mostly not ask for a clear and concrete proof for the substantiation of arguments allegedly justifying human rights restrictions, such as, for instance, evidence that concealing one’s face objectively prevents to ‘live together’ (which was put forward as a legitimate aim in *SAS v. France*³⁶¹) or whether the wearing of the headscarf by agents of a public hospital *in concreto* risks to infringe their impartiality towards the patients (which was used as an

³⁵³ ECtHR, *Ebrahimian v. France*, 26 November 2015, Appl. No. 64846/11.

³⁵⁴ More elaborate on the cases of *Eweida and Others*, see I. Leigh and A. Hambler, “Religious Symbols, Conscience, and the Rights of Others”, *Oxford Journal of Law and Religion* 2014, vol. 3, no. 1, pp. 2-24; E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 510; C. Mathieu, S. Gutwirth and P. De Hert, “La croix et les juges de la Cour européenne des droits de l’homme: les enseignements des affaires Lautsi, Eweida et Chaplin”, *E.J.H.R.-J.E.D.H.* 2013, no. 2, p. 264; O. De Schutter, “Human Rights in Employment Relationships: Contracts as Power”, *E.J.H.R.-J.E.D.H.* 2013, no. 1, p. 49.

³⁵⁵ For a similar remark, see E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 511. See also E. Brems, “Headscarf ban upheld for entire public sector”, blog post Strasbourg Observers, 27 November 2015, available at <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/> (visited on 15 August 2016).

³⁵⁶ See for instance ECtHR, *Ebrahimian v. France*, *op. cit.*, para. 69.

³⁵⁷ See ECtHR (GC), *SAS v. France*, *op. cit.*, paras. 148-149. See also S. Ouald Chaib, “S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil”, blog post on Strasbourg Observers, 3 July 2014, available at <https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/> (visited on 15 August 2016).

³⁵⁸ Bribosia, Caceres and Rorive made similar remarks in the context of the case of ECtHR, *Ahmet Arslan and Others v. Turkey*, *op. cit.*. See E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, p. 511.

³⁵⁹ See S. Ouald Chaib, *op. cit.*. In the case of *SAS v. France* for example, in which the Court announces a ‘careful examination’ as to whether the national measure (a general ban on concealing one’s face in public) could be justified in light of the aim of ‘living together’, it subsequently offered the State a wide margin of appreciation. Therefore, such a ‘careful examination’ barely took place.

³⁶⁰ ECtHR (GC), *Eweida and Others v. United Kingdom*, *op. cit.*, para. 95.

³⁶¹ ECtHR (GC), *SAS v. France*, *op. cit.*, para. 121.

argument against wearing the headscarf by personnel of public hospitals in *Ebrahimian v. France*³⁶²).³⁶³ A lack of such a concrete examination of the circumstances does not do justice to protecting (vulnerable) minorities against majority-measures.³⁶⁴

670. Recent Strasbourg case law about religious symbols offers modest signs that the Court – in a subsequent *Singh*-case – might change its approach by developing a more concrete supervision and a closer proportionality examination (by studying the practical impact of the measures). Especially the cases of *Chaplin* and *Eweida* are relevant in this respect; the Court, together with stepping into a strict proportionality approach, reduced the State's margin of appreciation in these cases. In addition, it forced the State to look for alternative solutions, and it casted doubt on invoking reasons such as 'health' and 'public security' to justify a restriction on wearing religious symbols.³⁶⁵ This seems to reflect some willingness of the Court to follow more closely the approach of the HRC, however, without explicitly referencing the decisions of the HRC.³⁶⁶ Other recent cases, such as *SAS v. France* and *Ebrahimian v. France*, also included a more concrete supervision, at least when compared to the Strasbourg *Singh*-cases.

671. Nonetheless, it is far from certain whether these developments will actually lead to convergence between the outcome of the Court's interpretation and the one of the HRC. This will depend on the extent to which the ECtHR holds tight to its margin of appreciation-doctrine and to the States' discretion to justify interferences for reasons of protecting rights of others, health, public security, or protection the aim of 'living together'. As long as the Court – as it still does today – remains largely responsive to such arguments and as long as it still offers States a considerable margin, convergence towards the outcomes of the HRC does not seem to happen any time soon. A potential process of convergence might be accelerated by the Court relying more heavily on external instruments such as the ICCPR (including the interpretation of that instrument by the HRC). As demonstrated by the case of *SAS v. France*, (third) parties have mobilized several instruments of the HRC (including its General Comment No. 28 and its Views in the case of *Raihon Hudoyberganova v. Uzbekistan*)³⁶⁷, *in casu*

³⁶² ECtHR, *Ebrahimian v. France*, *op. cit.*, para. 69.

³⁶³ See also E. Brems, *op. cit.*, blog post on 'Strasbourg Observers' of 27 November 2015.

³⁶⁴ See *ibidem*.

³⁶⁵ ECtHR, *Eweida and Others v. United Kingdom*, *op. cit.*, paras. 83 and 98.

³⁶⁶ See E. Bribosia, G. Caceres, I. Rorive, *op. cit.*, pp. 510-511.

³⁶⁷ The Human Rights Committee stated as follows in its General Comment No. 28 concerning Article 3 (equality of rights between men and women), adopted on 29 March 2000: "13. [Regulations on clothing to be worn by women in public] may involve a violation of a number of rights guaranteed by the Covenant,..." (UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10. In the case of *Raihon Hudoyberganova*, the HRC found, for example, that "...in the absence of any justification provided by the State party" there had been a violation of Article 18 § 2 of the Covenant where a student had been expelled from her University on account of her refusal to remove the *hijab* (headscarf) that she wore in accordance with her beliefs. See CCPR, communication no. 931/2000, *Raihon Hudoyberganova v. Uzbekistan*, Views of 8 December 2004, CCPR/C/82/D/931/2000. The latter instruments had been introduced by the applicant to the *SAS*-case (ECtHR (GC), *SAS v. France*, *op. cit.*, para. 78) as well as by several NGOs (*ibidem*, paras. 90 and 92).

to support their argument that a general ban on concealing a person's face in public violates the Convention. In the 'law'-section of *SAS*, the Court ignored these instruments (mentioned as 'facts' of the case).³⁶⁸ Here, the Court missed an opportunity to make use of external instruments and, by doing so, to strengthen its European supervision by having a closer look at the proportionality of the State's measures.³⁶⁹

672. In a potential new *Singh* case, we advise the Court to develop a more concrete supervision, instead of relying on a large margin of national discretion. The Court could make use of Articles 53 ECHR and 31 paragraph 3 (c) VCLT as a legal support. However, in none of the cases about the wearing of religious symbols the Court has mobilized these provisions. We recommend the Court to use more intensively the principles of 'safeguarding of human rights' and 'systemically integrating human rights' as legal mandates to substantively integrate the higher and more concrete protection standards offered by the ICCPR (and the manner in which they are interpreted by the HRC). We keep our eyes open to how the Court will approach the matter in two upcoming cases brought to the Strasbourg Court as a result of a Belgian (criminal) ban on covering the face in public (the cases of *Belkacemi and Oussar v. Belgium*³⁷⁰ and the case of *Dakir v. Belgium*³⁷¹).³⁷²

§ 3.4. Concluding observations

673. There is no clear and comprehensive legal provision in the Convention that addresses the referencing practice of the Strasbourg Court. General law on treaty interpretation, codified by the VCLT, does not offer straightforward guidance either. Nonetheless, in both the Convention and the VCLT, there is a provision which, in our view, obliges the Court to, under certain conditions, refer to and harmonize with external applicable law as 'binding authorities'.

674. The first provision is Article 53 of the Convention, which offers a safeguard for existing levels of external human rights protection. We have argued that this provision covers both a procedural and a substantive aspect. The procedural aspect allows a direct application of Article 53 ECHR: when a respondent State does not live up to external human rights obligations, which offer similar and higher protection standards than the Convention, it could be directly sanctioned on that basis. The substantive aspect of Article 53 ECHR

³⁶⁸ *Ibidem*, paras. 38-39.

³⁶⁹ This case has been considered as an example of a dismissive use, see *supra*, para. 219.

³⁷⁰ Application no. 37798/13.

³⁷¹ Application no. 4619/12.

³⁷² For more information on these cases, see E. Brems, "Face veils in Strasbourg (bis): the Belgian cases", blog post Strasbourg Observers, 28 December 2015, available at <https://strasbourgobservers.com/2015/12/28/face-veils-in-strasbourg-bis-the-belgian-cases/> (visited on 15 August 2016).

allows a material integration of external higher protection standards. The substantive aspect comes at play when higher protection standards are applicable in all Member States. In our pool of cases, the Grand Chamber, on occasions, has considered a State's non-respect for its external obligations as an 'aggravating factor' when assessing the proportionality of interference.³⁷³ Article 53 ECHR urges the Court to go a step further and to directly sanction a State when it does not live up to its external obligations, or to substantively integrate these external protection standards, provided that they are applicable in all Member States.

675. The second provision is Article 31 paragraph 3 (c) VCLT, which builds on the idea of 'systemic integration' and which aims to combat 'fragmentation'. In relation to external higher human rights standards, this provision has an effect comparable to the substantive effect of Article 53 ECHR: it obliges the Court to substantively harmonize with such larger standards provided that they are applicable in all Member States. Article 31 paragraph 3 (c) VCLT goes even further; it also obliges the Court to look for inspiration in external more specific (but not necessarily 'higher') human rights that apply in all Member States. In addition, Article 31 paragraph 3 (c) VCLT mandates to integrate external law that falls outside the human rights domain. Thus, when external (general) international law is applicable in all Member States, the Court should take this legal body into account when interpreting and applying the Convention. To our view, contrary to what the Court suggested in *Hassan-case*³⁷⁴, the Court should do this *proprio motu*, not only because Article 31 paragraph 3 (c) VCLT requires this for the sake of 'systemic integration', but also because the external instruments covered by this provision may have a normative influence on the interpretation of the ECHR.

676. Both provisions, under certain conditions, cover an obligation of 'harmonization' with external applicable law. They operate as interpretative sources of binding authority *vis-à-vis* the Strasbourg judges. When external instruments contain higher human rights norms, 'harmonization' means giving precedence to these norms by substantively integrating them in the protection of the Convention. When external instruments contain more specific human rights norms, 'harmonization' means allowing these provisions to fill in gaps of the Convention. Finally, in relation to external instruments that contain rules outside the area of human rights law, 'harmonization' implies coordinating with these provisions but, when the latter is not feasible without infringing human rights, the Convention should receive precedence.

³⁷³ See *supra*, Part II, Chapter, § 7.4.

³⁷⁴ ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 107: "Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law *only where this is specifically pleaded by the respondent State*. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect" (own emphasis).

677. So understood, the proposed legal framework sometimes compels the Court to open up to the external normative environment. It avoids interpreting and applying the Convention in a legal vacuum and mandates a dialogue between the ECtHR and other legal mechanisms. More coherence in the today ‘fragmented’ legal world and more legal certainty may be expected from such a method. At the same time, in line with a principle of non-regression, human rights protection should not be sacrificed for the sake of more unity. When external provisions endanger current Strasbourg levels of human rights protection or infringe upon human rights in a disproportionate manner, their influence should be mitigated.

678. Moreover, the activation of the mandatory legal framework only takes place in relation to external ‘hard’ legal sources, applicable in all Member States. When a certain level of ‘hard’ human rights protection applies in all Member States, the Court should avoid offering a protection that goes below such a common ground. This framework ensures that States are held responsible under all their binding commitments, also when they are initiated under external legal frameworks. Hence, the risk of States hiding behind the Convention to escape external (human rights) obligations will be reduced to a minimum. This empowers the Court and allows it to consider some external instruments that normally have no clear supervising mechanism (such as the Hague Convention on Child Abduction).

679. The approach, as we developed it, is innovative. The Grand Chamber does not use Article 53 ECHR in this manner. Also, Article 31 paragraph 3 (c) VCLT usually receives a more narrow application, *i.e.* to stress a need for an harmonious interpretation when a State justifies its contested behavior by external obligations. Texts of legal doctrine that criticize the Court’s use of Article 31 paragraph 3 (c) VCLT in relation to a (dynamic) referencing practice based on non-binding instruments, thus somewhat miss their goal. In general, the Grand Chamber does not attach such a referencing practice to this provision.

680. We recommend the Court to, in relation to its referencing practice, make more systematically use of a clear legal framework. This would increase the quality, the clarity and the coherence of some aspects of external referencing. Beneficial effects on the legal validity will result from it. This is necessary, given the amount of criticism the Court has received with regard to its unclear and non-transparent method of integrating external materials. Although the mandatory legal framework might soften some deficiencies of the referencing practice, it might also create new problems.

681. Our suggestions, obliging the Court to integrate higher applicable protection standards (even when these standards follow from *quasi*-judicial bodies), are far-going and

politically controversial; they imply that Article 53 of the ECHR and/or Article 31 paragraph 3 (c) VCLT could justify some external references, possibly with an indirect ‘evolutive’ effect on the understanding of the Convention.³⁷⁵ Likely, both judges and States would not be pleased being ‘forced’ to move in a certain direction because external mechanisms did so. For instance, when the HRC decides to increase its standards under the ICCPR, and when the Court then has to adapt its protection accordingly, this might be perceived as too much loss of autonomy. Moreover, obliging the Strasbourg judges to move into a certain direction might run counter to a certain degree of flexibility which is often necessary for a qualitative legal reasoning.

682. The difficulties inherent to our proposal forced us to set some conditions. We do not interpret Article 53 ECHR and Article 31 paragraph 3 (c) VCLT in the largest possible manner. In respect of both provisions, for example, we argue that the obligation to take account of external instruments only applies when the instruments are binding in all Member States. Generally, we aim to opt for a reasonable solution, keeping a balance between a loss of autonomy and a benefit of safeguarding and systemically integrating human rights protection and other rules of international law. Furthermore, one should realize that the incorporation of external instruments (even if mandatory) can be beneficial for legal reasoning. The use of external instruments may have the benefit of filling gaps in the ECHR, combating confusing situations of ‘fragmentation’, offering inspiration for the interpretative process, serving the interests of human rights users, *etc.*³⁷⁶

§ 4. Legal incentives to give effect to external instruments

683. So far we have argued that some legal provisions mandate the Court to take external instruments into account as binding authorities. In addition, the justification of the referencing practice could benefit from the creation of a better legal framework *vis-à-vis* non-obligatory, ‘optional’ references. Sometimes, such external references are legally covered by the text of the Convention (§ 4.1.). On other occasions, the referencing practice is exercised in the light of some Strasbourg interpretation principles (§ 4.2.). When the Strasbourg interpretation principles are informed by a method of external referencing and when the overall interpretation process fits the rules of the VCLT, the legality of the references might be guaranteed (§ 4.3.)

³⁷⁵ This does not mean that both Articles 53 ECHR and 31 paragraph 3 (c) VCLT could be mobilized to justify the development of ‘new’ rights (based on the use of external instruments) in a direct manner: the provisions, respectively, aim at ‘safeguarding human rights’ and ‘systemic integration’ (of which ‘evolution’ might be an indirect result), they do not aim at ‘evolutive’ interpretation and these provisions alone could not legally justify references aiming to keep up with present-day conditions.

³⁷⁶ The latter arguments will be developed further when considering the validity of external referencing from a users’ perspective. See *infra*, Part III, Chapter 2.

§ 4.1. References stimulated by the text of the Convention

684. Sometimes, as demonstrated by our empirical analysis of cases, external instruments do not give a normative direction to the requirements of the Convention, but offer ‘facts’ that are connected to the circumstances of the case and that influence the application of the Convention.³⁷⁷ According to the idea that the parties bring the facts to the case (*da mihi factum, dabo tibi jus*)³⁷⁸, the parties should invoke such external instruments.

685. An example in this respect is the use of external instruments to uncover if the interference has a ‘legal basis’. Doing so, the Court gives effect to Convention provisions that require an assessment as to whether the contested national measures had been ‘prescribed by law’, or were ‘lawful’.³⁷⁹ For instance, external instruments have been imported to examine whether a certain (external) law prescribed a deprivation of liberty (under Article 5 of the Convention), or whether it prescribed an interference with the right to privacy and family life under Article 8 ECHR on the right to privacy.³⁸⁰

686. A ‘legal basis’ or a ‘legal root’ of State behavior, encountered in external instruments, could offer relevant information in respect of the question of ‘State responsibility’.³⁸¹ Once again, the imported external instruments are a rather natural part of establishing the circumstances of the case.³⁸² They serve as a factual input to decide whether a State had ‘responsibility’ over its actions and whether the Court is allowed to exercise its supervision. Article 1 of the Convention activates the States’ responsibility provided that the acts or omissions fall under the States’ jurisdiction. This provision thus legally covers an empirical mobilization of external instruments for that purpose. External instruments could help to factually find out whether certain actions, for instance when contributing to military operations abroad, are attributable to a State and thus, whether a State carries responsibility in this respect.³⁸³

687. References are also covered by the text of the Convention when the Court uses external instruments to find out whether a State’s interference with the Convention pursued a ‘legitimate aim’. The search for such aim is sometimes requested by the text of the Convention itself, as a condition to justify a State’s interference with the Convention. To uncover the aim of some national measures, the Court sometimes refers to external

³⁷⁷ See *supra*, Part II, Chapter 3, § 10.

³⁷⁸ Cf. F. Tulkens, S. Van Drooghenbroeck and F. Krenck, *op. cit.*, pp. 470 *et seq.*

³⁷⁹ See *supra*, Part II, Chapter 3, § 7.1.

³⁸⁰ *Ibidem.*

³⁸¹ This had been elaborately discussed under the previous Chapter of this work. See *supra*, Part II, Chapter 3, § 7.3.

³⁸² Cf. R.C.A. White and C. Ovey, *op. cit.*, pp. 338-339.

³⁸³ See for an example: ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 76 and 84.

instruments.³⁸⁴ For instance, the Court has looked for the aim of an interference in the external instruments that had inspired the adoption of the national measures. Here, external instruments fulfill a purely informative role, closely linked to the circumstances of the case.

688. Most references disclosing the (absence) of connection between external instruments and State action or omission do not require additional justification ‘in law’. They do not fine-tune or develop the understanding of the Convention itself, since they have an informative function closely related to the circumstances of the case, and since they empirically serve examinations that are explicitly prescribed by the Convention. Therefore, they actually reflect ‘factual findings’ serving the application of the Convention. The legal stimuli for such references appear clearly in the Court’s ‘internal’ instruments. Accordingly, there is no further need to justify them by ‘external’ legal instruments.³⁸⁵

§ 4.2. A referencing method to support specific interpretation principles

689. The Court has taken a special approach to treaty interpretation and created ‘own labels’ for interpretative techniques. These techniques often relate to the *lex specialis* character of human rights and have been criticized by more traditionalist approaches.³⁸⁶ The most relevant specific interpretation principles in jurisprudential practice are ‘evolutive interpretation’, ‘autonomous interpretation’, ‘effective interpretation’, and the use of the ‘margin of appreciation’.³⁸⁷

690. It happens that the Grand Chamber connects external references to some of its specific interpretation principles. In our view, however, the Court should be more transparent in this respect. Too often, opportunities are missed to better explain external referencing as a method of interpretation serving diverse interpretative aims, such as ‘evolutive’ interpretation, effective interpretation, *etc.* The latter principles seem to have

³⁸⁴ For examples of case law, see *supra*, Part II, Chapter 3, § 7.2.

³⁸⁵ Except when these legal roots would trigger an harmonious interpretation, which could, under some conditions, be justified by Article 31 paragraph 3 (c) VCLT. See *supra*, Part III, Chapter 1, § 3.2.

³⁸⁶ More generally on this issue: G. Letsas, *op. cit.*, 2007, p. 59; M. Forowicz, *op. cit.*, p. 17; F. Vanneste, *op. cit.*, 2009, p. 227; G. Gaja, “Does the European Court of Human Rights Use its Stated Methods of Interpretation?”, in *Divinire Sociale e Adeguamento del Diritto. Study in Onere di Francesco Capotorti*, Dott. A. Giuffrè Editore, Milano, 1999, pp. 213-227.

³⁸⁷ Vanneste speaks of ‘evolutive interpretation’, ‘effective interpretation’, ‘autonomous interpretation’, and the ‘margin of appreciation’ as being examples of specific ‘interpretation methods’ (see F. Vanneste, *op. cit.*, 2009). We however prefer to speak of them as ‘interpretation principles’ that are pursued by using certain interpretation methods (including a method of external referencing). See in a similar sense: H. Senden, *op. cit.*, pp. 70-90; S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge, Cambridge University Press, 2006, p. 194. See also G. Letsas, *op. cit.*, 2007, p. 59. For more on the distinction between interpretation ‘methods’ and interpretation ‘principles’, see H. Senden, *op. cit.*, pp. 390-391. Senden clarified that “[a]n interpretation method is a technique that clarifies which substantive argument has been used in order to support a specific reasoning and which helps the judge to objectify its reasoning” and that “[a]n interpretation principle serves as an objective or aim that can be taken into account when interpreting a provision with the help of an interpretation method”. *Ibidem*, p. 390.

good potential to stimulate the referencing practice. To clarify this, we will address the specific Strasbourg interpretation principles to see how external instruments could be (and have been) mobilized in serving their purpose. These principles include ‘evolutive’ interpretation (§ 4.2.1.), interpretation to render rights ‘practical and effective’ (§ 4.2.2.), autonomous interpretation (§ 4.2.3.), and the ‘margin of appreciation’ (§ 4.2.4.).

§ 4.2.1. ‘Evolutive’ interpretation

691. The principle of ‘evolutive’ interpretation builds on the idea that the Convention is a ‘living instrument’. By using this principle, the Court aims at reading the Convention in the light of present day conditions, of changing developments, and of contemporary concerns.³⁸⁸ This might lead to the development of certain Convention provisions, for instance by bringing more specific rights under their scope. The living instrument doctrine is widely used and accepted in Strasbourg human rights interpretation.³⁸⁹ The Court used the term ‘living instrument’ for the first time in the *Tyrer*-judgment of 1978.³⁹⁰ Now, it is “...one of the best known principles of Strasbourg case-law”.³⁹¹ The principle of ‘evolutive’ interpretation is, in itself, not very controversial³⁹², but debates continue on the extent to which it should be used.³⁹³ Often, it seems to be too poorly supported by empirical data.³⁹⁴

A. External referencing as a method for ‘evolutive’ interpretation

692. External instruments have the ability to point at what the current present-day (normative) conditions are; the reasons for departing from precedents might not only

³⁸⁸ In the case of *Demir and Baykara* the Court interestingly noted that “...it is in the interests of legal certainty, foreseeability and equality before the law that [it] should not depart, without good reason, from [its] precedents”. However, “...a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement”. ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 153. The Court thus in principle follows its own previous rulings but, as Judge Zagrebelsky remarked, it “...does from time to time, very cautiously, develop its case-law by a reversal of precedent”. Separate opinion of Judge Zagrebelsky to ECtHR (GC) *Demir and Baykara v. Turkey*, *op. cit.*, para. 3.

³⁸⁹ M. Marochini, *op. cit.*, p. 77; K. Dzehtsiarou, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, *GLJ* 2011, vol. 12, p. 1731. Prebensen said that the dynamic or evolutive approach is “...firmly established in the Strasbourg jurisprudence as a flexible, albeit a limited, means of adaptation of the Convention law”. S. Prebensen, *op. cit.*, p. 1136. This interpretative technique is also used as an interpretative technique in other jurisprudential settings such as the ICJ and the WTO. See on the latter: D. French, *op. cit.*, pp. 295 *et seq.*

³⁹⁰ The case was about whether corporal punishment of a juvenile amounted to degrading treatment under Article 3 of the Convention. The Court in this case recalls that “...the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field”. ECtHR, *Tyrer v. the United Kingdom*, 25 April 1978, Appl. No. 5856/72, para. 31. See also: M. Marochini, *op. cit.*, p. 77.

³⁹¹ L. Wildhaber, “The European Court of Human Rights in Action”, *RitsLRev* 2004, vol. 21, p. 84.

³⁹² However, some authors connect the use of the technique itself to non-allowed judicial activism and to undemocratic tendencies (because exercised by ‘non-elected’ judges). For more information on this criticism and references, see K. Dzehtsiarou, *op. cit.*, p. 130.

³⁹³ H. Senden, *op. cit.*, p. 71.

³⁹⁴ A. Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 2005, vol. 5, p. 61, referred to by K. Dzehtsiarou, *op. cit.*, 2015, p. 131.

connect to societal changes and technical progress, but also to legal developments.³⁹⁵ The case law analysis shows that, from the end of 2008 until the end of 2015, external instruments have stimulated an explicit ‘evolutive’ interpretation on a few occasions.³⁹⁶ However, in most recent years, between 2010 and 2015, the phenomenon has become rare.³⁹⁷

693. External instruments used in a context of ‘evolutive’ interpretation operate as vehicles to ‘create’ or ‘broaden’ specific rights under the Convention. For example, in the case of *Micallef v. Malta*, the Court, with the help of external instruments, dynamically developed the scope of Article 6 ECHR on the right to a fair trial: it also brought interim decisions (determining civil rights or obligations) under the provision. This reflected a change in respect of the Court’s previous case law.³⁹⁸ Hence, the external instruments created a normative effect by stimulating the development of the Convention in order to keep up with present day conditions. They were used as tools to create ‘transformation through interpretation’.³⁹⁹

694. When external instruments, in our pool of case law, were used for ‘evolutive’ interpretation, the Court often also mentioned the idea of an interpretation that is ‘practical and effective’, such as, for example, in the case of *Micallef v. Malta*.⁴⁰⁰ This connection seems logical. It alludes to the idea that a provision, in order to remain ‘effective’, should be adapted to contemporary developments, especially when they are framed in a vague and broad manner, as is the case with the Convention provisions.⁴⁰¹

695. ‘Evolutive’ interpretation is also connected to teleological interpretation that urges to read a provision in the light of its own ‘object and purpose’ and of the ‘object and purpose’ of the Convention as a whole.⁴⁰² Amongst the specific ‘purposes’ of human rights law, we find the progressive improvement of the protection of fundamental rights throughout Europe⁴⁰³, the protection of individual human rights, and the maintenance and promotion of

³⁹⁵ K. Dzehtsiarou, *op. cit.*, 2015, p. 140. Senden elaborates on the connection between establishing ‘present day conditions’ and the comparative method. See H. Senden, *op. cit.*, pp. 71-72.

³⁹⁶ In seven cases to be more particular. For a detailed overview see *supra* Part II, Chapter 3, § 4.1.

³⁹⁷ For a more detailed analysis of this phenomenon, see *supra*, Part II, Chapter 3, § 4.3.

³⁹⁸ ECtHR (GC), *Micallef v. Malta*, *op. cit.*, paras. 78-82.

³⁹⁹ J. Arato, *op. cit.*, p. 382.

⁴⁰⁰ ECtHR (GC), *Micallef v. Malta*, *op. cit.*, para. 81. See also: See ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 66, 70, 110 and 143; ECtHR (GC), *Sergey Zolotukhin v. Russia*, 10 February 2009, Appl. No. 14939/03, para. 80; ECtHR (GC), *Scopolla v. Italy* (No. 2), 17 September 2009, Appl. No. 10249/03, para. 104; ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 89.

⁴⁰¹ F. Vanneste, *op. cit.*, 2009, pp. 244-245; J. Arato, *op. cit.*, p. 355, with reference to ILC Koskenniemi Report, *op. cit.*, para. 478.

⁴⁰² F. Vanneste, *op. cit.*, 2009, pp. 244-245 and p. 252; J. Arato, *op. cit.*, p. 355, with reference to ILC Koskenniemi Report, para. 478.

⁴⁰³ Note for instance the Preamble of the Convention and the Statute of the CoE. See *supra* for references and for more information on this issue in light of the specific character of human rights law and the principle of ‘non-regression’, Part III, Chapter 1, § 2.

the ideals and values of a democratic society.⁴⁰⁴ Against this background, one can argue that the ‘object and purpose’ of the Convention supports solely a *progressive* evolution of human rights interpretation. In line with a principle of ‘non-regression’, it stimulates ‘evolutive’ interpretation as long as it does not lead to lowering the standards.⁴⁰⁵ Teleological interpretation (connected to ‘evolutive’ interpretation) might also foster external references pointing at current normative developments in order to give substance to the ‘object and purpose’ of provisions *at the moment of interpretation*.⁴⁰⁶ When the Court uses external instruments for ‘evolutive’ reasoning, it seldom explicitly refers to the ‘object and purpose’ of the Convention.⁴⁰⁷

696. For a long time, the Court has built on ‘internal comparisons’⁴⁰⁸ between laws and practices of Member States in order to objectify ‘evolutive’ (and consensual) interpretation of the Convention. The Court thereby acknowledged the need for a ‘European consensus’⁴⁰⁹ and hence, for a regional vocation of the treaty.⁴¹⁰ In more recent case law, however, the Grand Chamber regularly includes external instruments in the comparisons used as a basis for ‘evolutive’ interpretation. In a large majority of the Grand Chamber cases, the Court, when it observes an evolution in a certain field, arrives at these conclusions on the basis of external instruments (mostly in combination with internal comparisons) rather than through

⁴⁰⁴ H. Senden, *op. cit.*, pp. 55 *et seq.*

⁴⁰⁵ In a similar sense: F. Vanneste, *op. cit.*, 2009, pp. 262-263. See also: M. Marochini, *op. cit.*, p. 67; F. Tulkens, “On Touzé. Les techniques interprétatives des organes de protection des droits de l’homme”, *Revue Générale de Droit Int Public* 2011, vol. 115, p. 534; C. Pitea, *op. cit.*, 2014, p. 6, with reference to F. Tulkens, “Commentaire sur Touzé. Les techniques interprétatives des organes de protection des droits de l’homme”, *RGDIP* 2011, vol. 115, pp. 533-540, at 534 and P.M. Dupuy, “Evolutionary Interpretation of Treaties: Between Memory and Prophecy”, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, p. 133.

⁴⁰⁶ This is one of the possible approaches to teleological interpretation. A teleological method can be seen as a variant of a textual approach (considering that the object and the purpose stem from the text and the Preamble), or as a variant of an intentional approach (considering the object and purpose the parties had in mind when issuing the Convention). But, the ‘object and purpose’ could also be put in light of subsequent developments in international law (alluding at an ‘object and purpose’ that can ‘evolve’ over time and that could be considered at the time of interpretation). The latter approach of the teleological school is of particular relevance when putting ‘evolutive’ interpretation in light of the ‘object and purpose’ of the Convention. See, more general, F. Vanneste, *op. cit.*, 2009, pp. 224-225, pp. 254 *et seq.*, and H. Senden, *op. cit.*, p. 91 and pp. 97-100.

⁴⁰⁷ See for instance ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 80.

⁴⁰⁸ With an internal comparison, we mean: ‘a European consensus based on comparative analysis of the internal national laws and practices of Contracting Parties’ (and not ‘internal consensus in the respondent State’). It represents the common standards adopted by European States. See also K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge University Press, Cambridge, 2015, pp. 39 *et seq.* Such comparative law is often based on comprehensive comparative materials, of which the judgment only provides a summary. *Ibidem*, p. 41. It is said that the Court in connection to internal consensus-building “...has begun using a more rigorous ‘statistical’ approach to comparative law”. *Ibidem*, p. 44. In more recent years, the comparative data used to establish an internal European consensus have been much more professionally prepared by the Court (with the help of the Research Division), increasing the credibility of the European consensus and making the judgments more convincing. *Ibidem*, p. 73.

⁴⁰⁹ The notion of a consensus, which actually covers a situation of unanimity, is not accurate. What the Court generally means with this notion is a ‘trend’. *Ibidem*, pp. 2 and 12. The Court makes use of ‘European consensus’ “...only in cases of major importance that concern difficult questions of interpretation of the Convention. Whilst consensus is more often utilized by the Grand Chamber than the Chamber, it is not exclusive to it”. *Ibidem*, p. 21.

⁴¹⁰ S. Van Drooghenbroeck, *op. cit.*, p. 829; F. Vanneste, *op. cit.*, 2009, p. 276. Within Strasbourg case law, Dzehtsiarou distinguishes between four types of consensus: consensus based on comparative analysis of the legislation of Contracting Parties, international consensus based on international treaties, internal consensus in the respondent State, and expert consensus. K. Dzehtsiarou, *op. cit.*, pp. 39 *et seq.* The first type of consensus often deals with rules while the consensus based on international treaties mostly plays at the level of principles. See *ibidem*, pp. 15 *et seq.* and p. 57.

internal comparisons only.⁴¹¹ Already the key case of *Demir and Baykara v. Turkey* made clear that the Court, to enable ‘evolutive’ interpretation, does not shy away from making use of external instruments, including those of a non-binding nature.

697. In this case, the Court elaborated on the relevance of a consensus – including a consensus in specialized international instruments – in the light of ‘evolutive’ interpretation.⁴¹² It held that “...it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned”, but that it

“...will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies”.⁴¹³

In its aim of justifying external references (including non-binding instruments), the Court relied on the principle of ‘evolutive’ interpretation (linked to an interpretation that is ‘practical and effective’) rather than on Article 31 paragraph 3 (c) VCLT (which, as we argued above, is not suitable for explaining references to non-binding materials).⁴¹⁴ Also in Grand Chamber cases issued after *Demir and Baykara v. Turkey*, the Court included (non-binding) external instruments as a support for ‘evolutive’ reasoning, including instruments that are situated outside a European context. Two types of cases are worth mentioning.

698. Firstly, there are Grand Chamber cases in which the Court used external instruments to trigger ‘evolutive’ interpretation without explicitly specifying whether there is a ‘consensus’ or a ‘trend’. In these cases, the Court relied only on external case law, including case law from the ECJ, the ACtHR, and the HRC.⁴¹⁵ Here, judicial dialogue – including a dialogue crossing European borders – helped to establish certain developments and contributed to ‘evolutive’ interpretation. All Grand Chamber cases including such approach since the case of *Demir and Baykara* date from the year 2009. Between 2010 and the end of

⁴¹¹ For more details on this issue, see *supra*, Part II, Chapter 3, § 3.3.

⁴¹² ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 85-86. The Court stated in this respect that “[t]he consensus emerging from specialized international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases” (*ibidem*, para. 85). In its consideration of the substantive issues that rise under Article 11 of the Convention, however, the Court in *Demir and Baykara* did not explicitly build on a ‘consensus’ or a ‘trend’ to support its ‘evolutive’ interpretation. The ‘evolutive’ interpretation in this case took place by generally referring to external instruments on the matter.

⁴¹³ *Ibidem*, para. 86, with reference, *mutatis mutandis*, to ECtHR, *Marckx v. Belgium*, 13 June 1979, Appl. No. 6833/74, para. 41.

⁴¹⁴ *Supra*, Part III, Chapter 1, § 3.2.2.

⁴¹⁵ Such a use of external instruments in light of ‘evolutive’ interpretation is witnessed in three cases. For their elaborate discussion, see *supra*, Part II, Chapter 3, § 3.1.1.

2015, there are no such examples. This could point at the Court's increased reluctance to develop such kind of references.

699. Secondly, external references have triggered 'evolutive' interpretation linked to observations of 'emerging consensus in Europe and internationally'⁴¹⁶, a 'virtual general consensus...in Europe and beyond'⁴¹⁷, 'emerging trends in national legislation and the relevant international instruments'⁴¹⁸, or 'evolution of society based on international and internal comparative law material'⁴¹⁹. In these cases, the Grand Chamber included – next to internal comparisons – external references to two or more (binding – and non-binding) instruments of State- or judicial origin.⁴²⁰ Thus, the construction of a 'trend' or 'consensus' goes beyond a State-centric and a Euro-centric vision. However, in none of these cases, the Court supported 'evolutive' reasoning by instruments of expert committees (such as the CPT, the ILC or the Venice Commission) or non-governmental organizations. This might indicate some caution of the Court, preferring to include those 'soft' instruments (such as recommendations of the COM or the PACE) that are (indirectly) backed up by State consent, instead of instruments that had not been adopted by political bodies.⁴²¹ In general, Grand Chamber cases using various instruments to arrive at a 'consensus' or a 'trend' in the light of 'evolutive' interpretation, are in decline. The last time (until the end of 2015) that we observed such an argumentation in a Grand Chamber case, was in March 2012, in the case of *Konstantin Markin v. Russia*.

700. The Court's more universal approach to comparative law, expressed by the latter case law and explicitly addressed in *Demir and Baykara v. Turkey*⁴²², was not new. An example of a

⁴¹⁶ ECtHR (GC), *Scopolla v. Italy* (No. 2), *op. cit.*

⁴¹⁷ ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*

⁴¹⁸ ECtHR (GC), *Stanev v. Bulgaria*, 17 January 2012, Appl. No. 36760/06.

⁴¹⁹ ECtHR (GC), *Konstantin Markin v. Russia*, 22 March 2012, Appl. No. 30078/06.

⁴²⁰ In the case of *Scopolla v. Italy* (No. 2), the Court supported a consensus that emerged in Europe and internationally by *inter alia* referring to the ACHR, the EU Charter, and case law of the ECJ and the ICTY (ECtHR (GC), *Scopolla v. Italy* (No. 2), *op. cit.*, paras. 104 *et seq.*). In *Bayatyan v. Armenia*, the Court backed up the observation of developments in international fora, *inter alia* by references to the EU Charter, a General Comment of the HRC, as well as 'soft' instruments from the CoE PACE and COM (ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, paras. 105 *et seq.*). Also in *Stanev v. Bulgaria* and *Konstantin Markin v. Russia*, the Court triggered 'evolutive' reasoning by a mix of non-binding instrument (ECtHR (GC), *Stanev v. Bulgaria*, *op. cit.*; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*).

⁴²¹ The Court rarely refers to 'expert consensus'. Such references do in any case not fall under our study since they include scientific instruments (underlining outcomes of scientific research including statements such as 'sexual orientation is usually established before puberty in boys and girls') which do not fall under our definition of a 'normative instrument' (see *supra*, Part I, Chapter 2, § 2.1.1). More elaborate on the relevance of 'consensus among experts' in legal arguments, see K. Dzehtsiarou, *op. cit.*, pp. 55-56.

⁴²² See *supra*, Part I, Chapter 1, § 2.2. The Court said here that both International and European legal practice may be relevant, by stressing that it "...can and must take into account elements of international law, other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values..." and that "...the consensus emerging from specialized international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases". It also stressed that "...continuous evolution in the norms and principles applied in international law or in the domestic law of the vast majority of the member States...show common ground". Also Vanneste quoted the case of *Demir and Baykara* in this context, see F. Vanneste, *op. cit.*, 2009, pp. 277-279, including other cases.

controversial case in which the Court adopted a more universal view to a comparison and relied on an ‘international trend’ for ‘evolutive’ interpretation *in the absence of a firm European consensus*, is the case of *Christine Goodwin* where the Court stressed that it

“...attached less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals ...”.⁴²³

In this case, despite the lack of European consensus, ‘evolutive’ interpretation was strengthened by a “...continuing international trend”.⁴²⁴ In our pool of cases, there are no expressions comparable to those in *Christine Goodwin*. Admittedly, in the examined cases, the Court looks beyond European and binding instruments to add strength to comparisons, but it has no longer included the (far-fetched)⁴²⁵ phrase that it, in the light of ‘evolutive interpretation’, attaches more importance to international than to European trends. As the pool of cases shows, the Court, for ‘evolutive’ purposes, most often attaches importance to both the evidence of a (common) European approach and the existence of an external trend. Hence, external instruments are strengthening developments that occur internally, rather than prevailing over the lack of a European consensus. In the pool of cases, internal comparisons that trigger ‘evolutive’ interpretation (without referring to external instruments), are rare. The establishment of a consensus, based on an almost arithmetic comparison of national laws and practices, thus, loses relevance as an independent tool to create ‘evolutive’ interpretation.⁴²⁶ The traditional approach is often replaced by a more global comparison. In that respect, Tulkens, Van Drooghenbroeck and Krenc have observed that the Court “...*passe moins systématiquement par des études de droit national comparé, que par le*

⁴²³ ECtHR (GC), *Goodwin v. the United Kingdom*, 11 July 2002, Appl. No. 28957/95, para. 85. See also F. Vanneste, *op. cit.*, 2009, p. 277.

⁴²⁴ Also in the *Marckx*-case, in absence of a majority of domestic legislation in the member States, the Court relied on two international conventions to establish a “...clear measure of common ground in this area among modern societies” (ECtHR, *Marckx v. Belgium*, *op. cit.*, para. 41). The attitudes amongst modern societies, going beyond an evolution noted in domestic legislation, thus guided the Court’s ‘evolutive’ interpretation. G. Letsas, *op. cit.*, 2007, p. 77. Letsas said that “...[i]n *Marckx*, ‘living instrument’ meant, above all, keeping pace with evolving European attitudes and beliefs, rather than with some specific legislation to be found in the majority of Member States”, which made the requirements for consensus very loose (*ibidem*).

⁴²⁵ Dzehtsiarou considered the reasoning in the *Christine Goodwin*-case as being ‘far-fetched’. See K. Dzehtsiarou, *op. cit.*, p. 66. This case was also challenging because the Court proved the ‘international trend’ by references only to legal developments in six third States (mainly of the common-law system), including Israel, Australia, New Zealand, Canada, Singapore and South Africa, and all except two of the States of the United States of America. Dzehtsiarou says that because this ‘trend’ was based on a few external jurisdictions, it faces serious legitimacy concerns. What about the laws of all other countries? The Court did not specify whether the trend should exist among ‘democratic nations’ or not. If the Court would have examined other third States as well (including non-democratic nations), the trend might equally have pointed in a direction of restricting transsexual rights. The legitimacy of the international trend as established in the *Christine Goodwin*-case was further challenged since it offered a reason to disregard the lack of European consensus. According to Dzehtsiarou, a “...Court’s decision to overrule a lack of European consensus on the basis of an international trend poses serious questions of legitimacy” (*ibidem*, p. 71). See more elaborate: K. Dzehtsiarou, *op. cit.*, pp. 66-69.

⁴²⁶ Cf. E. Bribosia, I. Rorive, I. and L. Van den Eynde, L., “Same-sex Marriage – Building an Argument before the European Court of Human Rights in Light of the North American Experience”, *Berkeley J. Int’l Law* 2014, vol. 32, no. 1., pp. 22-23.

*relevé des 'indications' fournies par divers instruments élaborés dans les sphères européennes et internationales".*⁴²⁷

701. The mixed comparisons used for 'evolutive' reasoning are in decline. Whether this indicates a revived relevance of purely internal comparisons in this context is, however, another question. Rather, the regress of comparisons including external instruments seems to result from an overall decline in the Grand Chamber's cases including an explicit 'evolutive' interpretation (based on internal and/or external comparisons). If we look at the Grand Chamber cases between the end of 2008 and the end of 2015, there is only one case in which a purely internal comparison clearly fostered an 'evolutive' interpretation.⁴²⁸ Thus, there is no reason to believe that, in recent years, internal comparisons have gained in relevance over comparisons that equally include external instruments.

B. The inclusion of non-binding instruments: an issue of concern

702. Some traditionalist positivist views – insisting on the original intentions of the States Parties – challenge the idea of 'evolutive' interpretation.⁴²⁹ 'Evolutive' interpretation is then a sensitive topic altogether because there is no clear 'State consent'. As Schlütter frames it, "... a 'dynamic' interpretation which factually exceeds the original wording or meaning of certain treaty rules may extend the states parties' canon of material obligations" and therefore blur "...the limits between interpretation *de lege lata* and *de lege ferenda*" raising "...the question of interpretation as an *ultra vires* act ... and about the legality, as well as the legitimacy of the methods and means of interpretation utilized in human rights law".⁴³⁰

703. Allowing non-binding instruments to support 'evolutive' reasoning *a fortiori* provokes criticism.⁴³¹ Concerns are the most intense when voiced by a positivist or voluntarist stance, which insists on the (original) intentions of the parties and the text of the Convention.⁴³² This approach does not necessarily reject 'evolutive' interpretation but it considers 'State consensus' as a prerequisite.⁴³³ From such a point of view, 'evolutive'

⁴²⁷ F. Tulkens, S. Van Drooghenbroeck S. and F. Krenc, "Le soft law et la Cour européenne des Droits de l'Homme: questions de légitimité et de méthode", *RTDH* 2012, no. 91, pp. 461-462.

⁴²⁸ ECtHR (GC), *Herrmann v. Germany*, 26 June 2012, Appl. No. 9300/07.

⁴²⁹ More on such a traditionalist view, see F. Vanneste, *op. cit.*, 2009, pp. 250-251, and references there.

⁴³⁰ B. Schlütter, *op. cit.*, p. 266.

⁴³¹ More elaborate on this criticism, see *supra* Part I, Chapter 1, § 3.1. Stressing the importance of 'State consent' at European or international level follows a similar spirit than speaking of democratic legitimacy at national level. G. Letsas, *op. cit.*, p. 73.

⁴³² The idea of approaching the consensus 'at the time of interpretation', instead of looking for the 'original consensus', is strongly established. See B. Schlütter, *op. cit.*, p. 272.

⁴³³ M. Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties, Part I", *Hague Yearbook of International Law* 2008, vol. 21, pp. 101-153 and 131-153. See also sir G. Fitzmaurice's dissenting opinion to the *Golder* case: Separate opinion of Judge Sir Gerald Fitzmaurice to ECtHR, *Golder v. the United Kingdom*, 21 February 1975, Appl. No. 4451/70, para. 30. Helfer said that Strasbourg "...risk[s] judicial illegitimacy whenever they depart from an

interpretation is only allowed when it reflects a type of ‘consensual’ interpretation⁴³⁴, which does not allow the Court to ‘autonomously’ interpret the Convention moving beyond the will of the Member States.⁴³⁵ Concerns on the use of non-binding law to support ‘evolutive’ reasoning also relate to issues of methodology. It is said that Strasbourg case law lacks clarity as to when or why it prefers national and/or international and binding and/or non-binding instruments to establish a consensus or a trend that influences the progressive character of the reasoning.⁴³⁶ Concerns about ‘evolutive’ interpretation provoke allegations of ‘judicial activism’ and ‘judicial legislation’, which blame the ECtHR of going beyond its subsidiary nature.⁴³⁷ ‘Judicial activism’ is associated with worries about judges creatively pursuing ‘activist’ goals, crossing the boundaries of what the law is.⁴³⁸ Judge Wojtyczek, in the aftermath of the *R.M.T.*-case (which referred to the landmark case of *Demir and Baykara*), said in this respect that

“[i]n any case, invoking arguments such as a “continuous evolution in the norms and principles applied in international law” or a “strong international trend” usually discloses the fact that there are no strong arguments based on international law to support the chosen interpretation. It is an unequivocal warning sign of judicial activism”.⁴³⁹

interpretation based on the intent of the Convention’s drafters”. L. Helfer, “Consensus, Coherence and the European Convention on Human Rights”, *Cornell International Law Journal* 1993, vol. 26, p. 135.

⁴³⁴ Also Gerards stressed that the consensus-method or the common-ground method are often used as synonyms for a ‘comparative method’, which means that the Court for a new interpretation finds support in legal developments in member States or in international law built on a sufficient consensus. J.H. Gerards, *op. cit.*, 2011, pp. 62 and 75. See also: L. Helfer, *op. cit.*, 1993; F. Rigaux, “Interprétation consensuelle et interprétation évolutive”, in F. Sudre (ed.), *L’interprétation de la Convention européenne des droits de l’homme*, Bruylant, Brussels, 1998, pp. 41-62, all referred to by: F. Vanneste, *op. cit.*, 2009, p. 263.

⁴³⁵ Schlütter observed that the Court, by making use of the idea of the ‘object and purpose’ goes further than blindly following the State’s perspective to the treaty and thus includes some degree of autonomous interpretation (autonomous from the national level). See B. Schlütter, *op. cit.*, p. 288.

⁴³⁶ K. Dzehtsiarou, *op. cit.*, p. 39.

⁴³⁷ On the vocabulary of ‘judicial creativity’ and ‘power of discretion’, see G. Letsas, *op. cit.*, pp. 2-3. The subsidiary nature of the Court, which defines the relationship between the Court and the national authorities, is reflected in Articles 1 and 13 of the Convention providing the obligation for national authorities to ensure at national level the protection of human rights for everyone within their jurisdiction and to offer an effective remedy for alleged infringements. Also Article 35, with its requirement to exhaust national remedies before turning to the Court (as an admissibility criteria) is relevant in this respect. It is not easy to say what the principle of ‘subsidiarity’ exactly entails had it has not been explicitly integrated into the ECHR but one might say that it “on the one hand ... determines the ‘procedural relationship’ between the national authorities and the ECtHR and on the other hand it provides a limit on the ECtHR in exercising its supervisory functions”. Some discretion will thus be left to the national authorities for policy choices, which mostly plays a role in the Court’s interpretation process (for instance leaving room of manoeuvre for the States when balancing human rights). But, as explained by Senden, this principle might also play a role in the interpretation process for instance making it more difficult to adopt extensive interpretations. H. Senden, *op. cit.*, pp. 22-23. As Senden frames it, the subsidiary relationship between the ECtHR and the national authorities “...explains why the ECtHR cannot boldly opt for an extensive interpretation of a certain right: the multilevel setting needs to be taken into account and the fact that the ECHR plays a subsidiary role is relevant in that context”. H. Senden, *op. cit.*, p. 23.

⁴³⁸ About such criticism of ‘judicial activism’ and what such criticism entails: L. Hoffman, “The Universality of Human Rights”, *Law Quarterly Review* 2009, vol. 125, p. 428; H. Senden, *op. cit.*, pp. 102-103; C. Pitea, *op. cit.*, 2014, p. 5; G. Letsas, *op. cit.*, 2007, p. 48; F. Vanneste, *op. cit.*, 2009, pp. 224-225, and references there.

⁴³⁹ Concurring opinion of Judge Wojtyczek to ECtHR, *R.M.T. v. the United Kingdom*, *op. cit.*, para. 4.

C. Mitigating concerns and the search for a 'middle ground'

C.1. Dynamic interpretation as a natural phenomenon

704. Some commentators highlight that 'law' does not speak for itself and that the interpretation of the law will always be subject to discussion and disagreement.⁴⁴⁰ As Mahoney frames it, judges necessarily make judicial choices and they "...cannot be regarded as having a purely neutral role as discoverer and enforcer of the law but as being an active participant".⁴⁴¹ From such perspective, decision-making is by its nature not purely rational and deductive. As a consequence, it is quite logical that judges actively participate in the law-making process.⁴⁴² As Tzevelekos says, "...[t]he dividing line between legislating and adjudicating is always fine".⁴⁴³ Other authors consider that developing the law is inherent to the judicial mandate of an international tribunal.⁴⁴⁴ Accordingly, we could say that States, by giving competence to a Court as the 'guardian of a common plan', have implicitly agreed with developments beyond their initial expectations.⁴⁴⁵ As Dzetsiarou points out:

"... it is crucial for the effectiveness of the Strasbourg system to change and develop in order to reflect changes in society and to be an engine behind the improvement of human rights protection in Europe. The Court cannot be an institution of human rights mummification but rather it should develop the standards".⁴⁴⁶

705. Mitigating concerns of 'judicial activism' could not only be connected to the 'natural' role of judges who aim to ensure 'effective' human rights, it could also be tied to the *lex specialis* character of human rights and the particular object and purpose of the Convention. Judge Cançado Trindade (of the IACtHR and the ICJ), for instance, stresses that human rights treaties are by their nature 'law-making' treaties.⁴⁴⁷ Also Marochini is of the opinion that "... judicial activism is necessary ... particularly for the reasons stressed by the Court in

⁴⁴⁰ Whether dynamic interpretations are a natural part of legal reasoning is an old debate in legal theory. See on this issue (including further references going beyond a human rights context): B. Frydman, *Le sens des lois: histoire de l'interprétation et de la raison juridique*, Bruylant, Brussels, 2nd edition, 2007; I. Rorive, *Le revirement de jurisprudence. Etude de droit anglais et de droit belge*, Bruylant, Brussels, 2003, 565 p.

⁴⁴¹ P. Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", *H.R.L.J.* 1990, vol. 11, p. 60.

⁴⁴² M.B. Dembour, "Diversity or Commonality? The Power to Toss the Human Rights Coin", *Mediterranean Journal of Human Rights* 2005, vol. 9, p. 87; P. Mahoney, *op. cit.*, pp. 57-60, both referred to by F. Vanneste, *op. cit.*, 2009, pp. 251-252.

⁴⁴³ V.P. Tzevelekos, *op. cit.*, p. 637.

⁴⁴⁴ C. Pitea, *op. cit.*, 2014, p. 5, with reference to T. Treves, "Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?", in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making*, Springer, Berlin, 2005, pp. 587-620.

⁴⁴⁵ C. Pitea, *op. cit.*, p. 6, with reference to P.M. Dupuy, *op. cit.*, p. 125 and R. Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights", *German Yearbook of International Law* 1999, vol. 42, pp. 11-25, at p. 24.

⁴⁴⁶ K. Dzetsiarou, *op. cit.*, 2015, p. 155.

⁴⁴⁷ See A.-A. Cançado Trindade, *op. cit.*, 2004, p. 753.

order to safeguard the Convention's object and purpose as an effective human rights instrument and to prevent the states from circumventing the Convention's guarantees".⁴⁴⁸

C.2. Other perspectives, lesser concerns

706. Approaches attaching importance to at least some degree of State consent (in the light of 'evolutive' reasoning) are the most prominent. Letsas observes that a very common argument these days "...is based on the idea that the interpretation of the ECHR, and international law in general, should promote certainty and should not defeat the expectations that states have formed about their treaty obligations".⁴⁴⁹ But, also when subscribing to the relevance of 'State consent' as a condition for dynamic interpretation, opinions could still differ as to the required degree of approval.⁴⁵⁰ Whether normative 'evolution' should necessarily be attached to (a certain degree of) State consent is no settled issue. The response largely depends on which theoretical approach one adopts.⁴⁵¹

707. A positivist or voluntarist perspective challenges 'evolutive' interpretation moving away from State consent. More naturalist or objectivist approaches express less concern about such phenomenon. They pay particular attention to the 'objective' nature human rights, connected to human dignity and universal values. Because human rights protect individuals against the State and because they have moral foundations, it is said that they, by their very nature, "...subvert the concept of State sovereignty"⁴⁵² and, therefore, allow

⁴⁴⁸ M. Marochini, *op. cit.*, p. 83.

⁴⁴⁹ G. Letsas, *op. cit.*, p. 57. According to Letsas, the latter argument "...goes against the idea of interpreting ECHR rights in their best moral light and independently of states' expectations and consensus" (*ibidem*). He is of the opinion that the argument "...not only fails in the case of human rights but is also incompatible with the European Court's long-standing rejection of intentionalism and textualism" (*ibidem*).

⁴⁵⁰ Schlütter for instance stressed the need for a 'growing consensus' built on a 'majority' of States. More elaborate, see B. Schlütter, *op. cit.*, pp. 316 *et seq.* Also Senden considered that a 'consensus' or a 'common ground' can be found in a majority or more member States, see H. Senden, *op. cit.*, pp. 66-69 and pp. 112 *et seq.* Voluntarist approaches would rather require 'unanimity'. See O. Corten, *op. cit.*, pp. 230 *et seq.* Letsas is situated on the entire other end of the spectrum, according to this author, only moral reasons may ultimately justify interpretative outcomes. G. Letsas, *op. cit.*, 2004, pp. 295 *et seq.*

⁴⁵¹ On the different approaches and what they entail: V.P. Tzevelekos, *op. cit.*, p. 638; F. Vanneste, *op. cit.*, 2009, p. 263; O. Corten, *op. cit.*, pp. 234-238; R.C.A. White and C. Ovey, *op. cit.*, p. 72; M. Forowicz, *op. cit.*, p. 388.

⁴⁵² B. Schlütter, *op. cit.*, p. 264. The specific character of human rights – going against basis ideas of 'State sovereignty' – appears for instance from Article 3 of the Statute of the Council of Europe which provides that every contracting state "...must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" and which moreover stresses that, when a State seriously violates this article, it may be suspended from its rights of representation and may be requested by the Committee of Ministers to withdraw from the Council of Europe. Ovey and White draw our attention to the innovative character of such an approach since it moves beyond the traditional conception that human rights fall under domestic jurisdiction (the protection of individuals is the exclusive prerogative of the individuals' own State) and that international law is only relevant in case the interests of States are affected. The latter implies turning away from the traditional concepts of state sovereignty and international law, which, as history proved, had been insufficient to protect individuals and create peace. The creation of the Council of Europe and the elaboration of the ECHR, as Ovey and White note, are a result of the idea that the protection of human rights is an indispensable element of European democracy. R.C.A. White, C. Ovey, *op. cit.*, p. 6. Note moreover that the project of the Council of Europe had been built on some *moral* foundations since the member States, in the Preamble of the Statute of the Council of Europe, affirmed that "...their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis for all genuine democracy". See Preamble of the Statute of the Council of Europe, London, 5.V.1949, CoE Treaty Series Nos. 1/6/7/8/11, available at

interpretations that derogate from State sovereignty.⁴⁵³ In such a line of reasoning, human rights adjudication should not necessarily rely on the will of a majority of States ('anti-majoritarian argument').⁴⁵⁴ The whole idea of human rights is to grant people a set of moral rights against their State, irrespective of the practices of that State.⁴⁵⁵ As Letsas says, State consent at domestic or international level cannot be the sole value.⁴⁵⁶ The Convention "...protects certain universal human rights, not some *sui generis*, internationally agreed upon rights".⁴⁵⁷ According to such a viewpoint, it is allowed to interpret human rights in a manner that moves away from the will of States, even when this implies a decrease in legal certainty. Letsas, for instance, holds that, while he understands why peoples' expectations should be respected, he does not see why 'surprising' a State would be morally wrong. This author does not acknowledge any harm in not respecting States' expectations and, as a result, in dynamic interpretations moving away from State consent.⁴⁵⁸

708. According to Letsas, the Strasbourg Court generally acts in accordance with this moral vision. The Court does not always find a 'common ground' sufficient and it does not always follow changes in rules and attitudes. For this author, this proves that the Court is mainly interested in "...evolution towards the moral truth of ECHR rights, not in evolution towards commonly accepted standards, regardless of its content".⁴⁵⁹ Dzehtisarou makes a similar observation in respect of the use of the consensus-argument. He holds that the Court

http://www.ifa.de/fileadmin/pdf/abk/inter/ec_ets_001.pdf (visited on 31 May 2016).

⁴⁵³ Slaughter and Helfer consider the Strasbourg human rights protection mechanism as 'supranational' rather than 'international', implying that it concerns an organization that has received the power to exercise some functions that traditionally come to the states, limiting state sovereignty. L. Helfer and A.-M. Slaughter, "Towards a Theory of Effective Supranational Adjudication", *Yale Law Journal* 1997, vol. 107, no. 2, p. 287, quoted by G. Letsas, *op. cit.*, 2007, p. 34.

⁴⁵⁴ For a further explanation of this argument and additional references, see K. Dzehtisarou, *op. cit.*, p. 116. The latter statement is stimulated by the idea that rights have a 'anti-majoritarian' dimension, and that it is the Court's task to protect rights and interests of unpopular minorities against political majorities. See J.H. Gerards, *op. cit.*, 2011, pp. 92-93; G. Letsas, *op. cit.*, 2007, p. 119. As Letsas says: "The purpose of human rights treaties, unlike that of many other international treaties, is to protect the autonomy of individuals against the majoritarian will of their state, rather than to give effect to that will" (*ibidem*, p. 74).

⁴⁵⁵ Letsas is a prominent defender of this view. See G. Letsas, *op. cit.*, 2007, pp. 19 *et seq.* and pp. 57 *et seq.* Letsas concluded that "...any theory of interpretation for the ECHR (or any international treaty) must at some stage stand outside drafters' intentions and provide a normative justification based on values of political morality" (*ibidem*, p. 72). He quotes Dworkin in this context: "[s]ome part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular" (*ibidem*, p. 72 with reference to R. Dworkin, *A Matter of Principle*, 1985, p. 54). Letsas argues that "...State consent is neither a sufficient nor a necessary condition for the creation of an international legal duty". G. Letsas, *op. cit.*, 2007, p. 34. See also E. Benvenisti, "Margin of Appreciation, Consensus and Universal Standards", *New York University Journal of International Law and Politics* 1998-1999, vol. 31, p. 852. The latter author argues that the Court "...stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities". Also for him, the majority of States should thus not determine (supranational) human rights litigation.

⁴⁵⁶ G. Letsas, *op. cit.*, 2007 p. 73.

⁴⁵⁷ *Ibidem*, p. 82. Letsas stresses that 'evolutive' reasoning, in a moral reading of the Convention, should do justice to its underlying values (*ibidem*, p. 79). The latter author even goes as far as saying that in respect of 'evolutive' interpretation, "...it is not necessary to establish a concrete consensus among the majority of Contracting States" (*ibidem*) and that "...evolutive interpretation might go against State consent" (*ibidem*, p. 73). In his view a 'living instrument' approach is thus equal to an 'autonomous approach' put in the perspective of an effective reading of the Convention (*ibidem*, p. 79).

⁴⁵⁸ *Ibidem*, p. 73.

⁴⁵⁹ *Ibidem*, pp. 78-79, including examples of case law. Letsas is in favor of a 'moral reading' of the Convention and thus of a "...reasoning informed by substantive considerations about the protected right, not by a common denominator approach". *Ibidem*, p. 79.

does not apply the argument automatically and that, when it is applied, it does not have an adverse effect on the protection of minority rights.⁴⁶⁰

C.3. A middle ground: a search for 'opinio juris under the treaty'

709. On the one hand, as naturalist approaches highlight, one should not lose sight of the specific values characterizing human rights law. On the other hand, as Waldron reminds us, it is important to realize that there might be disagreement on how rights and values should apply, especially in 'hard' cases.⁴⁶¹ Therefore, it seems unfeasible to justify 'evolutive' reasoning by abstract values only. As Dzehtsiarou holds, "...human rights adjudication cannot rest solely on the moral superiority of human rights".⁴⁶² This would make the Court too vulnerable for accusations of arbitrary judgments, which would affect its effectiveness and legitimacy.⁴⁶³

710. Against that background, it seems useful to strive for a compromising technique that enables 'evolutive' reasoning in a manner that does justice both to some degree of State consent and to the moral values underlying the Convention.⁴⁶⁴ Such a middle road, on the one hand, allows the Court some flexibility in protecting the fundamental values of human rights law, also when this implies deviating from the viewpoints of a majority of States or when this implies establishing an argument that is not supported by all States. This anti-majoritarian aspect ensures that the will of States does not become the only determining factor in human rights litigation.⁴⁶⁵ A middle ground, on the other hand, guarantees that

⁴⁶⁰ Dzehtsiarou rejects the anti-majoritarian argument as a criticism against decision-making that makes use of a consensus-argument. The key counter-argument here is that the Court in fact does not use the European consensus in an automatic or absolute manner; even if a consensus is established, the Court in practice keeps on analyzing the situation. Therefore, the consensus could be set aside when it risks to endanger minority rights (which is something else than putting the consensus-argument aside in its entirety). Moreover, this author demonstrates that consensus decision-making in Strasbourg reasoning had also been beneficial for the protection of minority rights. The ECtHR has used European consensus in minority cases to advance the rights of minorities. Note that external instruments could also serve to observe an emerging consensus towards the recognition of national minority rights. Indeed, a vast majority of CoE member States has ratified the Framework Convention for the Protection of National Minorities. In the case of *D.H. and Others v. the Czech Republic* for example, the Court argued that there was international consensus on the proper protection of minority rights and it therefore placed less emphasis on the observation that there was no European consensus based on an internal comparison (ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007, Appl. No. 57325/00, para. 181 (see for a comparable case in our pool: ECtHR (GC) *Oršuš and Others v. Croatia*, 16 March 2010, Appl. No. 15766/03). More elaborate, see K. Dzehtsiarou, *op. cit.*, 2015, pp. 116 *et seq.*, p. 120, and pp. 123-128.

⁴⁶¹ K. Dzehtsiarou, *op. cit.*, 2015, pp. 117 and 154, with reference to J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford, 1999, 344 p.

⁴⁶² *Ibidem*, p. 154. This author added that: "...some more objective and palpable grounds other than a moral reading are desirable; otherwise, such decision-making can be perceived as arbitrary and political, reflecting subjective beliefs of the majority of seven or seventeen judges of the Court, and therefore illegitimate. The moral value of the judgments of the ECtHR is an important but insufficient element of the legitimacy of the ECtHR judgments" (*ibidem*).

⁴⁶³ *Ibidem*, pp. 117-118.

⁴⁶⁴ Dzehtsiarou also subscribes to this idea. He said that "Letsas correctly focuses on the moral value of human rights. However, it cannot be the only justification for otherwise seemingly arbitrary decisions to deploy evolutive interpretation". *Ibidem*, pp. 139-140.

⁴⁶⁵ Cf. *ibidem*, p. 119.

‘evolutive’ interpretation does not become entirely disconnected from State consent. The special character of the Convention together with its object and purpose should not operate as an unlimited and open invitation “...to elevate any positive development in the Member States to the level of a binding international norm, thus limiting the States’ sovereign and democratic rights”.⁴⁶⁶

French supported this road of compromise, pointing out the following:

“This is not to say that treaty interpretation which incorporates other rules of international law is not a useful, positive and, in fact, very necessary tool in some instances, but one should remember that judicial deliberation is but part of a wider and much more complex picture of an international system ultimately premised upon sovereign consent. On the other hand, undue deference to such principles as legal certainty and judicial self-restraint may itself risk stymieing the law, preclude the development of further coherence therein, and undermine broader notions of justice within individual cases. What is called for, therefore, is for tribunals to find some sensible middle ground between respect for the limits imposed by the treaty on which they have been called to adjudicate and awareness of the general international law into which it falls.”⁴⁶⁷

711. In our view, a middle ground between naturalist and voluntarist approaches is present in some proposals of Vanneste. This author accommodates rigid views on the necessity of ‘State consent’ with some more flexible approaches. According to Vanneste, ‘evolutive’ interpretation is valid when it corresponds to a demonstration of ‘*opinio juris* under the treaty’. This phrase covers a contemporary ‘general belief’ that (emerging) consensus requires a certain interpretation.⁴⁶⁸ On the one hand, this view does not require full State consent for human rights interpretation to evolve. On the other hand, a certain level of State consent is not sufficient either; there must also be a ‘general belief’ that this consent should trigger an ‘evolutive’ interpretation. In other words, the ‘*opinio juris*’ gives legal relevance the (emerging) consensus in State practice.⁴⁶⁹

712. The requirement of a ‘general belief’ is not State-centric. It can rest on a combination of the following elements: the text and the context of the Convention, the practice of States (including not only what they ‘do’ but also what they claim and consider)⁴⁷⁰, and the object and purpose of the treaty (which can evolve over time).⁴⁷¹ The relevance of the ‘object and purpose’ of the treaty ensures that one does not lose sight of the values on which the

⁴⁶⁶ Dissenting opinion of Judge Spano joined by Judge Kjolbro to ECtHR (GC), *Magyar Helsinki Bizottsag v. Hungary*, 8 November 2016, Appl. No. 18030/11, para. 16.

⁴⁶⁷ D. French, *op. cit.*, p. 284.

⁴⁶⁸ F. Vanneste, *op. cit.*, 2009, p. 265.

⁴⁶⁹ *Ibidem*, pp. 278-279. See also F. Vanneste, *op. cit.*, 2011, pp. 830-831.

⁴⁷⁰ Vanneste stresses that, when national legislation falls short, this should not stand in the way of developing an approach on the international aspirations rather than on domestic actions. *Ibidem*, 2009, p. 269.

⁴⁷¹ *Ibidem*, 2009, pp. 262-263.

Convention is built. It is of major importance that 'evolutive' interpretation serves the aim and object of the Convention and accordingly, does not lead to 'regressive' evolution in human rights protection and does not affect minority rights.⁴⁷²

713. In the search for '*opinio juris* under the treaty', Vanneste distinguishes between an 'ambiguous' or 'emerging' consensus, and a 'clear' consensus.⁴⁷³ In case there is a clear consensus among Member States, progressive 'evolutive' reasoning is not likely to attract large controversies. Then, the consensus will offer a sufficient proof of a 'general belief' under the treaty, which allows an 'evolutive' interpretation. The consensus could serve here as the decisive argument for an 'evolutive' reasoning (so long as it does not lead to a backward protection).⁴⁷⁴ The Strasbourg Court, in jurisprudential practice, seems to generally agree with this viewpoint.⁴⁷⁵

714. When there is only an emerging consensus (alluding to a growing 'tendency' not necessarily firmly supported by full consensus) or an ambiguous consensus (alluding to an unclear consensus, for instance because some States do not deal with a certain issue) among the Member States, there are gaps and uncertainties. However, this should not necessarily prevent the establishment of '*opinio juris* under the treaty', and the recourse to 'evolutive' interpretation.⁴⁷⁶ An emerging or ambiguous consensus could lead to 'evolutive' (or other dynamic) interpretations in case there is a 'general belief' or '*opinio juris*' that this incomplete consensus should lead to a certain (evolved) interpretation.⁴⁷⁷

715. How could external instruments be of value here? A 'general belief' might be supported by the text of the Convention and the Preamble (which is what we call the 'internal' context of the treaty), but also by attitudes and practices of Member States (possibly demonstrated by internal or external instruments) and by an evolving international legal order (possibly expressed by external instruments).⁴⁷⁸ *Firstly*, external instruments could offer support in searching for a consensus. We consider that this notion, in the first place, refers to 'State consent', which could be expressed by 'hard' binding domestic and

⁴⁷² In case a consensus does not serve the 'aim and object' of the Convention such as the progressive development of human rights, could be ignored. See F. Vanneste, *op. cit.*, 2009, pp. 253-254 and 265. Admittedly, in cases of balancing human rights, it might be difficult to say whether a certain decision would lead to lowering the standards or not. Also then, however, the Court should not always give effect to the outcome of the balancing exercise that is argued by a majority of States.

⁴⁷³ On these notions and their meaning, see *ibidem*, pp. 265 and pp. 273-274.

⁴⁷⁴ *Ibidem*, pp. 279-281.

⁴⁷⁵ *Ibidem*.

⁴⁷⁶ *Ibidem*, pp. 274-275.

⁴⁷⁷ *Ibidem*, pp. 265-267. With a reference to *Demir and Baykara* (GC), Vanneste stresses that an emerging consensus is made more strong by the respondent State's (tacit) acceptance by the respondent state, but that this acceptance is not a necessary requirement for 'evolutive' interpretation.

⁴⁷⁸ *Ibidem*, p. 265.

international instruments.⁴⁷⁹ Secondly, in accordance with Vanneste, we embrace the idea that when there is only an emerging or ambiguous consensus, a 'general belief' could nonetheless be established by adding other external instruments.⁴⁸⁰ Thirdly, external instruments may challenge an emerging or ambiguous consensus, namely when they go in another direction and demonstrate a growing '*opinio non juris*' under the Convention.⁴⁸¹ As such, they could operate as means of falsification, which could prevent tunnel visions and stimulate creative imagination.⁴⁸² However, in line with the idea of non-regression, it is important to realize that external instruments could not challenge a progressive (emerging) State consensus. Their influence fits the image of a 'one-way street'.⁴⁸³

716. This being said, *opinio (non) juris* could be found in a diversity of instruments, including different kind of 'soft' instruments.⁴⁸⁴ While non-binding instruments have no capacity to establish an (emerging) consensus, they have persuasive power to strengthen (or weaken) the existence of a 'general belief'. They could be integrated to prove that a tendency in a certain direction (backed up by binding State consent) also reflects '*opinio juris*'. If the emerging or unclear consensus is backed up by '*opinio juris*', this could trigger dynamic interpretations, or *vice versa*.⁴⁸⁵ Also Vanneste acknowledges that 'soft' instruments could strengthen an emerging consensus. For that purpose, this authors mentions the relevance of doctrinal writings⁴⁸⁶, international and foreign case law⁴⁸⁷, expert opinion, international

⁴⁷⁹ Cf. *ibidem*, p. 279, footnote 1023. Here, our approach seems to deviate from Vanneste's approach. What seems to count for this author, to establish an (emerging) consensus, is the existence of State practice. As far as I noticed, this State practice, in the view of Vanneste, should not necessarily be evidenced by 'hard' legal instruments.

⁴⁸⁰ *Ibidem*, p. 265

⁴⁸¹ Cf. *ibidem*, p. 276.

⁴⁸² Ackerman said in this respect that "[a]t some stage in a judge's reasoning process...the judge will come to a preliminary conclusion or hypothesis as to what the result should be and why. I suggest that the best way to test such preliminary conclusion is to attempt rigorously to falsify it. However, my experience – both of myself and other lawyers – has been that...one can easily become trapped into a sort of tunnel vision, from which it is difficult to escape, or to see other or lateral answers.... One often ends up rehearsing the same line of reasoning or...trying to find additional authority for the provisional conclusions one has already reached. It is in this context that foreign law can play a particularly valuable role. It may be that, when one commences the inquiry into foreign law one is psychologically hoping to find confirmation for one's hypotheses, but if one remains alive to falsifying possibilities, the foreign law can be of particular value. In any event, foreign law may stimulate, in Einstein's words, "creative imagination" by "...rais(ing) new questions, new possibilities...regard(ing) old problems from a new angle"". L.W.H. Ackermann, "Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke", *Tulane Law Review* 2005, vol. 80, p. 185.

⁴⁸³ As Judge Pinto de Albuquerque says: "...the relationship between hard and soft law in European human rights law is a one-way street: where there is hard law, soft law may enrich it, but it may not weaken it. Were soft law to weaken existing hard law, it would be fraudulent, a breach of the European human rights normative threshold and thus a pathological phenomenon of international normativity. Soft law is one of the ways in which European law development may occur, not a way in which it regresses". Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 33.

⁴⁸⁴ About '*opinion juris* under the treaty' and how it can be established, see F. Vanneste, *op. cit.*, 2009, pp. 285 *et seq.*

⁴⁸⁵ Compare Helfer who says that ECtHR generally relies on three different factors as evidence of consensus: "...legal consensus, as demonstrated by European domestic statutes, international treaties and regional legislation; expert consensus; and European public consensus". L. Helfer, *op. cit.*, 1993, p. 139, referred to by F. Vanneste, *op. cit.*, 2009, p. 285, footnote 1047.

⁴⁸⁶ Giving a complete and satisfactory overview of legal doctrine might however be a difficult undertaking, and it is also seldom unanimous. F. Vanneste, *op. cit.*, 2009, pp. 291-292.

⁴⁸⁷ According to Vanneste, international case law can thus not be considered as 'State practice' (unless States adapt their practice to such case law). *Ibidem*, p. 288. In a similar sense: *Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law*, International Law Association (ILA), Report of the Sixty-Ninth Conference, London,

trends outside the European sphere, etc.⁴⁸⁸ As such, various perspectives and actors could stimulate the search for '*opinio juris*'.

717. In our view, this approach adds value to legal reasoning since it goes beyond a purely State-centric vision but stimulates the richness and quality of a comparison enabling 'evolutive' interpretation. It has the ability to diversify and balance the 'roots' and 'faces' stimulating dynamism in legal reasoning. 'Evolutive' interpretation backed up by '*opinio juris* under the treaty' could mitigate the criticism accusing the ECtHR of *creating* new provisions; instead, the Court here rather *recognizes* new emerging and relevant viewpoints in society, including in political, judicial and expert circles.⁴⁸⁹

718. The search for '*opinio juris* under the treaty' allows the Court – to some degree – to act independently from the will of (some) Member States. The approach is not rigidly attached to a requirement of full State consent, offering judges a certain degree of flexibility and autonomy.⁴⁹⁰ This seems of high relevance in a context of adjudicating human rights, which are often broadly framed, which have specific 'aims and objects' of a 'moral' character, and which have evolved as a result of States voluntarily giving up some aspects of their sovereignty.⁴⁹¹ Accordingly, we consider the approach to 'evolutive' interpretation built on a search for '*opinio juris* under the treaty' as an adequate 'middle way'. On the one hand, it does not lose sight of the importance of State consent. On the other hand, it does not always require full State consent and it does not demand blindly following national tendencies. It keeps a careful eye on both the 'object and purpose' of the Convention and developments in the wider normative environment. Therefore, the search for '*opinio juris* under the treaty'

2000, 66 p., available at <file:///Users/newuser/Downloads/CustomaryLaw.pdf> (visited on 4 August 2016), referred to by F. Vanneste, *op. cit.*, 2009, p. 288, footnote 1060.

⁴⁸⁸ F. Vanneste, *op. cit.*, 2009, p. 285. The view of this author on the search for '*opinio juris* under the treaty' and the diversity of instruments that could be mobilized for this purpose, was inspired by the meaning the ICJ attaches to '*opinio juris*'. The ICJ often assesses the existence of *opinio juris* by referring to evidence of a general practice, or a consensus in literature, or the previous determinations of the Court or other international tribunals. See *ibidem*, p. 285, footnote 1047, and references there.

⁴⁸⁹ Cf. *ibidem*, p. 251.

⁴⁹⁰ 'Evolutive' interpretation could thus to some extent be part of 'autonomous' interpretation, in a sense of moving away from the 'consent' of some member States and of moving towards those tendencies that are generally accepted on an international and transnational level. *A contrario*: M. Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law", *Erasmus Law Review* 2009, vol. 2, no. 3, p. 361, who argues that an 'evolutive' interpretation (based on some degree of State consent) it is not defensible in combination with a principle of autonomous interpretation. Cf. M. Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law", *Erasmus Law Review* 2009, vol. 2, no. 3, p. 361.

⁴⁹¹ It is important to realize that the provisions of the ECHR are open-ended, setting objectives rather than precise rules and that when the Court has to clarify these standards or objectives, it almost – because of their open character, naturally has a certain discretion. P. Mahoney, *op. cit.*, p. 61, referred to by F. Vanneste, *op. cit.*, 2009, p. 257. See also M. de Blois, "The Fundamental Freedom of the European Court of Human Rights", in R. Lawson and M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers*, Martinus Nijhoff Publishers, Leiden, 1994, p. 51. The latter author says that "...most substantive provisions of the Convention leave much room for different interpretations" and that "...[t]hey are therefore a source of judicial discretion". Related to the specific character of the norms, there are authors stressing that the intention of the drafters is of lesser importance for human rights treaties than for treaties of general international law, see W. Kälin and J. Künzli, *The Law of International Human Rights Protection*, Oxford University Press, Oxford, 2009, p. 38.

does justice to the Convention's 'dual nature'; it is a classic international treaty with a subsidiary role that needs legitimacy and credibility, not the least in the eyes of the constituent State community,⁴⁹² but also, it is a special instrument of human rights protection based on fundamental values.⁴⁹³

719. A diversified and more qualitative approach, using various instruments to demonstrate '*opinio juris* under the treaty', has the additional value of strengthening the methodological quality of an argument and, thus, of generating persuasive authority. When 'evolutive' interpretation is built only on an internal comparison, the interpretative method might methodologically suffer in respect of the quality and the objectivity of the comparison.⁴⁹⁴ It is often challenging and complex to develop 'watertight' studies about national rules and practices. National statistical data might also entail problems of reliability.⁴⁹⁵ Moreover, the Court is not always transparent about which materials serve as a basis for comparative studies. Our case law analysis demonstrates that there is almost no Strasbourg case in which the Court, when making an internal comparison, specifies the precise national standards and instruments on which the internal comparison is based.⁴⁹⁶ Although not all commentators share this point of view⁴⁹⁷, we believe that the use of international treaties and international non-binding normative instruments could make a comparison easier and richer. In respect of their use, it might suffice to look at the amount of signatures and ratifications, which is less time-consuming than stepping into a comparison of often very complex national rules and practices.⁴⁹⁸ Moreover, the use of external international 'hard' instruments to establish (emerging) consensus, could allow a firmer proof of 'State consent', which would make a reasoning more acceptable and credible from a

⁴⁹² Therefore, when 'hard' European and international regulations do not point in a certain direction – demonstrating an absence of emerging consensus – a revision and/or evolution in the Court's reasoning could hardly be justified at that point of time. For this reason, Dzetsiarou defended the outcome of the case of *Schalk and Kopf v. Austria*, in which the Court found that prohibition of same-sex marriages in Austrian law did not violate Article 8 taken together with Article 14 and 12 of the ECHR. The Court argued a lack of European consensus in favor of same-sex marriages: only six member States allowed it at the time of the judgment (ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, Appl. No. 30141/04, para. 58). See K. Dzetsiarou, *op. cit.*, 2015, pp. 126-127. Dzetsiarou acknowledges in this respect that "[t]he application of consensual decision-making in certain circumstances can justify restrictive or conservative approaches" and that "[i]t seems fair to suggest that the Contracting Parties should have some input when the Court intends to add new rights. If the Court unilaterally decides for the States, it may negatively influence the legitimacy of the ECtHR". K. Dzetsiarou, *op. cit.*, 2015, pp. 127-128. Helfer said that judgments of the Court are effective if they are embedded in national legal systems. L.R. Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime", *EJIL* 2008, vol. 19, no. 1, p. 125.

⁴⁹³ Cf. V.P. Tzevelekos, *op. cit.*, p. 640. See also C. Pitea, *op. cit.*, 2014, p. 6.

⁴⁹⁴ J.H. Gerards, *op. cit.*, 2011, pp. 80-81.

⁴⁹⁵ See K. Dzetsiarou, *op. cit.*, p. 54.

⁴⁹⁶ Vanneste made a similar remark saying that often in respect of internal comparisons there is no specification about the policies or the precise national developments and standards in the member States, see F. Vanneste, *op. cit.*, p. 268.

⁴⁹⁷ Dzetsiarou argued that the "...European consensus based on comparison of rules and practices of the Contracting States usually contains more precise regulations than consensus based on international treaties. The latter ordinarily requires implementation and therefore it cannot claim the same level of persuasiveness as consensus based on laws and practices of the Contracting Parties". K. Dzetsiarou, *op. cit.*, 2015, p. 4.

⁴⁹⁸ Cf. J.H. Gerards, *op. cit.*, 2011, p. 81; J. Gerards, "Rechtsvinding door het Europees Hof voor de Rechten van de Mens", *NJCM Bulletin* 2006, vol. 31, p. 117. See also F. Vanneste, *op. cit.*, 2009, pp. 268-269.

State's point of view. This has the potential to mitigate allegations of 'judicial law-making' or 'judicial activism'.⁴⁹⁹ The legitimacy of the Court can be "...improved if it is seen by the stakeholders as an institution that merely implements legal norms and not as an institution that pushes its own political agenda forward...".⁵⁰⁰

720. To increase the persuasiveness of 'evolutive' reasoning through the use of external instruments, there is a need for a more constant and consistent methodological framework. Dzehtsiarou, for instance, in his recent book on the *European Consensus and the Legitimacy of the ECtHR*, argues that "European consensus can enhance the legitimacy of the ECtHR by improving the predictability and foreseeability of the Court's judgment" but that "[i]n order to achieve this, the Court should establish clear rules of selection on the type of consensus to be followed".⁵⁰¹ In our view, the framework of '*opinio juris* under the treaty' (which seems valid under the VCLT⁵⁰²) could offer such 'clear rules' as well as the necessary systematization to tackle the methodological criticism directed against the Court. To increase the legality of dynamic interpretations (based on external instruments), we advise the Court to make more intensive use of the proposed framework.⁵⁰³ Since human rights judges almost naturally have some degree of judicial discretion and therefore, establishing convincing (but flexible) interpretative frameworks is of utmost importance.⁵⁰⁴

§ 4.2.2. Interpretation to render rights 'practical and effective'

721. An interpretation that renders rights 'practical and effective' aims to guide the interpretative process towards concrete, workable and practical results, avoiding effects that are illusory or unpractical.⁵⁰⁵ It is connected to an inherent aspect of the 'object and purpose' of human rights; the notions and expressions in the Convention are no 'dead letters' but are supposed to make sense.⁵⁰⁶ Because this 'sense' should remain effective in a context of

⁴⁹⁹ C. Pitea, *op. cit.*, p. 6; K. Dzehtsiarou, *op. cit.*, 2015, pp. 6-7. The latter author issued this remark in a context of using 'internal' comparisons to construct consensual reasoning. He said that "[t]hrough consensus, the Contracting Parties can influence the interpretation of the Convention, and perhaps this creates a sense of common ownership of the Convention case law.

⁵⁰⁰ K. Dzehtsiarou, *op. cit.*, 2015, p. 6.

⁵⁰¹ *Ibidem*, p. 4.

⁵⁰² On the validity of an 'evolutive' method in general under the VCLT, see Concurring opinion of Judge Sicilianos, joined by Judge Raimondi, to ECtHR (GC), *Magyar Helsinki Bizottság v. Hungary*, *op. cit.*, para. 8 and references there. On the validity of a search for '*opinio juris* under the treaty' in the light of the VCLT, see F. Vanneste, *op. cit.*, 2011, pp. 830-831 and see *infra*, Part III, Chapter 1, § 4.3.

⁵⁰³ The 'consensus' argument should moreover not stand in the way of considering other arguments to analyze the situation. Indeed, the values of human rights should not be negated by the will of a majority. Also Dzehtsiarou, in relation to the use of a consensus-argument by the Court, is of the opinion that "[t]he Court can disregard European consensus if justification is provided, and the fact that the case concerns minority rights can be seen as such a justification". K. Dzehtsiarou, *op. cit.*, 2015, p. 124. See also *ibidem*, p. 118.

⁵⁰⁴ The judicial choices made, especially if they lead to 'evolving' the Convention, should indeed be well explained. See, more elaborate, G. Letsas, *op. cit.*, pp. 50-55.

⁵⁰⁵ F. Vanneste, *op. cit.*, 2009, p. 312.

⁵⁰⁶ O. Corten, *op. cit.*, pp. 234-238; B. Schlütter, *op. cit.*, p. 286; H. Senden, *op. cit.*, pp. 73-77.

contemporary circumstances, effective interpretation is also naturally linked to ‘evolutive’ interpretation.

722. An interpretation that is ‘practical and effective’ does not necessarily cover a *pro persona* principle which means that the most effective interpretation always chooses the norm most favorable to the applicant and always opts for the least restrictive result.⁵⁰⁷ The ECHR is said to offer ‘minimum’ subsidiary standards and therefore, the ECtHR should not always maximize human rights protection (for instance because of the existence of some higher protection standards offered in some CoE-member States). However, when there is ‘(emerging) consensus’ about some higher standards this could, as we argued, justify aligning the Convention with these standards (under the condition this ‘evolution’ is supported by a ‘general belief under the treaty’).⁵⁰⁸ The purpose of rendering rights ‘practical and effective’ is not sufficient to support upwards ‘evolution’, but it could offer an additional argument in this respect.

723. Apart from a situation of ‘evolutive’ interpretation, a practical and effective reading of the Convention could also be linked to the use of some external instruments. Our Grand Chamber case law analysis shows that this is rarely found in Strasbourg adjudication practice. In our view, here, the Court misses some opportunities to better explain its referencing practice. For example, when the Court uses external instruments to define ambiguous treaty terms, or when the Court imports specific human rights provisions protecting particular groups of persons, the principle of effectiveness could add strength to such references, even when there is no clear consensus on the issue. In respect of ambiguous provisions, “...one may assume that in absence of clear consensus the contracting States have accepted the discretionary power of the Courts”.⁵⁰⁹

724. When external instruments are not used to support an ‘evolutive’ interpretation but to fill gaps in vague provisions for ‘learning purposes’, the idea of ‘effectiveness’ seems particularly relevant. The use of specific and specialized external instruments might render Convention provisions ‘practical and effective’, giving them more substance and making them more workable in view of the particular circumstances of the case. Then, external instruments are mobilized to ‘fine-tune’ the Convention, rather than to expand certain rights. This does not mean, however, that such a mobilization could not have normative effects. Admittedly, such a mobilization does not necessarily lead to a progressive reading of the Convention or to a broadening of its scope. Nonetheless, it could support some dynamism in

⁵⁰⁷ F. Vanneste, *op. cit.*, p. 315.

⁵⁰⁸ Cf. *Ibidem*, pp. 316 and 343. Therefore, Vanneste said, referring to the effectiveness principle in a sense of a ‘*pro persona*’ approach is questionable when used to depart from general international law.

⁵⁰⁹ F. Vanneste, *op. cit.*, p. 317.

the interpretative process. Accordingly, the aim of rendering rights ‘practical and effective’ could justify normative effects of external instruments under the condition that these effects lie in the instruments’ ability to shape the interpretation of the Convention, rather than in their ability to progressively create new human rights in its margin. A ‘learning’-factor is at play here, stimulating the Court to search for good and convincing solutions in external instruments, instead of looking for widely shared solutions or positions.⁵¹⁰

725. So far, the Court seldom attached the method of external referencing to the idea of rendering rights ‘practical and effective’. This aim could nonetheless enhance the legal validity of the referencing practice, certainly because an interpretation that is ‘practical and effective’ might be legally justified by the interpretative rules of the VCLT. The latter instrument does not mention the aim of ‘effectiveness’ explicitly but commentaries to the VCLT stress that it is included in the VCLT’s references to ‘good faith’ and to the ‘object and purpose’.⁵¹¹

§ 4.2.3. Autonomous interpretation

726. An autonomous interpretation of the Convention builds on the idea that an interpretation can be done in an independent manner, not entirely depending on the exclusive will of the States. Giving an autonomous meaning to the Convention, detached from the domestic level, might differ from the meaning given to it by the respondent State. The underlying idea of autonomous interpretation is that the Court controls the explanation of the ECHR, and not the national authorities. It prevents national authorities from escaping their obligations.⁵¹² This implies that the meaning the ECtHR gives to the provisions should not always be similar to the meaning the respondent State or the (majority of) Member States gives to them. The Court is allowed to give an autonomous interpretation, often based on some more substantive moral principles.⁵¹³ The Court legitimized this interpretative technique by stressing that the reliance on national classifications might undermine the credibility of the ECHR as a minimum level of protection.⁵¹⁴ Not holding tight to the meaning (some) Member States give to certain provisions, autonomous interpretation serves the objectivity, unity and uniformity of the Convention, giving it a ‘unique’ Strasbourg meaning.⁵¹⁵

⁵¹⁰ J.H. Gerards, *op. cit.*, 2011, pp. 89-90.

⁵¹¹ H. Senden, *op. cit.*, pp. 73-77 and references there. See *infra* for more on this issue, Part III, Chapter 1, § 4.3.

⁵¹² J.H. Gerards, *op. cit.*, 2011, p. 96.

⁵¹³ G. Letsas, *op. cit.*, 2007, p. 10.

⁵¹⁴ H. Senden, *op. cit.*, pp. 77-79, with reference to case law of the ECtHR.

⁵¹⁵ G. Letsas, *op. cit.*, 2007, p. 10; J.H. Gerards, *op. cit.*, 2011, pp. 92-93; F. Vanneste, *op. cit.*, p. 337, with reference to W.J. Ganshof Van Der Meersch, “Le caractère ‘autonome’ des termes de la marge d’appréciation des gouvernements dans l’interprétation de la Convention européenne des Droits de l’Homme”, in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in honour of G. J. Wiarda*, Carl Heymanns Verlag KG, Köln, 1988, pp. 201-205.

727. There is potential for informing the principle of autonomous interpretation by a method of the referencing practice.⁵¹⁶ For instance, from the moment the Court uses a non-ratified external instrument to support ‘evolutive’ or a ‘practical and effective’ reasoning, this reasoning might develop independently of the viewpoint of the respondent State. When the Court looks for the ‘ordinary meaning’ of the words in their context (making use of international treaties, international case law, practices of international organizations, *etc.*), this might result in an autonomous interpretation. Thus, an interpretation witnessing ‘internal autonomy’ (alluding to an interpretation independent from the internal national level), thus, does not necessarily equalize an interpretation with ‘external autonomy’ (alluding to an interpretation independent from the external normative context).

728. An autonomous interpretation should not take place in isolation from other interpretative guidelines. It should accord to the general object and purpose of the Convention, and, as a consequence, not lead to a backward evolution or to ineffective solutions.⁵¹⁷ When the Court is inspired by external instruments for autonomous interpretation, it actually looks for a more global ‘ordinary meaning’, not only attached to textual and consensual arguments, but also to contextual arguments.⁵¹⁸ Such an autonomous meaning could reflect a (progressive) ‘evolution’, the most ‘effective’ solution, or the interpretation that serves best the ‘object and purpose’ of the Convention.

729. In jurisprudential practice, as appears from our case law study, the mobilization of a method of external instruments is almost never attached to the principle of autonomous interpretation. When the Court finds inspiration in a diversity of international instruments and when it, by doing so, deviates from the viewpoint of the respondent State, we recommend the Court to refer more explicitly to the principle of autonomous interpretation (possibly in combination with other principles). Moreover, this would correspond to the interpretative rules of the VCLT, which, under some conditions, confers the legal validity to the interpretative technique of autonomous reasoning.⁵¹⁹

⁵¹⁶ Also Senden points at the role of ‘comparisons’ in connection to autonomous interpretation and includes some examples in this respect. H. Senden, *op. cit.*, p. 262.

⁵¹⁷ F. Vanneste, *op. cit.*, p. 337.

⁵¹⁸ See in a similar sense: *ibidem*, p. 338.

⁵¹⁹ For more on this issue, see *infra* Part III, Chapter 1, § 4.3.

§ 4.2.4. Margin of appreciation

730. The Strasbourg interpretative technique of offering States a ‘margin of appreciation’ reflects the other side of the coin of an ‘evolutive’ interpretation.⁵²⁰ ‘Evolutive’ interpretation generally pushes the Convention in a certain (progressive) direction based on (emerging) consensus. This sometimes triggers allegations of judges affording themselves too much freedom and power. The doctrine of the margin of appreciation, on the contrary, hinders ‘evolutive’ interpretation and corresponds to the idea opposite to ‘judicial activism’, *i.e.* ‘judicial restraint’.⁵²¹ In the absence of consensus, the Court generally offers the respondent States some freedom of manoeuvre, confirming its role as a subsidiary body.⁵²²

731. The specific aim of the Court offering a margin of appreciation is to take local views into account and to accept various solutions in different States, depending on some local particularities.⁵²³ The margin leaves room for pluralism and divergences among Member States.⁵²⁴ Therefore, the technique most often appears in cases touching on sensitive issues.⁵²⁵ It builds on a ‘better-placed’ argument, implying that national authorities are sometimes in a better position than the Court to undertake a specific assessment and to decide which restrictions to human rights are necessary in the light of the internal conditions.⁵²⁶ Offering the authorities a margin of assessment has proven particularly useful in cases involving balancing of human rights.⁵²⁷

⁵²⁰ J. H. Gerards, *op. cit.*, 2011, p. 79; F. Vanneste, *op. cit.*, p. 323; P.G. Carozza, “Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights”, *Notre Dame L. Rev.* 1997-98, vol. 73, p. 1220.

⁵²¹ F. Vanneste, *op. cit.*, pp. 320 and 323.

⁵²² J.H. Gerards, *op. cit.*, 2011, pp. 184-185; K. Dzetsiarou, *op. cit.*, p. 139.

⁵²³ On the doctrine of the ‘margin of appreciation’, see R.St.J. Macdonald, “The Margin of Appreciation”, in R.St.J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht/Boston/London, 1993, pp. 83-124; P. Mahoney *et al.*, “The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice”, *Human Rights Law Journal* 1998, vol. 19, pp. 1-36; E. Brems, “The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights”, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 1996, vol. 56, pp. 240-341; E. Brems, “The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe”, in D.P. Forsythe, P.C. McMahon (eds), *Human Rights and Diversity: Areas Studied Revisited*, University of Nebraska Press, Lincoln, 2003, pp. 81-110; S. Greer, “The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?”, *UCL Human Rights Review* 2010, vol. 3, pp. 1-14; F. Mena Parras, “Democracy, Diversity and the Margin of Appreciation: a Theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights”, *Revista Electronica de Estudios Internacionales* 2015, vol. 29, pp. 1-18; F. Vanneste, *op. cit.*, p. 320; M. Ambrus, *op. cit.*, pp. 356-360.

⁵²⁴ The case of *Handyside v. the United Kingdom* is generally considered as the basis for the recognition of the margin of appreciation-doctrine. ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, especially paras. 48-49. See also J. H. Gerards, *op. cit.*, 2011, pp. 184 *et seq.*

⁵²⁵ E. Benvenisti, *op. cit.*, p. 843; J. H. Gerards, *op. cit.*, 2011, p. 79.

⁵²⁶ J.H. Gerards, *op. cit.* 2011, pp. 184-185; F. Vanneste, *op. cit.*, p. 320.

⁵²⁷ S. Greer, “The Margin of Appreciation. Interpretation and discretion under the European Convention on Human Rights”, Council of Europe Publishing, 2000, pp. 18 *et seq.*, available at [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf) (visited on 23 January 2017); F. Vanneste, *op. cit.*, 2007, p. 320.

732. The existence or absence of a consensus is the most important element to establish the width of the margin of appreciation.⁵²⁸ Therefore, it is said that the most common way that the consensus is applied “...is as a means of mediation between dynamic interpretation and the margin of appreciation”.⁵²⁹ When there is consensus on a certain issue, the Court normally offers a narrow margin of appreciation granting a State little discretion. Generally, when a State acts in accordance with a consensus, it is likely that there will be no violation.⁵³⁰ If a State deviates from a consensus, the Court’s examination will become more severe, and it will closely look into the facts of the case, the existence of alternatives, the interests involved, *etc.* Then, the Court is likely to impose its own solution to the case. On the contrary, in the absence of consensus, the Court generally affords a wide margin to the States, leaving space for various solutions and/or only exercising some procedural supervision (did the national authorities consider the issue in a procedurally correct manner?).⁵³¹ Also a wide margin might be overstepped and lead to a violation of the Convention.⁵³² Therefore, a lack of consensus establishes a rebuttable presumption in favor of the solution that had been adopted by the State, but it does not automatically excuse the States’ actions or omissions.⁵³³

733. Most often, the technique of the margin of appreciation is linked to the phase in which the ECtHR considers whether interference with the Convention could be justified. Generally, it does not guide the interpretation of the Convention, but it points at the freedom of manoeuvre Member States have in offering different solutions for similar situations. It does not lead to more convergence between the Member States, but allows a certain degree of diversity in the application of the treaty.⁵³⁴ It offers a way to mitigate tension between a need for uniformity and respect for diversity.⁵³⁵

734. The doctrine of the margin of appreciation is often criticized, mostly because of its weak and inconsistent procedural methodology and scope. More substantive challenges have also emerged. The doctrine is said to violate moral values of human rights by tolerating questionable practices and decisions and by giving too much space to State interests, to the detriment of a uniform and high protection of human rights.⁵³⁶ However, also beneficial

⁵²⁸ Other elements include: the nature of the rights, the context of the State, the nature of the restriction, the role of the domestic policy maker, *etc.* More elaborate, see F. Vanneste, *op. cit.*, pp. 327-330; J. H. Gerards, *op. cit.*, 2011, pp. 193-194.

⁵²⁹ K. Dzehtsiarou, *op. cit.*, 2015, p. 23.

⁵³⁰ *Ibidem*, p. 25.

⁵³¹ M. Marochini, *op. cit.*, pp. 69 *et seq.*; F. Vanneste, *op. cit.*, p. 323; J. H. Gerards, *op. cit.*, 2011, p. 191.

⁵³² See for example in ECtHR (GC), *Hirst v. the United Kingdom* (No. 2), 6 October 2005, Appl. No. 74025/01, para.

82. See also F. Vanneste, *op. cit.*, 2009, p. 322.

⁵³³ K. Dzehtsiarou, *op. cit.*, 2015, p. 29.

⁵³⁴ F. Vanneste, *op. cit.*, 2009, pp. 323-324.

⁵³⁵ J.H. Gerards, *op. cit.*, 2011, p. 186. On some occasions, however, the use of the technique might be more ‘substantive’ for instance when it is used to recognize or reject (new) Conventional rules, as a matter of interpretation, see F. Vanneste, *op. cit.*, pp. 324 *et seq.*, including examples of case law.

⁵³⁶ For procedural and/or substantive criticism, see G. Letsas, *op. cit.*, 2007, pp. 121 *et seq.*; M. Marochini, *op. cit.*, p. 74; K. Dzehtsiarou, *op. cit.*, p. 133; R.C.A. White and C. Ovey, *op. cit.*, p. 576; J.H. Gerards, *op. cit.*, 2011, p. 183 and p.

aspects of the technique have been acknowledged. The technique has, for instance, been praised for its ability to avoid controversial judgments, for leaving room for national particularities, for doing justice to the Court's subsidiary role, and for mitigating dangers of non-implementation.⁵³⁷

735. Our case law analysis shows that the referencing practice could be helpful in the light of the margin of appreciation doctrine. There are several Grand Chamber cases in which the intensity of the Court's review was (implicitly) based on whether or not there was a consensus between Member States. However, the methodology of the Grand Chamber is not consistent. Often, the search for a consensus was based only on a collection of internal rules and practices.⁵³⁸ On some occasions, the Court also included external instruments into the comparison. At times, the Court enhanced the internal consensus with CoE instruments (narrowing the margin).⁵³⁹ Furthermore, the Court strengthened the internal consensus with a diversity of 'hard' and 'soft' CoE instruments (narrowing discretion).⁵⁴⁰ The Court also empowered a lacking internal consensus by the absence of consensus in external CoE instruments (widening the margin).⁵⁴¹ In addition, the Court has sometimes paid more attention to the absence of internal consensus than to the presence of an external trend going in another direction, as expressed in CoE instruments (widening the margin).⁵⁴² It also happened that the Court paid less attention to the lack of an internal consensus than to an emerging trend, as demonstrated by CoE instruments (narrowing discretion).⁵⁴³ In addition, some cases show that external instruments – independently from an internal comparison of national law and practices – could point at (the absence of) a shared position or interest (narrowing or widening discretion).⁵⁴⁴ In other cases, EU-instruments have led to the establishment of a lack of consensus (widening the discretion).⁵⁴⁵

736. The latter examples demonstrate that the Court regularly refers to external instruments in a more quantitative manner, where they contribute to the establishment of (a

226; D. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights*, 2nd edition, Oxford University Press, Oxford, 2009, p. 13; M. Ambrus, *op. cit.*, pp. 356 *et seq.*

⁵³⁷ See, more generally about these views: G. Letsas, *op. cit.*, pp. 124-125; M. Marochini, *op. cit.*, p. 74; R.C.A. White and C. Ovey, *op. cit.*, p. 576; J.H. Gerards, *op. cit.*, 2011, p. 256.

⁵³⁸ For an overview of all cases of our pool in which the margin of appreciation had been influenced by an internal comparison of national laws and practices, see *supra*, Part II, footnote 524. Because of the lack of mobilization of external instruments, such a comparison falls outside the scope of this work.

⁵³⁹ ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 112.

⁵⁴⁰ ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 176.

⁵⁴¹ ECtHR (GC), *Animal Defenders International v. the United Kingdom*, 22 April 2013, Appl. No. 48876/08, para. 123.

⁵⁴² ECtHR (GC), *Stummer v. Austria*, 7 July 2011, Appl. No. 37452/02, paras. 104 *et seq.*

⁵⁴³ ECtHR (GC), *Vallianatos and Others v. Greece*, 7 November 2013, Appl. Nos. 29381/09 and 32684/09, paras. 91-92.

⁵⁴⁴ ECtHR (GC), *Roman Zakharov v. Russia*, 4 December 2015, Appl. No. 47143/06, para. 269; ECtHR (GC), *Mangouras v. Spain*, 28 September 2010, Appl. No. 12050/04, para. 86; ECtHR (GC), *Rohlena v. Czech Republic*, 27 January 2015, Appl. No. 59552/08, para. 71; ECtHR (GC), *Khoroshenko v. Russia*, 30 June 2015, Appl. No. 41418/04, para. 133.

⁵⁴⁵ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 256-257. *In casu* this did not influence the margin since the respondent State stood at one end of the spectrum of the divergent approaches.

lack of) a common approach. Furthermore, the Court integrates the content of rather specific and isolated external instruments (not pointing at the existence or absence of a shared position). Then, the Court directly uses the content of a certain instrument to indicate the States' discretion. For instance, external binding and non-binding instruments (of the CoE and the EU) were used because they point at a State's option to take less intrusive measures (limiting the State's freedom of discretion)⁵⁴⁶ or endorse a State's freedom of regulation on a certain matter (broadening the freedom of discretion).⁵⁴⁷

737. The least we can say about a method of external referencing influencing the States' freedom of manoeuvre, is that it does not reflect clear and straightforward patterns. Sometimes, the external instruments are part of an internal logic, sometimes they provide a stronger argument than the outcome of the internal comparison, sometimes they, in themselves, are sufficient to establish a (lack) of consensus (without comparing laws and practices), *etc.* The comparative argument is mostly constructed differently than the comparative argument used within the framework of 'evolutive' interpretation. To enable the latter interpretation, the comparative exercise often has a more 'global' character (including both internal and external comparisons). On the contrary, when the Court establishes (the width of) a margin of appreciation, the comparison is mostly internal and/or makes use of CoE and EU instruments (fitting an internal logic). A firmer methodology might be created with the help of the VCLT.

§ 4.3. The rules of the VCLT as a justification

738. The Court gives shape to several interpretation principles with the help of a method of external referencing. Often, however, the Court does not link the importation of external instruments to these principles. We recommend the Court to mention more explicitly the interpretative principles that might explain some external importations as well as to improve its method in that respect. This could enhance the validity of the method of external referencing in connection to the VCLT. Previously, we have argued how Article 53 ECHR and Article 31 paragraph 3 (c) VCLT could mandate a 'harmonizing' referencing practice by having recourse to co-existing 'hard' applicable law. Here, we demonstrate how a holistic view to the VCLT could offer an incentive and a legal basis for references to a wider diversity of external instruments.

⁵⁴⁶ ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009, Appl. Nos. 27996/06 and 34836/06, para. 48.

⁵⁴⁷ ECtHR (GC), *S.H. and Others v. Austria*, 3 November 2011, Appl. No. 57813/00, paras. 106-107; ECtHR (GC), *Boulois v. Luxembourg*, 3 April 2012, Appl. No. 37575/04, para. 103; ECtHR (GC), *X and Others v. Austria*, 19 February 2013, Appl. No. 19010/07; ECtHR (GC), *Parrillo v. Italy*, *op. cit.*, paras. 180 *et seq.*

739. To explain this argument, we will first address the relevant interpretative rules of the VCLT in a holistic manner (§ 4.3.1.). Subsequently, we will clarify how and when a holistic view tolerates the method of external referencing (§ 4.3.2.). Lastly, we will address several functions of the referencing practice and illustrate how referencing practice could be (better) embedded and legally justified by a combined reading of the rules of the VCLT (§ 4.3.3.).

§ 4.3.1. A holistic view

740. While the ECHR does not offer much guidance for the interpretative process⁵⁴⁸, Articles 31-33 of the VCLT⁵⁴⁹ reflect a general framework of rules of international public law governing interpretation of multilateral international treaties (such as the ECHR⁵⁵⁰).⁵⁵¹ Already in the *Golder*-case of 21 February 1975⁵⁵² the Court held that Articles 31-33 of the VCLT should guide the interpretation of the ECHR.⁵⁵³ Article 31 VCLT contains the general rule of interpretation and Article 32 VCLT is about supplementary means of interpretation. These provisions read as follows:

Article 31 - General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

⁵⁴⁸ The only rule that touches upon human rights interpretation, is found in the human rights safeguard of Article 53 ECHR. The meaning and relevance of this article in respect of external referencing practice had been discussed earlier, see *supra* Part III, Chapter 1, § 3.1.

⁵⁴⁹ Articles 31-33 VCLT offer a general framework of interpretation whereby the general rule of interpretation is reflected in Article 31 and the supplementary means of interpretation in Article 32. The VCLT in its entirety contains the essential rules about the establishment, interpretation, application, modification and termination of treaties, introducing important concepts such as *jus cogens*. F. Vanneste, *op. cit.*, p. 49. For some standard works on the law of treaties, see *Draft Articles on the Law of Treaties with Commentary*, ILC, Yearbook 1966, Vol. II, pp. 177-274; T. Elias, *The Modern Law of Treaties*, Sijthoff, Leiden, 1974, 272p.; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, Manchester, 1984, 270 p.; L. McNair, *The Law of Treaties*, Clarendon Press, Oxford, 1986, 789 p.; P. Reuter, *Introduction to the Law of Treaties*, 1989; M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties*, Eleven, 2005, 398 p., all quoted by F. Vanneste, *op. cit.*, p. 46, footnote 142. See also: O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford University Press, Oxford, 2011, 2176 p.

⁵⁵⁰ The ECHR is an international treaty bound to follow the rules of interpretation of treaties set out in the VCLT. G. Letsas, *op. cit.*, 2007, p. 58.

⁵⁵¹ F. Vanneste, *op. cit.*, p. 32. Most but not all provisions of the VCLT codify general international law (*ibidem*, p. 47). This means that most rules of the VCLT are "...essential norms of international law that must be respected, unless State Parties have clearly departed from it in a specific treaty" (*ibidem*, p. 49). Articles 31-33 VCLT belong to general international law: see, J. Arato, *op. cit.*, pp. 351-352. They also apply to human rights treaties, see S. Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System. Theory, Practice and Prospect*, Intersentia, Cambridge/Antwerp/Portland, 2013, *op. cit.*, p. 22, with reference to M. Scheinin, "Impact on the Law of Treaties", in M.T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law*, Oxford University Press, Oxford, 2009, pp. 27 and 28.

⁵⁵² The Court in this case said more particularly that it is "...prepared to consider ...that it should be guided by Article 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of the Treaties. ...[I]ts Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion...", ECtHR, *Golder v. the United Kingdom*, 21 February 1975, Appl. No. 4451/70, para. 29. See also J.H. Gerards, *op. cit.*, 2011, p. 16. This case is very important as it lays down the basis for the interpretative principles of the Court. More elaborate on this case, see G. Letsas, *op. cit.*, 2007, pp. 61 *et seq.*

⁵⁵³ Articles 31-33 VCLT constitute Section 3 of the VCLT: "Interpretation of treaties". Article 33 VCLT is about treaties that are authenticated in two or more languages. This provision is not of particular relevance in respect of external referencing practice.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 - Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

741. The VCLT offers a ‘general framework’ for interpretation with a certain degree of flexibility; the precise content of this framework is subject to interpretation and development and it leaves room for different theories of interpretation.⁵⁵⁴ One of these theories (or ‘schools’) adopts a holistic perspective, which exists next to (and which can be challenged by) other perspectives.⁵⁵⁵

742. A holistic or inclusive view approaches the process of interpretation as ‘a single combined operation’ and reads the different elements of Articles 31 (and 32 VCLT) as a single integrated rule. It considers the various aspects of Article 31 of the VCLT as equal, without there being a hierarchy.⁵⁵⁶ The main elements of Article 31 VCLT include interpretation in good faith in accordance with the ordinary meaning of the terms (alluding at the *text* of the treaty), interpretation in accordance with the *internal context* of the treaty

⁵⁵⁴ Arato says in respect of the rules of the VCLT that “...it should be borne in mind that the rules themselves are subject to interpretation”. J. Arato, *op. cit.*, p. 352. French acknowledges that the VCLT “...sets out certain basic rules of interpretation – rules that have also been endorsed as reflecting general international law – they are no more than a starting point for a treaty interpreter, and invariably offer more than one possible result. The indeterminate nature of treaty interpretation thus provides international judicial and arbitral tribunals with just the necessary degree of flexibility to fashion their own reasoning, hopefully without either exceeding jurisdictional limits or transgression expectations of the adjudicative function”. D. French, *op. cit.*, pp. 281-282. See also F. Vanneste, *op. cit.*, pp. 217 and 218 and references there.

⁵⁵⁵ For an overview of different view of interpretation and on the different schools of interpretation, see O. Corten, *op. cit.*, pp. 209 *et seq.*; F. Vanneste, *op. cit.*, pp. 217-218 and pp. 221 *et seq.* As Vanneste observed, the teleological school is the most controversial.

⁵⁵⁶ See, more elaborate: *ibidem*, p. 220 and pp. 225-226, and references there.

(including the text, the preamble and the annexes, and instruments and agreements related to the treaty), interpretation in the light of the *object and purpose* of the treaty, and interpretation in the light of, what we call, the *external context* of the treaty (subsequent agreements between the parties regarding the interpretation or application of the treaty, subsequent practice in the application of the treaty establishing the agreement of the parties regarding its interpretation, and rules applicable in the relations between the parties).

743. Because of the necessary interaction of these different elements (the text of the Convention, the ‘internal’ and ‘external’ context of the treaty, and the object and purpose of the treaty), a holistic approach combines different ‘schools’ or methods of interpretation such as textual interpretation⁵⁵⁷, teleological interpretation⁵⁵⁸, intentional (and consensual) interpretation⁵⁵⁹, and systemic and contextual interpretation⁵⁶⁰. The fact that textual interpretation, teleological interpretation, and systemic interpretation all appear in the VCLT as part of a general rule of interpretation could be considered as an indication that there is no hierarchy among them.⁵⁶¹
744. Several commentators have supported a combined approach to the VCLT, especially in human rights interpretation. Schlütter, for instance, favors a combined approach to different interpretative techniques and principles in the specific context of human rights interpretation, which, according to her view, requires attention for dynamism, for the (systemic) context, and for effectiveness.⁵⁶² Also Corten seems to support a combined reading by noting that a ‘good’ interpretation, *inter alia*, reconciles as much as possible the different means of interpretation as represented in Articles 31-33 of the VCLT.⁵⁶³ In practice, also the Court’s own approach generally corresponds to a holistic reading of the latter provisions, without establishing a clear hierarchy.⁵⁶⁴

⁵⁵⁷ A textual interpretation looks at the intention of the parties as expressed in the text. As words do not speak for themselves, it appears from Strasbourg case law that this method is almost never sufficient. See, more elaborate *ibidem*, pp. 221-222; H. Senden, *op. cit.*, pp. 50 *et seq.*

⁵⁵⁸ A teleological method starts from the idea that one should interpret the text so that it fulfills the aim and object of the treaty as a whole and of an individual provision. This can be seen as a variant of a textual approach (considering that the object and the purpose stem from the text and the preamble), or as a variant of an intentional approach (what were the aims of the parties?), or the object and purpose can also be put in light of the subsequent developments in international law (alluding at an ‘object and purpose’ that can ‘evolve’ over time and that could thus also be considered at the time of interpretation). The latter approach to the teleological school will be of particular relevance for external referencing (but is often linked to ‘judicial activism’). See, more general: F. Vanneste, *op. cit.*, pp. 224-225; H. Senden, *op. cit.*, p. 91 and pp. 97-100.

⁵⁵⁹ A subjective or intentional interpretation puts large stress on discovering the intentions of the parties. Vanneste makes us aware that ‘the common intentions’ do often not exist and are in fact an illusion (there might be ambiguous terms, parties might give other meanings to the wording, etc.). See, more general, F. Vanneste, *op. cit.*, pp. 222-223 and references there.

⁵⁶⁰ Note that some authors use the term of ‘systemic interpretation’ only to allude at an interpretation method that takes account of the ‘internal context’ of a treaty including the different provisions and the protocols and other ‘internal’ documents that the interpreter should read ‘as a whole’. See H. Senden, *op. cit.*, pp. 59-61.

⁵⁶¹ H. Senden, *op. cit.*, pp. 47-50.

⁵⁶² B. Schlütter, *op. cit.*, pp. 316 *et seq.*

⁵⁶³ O. Corten, *op. cit.*, pp. 221-222.

⁵⁶⁴ See F. Vanneste, *op. cit.*, 2011, p. 830. R.C.A. Ovey and C. White, *op. cit.*, pp. 64-65. While Ovey and White acknowledge that the Court itself considers the interpretation process as a single complex operation, they also

745. A holistic approach to the VCLT attaches importance to an interaction of the different elements of the general rule of interpretation. Vanneste argues that the special Strasbourg' interpretative principles (including 'evolutive' interpretation, an interpretation that renders rights 'practical and effective', *etc.*) generally fit a holistic view of the VCLT. In his opinion, the special Strasbourg interpretation techniques, although they add some specific accents to the interpretation process, generally develop and enrich the VCLT without contradicting it.⁵⁶⁵ Christoffersen, in a similar sense, claims that the particular methods of human rights interpretation are in fact not that 'special' as they generally fit the overall framework of treaty interpretation as codified in the VCLT.⁵⁶⁶ Also Schlütter notes that dynamic interpretations (in line with the principle of effectiveness) fit the legal provisions of the VCLT.⁵⁶⁷ While the latter authors argue that specific human rights interpretation might comply with the VCLT, others do not entirely agree with their view. On the one hand, there are authors that challenge the specific interpretation methods of the Strasbourg Court.⁵⁶⁸ On the other hand, some authors support the specific interpretation principles but consider that there should be a cautious reading or a modification of the VCLT, or that the VCLT does not offer an appropriate framework to interpret human rights law, which is of a specific nature.⁵⁶⁹

note that in practice, the object and purpose of the provision read together with the context of the ECHR as a whole has the most influence as an interpretative principle.

⁵⁶⁵ F. Vanneste, *op. cit.*, 2009, p. 55, p. 336 and pp. 345 *et seq.* To his view, the specific techniques do thus mostly not witness 'human rightism', which alludes to a particular human rights approach moving away from general international law.

⁵⁶⁶ J. Christoffersen, "Impact on General Principles of Treaty Interpretation", in M. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law*, Oxford University Press, Oxford, 2009, pp. 43 and 50.

⁵⁶⁷ B. Schlütter, *op. cit.*, pp. 316 *et seq.*

⁵⁶⁸ Some authors stress that there is, particularly in light of the Court's external referencing practice, an increasing "...isolationist stance of the Court in developing "special" hermeneutic canons, allegedly not grounded in the customary rules of treaty interpretation, codified in the VCLT" and that the Court, particularly in its concrete use of Article 31 paragraph 3 (c) VCLT for purposes of 'systemic integration' (going beyond this provision), "...disintegrates customary rules of treaty interpretation". C. Pitea, *op. cit.*, 2014, p. 7. This author mobilizes the case law of *Demir and Baykara v. Turkey* and the explanation by the Court of external referencing practice in this case, to argue that the Court "...seems to be ready to bend generally accepted rules of interpretation to a breaking point and beyond". Further in his reasoning, however, Pitea introduces some nuances by stressing that the Court's interpretative techniques do not necessarily contradict the VCLT. See C. Pitea, *op. cit.*, 2014, p. 12.

⁵⁶⁹ Ovey and White acknowledge the general guidance the VCLT offers to the Strasbourg Court, but they also stress that it should be applied with caution because of the *lex specialis* character of the ECHR. R.C.A. White and C. Ovey, *op. cit.*, pp. 65-66. Scheinin pleads in favor of a modified application of the VCLT to human rights treaties. M. Scheinin, *op. cit.*, 2009, pp. 27 and 28, referred to by S. Alemahu Yeshanew, *op. cit.*, p. 22. Authors as Craven and Giegerich have questioned whether it is appropriate to interpret human rights treaties in light of the general rules of interpretation of the VCLT: M. Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law", *EJIL* 2000, vol. 11, no. 3, pp. 497-499; T. Giegerich, "Reservations to Multilateral Treaties", in *Max Planck Encyclopedia of Public International Law*, 2010, available at <http://www.mpepil.com> (visited on 18 April 2016), para. 31.

§ 4.3.2. The VCLT-rules as incentives to give effect to external instruments

746. When the Court finds support in external instruments but stays close to the ordinary wording and the ‘object and purpose’ of the Convention, an interpretation is not likely to be controversial. Then, there is a clear textual and consensual basis, which could easily be covered by the different elements of Article 31 of the VCLT. Then, external instruments could still operate as an additional argumentative support under Article 32 VCLT (confirming or fine-tuning a reasoning that followed from a textual and teleological interpretation).
747. When the Court enters a more dynamic interpretation on the basis of external instruments, creating rights in the margin of the text of the Convention and/or revising its previous case law, the interpretation might become more controversial. When such a dynamic interpretation (partly) builds on external instruments, these instruments might produce more independent normative effects. To justify such a dynamic interpretative process, we find guidance in a framework that combines the different elements of the interpretative aspects of the VCLT. Regarding the usage of external instruments, the aspect of the ‘external context’ is particularly relevant. This context may be covered by Article 31 paragraph 3 (a), (b) and (c) of the VCLT (and Article 32 ECHR).
748. Article 31 paragraph 3 (c) VCLT mandates the Court to harmoniously integrate ‘hard’ and applicable external instruments. Consensual interpretation justifies such a reasoning.⁵⁷⁰ The obligatory aspect of this provision only concerns a specific type of binding external instruments. However, other external instruments could have interpretative value, too. Could they be legally covered as a proof for ‘State agreement’ or ‘State practice’ under, respectively, Article 31 paragraph 3 (a) VCLT and Article 31 paragraph 3 (b) VCLT?
749. In connection with the referencing practice, so far, Article 31 paragraph 3 (a) and (b) VCLT has not received much attention in legal doctrine.⁵⁷¹ Also our pool of Grand Chamber cases did not offer much information on how the Court interprets these provisions. The only case of the pool that seems relevant is *Hassan v. the United Kingdom*. In this case, the Grand Chamber made use of Article 31 paragraph 3 (b) VCLT to stress that:

⁵⁷⁰ Because of this consensual basis, this reading of Article 31 paragraph 3 (c) VCLT does not seem very controversial. However, it could be challenged by the idea that the Court’s should not ‘supervise’ external instruments, and that only the ECHR falls under the Court’s competence. Moreover, we have argued (see *supra*, Part III, Chapter 1, § 3.3.4.) that also a clear line of jurisprudence or General Comments of the UN Treaty Bodies could be brought under this provision because these materials are necessarily connected to the ‘hard’ instrument in relation to which they had been developed (like the ICCPR, or the CAT, *etc.*). The latter proposal is controversial and foregoing. Views and General Comments of the Treaty Bodies might rather be brought under Articles 31 paragraph 3 (a) and (b) VCLT. See *infra*, paras. 753-755.

⁵⁷¹ See however: B. Schlütter, *op. cit.*, pp. 289-292 and pp. 316 *et seq.* and C. Pitea, *op. cit.*, 2014, pp. 9-10.

“... a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention (see, *mutatis mutandis*, *Soering v. the United Kingdom*, 7 July 1989, §§ 102-103, Series A no. 161 and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 120, ECHR 2010)”.⁵⁷²

750. The merits of the *Hassan* case do not offer good insights into how the ECtHR conceives the role of Article 31 paragraph 3 (b) VCLT in relation to external instruments. The separate opinion of Judge Spano sheds some more light on the issue. The separate Judge, including a reference to a book of Magdalena Forowicz on Strasbourg’s reception of international law⁵⁷³, held that the Court had *implicitly* made use of the provision when it characterized the Convention as a ‘living instrument’.⁵⁷⁴ In general, as the separate Judge noted, the Court was rather prudent when applying Article 31 paragraph 3 (b) VCLT, allowing it to cover only

“... subsequent practice common to all Parties, as well as requiring that the practice be concordant, common and consistent. Subsequent practice of States Parties which does not fulfill these criteria may only constitute a supplementary means of interpretation of a treaty (see *Report of the International Law Commission on the Work of the Eighteenth Session* (Geneva, 4 May to 19 July 1966), 1966 (2) Yearbook of the International Law Commission 173, p. 222)”.⁵⁷⁵

751. Generally, there is only limited doctrine and case law about the concepts of ‘subsequent agreement’ and ‘subsequent practice’. Recently, however, the ILC developed several reports on the issue (inspired by some national and international case law and legal doctrine).⁵⁷⁶ According to these reports, ‘subsequent agreement’ and ‘subsequent practice’,

⁵⁷² ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 101. The Court then mentioned aspects of State practice under Article 5 ECHR (“The practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts”) as well as under the ICCPR (“...the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights”). The Court thus considered State practice under certain (external) provisions but it did not use the content of external instruments themselves (like for instance the content of ‘soft’ international instruments) to prove that there is a certain State practice.

⁵⁷³ M. Forowicz, *op. cit.*, p. 38.

⁵⁷⁴ Partly dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva to the case of ECtHR (GC), *Hassan v. the United Kingdom*, 16 September 2014, Appl. No. 29750/09, para. 13.

⁵⁷⁵ *Ibidem*.

⁵⁷⁶ Between 2013 and 2016, the UN Special Rapporteur Georg Nolte has finalized four reports of the ILC on “subsequent agreement and subsequent practice in relation to the interpretation of treaties”. *First report on subsequent agreements and subsequent practice in relation to treaty interpretation*, Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/660 (19 March 2013) (hereafter: ‘ILC first report’); *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/671 (26 March 2014) (hereafter: ‘ILC second report’); *Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/683 (7 April 2015) (hereafter: ‘ILC third report’); *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Report of the International Law Commission by Special

respectively covered by Article 31 paragraph 3 (a) and (b) VCLT, allude to “objective evidence of the understanding of the Parties” and constitute “authentic means of interpretation”.⁵⁷⁷ The difference between (a) and (b) lies in the fact that a subsequent agreement between *all* the parties should, in any case, be taken into account⁵⁷⁸, while ‘subsequent practice’ only has this effect if it “...shows the common understanding of the parties as to the meaning of the terms”.⁵⁷⁹ The ILC defines ‘subsequent practice’ as “...conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application”.⁵⁸⁰ Nevertheless, such practice should point at (silent) agreement of *all* parties.⁵⁸¹ ‘Agreement’ is necessary under both (a) and (b) and should reflect a ‘common understanding’, but it does *not* have to reflect an agreement that is legally binding.⁵⁸² ‘Subsequent agreement’ and ‘subsequent practice’, possibly supported by ‘soft’ instruments, could clarify the meaning of a treaty in interaction with other means of interpretation, also when this would lead to ‘evolutive’ interpretation.⁵⁸³ The weight of the subsequent agreement or practice as a means of interpretation depends on its clarity and specificity.⁵⁸⁴

752. Since (‘soft’ or ‘hard’) external instruments could constitute a ‘legal agreement’ or ‘legal practice’, they might be covered by Article 31 paragraph 3 (a) and (b) of the VCLT. In the first place, and in a Strasbourg context, these provisions might give relevance to ‘soft’ political instruments elaborated by States expressing an agreement about the interpretation of the Convention. Thereby, we think in particular of ‘soft’ instruments of the CoE COM and the PACE, and decisions of Conferences of State parties.⁵⁸⁵ Also Conventions that are not yet

Rapporteur Georg Nolte, UN doc. A/CN.4/694 (7 March 2016) (hereafter: ‘ILC fourth report’). See also: *Subsequent agreements and subsequent practice in relation to the interpretation of treaties. Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading*, International Law Commission, UN doc. A/CN.4./L.874 (6 June 2016) (hereafter: ‘ILC Draft conclusions’).

⁵⁷⁷ ‘ILC first report’, *op. cit.*, para. 30 and references there. See also ‘ILC Draft conclusion’, *op. cit.*, no. 3.

⁵⁷⁸ An agreement, refers to an “agreement between *all* the parties to the treaty”: ‘ILC first report’, *op. cit.*, para. 79.

⁵⁷⁹ *Ibidem*, para. 70.

⁵⁸⁰ *Ibidem*, para. 118.

⁵⁸¹ “The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31 (3) (b) may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction”. (‘ILC draft conclusions’, *op. cit.*, no. 10.2).

⁵⁸² *Ibidem*, no. 10. The ‘agreement’ or the ‘practice’ pointing at agreement should not be formal (‘ILC second report’, *op. cit.*, para. 54). In addition, it should, as such, not be legally binding (*ibidem*, para. 56). A certain (non-binding) common understanding is sufficient (*ibidem*). The ILC explicitly admitted that “Subsequent agreements and subsequent practice under article 31 (3) (a) and (b), even if they are not in themselves legally binding, can nevertheless, as means of interpretation, give rise to legal consequences as part of the process of interpretation according to article 31” (*ibidem*).

⁵⁸³ ‘ILC draft conclusions’, *op. cit.*, no. 7. The ILC indeed explicitly said that subsequent agreement and subsequent practice may guide such ‘evolutive’ interpretation (‘ILC first report’, *op. cit.*, para. 64).

⁵⁸⁴ ‘ILC draft conclusions’, *op. cit.*, no. 9.

⁵⁸⁵ The ILC noted in this respect that Decisions of Conferences of State Parties (for the purpose of reviewing or implementing the treaty) may be included under both provisions as far as it expresses agreement regarding the interpretation of a Treaty (‘ILC second report’, *op. cit.*, para. 94, 111; ‘ILC draft conclusions’, *op. cit.*, no. 11.3.). Indeed, “When a treaty body is composed of State representatives, and which is not an organ of an international organization, is a form of State practice by those States that thereby act collectively within its framework” (‘ILC fourth report’, *op. cit.*, para. 11).

in force could be relevant.⁵⁸⁶ Furthermore, as confirmed by the ILC, also ‘soft’ instruments of international organizations and of non-State actors could be mobilized, but only when they offer a proof of a ‘State practice’ or ‘agreement’.⁵⁸⁷ Thus, collections, reports or analytical studies of international organizations, of NGOs or of the ICRC may be indicative or serve as evidence for relevant State practice”.⁵⁸⁸

753. There has been discussion about whether expert opinion could be considered as a proof for subsequent State agreement or practice. The ILC devoted a separate report (the ‘ILC fourth report’) on this issue and examined, in particular, whether treaty-based expert bodies with members serving in their individual capacity⁵⁸⁹, such as the UN Treaty Bodies, could provide a proof of State practice or State agreement in relation to the UN Treaties. Although the ILC did not focus on treaty-based expert bodies of the CoE (such as the CPT⁵⁹⁰), we think the findings of the ILC could also apply to them, *mutatis mutandis*.

754. The ILC concluded that ‘a pronouncement’ of an expert treaty body might give rise to, or refer to, a ‘subsequent agreement’ and ‘subsequent practice’.⁵⁹¹ More particularly, the views, recommendations and comments of the Treaty Bodies, although they are not legally

⁵⁸⁶ See also in this sense: C. Pitea, *op. cit.*, 2014, pp. 9-10. Under the African human rights protection system, several ‘soft’ instruments are allowed to be mobilized as a proof of subsequent State practice (or State agreement), including regulations, resolutions, and decisions and rules of international organs. S. Alemahu Yeshanew, *op. cit.*, p. 23.

⁵⁸⁷ The ILC, in relation to the question as to which actors could be included as a proof for ‘subsequent practice’, held that “Subsequent practice of the parties to a treaty can be reflected in, or be initiated by the pronouncements or conduct of other actors, such as international organizations or non-State actors. Such initiation of subsequent practice of the parties by international organizations or by non-governmental organizations should not, however, be confounded with the practice by the parties to the treaty themselves. Activities of other bodies may rather constitute evidence of a subsequent agreement or practice of the parties in question”. ‘ILC first report’, *op. cit.*, para. 135. Note that “[t]he conduct of an organ of an international organization in the application of the constituent instrument of the organization may itself constitute a relevant practice for the purpose of the interpretation of such a treaty” (‘ILC third report’, *op. cit.*, para. 86 and ‘ILC draft conclusions’, *op. cit.*, no. 12).

⁵⁸⁸ *Ibidem*, paras. 135, 138 and 142.

⁵⁸⁹ The ILC report is only about expert bodies that consist of members operating in their personal capacity. The ILC acknowledged that “[t]here are also treaties which establish bodies that have the task of monitoring or contributing in other ways to the application of such treaties, including bodies consisting of experts who serve in their individual capacity. Treaty bodies consisting of such experts adopt pronouncements as a form of practice which contributes to the application of the treaty and which may be relevant for the purpose of interpretation of the treaty. The best-known expert bodies are those established under human rights treaties”. ‘ILC fourth report’, *op. cit.*, para. 10. The ILC added that: “[t]he output of a treaty body that is an organ of an international organization (and which may or may not consist of States) is, in the first place, attributed to the organization. Such output may, however, under certain circumstances also be attributed, for the purpose of interpretation, to the States represented therein” (‘ILC fourth report’, *op. cit.*, para. 11), namely sometimes when it concerns resolutions of international organizations and international conferences). The Fourth Report is however not concerned with treaty bodies that consist of States, nor with bodies that are organs of an international organization. Is is concerned with treaty bodies that consist of experts who serve in their individual capacity, like the UN Treaty Bodies (*ibidem*, para. 12).

⁵⁹⁰ The CPT was set up under the Council of Europe’s “European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, which came into force in 1989. It builds on Article 3 of the European Convention on Human Rights, which provides that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. See <http://www.cpt.coe.int/en/about.htm> (visited on 7 November 2016).

⁵⁹¹ ‘ILC draft conclusions’, *op. cit.*, para. 13.3.

binding, might, under some conditions, be relevant for treaty interpretation.⁵⁹² However, as the ILC stresses,

“[a] pronouncement of an expert body under a human rights treaty cannot, as such, constitute subsequent practice under article 31 (3) (b), since that provision requires that a subsequent practice in the application of the treaty establishes the agreement of the parties”⁵⁹³, but “[p]ronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice *by the parties themselves* which establish their agreement regarding the interpretation of the treaty under article 31 (3) (a) or (b)”.⁵⁹⁴

The ILC admits that the latter condition will not be fulfilled easily in practice. It might for instance happen when a General Comment is subsequently followed in a Resolution of the General Assembly, or, when a Treaty Body’s draft General Comment can be commented on by States but do not provoke any objections.⁵⁹⁵

755. Several legal commentators endorse the opinion that the pronouncements of expert treaty bodies could not constitute State practice. Schlütter, for instance, argues that General Comments of UN Treaty Bodies do not reflect ‘agreement’ because they only include the perception of these Bodies while they do not reflect national State practice and implementation. She adds, nonetheless, that such General Comments could fall under Article 31 paragraph 3 (b) VCLT provided that these bodies are conceived as members of a ‘broader international community’ that can “contribute to law-making in that community”.⁵⁹⁶ Other authors point more explicitly at the possibility of mobilizing observations of the Treaty Bodies under Article 31 paragraph 3 (b) VCLT. Alemahu Yeshanew argues that General Comments and other observations of UN Treaty Bodies could be considered as ‘subsequent practice’ or ‘authoritative institutionalized practice’ in the application and the interpretation

⁵⁹² ‘ILC fourth report’, *op. cit.*, paras. 13-16. On the basis of doctrine, and national and international case law, the ILC observed that mostly, other actors did not explain their position on the relevance of the Treaty Bodies’ pronouncements in terms of the general rules of the VCLT (*ibidem*, para. 40). The ILC aimed to fill that gap in the report in question.

⁵⁹³ *Ibidem*, para. 42.

⁵⁹⁴ *Ibidem*, para. 43. The latter position, as the ILC stresses, is recognized by previous studies of the ILC, by States, and by legal doctrine. The ILC said in this regard: “There is indeed no reason why a subsequent agreement between the parties or subsequent practice that establishes the agreement of *the parties themselves* regarding the interpretation of a treaty could not arise from, or be reflected in, a pronouncement of a human rights expert body” (*ibidem*, para. 43). The ILC supported the statement that a pronouncement of an expert treaty body could as such not constitute subsequent State practice, by its observation that the HRC itself “...has abandoned its own proposal to consider its pronouncements to be a form of subsequent practice under article 31 (3) (b)” (*ibidem*, para. 42). Indeed, the HRC, in its draft General Comment no. 33, acknowledged that its ‘general body of jurisprudence’ constitutes subsequent State practice under Article 31 paragraph 3 (b) VCLT, but it abandoned this approach in its final General Comment no. 33, which did no longer refer to Article 31 paragraph 3 (b) VCLT, nor to ‘subsequent State practice’. See *ibidem*, para. 18 and Human Rights Committee, Draft General Comment No. 33, on *The Obligations of States Parties under the Optional Protocol to the ICCPR*, CCPR/C/GC/33/CRP.3, Second revised version as of 8 August 2008, 25 August 2008, at para. 17.

⁵⁹⁵ ‘ILC fourth report’, *op. cit.*, paras. 45-46.

⁵⁹⁶ B. Schlütter, *op. cit.*, pp. 316 *et seq.* and pp. 289-292.

of treaties.⁵⁹⁷ According to Pitea, the practice of treaty and expert bodies could fall under Article 31 paragraph 3 (b) of the VCLT.⁵⁹⁸

756. When an external instrument does not meet the conditions of Article 31 VCLT, for instance, because it does not reflect a full (silent) State agreement, Article 32 VCLT comes into play. Indeed, according to the ILC, State practice that reflects incomplete agreement could be useful as a subsidiary means of interpretation under that provision.⁵⁹⁹ The same counts for the pronouncements of expert treaty bodies that do not offer a proof of State practice. The ILC holds that there is no legal obligation to take these pronouncements into account, but that “...an individual pronouncement normally carries less weight than a series of pronouncements or a general comment reflecting a settled position on a question of interpretation (“jurisprudence” or “case law”)”.⁶⁰⁰

757. Our case law analysis shows that the Grand Chamber regularly imports ‘soft’ political instruments to (partly) support its (‘evolutive’) reasoning. We could say that, on those occasions, the Court implicitly alludes to the relevance of Articles 31 paragraph 3 (a) and (b) of the VCLT. The Court almost never invokes these provisions explicitly, while this could enhance the validity and transparency of the referencing practice. The rules as explained by the ILC are however quite rigid. We are of the opinion that the Strasbourg Court, as a specific human rights Court, could afford itself some more flexibility, without manifestly contradicting the VCLT-framework. This flexibility plays in respect of two aspects in particular.

758. *Firstly*, the ILC stresses that ‘State agreement’ or ‘State practice’ under Article 31 of the VCLT concerns conduct that specifically relates to the interpretation and application of the treaty that is under consideration.⁶⁰¹ When the Court, for instance, refers to ‘State

⁵⁹⁷ S. Alemahu Yeshanew, *op. cit.*, p. 25.

⁵⁹⁸ C. Pitea, *op. cit.*, 2014, pp. 9-10.

⁵⁹⁹ ‘ILC first report’, *op. cit.*, para. 81. In its fourth report, the ILC said that “[l]ike the practice of international organizations, pronouncements of expert bodies cannot themselves be a form of subsequent practice under Article 31 (3) (b). It is, however, their purpose under the treaty to contribute to its interpretation. That means of interpretation is “supplementary” in the sense of article 32 and, in contrast to the subsequent practice under article 31 (3) (b), there is no strict obligation to take them “into account”. Pronouncements of expert bodies may also ‘contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty’ without being themselves one of those primary means of interpretation under article 31 (1)”. ‘ILC fourth report’, *op. cit.*, para. 62. Thus, the pronouncements of human rights expert bodies are, as such, supplementary means under article 32 (*ibidem*, para. 63).

⁶⁰⁰ *Ibidem*, paras. 54-55. The ILC added that “[t]he interpretative weight of a general comment, for the purpose of interpretation, accordingly depends on whether it reflects a thoroughly considered view of the Committee regarding the actual legal content (*lex lata*) of certain provisions of the Covenant, in particular whether the general comment is based on repeated engagement by the Committee with certain specific cases or situations”, and that “[t]he level of acceptance of a particular pronouncement, or series of pronouncements, by States parties is also an important factor that determines the degree to which States, and their courts, should or need to take them into account”. *Ibidem*, para. 56.

⁶⁰¹ The ILC stressed that it should really concerns conduct “regarding the interpretation of the treaty”, not about conduct “in the wider context”. It added that “...the more specifically an agreement of a practice is related to a treaty the more probative or interpretative value it can acquire...”. ‘ILC second report’, *op. cit.*, para. 10.

practice' (possibly expressed through external instruments) of the Member States of the CoE under the ICCPR, this 'State practice' actually relates to the interpretation of the ICCPR, rather than to the interpretation of the ECHR. Since some provisions of the Convention are comparable to provisions of external catalogues and since the Convention's provisions are framed broadly, we are of the opinion that this condition could be construed with some flexibility. State practice does *not* have to *directly* relate to how States interpret and apply the Convention text, it suffices that it relates to their visions and opinions on aspects of human rights more broadly (as long as these visions and opinions demonstrate relevant conduct for the understanding of human rights of the ECHR).

759. *Secondly*, the ILC is quite strict with regard to the amount of States that should observe a certain practice or agreement; there is only an obligation for the interpreter to take account of State practice when it reflects a 'common understanding'. Thus, a single objection by one Member State suffices to no longer speak of a State practice or agreement under Article 31 paragraph 3 (a) and (b) VCLT. Admittedly, our view in respect of Article 31 paragraph 3 (c) VCLT strictly pertains to this matter; the Court is only mandated to give a binding effect to rules that are applicable between *all* Member States. The difference with Article 31 paragraph (a) and (b) is that, although the Court is obliged to take account of 'State agreement' and 'State practice', it is not compelled to give these provisions a binding effect. Moreover, in line with the specific character of human rights law, not every interpretation needs to be backed up by full State consent or State practice. The Grand Chamber seems to share this view.⁶⁰² We argue for a middle ground in this respect: the search for '*opinio juris* under the treaty'.⁶⁰³

760. The search for *opinio juris*, as demonstrated by Vanneste, fits a holistic reading of the relevant interpretative elements of Article 31 and 32 of the VCLT because it acknowledges the relevance of the text of the Convention (there can be no interpretation that goes against the text, except when there is a *full* agreement between all the Member States)⁶⁰⁴, of State consent (there should be, at least, an observation of emerging or ambiguous State consensus), of the external context, and of the object and purpose, in a combined manner.⁶⁰⁵ Therefore,

⁶⁰² See above under the examples of 'evolutive' interpretation, which are not always backed up by full State consent. Also the first ILC report observed that the Strasbourg Court makes implicit use of Article 31 paragraph 3 (b) VCLT, namely on those occasions on which the Court confirmed that uniform, or *largely uniform* national legislation or domestic administrative practice could constitute 'subsequent practice' (own emphasis). 'ILC first report', *op. cit.*, para. 37. According to this first report, the Court, whenever it entered 'evolutive' interpretation on the basis of State, social, or international legal practice and orientation, in fact made implicit use of Article 31 paragraph 3 (b) VCLT. *Ibidem*, para. 38. Since 'evolutive' interpretation as exercised by the Court is not always backed up by full State consent, even the ILC thus seemed to leave open the possibility to (partly) justify such reasoning by reference to Article 31 paragraph 3 (b) VCLT.

⁶⁰³ Elaborate on this issue, see *supra*, Part III, Chapter 1, § 4.2.1., C.3.

⁶⁰⁴ As remarked by Judge Sicilianos, the Court, as a general rule, has carefully avoided interpretations '*contra legem*'. See Concurring opinion of Judge Sicilianos, joined by Judge Raimondi, to ECtHR (GC), *Magyar Helsinki Bizottság v. Hungary*, *op. cit.*, paras. 11-13.

⁶⁰⁵ See F. Vanneste, *op. cit.*, 2009, pp. 339 *et seq.* See also G. Letsas, *op. cit.*, 2007, p. 59.

external instruments – even when ‘soft’ – could be imported in a legally valid manner to offer support for a search for ‘*opinio juris* under the treaty’.

761. What does this mean in practice? Actually, Articles 31 paragraph 3 (a) and (b) VCLT could be used to justify political ‘soft’ instruments that point at State agreement on a human rights matter, also when this leads to a “wider interpretation”.⁶⁰⁶ Political ‘soft’ instruments that have not faced any objections might gain a stronger weight than others but, in our view, it is not necessary that they reflect a full common agreement. Moreover, because such instruments fall under Article 31 paragraph 3 (a) and (b) VCLT, the Court is obliged to take them into account (but not to give them a binding effect). The same applies to non-binding instruments of judicial or private origin, but only under the condition that they clearly point at some degree of ‘State practice’. The existence of a certain degree of State practice, possibly evidenced by external instrument, however, is not sufficient to support a dynamic interpretation. What ultimately counts is whether there is ‘*opinio juris* under the treaty’. If the latter can be established, this should be a strong incentive for the Court to give effect to this observation. ‘Soft’ instruments that do not point at any ‘State practice’ do not fall under Article 31 paragraph 3 (a) and (b) VCLT. Whereas the Court is not compelled to take them into account, they could contribute as additional convincing elements in the establishment of ‘*opinio juris* under the treaty’ (in the spirit of Article 32 ECHR).

§ 4.3.3. Illustration per argumentative function of the referencing practice

762. External instruments exercise different functions in a Strasbourg decision-making process. Some of these functions, we already addressed. Article 31 paragraph 3 (c) VCLT, for instance, could justify external references with a function of harmonious interpretation.⁶⁰⁷ Also when the Court imports rules of the VCLT in a function of ‘establishing rules about the interpretation and execution of treaties’, this reflects an example of ‘systemic integration’ in line with Article 31 paragraph 3 (c) VCLT.⁶⁰⁸ In addition, the Court sometimes refers to external instruments because they disclose (the absence of) a connection between external instruments and States’ actions or omissions. Here, the text of the Convention itself, because it requires establishing a ‘legal basis’ or a ‘legitimate aim’ for the interference, explains such references.⁶⁰⁹ In addition, when a respondent State mentions the external normative ‘roots’ of certain actions to justify its behavior, we said that the Court’s competence, as described in

⁶⁰⁶ The ILC said that subsequent practice “may contribute to a clarification in the sense of confirming a wider interpretation” of the treaty. See *Report of the International Law Commission*, Sixty-sixth session, 5 May – 6 June and 7 July – 8 August 2014, UN Doc A/69/10, p. 180, para. 2, as cited by Judge Sicilianos in his concurring opinion to ECtHR (GC), *Magyar Helsinki Bizottság v. Hungary*, *op. cit.*, para. 29.

⁶⁰⁷ *Supra*, Part II, Chapter 3, § 8 and Part III, Chapter 1, § 3.2.

⁶⁰⁸ *Supra*, Part II, Chapter 3, § 2.

⁶⁰⁹ *Supra*, Part II, Chapter 3, § 7.1. and § 7.2.

the Convention, does not resist to put these ‘roots’ under a ‘harmonious’ human rights supervision.⁶¹⁰

763. Some other ‘functions’ of external referencing have so far not been elaborately discussed under the question of the legal validity. It concerns, more particularly, references to “to allow (or resist) ‘evolutive’ interpretation”, to “clarify and import notions”, to “shape requirements of positive action”, to serve as a “general interpretative support”, and references to “specify a State’s freedom of discretion”. Under some conditions, the importation of external instruments to fulfill these functions, could be legally validated by Article 31 paragraph 3 (c) VCLT or Article 53 ECHR.⁶¹¹ But, what happens when the imported instruments are not ‘hard’ applicable law? A holistic approach to the interpretative rules of the VCLT is useful to enhance the legal validity of such references.

A. Legal validity of references enabling ‘evolutive’ interpretation

764. ‘Evolutive’ interpretation is sometimes controversial. This is not surprising since it has clear impact on the understanding and development of the Convention and since it might be associated with ‘judicial activism’. An ‘evolutive’ reasoning does not only specify the Convention, it also revises and/or expands its scope. In *Demir and Baykara*, the ECtHR accepted the principle of ‘evolutive’ interpretation to be a legal basis for referencing (non-binding) instruments. However, in this case, the Court had not developed a clear legal framework for that purpose.

765. An ‘evolutive’ interpretation of human rights treaties does *in se* not go against the rules of interpretation of the VCLT.⁶¹² We favor an approach that holds a middle ground between the importance of ‘State consent’ some judicial creativity. We find this middle way in connecting ‘evolutive’ interpretation to a search for ‘*opinio juris* under the treaty’. To be legally valid under a holistic approach to the VCLT, ‘evolutive’ interpretation is thus not without boundaries. It should depend on the text, on State consent, on the context and on the (evolving) object and purpose of the Convention and its provisions.⁶¹³ Therefore, we consider an ‘evolutive’ interpretation against a clear Convention text as an avoidable and illegal undertaking. A ‘general belief’ is not enough to change the clear treaty text (*‘in claris cessat*

⁶¹⁰ *Supra*, Part II, Chapter 3, § 7.3.1.

⁶¹¹ Thus for example, also when the Court imports an external definition or notion developed by an external (human rights) instrument applicable between all member States, we argue that the Court could explain and legally validate this importation by making use of Article 53 ECHR and/or by Article 31 paragraph 3 (c) VCLT. For more on both provisions, see *supra*, Part III, Chapter 1, § 3.1. and § 3.2.

⁶¹² R. Higgins, “A Babel of Judicial Voices? Ruminations from the Bench”, *Int. Comp. Law Q.* 2006, vol. 55, pp. 797-798; C. Pitea, *op. cit.*, 2013, p. 555; G. Letsas, *op. cit.*, 2007, p. 59.

⁶¹³ F. Vanneste, *op. cit.*, 2009, pp. 253-254.

interpretatio’) and a clear text is the main limit to ‘evolutive’ interpretation.⁶¹⁴ Moreover, an ‘evolutive interpretation’ in the light of a changing ‘object and purpose’ and stimulated by a changing external normative environment, should not be acknowledged too easily. In a holistic reading of the VCLT, all relevant elements of interpretation (including the text, context, and the consensus) have to point in a same direction.⁶¹⁵ As such, another limit to ‘evolutive’ interpretation is found in the ‘object and purpose’ of the Convention, which does not accept a backward human rights protection.⁶¹⁶

766. In the Grand Chamber case of *Demir and Baykara*, the Court *inter alia* considered whether collective bargaining and entering into collective agreement could be considered as a right under Article 11 of the Convention. The Court revised its earlier case law and, in line with the observation that the ECHR is a ‘living instrument’ stressed that, having regard to the developments in labor law both internationally and nationally as well as to the practice of European States, the right to bargain collectively in principle became an essential element of the right to form and join trade unions.⁶¹⁷ To come to this conclusion, the Court referred to several external instruments including to the ILO Convention No. 98⁶¹⁸ (ratified by Turkey) and the interpretation of this Convention by the ILO Committee of Experts, to the ILO Convention No. 151⁶¹⁹ (ratified by Turkey), to Article 6 paragraph 2 of the ESC (not ratified by Turkey), and to Article 28 of the EU Charter (to which Turkey is no member).⁶²⁰ The Court also took into account the practice of European States of which appeared that “...in a vast majority of them, the right of civil servants to bargain collectively with the authorities has been recognized”.⁶²¹

767. The ‘evolutive’ interpretation in *Demir and Baykara* under Article 11 ECHR seems to fit the search for ‘*opinio juris* under the treaty’ and to accord with a holistic reading of the VCLT.⁶²² In *Demir and Baykara*, although the Court does not say that in so many words, the ‘evolutive’ argument is supported by an ‘emerging consensus’ confirmed by ‘*opinio juris*’. In this case, the Court established an emerging internal consensus based on internal law and practices. The imported external instruments – ratified by a large majority of Member States – added strength to this internal consensus. They offered proof of wider and more specialized contemporary views, supporting a position that was already emerging internally.

⁶¹⁴ *Ibidem*, pp. 293 and 347. Generally, as remarked by other authors, the Court does not easily enter ‘evolutive’ interpretation against the text of the Convention, with some rare exceptions. See J. H. Gerards, *op. cit.*, 2011, p. 41, and cases cited there.

⁶¹⁵ F. Vanneste, *op. cit.*, 2009, p. 262.

⁶¹⁶ See also B. Frydman, *Le sens des lois: histoire de l’interprétation et de la raison juridique*, *op. cit.*, pp. 236 *et seq.* and pp. 302 *et seq.*

⁶¹⁷ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 146-154.

⁶¹⁸ This Convention concerns the Right to Organize and to Bargain Collectively.

⁶¹⁹ This Convention concerns the Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service.

⁶²⁰ *Ibidem*, paras. 147-150.

⁶²¹ *Ibidem*, para. 151. The Court also points at internal evolutions in the Turkish situation (*ibidem*, para. 152).

⁶²² See also F. Vanneste, *op. cit.*, 2009, pp. 267 *et seq.*

In *Demir and Baykara*, the Court, although it creates rights in the margin of the Convention, does not go against its text⁶²³ and it interprets the words with attention for some degree of 'State consent'. This is important under Article 31 paragraph 1 VCLT, which asks for interpretation in 'good faith' in line with the 'ordinary meaning of the words'. In addition, the Court gives priority to the 'object and purpose' of the Convention, which also accords to Article 31 paragraph 1 VCLT. In order to respect the object and purpose, human rights provisions might *progressively* include 'present-day conditions', including normative conditions.⁶²⁴ 'Evolutive' interpretation, as in *Demir and Baykara*, makes the Convention 'practical and effective' (under contemporary circumstances), once more corresponding to the treaty's object and purpose.⁶²⁵ When we approach the object and purpose at the time of interpretation – put in light of subsequent normative developments⁶²⁶ – this stimulates an interpretation that is 'evolutive' and that renders rights 'practical and effective'.⁶²⁷ This contemporary object and purpose can be established by external instruments and can evolve, to a certain extent, independently from the binding will of the States.⁶²⁸ Furthermore, the Court, in *Demir and Baykara*, pays attention to the external context of the Convention as required by Articles 31 paragraph 3 (a), (b) and (c) VCLT.

768. We conclude that, in the reasoning of *Demir and Baykara*, there is a clear interaction between the relevant elements of the VCLT (text, object and purpose, external context, State consent and practice,...) without one single element being decisive. These interactions together reflect '*opinio juris* under the treaty'. The Convention has evolved in accordance with the general belief that a right to collective bargaining should be protected. Against that background, we do not consider the integration of some non-binding instruments in this case as a controversial phenomenon.⁶²⁹ They prove that the 'emerging' State consensus is backed up by a variation of other instruments, contributing to a 'general belief' in CoE Member

⁶²³ A consensualist reading of the VCLT seems to confirm the possibility of an interpretation against the text (see Article 53 VCLT, that recognizes that an imperative norm of international law can be modified by a new norm of general international law with the same character). It seems however that a general agreement is required, supported by all member States. See, more elaborate, F. Vanneste, *op. cit.*, 2011, p. 815.

⁶²⁴ If the case of *Demir and Baykara*, with the help of external instruments, would have led to leveling down human rights protection and narrowing the scope of the Convention, this would not have fit the 'object and purpose' of the Convention, and this would as a consequence not have fit a holistic approach to the VCLT. See also F. Vanneste, *op. cit.*, 2009, pp. 339-341.

⁶²⁵ S. Alemahu Yeshanew, *op. cit.*, p. 23, with reference to M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerp, 2003, pp. 81-82; F. Vanneste, *op. cit.*, 2009, p. 340.

⁶²⁶ Besides subsequent normative developments, also 'medical evolutions', 'recent scientific research', 'increased sensitivity', etc. could play a meaningful role. See F. Vanneste, *op. cit.*, 2009, p. 340. The use of such kind information is however not the focus of our work, which lies on the use of external normative instruments.

⁶²⁷ This is one of the possible approaches to teleological interpretation. See, more elaborate, F. Vanneste, *op. cit.*, 2009, pp. 224-225. This is a controversial approach as linked to 'judicial activism', see *infra* para. 610. See also: G. Letsas, *op. cit.*, 2007, p. 59.

⁶²⁸ The idea that the Convention should be able to evolve independently from the will of the States captures, according to Letsas, the spirit of Articles 31 and 32 of the VCLT, in particular because of the inclusion of the importance of the 'object and purpose'. He interestingly says that "How to read the drafters' original intentions is the result of, rather than an alternative to, a theory about the object and purpose of the treaty". G. Letsas, *op. cit.*, 2007, p. 73.

⁶²⁹ In a similar sense: J. H. Gerards, *op. cit.*, 2011, p. 85.

States that the ‘emerging’ consensus is legally relevant and should be followed in judicial practice. The fact that Turkey did not ratify one of the instruments is then not of great concern. For ‘evolutive’ interpretation, it is not necessary that all external instruments (that point at a normative evolution) are strictly ‘applicable’ between all Member States. The latter would be required when entering into ‘harmonious’ interpretation on the basis of Article 31 paragraph 3 (c) VCLT, but the creation of harmony was not the chief purpose the ECtHR had in mind here.

769. Most of the cases of the pool that create an ‘evolutive’ reasoning based on a ‘common ground’⁶³⁰ (demonstrated by external instruments) exercise the referencing practice in a legally valid manner.⁶³¹ A first example is the case of *Scopolla v. Italy (No. 2)*. Here, the Court revised its case law by offering a right to a more lenient penalty provided in a law subsequent to the offence, which was protected under Article 15b paragraph 1 *in fine* of the ICCPR (applicable between all Member States). While the Court here, in our view, missed an opportunity to attach the use of the ICCPR to the mandatory aspect of Article 31 paragraph 3 (c) VCLT (in the light of an harmonious interpretation), it nonetheless established a legally valid ‘evolutive’ reasoning: the reasoning was supported by a European and international consensus. In addition, the Court mentioned ‘important developments internationally’ and various external instrument including the ACHR, the EU Charter, case law of the ECJ, the Statute of the ICC, and case law of the ICTY (which, in our view, prove ‘*opinio juris* under the treaty’).⁶³² The Court also referred to the importance of protecting rights in a manner that renders them ‘practical and effective’. In *Scopolla v. Italy (No. 2)*, the combination of all the latter elements rendered the ‘evolutive’ reasoning legally valid under a holistic approach to the VCLT.

770. The same could be said about the case of *Bayatyan v. Armenia* in which the Court built its dynamic ‘evolutive’ interpretation on an internal consensus and on important developments in international fora (referring to a HRC General Comment, the EU Charter, and some ‘soft’ instruments of the PACE and the COM)⁶³³, about the case of *Stanev v. Bulgaria*, in which the Court progressively developed the Convention on a trend on the European level and on the international level as expressed by a variety of international ‘hard’

⁶³⁰ We mean those cases that refer to a ‘consensus’ or a ‘trend’, which are *Scopolla v. Italy (No. 2)*, *Bayatyan v. Armenia*, *Stanev v. Bulgaria*, and *Konstantin Markin v. Russia*.

⁶³¹ In almost none of the cases in which the Court developed ‘evolutive’ interpretation on the basis of a ‘common ground’, the Court solely used internal law and practices. Most cases in which the Court uses an internal comparison only, do not connect it to ‘evolutive’ interpretation but to the establishment of a State’s margin of appreciation. In fact, the only case in which we observed explicit ‘evolutive’ interpretation based on a purely internal convergence (and thus only based on an emerging consensus without a further search for ‘*opinio juris*’) is the case of *Herrmann v. Germany* of 26 June 2012.

⁶³² ECtHR (GC), *Scopolla v. Italy (No. 2)*, *op. cit.*, paras. 103-106.

⁶³³ ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, paras. 105-109.

and ‘soft’ instruments⁶³⁴, and about the case of *Konstantin Markin v. Russia* in which the Court supported an ‘evolutive’ outcome by national and international comparative law including UN, EU and CoE ‘soft’ and ‘hard’ instruments.⁶³⁵

771. The Grand Chamber also includes external instruments in a more qualitative manner. Then, the Court does not look for shared positions leading to a ‘consensus’ or a ‘trend’ but instead, establishes ‘evolutive’ interpretation by paying attention to specific solutions adopted by other actors.⁶³⁶ In our pool, the examples of this kind reflected a ‘judicial dialogue’.⁶³⁷ A holistic approach under the VCLT requires that the ‘judicial dialogue’ – especially when the constitutive act of the judicial organ is not ratified by the Member States – does not operate as the sole basis for expanding the Convention. Because of its normative effects, more arguments should be mobilized to prove the existence of ‘*opinio juris* under the treaty’. In some cases, the Court seemed to respect the latter recommendation. In *Micallef v. Malta*, for example, the Court attached its reasoning to an internal consensus, further supported by ECJ case law (which could be considered as an additional proof of a ‘general belief under the treaty’). On the other hand, in the case of *Sergey Zolotukhin*, for example, the Court chiefly builds its ‘evolutive’ interpretation on cases of the ECJ and the ACtHR while the respondent State is not a member of both judicial bodies.⁶³⁸ In the latter case, the Court’s interpretation seems difficult to reconcile with a search for ‘*opinio juris* under the treaty’.

772. If the Court would be more explicit about its method and about questions of legality, the use of external instruments to support an ‘evolutive’ interpretation, even when based on non-binding instruments, would not necessarily be a controversial phenomenon. Mostly, the Court’s ‘evolutive’ case law fits a search for ‘*opinio juris* under the treaty’ and therefore, enters the legal criteria of the VCLT. The lack of transparency reflects the main problem, rather than the method by itself.

⁶³⁴ ECtHR (GC), *Stanev v. Bulgaria*, *op. cit.*, paras. 243-245.

⁶³⁵ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 140.

⁶³⁶ With the exception of the case of *Micallef v. Malta* which rather builds on an internal consensus, further supported by case law of the ECJ. See ECtHR (GC), *Micallef v. Malta*, *op. cit.*, para. 78.

⁶³⁷ We observed the latter phenomenon mainly in respect of procedural issues such as the Court’s temporal jurisdiction, the meaning of the notion of ‘same offence’ under Article 4 of Protocol 7 (right not to be punished twice for the same offence), and the application of Article 6 ECHR (right to a fair trial) to interim measures. External instruments expanded the interpretation of the Convention, for instance broadening the understanding of a ‘same offence’ (ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, paras. 78-80) or intensifying the State’s procedural positive duties under Article 2 on the right to life in the case of *Šilih v. Slovenia* (ECtHR (GC), *Šilih v. Slovenia*, 9 April 2009, Appl. No. 71463/01, paras. 159-160). Note that Vanneste considers the latter case as a good example of how the Strasbourg Court harmonizes with rules of the VCLT (and more particularly with Article 28 VCLT) in its determination of the temporary competence for certain facts. See more elaborate: F. Vanneste, *op. cit.*, 2011, pp. 822-823.

⁶³⁸ See also S. Van Drooghenbroeck, *op. cit.*, 2009, p. 821.

B. Legal validity of references clarifying notions

773. In Grand Chamber case law, the referencing practice helps to import and clarify notions. Generally, such references do not lead to a creation of rights in the margin of the Convention or to a revision of previous case law. They chiefly ‘inform’ the ‘ordinary meaning’ of some (external) notions, without having a large dynamic impact on the interpretation and the scope of the Convention. Therefore, such references might be easily justified by a holistic reading of Article 31 and 32 of the Convention.

774. However, one could not deny that giving a meaning to certain notions could have a normative influence on the understanding of the Convention and on the interpretation of external notions. A definition might have a ‘narrowing’ or ‘expanding’ effect because it can include ‘filters’ determining the scope of certain terms and rights, and because it could highlight some elements and interests that should be taken into account when applying the Convention. These observations stimulate our search for a framework strengthening the legal validity of such references. Again, we find this framework in a combined reading of the different elements of the VCLT. To clarify this, we will include cases that used external instruments to define notions of the Convention (B.1.) and cases that, with the help of external instrument, imported external notions (B.2.).

B.1. Notions of the Convention

775. Our pool of cases demonstrates that, when the Grand Chamber refers to external instruments to fill in notions of the Convention, it mostly refers to instruments applicable in all the Member States, such as the CAT, the CERD, the ICCPR, the ILO Forced Labor Convention No. 29, instruments of general international law, *etc.* Then, the Court attaches the words’ ordinary meaning to external applicable international (human rights) law backed up by a full State consensus. Under the condition these interpretations respect the ‘object and purpose’ of the Convention, the legal validity of such references could be enhanced with a reference to the mandatory framework offered by Article 53 ECHR and Article 31 paragraph 3 (c) VCLT.⁶³⁹ In practice, the Court does not include such references in this context. We recommend the Court to do so more consistently.

776. In addition, the Court could also enhance the legal validity of such references by attaching them to the principle of a ‘practical and effective’ interpretation. To our understanding, this principle benefits from the importation of notions that correspond to the meaning giving to them by specialized bodies and treaties. To be ‘practical and effective’, the

⁶³⁹ *Supra*, Part III, Chapter 1, § 3.1. and § 3.2.

notions of the Convention should also be ‘up-to-date’, aligned with more recent and specialized treaties, such as, for example, the CAT. This could enhance the legality of the references under a holistic approach of the VCLT, which favors to take account, *i.a.*, the object and purpose of the Convention (including the relevance of an interpretation that is ‘progressive’ and that renders rights ‘practical and effective’).

777. Imagine that the created definition is not backed up by ‘hard’ instruments applicable in all Member States, but is built on non-binding instruments. Then, the Court actually does not offer a ‘common’ definition but a definition that is somewhat autonomous from the views of (some) Member States.⁶⁴⁰ For several authors, this seems unacceptable. Corten for instance holds that, to invoke external definitions contained in external instruments, it should be verified whether *all* Member States of the external treaty are also member States of the interpreted treaty.⁶⁴¹ Brems, to the contrary, argues that the Court could give an autonomous meaning to a notion – thus different from the meaning of the respondent States (and other States) – when there is no generally shared ordinary meaning. To her view, this meaning can be influenced by the external context of human rights law. Brems says that

“(i)f the ordinary meaning of a term is different in different States that are parties to the convention, one may conclude that there is no clear ordinary meaning of the term used in the convention. Moreover the ordinary meaning is to be given to the terms of the treaty ‘in their context’, which *in casu* is the context of international human rights protection, and which may differ greatly from the context in which the terms is used in domestic law”.⁶⁴²

778. Could a dynamic autonomous definition relying on non-binding instruments be justified by the VCLT? This depends, in our view, on whether the reasoning fits a holistic view on the VCLT.⁶⁴³ As such, a definition, at least, requires some degree of binding State

⁶⁴⁰ For instance, in our key case of *Demir and Baykara v. Turkey*, the Court gave meaning to ‘members of the administration of the State’ (which is a notion that appears under paragraph 2 of Article 11 ECHR on the freedom of association) not only by making use of hard instruments but also by referring to treaties not ratified by Turkey. ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, pp. 99-106. Is this legally valid? This is a relevant question since the developed definition *in casu* had an influence on the scope of the Convention: according to the Court, based on external instruments, municipal servants did not fall under the notion of ‘members of the administration of the State’ and therefore, these servants could not be subjected to limitations of their right to organize.

⁶⁴¹ O. Corten, *op. cit.*, p. 229.

⁶⁴² E. Brems, *Human Rights: Universality and Diversity*, doctoral thesis, K.U.Leuven, 1999, p. 336 (published in E. Brems, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, The Hague, 2001, 579 p.), referred to by F. Vanneste, *op. cit.*, 2009, p. 336.

⁶⁴³ Most Authors consider that autonomous interpretation is compatible with the ‘ordinary meaning rule’ of Article 31 of the VCLT when the treaty text is unclear. For an overview, see F. Vanneste, *op. cit.*, 2009, p. 336. For Ost, however, autonomous interpretation is ‘entirely specific’ posing complex questions, and does not easily fit the VCLT. F. Ost, “The Original Canons of Interpretation”, in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, Martinus Nijhoff, 1992, p. 311: “This autonomy of interpretation poses complex questions to the extent that given that it can only be ‘relative’ it requires the judges to seek a common denominator which it is not clear whether it is quantitative (reference being to the majority of Member States) or qualitative (reference to an ideal standard illustrated by the legislation or practice of a few Council of Europe Members)”, referred to by F. Vanneste, *op. cit.*, 2009, p. 338, footnote 1256. Ganshof van der Meersch even moves beyond Article 31 of the VCLT and adds that an autonomist approach could be justified by article 5 VCLT. This provision provides that “Treaties constituting international organizations and treaties adopted within an international organization. The present Convention applies to any

support (demonstrated by ‘hard’ internal- and/or external instruments), possibly strengthened by non-binding instruments. The only further condition is that the interpretation does justice to the ‘object and purpose’ of the Convention (Article 31 paragraph 1 VCLT), preventing a backward human rights protection.⁶⁴⁴ If the combination of imported instruments allows speaking of ‘*opinio juris*’ that maintains or develops the level of human rights protection, we consider that a combined reading of the interpretative rules of the VCLT could justify an ‘autonomous’ definition.⁶⁴⁵

B.2. Notions from outside the Convention

779. Although the Court, in our pool of case law, generally imports external notions that were ‘accepted’ by all Member States under external binding commitments, there are some exceptions. In the case of *Mangouras v. Spain*, the Court introduced the notion of a ‘reasonable bond’ by referring to case law of the International Tribunal for the Law of the Sea.⁶⁴⁶ In the case of *Neulinger and Shuruk v. Switzerland*, the Court relied on UNHCR Guidelines to specify some relevant factors to give substance to the notion of a ‘child’s best interest’.⁶⁴⁷ Furthermore, in the case of *El-Masri v. “the former Yugoslav Republic of Macedonia”*, the Court made use of the ICPED of 2006 (not ratified by all Member States) and a CoE PACE resolution to define what the notion of ‘enforced disappearance’.⁶⁴⁸ In the case of *Lambert and Others v. France*, the Court also defined ‘treatment’ with the help of the ‘CoE Guide on the decision-making process regarding medical treatment in end-of-life situations’.⁶⁴⁹

780. In these examples, the Court uses external instruments to give content to ‘foreign’ notions and not to notions that are part of the Convention. When ‘foreign’ notions are relevant when applying the Convention to specific, complex and/or technical circumstances,

treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”. According to Ganshof van der Meersch, autonomous interpretation in light of the general object and purpose is a ‘relevant rule of the organization’ and thus a relevant rule of the CoE. One of the aims of CoE, like van der Meersch stresses, is achieving greater unity between its members and that is what autonomous interpretation does. F. Vanneste, *op. cit.*, 2009, pp. 337-338, with reference to: W.J. Ganshof Van Der Meersch, “Le caractère ‘autonome’ des termes de la marge d’appréciation des gouvernements dans l’interprétation de la Convention européenne des Droits de l’Homme”, in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in honour of G.J. Wiarda*, Carl Heymanns Verlag KG, Köln, 1988, pp. 201-205.

⁶⁴⁴ The Court acknowledged in *Demir and Baykara* the importance to ascertain the ‘ordinary meaning’ to be given to the words “...in their context and in the light of the object and purpose of the provision...”. ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 65.

⁶⁴⁵ Vanneste says that when autonomous interpretation is *only* to be determined by their “real nature” by referring to natural law (putting the object and purpose of the provision at the centre), then, it is indeed correct to see autonomous interpretation as an “entirely specific” approach. But, if also textual, consensual and contextual arguments are taken into account, then, it could fit into Article 31 and Article 5 of the VCLT. F. Vanneste, *op. cit.*, 2009, p. 338.

⁶⁴⁶ ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 89.

⁶⁴⁷ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, para. 134.

⁶⁴⁸ ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 240.

⁶⁴⁹ ECtHR (GC), *Lambert and Others v. France*, 5 June 2015, Appl. No. 46043/14, para. 154.

it does not seem surprising that the Court makes use of specialized and/or technical instruments (touching upon child matters, on medical aspects in end-of-life situations, on financial security issues such as ‘reasonable bonds’, *etc.*). In our view, also when the Court uses non-binding instruments to give meaning to external notions, this could be legally covered by the VCLT. The Court demonstrates loyalty to Article 31 of the VCLT when it interprets ‘foreign’ notions ‘in good faith’ in the light of the ‘ordinary meaning’ they normally receive in ‘foreign’ specialized instruments and fora. The external instruments ‘fill gaps’ in the Convention and therefore, make its application ‘effective’ (because more ‘specific’) and ‘up-to-date’ *vis-à-vis* specialized (and evolving) criteria. As such, it is not problematic that these instruments are not backed up by State consent. They do not dynamically expand the Convention, but fine-tune the relevant notions connected to the specificities of the case.⁶⁵⁰

C. Legal validity of references framing positive responsibilities

781. Our cases studies demonstrate that external instruments regularly have a clear effect on the formulation of positive obligations under the Convention. For example, in the case of *Lambert and Others*, the Court establishes with the help of the Guide of the CoE Committee on Bioethics some positive responsibilities in end-of-life situations.⁶⁵¹ In the case of *Aksu v. Turkey*, the Court refers to ‘soft’ CoE expert material of the ECRI to stress that the State has positive obligations to combat negative stereotypes against Roma.⁶⁵² As a final example – but there are more illustrations⁶⁵³ – the case of *Animal Defenders International v. the United Kingdom* makes use of a specific CoE Recommendation of the COM to stress that the right to freedom of thought under Article 10 ECHR requires the State to protect and actively promote a pluralistic media and to put in place an appropriate legislative and administrative framework.⁶⁵⁴

782. Generally, the external instruments that give shape to positive obligations under the Convention are only of a ‘soft’ nature. The arguments are not (implicitly) supported by ‘*opinio juris* under the treaty’ and therefore, their normative effects might be controversial in the light of the VCLT, which includes ‘consensus’ as one of its relevant elements. As such, they could only operate as a supplementary means of interpretation (Article 32 ECHR). In

⁶⁵⁰ This does not mean that the content of such terms has no effect on the reasoning of the Court. For instance, when the Court borrows criteria from ‘soft’ instruments that should be taken into account when considering a ‘child’s best interest’ (as is the case in *Neulinger and Shuruk v. Switzerland*), this certainly has influence on the assessment of the Convention in the light of the circumstances.

⁶⁵¹ For instance obliging the State to involve the patient in the decision-making process by means of previously expressed wishes. ECtHR (GC), *Lambert and Others v. France*, *op. cit.*, para. 178.

⁶⁵² ECtHR (GC), *Aksu v. Turkey*, 15 March 2012, Appl. Nos. 4149/04 and 41029/04, para. 75.

⁶⁵³ For all cases in which the Court mobilizes external instruments to fill in positive action requirements of the States, see *supra* under Part II, Chapter 3, § 5.

⁶⁵⁴ ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 101.

the case of *Animal Defenders International*, however, also Article 31 (a) and (b) of the VCLT could play a particular justifying role. Here, the Court uses a political ‘soft’ instrument of the CoE, containing concrete policy requirements that are generally agreed upon by the Member States.

D. Legal validity of references offering a general support to interpret the ECHR

783. In several Strasbourg cases, external instruments support or confirm how the Grand Chamber interprets the Convention. When external instruments are used as a general support, their effect is not explicitly ‘evolutive’. This does not mean that the instruments have no effect on the scope and the development of human rights provisions. This can be illustrated by one example, but there are many more.

784. In the case of *Svinarenko and Slyadnev v. Russia*, the Court uses *inter alia* non-binding UN and NGO instruments to conclude that the use of a metal cage to hold defendants during criminal trial violates Article 3 of the ECHR.⁶⁵⁵ External references of ‘general support’ might stimulate developments in the Court’s decision-making process. In *Svinarenko and Slyadnev v. Russia*, non-binding instruments offered a general, but modest, support to the reasoning, which was built on other arguments, too. The Court did not seem to include the non-binding instruments as weighty elements. This is understandable since a dynamic interpretation built on effects of non-binding instruments alone, would challenge the VCLT. Since the use was ‘subsidiary’, it can be defended by Article 32 of the VCLT.⁶⁵⁶ For the sake of transparency, it would be helpful if the Court would be more explicit about the weight of the external instruments. When they are imported only to confirm and add strength to other arguments, the Court might strengthen this reasoning by citing Article 32 of the VCLT.

785. Generally, in relation to references offering a general interpretative support, no other rules apply than in relation to other kind of references. Also here, we recommend the Court to find inspiration in the diverse Strasbourg interpretation principles and, in that light, to exercise a referencing method that could fit a holistic reading of the VCLT.

⁶⁵⁵ ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, 17 July 2014, Appl. Nos. 32541/08 and 43441/08, para. 132.

⁶⁵⁶ A subsidiary means of interpretation confirms what had been established by other means or makes more precise the outcome of an interpretation done by the principal means, if this outcome is still ambiguous or obscure. According to Corten, this might include a practice between a few member States, doctrine, external case law, the position of the ICRC (for instance on how to interpret humanitarian law) and practice of the UN Security Council. This seems to open the door to a large utilization of this supplementary means since it is generally accepted that international rules almost never have a ‘clear sense’ and thus always have a certain degree of ambiguity. Nonetheless, as Corten says, it will be quite exceptional that nor the text and the context of the treaty, nor the manner in which it had been applied, nor the principle of the object and the purpose (all provided for in Article 31 VCLT) would not lead to a meaning that is rather ‘clear’. See O. Corten, *op. cit.*, pp. 242-248.

E. Legal validity of references influencing States' freedom of manoeuvre

786. To validate external referencing to influence (implicitly or explicitly) a States' freedom of manoeuvre and margin of appreciation, we plead for the consideration of some guiding principles which bring more systematization in the Court's reasoning.

787. A *first* principle is that the Court should inform itself thoroughly and non-selectively about the existence of external instruments on a certain issue. When it develops internal comparisons, this exercise could be supported by using ('hard') external instruments. Admittedly, such research could be time-consuming and difficult.⁶⁵⁷ Parties, third parties and the Court's Research Division could play a meaningful role here. They might bring complete and precise data about internal and external norms to the Court.⁶⁵⁸

788. A *second* principle is that when the – hopefully sufficiently large and trustworthy – collection of national and external instruments points at the existence of a progressive (emerging) consensus and at a 'general belief', this consensus merits legal effects. In case of a full consensus evidenced by external law, the Court is obliged to integrate this consensus (Article 31 paragraph 3 (c) VCLT). In case of an emerging consensus confirmed by *opinio juris*, the Court should seriously consider to read the Convention in accordance with this consensus, possibly leading to a 'evolutive' interpretation and to a narrowing of the margin of appreciation. Sometimes, the Court seems to miss opportunities in this respect.⁶⁵⁹

789. A *third* principle is: when positions outside the CoE demonstrate less protective tendencies than what is observed in the CoE context, these external tendencies should not widen the margin of appreciation. Imagine that a great majority of Member States protects a certain situation while a great majority of third States or other external actors does not protect such a situation. Then, the external information should not lead to a widening of the margin of appreciation. The external influence should go in a one direction only, for instance to strengthen an internal emerging consensus leading to a narrower margin or to an 'evolutive' interpretation.

790. A *fourth* principle is that the use of the doctrine of the 'margin of appreciation', which might be informed by external instruments, should not be entirely abolished, and could – in rather exceptional and sensitive cases – be a valid technique under the VCLT. The doctrine

⁶⁵⁷ A collection of data about internal and external instruments does, for instance not always lead to clear results. Often, discussions could remain about the method of collecting the data and the precise interpretation of the data. See *supra*, para. 719.

⁶⁵⁸ If the court has not the means to do all the comparative work, it might invite the third parties or the States to do so. The latter is possible by using Article 36 para. 2 of the Convention. F. Vanneste, *op. cit.*, 2009, p. 270.

⁶⁵⁹ See on missed opportunities of advancing human rights law, *infra*, Part III, Chapter 2, § 2.3.

elaborates the law of treaties rather than that it departs from it and explains interaction between sovereign States and international Courts, which is not contrary to the spirit of the VCLT.⁶⁶⁰

791. As a *fifth* principle, a large margin could only appear when there is no (emerging) consensus and in absence of a clear treaty text. The absence of (emerging) consensus should however only be established after external instruments on the matter had been examined too, such as international human rights treaties. Thus, when there is no internal consensus but a clear external trend towards the advancement of some rights, this external trend should receive weight and limit the State's freedom of discretion. Only when both internal and external instruments point at a lack of an (emerging) consensus, the Court, in our view, could leave a valid margin of appreciation.⁶⁶¹ In absence of (emerging) consensus and in absence of a clear treaty text, the Court should not stretch the scope of the Convention to include new rules from the underlying principles.⁶⁶²

792. A *sixth* principle is: the establishment of a 'margin of appreciation' does not imply that the Court should no longer interpret the Convention. It is recommended that also then, the Court does not lose sight of possibly relevant principles of 'autonomous' and/or 'practical and effective' interpretation (possibly informed by external instruments). Furthermore, the lack of consensus is only one out of many relevant factors in respect of establishing a 'margin'. A lack of consensus should thus not automatically lead to large measure of discretion, which could be influenced by other determinants too.⁶⁶³

793. Our pool of cases demonstrates that there are two categories of references to determine the States' margin of discretion.⁶⁶⁴ *In the first category*, the Court makes use of (only EU and CoE) instruments to confirm, challenge or independently construct a 'consensus', influencing the width of the 'margin of appreciation'. We argue that external mobilizations of this category are valid as far as the Court respects the five principles developed above. *In the second category*, the content of external instruments directly informs the Court about the existence of some freedom of discretion. This category – in which the Court is not in search of a 'common ground' – is not often discussed in human rights doctrine or adjudication. However, a situation in which the content of an external instrument (confirming some

⁶⁶⁰ The observation that the 'margin'-doctrine is legally valid under the VCLT is borrowed from Vanneste. F. Vanneste, *op. cit.*, 2009, pp. 343-344.

⁶⁶¹ Letsas is very severe in respect of establishing a 'margin' for the States. He says that only in very rare exceptional cases, when there is a clear and present danger that ruling to a violation will trigger political turmoil and violence harming interests of the people, that it is morally valid to ignore the substance of the law and to grant a margin. He stresses that the latter is not an argument of cultural relativism, but a 'consequentialist' argument, which is defensible in light of legality. G. Letsas, *op. cit.*, 2007, p. 125.

⁶⁶² Except in cases in which there is an absolute necessity for a new rule. F. Vanneste, *op. cit.*, 2009, p. 293.

⁶⁶³ *Ibidem*.

⁶⁶⁴ See more elaborate *supra* Part II, Chapter 3, § 9.

freedom of discretion) determines the width of the State's freedom of manoeuvre only seems legally defensible under the condition this does not prevent the Court from exercising its competence and to, if necessary, bring the effects of the external instrument (offering a certain margin) under its control and supervision.

794. The ECtHR confirmed the latter in *X and Others* by saying that even when external instruments would leave open some options (in respect of registering same-sex couples for adoption), this does not mean that a State could exercise this discretion in a discriminatory manner, or that the Convention would no longer apply.⁶⁶⁵ However, in some cases, such as *S.H. and Other v. Austria* and *Boulois v. Luxembourg*, the Court does not seem to fully live up to these statements. In the first case, one of the arguments was that external instruments did not offer the State clear guidance but freedom of regulation in respect of the use of ova and sperm donors for *in vitro* fertilization.⁶⁶⁶ This contributed to the Court's conclusion that the State did not overstep its margin of appreciation when regulating reproductive issues. In the case of *Boulois*, the Court pointed at the freedom of discretion offered by external instruments in regulating resettlement of prisoners. This supported the conclusion that a prison board's refusal to grant a prisoner temporary leave with no possibility of appeal did not violate Article 6 ECHR on the right to a fair trial.⁶⁶⁷ Similar examples are offered by the cases of *Mangouras v. Spain* and *Rohlena v. Czech Republic*.⁶⁶⁸ In all these cases, external instruments enabled the Court to resist a closer European supervision. We see how this approach of the Court may contribute to more coherence between the ECHR and external norms. The Court should ensure, however, that the mere existence of external instruments does not erase its supervising role and that, although these instruments may influence the proportionality assessment of the interference, other arguments should be taken into account as well.

§ 4.4 Concluding observations

795. External referencing could operate as a meaningful method for interpretative purposes, including 'evolutive' interpretation, interpretation rendering rights 'practical and effective', autonomous interpretation and an interpretation making use of the doctrine of the 'margin of appreciation'. In principle, as several authors argue, these interpretation principles are covered by the interpretative rules of the VCLT, especially when these rules are approached in a holistic manner.

⁶⁶⁵ ECtHR (GC), *X and Others v. Austria*, *op. cit.*

⁶⁶⁶ ECtHR (GC), *S.H. and Others v. Austria*, *op. cit.*, paras. 106-107.

⁶⁶⁷ ECtHR (GC), *Boulois v. Luxembourg*, *op. cit.*, para. 103.

⁶⁶⁸ ECtHR (GC), *Mangouras v. Spain*, *op. cit.*; ECtHR (GC), *Rohlena v. Czech Republic*, *op. cit.*

796. A holistic view on the interpretative rules of the VCLT implies that the interpretation process should do justice, in a combined manner, to the various elements that these rules cover. These elements include: the *text* of the treaty, the importance of (some degree of) *State consent*, the *internal and external context* of the treaty, and the *object and purpose* of the treaty. External instruments are particularly relevant to prove State consent. They also serve to take account of the external context and of the object and purpose of the treaty and its provisions.

797. It is true that the Court, in *Demir and Baykara v. Turkey*, afforded itself large freedom in interpreting the Convention by taking into account the external context. This was reaffirmed in the case of *Tănase v. Moldova*, where the Court announced, with a reference to *Demir and Baykara*, that it

“...has consistently held that it must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field. It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them. Where there is a common standard which the respondent State has failed to meet, this may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases”.⁶⁶⁹

798. Our argument does not oppose a certain level of flexibility when using external instruments in interpreting the Convention. However, if the argumentation is to be legally valid *vis-à-vis* the general international rules of interpretation, this flexibility has limits. A holistic reading of the VCLT could serve as a legal incentive and legal justification for the use of external instruments, but it also sets boundaries to this practice. In our view, an method of referencing that is used to develop specific interpretative principles, gains formal validity when it corresponds to a combined approach to the VCLT.

799. What does this mean in practice? The main implication is that the Court, when it dynamically builds on the external context, should not lose sight of the other relevant elements of the VCLT. The method, when it pays respect to the ‘object and purpose’ of the treaty, should not lead to a backward human rights protection. This implies that a dynamic interpretation, particularly when it is not backed up by a full State consent, should not go against the text of the Convention. The Court, moreover, is advised to pay due respect to the perspective of States, as an aspect of consensual interpretation. The latter condition nonetheless allows some flexibility in the specific area of human rights protection. Human rights law is a *lex specialis*, fuelled by values of human dignity capable of transcending the dictates of States. For this reason, we are of the opinion that human rights interpretation does

⁶⁶⁹ ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 176.

not need to be supported by full State agreement. This idea does not oppose the rules of the VCLT; it rather enriches their meaning in the particular context of human rights adjudication.

800. The search for '*opinio juris* under the treaty' is a concept that succeeds in catching a combined reading of the rules of the VCLT, without losing sight of the specificity of human rights law. Within this interpretative framework, an emerging or an ambiguous State consensus is sufficient to create a dynamic interpretation, under the condition that this incomplete consensus is confirmed by *opinio juris*. To establish an emerging or ambiguous State consensus, external (and internal) instruments of a 'hard' nature will be of particular relevance. Besides, to demonstrate *opinio juris*, a wide diversity of external instruments might be mobilized, including those of a judicial and of a non-binding nature. Thereby, political 'soft' instruments pointing at some 'State practice' or 'State agreement' will be of particular relevance; the VCLT, in Article 31 paragraph 3 (a) and (b), requires such instruments to be taken into account (but not to give them a binding effect). Generally, we argue that the lesser the degree of externality of the instruments, the more weight they may have in establishing an '*opinio juris* under the treaty'.⁶⁷⁰

801. We made use of the general rules of interpretation of the VCLT to argue that international law, under some conditions, encourages and justifies the interpreter to import external instruments in his or her reasoning. In doing so, we aimed to systemically embed the method of the referencing practice in the more general legal framework. At the same time, we achieved to accommodate this framework with the specific character of human rights law, affording the Court a certain measure of flexibility. This flexible interpretative framework has the potential to enhance the legal validity of the method of the external referencing practice in Strasbourg reasoning.

⁶⁷⁰ On the different degrees of externality, see *supra*, Part II, Chapter 2, § 6, and the footnotes included there.

CHAPTER 2 – THE USERS’ PERSPECTIVE

802. A users’ approach leads us to a justification of the referencing practice while standing in the shoes of a variety of actors who are involved in and concerned with human rights adjudication ‘on the ground’, including rights holders, judicial users, duty bearers and third parties.⁶⁷¹ Their interests are largely connected to issues of procedural and substantive quality of legal reasoning.⁶⁷² We address the potential of the referencing practice from that point of view, paying particular attention to the users’ category of the rights holders. Nevertheless, when certain aspects or consequences of external referencing are clearly connected to interests of other categories of human rights users, their perspective will also be included.
803. Doing justice to users’ characteristics, experiences and needs, external referencing gains validity by doing justice to all specificities of the victims’ experience (§ 1.), by leading to a higher (§ 2.), effective (§ 3.) and universal (§ 4.) human rights, by enhancing bridge building, coherence and legal certainty (§ 5.), by deformalizing the interpretation process (§ 6.), by increasing ‘procedural economy’ (§ 7.), by network building (§ 8.), by serving as pragmatic tools to convince an audience (§ 9.).

⁶⁷¹ For more information on a users’ approach, see *supra*, Part I, Chapter 2, § 2.3.2.

⁶⁷² ‘Procedural’ and ‘substantive’ quality of legal reasoning relates to considerations of ‘procedural’ and ‘substantive’ legitimacy of the Court’s decision-making process. Legitimacy may be defined as ‘justified authority’ starting from “...general beliefs about the propriety of the judicial process and the justness of judicial outcomes”. Y. Shany, *Assessing the Effectiveness of International Courts*, Oxford University Press, Oxford, 2014, p. 139. A commonly accepted theory of legitimacy lacks, but literature generally distinguishes between substantive- and procedural legitimacy, or combines both into a hybrid form of legitimacy. See K. Dzehtsiarou and V. Lukashevich, “Informed Decision-Making: The Comparative Endeavors of the Strasbourg Court”, *Neth. Q. Hum. Rts.* 2012, vol. 30, no. 3, pp. 274-276. Substantive legitimacy focuses on the stakeholders’ perception of a decision as substantively correct and as encompassing all relevant points of dispute, as well as on the outcome of a case which must be considered lawful and just. R.H. Fallon, “Legitimacy and the Constitution”, *Harvard Law Review* 2005, vol. 118, no. 6, pp. 1787-1853 and J. Raz, *The Morality of Freedom*, Clarendon, Oxford, 1988, p. 53, both quoted by K. Dzehtsiarou and V. Lukashevich, *op. cit.*, pp. 274 and 277. Procedural legitimacy can generally be understood as adherence to established decision-making procedures and fairness in light of the parties’ satisfaction with the legal process. T.M. Franck, “Why a Quest for Legitimacy?”, *UC Davis Law Review* 1987, vol. 21, no. 3, p. 543, quoted by K. Dzehtsiarou and V. Lukashevich, *op. cit.*, p. 274. Procedural legitimacy could contribute to desired outcomes: an effective legal process promotes fair and just substantive outcomes. Y. Shany, *op. cit.*, pp. 139-140 and p. 143. Procedural legitimacy’ considerations might include concerns of ‘procedural justice’. They point at the importance of victim’s participation, neutrality or lack of bias in decision-making, equal treatment of the parties, consistency of the procedure, respect towards the victims, trust in the Court, *etc.* The central idea behind procedural justice is that the parties to the case assess legitimacy rather on the evaluation of the (fairness of the) decision-making process than on whether they can agree with the substantive outcome of decisions. On ‘procedural justice’, see E. Brems and L. Lavrysen, “Procedural Justice in Human Rights Adjudication: The European Court of Human Rights”, *Human Rights Quarterly* 2013, vol. 35, pp. 176-200.

§ 1. Doing justice to all specificities of the victims' experience

804. External referencing could serve victims' procedural and substantive interests provided that it ensures due respect of all aspects of their specific identity and of their lived experiences.⁶⁷³ The Convention contains a rather limited amount of rights, and the rights that it contains are often framed in a general manner. Entire specific areas of rights, such as rights of the child, rights of disabled persons, rights of migrant workers, *etc.* as well as rights of other 'generations' are not specifically addressed by the text of the Convention. Other external instrument, such as several UN categorical human rights treaties, carry more specific and detailed rights tailored to the particular circumstances and traits of certain groups of persons.⁶⁷⁴

805. An integrative view on the rights holders stimulates full consideration of the victims' particular situation and of their multifaceted identity and experiences.⁶⁷⁵ This view could be supported by a referencing method that takes account of specific instruments dealing with certain categories of persons or with particular circumstances that these persons may face (§ 1.1.), and/or by an interdependent referencing method that integrates instruments dealing with social, economic or cultural aspects of the rights holders' situation (§ 1.2.).

⁶⁷³ Brems says the following about human rights integration in the light of doing justice to the lived experience: "[a]nother consideration from the viewpoint of rights holders is that an integrated human rights perspective may do better justice to the lived experience of those who undergo human rights violations. This is because an integrated approach allows to deal with the issue as a whole, instead of artificially lifting out one aspect or cutting the matter up in several issues to be evaluated separately. This plays out in at least three dimensions: the integration of the general and the specific (a), intersectionality (b) and indivisibility/interdependence (c)". E. Brems, *op. cit.*, 2014, p. 465. The latter three dimensions, as observed by Brems, inspired the structure and relevant issues in what follows under this paragraph. Our approach thus partly overlaps with Brems' thoughts, who considered the more general question of human rights integration from the perspective of rights holders. See *ibidem*, pp. 464 *et seq.* Her thoughts also offered us guidance on identifying some rights holders' interests. In addition we found inspiration in writings about the concept of 'procedural justice'. On the latter, see E. Brems and L. Lavrysen, *op. cit.*, pp. 176-200. We also made use of a sociological study explicitly examining users' perceptions (including of judges, lawyers, and States) about what constitute relevant factors in relation to the Strasbourg Court's legitimacy. See B. Çali, A. Koch, and N. Bruch, "The Legitimacy of the European Court of Human Rights: the View from the Ground", 2011, UCL Report, pp. 1-40, available at <https://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> (visited on 20 September 2016). In respect of interests of judicial users, our approach had been stimulated by writings on the analysis and explanation of 'judicial behavior'. On the latter, see *infra* under footnote 1010, 1012, 1019.

⁶⁷⁴ For example, the right to education is protected under regional human rights treaties, including the First Protocol to the European Convention on Human Rights, which provides that "No person shall be denied the right to education" (Article 2 of the *First Protocol of the European Convention of Human Rights*). Article 13 of the ICESCR ensures the same right, but additionally provides extensive detail on the State's obligation to fulfill the right to free education, including by providing to individuals at least primary and secondary education. The Committee on Economic, Social and Cultural Rights in its General Comments developed the scope of this right further (such as in General Comment No. 13 *on the Right to Education* of 12 August 1999, UN Doc. E/C.12/1999/10, 8 December 1999).

⁶⁷⁵ E. Brems, *op. cit.*, 2014, p. 452 and p. 455.

§ 1.1. Referencing specialized instruments

806. Eva Brems draws attention to the importance of considering the rights holders' "...different specific characteristics that have been recognized as relevant by international human rights law and that therefore affect their human rights claims" and stresses that an "...integrated human rights perspective requires attention to such differences, in particular by making appropriate reference to specialized human rights provisions that may be relevant for only some of the affected persons".⁶⁷⁶ Detailed and categorical instruments could be particularly fruitful in filling gaps in the Convention, and in approaching specific questions and problems individuals are faced with.
807. For instance, from a rights holders' approach, it may be valid to take account of several specific instruments that correspond to the different aspects of the identity of the alleged victim.⁶⁷⁷ In a case of police detention of minors, for example, this requires introducing arguments that are tailored to the multifaceted identity of the alleged victim, including particular features of his or her vulnerability. As demonstrated by the case of *Salduz v. Turkey*, about a minor who was denied access to a lawyer at the initial stages of police interrogation, external instruments may be of help here.⁶⁷⁸ In this case, the Court adapts its argumentation to the specific young age of the applicant. The relevance of this identity was supported by external instruments dealing with issues of children and juveniles, such as CoE Recommendations and the CRC. Besides 'age', the particular vulnerable position of the accused was taken into account. The relevance of the applicant's vulnerability was stimulated by viewpoints and recommendations of the CPT. Likewise, in the case of *Bouyid v. Belgium*, which examined police treatment under Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment), the Court highlights the importance of the notion of 'dignity', supported by multiple external instruments.⁶⁷⁹
808. The ECtHR also responds to the needs of the rights holders when establishing certain positive obligations. For example, a decision that requires combating stereotypes witnesses an approach that takes account of the particularities of a victim's experience. To stimulate the

⁶⁷⁶ *Ibidem*, pp. 454-458, 460-461 and 465. According to this author, an integrated perspective means taking into account, at the same time, all (aspects of) relevant human rights norms and claims. Brems considers referencing to external instruments to be the expression of an integrated view on the part of the judges. According to Brems, the principles of universality, indivisibility and interdependence plead in favor of such an integrated approach.

⁶⁷⁷ *Ibidem*, pp. 460 and 465. See also M. Forowicz, *op. cit.*, pp. 124 *et seq.*, including Strasbourg cases about the Court using the UN Convention on the Rights of the Child in cases of corporal punishment and abuse. The latter examples equally demonstrate how external referencing could allow to better respond to the specific character of the claims: touching upon the issue of corporal punishment and abuse of children. By doing so, the Strasbourg judges have been able to shape and adapt article 3 ECHR (prohibition of inhuman and degrading treatment) and article 8 ECHR (right to respect for private and family life) to situations involving children, which has resulted in more coordinated and coherent law on the issue.

⁶⁷⁸ ECtHR (GC), *Salduz v. Turkey*, 27 November 2008, Appl. No. 36391/02, para. 60.

⁶⁷⁹ ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 89.

fight against stereotypes, the Court has made use of detailed external instruments focusing on particular categories of persons and containing specific provisions on the issue of stereotyping. For instance, regarding discrimination against women, the Grand Chamber in the case of *Konstantin Markin v. Russia*, stresses the importance of combating stereotypes with reference to the CEDAW.⁶⁸⁰ Another example is *Aksu v. Turkey*, in which the Grand Chamber highlights the need to combat stereotypes as a requirement under Article 8 ECHR (on the right to privacy). To this end, the Court mobilized conclusions of the ECRI to affirm that “...the Government should pursue...efforts to combat negative stereotyping of the Roma”.⁶⁸¹ Moreover, the Court considers it relevant that the observations were in line with a policy recommendation of the ECRI, which stipulates that States should “...[promote] critical thinking among pupils and [equip] them with the necessary skills to become aware of and react to stereotypes or intolerant elements contained in [the] material they use”.⁶⁸²

§ 1.2. An interdependent method strengthening the indivisibility of rights

809. The ECHR and its Protocols mainly focus on civil and political rights, with some exceptions.⁶⁸³ The referencing practice of the ECtHR integrates norms of other ‘generations’⁶⁸⁴ of human rights, especially social rights.⁶⁸⁵ This kind of references might help to fine-tune and develop the normative content of Convention rights, by giving them a more pronounced social, economic, or cultural dimension. Such a judicial practice – which is said to reflect an interdependent approach⁶⁸⁶ – reinforces the principle of indivisibility of human rights, which starts from a unified understanding of human rights law that does not allow artificial distinctions.⁶⁸⁷ It builds on the idea that the protection of one ‘group’ of rights might be

⁶⁸⁰ ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, paras. 49 and 14.

⁶⁸¹ ECtHR (GC), *Aksu v. Turkey*, *op. cit.*, para. 75.

⁶⁸² *Ibidem*, para. 85.

⁶⁸³ Convention rights with social dimensions include: syndical liberty, syndical rights, the interdiction of forced labor, and the right to education. Convention rights with economic dimensions include the rights to respect to property and the prohibition of deprivation of property.

⁶⁸⁴ The categorization of rights in ‘generations’ is in itself controversial as it alludes to economic, social and cultural rights having a ‘secondary’ status. See S. Alemahu Yeshanew, *op. cit.*, pp. 300-301.

⁶⁸⁵ In doctrine and international instruments it is generally accepted that social rights are those rights that concern the well-being of the members of society and that envisage ensuring the living conditions conform to human dignity. Social rights include: the right to work, to education, to health, to social security, to housing, to environmental protection, to the protection of special groups like family, children and adolescents, immigrant, disabled persons, old persons, *etc.*. These rights do thus not only address workers, but vulnerable groups more largely. See N. Aliprantis, “Les droits sociaux sont justiciables!”, *Dr. soc.* 2006, no. 2, p. 158; A. Fabre, “La ‘fondamentalisation’ des droits sociaux en droit de l’Union européenne”, in R. Tinière and C. Vial (eds), *La protection des droits fondamentaux dans l’Union européenne. Entre évolution et permanence*, Bruylant, Brussels, 2015, p. 163. Fabre, for lecture on the notion of ‘social rights’, also refers to: D. Roman, “Les droits sociaux, ‘droits des pauvres’ ou droits de l’Homme”, in D. Roman (ed.), *Les droits sociaux, entre droits de l’Homme et politiques sociales. Quels titulaires pour quels droits?*, L.G.D.J. Lextenso, Paris, 2012, pp. 1-26.

⁶⁸⁶ For the use of this notion and more information in this respect (including on the legal basis of approach in the UDHR, ICCPR and the ICESCR), see S. Alemahu Yeshanew, *op. cit.*, pp. 299-321.

⁶⁸⁷ Principles of indivisibility, interdependence and interrelatedness of human rights call for a unified understanding of rights falling into the rather artificial categories. *Ibidem*, pp. 300-303 (and references there, including *inter alia*: P. Hunt, *Reclaiming Social Rights: International and Comparative Perspectives*, Aldershot, Dartmouth, 1996, p. 2). See also E. Brems, *op. cit.*, 2014, pp. 452 *et seq.* and pp. 466 *et seq.* Arguments for the

important for the realization of other ‘groups’ of rights; civil and political rights may serve as a basis for the realization of social, economic and cultural rights (and *vice versa*).⁶⁸⁸ This accentuates the permeability and intertwinement of various rights, implying that the protection of one right is fundamental to realize others.⁶⁸⁹ Some authors consider this integrated approach (concretized by the referencing practice) as a separate method of interpretation limiting the effects of the division between the ECHR and rights of the ‘second’ generation.⁶⁹⁰ An interdependent approach could do justice to specific circumstances and lived experiences of victims.⁶⁹¹ References to instruments that are related to other ‘generations’ of rights might stimulate a comprehensive assessment of a rights holders’ situation.

810. The Court already in its early cases acknowledged the possibility of integrating ‘generations’ of human rights. In the case of *Airey v. Ireland* of 9 October 1979 for example, it highlighted human rights interdependence by stating that

“...whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature...the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention”.⁶⁹²

interdependence of human rights often rely on the provision of the 1993 Vienna Declaration that ‘all human rights are universal, indivisible, interdependent, and interrelated’, see *The Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN doc A/CONF. 157/24 (1993), 32 ILM 1661, part 1, para. 5, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (visited on 21 September 2016).

⁶⁸⁸ S. Alemahu Yesanew, *op. cit.*, p. 302.

⁶⁸⁹ *Ibidem*. For example, ensuring human treatment in prison might be connected to aspects of the right to health. See also C. Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights”, *Osgoode Hall L J* 1989, vol. 27, p. 769; I.E. Koch, “Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective”, *IJHR* 2006, vol. 10, no. 4, pp. 405 and 424; T. Melish, “Rethinking the ‘Less as More’ thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas”, *NYU J Int’l L & Pol* 2006, vol. 39, pp. 221-222.

⁶⁹⁰ See V. Mantouvalou, “Work and Private Life: *Sidabras and Dziautas v. Lithuania*”, *ELRev* 2005, vol. 30, pp. 573 *et seq.* This author focused not on the case of *Demir and Baykara v. Turkey* but on the case of *Sidabras and Dziautas v. Lithuania*, which was considered as an illustration of an ‘integrated approach’ (see more on this case, *infra*, footnote 692).

⁶⁹¹ E. Brems, *op. cit.*, 2014, pp. 466-467.

⁶⁹² ECtHR, *Airey v. Ireland*, 9 October 1979, Appl. No. 6289/73, para. 26. In this case, the Court used Article here mobilized Article 6 on the right to a fair trial as a vehicle for its interdependent approach, considering the right to free legal assistance to be a ‘social’ dimension of the right to a fair trial. In other cases, Article 6 ECHR had for instance been connected to social security benefits. More elaborate, see M. Scheinin, “Economic and Social Rights as Legal Rights”, in A. Eide, C. Krause, and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, Dordrecht, 2001, pp. 32-33. Another important Strasbourg case integrating the interpretation of civil and political rights with the interpretation of economic, social and cultural rights is the case of *Sidabras and Dziautas v. Lithuania* of 27 July 2004. The Court in this case endorsed a broad view of the ECHR ensuring consistency with external instruments in the context of social rights. In this case the Court argued that a ban to apply for some jobs violated Article 14 ECHR on the prohibition of discrimination and Article 8 on the respect for private life (paras. 50 and 65). The Court hereby created a connection between the right to work and the right to respect for private life. In giving particular weight to Article 1 (2) of the European Social Charter on the right to earn a living in an occupation freely chosen, the Court here clearly demonstrated an integrated and interdependent approach through the vehicle of referencing practice. ECtHR, *Sidabras and Dziautas v. Lithuania*, 27 July 2004, Appl. Nos. 55480/00 and 59330/00. See V. Mantouvalou, *op. cit.*, 2005, p. 573; S. Alemahu Yesanew, *op. cit.*, pp. 307 *et seq.*

811. In a recent European Conference held in February 2015 and discussing the future of the protection of social rights in Europe, external referencing was put forward as one of the means to strengthen indivisibility between human rights, to improve the protection of social rights, and to create consistency of social rights protection in Europe. The outcome document of this conference, prepared by academic experts and called the “Brussels’ Document on the future of protection of social rights in Europe”⁶⁹³ (hereafter: ‘Brussels’ Document’) acknowledged that “...instruments gain from being interpreted more broadly in the light of the provisions of other instruments addressing the same objectives or concerns or of the interpretation adopted by their respective supervisory bodies”.⁶⁹⁴ For instance, according to the Brussels’ Document, the European Social Charter (ESC)⁶⁹⁵ could serve as an inspirational instrument for the development of human rights.⁶⁹⁶ In addition, the Document stressed a need for openness beyond instruments of the CoE, for instance in relation to ILO and other UN instruments that are devoted to social rights.⁶⁹⁷

812. The case law of our pool demonstrates that the Grand Chamber often does justice to the recommendations as framed in the Brussels’ Document. When the Court refers to external instruments, for instance to support ‘evolutive’ reasoning, to explain a notion, or to offer a general argumentative support, it sometimes integrates social and economic aspects of rights. This contributes to a convergence between ‘categories’ of human rights and strengthens the principle of indivisibility. In the Grand Chamber’s decisions, the area of freedom of association (Article 11 ECHR), in particular, witnesses an interdependent approach.⁶⁹⁸

813. Indeed, in *Demir and Baykara v. Turkey*, the Court, with the help of external instruments, revised its case law by integrating into the right to freedom of association a right to collective bargaining, which can be associated with a rights of the second ‘generation’. To support the acknowledgment of this right under the scope of article 11

⁶⁹³ *Brussels’ Document on the Future of the Protection of Social Rights in Europe*, Belgian Chairmanship of the Committee of Ministers of the Council of Europe, outcome document of the European Conference on “the future of the protection of social rights in Europe”, 13 March 2015, Brussels.

⁶⁹⁴ Brussels’ Document, *op. cit.*, p. 5.

⁶⁹⁵ This instrument guarantees social and economic rights at the level of the CoE and is a natural complement and counterpart of the ECHR. For more information, see <http://www.coe.int/en/web/turin-european-social-charter> (visited on 23 July 2016).

⁶⁹⁶ The Brussels’ document observed that there is still considerable variation in the commitments of the EU Member States in respect of European Social Charter (some did not access the Revised Social Charter, and not all accepted the same provisions of the Social Charter) and that therefore, also the ECJ for instance shows reluctance to fully acknowledge the European Social Charter “...as a source of inspiration for the development of fundamental rights among the general principles of law it ensures respect for”. Brussels’ Document, *op. cit.*, p. 9.

⁶⁹⁷ Brussels’ document, *op. cit.*, p. 5.

⁶⁹⁸ See also: R.C.A. White and C. Ovey, *op. cit.*, p. 575. In the Convention’s list of traditional rights the following are included that might be relevant in the context of labor issues: the right to private life, freedom of expression, the right to form and join a trade union, prohibition of slavery, servitude, forced and compulsory labor. The following ‘labor rights’ are not included: the right to strike and the right to decent work conditions. See Mantouvalou, V., “Are Labor Rights Human Rights”, *European Labor Law Journal* 2012, vol. 3, p. 153.

ECHR, the Court referred to some ILO Conventions, to the ESC and the EU Charter.⁶⁹⁹ The Court thus created links between civil and political rights (*in casu* Article 11 ECHR) and social workers' rights (*in casu* the right to collective bargaining) and made Article 11 ECHR encompass dimensions of social rights. Injecting civil and political rights with social dimensions, is considered to be one of the options to realize an interdependent approach.⁷⁰⁰

814. We notice a similar phenomenon in the case of *R.M.T. v. the United Kingdom*. Here, the Court *inter alia* with the help of instruments, connects to the 'social sphere' (including ILO Convention No. 87⁷⁰¹ and the European Social Charter⁷⁰²) by bringing a right to secondary strike⁷⁰³ under the scope of Article 11 ECHR.⁷⁰⁴ However, unlike what happened in *Demir and Baykara*, the Court, in the case of *R.M.T.*, does not give much weight to the external 'social' instruments in the concrete proportionality assessment of the State's interference. Thus, in the abstract, the *R.M.T.*-case aligns with the position assumed in the external instruments and recognizes a right to secondary strike. *In concreto*, however, it does not consider the results of the national measures (that prohibited a secondary strike) as a disproportionate action under the Convention.⁷⁰⁵

815. In our pool of cases, *Palomo Sánchez and Others v. Spain* is relevant, too. Also in this case, the ECtHR connects aspects of worker's rights to Convention provisions. Inspired by case law of the ACtHR, the Court stresses that Article 10 ECHR on the freedom of expression should be considered as a *conditio sine qua non* for Article 11 ECHR on the freedom of assembly and association.⁷⁰⁶ When addressing the principles under Article 10 of the

⁶⁹⁹ ECtHR (GC), *Demir and Baykara*, *op. cit.*, paras. 147-150.

⁷⁰⁰ Besides the creation of links between substantive rights, another option for an interdependent approach is to enforce second-generation rights attached to non-discrimination or procedural rights (like the right to a fair trial). An interdependent approach in legal reasoning had therefore been described as a method "...that relies on process and procedural rights that are common to all groups of rights and on the interrelationship between the components of various substantive rights. It draws on the lack of logic in the strict categorization of rights into different groups. It aspires to establish a coherent norm system based on the holistic interpretation of provisions of one or more human rights instruments". S. Alemahu Yeshanew, *op. cit.*, p. 344. See also: M. Scheinin, *op. cit.*, 2001, pp. 32-42, M. Scheinin, "Justiciability and the Indivisibility of Human Rights", in J. Squires, M. Langford and B. Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, UNSW press, Sydney, 2005, p. 19, all referred to by S. Alemahu Yeshanew, *op. cit.*, p. 300. Another example of interdependence between separate substantive rights is making a connection between the rights to life and the right to health whereby the lack of certain medical treatments (and other dimensions of the right to health) may engage responsibility under the right to life (Article 2 of the Convention). Article 2 ECHR could thus create positive obligations in respect of health care. On this issue including case law, see S. Alemahu Yeshanew, *op. cit.*, p. 309.

⁷⁰¹ ECtHR (GC), *R.M.T. v. the United Kingdom*, *op. cit.*, para. 27.

⁷⁰² *Ibidem*, para. 34.

⁷⁰³ A 'secondary' action means that a trade union encourages the employees of an employer that is not a party to the relevant industrial dispute to take industrial action in support of employees of a separate employer that is party to the dispute.

⁷⁰⁴ ECtHR (GC), *R.M.T. v. the United Kingdom*, *op. cit.*, paras. 76-78.

⁷⁰⁵ For more details on this issue see *supra*, paras. 609 *et seq.* and *infra*, para. 855.

⁷⁰⁶ ECtHR (GC), *Palomo Sánchez and Others v. Spain*, 12 September 2011, Appl. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, para. 56: "The Court takes the view that the members of a trade union must be able to express to their employer the demands by which they seek to improve the situation of workers in their company. In this respect, the Court notes that the Inter-American Court of Human Rights, in its Advisory Opinion OC-5/85, emphasized that freedom of expression was "a *conditio sine qua non* for the development of ..trade unions".

Convention, the Court elaborates on the scope of ‘trade-union expression’ with the help of an ILO-recommendation, by saying that

“...the national authorities must ensure that disproportionate penalties do not dissuade trade-union representatives from seeking to express and defend their members’ interests. Trade-union expression may take the form of news sheets, pamphlets, publications and other documents of the trade union whose distribution by workers’ representatives acting on behalf of a trade union must therefore be authorized by the management, as stated by the General Conference of the International Labor Organization in its Recommendation No. 143 of 23 June 1971...”⁷⁰⁷

The latter phrase demonstrates that the influence of external instruments can be more subtle than bringing (new) rights under the Convention. They might also help framing notions and legal criteria when applying the Convention, for example in a context of employment. Such references may dynamically influence the scope of application of the Convention. In the case of *Sindicatul “Păstorul cel Bun” v. Romania*, for example, the Court references external instruments to uncover whether there exists an ‘employment relationship’ between members of the clergy and the Church. Such a relationship would render the right to form a trade union applicable under Article 11 of the Convention.⁷⁰⁸ More particularly, the Court imports the ILO Recommendation No. 198 to stress that determining whether there is an ‘employment relationship’ should be guided by the facts relating to the performance of work and the remuneration of the worker, it imports the ILO Convention No. 87 to highlight that workers and employers, without distinction, have the right to establish organisations of their own choosing, and it refers to the EU Council Directive 78/2000/EC to stress that a heightened duty of loyalty, which characterizes the relationships between the clergy and the Church, cannot prejudice the right to establish unions.⁷⁰⁹ With support of instruments touching on workers’ and employment issues, the Court thus dynamically interprets the right to form a trade union; members of the clergy who fulfill their mission in a context of an employment relationship also fall under the scope of that provision.

816. In recent years, the Court has become more receptive to workers’ and trade unions’ claims.⁷¹⁰ To some extent, workers’ rights, and the specific criteria relevant for their application, are now integrated in Strasbourg human rights adjudication.⁷¹¹ As a result, the

⁷⁰⁷ *Ibidem*.

⁷⁰⁸ ECtHR (GC), *Sindicatul “Păstorul cel Bun” v. Romania*, 9 July 2013, Appl. No. 2330/09, para. 142.

⁷⁰⁹ *Ibidem*.

⁷¹⁰ V. Mantouvalou, *op. cit.*, 2012, p. 158. This author said that “...[t]he Court extended the principles of the Convention in the employment sphere through the adoption of an ‘integrated approach’ to interpretation”, whereby the Court “...reads certain social and labor rights in the provisions of the ECHR”.

⁷¹¹ Because labor rights rather relate to ‘private economic power’ than to ‘State power’ (which is of concern under human right protection), the integration of ‘labor rights’ and aspects of the employment sphere in human rights adjudication indicates that the Court admits that private power can be as harmful as public power and that the public authorities carry (positive) responsibilities to regulate this private sphere, including employment relations. *Ibidem*, p. 161.

identity of workers' rights as 'human rights' has become stronger.⁷¹² Human rights have the advantage to be universal and, unlike labor rights, to be less attached to 'citizenship', which might, for example, be beneficial for the protection of irregular migrant workers.⁷¹³ From the eyes of rights holders faced with problems in employment relations, such developments do justice to their full experience and to their inter-connected needs. Then, external instruments allow to better adapt the argumentation to the rights holders' identity of being 'workers', avoiding a fragmented view on their situation.

817. Such tendencies are not uncontested. For instance, the Turkish government in its submissions to the case of *Demir and Baykara* challenged the use of instruments that included human rights of the second generation. The government pointed at the lack of political support of the CoE Member States regarding the work of the Steering Committee for Human Rights with a view to creating an additional protocol to the ECHR concerning social and economic rights. The Court responded to this argument by stressing that the lack of political support went hand in hand with the wish of States to strengthen the mechanism of the ESC. According to the Court, this has contributed to a consensus among Member States to promote social and economic rights, which pleads in favor of such references.⁷¹⁴

818. The Court, in *Demir and Baykara* and in some subsequent cases, adopted an integrated approach, moving away from a classic conception of rights of the second 'generation'. In a more classic approach – still popular in legal doctrine and practice – rights of the 'second generation' are no real rights because they do not constitute subjective rights that are directly justiciable.⁷¹⁵ This vision treats social and economic 'rights' rather as political declarations, addressed to the legislator rather than to individuals. The integrated approach in Strasbourg practice reflects a sign that the classic vision is somewhat in decline. In legal doctrine and in

⁷¹² An instrumental view treats rights as human rights from the moment certain institutions (like courts, NGOs, etc.) start protecting rights as human rights. If they are successfully promoted within a certain framework of human rights, they can be considered as 'human rights' under that framework. This contrasts to a more 'positivist view', which is often found in international law literature and which only considers rights as human rights if they are protected in a human rights treaty or if an instrument explicitly recognizes certain rights as 'human rights' (such as when rights appear in the ICESCR). But the ILO, for long, did not explicitly present its documents as being 'human rights documents'. To a positivist approach, the rights enshrined therein could thus not be considered as 'human rights'. In more recent years, however, the ILO endorsed a list of labor rights as 'human rights': it elaborated the Declaration of Fundamental Principles and Rights at Work which contains four core rights: freedom of association and the right to collective bargaining, elimination of forced or compulsory labor, abolition of child labor, and the elimination of discrimination in employment. Also the EU Charter contains a list of labor rights as 'human rights' including the right to information and consultation, protection from unfair dismissal, and the prohibition of forced labor. Besides a 'positivist' and an 'instrumental' approach, there is also a 'normative approach' as to whether labor rights could be considered as 'human rights'. The latter approach builds on a theoretical perspective (rather than a practical perspective) examining the issue within a moral understanding focusing on the nature of labor rights. According to this view some 'labor rights' are 'human rights' because of their nature. For more information, see *ibidem*, pp. 163 *et seq.*

⁷¹³ See V. Mantouvalou, *op. cit.*, 2012, p. 171.

⁷¹⁴ ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 80.

⁷¹⁵ 'Justiciable' means: able to be invoked by an individual in legal proceedings. For more on this approach, see A. Fabre, *op. cit.*, p. 164.

other legal bodies too, more and more writers and practitioners defend the view that social rights could serve as justiciable fundamental rights.⁷¹⁶

819. An interdependent approach to human rights has the potential to empower justiciability of social, economic, and cultural rights.⁷¹⁷ It allows – in an indirect manner – to enforce these rights as elements of certain classic civil and political rights and to give them binding effects.⁷¹⁸ The external referencing practice, therefore, has strong potential to serve as a vehicle to achieve a holistic interpretation⁷¹⁹ of human rights instruments.⁷²⁰ This implies that the Strasbourg referencing practice could contribute to soften the still existing divergence in treatment between the two ‘generations’ of human rights. Indeed, the charters containing social rights (the ESC, 1961 – revised in 1996)⁷²¹ do not have a status as strong as the ECHR, supervised by the ECtHR.⁷²² The interdependent approach, bringing some rights of the ESC under the Court’s direct supervision, thus helps to enforce certain rights that would otherwise be enforced by the ECSR (which is the ‘usual’ monitoring body of the ESC). This could circumvent some objections with regard to legitimacy and competence which appear in relation to the supervisory task of the ECSR, but which are generally absent in relation to the enforcement of civil and political rights by the ECtHR.⁷²³

820. From a users’ perspective, we applaud these developments. However, there is still a great deal of work to be done in advancing the protection of economic and social rights. The principle of interdependence of human rights is not yet fully developed in jurisdictional practice.⁷²⁴ This also counts in relation to Strasbourg case law, which does not on every

⁷¹⁶ D. Roman (ed.), *La justiciabilité des droits sociaux: vecteurs et résistances*, Pedone, Paris, 2012, 460 p.; D. Roman (ed.), *Les droits sociaux, entre droits de l’Homme et politiques sociales. Quels titulaires pour quels droits?*, L.G.D.J. Lextenso, Paris, 2012, 200 p., both referred to by A. Fabre, *op. cit.*, p. 164. The ICESCR only has since recently an individual complaints procedure. Before, it was only monitored through procedures of reporting. However, many states did not yet ratify the optional protocol allowing individual complaints procedure. The instrument itself is also framed in soft terms, rather reflecting aspirational goals than clear rights. For more information on the ICESCR, see <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx> (visited on 24 July 2016). The ESC is also monitored in a soft manner by a procedure of reporting to the European Committee of Social Rights. Certain NGOs, trade unions and other groups can however, since 1998, make use of a right of collective complaints. For more information, see <http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1> (visited on 24 July 2016).

⁷¹⁷ For more on this issue of ‘justiciability’, see S. Alemahu Yeshanew, *op. cit.*, pp. 36 *et seq.* and pp. 306 *et seq.*

⁷¹⁸ Cf. *ibidem*, p. 304. More on different approaches to litigation and adjudication of second-generation rights including the minimum core model, the reasonableness model, and the indirect interdependence model, see *ibidem*, pp. 275-321. For more information on the interdependence model in particular, see *ibidem*, pp. 299-321.

⁷¹⁹ Notion used by: *ibidem*, pp. 305 and 344.

⁷²⁰ *Ibidem*, pp. 305 *et seq.*. According to this author, speaking about the African human rights context, external referencing could be used to give ‘more flesh’ to the ‘thin’ economic, social and cultural rights (that are broadly framed in the African Charter). *Ibidem*, p. 267.

⁷²¹ The European Social Charter (ETS No.035) supplements the European Convention on Human Rights in the field of economic and social rights. It lays down various fundamental rights and freedoms and establishes supervisory mechanism based on a system of collective complaints and national reports, guaranteeing their respect by State Parties. The Charter was amended in 1996 and is now ratified by 43 of the 47 Council of Europe member States (32 being bound by the Revised Charter and 11 by the original Charter). Information taken from: http://www.coe.int/t/democracy/migration/bodies/ecsr_en.asp (visited on 21 August 2016).

⁷²² A. Fabre, *op. cit.*, p. 165.

⁷²³ Cf. S. Alemahu Yeshanew, *op. cit.*, p. 344.

⁷²⁴ See M. Scheinin, *op. cit.*, 2005, p. 21.

occasion demonstrate a holistic approach to the human rights field. On the one hand, since the Court is in the first place a body that monitors civil and economic rights, this is understandable. On the other hand, if the Court wants to do full justice to the idea of interrelatedness of ‘generations’ of human rights, it should insist stronger on reading the Convention together with instruments of social, economic and cultural rights. There are several cases in which the Court misses opportunities in this regard and in which it does not do full justice to a users’ point of view, which requires taking account comprehensively of human rights holders’ specific needs and interests. These cases, for example, include *Răzvan Mihai Gherghina v. Romania* and of *A, B, C v. Ireland*.

821. The case of *Răzvan Mihai Gherghina v. Romania* represents a missed opportunity in terms of explicitly including provisions about socio-economic aspects of the rights of persons with disabilities.⁷²⁵ This case was about the physical inaccessibility of a university building for a student in a wheelchair. The student argued that he was discriminated in the exercise of his right to education (violation of Article 14 ECHR in conjunction with Article 2 of Protocol 1 of the ECHR). The Court stresses in this case how evolutions under international law were only recent and how this had led to the absence of national case law on the issue of accessibility of public buildings.⁷²⁶ However, it does not make use of the substance of clear and specialized instruments including socio-economic aspects of the experiences of disabled persons such as the CRPD, which explicitly fosters an inclusive education.⁷²⁷

822. The case of *A, B, C v. Ireland* reflects a missed opportunity to create stronger connections between Convention rights and, *in casu*, issues of health and well-being. In this judgment, the Grand Chamber allows restrictions under Irish law on obtaining abortion, even when abortion was required for reasons of health and/or of well-being. This case largely leaves aside arguments about women’s right to health. Such arguments could have been supported by external instruments, as suggested by the applicant and some third parties. One of the applicants, indeed, underlined that protecting pre-natal life by criminalizing necessary health care does not fit the Convention’s values and that there should be national alternative measures permitting legal abortion in order to protect health and well-being of women. She supported her position with references to external instruments including the OHCHR, the CEDAW, and the HRC. One of the applicants equally demanded the Court, with the help of an external instrument, to take account of the

⁷²⁵ ECtHR (GC), decision of *Răzvan Mihai Gherghina v. Romania*, 9 July 2015, Appl. No. 42219/07. This case of our pool, however, is not included as an example of a case that exercises a referencing practice because the Court, here, only refers to international law in general terms (without mentioning a specific provision or instrument). We nonetheless include it here because it offers a good example of a missed opportunity of a more interdependent approach.

⁷²⁶ *Ibidem*, para. 100.

⁷²⁷ UNCRDP, article 24.

major health concerns that unsafe abortions bring.⁷²⁸ In addition, some third parties drew attention to issues of health, clearly inspired by the CEDAW.⁷²⁹ One of the third parties explicitly stressed that:

“International human rights law also reflected an understanding in an abortion context that the protection of life was practically indistinguishable from the protection of health. A comparative review revealed that all Contracting States which permitted abortion to preserve life also admitted abortion to protect health – all except Ireland. This recognized that distinctions between life and health protection could not be meaningfully drawn in a clinical context”.⁷³⁰

The ECtHR, by largely ignoring the observations and concerns relating to a woman’s health, missed an opportunity to develop an interdependent approach. If it had given more weight to social and economic arguments, respect for the lived experiences of the women involved would have been stronger. From the perspective of the victims, it is preferable to give effect to some external instruments, stressing the link between, on the one hand, the right to life and privacy and, on the other hand, aspects of health and well-being. Such references would enhance the validity of the referencing practice from a victims’ viewpoint, taking account of all their specific needs, interests and characteristics.

§ 2. The advancement of human rights protection

823. From the perspective of the rights holders, it is beneficial that the ECtHR takes account of external instruments that may advance the protection standards under the Strasbourg system. For instance, when the Court aligns with external higher levels of protection, this encourages a ‘race-to-the-top’ in human rights development as well as equal protection of individuals across legal systems.⁷³¹ The advancement of human rights protection serves the substantive quality of the decision-making process from the eyes of alleged human rights victims. Of course, they strive to win their case and pursue the highest possible protection of their rights. ‘Evolutive’ standards are also beneficial from the viewpoint of human rights holders more generally. They might applaud a strengthened protection of human rights across the CoE. Thus, in our view, ‘maximising’ human rights protection is justified from a bottom-up rights holders’ perspective, and especially from the perspective of the applicants.

⁷²⁸ ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, paras. 173 and 175.

⁷²⁹ *Ibidem*, para. 109.

⁷³⁰ *Ibidem*.

⁷³¹ Brems draws attention to how an integrated approach to human rights law can avoid a ‘race-to-the-bottom’, also within a duty bearers’ perspective, see E. Brems, *op. cit.*, 2014, pp. 462-463.

824. The latter statements demand some caution and nuance. One should realize that not all human rights holders necessarily applaud the development of (certain) human rights. Delicate issues such as the enhancement of voting rights for prisoners might provoke very mixed reactions in public opinion. A reasoning starting from a general rights holders' category thus oversimplifies reality. Within this category, there might be groups supporting the advancement of human rights and others being more critical about it. Moreover, talking about an enhanced human rights protection is not always straightforward. Since interests of individuals or groups do not always overlap, evaluating 'progress' in human rights protection is a difficult undertaking. A situation in which a Strasbourg decision involves a balancing of different human rights illustrates this. Then, an increased protection standard for one sub-category of rights holders (as a possible result of referencing) does not necessarily imply an advantageous situation for other sub-categories of rights holders. We will make this more concrete with an illustration.

825. In the case of *Staatkundig Gereformeerde Partij v. the Netherlands*,⁷³² the Strasbourg Court decided that the Dutch government could lawfully protect women from discrimination by taking measures against the '*Staatkundig Gereformeerde Partij (SGP)*', a Dutch orthodox political party that did not allow women on its voting lists. The (implicit) use of external instruments in this case supported the Court's battle against gender stereotypes, and the outcome of the decision. On the one hand, this outcome was advantageous from the perspective of protecting women against discrimination. Orthodox women clearly experienced benefits as a result of the increased attention for their rights.⁷³³ On the other hand, it is not unthinkable that some orthodox women attached more importance to their freedom of religion, even when religious prescriptions implied gender discrimination. Several women, as appeared from interviews with members of the orthodox community, were not pleased with the outcome of the case. They considered it as a humiliating and paternalist form of forced emancipation and as an unpermitted meddling in their personal religious affairs.⁷³⁴ In addition, the outcome of the case of '*Staatkundig Gereformeerde Partij*' might be controversial for the interests of those rights holders who primarily strive for freedom of organization of political parties.⁷³⁵ In this case, regarding a situation of 'balancing' of human rights, it is therefore difficult to say whether the use of external instruments contributed to, or rather inhibited, the advancement of human rights protection.

⁷³² ECtHR, *Staatkundig Gereformeerde Partij v. the Netherlands*, 10 July 2012, Appl. No. 58369/10.

⁷³³ For some women of the Orthodox community, the decision indeed appeared as a welcome evolution. After the decision, which kept untouched the Dutch obligation to allow women on a voting list, some Orthodox women registered themselves for local elections for the department of the SGP in Vlissingen.

⁷³⁴ B. Oomen, J. Guijt, I. Meijvogel, M. Ploeg and N. Rijke, "Van Walswetten en de Wil van God", *N.J.B.* 2010, vol. 4, pp. 216-222; B. Oomen, "Between Rights Talk and Bible Speak: The Implementation of Equal Treatment Legislation in Orthodox Reformed Communities in the Netherlands", *Human Rights Quarterly* 2011, vol. 33, no. 1, p. 176.

⁷³⁵ For more on the case of SGP and on the difficult balancing exercise in covers: D. Staes, "L'interdiction de discrimination et l'autonomie des partis politiques", *E.J.H.R.-E.J.D.H.* 2015, no. 2, pp. 123-145.

826. Nonetheless, generally speaking, we start from the assumption that the human rights holders have a positive interest in a development of human rights. Building on our case law analysis, we conclude that, more often than not, the levels of human rights protection benefit from the use of external instruments (§ 2.1.). In some specific areas of human rights protection, this had been demonstrated by other authors, too.⁷³⁶ This increases the validity of the referencing practice from a rights holders' point of view. However, there are also examples demonstrating how external instruments resist or slow down human rights development, or how they contribute to 'excusing' some human rights infringements (§ 2.2.). Finally, our case law analysis demonstrates that the Court misses some opportunities in taking account of external instruments to advance human rights law (§ 2.3.).

§ 2.1. Human rights protection generally benefits from external referencing

827. There are several situations in which external instruments act as driving forces behind a progressive development of human rights in Strasbourg adjudication.

828. A *first* – and the most obvious – such situation is when the Court builds on external instruments to enable 'evolutive' interpretation. Our case law analysis demonstrates that in several cases the Grand Chamber mobilized external instruments to dynamically revise earlier case law in a progressive manner.⁷³⁷ In a large majority of the examined Grand Chamber cases, the Court, when it observes an evolution in a certain normative field, bases this conclusion on external instruments (in combination with internal comparisons) rather than on internal comparisons only. In our pool of Grand Chamber cases, the Court develops an internal comparison that 'stands on its own' (without including external instruments) in about twenty-five cases. Only in one of these cases, the internal comparison has an explicit 'evolutive' effect.⁷³⁸ Accordingly, for 'evolutive' purposes, the Grand Chamber usually looks beyond national law and practices and equally includes external instruments.

829. *Secondly*, although the use of the 'margin'-doctrine generally goes against the interests of the applicants, external instruments could have a beneficial effect on narrowing a State's margin, and thus on stimulating a more rigorous human rights supervision. When external instruments are part of the comparison, they contribute to the establishment of a consensus

⁷³⁶ On the role of some external references to enhance the Court's constitutional justice (illustrated by the Court's contribution to an important shift in migration law beginning in the late 1980s and resulting in an enhanced scheme for the protection against expulsion in Europe), see A. Farahat, *op. cit.*, pp. 303-322.

⁷³⁷ See *supra*, Part II, Chapter 3, § 3.1.

⁷³⁸ ECtHR (GC), *Herrmann v. Germany*, 26 June 2012, para. 78. A comparison that 'stands on its own' rather leads to the establishment of a 'margin of appreciation'. For more on this issue, see *supra* para. 294.

or a trend and therefore, decrease a State's freedom of manoeuvre. Such a narrower margin is generally beneficial for the outcome of a case from a human rights user's point of view. In our analysis of Grand Chamber cases (except in *Animal Defenders International v. the United Kingdom*⁷³⁹, *Stummer v. Austria*⁷⁴⁰ and *Perinçek v. Switzerland*⁷⁴¹) the importation of external instruments (mainly of EU- and CoE-origin) contributes to narrowing the 'margin of appreciation'.⁷⁴² Indeed, sometimes the Court empowers an internal consensus with external instruments,⁷⁴³ sometimes it pays less attention to the lack of an internal consensus than to an emerging trend expressed in external instruments,⁷⁴⁴ and sometimes the external instruments themselves – independently from an internal comparison – point at the existence of a consensus.⁷⁴⁵

830. *Thirdly*, the positive impact of external instruments on the development of human rights appears more implicitly, in cases in which the Court does not explicitly create an 'evolutive' interpretation. For example, in the case of *Vinter and Others v. the United Kingdom* both an internal and an external comparison (including several international instruments) offer a general support for the conclusion that there exists a principle that all prisoners must be offered a possibility of rehabilitation and the prospect of release. This outcome contrasted with an earlier similar (but not identical) case, namely the case of *Kafkaris v. Cyprus*. In the latter case, the Court had built only on an internal consensus to conclude that, in Europe, no uniform standards exist about life imprisonment, review and adjustments, and that no clear tendencies can be ascertained about the system and procedures of early release. In the latter case, the European consensus prevailed over an emerging trend in international law.⁷⁴⁶ Therefore, the Court concluded in *Kafkaris v. Cyprus* that there was no violation of Article 3 of the Convention.⁷⁴⁷ This outcome was criticized by several dissenting judges who drew attention to various international law instruments which might have guided the majority of the Court towards another outcome.⁷⁴⁸ In the subsequent case of *Vinter and Others v. the United Kingdom*, the Court was receptive to these arguments of international law, which offered support for the statement that life sentences without parole violate Article 3 of the Convention. Here, the openness to external instruments had stimulated higher protection standards under the Strasbourg system.

⁷³⁹ ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123.

⁷⁴⁰ ECtHR (GC), *Stummer v. Austria*, *op. cit.*, paras. 104 *et seq.*

⁷⁴¹ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 256-257.

⁷⁴² On these three Strasbourg cases in which external instruments rather contributed to the establishment of a wide margin, see *supra*, Part III, Chapter 1, § 4.2.4.

⁷⁴³ ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 112.

Para. 112; ECtHR (GC), *Tănase v. Moldova*, *op. cit.*, para. 176.

⁷⁴⁴ ECtHR (GC), *Vallianatos and Others v. Greece*, *op. cit.*, paras. 91-92.

⁷⁴⁵ ECtHR (GC), *Roman Zakharov v. Russia*, *op. cit.*, para. 269.

⁷⁴⁶ K. Dzehtsiarou, *op. cit.*, pp. 58-59.

⁷⁴⁷ ECtHR (GC), *Kafkaris v. Cyprus*, 12 February 2008, Appl. No. 21906/04, para. 104. This case is not part of our pool of case law.

⁷⁴⁸ Dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens to the case of ECtHR (GC), *Kafkaris v. Cyprus*, 12 February 2008, Appl. No. 21906/04, para. 4.

831. A *final* example of a situation in which the referencing practice contributes to advancing human rights, is when external instruments inform the Court about alternative measures that would result in lesser human rights restrictions than the measures issued by the State. For instance, in the case of *Sejdić and Finci*, the Court, when applying Article 14 ECHR (prohibition of discrimination) in conjunction with Article 3 of Protocol 1 ECHR (right to free elections), refers to opinions of the Venice Commission, which "... clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities".⁷⁴⁹ For the Court, the "...possibility of alternative means achieving the same end" is "...an important factor in this sphere".⁷⁵⁰ As such, the information of the external instruments affected the proportionality assessment in a manner that was beneficial for the rights holders.

§ 2.2. Counterexamples: references hindering human rights development

832. It happens that the referencing practice challenges human rights protection. Such references are difficult to defend from a rights holders' point of view. To ensure that referencing practice progresses or at least maintains protection levels, it is important to resist or to be cautious in respect of two specific phenomena in Strasbourg adjudication. A first phenomenon alludes to a situation in which external instruments might lead to 'regressive' evolution or to a 'disapplication' of human rights (§ 2.2.1.). A second phenomenon is when external instruments hamper 'evolutive' interpretation or 'excuse' interferences (§ 2.2.2.).

§ 2.2.1. External referencing to support regressive evolution or to 'disapply' human rights

833. While the case law analysis demonstrates that the Court does usually not establish a 'regressive' evolution, some cases including external instruments require some caution from a rights holders' point of view.

834. A first example is *Scoppola v. Italy* (No. 3), a case in which the Grand Chamber seems to recognize the possibility of 'degressively' reconsidering Strasbourg precedents (such as the case of *Hirst* (No. 2) *v. the United Kingdom*) on the basis of an external backward evolution, which might lead to a 'race-to-the-bottom' in human rights protection.⁷⁵¹ The Court's unusual statements in this case should however be read in the exceptional context of the

⁷⁴⁹ ECtHR (GC), *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.* para. 48.

⁷⁵⁰ *Ibidem.*

⁷⁵¹ ECtHR (GC), *Scoppola v. Italy* (No. 3), *op. cit.*

Hirst (No. 2)-case (about voting rights for prisoners), which provoked very strong criticism in the United Kingdom.⁷⁵²

835. In addition, the Court's case of *Mangouras v. Spain* is interesting.⁷⁵³ Here, the Grand Chamber examines the imposition of a high level of recognizance to secure release on bail under Article 5 of the ECHR on the right to liberty and security. The bail concerned the Master of a ship facing criminal charges in an oil pollution case. In its judgment, the Court, with reference to external instruments, stresses the "growing and legitimate concern both in Europe and internationally in relation to environmental offences" and the importance of preventing maritime pollution and bringing to trial those responsible for environmental offences. Therefore, the very high amount of the bail was allowed. Here, because of the external normative developments, the Court seems to curtail some rights (under Article 5 ECHR) of the alleged victim. It did not conclude to a violation where otherwise – when it would not be to protect the environment – such an interference might not be acceptable. As a result, the State was allowed flexibility and freedom in the measures to respond to 'new' demands of combating environmental offences, even when these measures interfere with human rights.

836. The ECtHR also integrates instruments that originate in domains not sharing a human rights' philosophy. In our view, this should on no account affect human rights' specific aims and purposes. Admittedly, harmonization with other domains of law does not necessarily affect human rights protection. Our case law analysis demonstrates that the Court generally considers itself competent to supervise the national effects of external obligations and the Court makes efforts to preserve the specific character of human rights. On some occasions, however, the aim of creating harmonization with external normative fields has afforded too much weight to external international law, to the detriment of human rights protection.

837. For example in the case of *Al-Adsani* of 21 November 2001 (not part of our pool of cases), the Strasbourg Court holds that the prohibition of torture, even though it has the character of *jus cogens*, does not set aside the rules of public international law on State immunity and, as a result the Court, making use of Article 31 paragraph 3 (c) of the VCLT, disabled an adequate protection under the Convention.⁷⁵⁴

⁷⁵² See *supra*, para. 289.

⁷⁵³ ECtHR (GC), *Mangouras v. Spain*, *op. cit.*, para. 86.

⁷⁵⁴ ECtHR (GC), *Al-Adsani v. the United Kingdom*, 21 November 2001, Appl. No. 35763/97, para. 55. The Court stressed in the following paragraph (para. 56) that: "It follows that measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally

838. Furthermore, in the case of *Al-Jedda v. the United Kingdom*, the Court gives quite some weight to international humanitarian law and to UN obligations. In this case, the Court looks for a legal basis of indefinite detention in UN instruments. It considers that, *in casu*, UN Resolutions did not allow to adopt measures infringing the right to liberty and security.⁷⁵⁵ As such, there was no question about a conflict between obligations under the UN Charter and obligations under the ECHR.⁷⁵⁶ Nonetheless, the Court gives the impression that provisions of external origin may potentially ‘disapply’ Convention requirements. Indeed, it holds that it had to verify

“... whether, in the absence of express provisions in Resolution 1546 [of the UN], there was any other legal basis for the applicant’s detention which could operate to *disapply* the requirements of Article 5 § 1 of the Convention (own emphasis)”.⁷⁵⁷

In search of such ‘any other legal basis’, the Court examines external provisions under international humanitarian law and notes that this external body of law does not oblige the State to use indefinite internment without trial.⁷⁵⁸ Imagine the opposite case, of international humanitarian law obliging such an internmen. Could the external obligations then offer a reason to no longer apply the Convention? The Court, in *Al-Jedda*, at least gives us that impression. The Court seems to acknowledge a higher ranking of external conflicting obligations, compared to the ECHR.⁷⁵⁹ Thus, the case of *Al-Jedda v. the United Kingdom*, mentioning the content and spirit of Article 31 paragraph 3 (c) VCLT (without explicitly writing down the name of this provision), unveils some risks of the Court’s harmonizing efforts.

839. A similar concern applies to the case of *Hassan v. the United Kingdom*, which was about the internment of an Iraqi national by armed forces in Iraq.⁷⁶⁰ Although the Court, in this case, avoids treating international humanitarian law as a *lex specialis* having priority over Convention (as the Government suggested), the harmonizing efforts, based on Article 31

accepted by the community of nations as part of the doctrine of State immunity”. The latter phrase had been taken up by subsequent case law including cases of our pool, such as in ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 57. In the latter case, however, the Court concluded that the State did not observe the exceptions to State immunity as provided in public international law and that therefore, the interference with Article 6 ECHR was disproportionate (*ibidem*, paras. 64 *et seq.*). Example and interpretation taken from: B. Simma, *op. cit.*, p. 273.

⁷⁵⁵ ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 101-108.

⁷⁵⁶ *Ibidem*, para. 109.

⁷⁵⁷ *Ibidem*, para. 107.

⁷⁵⁸ *Ibidem*.

⁷⁵⁹ On the contrary, the agreement between the Iraqi government and the US did not seem to have that capacity. Indeed, while the Court ruled that this agreement could offer a ‘legal basis’ in respect of Article 5 of the Convention, it added that “...such an agreement could not override the binding obligations under the Convention”. Here, the Court recalled its case law “...to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments and other agreements between States *subsequent* to the entry into force of the Convention (own emphasis)”. *Ibidem*, para. 108.

⁷⁶⁰ ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*

paragraph 3 (c) VCLT, seem detrimental to human rights protection. For the Court, to be compatible with Article 5 ECHR (right to liberty and security), it suffices that the detention required by international humanitarian law, is free from arbitrariness. However, as separate Judge Spano meaningfully points out, the provisions of the ECHR and international humanitarian law are in fact irreconcilable and in direct conflict.⁷⁶¹ In his view, the detention allowed by international humanitarian law is irreconcilable with the lawful grounds of detention listed in Article 5 ECHR as well as with the Court's consistent interpretation that these grounds should be interpreted in an exhaustive and a narrow manner. Judge Spano, calling the method of accommodation 'a novelty' in the Court's case law, notes that the majority

"...effectively disappplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision. Whatever accommodation means, it cannot mean this!"⁷⁶²

For Judge Spano, the unfeasibility of accommodation is actually the '*raison d'être*' of the possibility of derogation under Article 15 ECHR in times of war. However, the Court, *in casu*, went around the necessity of 'derogation', which requirement could now be circumvented by the State. According to the separate Judge, the Court's harmonizing efforts were detrimental for established human rights standards and led to a 'race-to-the-bottom'. We agree with Judge Spano that there are limits to harmonious interpretation and that the Court

⁷⁶¹ Partly dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva to the case of ECtHR (GC), *Hassan v. the United Kingdom*, 16 September 2014, Appl. No. 29750/09, paras. 6 and 16 *et seq.* Judge Spano stressed that "...the doctrine of consistent interpretation has its limits, as does any other harmonious method of legal interpretation. Article 5 § 1 is worded exhaustively, as regards the permitted grounds for deprivation of liberty, and the Court has consistently held, without exception till today, that these grounds should be interpreted narrowly. There is simply no available scope to "accommodate", ..., the powers of internment under international humanitarian law within, inherently or alongside Article 5 § 2". (*ibidem*, para. 16). He added that "...International human rights law and international humanitarian law exhibit quite extensive differences both methodologically and structurally, entailing distinct judicial approaches in the evaluation of individual rights. As worded in the third-party submissions, filed in the present case by the Human Rights Centre of the University of Essex, it is thus clear that the "internal coherence of international humanitarian law [is] significantly different from that of human rights law" (see paragraph 92 of the judgment). Thus, in my view, the underlying differences in the system of protection under the Convention, on the one hand, and international humanitarian law, on the other, constitute a particularly persuasive ground for dismissing the automatic assimilation of these distinct regimes of international law, at least where the relevant provision of the Convention is not legally amenable to such an approach." (*ibidem*, para. 17). In his view, "...this method of "accommodation" of Convention rights is a novelty in the Court's case-law. Its scope is ambiguous and its content wholly uncertain, at least as a legitimate method of interpretation of a legal text. Whatever this purported method entails, it bears reiterating that there is simply no available room to "accommodate" the powers of internment under international humanitarian law within, inherently or alongside Article 5 § 1 (see paragraph 16 above). Furthermore, as the disapplication option is off the table, since no derogation from the Convention has occurred, this novel method of accommodation cannot be implemented in such a manner as to have effectively the same legal effects as disapplication. However, by concluding, as the majority does, that the grounds of permitted deprivation of liberty under Article 5 § 1 should be "accommodated, as far as possible", with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions, the majority, in essence, does nothing else on the facts of this case...". (*ibidem*, para. 18).

⁷⁶² *Ibidem*, para 18.

should not strive for accommodation at the cost of human rights. In line with his separate opinion, priority should have been giving to Article 5 of the Convention, *quod non*.⁷⁶³

840. The latter examples demonstrate that conceiving ‘anti-fragmentation’ as *the* ideal picture might bring risks for human rights protection. It is remarkable how a Government, as in the case in *Hassan v. the United Kingdom*, misuses the aim of coherence to affect human rights protection. The United Kingdom, for that purpose, even mobilized the Report of the ILC on the “Fragmentation of International Law”, as well as some academic writings on the issue.⁷⁶⁴ The Court should strive *as much as possible* for coordinative harmonization. However, when reconciling human rights and external obligations is not feasible (because it would lead to ‘regression’ in human rights protection or because it would disproportionately affect human rights), the Court should create harmonization by putting human rights law in a higher hierarchical position, potentially setting aside external obligations. The battle against ‘fragmentation’ and the strive for ‘systemic integration’ should not sacrifice human rights. As Tzevelekos stresses, Article 31 paragraph 3 (c) VCLT is all about “...creating an equilibrium between the special character of the ECHR and its subordination to the logic and economy of the international legal system”.⁷⁶⁵ In the cases mentioned, this balance seems disturbed in favor of external international law. Is it a coincidence that the respondent State to most of these cases, *i.e.* the United Kingdom, is particularly skeptical towards a supranational supervision of their internal affairs? It seems plausible that the Court was overanxious to establish a firm human rights supervision in order to uphold its credibility in the eyes of this nation.

§ 2.2.2. External referencing to hamper progress or to excuse an interference

841. As we said, external instruments are prone to lower Strasbourg protection standards when they contribute to a race-to-the bottom in human rights protection or when they oppose some specificities of the Convention. Besides the situations described in the previous paragraph, external referencing possibly affects human rights protection in a more hidden manner. This covers two principal situations. A first situation appears at the level of human

⁷⁶³ Judge Spano said this in the following words: “In conclusion, on the facts of this case, the powers of internment under the Third and Fourth Geneva Conventions, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5 § 1 of the Convention. The Court does not have any legitimate tools at its disposal, as a court of law, to remedy this clash of norms. It must therefore give priority to the Convention, as its role is limited under Article 19 to “[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”. By attempting to reconcile the irreconcilable, the majority’s finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the Convention, as reflected in its purpose and its historical origins in the atrocities of the international armed conflicts of the Second World War”. *Ibidem*, para. 19.

⁷⁶⁴ ECtHR (GC), *Hassan v. United Kingdom*, *op. cit.*, paras. 87-88.

⁷⁶⁵ V.P. Tzevelekos, *op. cit.*, p. 623.

rights ‘interpretation’ and concerns the use of external instruments to establish a lack of evolution, impeding ‘evolutive’ interpretation.⁷⁶⁶ A second situation, situated at the level of human rights application, covers references that ‘excuse’ interferences with human rights.

842. As an example of the first situation, we mention the case of *Gäfgen v. Germany* in which the Court concludes that the use in trial of evidence obtained under duress does not necessarily amount to a violation of Article 6 ECHR (right to a fair trial). The Court takes into account that there was “...no clear consensus among the Contracting States to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule”.⁷⁶⁷ Here, external instruments (and the absence of consensus that was derived from them) have influenced the Court not to dynamically interpret the Convention. Because some external actors, such as some (foreign) courts and external human rights mechanisms, did not provide an exclusionary rule in all circumstances, the Court too, feels less urged to establish such a rule under Article 6 ECHR. The external instruments relevant for this case, some of which had been introduced by the (third) parties⁷⁶⁸, rather challenged the firmness of an exclusionary rule, instead of empowering it.

843. Another example from our pool is *Sitaropoulos and Giakoumopoulos v. Greece*, a case about the absence of a national procedure to enable Greek national residents overseas to vote in parliamentary elections, which the Court did not consider to be in violation with the Convention.⁷⁶⁹ When examining the relevant international and comparative law (including the ICCPR, the AfCHR and the ACHR) in this case, the Court, on the one hand, notes a lack of ‘evolution’ in the external normative context.⁷⁷⁰ On the other hand, it admits that some ‘soft’ external instruments (including a Resolution and a Recommendation of the CoE PACE, and an recommendation of the Venice Commission) recommend to increase protection standards in respect of the right to free elections and more particularly the right to vote of citizens living abroad.⁷⁷¹ The latter recommendations did not change the position of the

⁷⁶⁶ Particularly on this issue, see *supra* under Part II, Chapter 3, § 3.2.1.

⁷⁶⁷ ECtHR (GC), *Gäfgen v. Germany*, *op. cit.*, para. 174. The Court in that respect particularly referred to the US Supreme Court, the Court of Appeal of South-Africa, General Comments of the HRC and Concluding Observations of the CAT.

⁷⁶⁸ While the Court, on the basis of General Comments of the HRC, of Concluding Observations of the CAT, of case law of the US Supreme Court and the Supreme Court of Appeal of South Africa, and of a lack of internal consensus, observed uncertainty about the exact scope of the exclusionary rule, a more selective collection of external instruments seemed to move the applicant and the third party in another direction. The applicant for instance referred to several provisions of the ICCPR and the CAT, warranting the exclusion of all evidence obtained by means of torture and inhuman treatment (*ibidem*, para. 153). The third party, on its turn, by reference to General Comments of the HRC and to case law of the Supreme Court of Appeal of South Africa, concluded that evidence obtained through torture should be inadmissible (*ibidem*, para. 161).

⁷⁶⁹ With reference to *Demir and Baykara* and other precedents, the Court stressed that the right to free vote “...should be interpreted with reference to the relevant international and comparative law...and to the domestic law of the country concerned. ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, *op. cit.*, para. 71.

⁷⁷⁰ *Ibidem*, para. 72.

⁷⁷¹ *Ibidem*, para. 73.

Court, probably because of their non-obligatory character.⁷⁷² While 'soft' instruments regularly offer an argumentative support for the Court's reasoning, here, they were not capable of overturning an opposite trend in external 'hard' instruments. The ICCPR, the ACHR and the AfCHR, not pointing at a certain evolution, thus seemed to hamper a more progressive protection of voting rights.⁷⁷³

844. The latter examples are controversial from a rights holders' point of view since they seem to stimulate some 'inertia' in human rights protection. The message the Court actually sends out in these cases, is the following: because other actors or instruments do not move forward in human rights protection, we do not feel the urge to move forward in the Strasbourg context either. This approach risks creating a 'vicious circle' of human rights bodies not further developing certain aspects of human right because ... others are not developing them either.⁷⁷⁴

845. In a second situation, external references, to some extent, contribute to 'excusing' interference with human rights. The case of *Perinçek v. Switzerland* offers an example in this respect. In this case, the Court considers whether it was allowed under the Convention to criminally convict a person for rejecting the legal characterization of the atrocities committed by the Ottoman Empire against the Armenian people in 1915 as 'genocide'. The Court accepts that the conviction interfered with the applicant's freedom of speech. Some of the third parties justified this interference by referring to external obligations of Switzerland, requiring it to criminalize such behavior. The Court examined this argument in order to assess whether the interference could be justified in a democratic society. After interpreting the invoked external obligations, the Court rules that these obligations did not require the conviction of the applicant.⁷⁷⁵ In addition, the Court considers it noteworthy that most international bodies having dealt with the issue (e.g. the HRC, the CERD, and a UN Special Rapporteur), had made inconclusive pronouncements.⁷⁷⁶ The only exception the Court observes was a recommendation of the ECRI, being the only body "...that unequivocally

⁷⁷² For instance, the Court highlighted in the above-cited paragraph that while the Venice Commission "...recommended that member States facilitate the exercise of expatriates' voting rights, it did not consider that they were obliged to do so". *Ibidem*, para. 73.

⁷⁷³ *Ibidem*, para. 72. In addition, it also attached importance to an 'internal' comparative study between its member States in respect of which it said that there is no legal basis to conclude that "...States are under an obligation to enable citizens living abroad to exercise the right to vote" and that also in respect of the "...arrangements for exercising that right put in place by those Council of Europe member States that allow voting from abroad, there is currently a wide variety of approaches". *Ibidem*, para. 75.

⁷⁷⁴ While this argument is difficult to understand from a rights holders' point of view, legally, however, it seems defensible. Indeed, when we argue that the Court is encouraged to enter 'evolutive' interpretation in case it observes '*opinio juris* under the treaty', it is logical to argue that the non-observation of '*opinio juris*' should result in a non-development of human rights.

⁷⁷⁵ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 262-266. According to the Court, nor the CERD nor other international law obligations (like those in the Genocide Convention - as interpreted by the ICTR -, and the ICCPR - as interpreted by the HRC), nor customary international law required criminalizing genocide denial as such. It noted one exception, being the Additional Protocol to the Convention on Cybercrime, but the Court stressed in this respect that the respondent State did not sign nor ratify that Convention.

⁷⁷⁶ *Ibidem*, para. 267.

called for the criminalization of genocide denial". The Court however mitigates the importance of the latter recommendations by adding that this was only "...a policy recommendation which, however important, is not binding international law".⁷⁷⁷ As a consequence, the Court concludes that

"[I]t cannot therefore be said that the interference with the applicant's right to freedom of expression was required under, and could hence be justified by, Switzerland's international law obligations".⁷⁷⁸

846. It is common practice to examine whether there is a 'legal basis' for an interference with the Convention. *In casu*, however, the Court goes further than that. It does not only search for external 'roots' of the actions in order to examine the existence of a legal basis for the interference. Here, the Court includes a separate heading "(ε) Could the interference be regarded as required under Switzerland's international law obligations?" as one of the relevant factors to assess the necessity of the interference. As such, the search for external obligations reflects one of the relevant elements influencing the rigidity of the Court's supervision, next to, *inter alia*, the search for internal consensus. *In casu*, the absence of external obligations seems to give weight to the State's interference, as a factor 'aggravating' the State's actions in the light of the Convention.⁷⁷⁹ *A contrario*, the Court insinuates that the existence of an external requirement might contribute to justifying or 'excusing' an interference with the Convention (*in casu* with Article 10 ECHR). The existence of an external legal basis *an sich*, seems to make the Court's supervision less severe. If the Court would give a large weight to this argument, this might challenge the idea that the effects of external obligations are subject to a human rights supervision. In the *Perinçek*-case, as the Court explicitly admits, the use of external obligations was encouraged by a wish for coordination and the avoidance of opposition between the ECHR and external legal domains.⁷⁸⁰

⁷⁷⁷ *Ibidem*.

⁷⁷⁸ *Ibidem*, para. 268.

⁷⁷⁹ When concluding the case of *Perinçek*, the Court found support in the observation that there was no international law obligation for Switzerland to criminalise the applicant's statements (together with observations about the seriousness of the conviction, and the applicant's statements not having touched on a matter of public interest, not having called for hatred or intolerance, not having been made in a context of heightened tensions or special historical overtones, etc.) to stress that "...it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case". *Ibidem*, para. 280.

⁷⁸⁰ Indeed, at the beginning of its reasoning in *Perinçek*, the Court explicitly referred to several of its precedents that demonstrate that State behavior could be justified when this behavior results from international law obligations. It added in that respect that putative conflicts should be avoided by coordinating the effects. The Court framed this in the following paragraph: "The next point to be determined is whether, as argued by some of the third parties, the interference was justified because it was required under Switzerland's international law obligations (see, *mutatis mutandis*, *Jersild v. Denmark*, 23 September 1994, §§ 28, 30 and 31 *in fine*, Series A no. 298, with regard to an interference said to be required under Article 4 of the CERD; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, §§ 56, 57 and 60-66, ECHR 2001-XI; *Cudak v. Lithuania* [GC], no. 15869/02, §§ 57 and 63-67, ECHR 2010; and *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, §§ 189, 196-98 and 201-15, ECHR 2014, with regard to denial of access to court required under the international law relating to foreign State immunities; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 149-51, ECHR 2005-VI, with regard to obligations flowing from a State's membership in the European Union). The

847. The case of *Răzvan Mihai Gherghina v. Romania* offers another example of the Court using external instruments as a contribution to ‘excuse’ interferences with human rights protection.⁷⁸¹ In this case, we find evidence of the Strasbourg Court relying on international law to trivialize concerns about deficient national remedies for persons with disabilities facing difficulties to access university buildings. Regarding the requirement of an exhaustion of national remedies, the applicant argued that the absence of examples of national case law on the issue was due to a lack of foreseeability and clarity of the domestic laws. To answer this allegation, the Court admits that the domestic proceedings were indeed rarely used. However, instead of examining *in concreto* why this was the case (maybe national law was indeed not clear enough, as the applicant argued...), it justifies the situation by saying that protection of the rights of persons with disabilities in national law – alongside developments in international law – was relatively recent.⁷⁸² We cannot shake off the impression that, by doing so, the Court (mis)uses international law as a kind of ‘justification’ for the State’s inertia in offering satisfactory domestic proceedings for disabled persons lacking access to public buildings. The Court, in this admissibility decision, justifies in general terms the scarce use of domestic proceedings by a lack of action at the international level, without even explicitly mentioning the UNCRPD as a relevant instrument.⁷⁸³ Hence, the reference to ‘international law’ (in general terms) does not stimulate human rights protection but rather contributes to a ‘race-to-the-bottom’. At least the third parties in the case of *Gherghina* had envisioned the effect of importing international law differently: they argued that in the light of recent developments in international law, “...the national authorities could no longer avoid the issue or delay honouring their obligation to progressively ensure the accessibility of buildings for public use...”.⁷⁸⁴

§ 2.3. Progressive interpretation on the basis of external instruments: missed opportunities

848. The ‘evolutive’ arguments of the Court do not seem methodologically consistent. If the Court would have applied the statements made in *Demir and Baykara* more coherently, some cases might have looked differently. We demonstrate this with three examples: *A, B and C v. Ireland*, *Stummer v. Austria*, and *SAS v. France*.

principles that govern the examination of a putative conflict between the obligations that a High Contracting Party has under the Convention and its other international law obligations were set out in detail in *Nada v. Switzerland* ([GC], no. 10593/08, §§ 168-72, ECHR 2012); there is no need to repeat them here, except to emphasise that apparent contradictions should, as far as possible, be avoided by construing the simultaneously applicable provisions in a way that coordinates their effects and avoids opposition between them”. *Ibidem*, para. 259.

⁷⁸¹ This example was also mentioned in this context by D. Staes and J. Dammame, *op. cit.*, to be published.

⁷⁸² ECtHR (GC), *Gherghina v. Romania*, Appl. No. 42219/07, 9 July 2015, para. 100.

⁷⁸³ *Ibidem*.

⁷⁸⁴ *Ibidem*, para. 82, which refers to third-party comments submitted by the International Disability Alliance, the European Disability Forum and the Romanian National Disability Council.

849. In the case of *A, B and C v. Ireland*, touching upon a complaint about restrictive abortion laws in Ireland, the Court noted an almost complete consensus in the Member States towards allowing abortion on broader grounds than in Irish law. Normally, this would at least lead to a narrow margin for the respondent State. The ECtHR, however, established a more abstract reasoning stressing that there was no consensus about the rights of the unborn more generally, leading to a large margin for Ireland. Despite the existence of a concrete consensus about the issue at stake, it refused to create a firm European supervision.⁷⁸⁵ Therefore, the Court seemed to attach large importance to its subsidiary role, to State interests, and to the moral sentiments of the citizens of Northern Ireland.⁷⁸⁶

In our opinion, and in line with the Court's earlier approaches, the internal consensus together with external instruments could have triggered a more dynamic interpretation. Both internal consensus and various external instruments mobilized by the (third) parties, including the views of the CEDAW and the HRC⁷⁸⁷, are relevant. Together, they show an '*opinio juris* under the treaty' that abortion should be allowed on broader grounds than in Ireland. The latter could have offered a strong incentive for the Court to establish 'evolutive' interpretation, considering the Irish restrictions to abortion as a violation under the Convention.⁷⁸⁸ A holistic view to the VCLT could have supported such viewpoint, since it would be backed up by strong State consent (a strongly emerging consensus), by external normative instruments and practice, and by the 'object and purpose' of the Convention (stimulating 'effective' and 'progressive' interpretations). In that light, it does not come as a surprise that some dissenting judges criticized the reasoning in *A, B, C v. Ireland*. In their view, the Court should not have disregarded the European consensus (on the ground of moral views) and should have narrowed the State's margin of appreciation.⁷⁸⁹

850. Another example is the case of *Stummer v. Austria*, assessing whether working prisoners should be affiliated to the social security system and more particularly, whether their work should be taken into account for the calculation of pension rights. Verifying the existence of a 'common ground' between the Member States, the Court observed, on the one hand, a 'lack of European consensus'. On the other hand – based on the 2006 European Prison Rules – it observed an 'evolving trend' that "...[as] far as possible prisoners who work

⁷⁸⁵ M. Marochini, *op. cit.*, p. 79.

⁷⁸⁶ J.H. Gerards, *op. cit.*, 2011, pp. 94-95; K. Dzehtsiarou, *op. cit.*, p. 34.

⁷⁸⁷ See observations of the applicant in ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, paras. 173 and 175 and observations of third parties in *ibidem*, paras. 209-210.

⁷⁸⁸ For another case in which the Court had been criticized for offering a large margin of appreciation to the States in a case touching upon the sensitive issue of the definition of 'life' in Article 2 of the Convention, see ECtHR (GC), *Vo v. France*, 8 July 2004, Appl. No. 53924/00, paras. 82-85. More elaborate on the latter case: J.H. Gerards, *op. cit.*, 2011, p. 54.

⁷⁸⁹ See joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi to the case of ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, paras. 2 *et seq.* See also: K. Dzehtsiarou, *op. cit.*, p. 36. The latter author is of the opinion that "[t]he dissenting judges rightly pointed out that *A, B, and C* was a dangerous departure from the previous case law of the ECtHR" (*ibidem*).

shall be included in national security systems”.⁷⁹⁰ The Court did not give concrete effect to this evolving trend and did not allow it to narrow the State’s margin of appreciation.⁷⁹¹

The main reasons for this approach, as states by the Court, are the cautious words in which the external instrument is framed (“[a]s far as possible”) and the lack of internal practice in respect of the external instrument; the internal comparison demonstrated that only a small majority of Member States affiliated prisoners to their old-age pension system.⁷⁹² The Court observed in that respect that it was “...only gradually that societies are moving towards the affiliation of prisoners to their social security systems in general and to their old-age pension systems in particular”.⁷⁹³ Internal practices thus received particular weight as they indicated that there was not yet a ‘common ground’ but rather a ‘context of changing standards’.⁷⁹⁴ Against this background, the Court concluded that “...by not having affiliated working prisoners to the old-age pension system to date, it has not exceeded the margin of appreciation afforded to it in that matter”⁷⁹⁵ and that there was no violation of the Convention.⁷⁹⁶

In our opinion, based on internal comparisons, the Court could have established an emerging consensus on the issue. As appears from the data in the case, the majority of Member States give prisoners access to the old-age pension system. Only in twelve Member States, working prisoners are not covered by such a system. In addition, the Court acknowledged itself a context of changing standards in which societies are gradually moving towards an affiliation of prisoners to old-age pension systems.⁷⁹⁷ This ‘gradual move’ and ‘changing context’ amount, in our view, to an ‘emerging consensus’. In addition, there are the 2006 European Prison Rules reflecting the position of all the CoE Member States in terms of policy.⁷⁹⁸ Rule 26.17 explicitly recommends that “...[a]s far as possible prisoners who work shall be included in national social security systems”. Regardless of whether this instrument is followed in national practice or not, it is clearly directed to and theoretically supported by the member States. Besides the 2006 European Prison Rules, further support could be found in the ESC and the interpretation of this Charter by the ECSR (which was mentioned by the Court under the ‘facts’⁷⁹⁹ of the case but ignored under the ‘law’-section).

⁷⁹⁰ ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 105.

⁷⁹¹ The Court – mainly based on the subject of the matter under scrutiny – stressed that the State’s margin of appreciation is a wide one (*ibidem*, paras. 89-89 and para. 101). The evolution the Court observed in the external instrument of the 2006 European Prison Rules did thus not alter this conclusion.

⁷⁹² *Ibidem*, para. 105. To stress the lack of a common ground, the Court also referred to the 1987 European Prison Rules, “which did not contain any provision in this regard” (*ibidem*, para. 106). Note that this version of the Prison Rules is outdated.

⁷⁹³ *Ibidem*, para. 106.

⁷⁹⁴ *Ibidem*, paras. 106-109.

⁷⁹⁵ *Ibidem*, para. 109.

⁷⁹⁶ *Ibidem*, para. 110.

⁷⁹⁷ *Ibidem*, paras. 106 and 109.

⁷⁹⁸ Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.

⁷⁹⁹ See *ibidem*, para. 59.

Taking account of the latter external instruments, the emerging consensus might be considered as 'legally relevant'. Thus, they might contribute to the establishment of a 'general belief under the treaty' at the moment of interpreting the Convention.⁸⁰⁰ In the presence of an 'emerging consensus', the lack of an internal follow-up of the CoE recommendations in (a limited number of) Member States should not challenge that.⁸⁰¹ Hence, in line with the Court's argumentation in some precedents (including *Demir and Baykara v. Turkey*), the imported internal and external instruments stimulate the Court to adopt a dynamic viewpoint that criticizes the absence of national measures affiliating workers in prison to the pension systems (rather than offering the State a margin of appreciation on the issue). Several dissenting judges pointed in that direction, too.⁸⁰² In our view, the proposed dynamic reasoning respects the rules of the VCLT which stresses the importance of the text, of State consent and practice, of the external context, and of the 'object and purpose'. *In casu*, all these elements move in a same direction and there seems to be an 'opinio juris' on a right to affiliation to the pension system for persons working in prison.⁸⁰³

851. Finally, the case of *SAS v. France* offers an illustration of a missed opportunity for 'evolutive' interpretation. This case concerned a French law of 11 October 2010 introducing a ban on the wearing in public of clothing designed to conceal one's face. The Court concluded this case by stating that the interference of this national measure with the right to respect for private and family life and the right to respect for freedom of religion could be considered as 'necessary in a democratic society' in the light of the aim of 'living together'.⁸⁰⁴ Together with many other arguments in which the Court took account of the concrete situation of women wearing the veil⁸⁰⁵, the Court also imported external instruments to stress that "...a large

⁸⁰⁰ The Court however rather looked at the conditions at the time of the facts. See joint partly dissenting opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popovic, Malinverni and Pardalos to ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 5.

⁸⁰¹ Also Vanneste stressed that if a State ratified a certain instrument, but if the domestic legislation falls short in following up that instrument, that this should not stand in the way of developing an approach on the international aspirations rather than on domestic actions. F. Vanneste, *op. cit.*, 2009, p. 157.

⁸⁰² Several Judges said that there is a trend which "...is gradually reducing the margin of appreciation which States may enjoy in this area" and that States "While they still retain a choice in respect of the policies to be implemented and the timing of any legislative changes" "... cannot disregard such a trend altogether". See joint partly dissenting opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popovic, Malinverni and Pardalos to ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 5. Also dissenting Judge Tulkens noted difficulties in respect of the consensus-argument of the Court in light of the contemporary developments and the lack of European supervision in the present case. Partly dissenting opinion of Judge Tulkens, to ECtHR (GC), *Stummer v. Austria*, *op. cit.*, para. 10.

⁸⁰³ Article 1 of Protocol 1 of the ECHR on the right to property might be of relevance for this argumentation.

⁸⁰⁴ This aim was accepted as part of the 'protection of the rights and freedoms of others'. As to the "protection of the rights and freedoms of others", the Government referred to the need to ensure "respect for the minimum set of values of an open democratic society", listing three values in that connection: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (or of "living together"). This aim is not expressly mentioned by the second paragraphs of Articles 8 and 9 of the Convention. Also the three values mentioned do not expressly appear as a ground for justification in these articles. See ECtHR (GC), *SAS v. France*, *op. cit.*, paras. 114 and 121.

⁸⁰⁵ The Court admitted that a blanket ban might appear excessive because of the small number of women concerned, that the measure had a significant negative impact on the situation of women who chose to wear the full-face veil for reasons related to their beliefs, that there were indications that the debate which preceded the adoption of the measure had been marked by certain Islamophobic remarks (*ibidem*, paras. 145-146 and para. 149). The Court also stressed that a State which entered into a legislative process of this kind took the risk of

number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate”, including “...the French National Advisory Commission on Human Rights..., non-governmental organizations such as the third-party interveners, the Parliamentary Assembly of the Council of Europe ... and the Commissioner for Human Rights of the Council of Europe”.⁸⁰⁶

Nonetheless, the Court offered a wide margin of appreciation and accepted that France pursued its aims in a proportionate manner. In our view, the internal and external comparisons actually offered a strong incentive and a legal basis for considering a general prohibition of concealing the face in public – in its abstract existence – an illegal measure. On the basis of external instruments, the right to freedom of religion does *not* allow general national laws prohibiting the wearing of full-face veils as religious symbols.⁸⁰⁷ Internal law and practice point at a firm consensus that there is *no* need for such general bans and that in principle, individuals should have the right to wear religious symbols (even when they conceal the face). This consensus is moreover strongly supported by external instruments. The instruments mobilized by (third) parties, but ignored by the Court in the ‘law’-section of the case, might have shed a different light on the issue (e.g. the General Comments of the HRC, Reports of the UN Special Rapporteur on freedom of religion, the Framework Convention for the Protection of National Minorities, *etc.*⁸⁰⁸). In addition, the Court could have studied more closely some recent developments in the Member States pointing at a tendency to explicitly reject general headscarf bans.⁸⁰⁹

The concrete interferences with the rights of the applicant resulted from the ‘mechanical’ application of an abstract norm (*in casu* the general ban on concealing the face

contributing to the consolidation of the stereotypes which affected specific groups of people and of encouraging the expression of intolerance, when it had a duty, on the contrary, to promote tolerance (*ibidem*, para. 149). The Court reiterated that remarks which constituted a general, vehement attack on a religious or ethnic group were not reconcilable with the underlying values of the Convention of tolerance, social peace and non-discrimination and did not fall within the right to freedom of expression that it protected (*ibidem*, para. 149). It also took account of the ‘light’ character of the sanctions (*ibidem*, para. 152).

⁸⁰⁶ *Ibidem*, para. 147.

⁸⁰⁷ In our view, the national French legislation reflects a general ban on wearing a headscarf. The Court, however, interpreted the French law as not establishing such ‘blanket ban’ of wearing the veil. Although the Court said that it is aware that the ban mainly affects certain Muslim women, it nevertheless considered that there was no restriction on the freedom to wear in public any item of clothing which did not have the effect of concealing the face. According to the Court, the ban was not expressly based on the religious connotation of the clothing but solely on the fact that it concealed the face. See *supra*, Part II, Chapter 3, § 1.2.

⁸⁰⁸ See *ibidem*, paras. 78, 89-90, 92-93 and 100.

⁸⁰⁹ In the context of the case of *Ebrahimian v. France* in which the Court upheld the non-renewal of a contract in a public hospital on the ground of the applicant’s refusal to take off her headscarf (ECtHR, *Ebrahimian v. France*, 26 November 2015, Appl. No. 64846/11) Brems indeed noted the following: “Once more, the European Court of Human Rights is showing signs of looking at Europe through the windows of its host country. Here is what I see: After decades in which headscarf bans seemed to spread like oil stains in several European countries, a counter-movement seems to be on the rise. Both in Germany (Constitutional Court judgment of 27 January 2015) and Belgium (Council of State judgment of 14 October 2014), Courts have rejected abstract principles and speculations as a basis for headscarf bans, and limited the justifiability of such bans instead to situations in which there is evidence of concrete risks for neutrality or the rights of others. In a context in which social cohesion within multi-religious societies is back as a priority concern in Europe, it is widely agreed that these nuanced approaches deserve to be encouraged. The European Court of Human Rights however does not appear to think so”. See E. Brems, “Headscarf ban upheld for entire public sector”, blog post Strasbourg Observers, available at <https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/> (visited on 15 August 2016).

as provided in national law). This concrete interference should have been assessed as part of an abstract control guided by internal and external tendencies. In line with a more constitutional approach⁸¹⁰ – we suggest to focus in the first place on the norm itself; the norm in its general appearance constitutes a violation of the Convention.⁸¹¹ The latter does not imply that a (specific) ban could never be justified *in concreto*. Even then, however, as stressed by the dissenting Judge to this case, “[t]he arguments drawn from comparative and international law militate against the acceptance of a broad margin of appreciation and in favor for a close supervision of the Court”.⁸¹² Such close supervision would require taking account of all concrete interests and particularities of the case. The ECtHR in *SAS* missed a turn in its assessment of the relevance of internal and external instruments. A comprehensive view on these instruments should have incited the Court to impose a dynamic solution in the light of freedom of religion.

852. In cases such as *Stummer v. Austria*, *SAS v. France* and *A, B, C v. Ireland*, the ECtHR relied too heavily on the margin-doctrine. It thereby omitted to give serious effects to external (and internal) normative trends.⁸¹³ Such missed opportunities seemed to have been influenced by the particularly sensitive character of the cases, touching, for instance, on questions of abortion, prisoners’ rights, and religious symbols in States largely stressing the idea of ‘*laïcité*’.⁸¹⁴

§ 3. Effective human rights

853. As the Strasbourg Court stresses regularly, human rights protection should be concrete and effective, not theoretical or illusionary.⁸¹⁵ Rendering the consequences of human rights meaningful in practice serves the interests of human rights holders ‘on the ground’ to

⁸¹⁰ As noted by Van Drooghenbroeck, Krenc and Van der Noot, the Court in other cases stressed its mission going beyond a case-to-case supervision. S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, p. 13. The Court famously held in the *Karner*-case that “The Court has repeatedly stated that its “judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties”. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States” (ECtHR, *Karner v. Austria*, *op. cit.*, para. 26. And see also: ECtHR (GC), *Centre for Legal Resources on behalf of Valentin Câmpeneanu v. Romania*, 17 July 2014, Appl. No. 47848/08, para. 105; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 89. The latter case-law examples are taken from *ibidem*, p. 13, footnote 40.

⁸¹¹ The issue of the Court’s abstract control of a national situation resulting from the mechanical application of a national general norm had also been discussed in the context of the case of *R.M.T.* See fore more on this issue: *ibidem*, pp. 12-13 (with reference to other relevant Strasbourg case law).

⁸¹² Partly Dissenting opinion of Judges Nussberger and Jäderblom to ECtHR (GC), *SAS v. France*, *op. cit.*, para. 20.

⁸¹³ See above under missed opportunities in respect of ‘evolutive’ reasoning.

⁸¹⁴ See also J.H. Gerards, *op. cit.*, 2011, p. 56, including other examples. Relying too heavily on national particularities might go against the idea of a universality of human rights and the idea of legality that requires that similar cases are treated alike. On this issue, see *infra*, para. 861.

⁸¹⁵ See *inter alia* ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, para. 146; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 80.

whom rights are above all relevant when they have concrete results in their daily lives. When external instruments help to make human rights ‘effective’, this enhances the validity of such references from a rights holders’ approach. We note in this context two major advantages of a referencing practice.

854. *Firstly*, referencing can make human rights protection more ‘up-to-date’ and adapted to present-day circumstances. External instruments have been used for ‘evolutive’ reasoning; they point at current normative developments, built on recent data, knowledge, needs, *etc.* It thus seems no coincidence that in our pool of cases, the Court, in light of ‘evolutive’ interpretation (guided by external instruments), almost consistently stressed the principle of ‘effectiveness’ as well.⁸¹⁶ This points at the idea that a rule should be adapted to contemporary evolutions in order to be and to remain ‘effective’.⁸¹⁷

Secondly, we notice value of external instruments in better informing the Court about specific, and often complex, normative domains. A rapprochement between the understanding of the Convention and the understanding of external specialized instruments (often elaborated by experts on the matter) has this capacity. An interpretation might benefit from a ‘technocratic’ input, making it better adapted to specific insights and positions in a particular field of expertise. Out of many other examples of this phenomenon in our pool, we mention the cases of *Sargsyan v. Azerbaijan* and *Chiragov and Others v. Armenia*. In these cases, the Court finds inspiration in the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons of 2005 (the ‘Pinheiro Principles’) to explain (under Article 1 of Protocol 1 on the right to property) how evidence should be provided by people who have lost their property and home in situations of armed conflict.⁸¹⁸

855. If human rights users want to feel the impact and ‘effectiveness’ of the decision-making process, it is also required to attach concrete effects to the abstract principles of the Convention, moving beyond a case-to-case justice. From a rights holders’ view, the impact of external instruments on the Court’s arguments *in principle*, should be felt *in practice* as well. Therefore, we consider that no justice has been done to a rights holders’ perspective in the case of *R.M.T. v. the United Kingdom*. In this case, with the help of several external positions, the Court argues in the abstract that it is difficult to legally defend a ban on ‘secondary strikes’.⁸¹⁹ The ECtHR held that, to be consistent with the interpretative method in *Demir and*

⁸¹⁶ See ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 66, 70, 110 and 143; ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 80; ECtHR (GC), *Scopolla v. Italy* (No. 2), *op. cit.*, para. 104; ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, para. 89; ECtHR (GC), *Micallef v. Malta*, *op. cit.*, para. 81.

⁸¹⁷ F. Vanneste, *op. cit.*, 2009, pp. 244-245; J. Arato, *op. cit.*, p. 355, with reference to ‘ILC Koskenniemi Report’, *op. cit.*, para. 478.

⁸¹⁸ See ECtHR (GC), *Sargsyan v. Azerbaijan*, *op. cit.*, para. 184; ECtHR (GC), *Chiragov and Others v. Armenia*, *op. cit.*, para. 136.

⁸¹⁹ The Court concluded that the non-protection of such action interfered with freedom of association rights. In that argument, the Court took account of the recognition and protection of secondary action as part of trade union freedom under ILO Convention no. 87 and the European Social Charter. It did so despite its observation

*Baykara v. Turkey*⁸²⁰, it will not establish a much narrower view in relation to Article 11 of the Convention than the one that prevails in international law.⁸²¹ *In concreto*, however, this ‘evolution’ did not have effective results since the Court, in light of the circumstances, did not consider the national ban on secondary strikes unjustified. Thus, the external positions received a large weight when the Court *interpreted* the ECHR, but they lost their relevance when the Court *applied* the Convention.⁸²² The Court explained this attitude by pointing at the specific character of its supervision, which is different when compared to the supervisory roles of the referenced external mechanisms. In principle, the Court agreed with the external positions, but it stressed under the ‘necessity-assessment’ that there is a

“... distinct character of the Court’s review compared with that of the supervisory procedures of the ILO and the European Social Charter. The specialized international monitoring bodies operating under those procedures have a different standpoint, shown in the more general terms used to analyze the ban on secondary action. In contrast, it is not the Court’s task to review the relevant domestic law in the abstract, but to determine whether the manner in which it actually affected the applicant infringed the latter’s rights under Article 11 of the Convention”.⁸²³

The Court distinguished its role as a body that interprets *in concreto* from the role of external supervisory bodies that interpret *in abstracto*. Thereby, it put the focus on its responsibility to provide *individual* justice, rather than *constitutional* justice.⁸²⁴ Accordingly, the Court examined the concrete effects of the national ban, which violated the Convention *in abstracto*. It concluded that, *in concreto*, the measure was proportionate and did not reflect an unjustified interference with the applicant’s right to freedom of association.⁸²⁵ From a rights holders’ view, the latter reasoning is far from ideal. From their perspective, the Court

that the United Kingdom interpreted the effects of the latter instruments differently. ECtHR (GC), *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *op. cit.*, paras. 69 *et seq.* and para. 76.

⁸²⁰ In which it said that “The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting common values” (*ibidem*, para. 85).

⁸²¹ *Ibidem*, para. 76.

⁸²² S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 11-12. The idea behind the Court’ reasoning was that a norm might *in abstracto* be in violation with human rights while such a norm could nonetheless be compatible with human rights *in concreto*. This was new; such explicit detachment of the role of external instruments in the interpretation phase and in the application phase did not appear in earlier cases. According to Van Drooghenbroeck, Krenc and Van der Noot the maintenance and repetition of the latter line of reasoning by the Court “...could have spectacular – and even catastrophic – consequences on the “importability” and the weighting, in the reasoning of the Court, of several “external sources””. *Ibidem*, p. 12. The authors thus asked themselves: “Should one conclude that their ‘persuasive weight’ is necessarily limited in the reasoning of the European Court, which, for its part, would always be ‘concrete’?”. *Ibidem*, pp. 12-13 of the draft version.

⁸²³ ECtHR (GC), *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *op. cit.*, para. 98.

⁸²⁴ This might lead to case-to-case considerations and negatively affect legal certainty. In this sense, see L. Lavrysen, “Strasbourg Court fails to adequately protect trade union freedom: secondary strike action only considered to be an ‘accessory’ aspect of Article 11 (R.M.T. v. UK)”, Blog post on ‘Strasbourg Observers’, 12 May 2014, available at <http://strasbourgobservers.com/2014/05/12/strasbourg-court-fails-to-adequately-protect-trade-union-freedom-secondary-strike-action-only-considered-to-be-an-accessory-aspect-of-article-11-r-m-t-v-uk/> (visited on 11 March 2016).

⁸²⁵ ECtHR (GC), *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *op. cit.*, paras. 98 and 104.

should give full and effective weight to the external instruments and, as a consequence, judge that the concrete effects of the ‘illegal’ national measure are unacceptable. Van Drooghenbroeck, Krenc and Van der Noot too, stress that, when concrete interferences result from a ‘mechanical’ application of abstract norms (*in casu*, the national ban on ‘secondary strikes’), the Court’s control of compatibility should be abstract and focus on the norm itself.⁸²⁶ This would do better justice to the position of rights holders as well as to the Court’s mission to go beyond a case-to-case supervision.⁸²⁷ The Court famously held in the *Karner*-case that its

“ ... judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties” Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States”⁸²⁸.

§ 4. Universal human rights

856. Although the debate on the universality versus the relativity of human rights still runs, their theoretical universality has been generally accepted.⁸²⁹ Human rights are defined as “*l’ensemble des principes et des normes fondés sur la reconnaissance de la dignité inhérente à tous les êtres humains et qui visent à en assurer le respect universel et effectif*”.⁸³⁰ This moral claim is not necessarily threatened by the existence of diverse human rights catalogues.⁸³¹ However, references between these catalogues have the capacity to highlight the principle of universality.⁸³² They strengthen the existence of (worldwide) common values and of a ‘shared law’ of human rights that requires universal promotion.⁸³³

⁸²⁶ S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 12-13.

⁸²⁷ *Ibidem*, p. 13.

⁸²⁸ ECtHR, *Karner v. Austria*, *op. cit.*, 24 July 2003, para. 26, cited by *ibidem*, p. 13, footnote. And see also: ECtHR (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, *op. cit.*, para. 105; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, para. 89. Also the latter case-law examples were taken from *ibidem*.

⁸²⁹ *The Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available at <http://www2.ohchr.org/english/law/vienna.htm> (visited on 7 May 2012).

⁸³⁰ J.-B. Marie, *Dictionnaire encyclopédique de théorie et de sociologie du droit*, in A.-J. Arnaud (ed.), L.G.D.J., Paris, 2nd edition, 1993, p. 208, as cited by J. Turgis and J. Dhommeaux, *op. cit.*, p. 24.

⁸³¹ See *supra*, Introduction.

⁸³² Brems considers the referencing to external documents to be the expression of an integrated view on the part of the judges. According to Brems, the principles of universality, indivisibility and interdependence plead in favor of such an integrated approach. See E. Brems, *op. cit.*, 2014, p. 454.

⁸³³ Cf. J. Allard, *op. cit.*, pp. 126-127 and pp. 131-132. Allard considers the Judges’ conviction of universal human rights as an underlying motivation stimulating referencing practice. According to Allard, a similar rationale does not exist in the heads of the judges of the US Supreme Court. There, the use of external instruments is not based on a common mission of universality but rather stimulated by the additional interpretation tool it offers. In her view, the underlying rationale of external references highlights the existence of a ‘shared law’ of universal human rights and explains why this practice is not politically justified in an elaborate manner: besides the argument of

857. References to external human rights norms emphasize that all human rights are drawn on a common root: the UDHR, which is explicitly incorporated in the Convention's preamble. This instrument is the "reference text *par excellence*" for the drafters of the Convention.⁸³⁴ The use of the UDHR and of other human rights catalogues which follow this instrument closely, particularly accentuate human rights' universal nature and the importance of their collective enforcement.⁸³⁵ This also counts for references to instruments of (*quasi*-) judicial origin, such as of the HRC. As Bossuyt holds, decisions of such bodies "...even viewed from a European perspective" could "...foster a better understanding of the universality of human rights and fundamental freedoms".⁸³⁶ Given the wide geographic coverage of the ICCPR and given the universal membership of the HRC, the HRC's decisions imply "... that we do not forget that these rights and freedoms are characterized in particular by the fact that they form the common minimum set of rights and freedoms which must be respected by all States for the benefit of all individuals".⁸³⁷

858. The Court does justice to the principle of universality by avoiding a narrow 'European' focus by referencing a variety of regional and/or universal human rights instruments. Our case law study shows that the Court includes references to external instruments of diverse origin, including UN material, norms and decisions of the Inter-American and the African protection system, EU human rights instruments, *etc.* It also communicates with other judges from over the globe. Hence, in a context of the Strasbourg referencing practice, we could borrow terms such as a 'globalizing (judicial) dialogue' or a 'judicial globalization'.⁸³⁸ Such phenomena stimulate processes of convergence and put the spotlight on the common nature of and the shared agreement on universal human rights. As Dzehtsiarou frames it:

'universality' itself, it does not need a lot of justification. Allard notices that Wildhaber, former President of the ECtHR argued in favor of such a 'shared law'. Canivet, cited by Allard, said in this respect: "*On admettra donc que la compétition est un mode normal de relation entre les systèmes juridictionnels et qu'elle est facteur de progrès. Ce qui n'empêche pas que l'ouverture des juridictions à d'autres jurisprudences peut aussi traduire une conscience juridique nouvelle marquée par les préoccupations d'humanité ou d'universalité, s'appuyant sur certaines valeurs de civilisation partagées à l'échelle mondiale*". G. Canivet, "Les influences croisées entre juridictions nationales et internationales. Eloge de la 'bénévolence' des juges", *Revue des sciences criminelles et le droit compare*, Dalloz, Paris, October-December 2005, available at <http://www.ahjucaf.org/Les-influences-croisees-entre,7177.html> (visited on 14 September 2016).

⁸³⁴ Concurring opinion of Judge Sicilianos, joined by Judge Raimondi, to ECtHR (GC), *Magyar Helsinki Bizottság v. Hungary*, *op. cit.*, para. 4.

⁸³⁵ *Cf. ibidem.*

⁸³⁶ M. Bossuyt, "Chronique de jurisprudence du Comité des droits de l'homme (1993-1997)", *RTDH* 1998, p. 509, own translation.

⁸³⁷ *Ibidem.*

⁸³⁸ For the notion of a 'global judicial dialogue', see A.-M. Slaughter, "A Brave New Judicial World", in M. Ignatieff, *American Exceptionalism and Human Rights*, Princeton University Press, Princeton, 2005, pp. 302-303. For the notion of 'judicial globalization', see A.-M., Slaughter, "Judicial Globalization", *Va. J. Int'l L.* 2000, vol. 40, pp. 1103-1124; C. Baudenbacher, "Judicial Globalization: New Development or Old Wine in New Bottles?", *TILJ* 2003, vol. 38, pp. 505-526.

"The Court's impact does not stop at the borders of the Council of Europe. The ECtHR has a worldwide mission of promoting human rights; its judgments are quoted in many countries outside the immediate signatories, and the ECtHR is treated as an example for other regional and national courts that deal with human rights issues. ... If the ECtHR aspires to develop its worldwide mission, it needs to continue to build up its comparative legal research".⁸³⁹

859. In the case of *Scopolla v. Italy* (No. 2), for example, the Court erases divergences between the ICCPR and the ECHR and supported the progressive revision of its case law by 'important developments internationally'⁸⁴⁰ and a 'consensus' which has 'emerged in Europe and internationally'⁸⁴¹, which was demonstrated *inter alia* by the ACHR⁸⁴² and the EU Charter⁸⁴³. The constructive inclusion of these external regional human rights instruments concretises and reaffirms the theoretical universality of their reach. The ECtHR also pays respect to the principle of universality when it substantively integrates external norms and positions that contain higher levels of protection. In relation to most 'evolutive' interpretations built on external instruments, as demonstrated by our pool of cases, the Court, indeed, integrates higher levels of protection.⁸⁴⁴

860. The more external instruments share the values of the Convention, the more easy and useful the coordinative referencing practice becomes.⁸⁴⁵ As such, a harmonization process within human rights points at globally shared positions and highlight a common judicial mission to protect universal human rights.⁸⁴⁶ Supported by such observations, it does not come as a surprise that several scholars have conceived a judicial referencing as part of a cooperative endeavor that reflects a process of 'unification by transplantation'⁸⁴⁷ leading to a 'shared law' (*droit commun*)⁸⁴⁸ and as a way of achieving coordinative integration.⁸⁴⁹

⁸³⁹ K. Dzehtsiarou, *op. cit.*, p. 76.

⁸⁴⁰ ECtHR (GC), *Scopolla v. Italy* (No. 2), *op. cit.*, para. 105.

⁸⁴¹ *Ibidem*, para. 106.

⁸⁴² *Ibidem*, para. 105.

⁸⁴³ *Ibidem*.

⁸⁴⁴ See *supra*, Part II, Chapter 3, § 3.1.

⁸⁴⁵ L. Hennebel and A. Van Waeyenberge, *op. cit.*, p. 10; E. Dubout and S. Touzé, *op. cit.*, p. 16; I. Rorive, *op. cit.*, p. 283. Although all human rights instruments share similar values, this does not mean that human rights instruments could not differ on certain points: they are not always strictly equivalent or compatible. They might also be in competition with one another. Cf. J.-S. Bergé, *op. cit.*, p. 259.

⁸⁴⁶ Cf. A.-M. Slaughter, "Typology of Transjudicial Communication", *U. Rich. L. Rev.* 1994, vol. 29, pp.121-123, 127; C. McCrudden, *op. cit.*, p. 529; J. Allard, *op. cit.*, p. 122; A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton, 2005, 368 p. Slaughter perceives the practice of referring to external instruments as contributing to the creation of a worldwide judicial order. In relation to 'judicial dialogue' and references to 'foreign law', Allard also stresses the idea of a common law, but she equally adds some nuances by saying that: "Cela ne veut pas dire, bien sûr, que n'émerge pas de ce dialogue une forme de visée cohérente de la justice ou...une convergence des droits fondamentaux. Mais celle-ci surgit de cas particuliers, après coup, comme un élément de justification du dialogue, et non d'un droit en soi, qui serait universel a priori. Le dialogue des juges est donc non seulement une pratique restreinte, mais également partielle: ce n'est pas tout le droit qui est mis en commun et uniformisé à l'image d'un droit mondial universel". J. Allard, *op. cit.*, p. 136.

⁸⁴⁷ M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Hart Publishing, Oxford/Portland, 2009, translated by Naomi Norberg, 196 p.

⁸⁴⁸ M. Delmas-Marty, *Le Relatif et l'Universel: Les Forces imaginantes du Droit*, Seuil, Paris, 2004, 440 p. See also: O. De Schutter, "The Emerging Common Law of Human Rights", in E. Bribosia and I. Rorive (eds), *A Global and Multilayered Approach of Human Rights: Promises and Challenges*, Intersentia, forthcoming in 2017.

Therefore, integrating the field of human rights law through a referencing technique, could correspond to – what Jeremy Waldron calls – a *ius gentium*, which reflects “...a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems”.⁸⁵⁰ The creation of ‘common standards’ in human rights law encompasses “...both the value of harmonizing judicial human rights standards across Europe, and of historically shared values that underlie the creation of the Court”, which can be considered as a ‘political-normative standard’ constituting one of the dimensions of the ‘legitimacy’ of the ECtHR.⁸⁵¹

861. The principle of universality promotes openness to external human rights instruments, especially when they offer higher protection standards. This accentuates the common project of safeguarding human rights law, in which every person – morally speaking – merits equal protection, regardless of territorial boundaries. Human rights law does not allow radical distinctions. Instead, it is based on the unity of the human nature and the universality of its reach.⁸⁵² References that (implicitly) acknowledge the universality of human rights serve the rights holders’ interests from a more humanist point of view. Indeed, we could argue that the peoples from one single worldwide community have developed a ‘global consensus’ on universal applicable human rights.⁸⁵³ Such a *ius gentium* implies a need of ‘equal treatment’ and of approaching “...all peoples as members of a single community insofar as the administration of human rights is concerned”.⁸⁵⁴ Against that background, there is a legitimate concern of the rights holders “...about inconsistencies and disparities in the administration of fundamental rights and to complain of unfairness of like cases not treated alike in the world”.⁸⁵⁵ When external instruments reflect a general belief about what

⁸⁴⁹ The notion of integration is then not used in a formal hierarchical sense, but rather in a sense of increased coherence. ‘Coordinative integration’ reflects one of the models of integration based on global law theories. For an overview of three possible theoretical models of human rights integration (‘hierarchy’, ‘coordination’ and ‘conflict’) inspired by global law theories, see M. Baumgärtel, D. Staes and F.J. Mena Parras, *op. cit.*, pp. 326-354. Delmas-Marty focuses on the interactions between *legal orders* and considers the practice of cross-referencing as a form of coordination able to achieve integration between these orders. Nonetheless, she sees it only as a very weak form of integration because it is a horizontal and a non-binding process. See M. Delmas-Marty, *op. cit.* 2009. Slaughter, who focuses on ‘vertical communication’ between national courts and the ECtHR, stresses the tendency towards ‘collective judicial deliberation’ or cooperation, thereby suggesting a view of a non-hierarchical relationship between the ECtHR and national courts. See A.-M. Slaughter, *op. cit.*, 1994, pp. 120-121.

⁸⁵⁰ J. Waldron, *Partly Laws Common to All Mankind. Foreign Law in American Courts*, Yale University Press, Yale, 2012, p. 133.

⁸⁵¹ B. Çali, A. Koch, and N. Bruch, “The Legitimacy of the European Court of Human Rights: the View from the Ground”, 2011, UCL Report, pp. 8-9, available at <https://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> (visited on 20 September 2016).

⁸⁵² See L. Hennebel and A. Van Waeyenberge, “Reflexions sur le Commerce transnationale entre Juges”, in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerckhove (eds), *Les Sources du Droit revisitées. Volume 2: Normes internes infraconstitutionnelles*, Anthemis - Publications de l’Université Saint-Louis, Brussels, 2013, chapter available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211183 (visited on 20 September 2016), p. 15.

⁸⁵³ J. Waldron, *op. cit.*, 2012, p. 134, quoted in L. Van den Eynde, “Interpreting Rights Collectively. Comparative Arguments in Public Interest Litigants’ Briefs on Fundamental Rights Issues”, doctoral thesis defended in November 2015, ULB, unpublished, p. 474.

⁸⁵⁴ *Ibidem*, p. 133, quoted by L. Van den Eynde, *op. cit.*, 2015.

⁸⁵⁵ *Ibidem*.

human rights protection should entail, it seems justified to align with this belief.⁸⁵⁶ From a rights holders' perspective, it would be invalid not to expand the effects of external higher protection levels. Arguing in line with Letsas, universality (and legality) require treating like cases alike and extending the benefit of the moral principles justifying human rights equally to all.⁸⁵⁷ Laurence Burgogues-Larsen holds in this context that

“...Il est tantôt question d’assurer la cohérence de systèmes dont les principes de fonctionnement sont similaires: on retrouve alors ici la logique de système, c’est l’idéal systémique; tantôt il s’agit in fine de faire prévaloir une vision commune des droits de la personne humaine voire de leur degré de protection, c’est l’idéal humaniste”.⁸⁵⁸

862. In a rights holders perspective, dismissive references of (higher standards in) external human rights catalogues are not defensible. In our pool, there are only very few examples in this respect.⁸⁵⁹ *A. and Others v. the United Kingdom*, in which the Grand Chamber considers an indefinite detention of suspected terrorists under Article 5 ECHR (right to liberty and security), offers the sole explicit illustration.⁸⁶⁰ In this case, the Court argues that State

⁸⁵⁶ Under the condition it does not lower protection standards or infringe the rights of minorities.

⁸⁵⁷ G. Letsas, *op. cit.*, 2007, pp. 5 and 8.

⁸⁵⁸ L. Burgogues-Larsen, “De l’internationalisation du dialogue des juges – Missive doctrinale à l’attention de Bruno Genevois”, in *Le dialogue des juges – Mélanges en l’honneur de Bruno Genevois*, Dalloz, Paris, 2009, p. 121.

⁸⁵⁹ It might happen more often that the Court entirely ignores higher external human rights standards in its legal reasoning. Our research did not examine such situations, but only focuses on the Court’s explicit references in the ‘law’-section of the case. Such an example of ‘ignorance’ is present in *Saadi v. the United Kingdom* (not part of our pool of case law). In this case concerning the detention of asylum seekers, the Court, to interpret the expression ‘lawful...detention of a person to prevent his effecting an authorized entry (article 5(1)(f) ECHR)’, relied on instruments of the UNHCR and did not follow the more protective viewpoint of the HRC on the interpretation of the ICCPR. Relevant provisions of the ICCPR, as well as their interpretation by the HRC, were cited under the ‘facts’ section of the *Saadi* case. The Court invoked the ICCPR under the heading ‘relevant international law instruments’ but did not follow the interpretation of this instrument by the HRC. According to the HRC, article 9 ICCPR prohibits detention on grounds of administrative expediency. By ignoring this external information, the Strasbourg Judges applied a lower protection standard for asylum seekers than the one that had been established by the HRC. The latter situation led the dissenting Judges to ask “...whether it is permissible today for the European Convention on Human Rights to provide a lower level of protection than that which is recognized and accepted in the other organizations”. ECtHR (GC), *Saadi v. the United Kingdom*, 29 January 2008, Appl. No. 13229/03, paras. 31-32 and Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in ECtHR (GC), *Saadi v. the United Kingdom*, *op. cit.* See also M. Forowicz, *op. cit.*, pp. 261-262.

⁸⁶⁰ The Court might also create opposition in a more sophisticated and hidden manner. This for instance happens when the Court gives a large margin of appreciation to the States despite some external evolutions going in another direction, or when it distinguishes the assessment of the abstract national measures from the assessment of the concrete circumstances that follow from the measures. Respectively, this can be illustrated by the cases of *SAS v. France* and *R.M.T. v. the United Kingdom*. In the case of *SAS v. France* the Court upheld a French general ban on the wearing in public clothing designed to conceal one’s face. In this case, the Court offered the State a wide margin of appreciation despite the fact that the imported external instruments stressed that “...a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate” (ECtHR (GC), *SAS v. France*, *op. cit.*, para. 147). The Court did not explicitly oppose these external instruments. However, by offering the State a wide margin of appreciation, knowing that the national ban to conceal one’s face would mostly affect women wearing full-face veils, the Court nonetheless seemed to ignore the message of the external instruments under its consideration of the right to freedom of religion. In the case of *R.M.T. v. the United Kingdom*, the Court acknowledged that United Kingdom was “...out of line with a discernible international trend calling for a less restrictive approach” and it, in accordance with external positions, accepted a right to secondary strike under Article 11 ECHR (ECtHR (GC), *R.M.T. v. United Kingdom*, *op. cit.*, paras. 78 and 98). In the abstract, the Court thus aligned its position with external instruments. However, although the United Kingdom denied the right to secondary strike by its national measures, the Court argued that the concrete effects following from this measures could be justified as falling within the State’s margin of appreciation under Article 11 ECHR. In the reasoning *in concreto*, the Court thus no longer gave particular weight to the external

measures derogating from the Convention for reasons of a public emergency (under Article 15 of the Convention) could continue for many years. According to the Court, the non-temporary character of the derogating measures do not make them invalid. It arrives at this conclusion despite its citation (in the same paragraph) of the contrary viewpoint of the HRC. The HRC observed that measures derogating from the ICCPR must be of “...an exceptional and temporary nature”.⁸⁶¹ While this case misses transparency (the Court did not explicitly elaborate on why it does not follow the external viewpoint), it also disregards opportunities to harmonize with higher standards, to the detriment of the principle of the universality of human rights. From a rights holders’ point of view, the creation of opposition between the Convention and higher external standards is not a valid approach. The importations of instruments outside the human rights domain might challenge the principle of universality as well, namely when they endanger a genuine application of the ECHR. Some (exceptional) cases of our pool, for instance those integrating international humanitarian law, seemed to go in such a direction.⁸⁶²

§ 5. Bridge building, integrity and legal certainty

863. External references make connections between diverse instruments of the global normative environment (§ 5.1.). This leads to the structuring and more integrity of the picture that is often referred to as ‘legal pluralism’ (§ 5.2.). This phenomenon generally contributes to a users’ interest of legal certainty (§ 5.3.), whereas some of its characteristics might also threaten it (§ 5.4.).

§ 5.1. Building bridges in time, substance, space and across legal status

864. The referencing practice generally builds genuine bridges between various external instruments. The Grand Chamber cases that import external instruments in an explicit dismissive manner are not frequent.⁸⁶³ Moreover, and most often, dismissive uses do not destroy bridges because they do not create a true opposition. For instance, a Court’s disregard might result from the different situation or legal question that the instrument covers which does not necessarily create a divergence of interpretation between this instrument and the ECHR.

instruments it deemed important when assessing the national measure *in abstracto*. Thereby, but in a rather sophisticated manner, the Court created opposition between (the effects) of the ECHR and the external instruments. More elaborate on this case and its effects, see S. Van Drooghenbroeck, F. Krenc and O. Van der Noot, *op. cit.*, pp. 1-18.

⁸⁶¹ ECtHR (GC), *A. and Others v. the United Kingdom*, *op. cit.*, para. 178.

⁸⁶² For examples in this respect, see *infra*, para. 890 and see *supra*, Part III, Chapter 2, § 2.2.1.

⁸⁶³ Then, the Court explicitly uses external instruments in its legal reasoning, but disregards their content, or puts the content in unfavorable contrast with the ECHR. For an overview of all dismissive references, see *supra*, Part II, Chapter 3, § 1.

865. The bridges created by the Court connect and converge instruments in four dimensions: ‘in time’ (because of taking account of old and new instruments), ‘in substance’ (because of importing instruments that are diverse *ratione materiae*), ‘in space’ (because of taking account of diverse instruments *ratione loci*), and in ‘legal status’ (connecting binding- and non-binding instruments).⁸⁶⁴

866. *Firstly*, some situations point at the integration of external instruments ‘in time’. External referencing can, for instance, put circumstances of a case in their historical perspective, such as in *Vasiliauskas v. Lithuania*, where the ECtHR used external instruments to clarify the understanding of the notion ‘genocide’, now and historically.⁸⁶⁵ External referencing can also address the normative (and often more recent) roots of some contested measures. As the Court held in the case of *Hirsi Jamaa v. Italy* of 23 February 2012, “...Contracting States’ responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention and its Protocols”.⁸⁶⁶ The importation of external instruments to demonstrate changed normative present-day-conditions, is another example of a referencing practice building bridges ‘in time’. The case of *Bayatyan v. Armenia*, for example, integrates more recent and shifted positions and recommendations, leading to ‘evolutive’ interpretation in line with the ‘living instrument’-doctrine.⁸⁶⁷

867. *Secondly*, bridges are built ‘in substance’, for example through the creation of convergence between diverse instruments of general and specific content. By means of a referencing practice, the Court, for instance, integrates general law on State immunity and diplomatic protection.⁸⁶⁸ The Court also builds bridges among specific (human rights) instruments, for example by giving weight to the ICCPR, the ACHR or the AfCHR.⁸⁶⁹ It further converges with instruments covering particular human rights domains and groups of persons, such as juveniles and children. The cases of *Salduz v. Turkey*, *O’Keeffe v. Ireland*, *Neulinger and Shuruk v. Switzerland*, and *Bouyid v. Belgium* offer illustrations in this respect.

⁸⁶⁴ For a comprehensive overview of all directions of importations, with an exhaustive overview of case law from the pool, see *supra*, Part II, Chapter 2.

⁸⁶⁵ ECtHR (GC), *Vasiliauskas v. Lithuania*, 20 October 2015, Appl. No. 35343/05, para. 166.

⁸⁶⁶ ECtHR (GC), *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Appl. No. 27765/09, para. 129. In a similar line, it said in *X and Others v. Austria* of 19 February 2013 that the “...Court reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention”. ECtHR (GC), *X and Others v. Austria*, *op. cit.*, para. 150.

⁸⁶⁷ ECtHR (GC), *Bayatyan v. Armenia*, *op. cit.*, paras. 109–11, 124, 128.

⁸⁶⁸ See for example ECtHR (GC), *Cudak v. Lithuania*, *op. cit.*, para. 56; ECtHR (GC), *Cyprus v. Turkey (just satisfaction)*, *op. cit.*, para. 45.

⁸⁶⁹ For an example referring to all three of these instruments, see ECtHR (GC), *Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012, Appl. No. 42202/07, para. 72. These instruments were used to ‘resist’ evolution under the Convention. This example thus makes clear that using constructively the content of comparable human rights catalogues is no synonym to using them in a manner that broadens human rights protection.

Here, the Court references *inter alia* the CRC (which contains dozens of substantive children's tailored rights)⁸⁷⁰ and several CoE recommendations on juveniles and children.⁸⁷¹

868. *Thirdly*, a referencing practice constructs bridges 'in space'. External importations stimulate convergence between the Convention and instruments of diverse geographic scope, including those having a national, regional and universal reach. In our pool of case law, references to external national instruments are rare but cover national systems from around the globe. Often, they are embedded in common law systems, which might be explained by their usefulness for comparative exercises in cases against the United Kingdom. An example is the case of *Al-Kwahaja and Tahery v. the United Kingdom*, in which the Court refers to the Federal Court of Australia, the Supreme Court of Canada, the South-African Supreme Court, the US Supreme Court, and legal recommendations by the Law Reform Commission of Hong Kong and of New Zealand to verify the application of some rules in common-law systems.⁸⁷² Furthermore, the Court integrates instruments of regional focus, such as instruments of the EU and the CoE⁸⁷³, as well as instruments that, geographically speaking, operate on a universal level, such as references to the UN (human rights). In the case of *Neulinger and Shuruk v. Switzerland* for example, the Court brought universal external instruments closer together by building on the CRC, the UNHCR Guidelines, and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 to include and define the notion of 'child best interests'.⁸⁷⁴

869. *Fourthly*, the Court integrates external instruments of diverse legal status, going beyond the notion of what is traditionally considered as a formal 'source of law'. Thereby, also non-binding instruments (including those elaborated by non-State actors), influence the

⁸⁷⁰ Such as survival rights (including the child's right to life and the needs that are most basic to existence, such as nutrition, shelter, an adequate living standard, and access to medical services), protection rights (ensuring children are safeguarded against all forms of abuse, neglect and exploitation, including special care for refugee children; safeguards for children in the criminal justice system; protection for children in employment; protection and rehabilitation for children who have suffered exploitation or abuse of any kind), development rights (including the right to education, play, leisure, cultural activities, access to information, and freedom of thought, conscience and religion), and participation rights (encompassing children's freedom to express opinions, to have a say in matters affecting their own lives, to join associations and to assemble peacefully). All cases of our pool of case law that refer to the CRC: ECtHR (GC), *Salduz v. Turkey*, 27 November 2008, Appl. No. 36391/02, para. 60; ECtHR (GC), *S. and Marper v. the United Kingdom*, *op. cit.*, para. 124; ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, paras. 131 *et seq.*; ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, *op. cit.*, para. 136; ECtHR (GC), *X v. Latvia*, *op. cit.*, para. 96; ECtHR (GC), *O'Keeffe v. Ireland*, *op. cit.*, para. 147; ECtHR (GC), *Tarakhel v. Switzerland*, 4 November 2014, Appl. No. 29217/12, para. 99; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 89 and 109. The latter enumeration takes account only of references that particularly focus on the CRC, rather than references that take account of other instruments of the Committee on the Rights of the Child, which could nonetheless relate to the CRC.

⁸⁷¹ Such as CoE COM Rec(2003)20 of 24 September 2003 (referred to by ECtHR (GC), *Salduz v. Turkey*, *op. cit.*, para. 60); CoE COM Rec.No.R(87)20 of 17 September 1987 (referred to by *ibidem*); CoE COM Rec.No.R(79)17 (referred to by ECtHR (GC), *O'Keeffe v. Ireland*, *op. cit.*, para. 147); and CoE COM Recommendation CM/Rec(2009)10 of 18 November 2009 (referred to by ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, para. 109).

⁸⁷² ECtHR (GC), *Al-Khawaja and Tahery v. the United Kingdom*, 15 December 2011, Appl. Nos. 26766/05 and 22228/06, para. 136.

⁸⁷³ Often, such instruments are used to confirm or contribute to the acknowledgement of 'internal consensus', for instance when considering the width of the 'margin of appreciation'.

⁸⁷⁴ ECtHR (GC), *Neulinger and Shuruk v. Switzerland*, *op. cit.*, paras. 131 *et seq.*

Court's reasoning. The Court, as a consequence, builds bridges between the ECHR and both binding and non-binding external instruments. Among many others, our key case of *Demir and Baykara* offers an example in that respect.⁸⁷⁵

§ 5.2. Integrity of the system

870. The global normative environment is characterized by a diversity of normative instruments, not necessarily corresponding to the traditional definition of 'a source'.⁸⁷⁶ External referencing builds various bridges between the different components of this global setting and therefore, contributes to a more structured and coherent 'legal pluralism', enhancing the integrity of the global legal system.

871. The global normative environment lacks hierarchy, centralization or a clear order of norm application.⁸⁷⁷ To say it in the words of Krisch, the global human rights architecture does not form "...an integrated whole, neatly organized according to rules of hierarchy and a clear distribution of tasks".⁸⁷⁸ This is why some theorists do not speak of a 'legal order' structured as a system, which would at least require "...a classification of its normative constituents, as well as a set of mechanisms administering the relationship between these differently classified elements".⁸⁷⁹ Images that are used instead, are a 'global disorder'⁸⁸⁰, a 'jungle'⁸⁸¹ or a 'cacophony'.^{882 883} To grasp the diverse and unstructured environment, there are scholars that speak of '(global) legal pluralism'.⁸⁸⁴ Legal (or normative) pluralism is

⁸⁷⁵ Elaborate on this case, including on its references to non-binding instruments, see *supra*, Part I, Chapter 1, § 1.

⁸⁷⁶ For more on this issue, see our explanation of the notion of 'instruments' in *supra* Part I, Chapter 2, § 2.1.1. We start from the assumption that also instruments that emanate from non-State actors or that do not include binding provisions can have normative effects in legal reasoning.

⁸⁷⁷ A similar observation is made by: A. Fischer-Lescano and G. Teubner, *op. cit.*, p. 1002. They refer in this respect to a study of Hafner which stimulated the creation of the ILC Study Group, see G. Hafner, "Risks Ensuing from Fragmentation of International Law", U.N. GAOR, 55th Sess., Supp. Nr. 10, UN Doc. A/55/10 (2002). See also: ILC Koskenniemi Report, *op. cit.*, para. 486; B. Schlütter, *op. cit.*, p. 302; M. Rosenfeld, *op. cit.*, 2001, p. 70; J. Pauwelyn, *op. cit.*, p. 908; M. Forowicz, *op. cit.*, p. 396. It is not because, in theory, there is no hierarchy between instruments (except for norms of *jus cogens*), that the Court could not create such hierarchy (O. Corten, *op. cit.*, pp. 206-207).

⁸⁷⁸ Krisch made this observation in his article in respect of the European human rights setting. N. Krisch, "The Pluralism of Global Administrative Law", *European Journal of International Law* 2006, vol. 17, no. 1, p. 184.

⁸⁷⁹ V.P. Tzevelekos, *op. cit.*, p. 630.

⁸⁸⁰ See E. Dubout and S. Touzé, *op. cit.*, p. 11; L. Hennebel and A. Van Waeyenberge, *op. cit.*, p. 7.

⁸⁸¹ The notion of a 'jungle' in this context is used by S. Hespel, J. Put and M. Rom, "Navigate the Maze. The interrelation of International Legal Norms, with Illustrations from International Juvenile Justice Standards", *HR&ILD* 2012, vol. 6, no. 2, p. 330.

⁸⁸² The notion of a 'cacophony' is used by E. Brems, *op. cit.*, 2014, p. 451.

⁸⁸³ The latter notions contrast for instance with perceptions of the legal structure as a 'archipelago', alluding to clearly separated and somehow organized units. Rouland uses the image of a 'human rights archipelago'. N. Rouland, "L'archipel des droits de l'homme", *Revue québécoise de droit international* 1993, vol. 8, pp. 14-27. Pauwelyn compares the diverse international bodies of law with 'islands'. J. Pauwelyn, *op. cit.*, pp. 915-916.

⁸⁸⁴ The picture of 'legal pluralism' could be used to describe the legal context, as a synonym for the empirical reality of complex, multiple and diverse (human rights) norms and institutions. 'Legal pluralism' also alludes to a theoretical perspective that acknowledges the observation of a diverse picture of human right law and that, at the same time, offers inspiration for fields of research and provides analytical tools. On global legal pluralism, see P.S. Berman, *op. cit.*, 2005 and 2007; R. Michaels, *op. cit.*, pp. 2-3; J.-S. Bergé, *op. cit.*, pp. 241-263. For an important older work on legal pluralism, see J. Griffiths, "What is legal pluralism", *J. Legal Pluralism & Unofficial L.* 1986, vol.

inherent to ‘fragmentation’ and indicates that “...diverse, competing and overlapping legal orders in different types and forms appear to be everywhere and multiplying”.⁸⁸⁵ It also draws attention to the existence of multiple and highly diverse bodies of law which coexist, often in an uncoordinated manner.⁸⁸⁶ As Tzevelekos holds, it “...should be highlighted ...that, for the majority of scholars, pluralism means heterogeneity, which – to a large extent – jeopardizes the integrity of the international legal order”.⁸⁸⁷ This ‘messy hybrid world’, by its nature, is permeated by conflicts between norms and their interpretation, without there being an “...authoritative metric for determining which norms should prevail” (such as a *Grundnorm* or a rule of recognition).⁸⁸⁸ It develops hand in hand with a process of (cultural) differentiation and specialization that is characteristic of today’s globalized world.⁸⁸⁹ Normative heterogeneity will thus, given the continuing processes of globalization, not soon disappear.⁸⁹⁰

872. When we analyze the normative setting as a ‘global disorder’, the external referencing practice is embedded in and characteristic of ‘legal pluralism’. In such perspective, the Strasbourg Court is situated in a ‘jungle’ where various instruments circulate and cross.⁸⁹¹ The Court mostly uses these instruments as argumentative ‘tools’ to inform the Convention and/or to read the Convention in that light. Doing so, it builds bridges in time, space and substance, enhances coordination and diminishes the ‘chaos’. Throughout the referencing practice, it levels down divergences between the ECHR and the

24, pp. 1-55. Vanderlinden already in 1972 said that legal pluralism allows describing “...l’existence, au sein d’une société déterminée, de mécanismes juridiques différents s’appliquant à des situations identiques”. See J. Vanderlinden, “Le pluralisme juridique: essai de synthèse”, *Le pluralisme juridique* 1972, pp. 19-56. For the connection between the idea of heterogeneity in human rights and ‘legal pluralism’, see E. Brems, *op. cit.*, 2014, p. 451.

⁸⁸⁵ B. Tamanaha, *op. cit.*, p. 396.

⁸⁸⁶ *Ibidem*, p. 375.

⁸⁸⁷ V.P. Tzevelekos, *op. cit.*, p. 629.

⁸⁸⁸ P. Berman, “A Pluralist Approach to International Law”, *The Yale Journal of International Law* 2007, vol. 32, p. 327. See also M. Rosenfeld, *op. cit.*, p. 416.

⁸⁸⁹ See, more elaborate, N. Rouland, *op. cit.*, pp. 14-27. Fischer-Lescano and Teubner remark that “[L]egal fragmentation is merely an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself”. A. Fischer-Lescano and G. Teubner, *op. cit.*, p. 1004. It is thus argued that the roots of normative inflation go back to sociological and historical developments of globalization that show an (competitive and market-like) “...emergence of specialized and relatively autonomous spheres of social action and structure”, leading to a paradox within our globalised world: on the one hand, globalization processes stimulated “...uniformization of social life around the world” and, on the other hand, they resulted in more ‘fragmentation’, see ‘ILC Koskeniemi report’, *op. cit.*, para. 7. See also cf. F. Ost and M. van de Kerchove, “La doctrine entre ‘faire savoir’ et ‘savoir-faire’”, chapter in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les sources du droit revisitées, volume 3 – normativités concurrentes*, F.U.S.L., Anthemis/Limal/Brussels, 2012, pp. 31 *et seq.* These authors observe that specialized areas of law tend to offer solutions rather than rules. The distance between rules and solutions therefore becomes smaller and the law becomes more and more specific and complex (by becoming more detailed and constantly adapted to changing circumstances).

⁸⁹⁰ Cf. F. Ost and M. van de Kerchove, *op. cit.* 2012, pp. 31-33.

⁸⁹¹ Flauss speaks in this respect of a ‘circularity of case law’ (*‘circularité des jurisprudences’*), J.-F. Flauss, “La Présence de la Jurisprudence de la Cour Suprême des Etats-Unis d’Amérique dans le Contentieux européen des Droits de l’Homme”, *Rev. trim. dr. de l’homme* 2005, vol. 62, p. 346. G. Canivet said: “Qu’elle soit interne ou internationale, une juridiction ne peut être un lieu clos, c’est au contraire un Carrefour, un carrefour circulaire où se croisent de manière ordonnée les décisions de justice qui construisent un droit en devenir permanent”. G. Canivet, “Les influences croisées entre juridictions nationales et internationales. Eloge de la ‘bénévolence’ des juges”, *Revue des sciences criminelles et le droit compare*, Dalloz, Paris, October-December 2005, available at http://www.ahjucaf.org/activite&travaux/benevolence_juges/02.htm (visited on 14 September 2016). See also L. Hennebel and A. Van Waeyenberge, *op. cit.*, pp. 7-8.

imported instruments, to the benefit of harmonization. This correspond to the wish of Chevallier who stresses that in a postmodern world “... il s’agit “d’ordonner le multiple”, par des procédés visant à réaliser la mise en cohérence et à assurer la compatibilité des normes de provenances diverses... ”.⁸⁹² This viewpoint accords to a ‘normative pluralism’ that includes a conception of ‘the good’. For some authors, the ‘good’ lies in maintaining the plurality, while, at the same time, striving for its ordering and coherence.⁸⁹³ There are authors who speak in this context of ‘ordering pluralism’ by means of “...harmonization through the spread of normative congruence that weaves together a plurality of legal regimes and of world views”.⁸⁹⁴ Forowicz interestingly holds in this respect that

“... the truth lies in between an international hierarchical set-up and a purely fragmented international legal order. It is believed that there is an operational international legal system which provides a diversified legal tool-box to judges, lawyers, academics, and others. Due to the difficulties in reaching an agreement at the international level among non-homogeneous states and due to the lack of an international legislative body, it is often left to international judges to close the gap and to harmonize different international legal norms”.⁸⁹⁵

If the Strasbourg judges are situated in a normative ‘jungle’, one could say that they at least use the lianas of the jungle as tools to connect to the ‘organisms’.

873. Our case law analysis demonstrates that there are two main situations: harmonization with general and specific instruments outside the human rights domain and harmonization with instruments situated within the human rights area.⁸⁹⁶

874. In respect of the Court using instruments *outside the human rights domain*, the ECtHR mainly contributes to the development of the general international law and does not oppose it. Although there is no agreement on this issue⁸⁹⁷, Vanneste, on the basis of a large doctoral study, has concluded that the Court usually does not contradict general international law. On the contrary, the ECtHR, when using this external legal domain, often develops and clarifies it.⁸⁹⁸ Treves too, observes that specialized courts generally do not tend to locate

⁸⁹² J. Chevallier, *op. cit.*, p. 674.

⁸⁹³ Cf. the sections on ‘coordinative’ and ‘hierarchical’ pluralism in: M. Baumgärtel, D. Staes, and F. Mena Parras, F., “Hierarchy, Coordination or Conflict? Global Law Theories and the Question of Human Rights Integration”, *E.J.H.R.-J.E.D.H.* 2014, no. 3, pp. 326-354. See also there for more references in respect of *i.a.* ordered pluralism.

⁸⁹⁴ M. Rosenfeld, *op. cit.*, 2008, p. 417. The notion of ‘ordered pluralism’ is used by M. Delmas-Marty, *op. cit.*, 2009.

⁸⁹⁵ M. Forowicz, *op. cit.*, p. 21.

⁸⁹⁶ This is however not a constant process. On some rare occasions, external instruments are put in opposition. Moreover, references are not present in every case and often know incoherent patters.

⁸⁹⁷ See, for instance, the separate opinion to the judgment of *Chiragov and Others v. Armenia*, in which Judge Gyulumyan criticizes the majority for having taken a different approach to extra-territorial jurisdiction than the general approach in international law. According to this Judge, the Court thus opposed general international law and interpreted the Convention in a vacuum, contributing to the phenomenon of ‘fragmentation’. Dissenting opinion of Judge Gyulumyan to the case of ECtHR (GC), *Chiragov and Others v. Armenia*, 16 June 2015, Appl. No. 13216/05, paras. 1, 58 and 83.

⁸⁹⁸ F. Vanneste, *op. cit.*, 2011, p. 831.

themselves outside the influence of general international law and that the risk of fragmentation should thus not be exaggerated.⁸⁹⁹ This author holds that there “...is an incentive for international decision-makers to pay careful attention to the work of their colleagues” and that “...[w]hat is striking is not the differences between the international courts and tribunals, but the efforts at compliance with general international law, even within the context of specialized institutional treaties”.⁹⁰⁰ From this perspective, we expect judges to have ‘good reasons’ and to have a high sense of urgency when they oppose general international law.⁹⁰¹

875. On the basis of our case law analysis, we arrive at similar observations; when the Court is confronted with applicable rules of general international law, it mostly aims to maintain the integrity of the system through a process of harmonization. In this context, the Court gives a prominent place to Article 31 paragraph 3 (c) VCLT, covering the idea of a ‘systemic integration’ that deals with normative diversity by means of interpreting a treaty as a part of the larger international system and, therefore, “...in accordance with the general principles of international law”.⁹⁰² The Court’s harmonization process, that highlights the aims of reconciliation and accommodation, acknowledges the role of the larger system. The Court affirmed for that matter that where

“...a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law”.⁹⁰³

876. The theoretical ideal of ‘coordination’ might be more controversial than it appears at first sight. The Court sometimes seems to ignore that ‘reconciliation’ and the fight against fragmentation may risk losing sight of an effective and progressive human rights protection.⁹⁰⁴ In *Nada v. Switzerland*, for example, the Grand Chamber, by explicitly referencing the need for ‘coordination’ (by citing the ILC report on ‘fragmentation’),

⁸⁹⁹ T. Treves, *op. cit.*, 2009, p. 226.

⁹⁰⁰ *Ibidem*. Treves does not focus on the situation of the ECtHR specifically.

⁹⁰¹ Cf. B. Simma, “Fragmentation in a Positive Light”, *Mich. J. Int’l L.* 2003-04, vol. 25, p. 846. Simma observes that international courts and tribunals are “...aware of the necessity to preserve the coherence of international law”.

⁹⁰² M. Forowicz, *op. cit.*, pp. 355-356.

⁹⁰³ ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, para. 170, with references to earlier case law. As we stressed above, coordinative integration with instruments not relating to the human rights domain not always an easy undertaking. A challenge of importing such instruments might be that they do not always share the aims, objects, interests and missions of Strasbourg human rights protection.

⁹⁰⁴ In the case of *Hassan v. the United Kingdom*, for example, the Court, to assess a situation of detention in armed conflict, aimed for reconciliation between obligations of international humanitarian law and obligations of the ECHR, while ignoring that both obligations were actually irreconcilable. This weakened the protection offered by Convention. ECtHR (GC), *Hassan v. the United Kingdom*. More elaborate on this issue, *infra*, para. 890.

sanctions the State for not creating an harmonious interpretation.⁹⁰⁵ According to the Court, Switzerland did not ensure respect for the (flexible) UN-obligations in a manner that would equally respect the Convention. In reality, however, the Court seemed to deny the existence of an unfixable normative conflict.⁹⁰⁶ Indeed, the cited UN-obligations had explicitly announced that the State was allowed to infringe human rights and they did not offer any latitude to the States.⁹⁰⁷ Here, although the Court rebutted the presumption of equivalent protection, it did not challenge the UN obligations and their possible national effects. These UN obligations, as argued by separate Judges Bratza, Nicolaou and Yudkivska, opposed the protection of the ECHR.⁹⁰⁸ Therefore, the Court's (artificial) efforts of 'reconciliation', highlighting the stable relations between the ECtHR and the UN system, seemed to cover up human rights interferences (and potential violations) by instruments of the UN. Moreover, in another case, which included a reference both to the ideal of 'coherence' and to the precedent of *Nada v. Switzerland*, the Court alluded to the possibility of external obligations 'justifying' interferences with the Convention.⁹⁰⁹

877. In our view, the Court should prevent that the strive for more coherence in the chaotic normative environment overrules the strive for an adequate human rights supervision. This has stimulated our proposal to achieve 'accommodation' based on a twofold process: one of 'coordinative harmonization' and one of 'hierarchical harmonization'.⁹¹⁰ 'Coordination' reconciles the ECHR and the external obligations. This implies a human rights conform interpretation of the external provision, however without contradicting it. A hierarchical direction of integration should only take place when a coordinative harmonization is not feasible without disproportionately affecting human rights. Human rights law, as a *lex specialis*, should, in our view, receive priority and disapply external conflicting obligations when a reconciliation process is unsuccessful. In such exceptional circumstances, the Court is advised to highlight its autonomy and independence *vis-à-vis* external mechanisms and to not shy away from ascertaining a conflict between the ECHR and external norms. Here, external references may actually denote a 'struggle for influence'⁹¹¹ between different actors.⁹¹²

⁹⁰⁵ ECtHR (GC), *Nada v. Switzerland*, *op. cit.*, paras. 170-171.

⁹⁰⁶ For comparable criticism, see all separate opinions to ECtHR (GC), *El-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*

⁹⁰⁷ Joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska to the case of ECtHR (GC), *Nada v. Switzerland*, 12 September 2012, Appl. No. 10593/08, para. 6.

⁹⁰⁸ *Ibidem*; A. Bailleux, *op. cit.*, pp. 320-321.

⁹⁰⁹ ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, para. 259.

⁹¹⁰ Elaborate on this issue, see *supra*, Part III, Chapter 1, § 3.2.2., C.2. For the difference between 'coordinative' and 'hierarchical' integration, see in M. Baumgärtel, D. Staes, and F. Mena Parras, F., *op. cit.*, pp. 326-354.

⁹¹¹ R. von Jhering, *Der Kampf um's Recht* [1872], trans. *The Struggle for Law*, Callaghan company, Chicago, 1915, 138 p. On external referencing in relation to competitive relationships between courts, see E. Voeten, "Borrowing and Nonborrowing among International Courts", *Journal of Legal Studies* 2010, vol. 39, no. 2, pp. 551-552.

⁹¹² Allard and Garapon consider the '*commerce des juges*' (of which the practice of referring to external instruments forms part) to be a consequence of a confrontation between judicial cultures and of a struggle for influence between states on the global scale. See J. Allard and A. Garapon, *Les juges dans la mondialisation*, Seuil, Paris, 2005, pp. 35-53. See also T. Treves, *op. cit.*, 2009, p. 219. With regard to discussions on the risk of conflicting

878. Regarding the importation of external instruments *within the human rights domain*, the Court has relied less on the idea of ‘harmonization’. In addition, the Court seldom referred to Article 31 paragraph 3 (c) VCLT in this context. This does not mean that such references could not have harmonious effects. Our case law analysis shows that the Court regularly builds on specific (human rights) instruments for ‘evolutive’ interpretation, for establishing a common approach or a consensus, for general supportive arguments, *etc.* While the general tendency seems to be one of harmonization, we could not deny that the Court sometimes misses opportunities to integrate external higher protection standards in a coordinative manner.⁹¹³

879. The Court generally makes constructive connections, both with instruments of general international law and with specific normative (human rights) instruments. It builds bridges in time (by introducing more recent materials), in space (by introducing solutions and positions adopted in other systems), and in substance (by introducing other specific and general instruments). These multidimensional tendencies lead to more coherence and systematization in the global normative environment and as a result, to more integrity of the global ‘system’. According to Dworkin’s integrity criterum, this serves the interests of a ‘Judge Hercules’, who is concerned with preservation and reinforcement of coherence in a legal system as well as in the legal solutions that it offers.⁹¹⁴ Besides a judicial perspective, such an integrity also serves a rights holders’ and a duty bearers’ need for legal certainty.

§ 5.3. Legal certainty

880. The Court’s genuine openness to the external normative context leads to convergences and rapprochements, and, generally, to more coherence in the global normative field.⁹¹⁵ It therefore serves the ‘substantive’ understanding of the notion of legal certainty.⁹¹⁶ Judge Pinto de Albuquerque in this context remarks the following:

jurisprudence, Treves speaks of a ‘clash for power between institutions and the persons which partake in the decisions of these institutions’.

⁹¹³ For more on this issue and for examples, see *supra*, Part III, Chapter 2, § 2.3.

⁹¹⁴ R. Dworkin, *L’empire du droit (traduit de l’américain par Elisabeth Soubrenie)*, PUF, Paris, 1994, pp. 247 *et seq.*. See A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur*, Bruylant and F.U.S.L., Brussels, 2009, pp. 332 and 348; H. Dumont and A. Bailleux, “Esquisse d’une théorie des ouvertures interdisciplinaires accessibles aux juristes”, *Droit et société* 2010, vol. 2, no. 75, pp. 280-281. Dworkin mainly alludes to a chain of precedents (and thus, to bridges ‘in time’) that allow justifying a decision because it presents law in the form of a just order that rests on a coherent whole of principles. See B. Frydman, Conclusions on “Le dialogue international des juges et de la perspective idéale d’une justice universelle”, 2007, pp. 9-10, available at http://www.philodroit.be/IMG/pdf/B._FRYDMAN_-_Conclusion_-_Le_dialogue_international_des_juges_-_30_mars_2007.pdf (visited on 19 January 2017); B. Frydman, *Le sens des lois: histoire de l’interprétation et de la raison juridique*, *op. cit.*, 2007.

⁹¹⁵ A genuine openness covers the intention to harmonize with and/or to learn from the external environment in a manner that respects human rights law. The creation of opposition for reasons beyond the protection of human rights law, does not reflect a genuine openness. D. Staes, “The Importation of ‘External Sources’ by the European

“In a world of decentralised and deformed international law, legal certainty is more a question of substance than one of form and procedure... The touchstone of legal certainty is neither the form which encapsulates the norm nor the procedure by which the norm is created, but definitely the substance of the norm”.⁹¹⁷

881. In one of the cases that we examined, in *Sergey Zolotukhin v. Russia*, the Grand Chamber explicitly stresses this principle in a context of referencing. In this case, the Court holds that diverging approaches about the meaning of certain notions might lead to legal uncertainty and that therefore, there is a need for harmonization. Against that background, the Court underlines the importance of a dynamic interpretation, even when this would mean to depart from its earlier case law.⁹¹⁸ Here, the Court is giving priority to the aim of *external* certainty (coherence between different protection systems) and used this argument as a justification for an ‘evolutive’ interpretation, instead of giving precedence to the aim of *internal* certainty (coherence between Strasbourg decisions), which would rather temper an ‘evolutive’ reasoning.

882. However, while the creation of coherence serves the ideal of legal certainty, it may not always be of a practical concern for the rights holders. Actually, the rights holders could even profit from the external normative diversity and the existence of ‘uncertainty’. It is precisely this diverse context that offers them opportunities to frame comparative arguments.⁹¹⁹ When the external environment would be highly coherent and similar, there would not be much to compare. In addition, the Court does justice to the rights holders’ interests when it maintains a certain level of diversity in case the external domains do not share the aims and objects of human rights law. This could be illustrated by the dismissive reference in *Catan v. the Republic of Moldova and Russia* in which the Court, when considering the State’s jurisdiction under Article 1 of the Convention⁹²⁰, does not follow the Russian

Court of Human Rights. Challenges and Opportunities in Light of Legal Certainty”, in M. Arcari and L. Balmond (eds), *Judicial Dialogue in the International Legal Order. Between Pluralism and Legal Certainty*, Editoriale Scientifica, Napoli, 2014, pp. 61-91.

⁹¹⁶ On the issue of external referencing in the light of legal certainty, see D. Staes, *op. cit.*, 2014, pp. 61-91. On legal certainty as a factor of process legitimacy, see, K. Dzetsiarou, *op. cit.*, 2015, pp. 159-160.

⁹¹⁷ Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 26.

⁹¹⁸ ECtHR (GC), *Sergey Zolotukhin v. Russia*, *op. cit.*, para. 78. The Court established dynamic evolution (and ‘harmonization’) with support of external instruments, mainly relying on case law of the ECJ and the ACtHR (embracing an approach to interpret the notion of a ‘same offence’ based strictly on the identity of the material acts and not on the legal qualification of such acts). *Ibidem*, paras. 79-81.

⁹¹⁹ An other example of rights holders strategically profiting from the diversity of legal forums, can be found in the practice of ‘forum shopping’. The phenomenon of ‘forum shopping’ (accumulating procedures) is considered as a typical phenomenon of a global context of normative diversity. For more on this issue, see S. Turgis and J. Dhommeaux, *op. cit.*, p. 50 and references there; B. Frydman, “L’affaire Total et ses enjeux”, in *Liber amicorum Paul Martens. L’humanisme dans la résolution des conflits. Utopie ou réalité ?*, Larcier, 2007, pp. 301-321; B. Frydman and L. Hennebel, “Le contentieux transnational des droits de l’homme: une analyse stratégique”, *RTDH* 2009, vol. 77, pp. 86-90.

⁹²⁰ Article 1 of the Convention provides that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

argument (that relied on ICJ case law⁹²¹) pointing at the absence of jurisdiction over a region controlled *de facto* by a government that was not an organ or instrument of the State.⁹²² The Court concludes that Russia had jurisdiction because of its ‘effective control’ over the regime and added that “...the test for establishing the existence of “jurisdiction” under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under international law”.⁹²³ The Court in the case of *Catan and Others* highlights the specificity and non-similarity of human rights law, as compared to general international law.⁹²⁴ The Court *inter alia* relies on statements developed in *Loizidou v. Turkey*⁹²⁵, which is another case where the Court maintained a divergence with general international law. The latter decision is often mobilized to illustrate the dangers of fragmentation of international law through the proliferation of international tribunals.⁹²⁶

883. When we dogmatically hold on to an ideal of legal certainty, even in relation to less protective human rights instruments, or even in relation to conflicting general international law, the referencing practice is prone to lead to a ‘race-to-the-bottom’ and to affect some specificities of human rights protection. While ideals of coherence and legal certainty serve procedural interests of the rights holders (and the duty bearers), they might thus not always contribute to desired substantive outcomes. From a rights holders’ perspective, the Court should refrain from importing instruments that run counter to the specific aims and purposes of human rights law or that might paralyze its progressive development.⁹²⁷

⁹²¹ ICJ case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), *op. cit.*

⁹²² ECtHR (GC), *Catan and Others v. the Republic of Moldova and Russia*, 19 October 2012, Appl. Nos. 43370/04, 8252/05 and 18454/06, para. 96.

⁹²³ *Ibidem*, para. 115.

⁹²⁴ In a similar spirit, the Grand Chamber in the case of *Jaloud v. the Netherlands* of 20 November 2014 (which referred *inter alia* to the precedent of *Catan and Others*) stressed that “...the status of the “occupying power” within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative”. ECtHR (GC), *Jaloud v. the Netherlands*, 20 November 2014, Appl. No. 47708/08, para. 142.

⁹²⁵ *Ibidem*, paras. 106 *et seq.* In the *Loizidou case*, the ECtHR said that normal rules on reservations to treaties (as developed for instance by the ICJ) do not *per se* apply to human rights law, which could be considered as a creation of conflict between general law and special law. See ECtHR (GC), *Loizidou v. Turkey* (preliminary objections), *op. cit.*, paras. 76 *et seq.*; ECtHR (GC), *Loizidou v. Turkey* (merits), 18 December 1996, Appl. No. 15318/89, para. 52.

⁹²⁶ ICJ Judge and President Guillaume, *inter alia* in the context of this case law example, held that the proliferation of Courts was accompanied by “...a serious risk: namely loss of overall control” and that this proliferation “...may jeopardize the unity of international law and, as a consequence, its role in inter-State relations”. Speech by H.E. Judge Gilbert Guillaume, President of the ICJ, to the General Assembly of the United Nations, 30 October 2001, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1> (visited on 24 August 2016). See also M. Koskenniemi and P. Leino, *op. cit.*, pp. 554-555. To tackle these ‘dangers’ of fragmentation, proposals had been done to grant the ICJ a supreme position in respect of treating some questions of international law. Other courts facing difficulties with some aspects of public international law could then ‘refer’ these issues to the ICJ and request for advice. See more general: T. Treves, “Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals”, in J.A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook on United Nations Law*, vol. 4, Kluwer Law International, Alphen aan den Rijn, 2000, pp. 215-231.

⁹²⁷ For authors such as Forowicz, an effective strategy for reducing fragmentation is therefore only possible in legal areas that share the same aims and missions. M. Forowicz, *op. cit.*, p. 400 with reference to M. Koskenniemi and P. Leino, “Fragmentation of International Law? Postmodern Anxieties”, *LJIL* 2002, vol. 15, pp. 561-562.

§ 5.4. Legal certainty under threat: ‘soft’ law, inconsistency and interpretation difficulties

884. When we zoom in on the procedural aspects of legal certainty, the extent to which a referencing practice has a positive effect depends on how external instruments are imported by the ECtHR. Several authors consider the Court’s references to ‘soft’ instruments as detrimental for legal certainty. In this context, Bailleux argues that the case of *Bayatyan v. Armenia* – which is a case that relied on external developments in ‘soft’ law to bring under the Convention a right to object against the military service – is “...one of the most blatant examples of ‘soft’ law-nurtured reasoning” that is “...likely to undermine legal certainty” as a result of which it “...becomes increasingly difficult to make out the existence of a boundary – whether gradual and porous – between the law’s empire and the provinces of politics and morals”.⁹²⁸ The human rights users might thus be surprised when the Court gives normative weight to provisions that are ‘soft’ and/or lack a democratic basis. Such concerns play less in a more substantive approach. Then, references to ‘soft’ law actually enhance legal certainty since they have the potential to unite States’ ‘hard’ obligations with their ‘soft’ policy declarations and intentions.

885. The inconsistency of the Court’s method of external referencing is a further threat to procedural aspects of legal certainty, both from a duty bearers’ and from a rights holders’ viewpoint. It is regrettable that importations of external instruments – for instance to establish an international trend or consensus – generally lack a consistent and a structured method. Sandland, for instance, points out that “... the Court seems almost to endorse a chaos theory version of jurisprudence, where developments and ‘trends’ bounce around the globe in unpredictable ways”.⁹²⁹ As such, the possible benefit of the referencing practice on the principle of legal certainty (because of the creation of coherence with external instruments) risks to be wiped out by the challenges the practice poses to that same principle as a result of its inconsistent use. From a perspective that considers legal certainty as a central characteristic of the rule of law, the deficient methodology of the referencing practice is problematic.⁹³⁰

886. Finally, difficulties in interpretation could maintain or increase divergences and affect the principle of legal certainty. Such difficulties are present when the Court gives the imported instruments a different meaning from the one they ‘normally’ have under external mechanisms. Diverging views on interpretation are a rather natural consequence of various

⁹²⁸ A. Bailleux, *op. cit.*, 2014, p. 303.

⁹²⁹ R. Sandland, “Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights”, *Feminist Legal Studies* 2003, vol. 11, no. 2, pp. 191-209, as cited by K. Dzehtsiarou, *op. cit.*, p. 70.

⁹³⁰ Cf. N. Krisch, *op. cit.*, p. 207.

actors interpreting the same instruments, often in different contexts. Normative instruments do not speak for themselves and may originate from systems of which the Strasbourg judges do not know all particularities. Hence, interpretation difficulties that result from external referencing might intensify ‘fragmentation’, and might be difficult to be erased.

887. An example of a Strasbourg case that reflects a divergent interpretation, is *X. and Others v. Austria* (a case on the issue of second-parent adoption). Without entering into the details of this decision, it is interesting to observe how the dissenting judges to this case criticize the use by the majority of the 2008 CoE Convention on the Adoption of Children. They allege that the majority interpreted this convention in an incorrect manner that did not correspond to its letter, object and purpose. The dissenters, furthermore, draw attention to difficulties of interpretation regarding the CoE Committee of Ministers Recommendation of 31 March 2010, another instrument that was introduced by the majority. The dissenters stress that parts of sentences as well as entire provisions of this Recommendation had been omitted.⁹³¹ In line with this criticism, they hold that the majority applied an approach that created opposition, rather than an approach based on harmonization.⁹³²

888. Difficulties to interpret external instruments may also be rooted in the specific context in which the external system is embedded. When addressing the practice of cross-referencing of the ECtHR, Bailleux, for instance, stresses the following:

“When they practice cross-references and intermingling across the board and in an indiscriminate manner, the dots of the human rights network also run the risk of being conflated and merged with each other. This conflation process results in an impoverishment of the network. Human rights are imbued with cultural values and rooted in constitutional traditions which far exceed the black-letter law of a unified international bill of rights. Stripping off these specificities undoubtedly undermines the functioning of the network and decreases the level of protection of human rights.”⁹³³

889. In her dissenting opinion to the case of *Faber v. Hungary*, Judge Keller makes a similar observation, by pointing out that:

“While I am generally in favor of citing international law materials, the Court should do this only where it is helpful for the reasoning in the case at hand. Needless to say, it is dangerous to quote precedents from another jurisdiction without mentioning that those decisions or judgments are based on a different human rights concept (e.g. free speech according to the First Amendment to the US Constitution, rather than freedom of expression in Article 10 of the Convention) and handed down by

⁹³¹ Joint partly dissenting opinion of Judges Casadevall, Ziemeles, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos to ECtHR (GC), *X and Others v. Austria*, 19 February 2013, Appl. No. 19010/07, paras 19 *et seq.*

⁹³² *Ibidem*, para 22.

⁹³³ A. Bailleux, *op. cit.*, 2014, p. 303.

a body having different functions and competences from those of our Court (e.g. a Federal Supreme Court, as opposed to an international court). The bare citation of such judgments outside the comparative context is overly simplified and therefore misleading.”⁹³⁴

890. In addition, separate judges have complained about the majority making ‘false analogies’ with external instruments. According to Judge Spano, this happened in the case of *Hassan v. the United Kingdom*, to the detriment of human rights protection. In this case, the majority, to assess Article 5 of the ECHR (on the right to liberty and security), considered relevant State practice under Article 9 of the ICCPR (also on the right to liberty and security). The separate Judge criticizes such a comparative approach since the provision of the ICCPR only protects against arbitrary forms of detention and does not, contrary to the ECHR, contain an exhaustive list of permissible grounds of detention.⁹³⁵ Other separate opinions equally witnessed disagreement as to how to interpret certain external instruments. For instance, in the case of *Nada v. Switzerland*, the separate opinion reveals disagreement about the scope and meaning of some Resolutions of the UN Security Council.⁹³⁶ In *Animal Defenders International v. the United Kingdom*, the separate Judge points at the existence of ‘brief and selective’ external references by the majority. In the latter case, the majority frequently used instruments of the United States. Judge Tulkens challenges such a use by saying that “...the latter country’s regulatory system is so different to that in issue here that the comparison strikes me as barely relevant” whereas the “...less restrictive options envisaged were dismissed in general terms...”.⁹³⁷ Interpretation difficulties may, moreover, go hand in hand with some uncertainties inherent to the imported external instruments. Judge Jungwiert, for instance, acknowledges in one of his dissenting opinions that the majority of the recommendations, reports and other documents cited by the Court (in the case in question) were relatively vague, and largely theoretical.⁹³⁸

891. Overcoming such challenges may not be that easy. We recommend that the judges consider the specific characteristics, background and practices of the external setting and its sources,⁹³⁹ but one should not forget that judges, at least to a certain extent, will always think

⁹³⁴ Dissenting opinion of Judge Keller to ECtHR, *Case of Faber v. Hungary*, Appl. No. 40721/08, 24 July 2012, para. 17. It is interesting to note that Judge Keller was a member of the UN Human Rights Committee from July 2008 to December 2010. Previous memberships to external institutions might have an impact on the attitude of the judges regarding the practice of importing (certain) external instruments. Note in addition that the first phrase of the remark of Judge Keller unveils some opportunism in a sense that one should only cite international law when it is helpful for the reasoning.

⁹³⁵ Partly dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva to the case of ECtHR (GC), *Hassan v. the United Kingdom*, *op. cit.*, para. 14.

⁹³⁶ Joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska to the case of ECtHR (GC), *Nada v. Switzerland*, 12 September 2012, Appl. No. 10593/08, paras. 4-6.

⁹³⁷ Dissenting opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque to the case of ECtHR (GC), *Animal Defenders International v. the United Kingdom*, 22 April 2013, Appl. No. 48876/08, para. 17.

⁹³⁸ Dissenting opinion of Judge Jungwiert to the case of ECtHR (GC), *D.H. and Others v. Czech Republic*, 13 November 2007, Appl. No. 57325/00.

⁹³⁹ Cf. J. Allard, “Le dialogue des juges à la Cour européenne des droits de l’homme et à la Cour supreme des Etats-Unis. Constats et perspectives philosophiques”, in J. Allard, G. Haarscher, L. Hennebel and G. Lewkowicz

from their own perspective. Moreover, time and resources to undertake a profound contextual study on external instruments and on the setting in which they are embedded might be lacking. Therefore, a well-equipped Research Division in the Court is of great importance, including library facilities with comparative materials.⁹⁴⁰ To avoid sharp contrasts in interpretation we could recommend the ECtHR to give the imported instruments – especially when they share the object and purpose of the Convention – a meaning that stays close to the interpretation given by their ‘normal’ supervising body. Thus, for example, it would be advisable to listen to the interpretation of the HRC when the ICCPR is the imported instrument. In addition, as recommended by Judge Ziemele, the Court could, when there are uncertainties about international law, only take account of the essential points.⁹⁴¹

892. Note that a certain degree of divergence in interpretation might also be indicative of harmonizing efforts; some divergences result from the Court’s wish to give an instrument of general international law a meaning in accordance with the Convention. This might ensure peaceful coexistence between both instruments. Think, for example, of the use the Court makes of the interpretative rules of the VCLT. The Court offers these rules a specific understanding, but generally, does not oppose them.⁹⁴² By doing so, the Court, on the one hand, adds to ‘fragmentation’ because it gives the VCLT a somewhat different meaning than the meaning it ‘normally’ has under general international law. On the other hand, this allows for external instruments, such as the VCLT, to serve in a human rights context too, without creating flagrant opposition.

§ 6. A process of deformalization

893. Today’s globalised world order is ‘post-Westphalian’; States increasingly share their power with non-State entities. This affects the central and sovereign role of States, including in the area of their traditional legal functions of norm-creation and norm-enforcement.⁹⁴³ A

(eds), *Juger les droits de l’homme. Europe et Etats-Unis face à face*, Collection ‘Penser le Droit’, Bruylant, Brussels, 2008, p. 134. See also C. McCrudden, “Common Law of Human Rights?": Transnational Judicial Conversations on Constitutional Rights”, *Oxford Journal of Legal Studies* 2000, vol. 20, no. 4, p. 508; M. Rosenfeld, “Constitutional Migration and the Bounds of Comparative Analysis”, *NYU Ann. Surv. Am. L.* 2001, vol. 58, issue 1, p. 73.

⁹⁴⁰ F. Vanneste, *op. cit.*, 2010, p. 269.

⁹⁴¹ Concurring opinion of Judge Ziemele to the case of ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”*, 16 July 2014, Appl. No. 60642/08, para. 2.

⁹⁴² See F. Vanneste, *op. cit.*, 2011, pp. 819 *et seq.*

⁹⁴³ See J. A. Sanahuja, “Entre Washington y Westfalia: desarrollo y cohesión social en la globalización”, *Papeles de cuestiones internacionales* 2004, vol. 87, pp. 35-41; B. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global”, *Sydney L. Rev.* 2008, vol. 30, pp. 385-386. Historically, within a ‘Westphalian’ context of states having a central role legal pluralism lost a large part of its relevance. Then, the dominant picture was that all law emanated from the state, establishing a unified and uniform legal system. During colonial times, legal pluralism however regained attention as several states exported their legal regimes to the colonised areas. Pluralism addressing the colonised world has been referred to as ‘classical legal pluralism’, which concerned, geographically, the interplay of Western and non-Western laws and, conceptually, the subordination of

concrete manifestation of this phenomenon is reflected in the popularity of ‘soft’ law instruments. Such instruments are characteristic of normative and social heterogeneity and of post-sovereign global governance, connected to a declining role of the State.⁹⁴⁴ Against that background, references to external ‘soft’ and other non-binding instruments by the Strasbourg Court reflect a practice embedded in a globalizing world characterized by a diminishing role of the State and by a lesser attention to questions of ‘formalism’ in law and argumentation. Referencing non-binding instruments mitigates the relevance of ‘State consent’ in legal reasoning, which could be conceived as a phenomenon of ‘deformalization’. This phenomenon is more common in international adjudication than in domestic adjudication and it fits well the specific character of human rights, which relies on a legal as well as on moral and a political force.⁹⁴⁵

894. A process of deformalization may serve some interests of judges and the parties to the case, offering them more freedom in building their arguments. This pragmatic ‘usefulness’ might possibly explain why, in the Court’s cases and separate opinions, there have not been large debates about the use of non-binding instruments in legal reasoning.⁹⁴⁶ However, from more traditional ‘formal’ viewpoints, including perspectives of duty bearers, references to non-binding law instruments may be controversial. This is particularly so because the importations of non-binding instruments, as our case law analysis demonstrates, influence the understanding and the development of the Convention and therefore, indirectly offer some ‘hard’ traits to what is generally considered to be non-binding and ‘soft’.⁹⁴⁷ As the Court announced, for the purpose of interpreting the Convention, the legal status of external human rights standards should not necessarily be ‘hard’ or ratified.⁹⁴⁸ By using non-binding external instruments in jurisprudential practice, the instruments thus gain authority and mandatory power, similar to more traditional legal sources.⁹⁴⁹

indigenous non-state law to the law introduced by the colonizing power. See also R. Michaels, “Global legal pluralism”, *Annual Review of Law & Social Science* 2009, vol. 5., pp. 243-262.

⁹⁴⁴ U. Mörtz, Chapter “Introduction” in U. Mörtz (ed.), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, Edward Elgar, Cheltenham UK, 2004, p. 2, and references there. The rise of ‘soft’ law is said to be stimulated by the increase of rules-enacting entities that are not organized as a constitutionally-based authority (thus not having the power to issue ‘hard’ law), by the need for flexibility and rapid reactions, by the complexity of the issues and the diversity of the problems, by the need to move forward in respect of areas of strong political controversy and by the concern of the possibility of non-compliance. U. Mörtz, *op. cit.*, p. 3, and references there.

⁹⁴⁵ E. Brems, *op. cit.*, p. 450. The ICJ acknowledged that non-binding international rules might have ‘normative value’.

⁹⁴⁶ The same cannot be said about some respondent States. For instance, the Turkish Government in *Demir and Baykara* criticized the effects of referencing on the status of the imported instrument, which could, although not ratified, become binding on an indirect basis. ECtHR (GC), *Demir and Baykara v. Turkey*, *op. cit.*, paras. 54 and 61-62.

⁹⁴⁷ F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 448; S. Van Drooghenbroeck, *op. cit.*, p. 824. The notion of ‘transformation’ used in this context is taken from Blutman. See L. Blutman, “In the Trap of a Legal Metaphor: International Soft Law”, *I.C.L.Q.* 2010, vol. 59, p. 618, footnote 58, quoted by Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 450, footnote 64.

⁹⁴⁸ See the Grand Chamber case of *Demir and Baykara*, *supra*, Part I, Chapter 1, § 2.2.

⁹⁴⁹ Cf. F. Schauer, *op. cit.*, p. 1959.

895. This does not mean that non-binding instruments suddenly receive independent ‘binding’ force. Our case law analysis demonstrates that the use of non-binding instruments for ‘evolutive’ purposes are often accompanied by comparisons of ‘hard’ national and international formal sources, and/or by other arguments.⁹⁵⁰ The ECtHR has also expressed doubts on their relevance, *i.a.* pointing at their non-binding character or the cautious wording in which they are written.⁹⁵¹ Moreover, the phenomenon of ‘evolutive’ interpretation in general (including ‘evolutive’ interpretations based on comparisons of binding and non-binding instruments) is in decline in Grand Chamber cases over the last years.⁹⁵² Not so long ago, Judge Pinto de Albuquerque has expressed his concern that the Court does not give sufficient weight to ‘soft’ instruments of the CoE (*i.e.* of the CPT, the Council of Penological Cooperation and the European Committee on Crime Problems).⁹⁵³ Although he notes that “...in Strasbourg there has never been a monopoly of formalism in the ascertainment of international law”, he also acknowledges that “...[i]n European human rights law, a formal theory of sources of law is still prevailing”.⁹⁵⁴

896. Consequently, non-binding instruments generally do not often serve as legal sources with decisive weight in the examined Grand Chamber cases. Their value rather lies in *co-determining* an interpretation. Even so, however, it cannot be denied that they are accorded a certain juridical efficacy and normative force and that they, to some extent, move beyond a pure moral or policy status.⁹⁵⁵ Demonstrated by our empirical analysis, external instruments used in the ‘law’-section of the case, usually embody a role that goes beyond the establishment of ‘facts’ by exercising some normative effect on the legal reasoning.⁹⁵⁶ Through the referencing practice and the ‘deformalization’ process inherent to it, the Court erases the sharp dividing lines between traditional and non-traditional legal instruments and turns *soft* arguments into *legal* arguments.⁹⁵⁷ Focusing on how diverse external instruments concretely operate in legal reasoning clarifies what, in the heads of the judges (and the (third) parties using external instruments in legal reasoning), counts as *law*. The examined

⁹⁵⁰ See *supra*, Part II, Chapter 3, § 3.3.

⁹⁵¹ For examples in this regard, Part II, Chapter 3, § 1.4.

⁹⁵² See *supra*, Part II, Chapter 3, § 3.3.

⁹⁵³ 22 In his partly dissenting opinion in the case of *Muršić v. Croatia*, Judge Pinto de Albuquerque did not agree with the majority on the point where that majority did not observe a degrading treatment (Article 3 ECHR) in respect of the placement of a person in prison in which he disposed of less than 4 sq. m of personal space. See Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 22. In paragraph 62 of this opinion, he concluded that: “[t]he present judgment pays no heed to what the representatives of the forty-seven democratically elected European governments unanimously agreed upon in the Committee of Ministers of the Council of Europe, or indeed to the most laudable work of renowned legal, medical, psychological, sociological and penological experts such as those in the CPT and the Council for Penological Cooperation of the Council of Europe” (*ibidem*, para. 62).

⁹⁵⁴ *Ibidem*, para. 23.

⁹⁵⁵ Cf. F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 451; Allard and Garapon, focusing on judicial dialogue, stressed the following: “La force normative du droit qui se concrétise dans le procès n’est plus seulement située dans un ordre hiérarchique entièrement adossé à la volonté politique exprimée par le législateur, ni dans les précédents qui fourniraient au jugement une assise historique précise et solide. L’autorité résulte désormais aussi d’un commerce transfrontalier entre juges égaux.” J. Allard and A. Garapon, *op. cit.*, p. 58.

⁹⁵⁶ See *supra*, Part II, Chapter 3, § 10.

⁹⁵⁷ Cf. F. Schauer, *op. cit.*, pp. 1960-1961.

legal practice tells us that some (third) parties and Strasbourg judges consider non-binding instruments to be legitimate and good references, capable of having legal effects in argumentation.⁹⁵⁸ We could therefore say that, in the Strasbourg context, the referencing practice has an influence on the understanding of the notion of a 'legal source'.⁹⁵⁹

Hence, and unsurprisingly, this issue has attracted attention from scholars reflecting on what the referencing practice means for the conception and theory of 'legal sources'. Allard and Van den Eynde, for instance, conceive a 'judicial dialogue' as reflecting some kind of 'legal source'.⁹⁶⁰ Tulkens, Krenc and Van Drooghenbroeck argue that the referencing practice could indirectly transform 'soft' law instruments into binding formal sources.⁹⁶¹ These authors speak of a 'borrowing of obligatory character' (*'emprunt d'obligatorité'*)⁹⁶² and of a type of co-determination (*'codétermination'*)⁹⁶³.

897. For Judge Pinto de Albuquerque, what he calls, 'hardening of soft law', even represents one of the three pillars of the CoE normative system. He reinforces this stance with the following phrases:

"Based upon these pillars from the very beginning, and animated by a common quest for 'economic and social progress', the Council of Europe legal order can no longer be confused with the traditional international accord of juxtaposed egoisms. Sovereignty is no longer an absolute given, as in Westphalian times, but an integral part of a human rights-serving community. In this context, the Convention cannot but be interpreted in the light of the formally binding "agreements" (*i.e.* treaties) and the immense plethora of formally non-binding 'common actions' performed by the political and technical bodies of the Council of Europe...".⁹⁶⁴

Because "...European human rights law evolves by means of a rich panoply of sources that do not necessarily share the classical, formal features of hard international law", Judge Pinto de Albuquerque observes the absence of a "...water-tight, binary distinction between hard

⁹⁵⁸ Cf. *ibidem*, pp. 1957-1959, with reference to Wittgenstein and Twining.

⁹⁵⁹ In a similar sense, see L. Hennebel and A. Van Waeyenberge, *op. cit.*, p. 20.

⁹⁶⁰ J. Allard and L. Van den Eynde, "Le Dialogue des Juges comme Source de Droit: Arguments entre Idealization et Sceptisme", in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost and M. van de Kerchove (eds), *Les Sources du Droit revisitées. Volume 3: Normativités concurrentes*, Publications de l'Université Saint-Louis, Limal/Anthemis/Brussels, 2013.

⁹⁶¹ F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 442-445. They come to this conclusion, *inter alia*, on the basis of the case of ECtHR, *Grosaru v. Romania*, 2 March 2010, Appl. No. 78039/01, paras. 54-56, where a 'soft' instrument of the Venice Committee was turned into a formal legal binding source. Other examples mentioned by the authors, include ECtHR, decision of *Fägerskiöld v. Sweden*, 26 February 2008, Appl. No. 37664/04, p. 9. The latter is an environmental case in which the Court refers to legally non-binding norms elaborated by the 'World Health Organisation'. See also: F. Tulkens and S. Van Drooghenbroeck, *op. cit.*, 2008, pp. 505-526. Another manner in which 'soft' law may gain juridical efficacy is to be taken up by a binding treaty. The trajectory of the UDHR of 1948 that lies at the origin of the ECHR and that is mentioned in its Preamble can serve as an example. A reference by the Court to the UDHR is thus not that suprising and challenging, since it lies at the ECHR's basis. *Ibidem*, pp. 450-451.

⁹⁶² F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 442.

⁹⁶³ *Ibidem*, p. 444.

⁹⁶⁴ Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 22, including the references made there.

law and non-law".⁹⁶⁵ For this Judge, the CoE legal order therefore reflects "a truly *jus gentium*, based on a participated, accountable and multi-level international law-making system which is not the preserve of States" and in which the "...State is not the sole possible subject capable of creating international law".⁹⁶⁶ In a same line of reasoning, he argues that "[t]he 'further realisation of human rights' calls for a certain degree of deformalisation...".⁹⁶⁷

898. These observations challenge the fundamentals of more traditional theories of sources.⁹⁶⁸ Positivist theories have a more legalist, state-centric, and hierarchical approach to identifying legal rules (and to distinguish legal prescriptions from social norms).⁹⁶⁹ External instruments, as they are imported by the Strasbourg Court, often escape closed theories and definitions of legal sources relying on formal rules of recognition, as developed by authors such as Kelsen and Hart.⁹⁷⁰ In a referencing context, these formalist approaches thus seem to lose relevance. They are no longer sufficient to explain the use of external instruments in human rights adjudication, which is a practice exposing a more global, pragmatic and flexible approach on legal argumentation.⁹⁷¹

899. A deformalization of 'sources' might challenge the users' interest to be faced judicial decision-making built on instruments that are clearly backed up by democratic State consent. The concern of a 'democratic deficit' might nonetheless be mitigated by some observations. Firstly, external instruments (including non-binding instruments) might serve as tools influencing the judges and could therefore empower rights' holders and third party users' input 'from below'.⁹⁷² Moreover, when the Court imports 'soft' law, allowing such instruments to have an influence on the law, such references are not *per se* deprived of some democratic backup of the broader international community. For instance, when the imported instruments emanate from NGOs, a referencing practice enables civil society to have a more

⁹⁶⁵ *Ibidem*, para. 23, including the references made there.

⁹⁶⁶ *Ibidem*, para. 25, including the references made there.

⁹⁶⁷ *Ibidem*, para. 23. He adds in this respect that the 'inherent deformatization' is no synonym of 'nihilist dissolution of legality' and that the formal theory of sources of law should not be abandoned. He pleads in favor of 'hardening' soft law on the basis of some objective criteria.

⁹⁶⁸ Van Drooghenbroeck said in this respect that "[l]es appuis que prend la Cour européenne sur des référents extra-conventionnels cadrent mal avec la logique formaliste, binaire et juridiquement pure...". S. Van Drooghenbroeck, *op. cit.*, p. 829.

⁹⁶⁹ I. Hachez, "Balises conceptuelles autour des notions de "source du droit", "force normative" et "soft law"", *R.I.E.J.* 2010, vol. 65, pp. 16-17, and references there.

⁹⁷⁰ H. Kelsen, *Théorie pure du droit*, transl. Ch. Eisenmann, Bruylant, L.G.D.J., Brussels and Paris, 1999; L.A. Hart, *Le concept de droit* (transl. Michel van de Kerchove), F.U.S.L., 2nd edition, Brussels, 2005. See Fr. Ost and M. van de Kerchove, *op. cit.*, pp. 324 *et seq.*, as quoted and summarised by I. Hachez, *op. cit.*, pp. 28-30.

⁹⁷¹ See L. Hennebel and A. Van Waeyenberge, *op. cit.*, pp. 19-20. These authors observe that the 'commerce transjudiciaire' among judges "...s'accompagne assez naturellement d'une réforme de la culture judiciaire et d'une nouvelle conception de la fonction de juger basée moins sur l'imperium que sur la jurisdictio, et pour laquelle, par conséquent, la légitimité des juges et de leur pouvoir ne dépend plus d'un système formel qui habilite à juger, mais de la qualité des décisions rendues" (*ibidem*, p. 19). They add that "...le concept de 'source', s'il veut être en phase avec ces phénomènes, doit quitter son habit formaliste au profit d'une approche plus pragmatique du droit, c'est-à-dire en appréhendant la règle de droit, l'ordre dans lequel elle s'inscrit et la source qui la formule dans la perspective de son application – généralement discutable et controversée – à une situation concrète, où elle prend son sens et produit ses effets" (*ibidem*, p. 20).

⁹⁷² More on this issue, see *infra*, para. 914.

direct impact on decision-making and on the development of the law.⁹⁷³ Moreover, when imported ‘soft’ instruments emanate from bodies of the CoE, the lack of a formal domestic ratification does not mean that there is no form of democratic control at all (by the COM, the PACE and ultimately, by the Court).⁹⁷⁴ Lastly, several voices plead in favor of making the use of non-binding instruments more formalized. This is evidenced by the proposals of some Strasbourg judges and academics to vary the interpretative weight of ‘soft’ instruments on the basis of some more objective parameters (‘hardening factors’⁹⁷⁵) such as their origin, their content, their procedure of adoption, ... *etc.*⁹⁷⁶ As Judge Pinto de Albuquerque frames it:

“In the *continuum* between hard law and soft law, several factors may harden the text. Like a *degradé normatif*, the gradual normativity of the text increases with the number of these factors that are present and decreases with their absence. In this gradualist logic, it is ultimately up to the Court to decide “how much weight” to attribute to these hardening factors of soft law. Soft European human rights law may be hardened by certain factors that relate either to the rule-making procedure or to the rule-application procedure. These are ‘building bricks in a wall of normativity’”.⁹⁷⁷

§ 7. Better ‘procedural economy’

900. The external referencing practice could have beneficial effects on ‘procedural economy’, which is a standard of process legitimacy.⁹⁷⁸ In light of the procedural quality of the decision-making process, the human rights users have an interest in receiving (and delivering) justice within a reasonable delay.⁹⁷⁹ External referencing could be of help here.

901. Firstly, external referencing may offer a rather easy inspiration for solving a case. A judicial dialogue, for instance, provides the judges with clear information on how similar cases have been decided elsewhere. Also the arguments used in such cases might offer a particular (and easy) argumentative support. The latter prevents the ECtHR having to ‘reinvent the wheel’, which would be inefficient in light of procedural economy.⁹⁸⁰

⁹⁷³ Judge Pinto de Albuquerque says in this respect that “[s]ince the State is not the sole possible subject capable of creating international law, a State-will theory of sources of law gives way to a democratic international community-based normativity theory... Furthermore, the involvement of States and grass-roots non-State actors in the exercise of law-making powers is not only testament to the principle of subsidiarity, but indeed reinforces the democratic nature of the process and the responsiveness of the international public policy-making system towards the European people”. Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 25.

⁹⁷⁴ *Ibidem*.

⁹⁷⁵ *Ibidem*, para. 29.

⁹⁷⁶ For proposals in this regards, see *ibidem*, paras. 27-29 and Fr. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 463 *et seq.*

⁹⁷⁷ Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, paras. 27-28 including the references there.

⁹⁷⁸ Y. Shany, *op. cit.*, p. 265. The length of the proceedings is considered as an aspect of the ‘performance dimension’ of the Strasbourg Court’s legitimacy. See B. Çali, A. Koch, and N. Bruch, *op. cit.*, p. 10.

⁹⁷⁹ This is one of the elements of Article 6 of the Convention (on the right to a fair trial).

⁹⁸⁰ C.P.R. Romano, “Deciphering the Grammar of International Jurisprudential Dialogue”, *International Law and Politics* 2009, vol. 41, p. 780.

902. Furthermore, in respect of external instruments used for establishing a common ground, comparisons building on external (international) instruments may be easier and faster to make compared to internal comparisons, which often require complicated examinations of domestic rules and practices of the CoE Member States. In respect of the searching for tendencies or for consensus sustained by some ('soft') international instruments, it could suffice to look at the amount of signatures and ratifications, which is less time-consuming.⁹⁸¹

903. Admittedly, the examination of what are relevant external instruments (and of what effects should be given to them) might be an elaborate task as well, and could therefore also have some negative impact on the length of the proceedings.⁹⁸² The latter risk could be mitigated by encouraging (third) parties to assist the Court as much as possible in uncovering relevant external instruments. Rule 44A of the Strasbourg Court after all obliges the parties to cooperate with the Court.⁹⁸³ Also the Research Division, which examines questions of comparative law⁹⁸⁴, could play a particular role. Hence the importance of providing the Research Division with sufficient funding, (electronic) tools, and internationally educated staff in order to help the judges to frame their arguments based on external instruments.

§ 8. Network building

904. The Court coordinates with instruments of varying origin, elaborated by State actors, (*quasi*-) judicial bodies, expert committees, or non-governmental organisations.⁹⁸⁵ One case of our pool suffices to make this clear. It concerns the case of *Svinarenko and Slyadnev v. Russia*, in which the Court coordinated its approach with 'soft' instruments (*in casu*, the UN Standard Minimum Rules for the Treatment of Prisoners), with instruments of *quasi*-judicial origin (*in casu*, views of the HRC), and with instruments of non-governmental origin (*in casu*, the Amnesty International Fair Trials Manual). These references supported the Court's

⁹⁸¹ Cf. J.H. Gerards, *op. cit.*, 2011, p. 81; J.H. Gerards, *op. cit.*, 2006, p. 117; F. Vanneste, *op. cit.*, 2009, pp. 268-269. See also *supra*, para. 719. For more on this issue see *supra*, para. 719.

⁹⁸² Senden said in this respect that "[g]iven the case load of the ECtHR it is highly unlikely that a comparative study will be done for every case, not even now that the judges no longer have to conduct comparative studies themselves. Even for a research unit it would be too much to supply comparative information in every case". H. Senden, *op. cit.*, p. 135.

⁹⁸³ Rule 44A of the Rules of the Court provides a "Duty to cooperate with the Court". It says that "The parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty shall also apply to a Contracting Party not party to the proceedings where such cooperation is necessary". See also K. Dzehtsiarou and V. Lukashevich, *op. cit.*, p. 297. The latter authors point out that the Research Division could request States, on the basis of Rule 44A, to help them with aspects of comparative research.

⁹⁸⁴ M. Forowicz, *op. cit.*, p. 401.

⁹⁸⁵ For more information on the diversity of origin of the imported instruments, see *supra*, Part I, Chapter 2, § 4.

reasoning that keeping a defendant in a metal cage during trial is in violation with the Convention.⁹⁸⁶

905. Whereas a bulk of literature focuses on dialogues between judges ('judicial dialogue'), the communication network created by means of external referencing goes further. It is the reflection of a dialogue with a variety of actors including States, judges, experts and NGOs. The Strasbourg Court, being one actor in the global legal field, opens its eyes for the global external normative environment, which covers several geographical countries, regions, and continents, consists of various actors and includes multiple instruments, differing as to their scope and legal status. By means of the 'cooperative communication'⁹⁸⁷ that this creates, the Court operates as a dot in a wider network, which reflects a structure that is open to external influences.⁹⁸⁸ By including external references, the Court connects with the other 'dots' that are part of the wider normative setting.⁹⁸⁹ As Chevallier says:

*"...on parlera ainsi "d'inter-légalité" ou "d'inter-normativité" pour caractériser ces processus de communication et d'échange entre "espaces juridiques" différents, "ordres juridiques" distincts, traduisant l'émergence d'une conception nouvelle d'un droit structuré "en réseau"..."*⁹⁹⁰

906. The concept of a 'network' is rooted in a pluralistic vision of the law and addresses normative relation building within a specific legal order or between different legal systems. The network perspective does not indicate a global legal order with similar characteristics as a domestic legal order. On a worldwide scale, it does not uncover a traditional Kelsen-like pyramid in which the system is organised.⁹⁹¹ When conceiving law as a 'network', subordination is replaced by coordination and collaboration. In the book *De la pyramide au réseau? Pour une théorie dialectique du droit*, Ost and van de Kerchove describe the network as follows:

"Par-delà la diversité des usages auxquels elle se prête, et en dépit de son évidente polysémie, la notion de «réseau» s'accompagne d'un «noyau dur de signification» relativement stable.... De manière positive, on retiendra ainsi le fait que le réseau constitue une «trame» ... composée d' «éléments» ou de «points» ... reliés entre eux par des «liens ou «liaisons» assurant leur «interconnexion» ou leur «interaction».... De manière négative, par ailleurs, on souligne généralement que, à la différence sans doute de la structure d'un système, et certainement d'une structure pyramidale, arborescente ou hiérarchique, dans un réseau, «aucun point n'est

⁹⁸⁶ ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, *op. cit.*, para. 132.

⁹⁸⁷ For the notion of "communication cooperative", see S. Goltzberg, *L'argumentation juridique*, Dalloz, Paris, 2013, p. 8.

⁹⁸⁸ See A. Bailleux, *op. cit.*, 2009, p. 331.

⁹⁸⁹ See more generally: A. Bailleux, *op. cit.*, 2014, pp. 293-325.

⁹⁹⁰ J. Chevallier, "Vers un droit post-moderne? Les transformations de la régulation juridique", *Rev. dr. publ.* 1998, no.3, pp. 659-690, particularly p. 674.

⁹⁹¹ See A. Bailleux, *op. cit.*, p. 294.

privilegié par rapport à un autre, aucun n'est univoquement subordonné à tel ou tel». A la différence de la notion de système, celle de réseau paraît également n'impliquer aucune forme de «clôture», les réseaux étant des «structures ouvertes, susceptibles de s'étendre à l'infini, intégrant des nœuds nouveaux en tant qu'ils sont capables de communiquer au sein du réseau...»⁹⁹²

907. The metaphor of 'law as a network' grasps well the phenomenon of the Strasbourg Court referencing external instruments. Normative importations (for purposes of evolution, harmonization, filling gaps, learning, *etc.*) highlight the Court's role as a dot of a dialogical network, which can only be called a 'network' because of the communications that take place within. In addition, they confirm that the Court is not an entirely 'autonomous' or 'self-sufficient' institution.⁹⁹³ The idea of a network could even explain the existence of dismissive references; as Bailleux underlines, "...networks are *necessarily* and *entirely* made up of ...tensions" which might not only contribute to "the cleansing and ordering of the network (pyramid-oriented move), but which might equally push "...toward its delusion (chaos-oriented move)".⁹⁹⁴

908. How could the conception of a referencing practice as 'communication in a network' contribute to the interests of the human rights users? The phenomena are central here. *Firstly*, references could make the reasoning more convincing *vis-à-vis* the actors that created the cited instruments, who might value the fact that the Court communicates with them. *Secondly*, the network of communications could lead to better and more balanced outcomes, increasing the persuasiveness of Strasbourg decision-making.

909. As an example of the *first* phenomenon, we mention the Court's citations of instruments of State origin. Doing so, the Court enters in communication with the duty bearers, which might be beneficial from their perspective. The extent to which a referencing practice reflects a means to communicate with 'States' largely depends on whether the ECtHR considers it relevant that the imported instruments are backed up by State consent.⁹⁹⁵ When the Court uses external instruments that are covered by Member States' agreement, this reflects a rather direct dialogue between the Strasbourg Court and (external) positions and/or obligations of the Member States. Hence, the Court pays attention to a more comprehensive set of public engagements, beyond the State's engagements under the ECHR. This implies attention not only for the Convention, but also for those instruments to which States agreed upon in external forums. For instance, when the Court evolves the ECHR on

⁹⁹² F. Ost and M. van de Kerchove, *De la pyramide au réseau?: pour une théorie dialectique du droit*, F.U.S.L., Brussels, 2002, pp. 24-25.

⁹⁹³ Cfr. M. Forowicz, *op. cit.*, p. 2. She notes that "...the Court may appear, at first, as a self-sufficient institution which does not need to refer to any other external non-ECHR sources".

⁹⁹⁴ A. Bailleux, *op. cit.*, p. 297.

⁹⁹⁵ See cf. K. Dzetsiarou, *op. cit.*, 2015, pp. 155 *et seq.* This author considers use of a European consensus as a legitimacy-enhancing factor that can increase legitimacy of the ECtHR since it reflects an updated consent and a means of dialogue between the Court and the Member States.

the basis of ‘hard’ external instruments ratified by the member States (or of ‘soft’ instruments expressing a common agreement), it actually embeds the reasoning in an ‘updated consent’⁹⁹⁶. The latter could, as Dzetsiarou argues, “...limit the negative effect of not engaging in originalist interpretation of the Convention”⁹⁹⁷ and stimulate a dialogue between the Court and the Member States which “...enhances the legitimacy of the Court and the judgments it produces”.⁹⁹⁸ When the Court, with the help of external instruments, establishes a ‘margin of appreciation’, this also reflects a means of communication with the Member States.⁹⁹⁹

This communicative approach is ‘inclusive’ of the positions and agreements duty bearers have adopted in other normative contexts. Such approach is however not always present in the Strasbourg argumentation practice. For instance, when the Court establishes ‘evolutive’ interpretation on the basis of instruments that have not been ratified by all Member States, this may – at least from the perspective of some duty bearers – not be conceived as a genuine dialogue, or as a means of communication contributing to the persuasiveness of the decision.

910. *Secondly*, the development of a global network can be particularly meaningful for dealing with modern issues and problems of a globalizing world, which are often complex, inter-connected and intertwined with various conflicting interests and positions. As Judge Pinto de Albuquerque frames it, references can facilitate “...the application of binding instruments by resolving complex, technical issues that were not envisaged when they were approved or deadlocks that had not been anticipated”.¹⁰⁰⁰ Solutions to such challenges might benefit from a communication with various actors, from the information of several specialized legal instruments, from the positions of other judges, from solutions from other branches of law, from technocratic views from NGOs and other expert organs, *etc.* A diversification of the comparisons allows exchanging and taking account of different viewpoints and solutions.

Against that background, the referencing practice has the potential, in accordance with a pluralist ethos, to accommodate with and strike equilibrium between perspectives of several actors in a global setting.¹⁰⁰¹ This might contribute to a more balanced approach,

⁹⁹⁶ K. Dzetsiarou, *op. cit.*, p. 149.

⁹⁹⁷ *Ibidem.*

⁹⁹⁸ *Ibidem*, p. 157.

⁹⁹⁹ The Court here, throughout normative comparisons, takes account of tendencies in (external) State practice. When no consensus appears, States will generally have discretion, allowing them to impose their own solutions, and pushing the Court to take a step back. This can be considered as a form of interaction between the Court and the member States, the necessity of which had been recognized by the Brighton Declaration. This Declaration urges the Court to pay attention to national decisions through the use of the margin-doctrine. See Section B of the Brighton Declaration, adopted on 20 April 2012.

¹⁰⁰⁰ Partly dissenting opinion of Judge Pinto de Albuquerque to ECtHR (GC), *Muršić v. Croatia*, *op. cit.*, para. 8.

¹⁰⁰¹ Rosenfeld makes this remark in respect of the ‘margin of appreciation’, which he says could be considered as a traditional constitutional tool that helps shaping a post-Westphalian order with respect of a pluralist ethos and equilibrium between convergences and divergences in a transnational or international environment. Divergences

moving away from a narrow focus on the positions of Member States only.¹⁰⁰² A referencing practice might contribute to a better balancing of interests and values and to a more nuanced development of the law.¹⁰⁰³ This might be particularly fruitful when solving complex and delicate moral dilemmas.¹⁰⁰⁴ When ‘reasonable approximation’, ‘reconciliation’ or ‘accommodation’ takes place on a large scale and between multiple normative provisions and actors, the referencing practice could operate as a conflict-avoiding technique, diminishing frictions between jurisdictions, actors and institutions, and enhancing openness in a spirit of ‘comity’¹⁰⁰⁵.¹⁰⁰⁶ Comity across legal domains might as such be a valuable track of dealing with pluralism.

Various actors, including those of a non-State nature, are part of the problems and the solutions and their views are relevant too. We assume that tackling today’s legal issues could benefit from escaping isolation and developing an attitude that shares solutions and arguments and that ‘shares’ justice and values in a network rather than that it hides behind institutional walls. In a globalised world full of powerful actors, legal issues should not be solved in quarantine. Also when interpreting and developing human rights law, it seems pertinent to learn from others and to take account of and accommodate between various actors and viewpoints. It therefore seems important, through referencing practice, to connect with, and network among, different areas and bodies. This pushes for an integrated, and a more unitary, coordinated and harmonized view on the normative environment.

Against this background, it is interesting to recall what Judge Cançado Trindade held in his separate opinion to the ICJ *Diallo*-case regarding the aspect of ‘judicial dialogue’. Stressing the positive impact of the multiplication of international law, he noted the following:

are allowed so far as the States do not exceed the boundaries of their margin of appreciation. See M. Rosenfeld, *op. cit.*, 2008, p. 426, p. 445 and p. 450.

¹⁰⁰² In respect of an exchange of solutions between various Judges, authors as Allard and Garapon speak of a ‘commerce des juges’. See J. Allard and A. Garapon, *op. cit.*, pp. 35-53. Hennebel and Van Waeyenberge observe a ‘commerce transjudiciaire’ among Judges See L. Hennebel and A. Van Waeyenberge, *op. cit.*, pp. 19-20.

¹⁰⁰³ Cf P. Heck, “The Jurisprudence of Interests – An Outline”, in M. Schoch (ed.), *The Jurisprudence of Interests*, 20th Century Legal Philosophy Series, Harvard University Press, Cambridge (USA), 1948, p. 15; P. Vander Eycken, *Méthode positive de l’interprétation juridique*, Falk Fils, Brussels, 1907, p. 60. Heck points out that: “...each command of the law determines a conflict of interests; it originates from a struggle between opposing interests, and represents as it were the resultant of these opposing forces. Protection of interests through the law never occurs in a vacuum. It operates in a world full of competing interests, and, therefore, always works at the expense of some interests”. See also A. Bailleux, *op. cit.*, 2009, pp. 335 *et seq.* and p. 342.

¹⁰⁰⁴ A. Bailleux, *op. cit.*, 2009, p. 355. See also: B. Frydman, *Le sens des lois: histoire de l’interprétation et de la raison juridique*, *op. cit.*, 2007, pp. 422 *et seq.* and p. 662 *et seq.*

¹⁰⁰⁵ ‘Comity’ means: courtesy and considerate behavior towards others. The United States once invoked a ‘comity principle’ in proceedings for the Inter-American Court of Human Rights to ensure that this Court would wait for the ICJ to take its decision in a pending case that involved the same question. The Inter-American Court of Human Rights (in its advisory opinion on the interpretation of article 36, para. 1 (b) of the Vienna Convention on Consular Relations of 1963) declined to follow such a principle and refused to suspend the proceedings. See T. Treves, *op. cit.*, 2009, pp. 247-248. The United States considered the principle of comity as a technique to avoid diverse jurisdictions by given ‘priority’ or authority to the ICJ. The IACtHR nonetheless stressed its autonomous position.

¹⁰⁰⁶ On the idea of ‘reasonable accommodation’ in respect of the principles of subsidiarity, proportionality, *etc.*, see M. Rosenfeld, *op. cit.*, pp. 451-452. According to this author, normative pluralism prescribes reconciliation through mutual accommodation. See *ibidem*, p. 429.

"The co-existence of multiple international tribunals, fostering access to international justice on the part of a growing number of *justiciables* around the world in distinct domains of human activity, bears evidence of the way contemporary international law has developed in the old search for the realization of international justice. Contemporary international tribunals have much to learn from each other."¹⁰⁰⁷

Judge Cançado Trindade also said what the diverse international tribunals should do to cope with this reality of 'multiplication', by stressing that:

"Contemporary international tribunals should pursue their common mission – the realization of international justice – working together, without antagonisms, self-sufficiencies or protagonist moves ... By cultivating this dialogue, attentive to each other's work in pursuance of a common mission, contemporary international tribunals will provide avenues not only for States, but also for human beings, everywhere, and in respect of distinct domains of international law, to recover their faith in human justice."¹⁰⁰⁸

As a consequence, references that are connecting dots of a network add strength to the argumentation and therefore, might serve the interests of the public (being more convinced of the 'good' outcome of a case) and the judges (a convincing reasoning positively reflects on their reputation and credibility).

§ 9. Pragmatic tools to make a convincing argument

911. Our case law analysis demonstrates that external instruments exercise diverse argumentative functions in legal reasoning.¹⁰⁰⁹ Referencing corresponds to a pragmatic dimension; it is of added value because of the concrete argumentative tools that it offers to the users of human rights.¹⁰¹⁰ External importations might add power to an argument,

¹⁰⁰⁷ Separate opinion of Judge Cançado Trindade to International Court of Justice, case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 30 November 2010, p. 174, para. 238, available at <http://www.icj-cij.org/docket/files/103/16254.pdf> (visited on 1 August 2016).

¹⁰⁰⁸ *Ibidem*, paras. 240 and 245.

¹⁰⁰⁹ *Supra*, Part II, Chapter 3.

¹⁰¹⁰ J. Allard, *op. cit.*, p. 136; I. Rorive, E. Bribosia and L. Van den Eynde, *op. cit.*, pp. 1-43; C.P.R. Romano, *op. cit.*, p. 780. Judges can be conceived as 'strategic actors', pursuing certain interests. In accordance with strategic models for explaining judicial behavior, strategic judges seek a desirable outcome of their actions by taking into account the responses of other people. See L. Baum, *op. cit.*, pp. 27-29 with reference to L. Epstein and J. Knight, *The Choices Justices Make*, C.Q. Press, Washington, 1998, 224 p.

It is challenging to treat the category of 'Judges' in general, without differentiation. As demonstrated by some separate opinions, not all Judges always agree with the mobilization of external instruments. In a similar sense, Baum expressed his concern that "judicial scholars largely rule out variation in motivational profiles among judges. ... [J]udges on the same court are assumed to be homogeneous in their motivations and thus in the bases for their votes and opinions. ... The possibility of significant interpersonal variation in judges' goal orientation is generally set aside". L. Baum, "Motivation and Judicial Behavior: Expanding the Scope of Inquiry, prepared for the Workshop on Exploring the Judicial Mind", University of Virginia, March 30-31, 2007, available at www.faculty.virginia.edu/judging/Documents/motivation.lb.pdf (visited on 30 July 2014), pp. 4-5 and references there.

contribute to persuade a (universal) audience¹⁰¹¹, and accordingly, serve the judicial users in upholding their reputation and credibility.¹⁰¹² Because of the explicit – often voluntary – use of external instruments, we assume that it strengthens the argumentative position of the parties (§ 9.1.), enhances the quality of Strasbourg reasoning and, accordingly, serves the persuasive strength of the arguments and the credibility of the Court (§ 9.2.), in particular when the references are accompanied by a convincing methodology (§ 9.3.).¹⁰¹³

§ 9.1. Enhancing the procedural position of the parties

912. External referencing initiated by (third) parties has the potential, through its persuasive power, to influence the judges. Hence, it could enhance the parties' (strategic) procedural participation, which reflects one of the standards of process legitimacy.¹⁰¹⁴ Thus, external referencing may serve as a vehicle to empower procedural and argumentative positions, which reflects positively on the validity of such references from a rights holders' and a third party users' point of view.

913. Admittedly, the Strasbourg judges are those who ultimately decide whether to make use of external instruments in the argumentation of the case. In accordance with the legal maxim '*da mihi factum, dabo tibi jus*', they are not obliged to import external instruments because they were used by (third) parties. It is the independent responsibility of the judges to

¹⁰¹¹ The notion of universal audience ('auditoire universel') is taken from Chaïm Perelman: Ch. Perelman and L. Olbrechts-Tyteca, *La nouvelle rhétorique. Traité de l'argumentation*, Editions de l'Université de Bruxelles, Brussels, 1992, 752 p. Allard and Van Waeyenberge underline that Perelman "...en s'imaginant devoir convaincre un auditoire le plus universel possible, le juge est amené à évaluer sa décision et les arguments qu'il peut avancer à son appui. Cet auditoire agit donc sur le jugement comme une contrainte: ce dernier tient alors sa légitimité du degré d'autorité persuasive qu'il possède au regard de l'auditoire universel. Le juge, dans sa relation avec ses homologues étrangers, s'adresserait donc à une auditoire universel qui, seulement supposé chez Perelman, se matérialiserait peu à peu à travers le dialogue des juges". J. Allard and A. Van Waeyenberge, "De la bouche à l'oreille? Quelques réflexions autour du dialogue des juges et de la montée en puissance de la fonction de juger", *Revue Interdisciplinaire d'Etudes Juridiques* 2008, vol. 61, no. 2, p. 123. See also L. Hennebel and A. Van Waeyenberge, *op. cit.*, pp. 13-14.

¹⁰¹² Based on socio-legal studies focusing on judicial behavior, it appears that Judges have an interests in developing a convincing and persuasive motivation *i.a.* to uphold their credibility and reputation. In explaining judicial behavior, scholars have mostly put their emphasis on goals (often defined in common-sense terms). See L. Baum, *op. cit.*, p. 2. According to strategic theoretical models of judicial behavior, Judges act strategically to advance multiple goals. *Ibidem*, pp. 25-26. Judges might for instance be concerned with the development of human rights, with their credibility and authority, with making good policy, *etc.* (*ibidem*, p. 3). Although contested by legal realism, which says that legal considerations have no impact on Judges' choices (*ibidem*, p. 23), legal motives might be relevant too. See A. Lindquist and D.E. Klein, "The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases", *Law & Society Review* 2006, vol. 40, no. 1, pp. 135-136). Authors such as Klein note that Judges in federal courts respond to the decisions of other courts largely on the basis of an effort to interpret the law well. See E.D. Klein, *Making Law in the United States Courts of Appeals*, Cambridge University Press, New York, 2002, 180 p.

¹⁰¹³ Romano stresses that explaining judicial dialogue by 'persuasion' requires that references have been made in an explicit manner. See C.P.R. Romano, *op. cit.*, pp. 771-772.

¹⁰¹⁴ See E. Brems and L. Lavrysen, *op. cit.*, p. 181 and Y. Shany, *op. cit.*, p. 265. Both "formal participation" (parties must be offered the opportunity to present their story and arguments) and "substantive participation" (the contributions of the parties must be truly considered) are of importance in light of process legitimacy. B. Cali, A. Koch, and N. Bruch, *op. cit.*, p. 4. In legal decisionmaking processes, participation is an aspect of so-called 'throughput legitimacy' (which exists next to 'input' and 'output' legitimacy). D. Caluwaerts and M. Reuchamp, "Strengthening democracy through bottom-up deliberation: As assessment of the internal legitimacy of the G1000 project", *Acta Politica* 2015, vol. 50, no. 2, pp. 152 *et seq.*

develop a legal reasoning and to give a legal qualification to the facts, without them being bound by what is pleaded by the (third) parties (or what is brought to them by the Research Division). Accordingly, when external instruments have the procedural status of *jus*, the Court is allowed – and even obliged – to invoke external instruments *proprio motu* (of its own accord).¹⁰¹⁵

914. It is not unlikely, however, that the introduction of external instruments by (third) parties influences the Court.¹⁰¹⁶ The meaningful role of public interests litigants in respect of the referencing practice is demonstrated by the recent doctoral research of Laura Van den Eynde.¹⁰¹⁷ Other authors equally point to the power of applicants and third parties in influencing the Court's use of external instruments.¹⁰¹⁸ Hence, it seems that the referencing practice does not develop solely on the basis of *spontaneous* actions of the Strasbourg judges.¹⁰¹⁹ The Court also 'filters' external instruments that had been introduced by some

¹⁰¹⁵ F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 470 *et seq.* Note that also the characteristics of the individual judges might influence the use of external instruments. Judges that have a background in international law might for instance be more prone to develop arguments based on external instruments. Wildhaber said that which interpretative principle prevails, largely depends on the composition of the Court. See R.C.A. White and I. Boussiakou, "Separate Opinions in the European Court of Human Rights", *Human Rights Law Review* 2009, vol. 9, p. 45. See also H. Senden, *op. cit.*, pp. 135 *et seq.* Also on that theme, no elaborate academic research exists. Voeten is an author that in recent years paid increasing attention to personal characteristics of the Strasbourg judges and their influence on phenomena such as referencing practice, see E. Voeten, *op. cit.*, pp. 547-576.

¹⁰¹⁶ Third party interventions might assist the ECtHR in the clarification of the context of certain policies or practices as well as of comparative material. It indeed often happens that human rights organizations with particular experience and expertise provide information on relevant comparative international law materials. Interventions thus often concern and consider the comparative situation under other international human rights provisions (such as under the ICCPR) or the national situation in other CoE-member states or under domestic Constitutions of both member states and third states. For rights holders it might be of high added value when a respected human rights organization sends submissions to the ECtHR supporting their position. See P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford, 2005, pp. 55-61. The book of Leach includes examples of third party interventions referring to comparative material. See *ibidem*, pp. 58-61.

¹⁰¹⁷ See L. Van den Eynde, *op. cit.* pp. 488-489. This author's doctoral research, making use of case law studies and interviews, confirms the influence of comparative arguments developed by third party public interests litigants on the Court's consideration of external instruments and its legal reasoning.

¹⁰¹⁸ O. De Schutter, "Sur l'émergence de la société civile dans le droit international: le rôle des associations devant la Cour européenne des droits de l'homme", *EJIL* 1996, no. 7, p. 396; H. Senden, *op. cit.*, pp. 135 and 261; J.F. Flauss, "Du droit international comparé des droits de l'Homme dans la jurisprudence de la Cour européenne des Droits de l'Homme", in *Le rôle du droit comparé dans l'avènement du droit européen*, Zürich, Schulthess, 2002; J.F. Flauss, *op. cit.*, 2005, p. 317; F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, pp. 470 *et seq.* In some exceptional cases, the court explicitly mentions that it was a (third) party that supplied the external instruments by which it was inspired, see H. Senden, *op. cit.*, p. 261.

¹⁰¹⁹ Some 'notes' in the margin are needed. *Firstly*, the observation that a (third) party uses an external instrument in its submission combined with the observation that the Court, subsequently, imports this instruments, provides information about the 'correlation' between both actions, but does not deliver information about a 'causal link'. See D. Staes "Examining Strasbourg Case Law and judicial behavior. A view across disciplines", blog post Strasbourg Observers, 26 August 2015, available at <https://strasbourgobservers.com/2015/08/26/examining-strasbourg-case-law-and-judicial-behavior-a-view-across-disciplines/> (visited on 28 August 2016). *Secondly*, we should – next to the role of (third) parties – mention the role of the Research Division of the Court. Since this Division prepares studies on questions of comparative and international law, it seems to have a considerable role and influence on the use of external instruments in Strasbourg reasoning. The Research Division of the Strasbourg Court is considered as a relevant actor in light of referencing practice. Senden indeed said that it is "...safe to assume that the sections on comparative and international material [in the Court's case law] are based on findings made by ...[the] research unit". H. Senden, *op. cit.*, p. 261. The Research Division of the ECtHR had been expanded due to the increasing need to consider non-ECHR material. It is *inter alia* charged with studying questions relating to comparative and international law and it prepares reviews of case law of external bodies. See M. Forowicz, *op. cit.*, p. 401. It is thus likely that referencing practice has been intensified under the Research Division's auspices. It is however not yet clear whether this unit is sufficiently equipped to undertake systematic and comparative studies H. Senden, *op. cit.*, p. 135. It is expected that referencing practice will be influenced as well as intensified under the auspices of this unit. Forowicz said that "[j]udicial cooperation should be intensified

actors ‘from below’. In fact, the references to external instruments that they make, which are prone to be picked up by the judges, have a large potential to, subsequently, operate as the *jus* of the case.¹⁰²⁰ This softens the adagium ‘*iura novit curia*’ and contributes to the procedural and substantial involvement of the (third) parties.¹⁰²¹ This strengthened position of the (third) parties might, from their point of view, enhance the validity of the referencing practice. Moreover, the attention the judges pay to the external instruments invoked by the (third) parties, may demonstrate that the Strasbourg judges are approaching their positions with some trust and respect, which is a relevant aspect of procedural justice.¹⁰²²

915. Bearing in mind that, compared to the Strasbourg judges, (third) parties often have more time and resources for comparative research, their ‘power’ in relation to the referencing practice becomes particularly noteworthy.¹⁰²³ Developing comparative arguments is demanding in terms of time, expertise and resources. This observation reminds us of how the argumentative influence of external instruments might have particular beneficial effects for the procedural position of an elite that is well placed to develop convincing comparative arguments because of its advantages in terms of education, resources and hegemonic power.¹⁰²⁴ This corresponds to the challenges of a globalizing world more generally, demonstrating the privileged position of powerful voices (such as large international NGOs), whereas other voices might face difficulties to find their way to the surface. Moreover, (third) parties do not always defend a progressive development of human rights. There are indeed several examples of (third) parties that use external instruments in favor of the protection of one right to the detriment of the protection of a conflicting right¹⁰²⁵, or that use the

under the auspices of this unit; it could take the form of requests for information, expert advice, transfers of litigation, or recognition of rulings from another body. This would improve administrative coordination, mutual legal assistance, and the possibility of finding optimal regime solutions between the ECHR and other counterparts of the international legal system”. M. Forowicz, *op. cit.*, 401. The extent to which the work of the Research Division influences the Strasbourg Judges is difficult to measure since the studies of the Research division, offering input for cases, are not publicly accessible and do not appear from the decision itself. Senden said in this respect that “...even though the existence of the research unit shows that the court does take comparative interpretation seriously, it is not possible to answer a number of important questions as to its exact functioning on the basis of publicly available information”. H. Senden, *op. cit.*, p. 262.

¹⁰²⁰ For our argument that says that external instruments often have a procedural status of ‘jus’, see *supra*, Part II, Chapter 3, § 10.

¹⁰²¹ For more on this issue, see Van Den Eynde, L., “*Iura novit curia*...? Une aide externe pour l’interprétation du droit peut néanmoins être bienvenue. La présentation d’arguments de droit comparé au juge par les amicus curiae”, forthcoming in *Administration Publique Trimestriel* 2017. See also: F. Tulkens, S. Vandrooghenbroeck, and F. Krenc, *op. cit.*, pp. 471-473.

¹⁰²² See E. Brems and L. Lavrysen, *op. cit.*, p. 181.

¹⁰²³ See J.F. Flauss, *op. cit.*, 2005, p. 317. See also F. Tulkens, S. Van Drooghenbroeck and F. Krenc, *op. cit.*, p. 473.

¹⁰²⁴ Cfr. M. Guerrero, “Activating the Courtrooms: Opportunities for Strategic Same Sex Rights Litigation before the European Court of Human Rights and the Court of Justice of the European Union”, preliminary draft, not published, p. 8 and references there.

¹⁰²⁵ In the case of *Perinçek v. Switzerland*, for example, some of the third parties argues that the conviction of a person denying genocide constituted a justified interference with the right to freedom of expression because Switzerland was obliged to criminally convict this person in observance of external obligations under international law. Other third parties to the case argue the opposite, pointing at the absence of external obligations on the issue. ECtHR (GC), *Perinçek v. Switzerland*, *op. cit.*, paras. 176 *et seq.* See also the case of *A, B, C v. Ireland* in which some third parties opposed a right to abortion. ECtHR (GC), *A, B, C v. Ireland*, *op. cit.*, para. 201.

referencing practice to soften the protection of some rights (without a conflict of rights) or to stimulate some inertia in human rights protection.¹⁰²⁶

916. External instruments might serve as tools for (third) parties to ‘persuade’ the Strasbourg judges. From this observation, we derive some practical recommendations, for instance for the actions of NGOs in a Strasbourg context. NGOs might exercise influence on which cases are brought to the Court.¹⁰²⁷ In Strasbourg adjudication, it happens that an NGO lies at the basis of a complaint, for instance because it supports an applicant who, as an alleged victim, faces the ‘ideal’ situation to strive for a judicial outcome that would fit the NGO’s strategic agenda.¹⁰²⁸ In our view, an NGO’s strategy would benefit from finding a case that is comparable to cases previously decided by external bodies. For instance, if an NGO aims to persuade the Court to take a more severe stance on the ban on face veils, it could, for strategic purposes, look for a new, *Singh*-case characterized by circumstances comparable to the *Singh*-cases decided by the HRC.¹⁰²⁹ Then, knowing that the Court is open to external arguments, the NGO could import the HRC’s decision to push the Court towards a stronger right to wear religious symbols. Of course, there is no guarantee that the Court will actually follow the external instrument. Indeed, several cases have demonstrated that the Court sometimes ignores external instruments or declares them to be in opposition to the Convention.¹⁰³⁰

917. Since the ECtHR is open to arguments from external instruments, we recommend (third) parties to include in their submissions all relevant external instruments that support their view. Therefore, (third) parties could pay due attention to academic works that include well-developed comparative arguments on human rights issues. For instance, when a (third) party aims to strengthen rights of same-sex partners, it could make use of academic papers developing comparative arguments on this matter. Rorive, Bribosia and Van den Eynde, for example, issued a paper that relied on North-American courts’ decisions and on North-American debates in a plea for a stronger protection of same-sex marriages in the Strasbourg

¹⁰²⁶ See for instance the case of *Allen v. the United Kingdom*, in which the respondent State argues that because the HRC did not require a certain level of protection, that also the Court should not provide such a protection level. ECtHR (GC), *Allen v. the United Kingdom*, *op. cit.*, para. 85. Another example is the case of *Al-Jedda v. the United Kingdom*, in which the respondent State invoked external obligations of the UN and said that, in case these obligations conflicted with human rights, that the UN law should receive precedence. ECtHR (GC), *Al-Jedda v. the United Kingdom*, *op. cit.*, paras. 89-92.

¹⁰²⁷ See L. Van den Eynde, “The Multifaceted and crucial role played by NGOs at the European Court of Human Rights”, 4 August 2014, available at <https://strasbourgobservers.com/2014/08/04/the-multifaceted-and-crucial-role-played-by-ngos-at-the-european-court-of-human-rights/> (visited on 28 August 2016).

¹⁰²⁸ In light of human rights litigation, Frydman and Hennebel said that NGOs “...jouent un rôle décisive dans la construction de la cause, dans la formulation de la demande, dans la conduite de l’action et les choix stratégiques à effectuer tout au long de la procédure...”. They speak in this respect of an “...intervention quasi-systématique de la société civile organisée dans ce type de contentieux”. B. Frydman and L. Hennebel, *op. cit.*, p. 98. These authors underline that the intervention of NGOs as third parties in human rights litigation reinforces the political character of this type of procedures. *Ibidem*, p. 122.

¹⁰²⁹ On the *Singh*-cases, see *supra*, Part III, Chapter 1, § 3.3.

¹⁰³⁰ Under the legal framework we proposed in this work, the Court would be compelled to take account of the ICCPR, as interpreted by the HRC, and to ‘harmonize’ this instrument with the Convention.

context.¹⁰³¹ Academic research centers may, moreover, engage as third parties in Strasbourg proceedings, which could offer them a stepping stone in advocating their comparative research results and positions. In our pool of cases, the Human Rights Centre of Ghent University, for instance, issued a third party submission in the cases of *Bouyid v. Belgium*, *SAS v. France*, and *Konstantin Markin v. Russia*.¹⁰³² Academic researchers and centers could – both by creating comparative arguments in academic papers as well as by their possible engagement as third parties – play a meaningful role in the development of human rights litigation on the basis of external instruments.¹⁰³³

918. So far, we have started from the idea that the (third) parties' use of external instruments has repercussions on the Court's importation and choice of external instruments. While this might be true in general terms, one should realize that there is no constant practice of the Court to take up external instruments introduced by other actors. As demonstrated, for instance, in the case of *SAS v. France* – but there are more examples of this kind – the Court, in the 'law'-section of the case, sometimes ignores (or does not give substantive effect to) external instruments imported by the (third) parties.¹⁰³⁴ Another example, is the case of *Mouvement raëlien suisse v. Switzerland*.¹⁰³⁵ Also in this case, the Court did not pick up several external instruments that had been introduced by the (third) parties. The Court concluded this case by stating that there was no violation of Article 10 ECHR (freedom of expression) in relation to a ban on displaying an advertising poster in public. The external instruments that the Court ignored, included case law of the German Constitutional Court¹⁰³⁶ and judicial decisions issued in the United Kingdom and in the

¹⁰³¹ See E. Bribosia, I. Rorive, and L. Van den Eynde, *op. cit.*, pp. 1-43. The authors argue more particularly that: "...amidst other courts' decisions and the current debate in the United States, the ECtHR should recognize the right of same-sex partners to marry. We argue that this is an unavoidable step to achieving legal consistency in accordance with "...the doctrine of the [European] Convention [on Human Rights] as a living instrument and the principle of dynamic and evolutive interpretation." Our argument is built so as to help the ECtHR decide future cases on same-sex marriage. But the arguments put forth in this article should also feed the efforts of civil society organizations striving for equality, whose goals and strategies are experiencing a growing transnationalization" (*ibidem*, p. 5). On the relevance of a global and open approach to anti-discrimination law with a prominent place for comparative law, see I. Rorive and E. Bribosia, "Anti-discrimination Law in the Global Age", *E.J.H.R.-J.E.D.H.* 2015, no. 1, pp. 3-10.

¹⁰³² For more on all Strasbourg third party interventions done by this academic research institute, see <http://www.hrc.ugent.be/third-party-interventions-before-ecthr/> (visited on 20 September 2016).

¹⁰³³ On the engagement of the academic world in human rights litigation, see B. Frydman and L. Hennebel, *op. cit.*, pp. 109 *et seq.*

¹⁰³⁴ These instruments included *inter alia*: HRC General Comment No. 28 and the HRC Views in the case of *Railhon Hudoyberganova v. Uzbekistan*. The Human Rights Committee stated as follows in its General Comment No. 28 concerning Article 3 (equality of rights between men and women), adopted on 29 March 2000: "13. [Regulations on clothing to be worn by women in public] may involve a violation of a number of rights guaranteed by the Covenant,..." (UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10. In the case of *Railhon Hudoyberganova*, the HRC found, for example, that "...in the absence of any justification provided by the State party" there had been a violation of Article 18 § 2 of the Covenant where a student had been expelled from her University on account of her refusal to remove the *hijab* (headscarf) that she wore in accordance with her beliefs. See CCPR, communication no. 931/2000, *Railhon Hudoyberganova v. Uzbekistan*, Views of 8 December 2004, CCPR/C/82/D/931/2000. The latter instruments had been introduced by the applicant to the *SAS-case* (ECtHR (GC), *SAS v. France*, *op. cit.*, para. 78) as well as by several NGOs (*ibidem*, paras. 90 and 92).

¹⁰³⁵ ECtHR (GC), *Mouvement raëlien v. Switzerland*, *op. cit.*

¹⁰³⁶ *Ibidem*, para 34, referred to by the applicant.

United States¹⁰³⁷. If these instruments, introduced by the (third) parties, would have been taken into account more genuinely, the Court might have decided differently (*in casu*, towards a violation of Article 10 ECHR).

919. The latter examples demonstrate that (third) parties' external references do not necessarily enhance their procedural participation. True process participation does not only require a *formal participation* (according to which parties must be offered the opportunity to present their story and arguments), but also a *substantive participation* (according to which the arguments of the parties must be truly considered).¹⁰³⁸ Therefore, in order to uphold the validity of the referencing practice from a users' point of view, it is of importance that the Court genuinely considers the external instruments introduced by (third) parties and that it justifies and explains why it does or does not give effect to these instruments. Furthermore, a meaningful participation requires that external instruments introduced on the judges' own initiative are communicated to the (third) parties in order to enable them to take these instruments into consideration as well as to allow them – in light of the exigencies of 'equality of arms' and 'contradictory debate' – to comment, contest and/or dispute their meaning, relevance, *etc.*

§ 9.2. The persuasiveness of the referencing practice

920. Our case law analysis demonstrates that the ECtHR sometimes imports external common positions or shared outcomes ('position reception'), for instance to evolve the ECHR.¹⁰³⁹ The awareness that there is some agreement by authoritative external actors might add to the 'moral weight' of the argument.¹⁰⁴⁰ This may be the reason why the Grand Chamber, in its comparisons to find a common ground, mostly refers to instruments originating in well-known and authoritative organizations such as the EU, the UN, the CoE, and inter-American human rights mechanism. Also, when the Court imports a specific (but not necessarily widely shared) external argument ('reason reception'), the reference might be convincing as an authoritative and specialized 'source' filling gaps in the Convention and making it more precise.¹⁰⁴¹

¹⁰³⁷ *Ibidem*, para. 47, referred to by a third party to the case.

¹⁰³⁸ E. Brems and L. Lavrysen, *op. cit.*, p. 181.

¹⁰³⁹ Such importations reflect, in the view of Larsen, a search for 'moral facts'. See J.L. Larsen, "Importing Constitutional Norms from a 'Wider Civilization': Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation", *Ohio State Law Journal* 2004, vol. 65, pp. 1292 *et seq.*

¹⁰⁴⁰ J.L. Larsen, *op. cit.*, pp. 1291 *et seq.* Note that the Court often refers to authoritative bodies like the Venice Commission and the ILC. Larsen distinguished between 'reason-borrowing' and 'moral fact-finding' (which alludes to borrowing a 'position').

¹⁰⁴¹ See also H. Senden, *op. cit.*, p. 117 *et seq.*

921. External references can make the arguments richer, more objective and more precise. About a globalizing judicial dialogue, Slaughter, for instance, says that “[i]n the end, judges participating in the processes of judicial globalization, willingly or not, are likely to regard themselves as better judges as a result, and so they will be”.¹⁰⁴² She adds that “...for courts...committed to the need to persuade as well as to coerce their audience of litigants, lawyers, and citizens in any particular case – the persuasiveness of any one particular decision may be enhanced by a simple demonstration that others have trodden a similar path”.¹⁰⁴³ Based on interviews with Strasbourg judges, Dziatsiarou concludes the following: “[i]t seems that judges are of the opinion that if they employ comparative materials, then their judgments may seem more legitimate, not only within their jurisdiction but also to the outside world”.¹⁰⁴⁴

922. Both in a situation of ‘position-reception’ and of ‘reason-reception’, external instruments inform the Court profoundly about specific and current practices and norms as well as about (common) external viewpoints. This enhances the ‘input-legitimacy’ of the Court’s decision-making process.¹⁰⁴⁵ Its referencing practice, leading to a ‘multifaceted’ integration of different legal fields and actors,¹⁰⁴⁶ injects Strasbourg adjudication with a variety of information and perspectives. This might broaden the vision of the judges and add strength to their argumentation. As a consequence, external instruments could contribute to ‘persuasive reasoning’ and therefore, to the convincing and authoritative character of Strasbourg case law (even when the applicant loses his or her case).¹⁰⁴⁷ With respect to ‘position-reception’, the authority and quantity of external actors (sharing a certain vision) seem the most relevant element to persuade the rights holders; an opinion that is shared, maybe even on a worldwide scale, will promote the respect of a ‘(universal) audience’.^{1048 1049}

923. When authority adds to the ‘persuasion’-process, we could speak – to use Schauer’s terminology – of ‘persuasive authority’.¹⁰⁵⁰ This is connected with the idea of external

¹⁰⁴² A.-M. Slaughter, *op. cit.*, 2005a, pp. 302-303.

¹⁰⁴³ A.-M. Slaughter, *op. cit.*, 1994, p. 119.

¹⁰⁴⁴ K. Dziatsiarou, *op. cit.*, 2015, p. 77.

¹⁰⁴⁵ For the notion of ‘input-legitimacy’ in jurisprudential decision-making we have been inspired *mutatis mutandis* by the notion of ‘input-legitimacy’ in political deliberative processes and law-making procedures (referring to input of public demands). About ‘input-legitimacy’ in political deliberative processes, see D. Caluwaerts and M. Reuchamp, *op. cit.*, pp. 153 *et seq.*

¹⁰⁴⁶ More on this issue, see *supra* Part II, Chapter 2, § 6.

¹⁰⁴⁷ Inspired by C. McCrudden, *op. cit.*, pp. 514 and 527; F. Tulkens, S. Van Drooghenbroeck and F. Krenck, *op. cit.*, p. 483; A. M. L. Cocco Ortu, “La comparaison en tant que méthode de détermination du standard de protection des droits dans le système CEDH”, *Revista Telematica Giuridica dell AIC* 2011, no. 4, pp. 5 and 29. On persuasion and authority, see also: A.-M. Slaughter, *op. cit.*, 1994, p. 119.

¹⁰⁴⁸ Ch. Perelman and L. Olbrechts-Tyteca, *op. cit.*, 752 p.

¹⁰⁴⁹ Contrary to our view, Larsen only treats ‘reason-borrowing’ as a central phenomenon in light of ‘persuasion’. In his view, the ‘authority’ of a certain external instrument does not really contribute to ‘persuasion’ and the argument that ‘everyone else is doing it too’ is in his view not sufficient. See J.L. Larsen, *op. cit.*, pp. 1299 *et seq.*

¹⁰⁵⁰ F. Schauer, *op. cit.*, pp. 1931-1961. See also J. Allard and A. Garapon, *op. cit.*, pp. 58-60; B. Frydman, “Le dialogue international des juges et de la perspective idéale d’une justice universelle”, *op. cit.*, p. 7.

instruments being ‘persuasive’ (rather than ‘binding’) authorities.¹⁰⁵¹ Some authors, focusing on transnational dialogues between judges, acknowledge a change in the conception of legal sources in the sense that a formalist understanding loses relevance to the benefit of a more pragmatic approach that highlights the importance of the persuasive authority of judicial arguments.¹⁰⁵² When decisions become more persuasive because of the ‘authority’ that they carry, the public and the States will accept these decisions more easily. External instruments then gain validity, not because they are formal legal sources, but because they operate as valuable tools in persuading external audiences. Persuasive decisions are not only important in light of ‘effectiveness’ but also regarding the Court’s accountability, countering criticism of ‘judicial activism’.

924. The Court seems to understand that the references’ convincing effects do not necessarily take place *vis-à-vis* the duty bearers. In some sensitive cases, for instance about the integrity of persons (such as the case of *A, B, C v. Ireland* on abortion), about religious symbols (such as the case of *SAS v. France*), or about prisoners’ rights (such as the case of *Stummer v. Austria*), the Court is reluctant to give weight to certain (‘soft’) external instruments in an ‘evolutive’ manner. This might be explained by the Court’s fear to lose some credibility in the eyes of the (respondent) States. The Court, as an international institution, aims to keep its reputation high and its authority also depends, to a large extent, on the views of the Member States.¹⁰⁵³

925. The referencing practice has the potential to enhance the quality of legal arguments.¹⁰⁵⁴ As a consequence, it also has the potential to ‘persuade’ human rights users about the outcome of a case. From a users’ point of view, this enhances the validity of external importations. Convincing arguments are beneficial for ‘procedural justice’, which

¹⁰⁵¹ On the distinction between ‘binding’ and ‘persuasive’ authorities, see F. Schauer, *op. cit.*, p. 1952.

¹⁰⁵² See L. Hennebel and A. Van Waeyenberge, *op. cit.*

¹⁰⁵³ Upholding credibility and authority, interests that can be assumed to be of importance to the Court and the Judges, only remain high when the arguments are acceptable and convincing in the eyes of others. Whether it is desirable from the point of view of the Court to refer to external instruments thus depends on whether the practice is welcomed from the point of view of other user categories. The responses of both rights holders and duty bearers are relevant. However, given that Court is created by States and that the implementation of the decisions ultimately depends on their willingness, the actions and opinions of the duty bearers might be more powerful in influencing Judges’ reputational considerations. What is desirable in the eyes of the rights holders is not *per se* desirable in the eyes of the duty bearers. The outcome of an assessment from a users’ view is therefore somewhat subjective and – at least to some extent – relates to which standpoint one adopts. See more elaborate: D. Staes, “The Use of Documents Other than the European Convention on Human Rights and Its Protocols in Cases Before the European Court of Human Rights: Reflections from and upon a Users’ Perspective”, *HR&ILD* 2014, no. 2, pp. 186-215. Also Çali, Koch, and Bruch allude to the importance of diversification in users’ categories by stressing that: “...politicians, judges and lawyers place different legitimacy demands on the Court”. Legitimacy accounts are thus “...dependent on the standpoint from which the legitimacy of the Court is assessed”. B. Çali, A. Koch, and N. Bruch, *op. cit.*, pp. 35-36.

¹⁰⁵⁴ Hennebel and Van Waeyenberge call this the pure ‘argumentative approach’ to transjudicial dialogue. External referencing then above all constitutes a rational element of the interpretation process that aims at the best possible decision. See L. Hennebel and A. Van Waeyenberge, *op. cit.*, p. 12.

alludes to the parties' satisfaction with the legal process.¹⁰⁵⁵ The latter, in turn, positively reflects on the perceived fairness of the outcome of a case. In addition, the referencing practice has potential to increase the quality and authority of arguments, and accordingly, to enhance the legitimacy and reputation of the judges and the Court.¹⁰⁵⁶ Whereas referencing the Court's legal precedents can make decisions more persuasive,¹⁰⁵⁷ references to external instruments, building bridges in time, in space, in substance, *etc.*, can also add to the convincing character of the arguments.

§ 9.3. Persuasion at risk: a deficient methodology

926. Persuasion through references only holds when the importation of external instruments is accompanied by a convincing methodology and justification. The Court falls short in this respect. The selective, non-consistent and non-transparent method of the Court reflects one of the major concerns connected to its referencing practice.¹⁰⁵⁸ As Pitea framed it:

“The growing use of international law to interpret the Convention has long become a reality. However, the contribution given by the systematization of this practice into a “methodology” to the unity of international law and to the enhancement of consistency and predictability of the Court's jurisprudence remains, to a large extent, a myth”.¹⁰⁵⁹

927. Methodological concerns also follow from our case law analysis. We will mention some examples. Often, the Court quotes external instruments in the ‘facts’-section without explicitly using them in the ‘law’-section. When the Court does not explain the relevance or non-relevance of instruments that were cited under the ‘facts’, this creates confusion about the role ‘in law’ of these instruments. Another confusing situation occurs when the Court

¹⁰⁵⁵ Procedural justice gained popularity in legitimacy assessment and includes criteria of a more procedural nature such as participation, neutrality, respect, and trust. See E. Brems and L. Lavrysen, *op. cit.*, pp. 176-200 and references there; Y. Shany, *op. cit.*, p. 137. The central idea behind procedural justice is that people assess legitimacy rather on the evaluation of the fairness of the decision-making process (which will ultimately also contribute to the promotion of fair and just outcomes), than on whether they can agree with the substantive content of the outcome of the decisions. See Y. Shany, *op. cit.*, pp. 139-140 and p. 143; E. Brems and L. Lavrysen, *op. cit.*, p. 182 and references there.

¹⁰⁵⁶ See also Y. Shany, *op. cit.*, p. 141; F. Schauer, *op. cit.*; J. Allard, *op. cit.*, p. 133. Dzetsiarou also draws attention to the persuasive character of comparative arguments pointing at a European consensus. See K. Dzetsiarou, *op. cit.*, 2015, pp. 77 *et seq.* The question of legitimacy is of particular importance in respect of the ECtHR. As Çali, Koch and Bruch say: “Legitimacy can be no more important to any other institution than it is for the European Court of Human Rights. As a supranational human rights court, it does not have enforcement or sanctioning powers. Furthermore, its main task is to judge the actions of exactly those state authorities upon whose support it relies to enforce its judgments. Thus, it primarily relies on its legitimacy to gain respect and deference from domestic judges and politicians. Individual applicants turn to the Court because they trust that domestic actors perceive it as a legitimate institution and will therefore enforce and respect its judgments”.

¹⁰⁵⁷ Y. Lupu and E. Voeten, “Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights”, *B.J. Pol. S.* 2011, vol. 42, p. 420.

¹⁰⁵⁸ More elaborate on this criticism, see *supra* Part I, p.. Such concerns are not only linked to external referencing practice; allegations of shortcoming methodologies and inconsistencies also affect other interpretation methods and principles of the Strasbourg Court. See M. Marochini, “The Interpretation of the European Convention on Human Rights”, *Zbornik radova Pravnog fakulteta u Splitu* 2014, no. 1, pp. 83-84.

¹⁰⁵⁹ C. Pitea, *op. cit.*, 2014, p. 14.

includes various external instruments with a diverging rationale. This happened for example in the case of *Ivinović v. Croatia*, in which the Court, under the ‘facts’, cited, on the one hand, Article 12 UNCRPD (rejecting deprivation of legal capacity on account of disability) and, on the other hand, the CoE-principles concerning the legal protection of incapable adults (allowing such deprivation), without explicitly clarifying which instrument’s logic should prevail.¹⁰⁶⁰ As a further example, the Court is not clear about what should happen when normative conflicts occur. Instead, it rather artificially denies the existence of such conflicts.¹⁰⁶¹

928. In addition, the ECtHR sometimes gives weight to external instruments in the context of certain interpretative principles while it omits doing so in other comparable cases. It is not predictable either how much weight instruments receive. Neither is it foreseeable how many (and what kind of) instruments are sufficient to establish a consensus or a trend, or to influence a reasoning *tout court*. Furthermore, the status of non-binding instruments lacks clarity. Sometimes they contribute to frame interpretative principles or arguments. On other occasions, however, the Court doubts their relevance. In addition, whereas Court often creates ‘harmony’ with external instruments, it sometimes – without a clear reason – declares external instruments to be in opposition to the ECHR.

929. More methodological problems arise in light of exigencies of transparency. A major concern is that the Court generally does not (legally) justify the referencing practice and that when it does make an attempt, it remains unclear and confusing.¹⁰⁶² In addition, the Court sometimes refers to an external normative domain in general terms only, without any further specification.¹⁰⁶³ Neither does it always mention by name the external instruments it imports in its legal reasoning. Sometimes, in the ‘law’-section of the case, the Court only includes the numbers of the paragraphs in which the external instruments are mentioned under the ‘facts’ of the case.¹⁰⁶⁴ This actually happens quite often and largely complicates the search for

¹⁰⁶⁰ See ECtHR, *Ivinović v. Croatia*, 18 September 2014, Appl. No. 13006/13, paras. 21 and 22. In this regard, V. David notes that the last instrument reflects an outdated approach to rights of persons with disabilities, in contrast with the UNCRPD, see V. David, “Legal Capacity and the (Missing) Call for Supportive Decision-Making”, Blog Post Strasbourg Observers, available at <https://strasbourgobservers.com/author/valeskadavid/> (visited on 28 August 2016).

¹⁰⁶¹ See for example: ECtHR (GC), *Nada v. Switzerland*, *op. cit.*. See also: ECtHR (GC), *Al-Dulimi and Montana Management Inc. v. Switzerland*, *op. cit.*. More elaborate on this issue, see *supra* paras. 472, 643-644, 837-840, 876.

¹⁰⁶² This is what happened, in our view, in *Demir and Baykara v. Turkey*, see *supra* Part 1, Chapter 1, § 4.

¹⁰⁶³ Such references have not been part of our study because we only included references to specific external instruments. In light of transparency, it would be recommendable that the Court makes its references as precise as possible.

¹⁰⁶⁴ For cases in which the Court only refers to the number of the paragraph (in which the instruments can be found under the ‘fact’) without mentioning the name of the instrument, see for example: ECtHR (GC), *Saldüz v. Turkey*, *op. cit.*, paras. 53 and 60; ECtHR (GC), *Carson and Others v. the United Kingdom*, *op. cit.*, para. 88; ECtHR (GC), *Depalle v. France*, 29 March 2010, Appl. No. 34044/02, para. 81; ECtHR (GC), *Gäffen v. Germany*, *op. cit.*, para. 174; ECtHR (GC), *Konstantin Markin v. Russia*, *op. cit.*, paras. 90, 99, 126, 127, 139, 140; ECtHR (GC), *El-Masri v. “the former Yugoslav Republic of Macedonia”*, *op. cit.*, para. 240; ECtHR (GC), *Animal Defenders International v. the United Kingdom*, *op. cit.*, para. 123; ECtHR (GC), *O’Keeffe v. Ireland*, *op. cit.*, para. 147; ECtHR (GC), *Rohlén v. Czech Republic*, *op. cit.*, para. 71; ECtHR (GC), *Bouyid v. Belgium*, *op. cit.*, paras. 89 and 109; ECtHR (GC), *Perinçek v.*

external instruments (also throughout my thesis research).¹⁰⁶⁵ It makes it difficult to verify whether and which external instruments are used, and it creates the impression of ‘hidden’ references. Moreover, the paragraph numbers are sometimes not correct.¹⁰⁶⁶ It also happens that the Court mentions an external instrument by name under the ‘law’-section, but does not include the number of the paragraph where the instrument can be found under the ‘facts’ (if the instrument appears under the ‘facts’-section at all...¹⁰⁶⁷).¹⁰⁶⁸ This makes it difficult for the reader to detect when and where external instruments are used. Transparency would be served if the Court would always mention the name of the instrument and the number of the paragraph where its relevant aspects had been treated more elaborately, possibly including some explanation.¹⁰⁶⁹

930. Furthermore, the issue of ‘cherry-picking’ is problematic. This issue plays most when the Court is looking for a tendency or a consensus in order to enable ‘evolutive’ interpretation. The Court generally does not explain why it chooses some instruments for that purpose, why it ignores others, and why some instruments seem to receive more weight than others. Therefore, there should be more systematization about which instruments the Court considers relevant. Are only internal or also external instruments indicative of a trend

Switzerland, op. cit., para. 238; ECtHR (GC), *Schatschaschwili v. Germany*, 15 December 2015, Appl. No. 9154/10, para. 139.

¹⁰⁶⁵ The external instruments that were mentioned in Part II of this research were ‘exhaustive’. It concerned all external instruments that had been introduced by the Grand Chamber in some previous years. However, the Court did not always mention these external instruments ‘by name’ in the ‘law’-section of the legal reasoning. Sometimes, there was only a reference by including the paragraph number in which these instruments were cited under the ‘facts’. The latter difficulty might be a reason why we might have ‘missed’ some references in our study.

¹⁰⁶⁶ See for example: ECtHR (GC), *Guiso-Gallissay v. Italy* (just satisfaction), 22 December 2009, Appl. No. 58858/00, para. 99.

¹⁰⁶⁷ On some occasions, some normative instruments used in legal reasoning are not mentioned at all under the facts. See for instance the use of the ICC Rome Statute in ECtHR (GC), *Varnava and Others v. Turkey, op. cit.*, para. 163; the use of an ICJ advisory opinion in ECtHR (GC), decision of *Demopoulos and Others v. Turkey*, 1 March 2010, Appl. Nos. 46113/99, 3843/02, 13751/02, etc., paras. 93-94; the use of the VCLT in ECtHR (GC), *Sabeh El Leil v. France, op. cit.*, para. 48 and in ECtHR (GC), *Hirsi Jamaa and Others v. Italy, op. cit.*, paras. 170-171 and in ECtHR (GC), *Perinçek v. Switzerland, op. cit.*, para. 149; and the use of ICJ case law in ECtHR (GC), *Chiragov and Others v. Armenia, op. cit.*, 2015, para. 177 and in ECtHR (GC), *Perinçek v. Switzerland, op. cit.*, para. 150.

¹⁰⁶⁸ For examples of case law in which the Court only mentions the name of the external instrument without it including the number of the paragraph where this instrument can be found in the ‘facts’-section, see: ECtHR (GC), *S. and Marper v. United Kingdom, op. cit.*, para. 124; ECtHR (GC), *Sergey Zolotukhin v. Russia, op. cit.*, para. 79; ECtHR (GC), *Enea v. Italy*, 17 September 2009, Appl. No. 74912/01, para. 101; ECtHR (GC), *Varnava and Others v. Turkey, op. cit.*, paras. 138 and 163; ECtHR (GC), *Tănase v. Moldova, op. cit.*, para. 163; ECtHR (GC), *M.S.S. v. Belgium and Greece, op. cit.*, para. 251; ECtHR (GC), *Sabeh El Leil v. France, op. cit.*, para. 49; ECtHR (GC), *Stummer v. Austria, op. cit.*, paras. 117 *et seq.* and 130 *et seq.*; ECtHR (GC), *Nada v. Switzerland, op. cit.*, paras. 120-124; ECtHR (GC), *Allen v. the United Kingdom*, 12 July 2013, Appl. No. 25424/09, paras. 105 and 133; ECtHR (GC), *Janowiec and Others v. Russia*, 21 October 2013, Appl. Nos. 55508/07 and 29520/09, para. 211; ECtHR (GC), *X v. Latvia, op. cit.*, paras. 59-62 and 93-94; ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “the former Yugoslav Republic of Macedonia”, op. cit.*, paras. 120-121; ECtHR (GC), *Parrillo v. Italy, op. cit.*, paras. 174 *et seq.*; ECtHR (GC), *Vasiliauskas v. Lithuania, op. cit.*, paras. 167 *et seq.*

¹⁰⁶⁹ For good examples in this respect, see among many others: ECtHR (GC), *Scopolla v. Italy* (No. 2), *op. cit.*, paras. 105 *et seq.*; ECtHR (GC), *Cudak v. Lithuania, op. cit.*, para. 64; ECtHR (GC), *Mangouras v. Spain, op. cit.*, para. 89; ECtHR (GC), *Bayatyan v. Armenia, op. cit.*, paras. 98 *et seq.*; ECtHR (GC), *Axel Springer AG v. Germany, op. cit.*, paras. 91 and 96; ECtHR (GC), *Aksu v. Turkey, op. cit.*, paras. 75 and 85; ECtHR (GC), *Boulois v. Luxembourg, op. cit.*, para. 103; ECtHR (GC), *Centro Europa 7 S.r.l. and Di Stefano v. Italy, op. cit.*, paras. 134, 151, 153, and 176; ECtHR (GC), *Vallianatos and Others v. Greece, op. cit.*, paras. 91-92; ECtHR (GC), *Svinarenko and Slyadnev v. Russia, op. cit.*, para. 132; ECtHR (GC), *Jeunesse v. the Netherlands, op. cit.*, paras. 110-111; ECtHR (GC), *Lambert and Others v. France, op. cit.*, paras. 143, 155 and 178; ECtHR (GC), *Delfi AS v. Estonia*, paras. 133, 128 and 147; ECtHR (GC), *Khoroshenko v. Russia, op. cit.*, paras. 133 *et seq.*

or consensus? If also external instruments are indicative, which kind of external instruments may be included in comparative endeavors? To address these questions, and to empower dynamic arguments, we have argued for more structure by means of the concept of '*opinio juris* under the treaty'.¹⁰⁷⁰ This phrase could lead to a more standardized method, replacing a variety of notions as 'European consensus', 'international tendencies', 'international consensus', *etc.* Such a framework would bring systematization to the deployment of comparisons.

931. In light of requirements of transparency – which is a necessary prerequisite to ensure the persuasiveness of external references – 'implicit' or 'silent' references are also disturbing.¹⁰⁷¹ A referencing practice is 'implicit' when external instruments offer inspiration without the instruments being mentioned. Implicit references are obviously very difficult to detect. We found an example in the case of the *Staatkundig Gereformeerde Partij (SGP) v. The Netherlands*¹⁰⁷². In this case, the Court held more particularly that "...nowadays the advancement of the equality of the sexes in the Member States of the Council of Europe prevents the State from lending its support to views of the man's role as primordial and the woman's as secondary".¹⁰⁷³ The Strasbourg Court here, although it did not explicitly mention this provision¹⁰⁷⁴, seemed to allude to Article 5 (a) of the CEDAW that provides that

"States Parties shall take all appropriate measures (...) [T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

In the Court's reasoning, the CEDAW seemed an implicit source of inspiration, opening the door to frame the facts of the case as a problem of gender stereotyping.¹⁰⁷⁵

932. To increase the validity of referencing, the Court should be explicit about its sources of inspiration.¹⁰⁷⁶ Some initiatives of the CoE can be applauded in this respect. Recently, it

¹⁰⁷⁰ See *supra*, Part III, Chapter 1, § 4.2.1., C.3.

¹⁰⁷¹ Also Dzetsiarou and Lukashevich point at the importance for the ECtHR to acknowledge its sources of comparative exercises. K. Dzehtsiarou and V. Lukashevich, *op. cit.*, p. 286.

¹⁰⁷² ECtHR, *Staatkundig Gereformeerde Partij v. the Netherlands*, *op. cit.*

¹⁰⁷³ *Ibidem*, with reference to ECtHR (GC), *Konstantin Markin v. Russie*, *op. cit.*, para. 127.

¹⁰⁷⁴ In the 'facts'-section, the Court only referred to Article 7 of the CEDAW. See para. 63.

¹⁰⁷⁵ The argumentation of the Court, introducing a reference to gender stereotyping, was in line with the viewpoint of some Dutch authors who, yet before the Court pronounced itself on the case, argued in favor of introducing article 5 of the CEDAW within the context of the national SGP-cases (instead of only referring to article 7 of the CEDAW). See R. Oostland, "Het VN-Vrouwenverdrag: mensenrechten voor vrouwen", in R. Holtmaat (eds.), *Eén Verdrag voor Alle Vrouwen: Verkenningen van de betekenis van het VN-Vrouwenverdrag voor de multiculturele samenleving*, E-Quality, The Hague, 2002, p. 13; R. Holtmaat and A. Timmer, "De SGP-zaak anders bekeken. Naar een holistische uitleg van Artikel 7 VN-Vrouwenverdrag", *NTM/NJCM-Bulletin* 2011, vol. 86, pp. 448 *et seq.*

¹⁰⁷⁶ On the other hand, however, one could argue that the less the Court reveals, the more it puts itself open to potential criticisms.

issued some research reports offering a comprehensive overview of references made to particular types of external instruments (i.e. case law of the ACtHR and CoE-treaties) in Strasbourg decision-making.¹⁰⁷⁷ Moreover, we recommend the Court, especially when an external instrument serves an interpretation ‘in law’, to explicitly mention the name of the instrument and to indicate in which part of the decision more elaborate information on the instruments’ content and ratification status can be found. So far, this information is often included in the ‘facts’-section of the case.¹⁰⁷⁸ This is not very logical since the external instruments that are used in ‘law’ generally embody a role that goes beyond the establishment of ‘facts’. Therefore, we have pleaded in favor of introducing a third section – in between the ‘facts’ and the ‘law’ – with the following heading: ‘Legally relevant external instruments’.¹⁰⁷⁹

933. To validate the referencing practice from a judicial perspective, the method and justification thereof also matters. An inconsistent and poorly motivated method of external referencing might be associated with opportunism or activism, external instruments being instrumentalized to sustain the judges’ desired outcomes and intimate convictions, rather than serving as genuine tools of interpretation.¹⁰⁸⁰ Admittedly, such ‘picking and choosing’ might, on the one hand, serve judicial interests in solving a case, and even in pursuing some policy aims. On the other hand, such incoherent uses could affect the judges’ interests in upholding their reputation. The absence of a clear methodology thus erases the positive effects external referencing might have on the persuasiveness of the reasoning and the credibility of the Court. Against this background, we consider it of utmost importance that the Court pays explicit attention to questions of methodology and that it pays elaborate attention to the manner in which it justifies its referencing practice.¹⁰⁸¹

¹⁰⁷⁷ See Council of Europe, “Research report: references to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights”, prepared by the Research and Library Division of the Court, 2012, 20 p., http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf (visited on 12 April 2016), and “Research report: the use of Council of Europe Treaties in the case-law of the European Court of Human Rights”, prepared by the Research and Library Division of the Court, 2011, http://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf (visited on 12 April 2016).

¹⁰⁷⁸ It happens, but rarely, that instruments referenced ‘in law’ are not mentioned under the facts at all. Of those instruments that appear in the ‘facts’-section, the Grand Chamber does not consistently include information on their ratification status.

¹⁰⁷⁹ For more on this issue, see *supra*, para. 512.

¹⁰⁸⁰ See J. Allard, *op. cit.*, p. 134; T. Barkhuysen and M.L. van Emmerik, “Ongebonden binding: verwijzing naar soft law standaarden in uitspraken van het EHRM”, *NJCM-Bulletin* 2010, vol. 35, issue 7, pp. 827-835; L. Hennebel and A. Van Waeyenberge, *op. cit.*, pp. 18-19.

¹⁰⁸¹ However, in very sensitive cases like the cases mentioned above, even the use of external instruments pointing at ‘*opinio juris* under the treaty’ might remain difficult to accept from the eyes of the respondent State (exactly because it concerns such nationally sensitive issues). From the perspective of other member States, however, such references might be acceptable and increase the consistency and persuasiveness of the arguments.

§ 10. Concluding observations

934. If we want to empower a practice of importing external instruments, a users' perspective cannot be left aside. On the contrary, it could offer valuable arguments to justify, and enhance the legitimacy of the referencing practice. These arguments concentrate around three central axes: the specific identity of the rights holders, procedural needs, and substantive interests.
935. Since external instruments can inject the Court's interpretations with specialized human rights catalogues as well as with catalogues covering rights of the second 'generation', the referencing practice has the potential to do justice to all aspects of a victim's specific identity and experiences. In addition, external references could strengthen the principles of universality and thereby ensure that, on a wider scale, similar cases are treated alike. This would show respect for the dignity of the rights holders, who are all part of a global community of universal human rights.
936. Secondly, the importation of external instruments by (third) parties may influence the Court and, as a result, enhance (third) parties' strategic procedural positions. In addition, their use could contribute to ordering pluralism, and thus to more coherence and integrity of the global environment, which serves the procedural aim of legal certainty. External instruments, also when they operate in a 'deformalized' process of legal reasoning, could serve as persuasive tools. With a view to the judges' and (third) parties' practical interests, arguments based on external instruments are valid, not because these instruments reflect formal legal sources, but because they reflect authorities capable of convincing the public about the objectivity and the fairness of the arguments. Making comparisons based on external instruments might also be easier compared to developing complex internal comparisons of national laws and practices. Therefore, the referencing practice has beneficial effects for 'procedural economy'.
937. The consequences of external instruments on procedural justice could, in turn, reflect positively on the substantive output of the cases. A convincing reasoning and outcome is of great importance, not only from the perspective of (third) parties, but also from the perspective of the judicial users who aim to keep their credibility high. Some signs of substantive benefits of referencing are found in its ability to progressively evolve human rights standards, to make them more effective, and to enhance the quality of arguments by communicating within a network on a global scale.

938. Since the referencing practice could do justice to the specific identity, procedural needs, and substantive interests of the human rights users, it can be validated from a users' point of view. To a large extent, however, this justification remains hypothetical. On occasions, the opportunities of external referencing are not concretized in the jurisprudential practice. Besides these missed opportunities, the potential benefits of the referencing also risk to be wiped out by deficiencies to the Court's methodology. This is exactly why the creation of a more transparent and stronger legal framework is so important. Such a framework could temper methodological challenges without losing sight of the users' interests.

939. On the one hand, ameliorating the legal validity of the referencing practice enhances the validity from a users' point of view: a better-justified method renders external referencing more clear, consistent, authoritative and persuasive, to the benefit of the different users of human rights law. On the other hand, users' interests are useful to inform the method, i.e. to ensure that it enhances the procedural position of (third) parties, that it leads to progressive, effective and convincing decisions, and that it takes account of the full experiences and identities of the rights holders. This prevents external instruments being blindly or routinely followed.¹⁰⁸² From a users' perspective, it is crucial that the Court pays close attention to the content and quality of external instruments and that processes such as legal learning, persuasion and innovation operate as prominent guides.¹⁰⁸³

¹⁰⁸² Although 'blindly' following external instruments might save time, this could also lead to a kind of idleness including a danger of creating a rather brainless and non-innovative 'routine' whereby external position or solutions are reproduced. Cf. F. Ost and M. van de Kerchove, *op. cit.*, 2012, p. 35.

¹⁰⁸³ Adhieh also points at the potential of judicial dialogue for legal learning and innovation and how this could be served by referring to a mix of diverse and common perspectives. See R.B. Ahdieh, "Between dialogue and Decree: International Review of National Courts", *N.Y.U.L.R.* 2004, vol. 79, no. 6, pp. 2035 and 2095.

Final conclusions

940. The Strasbourg referencing practice lacks clarity and faces validity gaps. The Court did not succeed in addressing these issues adequately in the Grand Chamber case of *Demir and Baykara v. Turkey*, i.e. the sole judgment in which the Court made an effort to explain and justify its referencing practice. On the contrary, it only created more confusion about the practice's underlying method and the aims it serves. More specifically, the case offered a disjointed enumeration of interpretation principles and illustrations, making it very difficult for the reader to see the wood for the trees. Is external referencing mandatory or not, and if so, in what situations? What is its precise legal basis? The Court noted the relevance of the interpretative rules of Articles 31 to 33 of the VCLT, and of Article 31 paragraph 3 (c) VCLT in particular.¹ It equally mentioned the aim of 'evolutive' interpretation and of a 'practical and effective' reasoning corresponding to the object and purpose of the ECHR. However, the exact relevance of all these elements in light of (some aspects of) the referencing practice was far from clear. *Demir and Baykara* remained silent about the relationship between the Convention and general international law. In addition, whereas it recognized the use of non-binding instruments for ('evolutive') interpretation, it did not elaborate on specific criteria and requirements in that regard. If the Grand Chamber in *Demir and Baykara* aimed to shed light on the Court's referencing practice, it failed.

941. This thesis fills this knowledge gap by addressing two major research questions: 'What are the characteristics of external referencing as exercised by the ECtHR?' and, 'Which arguments may offer a justification for the Strasbourg referencing practice?'. Answering the first question allows a better understanding of the practice and discourse of the referencing practice, which is a necessary step in framing answers to the second question.

Characteristics of the Court's referencing practice based on the case law analysis

942. Answers to the first question resulted from an exhaustive study of Strasbourg case law, covering all Grand Chamber cases since *Demir and Baykara v. Turkey* until the end of 2015. On the basis of these 136 cases, we created a comprehensive quantitative and qualitative categorization of Strasbourg' external importations.

¹ Article 31 paragraph 3 (c) of the VCLT provides that "...there shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties".

The Court's referencing practice is no marginal phenomenon; external instruments, for all kind of purposes, appear in about 70 per cent of all Grand Chamber cases, on a rather constant basis over time. Quantitatively, over recent years, there are no large peaks or troughs in the prevalence rate. We also focused on the number of arguments that include external references in order to interpret or apply the Convention. On average, every case of the Grand Chamber includes one argument that mentions an external instrument in its support.

943. The Court approaches the external global context comprehensively; the imported instruments are widely diverse. *Ratione materiae*, the Court refers to instruments of general and specific content, both within and outside the area of human rights law, and covering areas of economic and social rights, criminal law, labor law, international humanitarian law, *etc.* *Ratione personae* the Court includes instruments of a general scope next to instruments that focus on specific groups of human beings. *Ratione loci*, references are made to instruments operating at national, regional and universal levels. As to their *origin*, there are importations of instruments emanating from (third) States, international organizations, judicial actors, expert bodies, *etc.* The legal status varies as well; references are made to both binding and non-binding instruments.

944. The referencing practice covers different functions and purposes. The case law analysis exposes five main categories of argumentative uses: dismissive uses; references to clarify the rules of treaty interpretation; references to establish a common ground (in Europe and beyond) or to import specific external instruments in order to interpret the ECHR; references to establish a common ground in Europe or to import specific instruments in order to apply the ECHR; and references to external obligations that influenced the States' actions or omissions in order to apply (and to harmoniously interpret) the ECHR.

A *first* category of uses is 'dismissive'. This means that the Court puts external instruments in contrast to the Convention or disregards their content. Often, the Court motivates such a dismissal by referring to varying reasons: insufficient comparability between the external instrument and the issues of the case, absence of competence to supervise external instruments, a lack of agreement between the Member States on the relevance of the instrument, *etc.* *Secondly*, references are made to the VCLT in order to establish the rules for the interpretation and the execution of treaties, including, for instance, execution and interpretation in 'good faith', interpretation in light of 'subsequent agreement' and 'subsequent practice', and in light of the relevant rules of international law applicable between the parties, *etc.* A *third* reason why the Court includes external instruments is their usefulness to establish a common ground (in Europe and beyond) or to import specific external instruments in order to *interpret* the ECHR, including an 'evolutive' interpretation (sometimes, the referencing

practice discloses an evolution enabling ‘evolutive’ interpretation, whereas, on other occasions, they enable the observation of a lack of evolution, preventing a (backward) ‘evolutive’ interpretation), the interpretation of notions, refining a State’s positive responsibilities, or, offering a general support for an argument. As a *fourth* function, the referencing practice appears when external instruments operate as tools to influence a State’s freedom of manoeuvre when applying the Convention. External instruments do not only influence a State’s freedom of discretion when they expose a (lack of) shared position, but also when their content explicitly allows some flexibility in regulating certain issues. A *fifth* reason why external instruments are introduced is to enable references to external obligations that influenced the States’ actions or omissions, in order to establish whether the State carries responsibility and whether its interference had a ‘legal basis’, served a ‘legitimate aim’, and was proportionate in a democratic society. The Court, mostly by stressing Article 31 paragraph 3 (c) of the VCLT, avoids reading the Convention in a vacuum but, instead, interprets it in harmony with coexisting applicable international law, for example in the areas of State immunity, child abduction, international humanitarian law, UN Resolutions, *etc.*

Principal conclusions on the Court’s referencing practice based on the case law analysis

945. The largest challenge is not so much the method of the referencing practice *an sich*: although external references can have an important position in the legal arguments, they are not necessarily controversial. Rather, the non-justified and inconsistent use of the references, is what worries us.

The influential, but not necessarily controversial, impact of external instruments

946. Our research focused on the importation of external instruments under the ‘law’-section of the case (and not under the ‘facts’-section). This does not imply, however, that references ‘in law’ might not be closely connected to the facts. Indeed, normative importations may be necessary because the State’s contested behavior results from external instruments. On most other occasions, external referencing practice is more independent of the circumstances of the particular case. Whether the instruments connect to the facts or not, both kind of importations may have a substantive and normative effect on legal reasoning. For instance, an harmonious interpretation with external obligations (closely connected to the circumstances of the case) could influence the understanding of the Convention through efforts of reconciling both bodies of law, and an ‘evolutive’ interpretation based on instruments without connection to a State’s actions, could contribute to the creation of new rights under the Convention. This is why, in relation to most of the references, we have concluded that the external instruments

that are used in the 'law'-section, embody a role that goes beyond the establishment of 'facts'. We therefore plead in favor of introducing a third section in the Court's decisions and judgments – in between the 'facts' and the 'law' – with the following heading: "Legally relevant external instruments".

947. On the whole, the more substantive and influential the references are, the more controversial they may become, especially when grounded in non-binding instruments. The Court, for instance, builds on non-binding instruments to define concepts or to frame a State's positive actions. When such references are creative, they become more difficult to justify under the general rules on treaty interpretation. When non-binding instruments contribute to 'evolutive' interpretation, this will be even more so. However, in recent Grand Chamber cases, there is no great reason for concern in this regard. Firstly, the Court has regularly conceived instruments' non-binding nature as a reason not to give a dynamic effect to them. Moreover, when non-binding instruments are used for 'evolutive' interpretation, they mostly operate next to 'hard' (internal) instruments and next to other arguments; no decisive weight is given to them.

948. Admittedly, the inclusion of general international law may create difficulties, too. The Court, in accordance with the ILC, puts great emphasis on the aims of harmonization and 'systemic integration' between the area of general international law and human rights law. Doing so, the Court insists on the prevention of conflict and on reading external obligations together with the Convention. In the light of combating the fragmentation of the law, this is applaudable. However, on several occasions, the Court strived so much for the ideal of reconciliation that it aimed to harmonize obligations that actually were irreconcilable. Accordingly, the aim of systemic integration came at the cost of truly substantive human rights supervision. By 'artificial' avoidance of conflict, the Court evaded the politically sensitive question of the relationship (hierarchy?) between human rights law and general international law.

949. The Court generally does not create explicit opposition between the ECHR and the external normative context. Usually, when the Court creates references, it does so in a spirit of comity. It does not aim to oppose decisions of its colleagues in other judicial bodies or to contradict instruments created by States or other institutions. Admittedly, some dismissive references are present, but often, these are well explained by the Court. Sometimes, however, explicit dismissive uses seem to hide deeper, more substantive, disagreement between the Court and external bodies or instruments. Then, the 'well-argued' disregard rather operates as a pretext to ignore the content. In those cases, the Court, for the benefit of its audience, acts 'as if' external instruments are taken seriously, but actually excludes them for not very convincing

reasons. Do we perceive some signs of opportunism here? The content of the external instruments, not fitting a desired solution to the case, might have been the real reason to dismiss them. If the Court, consistent with its practice in previous cases, would have given more weight to certain external instruments, some outcomes might have been more progressive.

A lack of justification and consistency

950. After the case of *Demir and Baykara*, the Grand Chamber did not engage in further efforts to justify its referencing practice, and – partly for that reason – its method remains inconsistent. The Grand Chamber seldom invokes formal rules to justify the use of external instruments. It does not legally explain its references by appealing to provisions of the Convention. In only a few cases, the Court relies on Articles 31-33 of the VCLT, and on Article 31 paragraph 3 (c) VCLT in particular. Indeed, when a State invokes obligations under general international law to excuse a possible interference with the Convention, the Court invokes this provision to stress the need to avoid normative conflict and to accommodate both areas of law. Generally, the Court does not conceive the meaning of this provision differently, for instance to justify a reference to a growing normative tendency based on binding and non-binding instruments. On a rare occasion, Separate judges have pointed at the relevance of the human rights safeguard of Article 53 ECHR², some in order to support importations of higher standards, other, on the contrary, to oppose this phenomenon.

951. Besides legal arguments, the Court, does not often invoke other purposes. Only in exceptional cases, the Court justifies external referencing by the need to combat fragmentation and to create coherence. Once, it mentioned the principle of legal certainty. Besides, the Court invoked ‘evolutive’ interpretation to explain references pointing at normative developments. On the contrary, aims such as a universal or progressive human rights protection, an interdependent view on different categories of human rights, an objective, well-informed and specific reasoning, *etc.*, were not mentioned to justify the referencing practice.

952. The Court’s method of external referencing is not consistent. This is a long-lasting problem that did not change after *Demir and Baykara v. Turkey* and that hinders transparency and predictability. As a consequence, it is not always clear when the Court will (or will not) introduce external instruments. Moreover, the weight it gives to them varies, without there being clear criteria. Whereas *Demir and Baykara* clearly stated that non-binding instruments could contribute to the establishment of ‘evolution’, the Court, in other cases, doubts the

² Article 53 ECHR reads as follows: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

relevance of such instruments. Furthermore, the use of Article 31 paragraph 3 (c) VCLT is confusing. Often, the Court only makes implicit use of it. Moreover, it hardly ever ties this provision to the importation of external *human rights* instruments, while the Court stated explicitly that Article 31 paragraph 3 (c) VCLT imposes the obligation to take account of external rules, in particular those of international human rights protection.

953. The Court has difficulties in creating a straightforward methodology and in interpreting the VCLT in that context. The hesitation and vagueness in the Court's efforts of justification, create a general lack of transparency and afford the judges great freedom in the development of the referencing practice. The problem remained after the case of *Demir and Baykara*, despite it trying to shed some light on the issue. The practice still faces a validity gap. Even when references are not problematic, they merit transparency and explanation. It would give more credibility to the method in general and prevent that, in all its diversity, it becomes a baby thrown out with the bathwater. To address that, our thesis creates a stronger legal framework. It thereby goes beyond a legality perspective by including the potential of external referencing for users' interests, and by offering recommendations as to how the Court could maximize that potential. Doing so, we offered an answer to the second research question: 'Which arguments might enhance the validity of the Strasbourg' external referencing practice?'.

A justification of a referencing method by the law

954. External referencing has no single purpose and, as a result, it can not be justified by a single principle or aim. The legal framework we propose in relation to the Strasbourg referencing practice covers three dimensions: the first proposes an obligatory human rights integration in order to safeguard applicable human rights (under Article 53 ECHR); the second dimension mandates integration of external applicable law to serve the principle of harmonious interpretation (under Article 31 paragraph 3 (c) VCLT); and the third dimension authorizes a method of referencing designed to serve the principles of 'evolutive' interpretation, of interpretation making rights 'practical and effective', of 'autonomous' interpretation and the 'margin or appreciation' (under a holistic approach to the interpretative rules of the VCLT). As a red line throughout all three dimensions runs a principle of non-regression, based on the specific nature of human rights law.

	Article 53 ECHR (substantive aspect)	Article 31 paragraph 3 (c) VCLT	Holistic reading of Articles 31-32 VCLT (text, consent, context and ‘object and purpose’)
Principle	Safeguarding human rights	Harmonious interpretation, systemic integration, anti-fragmentation	‘Evolutive’, ‘effective’, ‘autonomous’, ‘margin’
External norms	Human rights norms applicable in all Member States	All external norms applicable in all Member States	Binding and non-binding norms
Force of the external context	Obligation of ‘coordinative integration’; obligation to give a binding effect (binding force)	Obligation of ‘coordinative integration’ (binding force) or ‘hierarchical integration’ (no force)	Optional and persuasive force under the condition of (emerging) consensus confirmed by <i>opinio juris</i> under the Treaty

First dimension

955. The *first* dimension of the referencing practice aims to safeguard external human rights law, as required by Article 53 of the Convention. Article 53 ECHR reads as follows:

“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

This provision ensures peaceful coexistence between the ECHR (as a minimum level of protection) and higher internal protection standards (of national and international origin). In

its relationship to national authorities, Article 53 ECHR requires to prevent a conflict of norms in the national sphere and to give effect and precedence to the highest applicable standard. The message of Article 53 ECHR to the Strasbourg judges is twofold.

956. In its procedural aspect, this provision applies when a respondent State does not respect external obligations that offer higher protection standards than the Convention. When the Court observes this in the context of specific proceedings against a State, it could directly use this article to sanction it. A State cannot invoke lower Strasbourg standards in order to excuse its non-observance of other, binding higher levels of protection. The substantive aspect of this provision is activated when higher and binding human rights standards are applicable in *all* Member States. In that case, this external level of protection actually reflects the common standard in the Strasbourg context. Just as national authorities are obliged to give precedence to such applicable higher norms in a national context, the Court is advised to pursue that result. As a consequence, higher human rights standards binding all Member States exercise coercive or binding authority *vis-à-vis* the Court's reasoning; the Court has the obligation to substantively integrate them in order to safeguard their existence.

957. On top of that, Article 53 ECHR prevents a downward evolution of the ECHR on the basis of external human rights instruments offering lower standards. Inspired by the ACtHR, we argued for a *symmetric* human rights safeguard; it does not only safeguard external standards, it also safeguards the ECHR by protecting it against external detrimental influences which could lead to a 'race-to-the-bottom' in human rights protection.

Second dimension

958. The *second* dimension of the legal framework introduces Article 31 paragraph 3 (c) VCLT. Article 31 paragraph 3 (c) VCLT, as a general rule of interpretation, provides that

"...[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in relations between the parties".

The provision aims at systemic integration and harmony within and between different systems of law. The Court includes this provision to support its referencing practice, mostly in a context of 'harmonious interpretation' between the ECHR and external obligations of general international law. The Grand Chamber generally does not interpret *Demir and Baykara v. Turkey* as offering a green light to use Article 31 paragraph 3 (c) VCLT in relation to non-binding instruments and/or to 'evolutive' interpretation. In the examined case law, it hardly ever happens that the Court includes this provision for that purpose. This is understandable. Although doctrine has criticized the Court for misinterpreting Article 31 paragraph 3 (c) VCLT

in the sense of defining it in a too expansive way (covering non-binding instruments), we do not think such broad interpretation necessarily follows from *Demir and Baykara* (or from the other Grand Chamber cases examined). Admittedly, the Court in *Demir and Baykara* situated Article 31 paragraph 3 (c) VCLT in a context of referencing: it used it to stress that the ECHR should not be read in a vacuum. However, the Court did not explicitly acknowledge that this provision would justify the use of non-binding instruments, neither that it would validate ‘evolutive’ reasoning. In our opinion, it was not the Court’s purpose to give such effect to Article 31 paragraph 3 (c) VCLT or, at least, when it had that purpose, it did not explain it well. According to our case law analysis, subsequent Grand Chamber decisions share that opinion; they do generally not conceive Article 31 paragraph 3 (c) VCLT as an open door to make use of non-binding instruments or to make ‘evolve’ the Convention based on external norms. The added value of studying a large amount of cases is apparent here; it shows a larger picture, instead of isolating controversial cases (such as *R.M.T. v. the United Kingdom* which, in our view, misinterpreted *Demir and Baykara* by invoking Article 31 paragraph 3 (c) VCLT to justify ‘evolutive’ references to non-binding instruments).

959. We suggest a *maximalist* understanding of Article 31 paragraph 3 (c) VCLT, which means that account should be taken of external instruments when interpreting the Convention under the condition that ‘every party’ of the CoE is also a member to the imported instrument. Generally, the Court respects this understanding in its case law. There has been some discussion about the scope of the notion of a ‘relevant’ external rule. Both doctrine and the Court itself – at least in theory – favored a broad approach, allowing the term to equally cover external human rights norms, and not only norms of general international law. Then, the effect would not be any different from that of Article 53 ECHR. In practice, however, the Court did generally not connect the use of Article 31 paragraph 3 (c) VCLT to human rights instruments, which we regret. The reason for the Court’s attitude is not certain. Possibly, it is motivated by the heavy impact of a broad reading of the notion ‘relevant’. Such a stance would require harmonization with all human rights instruments with binding force in all Member States, including a substantive integration of all their higher protection standards. The Court does not seem willing to accept such a coercive ‘*pro persona*’ principle.

960. While pleading in favor of a coordinative integration of external human rights law on the basis of Article 31 paragraph 3 (c) VCLT, we would urge some caution in respect of such integration in connection to general rules of international law. Article 31 paragraph 3 (c) VCLT, and the manner in which it is conceived by the ILC, is underpinned by an ideal of respecting general international law for the sake of unity of the international normative environment. The aim of combating fragmentation combined with a strong presumption against conflict might go against the specific logic of the ECHR. Human rights law, compared

to other branches of law, has a particular nature, built on human dignity and the protection of the public order. Admittedly, reconciliation and 'coordinative integration' is always the first aim. This implies human rights conform interpretation of general international law, which is generally respected by the Court. For instance, the Court interprets the VCLT in a human rights specific manner, but without contradicting it. Doing so, the Court does justice to the international legal framework; it allows general law to permeate its own legal order and it combats fragmentation. However, when such porosity is not possible without negatively affecting human rights, 'coordinative integration' should be replaced by 'hierarchical integration', leading to 'disapplication' of the conflicting norm. In turn, human rights law also injects general international law, as a *lex specialis* of constitutional protection. By not acknowledging conflicts where they actually exist, the Court has so far avoided the question about the relationship between general international law and human rights law. It is clear that it prefers coherence and accommodation, but it sometimes defends these ideals to the detriment of an effective human rights protection. In our view, the fight against fragmentation is important, but not at any cost. When international law conflicts with human rights law in an irreconcilable manner, this conflict should at least be recognized. In such a situation, although there is no common agreement on this issue, we argue for a priority of the Convention, based on its *lex specialis*-character, on its position as an instrument of European public order, on the principle of non-regression, and on the absence of a binding human rights supervision at the global level.

961. Both obligatory dimensions are innovative. The Grand Chamber has so far not used Article 53 ECHR in this manner. Also, Article 31 paragraph 3 (c) VCLT has generally received a narrower application. We recommend the Court to make use more systematically of the proposed mandatory legal framework. This would increase quality, clarity and coherence of some aspects of the Strasbourg referencing practice, with beneficial effects on legal validity. This is necessary, given the amount of criticism the Court receives with regard to its unclear and non-transparent method. Our suggestions are far-going, obliging the Court to integrate higher applicable protection standards (even when these standards follow from *quasi*-judicial bodies), and will be difficult to defend politically. Nevertheless, we strived as far as possible for keeping a balance between a loss of autonomy and a benefit of safeguarding and systematically integrating human rights provisions and other rules of international law. Therefore, we did not interpret Articles 53 ECHR and 31 paragraph 3 (c) VCLT in the largest possible manner; they only have effect in case the external norms are binding in all Member States. Moreover, we only plead in favor of substantive integration in case the higher level of protection is clear *prima facie*.

Third dimension

962. External references could be authorized as a method to enable ‘evolutive’ interpretation, ‘practical and effective’ interpretation, autonomous interpretation and the establishment of a ‘margin of appreciation’. In principle, a method serving these principles could be covered by a holistic approach to the interpretative rules of the VCLT. Such combined view on the VCLT requires an interpretation that does justice to the various elements these rules cover, including: the *text* of the treaty, the importance of (some degree of) *State consent*, the *internal and external context* of the treaty, and the *object and purpose* of the treaty. External instruments are particularly relevant to prove State consent as well as to take account of the external context and the object and purpose of the treaty and its provisions.

963. A holistic reading of the VCLT could serve as a legal justification for the optional use of external instruments, but it also sets boundaries. For instance, no interpretation against the text is allowed (except when there is full State consensus on the matter). In addition, a backward reference is prohibited, in the light of the object and purpose of the Convention. Furthermore, because the external context is not the only relevant element, any interpretation should pay due attention to State consent too. This condition, nonetheless, allows some flexibility in the area of human rights protection, which is fuelled, as a *lex specialis*, by values of human dignity capable of transcending the dictates of States. For this reason, human rights interpretation should not be backed up by full State agreement. This does not oppose the rules of the VCLT, but enriches their meaning in the particular context of human rights adjudication.

964. A concept that catches well a combined reading of the rules of the VCLT, without losing sight of the specificity of human rights law, is the search for the ‘*opinio juris* under the treaty’. This phrase covers a contemporary ‘general belief’ that an (emerging or ambiguous) consensus (demonstrated by binding national and international instruments) requires a certain interpretation. On the one hand, this view does not require full State consent for a dynamic reading of the Convention. On the other hand, a certain level of State consent is not sufficient either: there must also be a ‘general belief’ that this consent should trigger a certain interpretation. In other words, the ‘*opinio juris*’ gives legal relevance to an emerging or an ambiguous consensus, which needs positive proof of a general belief to be legally binding. To demonstrate *opinio juris*, a wide diversity of external instruments could be mobilized, including those of a non-binding and of a judicial nature. What counts, is a changing trend in State and non-State normative practice and initiatives. Political non-binding instruments, such as recommendations of the CoE COM and PACE, that evidence some ‘State practice’ or ‘State agreement’, are of particular relevance in this context: the VCLT, in Articles 31 paragraph 3 (a) and (b), obliges to take such instruments into account (but not to give them a binding effect).

In order to measure the weight of certain 'soft' instruments *vis-à-vis* the search for *opinio juris*, it is interesting to establish 'degrees' of externality, *inter alia* depending on the author of the instrument, its content, date, *etc.* A great value of the notion of '*opinio juris* under the treaty' is that it could replace the current potpourri of Strasbourg terminology to designate a common approach, i.e. a consensus (European, international, clear, emerging,...), a majority, a tendency, a development, ...

965. A holistic reading of the VCLT, under some conditions, authorizes ('binding authority'), encourages ('persuasive/optional authority') and justifies the interpreter to import external instruments in its reasoning. Just as we did when mobilizing Article 53 ECHR and Article 31 paragraph 3 (c) VCLT, we systemically embed the method of external referencing in the more general legal framework. At the same time, we achieve to accommodate this framework with the specific character of human rights law, affording the Court a certain measure of flexibility. This flexible interpretative framework has the potential to enhance the legal validity of the method of external referencing in Strasbourg reasoning.

A justification of a referencing method by interests and needs of human rights users

966. When thinking about validity from a users' perspective, we adopt a functional approach and focus on the benefits of the referencing practice for human rights users' interests. Justifying arguments are then underpinned by practical objectives. Is referencing useful on the ground? Does it serve needs and identities of the users? What 'tools' does it offer them? Four user categories are put in the centre of our attention: rights holders, third party users, duty bearers, and judicial users (the judges).

967. Some members of these groups have an interest in progressive human rights protection, including some duty bearers that might want to avoid 'free riders' in the field. We conclude that, most often, the inclusion of external instruments operates as a vehicle for enhancing human rights. Generally, their use raises protection levels. This trend, however, is not always affirmed; sometimes the Court includes external instruments without giving effect to them, preventing development of human rights on that basis. Moreover, there are examples of references hindering progressive protection; they might lead to inertia or support the proportionality of interferences. Also when human rights conflict with rules of general international law, this affects a substantive supervision.

968. When we focus solely on the rights holders, referencing serves varying needs. Firstly, it contributes to the ideal of treating like cases alike by creating a global *ius communis*. The core of this *ius* are the peoples, who, as members of a global community, have an interest in rules

applicable in an equal manner to all. Such a *ius gentium* does justice to their dignity and to the global consensus on the universality of human rights. From that perspective, a human rights adjudication that integrates higher protection standards is valid. The same can be said about references to human rights of a social, economic or cultural nature. The integration of these rights in a Strasbourg context strengthens the principles of universal and indivisible rights. Such an interdependent approach responds to the full experience of human rights users, avoiding a fragmented view on their identities. This also holds true for the importation of specific categorical rights. A rights holder that is not only a victim, but also a woman and a worker might feel satisfied when the Strasbourg Court makes use of external instruments specifically tailored to these traits. The inclusion of such references respects the rights holders' full experiences and identity, which is useful and valid from their perspective.

969. External referencing contributes to the coherence of the system. As we said, references generally happen in a spirit of comity, without explicit opposition. A Judge Hercules, looking down at the normative architecture from above, would be satisfied with such integrity. Also the rights holders and the duty bearers might benefit from this situation since it enhances the principle of legal certainty. For rights holders, references are particularly useful when they serve legal certainty in its substantive understanding. Material coherence indeed brings human rights norms closer together and strengthens their universality and indivisibility. Duty bearers might be more interested in the traditional aspect of legal certainty, ensuring processes are underpinned by formal rules. The Court, from their perspective, falls short when it allows non-binding instruments having coercive effects in legal reasoning. Admittedly, the Court strengthens the power of 'soft' instruments by the referencing practice, but this challenge should not be overrated. Often, the Court exposes a rather traditional viewpoint on the interpretative sources, not allowing non-binding instruments to exercise independent decisive weight.

970. Users' interests are not objective and straightforward; they differ between users' categories. What is valuable in the eyes of one actor, might be invalid in the eyes of others. For instance, a Judge Hercules might be satisfied with a high degree of coherence. However, when these coordinative efforts affect progressive human rights, some rights holders might feel negatively affected. When non-binding instruments operate as tools for a coherent development of human rights, leading to higher and predictable standards, some (third) parties might be satisfied. On the contrary, such 'soft' references might be perceived invalid from a duty bearers' point of view. Also within users' categories, interests might vary. This thesis, for instance, shows that references included by (third) parties might hinder human rights protection, or aim to push for one right to the detriment of another.

971. Human rights law, especially in hard cases, is often about balancing values and interests. Also here, the referencing practice has benefits. It could contribute to nuanced and shared decision-making. The importing of instruments of different authors allows taking into account of a wide diversity of voices. For instance, it enables the injection of (policy) decisions States made elsewhere, it allows the influence of 'good solutions' that other judges created in comparable cases, it facilitates expert views to permeate the arguments, *etc.* Throughout comparative exercises, the judges build a dialectic network of mutual influences and communicative enrichment on a global scale. If we conceive it as the Court's task to translate pluralism in nuanced outcomes and to canalize the different interests underlying a case, the importation of various views from across the globe might contribute to that responsibility.

972. When we move to a very pragmatic level, references are valid because they serve as arguments in legal reasoning. While instruments could theoretically be conceived as 'external', they might operate as 'internal' components of the interpretative context. The human rights users might not care much about the legal status of an external instrument or about the integrity of the system. Their highest concern seems whether the instrument offers arguments to convince their audience or not. External instruments, as argumentative tools, have such power. As persuasive authorities, (third) parties could import them to influence their 'audience', *i.e.* the judges. Referencing strengthens their procedural position, enhancing the validity of this practice from their perspective. The same can be said about the Judges. Also they include references to persuade their (universal) audience. This has the potential to increase their credibility, which is one of the judges' main interests. The importance, from a Judges' perspective, is to convince and show, with the help of these instruments, that a 'just' outcome has been reached. For that purpose, it might be interesting to take account (and balance between) other users' interests such as a universal and indivisible protection of human rights, legal certainty, progressive reasoning, *etc.* Moreover, the use of external instruments could contribute to procedural economy, which could equally have a positive influence on the Court's reputation.

973. Almost none of the Strasbourg external references are justified by (desirable) effects from a users' point of view. Indeed, to support external referencing, the Court generally does not mention the principles of universality and indivisibility of human rights, the need to create a larger communication network from an ideal of 'sharing justice', the need to build argumentations within a more global, informal or shared approach, *etc.* If the Court would put external referencing more often under these spotlights, the validity of the references could grow.

Practice and the law – a reciprocal interaction

A users' perspective informing requirements of legality, and vice versa

974. At a practical and pragmatic level, it is not of high concern when human rights users 'pick and choose' external instruments that fit best the achievement of their arguments and interests. 'Cherry picking' might actually be a very welcome phenomenon for pursuing aims such as finding a solution to a case, progressively evolve human rights, convincing the public, *etc.* As long as the referencing practice serves such interests, the users might conceive it as 'valid', regardless of whether it is 'legal' or not. Full discretion with regard of the choice of external instruments, however, does not seem the best solution for the validity of the practice, not even from a users' perspective. From a perspective that considers legal certainty as a central characteristic of the rule of law, a deficient methodology of the referencing practice is problematic. Judges, moreover, have an interest in keeping their credibility high in the eyes of the duty bearers and the rights holders. Some degree of formalism is required for that purpose: illegal references will not easily persuade the audience. The human rights users, including the rights holders, are concerned with legality when assessing the legitimacy of the Court. Even from a users' point of view, the creation of a strong legal framework (and internal methodological coherence) is an important aim that nourishes their interests.

975. Our legal framework interprets the existing law in a balanced manner, holding a middle ground between the interests of the duty bearers (because of the importance of State consent) and the rights holders (because of the importance of the specific character of human rights law, that, as an instrument of public order, puts individuals and their dignity in the centre of attention). The creation of the legal framework, inspired by some users' interests, might also serve the human rights users' needs in practice. For example, the framework encourages and strengthens the advancement of human rights protection. Indeed, we have argued for the application of a principle of non-regression and, in line with the ECHR and the VCLT, for absorbing higher applicable protection standards. Formal systematization might also contribute to making references more 'legally certain' and predictable. The legal framework does justice to a rights holders' perspective; it encourages progressive, universal, interdependent, effective, predictable, ... human rights in a legally convincing manner. Hence, besides the users nourishing legal questions of formal validity, questions of legality also inform the validity from a users' perspective, in a process of reciprocal interaction.

976. The users' influence on lawmaking is twofold. Their 'bottom up' input is noteworthy given the initiative they take *vis-à-vis* external referencing. In addition, users have an impact on the law when they are the authors of the imported instruments.

977. External instruments enter legal reasoning and enter the law on the initiative of the judges or of the (third) party users. These actors are the references' social points of entry. Through the use of instruments, these actors construct legal arguments and convince the audience, often in a dynamic manner. As a consequence, they influence the social and dialectic process that law-making is. One other user might also be influential in this process, *i.e.* the Court's Research Division. This section offers legal information to the judges and seems to play a large role in the introduction and examination of external instruments. Accordingly, it might have considerable influence on the choice and impact of such instruments in the Strasbourg decision-making process. For a comprehensive understanding of all social actors contributing to lawmaking in a context of external referencing, the study of the role of the Research Division is important and recommended for further (sociological) research. Whereas (third) parties and the Research Division might encourage the Court to include references, it is ultimately the Court that decides if instruments are imported and how much weight will be attributed to them. Here too, there is room for further research. A true participants' approach aims to look into the judges' heads in order to find out why, in their perception, some external instruments are (not) relevant and to what extent, for them, such instruments constitute 'sources' of law. Interviewing the judges would therefore be a recommendable next step to complement research about external referencing.

978. The instruments that are used in Strasbourg adjudication are of very different origin. Imagine that the judges import a decision of the ACtHR. As a result, the content of this judicial instrument, through global communication, becomes part of the CoE legal order, with normative effects on the understanding of the law. Here, the judges of the ACtHR contribute to the shared process that law-making is. This challenges traditional theories on 'legal sources'. If the Court is willing to ensure the continuance of the global dialogue, we estimate that it should be aware of its controversial aspects. Especially from a State's point of view, 'deformalization' might be considered to be a move infringing sovereignty. Sometimes, States have consciously opted for creating 'soft' instruments in order to avoid binding effects. If such binding effects are obtained more indirectly, through the referencing practice, States' autonomy might suffer. To soften such challenges, it seems of importance that the Court, in a flexible manner, connects the referencing method to the interpretative rules of the VCLT, in a combined reading. The latter framework, on the one hand, does not deny non-binding

instruments a role in legal reasoning. On the other hand, it insists on a more structured methodology without denying the relevance of some degree of 'State content'

979. We started our research with a sketch of the present normative environment; it is disordered and can be metaphorically compared to a jungle. The Strasbourg judges walk through this area and use lianas to make connections between all elements that compose this forest. Through their referencing practice, they communicate, learn, and argue. In an ecosystem, all organisms are dependent on one another; they cannot survive in isolation. Following the rules of nature, the organisms mutually profit from each other's existence and finally, provide each other with oxygen. In order to be good rangers in this jungle, the Strasbourg judges should recognize and acknowledge the existence and the value of all the other organisms. In addition, to ensure a high degree of balance, they should keep an eye both on the system's rules (legality) and on the views and interests of those that benefit from the system (the users). By handling the lianas in such manner, the Court contributes to more coherence of the system (combating fragmentation) and caters for the users' needs. This does not mean that one day, the jungle will be turned into a nicely organized cornfield. Some diversity in global times is inevitable and necessary. After all, it is the chaotic context that offers us tools to advance the law, to persuade the public, *etc.* The art is not to replace pluralism by unity, but to find a balance between divergence and convergence by creating a form of justice that is shared by all.

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- 91) ECtHR (GC), *Janowiec and Others v. Russia*, 21 October 2013, Appl. Nos. 55508/07 and 29520/09.
- 92) ECtHR (GC), *Vallianatos and Others v. Greece*, 7 November 2013, Appl. Nos. 29381/09 and 32684/09.
- 93) ECtHR (GC), *Söderman v. Sweden*, 12 November 2013, Appl. No. 5786/08.
- 94) ECtHR (GC), *X v. Latvia*, 26 November 2013, Appl. No. 27853/09.
- 95) ECtHR (GC), *O'Keeffe v. Ireland*, 28 January 2014, Appl. No. 35810/09.
- 96) ECtHR (GC), *Kurić and Others v. Slovenia*, 12 March 2014, Appl. No. 26828/06.
- 97) ECtHR (GC), *Vučković and Others v. Serbia*, 25 March 2014, Appl. Nos. 17153/11, 17157/11, etc.
- 98) ECtHR (GC), *Vistiņš and Perepjolkins v. Latvia (just satisfaction)*, 25 March 2014, Appl. No. 71243/01.
- 99) ECtHR (GC), *Cyprus v. Turkey (just satisfaction)*, 12 May 2014, Appl. No. 25781/94.
- 100) ECtHR (GC), *Marguš v. Croatia*, 27 May 2014, App. No. 445/10.
- 101) ECtHR (GC), *Fernández Martínez v. Spain*, 12 June 2014, Appl. No. 56030/07.
- 102) ECtHR (GC), *SAS v. France*, 1 July 2014, Appl. No. 43835/11.

- 103) ECtHR (GC), *Georgia v. Russia (No.1)*, 4 July 2014, Appl. No. 13255/07.
- 104) ECtHR (GC), *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, 16 July 2014, Appl. No. 60642/08.
- 105) ECtHR (GC), *Hämäläinen v. Finland*, 16 July 2014, Appl. No. 37359/09.
- 106) ECtHR (GC), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, 17 July 2014, Appl. No. 47848/08.
- 107) ECtHR (GC), *Svinarenko and Slyadnev v. Russia*, 17 July 2014, Appl. Nos. 32541/08 and 43441/08.
- 108) ECtHR (GC), *Hassan v. the United Kingdom*, 16 September 2014, Appl. No. 29750/09.
- 109) ECtHR (GC), *Mocanu and Others v. Romania*, 17 September 2014, Appl. Nos. 10865/09, 45886/07, 32431/08.
- 110) ECtHR (GC), *Gross v. Switzerland*, 30 September 2014, Appl. No. 67810/10.
- 111) ECtHR (GC), *Jeunesse v. the Netherlands*, 3 October 2014, Appl. No. 12738/10.
- 112) ECtHR (GC), *Tarakhel v. Switzerland*, 4 November 2014, Appl. No. 29217/12.
- 113) ECtHR (GC), *Jaloud v. the Netherlands*, 20 November 2014, Appl. No. 47708/08.
- 114) ECtHR (GC), *Rohlena v. Czech Republic*, 27 January 2015, Appl. No. 59552/08.
- 115) ECtHR (GC), *Bochan v. Ukraine (No.2)*, 5 February 2015, Appl. No. 22251/08.
- 116) ECtHR (GC), *S.J. v. Belgium (striking out)*, 19 March 2015, Appl. No. 70055/10.
- 117) ECtHR (GC), *W.H. v. Sweden (striking out)*, 8 April 2015, Appl. No. 49341/10.
- 118) ECtHR (GC), *M.E. v. Sweden (striking out)*, 8 April 2015, Appl. No. 71398/12.
- 119) ECtHR (GC), *Mustafa Tunç and Ferice Tunç v. Turkey*, 14 April 2015, Appl. No. 24014/05.
- 120) ECtHR (GC), *Morice v. France*, 23 April 2015, Appl. No. 29369/10.
- 121) ECtHR (GC), *Lambert and Others v. France*, 5 June 2015, Appl. No. 46043/14.
- 122) ECtHR (GC), *Sargsyan v. Azerbaijan*, 16 June 2015, Appl. No. 40167/06.
- 123) ECtHR (GC), *Chiragov and Others v. Armenia*, 16 June 2015, Appl. No. 13216/05.
- 124) ECtHR (GC), *Delfi AS v. Estonia*, 16 June 2015, Appl. No. 64569/09.
- 125) ECtHR (GC), *Khoroshenko v. Russia*, 30 June 2015, Appl. No. 41418/04.
- 126) ECtHR (GC), decision of *Răzvan Mihai Gherghina v. Romania*, 9 July 2015, Appl. No. 42219/07.
- 127) ECtHR (GC), *Parrillo v. Italy*, 27 August 2015, Appl. No. 46470/11.
- 128) ECtHR (GC), *Bouyid v. Belgium*, 28 September 2015, Appl. No. 23380/09.
- 129) ECtHR (GC), *Perinçek v. Switzerland*, 15 October 2015, Appl. No. 27510/08.
- 130) ECtHR (GC), *Kudrevičius and Others v. Lithuania*, 15 October 2015, Appl. No. 37553/05.
- 131) ECtHR (GC), *Vasiliauskas v. Lithuania*, 20 October 2015, Appl. No. 35343/05.
- 132) ECtHR (GC), *Pentikäinen v. Finland*, 20 October 2015, Appl. No. 1182/10.
- 133) ECtHR (GC), *Dvorski v. Croatia*, 20 October 2015, Appl. No. 25703/11.
- 134) ECtHR (GC), *Couderc and Hachette Filipacchi Associés v. France*, 10 November 2015, Appl. No. 40454/07.
- 135) ECtHR (GC), *Roman Zakharov v. Russia*, 4 December 2015, Appl. No. 47143/06.
- 136) ECtHR (GC), *Schatschaschwili v. Germany*, 15 December 2015, Appl. No. 9154/10.

Annex 2: Argumentative functions of external referencing per case

List of argumentative functions:

- A = dismissive use of external instruments
- B = clarification of the interpretation and execution of treaties by importing the VCLT (except Article 31 paragraph 3 (c) VCLT, which is included under H)
- C = external instruments demonstrating (a lack of) evolution to allow or resist an 'evolutive' interpretation
- D = external instruments to (import and) define notions
- E = external instruments to shape requirements of positive action
- F = external instruments as a general interpretative support
- G = external instruments to demonstrate a (missing) link between an external obligation and a State's behavior
- H = external instruments to create an harmonious interpretation
- I = external instruments to demonstrate a (lack of a) shared position influencing a State's freedom of discretion

	Argumentative functions → ----- GC Cases	No reference	A	B	C	D	E	F	G	H	I
	2008										
1	<i>Demir and Baykara</i>			X	X	X					X
2	<i>Salduz</i>						X				
3	<i>S. and Marper</i>							X			X
	2009										
4	<i>Sergey Zolotukhin</i>				X	X				X	
5	<i>Andrejeva</i>					X					
6	<i>Kozacioğlu</i>						X				
7	<i>A. and Others</i>		X								
8	<i>Bykov</i>	X									
9	<i>Paladi</i>							X			
10	<i>Gorou</i>	X									
11	<i>Léger</i>										
12	<i>Šilih</i>			X	X						
13	<i>VgT</i>			X		X	X				
14	<i>Mooren</i>	X									
15	<i>Scopolla (No. 2)</i>				X						
16	<i>Enea</i>							X			
17	<i>Varnava and Others</i>			X				X			
18	<i>Micallef</i>				X						
19	<i>Kart</i>	X									
20	<i>Sejdić and Finci</i>					X			X		X
21	<i>Guiso-Gallisay</i>	X									
	2010										
22	<i>Demopoulos and Others</i>					X		X			

23	Carson and Others							X			
24	Oršuš and Others							X			
25	Cudak								X	X	
26	Brosset-Triboulet						X				
27	Medvedyev and Others								X		
28	Depalle						X				
29	Tănase							X	X		X
30	Kononov					X			X		
31	Gäfgen				X	X					
32	Neulinger and Shuruk					X			X	X	
33	McFarlane	X									
34	Sanoma Uitgevers B.V.	X									
35	Mangouras					X					X
36	Sakniovskiy	X									
37	Şerife Yiğit	X									
38	Perdigao	X									
39	Taxquet	X									
40	A, B, C		X					X			
	2011										
41	Paksas	X									
42	M.S.S.						X	X	X		
43	Lautsi and Others	X									
44	Giuliani and Gaggio						X				
45	Sabeh El Leil								X	X	
46	Al-Jedda								X		
47	Al-Skeini and Others						X				
48	Stummer		X x2			X					X
49	Bayatyan				X				X		
50	Palomo Sánchez and Others							X			
51	Nejdet Şahin and Perihan Şahin	X									
52	S.H. and Others										X
53	Sargsyan (decision)			X		X					
54	Chiragov and Others (decision)			X		X					
55	Al-Khawaja and Tahery							X			
	2012										
56	Stanev				X						
57	Axel Springer A.G.							X			
58	Von Hannover							X			
59	Hirsi Jamaa			X x2		X			X		
60	Creangă	X									
61	Sitaropoulos and Giakoumopoulos		X		X						
62	Aksu						X				
63	Austin and Others	X									
64	Konstantin Markin				X			X			
65	Boulois				X						X
66	Gillberg							X			
67	Kotov	X									
68	Van der Heijden	X									
69	Scopolla (No.3)				X			X			
70	Idalov	X									
71	Centro Europa 7 S.r.l. and Di Stefano						X				
72	Herrmann	X									
73	Kuric and Others		X								
74	Mouvement raëlien										

75	Sabri Güneş		X	X							
76	Nada					X			X	X	
77	Chabauty	X									
78	Catan and Others		X							X	
79	Vistiņš and Perepjolkins	X									
80	El Masri					X x2	X	X	X		
81	De Souza Ribeiro	X									
	2013										
82	Fabris										X
83	X and Others		X					X			X
84	Animal Defenders International						X				X
85	Fabris (just satisfaction)	X									
86	Sindicatul "Păstorul cel Bun"					X					
87	Vinter and Others						X				
88	Allen					X			X		
89	Maktouf and Damjanović								X		
90	Del Rio Prada	X									
91	Janowiec and Others			X x3							
92	Vallianatos and Others										X
93	Söderman	X									
94	X					X			X	X	
	2014										
95	O'Keeffe						X				
96	Kurić and Others	X									
97	Vučković and Others	X									
98	Vistiņš and Perepjolkins	X									
99	Cyprus					X				X	
100	Marguš									X	
101	Fernández Martínez								X		X
102	SAS		X				X				
103	Georgia	X									
104	Ališić and Others		X					X			
105	Hämäläinen	X									
106	Centre for Legal Resources	X									
107	Svinarenko and Slyadnev							X			
108	Hassan			X					X	X	
109	Mocanu and Others							X			
110	Gross	X									
111	Jeunesse		X						X		
112	Tarakhel						X		X		
113	Jaloud		X			X	X		X		
	2015										
114	Rohlena										X
115	Bochan	X									
116	S.J.	X									
117	W.H.	X									
118	M.E.	X									
119	Mustafa Tunç and Ferice Tunç	X									
120	Morice							X			
121	Lambert and Others					X	X				
122	Sargsyan (judgment)		X			X x2	X	X			
123	Chiragov and Others (judgment)						X	X			
124	Delfi AS							X	X		
125	Khoroshenko						X				X

126	<i>Răzvan Mihai Gherghina</i>	X									
127	<i>Parrillo</i>										X
128	<i>Bouyid</i>					X	X				
129	<i>Perinçek</i>		X x2	X		X		X	X		X
130	<i>Kudrevičius and Others</i>		X								
131	<i>Vasiliauskas</i>			X		X			X		
132	<i>Pentikäinen</i>	X									
133	<i>Dvorski</i>	X									
134	<i>Couderc and Hachette Filipacchi Associés</i>							X			
135	<i>Roman Zakharov</i>										X
136	<i>Schatschaschwili</i>								X		
	TOTAL	41	17	15	12	28	22	28	25	10	18