

**‘Fragmentation or Unity of Public International Law’ Revisited:
Analysing the European Convention on Human Rights when the
European Court Takes Cognisance of Public International Law
Norms**

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ABSTRACT

This thesis addresses the legal challenges arising in the context of the ‘fragmentation or unity of public international law’. The question of the so-called fragmentation of public international law mainly refers to the phenomenon of diversification and expansion of public international law. In recent years, the proliferation of international bodies entrusted with the task of monitoring States’ compliance with their international obligations has increased the possibility of conflicting interpretations of similar or identical rules of international law.

In this context, it is claimed that international courts with limited *ratione materiae* and *personae* jurisdiction fragment international law and threaten its unity. This thesis examines the question of the fragmentation of public international law from the perspective of the European Court of Human Rights (ECtHR). In the view of the present author, the European Court has developed the autonomous interpretative principle of taking cognisance of public international law norms when interpreting the European Convention on Human Rights (ECHR). The ECtHR employs this interpretative principle in a fashion that is distinct from other seminal interpretative principles, namely the so-called comparative interpretation, the dynamic interpretation and the principle of effectiveness.

Furthermore, this thesis provides in depth analysis of the ECtHR’s legal reasoning. It reaches conclusions on the type of public international law norms that the ECtHR takes into account and the conditions a norm must satisfy to qualify as ‘relevant’ and ‘applicable in the relations between the parties’. This thesis also provides an overall assessment of the different uses of public international law norms in the ECtHR’s reasoning, when expanding or restricting the scope of the rights and freedoms of the ECHR. It stresses the importance of the ECtHR’s practice of relying upon public international law norms in order to (re-)interpret the ECHR and overrule its previous case-law. Finally, this thesis explores the boundaries that should be set to restrict the impact of other relevant public international law norms on the construction of the ECHR.

The study concludes that, in principle, the ECtHR does not threaten the unity of international law, but reads the ECHR harmoniously to public international law. The findings of this thesis also furnish evidence that the ECtHR has competence to pronounce on questions relating to international law and that, on certain occasions, it develops and enriches the scope and content of international law.

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Some years ago, when I was about to leave Greece, in a moment of anger, I told one of my friends that ‘I have worked so hard for everything that I have done in my life and I do not owe anything to anybody’. Such a statement, besides being very arrogant, can never be true. I am so privileged to owe to so many people.

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Abbreviations

- AJIL** - American Journal of International Law
- All E.R.** - All England Reports
- AFDI** - Annuaire Français de Droit International
- ASIL Proc.** - Proceedings of the American Society of International Law
- Aust. YbkIL** - Australian Yearbook of International Law
- Brook.J.Intl.L.** - Brooklyn Journal of International Law
- BYbkIL** - British Yearbook of International Law
- CJICL** - Cambridge Journal of International and Comparative Law
- Chi.J.Intl.L.** - Chinese Journal of International Law
- Cornell Intl LJ** - Cornell Journal of International Law
- Duke JComp&IntlL** - Duke Journal of Comparative & International Law
- EHRLR** - European Human Rights Law Review
- EJIL** - European Journal of International Law
- ETS** - European Treaty Series
- Eur Ybk Min Issues** - European Yearbook of Minority Issues
- Geo. Wash.IntlLRev.** - George Washington International Law Review
- GLJ** - German Law Journal
- GYbkIL** - German Yearbook of International Law
- Harv.IntlLJ** - Harvard International Law Journal
- Howard L.J.** - Howard Law Journal
- HRLJ** - Human Rights Law Journal
- HRLRev** - Human Rights Law Review
- HRQ** - Human Rights Quarterly

ICLQ - International and Comparative Law Quarterly

ILM - International Legal Materials

IJGLS - Indiana Journal of Global Legal Studies

Ind.L.J. - Industrial Law Journal

IJHR - International Journal of Human Rights

Intl JRefL - International Journal of Refugee Law

Intl OrgLRev - International Organisations Law Review

JDI - Journal de Droit International

JEMIE - Journal of Ethnopolitics and Minority Issues in Europe

JIntlCrimJ - Journal of International Criminal Justice

J Intl Dip Settlement - Journal of International Dispute Settlement

J Priv Intl L - Journal of Private International Law

LNTS – League of Nations Treaty Series

LJIL - Leiden Journal of International Law

Max Planck YbkUNL - Max Planck Yearbook of United Nations Law

Michigan JIL - Michigan Journal of International Law

MLR - Modern Law Review

NILR - Netherlands International Law Review

NQHR - Netherlands Quarterly of Human Rights

NethYbkIL - Netherlands Yearbook of International Law

NGO - Non-Governmental Organisation

Nordic JIL - Nordic Journal of International Law

N.Y.U.J.Intl.L.&Pol. - New York University Journal of International Law and Politics

PL - Public Law

RdC - Recueil des cours de l' Académie de Droit International

RGDIP - Revue Général de Droit International Public

Sydney L.Rev. - Sydney Law Review

Transnatl L. & Contemp. Probs. - Transnational Law and Contemporary Problems

UNTS - United Nations Treaty Series

Virginia JIL - Virginia Journal of International Law

Yale JIL - Yale Journal of International Law

YbkILC – Yearbook of the International Law Commission

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INTRODUCTION

1. The questions addressed

The present thesis addresses certain of the legal challenges arising in the context of the ‘fragmentation or unity of public international law’. The question of the so-called fragmentation of public international law (hereafter PIL) has been at the forefront of academic debate and the practice of international courts and tribunals over the last decade. The fragmentation of PIL mainly refers to the phenomenon of diversification and expansion of PIL. In recent years, the proliferation of international bodies entrusted with the task of monitoring States’ compliance with their international obligations has increased the possibility of conflicting interpretations of similar or identical rules of PIL. The importance of the topic is evidenced by the fact that, in 2006, the United Nations International Law Commission (ILC) completed its Study on the ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’.¹

One of the main difficulties of the question of fragmentation of PIL is the role of courts with restricted *ratione materiae* jurisdiction, namely courts which are entrusted to interpret and apply a specific body of law, usually a treaty or a series of treaties.² It is argued that such courts often ignore PIL when interpreting and applying their constitutive instruments, hence forming

¹ International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law’, Report of the Study Group of the International Law Commission finalised by M. Koskenniemi, (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682.

² Alternately, international courts with limited *ratione materiae* jurisdiction may be defined in a negative way: they are international courts which are *not* potentially available to all States and/or their subject-matter jurisdiction is *not* potentially unlimited. See R. Mackenzie, C.P.R. Romano, Y. Shany with P. Sands, *Manual on International Courts and Tribunals* (Oxford University Press, Oxford, 2010) 1.

‘little separate empires’ and ‘special regimes’. Hence, it is claimed that international courts with limited *ratione materiae* jurisdiction fragment PIL and threaten its unity.

The thesis examines the question of the fragmentation of PIL from the perspective of the European Court of Human Rights (ECtHR or Court). The choice to study the example of the ECtHR is based on the fact that the court in question has the most extensive jurisprudence of any international court in PIL. Furthermore, the European Convention of Human Rights (ECHR)³ and its Additional Protocols, which update and enhance the scope and substantive guarantees of rights and freedoms, form the most well-developed regional system for the protection of human rights. Notably, the ECtHR has been frequently accused of endangering the unity of PIL. Therefore, it is the best candidate for testing whether, and if yes, how, it mitigates the challenges arising from the fragmentation of PIL through an examination of its case-law.

The thesis discusses the interpretation of the ECHR by taking cognisance of PIL norms. The ECtHR has already produced a significant pertinent practice. Judges sitting at the bench of the Court witness that hardly a week goes by without the Court discussing issues related to PIL.⁴ This practice also becomes evident from the text of the judgments themselves. It is common

³ Convention for the Protection of Human Rights and Fundamental Freedoms (concluded on 4 November 1950; entered into force on 3 September 1953) ETS No 005.

⁴ As noted by Judges Myjer and Caflisch: E. Myjer, ‘Hardly a Week Goes by without... Observations on the Increasing Number of General Problems of International Law in the Case Law of the European Court of Human Rights’, in I. Boerefijn, J. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights* (Intersentia, Antwerp-Oxford-Portland, 2008) 327, 327-328; L. Caflisch, ‘International Law and the European Court of Human Rights’, in *Dialogue between Judges* (Council of Europe, Strasbourg, 2007) 23, 27. See also Speech of H.E. Judge R. Higgins, President of the International Court of Justice, ‘The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights’, Ceremony marking the 50th Anniversary of the European Court of Human Rights, 30 January 2009, available at http://www.echr.coe.int/NR/rdonlyres/38D1E6A5-DE24-42BD-BC3D-45CCCC8A7F8A/0/30012009PresidentHigginsHearing_eng_.pdf

practice to encounter a separate heading under the Facts of the case entitled ‘relevant international law’ or ‘relevant international treaties and other materials’ in which the Court makes reference to a variety of PIL norms.⁵ It is also of interest that in 2012 the Court launched a new search engine of its case-law on its website. A new search option was introduced specifically including ‘international law and other relevant material’. An additional recent development is the establishment of a small research division in Strasbourg, which is entrusted with the task of carrying out studies on comparative and PIL questions. The division has already published a report on the use of Council of Europe treaties in the case-law of the Court.⁶ The Court’s practice to take cognisance of PIL has already found its way into the new editions of the general textbooks discussing the ECHR and the jurisprudence of the Court.⁷ Most importantly, in the 2010 Interlaken Declaration by the High Level Conference on the Future of the European Court of Human Rights, member States explicitly underlined the importance of ensuring that the judges appointed to the Court have sufficient knowledge of PIL.⁸

It is considered a truism to state that the ECtHR takes cognisance of PIL as an aid for the interpretation of the ECHR. Rather, this study provides

⁵ M. Eudes, *La Pratique Judiciaire de la Cour Européenne des Droits de l’ Homme* (Pedone, Paris, 2005) 250.

⁶ Report by the Research Division, The Use of Council of Europe Treaties in the Case-Law of the European Court of Human Rights (Council of Europe/European Court of Human Rights, 2011), available at http://www.echr.coe.int/NR/rdonlyres/FE35FFDC-6FFC-458E-A2E4-5FE51767A4E2/0/RAPPORT_RECHERCHE_CoE_Treaties_EN.pdf.

⁷ For example, cf. the fifth edition of C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 18, 580-581 to the fourth edition (2006).

⁸ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, point 8 (a), available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tnp/final_en.pdf; Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM (2012) 40 Addendum Final, 29 March 2012, [27]-[28].

detailed discussion of the legal reasoning of the Court and the different uses of PIL. An important question is whether the Court follows a specific methodology and whether it is possible to discern patterns in its jurisprudence. Certain interpretative means and principles have already been suggested, in the fragmentation of PIL discussion and in the ILC's work, in order to alleviate the difficulties of fragmentation. This thesis examines whether the Court follows the aforementioned principles. If the Court does follow a certain interpretative practice in its case-law, it is also crucial to explore how the interpretative practice of taking cognisance of PIL norms interrelates with other interpretative principles, such as the dynamic interpretation of the ECHR or the principle of effectiveness.

Another question concerns the different ways that PIL norms assist in the interpretation of the ECHR. Is the Court employing them in a rhetorical fashion? Do PIL norms serve as a supportive consideration of a given interpretation or do they have a significant impact on the final construction of the ECHR? Further, is the Court using PIL norms to enhancing the effective protection of human rights or to restricting the scope of protection under the ECHR? In order to emphasise the importance of systematically exploring the varying ways in which PIL norms are employed by the Court in its legal reasoning, this thesis follows the following structure. The relevant jurisprudence is classified and analysed on the basis of how the Court uses PIL norms, for example in order to define terms in the text of the ECHR or to expand or restrict the scope of rights envisaged in the ECHR.

If the Court has such an extensive practice of engaging with and taking other PIL norms into account, how it treats these external norms should be

studied. Since the Court's jurisdiction is restricted to interpreting and applying the ECHR and the Additional Protocols thereto (Article 32 ECHR), is there a boundary to draw with regards to its authority and competence to take cognisance of PIL norms for interpreting the ECHR?

Finally, and most importantly, does the practice of the Court of reading the ECHR in light of PIL norms effectively alleviates the alleged threat of fragmentation? Does the ECtHR endanger the unity of PIL? Or does it develop its case-law and the rights and freedoms under the ECHR consistently with and harmoniously to PIL?

While writing this thesis, two other studies were published concerning, in general, the relationship of the ECHR to PIL.⁹ This is not surprising considering the significance of the Court's jurisprudence and the topicality of the fragmentation of PIL discussion. It comes to reinforce the belief of the present author that the Court's practice qualifies as a legally significant phenomenon worthy of further study. Nonetheless, there are considerable differences between the present thesis and these publications.

Both studies focus on different research questions to the questions discussed in this thesis. As it will be seen, the present author puts forward an argument which has not been previously explored in literature. Also, Vanneste and Forowicz, in their studies, chose to focus on particular topics (Vanneste on general international law and Forowicz on specific themes, such as child rights, refugees' rights), whereas the present study discusses the Court's case-law holistically. The temporal scope also differs substantially. Although both

⁹ F. Vanneste, *General International Law before Human Rights Courts – Assessing the Specialty Claims of International Human Rights Law* (Intersentia, Antwerp-Oxford-Portland, 2010); M. Forowicz, *The Reception of International Law by the European Court of Human Rights* (Oxford University Press, New York, 2010).

monographs are quite recent, they do not take recent judgments of the Court (2008-2010) into account, which, as it will be seen, are fundamental to drawing final conclusions regarding the practice of the ECtHR.

2. Definition of terminology

It is essential to clarify the meaning of certain terms which are used throughout the thesis. The reader can see the term ‘public international law norms’ already in the title of the thesis. This term refers to the sources of international law, as envisaged in Article 38 (1) of the Statute of the International Court of Justice: international treaties, international custom and general principles of law recognised by civilised nations (general principles of law). It additionally includes non-binding international instruments (soft-law). For reasons of convenience, ‘public international law’ will be hereafter referred to as ‘PIL’.

There are also other important terms which will be used in the Introduction and throughout the thesis, for example ‘general international law’. General international law is a concept that is often used but rarely defined. In fact, there is no authoritative definition of the term.¹⁰ International lawyers often adopt a negative definition, namely general international law is anything but treaty law (*lex specialis*).¹¹ However, if treaties are excluded altogether from its scope, a narrow meaning would be attributed to general international

¹⁰ M.T. Kamminga, ‘Final Report on the Impact of International Human Rights Law on General International Law’, in M.T. Kamminga, M. Scheinin (eds.), *The Impact of Human Rights on General International Law* (Oxford University Press, Oxford, 2009) 1, 2; R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2010) 262.

¹¹ Kamminga, (note 10).

law.¹² Consequently, general international law for the present purposes means public international law which is binding on a large number of States. This includes international custom, general principles of law, *jus cogens* and multilateral treaties, which are widely ratified and are open to all States (for example, the International Covenant on Civil and Political Rights).

‘International courts and tribunals’ is also a term which will be frequently encountered. It refers to a standing organ or an *ad hoc* arbitral tribunal which is established by an international legal instrument and which interprets and applies international law and renders binding decisions. For reasons of convenience, I usually employ the term ‘international courts’ which includes arbitral tribunals too. In certain instances, the term ‘international body’ is used in order to cover, more widely, monitoring mechanisms which interpret and apply PIL, but which are not endowed with judicial functions and whose views are not legally binding, such as the United Nations Treaty bodies.

Finally, the study uses a number of different terms denoting the exercise of ‘taking cognisance of’, such as ‘take into account’, ‘take into consideration’, ‘take account of’, ‘interpret in light of’, ‘rely’, ‘find recourse’, ‘have recourse’. I use these phrases interchangeably.

3. Delimiting the scope of the present research

This thesis focuses on judgments delivered by the Grand Chamber between January 2000 and September 2011. Confining the focus from 2000 onwards is justified on the basis that the ECtHR’s practice of interpreting the

¹² Gardiner, (note 10); cf. J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, New York, 2003) 148.

ECHR by taking cognisance of PIL norms became more regular since then. I refer and, in certain instances, I discuss some important judgments predating this time-frame, when it is deemed necessary for the analysis. One of the original aspects of this study is that it discusses a series of recent judgments by the Grand Chamber (2008-2011), which are important for the present purposes and which have not been discussed in previous studies.

The thesis primarily addresses judgments of the Grand Chamber. An exhaustive survey of the Court's case-law on almost any topic is very difficult, if not impossible, due to the great number of judgments and decisions. Also, it became obvious from the initial stages of the research that the Court's practice of taking cognisance of PIL norms is so common within the jurisprudence that any expectation of exhaustively treating the subject, especially within the confines of a Ph.D. thesis, is proven untenable. Therefore, the present author chose to focus on the Grand Chamber.

This choice is justified by virtue of the authoritativeness of the Grand Chamber's judgments. The text of the ECHR explicitly acknowledges the authority of the Grand Chamber to deal with cases which raise serious questions affecting the interpretation of the ECHR or the AP thereto or threaten the consistency of the Court's jurisprudence.¹³ Moreover, as it has been admitted by the former President of the Court, the Grand Chamber's judgments may represent less than 1% of the Court's judgments, but they have a 'particularly strong impact'¹⁴ on the Court's jurisprudence. However, it ought

¹³ Articles 30 and 43 ECHR. D.J. Harris *et al*, *Law on the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 17.

¹⁴ Speech by J.-P. Costa, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 21 January 2010, 5, available at

to be noted that, on certain occasions, some relevant and important judgments stemming from the Chambers are included in the analysis, where they are considered necessary.

A further caveat relates to the exclusion of two types of provisions of the ECHR from this examination. The first are the direct references (*renvois*) to PIL, as provided in Article 7, Article 15 (1) Article 35 (1) and Article 1 of the first AP. These provisions authorise the Court to have direct recourse to ‘international law’ (Articles 7(1), 15 ECHR); ‘general principles of law as recognised by civilised nations’ (Article 7 (2) ECHR); ‘generally recognised rules of international law’ (Article 35 (1) ECHR); and ‘general principles of international law’ (Article 1 first AP). Finding recourse to PIL as a matter of *applicable law* before the Court is distinct from the Court’s practice of taking cognisance of PIL norms for the purpose of *interpreting* the ECHR. The second type of provisions, which are not discussed, are the provisions of a procedural nature contained in the ECHR. This choice was made due to the aforementioned time and space constraints.

Therefore, with these caveats in mind, this study examines judgments stemming (mostly) from the Grand Chamber in which the Court takes PIL norms into account when interpreting the ECHR. This means that I discuss the pertinent case-law that the Court uses PIL norms in its legal reasoning, namely other international treaties, international custom, general principles of law and non-binding international norms (soft-law). Although, strictly speaking, soft-law is not part of *lex lata* PIL, it will be seen that the Court frequently uses

instruments which lack binding force. Hence, precluding them from the scope of this research would not give an accurate account of the Court's interpretative practice. Pertinent examples of soft-law are Recommendations and Resolutions of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, United Nations documents, reports and legally relevant views issued by international bodies.

4. The structure of the thesis

The thesis is divided into two Parts. Part I examines the question of the 'fragmentation or unity of international law'. Part I aims not only to provide the general background to understanding the fragmentation challenges, but also to shed light on the ECtHR's jurisprudence. Chapter 1 gives an overview of the difficulties arising in the fragmentation of PIL context. Chapter 2 discusses how international courts and tribunals have addressed these concerns in their judgments.

Part II discusses the relevant case-law of the Court. It is divided into three Sections and seven Chapters on the basis of how the ECtHR uses PIL norms in its legal reasoning. Section I concerns the question of 'Finding recourse to public international law in order to define certain terms embodied in the ECHR and to define certain concepts necessary for applying the ECHR'. Chapters 3 and 4 analyse the respective case-law in which the Court takes PIL norms into account to define terms embodied in the text of the ECHR and to define concepts which are necessary for applying the ECHR (for example, the concept of jurisdiction). Section II relates to cases where the Court takes cognisance of PIL and restricts the scope of rights and freedoms under the

ECHR. Under this Section, Chapter 5 discusses the restriction of the right to access a court by relying on customary international law rules and Chapter 6 deals with other instances of taking cognisance of PIL norms which restrict rights and freedoms under the ECHR. Section III examines judgments in which the reliance upon PIL norms expands *ratione materiae* the scope of the rights and freedoms under the ECHR. This Section includes Chapter 7 on enlarging the applicability of the ECHR, Chapter 8 on reading positive obligations into the protective scope of rights and freedoms and, finally, Chapter 9 concerning the use of PIL norms as a material factor to assess the proportionality of a restriction to a right envisaged in the ECHR.

The final Chapter of the thesis draws final conclusions on the practice of the Court when it takes PIL norms into account for construing the ECHR and how this practice contributes to and further develops the discussion on the fragmentation of PIL.

PART I: The question of ‘fragmentation or unity of public international law’

1. The question of ‘fragmentation or unity of public international law’

1.1 Introduction

The question of “fragmentation or unity of international law” has been at the forefront of academic debate and international judicial practice over the last decade. The fact that two former Presidents of the International Court of Justice (ICJ) addressed the United Nations General Assembly (UNGA) with pertinent concerns illustrates the topicality of the issue. Former President Schwebel in his 1999 speech discussed the emergence of new international judicial institutions and expressed cautiousness regarding the ‘possibility of significant conflicting interpretations of international law’.¹⁵ In the same vein, former President Guillaume in 2000 urged the UNGA towards ‘realis[ing] the *danger* of fragmentation of the law’.¹⁶

The same year the International Law Commission (ILC) included the topic ‘Risks Ensuing from the Fragmentation of International Law’ into its long-term work programme. A Study Group was established and the topic’s title was modified, thus becoming ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law’. Between 2002 and 2007 the Study Group issued five Reports examining

¹⁵ Address to the Plenary Session of the General Assembly of the United Nations by Judge S. M. Schwebel, President of the International Court of Justice, 26 October 1999, available at <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1>.

¹⁶ Address to the Plenary Session of the General Assembly of the United Nations by Judge G. Guillaume, President of the International Court of Justice, 26 October 2000, available at <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1> (emphasis added).

certain aspects of the topic¹⁷ and in 2006 its Chairman, Martii Koskenniemi, finalised an overall Report accompanied by some General Conclusions.¹⁸

However, what is it really denoted when referring to the so-called fragmentation or unity of public international law (PIL)? Is it a dilemma? PIL *is* either fragmented or united? Or should PIL be *perceived* as being fragmented or united? Is it about fragmentation *of* international law or fragmentation *in* international law? The first question would imply that fragmentation is an inherent quality of PIL, whereas the second would indicate that fragmentation is a phenomenon that takes place within PIL. Fragmentation of PIL is being employed, in literature and in the present thesis, to address issues arising from the expansion, diversification and specialisation of the scope of PIL.

The difficulties arising from the fragmentation of PIL should be seen in light of an accumulation of different factors that led to the current state of affairs.¹⁹ First, PIL has been expanded and specialised towards the detailed regulation of many fields of international relations. Since the beginning of the twentieth century, States pursued intense law-making activity on the

¹⁷ International Law Commission (ILC), 'Report of the International Law Commission on the Work of its 54th Session' (29 April-7 June and 22 July-16 August 2002) UN Doc A/57/10 (2002 ILC Rep.); ILC, 'Report of the International Law Commission on the Work of its 55th Session' (5 May-6 June and 7 July-8 August 2003) UN Doc A/58/10 (2003 ILC Rep.); ILC, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/59/10 (2004 ILC Rep.); ILC, 'Report of the International Law Commission on the Work of its 57th Session' (2 May-3 June and 11 July-5 August 2005) UN Doc A/60/10 (2005 ILC Rep.); ILC, 'Report of the International Law Commission on the Work of its 58th Session' (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10 (2006 ILC Rep.). All ILC Reports are available at <<http://www.un.org/law/ilc/index.html>>.

¹⁸ ILC, 'Report of the Study Group of the International Law Commission finalised by M. Koskenniemi' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682 (ILC Final Rep.). The General Conclusions of the Study Group are incorporated into the 2006 ILC Final Rep.

¹⁹ Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *EJIL* 73.

international plane, by concluding numerous bilateral or multilateral international treaties of general or technical nature concerning, for example, international peace and security, trade relations or the protection of human rights. Detailed treaty provisions conferred specific rights and obligations upon State parties, which may complement, conflict or overlap each other.²⁰

At the same time, many of these treaties or set of treaties governing fields in international law, so-called ‘sub-systems’,²¹ attained a certain degree of autonomy *vis-à-vis* their normative environment. Tailor-made provisions relating to the creation, modification, application and the operation of the body of law are included in these sub-systems, thus, creating specific regimes which effectively self-regulate many aspects of their implementation. The fact that these regimes regulate to a certain extent – exhaustively or not – their own operation raises the question of their relationship to general international law, such as the rules on the law of treaties, for example - as codified in the Vienna Convention of 1969²² and the rules on State responsibility - as codified in the Articles on Responsibility of States for Wrongful Acts of 2001.²³ In other words, are these bodies of law isolated from the rest of PIL? It also raises the question of whether or not, and how, these specific regimes interrelate.²⁴

²⁰ C.W. Jenks, ‘The Conflict of Law Making Treaties’ (1953) XXX *BYbIL* 401.

²¹ K. Zemanek, ‘The Legal Foundations of the International Legal System’ (1997) 266 *RdC* 1, 62. Also, H. Kelsen, *Introduction to the Problems of Legal Theory* (Franz Deuticke, Vienna, 1934) (translated by B. Litschewski Paulson, S.L. Paulson, Clarendon Press, New York, 1992) 107.

²² Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

²³ International Law Commission’s Articles on Responsibility of States for Wrongful Acts as adopted in the Report of its 53rd Session (23 April-1 June and 2 July-10 August 2001) and acknowledged by the UN General Assembly’s A/Res/56/83 (28 January 2002) *YbkILC* 2001, vol. II, Part Two (Articles on State Responsibility).

²⁴ B. Simma, ‘Self-Contained Regimes’ (1985) XVI *Neth YbkIL* 111, 111-118; A. Marschik, ‘Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System’ (1998) 9 *EJIL* 212, 212-213.

Fragmentation of PIL is also driven by another important development, the institutionalisation of international relations through the creation of global and regional international organisations. Characteristic examples are the creation of the United Nations, as a successor of the League of Nations, the World Trade Organisation or the Council of Europe. The establishment of third party dispute settlement mechanisms of a judicial or quasi-judicial nature entrusted to supervise the proper function of the constitutive treaties of these organisations fuels the phenomenon of fragmentation. This development is usually referred to in the literature as the ‘proliferation of international courts and tribunals’.²⁵ The increasing establishment and functioning of international bodies is not only a parallel development to the expansion of international law but further contributes to the challenges arising from this expansion, since these bodies of a judicial or semi-judicial nature interpret, apply, elucidate and develop their respective treaty instruments and PIL. Hence, the possibility of conflicting or overlapping jurisdictions and divergent pronouncements concerning similar or identical PIL norms gradually becomes a reality.

The present Chapter introduces the question of ‘fragmentation or unity of international law’ from a legal perspective. It discusses the difficulties that have arisen in light of international case law, the academic debate and the ILC’s work. The second section clarifies the distinction between substantive and procedural coherence of PIL and underlines that the focus of this thesis is on substantive issues. The third section discerns three main strands of thought

²⁵ G. Guillaume, ‘Advantages and Risks of Proliferation: A Blueprint for Action’ (2004) 2 *JIntlCrimJ* 300; S.M. Schwebel, ‘The Proliferation of International Tribunals: Threat or Promise?’, in M. Andenas (ed.), *Judicial Review in International Perspective*, vol. III (Kluwer Law International, The Netherlands, 2000) 3. Cf. A.A.C. Trindade, ‘The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights’ (2004) 25 *HRLJ* 157, 158.

in the present literature insofar as the fragmentation of PIL and the multiplication of international courts and tribunals are concerned. Each strand identifies different problems and suggests different ways to mitigate the challenges of fragmentation of PIL. The fourth section builds upon these different views and argues what are, in the view of the present author, the crucial challenges.

1.2 The substantive and procedural coherence of public international law

The challenges posed by the expansion and specialisation of PIL are closely linked to the proliferation of international courts and other international monitoring bodies entrusted with the supervision of treaties.²⁶ Two different aspects of these challenges may be distinguished, the substantive and the procedural, although the ILC and the present thesis focus on the substantive aspect.²⁷

The first aspect relates to substantive issues, namely a scenario in which different international courts interpreted a PIL norm in different ways.²⁸ International law scholars are mostly concerned with the construction of general international law – customary international law, general principles of law and widely ratified multilateral treaties open to all States – which serves

²⁶ ILC Final Rep., [157].

²⁷ ILC Final Rep., [47]-[55].

²⁸ B. Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *N.Y.U.J.Intl.L.&Pol.* 679.

the role of unifying PIL.²⁹ Special attention is also drawn to the question of how international courts treat the rules on treaty interpretation, because they function as the spinal column of international law and they provide PIL with a “common language”, hence, preserving its unity.³⁰ The ILC stressed in its work the relevance and significance of the rules on treaty interpretation, as envisaged in the VCLT, as a unifying framework transcending general and special (treaty) international law.³¹

The second aspect concerns procedural issues, hence, instances when more than one international court exercises jurisdiction over the same legal dispute (overlapping or concurrent jurisdiction). It is argued that the absence of formal links between the international courts or/and treaty supervisory mechanisms, such as a hierarchical structure or rules regulating the delimitation of competence among courts, renders the procedural coherence of the dispute settlement system fragile.³²

An example illustrating both the procedural and substantive aspects of fragmentation of PIL is the *Mox Plant* dispute between Ireland and the United Kingdom (UK). At issue were a number of facilities on a site at Sellafield, on the coast of the Irish Sea, including the Mox plant facility, designed to recycle plutonium. Ireland claimed that the operation of the plant violated the

²⁹ B. Rudolf, ‘Unity and Diversity in the Settlement of International Disputes’, in A. Zimmermann, R. Hofmann (eds.), *Unity and Diversity in International Law* (Duncker and Humbolt, Berlin 2006) 389, 392; N. Matz-Lück, ‘Promoting the Unity of International Law: Standard-Setting by International Tribunals’, in D. König *et al.* (eds.), *International Law Today: New Challenges and the Need for Reform* (Springer, Heidelberg, 2008) 99, 117-118.

³⁰ P.-M. Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 *N.Y.U.J.Intl.L.&Pol.* 791, 792, 796.

³¹ ILC Final Rep., [17].

³² J.I. Charney, ‘Is International Law Threatened by Multiple International Tribunals?’ (1998) 271 *RdC* 101, 134, 373; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, New York, 2003) 106-110; T. Treves, ‘Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals’ (2000) 4 *Max Planck YbkUNL* 215.

international obligations of the UK under the UN Convention of the Law of the Sea (UNCLOS), the European Community (EC) law and the Convention on the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention). Ireland brought complaints before three different international tribunals.³³ The European Court of Justice (ECJ) was also involved in the dispute.³⁴ This resulted in four different international courts rendering decisions relating to different aspects of the same dispute.

The UK raised the objection before the International Tribunal for the Law of the Sea (ITLOS) that the tribunal lacked jurisdiction, because the main elements of the dispute were governed by the compulsory dispute settlement procedures under the OSPAR Convention and the EC Treaty. The ITLOS in its Order on the interim measures procedure categorically dismissed this argument upholding that the Tribunal has *prima facie* jurisdiction. It maintained that

even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights and obligations similar to or identical with the rights and obligations set out in the [UNCLOS], the rights and obligations under those agreements have a *separate existence* from those under the [UNCLOS].³⁵

It went on to explain that this is because

³³ Pending the constitution of the Annex VII arbitral tribunal, Ireland seised ITLOS for a measure of interim relief Article 290 (5) UNCLOS. Decisions were issued by the International Tribunal for the Law of the Sea *Mox Plant (Ireland v. UK)*, Provisional Measures, 3 December 2001, (2002) 41 ILM 405 (ITLOS *Mox Plant* decision). An UN Convention on the Law of the Sea tribunal gave also a judgment in the *Mox Plant (Ireland v. UK)* Procedural Order No 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, 42 ILM 1187 (UNCLOS *Mox Plant* case). The Permanent Court of Arbitration tribunal gave its view in *Access to Information under Article 9 of the OSPAR Convention (Ireland v. UK)*, Final Award, 2 July 2003, 42 ILM 1118 (Ospar Convention Award).

³⁴ *Commission v. Ireland*, Case C-459/03, 18 January 2006 (Grand Chamber).

³⁵ ITLOS *Mox Plant* decision, [50] (emphases added).

the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results having regard to, *inter alia*, *differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires*.³⁶

Likewise, the OSPAR tribunal held that '[e]ach of the OSPAR Convention and [EC law] is an independent legal source that establishes a distinct legal regime'.³⁷

The UNCLOS arbitral tribunal took a slightly different position in its judgment. It did accept that the ITLOS Order was correct in finding that the UNCLOS Tribunal has *prima facie* jurisdiction over the dispute. Moreover, it reiterated that, regardless of whether certain aspects of the dispute are regulated by other international treaties (OSPAR Convention and the EC treaty), the character of the dispute is one involving the interpretation and application of the UNCLOS.³⁸ However, given the exclusive jurisdiction of the ECJ over EC law, the UNCLOS tribunal doubted whether any provisions of the UNCLOS 'would in fact give rise to a *self-contained and distinct dispute* capable of being resolved by [it]'.³⁹ It decided to suspend its proceedings, on the basis of 'considerations of mutual respect and comity'⁴⁰ towards the ECJ, until the latter gave its judgment.

The ECJ, in turn, did not share the same degree of sympathy for parallel international judicial proceedings. It decided that, if a significant part of the

³⁶ *Ibid*, [51] (emphases added).

³⁷ Ospar Convention Award, [142].

³⁸ UNCLOS *Mox Plant* decision, [18].

³⁹ *Ibid*, [26] (emphases added).

⁴⁰ *Ibid*, [28].

dispute concerns the interpretation and application of Community law, then '[i]t is for the Court, should the need arise, to identify the elements of the dispute which relate to provisions of international agreements in question which fall outside its jurisdiction'.⁴¹ Hence, the ECJ asserted its jurisdiction over the dispute irrespective of whether or not certain parts of the dispute were governed by other international treaties.

The *Mox Plant* dispute demonstrates, from the procedural angle, that each international court may assert its jurisdiction over certain aspects of the dispute. Also, the ITLOS and Ospar tribunals explicitly highlighted the substantive point of view, which is the focus of the present thesis. Similar or even identical rights and obligations under different treaties retain their *separate existence* (ITLOS Tribunal) because their interpretation may lead to different results, notwithstanding the respective contexts, objects and purposes, subsequent practice of parties and preparatory work of each treaty. In the Ospar tribunal's words, every treaty forms a *distinct legal regime*. This 'distinctiveness' appears to be part and parcel of the interpretation process as well. Although the international courts apply the PIL rules on treaty interpretation, as prescribed in the VCLT, they may reach different conclusions on the construction of similar or identical treaty provisions since the application of the interpretation principles is subject to the distinct 'life' of every treaty instrument. Therefore, the role of and limits posed to the VCLT principles of interpretation as a unifying factor also come into play.

Moreover, the fact that in the *Mox Plant* dispute the international courts stress the *distinctive* nature of the case before them raises the question of how

⁴¹ ECJ, *Commission v Ireland*, [135].

they should, in fact, decide the case. Should they strictly limit themselves to the confines of their own distinct legal regime or should they take other relevant PIL norms into account during the interpretation process? For example, should the Ospar tribunal duly appreciate the obligations of the parties under EU law? Conversely, should the ECJ take any obligations of member States under the UNCLOS into account? The argument of this thesis is that treaties are not 'self-contained' or placed in a vacuum and it is argued that taking other relevant PIL norms into account when construing a treaty mitigates the fragmentation of PIL concerns.

1.3 The three main strands of thought concerning the fragmentation of public international law

In the literature one can discern three main strands of thought concerning the fragmentation of PIL. Each strand identifies different problems, depending on how they perceive PIL, and, accordingly, proposes different solutions. The first strand treats the multiplicity of international courts as a danger to the unity of PIL. It argues that the ICJ holds a critical role within the international dispute settlement system, at least, in so far as the interpretation and application of general international law. The second strand suggests that the competition among international courts over the 'best interpretation' will benefit the development of PIL. The third perspective, which appears to reflect the mainstream view in literature and in international judicial practice, asserts that the so-called fragmentation of PIL is not a danger to but rather a challenge for the unity of PIL.

The short outline of these views gives the opportunity to place the question of fragmentation of PIL in the case-law of certain international courts and tribunals. It also lays the basis for identifying, in the view of the present author, the main legal questions which will be discussed when analysing the practice of the ECtHR.

1.3.1 The proliferation of international courts as a danger to the unity of public international law

The first line of thought suggests that the proliferation of specialised and regional international courts is a threat to the unity of PIL and, especially, general international law - customary international law, general principles of law and treaties which are widely ratified and open to all States. It is argued that the only international court which has the authority and competence to pronounce on general international law is the ICJ. This is because, firstly, the ICJ is entrusted with an unrestricted *ratione materiae* jurisdiction and, secondly, its composition reflects the representativeness of the main legal systems in the world.⁴² Hence, regional and specialised international courts should be cautious and, moreover, should avoid pronouncing on general international law,⁴³ thereby consistently developing their case-law with the judgments of the ICJ.⁴⁴

⁴² K.J. Keith, 'The International Court of Justice: *Primus Inter Pares*?' (2008) 5 *Intl OrgLRev* 7, 21. Also, D. Terris, C.P.R. Romano, L. Swigart, *The International Judge – An Introduction to the Men and Women Who Decide the World's Cases* (University Press of New England, Hanover and London, 2007) 58-59.

⁴³ T. Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?' (2001) 14 *LJIL* 267, 272-273.

⁴⁴ *Infra* notes 1 and 2; G. Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *ICLQ* 848, 862; Guillaume, (note 11), 302; C.W. Jenks, *The Prospects of International Adjudication* (Stevens and Sons Limited-Oceana Publications, London-New York, 1964) 175-181; G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1998-1999) 31

There are two well-cited examples from international case-law which gave rise to these views. The first example concerns the allegedly different interpretations of the circumstances under which a State may be held responsible for the acts of non-state actors with which it is associated, as employed by the ICJ and the Appeals Chamber of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY has jurisdiction to prosecute persons that committed or gave orders to commit grave breaches of the 1949 Geneva Conventions (Article 2 ICTY Statute). In order to exercise its jurisdiction, it has first to affirm that the breaches took place in the context of an international conflict. In the *Tadić* case,⁴⁵ the ICTY had to decide whether an international armed conflict existed between the Federal Republic of Yugoslavia and Bosnia and Herzegovina. The crucial question was whether the acts of the armed forces of a Bosnian armed group could be attributed to the Federal Republic of Yugoslavia.

The ICTY went on to discuss the *Nicaragua* case,⁴⁶ in which the ICJ established that for a State to be held responsible for acts of non-State actors, it must be proven that it exercised ‘effective control’ over specific operations in the course of which breaches had occurred. The ICTY declined to apply the ‘effective control’ test. It found the *Nicaragua* test not to be consonant with the logic of State responsibility and to be at variance with judicial and state

N.Y.U.J.Intl.L.&Pol. 919; G. Abi-Saab, ‘The International Court as a World Court’, in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (Cambridge University Press, New York, 1996) 3; Schwebel, (note 11); Buergenthal, (note 29).

⁴⁵ *Prosecutor v. Tadić* (Judgment of Appeals Chamber) IT-94-1-A, 15 July 1999 (*Tadić* case).

⁴⁶ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment, Merits, ICJ Rep. 1986, p. 14 (*Nicaragua* Case), [109]-[116].

practice.⁴⁷ The ICTY instead adopted the ‘overall control’ test, holding that there was no need to prove that such control was exercised by the State over each and every military operation.⁴⁸

In the 2007 *Genocide* case,⁴⁹ Bosnia and Herzegovina, by invoking the *Tadić* case, questioned the validity of the *Nicaragua* test before the ICJ.⁵⁰ The ICJ gave careful consideration to the Appeals Chamber’s reasoning, but it ‘found itself unable to subscribe to the Chamber’s view’.⁵¹ It maintained that the ICTY in the *Tadić* case addressed an issue which was not indispensable for the exercise of its jurisdiction and that ‘the positions adopted by the ICTY on issues of general international law do not lie within the specific purview of its jurisdiction’.⁵² It also found the ‘overall control’ test ‘unpersuasive’ and ‘unsuitable’ in the context of State responsibility for specific acts committed in the course of a conflict.⁵³

A few days after the ICJ gave its judgment on the *Genocide* case, the International Criminal Court (ICC) appeared to have endorsed the *Tadić* approach in the *Lubanga* case, without explicitly referring to the *Nicaragua* or the *Genocide* cases.⁵⁴

Many international law scholars have qualified the ICTY and the ICJ dictums as conflicting or, at least, divergent in so far as the interpretation and

⁴⁷ *Tadić*, [115]-[136].

⁴⁸ *Ibid*, [145].

⁴⁹ *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, Merits, 26 February 2007, ICJ Rep. 2007, p. 43 (*Genocide* case).

⁵⁰ *Ibid*, [402]; Written Proceedings (Merits and Counter-claims), Reply of Bosnia and Herzegovina, 23 April 1998, Chapter 9, 758-761 and Chapter 10, [75]-[79].

⁵¹ *Ibid*, [403].

⁵² *Ibid*.

⁵³ *Ibid*, [404] and [406] respectively.

⁵⁴ *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06, [210]-[211].

application of a rule of customary international law.⁵⁵ Both the ICJ and the ICTY openly addressed the fact that they hold different views on the interpretation and application of the rules on State responsibility.⁵⁶ Not only did they find each other's reasoning unpersuasive, but, most importantly, the ICJ questioned the authority and competence of the ICTY to pronounce on the content and scope of general international law, when this is not necessary for exercising its jurisdiction.

A second pertinent example is the *Loizidou* case.⁵⁷ The ECtHR held that Turkey's reservation concerning a territorial restriction of the acceptance of its jurisdiction was not compatible with the ECHR. It held that the reservation was not only invalid but also separable from the declaration of accepting the ECtHR's jurisdiction and it went on to decide the case before it. Turkey strongly contested this conclusion, arguing that the pertinent provisions of the ECHR regarding reservations were almost identical to Article 36 of the ICJ Statute and, thus, the ECtHR should not find the reservation invalid and separable.⁵⁸ The ECtHR, however, justified its position on the basis of the object and purpose of the ECHR, as guaranteeing practical and effective rights, and the subsequent practice of member States accepting the jurisdiction of the Court without any restrictions.⁵⁹ It also underlined that the ECHR is a treaty for the collective enforcement of human rights and that the Court is entrusted

⁵⁵ Buergenthal, (note 29); Rudolf, (note 15), 407-408; N. Lavranos, 'On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals', EUI Working Paper, MWP 2009/14, 35.

⁵⁶ S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *ICLQ* 494, 504-507; S. Linton, F.K. Tiba, 'The International Judge in an Age of Multiple International Courts and Tribunals' (2009) 9 *Chi.J.Intl.L.* 407, 453-456.

⁵⁷ *Loizidou v. Turkey*, Preliminary Objections, 23 April 1995, (Grand Chamber) (*Loizidou* case).

⁵⁸ *Ibid*, [67].

⁵⁹ *Ibid*, [72], [79]-[82].

with the observance of the engagements undertaken by the High Contracting Parties (Article 19 ECHR); hence, a different conclusion concerning Turkey's reservation would undermine the effectiveness of the ECHR and would weaken the Court's role in discharging its functions.⁶⁰ By way of replying to Turkey's objections, it expressly distinguished its position and role from the ICJ. According to the ECtHR, the fact that its jurisdiction is limited regionally with a specific subject matter on directly supervising a law-making treaty concerning the protection of human rights marked a fundamental difference.⁶¹ Many international law scholars found the *Loizidou* case a disturbing insistence on separateness.⁶² They thought that *Loizidou* was a wrong and impermissible exception or divergence to the ICJ's *Advisory Opinion on Reservations to the Genocide Convention*,⁶³ hence, threatening the unity of PIL. However, as it will be argued in the following sections, *Loizidou* (as seen in 2012), in fact, paved the way for the development and enrichment of PIL.⁶⁴ It should be noted, at this point, that the ECtHR distinguished the ECHR to the ICJ Statute and its own role to the ICJ's role by employing the very VCLT principles of interpretation.⁶⁵ It also considered the fact that general

⁶⁰ *Ibid*, [70], [75].

⁶¹ *Ibid*, [83]-[84].

⁶² For example, R.Y. Jennings, 'The Judiciary, International and National and the Development of International Law' (1996) 45 *ICLQ* 1, 6.

⁶³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, p. 15.

⁶⁴ *Infra* 1.4; R. Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *LJIL* 745, 747; Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elabary, Judge Owada and Judge Simma, in *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (New Application: 2002), Judgment, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, ICJ Rep. 2006, p. 6, [23].

⁶⁵ See also G. Abi-Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti *et al.* (eds.), *The WTO at Ten* (Cambridge University Press, Cambridge, 2006) 457, 460.

international law, as identified by the ICJ at the moment, treated the issue of reservations differently.

The strand of opinion which qualifies cases, like the *Tadić* and *Loizidou* as disturbing threats to the unity of PIL, builds upon the preeminent role of the ICJ and suggests the establishment of mechanisms which would guarantee a formal hierarchy among international courts. Pertinent ideas, which seem to be a recurring theme in international law scholarship,⁶⁶ include a referral mechanism or an appeal procedure before the ICJ, when, for example, an international court encounters difficulties with the interpretation and application of general international law.⁶⁷ Both the desirability and feasibility of such proposals have been strongly criticised.⁶⁸

The perception of the multiplicity of international courts as a danger to the unity of PIL partly reflects the hegemonic conflict stemming from the ‘loss of hierarchical position by institutions of the ancient *régime*’.⁶⁹ It is telling that forceful advocates of this persuasion are former Judges of the ICJ (Jennings, Guillaume, Schwebel). On the other end of the spectrum, Trindade, former President of the Inter-American Court of Human Rights (IACtHR) and recently

⁶⁶ Treves, (note 18), 217-220; S.M. Schwebel, ‘Preliminary Rulings by the International Court of Justice at the Instance of National Courts’, in *Justice in International Law* (Cambridge University Press, New York, 1994) 84; Jenks, (note 30).

⁶⁷ Guillaume, (note 30); J. Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands’ (2003-2004) 25 *Michigan JIL* 903, 916.

⁶⁸ R. Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 *ICLQ* 791, 799; Charney, (note 18), 129-133; A. Aust, ‘Peaceful Settlement of Disputes: A Proliferation Problem?’, in T.M. Ndiaye, R. Wolfrum (eds.), *Law of the Sea, Environmental Law and the Settlement of Disputes* (Martinus Nijhoff Publishers, Leiden/Boston, 2007) 131, 141; B. Conforti, ‘Unité et Fragmentation du Droit International: “Glissez, mortels, n’appuyez pas!”’ [2007] *RGDIP* 5, 10-11; Rudolf, (note 15), 416, although she accepts that a reference procedure might be useful in specific instances.

⁶⁹ M. Koskeniemi, ‘Global Legal Pluralism: Multiple regimes and Multiple Modes of Thought’ (Harvard, 5 March 2005), 6 available at <<http://www.helsinki.fi/eci/Publications/Koskeniemi/MKPluralism-Harvard-05d%5B1%5D.pdf>>; cf. Treves, (note 18), 221.

appointed Judge at the ICJ bench, has given the following response to such views:

[I]n some international legal circles attention has been [drawn] to the false problem of the so-called ‘proliferation of international tribunals’. This narrow-minded, unelegant and derogatory expression simply misses the key point of the considerable advances of the old idea of international justice in the contemporary world.⁷⁰

1.3.2 The multiplicity of international courts as enhancing norm competition

A second strand of thought asserts that possible inconsistencies in the construction of PIL are not detrimental. On the contrary, a degree of experimentation and exploration among international courts gives way to cross-fertilisation, encouraging ‘the *best norms* to be widely adopted’.⁷¹ In the same vein, Pauwelyn argues that if international courts decide differently on the interpretation of the same rule, the *best interpretation* is likely to surface through competition.⁷² In a nutshell, the main idea is to allow international fora to compete, each championing their own interpretation of a PIL norm as correct.⁷³

⁷⁰ Trindade, (note 11), 158.

⁷¹ Charney, (note 18), 347 (emphasis added).

⁷² Pauwelyn, (note 53), 916; A. von Bogdandy, I. Venzke, ‘On the Democratic Legitimation of International Judicial Lawmaking’, (2011) 12 *GLJ* 1341, 1355.

⁷³ H.G. Cohen, ‘Finding International Law, Part II: Our Fragmenting Legal Community’, University of Georgia School of Law Research Paper Series, Paper No 11-10, May 2011, 45-

It does not come as a surprise that advocates of the position that the proliferation of international courts poses a threat to the unity of PIL have strongly objected to this line of thought. Guillaume opposed the ‘competition scheme’, by stating that ‘[t]he law of the market [...] cannot be the law of justice’.⁷⁴ A somewhat weaker response came from Shany who argued that this is ““a progress by catastrophe” line of reasoning’.⁷⁵ According to him, a competition among international courts will eventually lead to a state of anarchy and will undermine the credibility of the international judicial process. He suggests that there is the need for jurisprudential coherence and harmony, which can be served through the drafting of rules regulating the jurisdiction of the international courts and the exercise of judicial ‘comity’ among them.

The meaning of the *best* interpretation or the *best* norm is unclear. Even more, in a battle of interpretative communities over the meaning and content of PIL norms, there is no guarantee that the better rules or the better interpretations will always win. It could equally be a question of which interpretative community is the more influential.⁷⁶ For example, who is the winner in the *Tadić-Nicaragua* alleged dichotomy between the ICTY and the ICJ (and the ICC)? However, it cannot be disregarded that there is some merit in these views. A so-called competition among international courts is likely to further the quality of judicial reasoning⁷⁷ and enhance a sense of shared

49; J.K. Cogan, ‘Competition and Control in International Adjudication’ (2008) 48 *Virginia JIL* 411, 438-446.

⁷⁴ Guillaume, (note 11), 301.

⁷⁵ Shany, (note 18), 122.

⁷⁶ Cohen, (note 59), 48.

⁷⁷ E.U. Petersmann, ‘Justice and Conflict Resolution: Proliferation, Fragmentation and Decentralisation of Dispute Settlement in International Trade’, EUI Working Paper LAW No 2004/10, 50.

responsibility on the part of all concerned.⁷⁸ Most importantly, the underlying tenet of this strand of thought is that it does not acknowledge that the ICJ has an *a priori* inherent monopoly over PIL, and specifically, general international law. All international courts are equal players in engaging with and pronouncing on general international law.

1.3.3 The multiplicity of international courts as the emergence of different contexts

According to a third perspective, the alleged danger stemming from the varying constructions of PIL by different international courts is overestimated. It has characteristically been stated that ‘many authors even speak of the “proliferation” of international courts and tribunals, as if they were weapons of mass destruction threatening the international legal order’.⁷⁹ International scholars of this strand of thought do acknowledge that certain challenges arise,⁸⁰ but they prefer to see the multiplicity of international courts as an opportunity and to treat variances in the case-law of international courts as a reflection of different contexts.⁸¹ The basic tenet is that the unity of PIL is to be preserved, unless context dictates otherwise.⁸² Varying constructions of general international law, for example, or different solutions adopted for the same legal

⁷⁸ B. Simma, ‘Universality From the Perspective of a Practitioner’ (2009) 20 *EJIL* 265, 266.

⁷⁹ Rudolf, (note 15), 389-390.

⁸⁰ B. Simma, ‘Fragmentation in a Positive Light’ (2003-2004) 25 *Michigan JIL* 845; Dupuy, (note 17), 798-807; Higgins, (note 54), 798-799.

⁸¹ K. Oellers-Frahm, ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’ (2001) 5 *Max Planck YbkUNL* 67, 73. Rudolf, (note 15), 399; Linton, Tiba, (note 42), 427; Matz-Lück, (note 15), 104 *et seq.*; G. Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’ (2003-2004) 25 *Michigan JIL* 849, 850.

⁸² Higgins, (note 54).

questions can be explained and legitimised, since each international court is bound by its own applicable law, as defined in its constitutive instrument.⁸³ In this sense, every international court places a case brought before it within the confines of its constitutive instrument and, thus, the case attains a specific legal and factual context.⁸⁴

Rosalyn Higgins, former President of the ICJ, strongly argues that, although differences of perception among international courts remain, ‘given the *different relevant contexts*, they hardly constitute a drama’.⁸⁵ This statement was referring to the *Tadić – Nicaragua* alleged divergence on the rules of State responsibility. Without denying that a different perception between the ICJ and the Appeals Chamber of the ICTY exists, it is stressed that the different context of the cases should be duly appreciated. The fact that the ICTY held that the conflict was of an international character and, hence, it had to apply the rules on State responsibility with respect to individual accountability in the context of international humanitarian law mark a significant difference.⁸⁶

The different context may also refer to the features of a treaty and the role of the international body entrusted to supervise it. The ITLOS and Ospar tribunals stressed this in the *Mox Plant* dispute, when they highlighted that their constitutive instruments must be read in light of their object and purposes, subsequent practice and other contextual nuances.⁸⁷ The *Loizidou* case was also articulated from this angle. Although Article 57 ECHR (former Article 46)

⁸³ H. Hestermeyer, ‘Where Unity Is at Risk: When International Tribunals Proliferate’, in D. König *et al.* (eds.), (note 15), 123, 127-130.

⁸⁴ Higgins, (note 54), 792, 794-796; Charney, (note 18), 137; Rudolf, (note 15), 399-405; Hestermeyer, (note 69), 134; Matz-Lück, (note 15), 102; Oellers-Frahm, (note 67), 78-83.

⁸⁵ Higgins, (note 54), 795 (emphases added); *cf.* Jennings, (note 48), who ironically refers to the ‘art of distinguishing’.

⁸⁶ Higgins, (note 54), 794; C. Greenwood, ‘Some Challenges of International Litigation’ (2012) 1 *CJICL* 7, 19.

⁸⁷ ITLOS *Mox Plant* decision, [50], [51]; Ospar Convention Award, [142].

concerning the Court's jurisdiction was modelled on Article 36 of the ICJ Statute, for the ECtHR it was material that it had a specific subject matter jurisdiction over a law-making treaty on human rights.

The 'different context' approach, however, attains a great degree of circularity. In other words, a different context justification may be applied to every single instance when someone purports to find distinctiveness. Does this mean that context may always justify a variance or a divergence between international courts concerning the construction of PIL? International judicial practice already witnesses examples of such unlucky instances,⁸⁸ such as the disagreement of the ICJ and the IACtHR with respect to the interpretation of Article 36 of the Vienna Convention on Consular Relations (VCCR).⁸⁹ Article 36 VCCR concerns the privileges relating to a consular post and, in particular, issues of communication and contact with nationals of the sending State. The ICJ, in the *LaGrand* case, found that Article 36 VCCR creates individuals rights, but it considered it unnecessary to decide whether these rights were also human rights.⁹⁰ The IACtHR was also called upon to interpret Article 36 VCCR. In its Advisory Opinion it held that these rights can be qualified as 'part of the body of international human rights law'.⁹¹ Shortly after *LaGrand* case, the same issue arose again before the ICJ in the *Avena* case and Mexico invoked the view of the IACtHR. The ICJ restated that it was not necessary to examine whether individual rights under Article 36 VCCR should be qualified

⁸⁸ Higgins, (note 54), 796; Simma, (note 66); Oellers-Frahm, (note 67), 84-86.

⁸⁹ Vienna Convention on Consular Relations (adopted on 24 April 1963; entered into force on 19 March 1967) 596 UNTS 261.

⁹⁰ *LaGrand* case (Germany v, United States of America), Judgment, 27 June 2001, ICJ Rep. 2001, p. 466, [78] (*LaGrand* case).

⁹¹ Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, [141].

as human rights, but it added in passing that there seemed to be no indication to support such an argument.⁹² Although the ICJ did not give a definite answer on whether or not individual rights under Article 36 VCCR are also human rights, it is clear that – for the time being – the ICJ and the IACtHR hold different views on the interpretation of the same treaty provision.

International law scholars coming from this perspective argue that the challenges concerning the fragmentation of PIL may be alleviated through interpretation. Treaties and their progressive development by their supervisory bodies should not be treated as distinct and special, but should be perceived as being embedded within PIL.⁹³ The ILC in its work on fragmentation adopted the same position.⁹⁴ In practice, this means that international courts should place their constitutive instruments within PIL and construe them, to the extent possible, by taking other relevant PIL norms into account.⁹⁵ The pertinence of Article 31 (3)(c) VCLT has been highlighted in this respect, which provides that a treaty should be interpreted by taking any relevant rules of international law applicable in the relations between the parties into account.

Other suggestions include drafting specific treaty clauses in international treaties for regulating the phenomenon of overlapping jurisdictions,⁹⁶ the application of general principles (*lis alibi pendens*, abuse of

⁹² *Case concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, 31 March 2004, ICJ Rep. 2004, p. 12, [124].

⁹³ M.T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law', in M.T. Kamminga, M. Scheinin (eds.), *The Impact of Human Rights on General International Law* (Oxford University Press, Oxford, 2009) 1, 1-2.

⁹⁴ ILC Final Rep., [34]-[37].

⁹⁵ T. Broude, Y. Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms', in T. Broude, Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford, 2011) 1, 5.

⁹⁶ Shany, (note 18); Oellers-Frahm, (note 67), 88-90.

process, *forum non conveniens* and *res judicata*),⁹⁷ or the exercise of judicial comity among international courts.⁹⁸ It is also important to establish informal links between the courts and that the Judges sitting on their benches be informed of and respect each other's decisions and encourage jurisprudential harmonisation.⁹⁹ The composition of international courts and the appointment of Judges with expertise in PIL are also relevant factors.¹⁰⁰

1.4 Conclusion: Fragmentation of public international law as a legal challenge

In sum, one of the main concerns of international law scholars is the role of general international law and its development by the ICJ in retaining the unity between different fields in PIL. This unity is being challenged by the varying interpretations of the same or similar rules, especially general international law, by special and/or regional international courts. However, views differ on how to address these challenges.

The present thesis argues that special and regional international courts do not necessarily threaten the unity of PIL or the role of general international law in uniting PIL. Therefore, in principle, they have the authority and competence to engage with general international law, when necessary, in deciding their cases. This is supported by a number of preliminary points.

⁹⁷ V. Lowe, 'Overlapping Jurisdictions in International Tribunals' (1999) 20 *Aust. YbkIL* 197.

⁹⁸ Lavranos, (note 41).

⁹⁹ Higgins, (note 54), 804; Schwebel, (note 11), 6; Shany, (note 18), 120. Also, A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 *Harv.IntlLJ* 191, 192-193.

¹⁰⁰ S. Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 *ICLQ* 863, 864 referring to the ITLOS. See also High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, [8 (a)] where States parties emphasised the need for the Judges sitting at the European Court of Human Rights to 'have knowledge of public international law'.

First, one should carefully note that, when discussing the role of general international law as a unifying frame for PIL, general international law is not a static notion. The identification and construction of customary international law and general principles of law, as well as the interpretation and application of multilateral treaties widely ratified and open to all States, are not held in clinical isolation from the rest of PIL or from the jurisprudence of regional or special courts. By way of example, many concepts of general international law, such as the duty to make reparation and the exhaustion of internal legal remedies prior to a diplomatic claim, have been developed and elucidated by arbitral tribunals or specialised and regional international courts.¹⁰¹ Moreover, general international law is constantly reshaped to embody new developments stemming from special fields of PIL. In the investment protection field, more than two thousand concordant bilateral investment treaties have arguably altered the customary international law rules governing the treatment of foreign investment.¹⁰² The ICJ, in its recent judgment in the *Diallo* case, accepted that customary rules of diplomatic protection are subject to the impact of various international agreements governing investment protection.¹⁰³ International human rights law has also influenced the structure and content of general international law, as has been well argued.¹⁰⁴ Existing general international law

¹⁰¹ Report by H. Golsong, in Max Planck Institute for Comparative Public Law and International Law, *Judicial Settlement of International Disputes* (Springer, Berlin, 1974) 99, 113-114.

¹⁰² S.M. Schwebel, 'Investor-State Disputes and the Development of International Law' (2004) 98 *ASIL Proc.* 27.

¹⁰³ *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgment, Preliminary Objections, 24 May 2007, ICJ Rep. 2007, p. 582, [88], [90] (*Diallo* case).

¹⁰⁴ J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester 1993); T. Buergenthal, 'The Contemporary Significance of International Human Rights Law' (2009) 22 *LJIL* 217, 220; T. Meron, *The Implications of the European Convention on Human Rights for the Development of Public*

is reinterpreted or reoriented to accord with overarching human rights imperatives.¹⁰⁵ These examples demonstrate that the boundaries between general international law and special law are blurred, since both inform each other.¹⁰⁶ Both the content of general international law and the concept of unity of PIL are not static notions. This conclusion does not come to diminish the significance of general international law as unifying PIL as a whole. However, it highlights that general international law is receptive to developments from all the fields of PIL.

Since general international law is being informed by such developments, the present author sees no valid reason why special and/or regional international courts (or other monitoring bodies) should, as a matter of principle, be disapproved of pronouncing on questions concerning the content and application of general international law. The question of whether varying or divergent interpretations of general international law by different international courts should be treated as a development of or an exception to or, perhaps, bad application of general international law (as it stands at any given moment) does not always provide an easy answer. Nonetheless, it is clear that other international courts highlight developments in PIL, as does the ICJ. Furthermore, other international courts develop PIL themselves. Although many instances may be perceived as disturbing and threatening to general international law, in fact, they enrich and inform it. An example of such a case would be *Loizidou*, which has already been discussed. International law

International Law (Council of Europe Publishing, Strasbourg, 2000); S. Sivakumaran, 'Impact of International Human Rights Law on the Structure of International Obligations', in Kamminga, Scheinin (eds.), (note 79), 133.

¹⁰⁵ A.N. Pronto, "'Human-Rightism' and the Development of General International Law' (2007) 20 *LJIL* 753, 757.

¹⁰⁶ Pronto, (note 91), 763-765; ILC Final Rep., [460].

scholars, currently sitting on the bench of the ICJ, underlined that the practice of the ECtHR, the IACtHR and the Human Rights Committee (HRC) to decide on the compatibility of a reservation with their respective treaty is a development of PIL and not an exception to it.¹⁰⁷

Moreover, on certain occasions, regional and/or specialised international courts introduce adequate solutions to problems or develop PIL when the ICJ fails to do so. The failure of the ICJ to endorse or pronounce on *jus cogens* rules is in contrast to the fact that the ICTY and the ECtHR have recognised and incorporated the prohibition of torture as a *jus cogens* rule in their case-law.¹⁰⁸ Also, despite the reluctance of the ICJ, the idea of obligations *erga omnes* has been mainstreamed through the practice of other international bodies and it may be considered an established part of PIL.¹⁰⁹ Bruno Simma, currently an ICJ Judge, would readily welcome a regional court providing adequate judicial control of certain acts of the UN Security Council, admitting that ‘[if] universality might suffer, [...] it would be *a kind of universality which deserved to suffer*’.¹¹⁰

Interestingly, the ICJ in certain, recent judgments, has shifted from its long-standing practice and appears to duly appreciate the role of regional and special international bodies.¹¹¹ In the 2010 *Diallo* case, the ICJ used and

¹⁰⁷ Joint Separate Opinion of Judge Higgins, Judge Koijmans, Judge Elabary, Judge Owada and Judge Simma, in *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (New Application: 2002), Judgment, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, ICJ Rep. 2006, p. 6, [23]; Matz-Lück, (note 15), 120.

¹⁰⁸ Separate Opinion of Judge *ad hoc* Dugard, in *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), [5].

¹⁰⁹ Sivakumaran, (note 90), 141.

¹¹⁰ Simma, (note 64), 288 and 296.

¹¹¹ B. Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’ (2012) 3 *J Intl Dip Settlement* 1, 12-14; M. Andenas, ‘Case Comment: International

followed the views of the HRC and the jurisprudence of the IACtHR and ECtHR in order to confirm its own interpretation of provisions of the International Covenant in Civil and Political Rights and the African Charter on Human and People's Rights.¹¹² It reasoned that its reliance on other international bodies is a way of maintaining the 'necessary clarity and the essential consistency of international law as well as legal security'.¹¹³ In 2012 in the *Jurisdictional Immunities of the State* case,¹¹⁴ the ICJ relied again on the case-law of the ECtHR in order not only to reinforce its legal reasoning,¹¹⁵ but also to directly support its final conclusion regarding the customary status of State immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces.¹¹⁶ Therefore, the ICJ expressly acknowledges the competence of special and regional international courts to develop and assert authority with regards to general international law and PIL.

The fact, however, that international bodies and courts with limited jurisdiction have the competence to pronounce on PIL, when necessary, without threatening its unity necessarily entails that they should be aware and cautious of the challenges in light of the fragmentation of PIL. Hence, it is argued that they should place the treaties under their supervision within the corpus of PIL by means of interpretation.

Court of Justice, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) Judgment of 30 November 2010' (2011) 60 *ICLQ* 810, 818.

¹¹² *Diallo* case, [66]-[68].

¹¹³ *Ibid*, [66].

¹¹⁴ *Case concerning the Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment, 3 February 2012, General List No 143.

¹¹⁵ *Ibid*, [72], [73], [76], [90].

¹¹⁶ *Ibid*, [78].

2. Addressing the legal challenges of the fragmentation of public international law through interpretation

2.1 Introduction

Chapter 1 established two main points; firstly, that although certain legal challenges arise in the context of the fragmentation of PIL, the alleged dangers to the unity of PIL are overestimated. It was underlined that international courts of restricted jurisdiction have, in principle, the authority to pronounce on issues of general international law without posing a threat to the unity of PIL. Furthermore, PIL on the whole benefits from the developments and trends stemming from international courts. The second point was that international courts are responsible for demonstrating their awareness of the difficulties that may arise due to the different interpretations of similar or identical PIL norms by different bodies.

Special and/or regional international courts and tribunals adopt a confined view of the cases brought before them due to their restricted *ratione materiae* and *personae* jurisdiction. The Appeals Chamber of the ICTY in the *Tadić* case stated that ‘in international law, every tribunal is a self-contained system (unless otherwise provided)’.¹¹⁷ International courts have to make adjustments to a given dispute and the claims brought before them to their specific jurisdiction and to the body of law that they are entrusted to interpret and apply.

¹¹⁷ *Prosecutor v. Tadić*, Appeals Chamber, IT-94-1-AR72, Interlocutory Appeal on Jurisdiction, 8 September 1995, [11].

It is notable that these considerations are equally applicable, to a greater rather than a lesser extent, to the ICJ. Even though the ICJ is a body of general jurisdiction, it also operates, in practice, within the jurisdictional constraints of the case brought before it.¹¹⁸ Recently, in the *Georgia v Russia* case, the Russian Federation objected to the jurisdiction of the ICJ on the basis that the dispute was not about racial discrimination, but rather a dispute relating to other bodies of law, such as the use of force and international humanitarian law.¹¹⁹ The ICJ, however, was restricted to entertaining the dispute only over violations of the Convention of the Elimination of All Forms of Racial Discrimination (CERD). The Court found that the acts alleged by Georgia appeared to be capable of contravening rights provided under the CERD, even if these acts could also be covered by other rules of PIL – rules over which the ICJ was not entitled to pronounce.¹²⁰ This conclusion was confirmed in the judgment on the preliminary objections in which the ICJ stated that ‘one situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures’.¹²¹

Moreover, as the ILC emphasised, in certain cases a treaty or a cluster of treaties establish special regimes, in that they provide for a detailed set of rules concerning the creation, interpretation, application, modification or

¹¹⁸ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, Merits, ICJ Rep. 1986, p. 14, [222]. B. Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’ (2012) 3 *J Intl Dip Settlement* 1, 10-11; S. Sivakumaran, ‘The International Court of Justice and Human Rights’, in S. Joseph, A. McBeth (eds.), *Research Handbook on International Human Rights Law* (Edward Elgar, Cheltenham, 2010) 299, 325.

¹¹⁹ *Case Concerning Application of the Convention on the Elimination on All Forms of Racial Discrimination (Georgia v Russian Federation)*, Order on the Request on the Indication of Provisional Measures, General List No. 140, 15 October 2008, [95].

¹²⁰ *Ibid.*, [112].

¹²¹ *Case Concerning Application of the Convention on the Elimination on All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, General List No. 140, 1 April 2011, [32].

termination of the body of law within this regime.¹²² Hence, when an international court is established by and functions within such a regime it also has to take account of the specific features of the institutional setting of which it forms part. Metaphorically speaking, every treaty and the international body entrusted to supervise it form a planet within the universe of PIL.¹²³ It is, indeed, hard to miss that each planet has a very specific worldview and adopts a particular position with regards to the interpretation of its constitutive instrument, the construction of PIL and the resolution of the disputes brought before it.¹²⁴ The role of the supervisory bodies in this respect is material, largely determining the extent of autonomy of the planets and their interaction with the universe.¹²⁵

Therefore, in the fragmentation of PIL debate, one of the important challenges is to find the means to ensure that the different planets - namely treaties (or special regimes) and international bodies - interact with each other. An intrinsic aspect of this question is also how the planets interact with general international law. If one wanted to further Simma and Pulkowski's metaphor, then general international law should be somehow cosmic matter permeating the universe of PIL and, hence, all the planets too. This analogy is fitting, first, because Chapter 1 highlighted that general international law is in a constant process of informing and being informed by special law and, secondly, because

¹²² International Law Commission, 'Report of the International Law Commission on the Work of its 57th Session' (2 May-3 June and 11 July-5 August 2005), UN Doc A/60/10, [152] (ILC Final Rep.).

¹²³ B. Simma, D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 *EJIL* 483.

¹²⁴ ICSID, Case No. ARB/02/17, *AES Corp. v Argentine Republic*, Decision on Jurisdiction, 26 April 2005, [30].

¹²⁵ ILC Final Rep., [157].

general international law serves as ‘the glue that binds the [different planets of international law] together’.¹²⁶

The present thesis argues that international courts, despite their limited jurisdiction, can mitigate the challenges of fragmentation of PIL by interpreting their constitutive instruments against the background of PIL. This is also the position of the ILC in its work on the fragmentation of PIL, which highlights the potential of using the VCLT to alleviate the arising difficulties.¹²⁷ In this respect, the articulation of the international courts’ legal reasoning evidences whether or not they follow such a practice and, importantly, to what extent.¹²⁸

The present Chapter investigates, in brief, the practice of international courts and tribunals employ to construe their constitutive instruments by taking PIL norms into account. The discussion is divided into three sections. The first section inquires into the practice of international courts and tribunals when they take customary international law and general principles of law into account for interpretation purposes. The second section surveys their practice when they take cognisance of other treaties and non-binding international instruments. This analysis will be informative when addressing specific questions that are raised in the practice of the ECtHR.

2.2 Interpreting a treaty by taking customary international law and general principles of law into account

Generally, international courts readily declare that the interpretation and application of their constitutive instruments should not take place in

¹²⁶ S. Rosenne, ‘The Perplexities of Modern International Law’ (2001) 291 *RdC* 9, 43.

¹²⁷ ILC Final Rep., [423], [489].

¹²⁸ G. Abi-Saab, ‘The Normalization of International Adjudication: Convergence and Divergences’ (2010) 43 *N.Y.U.J.Intl.L.&Pol.* 1, 10.

isolation from customary international law and general principles of law and that they should promote a harmonious interpretation, as far as possible.¹²⁹

An interesting example is the decision of the ICSID Annulment Committee where it held that the ICSID arbitral tribunal in the *CMS* case had manifestly exceeded its powers because, among other things, it did not place the ICSID convention against PIL.¹³⁰ Before the arbitral tribunal Argentina claimed a state of necessity under both customary international law, as codified in Article 25 of the ILC Articles on State Responsibility, and a specific clause in the Argentina-US Bilateral Investment Treaty (BIT). Although the tribunal assessed (and rejected) both claims, the Annulment Committee opined that it should have examined the relationship between the treaty clause and customary international law, since ‘those two texts [have] a different operation and content’.¹³¹ Thus, the tribunal should have more thoroughly assessed if, and to what extent, customary international law informs the content of the treaty obligation.¹³²

Nevertheless, on certain occasions, it is clear that customary international law does not come into play when interpreting a treaty provision. In the *Dispute regarding Navigational and Related Rights*, the question of the

¹²⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, p. 16, [53]; ILC Final Rep., [37]-[43], [119]-[122], [159]-[185], [463]-[469]; R. Bernhardt, ‘Interpretation in International Law’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984) 318, 323; C. de Visscheur, *Problèmes d’Interprétation Judiciaire en Droit International Public* (Pedone, Paris, 1963) 92-93.

¹³⁰ *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Proceeding, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007.

¹³¹ *Ibid.*, [131].

¹³² C. McLachlan, ‘Investment Treaties and General International Law’, in A.K. Bjorklund *et al.* (eds.), *Investment Treaty Law: Current Issues III* (British Institute of International and Comparative Law, London, 2009) 105, 108.

extent of Costa Rica's right of free navigation through the San Juan River was before the ICJ. Although Costa Rica and Nicaragua had specifically concluded a treaty on the use of the river, Costa Rica argued that its right of free navigation is regulated, in part, by the customary international law on international rivers.¹³³ The ICJ rejected this claim, deciding that the treaty is sufficient to settle the dispute. Finding recourse to customary international law is not deemed necessary when a provision clearly excludes it, by way of establishing a modification or an exception to it, or explicitly regulates an activity in a self-sufficient manner.¹³⁴ This equally applies where a treaty completely opts out from the general rules on State responsibility, as in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. Diplomatic law was held to 'provide the necessary means of defence against, and sanction for, illicit activities. [...] The rules of diplomatic law, in short, constitute a self-contained regime'.¹³⁵

On the other hand, however, the exclusion, or inclusion, of customary international law or general principles of law from the construction of a treaty is not usually an easy question to answer. It is not sufficient to proclaim that it applies insofar as a treaty does not contract out of it.¹³⁶ Since, as discussed in Chapter 1, the relationship between a treaty provision and general international law is not fixed or static, it is a matter of interpretation on a case-by-case basis

¹³³ *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, Merits, 13 July 2009, ICJ Rep. 2009, p. 213, [32]-[36].

¹³⁴ *Ibid*, [35].

¹³⁵ *Case concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, ICJ Rep. 1980, p. 3, [83], [86].

¹³⁶ Appellate Body of the World Trade Organisation in *Korea – Measures Affecting Government Procurement*, Panel Report, WT/DS163/R, 19 January 2000, [7.96]; Permanent Court of Arbitration tribunal, *Access to Information under Article 9 of the OSPAR Convention (Ireland v. UK)* Final Award, 2 July 2003, 42 ILM 1118 (Ospar Convention Award), [85].

for deciding if, and how, general international law informs a treaty.¹³⁷ A relevant example comes from the field of international investment law. Article 25 of the ICSID convention provides the requirements for a tribunal to establish its jurisdiction:

(1) [t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of any investment between a Contracting State ... and a national of another Contracting State [...]

(2) ‘National of another Contracting State’ means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute.

A national of another Contracting State is defined by “positive” and “negative” requirements, namely a natural or juridical person that has the nationality one of the Contracting Parties (positive requirement) but does not have the nationality of the State which is a party to the dispute (negative requirement). This is a special rule, which modifies or displaces the standard under the customary international law regarding diplomatic protection.¹³⁸ It is an instance where, as the ICJ noted in the *Diallo* case, ‘the role of diplomatic protection somewhat fade[s]’,¹³⁹ in light of the detailed provisions in treaties. At first glance, it appears that there is no need to find recourse to customary international law for the construction of Article 25 ICSID convention. Yet,

¹³⁷ C. McLachlan, (note 16), 108.

¹³⁸ R.A. Luzi, B. Love, ‘Individual Nationality in Investment Treaty Arbitration: The Tension between Customary International Law and *Lex Specialis*’, in Bjorklund *et al.*, (eds.), (note 16), 183.

¹³⁹ *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgment, Preliminary Objections, 24 May 2007, ICJ Rep. 2007, p. 582, [88].

despite the *lex specialis*, tribunals hold different views on the relevance of customary international law.¹⁴⁰

In the *Champion Trading* case,¹⁴¹ Egypt, as the respondent State, raised a preliminary objection, arguing that the claimants were, in fact, dual nationals (American and Egyptian nationals) and, thus, were excluded *ratione personae* from the tribunal's jurisdiction. The claimants, in turn, responded that they were not dual nationals and, in the alternative, if they were, 'under international public law [...], an international tribunal dealing with the question of the nationality of a party in an investment dispute under the Convention must look to the real and effective nationality'.¹⁴² The tribunal accepted Egypt's objection and found that customary international law had no application in the case, since 'the [ICSID] Convention in Article 25 (2)(a) contains a clear and specific rule regarding dual nationals'.¹⁴³ Another tribunal in the *Olguín* case,¹⁴⁴ however, held that it had, first, to examine what the real and effective nationality of the claimant was, according to customary international law, and, then, apply Article 25 ICSID convention.¹⁴⁵ Hence, the tribunals reach different conclusions on the basis of whether customary international law should inform the interpretation of the ICSID convention. Although Article 25 of the ICSID convention contains a *lex specialis* provision on the positive and negative requirements on nationality, it does not define nationality as such. This is why customary international law

¹⁴⁰ Also S.R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *AJIL* 475 on aspects of regulatory takings.

¹⁴¹ *Champion Trading Company Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba against Arab Republic of Egypt*, ICSID Case No ARB/02/9, Decision on Jurisdiction, 21 October 2003.

¹⁴² *Ibid.*, [11].

¹⁴³ *Ibid.*, [16]; *Waguih Eleie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No ARB/05/15, 11 April 2007, [142]-[147], [195]-[198].

¹⁴⁴ *Mr. Eudoro Armando Olguín v. Republic of Paraguay*, Award, ICSID Case No ARB/98/5, 26 July 2001.

¹⁴⁵ *Ibid.*, [61].

on diplomatic protection and the notion of effective nationality might come into play and bring to the fore the question as to what extent customary international law is relevant under Article 25 of the ICSID convention.¹⁴⁶

The arbitral tribunal in the *Iron Rhine* arbitration also shed some light on these issues. Having found that sustainable development has attained the status of a general principle of law, the tribunal examined how this could be relevant for interpreting Netherlands's and Belgium's rights and obligations under the 1839 Treaty of Separation. The Treaty concerned the Iron Rhine railway which linked the port of Antwerp to Germany by crossing the Netherlands.¹⁴⁷ The Netherlands and Belgium disagreed about who should bear the costs for adapting and modernising the railway lines in territory belonging to the Netherlands. The tribunal thought that it should construe the 1839 Treaty according to the principle of effectiveness and in an evolutive manner, in light of the new technical developments relating to the operation and capacity of the railway.¹⁴⁸ It relied on Article 31 (3)(c) VCLT, which prescribes that when a treaty is interpreted there shall be taken into account, together with the context any relevant rules of international law applicable in the relations between the parties. It interpreted the 1839 Treaty by taking the duty to sustainable development into account. As a consequence, the tribunal held that Belgium's right of transit had to be reconciled, to the extent possible, with the Netherlands' environmental concerns.¹⁴⁹ The *Iron Rhine* judgment is a very good example of how reading a treaty in conjunction with a general principle

¹⁴⁶ Partial Dissenting Opinion of Professor Francisco Orrego Vicuña, in *Siag* case, [62].

¹⁴⁷ Permanent Court of Arbitration, *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (The Kingdom of Belgium and the Kingdom of Netherlands), Award, 24 May, 2005, [60].

¹⁴⁸ *Ibid*, [80]-[83].

¹⁴⁹ *Ibid*, [220].

of law informs the treaty's construction. If the tribunal had not acknowledged the duty to sustainable development under general international law and interpreted the Treaty in light of this duty, it would not have attempted to reconcile Belgium's treaty right with pertinent environmental concerns.

As the *Iron Rhine* judgment highlighted, it is generally accepted that new developments or emerging norms in general international law should be taken into account by international courts, when they construe a treaty provision, especially when the latter is receptive to follow subsequent pertinent (legal and technical) developments.¹⁵⁰ This is the case for generic terms whose content is expected to be subject to change through time, such as, for example, 'territorial status' or 'natural resources'.¹⁵¹

Although the extent to which general international law may be considered relevant is a matter of interpretation, limits can be safely drawn. One should not lose sight of the fact that the present discussion concerns the resort to general international law for the purpose of interpreting a treaty provision, rather than directly applying general international law, as in the case when a treaty contains a direct *renvoi*.¹⁵² Hence, the extent to which general international law is, in fact, relevant in the process of interpreting a treaty is subject to the jurisdictional confines of an international court and the claims

¹⁵⁰ *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia), Judgment, 25 September 1997, ICJ Rep., 1997, p. 7, [112], [140]; Dissenting Opinion of Vice-President Weeramantry, in *Case concerning the Kasikili/Sedudu Island*, (Botswana v Namibia), Judgment, ICJ Rep. 1999, p. 1045, [89].

¹⁵¹ *Case concerning the Aegean Sea Continental Shelf*, Judgment, ICJ Rep. 1978, p. 3, [77] and *United States Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, [130] respectively.

¹⁵² *Kasikili/Sedudu Island*, [93]; cf. Separate Opinion of Judge Kooijmans, [11].

raised before it. Otherwise, a treaty would be transformed into an unqualified and comprehensible jurisdictional regime.¹⁵³

The ICJ seems to have overstepped this limit in the *Oil Platforms* case.¹⁵⁴ The main issue before the Court was whether the United States (US), by destroying Iranian oil platforms on two occasions, violated its obligations under Article X of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran. The jurisdiction of the Court was based exclusively upon this Treaty. More specifically, Article X (1) reads that ‘between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation’.¹⁵⁵ In its defence the US brought Article XX into play, arguing that the actions that Iran complained over were measures to protect the US’ essential security interests. Hence, even if these actions constituted breaches of Article X, they were justified under Article XX. In the view of the Court, since the latter provision was invoked for justifying the use of armed force, its construction ‘necessarily entails an assessment of the conditions of legitimate self-defence under international law’.¹⁵⁶ The ICJ highlighted that it should interpret the Treaty by taking any relevant rules applicable in the relations between the parties into account (Article 31 (3)(c) VCLT). Although the ICJ stressed its limited jurisdiction by virtue of the 1955 Treaty, it brought the Charter of the United Nations and the totality of

¹⁵³ Ospar Convention Award, [85].

¹⁵⁴ *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, Merits, 6 November 2003, ICJ Rep. 2003, p. 161 (*Oil Platforms* case).

¹⁵⁵ *Ibid.*, [22].

¹⁵⁶ *Ibid.*, [40].

customary international law on the use of force to the fore and pronounced that the US' actions conformed to this corpus of law.¹⁵⁷

It appears that, when general international law (customary international law) is brought into play for interpreting a treaty provision, it is easy to overlook that general international law is not to be applied but merely to inform the treaty provision to a certain extent. In the *Oil Platforms* case, the incorporation of the totality of customary international law on the use of force 'overshadowed' the treaty provision, in that the ICJ misplaced the 1955 Treaty from the center of its inquiry. Therefore, it seems that the ICJ not only went beyond the limits of treaty interpretation, but it also did not respect the strictly conferred limits of its jurisdiction, namely to find whether Article X of the 1955 Treaty had been breached.¹⁵⁸

By way of summary, international courts and tribunals concur that they should interpret their constitutive instruments by taking general international law, customary international law and general principle of law, into account. International courts and tribunals do not seem to justify their interpretation on a specific legal basis. Only in the *Iron Rhine* and *Oil Platforms* cases was Article 31 (3)(c) VCLT specifically invoked and applied. The non-use of Article 31 (3)(c) VCLT is not material since it appears that the duty to interpret a treaty by taking general international law into account forms part of the 'common sense' of the international judge.¹⁵⁹ However, views differ on whether or not, and to what extent, general international law informs the construction of a given treaty. In certain instances, it is clear that the recourse to general

¹⁵⁷ *Ibid*, [41], [42].

¹⁵⁸ Separate Opinion by Judge Higgins, in *Oil Platforms* case, [46], [49]; Separate Opinion of Judge Kooijmans, in *Oil Platforms* case, [21]-[23]; ILC Final Rep., [458].

¹⁵⁹ ILC Final Rep., [468].

international law is unnecessary due to the detailed and effective regulation provided by a treaty provision (*Dispute regarding Navigational and Related Rights* case, *Diplomatic and Consular Staff in Tehran* case). Conversely, the inclusion of terms in a treaty, which are generic or evidence their receptiveness to new legal and technical developments, illustrates the necessity to take relevant general international law into account (the *Iron Rhine* case). In other cases, even though a treaty stipulates a *lex specialis* provision, difficulties arise in the interpretation process as to whether or not general international law should inform the treaty (*Champion Trading* and *Olguín* cases). The interpretative influence of general international law on the construction of a treaty provision could be material, as demonstrated in the *Iron Rhine* judgment. Nonetheless, as the *Oil Platforms* case demonstrates, one should not lose sight of the fact that the applicability and relevancy of general international law is restricted to informing, not substituting or overriding, the meaning of a treaty.

2.3 Interpreting a treaty by taking other treaties and non-binding norms into account

2.3.1 Interpreting a treaty by taking other treaties into account

Placing a treaty against the background of PIL does not only involve customary international law and general principles of law, but it also includes other treaties. Although the ILC highlighted this in its work on fragmentation, it did not discuss in detail the use of treaties for interpreting another treaty. Chapter 1 stressed that the fragmentation of PIL relates not only to differing interpretations of general international law or the emergence of special law as an exception or development to general international law, but it is also

concerned with whether or not, and how, different treaties and bodies of law differentiate and interact.¹⁶⁰ Hence, it is equally important to examine how international courts interpret and apply a given treaty under their jurisdiction by taking cognisance of other treaties.

When interpreting a treaty international courts often appear to have recourse to other treaties in order to ascertain the ordinary meaning of certain terms within the treaty in question. In the *Genocide* case,¹⁶¹ the ICJ had to ascertain the ordinary meaning of the word *undertake* in Article I of the Genocide Convention.¹⁶² The fact that other international treaties¹⁶³ employ this particular term as imposing specific obligations and not merely statements of aspirations was material for the ICJ in finding that the provision conferred a binding and autonomous international obligation on member States.¹⁶⁴ Likewise, in the *Nicaragua* case the ICJ had to interpret and apply Article XXI of the 1956 Treaty of Friendship, Commerce and Navigation between the US and Nicaragua.¹⁶⁵ At issue was whether the ICJ had jurisdiction to pronounce on whether the US measures could be justified as exceptions to the normal implementation of the Treaty. The court compared the provision of the bilateral Treaty to Article XXI of the General Agreement on Tariffs and Trade

¹⁶⁰ ILC Final Rep., [49]-[55].

¹⁶¹ *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, Merits, 26 February 2007, ICJ Rep. 2007, p. 43 (*Genocide* case).

¹⁶² Article I reads: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. Convention on the Prevention and Punishment of the Crime of Genocide (concluded on 9 December 1948; entered into force on 12 January 1951) 78 UNTS 277.

¹⁶³ The Court referred to the UN Convention of the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by the GA Res. 2106 (XX) on 21 December 1965; entered into force on 4 January 1969) 66 UNTS 195 and the International Covenant on Civil and Political Rights (concluded on 16 December 1966; entered into force on 23 March 1976) 999 UNTS 17.

¹⁶⁴ *Genocide* case, [162].

¹⁶⁵ *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment, Merits, ICJ Rep. 1986, p. 14 (*Nicaragua* case).

(GATT).¹⁶⁶ The treaties were not similarly worded and the ICJ concluded *a contrario* that it had jurisdiction to pronounce on the specific question, whereas the GATT left the evaluation to the contracting party.¹⁶⁷ One can find numerous similar examples in the judgments of the ICJ¹⁶⁸ and in the everyday practice of many international bodies entrusted to supervise a given treaty.¹⁶⁹

The fact that international bodies do not invoke a specific legal basis or an interpretative principle under Articles 31-33 VCLT to justify this practice does not come as a surprise. The international judge is inclined towards employing a ‘comparative reading’ of treaties, especially during the initial stage of the interpretation process. It is a legitimate means for identifying the ordinary meaning of a term under a given treaty.¹⁷⁰ In certain instances, a given treaty may qualify as an element and evidence under different interpretative principles, such as subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31 (3)(b) VCLT),¹⁷¹ or, as a relevant rule of international law applicable in the relations between the parties (Article 31 (3)(c) VCLT).¹⁷² Nevertheless, Article 31 (1) VCLT seems the most fitting

¹⁶⁶ 55 UNTS 194.

¹⁶⁷ *Nicaragua* case, [222].

¹⁶⁸ For example, *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, Preliminary Objections, 12 November 1996, ICJ Rep 1996, p. 803, [27]-[28]; *Dispute Regarding Navigational and Related Rights*, [53], [55].

¹⁶⁹ For example, B. Peters, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’, in H. Keller, G. Ulfstein (eds.), *United Nations Human Rights Treaty Bodies – Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) 29, as being available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013298.

¹⁷⁰ R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2010) 283; B. Simma, T. Kill, ‘Harmonising Investment Protection and International Human Rights: First Steps towards A Methodology’, in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century* (Oxford University Press, New York, 2009) 678, 683-686.

¹⁷¹ U. Linderfalk, ‘Who Are “the Parties”? Article 31, paragraph 3(c) of the 1969 Vienna Convention and the “Principle of Systemic Integration” Revisited’ (2008) LV *NILR* 343, 364.

¹⁷² J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, New York, 2003) 256; B. Rudolf, ‘Unity and Diversity in the Settlement of International

legal basis, thereby interpreting a treaty in good faith and identifying the common use of a term by States in PIL.¹⁷³

In the event that the interpretation of a treaty provision becomes a more complex exercise than employing a at first glance ‘comparative reading’ of treaties, international courts appear reluctant to read their constitutive instruments in light of other treaties. The *United States – Restrictions on Imports of Tuna* case is a good example.¹⁷⁴ The dispute concerned a complaint brought by the EC and the Netherlands against the US, arguing that certain US embargo practices were not consistent with the GATT. The US claimed that the embargo fell within the general exception clause (Article XX) and, in particular, the conservation of exhaustible natural resources.¹⁷⁵ It submitted that the Panel should interpret Article XX by taking other relevant treaties into consideration, such as the Convention on International Trade in Endangered Species. The Panel rejected the US arguments on the basis that these agreements were not binding on all GATT contracting parties¹⁷⁶ and, hence, they did not fall within either Article 31(3)(a) VCLT or Article 31 (3)(b) VCLT. It is unclear, however, why the Panel did not examine whether or not these agreements could trigger the applicability of Article 31 (3)(c) VCLT or

Disputes’, in A. Zimmermann, R. Hofmann (eds.), *Unity and Diversity in International Law* (Duncker and Humbolt, Berlin, 2006) 389, 391-392.

¹⁷³ Gardiner, (note 54), 282-284; F. Berman, ‘Treaty “Interpretation” in a Judicial Context’ (2004) 29 *Yale JIL* 315, 318; Linderfalk, (note 55), 364; Pauwelyn, (note 56), 256.

¹⁷⁴ *United States – Restrictions on Imports of Tuna*, Unpublished GATT Panel Report, DS29/R, 16 June, 1994.

¹⁷⁵ Article XX (‘General Exception’) provides that ‘[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’.

¹⁷⁶ *Restrictions on Imports of Tuna*, [5.19].

Article 31 (1) VCLT, as evidence of the ordinary meaning of a treaty or as an aspect of the general principle of harmoniously interpreting, to the extent possible, different treaties.¹⁷⁷

Nevertheless, the WTO Appellate Body (AB) undertook a different approach in the *US-Shrimp* case¹⁷⁸ to the Panel in the *Restrictions on Import of Tuna* case. The case before it was similar, insofar as having to identify whether the meaning of ‘exhaustible natural resources’ under Article XX (g) includes living resources. It did find ‘pertinent to note that modern international conventions and declarations’¹⁷⁹ refer to natural resources by embracing both living and non-living resources. Specific mention was made to two treaties, the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity. The AB did not provide a specific legal basis for using other treaties to interpret the GATT, although it seems that the evolutionary nature of the term facilitated its reasoning.¹⁸⁰

In other instances, however, as in the *Restrictions on Import of Tuna* case, the Panel was not inclined towards using other treaties in its interpretation. In the *EC-Biotech Products* case, the Panel categorically dismissed the applicability of relevant treaties, because they were not binding on all contracting parties to the GATT.¹⁸¹ This was based on the conclusion that when Article 31 (3)(c) VCLT refers to rules *applicable* in the relations between the *parties*, it means all the contracting parties to the treaty under

¹⁷⁷ I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, Oxford, 2009) 357-359, 375; Pauwelyn, (note 56), 257-263.

¹⁷⁸ *United States Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Appellate Body Report, WT/DS58/AB/R, 12 October 1998 (*US-Shrimp* case).

¹⁷⁹ *Ibid.*, [130].

¹⁸⁰ *Ibid.*, [129]-[131].

¹⁸¹ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Panel Report, WT/DS291R, WT/DS292R/WT/DS293, 29 September 2006, [7.68]-[7.75].

interpretation. If the treaty, which could be used for informing the interpretation of another treaty, is not binding on all contracting parties, the interpreter is not entitled to use it. Even though it is established that Article 31 (3)(c) VCLT covers treaties,¹⁸² it is disputed whether the ‘parties’ under Article 31 (3)(c) are only the parties to a given dispute or all contracting parties to the treaty under interpretation.¹⁸³

The only international court which has developed an extensive practice of taking other treaties into account for the interpretation of its constitutive instrument is the Inter-American Court of Human Rights (IACtHR). By way of example, in a cluster of cases concerning the rights of indigenous peoples, it drew interpretive guidance from the International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169).¹⁸⁴ In the *Yakye Axa Indigenous Community*¹⁸⁵ and *Sawhoyamaya Indigenous Community*¹⁸⁶ cases, the applicants complained of a violation of their right to use and enjoy their property under Article 21 Inter-American Convention on Human Rights (IACHR)¹⁸⁷ and, more specifically, their right to the communal property of their ancestral lands. The IACtHR considered Article 13 of the ILO Convention No. 169, which concerns the duty of State parties to respect the

¹⁸² ILC Final Rep., [470]; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, Manchester, 1984), 119; Gardiner, (note 54), 260-262.

¹⁸³ For a useful overview Gardiner, (note 54), 269-275. ILC Final Rep., [470]-[472]; Pauwelyn, (note 56), 257-263. Cf. Linderfalk, (note 55).

¹⁸⁴ Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169 (concluded on 27 June 1989, entered into force on 5 September 1991) (1989) 28 ILM 1382 (ILO Convention No. 169).

¹⁸⁵ *Yakye Axa Indigenous Community v Paraguay*, Series C No. 125, 17 June 2005.

¹⁸⁶ *Sawhoyamaya Indigenous Community v Paraguay*, Series C No. 146, 29 May 2006.

¹⁸⁷ Concluded on 22 November 1969, entered into force on 18 July 1978; OAS Treaty Series No. 36. Article 21 (1) reads ‘everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society’.

special importance of the relationship that indigenous peoples may develop with the lands that they occupy or use. Article 21 (1) IACHR was interpreted in light of this provision and the IACtHR established a collective understanding of the right to property under the IACHR.¹⁸⁸

In its legal reasoning the IACtHR employed a series of legal bases for legitimising the use of other treaties in the interpretation process. The IACtHR has acknowledged that the construction of the IACHR should take account of the ‘the system of which forms part of it’¹⁸⁹ (Article 31 (3) VCLT). It also invokes the need for an evolutive interpretation of human rights and the principle of the *corpus juris* of human rights protection¹⁹⁰.

In sum, international courts and tribunals have a widespread practice of taking other treaty provisions into account during their inquiry to ascertain the ordinary meaning of a term, especially when said term is commonly employed by States in treaties. More generally, however, international bodies appear reluctant to use other treaties when they interpret their constitutive instruments. From the previously discussed cases, it is only the IACtHR which is proactive in ascertaining the scope and content of rights under the IACHR by taking other detailed treaty provisions into account.

It should be noted, at this point, that the ILC has suggested what appears to be a very specific fashion for using other treaties in the interpretation process. It asserted that Article 31 (3)(c) VCLT reflects the ‘systemic integration’ interpretative principle, which has the objective to

¹⁸⁸ *Yakye Axa Indigenous Community*, [136]-[137]; *Sawhoyamaya Indigenous Community*, [119].

¹⁸⁹ *Yakye Axa Indigenous Community*, [126].

¹⁹⁰ *Ibid*, [125], [128]. See G.L. Neuman, ‘Import, Export and Regional Consent in the Inter-American Court of Human Rights’ (2008) 19 *EJIL* 101; F. Vanneste, *General International Law Before Human Rights Courts* (Intersentia, Antwerp-Oxford-Portland 2010) 294-330.

‘connect the separate treaty provisions [...] as aspects of an overall aggregate of the rights and obligations of the States’.¹⁹¹ The meaning of this is not entirely clear. Taking other treaties into account, when interpreting a treaty, enhances the consistency of the PIL rules applicable to the States and contributes to avoiding conflicts or inconsistencies.¹⁹² However, the systemic integration of treaties somehow implies a specific *objective* of interpreting one treaty by reference to another treaty in order to achieve ‘a sense of coherence and meaningfulness’.¹⁹³ Although interpretation may achieve a certain degree of consistency and harmonisation between different treaties, it is doubtful whether it can integrate them into a coherent whole and whether this should be the objective of Article 31 (3)(c) VCLT. The application of this provision and, in general, the practice of interpreting a treaty by taking other treaties into account reach their limits within the interpretation process and should not relate to law-making.¹⁹⁴

2.3.2 Interpreting a treaty by taking non-binding norms into account

The question of using non-binding law (soft-law) for interpreting a treaty has not been addressed either by the ILC’s work on fragmentation of PIL or in academic literature. As far as the VCLT interpretative principles are concerned, soft-law could, perhaps, may aid the interpretation of a treaty provision as evidence of the ordinary meaning (Article 31(1)). The AB WTO

¹⁹¹ ILC Final Rep., [467].

¹⁹² *EC-Biotech Products*, [7.70].

¹⁹³ ILC Final Rep., [419]; F. Baetens, ‘Muddling the Waters of Treaty Interpretation? Relevant Rules of International Law in the *Mox Plant* OSPAR Arbitration and *EC-Biotech* Case’ (2008) 77 *Nordic JIL* 197, 216.

¹⁹⁴ Simma, Kill, (note 54), 693-694; M. Samson, ‘High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties’ (2011) 24 *LJIL* 701, 710, 712-713; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, New York, 2008) 366-367.

in the *US-Shrimp* case used Agenda 21¹⁹⁵ and the Resolution on Assistance to Developing Countries¹⁹⁶ in this way.¹⁹⁷ Alternatively, non-binding PIL norms could trigger the applicability of Article 31 (3)(c) VCLT, if it is accepted that ‘rules of international law’ include non-binding sources of law. Nonetheless, the mainstream view is that Article 31 (3)(c) VCLT does not come into play in the case of considerations that are not firmly established as binding rules.¹⁹⁸ Gardiner is right, however, in carefully noting that the current practice of international courts is insufficiently developed.¹⁹⁹

The Oskar tribunal in the *Mox Plant* case dismissed Ireland’s suggestion to take non-binding international instruments to interpret the Oskar Convention. Ireland had specifically invited the tribunal to take ‘evolving international law and practice on access to environmental information’²⁰⁰ into account and referred to the Rio Declaration on Environment and Development²⁰¹ and the Aarhus Convention.²⁰² The Rio Declaration is a non-binding instrument and the Aarhus Convention was not ratified by either of the parties to the dispute. The tribunal accepted, in principle, the possibility of drawing from current international law and practice to inform the interpretation of the OSPAR convention. Yet, it proceeded to reject any interpretative guidance from not *lex lata* PIL norms, which are not admissible under Article

¹⁹⁵ Agenda 21: Programme of Action for Sustainable Development, UN Doc A/Conf.151/26, 14 June 1992.

¹⁹⁶ Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals.

¹⁹⁷ *US-Shrimp*, [130].

¹⁹⁸ ILC Final Rep., [426(a)]; Orakhelashvili, (note 78), 366; cf. Baetens, (note 77), 209.

¹⁹⁹ Gardiner, (note 54), 266-268; J. Merrills, ‘International Adjudication and Autonomy’, in R. Collins, N.D. White (eds.), *International Organisations and the Idea of Autonomy* (Routledge, Oxford, 2011) 160, 170.

²⁰⁰ Oskar Convention Award, [98].

²⁰¹ (1992) 31ILM 874.

²⁰² Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447.

31 (3)(c) VCLT.²⁰³ One of the arbitrators, Griffith, dissented from the judgment arguing that not-binding PIL norms could have normative and evidentiary value for informing the OSPAR convention.²⁰⁴

Griffith's view cannot be dismissed as being without merit. The fact that an international instrument has no binding force does not necessarily mean that it is of no relevance when interpreting a treaty.²⁰⁵ It is true that the use of soft-law cannot be easily justified on the basis of the interpretative principles in Articles 31-33 VCLT. Yet, its evidential weight is acknowledged by the IACtHR's jurisprudence, a pertinent example of which is the *Saramaka People* case.²⁰⁶ In this case the applicants were members of an indigenous people in Suriname who complained of a breach of their right to enjoy and use their traditionally occupied lands and resources under Article 21 IACHR. The IACtHR took the ICCPR and a number of non-treaty instruments and evidence of international practice into account.²⁰⁷ It referred to the UN Declaration on the Rights of Indigenous Peoples and it extensively discussed the views and General Comments by the Human Rights Committee, General Recommendations by the Committee on the Elimination of Racial Discrimination. The IACtHR concluded that Suriname had the obligation to protect the right of the Saramaka community to enjoy and use their traditionally occupied lands and resources. It also identified certain safeguards

²⁰³ Ospar Convention Award, [99]-[105].

²⁰⁴ Dissenting Opinion of Gavan Griffith QC, in Ospar Convention Award, [10].

²⁰⁵ J.A. Frowein, 'The Interrelationship between the Helsinki Final Act and the International Covenants on Human Rights and the European Convention on Human Rights', in T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord* (Allanheld, Osmun & Co. Publishers, New York, 1977) 71, 72.

²⁰⁶ *Saramaka People v Suriname*, Series C No 172, 28 November 2007.

²⁰⁷ *Ibid*, [130]-[131], [135]-[136], [140].

against restrictions of the community's right.²⁰⁸ Notably, these safeguards, such as the effective participation and sharing of benefits regarding development or investment projects within tribal territories, were inferred by reference to the non-treaty instruments.

2.4 Conclusions

This Chapter highlighted that international courts and tribunals have a considerable practice in interpreting their constitutive instruments by taking PIL into account. It is generally accepted that international courts and tribunals have the duty to take general international law, especially customary international law and general principles of law, into account. In most instances, whether or not and to what extent general international law is considered relevant to inform a treaty is a matter of a case-by-case interpretation. The restricted jurisdiction of the court or tribunal and the confines of the interpretation process dictate the limit of the interpretative influence that general international law may have on the construction of a treaty provision.

Turning to the question of taking other treaties into account to construe the treaty under interpretation, international courts and tribunals seem to be hesitant. With the exception of the IACtHR, which employs other treaties in its legal reasoning, the international case-law previously discussed indicates that such a practice is rarely encountered. Lastly, international court and tribunals - except the IACtHR - are rather dismissive of using non-binding PIL norms due to the lack of binding force and the difficulty of providing a solid legal basis under the VCLT for justifying their consideration.

²⁰⁸ *Ibid*, [93]-[96].

PART II: The case-law of the Court

Part I of this thesis discussed the challenges that arise due to the fragmentation of PIL. The analysis took the academic debate, the work of the ILC and the practice of international courts into account and addressed the dangers posed by international courts with a restricted subject-matter jurisdiction. Chapter 1 highlighted that, although difficulties exist in light of the expansion and diversification of PIL, the alleged dangers to the unity of PIL are overestimated. It was underlined that international courts of limited *ratione materiae* jurisdiction should have, in principle, the authority to pronounce on issues of general international law without posing a threat to the unity of PIL. It was also stressed that PIL, on the whole, benefits from the developments and trends stemming from international courts, something which is acknowledged by the International Court of Justice too in its recent judgments, in the *Diallo* and *Jurisdictional Immunities of the State* cases.¹ Chapter 2 investigated, in brief, the practice of international courts to interpret their constitutive instruments by taking other relevant PIL norms into account. Some informative examples were discussed illustrating that international courts, to a different extent, are aware of and try to mitigate the problem of different interpretations of same or identical PIL norms.

The primary aim of this study, however, is to test whether or not, and if yes, to what extent, the ECtHR alleviates the challenges arising from the

¹ *Infra* 1.4. *Case concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgment, Preliminary Objections, 24 May 2007, ICJ Rep. 2007, p. 582, [88], [90]; *Case concerning the Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening), Judgment, 3 February 2012, General List No 143, [72], [73], [76], [78], [90].

fragmentation of PIL. Part II examines in detail the pertinent case-law of the Court (subject to the caveats as they were explained in the Introduction). This thesis argues that, although the ECtHR has been accused of ignoring PIL when interpreting and applying the ECHR or forming a ‘little separate empire’, has, in fact, an extensive practice of engaging with other PIL norms during the process of the interpretation of the ECHR. The main argument is that the ECtHR has developed an autonomous interpretative principle of taking cognisance of other PIL norms when construing the ECHR. It will be demonstrated that this interpretative principle functions in a distinctive manner to other cardinal principles in the Court’s jurisprudence, namely the principle of effectiveness, the dynamic interpretation and the comparative interpretation.

Admittedly, interpreting the ECHR by relying upon other PIL norms is not a recent phenomenon in the Court’s case-law. By way of example, the Court, in 1975, in one of its leading judgments, the *Golder* case, found recourse to the ‘universally “recognised” fundamental principles of law’² in order to assert that the right to access a court is an inherent element of the right to a fair trial under Article 6 ECHR. The Court also employed in its reasoning Article 31 (3)(c) VCLT which explicitly states that when interpreting a treaty other relevant, applicable in the relations between the parties rules of international law will be taken into account. Nonetheless, it will be seen that the Court in its recent practice follows an exemplary ‘open and generous approach as it recognises the commonality of human rights problems, as well

² *Golder v. United Kingdom*, 21 February 1975 (Plenary), [36].

as the interconnectedness of regional and international regimes'.³ Construing the ECHR by finding recourse to other PIL norms is one of the Court's priorities and this is precisely the reason why it employs an *autonomous* interpretative argument.

Part II will study the Court's legal reasoning in order to ascertain whether it is possible to discern patterns in the jurisprudence. It will explore the interpretative means that the Court employs for alleviating the difficulties of fragmentation. The analysis will also show whether certain limits should be set to applying this interpretative principle. The three different Sections reflect the different impact that PIL norms may have on the Court's reasoning and the interpretation of the ECHR. The Court finds recourse to and uses PIL norms in order to define terms embodied in the ECHR and ascertain the meaning of concepts which are necessary for applying the ECHR (Section I); to restrict the protective scope of the rights and freedoms under the ECHR (Section II); and to expand *ratione materiae* the scope of the ECHR (Section III). The analysis will lay the basis for concluding on whether the ECtHR endangers the unity of PIL or rather develops its case-law consistently with PIL and what is the potential impact of the Court's interpretative practice on the ECHR.

³ Speech given by Mrs Louise Arbour, United Nations High Commissioner for Human Rights, on the Occasion of the Opening of the Judicial Year of the European Court of Human Rights, 25 January 2008, available at www.echr.coe.int.

Section I: Finding recourse to public international law norms in order to define certain concepts necessary for applying the ECHR and to define certain terms embodied in the ECHR

Section I discusses cases in which the Court has recourse to PIL norms in order to ascertain the meaning of certain concepts necessary for applying the ECHR and to define specific terms contained in the ECHR. It will be seen that the use of PIL norms penetrates the first stage of the Court's legal reasoning. This Section is divided into two Chapters.

Chapter 3 investigates two examples from the Court's practice. The first instance is taking cognisance of PIL norms in order to find the meaning of the concept of jurisdiction (Article 1 ECHR) and the second example is to determine the effects (if any) of State succession in human rights treaties on the construction of the ECHR. Chapter 4 examines judgments in which the Court relied on PIL norms in order to define specific terms embodied in the text of the ECHR, such as 'everyone' or 'slavery'.

This Section shares certain common features with the discussion in Chapter 2 in which it was concluded that international courts and tribunals are generally inclined towards employing PIL norms when they define a term found in the treaty under interpretation or when they have to settle a necessary matter in order to proceed to the merits of a claim. Hence, the Section provides an exploration as to whether the ECtHR has a similar interpretative practice.

3. Finding recourse to public international law in order to define certain concepts necessary for applying the ECHR

3.1 Introduction

This Chapter explores the Court's recourse to PIL norms in order to identify the meaning of certain concepts which are necessary for applying the ECHR. Two series of cases will be discussed; the first concerns the notion of jurisdiction under Article 1 ECHR. The relevant judgments that will be examined are, perhaps, the most well-known occasions of the Court's interpretative practice of taking cognisance of PIL norms. Although the *Banković* case, for example, is frequently cited as a fitting illustration of reading the ECHR harmoniously with PIL, the present author will critically address this view. Secondly, this Chapter will address whether the Court in cases concerning State succession relies on PIL norms in order to assess the effect in the application of the ECHR.

3.2 The question of exercising jurisdiction under Article 1 ECHR

Article 1 ECHR states that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. The provision prescribes *ratione loci* the scope of the Convention and is important because the question of whether the applicant falls within the jurisdiction of a member State is a precondition for the Court to

examine the merits of a complaint.¹ Yet, the text of the ECHR offers no guidance as to the precise meaning of the term *jurisdiction*. It is the Court which has elucidated the concept of jurisdiction in its jurisprudence.

The *Loizidou* case is one of the leading cases.² The Grand Chamber had to ascertain whether Turkey could be held responsible for violations of the ECHR outside its territory, in the northern part of Cyprus. The Court, when addressing the question of whether Turkey exercised jurisdiction over the northern Cyprus, recalled that the concept of jurisdiction is not restricted to the national territory of member States. If a member State exercises effective control of an area outside its national territory, its responsibility under the ECHR may arise.³ The exercise of effective control derived from ‘the *fact* of such control whether it [is] exercised directly, through its armed forces, or through a subordinate local administration’.⁴ The Court, in light of the facts of the case, found that Turkey exercised jurisdiction over the northern part of Cyprus since Turkey occupied that part and had established the ‘Turkish Republic of Northern Cyprus’.⁵ The Grand Chamber in the *Cyprus v Turkey* case reaffirmed this conclusion.⁶

However, the Court in *Banković*,⁷ by finding recourse to PIL, changed its position on the meaning of jurisdiction.⁸ The NATO air strikes against the

¹ D.J. Harris *et al*, *Law on the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 787; I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2008) 475.

² *Loizidou v. Turkey*, Preliminary Objections, 23 March 1995, (Grand Chamber).

³ *Ibid*, [62].

⁴ *Ibid* (emphasis added).

⁵ *Ibid*, [63]-[64].

⁶ *Cyprus v. Turkey*, 10 May 2001, (Grand Chamber).

⁷ *Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Joksimović and Dragan Suković v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal,*

Federal Republic of Yugoslavia and, in particular, the bombings of three television stations and four radio stations were at issue. The question was whether the applicants fell within the jurisdiction of the respondent States during the bombings. The Court stated that Article 1 ECHR should be interpreted on the basis of the general rule on treaty interpretation, Article 31 Vienna Convention on the Law of Treaties (VCLT). It highlighted Article 31 (3)(c) according to which a treaty should be interpreted by taking any relevant and applicable in the relations between the parties rules of international law into account. It was noted that

[...] the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law [...] although it must remain mindful of the Convention's special character as a human rights treaty [...] The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part [...].⁹

The Court asserted that the ordinary meaning of jurisdiction under PIL is 'primarily territorial',¹⁰ whereas other bases of jurisdiction (nationality, flag, diplomatic and consular relations, effect, passive personality, and universality) are exceptional and require special justification. This assertion was substantiated by citing academic authorities.¹¹ Since Article 1 ECHR should

Spain, Turkey and the United Kingdom, Admissibility Decision, 12 December 2001, (Grand Chamber).

⁸ M. Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, Oxford, 2011) 182.

⁹ *Banković* (GC), [57].

¹⁰ *Ibid*, [59], [61].

¹¹ *Ibid*, [59], [60].

reflect this notion of jurisdiction, the Court declared the application inadmissible on the basis that the applicants did not fall in *a legal sense* within either the territorial jurisdiction of the respondent States or any of the exceptional bases of jurisdiction.

Although the Court's position that a concept under the ECHR should reflect the respective notion under PIL is, in principle, welcome and sound, it is argued that in this instance the Court's approach was incorrect. The Court found recourse to the concept of jurisdiction under PIL, which is, however, different to the concept of jurisdiction under Article 1 ECHR.¹² The concept of jurisdiction under PIL concerns the State's legal competence, namely whether, and the extent to which, a State *may* regulate its conduct or the consequences of certain acts outside of its territory, without infringing the sovereignty of another State. This legal competence is indeed governed by a number of principles upon which a State may ground its conduct, such as the principle of territoriality or other bases of jurisdiction relating to nationality, flag, diplomatic and consular relations etc.¹³ Thus, as the Court correctly underlined, the exercise of jurisdiction under PIL is a legal question. Nonetheless, the question as to whether a member State to the ECHR exercises jurisdiction extraterritorially is not a question of whether a member State is entitled *as a matter of law* to exercise jurisdiction;¹⁴ it is a question of whether a State exercises its power *as a matter of fact*. The lawful or unlawful conduct of a State is irrelevant and the exercise of jurisdiction relates to the actual exercise

¹² F. Vanneste, *General International Law before Human Rights Courts* (Intersentia, Antwerp-Oxford-Portland, 2010) 157.

¹³ C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, New York, 2008) 6; M. Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *HRLRev* 411, 425.

¹⁴ *Cf. Banković* (GC), [60].

of power.¹⁵ Moreover, although *Banković* is supposed to clarify *Loizidou* (according to the Court), it actually departs from and limits *Loizidou* without sound justification. The *Loizidou* and *Cyprus v Turkey* cases assessed the question as to whether Turkey exercised jurisdiction as a fact, whereas *Banković*, by invoking PIL, construed a legal presumption of territoriality which does not fit well within Article 1 ECHR.¹⁶

It is unclear why the Grand Chamber took this stand, especially in light of the fact that four former professors of international law sat in *Banković* (Judges Ress, Rozakis, Caflisch and Wildhaber). The view that the Court shied away from the true reasons of its judicial policy claiming an alleged respect for PIL, in order to deal with a difficult case, does not lack merit.¹⁷ Further, it is notable that, although the Court was receptive to the notion of jurisdiction under PIL, it was dismissive of other pertinent developments in PIL. More specifically, the applicants in *Banković* argued that the Court, when interpreting Article 1 ECHR, should consider how other treaty supervisory bodies entrusted with the protection of human rights, such as the Human Rights Committee (HRC) and the Inter-American Commission on Human Rights (IACoMHR), interpret the concept of jurisdiction in their constitutive instruments.¹⁸ The Court noted that it was not convinced by the applicants' arguments and it found unnecessary to pronounce on the 'specific meaning to be attributed in various contexts to the allegedly similar jurisdiction provisions

¹⁵ R. Wilde, 'Triggering State Obligation Extraterritorially: The Spatial Test in Certain Human Rights Treaties', in R. Arnold, N. Quéniwet (eds.), *International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law* (Martinus Nijhoff Publishers, Leiden-Boston, 2008) 133, 142.

¹⁶ Milanović, (note 8), 23-29, 136; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, New York, 2008) 142.

¹⁷ Milanović, (note 13), 436.

¹⁸ *Banković* (GC), [46], [48].

in [other] international instruments'.¹⁹ This statement brings to mind the discussion in Chapter 1 concerning the fact that identical or similar PIL norms may have different meanings subject to the treaty context that they stem from. The question is whether the Court was correct in drawing this line on this occasion or not.

The Grand Chamber emphasised that the pertinent provision of the American Declaration did not envisage a similar limitation to the ECHR's limitation to its territorial reach²⁰ and that this is why the IACmHR follows a different approach in the *Coard* Report.²¹ It is worth of citing the IACmHR's conclusion in the *Coard* Report:

while [the notion of jurisdiction] most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus [...] In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.²²

Despite the fact that Article II of the American Declaration does not prescribe the term 'jurisdiction', it is natural that the IACmHR examines whether an individual falls within a State's jurisdiction. The IACmHR acknowledges that jurisdiction is a concept principally referring to the national territory without, however, precluding that it could refer to extraterritorial conduct, under certain

¹⁹ *Ibid*, [78].

²⁰ Article II provides that 'all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor'.

²¹ *Coard et al. v. United States*, Case 10.951, Report No 109/99, 29 September 1999.

²² *Ibid*, [37].

circumstances. Even though, at first glance, the IACmHR and the ECtHR in *Banković* appear to adopt the same line of reasoning, there is a considerable difference between the two positions. According to the IACmHR, the extraterritorial exercise of jurisdiction is not an exception subordinated to the rule of territoriality and, hence, no special justification is required. The presumption of exercising power and authority attains a descriptive character (not a legal one) and is equally applicable outside the national territory.²³ On the contrary, *Banković* establishes a strong legal presumption that jurisdiction refers to the territory and, consequently, an exceptional basis of jurisdiction has to be specifically justified.²⁴ As far as Article 2 (1) ICCPR is concerned,²⁵ the Court accepted that the provision is similar to Article 1 ECHR and expressly limits the jurisdictional scope of the ICCPR. Nonetheless, it noted that the HRC's *exceptional* recognition of instances of extraterritorial jurisdiction did not '[displace] in any way the territorial jurisdiction expressly conferred by that Article of the ICCPR'.²⁶ True as it may be that jurisdiction primarily refers to the territory of a State, it neither precludes instances of extraterritorial jurisdiction, nor establishes a legal presumption requiring special justifications.

In sum, the Court's reasoning, with regards to distinguishing the concept of jurisdiction under Article 1 ECHR from relevant PIL norms, does not appear to be convincing. There is nothing in the pertinent provisions of the American Declaration or the ICCPR or the practice of the IACmHR and the

²³ *Ibid*, footnote 6.

²⁴ Wilde, (note 15), 144.

²⁵ 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]'.
²⁶ *Banković* (GC), [78].

HRC which would deter the Court from taking them into account when interpreting the ECHR. Further, the Court in *Banković* furnished no solid justification for taking cognisance of the notion of jurisdiction under PIL whilst leaving aside the relevant PIL norms in other human rights treaties and the respective views of their supervisory bodies.

The Grand Chamber endorses the *Banković* reasoning in its subsequent jurisprudence, incorporating under Article 1 ECHR a strong, legal presumption of territoriality on the basis of PIL.²⁷ It was only in the *Issa* case, in which, without abandoning the *Banković* approach, the Court cited the *Coard* Report by the IACmHR and the above mentioned HRC's views for supporting its conclusion *in casu* that Turkey exercised jurisdiction extraterritorially.²⁸ The Court, however, did not discuss how the legal presumption of territoriality could be read together with the IACmHR and HRC's views on assessing the exercise of jurisdiction as a matter of fact.

The Court's insistence on not clarifying its position is illustrated in the recent *Al-Skeini* case.²⁹ The Grand Chamber granted leave to intervene in the proceedings to a large number of NGOs and human rights organisations (Bar Human Rights Committee, the European Human Rights Advocacy Centre, Human Rights Watch, Interights, the International Federation for Human Rights, Liberty and the Law Society of England and Wales). In their written comments they explicitly invited the Court to take into consideration the

²⁷ *Assanidze v. Georgia*, 8 April 2004, (Grand Chamber), [137]-[139]; *Ilaşcu and others v. Moldova and Russia*, 8 July 2004, (Grand Chamber), [312], [314], [376]; *Solomou and others v. Turkey*, 24 June 2008, [43]-[44]; *Medvedyev and others v. France*, 29 March 2010, (Grand Chamber), [63]-[65]; *Issa and others v. Turkey*, 16 November 2004, [51], [65]-[71]; *Behrami v. France and Saramati v. France, Germany, Norway*, Admissibility Decision, 2 May 2007, (Grand Chamber), [69], [133]-[136].

²⁸ *Issa*, [71].

²⁹ *Al-Skeini and others v. United Kingdom*, 7 July 2011, (Grand Chamber).

‘common ground between the international and regional courts and human rights bodies’³⁰ concerning the question of extraterritorial jurisdiction. They invoked not only the views of the HRC and the IACmHR, but also more recent developments which clearly prove the Court wrong insofar its construction of the meaning of jurisdiction. They referred to the HRC General Comment No. 31, according to which the extraterritorial exercise of jurisdiction is not necessarily an exceptional case from a legal point of view.³¹ The Advisory Opinion by the International Court of Justice (ICJ) on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was also mentioned.³² The ICJ, when discussing the applicability of the ICCPR outside the territory of a contracting party, accepted that States exercise jurisdiction primarily on their territory, but it was found natural that, given the object and purpose of the ICCPR, States are also bound by their obligations when they act extraterritorially.³³ The ICJ confirmed this position by relying on the constant practice of the HRC.³⁴ This is in direct contrast to the ECtHR’s assertion in *Banković* that the HRC’s views could not provide sufficient support to the extraterritorial applicability of the ICCPR. The ICJ’s position that human rights treaties may be applicable outside the national territory has been also affirmed in the Case *Concerning Armed Activities on the Territory of the Congo* and the Case *concerning Application of the International Convention*

³⁰ *Al-Skeini* (GC), [128]-[129]; written comments by the third-party interveners, p. 12, available at the www.interights.org.

³¹ HRC, General Comment No 31: ‘Nature of the General Legal Obligations Imposed on State Parties to the Covenant’, 26 May 2004, CCPR/C/21/Rev.1/Add.13, [10].

³² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 136 (Wall Advisory Opinion).

³³ Wall Advisory Opinion, [109].

³⁴ *Ibid.*

on the *Elimination of All Forms of Racial Discrimination*.³⁵ It is unfortunate that the Court did not discuss these developments in the *Al-Skeini* judgment. Even though the Court devotes a specific section analysing its relevant case-law in a systematic manner,³⁶ it did not address whether or not its interpretation of the term jurisdiction under Article 1 ECHR is sound or concordant to the views of international bodies and the judgments of the ICJ. Both the ICJ and the HRC refer to the primary territorial focus of the concept of jurisdiction without inferring any kind of presumptions that would require an exceptional justification in cases of extraterritoriality.³⁷ The Court's silence is even more notable given the fact that this thesis will demonstrate in a further discussion that its reasoning, in general, is very receptive to the submissions and arguments of the third-party interveners.³⁸

Although the Grand Chamber accepts in several instances in *Al-Skeini* that the exercise of jurisdiction is a matter of fact,³⁹ its legal reasoning is grounded on the *Banković* case.⁴⁰ The misconception of the meaning of jurisdiction is clearly evidenced when reference is made to a State's 'jurisdictional competence',⁴¹ which concerns whether or not a State is entitled to exercise jurisdiction and not whether it actually exercises jurisdiction in the specific circumstances. On the basis of the facts of the case, the Court found that a jurisdiction link could be established between the applicants and the UK.

³⁵ *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, ICJ Rep. 1995, p. 168, [178]-[180] and [216]-[217]; *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, ICJ Rep. 2008, p. 353, [109].

³⁶ *Al-Skeini* (GC), [130]-[137].

³⁷ Wilde, (note 15), 144; Milanović, (note 13), 419.

³⁸ *Infra* 3.3, 4.2, 7.5 and 8.7, 7.3.1, 8.3, 8.4.

³⁹ *Al-Skeini* (GC), [132], [136], [138], [139].

⁴⁰ *Al-Skeini* (GC), [131].

⁴¹ *Ibid* (emphasis added).

This was because the UK (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a government and, hence, exercised authority and control over the individuals killed in the course of security operations. The aforementioned conclusions were based on the UK being an Occupying Power, an official letter sent by the UK and the US to the United Nations Security Council creating the Coalition Provisional Authority and the legislative acts passed by the said Authority. It is not clear whether, and if yes to what extent, the Court follows a factual determination of the exercise of jurisdiction. It appears that it grounds its reasoning on formal and legal criteria similarly to *Banković*'s rationale.

In sum, the *Banković* case is one of the well-cited examples regarding the construction of the ECHR in accordance with PIL.⁴² Even though this position is, in principle, correct, it has been shown that its application was unfortunate. The Court found recourse to a different concept of jurisdiction under PIL and incorporated it under Article 1 ECHR. By way of relying on PIL, the Court validated a legal presumption of territoriality which is not akin to the ordinary meaning of jurisdiction under the ECHR. At the same time, the Court dismissed, without a convincing explanation, the relevance of other human rights treaties and the views of international bodies to its interpretation of jurisdiction. Only in the *Issa* case did the Court refer, in passing, to other PIL norms for finding that the member State exercised extraterritorial jurisdiction. However, the *Banković* case continues to dictate the Court's reasoning in the subsequent case-law. It is unclear as to why the Court does not

⁴² International Law Commission, 'Report of the Study Group of the International Law Commission finalised by M. Koskeniemi' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, [166], [469].

accept that assessing whether a State exercises jurisdiction is a factual and not a legal question as a matter of principle. The Court's methodology also gives rise to a selective treatment of relevant PIL norms, since the Court is (incorrectly) receptive towards the legal concept of jurisdiction under PIL, but it does not take cognisance of other pertinent human rights treaties and their uniform interpretation, among others, by the HRC and the ICJ. Consequently, the Court's jurisprudence is at divergence with the judgments of the ICJ and the practice of other international bodies and hinders a broader, hence more effective to the interests of the applicants, interpretation of the concept of jurisdiction.

3.3 The question of State succession in human rights treaties

Another concept the effects of which are necessary for applying the ECHR is State succession. Since the dissolution of the Czech and Slovak Federal Republic, the Socialist Federal Republic of Yugoslavia (SFRY) and the former Union of Soviet Socialist Republics, issues concerning the effects of State succession frequently arise before the ECtHR. One of the difficulties relates to the law of treaties and to the question as to whether a successor State continues to be bound by the treaty obligations of the predecessor State. This question was the issue at the heart of the *Bijelić* case.⁴³ The applicants lodged an application before the Court complaining of the non-enforcement of a final eviction order by the authorities of the State of Union of Serbia and Montenegro. Before the application was heard by the Court, however, Serbia

⁴³ *Bijelić v. Serbia and Montenegro*, 28 April 2009. The Grand Chamber rejected a request for a referral.

and Montenegro declared their independence. In the first instance, the Court found that the impugned enforcement proceedings had been solely within the competence of the Montenegrin authorities. Nonetheless, for the Court to examine the claim of the non-enforcement of the eviction order, it had to decide whether Montenegro should be held bound by the ECHR since the date that it became binding on the State of Union of Serbia and Montenegro (3 February 2004) or since the date that Montenegro acceded to the ECHR (6 June 2006).

PIL in the area of State succession is not settled, favouring mostly *ad hoc* solutions through the conclusion of agreements between the interested parties. As far as newly independent States are concerned, namely States emerging from colonial domination, the general rule is the non-continuity of treaty obligations, in that the successor State is not, in principle, bound by the treaty obligations of the predecessor State.⁴⁴ This is also the regulation of the 1978 Vienna Convention on State Succession (Article 16).⁴⁵ As far as successor States are concerned, Article 34 of the VCSS provides that they are, in principle, bound by the treaties which were binding on the predecessor State. However, very few States have ratified the VCSS and its acceptance in State practice is doubtful.⁴⁶ In this context, special consideration is given to the international obligations assumed by the predecessor States under human rights treaties. It is strongly argued that, in any case, human rights treaties continue to

⁴⁴ Brownlie, (note 1), 661-662.

⁴⁵ Vienna Convention on Succession of States in Respect of Treaties (adopted on 23 August 1978; entered into force on 6 November 1996) 11946 UNTS 3 (VCSS).

⁴⁶ M.T. Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 *EJIL* 469, 471-473; F. Pocar, 'Some Remarks on the Continuity of Human Rights and International Humanitarian Treaties', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, New York, 2011) 279, 281, 291.

bind the successor States. This thesis has found sufficient support in the practice and views of many international bodies, such as the HRC and other UN treaty monitoring bodies, the International Labour Organisation (ILO).⁴⁷

The Court in *Bijelić* did not engage with this discussion and did not provide the general context to State succession in respect to human rights treaties in its judgment. It was held that Montenegro should be considered as bound by the ECHR retroactively to the date that the State of Union of Serbia and Montenegro ratified it. The Court relied on Montenegro's transitional domestic legislation; Article 5 of its Constitutional Law envisaged that 'provisions of international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations that have been arisen after its signature'. However, the *Bijelić* case is distinguished from the previous case-law in that the Court reinforced its reasoning by invoking relevant PIL.⁴⁸

The Court referred to 'the *principle* that fundamental rights, protected by international human rights treaties, should indeed belong to the individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession'.⁴⁹ The Court's assertion was grounded in the HRC General Comment No. 26 regarding the continuity of obligations⁵⁰ and the written submissions of the European Commission for Democracy through Law (Venice Commission) which was granted leave to intervene

⁴⁷ Pocar, (note 46), 282-290; Kamminga, (note 46), 473-475; Vanneste, (note 12), 544-546.

⁴⁸ The Court relied exclusively upon transitional provisions of domestic law in previous cases concerning the dissolution of the Czechoslovakia. For example, *Matter v. Slovakia*, 5 July 1999, [52]; *I. S. v. Slovakia*, 4 April 2000, [36]; *Nemec and others v. Slovakia*, 15 November 2001, [30]; *Gajdusek v. Slovakia*, 18 December 2001, [51]; *Konečný v. Czech Republic*, 26 October 2004, [62]; *Škodáková v. Czech Republic*, 21 December 2004, [30].

⁴⁹ *Bijelić*, [69] (emphasis added).

⁵⁰ HRC, General Comment No. 26, 'Continuity of Obligations', CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997.

before the Court.⁵¹ The Venice Commission underlined that despite the general rule in PIL on the non-continuity of the treaty obligations, international treaties for the protection of human rights deserved special consideration. General Comment No. 26, more specifically, provides that ‘once the people are accorded the protection of the rights under the Covenant, such protection devolves with the territory and continues to belong to them, notwithstanding [...] dismemberment in more than one State or State succession’.⁵²

Given the fact that the Court does not provide a detailed analysis of the questions at hand, its statement that there is a *principle* concerning the continuity of human rights treaty obligations does not appear to be well-substantiated. Also it is unclear as to whether this principle referring to human rights treaties qualifies as an exception to the general rule of non-continuity under PIL or if it is part and parcel of the trend concerning the continuity of international obligations in case of State succession. Yet, it is notable that, for the first time, the Court takes account of relevant PIL in a judgment regarding State succession. Despite the fact that the developments reflected into the HRC Comment No. 26 and in the Amicus Brief of the Venice Commission were not the primary basis for the Court’s reasoning, they substantially strengthened the Court’s reasoning.

Furthermore, one should not lose sight of the fact that the Court took a clear position and contributed to the development of the solid trend concerning the continuity of human rights obligations on successor States (automatic

⁵¹ Venice Commission, Amicus Curiae Brief in the case of Bijelić against Serbia and Montenegro pending before the European Court of Human Rights, adopted by the Venice Commission on the basis of comments by Mr. A. Bradley and Mr. I. Cameron, Opinion No 495/2008 (20 October 2008), available at <http://www.venice.coe.int>.

⁵² General Comment 26, [4].

succession).⁵³ This is a trend in PIL driven by many international bodies, including, among others, UN treaty bodies and the ILO. On the other hand, the ICJ, in the *Genocide* case in 1996 did not address the question of whether human rights treaties were automatic binding on successor States,⁵⁴ refraining from pronouncing on the emerging principle in PIL.⁵⁵ Therefore, *Bijelić* supports the argument of this thesis concerning the role of the ECtHR in developing PIL. Chapter 1 underlined that PIL may be developed by all international courts and tribunals and other international bodies, especially in cases where the ICJ is not willing to pronounce on specific questions. In this instance the Court, although it did not discuss the relevant issues in detail, plays its part in elucidating State succession related matters in PIL, which in long term may lead to well-established rules and principles under PIL.

3.4 Conclusions

This Chapter examined two examples from the Court's practice of taking cognisance of PIL in order to ascertain the meaning of concepts which are necessary for applying the ECHR; the concept of jurisdiction envisaged in Article 1 ECHR and State succession.

Although the Grand Chamber in *Banković* and the subsequent jurisprudence followed a sound legal reasoning, including the application of

⁵³ B.E. Brockman-Hawe, 'European Court of Human Rights: *Bijelić v Montenegro and Serbia* (Application No 19890/05) Judgment of 11 June 2009' (2010) 59 *ICLQ* 845, 853, 865-867.

⁵⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, 11 July 1996, ICJ Rep. 1996, p. 595.

⁵⁵ S. Sivakumaran, 'The International Court of Justice and Human Rights', in S. Joseph, A. McBeth (eds.), *Research Handbook on International Human Rights Law* (Edward Elgar, Cheltenham, 2010) 299, 310.

Article 31(3)(c) VCLT, regarding the harmonious placement of the ECHR within PIL, it relied on PIL for validating a legal presumption of territoriality which is not akin to the ordinary meaning of jurisdiction under the ECHR. Notably, the Court selectively dismissed, without a convincing explanation, the relevance of other human rights treaties, the views of international bodies and judgments of the ICJ regarding the notion of jurisdiction. The Court's case-law was found to be divergent from international practice while favouring a narrow definition of jurisdiction.

On the other hand, *Bijelić* evidences the Court's receptivity to the views of other international bodies insofar as State succession in human rights treaties is concerned and that the PIL norms to which the Court found recourse strengthened its legal reasoning. Most importantly, although the Court did not engage with the pertinent discussion in PIL in detail, it took a stand on the matter of automatic succession to human rights treaties and aligned its case-law with the emerging practice of other international bodies.

On both occasions the third party interveners before the Court put forward a PIL related argumentation and openly invited the Court to align its position with the practice of other international bodies (*Al-Skeini*, *Bijelić*). Further, the consideration of PIL in *Bijelić* reinforces the effective application of the guarantees under the ECHR while progressively developing the content of PIL. If the Court in *Banković*, and in its subsequent case-law, had also followed the relevant practice of the ICJ and other international bodies, it would have employed not only a sound interpretation of the meaning of jurisdiction, but also a broader notion of jurisdiction which would more effectively protect the rights of applicants under the ECHR.

4. Finding recourse to public international law in order to define certain terms embodied in the ECHR

4.1 Introduction

Chapter 4 discusses cases in which the Court takes cognisance of PIL norms in order to define specific terms embodied in the text of the ECHR, such as ‘everyone’ or ‘slavery’. The Court employs other PIL norms, which are commonly referred to in PIL as having acquired a specific legal meaning or have a specialised focus. This series of cases appears to reflect, to a great extent, the general practice of international courts and tribunals to find recourse to other treaties for ascertaining the ordinary meaning of the treaty under interpretation (Chapter 2.3.1). The analysis lays the basis for drawing certain conclusions as to whether, and how, the ECtHR places the ECHR within PIL.¹

The distinction between finding recourse to PIL norms in the present Chapter and clarifying the *ratione materiae* scope of the rights under ECHR, as it will be examined in Section III, and especially Chapter 7, is not watertight or rigid and certain overlap may exist. This distinction serves analytical purposes for examining the Court’s legal reasoning.

4.2 Defining ‘everyone’ under Article 2 ECHR

The *Vo v. France* case² gave the Grand Chamber the opportunity to delimit the definition of ‘everyone’ under Article 2 ECHR.³ The applicant complained that France had failed to discharge its obligations under Article 2

¹ International Law Commission, ‘Report of the Study Group of the International Law Commission finalised by M. Koskenniemi’ (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, [49]-[44].

² *Vo v. France*, 8 July 2004, (Grand Chamber).

³ The relevant part of Article 2 reads that ‘everyone’s right to life shall be protected by law’.

ECHR by not qualifying the loss of life of her unborn child as unintentional homicide. France, in its turn, stressed that the wording of Article 2 ECHR did not encompass the protection of the foetus. The Centre for Reproductive Rights, a United States based NGO, intervened before the Grand Chamber and argued against the applicability of the right to life to the foetus. It found support in the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR),⁴ the Convention on the Rights of the Child (CRC),⁵ the Inter-American Convention on Human Rights (IACHR),⁶ and the views of their supervisory bodies. The heart of the matter was whether the unborn child fell within the meaning of ‘everyone’ under Article 2.

The Court’s starting point was to contrast the text of Article 2 ECHR to the provision safeguarding the right to life under the IACHR. Article 4 IACHR expressly provides that the right to life is protected ‘from the moment of conception’. It was also noted that member States in their legislation and practice did not apply the offence of the unintentional homicide to the foetus. Further, the Court drew guidance from recent, specialised PIL norms concerning biomedicine. The Oviedo Convention on Human Rights and Biomedicine (Oviedo Convention) and the two Additional Protocols to the said Convention did not provide a definition of the terms ‘everyone’ or ‘human being’. The text of the treaties and their Explanatory Reports clearly indicated that the contracting parties could not reach an agreement on the definitions and

⁴ Concluded on 16 December 1966; entered into force on 23 March 1976; 999 UNTS 17.

⁵ Adopted by UNGA Res. 44/25 (20 November 1989) UN Doc A/RES/44/25; entered into force on 2 September 1990; 1577 UNTS 3.

⁶ Concluded on 22 November 1969; entered into force on 18 July 1978; OAS Treaty Series No. 36.

the matter was left to national regulation.⁷ The Grand Chamber's analysis afforded considerable weight to these PIL norms for ascertaining the absence of a European consensus.⁸ This is, perhaps, justified given that the Oviedo Convention and its Additional Protocols were (at the time) recently concluded instruments which dealt specifically with the question of when life begins. They were also concluded under the auspices of the Council of Europe and, hence, were presumably representative of the common ground among member States. Yet, the Oviedo Convention at the time, although being in force, was ratified only by seventeen member States (out of forty seven).⁹ Fourteen States ratified the first Additional Protocol¹⁰ and the second Additional Protocol was not opened for signature yet.¹¹ Therefore, it is not entirely clear to what extent these treaties accurately reflected and substantiated (the absence of) a common ground, since they were not widely ratified.

Nonetheless, the Court refrained from giving a definite answer on the meaning of 'everyone' under Article 2 ECHR. Instead, it proclaimed that, *even assuming that* the right to life was applicable to foetus, the State was not

⁷ *Vo* (GC), [84].

⁸ Conversely, if the Oviedo Convention provides for specific standards, as in the case of regulating the conditions for giving a free and informed consent, the Court drew interpretive guidance from it and scrutinised the national regulatory framework against these standards: *Glass v. United Kingdom*, 9 March 2004, [58], [74]-[78].

⁹ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (concluded on 4 April 1997; entered into force on 1 December 1999) CETS No 164; <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=164&CM=8&DF=10/08/2012&CL=ENG>.

¹⁰ Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Rights (concluded on 12 January 1998; entered into force on 1 March 2001) CETS No 168; <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=168&CM=8&DF=10/08/2012&CL=ENG>.

¹¹ Additional Protocol to the Convention on Human Rights and Biomedicine concerning Biomedical Research (concluded on 25 January 2005; entered into force on 1 September 2007) CETS No 195; <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=195&CM=8&DF=10/08/2012&CL=ENG>.

obliged under Article 2 to provide for criminal law remedies concerning unintentional homicide. Likewise, the Court in the *Evans* case, by taking into consideration, among other things, PIL norms derived the absence of a European consensus on the legal definition of the beginning of life and dismissed the applicant's claims as not falling within Article 2 ECHR.¹²

The Court in the *Vo* and *Evans* cases takes the national legislation of member States and PIL norms into consideration in order to identify the existence or not of a European consensus. It is very common for the Court to inject comparative law analysis regarding the legislation and national practice of member States into its reasoning. This practice has attained the role of an interpretative principle in the Court's jurisprudence, commonly referred to as comparative interpretation of the ECHR (or otherwise consensual interpretation since the national standards reflect a consensus among member States).¹³ It is interesting, for the present purposes, that the Court construes and invokes the relevance of the *European consensus* by relying also on PIL norms. It conflates national standards with PIL norms. The *Marckx* case is a well-known, early example of this practice.¹⁴ The conflation under the heading 'European consensus' is the reason that many legal scholars treat the Court's practice of taking cognisance of PIL norms as an integral part of the comparative or consensual interpretation,¹⁵ as a type of European consensus,¹⁶ or as evidence of a 'double comparative interpretation'.¹⁷

¹² *Evans v. United Kingdom*, 10 April 2007, (Grand Chamber), [54].

¹³ P. Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference back to National Law', in G. Cavinet *et al.* (eds.), *Comparative Law before the Courts* (BIICL, London, 2004) 135, 136-138.

¹⁴ *Marckx v Belgium*, 13 June 1979, (Plenary), [41].

¹⁵ C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 168.

It is submitted, however, that the interpretation of the ECHR by taking PIL norms into account is a separate interpretative principle to the comparative interpretation. It cannot be disregarded that in the *Vo*, *Evans*, *Marckx* and other similar cases, domestic and PIL norms are different sources of law and different enquiries in the examination of the existence or not of common standards.¹⁸ In these instances, domestic standards converge with PIL norms, leading to the same interpretative outcome, namely the absence of common standards. Yet Chapters 7 and 8 will illustrate that the consideration of PIL norms serves a decisive role in the Court's reasoning even in the absence of common legal standards in national practice or, all the more, when member States have contrary national practice.¹⁹ Hence, the autonomy of the principle of taking PIL norms into account becomes more obvious when the two interpretative principles diverge. It will be also seen that the idea of the European consensus is seminal in the Court's reasoning insofar as the reliance upon PIL norms.

The *Vo* and *Evans* cases lend also support to the argument of distinguishing the principle of taking PIL norms into account from the dynamic (or evolutive) interpretation, according to which the ECHR must be interpreted in light of the changing conditions and higher standards of member States.

¹⁶ K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) *PL* 534, 548.

¹⁷ J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers, Leiden-Boston, 2009) 59.

¹⁸ *Marckx* (Pl.), [41]; *V. v. United Kingdom*, 16 December 1999 (Grand Chamber), [64], [73]-[77]; *Mangouras v. Spain*, 28 September 2010, (Grand Chamber), [59]; cf. Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre v. France*, 13 February 2003, (Grand Chamber), [15] where they criticised the majority for 'fail[ing] to refer to the various international instruments that play a decisive role in achieving a consensus'.

¹⁹ *Infra* 7.3, 7.6, 8.2, 8.3, 8.4, 8.5, 8.9.

Many commentators subordinate the first to the second.²⁰ Nonetheless, in these cases applying both principles creates tension, something that the dissenting Judges stressed in the *Vo* case.²¹ PIL norms (and national standards) function as a limitation to the application of the dynamic interpretation, since they do not sufficiently substantiate a dynamic reading of ‘everyone’ under Article 2 ECHR.²²

4.3 Defining ‘torture’ under Article 3 ECHR

Article 3 ECHR provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’. The text of the Convention does not contain a definition for any of the three concepts, ‘torture’, ‘inhuman’ or ‘degrading’ (treatment or punishment). It was the European Commission, which in its early practice concerning the definition of the prohibited practices under Article 3 ECHR, considered the definition of torture as encapsulated in the 1975 General Assembly’s Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Declaration on the protection against Torture).²³

²⁰ C.L. Rozakis, ‘The European Judge as Comparatist’, in Sir B. Markesinis, J. Fedtke (eds.), *Judicial Resource to Foreign Law. A New Source of Inspiration* (UCL Press, London, 2006) 338, 343-347; A. Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law’ (2009) 9 *HRLRev* 179, 193-194, 197. *Contra* 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?’ (2010) *Michigan JIL* 621, 648, 659-660.

²¹ Dissenting Opinion of Judge Ress, [5]; Dissenting Opinion of Judge Mularoni joined by Judge Strážnická, p. 58.

²² A. Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 *EHRLRev* 57, 68. Also *V. v UK* (GC), [64], [73]-[77]; *Stummer v Austria*, 7 July 2011, (Grand Chamber), [132].

²³ Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 3452 (9 December 1975) UN Doc. A/RES/3452 (XXX).

In the *Greek* case,²⁴ the Commission held that torture is an ‘inhuman treatment which *has a purpose*, such as obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment’.²⁵ Thus, according to the Commission, torture under Article 3 ECHR contains two definitional elements: an aggravated form of inhuman treatment and the purposive element. These elements were endorsed and further developed in the UN Declaration on the protection against Torture and subsequently in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),²⁶ as necessary conditions for qualifying a treatment as torture.²⁷

The Court in its case-law, however, took a different view from the Commission’s position in the *Greek* case. It seems that it distanced itself from the CAT definition insofar as the purposive element is concerned.²⁸ The Plenary Court in the *Ireland v. United Kingdom* case analysed the meaning of torture by exclusive reference to the distinction embodied in Article 3 ECHR between the notions of torture, inhuman and degrading treatment or

²⁴ *Greek case*, Report of the European Commission, 5 November 1969, 12 Ybk ECHR 1, 186.

²⁵ *Greek case*, 186 (emphases added).

²⁶ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (concluded on 10 December 1984; entered into force on 26 June 1987) 1465 UNTS 85.

²⁷ M.D. Evans, R. Morgan, *Preventing Torture* (Clarendon Press, Oxford, 1998) 74; M. Nowak, E. McArthur, *The United National Convention against Torture: A Commentary* (Oxford University Press, New York, 2008) 557-558; J.H. Burgers, H. Danelius, *The United Nations Convention against Torture* (Martinus Nijhoff Publishers, The Netherlands, 1988) 115.

²⁸ Article 1 (1) CAT states that ‘for the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’ (emphasis added).

For an analysis of the purposive element in the CAT definition Nowak, McArthur, (note 27), 75-77; M.D. Evans, ‘Getting to Grips with Torture’ (2002) 51 *ICLQ* 365, 375-378.

punishment. According to the Court, the principal differentiating feature of torture from the other practices under Article 3 ECHR is the intensity of suffering inflicted upon the individual.²⁹ In its legal analysis, the Court referred to the UN Declaration on the protection against Torture in order to support this assertion. According to Article 1 (2) 'torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. It selectively omitted, however, to cite the first paragraph of Article 1 which emphasised that torture must be inflicted for specific purposes.³⁰ Admittedly, in the assessment of the facts of the case, the Court found that 'the object [of the five techniques] was the extraction of confessions, the naming of others and/or information'.³¹ Yet, it is not clear whether or not the Court included the purposive element as a necessary requirement for defining torture under Article 3 ECHR.³² Similarly, in *Selmouni*, although explicit reference was made to the CAT definition and to the fact that the pain inflicted on the applicant served the purpose of extracting a confession for an offence he was suspected of having committed, it appears that the Court made this statement in passing.³³ The conclusion that the Court does not necessarily attach a legal significance to its reference to the purpose of the impugned act is reinforced by the fact that in other instances, when other forms of ill-treatment were under consideration, it also examines the purpose of

²⁹ *Ireland v. United Kingdom*, 18 January 1978, (Plenary), [167].

³⁰ '[...] for such purposes as obtaining from [the individual] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person'.

³¹ *Irish case*, [167].

³² C. Ingelse, *The United Nations Committee against Torture – An Assessment* (Kluwer Law International, The Hague, 2001) 58-59; Evans, Morgan, (note 27), 77.

³³ *Selmouni v. France*, 28 July 1999, (Grand Chamber), [96]-[97].

the prohibited treatment in order to overall assess the circumstances of the case.³⁴

The first time that the Grand Chamber explicitly endorsed the CAT approach, as far as the purposive element is concerned, is in 2000, in the *Salman* and *Ilhan* cases.³⁵ It further reaffirmed its position more recently in the *Gäfgen* case.³⁶ The Grand Chamber stated that

in addition to the severity of the treatment, there is a purposive element as recognised in the [CAT], which defines torture in terms of the intentional inflicting of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.³⁷

Here, the purposive element is adopted as a necessary condition and is treated on equal footing to the element of the severity of the treatment. In the *Salman* and *Ilhan* cases, however, when the Court went on to assess the facts of the case, it did not discuss whether the purposive requirement was met. Although in principle, it endorsed the CAT definition of torture under Article 3 ECHR, there is no clear evidence that it examined *in casu* that the ill-treatment suffered by the applicants had one of the enumerated purposes listed in Article 1 CAT.³⁸ On the other hand, in the *Gäfgen* case the Court addressed the purpose of the threats for extracting information from the applicant.³⁹ In this

³⁴ For example, *V. UK* (GC), [71]; *Peers v. Greece*, 19 April 2001, [74]; *Hénaf v. France*, 27 November 2003, [47].

³⁵ *Salman v. Turkey*, 27 June 2000, (Grand Chamber); *Ilhan v. Turkey*, 27 June 2000, (Grand Chamber).

³⁶ *Gäfgen v. Germany*, 1 June 2010, (Grand Chamber).

³⁷ *Salman* (GC), [114]; *Ilhan* (GC), [85]. Also *Gäfgen* (GC), [90].

³⁸ *Salman* (GC), [115]; *Ilhan* (GC), [87].

³⁹ *Gäfgen* (GC), [105].

instance, the Court incorporated the CAT purposive element in its legal reasoning and assessed it against the particular circumstances.

In sum, the jurisprudence creates confusion. Until the *Ihlan* and *Salman* cases, the Court had never clearly proclaimed that it has incorporated the purposive CAT element of torture into Article 3 ECHR. Any references to the purpose of the prohibited practice were in passing and in the context of assessing the facts of the cases.⁴⁰ Even though in the *Salman*, *Ihlan* and *Gäfgen* cases the Court expressly mentions the purposive element, it is not clear whether, and to what extent, it incorporates the element in its analysis.

A reasonable explanation for the Court's unclear practice is that it is, in fact, unwilling to transpose the CAT definition of torture under the ECHR. In the context of the CAT the purposive element of the definition of torture has a prominent role. Despite the fact that the CAT is sometimes understood as a "human rights treaty", it is an international treaty which, first and foremost, purports that States assert their jurisdiction over acts of torture.⁴¹ This is evidenced in the CAT structure (only one provision addresses other forms of ill-treatment) and in the substantive obligations incumbent on State parties for exercising universal jurisdiction and establishing an effective criminal law framework.⁴² If the ECtHR uncritically incorporates the CAT purposive

⁴⁰ Evans, Morgan, (note 27), 77; Evans, (note 28), 377; M.W. Janis *et al.*, *European Human Rights Law* (Oxford University Press, New York 2008) 204. *Contra* F. Ní Aoiláin, 'The ECHR and its Prohibition on Torture', in S. Levinson (ed.), *Torture – A Collection* (Oxford University Press, New York, 2004) 213, 217. *Cf.* Concurring Opinion of Judge Zupančič in *Jalloh v. Germany*, 11 July 2006, (Grand Chamber) who opined that 'in *Selmouni v. France* we integrated Article 1 of the United Nations Convention against Torture [...] into our own case law' (emphasis added).

⁴¹ Evans, (note 28), 376; For similar thoughts S. Sivakumaran, 'Torture in International Human Rights Law and International Humanitarian Law: The Actor and the Ad Hoc Tribunals' (2005) 18 *LJIL* 541; *Contra* M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, New York, 2010) 229.

⁴² Burgers, Danelius, (note 27), 70-71.

element as a *sine qua non* condition for defining torture under Article 3 ECHR, it leaves out many instances of ill treatment which cannot be qualified as torture. If, however, the Court decides that ‘torture is torture whatever its purpose may be’⁴³ it adopts a broader definition and a more inclusive approach. The CAT definition weakens the protection under the ECHR.⁴⁴ Given the important, different contextual nuances between the ECHR and CAT, it would be reasonable for the Court to explicitly state that it should not follow the CAT definition to the letter. Although the practice of using definitions of concepts contained in other PIL norms serves to avoid conflicting interpretations and even promotes the idea of ‘harmonising interpretation’,⁴⁵ the different context of PIL norms should always be kept in mind. The CAT definition can be used as an interpretive aid in order to define torture under the ECHR, but this does not necessarily entail that all the conditions under Article 1 CAT should be *transplanted* under the ECHR.⁴⁶

The Court’s line of reasoning regarding the purposive element of the CAT definition should be contrasted to its case-law concerning the question of who can be the actor of torture. According to Article 1 CAT, the prohibited practice must be ‘by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. The CAT definition is embedded into the idea of torture as an official act.⁴⁷ The ECtHR,

⁴³ Separate Opinion of Judge Sir Gerald Fitzmaurice, in the *Irish* case, 117.

⁴⁴ *Contra* Forowicz, (note 41), 229.

⁴⁵ B. Rudolf, ‘Unity and Diversity in the Settlement of International Disputes’, in A. Zimmermann, R. Hofmann (eds.), *Unity and Diversity in International Law* (Duncker and Humbolt, Berlin, 2006) 389, 392.

⁴⁶ *Prosecutor v. Dragoljub Kunarać, Radomir Kovač and Zoran Vuković*, Case Nos IT-96-23-T and IT-96-23/1-T, Appeals Chamber, 12 June 2002, [146]-[148] and *Prosecutor v. Dragoljub Kunarać, Radomir Kovač and Zoran Vuković*, Case Nos IT-96-23-T and IT-96-23/1-T, Trial Chamber, 22 February 2001, [465]-[497].

⁴⁷ Evans, (note 28), 375-376.

however, has taken a different position on this: member States are obliged to take measures to ensure that private individuals are not subjected to torture by other private individuals.⁴⁸ Therefore, the CAT's definitional element of torture, as being only an official act, has clearly not been incorporated into the definition of torture under Article 3 ECHR.⁴⁹ Admittedly, the articulation of positive obligations under Article 3 ECHR⁵⁰ and, in general, the language of State responsibility under human rights treaties may be a legitimate means to overcome the CAT restriction regarding the actor of torture.⁵¹ However, this does not alter the fact that, according to the ECtHR, the said restriction of the CAT definition does not fit well in the Convention's context and, hence, it is not incorporated under Article 3 ECHR. In light of this practice, it is deemed preferable that the Court clarifies its stand also with regards to the purposive CAT definitional element.

4.4 Defining 'forced or compulsory labour' under Article 4 ECHR

In the *Van der Mussele* case⁵² the applicant, a lawyer, complained that he was required to provide his services without receiving any remuneration or reimbursement for his expenses. He alleged a violation of the prohibition of forced or compulsory labour under Article 4 (2) ECHR. The Plenary Court noted the lack of a definition of the term 'forced or compulsory labour' in the text of the ECHR and the absence of any guidance from its preparatory work.

⁴⁸ *A v. United Kingdom*, 23 September 1998, [22]; *Kudla v Poland*, 26 October 2000, (Grand Chamber), [97].

⁴⁹ Nowak, McArthur, (note 27), 78; Sivakumaran, (note 41), 552-553; Evans, (note 28), 378-381.

⁵⁰ D.J. Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 106-111.

⁵¹ Evans, (note 28), 378-379; Sivakumaran, (note 41), 553.

⁵² *Van der Mussele v. Belgium*, 23 November 1983, (Plenary).

The Court had recourse to the 1932 International Labour Organisation (ILO) Convention concerning Forced or Compulsory Labour⁵³ and the 1959 ILO Convention on the Abolition of Forced Labour.⁵⁴ The resort to extraneous to the ECHR international treaties was justified on a two-fold basis. First, the Court underlined that the apparent, textual similarity between Article 4 (2) ECHR and Article 2 of the pre-existing ILO Convention No 29 was not accidental. Secondly, it noted that both ILO Conventions were binding on nearly all member States of the Council of Europe, including the respondent State (Belgium). However, it was stressed that the definition of forced or compulsory labour contained in ILO Convention No 29 shall provide a ‘*starting point* for the interpretation of Article 4’⁵⁵ and, thus, ‘sight should not be lost of [the European] Convention’s special features’.⁵⁶

The ILO Convention No 29 defines ‘forced or compulsory labour’ as ‘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’.⁵⁷ When the Court proceeded to examine whether the services rendered by the applicant amounted to compulsory labour, it encountered the difficulty on the meaning of ‘menace of any penalty’. It approached the notion by taking cognisance of the standards adopted by the ILO Committee of Experts⁵⁸ and concluded that the risk of striking the applicant’s name off the roll of pupils or

⁵³ Convention concerning Forced or Compulsory Labour, C29 (concluded on 28 June 1930; entered into force on 1 May 1932) 39 UNTS 55 (ILO Convention No 29).

⁵⁴ Convention concerning the Abolition of Forced Labour, C105 (concluded on 25 June 1957; entered into force on 17 January 1959) 320 UNTS 291 (ILO Convention No 105).

⁵⁵ *Van der Musselle* (PI), [32] (emphases added).

⁵⁶ *Ibid.*

⁵⁷ Article 2 (1).

⁵⁸ ‘Abolition of Forced Labour’: General Survey by the Committee of Experts on Application of Conventions and Recommendations, 1979.

rejecting his application for entry on the register of advocates qualified as a penalty.

As far as the second element of the definition is concerned, namely whether the applicant performed the service unwillingly, the crucial question was whether his prior consent to the general legal regime concerning legal aid in Belgium precluded compulsory labour from coming into play. According to the Plenary Court, the prior consent of the applicant should be given relative weight and other factors should be taken into account. It gave due regard to the national standards of member States and to the Convention's underlying objective of guaranteeing effective and practical rights.⁵⁹ In light of the facts, it found that there was no unreasonable imbalance between the aim pursued by the Belgian legislation and the obligations incumbent on the applicant.

The Court's resort to ILO Convention No 29 had an informative impact on the construction of Article 4 ECHR. Forced or compulsory labour was defined by reference to the ILO Convention - a pre-existing (to the ECHR) treaty regulating *ad hoc* forced labour - and the standards stemming from the ILO. At the same time, the Court sets certain limits as to the impact of the ILO definition on the interpretation of Article 4 ECHR. The question whether the applicant *unwillingly* offered his services was assessed against the structure and the aims of Article 4 ECHR and the Court did not follow a formal approach on the meaning of consent. Hence, the ECtHR did not employ an unqualified reliance on ILO Convention No 29, preserving the specificity of the ECHR.

⁵⁹ *Van der Musselle* (Pl), [37]. J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1993) 219.

The *Siliadin* case also relates to the definition of forced and compulsory labour. The applicant was a French national of Togolese origin who had been brought to France at fifteen years of age. Her passport was taken away from her and she became an unpaid housemaid working under inhuman conditions. She complained before the Court that the criminal law provisions applicable in France at the material time did not ensure her adequate protection against the treatment to which she was subjected. Moreover, she argued that the French criminal law framework was in ‘divergence with the European and international criteria for defining servitude and forced or compulsory labour’.⁶⁰

The Court took cognisance, again, of the ILO Convention No 29 for defining ‘forced or compulsory labour’, according to which the work or service had to be extracted by an individual under the *menace of penalty*. It admitted that the applicant in the specific circumstances had not been threatened by a ‘penalty’, but it stated that ‘the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat’.⁶¹ The equivalent status was inferred on the particular circumstances of the applicant’s vulnerable position (a minor who was unlawfully present on French territory) and her fear that the police would arrest her. Therefore, the Court, in light of the specific facts, equated the ILO standard of *being threatened* by a menace of penalty to *perceiving to be threatened* by a penalty. This is more flexible and favourable to the individual interpretation.

In sum, in both *Siliadin* and *Van der Mussele* cases the Court is guided by the definition of forced or compulsory labour, as contained in ILO

⁶⁰ *Siliadin*, [59].

⁶¹ *Ibid*, [118].

Convention No 29 and developed by the standards of the ILO Committee of Experts. It will be also seen below, that the Court has a standard practice of reading the PIL norms that takes into account in conjunction with the views (either binding or not) of their (if existent) supervisory bodies. This is crucial for two reasons; the first reason is that, in this way, the Court places the PIL norms in the treaty context from which they originate, hence, acknowledging the contextual differences of every treaty. This is a fundamental aspect of the fragmentation of PIL, as discussed in Chapters 1 and 2, since similar or identical norms may attain different meanings and interpretations, in light of the structure, aim and specificities of the treaty that they stem from. In practice, the Court starts its interpretation process, by taking the ILO definition into account, because it identifies a core of similarity between Article 4 ECHR and the ILO Convention No 29.⁶² However, the Court by reading the ILO Convention No 29 in its treaty context, also identifies a core of difference between the ECHR and the ILO context, setting a limit to the interpretative guidance that it derives from the external PIL norms. In *Van der Musselle* the meaning of unwillingness was approached by reference to the aim of the ECHR and the practice of member States. In *Siliadin* the Court relaxed the strict ILO requirement of being threatened. In this respect, one should not lose sight of the fact that the ILO Convention relates to the ‘labour law paradigm’, whereas the ECHR is a treaty for the protection of human rights.⁶³

⁶² T. Broude, Y. Shany, ‘The International Law and Policy of Multi-Sourced Equivalent Norms’, in T. Broude, Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford, 2011) 1, 5.

⁶³ Cf. Forowicz, (note 41), 361 who uncritically argues that the ECHR and the ILO Convention No 29 ‘strive for the same goals’. Also *infra* 7.4.

The second reason that the Court's practice of reading the external PIL norms in light of their supervisory bodies' views is important is because it alleviates the danger of having two international bodies interpreting the same PIL norm in different ways. The Court employs the PIL norm in its reasoning, whose content has been elucidated and developed through time by its supervisory body.⁶⁴ This enhances consistency and harmonisation of standards in PIL as different international bodies develop them. Nonetheless, the VCLT general rules of interpretation (Articles 31-33) do not appear to accommodate the interpretative development of treaties by their supervisory bodies,⁶⁵ although it is an arguable claim that their practice may qualify as a subsequent practice in the application of the treaty (Article 31 (3)(b) VCLT).⁶⁶ This is a point that should be kept in mind regarding the possible limits of the VCLT for addressing the challenges of the fragmentation of PIL.

4.5 Defining 'slavery' and 'servitude' under Article 4 ECHR

The definitions of 'slavery' and 'servitude' under Article 4 (1) ECHR came to the fore in the *Siliadin* case. The Court clarified the meaning of these terms by finding recourse to a series of international conventions concerning slavery and practices similar to slavery.

⁶⁴ For example, D. McGoldrick, *The Human Rights Committee – Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford, 1991).

⁶⁵ M.T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law', in M.T. Kamminga, M. Scheinin (eds.), *The Impact of Human Rights on General International Law* (Oxford University Press, Oxford, 2009) 1, 8; International Law Association, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Berlin Conference, 2004, [15]-[27].

⁶⁶ B. Peters, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', in H. Keller, G. Ulfstein (eds.), *United Nations Human Rights Treaty Bodies – Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) 29, as being available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013298.

With regard to the concept of ‘servitude’, the Court built upon the European Commission’s practice⁶⁷ and drew guidance from the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.⁶⁸ Although the Supplementary Convention on the Abolition of Slavery does not contain a definition of servitude, it defines related concepts, such as debt bondage and serfdom. Since servitude constitutes a particularly serious form of denial of freedom, the Court took the concept of serfdom into account⁶⁹ and defined servitude as ‘an obligation to provide one’s services that is imposed by the use of coercion’.⁷⁰

For the notion of ‘slavery’ the Court referred to the definition prescribed in the 1926 Slavery Convention.⁷¹ Article 1 (1) conceptualises the practice of slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. The Court adopted this definition for the purposes of Article 4 ECHR and examined whether, in the light of the facts of the case, its elements were met. It concluded that, although the applicant had been clearly deprived of her personal autonomy, the treatment to which she was subjected could not qualify as slavery. This was because, according to the Court, no indication existed that ‘a genuine right of legal ownership [was exercised] over her, thus reducing her

⁶⁷ *Van Droogenbroeck v. Belgium*, Report of the European Commission, 9 July 1980 (Series B, vol 44, p. 30), [78]-[80].

⁶⁸ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (concluded on 7 September 1956; entered into force on 30 April 1957) 226 UNTS 3 (Supplementary Convention on the Abolition of Slavery).

⁶⁹ Article 1 defines ‘serfdom’ as ‘the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status’.

⁷⁰ *Siliadin*, [124].

⁷¹ Slavery Convention (concluded on 25 September 1926; entered into force on 9 March 1927) 60 LNTS 254 (Slavery Convention).

to the status of object'.⁷² Several scholars criticised the Court due to its rigid application of the definition, which did not reflect the ordinary meaning of slavery.⁷³ It was argued that the Court disregarded the plain wording of the Slavery Convention's definition, which indicated that it was sufficient to ascertain *either* the exercise of the right of ownership over an individual *or* the exercise of powers attaching to the right of ownership over an individual.⁷⁴ In a more recent case the Court took the opportunity to revisit its approach.

In the *Rantsev v. Cyprus and Russia* case⁷⁵ the applicant argued that his daughter had been subjected to a practice amounting to slavery under Article 4 (1) ECHR. The Court took cognisance of the definition of the Slavery Convention and relevant judgments by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY in the *Kunarać* case⁷⁶ was of the view that the notion of slavery should not be exhausted to the so-called 'chattel slavery', but it should also encompass other contemporary forms of slavery. It stressed that the element of *exercising any or all of the powers attaching to the right of ownership* may be present in many different situations. The ECtHR, in the *Rantsev* case, by way of relying on the ICTY's reading of the Slavery Convention, accepted that the exercise of powers attaching to the right of ownership was sufficient for a practice to amount to slavery.⁷⁷

⁷² *Siliadin*, [122].

⁷³ J. Allain, 'The Definition of Slavery in International Law' (2008-2009) 52 *Howard L.J.* 239, 242-243; E. Decaux, 'Les Formes Contemporaines de l' Esclavage' (2008) 336 *RdC* 9, 171-172.

⁷⁴ Allain, (note 73), 274.

⁷⁵ *Rantsev v. Cyprus and Russia*, 7 January 2010.

⁷⁶ *Kunarać* case, [106]-[124].

⁷⁷ *Rantsev*, [142]-[143], [280]-[282].

It has been argued that the ICTY Appeals Chamber in the *Kunarać* and the ECtHR in the *Siliadin* cases employed divergent interpretations of the concept of slavery.⁷⁸ Notably, ‘Interights’, which was granted leave to intervene before the Court in the *Rantsev* case, invited the Court to align its approach to the ICTY judgments.⁷⁹ However, the view of the present author is that, in light of the fact that the Slavery definition explicitly encompasses ‘exercising any or all of the powers attaching to the right of ownership’, the ECtHR in *Siliadin* lost sight of the clear wording of the Slavery Convention and it came in *Rantsev* to correct its approach.

4.6 Defining the *ne bis in idem* principle under Article 4 of Additional Protocol 7 to ECHR

In the *Zolotukhin* case,⁸⁰ the applicant alleged a violation of Article 4 of Additional Protocol 7 (Article 4 of AP7) to the ECHR, complaining that he had been prosecuted twice for the same offence. He was charged before the administrative courts with a breach of public order, in the form of swearing at and pushing away police officers, and he was charged before the criminal courts with breaching public order, by uttering obscenities, threatening police officers with violence and offering resistance to them.

The Grand Chamber heard the application after granting a referral of the case. The Court admitted, at the outset, that there were a series of different approaches regarding the interpretation of the provision in its case-law. Article

⁷⁸ Allain, (note 73), 242-243; I. Kolodizner, ‘R v. Tang: Developing an Australian Anti-Slavery Jurisprudence’ (2009) 31 *Sydney L.Rev.* 487, 496 (footnote 49).

⁷⁹ Interights’ written submissions before the European Court in the *Rantsev* case, 3, available at http://www.interights.org/app/webroot/userimages/file/Rantsev_brief_%20FINAL_%2029October2008.pdf.

⁸⁰ *Sergey Zolotukhin v. Russia*, 10 February 2009, (Grand Chamber).

4 of AP 7 reads 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 the State’ (emphasis added). The Court’s different approaches reflected the different meanings attributed to the term ‘offence’. According to the dominant position, the term ‘offence’ should be understood by reference to the legal classification under national law.⁸¹ Consequently, if an act was classified as two distinct criminal offences under municipal law, the prohibition under Article 4 of AP 7 did not come into play.

Although the Chamber did not make any reference to relevant PIL norms in its judgment, the Grand Chamber revisited the definition of the term ‘offence’ by finding recourse to similarly drafted PIL norms envisaging formulations of the *ne bis in idem* principle. Reference was made to the respective provisions of the ICCPR, the Statute of the International Criminal Court (ICC Statute),⁸² the Charter of Fundamental Rights of the European Union (EU Charter),⁸³ the Convention Implementing the Schengen Agreement (Schengen Agreement)⁸⁴ and the IACHR. The ICCPR and the EU Charter contain the term ‘offence’,⁸⁵ the IACHR refers to ‘cause’,⁸⁶ the Schengen

⁸¹ For an analysis of the different approaches see *Zolotukhin* (GC), [70]-[77]; P. van Dijk *et al.*, *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerpen-Oxford, 2006) 981-982.

⁸² Concluded 17 July 1998; entered into force 1 July 2002; 2187 UNTS 90.

⁸³ Official Journal of the European Communities, 18.12.2000, C 364/1.

⁸⁴ Convention Implementing the Schengen Agreement 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 (concluded on 14 June 1985; entered into force 19 June 1990).

⁸⁵ Article 14 (7) ICCPR provides that ‘no one shall be liable to be tried or punished again for an *offence* for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country’; Article 50 EU Charter states that ‘no one shall be liable to be tried or punished again for an *offence* for which he or she has already been finally convicted or acquitted within the Union in accordance with the law’ (emphases added).

Agreement mentions ‘acts’⁸⁷ and the ICC Statute prescribes ‘conduct’.⁸⁸ The Court also emphasised that the jurisprudence of the European Court of Justice (ECJ) and the Inter-American Court of Human Rights (IACtHR) followed a more favourable to the individual approach. On this basis, it proclaimed that it could not ‘justify adhering to a more restrictive approach’,⁸⁹ than the one followed by the ECJ and the IACtHR, and that it must ensure practical and effective rights. The Grand Chamber held that ‘offence’ under the ECHR should be understood as encompassing the same sets of facts as well.

This interpretation of the *ne bis in idem* principle as formulated under AP 7 overrules the previous case-law of the Court. It dictates a different definition of the term ‘same offence’ and dramatically alters the scope of applicability of the provision. Whereas the Court’s position was to refer back to the national legislation and practice of the respondent State, the *Zolotukhin* case deviates and establishes that Article 4 AP 7 should also include the same set of facts. The judgment is informative with respect to the fact that the Court invokes three different interpretative principles to justify its interpretation in a distinct way: the evolutive interpretation, the principle of effectiveness and the interpretation of the ECHR in light of PIL norms. Thus, the three autonomous interpretation principles function as a *synergy*,⁹⁰ leading to and reinforcing the same interpretive outcome. The following Chapters will show that the Court

⁸⁶ Article 8 (4) stipulates that ‘an accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the *same cause*’ (emphasis added).

⁸⁷ Article 54 reads: ‘a person whose trial has been finally disposed of in one of the Contracting Party may not be prosecuted in another Contracting Party for the *same acts* provided that [...]’ (emphasis added).

⁸⁸ Article 20 (1) reads: ‘except as provided in this Statute, no person shall be tried before the Court with respect to *conduct* which formed the basis of crimes [...]’ (emphasis added).

⁸⁹ *Zolotukhin* (GC), [80].

⁹⁰ G. Cohen-Jonathan, J.-F. Flauss, ‘Cour Européenne des Droits de l’ Homme et Droit International Général (2008)’ (2008) LIV *AFDI* 529, 530.

invokes this synergetic relation between these principles of interpretation in other instances as well.⁹¹ In such cases, the specificities of the ECHR – need for effective and practical guarantees and dynamic interpretation – harmoniously coexist with the principle of reading the ECHR in light of other PIL norms. Yet, the driving force behind the Court’s reasoning in *Zolotukhin* was the construction of the ECHR in light of the PIL norms and the Court’s willingness to align its position with the jurisprudence of other international courts.

Nonetheless, the *Zolotukhin* judgment reveals certain weak points in the Court’s methodology. Even though the Court placed the external PIL norms into their specific treaty context and acknowledged that they embodied different formulations of the principle *ne bis in idem*, it used them in an inappropriate way in its interpretation of the ECHR. The strong inferences drawn by the jurisprudence of the ECJ and the IACtHR on the pretext of the most favourable to the individual interpretation are not reasonable. The two international courts develop the Schengen Agreement and the IACHR respectively, which define the *ne bis in idem* prohibition in broader terms to the ECHR. When the ECJ and the IACtHR employed a comparative overview of other PIL norms (an identical methodology to that of the ECtHR), they both underlined that the text of *their own* treaties provided broader terms and this is why they concluded that it would be absurd to follow a more restrictive interpretation.⁹² Ironically, the ECtHR relied upon this practice in order to provide a broad definition to the specific and restricted term ‘offence’ under

⁹¹ *Infra* 7.2, 7.4, 7.5, Chapter 9.

⁹² *Zolotukhin* (GC), [36]-[38], [40].

Article 4 of AP 7. Therefore, the interpretation by analogy and the inspiration drawn from the comparison are not sound.

A second weak point in the Grand Chamber's reasoning is that it gave such extensive meaning to the term 'offence' that it effectively disregarded the textual limits of the Convention. The Court afforded such great weight to the PIL norms, which resulted in a *contra legem* interpretation. The definition attributed to the term 'offence' went beyond the express text of the ECHR. Although the Court generally acknowledges in its case-law that the interpretation of the ECHR should not lead to a 'distortion of [its] language',⁹³ in this instance, the limits between judicial law-making and interpretation are blurred. The construction of the ECHR should not result in redrafting its provisions. Furthermore, it appears that the Court in other instances (as in the *Scoppola* and *Mamatkulov* cases) attempted to justify an interpretation of the ECHR, which cannot be accommodated within the text of the Convention, by way of invoking the synergy of the principle of effectiveness, the dynamic interpretation and the need to take cognisance of other PIL norms.⁹⁴ In the view of the present author, this is not a positive example of constructive dialogue among international courts or an opportunity to fill in gaps, but rather unfortunate instances.⁹⁵ All the more, since the text of the ECHR also delimits the Court's jurisdiction, a distortion of the text raises the question of whether

⁹³ *Pretty v. United Kingdom*, 29 April 2002, [39]; *Johnston and others v. Ireland*, 18 December 1986, (Plenary), [53]; Dissenting Opinion of Judge Myjer in *Muñoz Díaz v. Spain*, 8 December 2009, 27-28.

⁹⁴ The Court followed the same methodology in *Mamatkulov and Askarov v. Turkey*, 4 February 2005, (Grand Chamber), [109]-[113], [123]-[125] and in *Scoppola v. Italy (No 2)*, 17 September 2009 (Grand Chamber) *infra* 7.2.

⁹⁵ *Contra* Forowicz, (note 41), 360-361; 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-Heidelberg-New York, 2005) 587, 614-615.

the Court exceeds the boundaries of its jurisdiction.⁹⁶ In other words, as Chapter 2 discussed on the occasion of the *Oil Platforms* case, the jurisdiction of the Court and the clear text of the ECHR set clear limits to the impact that other PIL norms may have on the construction of the ECHR.⁹⁷

4.7 Conclusions

This Chapter demonstrated that the ECtHR is inclined to find recourse to PIL norms in order to define certain terms embodied in the ECHR. Given that the Convention and its Additional Protocols contain many generic terms, without providing for their definitions, it seems natural that the Court looks for guidance and interpretive aid outside the ECHR. The ECtHR identifies the meaning of the terms under the ECHR by reference to the usage of the identical or similar terms in other PIL norms, mostly international treaties. In most cases, external PIL norms specifically govern the subject matter, such as torture or slavery.

Evidence was provided that the Court's interpretive practice of taking PIL norms into account is autonomous to other interpretative principles in its jurisprudence. The *Vo* and *Evans* cases illustrated that interpreting the ECHR by taking cognisance of PIL should not be conflated with the comparative interpretation. Even though the Court employs the European consensus idea, domestic and PIL norms are different sources of law and different enquiries in the examination of the existence or not of common standards. Also, these cases demonstrated that when international developments and PIL norms are not sufficient to validate a dynamic interpretation of the ECHR, the interpretation

⁹⁶ Separate Opinion of Judge Verdross, in *Golder v United Kingdom*, 21 February 1975, (Plenary), 20-21.

⁹⁷ *Infra* 2.2.

of the ECHR by taking PIL norms in account limits the application of the dynamic interpretation. The *Zolotukhin* case exemplified that taking cognisance of PIL norms is a distinct principle to the principle of effectiveness and the dynamic interpretation. Although the Court invoked all three principles in a synergetic fashion, it deems it necessary to invoke them separately. Crucially, in *Zolotukhin*, the driving force behind the Court's legal reasoning and in overruling its previous case-law was the cognisance of PIL norms. It is of interest that the parties to the cases also frame their arguments with regard to the relevant PIL norms. In *Siliadin* the applicant invited the Court to find that the respondent States' legislation was in divergence with European and international standards; in the *Vo* and *Rantsev* cases the NGOs, which intervened before the Court, based their submissions on the PIL norms that the Court should take into account.

From a methodological point of view, the Court does not invoke a specific legal basis for its practice of drawing interpretative guidance from other PIL norms when defining terms under the ECHR. As seen in Chapter 2, international courts and tribunals are inclined to identify the ordinary meaning of a term under a given treaty by taking other PIL norms into account, especially treaties.⁹⁸ Also, they do not invoke a specific legal basis in their reasoning, taking for granted that examining the common use of a term by States in PIL is an integral part of finding the ordinary meaning.⁹⁹ Moreover, the practices of drawing *a contrario* arguments (*Vo*), inferring analogies

⁹⁸ *Infra* 2.3.1; R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2010) 283; B. Simma, T. Kill, 'Harmonising Investment Protection and International Human Rights: First Steps towards A Methodology', in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century* (Oxford University Press, New York, 2009) 678, 683-686.

⁹⁹ Gardiner, (note 98), 282-284; F. Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 *Yale JIL* 315, 318.

(*Zolotukhin*) or generally ‘borrowing’ definitions from other PIL norms contributes to harmonisation of standards and ensuring consistent international jurisprudence, as far as possible.

The Court is careful to place the PIL norms that it uses into the specific treaty context that they originate from (*Van der Mussele*, *Siliadin*, *Zolotukhin*). In practice, this means that it reads them in conjunction with the views (either binding or not) of their (if existent) supervisory bodies. This is very informative for identifying any contextual nuances tailored to the norms and for taking cognisance of their progressive development by their supervisory bodies. Although this practice does not seem to be easily accommodated by Articles 31-33 VCLT,¹⁰⁰ it is of seminal importance in avoiding divergent interpretations and harmonising approaches. Notably, the Court is also receptive to considering how a PIL norm has been interpreted by another international court, which does not supervise a given instrument, such as in *Siliadin* case in which it took cognisance of the ICTY approach on the meaning of slavery under the Slavery Convention. These instances evidence what Chapter 1 underlined, in that a treaty provision cannot be deprived of the context, object and purpose of its treaty. Even if a definition of a term, which the Court takes into account, refers to an identical or similar term found under the ECHR, the Court gives careful consideration to the different treaty context. Therefore, the Court reads harmoniously the ECHR to other PIL norms, subject to important differences in their context.

The cautious consideration of the different treaty context draws the line to the impact that the Court derives from other PIL norms. It appears that the

¹⁰⁰ *Infra* footnotes 64-66 and accompanying text.

Court's position is that unity and harmonisation of standards are subject to context. In *Van der Musselle* and *Siliadin* cases the Court applied the ILO standards (meaning of unwillingness and requirement of being threatened) in the construction of Article 4 ECHR by adapting them to the aims of the ECHR. However, the Court adopts an unclear definition of 'torture' under Article 3 ECHR with respect to the incorporation or not of the CAT purposive element. The analysis showed that the Court should take a clear-cut position on the non-incorporation of this element under the ECHR. It is argued that, given the serious contextual differences between the CAT and the ECHR, it is reasonable for the Court not to transplant the CAT definition.

Finally, the weight afforded to the PIL norms and the interpretative principle of taking them into account should not result in exceeding the clear limits of the text of the Convention, as the Court did in the *Zolotukhin* case. This undermines the Court's reasoning and questions the boundaries of its jurisdiction.

Section II: Restricting the scope of rights and freedoms under the Convention by taking public international law norms into account

Section II of the thesis examines cases in which the Court takes cognisance of PIL norms and restricts the protective scope of the rights and freedoms under the ECHR. This part of the jurisprudence is rather neglected by legal scholars who mostly emphasise the practice of the Court to rely on PIL for expanding the *ratione materiae* scope of the Convention. Chapters 5 and 6 identify the pertinent case-law and highlight several patterns that may be found in the Court's reasoning. Section III is important because it addresses the question as to whether the interpretative practice to read the ECHR in light of PIL should find any limits when PIL prevents the rights and freedoms under the ECHR from attaining their full weight. In other words, should the ECtHR harmoniously interpret the ECHR with other PIL norms, even if this means that it hinders the effective application of the rights and freedoms under the ECHR? How should international courts mitigate the possible tension between ensuring the unity of PIL and preserving the effectiveness of their constitutive instruments? The present Section purports to answer these questions.

Chapter 5 discusses the well-known cases concerning the rule of State immunity. In these instances, the Court found recourse to customary international law for construing the right to access a court. Chapter 6 examines the Court's jurisprudence where other PIL norms are taken into consideration.

5. Restricting the right to access a court under Article 6 ECHR by taking customary international law rules on State immunity into account

5.1 Introduction

In 2001 the European Court gave its judgments in three cases concerning State immunity: the *Fogarty*,¹ *McElhinney*² and *Al-Adsani* cases.³ The applicants complained that upholding States' immunity from jurisdiction before domestic courts violated their right to access a court under Article 6 (1) ECHR. All three applications brought before the Court involved the identification of the status and scope of the relevant PIL norms, since the applicants argued that their cases fell within exceptions to the rule on State immunity. It was upon the Court, firstly, to ascertain the legal status of State immunity in PIL and, secondly, to examine whether the facts of the cases triggered the scope of the alleged exceptions to State immunity.

The following analysis is also informed by some other pertinent cases of the Court where it is deemed necessary. The second sub-section examines in detail the PIL norms that the Court had recourse to and how it construed customary international law. The third sub-section inquires how the Court attempted to read the ECHR harmoniously to a customary international law rule and what was the impact on the interpretation of Article 6 ECHR. The fourth sub-section explores in an overall manner what type of role the ECtHR assumes in these cases and the last sub-section concludes.

¹ *Fogarty v. United Kingdom*, 21 November 2001, (Grand Chamber).

² *McElhinney v. Ireland*, 21 November 2001, (Grand Chamber).

³ *Al-Adsani v. United Kingdom*, 21 November 2001, (Grand Chamber).

5.2 The public international law norms that the Court took into account

The *Fogarty* case concerned the dismissal of an Irish national from a post working as administrative assistant at the United States (US) embassy in London. She brought proceedings before the industrial tribunal against the US government for an unlawful dismissal because she was allegedly sexually harassed. The tribunal granted her request for compensation. The applicant was unsuccessful in her subsequent application for another post in the embassy. Again, she brought proceedings before national courts alleging that she was once more a victim of discrimination because the refusal to employ her was due to her previous history with the embassy. The US government notified the tribunal that it would claim immunity from jurisdiction since the said post was covered by State immunity. The applicant was advised by her counsel not to pursue further her claims before domestic courts.⁴

The Court admitted that there appeared to be a trend in PIL toward limiting the scope of State immunity with respect to employment issues. Reference was made to Article 5 (1) of the European Convention on State Immunity (Basle Convention)⁵ and Article 11 (1) of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property (ILC Draft Articles).⁶ Both provided that a State cannot claim immunity from the jurisdiction of a court of another contracting State, if the proceedings relate to a contract of employment. The Court noted, however, that international practice was divided regarding employment in a foreign embassy.

⁴ *Fogarty* (GC), [10]-[14].

⁵ European Convention on State Immunity (concluded on 16 May 1972; entered into force on 11 June 1976) ETS No 74.

⁶ Draft Articles on Jurisdictional Immunities of States and Their Property (text adopted by the International Law Commission in 1991 and submitted to the General Assembly) YbkILC 1991, vol. II, Part Two.

Article 32 of the Basle Convention exempted privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them from the scope of Article 5. Nonetheless, the question of who actually exercises such functions did not produce a uniform answer. The Court considered Article 11 (2) (b) of the ILC Draft Articles, which included the recruitment of an individual within the exercise of such functions. It concluded that the applicant's case did not fall within an exception to the State immunity rule and, thus, the respondent State did not exceed its margin of appreciation.⁷

The Court's analysis did not involve an extensive investigation of the sources of PIL. It assumed that State immunity has acquired the status of a generally recognised rule of PIL or a customary rule of PIL solely by grounding its assertion on the Basle Convention. Despite being in force and binding on the United Kingdom, only eight States had ratified the Basle Convention. Given that the Basle Convention – or at least not all of its provisions – did not reflect the current state in PIL, it is reasonable to question on which basis the Court substantiated the customary status of the rule on State immunity.⁸

More recently, in the *Cudak* case the Grand Chamber unanimously reaffirmed that a civil claim requesting compensation for unlawful dismissal with regards to employment contracts (without involving the recruitment aspect of the contract) was a well-established exception to State immunity and,

⁷ *Fogarty* (GC), [37]-[38].

⁸ A. Orakhelashvili, 'State Immunity in National and International Law: Three Recent Cases before the European Court of Human Rights' (2002) 15 *LJIL* 703, 706-709.

hence, found a violation of Article 6 ECHR.⁹ The ILC Draft Articles - which at the time of the judgment had already been adopted by the United Nations General Assembly as the Convention on Jurisdictional Immunities of States and their Property¹⁰ (UN Convention on Jurisdictional Immunities) - expressly provided that the rule of non-immunity does not apply if ‘the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual’.¹¹ Hence, *a contrario*, the rule of immunity applied to unlawful dismissal. What is of interest here is how the Court treated and justified the use of the PIL material.

As the Court admitted, Lithuania was not a party to the Basle Convention.¹² The UN Convention on Jurisdictional Immunities was not yet in force and Lithuania had not even signed it. The Court attempted to legitimise its choice to use the said Convention by underlining that Lithuania did not object to the ILC Draft Articles and subsequently did not vote against the text of Article 11 of the UN Convention on Jurisdictional Immunities. This is an obscure statement since these facts may serve as indications of the practice or *opinio juris* of a State, but in no case may one safely assume that a State is somehow bound by a treaty provision or its content.

It was also asserted that ‘it is possible to affirm that Article 11 of the [ILC Draft Article and of the UN Convention on Jurisdictional Immunities] applies to the respondent State under customary international law’.¹³ The text

⁹ *Cudak v. Lithuania*, 23 March 2010, (Grand Chamber), [62]-[65].

¹⁰ United Nations Convention on Jurisdictional Immunities of States and their Property (adopted by the General Assembly of the United Nations on 2 December 2004, A/RES/59/38; not yet in force).

¹¹ Article 11 (2)(c) UN Convention on Jurisdictional Immunities.

¹² *Cudak* (GC), [27].

¹³ *Ibid*, [67]. *Sabeh El Leil v France*, 29 June 2011, (Grand Chamber), [54].

of the judgment, however, provides no convincing evidence that Article 11 reflects customary international law. This is because, firstly, the ILC's work involved both codification and progressive development elements and the Court did not clarify whether this provision codifies customary international law.¹⁴ Secondly, as the Court cites, the ILC in its Commentary to the Draft Articles stated that the rules formulated in Article 11 *appeared to be* consistent with the *emerging trend* in the legislative and treaty practice of a growing number of States.¹⁵ The ILC also noted that '[p]aragraph 2 (b) is designed to confirm the existing practice of States in support of the rule of immunity'.¹⁶ Neither statements do not seem to support the Court's definite conclusion that Article 11 reflected or had acquired the status of a rule of customary international law. Perhaps it would have been preferable for the Court to simply highlight the fact that the UN Convention on Jurisdictional Immunities qualifies as the most authoritative statement available on current international understanding of State immunity.¹⁷ In this way it would retain a validly justified position for relying on relevant and informative authorities without having to construct unclear arguments on the alleged applicability of the UN Convention to the respondent State.

In *McElhinney* the applicant brought an action before Irish courts against a British soldier and the British Secretary of State claiming for damages because the soldier had wrongfully assaulted him. Domestic courts, however, granted the British Secretary's claim for immunity and dismissed

¹⁴ *Ibid*, [64].

¹⁵ *Ibid*, [66] (emphases added); YbkILC 1991, vol. II, Part Two, 44, [14].

¹⁶ YbkILC 1991, vol. II, Part Two, 43.

¹⁷ E. Bates, 'State Immunity for Torture' (2007) 7 *HRLRev* 651, 664. Concurring Opinion of Judge Cabral Barreto joined by Judge Popovic in *Cudak* (GC), 22; Dissenting Opinion of Judges Caflisch, Cabral Barreto and Vajić in *McElhinney* (GC), 19.

McElhinney's action. McElhinney complained before the ECtHR that the rule granting immunity from jurisdiction and his inability to access national courts were in breach of Article 6 ECHR.¹⁸

Similarly to the *Fogarty* case, the Court took cognisance of the Basle Convention. Article 11 made an exception for 'proceedings which relate to redress for injury to a person [...], if the facts which occasioned the injury [...] occurred in the territory of the State of the forum, and if the author of the injury was present in that territory at the time those facts occurred' from the scope of the State immunity rule. The crux of the matter was, however, whether this exception encompassed instances where a member of the armed forces of another State causes personal injury. The Court noted that, according to Article 31 of the Basle Convention,¹⁹ State immunity should be granted in such instances. This finding was further supported by emphasising the fact that the ILC's work indicated toward the same direction, thereby excepting only insurable risks relating to traffic accidents.²⁰ The Grand Chamber found that despite the emerging trend with respect to claims for personal injuries, the applicant's action before national courts did not concern any of the recognised exceptions to the rule granting States immunity from jurisdiction and, hence, his right to access a court had not been disproportionately restricted.

¹⁸ *McElhinney* (GC), [20].

¹⁹ 'Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting Party in respect of anything done or omitted to be done by or in relation to its armed forces on the territory of another Contracting State'.

²⁰ Article 12 of the ILC Draft Articles on Jurisdictional Immunities of States and Their Property provides that '[...] a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission'.

The Court once again approached the Basle Convention rather uncritically. In terms of treaty law, Ireland was not bound by it. With respect to its alleged customary status Article 31 did not reflect customary international law and, thus, the majority should not have drawn definite conclusions solely by virtue of this treaty provision.²¹ Dissenting Judges Caflisch, Cabral Barreto and Vajić conducted a more thorough investigation of the pertinent PIL material in order to ascertain the scope of the exception to State immunity. They referred to the national legislation of certain States and to international practice evidenced by a series of authorities, such as a resolution adopted by the Institute of International Law on ‘Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement’, the 1984 International Law Association’s Revised Draft Articles for a Convention on State Immunity and the ILC Draft Articles and Commentary.²² Although these were non-binding legal instruments, their critical assessment appears to shed light on the content of the immunity rule. Contrary to the conclusions of the majority, the minority found that Article 12 of the ILC Draft Articles sustained the applicant’s complaint and that his case, in fact, fell under one of the exceptions to State immunity. This is arguably a more accurate approach since the ILC has equipped Article 12 with a very broad scope.²³ Therefore, although minority and majority analysed almost identical PIL norms, ironically, they employed different interpretations of the said norms and reached different conclusions to the case at hand.

²¹ Dissenting Opinion of Judges Caflisch, Cabral Barreto and Vajić in *McElhinney* (GC), 18.

²² *Ibid*, 17-20.

²³ *Ibid*, 19; YbkILC 1991, vol. II, Part Two, 45, [3] and 46, [11].

Turning to the *Al-Adsani* case, the applicant, a dual British/Kuwaiti national, filed a civil suit before English courts against the State of Kuwait for being subjected to torture. He complained before the Court that English courts had failed to secure his right not to be tortured and also his right to a fair trial by granting immunity from suit to the State of Kuwait.

The Court examined whether there was an exception to State immunity in PIL with respect to civil proceedings before national courts when the alleged torture did *not* take place on the territory of the forum State. It relied only on the Basle Convention which did not prescribe such an exception, unless such proceedings were linked to injury caused on the territory of the forum State.²⁴ The Court noted that this ‘provision reflect[ed] a generally accepted rule of international law’, ‘except insofar as it affects claims for damages for torture’.²⁵

The applicant’s main argument, however, was that a *lex specialis* human rights’ exception to State immunity could be sustained under PIL. He argued that the rule on the prohibition of torture was a *jus cogens* rule and, hence, should take precedence over any other rule of PIL, including State immunity. The Court affirmed the *jus cogens* nature of the prohibition of torture. It referred to the absolute prohibition of torture as enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)²⁶ and the Convention against Torture.²⁷ It also placed great emphasis on the judicial pronouncement by the

²⁴ Articles 11 and 15 Basle Convention; *Al-Adsani* (GC), [21]-[22], [57].

²⁵ *Al-Adsani* (GC), [57].

²⁶ Article 5 UDHR and Article 7 ICCPR stipulate that ‘[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment’.

²⁷ *Al-Adsani* (GC), [27]-[29].

International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Furundžija* case where the prohibition of torture was recognised as a peremptory norm under PIL.²⁸ This, as the Court noted, was followed by the subsequent case law of the ICTY, endorsed by the International Criminal Tribunal for Rwanda and considered to be - already at the time of deciding *Al-Adsani* - an accepted position. The recognition of the *jus cogens* character of the prohibition of torture by the Court is one of the instances where international courts and tribunals develop PIL. Chapter 1 stressed that specialised or/and regional international courts not only do not threaten the unity of PIL, but also enrich and develop PIL. Despite the hesitance of the International Court of Justice towards the concept of *jus cogens*, the ICTY in *Furundžija* and the ECtHR in *Al-Adsani*, explicitly acknowledged and developed that concept in their judgments. The peremptory character of the prohibition of torture is now considered an established position in PIL.²⁹

Yet, the Grand Chamber with a marginal vote of nine to eight did not accept that, in the specific instance, the *jus cogens* rule on the prohibition of torture could override the rule granting immunity from jurisdiction before domestic courts. The majority could not discern a firm basis that *as a matter of PIL* a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.³⁰ The Court took a critical stance toward the pertinent PIL norms by drawing a distinction between, on one hand, the criminal liability of an individual for alleged acts of torture and, on the other

²⁸ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, 10 December 1998, [144]-[154]; *Al-Adsani* (GC), [30]-[31], [60].

²⁹ Separate Opinion of Judge *ad hoc* Dugard in Case *Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), [5]; *infra* 1.4.

³⁰ *Al-Adsani* (GC), [61], [66].

hand, the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. It noted that the UDHR and ICCPR did not relate to State immunity or civil proceedings. This point is unclear, since these are provisions of a general nature and they do not relate to criminal liability either. All the more, it has been highlighted that the practice of the Human Rights Committee supports the inclusion of civil suits within an exception to immunity.³¹ The Court also underlined that no definite evidence could be drawn from recent State practice and legislation as incorporated into the ILC's work and the Draft Articles since the plea of State immunity seemed to be upheld by national courts in the case of civil suits. Finally, it clarified that ground-breaking judgments, such as the *Furundžija* and *Pinochet* cases,³² again related only to the criminal liability of individuals. Although it appears that the Court in *Al-Adsani* discusses and engages more systematically with the PIL norms before it, its legal reasoning seems rather poor insofar the justification given for this critical distinction is concerned.

The minority strongly opposed the assertion that the *lex specialis* human rights exception to State immunity could not be discerned in PIL. Dissenting Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić disapproved of the majority's distinction between civil and criminal proceedings as not being consonant with the very essence of the operation of a *jus cogens* rule. They argued that *jus cogens* is a higher source of law in the vertical hierarchy of the international legal system overriding any other rules of PIL. Hence, the procedural bar of State immunity

³¹ A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 555.

³² *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), 24 March 1999, UKHL, [1999] 2 All E.R. 97.

is automatically lifted and does not produce any legal effect.³³ Similarly to *McElhinney*, the majority and minority both allege that they decided the case as a matter of PIL. However, they employ different interpretations of the same PIL norms and, consequently, construe the scope of the exceptions to State immunity in different ways.

The Grand Chamber's judgments reveal reluctance and even confusion when addressing the legal status of State immunity in PIL. It also appears that the Court does not sufficiently understand certain concepts of PIL, which is evidenced by the Court's inconsistent terminology. State immunity is interchangeably qualified as a 'concept of international law',³⁴ a 'doctrine',³⁵ a 'rule',³⁶ a 'generally recognised rule of public international law',³⁷ or a 'general rule of international law'.³⁸ It was only certain dissenting Judges who explicitly stated that State immunity is a rule of customary international law.³⁹ Yet, more recent pronouncements by the Grand Chamber in the *Cudak* and *Sabeh El Leil* judgments refer clearly to State immunity as a rule of customary international law.⁴⁰

This uncertainty is not confined to issues of terminology. It extends to the choice of norms and legal material to which the Court refers. Strong or

³³ Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in *Al-Adsani* (GC), 29-30. Judge Loucaides agreed on this point with their Dissenting Opinion.

³⁴ *Al-Adsani* (GC), [54]; *Fogarty* (GC), [34]; *McElhinney* (GC), [35].

³⁵ *Al-Adsani* (GC), [56], [66]; *Fogarty* (GC), [36]; *McElhinney* (GC), [32], [37]. *Cudak* (GC), [57].

³⁶ *Fogarty* (GC), [38].

³⁷ *Al-Adsani* (GC), [56], [57]; *Fogarty* (GC), [36]; *McElhinney* (GC), [37]. *Cudak* (GC), [57].

³⁸ *Al-Adsani* (GC), [64].

³⁹ Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in *Al-Adsani* (GC), 30 (point 2); dissenting Opinion of Judge Loucaides in *Fogarty* (GC), 19.

⁴⁰ *Cudak* (GC), [66], [67]; *Sabeh El Leil* (GC), [54]. H. Fox, *The Law of State Immunity* (Oxford University Press, New York, 2008) 393.

exclusive reliance on certain instruments appears selective and lacking in sufficient justification:⁴¹ the unreserved reliance on the Basle Convention when it is not ratified by the respondent State (*Cudak*, *McElhinney*) or when it does not reflect customary international law (*Fogarty*, *Cudak*);⁴² and the obscure reasoning regarding the applicability of the UN Convention on Jurisdictional Immunities to Lithuania (*Cudak*). Moreover, in *McElhinney* and *Al-Adsani* it was the minority who conducted a more thorough and convincing investigation into relevant PIL norms for determining the scope of the exceptions to State immunity.

The Court's misgivings should be also seen in light of the fact that it encountered the challenge of having to pronounce itself on questions of PIL which were in a fluid state and unsettled at that moment.⁴³ Three months later the International Court of Justice (ICJ) came to clarify certain issues surrounding the exceptions to State immunity under PIL.⁴⁴ It cannot, however, be dismissed that in many instances the Court does not provide a convincing justification for using the specific PIL norms and drawing the said conclusions from them. For example, in *Cudak* it drew a definite conclusion on the customary status of Article 11 of the UN Convention on Jurisdictional Immunities, despite the fact that it did not seem to be supported by the ILC work. In *McElhinney*, the Court disregarded the broad scope attached to Article 12 of the ILC Draft Articles; a point addressed by the minority. In *Al-Adsani*,

⁴¹ M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, New York, 2010) 295.

⁴² Without in this respect exploring the possibility of the respective respondent States being persistent objectors to the customary international law rule on State immunity.

⁴³ Fox, (note 40), 391-393; Forowicz, (note 41), 307.

⁴⁴ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, ICJ Rep. 2002, p. 3; *Jurisdictional Immunities of the State* (Germany v Italy: Greece Intervening) Judgment, 3 February 2012, General List No 143, [53]-[58], [78].

the discussion of controversial and exceptionally complex questions was limited to a very few paragraphs in the Court's reasoning and the explanation for drawing the critical distinction between criminal jurisdiction and civil suits was supported by rather weak authorities and arguments. In sum, despite certain misgivings in the Court's construction of PIL norms, the main difficulty, in the view of the present author, is the Court's obscure or poor reasoning in justifying its conclusions. In principle, the Court does not seem to seriously lack in expertise in PIL, but it lacks in confidently engaging with and construing customary international law. These thoughts will be further explored in the fourth sub-section regarding the role that the Court assumes as an international court when addressing customary international law.

5.3 Accommodating the restrictive impact of the State immunity rule within the ECHR

As it was previously discussed - with the exception of *Cudak* - in *Fogarty*, *McElhinney* and *Al-Adsani* the Court did not find it established that the applicants' circumstances triggered the applicability of an exception to State immunity. Hence, it had to assess whether the refusal of national courts to entertain the civil suits breached their right to access a court under Article 6 ECHR.

The Court followed the same methodology and reasoning in all cases. It acknowledged that State immunity serves as a legitimate aim for restricting the applicants' right in order for States to comply with PIL. It further recalled that, while being mindful of the special character of the ECHR as a human rights

treaty, it should not place it in a vacuum. Hence, on the basis of Article 31 (3)(c) VCLT, the ECHR must be interpreted by taking other relevant rules of international law into account, namely the rule on State immunity and the ECHR ‘should so far as possible be interpreted in harmony with other rules of international law of which it forms part’.⁴⁵ It followed, according to the Court, that when the measures taken by a member State reflect generally recognised rules of PIL on State immunity they cannot *in principle* be regarded as imposing a disproportionate restriction on the right to access a court; these measures qualify as an *inherent* limitation to Article 6.⁴⁶

The Court was very careful not to mention the word *conflict* in the text of its judgments or to discuss a conflict of norms, even though certain dissenting Judges addressed the issue.⁴⁷ The Court’s reasoning lays the basis for avoiding through interpretation, a possible conflict between the customary rule of State immunity and Article 6 ECHR. This approach is followed in subsequent case law concerning the rules on State immunity⁴⁸ and diplomatic immunity.⁴⁹ In this way the Court attempts to accommodate the restrictive impact of State immunity under PIL within the structure of the ECHR.⁵⁰

⁴⁵ *Fogarty* (GC), [35]; *McElhinney* (GC), [36]; *Al-Adsani* (GC), [55].

⁴⁶ *Fogarty* (GC), [36]; *McElhinney* (GC), [37]; *Al-Adsani* (GC), [56].

⁴⁷ Judges Caflisch, Cabral Barreto and Vajić in their dissenting Opinion in *McElhinney* (GC), 20; Judge Loucaides in his dissenting Opinion in *McElhinney* (GC), 21; Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in their dissenting Opinion in *Al-Adsani* (GC), 29-30.

⁴⁸ For example, *Kalogeropoulou v. Greece* (Admissibility Decision), 12 December 2002, 8-9; *Cudak* (GC), [56]-[57]; *Sabeh El Leil* (GC), [48]-[50].

⁴⁹ For example, *Manoilescu and Dobrescu v. Romania and Russia* (Admissibility Decision), 3 March 2005, [70], [80]; *Treska v. Albania and Italy* (Admissibility Decision), 29 June 2006, 15-16; *Kirovi v. Bulgaria and Turkey* (Admissibility Decision), 2 October 2006, 14-16.

⁵⁰ P. Weckel, ‘Les Confins du Droit Européen des Droits de l’ Homme et le Progrès du Droit’, in *Libertés – Justice – Tolerance* (Bruylant, Bruxelles, 2004) 1729, 1731; L. Caflisch, A.A.C. Trindade, ‘Les Conventions Americaine et Européenne des Droits de l’ Homme et le Droit International Général’ [2004] *RGDIP* 5, 61; L. Caflisch, ‘L’ Application de Droit International Général par la Cour Européenne des Droits de l’ Homme’, in I. Buffard, J. Crawford, A. Pellet

The position that the ECHR ought not to be placed in a vacuum, and should be construed by taking other PIL norms into account, reflects international judicial practice.⁵¹ ‘In doubtful cases and where it is not established that the parties intended to depart from customary law rules, treaties should be interpreted in harmony with customary law’⁵² in order to avoid the tendency to overemphasise the alleged self-contained nature of a treaty system.⁵³ Therefore, although the Court could ‘have simply brushed aside State immunity as not relevant to the application of the [ECHR], [...] it did not do so’.⁵⁴ On the contrary, it placed the right to access a court under the ECHR against the background of PIL.

On the other hand, the Court recalled that it should be mindful of the special character of the ECHR as a human rights treaty - the meaning of which is not entirely clear. A reasonable assumption could be that the Court refers to the guarantee of practical and effective rights under the ECHR. It is interesting that the reference is made in passing, whereas in other cases the Court devotes a separate paragraph in its legal reasoning to elaborate on the principle of effectiveness. Hence, the tension between the interpretative principle of effectiveness and the principle of taking cognisance of relevant norms of PIL does not become obvious. When the interpretative principle of taking

et al. (eds.), *International Law Between Universalism and Fragmentation* (Martinus Nijhoff Publishers, Leiden-Boston, 2008) 627, 633.

⁵¹ G. Schwarzenberger, ‘Myths and Realities of Treaty Interpretation’ (1968-1969) 9 *Virginia JIL* 1, 14; C. de Visscheur, *Problèmes d’Interprétation Judiciaire en Droit International Public* (Pedone, Paris, 1963) 92-94.

⁵² R. Bernhardt, ‘Interpretation in International Law’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984) 318, 323.

⁵³ G. Schwarzenberger, *International Law*, Vol. I (International Law as Applied by International Courts and Tribunals: I) (Stevens & Sons Limited, London, 1957) 529.

⁵⁴ International Law Commission, ‘Report of the Study Group of the International Law Commission finalised by M. Koskeniemi’ (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, [438] (ILC Final Rep.).

cognisance of PIL norms leads to a restriction of the ECHR, the Court tends to hide away the contravention with the principle of effectiveness. Instead, it stresses the necessity that the ECHR should not be applied in a vacuum. In line with the main argument of the thesis, not only the principle of taking PIL norms into account and the principle of effectiveness are autonomous and distinct from each other, but also the two principles may conflict in their application. In these instances, the principle of effectiveness reinforces the special nature of the ECHR and prioritises the full weight of rights and freedoms under the ECHR over the construction of the ECHR in light of PIL. On the other hand, the principle of taking PIL norms into account introduces the relevant PIL norms in the Court's legal reasoning and restricts the effective application of the ECHR. Thus, this part of the jurisprudence illustrates that the interpretation of the ECHR by taking cognisance of PIL norms should be treated separately to the principle of effectiveness.⁵⁵

Moreover, a pattern appears to exist in the Court's jurisprudence. It will be seen in other cases as well that when the Court takes account of PIL norms which restrict the scope of the rights of the ECHR,⁵⁶ it downplays the application of the principle of effectiveness. On the contrary, where the

⁵⁵ Merrills, in his seminal work, perceptively discusses the principle of effectiveness and, in general, the relationship of the Convention with international law in different Chapters (Chapters 5 and 9 respectively): J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1993). Harris also treats separately the interpretation of the ECHR by 'reference to international standards' from the effective interpretation: D.J. Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 14-15.

Cf. D. Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of *Sui Generis*' (2010) 79 *Nordic JIL* 245, 267 *et seq.*, who construes unnecessary, complicated analytical devices such as the 'systemic dimension of the principle of effectiveness'; C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 168.

⁵⁶ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005 (Grand Chamber); *Saadi v. United Kingdom*, 29 January 2008, (Grand Chamber), [62].

relevant PIL norms reinforce the effective protection of the rights and freedoms under the ECHR the Court fully elaborates on the necessity of applying the principle of effectiveness.⁵⁷

The reference to the *special* character of the ECHR brings not only the guarantee of practical and effective rights under the ECHR into the fore, but it also highlights the Court's restricted *ratione materiae* jurisdiction. Judge Loucaides made an explicit point concerning the *lex specialis* and applicable law before the Court.⁵⁸ Hence, the question that emerges is how the Court should treat customary international law or general principles of international law, if they are not embodied in the ECHR by direct reference. When drafting the ECHR the Legal Committee of the Consultative Assembly of the Council of Europe foresaw that the Court should necessarily apply general principles of law recognised by civilised nations as stipulated in Article 38 (1) (c) ICJ Statute in the execution of its duties. It is for this reason that inserting a specific clause was not deemed necessary.⁵⁹

In this respect, it is also important to consider whether or not it makes any difference if the recourse to PIL for interpreting the ECHR restricts the scope of rights and freedoms under the ECHR. The Court's jurisprudence witnesses examples where general principles of law or customary international law have been relied upon. In *Golder*, for example, universally recognised fundamental principles of law and principles of international law prohibiting the denial of justice were utilised to support the conclusion that 'fair trial'

⁵⁷ For example, *Demir and Baykara v Turkey*, 12 November 2008, (Grand Chamber), [66]; *Mamatkulov and Askarov v Turkey*, 4 February 2005, (Grand Chamber), [111]. *Infra* Chapters 7, 8.

⁵⁸ Dissenting Opinion in *McElhinney* (GC), 21.

⁵⁹ *Golder v United Kingdom*, 21 February 1975, (Plenary), [35]; *Demir and Baykara* (GC), [71].

includes the right to access a court⁶⁰ and to expand the scope of Article 6 ECHR. Nonetheless, it is a quite rare instance for the Court to use the position under PIL in order to justify a restrictive interpretation of the ECHR.⁶¹ It has been argued that the Court should be particularly reluctant to read restrictions on ECHR rights derived from customary international law.⁶² This is because the guarantee of the right to access a court under the ECHR should be preserved over the requirements of the immunity rule under PIL.⁶³ However, there is nothing in the ECHR that safely and specifically indicates that the right to a fair trial and its implied guarantees establishes a *lex specialis* rule - which modifies or displaces the requirements of State immunity.

The Court does not take a clear-cut position on the previous questions. It attempts to preserve the specificity of the ECHR while at the same time reading it in light of the customary rule on State immunity. This is in line with the practice of international courts and tribunals examined in Chapter 2. The relevance of, and the extent to which, general international law will inform the construction of a treaty is a matter of interpretation on a case-by-case basis.⁶⁴ Hence, the extent to which PIL will inform the construction of the ECHR should be carefully assessed on the basis of the relevance and weight afforded to the State immunity rule when interpreting and applying Article 6 ECHR *in casu*.⁶⁵ It is for this reason that the Grand Chamber brought Article 31 (3)(c) VCLT into the fore. However, it seems that the Court employs Article 31 (3)(c)

⁶⁰ *Golder* (Pl.), [35].

⁶¹ One example is the series of cases concerning the expulsion of aliens: Merrills, (note 55), 206.

⁶² Dissenting Opinion of Judge Loucaides in *Maslov v. Austria*, 22 March 2007, 12.

⁶³ A. Orakhelashvili, 'State Immunity and International Public Order Revisited' (2006) 49 *GYbkIL* 327, 346; Merrills, (note 55), 206; Forowicz, (note 41), 311.

⁶⁴ *Infra* 1.4 and 2.2.

⁶⁵ ILC Final Rep, [473]-[474]; C. McLachlan, 'The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279, 310.

VCLT in an inappropriate way. It invokes the provision in order to support the harmonious interpretation of the ECHR to PIL and the presumption that the rule on State immunity is not, in principle, a disproportionate restriction to Article 6 ECHR. These assertions are read in the judgment as if they are causally linked.⁶⁶ Nonetheless, neither of these statements logically lead to the other and ought not to be conflated. When interpreting the ECHR Article 31 (3)(c) VCLT is used as an interpretative tool to introduce any relevant and applicable rules of PIL into the Court's legal reasoning. It is doubtful that Article 31 (3)(c) can support a presumed proportionate restriction of the ECHR. Although the said provision does not address how other rules of PIL are to be employed in the legal reasoning,⁶⁷ nor what kind of bearing they will have in the interpretation process,⁶⁸ it does not require interpreting the ECHR *in order to make it compatible* with the rule of State immunity.⁶⁹ Even more, its placement in the proportionality assessment,⁷⁰ besides being methodologically unsound, implies that the Court treats it as a medium for balancing conflicting interests and norms. In the view of the present author, the Court unnecessarily conflates the interpretation process of the ECHR with the proportionality assessment of the impugned restriction. It also conflates the well-recognised

⁶⁶ The Court for example uses the expression '[i]t follows': *Fogarty* (GC), [36]; *McElhinney* (GC), [37]; *Al-Adsani* (GC), [56]. Caflisch, (note 50), 634.

⁶⁷ A. van Aaiken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal' (2009) 16 *IJGLS* 483, 502.

⁶⁸ The International Court of Justice qualified it as a 'certain bearing' in *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, 4 June 2008, ICJ Rep. 2008, p. 177, [113]-[114].

⁶⁹ Orakhelashvili, (note 63), 345; 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?' (2010) *Michigan JIL* 621, 666-667; E. Jouannet, 'Le Juge International Face aux Problèmes d' Incoherence et d' Instabilité du Droit International' (2004) 108 *RGDIP* 917, 934-935.

⁷⁰ *Fogarty* (GC), [35]; *McElhinney* (GC), [36]; *Al-Adsani* (GC), [55]. Cf. *Cudak* (GC), [55]-[56].

interpretative principle of reading, in case of a doubt, a treaty in light of PIL with its own presumption that the State immunity rule cannot have a disproportionate effect on the right to access a court.⁷¹ The ILC and PIL scholars found common ground in the Court's reasoning in these cases to employ an appealing vision of Article 31 (3)(c) VCLT as a principle of systemic integration.⁷² They have not convincingly explained, however, the content of this principle, namely if it has an aim to serve besides placing a treaty instrument against PIL and introducing relevant rules in the process of the former's interpretation.⁷³

Any interpretative attempt towards harmonising two potentially conflicting rules should not result in 'set[ting] aside'⁷⁴ the rules of the ECHR.⁷⁵ Interpretation cannot make a conflict disappear. The Court, from the very beginning of its reasoning, establishes a particularly strong presumption regarding the harmonious reading of the ECHR to the rule on State immunity. This is not a proper starting point in the interpretation process since the Court does not start with the treaty terms (Article 6 ECHR) of its own constitutive instrument and does not apply the interpretative rules contained in Article 31

⁷¹ *Fogarty* (GC), [36]; *McElhinney* (GC), [37]; *Al-Adsani* (GC), [56].

⁷² ILC Final Rep, [410]-[460]; McLachlan, (note 65); J. d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in A. Nollkaemper, O.K. Fauchald (eds.), *The Practice of International and National Courts and the (De-) Fragmentation of International Law*, (Hart, 2012) 141; Tzevelekos, (note 69).

⁷³ B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *ICLQ* 573, 584; M. Samson, 'High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2011) 24 *LJIL* 701, 712; J. Kammerhofer, 'Systemic Integration, Legal theory and the International Law Commission' (Unedited final manuscript) 2, 6, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534086&download=yes.

⁷⁴ ILC Final Rep, [438].

⁷⁵ Weckel, (note 50), 1742-1743.

VCLT in its logical order;⁷⁶ it starts instead with how an inherent limitation can be read to Article 6. In other words, the Court should have started with the interpretation of the right to a fair trial and subsequently placed it – to a certain extent - against the background of customary international law.⁷⁷ Affording such heavy weight to the extraneous State immunity rule from the very beginning of the interpretation process diminishes the significance of the plain meaning and purpose of the right to access a court since the interpretive influence of the State immunity concept overshadows all the other elements and principles of interpretation.⁷⁸ Even if the right to access to justice is an implied right under Article 6 ECHR and may be more receptive to stricter limitations,⁷⁹ the proportionality of the restriction on the right to access a court should not be presumed. It should rather be assessed on the basis of interpretation and on the facts of the case, which is something that the Court did not do.⁸⁰ These remarks are made as a matter of proper methodology and sound legal reasoning. It is to be admitted, however, that – subject to the (evolving) scope of the State immunity rule – in *Al-Adsani* State immunity necessarily touches upon the core and essence of the right to access a court.

Interestingly, in light of new developments, the Court's reasoning may be pointing in a different direction. In the recent *Cudak* and *Sabeh El Leil* cases the Grand Chamber unanimously follows the same methodology to the letter without, however, including the assertion regarding the necessity of reading the

⁷⁶ R. Gardiner, *Treaty Interpretation* (Oxford University Press, New York, 2010) 279-280; F. Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 *Yale JIL* 315.

⁷⁷ Concurring opinion of Judge Ress in *Bosphorus* (GC), [5].

⁷⁸ Schwarzenberger, (note 51), 14; Orakhelashvili, (note 63), 345.

⁷⁹ A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford University Press, New York, 2007) 392; cf. Orakhelashvili, (note 31), 564-565.

⁸⁰ See Judge Loucaides concerns arguing that a blanket immunity should not have been accepted in his Dissenting Opinions attached to *Fogarty*, *McElhinney* and *Al-Adsani*.

ECHR in harmony with the State immunity rule.⁸¹ Given that the wording of the reasoning in every other respect is identical to all relevant cases, this omission may signify a slightly different approach. Secondly, the outline of its interpretative principles is now placed not within the proportionality assessment but under the general principles derived from its case law.⁸² Thirdly, the Grand Chamber explicitly stressed the importance of ensuring practical and effective rights under Article 6 ECHR.⁸³ It now becomes clearer that the interpretive principle of taking cognisance of PIL norms contravenes the principle of effective interpretation and leads towards different interpretive outcomes. In fact, the weight afforded to the external rule of State immunity and the respective impact that the Court readily accommodates within the scope of the ECHR dramatically restricts Article 6 ECHR. Hence, the fact that the Court chose in these recent cases to devote a paragraph in its reasoning on the importance of ensuing practical and effective rights possibly evidences its willingness to openly counterbalance the simultaneous application of the two principles.

Arguably, this different approach in the *Cudak* and *Sabeh El Leil* cases is all the more important since the Court has widely mainstreamed the *McElhinney*, *Fogarty* and *Al-Adsani* legal reasoning in its subsequent case law. The *Al-Adsani* case constitutes a constant explicit citation in the Court's jurisprudence alongside the *Golder*, *Loizidou* (and the subsequent *Demir and Baykara*, as it will be discussed below⁸⁴) cases. From a methodological point of

⁸¹ Cf., on one hand, *Fogarty* (GC), [35]; *McElhinney* (GC), [36]; *Al-Adsani* (GC), [55] and, on the other hand, *Cudak* (GC), [56]; *Sabeh El Leil* (GC), [48].

⁸² *Cudak* (GC), [55]-[56]; *Sabeh El Leil* (GC), [47]-[48].

⁸³ *Cudak* (GC), [58]; *Sabeh El Leil* (GC), [50].

⁸⁴ *Infra* 7.4.

view, *Al-Adsani* has developed an impact beyond its confines. Cases before the Grand Chamber that exemplify this practice are numerous.⁸⁵ It is cited by the Court when it takes cognisance of other treaty rules and their interpretation by other international bodies and it may support either an expansive interpretation of the ECHR provisions⁸⁶ or a restrictive one.⁸⁷ The Court's wording, however, slightly differs throughout its jurisprudence. A variety of expressions are employed indicating that the ECHR should be interpreted 'in light of'⁸⁸ or 'in harmony with',⁸⁹ or 'in accordance with',⁹⁰ or by 'tak[ing] into account',⁹¹ other norms of PIL. Although in theory these expressions entail different consequences, it seems that the Court uses them interchangeably. Therefore, it remains to be seen whether or not the Court in its future case law will follow and apply what it seems to be a different interpretive approach in the recent *Cudak* and *Sabeh El Leil* cases.

5.4 The role of the Court

The analysis explored, first, the Court's methodology when it finds recourse to customary international law and, secondly, the accommodation of its restrictive impact within the scope of Article 6 ECHR. These issues, however, relate not only to the interpretation of the ECHR as such but, more

⁸⁵ *Neulinger and Shuruk v. Switzerland*, 6 July 2010, (Grand Chamber), [131]-[132]; *Mamatkulov and Askarov* (GC), [111]; *Demir and Baykara* (GC), [67]; *Bosphorus* (GC), [150]; *Saadi* (GC), [62]; *Öcalan v. Turkey*, 12 May 2005, (Grand Chamber), [163]; *Rantsev v. Cyprus and Russia*, 7 January 2010, [274]; *Al-Saadoon and Mufdhi v. United Kingdom*, 2 March 2010, [126].

⁸⁶ *Neulinger and Shuruk* (GC); *Mamatkulov and Askarov* (GC); *Demir and Baykara* (GC); *Öcalan* (GC); *Rantsev*; *Al-Saadoon and Mufdhi*.

⁸⁷ *Bosphorus* (GC); *Saadi* (GC).

⁸⁸ *Bosphorus* (GC), [150].

⁸⁹ *Neulinger and Shuruk* (GC), [131]; *Öcalan* (GC), [163]; *Rantsev*, [274]; *Al-Saadoon and Mufdhi*, [126].

⁹⁰ *Mamatkulov and Askarov* (GC), [111].

⁹¹ *Demir and Baykara* (GC), [67]; *Saadi* (GC), [62].

generally, to the Court's perception of its role concerning PIL and, in particular, customary international law. Judge Pellonpää tackled the issue as follows:

[W]hen having to touch upon central questions of general international law, this Court should be very cautious before taking upon itself the role of a forerunner.⁹²

He went on to cite Sir Robert Jennings' concerns on 'the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented'.⁹³ Other Judges emphasised the overarching importance and the basic imperative of the rule on State immunity in PIL.⁹⁴ These preoccupations illustrate that the Court is aware of the challenges revolving around the fragmentation of PIL and of the criticism directed towards its case law.

In the cases examined the majority kept a position of 'self-restraint', in that, if in their view an exception to the rule of State immunity did not very clearly emerge from the pertinent PIL norms, then they readily reaffirmed the applicability of the immunity rule to the case.⁹⁵ In contrast, the dissenting Judges, in all three cases, not only held different views on the current state of PIL and the interpretation of the same norms, but they also appear to invite the Court to be more confident in its approach towards PIL.⁹⁶ Interestingly, most of

⁹² Concurring Opinion of Judge Pellonpää joined by Judge Sir Nicolas Bratza in *Al-Adsani* (GC), 27.

⁹³ *Ibid*, 28.

⁹⁴ Concurring Opinion of Judges Caflisch, Costa and Vajić in *Fogarty* (GC), 17.

⁹⁵ G. Cohen-Jonathan, J.-F. Flauss, 'Cour Européenne des Droits de l' Homme et Droit International Général (2001)' (2001) XLVII *AFDI* 423, 445.

⁹⁶ Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in *Al-Adsani* (GC); Dissenting Opinion of Judge Loucaides in *Fogarty* (GC), *McElhinney* (GC) and *Al-Adsani* (GC); Dissenting Opinion of Judge Rozakis in

the dissenting Judges - Rozakis, Costa, Wildhaber and Caflisch - had strong PIL expertise.⁹⁷ Judge Caflisch articulated this invitation in his Concurring Opinion joined by Judge Ziemele in the *Hirschhorn* case, which concerned diplomatic immunity:

It would appear [...] that the International Court of Justice is not very favourably disposed towards specialised international courts - a category which includes this Court - ruling on issues of public international law. Despite the reservations of the main judicial body of the United Nations, *I would have liked to see the majority of this Court adopt a position* on the immunity issues raised [in this case].⁹⁸

The question, then, is whether the Court's reluctance is justified. The fact that the Court appears hesitant to pronounce upon questions of PIL which were at the moment unsettled does not seem to be unreasonable. Should the Court, however, retain a position of 'self-restraint' as a matter of principle? Should its authority to pronounce on questions of PIL, such as customary international law, be disapproved or questioned? Chapter 1 discussed the ICJ's very critical approach toward the ICTY's pronouncements on questions of PIL.⁹⁹ The ICJ not only disagreed on the interpretation and application of the rules on State responsibility but also strongly disapproved of the authority of the ICTY to pronounce on customary international law. In fact, the previously

McElhinney (GC); Dissenting Opinion of Judges Caflisch, Cabral Barreto and Vajić in *McElhinney* (GC).

⁹⁷ Bates also spots this detail: E. Bates, 'The *Al-Adsani* Case, State Immunity and the Prohibition of Torture' (2003) 3 *HRLRev* 193, 213.

⁹⁸ Concurring Opinion of Judge Caflisch joined by Judge Ziemele in *Hirschhorn v. Romania*, 26 July 2007, [2] (emphases added).

⁹⁹ *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, 26 February 2007, General List No 91; *infra* 1.3.1.

mentioned Concurring Opinion of Judge Caflisch refers to this judgment. The ECtHR was also criticised in the *Loizidou* case for creating a ‘schism’ in PIL. Chapters 1 showed, however, that the ECtHR in *Loizidou* and other international courts and tribunals in their judgments, in principle, develop PIL, rather than fragment it. There is an inherent paradox in the way many PIL scholars treat regional or specialised courts. On one hand, regional and/or specialised courts accept criticism for regarding themselves as separate, little empires. On the other hand, if they do take on board, and inevitably engage with, customary international law, they are treated as an imminent danger to the unity of PIL.

Yet, the view that a regional tribunal and/or a tribunal with restricted *ratione materiae* jurisdiction should not recklessly take up the role of a forerunner when a field of PIL is in a fluid state does not lack merit. To a certain extent this is equally applicable to all international bodies. From the perspective of the ECtHR, despite its regional scope and its jurisdictional confines, is still an *international* court, being incumbent to interpret and apply an international treaty. Many of the Judges sitting on its bench have a very good background and expertise in PIL. In fact, the 2010 Interlaken Declaration, adopted by the Committee of Ministers, prescribes that one of the criteria for the establishment of lists of candidates to be elected as Judges is to have knowledge of PIL.¹⁰⁰ Consequently, in the future, the PIL expertise within the Court will be reinforced. It is also a Court which is entitled to take other PIL norms into account when interpreting its constitutive instrument, the ECHR.

¹⁰⁰ Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM (2012) 40 final, 29 March 2012, II.4.

Therefore, if the Court has before it a specific question, which necessarily involves customary international law and it is indispensable for the exercise of its jurisdiction and for entertaining the dispute, it has the competence and authority to take a position.¹⁰¹ Certain misgivings in the Court's methodology and reasoning, which were highlighted in the second sub-section, were arguably due to its hesitance to articulate and reason on the basis of customary international law. Yet, as long as the analogous PIL expertise exists within the Court and cautiousness is exercised, the ECtHR should perceive itself as an 'equal player' among international courts to pronounce on customary international law.

5.5 Conclusions

In the above series of cases the Court engaged for the first time with questions of customary international law in order to ascertain the scope of the rule on State immunity and the exceptions attached to it. The Court had before it a possible conflict of the ECHR with a rule of customary international law. It fully acknowledged the relevance of the external PIL norms and avoided the conflict by way of interpretation. The Court attempted to read the ECHR in harmony with the customary rule on State immunity and to accommodate its restrictive impact within the ECHR. However, this led to a dramatic restriction to the right to access a court, without preserving the very core of the right.

¹⁰¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, [403].

In terms of its legal reasoning, the Court did not conduct a very thorough investigation of the relevant sources in order to ascertain the status of the immunity rule. In identifying the scope of the respective exceptions, the Court's discussion is sometimes poor or not convincing. Its methodology involved the application of Article 31 (3)(c) VCLT. The provision's placement within the proportionality assessment implies that the Court overestimates - if not misuses - the potential of the said provision. The Court afforded considerable weight to the PIL norms that it took into consideration, to the detriment of the effective application of the right to access a court. An important finding of this Chapter is that the Court hides away the tension between the principle of taking PIL norms into account and the principle of effectiveness. However, it can be safely concluded that the two principles are distinct and, in fact, conflict in their application. In more recent case law (*Cudak* case) the Court appears to apply the two principles in a more balanced and transparent way.

The majority of the Court adopts a quite reluctant position as far as its engagement with customary international law is concerned. Nonetheless, a number of dissenting Judges, the majority of which are the ones with the strong PIL expertise, suggest a more assertive role for the Court. It is argued that the Court should be confident on its competence to pronounce on customary international law questions and that it should not hesitate to elaborate in its reasoning.

Despite the misgivings and the problematic points in the Court's reasoning that have been already discussed, the present author is, in principle, in agreement with the Court's practice to balance the necessity for the unity of

PIL with the effective application of the ECHR. The ECtHR should take other PIL norms into account even if they restrict the Convention's scope. Otherwise, the necessity of addressing the difficulties arising from the fragmentation of PIL would be grounded on a selective basis.¹⁰² As it was stressed, however, the weight accorded to the external, relevant PIL norms should not result in setting aside the ECHR's core guarantees. If the present author's view is correct in that the Court in *Cudak* adopts a more balanced application of the principle of effectiveness and the principle of taking cognisance of the rule on State immunity, it would be a welcome development.

¹⁰² *Contra* Forowicz, (note 41), 383, 385, 391.

6. Restricting the scope of rights and freedoms under the ECHR by taking public international law norms into account

6.1 Introduction

Chapter 6 discusses cases in which the Court restricts the scope of rights and freedoms under the ECHR by having recourse to PIL norms. These cases involve the scenario of a possible conflict between a right or freedom under the ECHR and an external PIL norm. In contrast to Chapter 5 which concerned customary international law rules, the present Chapter examines mostly other treaty provisions. In certain instances, the Court takes note of non-treaty binding norms, for example, United National Security Council's Resolutions, or non-binding European Union (EU) law. It should be clarified that secondary EU law (Regulations, Directives), although binding on EU member States, is not binding from the standpoint of PIL. This Chapter is informative because it shows that the Court is willing to read the ECHR in harmony with other PIL norms, even if this would mean that the rights and freedoms under the ECHR do not attain their full weight. The analysis will explore the extent of this practice and the methodology followed in order to assess whether or not the ECtHR endangers the unity of PIL.

In many of the cases that will be discussed, a conflict may exist between the ECHR and a PIL norm. For reasons of clarity, the term 'conflict' denotes a situation where two treaty provisions may be applicable to the same set of facts with conflicting results.¹ A distinction is usually drawn between

¹ M.E. Villiger, *Commentary on the 1969 VCLT* (Martinus Nijhoff Publishers, Leiden-Boston, 2009) 402; C.W. Jenks, 'The Conflict of Law-Making Treaties' (1953) XXX *BYbkIL* 401, 425-

apparent or *prima facie* conflict, which can be avoided through interpretation, and genuine or real conflict, which cannot be resolved through interpretation.² The term divergence is also used by some international lawyers as being a broader concept to conflict.³ This Chapter mainly uses the term ‘possible conflict’. When the author argues that a given situation qualifies as a real conflict it will be made explicit. The definition also includes a conflict between an obligation under the ECHR and an extraneous *permissive* PIL norm.⁴ This is a more inclusive approach that broadens the notion of conflict in order to encompass cases where a State is not under a duty to do something but has a choice of means. An integral part of the analysis will be how (if at all) the Court defines and address a (possible) conflict between the ECHR and another PIL norm.

This Chapter is divided into five sections. The second section discusses the practice of the Court to accommodate the restrictive impact of PIL norms within the ECHR. It discerns the Court’s general approach and the findings are equally applicable to the sections following it. The third, fourth and fifth sections examine series of cases in which the Court’s practice attains certain distinctive features and follows certain patterns. It is argued that the Court gives special consideration to certain PIL norms. The last section summarises the conclusions.

426; K. Wolfram, ‘Treaties, Conflicts Between’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984) 467, 468.

² Wolfram (note 1), 468; M. Milanović, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20 *Duke JComp&IntlL* 69, 73.

³ Wolfram, (note 1), 468.

⁴ International Law Commission, ‘Report of the Study Group of the International Law Commission finalised by M. Koskeniemi’ (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, [24]-[25] (ILC Final Rep.); J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, New York, 2008) 184-188; Milanović, (note 2), 73.

6.2 The practice of the Court to accommodate the restrictive impact of public international law within the ECHR

6.2.1 The practice of the Court not to acknowledge a possible conflict between the ECHR and an external public international law norm

The *Soering v. United Kingdom* case⁵ serves as one of the earliest examples in the Court's jurisprudence of a possible conflict between a ECHR right and the binding provision of another treaty on a member State. Soering complained that if extradited to the United States he would be subjected to the death-row phenomenon in violation of the prohibition of inhuman or degrading treatment or punishment under Article 3 ECHR. The UK denied that the extradition would engage its responsibility. If this approach were followed, the UK argued, it would cause interference with its treaty obligations under the USA-UK Extradition Treaty, leading to a possible conflict of norms.⁶

The Court famously acknowledged the *non-refoulement* principle under Article 3 ECHR⁷ and proclaimed that the extradition by a Contracting State may give rise to an issue under Article 3 ECHR. The member State's responsibility under the ECHR could be engaged, where substantial grounds are shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. Assessing the facts of the case, it concluded that if the decision to extradite Soering in the USA were to be implemented, the United Kingdom would breach Article 3 ECHR.

⁵ *Soering v. United Kingdom*, 7 July 1989 (Plenary).

⁶ *Ibid*, [83].

⁷ *Ibid*, [86], [88], [90].

What was left unsaid, however, is that if the UK was not in a position to honour its treaty obligation to extradite Soering, this may have involved a possible conflict of treaty obligations. Yet, in the said circumstances, a real conflict was rather remote since under the terms of the bilateral extradition treaty, the Secretary of the State enjoyed the discretion not to sign the arrest warrant.⁸ What is important for the present purposes, however, is that the Court neither framed the question before it as a possible conflict, nor replied to the respondent State's concerns. It considered it sufficient to apply the test of the *non-refoulement* principle and to assert that member States retain their liability under the ECHR. The States' legitimate interests in the extradition process for preventing fugitive offenders from evading justice were not completely ignored. Their relevance and importance were acknowledged in passing,⁹ but the extradition treaty *per se* was not treated as possibly conflicting with the application of the ECHR.

It could be argued that the Court did not entertain the possibility of a conflict due to the absolute prohibition of Article 3 ECHR which provides for no limitation clause. In this sense, the Court is precluded from taking cognisance of relevant treaty obligations which would restrict the scope of Article 3 ECHR. Such an argument is reasonable, but it does not sufficiently explain a series of other cases in which the Court did not acknowledge similar treaty engagements as a potential restriction to qualified rights under the ECHR.

⁸ C. Warbrick, 'Coherence and the European Court of Human Rights: The Adjudicative Background to the *Soering* Case' (1989-1990) 11 *Michigan JIL* 1073, 1093.

⁹ *Soering* (Pl), [86].

By way of example, in the *Kaboulov* and *Soldatenko* cases¹⁰ the applicants were held in detention in Ukraine in order to be extradited to Kazakhstan and Turkmenistan respectively, by virtue of the 1993 Commonwealth of Independent States Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention). They maintained before the Court that their detention was not in conformity with the requirements under Article 5 (1)(f) ECHR.¹¹ In both cases the Court did not address the question of a possible conflict between Article 5 ECHR and the Minsk Convention. It reviewed and subjected the lack of safeguards under the Minsk Convention against the standards of its case law. The ECtHR did not hesitate to hold that the Minsk Convention did not provide for a specific procedure to be followed in the requested State, and thus, it did not offer adequate safeguards against arbitrariness, in breach of Article 5 (1)(f) ECHR.¹² Therefore, any possible conflict between the ECHR and treaty obligations binding on the respondent State is transformed before and by the Court into a review of a given extradition treaty against the safeguards of the ECHR.

The practice not to address possible conflicts laid the basis for the view that the Court perceives the ECHR as superior to other treaty obligations of member States. It has been suggested that the ECHR has the potential to *trump*

¹⁰ *Kaboulov v. Ukraine*, 19 November 2009. The request for referral to the Grand Chamber was dismissed. *Soldatenko v. Ukraine*, 23 October 2008.

¹¹ ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’.

¹² *Kaboulov*, [136]; *Soldatenko*, [112]. *Shamayev and others v. Georgia and Russia*, 12 April 2005, [337]. I. Ziemele, ‘Case-Law of the European Court of Human Rights and Integrity of International Law’, in R.H. Vinaixa, K. Wellens (dir.), *L’Influence des Sources sur l’Unité et la Fragmentation du Droit International* (Bruylant, Bruxelles, 2006) 187, 205; E. de Wet, ‘The Role of European Courts in Reviewing Conflicting Obligations under International Law’ (2008) 5 *Intl OrgLRev* 359, 360.

any other treaty obligation¹³ either due to the ECHR's regional public order character or due to the allegedly higher status of human rights norms over other international treaty undertakings.¹⁴ Certain recent jurisprudential developments have retrospectively strengthened this hierarchical perception of the ECHR. The Grand Chamber in *Mamatkulov and Askarov* referred in passing to the *Soering* case and stated that in that instance the Court 'resolved the *conflict* [between the ECHR and the bilateral extradition treaty] by giving *precedence* to the former'¹⁵. In the *Al-Saadoon and Mufdhi* case, whereas the Court reiterated its standard position, regarding the fact that States retain their responsibility under the ECHR even if they engage in other anterior or posterior treaty obligations, it mentioned *Soering* as an example where Article 3 was 'held to *override*'¹⁶ the bilateral extradition treaty between the USA and the UK. These pronouncements appear to be at odds with the Court's jurisprudence. It should be noted that they were *obiter dicta*, since the Court was reiterating its previous case law without overruling or bypassing the *Soering* approach. Hence, it is suggested that the choice of the wording was rather unfortunate.

There is one case, however, the *Al-Jedda* case,¹⁷ in which the ECtHR, for the first time, openly addressed the possibility of a conflict between the

¹³ M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, New York, 2010) 388-393; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *LJIL* 611. Cf. B. Conforti, 'Consistency among Treaty Obligations', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, New York 2011) 187, 189.

¹⁴ J. Dugard, C. Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 *AJIL* 187.

¹⁵ *Mamatkulov and Askarov v. Turkey*, 4 February 2005, (Grand Chamber), [107] (emphases added).

¹⁶ *Al-Saadoon and Mufdhi v. United Kingdom*, 2 March 2010, [128].

¹⁷ *Al-Jedda v United Kingdom*, 7 July 2011, (Grand Chamber).

ECHR and another PIL norm. The applicant complained that he was held in preventive detention (internment) without trial and judicial guarantees by British armed forces in Iraq in violation of Article 5 (1) ECHR. Having established that the applicant fell within the jurisdiction of the respondent State, the Court proceeded to examine the merits of the complaint. The UK argued that it was under the obligation by virtue of the United Nations Security Council (UNSC) authorisation to take all necessary measures to restore and maintain international peace and security in Iraq. Since member States were, according to Article 25 UN Charter, obliged to accept and carry out decisions of the Security Council and since Article 103 UN Charter indicates that obligations under Article 25 have to prevail over other international treaties,¹⁸ the application of Article 5 ECHR was displaced. The Grand Chamber did not share this position. It found that the internment or preventive detention was not a lawful reason for the applicant's detention according to the requirements of Article 5 ECHR. The Court, by way of reading the ECHR in light of PIL norms, proceeded to examine whether or not PIL provided a legal basis for the applicant's preventive detention.¹⁹

The Court's starting point was that for Article 103 UN Charter to be applicable a *conflict* must exist between Article 5 ECHR and States' obligations under the UN Charter. Hence, it had to examine if the UK was, in fact, under the obligation to hold the applicant in internment on the basis of the UNSC Resolutions. Although the Court admitted that it is not its role to seek the authoritative meaning of other international instruments, it maintained that

¹⁸ Article 103 UN Charter provides that '[i]n 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'.

¹⁹ *Al-Jedda* (GC), [76], [105].

it was indispensable to examine whether the UN Charter and the UNSC Resolutions provided a plausible basis for the UK's actions. The Court read the UNSC Resolution by relying on the Advisory Opinion of the International Court of Justice (ICJ) in the *Namibia* case, which stated that a UNSC Resolution should be interpreted by considering not only its language but also the context in which it was adopted.²⁰ Crucially, the Court included in the notion of context the purposes of the UN Charter (Article 1). It asserted that the UNSC Resolution 1456 should be read not only in light of maintaining international peace and security, but also in light of the aim of promoting respect for human rights and fundamental freedoms. The Court concluded, that, unless the text of the UNSC Resolution does not clearly provide otherwise,²¹ a presumption should be established in that the UNSC does not intend to impose an obligation on States to breach human rights. In light of the facts of the case and the language of UNSC Resolution 1456, the Grand Chamber found that the Resolution did not impose an obligation on the UK to detain the applicant, but rather gave States *a choice of means*. Thus, Article 103 UN Charter was not applicable and no conflict arose. The United Kingdom was found in breach of its obligations under Article 5 ECHR.

The Grand Chamber in *Al-Jedda* reads the notion of conflict as restrictively as possible. It asserted that when the State has a choice of means rather an obligation, the possibility of a conflict with the ECHR is ruled out. Such a narrow definition of conflict was crucial in finding that Article 103 UN Charter did not come into play and no conflict existed in the first place. This

²⁰ *Ibid*, [76], [101]-[102].

²¹ *Cf.* partially dissenting Opinion of Judge Poalelungi in *Al-Jedda* (GC), 66-67.

narrow definition of conflict is not surprising in light of the Court's practice of avoiding, as much as possible, a conflict between the ECHR and other PIL norms. Therefore, in contrast to the ILC and international law scholars' arguments, the Court does not endorse the possibility of a conflict between a provision of the ECHR and a *permissive* PIL norm.²²

Besides this narrow definition, a possible conflict was avoided to a great extent due to the presumption inferred by the ECtHR, namely that - unless clearly stated - the UNSC does not impose an obligation on States to breach human rights. This strong presumption is a ground-breaking pronouncement by an international court.²³ It is the ECtHR's original contribution to develop PIL in this area. It paves the way for securing compliance of the Security Council to human rights.²⁴ According to the Court, if a breach of human rights is intended, it would have to be clear in the plain wording of a UNSC Resolution. This is one of the rare instances in which the Court takes up the task of ascertaining the authoritative meaning of another PIL norm, and especially of the UN Charter and Resolutions of the Security Council.²⁵ Such a task was even more difficult, since little authority exists insofar the interpretation of UNSC Resolutions is concerned.²⁶

The *Al-Jedda* is a judgment in which the ECtHR appears confident to engage with general international law. It supports the argument of this thesis that regional and/or specialised courts have the authority to pronounce on

²² *Ibid* and authorities *infra* footnote 2. Also Dissenting Opinion of Judges Caflisch, Cabral Barreto and Vajić in *McElhinney v. Ireland*, 21 November 2001, (Grand Chamber), 20.

²³ M.C. Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck YbkUNL* 73, 92-93.

²⁴ N.D. White, 'UN Sanctions: Where Public Law Meets Public International Law' (2011) 74 *MLR* 456, 466-469.

²⁵ *Cf. infra* 8.8.

²⁶ Wood, (note 23), 75, 86; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, New York, 2008) 486-493.

general international law and that, when they do, they benefit its progressive development. Chapter 5 highlighted that the Court discussed general international law (rule on State immunity) with great hesitance and that this was one of the reasons which led to a poor reasoning. On other occasions, the Court's recourse to general international law had serious misgivings, such as in the case of the concept of jurisdiction (Chapter 3). The *Al-Jedda* case, however, is closer to the *Bijelić* case in which the Court took a stand and developed PIL with regard to State succession in the law of treaties.²⁷ Yet, the *Al-Jedda* is a better judgment, in the sense that the Grand Chamber's discussion is detailed and the reasoning is persuasive. It is a well-balanced judgment too, in that the Court takes a stand on the relevant questions before it, without unnecessarily articulating on peripheral and seriously contested issues, such as the disputed effects of Article 103 UN Charter (if it were to be applied); or on giving a definite answer as to whether the UNSC Resolutions are covered by the scope of Article 103 UN Charter.²⁸ Lastly, *Al-Jedda* is a very good example of placing the ECHR within the corpus of PIL. On one hand, the Court investigated whether the UNSC Resolutions could provide for a plausible basis for the applicant's preventive detention and it accepted the relevance of Article 103 UN Charter. On the other hand, the Grand Chamber preserved the effectiveness of the ECHR's guarantees. Hence, the *Al-Jedda* case illustrates how the Court *in casu* balances the unity of PIL with the effective application of the ECHR.

²⁷ *Infra* 3.3.

²⁸ M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *EJIL* 121, 138; R. Bernhardt, 'Article 103', in B. Simma *et al* (eds.), *The Charter of the United Nations – A Commentary*, vol. II (Oxford University Press, New York, 2002) 1292, 1295-1296.

Nonetheless, one should not lose sight of the fact that the Court's general practice, as discussed in *Soering* and as it will be explored in this Chapter, is not to acknowledge a possible conflict of norms.²⁹ *Al-Jedda* is an exceptional instance because it involved the possible applicability of Article 103 UN Charter, which is the only treaty provision of its kind, claiming, under certain conditions, primacy over any other treaty obligations of UN member States, in order to serve the UN aims and purposes.³⁰ Yet, *Al-Jedda* is also in the same line with the prevalent tendency in the case-law, in that the Court follows, to the extent possible, a conflict-avoidance practice through interpretation. The Court's principal thesis, which qualifies as a constant reminder to member States, is that they cannot be absolved from their responsibility under the ECHR on the pretext of any other international obligations they have undertaken. Such a position does not relate to a hierarchical perception and the Court does not address the cases brought before it in terms of primacy or hierarchy of the ECHR. This position is akin to the Court's restricted jurisdiction to interpret and apply the ECHR to which it owes its existence (Articles 19 and 32 ECHR).³¹ To put it otherwise, before the ECtHR, there is no conflict to begin with. For a conflict to exist between the ECHR and another PIL norm the two norms should have an equal standing before the Court. In order to acknowledge, and all the more resolve, a conflict the Court must be in a position to apply both norms. However, the Court does not have the competence to apply other PIL norms. It is incumbent to ensure

²⁹ J. Klabbbers, *Treaty Conflict and the European Union* (Cambridge University Press, New York, 2009) 104, footnote 67.

³⁰ ILC Final Rep., [328]-[360].

³¹ Dugard, Van den Wyngaert, (note 14), 195.

the observance of the engagements undertaken under the ECHR.³² This is the consequence of the fact that international courts and tribunals are treaty creatures with a specific applicable law before them. As Chapter 2 argued, these considerations are equally applicable to all international courts and tribunals, including the ICJ (subject, of course, to the precise terms of a case brought before it by the parties). Although the ILC's position is not very clear on this, it does stress the limitations to the jurisdiction of international courts.³³ Therefore, the ECtHR is confined to apply only the ECHR, even if it is obvious that a possible or real conflict between the ECHR and another treaty provision (or PIL norm) exists. In this sense, the Court due to its restricted treaty-based competence decides a given case from its own particular perspective. The conflict remains from another perspective.³⁴ If, for example, the same set of facts were to be decided by another international court they would most likely lead to a different solution given that this court would have to apply its own constitutive instrument.³⁵

On the other hand, however, it is not correct either to say that the Court displaces other obligations of member States,³⁶ or that it ignores the international law context to the cases.³⁷ The *Soering*, *Shamayev*, *Kaboulov*, *Soldatenko* and *Al-Jedda* cases and the cases that follow demonstrate that the

³² Jenks, (note 1), 447-448.

³³ ILC Final Rep., [43].

³⁴ I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, Oxford, 2009) 18.

³⁵ J. Pauwelyn, L.E. Salles, 'Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 42 *Cornell Intl LJ* 77, 84; R. Michaels, J. Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law', in T. Broude, Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford, 2011) 19, 36-37.

³⁶ P. Langford, 'Extradition and Fundamental Rights: the Perspective of the European Court of Human Rights' (2009) 13 *IJHR* 512, 513.

³⁷ Klabbers, (note 29), 5.

Court not only does not ignore other PIL norms, but it takes account of them. It attempts to avoid a possible conflict by introducing and accommodating the PIL norms in its legal reasoning and by placing them within the structure of the ECHR provisions (mostly limitation clauses). Hence, to use the metaphor employed in Chapter 2, if the ECHR were a planet, despite of its specific worldview, is not isolated from the universe and the other planets.

6.2.2 Avoiding possible conflicts between the ECHR and an external public international law norm through interpretation

The practice of the Court to avoid possible conflicts through interpretation becomes clearer in *Jersild v. Denmark*,³⁸ which involved a possible conflict between the right to freedom of expression under the ECHR and Article 4 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD).³⁹ The applicant was a journalist employed by the Danish Broadcasting Corporation. When he presented a television programme, during which members of a racist group made abusive and derogatory remarks against immigrants and ethnic groups in Denmark, he was criminally charged, and finally convicted, for aiding and abetting these derogatory comments before the national courts. He resorted to the ECtHR complaining of a breach of his right to freedom of expression and to disseminate information under Article 10 ECHR.

³⁸ *Jersild v. Denmark*, 23 September 1994, (Grand Chamber).

³⁹ International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by the GA Res. 2106 (XX) on 21 December 1965; entered into force on 4 January 1969) 66 UNTS 195.

Denmark argued before the Court that ‘Article 10 ECHR should not be interpreted in such a way as to limit, derogate or destroy the right to protection against racial discrimination’.⁴⁰ It made extensive reference to its obligations under Article 4 CERD including the duty to criminalise practices concerning the dissemination of racist ideas. The applicant, on the other hand, asserted that according to the ‘due regard’ clause in Article 4 CERD Denmark’s obligation to criminalise such practices was subject to guaranteeing his freedom of expression, since ‘States Parties ... undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination ... with due regard to’ the freedom of opinion and expression. The Court, however, did not consider itself competent to interpret this ‘due regard’ clause.⁴¹

The Court acknowledged the significance of combating racial discrimination and accepted that the object and purpose of the CERD are weighty factors in ascertaining whether the applicant’s conviction was a necessary interference within the meaning of Article 10 (2) ECHR. In this way, the importance of combating racial discrimination qualifies as a legitimate aim under the ECHR and it is placed within the structure (limitation clause) of Article 10 ECHR. The Court further stated that ‘Denmark’s obligations under Article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention’.⁴² Thus, the Court follows a conflict avoidance practice through interpretation attempting to read the ECHR together with the obligations undertaken by State parties by virtue of the

⁴⁰ *Jersild* (GC), [27].

⁴¹ *Ibid*, [30].

⁴² *Ibid*.

CERD.⁴³ The interpretive impact inferred from the CERD provisions was restrictive for the construction of Article 10 ECHR, although Judges Garlçüklü, Russo and Valticos in their Joint Dissenting Opinion posited that the majority should have inferred a greater (more restrictive) impact from the prohibition of defending racial hatred on the scope of the applicant's freedom of expression.⁴⁴ This highlights how difficult it is to reach an agreement on precisely what impact should be inferred from an extraneous PIL norm on the construction of the ECHR in the interpretation process.

A last point concerns the (non) implication of Article 4 CERD in the Court's legal reasoning. The Court refused to engage with Article 4 CERD, which invites States parties to give effect to their obligation under the CERD to criminalise certain prohibited practices by paying due regard to the protection of the freedom of expression. Such a refusal is justified given the Court's lack of competence to provide for an authoritative interpretation of a provision of another treaty. Nevertheless, the Court uses CERD provisions for construing (and restricting) the scope of the right to expression under the ECHR. Treating the said CERD provisions in a compartmentalised fashion without placing them within their own treaty context may enhance instances of selectiveness and misguided readings of the CERD.

On the other hand, if the ECtHR were to engage with the CERD due regard clause, the latter would have a dubious legal relevance before it. Despite the fact that commentators have stressed that compatibility clauses, such as Article 4 CERD, have a crucial role to play in precluding the possibility of a

⁴³ O. de Schutter, F. Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution', in E. Brems (ed.), *Conflicts between Fundamental Rights* (Intersentia, Antwerp-Oxford-Portland, 2008) 169, 178, 188-190; Warbrick, (note 8), 1078.

⁴⁴ Joint Dissenting Opinion of Judges Golçüklü, Russo and Valticos in *Jersild* (GC), 36.

conflict between different rights and treaties, it seems that judicial practice witnesses their limited usefulness. This is the case when the wording and remit of such clauses is unclear with respect to avoiding conflicts, which is also the case with Article 4 CERD.⁴⁵ All the more, in the present context, it becomes clear that the CERD as a treaty and the compatibility clause contained therein indicate a certain structure and balance of interests different to those of the ECHR. According to the CERD clause, the duty to criminalise certain practices should be interpreted by giving due regard to the right of expression. For the ECHR the right to expression is the main protected interest which may be restricted under certain conditions. Hence, the two treaties – CERD and ECHR – prioritise different rights and interests. In practice, this means that the interpreter adopts different starting points in the interpretation process depending on the instrument that he engages with, which in turn marks a great difference concerning the scope of protection afforded to each right and the extent to which exceptions may be accommodated. In this sense, it is hard to see how the Court could employ the clause in its reasoning without upsetting the established priorities, protected interests and structure of the ECHR. What is notable is that the Court, despite the absence of a similar clause in the ECHR, through its interpretive practice accommodates PIL norms, hence, contributing to a minimum of consistency of international standards.

However, the Court does not pursue the same approach and legal reasoning in all cases concerning racial discrimination. In subsequent judgments with respect to various aspects of racial hatred, in which the CERD

⁴⁵ C.J. Borgen, 'Resolving Treaty Conflicts' (2005) 37 *Geo. Wash.IntlLRev.* 573, 636-637; cf. W. Czapliński, G. Danilenko, 'Conflicts of Norms in International Law' (1990) XXI *NethYbkIL* 3, 13.

should come into play, the Court did not take it into account.⁴⁶ This raises the question of selectiveness, namely why the Court acknowledges that certain extraneous international norms are relevant for the construction of the ECHR but only in certain instances. It also gives rise to lack of legal certainty and unequal treatment of similar situations before the Court, especially since the CERD may advance an instrumental impact on the interpretation of Article 10 ECHR.

6.3 Accommodating the restrictive impact of public international law norms when they reflect unique historical circumstances or the interests of restoration and maintenance of international peace and security

This thesis argues that the Court has a practice of giving special consideration and attaching a heavy weight on PIL norms due to their specific aims and functions in PIL. In the *Prince Hans-Adam* case⁴⁷ the Prince of Liechtenstein lodged an application before the European Court alleging *inter alia* a violation of his right to access to justice under Article 6 ECHR. The case concerned the post-Second World War confiscation of property of German nationals in Czechoslovakia. In 1946 the former Czechoslovakia confiscated the property of the applicant's father, including a painting, by implementing a series of Presidential Decrees on the confiscation and accelerated allocation of agricultural property of German and Hungarian persons, and of those having

⁴⁶ *Lehideux and Isorni v. France*, 23 September 1998, (Grand Chamber); *Balsytė-Lideikienė v. Lithuania*, 4 November 2008.

⁴⁷ *Prince Hans-Adam II of Liechtenstein v. Germany*, 12 July 2001, (Grand Chamber).

committed treason and acted as enemies of the Czech and Slovak people. In the past, the applicant had unsuccessfully attempted to regain the aforementioned painting before the Hungarian courts. When the painting was found on German territory, he instituted proceedings before German courts asking for its return. The German courts declined his case for adjudication due to Article 3 of the 1952 Convention on the Settlement of Matters Arising out of the War and Occupation (Settlement Convention) which excluded their jurisdiction. Before the ECtHR he argued that the application of the Settlement Convention impaired the essence of his right to access to courts. He also argued that the Settlement Convention was not applicable to the circumstances in the first place, and that, therefore, the German courts should have entertained jurisdiction to hear his case.

With respect to the applicability and interpretation of the Settlement Convention, the Court reiterated that it has no power to review the national courts' judgments insofar as they are not arbitrary or manifestly erroneous. Its role is rather confined to review the compatibility of the implementation - or in the Court's own words 'the effects of such an interpretation'⁴⁸ - to the ECHR. Turning to the merits of the complaint, it recalled that a limitation to the right to access to justice should not impair its very essence and that States cannot be absolved from their responsibility under the ECHR on the pretext of other treaty commitments.⁴⁹ On the facts the Court found that the limitations imposed on the jurisdiction of German courts and, hence, on the applicant's right to access to justice had a legitimate objective and were not

⁴⁸ *Ibid*, [50].

⁴⁹ *Ibid*, [46]-[48].

disproportionate because of the unique historical circumstances which led to the conclusion of the Settlement Agreement and the *sui generis* international status of Germany after the Second World War.⁵⁰

The striking feature of *Prince Hans-Adam* is that the Grand Chamber unanimously found no breach of Article 6 ECHR, although there were no alternative means for protecting effectively the applicant's right to access a court. The importance of the German courts giving effect to the Settlement Convention played an instrumental role in assessing the proportionality of the restriction. The Court attached significant weight to the Settlement Convention due to the fact that it reflected unique historical circumstances and the special status of the Federal Republic of Germany in PIL.

Nevertheless, the Court, in effect, set aside the guarantees under the ECHR giving a solution to a real conflict since no conflict avoidance interpretation could reconcile Article 6 ECHR with the Settlement Convention. This resulted in an infringement of the essence of the right to a fair trial⁵¹ and upsetting the structure and specificity of the ECHR. It is an example of the fact that interpretation cannot make a treaty conflict disappear. The only similar instance from the Court's jurisprudence is the State immunity related cases in Chapter 5. As it was argued in Chapter 5, the Court should not have derived such a great restrictive impact on the ECHR by way of diminishing the core of the right to access a court. Reading the ECHR in harmony with other PIL norms should take place *to the extent possible*. The alleged unity of PIL may not set aside the applicable law before the Court, when real conflicts cannot be

⁵⁰ *Ibid*, [59], [68].

⁵¹ Concurring Opinion of Judge Ress joined by Judge Zupančič; A. Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 564-565.

avoided. Chapter 5 argued, in detail, that, in such instances, the Court should balance better the application of the interpretative principle of taking PIL norms into account with the principle of effectiveness.

Another pertinent example is the *Slivenko v. Latvia* case⁵² the applicants were the family members of a former Soviet army officer. He and his family were stationed to Latvia until the conclusion of his time in service and continued residing there until they were deported, after Latvia regained independence. Their legal status and their residence rights were determined according to Latvia's domestic law and two bilateral treaties that Latvia had signed with Russia. The first applicant was the officer's wife and the second applicant was their daughter who was born in Latvia. Among other things, the two applicants complained that their deportation from Latvia violated their right to family life under Article 8 ECHR. They submitted that their deportations were required neither by Latvian law nor by the Latvian-Russian treaty on the withdrawal of Russian troops and that the impugned measures did not serve any legitimate aim and were unnecessary in a democratic society.⁵³

The Latvian-Russian treaty concerned the withdrawal of the ex-USSR/Russian troops from the Latvian territory and provided that all members of the armed forces of the Russian Federation and the members of their family should leave the territory of the Republic of Latvia by the 31st of August 1994 (Article 2). At the same time, Latvia resumed the obligation to guarantee the rights and freedoms of Russian Federation military troops affected by the

⁵² *Slivenko v. Latvia*, 9 October 2003, (Grand Chamber). Very similar is the *Sisojeva and others v Latvia*, 15 January 2007, (Grand Chamber).

⁵³ *Slivenko* (GC), [69].

withdrawal, and also of their families, in accordance with the legislation of the Republic of Latvia and principles of international law (Article 9).

The second agreement signed between Latvia and Russia concerned the social protection of retired members of the Russian Federation armed forces and their families residing within the territory of Latvia. This treaty was principally applicable to individuals discharged from the Soviet armed forces before Latvia regained its independence and permanent residents therein. It stipulated that, if they so desired, they could retain their rights to reside without hindrance in the territory of Latvia. The two States undertook the obligation to issue specific lists and that the individuals concerned should follow the administrative procedures stipulated therein. Hence, on the basis of the two bilateral treaties members of the Soviet armed forces who had retired before Latvia's independence and their families could, in principle, obtain a residence permit in Latvia and avoid the deportation.

The Latvian Government denied that there was an interference with the right to family life and, in the alternative, that such interference was compatible with domestic law and the Latvian-Russian treaties. The Court permitted a third party intervention by the Russian Government. Russia argued, in contrast, that the removal of the bilateral treaty did not require the removal of the applicants, since the latter was not applicable to the circumstances at hand. It was submitted that the interpretation of the treaty employed by the Latvian courts was incorrect.

The Court reiterated that it is not its task to settle a dispute between the parties as to the applicability or the correct interpretation of the Russian-Latvian bilateral treaty, but to review whether the reasoning of the national

courts is compatible with the guarantees under the ECHR.⁵⁴ In light of the facts it assessed that the deportation of the applicants had a sound legal basis: the bilateral treaty was accessible and foreseeable by the applicants and the Latvian courts' decision did not appear to be arbitrary. Their removal served a legitimate aim under the ECHR, namely the protection of Latvia's security's interests given the 'wider context of the constitutional and international law arrangements after Latvia's independence'.⁵⁵ However, the deportation did not meet the Court's necessity test. The fact that the Latvian authorities applied and executed the general scheme, envisaged under the Latvian-Russian treaty, without examining the necessity of the deportation for each individual case exceeded their margin of appreciation under Article 8 ECHR.⁵⁶

Six Judges strongly dissented to the majority's position.⁵⁷ In their view, the specific historical context of Latvia's independence and the aim pursued by the bilateral treaty, namely the eradication of the consequences of the Soviet rule of Latvia were not sufficiently appreciated by the majority. They stressed that Article 8 ECHR should not be construed in such a way as to demand a detailed evaluation in each individual case, since general schemes relating to the withdrawal of a State's armed forces from another State's territory by nature cannot easily accommodate procedures of an individual character. Such an interpretation of Article 8 'would undermine the effective implementation of the [bilateral] treaty'.⁵⁸

⁵⁴ *Ibid*, [105].

⁵⁵ *Ibid*, [111].

⁵⁶ *Ibid*, [114], [120].

⁵⁷ Joint Dissenting Opinion of Judges Wildhaber, Ress, Sir Nicolas Bratza, Cabral Barreto, Greve and Maruste and Separate Dissenting Opinion of Judge Maruste in *Slivenko* (GC).

⁵⁸ *Ibid*, [7].

The onus of the disagreement is to what extent the Court's legal reasoning and the ECHR construction should be receptive to accommodating the restrictive impact of the bilateral agreement. The majority gave priority to preserving the effective protection of the applicant's rights over Latvia's possibly conflicting obligations. In contrast, the minority considered that it was the effective application of the bilateral arrangements that should not be undermined.⁵⁹ Although a real conflict between the ECHR and the bilateral arrangements was unlikely, since it appears to have been a matter of how the said agreements were given effect in Latvian law, the minority covered this point too. It was stressed that in any case it would be difficult the bilateral treaty to provide for detailed individual considerations when applying a general scheme concerning the withdrawal of one State's armed forces from the territory of another one. Hence, in their view, the effective implementation of the bilateral agreements should have been prioritised and accommodated under Article 8 ECHR to the detriment of the effective protection of the applicant's rights.

In both the *Prince Hans-Adam* and *Slivenko* cases the Court attaches a heavy weight on the extraneous treaties due to their specific aim and function in PIL. This in turn advances a strong impact first on the construction of the protective scope of the ECHR, and secondly on the assessment of the proportionality test and whether or not the State has exceeded its margin of appreciation. The final outcome of these cases was different, leaving a wide discretion to Germany in *Prince Hans-Adam*. A reason for this could be the prevailing factual circumstances which are intrinsic to the appreciation of each

⁵⁹ Ziemele, (note 12), 199 *et seq.*

application before the Court. It may also have mattered that, in *Slivenko*, the restrictive effect of the external rules had to be accommodated and assessed under the specifically prescribed ‘national interests’ exception of Article 8 (2); whereas in *Prince Hans-Adam* the right to access to justice is an implied right under Article 6 ECHR and may be more receptive toward stricter limitations.⁶⁰ The Court’s inclination to distinguish the different extents to which it will accommodate the restrictive impact of other PIL norms on the basis of the purpose served by these norms is further evidenced by way of contrasting *Slivenko* to other cases related to deportation. In the *Saadi* case the respondent State similarly to *Slivenko* invoked its interest in effectively applying the cooperation agreement on crime prevention between Italy and Tunisia.⁶¹ The Grand Chamber neither addressed the concern in this instance nor the relevance of the said agreement when interpreting the ECHR.

There is a strong tendency in the case-law to restrict the scope of the ECHR by attaching a great interpretative weight to external PIL norms when they reflect weighty functions in PIL. Such weighty functions may relate to a variety of general interests in PIL. In *Slivenko* at issue was the specific historical context of Latvia’s independence and the aim pursued by the bilateral treaty. The Grand Chamber acknowledged and accommodated special post-war treaty arrangements (*Prince Hans-Adam*) or agreements serving the restoration of peace like the Dayton Agreement in the *Sejdić and Finci* case, which is

⁶⁰ A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford University Press, New York, 2007) 392; cf. Orakhelashvili, (note 51), 564-565 for his argument concerning the *Al-Adsani* case and Article 6 ECHR which is equally applicable here.

⁶¹ *Saadi v. Italy*, 28 February 2008, (Grand Chamber), [111].

discussed in Chapter 9.⁶² Also, in the *Al-Jedda* case, the Court paid due regard to the interest of maintaining international peace and security, as has already been discussed, and in the *Bosphorus* case, which is examined in detail below. This is not to suggest that the Court should take general interests in PIL as such during its interpretation process. Such a task could be part, for example, of assessing the margin of appreciation or examining the proportionality of a restriction to a right under the ECHR. However, for the present purposes, it is argued that the Court is willing to substantially restrict the ECHR when the relevant PIL norms reflect and are embedded in such weighty interests. It should be noted that in certain instances the Court seems to overstress the allegedly important interests that relevant PIL norms serve, as in the *Mangouras* case.⁶³

6.4 Accommodating the restrictive impact of the recognised right of States in public international law to regulate their international relations on a bilateral basis

A notable finding is that the Court acknowledges the restrictive impact of the absence of PIL norms in areas where States traditionally reserve their right to regulate their international relations on a bilateral basis. If a member State has the discretion in PIL to regulate a field by engaging in bilateral cooperation and it has not done so, the Court accepts the absence of *ad hoc*

⁶² *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009, (Grand Chamber), [45] and Partly Concurring and Partly Dissenting Opinion of Judge Mijović joined by Judge Hajiyevev and Dissenting Opinion of Judge Bonello; Also *infra* Chapter 9.

⁶³ *Mangouras v Spain*, 28 September 2010 (Grand Chamber), [60]; *cf.* Joint Dissenting Opinion of Judges Rozakis, Bratza, Bonello, Cabral Barreto, Davíd Thór Björgvinsson, Nicolaou and Bianku in *Mangouras* (GC), [8].

agreements as cogent considerations. In practice, this means that the Court will respect and *take the absence of PIL norms into account*. In such a scenario, the absence of these rules is duly appreciated on an equal basis with their existence. In other words, the Court acknowledges and takes cognisance of the recognised right and established practice of States to regulate a field of PIL on a bilateral basis. An example is the practice of States to conclude bilateral treaties for settling State succession related matters. In the *Kovačić* case the Grand Chamber deferred to the necessity that Slovenia enters into a bilateral agreement and did not proceed to examine the merits of the complaint.⁶⁴

Another pertinent example is the regulation of social security matters under PIL by means of bilateral treaties. In *Carson* the application concerned the refusal of British authorities to adjust the applicants' pensions in line with inflation.⁶⁵ The applicants, who were all British nationals, were not residents in the United Kingdom at that time. According to national legislation, although the basic State pension was payable to individual residents outside of the United Kingdom (UK), non-residents were disqualified from receiving adjusted to inflation pensions. The only exception provided was where the UK had concluded a bilateral reciprocal social security treaty with the State in which British nationals were residents. The applicants, who had paid their relevant social security contributions but were residing in States that had not entered in such agreements with the respondent State, complained of discrimination on the basis of their place of residence. The UK argued before the Grand Chamber that it only concluded reciprocal arrangements with certain

⁶⁴ *Kovačić and others v Slovenia*, 3 October 2008, (Grand Chamber), [255]-[269].

⁶⁵ *Carson and others v. United Kingdom*, 16 March 2010, (Grand Chamber).

States on the basis of its interests. If the Court would find that the applicants had suffered discriminatory treatment, this would effectively ‘negate the power to enter into bilateral treaties of this kind’.⁶⁶

The Grand Chamber endorsed the Government’s submission. It referred to a series of multilateral treaties under the auspices of the International Labour Organisation confirming that States have the right under PIL to regulate social security rights by virtue of specific bilateral or multilateral engagements. The ‘reciprocity condition’ is an essential feature in this field.⁶⁷ It was held that

it would be extraordinary if the fact of entering into bilateral arrangements in the social security sphere had the consequence of creating an obligation to confer the same advantages on all others living in all other countries. [It] *would effectively undermine the right of States to enter into reciprocal agreements and their interest in so doing*.⁶⁸

On this basis the Court concluded that no different treatment may be found under Article 14 ECHR since those living in reciprocal agreements countries are not in an analogous position with other individuals. The absence of a reciprocal agreement in itself precluded the possibility of analogous and comparable situations, hence, restricting the scope of the applicability of the applicants’ rights.

The *Carson* judgment is notable, especially in light of the Court’s previous jurisprudence. In other instances the Court did not accommodate such

⁶⁶ *Ibid*, [82].

⁶⁷ F. Pennings, *Introduction to European Social Security Law* (Intersentia, Antwerp-Oxford-New York, 2003) 3-4.

⁶⁸ *Carson* (GC), [89] (emphases added).

considerations in its legal reasoning.⁶⁹ Almost one year before the *Carson* judgment, the Grand Chamber in the *Andrejeva* case was not receptive to the respondent State's identical argument. It asserted that although it is fully aware of the importance of such bilateral agreements, Latvia could not be absolved of its responsibility under Article 14 ECHR on the grounds that it is not bound by a pertinent inter-State agreement on social security with Russia and Ukraine.⁷⁰ Consequently, the *Carson* case should be either seen as overruling the previous jurisprudence⁷¹ or it could be seen as a judgement with limited relevance. A feature that distinguishes *Carson* from *Andrejeva* is that the alleged discrimination in the former concerned the place of residence, whereas in the latter related to the applicants' nationality. Although *Carson* does not make such a distinction and its dictum appears equally applicable to all grounds of discrimination, this cautious caveat should be entered since the Court affords different weight to the grounds of discrimination under Article 14 ECHR.⁷² It should be noted that the force of the reciprocity argument in the international social security field is acknowledged and endorsed in the same fashion by other international bodies too,⁷³ a reference that the Court did not make in order to support or reinforce its conclusions in *Carson*.

⁶⁹ *Gaygusuz v. Austria*, 16 October 1996; *Koua Poirrez v. France*, 30 September 2003; *Luczak v. Poland*, 27 November 2007.

⁷⁰ *Andrejeva v. Latvia*, 18 February 2009, (Grand Chamber), [90].

⁷¹ Judge Garlicki in his Dissenting Opinion in *Carson* (GC), 28 spots the inconsistency too.

⁷² D.J. Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 591-592.

⁷³ Human Rights Committee, *Jacob and Jantina Hendrika van Oord v the Netherlands*, Communication No 658/1995, 4 November 1997, UN Doc CCPR/C/60/D/658/1995, [8.5]; *Mumtaz Karakurt v Austria*, Communication No 965/2000, 4 April 2002, UN Doc CCPR/C/74/D/965/2000, [8.4]. See M. Scheinin, 'Human Rights Committee', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, New York, 2008) 540, 543.

6.5 Accommodating public international law norms relating to States' membership of international organisations

A last series of cases concerns PIL norms which relate to member States' membership of international organisations. In the *Waite and Kennedy* case,⁷⁴ the applicants employed by a British company were placed at the disposal of the European Space Agency (Agency) created under the Convention for the Establishment of a European Space Agency. Subsequent to the termination of the cooperation of the British company with the Agency, they were informed that their contracts would be terminated too. They resorted to domestic labour courts arguing that they had acquired the status of employees of the Agency. National courts, however, refused to decide the case due to the Agency's immunity from jurisdiction. The applicants came before the Court complaining that the Agency's immunity from jurisdiction constituted a violation of their right of access to a court under Article 6 ECHR.

Two of the points raised by the applicants were, first, that the Agency could not rely on its immunity from jurisdiction, since it had waived this right; and secondly, they questioned the legitimate aim served by the Agency's privileges and immunities and asserted that, in any event, the protection of their human rights should claim priority over applying the immunity. With respect to the first point, the Court recalled that it is not its task to substitute itself for domestic courts and that its role is only to ascertain 'whether the effects of [the domestic courts'] interpretation are compatible with the Convention'.⁷⁵ It found that the courts' interpretation regarding the applicability of the immunity did not

⁷⁴ *Waite and Kennedy v. Germany*, 18 February 1999, (Grand Chamber); Identical is the *Beer and Regan v. Germany*, 18 February 1999, (Grand Chamber).

⁷⁵ *Waite and Kennedy* (GC), [54].

appear to be arbitrary. As far as the legitimate aim of the immunity under Article 6 ECHR is concerned, the Court stressed that immunities of international organisations form part of a well-established practice in international law and are essential means for their proper functioning. It highlighted ‘the importance of this practice is enhanced by a trend towards extending and strengthening international cooperation in all domains of modern society’.⁷⁶

Turning to the question of proportionality, the Court recalled that the proper functioning of an international organisation could not impair the effective protection of human rights and that States cannot be absolved from their responsibility under the ECHR in relation to any field of activity. It went on, however, to state that the proportionality test could not be applied in such a way as to compel an international organisation to submit itself to national litigation and to the employment conditions prescribed under national law.⁷⁷ This would run counter to the current trend of strengthening international cooperation. An important factor in light of the facts was that the applicants had alternative means for their claims to be heard by an independent body within the Agency. The Grand Chamber in unanimity concluded that the restriction imposed by the immunity from jurisdiction on the applicants’ right to access a court was not disproportionate.

In the same vein as the previously examined cases, the Court does not address the possibility of a conflict between Article 6 ECHR and the treaty provision concerning the Agency’s immunity from jurisdiction. It accommodates the restrictive impact stemming from the extraneous treaty

⁷⁶ *Ibid*, [63].

⁷⁷ *Ibid*, [72].

provision within the ECHR. In fact, it accorded significant weight to it due to its specific function, namely qualifying as the essential means for the proper functioning of international organisations and forming part of *a well-established practice in PIL*.⁷⁸ This consideration was instrumental in assessing the proportionality of the restriction,⁷⁹ since the Court stressed that it could not apply the proportionality test under the ECHR in such a way as to negate the international organisation's immunity. Similarly to the cases concerning the State immunity rule, and to many of the judgments examined in the present chapter, the Court employs a conflict avoidance interpretation of the Convention to the expense of the effective protection of the ECHR rights and freedoms. All the more, it established a presumptive proportionate effect of the restriction imposed by the extraneous treaty immunity rule. The proportionate relation of the said restriction to the aim served under the Convention was not affirmed against the same criteria as in the rest of the Court's case law, thus marking a special *ratio decidendi*.

This special *ratio decidendi* was further articulated and developed by the Court in the *Bosphorus* case.⁸⁰ The Court addressed the applicant company's complaint that the impounding of its leased aircraft by Ireland violated its right to property under Article 1 of Additional Protocol No 1. The airline charter company had leased an aircraft from the national airline of the

⁷⁸ Note that the Court invokes the *current trend towards international cooperation* as a weighty interest outside the context of international organisations. The Court acknowledged it, for example, in the field of administration of justice and took cognisance of the Council of Europe Convention on the Transfer of Sentences Persons (concluded on 21 March 1983; entered into force on 1 July 1985. CETS No. 112). See *Veermäe v Finland*, Admissibility Decision, 15 March 2005, 13-14; *Csozászki v Sweden*, Admissibility Decision, 27 June 2006, 8-9; *Szabo v Sweden*, Admissibility Decision, 27 June 2006, 9.

⁷⁹ Klabbers, (note 29), 170-171.

⁸⁰ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, (Grand Chamber).

former Yugoslavia. The aircraft was impounded in Ireland by national authorities by virtue of United Nations Security Council (UNSC) Resolutions implemented by the European Union (EU) and subsequently by its member States, including Ireland.

The Court found that the above interference was based on EU acts, which were transposed into the Irish legal order, rather than the Resolutions of the UNSC, which were not part of Irish law. In this way, the Court evaded the difficult question of the relationship of the UNSC Resolutions with the ECHR provisions, which was at issue in the *Al-Jedda* case.⁸¹ It also established that the Irish authorities had no discretion in implementing these EU acts affirming that State action was taken in compliance with legal obligations stemming from Ireland's EU membership.⁸²

Turning to assessing whether the impugned measure was justified, the Court acknowledged once again the growing importance of international cooperation and the need for the proper functioning of international organisations. It further reiterated that Ireland's membership in the EU is a legitimate interest of a *considerable weight*.⁸³ It went on to state that

‘the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) [VCLT], and *Al-*

⁸¹ *Infra* 6.2.1.

⁸² This distinguished the present instance from the *Matthews* case (*Matthews v. United Kingdom*, 18 February 1999, (Grand Chamber)) where the Court found that the United Kingdom should be held responsible under Article 1 ECHR for the lack of elections given the fact that it had freely entered into these international engagements, whereas herein Ireland has no discretion in complying with EU law. See also *M.S.S. v Belgium and Greece*, 21 January 2011, (Grand Chamber), [325]-[340].

⁸³ *Bosphorus* (GC), [150].

Adsani [...]), which principles include that of *pacta sunt servanda*'.⁸⁴

The placement of Article 31 (3)(c) VCLT into brackets alongside relevant case law does not make it clear whether the Court applies the said provision or whether it invokes it as a supportive consideration to its own, perhaps distinctive, interpretative practice of taking other relevant norms of PIL into account. Interestingly, the Court includes general principles of law in the norms that must be taken into account when interpreting the ECHR. The citation to *Al-Adsani* and Article 31 (3)(c) VCLT do not support this statement, however, since neither refer to principles. Yet, although Article 31 (3)(c) refers explicitly to 'rules of international law', it is argued that general principles of law fall within its scope.⁸⁵ In the Court's practice it is not uncommon to include general principles of law in the norms that should be taken into account when construing the Convention.⁸⁶

It is also unclear what the Court means when it stated that it takes the principle *pacta sunt servanda* into consideration. The pertinent PIL norms which were critical *in casu* were the EU Regulations establishing the sanctions regime. From the perspective of PIL these are not binding rules, although they qualify as binding law among EU member States. This further evidences that the Court is not applying Article 31 (3)(c) VCLT since soft law does not trigger

⁸⁴ *Ibid.*

⁸⁵ R. Gardiner, *Treaty Interpretation* (Oxford University Press, New York, 2010) 260-261; cf. 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?' (2010) *Michigan JIL* 621, 682.

⁸⁶ For example, *Demir and Baykara v Turkey*, 12 November 2008, (Grand Chamber), [67] (*infra* 7.4); *Loizidou v Turkey* (Merits), 18 December 1996, (Grand Chamber), [52]; *Vlastimir and Borka Banković and others v. Belgium and others* (Admissibility Decision), 12 December 2001, (Grand Chamber), [57] (*infra* 3.2); *Saadi v United Kingdom*, 29 January 2008, (Grand Chamber), [62]; *Mamatkulov and Askarov v Turkey*, 4 February 2005, (Grand Chamber), [110]-[111].

its applicability.⁸⁷ As far as the meaning of the reference to the principle *pacta sunt servanda* is concerned the judgment strongly indicates that it relates to Ireland's EU membership and to the need for the proper functioning of international organisations. Consequently, in the same vein as the cases discussed in the previous section, the Court incorporates the said treaty provision (primary EU law) into its reasoning, which attains a heavy weight because it is seen as being attached to and embedded within the need for international cooperation. It is difficult, however, to discern how this general principle informs the meaning and scope of the right to property during the interpretation process. For the Court, *pacta sunt servanda* is more like a rhetorical reference used to highlight the importance of Ireland's EU membership. It has been argued that the Court in *Bosphorus*, by applying Article 31 (3)(c), brings into its reasoning not any 'normative sources of international law but rather [...] an exceptional sort of international necessity - that is, the "need" to secure the proper functioning of the E.C. legal order'.⁸⁸ This is different to arguing that the Court takes certain PIL norms into consideration which may substantially restrict the scope of the ECHR because they reflect weighty functions and interests in PIL. It is submitted that assessing such arguments and vague interests in PIL without establishing a solid basis on specific PIL norms falls outside the task of treaty interpretation.⁸⁹ It could be a reasonable factor, for example, in the evaluating the member States' margin of appreciation.

⁸⁷ Cf. Gardiner, (note 85).

⁸⁸ Tzevelekos, (note 85), 682.

⁸⁹ Gardiner, (note 85), 281.

On the basis of this legal reasoning, the Court maintained that Ireland's compliance with EU obligations 'is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'.⁹⁰ It established that if the organisation provides for such equivalent or comparable protection, it will be presumed that the State has not departed from the ECHR requirements. In this respect, *Bosphorus* substantially evolves the *Waite and Kennedy* case. Whereas in *Waite and Kennedy* the Court accepted that the proportionality of the restriction could not be assessed by negating the Agency's immunity, in *Bosphorus* it introduces a formal presumption of compliance with the ECHR without even applying the proportionality test. The Court's legal reasoning, however, does not support its conclusion. The use of Article 31 (3)(c) VCLT is not causally linked to the equivalent protection presumption. The consideration by the Court of the institutional aspects of international cooperation in the context of a supranational organisation, such as the EU *in casu*, extends well beyond the confines of the interpretation process.⁹¹ In this sense, Article 31 (3)(c) VCLT and the use of other relevant norms of PIL are merely rhetorical devices. The Grand Chamber used Article 31 (3)(c) in a similar fashion in the State immunity related cases (Chapter 5) in that it was employed in order not only to introduce relevant PIL norms in the Court's legal reasoning, but also to

⁹⁰ *Bosphorus* (GC), [155].

⁹¹ Concurring Opinion of Judge Ress in *Bosphorus* (GC).

support a very strong presumed proportionate restriction to the ECHR, which led, in turn, to a dramatic restriction of the right to access a court.

Moreover, the Court in *Bosphorus* frames *in abstracto* a presumption regarding the compatibility of any State action in compliance with EU law obligations to the ECHR guarantees.⁹² This could be seen as an extreme version of its conflict avoidance practice through interpretation, although as it was underlined it clearly departs from the interpretation process. Also, the presumption effectively suspends, if not displaces, the applicable law before the Court. Whereas the Court in other cases involving possible conflicting international obligations of States parties restricts the scope of a right under the Convention, in the present instance the Court will not scrutinise the impugned measure at all. The presumptive equivalence means that a given restriction to a right or freedom under the ECHR will, in principle, be considered legitimate and necessary which leads to a reversal of the structure and architecture of the Convention's text itself. The Convention guarantees certain rights and freedoms and prescribes specific limitation clauses according to which a right may be restricted under certain conditions. This state of affairs does not fully apply in the context of the presumption: a given restriction by virtue of EU law to a right under the ECHR is not anymore exceptional and it will not be assessed on an *ad hoc* basis against the proportionality and necessity tests.⁹³ Moreover, the rigidity of the presumption is striking. The condition imposed by the Court for rebutting it is for the applicant to prove that in the circumstances of a particular case the protection of the Convention was

⁹² J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers, London-Boston, 2009) 321 *et seq.*

⁹³ Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in *Bosphorus* (GC).

manifestly deficient.⁹⁴ This is a heavy burden of proof incumbent on the applicant insofar as available recourses and legal advice that the applicant will have to have in his disposal in order to prove such a claim.

6.6 Conclusions

This Chapter concludes that the Court reads the ECHR in harmony with other PIL norms, even if this would mean that the rights and freedoms under the ECHR do not attain their full weight. The unity of PIL and the imperative not to place the ECHR in a vacuum are prominent concerns in the Court's case-law. The present author does not concur with the view that the ECtHR is not motivated by the need to reduce the fragmentation of PIL.⁹⁵ It was demonstrated that the restriction of the scope of the ECHR by taking cognisance of PIL norms is not exceptional.⁹⁶ The Court acknowledges the relevance of a variety of PIL norms, such as external treaty provisions, binding UNSC Resolutions (*Al-Jedda*) or secondary EU law (*Bosphorus*). It pursues a conflict avoidance practice between the ECHR and another PIL norm through interpretation and attempts to read the ECHR in harmony with them, as much as possible.

It became clear that, in this series of cases, the interpretation of the ECHR by taking PIL norms into account conflicts with the principle of effectiveness. Acknowledging and taking relevant PIL norms into account leads to a restriction of the ECHR's scope. In contrast, the principle of

⁹⁴ *Bosphorus* (GC), [156].

⁹⁵ Cf. Forowicz, (note 13), 383, 385, 391.

⁹⁶ Cf. J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1993) 206; Orakhelashvili, (note 51), 556.

effectiveness tends to preserve the specificity of the ECHR and stresses its 'self-contained' function, in order to ensure the application of practical and effective rights. Hence, Forowicz's argument that the principle of effectiveness unconditionally enhances the reception of PIL in the Court's reasoning is not convincing.⁹⁷ An equally important finding is that treating the interpretative principle of taking cognisance of PIL norms under the heading of the principle of effectiveness obviously falls short to discuss this part of the jurisprudence.⁹⁸ Consequently, in line with the main argument of this thesis, the interpretative principle of taking other relevant PIL norms into account is an autonomous principle to the principle of effectiveness. Most importantly, the Court's practice evidences that it supersedes the application of the principle of effectiveness. However, it is suggested that in certain cases (*Prince Hans Adam, Bosporus*) the Court attached such a great interpretative weight to the external PIL norms that it effectively set aside the core of guarantees under the ECHR. In such cases, the Court should balance better the application of the principle of effectiveness with the application of the principle of taking cognisance of PIL norms. This is because the ECHR should be interpreted in harmony with other PIL norms, *as much as possible*, without displacing the applicable law before the Court. Chapter 5 drew the same conclusion with respect to the *Al-Adsani* case.

Generally, the Court's reasoning and construction of the ECHR is very receptive to external PIL norms, substantially restricting the scope of

⁹⁷ Cf. Forowicz, (note 13), 12-13.

⁹⁸ Cf. D. Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of *Sui Generis*' (2010) 79 *Nordic JIL* 245, 267 *et seq*; C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 73 *et seq*.

protection. In certain instances (*Prince Hans-Adam, Bosphorus*) the Court arguably infringed the essence of the right under the ECHR, since a real conflict of norms cannot go away by means of interpretation. This is the case especially in *Bosphorus* in which the Grand Chamber presumed the proportionality of the restriction to the ECHR. Article 31 (3)(c) VCLT was invoked by the Court to validate this presumption. As it was highlighted, the Court does not share the enthusiasm of international scholars about the use of Article 31 (3)(c) VCLT. The said provision was employed only in *Bosphorus* where it served the role of a rhetorical device rather than a substantive contribution to the Court's reasoning. The Court employed Article 31 (3)(c) in the same manner in the *Al-Adsani* case (Chapter 5). Conversely, in the few judgments in which the majority decided *in casu* that the restriction to a given right under the ECHR was disproportionate (*Jersild, Slivenko, Andrejeva*), there were strong dissenting views by Judges positing that the impact drawn from the external norms should have been greater.

Another finding from the case-law is that the Court attaches significantly heavy weight to PIL norms, and treats them differently, when they serve an important function in PIL (*Prince Hans-Adam, Slivenko, Al-Jedda, Bosphorus*); when States have a recognised right and established practice of regulating a field in PIL on a bilateral basis (*Carson*); in the context of international cooperation (*Waite and Kennedy, Bosphorus*). It does not appear to matter if the relevant PIL norm is a bilateral treaty (*Slivenko*) or a multilateral treaty establishing an international organisation (*Waite and Kennedy, Bosphorus*) or the very absence of international regulation (*Carson*).

The Court's standard position is that its role is not to settle any dispute regarding the interpretation of other PIL norms. It is competent to review the compatibility of the *implementation* of these norms by States with the ECHR guarantees. As it was argued, this is due to the Court's limited *ratione materiae* jurisdiction under Articles 19 and 32 ECHR to interpret and apply only the ECHR. For this reason too the Court does not acknowledge a possible conflict of norms. The *Mamatkulov and Askarov* and *Al-Saadoon and Mufdhi* cases were highlighted as recent developments which may indicate otherwise. In the view of the present author, there were rather unfortunate choices of wording. The *Al-Jedda* case is the only instance where the Court openly addressed the possibility of a conflict notwithstanding the exceptional function of Article 103 UN Charter in PIL. In *Al-Jedda*, the Court also ascertained the authoritative interpretation of UNSC Resolutions. The Court's stand and its persuasive reasoning lend support to the present view that the ECtHR is a regional court with limited jurisdiction *ratione materiae* which, however, positively contributes to the development of PIL without endangering its unity.

Section III: Taking public international law norms into account in order to expand *ratione materiae* the scope of the rights and freedoms under the ECHR

Section III addresses the Court's reliance on PIL norms for expanding *ratione materiae* the scope of the rights and freedoms envisaged under the ECHR. The analysis is divided into three chapters on the basis of the different impact that PIL advances on the construction of the ECHR. This division is useful for analytical purposes but, most importantly, for exploring how the use of PIL influences the Court's legal reasoning in different stages of the interpretation of the ECHR. Chapter 7 concerns the enlargement of the applicability of the protective scope of the rights and freedoms; chapter 8 discusses the positive obligations read under specific provisions. Finally, chapter 9 deals with the use of PIL as a material factor for assessing whether or not a restriction to a right under the ECHR conforms to the principle of proportionality.

7. Enlarging the applicability of rights and freedoms under the ECHR

7.1 Introduction

Chapter 7 examines the enlargement of the applicability of the protective scope of the rights and freedoms. Chapter 6 discussed the Court's resort to PIL in order to define the terms found under the ECHR. Defining terms and expanding the scope of the rights are two distinct analytical enterprises when constructing a treaty, although sometimes it is hard to distinguish them. According to the first, the Court needs to, strictly speaking, conceptualise the precise meaning of a term embodied in the text of the ECHR,

such as, for example, ‘slavery’ or ‘torture’. On the other hand, the applicability of an ECHR provision involves, more broadly, the identification of the factual and legal circumstances that may trigger the protective scope of a provision.

This Chapter analyses four examples from the jurisprudence in which the Court relied on PIL norms for enlarging the applicability of the ECHR rights: the recognition of the retroactivity of the more favourable criminal law under Article 7 ECHR (7.2); the recognition of indirect discrimination under Article 14 ECHR (7.3); acknowledging the right to collective bargaining and the right to consultation under Article 11 ECHR (7.4); and ascertaining that human trafficking falls within Article 4 ECHR (7.5).

7.2 Recognising the retroactivity of the more favourable criminal law under Article 7 ECHR

Article 7 (1) ECHR embodies the principle of legality in criminal law. It provides that

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.

The question that was brought before the Grand Chamber in *Scoppola v Italy* (No 2) was whether the applicability of the provision encompassed the *lex mitior* principle, namely whether the applicant should have benefited from a

more lenient criminal law introduced subsequently to the commission of the offence.¹

The wording of Article 7 (1) does not recognise this principle. The Court in its case law had affirmed that, contrary to provisions of other international human rights treaties, the ECHR does not envisage the right to a more lenient penalty insofar as it is introduced *a posteriori* to the commission of a crime.

The applicant, however, argued that Article 7 (1) should now be construed differently in light of relevant international texts and international judicial practice.² He referred to Article 15 of the International Covenant on Civil and Political Rights (ICCPR),³ Article 9 Inter-American Convention on Human Rights (IACHR),⁴ Article 49 (2) Charter of Fundamental Rights of the European Union (EU Charter),⁵ and Article 24 (2) Statute of the International Criminal Court (ICC Statute).⁶ These provisions *expressly* prescribe the *lex mitior* principle. The European Court of Justice (ECJ) further acknowledged that the principle of the retroactive application of the more lenient penalty formed part of the common constitutional traditions of the member States.⁷ The applicant also pointed to the view taken by the International Criminal Tribunal

¹ *Scoppola v. Italy (No 2)*, 17 September 2009 (Grand Chamber).

² *Ibid.*, [35]-[41].

³ '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'; (concluded on 16 December 1966; entered into force on 23 March 1976) 999 UNTS 17.

⁴ 'If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom'; (concluded on 22 November 1969; entered into force on 18 July 1978) OAS Treaty Series No. 36.

⁵ 'The retroactive application of a lighter penalty is a generally an accepted exception to the principle of non-retroactivity'; official Journal of the European Communities, 18.12.2000, C 364/1.

⁶ 'In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply'; (concluded on 17 July 1998; entered into force on 1 July 2002) 2187 UNTS 90.

⁷ Joined cases C-387/02, C-391/02 and C-403/02 (*Berlusconi and others* case) 3 May 2005, [66]-[69].

for the Former Yugoslavia (ICTY) Appeals Chamber in the *Dragan Nikolić* case concerning the applicability of the said principle to its Statute.⁸

The Grand Chamber devoted a separate section of its judgment to the ‘interpretation of Article 7 of the Convention in the Court’s case-law’, where it revisited and overruled its previous practice. It opined that it must depart from its position because it did not correspond anymore to the needs of the ECHR system for the protection of human rights that is driven by the guarantee of practical and effective rights and the dynamic and evolutive approach in the interpretation of the Convention. According to the Court, the above-mentioned international developments demonstrated the existence of a consensus gradually emerging in Europe and internationally, whereby the *lex mitior* principle was treated as a fundamental principle of criminal law.⁹ Therefore, by an eleven to six majority vote, it was held that the right to the application of a more lenient law introduced subsequently to the commission of the crime should be guaranteed under the scope of Article 7 ECHR.

It cannot go unnoticed that *Scoppola* shares common features with the methodology followed in *Zolotukhin* in Chapter 4.¹⁰ As seen, in *Zolotukhin* the Grand Chamber defined the term ‘offence’ in Article 4 of the Additional Protocol 7 against the background of similarly-drafted treaty provisions which nevertheless envisaged *different formulations* of the *ne bis in idem* principle. Likewise, in the present case the Court used *equivalent*¹¹ treaty provisions

⁸ *Prosecutor v. Dragan Nikolić*, Appeals Chamber, Case No. IT-94-2-A, Judgment on Sentencing Appeal, 4 February 2005.

⁹ *Scoppola* (GC), [104]-[106].

¹⁰ *Infra* 4.5.

¹¹ Broude and Shany use the term ‘equivalent’ to denote norms which are identical or similar in their normative context and have been established through different instruments or are applicable in different substantive areas of law in T. Broude, Y. Shany, ‘The International Law

prescribing the principle of legality. The Court disregards again the fact that the extraneous to the ECHR PIL norms *explicitly* encapsulate the *lex mitior* principle, whereas the ECHR does not. Despite a core of similarity between the ECHR and the PIL norms, the Court does not take account of their difference, especially in light of the apparent textual divergence.¹²

Also, the connection established by the Court between, on one hand, the relevant international texts and the respective practice of their supervisory bodies and, on the other hand, the interpretation of the ECHR is weak. Until *Scoppola* the very same international instruments were employed by the Court as an *a contrario* argument in order to exclude the *lex mitior* principle from the applicability of Article 7 ECHR.¹³ In *Scoppola* the Court used them to substantiate the converse conclusion. Even if it were to be accepted that the *lex mitior* principle is a fundamental principle of criminal law and implicitly interconnected to the principle of the legality – a thesis strongly criticised by the minority¹⁴ and not sufficiently substantiated by the majority – the Court did not put forward a pertinent justification which could resonate the different use of the same international rules for interpreting Article 7. The same PIL norms are invoked and used in order to serve two converse lines of reasoning,¹⁵ rendering the use of PIL instrumental.

From a methodological point of view, a second shared feature of the *Zolotukhin* and *Scoppola* cases is that the Grand Chamber invokes the

and Policy of Multi-Sourced Equivalent Norms’, in T. Broude, Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford, 2011) 1, 5.

¹² Broude, Shany, (note 11), 9.

¹³ Similarly *cf.* the *Wilson, National Union of Journalists and others* and the *Demir and Baykara* (GC) cases and the *National Union of Belgian Police* (Pl) case (*infra* 7.4)

¹⁴ Dissenting Opinion of Judge Nicolaou joined by Judges Bratza, Lorenzen, Jočiené, Villiger and Sajó, in *Scoppola* (GC), 44-45.

¹⁵ T. Baumbach, ‘The Notion of Criminal Penalty and the *Lex Mitior* Principle in the *Scoppola v. Italy* Case’ (2011) 80 *Nordic JIL* 125, 138.

cumulative application (*synergy*) of the three interpretive principles, namely the need for ensuring effective and practical rights, the evolutive interpretation and the Court's duty to take relevant PIL norms into account. This is another example of the Court's practice of employing the three interpretative principles in an explicit and distinctive fashion.¹⁶ These principles lead to and reinforce the same interpretive result. In *Zolotukhin* the Court went so far as to explicitly state that it could not 'justify adhering to a more restrictive approach'¹⁷ than the one followed by other instruments or international bodies. This was also its approach in *Scoppola* where it construed and relied upon the European and international consensus. The interpretive guidance derived by the international instruments and international judicial practice had such an enormous impact on the construction of Article 7 so as to justify the majority overruling the jurisprudence of the Court. Hence, the PIL norms were influential in the Court's reasoning.

Crucially, however, the methodology and final outcome demonstrate that the Court does not respect the textual limits of the ECHR. The substantially influential extraneous PIL norms concerning the *lex mitior* principle are advanced in a way which cannot be accommodated within the text of the ECHR by means of interpretation.¹⁸ It is unclear why taking cognisance of the PIL norms is a sufficient and legitimate basis for the Court to find that the fact that Article 7 ECHR does not provide for the *lex mitior* principle is *not* decisive.¹⁹ The analysis made for the *Zolotukhin* case equally applies herein.

¹⁶ *Infra* 4.5 (*Zolotukhin* (GC)); 7.4 (*Demir and Baykara* (GC)).

¹⁷ *Zolotukhin* (GC), [80].

¹⁸ Dissenting Opinion of Judge Nicolaou joined by Judges Bratza, Lorenzen, Jočiené, Villiger and Sajó in *Scoppola* (GC), 44-47.

¹⁹ *Scoppola* (GC), [107].

The Court distorts the language of the ECHR and exceeds the boundaries of its jurisdiction.²⁰

7.3 Recognising ‘indirect discrimination’ under Article 14 ECHR

7.3.1 Recognising ‘indirect discrimination’ on the basis of race and/or ethnic origin

The notion of ‘indirect discrimination’ under Article 14 ECHR was acknowledged recently by the Grand Chamber in the *D.H. v. Czech Republic* case,²¹ which is ‘arguably the most important Article 14 case ever.’²² The Court’s findings were subsequently followed in the *Oršuš and others v. Croatia* case.²³ For reasons of clarity and convenience the crucial legal questions are discussed under two separate headings. The first addresses the definition of indirect discrimination and the second examines the means and evidence for proving indirect discrimination.

(i) Recognising indirect racial discrimination in accordance with developments in public international law

In *D.H.* eighteen Roma pupils of Czech nationality complained that they were placed in special schools exclusively on the basis of their race and/or ethnic origin, a practice of racial segregation. They argued that they were discriminated against the enjoyment of their right to education due to their race

²⁰ *Infra* 4.6.

²¹ *D.H. and others v. Czech Republic*, 13 November 2007 (Grand Chamber).

²² D.J. Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 615.

²³ *Oršuš and others v. Croatia*, 16 March 2010 (Grand Chamber). Since the two cases are similar, for the present purposes reference is made to the *D.H.* and to *Oršuš* only where necessary.

or ethnic origin, namely a breach of Article 2 of Additional Protocol No. 1²⁴ to the ECHR read together with Article 14 ECHR.

The Court, on the basis of statistical data submitted by the applicants, found an established *prima facie* indirect discrimination. The Czech Republic did not provide for an objective and reasonable justification to the discriminatory effect of its national legislation and policy. Claims such as that the students were subjected to adequate tests for their placement in the special schools, or that the parents gave their prior consent were dismissed and a violation of Article 14 read in conjunction with Article 2 of AP No. 1 was found.

Until the *D.H.* case it was commonplace that the Court did not generally address claims concerning indirect discrimination, namely whether a law or policy, although it may apply equally to everyone, has a disproportionate effect on one part of society.²⁵ Despite the fact that the Court stated that it builds upon its previous case law,²⁶ the concept of indirect discrimination was introduced in *D.H.* The term was explicitly employed²⁷ in accordance with EU Directive 97/80/EC on the burden of proof in cases of discrimination based on sex²⁸ and the EU Directive 2000/43/EC implementing the principle of equal

²⁴ Article 2 of Additional Protocol No. 1 to the ECHR (hereafter AP No. 1) reads: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions’.

²⁵ O.A. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, The Hague, 2003) 73-83, 122-126; G. Gilbert, ‘The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights’ (2002) 24 *HRQ* 763, 747-750.

²⁶ The Court employed in its case law the term ‘*de facto* discrimination’: cf. *Nachova v. Bulgaria*, 6 July 2005 (Grand Chamber) in which, although it took into consideration many of the PIL developments cited in the *D.H.*, it did not infer the respective interpretive impact from them regarding the question of defining and proving indirect discrimination under Article 14.

²⁷ *D.H.* (GC), [184].

²⁸ JO L 14/6 (20.01.1998) (Directive 97/80/EC).

treatment between persons irrespective of racial or ethnic origin.²⁹ Both instruments provide for the definition of indirect discrimination.³⁰ Mention was also made of the definition provided in General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI).³¹ As the Court noted, the ECRI definition is inspired by those found in the EU Directives.³² Despite of a slight differentiation in the wording of the three definitions, the main elements of the notion of indirect discrimination are found in all three definitions.

Accepting indirect discrimination within the scope of Article 14 ECHR and defining the concept in accordance with relevant PIL norms appears to be highly influenced by the applicants' arguments and the third party interveners' submissions. The applicants, represented before the Court among others by the European Roma Rights Centre based in Budapest and Lord Lester of Herne Hill, Q.C. - a widely recognised barrister on human rights and honorary President of Interights - advanced to a great extent a PIL related line of argumentation with respect to the interpretation of Article 14 ECHR. They

²⁹ JO L 180/22 (19.07.2000) (Directive 2000/43/EC).

³⁰ Article 2 (2) of Directive 97/80/EC provides that 'indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provisions, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex'. Article 2 (2)(b) of Directive 2000/43/EC prescribes that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

³¹ ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination (adopted on 13 December 2002) CRI (2003) 8, available at <<http://www.coe.int>> (ECRI Rec. No. 7). Paragraph 1 (c) states that "indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.

³² *D.H.* (GC), [61].

contended that indirect discrimination was prohibited under international law, including the ICCPR and the Convention on the Elimination of Racial Discrimination. They noted the ECRI Rec. No. 7, the relevant practice of many States of the Council of Europe and the pertinent jurisprudence of the ECJ. It was specifically submitted that ‘the restrictive interpretation [...] [of] the notion of discrimination *was incompatible* [...] with the case-law [...] of other jurisdictions in Europe and beyond’³³ and that ‘the principle of non-discrimination [should be] interpreted and applied consistently by the two European courts’.³⁴ Moreover, nine NGO’s asked permission and were granted leave to intervene before the Court.³⁵ The written submissions by Interights and Human Rights Watch were of particular significance. A wide range of State practice and European and international documentation on the definition of indirect discrimination was detailed therein and the Grand Chamber was strongly invited to ‘bring [its] jurisprudence [...] in line with existing international standards’.³⁶ The Court responded positively to these arguments, aligned its position with PIL norms and acknowledged the notion of indirect discrimination within the protective scope of Article 14.

(ii) Proving indirect racial discrimination

The core issue, however, besides the formal introduction of the concept of indirect discrimination, was the means available to the applicants to prove indirect discrimination. According to the established case law of the Court the

³³ *Ibid*, [128].

³⁴ *Ibid*, [132].

³⁵ These were: International Step by Step Association, Roma Education Fund, European Early Childhood Research Association, Interights, Human Rights Watch, Minority Rights Group International, European Network against Racism, European Roma Information Office and International Federation for Human Rights.

³⁶ *Ibid*, [161]-[162]; written submissions of Interights and Human Rights Watch, [5], available at <http://www.interights.org>.

burden of proof in cases of ‘*de facto* discrimination’ was allocated as in that the applicant had to show a difference in treatment (*prima facie* evidence) and subsequently the respondent State had to demonstrate whether this treatment was justified. Statistics were not considered sufficient as such to disclose a discriminatory practice which means that their use could not provide *prima facie* evidence and, hence, shift the burden of proof.³⁷

The Grand Chamber in *D.H.* followed a novel approach.³⁸ It admitted that the strict evidential rules posed significant difficulties to the applicants for proving the claim of indirect discrimination. It took note of the information furnished by the third-party interveners regarding the practice of national courts and UN treaty supervisory bodies which accepted statistics as evidence of indirect discrimination.³⁹ Human Rights Watch and Interights strongly encouraged the Court in their written submission to take a stance which *would not be at variance with international and comparative practice*, including the EU Directives and the respective case law of the ECJ, views of the Human Rights Committee in individual communications, conclusions of the Committee of Economic, Social and Cultural Rights, General Recommendations of the Committee on the Elimination of Discrimination against Women and case law of the Inter-American Court of Human Rights.⁴⁰ The common denominator in all of this documentation was the acceptance of statistical data as reliable and credible evidence in order to establish a refutable presumption for the existence of indirect discrimination. The applicants also

³⁷ *D.H.* (GC), [180].

³⁸ *Ibid*, [188]; cf. *D.H. and others v. Czech Republic*, 7 February 2006, [46].

³⁹ *Ibid*, [187].

⁴⁰ *Ibid*, [164]; written submissions of Interights and Human Rights Watch, [11]-[21]. For the submissions of the Minority Rights Group International, the European Network against Racism and the European Roma Information Office *ibid*, [166].

referred to the practice of UN bodies and stressed the recent EU legislative and jurisprudential developments.⁴¹ The Court, by giving account to these international instruments, aligned its interpretation to the practice of international bodies.⁴²

Interestingly, the Court did not engage with the legislative or judicial practice of member States, although there was a clear disagreement between applicants and the respondent State regarding the existence or not of a European consensus.⁴³ The Court referred in passing to the information furnished by the third-party interveners regarding the practice of national courts giving the impression that its conclusions are confirmed by domestic practice. The detailed written submissions of Interights and Human Rights Watch, however, make reference only to the Canadian and US Supreme courts, and limited judicial practice stemming from Germany, the UK, the Netherlands and Switzerland.⁴⁴ It seems that the Grand Chamber evaded the question of a European consensus and preferred substantiating its methodology and findings on the basis of PIL norms and practice without even invoking the evolutive interpretation of the ECHR.

PIL norms were also employed for assessing whether the legal justifications provided by the respondent State for the alleged discrimination against Roma pupils were reasonable and objective. To give an example, in *Oršuš* the Grand Chamber referred extensively to the Opinions issued by the

⁴¹ *Ibid*, [136].

⁴² *Ibid*, [187], [82]-[91].

⁴³ *Ibid*, [131], [133], [155].

⁴⁴ Written submissions of Interights and Human Rights Watch, [2], [6], [17].

Advisory Committee of the Framework Convention on National Minorities⁴⁵ with respect to Croatia and to the Comments submitted by Croatia in response to these Opinions.⁴⁶ The Court used the legal assessments and the views expressed by the Advisory Committee in order to *disqualify* the justifications put forward by Croatia for the discriminatory treatment.⁴⁷ In this way, the placement of the applicants in separate classes and the transfer and monitoring procedure of pupils were scrutinised against the legal yardstick of the Opinions of the FCNM Advisory Committee.⁴⁸ This practice is distinct from using findings derived from international reports or other documents *as a matter of fact*.⁴⁹ The Advisory Committee's views in the present instance were used *as a matter of law*.

Therefore, the legal criteria articulated by the Advisory Committee were incorporated into the analysis and the interpretation of the ECHR. This is interesting since the Grand Chamber in *Chapman* refused to derive interpretive guidance from the FCNM because the latter 'sets out general principles and goals but the signatory parties were unable to agree on means of

⁴⁵ Framework Convention for the Protection of National Minorities (concluded on 1 February 1995, entered into force on 1 February 1998) CETS No. 157 (FCNM).

⁴⁶ *Oršuš* (GC), [159], [164], [166], [174].

⁴⁷ Cf. Dissenting Opinion of Judge Jungwiert in *D.H.* (GC), 76 (point 5); Joint partly Dissenting Opinion of Judges Jungwiert, Vajić Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić in *Oršuš* (GC), [15].

⁴⁸ *Ibid*, [159], [174]; *D.H.* (GC), [200].

⁴⁹ Cf. M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, New York, 2010) 218, 222, 227, 242-244 and A. Rachovitsa, 'Book Review: Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*' (2011) 11 *HRLRev* 795, 797. With respect to the standards and findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: J. Polakiewicz, 'Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe', in R. Wolfrum, V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, Berlin-Heidelberg-New York, 2005) 245, 271; comment by J. Trachtman to J. Polakiewicz, in *ibid*, 291, 292.

implementation’.⁵⁰ *Chapman* seems to be in conformity with the nature of the FCNM insofar it ‘contains mostly programme-type provisions’⁵¹ which ‘are not directly applicable’⁵² and justifiable before national authorities. Hence, the FCNM was not meant to create legal rights for persons belonging to minorities; it provides only for principles.⁵³ The fact, however, that the FCNM was not designed like that retains limited relevance since the Advisory Committee started to articulate its own views regarding the construction of the FCNM. Although Article 26 FCNM does not afford ‘standard-setting’ functions to the Advisory Committee, the latter formulates its Opinions on the basis of legal criteria. Moreover, the Committee has developed a progressive practice clarifying and expanding the obligations under the FCNM⁵⁴ and, in turn, this practice has been, in general terms, endorsed by the Committee of Ministers entrusted to supervise the implementation of the FCNM.⁵⁵

In contrast to *Chapman*, in the *D.H.* and *Oršuš* cases the Grand Chamber derived interpretive guidance from the combined reading of the FCNM and the views of the Advisory Committee, hence, placing the external treaty norms within their dynamic environment by way of following their

⁵⁰ *Chapman v. United Kingdom*, 18 January 2001, (Grand Chamber), [94]. In fact, both judgments cite *Chapman: D.H.* (GC), [181]; *Oršuš* (GC), [148].

⁵¹ Explanatory Report to the FCNM, [11], available at <<http://www.coe.int>>.

⁵² *Ibid*, [11].

⁵³ R. Hofmann, ‘The Framework Convention for the Protection of National Minorities: An Introduction’, in M. Weller (ed.), *The Rights of Minorities to Europe* (Oxford University Press, New York, 2005) 1, 5; L. Hannikainen, ‘Article 19’, in *ibid*, 519, 521-522; R.M. Letschert, *The Impact of Minority Rights Mechanisms* (T.M.C. Asser Press, The Hague, 2005) 213.

⁵⁴ K. Topidi, ‘Articles 24-26’, in Weller, (note 53), 573, 585-586; M. Weller, ‘Conclusion: The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights’, in Weller, (note 53), 609, 637; Letschert, (note 53), 176-178; K. Henrand, ‘Ever-Increasing Synergy Towards a Stronger Level of Minority Protection Between Minority-Specific and Non-Minority-Specific Instruments’ (2003) 4 *Eur Ybk Min Issues* 15, 18, 24.

⁵⁵ Hofmann, (note 53), 12; Letschert, (note 53), 163.

progressive development by their supervisory body.⁵⁶ The interpretative impact was significant since the PIL norms and practice effectively disqualified the legal justifications invoked by the respondent State under Article 14 ECHR. Hence, the Court reads the ECHR in alignment with the standards stemming from the FCNM, draws links and synergies between various norms and practices and promotes coherency.⁵⁷

Nonetheless, the approach to place PIL norms within their dynamic environment should be also seen in light of the formal relationship between the FCNM and the ECHR. According to Article 23 FCNM which was drafted as a specific treaty clause

the rights and freedoms flowing from the principles enshrined in the present framework Convention, in so far as they are the subject of a corresponding provision in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto, shall be understood so as to conform to the latter provisions.

The aim of the provision is to ensure, first, that ‘under no circumstances can the Framework Convention modify the rights and freedoms safeguarded in the [ECHR]’⁵⁸ and, secondly, that the ‘rights and freedoms enshrined in the framework Convention [...] *must be interpreted in accordance with the [ECHR]*’.⁵⁹ In other words, the Court’s practice of aligning its position with and construe the applicability in accordance with the dynamic and progressive development of the FCNM by the Advisory Committee is in contrast to the

⁵⁶ Also *Muñoz Díaz v Spain*, 8 December 2009, [60], [64].

⁵⁷ S. Spiliopoulou-Akerman, ‘The Limits of Pluralism-Recent Jurisprudence of the European Court of Human Rights with regard to Minorities: Does the Prohibition of Discrimination Add Anything?’ (2002) 6 *JEMIE* 1, 22.

⁵⁸ Explanatory Report to the FCNM, [92].

⁵⁹ *Ibid*, [92] (emphases added).

FCNM treaty clause, which dictates the reverse scenario. Although the Court itself is not formally bound by Article 23 FCNM, this is another instance which illustrates that specific treaty clauses are not useful, or are even obsolete, in light of the complex interpretative practice of supervisory bodies of judicial or non-judicial nature.⁶⁰ It also brings to the fore, once more, the fact that the VCLT accommodates the current practice of international courts only to a certain extent. Chapter 4 underlined, and this is a point equally applicable to all the cases discussed in this thesis, that taking a PIL norm into account in conjunction with its development by the views of the international body supervising it is necessary for mitigating fragmentation of PIL, even though this interpretative practice does not fit easily within Articles 31-33 VCLT.⁶¹

The jurisprudence subsequent to the *D.H.* and *Oršuš* cases is not entirely consistent. Inconsistency and selectiveness concern the construction of the relevant PIL framework to the case at hand, like in the *Oršuš* judgment (rendered by the Chamber)⁶² in which the Court did not examine the claim for indirect discrimination against the background of relevant PIL norms. Discrepancy and selectiveness also exist in that the Court, even though it cites relevant PIL norms, does not derive any interpretative guidance from them, as in *Sampanis*.⁶³ In these instances the Court did not follow the methodology and the novel approach established by the Grand Chamber in the *D.H.* judgment. Yet, when the Grand Chamber decided the *Oršuš* case, it dismissed the

⁶⁰ *Jersild v. Denmark*, 23 September 1994, (Grand Chamber) and *infra* 6.2.2 for the discussion of the CERD ‘due regard’ clause.

⁶¹ *Infra* 4.4, 4.7.

⁶² *Oršuš and others v. Croatia*, 17 July 2008.

⁶³ *Sampanis v. Greece*, 5 June 2008, [37]-[48].

Chamber's approach and its final outcome, hence, reinforcing the position taken in *D.H.*

7.3.2 Recognising 'indirect discrimination' on the basis of gender

The *Opuz v. Turkey* case⁶⁴ is a pertinent example of how the Court follows up the novel approach consolidated in *D.H.* insofar as indirect discrimination under Article 14 on the basis of gender is concerned. The applicant argued that the Turkish authorities failed to protect her and her mother from domestic violence. Having found a violation of Articles 2 and 3, the Court addressed the alleged breach of Article 14 read in conjunction with Articles 2 and 3. In line with *D.H.*, the statistical data provided by the applicant was accepted as *prima facie* proof for the existence of a general and discriminatory judicial passivity of Turkish authorities concerning domestic violence mostly affecting women.

The Court thought, however, that in order to assess the indirect discrimination claim in the *context* of domestic violence, it should additionally take cognisance of the international law background to the legal question before it.⁶⁵ Reference was made to the Convention on the Elimination of All Forms of Discrimination against Women⁶⁶ and the practice of its Committee; the UN Human Rights Commission's Resolution on Elimination of violence against women;⁶⁷ the Inter-American Convention on the Prevention,

⁶⁴ *Opuz v. Turkey*, 9 June 2009.

⁶⁵ *Ibid*, [184].

⁶⁶ Convention on the Elimination of All Forms of Discrimination against Women (concluded on 18 December 1979; entered into force on 3 September 1981) 1249 UNTS 13 (CEDAW).

⁶⁷ Commission on Human Rights, Resolution 2003/45, 'Elimination of Violence Against Women', UN Doc. E/CN.4/RES/2003-45.

Punishment and Eradication of Violence against Women⁶⁸ and the relevant practice of the Inter-American Commission of Human Rights.⁶⁹ It cannot go unnoticed that the background to the case does not relate to European States' standards but concerns exclusively PIL norms and practice stemming from UN specialised instruments and bodies and specialised regional standards of Inter-American origin.

The common underlying denominator of these PIL norms and practice was the establishment of the nexus between gender-based violence and discrimination. The Court employed this nexus for affirming the existence of indirect discrimination.⁷⁰ Strictly speaking, it would be sufficient for the Court to accept the applicability of the facts of the case to the discrimination claim by applying the *D.H.* novel approach concerning the recognition of and the means to prove indirect discrimination under Article 14 ECHR. Until recently, however, domestic violence was not viewed as a 'human rights' issue.⁷¹ The PIL norms and practice - besides the significant impact they had on the merits of the case⁷² - enabled the Court to enlarge the applicability of Article 14 ECHR by way of recognising and consolidating the link between gender-based violence and non-discrimination under the ECHR.⁷³

⁶⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (concluded on 9 June 1994; entered into force on 5 March 1995) 33 ILM 1618.

⁶⁹ *Opuz*, [186]-[190].

⁷⁰ *Ibid*, [191].

⁷¹ For similar thoughts in a different context see D. McGoldrick, *Human Rights and Religion – The Islamic Headscarf Debate in Europe* (Hart Publishing, Oxford, 2006) 31-33.

⁷² *Infra* 8.3.

⁷³ S. Mullally, 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?' (2011) 60 *ICLQ* 459, 468-469.

7.4 Recognising the right to consultation and the right to collective bargaining under Article 11 ECHR

Another example of the Court's practice of enlarging the applicability of the rights under the ECHR by relying on PIL norms is the series of cases concerning the right to consultation and the right to collective bargaining. In the *Wilson, National Union of Journalists and others* case⁷⁴ the applicants argued that the English legislation provided no remedy for them in order to ensure the effective protection of their right to collective bargaining. They complained of their employers' practice of withdrawing their recognition from the trade unions and subsequently to offer incentives to certain employees while asking them to renounce their trade union rights. The Chamber, in line with the previous case law, asserted that Article 11 did not guarantee any specific type of treatment and, thus, the right to collective bargaining was not included under Article 11. Yet, in light of the facts, the Court acknowledged that the absence of any remedy available to the trade union against the practice of the employers to frustrate the union's ability to protect its members' interests was a breach of the right to association.

This conclusion was supported by the international obligations that the United Kingdom was incumbent with: the European Social Charter (ESC)⁷⁵ and the International Labour Organisation (ILO) Conventions No. 87⁷⁶ and No.

⁷⁴ *Wilson, National Union of Journalists and others v. United Kingdom*, 2 July 2002.

⁷⁵ European Social Charter (revised) (concluded on 3 May 1996; entered into force on 1 July 1999) CETS 163.

⁷⁶ International Labour Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise (concluded on 9 July 1948; entered into force on 4 July 1950) 68 UNTS 17.

98.⁷⁷ The Court also afforded considerable weight to the interpretation of these provisions by their expert bodies. Article 5 ESC protects the right to organise and Article 6 the right to bargain collectively. The ESC's Committee of Independent Experts (ESC Committee)⁷⁸ had specifically criticised the UK's practice of not providing for the necessary remedies in the national legislative and judicial machinery in order for the trade union to protect its rights. Article 11 of ILO Convention No. 87 prescribes that States should take all necessary measures for ensuring the effective exercise of the right to organise. Articles 3 and 4 of ILO Convention No. 98 envisage similar guarantees for the proper utilisation of the machinery for voluntary negotiation. The Court took into consideration the Recommendation of the ILO Committee on Freedom of Association⁷⁹ where it was stressed that if collective bargaining is to be exercised effectively, then its voluntary character should not be undermined. Hence, the Court concluded, if employers impose measures of compulsion, the State has the obligation to provide for the necessary framework for the objective verification of any claim made by the union. The right to collective bargaining was not read under the Convention. These treaties and the expert bodies' views provided supplementary support for and reinforced the Court's conclusion regarding the applicability of Article 11 to the particular circumstances of the case.⁸⁰

⁷⁷ International Labour Convention (No 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (concluded on 1 July 1949; entered into force on 18 July 1951) 96 UNTS 257.

⁷⁸ *Wilson, National Union of Journalists*, [32], [48].

⁷⁹ *Ibid*, [37], [48].

⁸⁰ *Cf. Gustafsson v. Sweden*, 25 April 1996 (Grand Chamber), [53] in which the Grand Chamber adopted a similar reasoning, although the case referred to a slightly different context to the one in *Wilson, National Union Journalists*; *Harris et al.*, (note 22), 539.

The *Demir and Baykara* judgment (held by the Chamber)⁸¹ also uses PIL norms as strongly supportive evidence in order to enlarge the applicability of Article 11 ECHR. The onus of the application was whether Turkey had the obligation to ensure the right of civil servants to enter into collective bargaining with their employer. The Court endorsed the views of the ESC's Committee with respect to the organic link between the freedom of association and the freedom to bargain collectively.⁸² This was despite the fact that Turkey was not bound by the ESC. The Court accepted that the collective agreement in question constituted *an integral part* of the applicants' freedom of association only in the present circumstances,⁸³ in contrast to the ESC Committee's Conclusions where the crucial organic link was established generally, in terms of law.

The *Demir and Baykara* and *Wilson, National Union of Journalists and others* cases are clear instances of the Court's practice of employing PIL norms in its reasoning in order to reinforce and confirm a position that it would have taken in any event under the specific factual circumstances, as it was the case, for example, in *Bijelic* in which relevant PIL norms on State succession were a substantial but secondary consideration in the Court's reasoning.⁸⁴ This point was also made explicit by the Grand Chamber when it discussed the *Demir and Baykara* case.⁸⁵ Yet the supplementary role of PIL for expanding the applicability of Article 11 ECHR should not be underestimated. The Court in

⁸¹ The case was decided by the Chamber *Demir and Baykara v. Turkey*, 21 November 2006 and by the Grand Chamber upon request for a referral by the Government: *Demir and Baykara v. Turkey*, 12 November 2008 (Grand Chamber).

⁸² *Ibid*, [35].

⁸³ *Ibid*, [36].

⁸⁴ *Infra* 3.3.

⁸⁵ *Demir and Baykara* (GC), [64].

its previous case law had employed the ESC as an *a contrario* forceful argument in order to exclude the right to consultation from the applicability of Article 11 ECHR.⁸⁶ Thus, whereas relevant PIL norms were used to set a limit to the interpretation of the ECHR,⁸⁷ now in the *Demir and Baykara* and *Wilson, National Union of Journalists and others* cases PIL norms and practice reinforce and supplement the Court's legal reasoning towards the opposite direction.

The interpretative impact of these relevant PIL norms became an autonomous and sufficient legal basis for enlarging *as a matter of law* the applicability of Article 11 ECHR when *Demir and Baykara* found its way, through a referral of the case, before the Grand Chamber. The crux of the matter was not only the final outcome of the application, but also the Court's methodology and legal reasoning. Turkey objected to the Court's practice of taking relevant rules of international law into account, unless the conditions set out in Article 31 (3)(c) VCLT are met. It argued that the Court should not have considered the provisions of the ESC or the ILO Conventions or the views of the ESC Committee since neither were binding on the respondent State. It was also stressed that the Court is not entitled to create by way of interpretation any new obligations which are not provided in the text of the Convention. Hence, in Turkey's view, the right to collective bargaining could not be read under the right to association as envisaged in Article 11 ECHR.⁸⁸ The Grand Chamber in turn clarified that the Chamber used references to ILO Conventions only in

⁸⁶ *National Union of Belgian Police v. Belgium*, 27 October 1975 (Plenary), [38]; *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, [39]; *Schmidt and Dahlström v. Sweden*, 6 February 1976, [34], [36].

⁸⁷ E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press, Oxford, 2010) 303.

⁸⁸ *Demir and Baykara* (GC), [62].

assessing the necessity of the impugned measure and that the views of the ESC's Committee were referred to as a supplementary argument.⁸⁹ Nonetheless, it discussed in great detail its methodology of take PIL norms into account.⁹⁰ This is a notable development, since the Court is reluctant and perhaps unwilling to articulate general theories in its case law concerning its principles of interpretation.⁹¹

(i) *The Court's methodology*

It was reiterated that the Court is '*guided mainly* by the rules on interpretation provided for in Articles 31 to 33 [VCLT]'.⁹² The Convention is first and foremost a system for the protection of human rights and, hence, it should be interpreted and applied as ensuring practical and effective rights and, in light of the present-day conditions, by way of giving account to evolving norms of national and international law. However, the Court does not consider the Convention's provisions as the sole framework of reference for its interpretation.

[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 (see *Saadi*, [...]; *Al-Adsani*, [...]; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v.*

⁸⁹ *Ibid*, [64].

⁹⁰ *Ibid*, [60]-[86].

⁹¹ F. Matcher, 'Quarante ans d' activités de la Cour Européenne des Droits de l' Homme' (1997) 270 *RdC* 237, 273-274; A. Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *HRLRev* 57, 61.

⁹² *Demir and Baykara* (GC), [65] (emphases added). See also *Tănase v. Moldova*, 27 April 2010, (Grand Chamber) *infra* Chapter 9.

Ireland [GC] [...]; see also Article 31 § 3 (c) of the Vienna Convention).⁹³

Several examples from its jurisprudence were provided, such as taking cognisance of provisions of international treaties for establishing State's positive obligations,⁹⁴ general principles of law recognised by civilised nations or non-binding instruments stemming either from the bodies of the Council of Europe or other international bodies.⁹⁵

Although Articles 31-33 VCLT were invoked for validating the Court's interpretative practice, it is not clear the extent to which (if any) the Court follows the interpretative arguments as enshrined in the general rules of treaty interpretation. This question is important since Turkey's preliminary objection related precisely to the conditions that have to be met when applying Article 31 (3)(c) VCLT. The fact that the Court is '*guided mainly*'⁹⁶ by the VCLT implies that Articles 31-33 VCLT is one source of inspiration among others. As to Article 31 (3)(c), although explicit reference is made to it, it appears that it is used by way of example or a source of guidance.⁹⁷ It is placed within brackets and it is cited with relevant cases.⁹⁸ A preliminary conclusion could thus be that the Court retains its distance from the letter of the provision and that it does not consider itself limited by the provision's formal requirements.⁹⁹

⁹³ *Ibid*, [67].

⁹⁴ *Ibid*, [69].

⁹⁵ *Ibid*, [75].

⁹⁶ *Ibid*, [65] (emphases added).

⁹⁷ G. Cohen-Jonathan, J.-F. Flauss, 'Cour Européenne des Droits de l' Homme et Droit International Général (2008)' (2008) LIV *AFDI* 529, 534.

⁹⁸ As discussed, identical wording was adopted in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, 30 June 2005, (Grand Chamber) *infra* 6.5.

⁹⁹ R. Nordeide, 'International Decisions: *Demir and Baykara v. Turkey* case' (2009) 103 *AJIL* 567, 572; R. Nordeide, 'The ECHR and Its Normative Environment: Difficulties Arising from a Regional Human Rights Court's Approach to Systemic Integration', in O.K. Fauchald, A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)*

Further support to this preliminary conclusion is furnished by the fact that, although Article 31 (3)(c) VCLT refers to ‘rules of international law’, the Court adopts a more inclusive approach. This is made clear in the Court’s looser terminology, such as ‘norms’¹⁰⁰ and ‘elements’¹⁰¹ of PIL instead of only rules. The Court admitted that it systematically employs international instruments of a non-binding nature, such as treaties not signed, or not ratified, by the respondent State, or Resolutions and Recommendations issued by Council of Europe bodies, in its legal reasoning.¹⁰² Article 31 (3)(c) VCLT, on the other hand, covers all sources of international law (treaties, customary international law, general principles), but it does not come into play in the case of considerations that are not firmly established as binding rules.¹⁰³

Another point that evidences the Court’s lack of application of Article 31 (3)(c) VCLT concerns the requirement that the relevant rules of international law to be taken into account must be *applicable in the relations between the parties*. Chapter 2 showed that scholars and international practice are divided as to whether ‘parties’ under Article 31 (3)(c) should involve only the parties to a given dispute or all contacting parties to the treaty under interpretation.¹⁰⁴ The ECtHR adopts a different perception of the meaning of

Fragmentation of International Law (Hart Publishing, Portland, 2012) 117, 122-123. *Contra* J. Arato, ‘Constitutional Transformation in the ECtHR: Strasbourg’s Expansive Recourse to External Rules of International Law’ (2012) 37 *Brook.J.Intl.L.* 349, 353 who thinks that the Court employs an astonishingly broad construction of Article 31 (3)(c).

¹⁰⁰ *Demir and Baykara* (GC), [68], [75], [78], [86].

¹⁰¹ *Ibid*, [85].

¹⁰² *Ibid*, [74], [78].

¹⁰³ International Law Commission, ‘Report of the Study Group of the International Law Commission finalised by M. Koskenniemi’ (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682, [426(a)] (ILC Final Rep.); A. Orakelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, New York, 2008) 366. Gardiner opines that there is some debate on this and that the practice of international courts is insufficiently developed: R. Gardiner, *Treaty Interpretation* (Oxford University Press, New York, 2010) 266-268.

¹⁰⁴ *Infra* 2.3.1.

applicable rules. Its analysis refers to treaties ‘applicable *in the particular sphere*’,¹⁰⁵ or ‘applicable *in respect of the precise subject matter of the case concerned*’.¹⁰⁶ The term ‘applicable’ appears attached to the subject matter of the case (commonly referred to in the case law as the international law background to the legal questions before it),¹⁰⁷ rather than to the condition that the rule has to be applicable in the relations between the parties.¹⁰⁸ The Court dismissed Turkey’s objection in that the relevant PIL norms should be applicable between the parties, thereby binding on the respondent State.

The Court sets out an alternative framework and justification for construing the notion of relevant and applicable norms when interpreting the ECHR. The basic premise in *Demir and Baykara* is that the Court identifies and uses in its reasoning any PIL norm if it qualifies as common international and/or domestic law standards accepted by the vast majority of States, hence, providing the guarantee that they form part of the European consensus.¹⁰⁹

The content of this European consensus is unclear, as is the exact meaning of ‘accepted by the vast majority of States’. In *Marckx* two international treaties, albeit not ratified or signed by the majority of member States (or the respondent State), were used for demonstrating the existence of

¹⁰⁵ *Demir and Baykara* (GC), [69] (emphases added).

¹⁰⁶ *Ibid.*, [86] (emphases added).

¹⁰⁷ *Ibid.*, [76]; *Opuz*, [184]. Occasionally, the Court refers to rules being applicable in relations between the Contracting Parties; *Demir and Baykara* (GC), [67].

¹⁰⁸ Interestingly the ICJ in the *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America) Judgment, 6 November 2003, ICJ Rep. 2003, p. 161, [42] referred to the ‘international law applicable *to the question*’ (emphases added); R. Howse, ‘The Use and Abuse of Other “Relevant Rules of International Law” in Treaty Interpretation: Insights from WTO Trade/Environmental Litigation’, International Law and Justice Working Papers, 2007/1, New York University, School of Law, 35, available at <http://www.iilj.org/publications/2007-1Howse.asp>.

¹⁰⁹ *Demir and Baykara* (GC), [76].

commonly accepted standards.¹¹⁰ In *Öneryildiz v. Turkey*, the Court used treaties which were not yet in force.¹¹¹ Therefore, the ordinary meaning of the requirement of being accepted by the vast majority of States is not being strictly followed. This raises the question of how the (European) consensus is to be discerned. In *D.H.* the Court disregarded the absence of the member States' consensus. The FCNM prescribed programme type provisions evidencing the explicit lack of agreement among States (*Chapman*). Yet, the Court interpreted the ECHR in light of the FCNM and the progressive views of the Advisory Committee. In the same case and on the issue of statistics, the Court evaded the question of the existence of a European consensus and instead considered a great variety of non-binding materials of an international origin in order to follow a new interpretation of Article 14 ECHR overruling its previous case law. These examples demonstrate that the European consensus idea, as originally construed by the Court and commonly referred to in the literature, does not have the same content to date.

The Court has progressively moved away from defining commonly accepted standards, by using the comparative (or consensual) interpretation, as solely those found in the legislation and practice of member States. This shift involves, contrary to what the Court proclaimed in *Demir and Baykara*, the consideration of international treaties not accepted by the majority of States (*Marckx*, *Öneryildiz*). It also involves instances in the case-law, in which the Court ignores the consensus of States as clearly reflected in certain international instruments (*D.H.* case). Moreover, PIL norms may serve a

¹¹⁰ *Marckx v Belgium*, 13 June 1979, (Plenary), [41]; J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1993) 79, 225-226.

¹¹¹ *Öneryildiz v. Turkey*, 30 November 2004 (Grand Chamber); *infra* 9.1.1.

decisive role in the absence of common legal standards in national practice¹¹² or, all the more, when member States have contrary national practice.¹¹³ Of course, national legislation and practice may converge with PIL norms (*Vo, Evans, Marckx*);¹¹⁴ in these instances the European consensus is construed and ‘discovered’ by conflating domestic and PIL norms and practice without distinguishing between different sources of law.¹¹⁵

The Court’s receptiveness to PIL norms is clear and it is acknowledged.¹¹⁶ Legal scholars have conceptualised in different ways the diverse fashions that PIL interacts with and/or alters the concept of European consensus. They argue that considering PIL is one of the types of European consensus (international consensus identified through international treaties)¹¹⁷ or that the Court employs a ‘double comparative interpretation’¹¹⁸ of the ECHR, namely in light of national *and* international standards. In a similar vein, interpreting the ECHR by reference to the general practice of member States (comparative interpretation) may include international treaties between member States and the Council of Europe, insofar as they could be presumed

¹¹² *Goodwin v United Kingdom*, 11 July 2002 (Grand Chamber), [85]; Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Louciades, Cabral Barreto, Tulkens and Pellonpää in *Odièvre v. France*, 13 February 2003 (Grand Chamber), [15].

¹¹³ *M. C. v. Bulgaria*, 4 December 2003, [154]-[166] *infra* 9.1.3; *Siliadin v. France*, 26 July 2005, [88]-[89] *infra* 7.1, 9.1.5; G. Letsas, ‘The ECHR as a Living Instrument: Its Meaning and Legitimacy’ (2012), 8, 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836.

¹¹⁴ *Infra* 4.2; Also, *V. v. United Kingdom*, 16 December 1999 (Grand Chamber), [64], [73]-[77].

¹¹⁵ *Demir and Baykara* (GC), [78], [85], [86].

¹¹⁶ Letsas, (note 113), 8-12; Mowbray, (note 91), 62, 66; K. Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ (2011) *PL* 534, 549-550.

¹¹⁷ Dzehtsiarou, (note 116), 548 where he refers also to consensus identified comparative analysis of laws of Contracting parties, internal consensus in the respondent State and expert consensus.

¹¹⁸ J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers, Leiden-Boston, 2009) 59.

to embody a consensus.¹¹⁹ The authors refer exclusively to Council of Europe treaties and they further articulate the tension between developing human rights on the basis of European law and the Court's willingness to avoid inconsistencies with other international instruments.¹²⁰ Yet, the tension between the comparative interpretation and taking PIL into account cannot be explained in light of cases in which the former deters the reception of PIL in the Court's reasoning.¹²¹ Others place the interpretation of the ECHR by taking PIL norms into account within the 'living instrument' theory (evolutive or dynamic interpretation),¹²² while at the same time they do accept that international developments (or the lack of them) may function as a limitation to the application of the 'living instrument' theory.¹²³

The preceding views reveal some confusion and complexity in a struggle to place the interpretative practice of taking PIL norms into account under the classic interpretation principles followed by the Court. The present author argues that this confusion is mitigated, if it is accepted that the consideration of PIL is a separate interpretative principle to the European consensus idea. It is clear that PIL norms have an impact on the interpretation of the ECHR of a distinctive nature to the interpretative impact stemming from national practice, functioning either in a converging or a diverging fashion. In many cases the Court sets aside the consensus as reflected in international

¹¹⁹ C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 168.

¹²⁰ *Ibid.*, 77.

¹²¹ Forowicz, (note 49), 8.

¹²² C.L. Rozakis, 'The European Judge as Comparatist', in Sir B. Markesinis, J. Fedtke (eds.), *Judicial Resource to Foreign Law. A New Source of Inspiration* (UCL Press, London, 2006) 338, 343-347; Mowbray, (note 91), 62, 66; A. Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9 *HRLRev* 179, 193-194, 197.

¹²³ Mowbray, (note 91), 68.

treaties or the consensus flowing from national legal orders. It should be thus acknowledged that interpreting the ECHR in light of PIL is a separate interpretative principle which interrelates in a manifold way with the comparative or consensual interpretation. This conclusion comes to support the argument of this thesis and is concordant with the conclusions from previous Chapters concerning the distinct nature of the practice of taking cognisance of PIL norms to the principle of effectiveness¹²⁴ and the principle of the evolutive interpretation.¹²⁵

Most importantly, the European consensus doctrine as articulated in *Demir and Baykara* has certain problematic features. Besides the fact that in many instances PIL does not converge with States' consensus, its alleged European origin and point of reference are not beyond doubt. In cases like *Scoppola* and *Opuz* PIL norms, which had a determinative impact on the Court's reasoning, had nothing to do with European developments, but were rather related to the IACHR or specialised regional or UN instruments or international instruments such as the Statute of the ICC. In other words, these instruments construe at the best case an international consensus while the European nexus is weak, if existent at all.¹²⁶ Therefore, the Court uses the European consensus as a rhetorical tool to legitimise employing PIL in its judgments. The invoked consensus legitimises progress,¹²⁷ even in cases where

¹²⁴ *Infra* 4.7, 5.5, 6.6.

¹²⁵ *Infra* 4.7.

¹²⁶ G. Cohen-Jonathan, J.-F. Flauss, 'La Cour Européenne des Droits de l' Homme et Droit International (2009)' (2009) LV *AFDI* 765.

¹²⁷ 'The Role of Consensus in the System of the European Convention on Human Rights', Discussion Paper Prepared by the Organising Committee, Composed of Anatoly Kovler, Vladimiro Zagrebelsky, Lech Garlicki, Dean Spielmann, Renate Jaeger and Roderick Liddell, in *Dialogue Between Judges* (European Court of Human Rights, Strasbourg, 2008), 3, available at http://www.echr.coe.int/NR/rdonlyres/D6DA05DA-8B1D-41C6-BC38-36CA6F864E6A/0/DIALOGUE_2008_EN.pdf; Dzehtsiarou, (note 116).

it is admitted that it is consensus in formation and not established.¹²⁸ It gives the false impression of a positivistic perception of the existence of common European standards which are to be found and not created by the Court.¹²⁹ This is the reason that the Court is inclined towards the *European consensus* idea and construing its reasoning on the alleged consensus of member States.¹³⁰

(ii) *The outcome of the case*

Turning now to the applicants' complaints, their arguments involved that their right to join a trade union and to bargain collectively, even though they were civil servants, fell under Article 11 ECHR and had been violated. The Court on the basis of PIL norms proclaimed that the right of public officials to form and join a trade union falls under the applicability of the ECHR and *in casu* had been breached. These PIL norms included UN treaties of general scope, such as the relevant provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹³¹ regional specialised treaties and practice, such as the ESC and the ESC's Committee of Independent Experts observations - although the ESC was not ratified by Turkey; ILO Convention No. 87 and the views of the ILO Committee of Experts and ILO Convention No. 98 and the ILO Committee on Freedom of Association. Reference was also made to the EU Charter, the Committee of Ministers of the Council of Europe Recommendation 6 (2000) and to the member States' practice. The common denominator of these PIL

¹²⁸ *Scoppola* (GC), [104]; *Muñoz Díaz*, [60]; Cohen-Jonathan, Flauss, (note 125), 766.

¹²⁹ Christoffersen, (note 118), 62; G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for an International Lawyer' (2010) 21 *EJIL* 509, 529-530.

¹³⁰ See G. Nolte, 'Subsequent Practice as a Means of Interpretation in the Jurisprudence of the WTO Appellate Body' in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, New York, 2011) 138, 143; Forowicz, (note 49), 367, 379.

¹³¹ Concluded on 16 December 1966; entered into force on 3 January 1976; 993 UNTS 3.

norms guaranteed the right of public officials to form trade unions and the restrictions provided therein did not come into play in light of the facts of the case.

As far as the right of civil servants to collective bargaining is concerned, ILO Conventions No. 98 and No. 151¹³² - both ratified by Turkey - explicitly envisaged this freedom. The first prescribes in Article 6 for the exception of 'public servants engaged in the administration of the State' but the ILO Committee of Experts interprets the exception as covering only officials whose activities were specific to the administration of State. ILO Convention No. 151 provides for certain exceptions concerning specific categories of employees working in the public sector, but the said right is fully applicable to civil servants. Further, Article 6 ESC, to which Turkey was not a party, does not provide for an obligation of the State to enter into collective bargaining. According to the Committee of Social Rights, however, Article 6 imposes an obligation 'to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations'.¹³³ Finally, the EU Charter and the great majority of the Council of Europe member States' legislation protected the said freedom. The Court, by way of building upon the perceptible evolution in both international and domestic legal systems, recognised that the right to bargain collectively with the employer has, in principle, become one of the essential elements of Article 11 ECHR and found a violation of Article 11 ECHR.¹³⁴

¹³² International Labour Convention (No 151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service (concluded on 27 June 1978; entered into force on 25 February 1981) 1218 UNTS 88.

¹³³ *Demir and Baykara* (GC), [149].

¹³⁴ *Ibid*, [153]-[154].

(iii) *Re-conceptualising the case-law on Article 11 ECHR*

Following a rather dramatically progressive development since *Wilson*, *National Union of Journalists and others* and the Chamber's judgment in *Demir and Baykara* in which the right to association was declared to have been violated on the basis of the particular circumstances of the cases - as a matter of fact - the Grand Chamber in unanimity in *Demir and Baykara* enlarged the applicability of Article 11 ECHR in general terms - as a matter of law. Thus, the *Demir and Baykara* case effectively overruled the previous jurisprudence of the Court.¹³⁵ In this respect, the interpretative argument of reading the Convention in the light of other PIL norms was decisive. Although the Court referred to the synergetic relation of this principle with the evolutive interpretation and the principle of ensuring practical and effective rights, the use of PIL norms was the driving force behind the Court's reasoning, as in the *Scoppola* and *Zolotukhin* cases.¹³⁶ This should be contrasted, again, to *National Union of Journalists and others* and the Chamber's judgment in *Demir and Baykara* where PIL was merely supportive. The approach and reasoning adopted in *Demir and Baykara* is further reflected in the subsequent jurisprudence with respect to the right of collective action and the right to strike.¹³⁷ *Demir and Baykara* is also followed and explicitly cited in other cases outside the context of Article 11 ECHR as far as the PIL related methodology introduced is concerned.¹³⁸ In the same vein, *Golder* and

¹³⁵ Harris *et al.*, (note 22), 545.

¹³⁶ K.D. Ewing, J. Hendy, 'The Dramatic Implications of *Demir and Baykara*', (2010) 39 *Ind.L.J.* 2, 6-8. *Infra* 4.6, 7.2.

¹³⁷ *Enerji Yapi-Yol Sen v. Turkey*, 21 April 2009, [16], [24], [31]; *Danilenkov and Others v. Russia*, 30 July 2009, [102]-[108], [123]. In detail see Ewing, Hendy, (note 136), 13 *et seq.*

¹³⁸ *Rantsev v Cyprus and Russia*, 7 January 2010, [274] and *infra* 7.5; *Opuz*, [184] and *infra* 7.3.2; *Tănase* (GC), [176] and *infra* Chapter 9; *Medvedyev and others v. France*, 29 March

Loizidou, *Al-Adsani* and *Demir and Baykara* appear to advance an impact beyond their confines and to dictate the Court's reasoning.¹³⁹ In the present author's view, the Court starts developing and establishing certain basic components of its methodology concerning the consideration of PIL norms for the interpretation of the ECHR.

Finally, as it has already been stressed, the Court places the external to the ECHR norms in their own dynamic environment. The provisions of the international instruments are read in conjunction with the views of their supervisory bodies. Such views either affirm the text of the treaties or progressively develop their meaning, as the ILO Committee of Experts views concerning ILO Convention No. 98 and the ESC Committee's views regarding the ESC. There is an aspect in the Court's process to discern the common denominator of many PIL norms while reading them in their own treaty context which is not, however, addressed. This involves the fact that the Court inevitably engages with regimes which attain their own particularities and conceptual structures. For example, the ILO conception of the right to strike follows a 'human rights approach' whereas the ESC conception of the same right reads it in a more 'industrial relations' context.¹⁴⁰ Moreover, the ECHR or the ICCPR are mostly instruments of a civil and political rights' nature in contrast to the ILO treaties which form part of the 'labour law' paradigm. Such nuances are disregarded in the process of *integrating standards* for discerning

2010 (Grand Chamber); *cf.* Dissenting Opinion of Judge Ziemele in *Andrejeva v. Latvia*, 18 February 2009 (Grand Chamber), [18].

¹³⁹ *Infra* 5.2.

¹⁴⁰ Ewing, Hendy, (note 136), 13.

a common denominator.¹⁴¹ Similar concerns were raised in the *Van der Mussele* and *Siliadin* cases, in Chapter 4, in which the Court employed PIL norms of an ILO origin when defining the concept of forced or compulsory labour under Article 4 ECHR.¹⁴² The process of reading many PIL norms together and, hence, integrating standards is part and parcel of developing PIL. At the same time, however, there a fine line to draw concerning the respect of different contextual nuances of different norms and the treaty context from which they originate. Chapter 1 underlined that international courts should pursue the unity of PIL and harmonising interpretations of similar or identical norms subject to the fact that different context may dictate otherwise. In other words, international courts have valid reasons to justify a different approach, if it is deemed necessary by virtue of differences in the purpose, aim, function of PIL norms. It is notable that in the instances discussed here the practice of the ECtHR reveals pertinent concerns on the other end of the spectrum: the ECtHR follows such an intensive integrative and harmonising interpretation of the ECHR with other PIL norms that questions the limits of developing and uniting PIL. The present author thinks that, in principle, such an interpretation is sound subject to not completely disregarding fundamental differences among PIL norms.

7.5 Recognising ‘human trafficking’ within Article 4 ECHR

The *Rantsev* case was discussed in chapter 4 with respect to how the Court used PIL in order to define ‘slavery’ under Article 4.¹⁴³ Here the focus

¹⁴¹ For example, International Labour Office, *ILO Multilateral Framework on Labour Migration – Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (Geneva, 2005).

¹⁴² *Infra* 4.4.

¹⁴³ *Infra* 4.5.

lies on how the Court enlarged the applicability of Article 4 by recognising human trafficking within its scope. The application, brought by a Russian national against Cyprus and Russia, concerned the circumstances which led to his daughter's death. She was a victim of trafficking who had travelled from Russia to Cyprus to work as an 'artiste' in a cabaret. A few days after her arrival in Cyprus, she died in unidentified and peculiar circumstances. Her father, the complainant before the Court, argued for a violation of Article 4 ECHR.

The starting point of the Court's analysis was that the case before it was a human trafficking case. Given the absence of an express reference to trafficking in Article 4, it had to establish that the provision was applicable to the specific circumstances. The Court followed the Grand Chamber's judgment in the *Demir and Baykara* case and set out the same methodology.¹⁴⁴ It stressed that the provisions of the Convention are not to be considered as the sole conceptual framework for the interpretation of the rights and freedoms provided therein. The ECHR should be read in its *context*, which encompasses any relevant rules and principles of international law applicable in the relations between the parties. Hence, the Convention should be read as far as possible in harmony with other rules of international law.¹⁴⁵ The Court also drew on the synergetic relation of the interpretation of the ECHR in light of relevant PIL norms with the 'living instrument' interpretation and the guarantee of practical and effective rights.¹⁴⁶

¹⁴⁴ Cf. *Rantsev v Cyprus and Russia*, 7 January 2010, [272]-[275] and *Demir and Baykara* (GC), [60]-[86].

¹⁴⁵ *Rantsev*, [274].

¹⁴⁶ *Rantsev*, [275], [277].

The Court construed the relevant international law context as including a large number of international treaties on trafficking. Reference was made to many trafficking agreements from the early twentieth century,¹⁴⁷ the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children¹⁴⁸ and the Council of Europe Convention on Action against Trafficking.¹⁴⁹ International instruments of a non-treaty nature were cited, such as a series of Recommendations issued by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe¹⁵⁰ and the Framework Decision to combat Trafficking by the European Union.¹⁵¹ Article 17 (1)(c) of the Rome Statute concerning enslavement as a crime against humanity¹⁵² and many provisions of the Slavery Convention were also invoked.

It should be recalled that in *Siliadin* the Court followed a different approach with respect to the identification of the relevant PIL norms.¹⁵³

¹⁴⁷ The Court (§ 146) made mention to the International Agreement for the Suppression of White Slave Traffic (concluded on 18 May 1904; entered into force on 18 July 1905) 2 AJIL Supp 363; the International Convention for the Suppression of White Slave Traffic (concluded on 4 May 1910; entered into force on 14 August 1951) 30 UNTS 23 and 98 UNTS 101; the Convention for the Suppression of Trafficking in Women and Children (concluded on 30 September 1921; entered into force on 15 June 1922) 9 LNTS 415; the International Convention for the Suppression of Traffic in Women of Full Age (concluded on 11 October 1933; entered into force on 24 August 1934) 150 LNTS 431; the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others (concluded on 2 December 1949; entered into force on 25 July 1951) 96 UNTS 271.

¹⁴⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Crime (concluded on 15 November 2000; entered into force on 29 September 2003) (2001) 40 ILM 335 (Palermo Protocol).

¹⁴⁹ Council of Europe Convention on Action against Trafficking (concluded on 16 May 2005; entered into force 1 February 2008) CETS No 197 (Anti-Trafficking Convention).

¹⁵⁰ *Rantsev*, [158]-[159].

¹⁵¹ Framework Decision of the Council of Europe on Combating Trafficking in Human Beings, 2002/JHA/629 (19 July 2002). Mention was also made to Action Plan of the Council of Europe on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings, OJ C 311/1 (9 December 2005); *Rantsev*, [156]-[157].

¹⁵² Rome Statute of the International Criminal Court (concluded on 17 July 1998; entered into force on 1 July 2002) 2187 UNTS 90.

¹⁵³ *Infra* 4.4.

Although both cases were human trafficking related cases, in *Siliadin* the pertinent context was indicated by reference to the Forced or Compulsory Labour Convention and the Slavery and the practices similar to Slavery Conventions,¹⁵⁴ even though the applicant's arguments involved trafficking allegations and the Court cited the Anti-Trafficking Convention under its 'relevant law' section.¹⁵⁵ In contrast, the Court in *Rantsev* explicitly acknowledged the human trafficking aspect and it took cognisance of more recent and specific to the subject matter of human trafficking PIL norms (Palermo Protocol, Anti-Trafficking Convention). The well-argued submissions by the applicant and third-party interventions by 'Interights' and the AIRE Centre appear to have substantially directed or supported this "anew" relevant international law context.¹⁵⁶ Crucially, however, this means that Article 4 ECHR is subject to different interpretations in light of different PIL norms, even though the set of pertinent facts were similar in both applications.¹⁵⁷

This gives rise to the question of what actually qualifies as a *relevant* PIL norm. The International Law Commission did not touch upon this issue when it discussed the notion of relevant rules that should be taken into account by virtue of Article 31 (3)(c) VCLT.¹⁵⁸ The question has not been addressed either in academic literature and when it is addressed circular approaches are

¹⁵⁴ H. Cullen, 'Siliadin v. France: Positive Obligations under Article 4 of the ECHR' (2006) 6 *HRLRev.* 585, 590-591.

¹⁵⁵ *Siliadin*, [91], [92], [50] respectively.

¹⁵⁶ 'Interights' written submission is available at <http://www.interights.org/app/webroot/userimages/file/Rantsev_brief_%20FINAL_%2029October2008.pdf>.

¹⁵⁷ Additionally, Cullen noted that the Court should have considered the more recent ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; Cullen, (note 154), 595.

¹⁵⁸ ILC Final Rep., [410]-[480].

adopted.¹⁵⁹ This is an important matter, however, since different relevant norms lead to different interpretations of the ECHR and, hence, advance a varying interpretative impact on the protective scope of a provision and States' obligations accordingly.¹⁶⁰

The concept of relevance is looser than the notion of the 'same subject-matter' as envisaged in Article 30 VCLT.¹⁶¹ One should not lose sight of the fact that relevant rules are those which provide aid for and inform the interpretation of a specific treaty provision rather than those applying in a situation generally.¹⁶² Former President of the International Court of Justice (ICJ), Higgins, stressed this point in her Separate Opinion in the *Oil Platforms* case.¹⁶³ She noted that according to Article 31 (3)(c) VCLT certain rules are relevant if, and to the extent that, they are sufficiently related to the *context* of the said treaty.¹⁶⁴ It is for the reason that she found it problematic that the majority of the ICJ took the totality of substantive international law on the use of force into account in order to interpret a provision of a type of treaty concerned with economic and commercial issues (a Friendship, Commerce and Navigation treaty). The criterion, however, of ascertaining the *type of treaty* under interpretation is not very clear in cases other than contrasting a commercial and economic treaty to the corpus of PIL on the use of force. It is

¹⁵⁹ 'If this "other rule" sheds light on the meaning of the WTO term, it is "relevant"' in J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, Cambridge, 2008) 263-264.

¹⁶⁰ Cf. *infra* 9.1.4 (concerning *Siliadin*) with 9.1.5 and 9.2.2 (regarding *Rantsev*).

¹⁶¹ D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 *ICLQ* 281, 304; B. Simma, T. Kill, 'Harmonising Investment Protection and International Human Rights: First Steps towards A Methodology', in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century* (Oxford University Press, New York, 2009) 678, 695.

¹⁶² Gardiner, (note 103), 266.

¹⁶³ Separate Opinion of Judge Higgins in *Oil Platforms* case, [45]-[46]; *infra* 2.3.1; F. Berman, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 *Yale JIL* 315, 316-317.

¹⁶⁴ 'There shall be taken into account *together with the context* [...] any relevant rules of international law [...]' (emphasis added).

difficult to see how useful this consideration can be in finding out what type of treaty the ECHR is and how this, in turn, delineates the concept of relevant rules to be taken into account. Also, as it has rightly been highlighted, the letter of Article 31 (3)(c) does not ask that relevant rules of international law are part of the context of the treaty under interpretation, but that they shall be taken into account *together with* the context of that treaty.¹⁶⁵ This seems to imply that the variety of rules to be relevant is greater.

The ICJ in the *Mutual Assistance* case¹⁶⁶ in 2008 appears to make a different and interesting suggestion regarding the relevance of PIL norms for the purpose of interpreting a treaty provision. In this instance, the ICJ accepted France's argument that the 1977 Treaty of Friendship and Cooperation between France and Djibouti was a relevant rule for interpreting the 1986 Convention on Mutual Assistance in Criminal Matters. This was the case although the 1977 Treaty's provisions were mostly aspirational in character without providing any specific operational guidelines. Most importantly, no substantial link connected the two treaties, since the fields of cooperation envisaged in the 1977 Treaty did not include judicial cooperation as prescribed under the 1986 Convention. Yet, the ICJ by way of applying Article 31 (3)(c) VCLT, affirmed that the 1977 Treaty has a 'certain bearing'¹⁶⁷ on the interpretation of the 1986 Convention. Hence, according to the ICJ, the concept of relevance includes a great spectrum of rules which are not necessarily embedded within or directly

¹⁶⁵ J. Klabbers, 'Reluctant *Grundnormen*: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of treaties and the Fragmentation of International Law', in M. Craven *et al* (eds.), *Time, History and International Law* (Martinus Nijhoff Publishers, Leiden-Boston, 2007) 141, 160 (footnote 102).

¹⁶⁶ *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France), Judgment, 4 June 2008, ICJ Rep. 2008, p. 177.

¹⁶⁷ *Mutual Assistance* case, [114].

related to the context of a treaty. The *certain* bearing of the 1977 Treaty on the interpretation of the 1986 Convention indicates that if a PIL norm is of limited relevance to the treaty provision under interpretation, then the interpretive impact should be also limited. The higher the degree of abstraction, the lower the impact on the interpretation of the treaty in dispute.¹⁶⁸ Likewise, the closer to the so-called context of a treaty under interpretation another PIL norm is the greater bearing and interpretative impact may the latter advance on the former. The relevance - impact dependence seems appealing. It suggests a model which is rather inclusive of varying degrees of *relevant* norms, although it also introduces a certain degree of uncertainty. This model - which can be followed either by way of applying Article 31 (3)(c) VCLT or generally to the concept of relevance - is also concordant with the ECtHR's practice of ascertaining and construing different PIL contexts to different cases. Yet, it raises concerns in that identical or similar sets of facts may acquire a different relevant PIL context. It gives way to legal uncertainty, selectiveness and different treatment of similar cases.

Turning now to the applicability of Article 4, the Court opined in *Rantsev* that trafficking *in itself*, as defined in the Palermo Protocol and the Anti-Trafficking Convention, falls within the scope of Article 4.¹⁶⁹ It found it rather unnecessary to assess whether trafficking met the definition of one (or more) of the practices envisaged in the provision, namely slavery, servitude and forced or compulsory labour. It was asserted that Article 4 comes into play, *in abstracto*, in all cases of human trafficking. This conclusion -

¹⁶⁸ Simma, Kill, (note 161), 696.

¹⁶⁹ *Rantsev*, [282].

according to the references that the Court provides in the text of its judgment - was based on the Explanatory Report to the Anti-Trafficking Convention and the Reports published by the Cypriot Ombudsman and the Council of Europe Commissioner for Human Rights during his visit to Cyprus.¹⁷⁰ The cited extracts from the two Reports referred to the factual background regarding trafficking with a specific emphasis on Cyprus. The Explanatory Report to the Anti-Trafficking Convention mentioned that trafficking in human beings is the modern form of the old worldwide slave trade. It is difficult to see how these references substantiate the Court's assertion, since they do not use therein the notion of slavery or the exercise of powers attaching to the right of ownership in a legal sense.

It should be noted that the link between trafficking and the concept of slavery is established in the Palermo definition of trafficking through the notion of exploitation. Exploitation is considered to be the purpose of trafficking and it may involve diverse forms of forced labour or services, slavery or practices similar to slavery or servitude.¹⁷¹ Nonetheless, the fact that the definition of trafficking under the Palermo Protocol and the Anti-Trafficking Convention encompasses practices such as those prohibited in Article 4 does not necessarily result in Article 4 being applicable to all the

¹⁷⁰ *Ibid*, [281].

¹⁷¹ Article 3 (a) of the Palermo Protocol provides for the definition of trafficking: 'For the purposes of this Protocol (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of exploitation*. *Exploitation shall include*, at a minimum, the exploitation of the prostitution of others or *other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude* or the removal of organs' (emphases added).

Cf. identical wording of the definition of trafficking under Article 4 (a) of the Anti-Trafficking Convention.

different types of trafficking. This makes the Court's unconditional conclusion that trafficking in all its forms falls within Article 4 without the need to examine the circumstances of the application before it questionable. The concepts under Article 4 ECHR are marginalised.¹⁷² A certain degree of conflation of notions stems from the Court's legal reasoning with respect to exploitation, slavery and exercise of powers attaching to the right of ownership.¹⁷³

7.6 Conclusions

This Chapter demonstrated that the Court takes PIL norms into account in order to enlarge the applicability of the rights and freedoms under the ECHR. The relevant PIL referred to and discussed in the judgments serve different functions. First, PIL norms are invoked *a contrario* so as to exclude a given interpretation of the ECHR.¹⁷⁴ Second, the consideration of PIL norms has a supplementary or reinforcing role along with other legal arguments or factual considerations (*Wilson, National Union of Journalists and others*; Chamber judgment in *Demir and Baykara*). Third, in most cases, however, the consideration of PIL norms had a determinative impact on the construction of the ECHR and the final outcome of the case. In *Scoppola, D.H., Oršuš, Opuz* and *Demir and Baykara* cases the Grand Chamber overruled its previous case law and the use of PIL norms in (re-)interpreting the ECHR was the primary factor to this end.

¹⁷² V. Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' (2012) 30 *NQHR* 163, 172, 186.

¹⁷³ J. Allain, '*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 *HRLRev* 546, 555.

¹⁷⁴ *National Union of Belgian Police* (Pl), [78] and *infra* footnotes 86-87 and accompanying text; also see *Scoppola* (GC), [104]-[107] and the previous case law to this judgment *infra* 7.2.

In the series of cases where PIL had a decisive impact on the construction of the ECHR the Court invokes the synergetic relation of three principles of interpretation: the principle of ensuring practical and effective rights, the principle of evolutive interpretation and the interpretation of the ECHR by taking other relevant PIL norms into account (*Rantsev*, *Scoppola*, *Demir and Baykara* cases). Yet, the driving force behind the Court's reasoning is the reliance upon PIL norms (*Opuz*, *D.H.*, *Oršuš* cases).

From the cases examined, it may be concluded that the Court employs the European consensus idea in order to legitimise the use of PIL. In most of the instances it is invoked as a rhetorical tool. The Court construes and uses common standards that are neither based on a consensual nature nor are of a European origin. In *Scoppola* the emerging standards were mostly international. In *D.H.* the Court not only evaded the question of the existence of a European consensus, but also disregarded the member States' consensus as reflected in the FCNM and preferred aligning its position with the views of the FCNM Advisory Committee which were progressively developing the FCNM standards. In *Opuz* the common standards were exclusively of international and inter-American origin. Therefore, the Court's practice of taking cognisance of PIL norms should not be conflated with the European consensus doctrine, although in certain cases they may reinforce each other and converge.

Another important feature that stems from the present examination is that the Court places the PIL norms in their own dynamic environment, namely the treaty context from which they come from. This means that when the Court takes an external treaty provision into account, it considers the interpretation given to it by the respective supervisory body. The same conclusion was also

drawn in Chapter 4, witnessing that the Court takes account of the fact that an extraneous treaty provision serves a specific purpose within the context, object and purpose of another treaty regime. Additionally, in this way, the Court follows the most updated and progressive meaning attributed to the external norms by their supervisory bodies. The practice of other international courts or supervisory bodies is a forceful argument before the Court and it is put forward also by the applicants and the third party interveners (*Rantsev, D.H., Oršuš*).

Nonetheless, certain difficulties arise when the Court reads all these external PIL norms together and construes a common denominator of them. On one hand, the Court promotes coherence of PIL standards and even serves a role of integration. On the other hand, the creative construction of a common denominator implies that the Court sees and identifies a core of similarity and equivalence between PIL norms which is not always accurate and could be problematic. In *Scoppola*, the Court clearly did not respect the different formulations of the *lex mitior* principle envisaged in numerous treaties leading to a distortion of the ECHR language and perhaps to it stepping outside its jurisdictional confines. In *Demir and Baykara*, the nuances and different contexts of the ILO ‘labour law’ paradigm, the peculiarities of the ESC and the nature of rights and freedoms under the ECHR seem to be conflated. It is submitted that the Court in developing standards under PIL in this way should be very cautious of the contextual nuances tailored to the relevant PIL norms.

Finally, one of the important aspects of the present discussion - illustrated also by Turkey’s preliminary objection before the Grand Chamber in *Demir and Baykara* - is whether the Court applies Article 31 (3)(c) VCLT or whether it follows an interpretative practice of its own. The conclusion of this

Chapter is that, in contrast to the great interest of international lawyers towards the interpretive tool of Article 31 (3)(c), the Court is not applying the said provision in its everyday practice. Reference was not made to it, except in the case of *Demir and Baykara*, where, although it was cited, it is clear that the Court keeps its distance from the provision's requirements. It was clarified that the Court is guided mainly by it; that it does not take only rules of international law into account but also a great spectrum of PIL norms; and that it does not examine if the relevant rules are applicable in the relations between the parties. Therefore, the Court does not apply Article 31 (3)(c) VCLT.

This is a useful conclusion in the sense of being aware of whether the Court's reasoning provides a sound legal basis demonstrating legal certainty and transparency. This is not to say that the non-use of Article 31 (3)(c) automatically rules out meeting these requirements, although it would have been preferable for the Court to use an interpretative tool found in the VCLT and employ a common methodological language as the rest of international courts. Nonetheless, in any case, applying Article 31 (3)(c) does not either assure a uniform and consistent approach across international courts in light of its open ended conditions which are subject to different interpretations (see in *Demir and Baykara* the discussion about the notion of 'applicable rules in the relations between the parties' or in *Rantsev* the discussion on the concept of relevance).¹⁷⁵

¹⁷⁵ J. Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice *et al* (eds.), *Treaty Interpretation and the Vienna Convention: 30 Years On* (Martinus Nijhoff, Leiden, 2010) 17, 33; D. McRae, 'Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body', in S. Breitenmoser *et al* (eds.), *Human Rights, Democracy and the Rule of Law* (Dike Verlag AG-Nomos, Zürich-St Gallen-Baden-Baden, 2007) 1407, 1408.

This brings into fore the question as to whether the Court employs a predictable and transparent legal reasoning, which is of importance since the Court is under the obligation to give reasons for its judgments.¹⁷⁶ There are instances of selectiveness and inconsistency in the jurisprudence concerning both the construction of the PIL context (for example, *Rantsev* and *Siliadin*, *D.H.* and the subsequent case law) and concerning the interpretative impact drawn from the relevant norms (for example, *D.H.* and the subsequent pertinent case law). What is important, however, is the Court's initiative to draw an overarching theory in *Demir and Baykara* case. This means that it openly acknowledges its practice of considering PIL norms and attempts to provide for a methodological framework. This framework is loose in many of its parameters but it is a start. In the present author's view, *Demir and Baykara* is a landmark judgment in this respect and it has already started to have an impact in the case law. If we add to this development the constant citations in the pertinent case law and the impact of *Golder*, *Loizidou* and *Al-Adsani* cases, then one could validly argue that a framework is gradually being developed. It would not be reasonable to expect the Court to adopt an absolutely coherent interpretative approach from one day to another. As a matter of comparison, when the Court started developing, in the second half of 1970's, its key interpretative techniques and decided *Golder*, it took some time for them to flourish and find their proper place in the case law.¹⁷⁷ Overall, the interpretation of the ECHR by taking PIL norms into account is under evolution and already provides convincing evidence of predictability.

¹⁷⁶ According to Article 45 (1) ECHR 'Reasons shall be given for the judgments of the Court'.

¹⁷⁷ Bates, (note 87), 304, 321, 356-357.

8. Reading positive obligations into the protective scope of rights and freedoms

8.1 Introduction

The rights and freedoms enshrined in the ECHR, as in most international treaties for the protection of human rights, are typically framed as imposing negative obligations on the contracting parties. Member States have the obligation to refrain from interfering with those rights. The jurisprudence of the Court, however, constitutes a driving force towards developing further obligations incumbent on States. The case law witnesses the imposition of *positive* obligations on States, namely the duty to take certain action in order to secure the effective protection of the rights and freedoms prescribed under the Convention.¹

Relevant studies demonstrate the Court's increasing practice of reading positive obligations under the scope of the ECHR.² The 'common justification for this judicial activity has been to ensure that the relevant rights are "practical and effective" in their exercise', consolidating, in this way, the link between, on one hand, the development of positive obligations and, on the other hand, the principle of effectiveness and the dynamic interpretation of the Convention.³ The present inquiry examines how the Court's reliance upon PIL norms contributes to the development of positive obligations under the ECHR and consequently, how the principle of taking PIL norms into account relates to the principle of effectiveness and the dynamic interpretation.

¹ D.J. Harris *et al.*, *Law of the European Convention on Human Rights* (Oxford University Press, Oxford, 2009) 18.

² A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004).

³ *Ibid*, 221, 229.

The Chapter is divided into seven sections addressing a variety of examples of positive obligations, such as the duty to penalise and prosecute certain acts, obligations related to the protection of the environment and access to information or to diligently investigate human trafficking.

8.2 Criminalisation of negligent treatment of household waste by public authorities under Article 2 ECHR

In the *Öneryildiz v. Turkey* case⁴ the applicants complained of a violation of their right to life under Article 2 ECHR. They claimed that the Turkish authorities were responsible for the deaths of their relatives as a result of a methane explosion at the municipal rubbish tip in Istanbul. Having established that the circumstances fell within the applicability of Article 2 ECHR the right to life,⁵ the Court proceeded to the merits for assessing Turkey's compliance with the procedural obligations under the right to life. In the case of unintentional homicide, the States' obligation to set up an effective judicial system does not necessarily require criminal proceedings to be brought; this obligation can be equally met if civil, administrative or disciplinary remedies are available to the victims.⁶ The present instance was distinguished, however, from the standard case law. The Court opined that it should instead apply the legal principles concerning the use of lethal force by analogy. This conclusion was justified by virtue of guaranteeing practical and

⁴ *Öneryildiz v. Turkey*, 18 June 2002. The Grand Chamber also delivered a judgment upon a request for a referral by Turkey: *Öneryildiz v. Turkey*, 30 November 2004, (Grand Chamber).

⁵ *Öneryildiz* (GC), [71]. The characterisation of the waste collection site as *dangerous* was a legal qualification by reference to a series of PIL norms. This is another example of the Court's practice of enlarging the applicability of the rights under the ECHR by relying on PIL norms; *infra* Chapter 7.

⁶ *Öneryildiz* (GC), [92]; Harris *et al.*, (note 1), 48.

effective rights⁷ and by furnishing evidence in developments in the relevant European standards.⁸

These developments refer to the Convention on the Protection of the Environment through Criminal Law (Strasbourg Convention).⁹ The Strasbourg Convention, concluded under the auspices of the Council of Europe, promotes a common criminal policy for the protection of the environment, providing that member States must criminalise the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause, intentionally or by negligence, death or serious injury to any person.¹⁰ Nonetheless, the Convention was not in force at the relevant time; being signed by twelve States and ratified by one. The Court, by an overwhelming majority of sixteen to one, noted this, but stated that ‘it is very much in keeping with the *current trend* towards harsher penalties for damage to the environment’.¹¹ The current trend, in turn, was a reference to a Proposal by the European Commission for a Directive on the Protection of the Environment through Criminal Law¹² and the European Union’s (EU) Framework Decision No 2003/80.¹³

The Court drew a strong interpretative impact from these PIL norms – as acknowledged subsequently by a unanimous Grand Chamber in *Demir and Baykara*¹⁴ – and transposed them into the scope of Article 2 ECHR by way of

⁷ *Öneryildiz* (GC), [69].

⁸ *Ibid*, [93].

⁹ Convention on the Protection of the Environment through Criminal Law (concluded on 4 November 1998; not into force) ETS No. 172.

¹⁰ Articles 2(b) and 3.

¹¹ *Öneryildiz* (GC), [61] (emphasis added).

¹² COM (2001) 139 Final OJ C 180E (26.06.2001), p. 238.

¹³ Council Framework Decision 2003/80/JHA on the Protection of the Environment through Criminal Law (27 January 2003) OJ L 29, 5.2.2003, pp. 55–58.

¹⁴ *Demir and Baykara v. Turkey*, 12 November 2008, (Grand Chamber), [82].

imposing the positive obligation to criminalise the negligent treatment of household waste by public authorities on States. These norms were either non-binding material (the Proposal for a Directive, the 2003 Framework Decision) or instruments which were not in force at the material time (the Strasbourg Convention and the 2003 Framework Decision).¹⁵ Hence, the criterion set in *Demir and Baykara*, that the Court takes common European or/and international standards into account insofar as they are accepted by the vast majority of States (as discussed in Chapter 7), is not met.¹⁶ Although a trend may be discerned, the Strasbourg Convention was signed by a very small number of States and the rest of PIL norms neither provide for such detailed standards nor were mainstreamed in States' practice. The Court's resort to an emerging consensus had, however, a significant impact on States' obligations under Article 2 ECHR.

8.3 Establishment and effective application of a system punishing all forms of domestic violence and providing sufficient safeguards for the victims under Article 2

In *Opuz* the applicant complained of the Turkish authorities' failure to protect her and her mother from domestic violence arguing for a breach of Article 2 due to the lack of a deterring effect of Turkish legislation. The Court noted at the outset that

there seems to be *no general consensus among States Parties* regarding the pursuance of the criminal prosecution against

¹⁵ The 2003 Framework Decision imposed certain obligations on EU member States from 27 January 2005 onwards (Article 10(1)).

¹⁶ *Infra* 7.3.

perpetrators of domestic violence when the victim withdraws her complaints.¹⁷

The comparative survey, incorporated in the judgment, evidenced that in the great majority of member States authorities enjoyed a margin of discretion in deciding whether to pursue criminal proceedings against perpetrators of domestic violence.¹⁸

Despite the clear absence of consensus among member States, the Court by relying on PIL norms unanimously held that States have the positive obligation under the ECHR to establish and effectively apply a system punishing all forms of domestic violence and providing sufficient safeguards for the victims.¹⁹ The fact that the criminal investigations in Turkey were strictly dependent on the pursuance of complaints by the victim of the domestic violence was found to be regrettable. The outcome of the case was that Turkey's legislation lacked adequate deterrent effect and that national authorities' omissions breached Article 2 ECHR.²⁰

In its legal reasoning the Court referred to a number of PIL norms and practice which adopt the concept of due diligence as a yardstick to assess State responsibility in the context of violence against women. The applicant and the third-party intervener (Interights) substantially contributed to the construction of the PIL background to the case.²¹ Further, reference was made to the practice of the Committee on the Elimination of All Forms of Discrimination

¹⁷ *Opuz v. Turkey*, 9 June 2009, [138] (emphasis added).

¹⁸ *Ibid*, [87]-[90].

¹⁹ *Ibid*, [145].

²⁰ *Ibid*, [145], [151]-[153].

²¹ *Ibid*, [131]. Interights written submission available at <http://www.interights.org/view-document/index.htm?id=237>.

against Women (CEDAW). General Recommendation 19 provides the obligation to

exercise *due diligence* to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.²²

This Recommendation was subsequently affirmed and mainstreamed in the views of the CEDAW Committee in individual Communications.²³ The Court devoted special attention to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women which is the only multilateral instrument in PIL specifically addressing violence against women.²⁴ The Inter-American Commission of Human Rights (IACmHR) also ascertained that States must exercise due diligence by preventing and investigating domestic violence incidents.²⁵ The Committee of Ministers' Recommendation on the protection of women against violence²⁶ provides for the same triptych definition of due diligence (to prevent, investigate and punish certain acts) and indicates specific measures, such as penalising all forms of violence within the family and ensuring that victims are able to institute

²² Declaration on the Elimination of Violence Against Women, UN General Assembly Resolution 48/104 (20 December 1993) UN Doc A/RES/48/104, Article 4 (c) (emphasis added).

²³ *A.T. v. Hungary*, CEDAW Committee, Communication No. 2/2003, Views adopted on 26 January 2005; *Fatma Yildirim v. Austria*, CEDAW Committee, Communication No. 6/2005, Views adopted on 6 August 2007.

²⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (concluded on 9 June 1994; entered into force on 5 March 1995) (1994) 33 ILM 1534 (Belem Convention). According to Article 7 'States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: [...] (b) apply *due diligence* to prevent, investigate and impose penalties for violence against women' (emphasis added).

²⁵ *Maria Da Penha v. Brazil*, Report No. 54/01, [55], [56].

²⁶ Recommendation (2002) 5 of the Committee of Ministers on the Protection of Women Against Violence.

proceedings before domestic courts. The judgment drew upon the 2006 UN Special Rapporteur's Report on violence against women and the standard of due diligence where the Rapporteur goes so far as to assert that this standard has acquired the status of a rule of customary international law.²⁷

The impact advanced by the combined reading of these PIL norms on the interpretation of Article 2 was material. Although the Court builds upon its previous jurisprudence concerning the national authorities' positive obligations to maintain and apply an adequate legal framework affording protection against acts of violence by private individuals and to take preventive operational measures,²⁸ the use of PIL marks a shift. The Court introduced *de novo* detailed positive obligations under the scope of Article 2. This is illustrated if one compares *Opuz* to the *Bevacqua and S. v. Bulgaria* case that was rendered only a year earlier.²⁹ In this instance the Court dismissed the applicants' claim that their right to be protected against domestic violence could be adequately protected *only* by means of criminal law sanctions. In light of the States' margin of appreciation, the choice of means to secure compliance with the rights under the ECHR was categorically left to them.³⁰ With *Opuz* the choice of means is no longer left to the States. In contrast to *Bevacqua*, the Court accepts that the ECHR requires, in all cases of domestic violence, that the prosecution is initiated by national authorities even if the victim withdraws her complaint. Interestingly, the Court in the *Bevacqua* case took cognisance of the same PIL norms as in *Opuz*. In *Bevacqua* the Court devotes five paragraphs to

²⁷ Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences (20 January 2006), UN Doc E/CN.4/2006/61, [29].

²⁸ *Osman v United Kingdom*, 28 October 1998, (Grand Chamber).

²⁹ *Bevacqua and S. v. Bulgaria*, 12 June 2008.

³⁰ *Ibid*, [82].

the relevant PIL (one to two pages of its judgment) and the emphasis is on the Recommendation by the Committee of Ministers on the protection of women against violence, whereas the rest of PIL norms are mentioned in passing classified as ‘other material’;³¹ in *Opuz* the Court devotes fourteen paragraphs (five pages in its judgment) to discussing the relevant PIL norms. Besides the quantitative change, the PIL norms are subdivided into pertinent ‘regimes’ – ‘the United Nations position’, ‘the Council of Europe’ and ‘the Inter-American system’) and the Court discusses them in greater detail.³² The interpretative impact that the Court drew from these norms on the construction of the ECHR in *Bevacqua* is limited to informing the Court’s perception of the vulnerability of the victims of domestic violence.³³ *Opuz*, on the other hand, signifies a change in the Court’s legal reasoning and the protective scope of Article 2 ECHR. The duty to due diligence, as articulated in the PIL norms, is incorporated in the Court’s analysis. National authorities’ acts and omissions are scrutinised against this yardstick and the link is explicit in many instances in the judgment.³⁴

This brings the question of the content of the due diligence standard into the fore. Linguistically speaking due diligence can be found in *Osman* and the subsequent case law concerning the preventive operational measures that States ought to take under Article 2. *Osman*, however, applied this standard narrowly and set a strict condition, namely that it must be established that national authorities knew or ought to have known that there was *a real and*

³¹ *Ibid*, [49]-[53].

³² *Opuz*, [72]-[86]. The ‘comparative material’ (survey of member States’ practice) is discussed under a separate heading: [87]-[90].

³³ *Bevacqua*, [65].

³⁴ *Opuz*, [131], [137], [147], [149].

immediate risk to the life of a said individual from the criminal acts of a third party.³⁵ Is this part of the due diligence standard as applied in the context of domestic violence in *Opuz*? It seems that this is not the case. This strict condition (real and immediate risk) under Article 2 ECHR is not mentioned in any of the relevant PIL norms and practice. This is arguably the reason that the *Osman* case and the subsequent case law were qualified as ‘*a variant of the due diligence standard*’.³⁶ Consequently, there are two different standards of due diligence and *Opuz* is not merely a follow up to *Osman*.³⁷

All the more, the Court in its process of integrating extraneous PIL standards into a common denominator and incorporating in turn this denominator under Article 2 ECHR loses certain fundamental contextual nuances. Although this standard was treated by the Court and partly by the literature as a well-established duty, this is not a valid assertion.³⁸ Even the UN Special Rapporteur, who asserted that the due diligence standard has acquired the status of a rule of customary international law,³⁹ acknowledged the lack of clarity of its content and the existence of certain caveats in articulating this integration project. The CEDAW Committee in *A.T. v. Hungary* did not

³⁵ C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 153; A.R. Mowbray, *Cases, Material and Commentary on the European Convention on Human Rights* (Oxford University Press, Oxford, 3rd ed., 2012) 122.

³⁶ 2006 UN Report on Violence Against Women, [22] (emphases added).

³⁷ *Contra* Ovey, White, (note 35); Mowbray, (note 35). Subsequent case law is not clear. The Court, on one hand, affirms, in principle, the strict *Osman* test but, on the other hand, it adds that ‘owing to the particular vulnerability of victims of domestic violence [...] the domestic authorities should have exercised an even greater degree of vigilance’ which seems to introduce a lower threshold for State responsibility; for example, *Hajduová v Slovakia*, 30 November 2010, [50].

³⁸ J. Bourke-Martignoni, ‘The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence’, in C. Benninger-Budel (ed.), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers, Leiden, 2008) 47; M. Hakimi, ‘State Bystander Responsibility’ (2010) 21 *EJIL* 341, 380.

³⁹ *Contra* B. Meyersfeld, *Domestic Violence and International Law* (Hart, Oxford, 2012) 107.

explicitly mention an absence of due diligence by Hungary; it is rather assumed that the standard clearly informed the way in which the Committee determined that the State failed to fulfil its obligations.⁴⁰ Insofar as the practice of the IACmHR is concerned, the due diligence, as articulated in the *Maria Da Penha v. Brazil* case, forms an integral part of the general jurisprudential practice of the IACtHR to refer extensively to due diligence issues under the general provisions of Article 1 IACHR. It should not be ignored either that the IACmHR employed the due diligence standard in that case when it was exercising jurisdiction over, and declared a violation of, the specialised and regional Belem Convention.⁴¹ Hence, it appears that different *variants* of the due diligence standard exist depending on the treaty context from which it is being drawn – the Inter-American context, the UN context and the ECHR context. The Court detached the different variants of the standard from their treaty context. The process of reading many PIL norms together and construing a common denominator may be considered as an intrinsic feature of developing PIL, as it was also highlighted in *Demir and Baykara* case.⁴² Although such a process it to be, in principle, welcomed, one should not lose sight of the important contextual differences;⁴³ otherwise such an integration enterprise finds its place in the threshold of interpretation and judicial law-making.

8.4 Criminalisation and effective prosecution of non-consensual sexual acts under Articles 3 and 8 ECHR

In *M.C. v. Bulgaria* the applicant – a rape victim – argued for a breach of Articles 3 and 8 due to the ineffectiveness of domestic law and practice to

⁴⁰ 2006 UN Report on Violence Against Women, [23].

⁴¹ *Maria Da Penha v. Brazil*, [60]; Meyersfeld, (note 39), 81.

⁴² *Infra* 7.4.

⁴³ For example, *infra* 4.2 (*Zolotukhin*), 7.2 (*Scoppola*).

secure her right to legal protection against rape and sexual abuse.⁴⁴ The core issue was that the Bulgarian criminal legislation required proof of physical resistance by the victim in order for a forcible sexual act to qualify as rape. In support of her arguments she referred to developments in international and comparative law on the definition of rape.⁴⁵ Interights was permitted to intervene in the written proceedings. They submitted that the criminal offence of rape had evolved by providing an extensive survey of national legislations and developments in international criminal law.⁴⁶ The shared concern of the relevant legislative reforms was that a rape victim did not have to prove physical resistance in order to substantiate the lack of consent.

The Court, while acknowledging the margin of appreciation that States enjoy insofar as the means to ensure effective protection against rape are concerned, opined that it should be limited in light of guaranteeing the effective protection of the individual and giving effect to changing conditions within member States.⁴⁷ In unanimity, it went on to proclaim that States have the duty to enact criminal legislation and to effectively investigate and prosecute rape, including non-consensual sexual acts even where the element of the physical resistance by the victim is absent. Bulgarian authorities were found to have afforded too much weight to the fact that the applicant had not actively resisted to her rape and too little consideration of her young age and the special psychological conditions of her case. This led to a failure to investigate sufficiently the applicant's circumstances under Articles 3 and 8 ECHR.

⁴⁴ *M.C. v. Bulgaria*, 4 December 2003.

⁴⁵ *Ibid*, [112].

⁴⁶ *Ibid*, [128]-[147].

⁴⁷ *Ibid*, [154]-[155], [166].

The legal reasoning for justifying the inclusion of the duty to criminalise and prosecute even in the absence of physical resistance under the ECHR was based on the existence of a 'clear and steady trend in Europe and some other parts of the world towards abandoning formalistic definition and narrow interpretation of the law in this area'.⁴⁸ The comparative survey attached to the judgment was very restricted in its scope (ten member States) and did not offer any definite conclusions on the issue of physical resistance by the victim as a *sine qua non* condition for rape.⁴⁹ At best, member States' practice was divided. The Court attempted to reinforce its conclusion by referring to Recommendation (2002) 5 on the protection of women against violence by the Committee of Ministers of the Council of Europe, which strongly encouraged States to 'penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance'.⁵⁰ Although this may provide some form of support, on the other hand, it confirms that no harmonised position existed among States.⁵¹ Therefore, the consensual basis as a legal justification for such an interpretation is rhetorical and it serves legitimising purposes. The Court once again invokes and uses a dubious trend in formation and an emerging consensus. The reference to the trend in *other parts of the world* was not explained convincingly either. Presumably, the Court drew upon the material submitted by Interights which concerned the practice of several States in the USA, Canada, Australia and South Africa.⁵²

⁴⁸ *Ibid*, [156].

⁴⁹ *Ibid*, [88]-[100].

⁵⁰ 30 April 2002, Appendix, [35]. *M.C.*, [101].

⁵¹ I. Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations' (2008) *EHRLR* 357, 371.

⁵² *M.C.*, [143]-[147].

The only well-argued part of the judgment, which seems to have influenced the Court's reasoning, is the reliance upon the developments in international criminal law. In line with the applicant's and Interights submissions, the Court underlined a series of judgments by the ICTY which categorically recognised that force is not an element *per se* of rape.⁵³ Although it was acknowledged that such a definition was formulated 'in the *particular context* of rapes committed against the population in the conditions of an armed conflict',⁵⁴ it was stressed that at the same time 'it also reflects *a universal trend*'.⁵⁵ The ICTY Trial Chamber in *Furundžija* had indeed followed a 'process of identification of the common denominators in [the] legal systems so as to pinpoint the basic notions they share'⁵⁶ as to the definition of rape. Similarly to other cases discussed in Chapter 4 (*Van der Mussele*, *Siliadin*),⁵⁷ however, the Court pays attention not to apply a definition formulated for a criminal offence under a different legal context into the ECHR uncritically.⁵⁸

The *M.C.* case demonstrates the distinctive nature and function of the three major interpretative principles employed by the Court. In the absence of a common approach of the member States' practice, the comparative interpretation leans in a different direction to the principle of interpreting the

⁵³ *Ibid*, [102]-[107]; *Prosecutor v. Furundžija* (Trial Chamber), Case No. IT-95-17/1-T, 10 December 1998, [78]; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vucovic* (Trial Chamber), Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001, [436]-[460]; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vucovic*, (Appeals Chamber), Case No IT-96-26 & IT-96-23/1-A, 12 June 2002, [128]-[129].

⁵⁴ *M.C.*, [163] (emphases added).

⁵⁵ *Ibid* (emphases added).

⁵⁶ *Furundžija*, [78].

⁵⁷ *Infra* 4.4.

⁵⁸ G. Cohen-Jonathan, 'Rapport Introductif Général', in G. Cohen-Jonathan, J.-F. Flauss (dir.), *Droit International, Droits de l' Homme et Juridictions Internationales* (Bruylant, Bruxelles, 2004) 11, 25.

ECHR in light of PIL norms.⁵⁹ This conclusion has already been established in Chapter 4 (*Vo, Evans*) and Chapter 7 (*D.H., Oršuš, Opuz*).⁶⁰ It is doubtful whether the Court would have reached this interpretation of Articles 3 and 8 ECHR without the reliance on PIL norms. Hence, PIL norms not only strongly reinforce the trend (if any) found in State practice,⁶¹ but also serves a primary role in formulating and justifying the final outcome. The fact that the interpretation of the ECHR by taking cognisance of PIL norms is the driving force behind the Court's reasoning has been stressed in Chapter 4 (*Zolotukhin*), Chapter 7 (*Scoppola, D.H., Opuz, Rantsev, Demir and Baykara*); one should not forget the substantial restrictions that the Court read on the scope of the ECHR by taking other PIL norms into account, as seen in Chapters 5 and 6.

8.5 Criminalisation of prohibited practices under Article 4 ECHR

As previously discussed, the applicant in *Siliadin* alleged that French criminal law did not afford her adequate protection against the practices of slavery and servitude. Chapter 4 analysed how the Court used PIL norms to define the terms under Article 4⁶² and Chapter 7 demonstrated that the construction of the 'relevant PIL background' to the case by the Court can be a selective process which nonetheless has significant consequences in terms of legal reasoning and the interpretation of the ECHR.⁶³ The focus herein lies on the applicant's claim that a positive obligation should be read under Article 4

⁵⁹ Radacic, (note 51).

⁶⁰ *Infra* 4.2 and 4.7, 7.3 and 7.6.

⁶¹ C. Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: the European Court's Judgment in *M.C. v. Bulgaria*' (2005) 3 *JIntlCrimJ* 447.

⁶² *Infra* 4.4 and 4.5.

⁶³ *Infra* 7.5.

to adopt deterring criminal law legislation and effective enforcement machinery.⁶⁴

The Court concurred with the applicant's arguments and included for the first time in its case law positive obligations under Article 4, namely the member States' duty to enact criminal law provisions penalising the practices of slavery, servitude and forced or compulsory labour and to apply them effectively. The Court reasoned its approach on two grounds: the absence of positive obligations would, first, render Article 4 ineffective and, secondly, it would be inconsistent with the PIL norms specifically concerned with the issue.⁶⁵

Although the judgment was welcomed in academic literature,⁶⁶ the Court reasoning lacks material basis and treats the relevant PIL in a rhetorical fashion. None of the instruments referred to by the Court imposes a duty on States to specifically criminalise the prohibited practices under Article 4 ECHR in their legislation. The Forced or Compulsory Labour Convention and the Supplementary Convention on the Abolition of Slavery provide that all contracting parties shall take all necessary legislative and other measures to suppress and abolish slavery or forced or compulsory labour practice respectively.⁶⁷ The Convention on the Rights of the Child (CRC) similarly asks member States to take appropriate legislative and administrative measures for

⁶⁴ One of the applicant's representatives before the Court was a lawyer for the Committee against Modern Slavery acting as an assistant.

⁶⁵ *Siliadin*, [89], [112].

⁶⁶ V. Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of the Domestic Workers' (2006) 35 *Ind.L.J.* 395, 404-407; H. Cullen, 'Siliadin v. France: Positive Obligations under Article 4 of the ECHR' (2006) 6 *HRLRev.* 585, 590-592; E. Decaux, *Jurisprudence*, (2006) 133 *JDI* 1138.

⁶⁷ Article 1 Supplementary Convention on the Abolition of Slavery; Articles 1 and 4 (1) Forced or Compulsory Labour Convention; *Siliadin*, [85]-[87].

protecting children.⁶⁸ The only PIL norms directly addressing the issue of criminalization, although cited in the judgment under the ‘Relevant Law’ heading, are not referred to or discussed or even cited in the main body of the judgment and in the Court’s reasoning. These were Recommendation 1523 (2001) of the Parliamentary Assembly and recent Anti-Trafficking Convention (Articles 18 to 21). The Assembly admitted in its Resolution that none of the Council of Europe member States expressly made domestic slavery an offence in their criminal codes,⁶⁹ demonstrating the absence of a common denominator in the national legislations of member States. Also, the Anti-Trafficking Convention not only was not in force at the time (signed by fifteen and ratified by none),⁷⁰ but also the Court does not discuss it or links it to its reasoning.

Subsequently, in the *Rantsev* case the Court affirmed the existence of the duty under Article 4 to criminalise human trafficking in a more consistent fashion. The duty to criminalise and ensure effective investigation and prosecution, as envisaged in the Palermo Protocol⁷¹ and the Anti-Trafficking Convention, was tightly linked to the positive obligations under Article 4 ECHR. In fact, Cyprus’ legislative framework was assessed against the detailed standards provided in Article 5 of the Palermo Protocol and Article 1 of the

⁶⁸ Articles 19 (1) and 32 (2) state that ‘[...] States Parties shall take legislative, administrative, social and educational measures [...]’ and Article 36 provides that ‘States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.’

⁶⁹ Recommendation 1523 (2001) of the Parliamentary Assembly of the Council of Europe on Domestic Slavery, 26 June 2001, [9], [10]; *Siliadin*, [49].

⁷⁰ Council of Europe Convention on Action against Trafficking (concluded on 16 May 2005; entered into force 1 February 2008) ETS No 197 (Anti-Trafficking Convention).

⁷¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Crime (concluded on 15 November 2000; entered into force on 29 September 2003) (2001) 40 ILM 335 (Palermo Protocol).

Anti-Trafficking Convention.⁷² Since Cyprus had given effect into its national law to its international obligations, the Court found no violation. The direct link between the external detailed PIL norms and the construction of the ECHR is now evident and it is so strong that, if the reader of the *Rantsev* judgment were not aware that the European Court is under the obligation to interpret and apply only the ECHR, he would be under the impression that the Court applies the Palermo Protocol and the Anti-Trafficking Convention. Therefore, the interpretive impact derived from the PIL norms is in practice equated to *indirectly* applying these norms through the ECHR.⁷³ In this way, member States that have chosen *not* to be bound by the said international treaties are now bound by the Article 4 positive obligations.⁷⁴

The Court in this instance not only transposes detailed PIL norms in the positive obligations under Article 4 ECHR, but also it appears that it indirectly supervises the implementation of these norms, which questions the limits of its jurisdiction.

8.6 The obligations to ensure the right to access information, to participate in the decision-making process and to access justice under Articles 2 and 8 ECHR in cases related to the protection of the environment

The *Taşkin* case⁷⁵ was concerned with the legality of the operating permit issued for a gold mine and the decision-making process that had been

⁷² *Rantsev*, [285], [290].

⁷³ S. Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law' (2011) 33 *Michigan JIL* 77, 93; R. Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) *Intl JrefL* Advance Access (published April 4, 2012) 1, 19.

⁷⁴ The Anti-Trafficking Convention is ratified by twenty seven States, chart of signatures and ratification of the Convention available at <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=27/04/2010&CL=ENG>>.

⁷⁵ *Taşkin and others v. Turkey*, 10 November 2004.

followed. The applicants claimed that the use of sodium cyanide in the mine was a threat to the environment and breached the rights to life and to the private life of the neighbouring population. Having established the applicability of Article 8 to severe environmental pollution cases, the Court proceeded to assess Turkey's compliance with its positive obligations. Although the text of Article 8 does not provide for explicit procedural requirements, it held that the national authorities' decision-making process should be subject to specific conditions. Three different procedural guarantees were outlined. According to the first, the decision-making process had to involve appropriate investigation and studies for the competent authorities to evaluate and balance the possible risks to the environment or to human health accordingly. Secondly, interested individual should be granted access to the conclusions of such studies and to relevant information, thereby giving them the opportunity to evaluate, in advance, the risks to which they may be exposed. Thirdly, the individuals concerned should be able to appeal to national courts against any administrative act or omission.⁷⁶ In the specific instance the Turkish Council of Ministers extended the operation of the gold mine by a decision which was not made public. Moreover, the Turkish administration did not comply with subsequent decisions of national courts. Hence, the Court, in a unanimous judgment, found a breach of Article 8 ECHR.

Although these guarantees appeared to stem from the Court's previous case law, the judgment - under the 'Facts' section⁷⁷ - contained references to a

⁷⁶ *Ibid*, [119].

⁷⁷ *Ibid*, [98]-[100].

series of PIL norms. It cited Principle 10 of the Rio Declaration on Environment and Development⁷⁸ (Rio Declaration) which reads that

each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and *the opportunity to participate in decision-making processes*. [...] *Effective access to judicial and administrative proceedings*, including redress and remedy, shall be provided.

(Emphases added)

Also, the detailed legal framework on access to environmental information contained in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁷⁹ (Aarhus Convention) was outlined: (Article 4), public participation in decision of specific activities (Articles 6-8) and access to justice (Article 9). Mention was made to a Resolution by the Parliamentary Assembly of the Council of Europe which underlines the imperative of treating public access to information as a human right.⁸⁰ The Court did not link these PIL norms to Article 8 procedural guarantees in the main body of the judgment.⁸¹ Yet it is hard to miss the notable similarity of the wording between the States' positive obligations and the Rio Declaration's guidelines and the Aarhus Convention's standards.⁸² In fact, in *Demir and Baykara*, a unanimous Grand Chamber came to admit

⁷⁸ (1992) 31ILM 874.

⁷⁹ 2161 UNTS 447.

⁸⁰ Resolution 1087 (1996) of the Parliamentary Assembly on the Consequences of the Chernobyl Disaster, 26 April 1996, [4].

⁸¹ *Taşkin*, [98]-[100].

⁸² M. Fitzmaurice, 'Environmental Degradation', in D. Moeckli, S. Shah, S. Sivakumaran (eds.), *International Human Rights Law* (Oxford University Press, New York, 2010) 622, 640.

retrospectively that the *Taşkın* judgment builds largely upon the standards envisaged in the Aarhus Convention.⁸³

Similarly, in the *Öneryildiz* case, the public's right to information was one of the factors assessed by the Grand Chamber in the context of the preventive measures that Turkey should have taken for effectively safeguarding the right to life. The interpretation of Article 2 ECHR as including the public's right to information was presented as a follow-up of previous case law (*Guerra* case⁸⁴) and because such a construction 'is supported by current developments in European standards'.⁸⁵ The only reference to a European standard was the 1996 Parliamentary Assembly's Resolution mentioned in *Taşkın*. Despite the invocation of developments in European standards, its substantiation is poor and, again, the link between the ECHR interpretation and PIL norms is weak.

The Court's legal reasoning became more transparent in the *Tătar* case.⁸⁶ It is indicative that nine pages in the judgment are devoted to analysing the pertinent PIL. The case concerned an accident which took place in a gold mine extraction site causing a serious water pollution problem due to the use of cyanide in the site. The applicants – father and son – who lived nearby the site argued that the effects of this accident were a danger for their right to life and contributed substantially to the aggravation of the second applicant's asthma condition. The Court examined their complaints under the angle of Article 8 and their right to private life and to a home. Romania, for its part, denied the

⁸³ *Demir and Baykara* (GC), [83].

⁸⁴ *Guerra and others v Italy*, 19 February 1998, (Grand Chamber).

⁸⁵ *Öneryildiz* (GC), [90].

⁸⁶ *Tătar v. Romania*, 27 January 2009. The judgment is available only in French. This is unfortunate given the importance of the judgment in matters of environmental protection and with respect to the Court's interpretative practice of taking PIL norms into account.

allegations and stressed the lack of a causal link between the applicants' right to private life and the circumstances of the case.

The three procedural guarantees outlined in *Taşkin* were highlighted as essential *corpus* of the protective scope of the right to private life.⁸⁷ In contrast to *Taşkin*, the link between the Aarhus Convention (ratified by Romania) and the said guarantees was expressly made in the main body of the judgment.⁸⁸ Emphasis was put on the specific aspect of States' obligation to disseminate information to the public in order to enable them to prevent or mitigate harm arising from another future accident.⁸⁹ This positive obligation originates from Article 5 of the Aarhus Convention which envisages that

in the event of any imminent threat to human health or the environment [...] which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

The Parliamentary Assembly Resolution on Industrial Hazards, which was also cited, urges member States 'to improve the dissemination of information about good practices concerning the prevention and limitation of major accidents already pursued by certain member states'.⁹⁰ Again, the similarity between the wording of these PIL norms and the Court's detailed standards of review is remarkable.⁹¹

⁸⁷ P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment* (Oxford University Press, New York, 2009) 288, 295.

⁸⁸ *Tătar*, [118].

⁸⁹ *Ibid*, [88], [101].

⁹⁰ Parliamentary Assembly Resolution 1430 (2005) on Industrial Hazards, 18 March 2005, [8] (iv).

⁹¹ *Tătar*, [101].

The *Taşkin* and *Tătar* judgments mark a discernible shift in the Court's interpretation of the ECHR with respect to the use of PIL norms relevant to environmental protection. In previous cases the applicants attempted to raise arguments for establishing a link between the protective scope of the ECHR and the protection of the environment and, hence, extend the protective scope of the ECHR. The Court, however, was unwilling to entertain such claims. Strong Joint Dissenting Opinions were raised before the Grand Chamber in the *Balmer-Schafroth* and *Hatton* cases where it was argued that PIL developments should have been taken into account for construing the ECHR.⁹² Many authors also refer to the long awaited *integration* of environmental *concerns* or *considerations* or *objectives* into the human rights discourse.⁹³ In *Taşkin* and *Tătar* the Court's interpretation of the ECHR, by taking cognisance of environment-related PIL norms, resulted in the integration into the ECHR's scope not only of environmental *concerns*, but also of specific *standards*. Detailed obligations under the Aarhus Convention concerning access to information, public participation in decision-making and access to justice were fully incorporated into the positive obligations of Article 8 ECHR. In effect the Court provided for indirect procedural environmental rights,⁹⁴ which is the 'the narrowest but strongest argument for a human right to the environment'.⁹⁵ Such a position taken by the Court must have been facilitated by the fact that the

⁹² Dissenting Opinion of Judge Pettiti joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek in *Balmer-Schafroth and others v. Switzerland*, 26 August 1997 (Grand Chamber); Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton and others v. United Kingdom*, 8 July 2003, (Grand Chamber).

⁹³ A. Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in A.E. Boyle, M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 52; T. Stephens, *International Courts and Environmental Protection* (Cambridge University Press, Cambridge, 2009) 320; F. Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *EJIL* 41.

⁹⁴ M. Fitzmaurice, 'Environmental Degradation', in Moeckli *et al.*, (note 82), 640.

⁹⁵ Boyle, (note 93), 59-60. Also Stephens, (note 93), 315.

Aarhus Convention is the first internationally binding instrument in the field of the environment which adopts a ‘human rights approach’ acknowledging the close relationship between human rights and environmental protection.⁹⁶ The Court once more, as in the *Rantsev* case transposes detailed PIL norms in the positive obligations under Article 4 ECHR.

8.7 The obligations to put in place the appropriate legislative and administrative framework, to take preventive measures and to diligently investigate human trafficking under Articles 2 and 4 ECHR

As it was previously discussed, *Rantsev* established the duty to penalise and prosecute trafficking in human beings as a positive obligation under Article 4 ECHR.⁹⁷ The Court asserted, however, that this duty is only one aspect of member States’ obligations and that a comprehensive approach to human trafficking should be adopted by considering the broader PIL context.⁹⁸ Such approach involved the introduction under Articles 2 and 4 ECHR of three separate sets of positive obligations: to put in place an appropriate legislative and administrative framework, to take preventive measures and to investigate (potential) trafficking. These positive obligations reflect the letter of the provisions of the Palermo Protocol and the Anti-Trafficking Convention. In fact, the Court scrutinised the acts and omissions of the two respondent States (Cyprus and Russia) against the standards of these two international treaties.

⁹⁶ Lucca Declaration, Addendum to the Report of the First Meeting of the Parties to the Aarhus Convention, Adopted on 21-23 October 2002 (2 April 2004) UN Doc ECE/MP.PP/2/Add.1, [5]-[6].

⁹⁷ *Infra* 8.1.4.

⁹⁸ *Rantsev*, [285].

First, the Court examined Cyprus' legislative framework. Even though the relevant legislation generally reflected the Palermo Protocol, the regulatory policy, and in particular the immigration policy, was considered unsatisfactory. The 'artiste visa' system gave indications of encouragement or tolerance, on behalf of public authorities, to individuals suspected of trafficking and did not provide practical and effective protection to (potential) victims.⁹⁹ It is telling that the Court assessed very strictly Cyprus' immigration policy, where member States traditionally enjoy a great margin of appreciation, by using PIL norms.¹⁰⁰

Secondly, with regard to the protective operational measures the Court found that State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that Ms. Rantseva was at real and immediate risk of being trafficked or exploited.¹⁰¹ A series of omissions by police officers to identify her as a trafficking victim and investigate her case violated Cyprus' positive obligations. These obligations were directly linked to detailed standards of the Palermo Protocol and the Anti-Trafficking Convention concerning the provision of adequate training for competent authorities.¹⁰²

Lastly, the Court addressed Cyprus' procedural obligation to adequately investigate the death of Ms. Rantseva and whether or not a link existed between the allegations of trafficking and the circumstances of her death under the ambit of Article 2 ECHR. The duty of States to cooperate effectively in cross-border trafficking cases under the Anti-Trafficking Convention was

⁹⁹ *Ibid*, [280], [290]-[293].

¹⁰⁰ Chaudary, (note 73), 93.

¹⁰¹ *Rantsev*, [286], [296].

¹⁰² *Ibid*, [296]; Article 10(2) Palermo Protocol and Article 10 Anti-Trafficking Convention.

underlined.¹⁰³ A series of pertinent factors were examined, such as whether all the necessary steps had taken for securing evidence and examining witnesses. In this context the Court noted that both respondent States were parties to the European Convention on Mutual Assistance in Criminal Matters¹⁰⁴ and had concluded a bilateral Treaty on Legal Assistance in Civil, Family and Criminal Law matters.¹⁰⁵ The Court criticised Cyprus for not asking assistance from Russia in order to secure evidence although these instruments set out a clear procedure.¹⁰⁶ This omission was one of the reasons that Cyprus breached its procedural obligation to effectively investigate under Article 2 ECHR. Criticising the respondent State for its (potential) failure to apply another international treaty clearly does not fall within the competence of the Court. This is all the more the case if such an alleged failure is one of the reasons for breaching the ECHR.¹⁰⁷

Overall, the Court's receptiveness to a great variety of PIL norms relevant to human trafficking involves the acceptance of different paradigms for responding to the phenomenon of trafficking. In this sense, the Court read the positive obligation to criminalise and prosecute trafficking which is the Palermo Protocol-‘criminal law paradigm’ and also the obligations to put in place an appropriate legislative and administrative framework, to take preventive measures and to investigate (potential) trafficking which qualify as

¹⁰³ *Rantsev*, [289].

¹⁰⁴ European Convention on Mutual Legal Assistance in Criminal Matters (concluded on 20 April 1959; entered into force on 12 June 1962) CETS No. 30.

¹⁰⁵ Treaty between USSR and the Republic of Cyprus on Legal Assistance in Civil, Family and Criminal Law Matters of 19 January 1984.

¹⁰⁶ *Rantsev*, [241].

¹⁰⁷ For example, *Karalyos and Huber v Hungary and Greece*, 6 April 2004, [40]; *Calabro v Italy and Germany* (Admissibility Decision), 21 March 2002, p. 8.

the Anti-Trafficking Convention- ‘human rights/regulatory paradigm’.¹⁰⁸ It is also characteristic that the AIRE Centre and Interights, in their third-party interventions before the Court, stressed the importance of different ‘paradigms’ – Interights focused on the ‘criminal law paradigm’ under the Palermo Protocol whereas the AIRE Centre underlined the ‘human rights approach’ and the necessity of protecting the victims under the Anti-Trafficking Convention.¹⁰⁹ The Court’s justification for reading such detailed obligations under Articles 4 and 2 ECHR in light of PIL was that

‘[i]t is clear from the provisions of these two instruments that the Contracting States, including almost all of the member States of the Council of Europe, have formed the view that only a combination of measures addressing all three aspects can be effective in the fight against trafficking’.¹¹⁰

As the discussion in *Demir and Baykara* case showed, the Court is inclined to invoke a (alleged) consensual basis for legitimising its reliance upon PIL norms. Nonetheless, at the relevant time, although the overwhelming majority of member States had ratified the Palermo Protocol,¹¹¹ only twenty six (out of forty seven) of the member States were formally bound by the Anti-Trafficking Convention.¹¹² Even so, the incorporation of very detailed external standards

¹⁰⁸ J. Todres, ‘Widening Our Lens: Incorporating Essential Perspectives in the Fight against Human Trafficking’ (2011) 33 *Michigan JIL* 53; V. Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case’ (2012) 30 *NQHR* 163, 177 *et seq.*

¹⁰⁹ *Rantsev*, [264]-[268] and [191]-[192], [269]-[271] respectively.

¹¹⁰ *Ibid*, [285].

¹¹¹ Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en.

¹¹² Twenty six member States had ratified the Convention and fourteen had signed it with unknown prospect of whether or not they would/will ratify it; available at

under the scope of the ECHR ignores the limits of the interpretation process and results in indirectly applying other international treaties.

8.8 The obligations under Article 8 ECHR concerning the expeditious return of a removed child in international abduction cases

The Court has also developed an extensive practice of taking into consideration the Hague Convention on the Civil Aspects of the International Child Abduction when interpreting Article 8 ECHR.¹¹³ In these cases, the common scenario before the Court is that the applicant is the left-behind parent who complains of a violation of Article 8. The Grand Chamber in *Neulinger and Shuruk* case¹¹⁴ restated its position that the ECHR cannot be interpreted in a vacuum but should be interpreted in harmony with the general principles of international law. As Article 31 (3)(c) VCLT indicates, it continued, consideration should be given to any relevant rules of international law and in particular the rules concerning the international protection of human rights.¹¹⁵ In this context, the obligations under Article 8 ECHR must be interpreted by taking the Hague Convention into account.¹¹⁶

This came as a confirmation of the previous rich case law of the Court concerning the Hague Convention. The Court has incorporated the detailed provisions of the Hague Convention under the positive obligations of Article 8 ECHR and uses them as a standard of review of member States' acts and

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=27/04/2010&CL=ENG>

¹¹³ Convention on the Civil Aspects of the International Child Abduction (concluded on 25 October 1980; entered into force on 1 December 1983) 1343 UNTS 89 (Hague Convention).

¹¹⁴ *Neulinger and Shuruk v. Switzerland*, 6 July 2010, (Grand Chamber).

¹¹⁵ *Neulinger* (GC), [131].

¹¹⁶ *Ibid*, [132].

omissions.¹¹⁷ Article 11 of the Hague Convention stipulates that ‘the judicial and administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children’ and provides them with six weeks to reach a decision. The Court has decided that national authorities have not shown the necessary diligence when inactivity and delay existed from six years¹¹⁸ or more than a year¹¹⁹ to two, three or four months.¹²⁰ The direct link between Article 11 of the Hague Convention and the positive obligations is explicit and striking in the judgments: ‘the Court notes that this period of time is not in accordance with Article 11 of the Hague Convention’.¹²¹ Not only does the Court find national authorities not to be in accordance with the Hague Convention but also that this breach automatically qualifies as a violation of Article 8 ECHR.

Article 7 of the Hague Convention also sets out detailed standards regarding the enforcement of the decision to return the child. Similarly, the Court, by employing in its analysis the criteria outlined in Article 7 of the Hague Convention, examines whether or not the measures undertaken by the national authorities create the necessary conditions for enforcing the decision for the return of the abducted child.¹²² It found a violation of Article 8 when States could not justify periods of inactivity of the competent authorities at the

¹¹⁷ Mowbray, (note 2), 167-168.

¹¹⁸ *Sophia Gudrún Hansen v. Turkey*, 23 September 2003, [101].

¹¹⁹ *Ignaccolo-Zenide v. Romania*, 25 January 2000, [104]; *Iosub Caras v. Romania*, 27 July 2006, [38].

¹²⁰ *H.N. v. Poland*, 13 September 2005, [79]; *Sylvester v. Austria*, 24 April 2003, [68]; *Carlson v. Switzerland*, 6 November 2008, [76]; *Karadžić v. Croatia*, 15 December 2005, [59]; *Bianchi v. Switzerland*, 22 June 2006, [94]; *P.P. v. Poland*, 8 January 2008, [89].

¹²¹ *Carlson*, [76].

¹²² P.B. Beaumont, ‘The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction’ (2008) 335 *RdC* 9, 19; A. Schulz, ‘The 1980 Child Abduction Convention and the European Convention on Human Rights’ (2002) 12 *Transnatl L. & Contemp. Probs.* 355, 387.

enforcement stage;¹²³ when no coercive measures were taken against the parent that abducted its child so as to oblige him/her to respect the national court's decisions;¹²⁴ when those coercive measures were not effective or realistic;¹²⁵ when the authorities did not take any measures in order to prevent the parent from go into hiding with the abducted child.¹²⁶ The same approach was followed in instances where no initiative was undertaken to ascertain the whereabouts of the child or the parent,¹²⁷ or where the respective investigation had remained inactive for a long time.¹²⁸ According to the jurisprudence, Article 8 ECHR includes the positive obligations to take preparatory measures in general¹²⁹ or, in particular, measures regarding meetings of the social services with the left-behind parent and the child,¹³⁰ and to take measures so as the parent can enjoy access while the court proceedings are pending.¹³¹ Again, the link between a violation of the Hague Convention and the breach of Article 8 ECHR is made crystal clear: the domestic courts' 'interpretation of the guarantees of the Hague Convention led to a violation of Article 8 [ECHR]'.¹³²

Although it is an established position that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law,¹³³ the Court does not hesitate to find that the interpretation followed by national courts

¹²³ *H.N.*, [80]; *Karadžić*, [60].

¹²⁴ *Ignaccolo-Zenide*, [105]-[109]; *Maire v. Portugal*, 26 June 2003, [75].

¹²⁵ *Gudrún Hansen*, [105]-[107]; *Karadžić*, [61]; *Bianchi*, [98]; *Lafargue v. Romania*, 13 July 2006, [103]; *P.P.*, [92].

¹²⁶ *H.N.*, [82].

¹²⁷ *Ignaccolo-Zenide*, [105]-[109]; *Sylvester*, [71]; *Gudrún Hansen*, [105]; *Karadžić*, [60]; *cf.* Article 7 (a) Hague Convention.

¹²⁸ *P.P.*, [91].

¹²⁹ *Sylvester*, [70].

¹³⁰ *Ignaccolo-Zenide*, [105], [112]; *cf.* Article 7 (d), (f), (g) Hague Convention.

¹³¹ *Gudrún Hansen*, [103]; *cf.* Article 7 (f) Hague Convention.

¹³² *Monory v. Romania and Hungary*, 5 April 2005, [81] and [79], [85].

¹³³ *Iglesias Gil and A.U.I. v. Spain*, 29 April 2003, [61].

contradicted the ordinary meaning of the Hague Convention;¹³⁴ that the procedure followed by national courts was not consistent with the aim and object of the Hague Convention;¹³⁵ or that the national Ministry deprived the Hague Convention of its very purpose.¹³⁶ The Court also reviews the national courts' judgments by interpreting the Hague Convention in an authoritative way. It indicates the *correct interpretation* of the Hague Convention by way of correcting national courts¹³⁷ and it ascertains the meaning of the text by considering its Explanatory Report,¹³⁸ its purpose and aim, the interpretation followed by national courts of other members States,¹³⁹ and by using Article 31 of the VCLT.¹⁴⁰ These instances have been depicted as signs of growing boldness.¹⁴¹

The transposition of external PIL standards under the scope of the positive obligations of Article 8 ECHR qualifies in effect as *integration*. The Court thinks that as insofar as Article 8 ECHR is examined in light of the Hague Convention, any weakening of the Hague Convention guarantees leads automatically to weakening the guarantees under Article 8 ECHR, and, hence, national authorities no longer enjoy exclusive competence to interpret and apply the Hague Convention.¹⁴² In this series of cases, the Court openly asserts a role that transforms its jurisdictional confines: it becomes a “player” who [...] participate[s] in the development of an international jurisprudence relating

¹³⁴ *Monory*, [81].

¹³⁵ *Bianchi*, [92].

¹³⁶ *Iosub Caras*, [36].

¹³⁷ *Bianchi*, [83].

¹³⁸ *Monory*, [76], [81]; *Iosub Caras*, [36]; *R.R. v. Romania (No 1)*, 10 November 2009, [118]-[120].

¹³⁹ *Monory*, [76], [81].

¹⁴⁰ *Bianchi*, [83].

¹⁴¹ Beaumont, (note 122), 51.

¹⁴² *Monory*, [81]. Also *Bianchi*, [92]; *Carlson*, [73].

to cross-border abductions and the Hague Convention in particular¹⁴³ and whose practice will have ‘a dramatic impact on the [Hague] Convention’.¹⁴⁴ Similarly to the cases previously discussed (*Rantsev*, *Taşkin*, *Tătar*) PIL norms have such a dramatic effect on the interpretation of the ECHR that they have effectively been transposed under the ECHR and the Court supervises their implementation. Such a practice questions the limits of the ECtHR’s jurisdiction to interpret and apply the ECHR and sets aside the applicable law before the Court.

8.9 Conclusions

This Chapter has illustrated the influential impact of PIL norms when reading positive obligations under the ECHR. In line with other studies, a common justification for this increasing practice of the Court is the guarantee of practical and effective rights.¹⁴⁵ Occasionally, the judgments contained a vague reference to the need to take changing conditions in member States into account without, however, invoking explicitly the dynamic interpretation of the ECHR. Nonetheless, the reliance upon PIL norms was the material factor for justifying and introducing positive obligations under the scope of the ECHR (*Öneryildiz*, *Opuz*, *M.C.*, *Siliadin*, *Rantsev* and the international abduction cases). The participants in the Court’s system are well aware of this fact. In the great majority of the previously discussed cases both the applicants and the

¹⁴³ L. Silberman, ‘Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence’ Institute of International Law and Justice (New York University, School of Law), Working Paper 2005/5, 32, available at <www.iilj.org>.

¹⁴⁴ *Ibid.* L. Walker, P. Beaumont, ‘Shifting the Balanced Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice’ (2011) 7 *JPrivIntL* 231, 238.

¹⁴⁵ Mowbray, (note 2), 221.

third-party interveners before the Court specifically advanced PIL related argumentation to support their claims. The Court in turn appears to warmly welcome this approach by openly endorsing their arguments and their supporting documentation. Special attention should be paid to the role of Interights in the *Opuz*, *M.C.* and *Rantsev* cases.

Crucially, the interpretative impact derived from PIL norms was significant despite the fact that in the great majority of the cases there was clearly no general consensus among member States (*Opuz*, *M.C.*, *Siliadin* cases). The Court also stepped into fields of law where States traditionally enjoyed a great margin of appreciation, such as in the area of ensuring the effective protection of the individual by having resort to criminal sanctions (*Öneryildiz*, *Opuz*, *M.C.*, *Siliadin*, *Rantsev* cases),¹⁴⁶ in the environment related cases (*Taşkin*, *Öneryildiz*, *Tătar* cases), and in the immigration context (*Rantsev* case).

The fact that the Court, in certain instances, construes a common denominator by certain PIL norms and subsequently reads and transposes this denominator in its analysis leads to indirectly applying, or even integrating detailed external standards into the ECHR (*Opuz*, *Taşkin*, *Tătar*, *Rantsev*).¹⁴⁷ This enterprise, however, poses certain difficulties. The first difficulty relates to the danger of disregarding fundamental contextual nuances in the process of forming a denominator out of a variety of PIL norms. It is submitted that when the Court develops the ECHR and PIL it should be very cautious of such concerns.

¹⁴⁶ Concurring Opinion of Judge Tulkens in *M.C.*, [2].

¹⁴⁷ C.L. Rozakis, 'The Particular Role of the Strasbourg Case-Law in the Development of Human Rights in Europe' (2010) *Nomiko Vima* 20, 26.

The second difficulty brings the role of the Court into play, since the methods used to interpret the ECHR reflect the role that the Court assumes.¹⁴⁸ Being incumbent with interpreting and applying the Convention, the imposition of such detailed external PIL norms on member States *via* the positive obligations under the ECHR seriously stretches the limits of the Court's jurisdiction and questions the boundaries of the interpretation task. For example, finding in *Rantsev* a violation of Article 2 ECHR on the basis that Cyprus had failed (according to the Court) to apply the procedures envisaged under the bilateral Treaty on Legal Assistance in Civil, Family and Criminal Law matters is clearly beyond the Court's jurisdiction. All the more, in the series of judgments concerning the international abduction of children the Court practically applies the Hague Convention and supervises the national authorities' actions according to the external PIL norms. Conversely, integrating PIL norms also means asserting authority over them.¹⁴⁹ On one hand, the receptiveness of the Court's reasoning to PIL norms mitigates fragmentation through harmonisation of the ECHR to other relevant PIL norms. On the other hand, however, this practice also paves the way to more fragmentation of PIL, since the Court claims to authoritatively interpret other PIL norms by way of correcting the alleged shortcomings of national courts' decisions, as was seen in the international abduction related cases.

¹⁴⁸ *Ibid.*, 26-27.

¹⁴⁹ T. Broude, 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation', in T. Broude, Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (Hart Publishing, Oxford, 2008) 99, 112.

9. Using public international law norms as a material factor to assess the proportionality of a restriction to a right under the ECHR

This Chapter investigates the practice of the Court to consider PIL norms when assessing whether or not a given restriction to a right under the ECHR is proportionate. It is typical in the jurisprudence that the Court acknowledges many factors when it applies the so-called proportionality principle, varying from the specific factual circumstances to legal considerations.¹ The cases that will be examined reveal that in certain instances the reliance upon PIL norms may be one of the factors for finding a restriction disproportionate to the ECHR. Crucially PIL norms may, in fact, qualify as a determinative element in the Court's reasoning. The Chapter discusses three judgments delivered by the Grand Chamber.

The first case is the *Tănase v. Moldova* in which the applicant, an ethnically Romanian and Moldovan politician, claimed for a breach of his right to stand as candidate in elections and to take his seat in Parliament if elected due to his ethnicity.² He complained that although he was elected as an MP in the national elections in Moldova, he had to renounce his second (Romanian) nationality for his mandate to be confirmed by the Constitutional Court and to be able to take up his public position. The application was heard by the

¹ Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, (Intersentia, Oxford, 2002).

² Article 3 of the First Additional Protocol to the ECHR provides that 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

Chamber; and subsequently by the Grand Chamber, upon a request for a referral by the Government.³

The Chamber held that, even though the restriction was prescribed by law and served a legitimate aim, it was not proportionate. When assessing the proportionality of the interference it was highlighted that there were alternative methods available to the State in order to ensure the loyalty of its MPs. The Court also took cognisance of the member States' practice in this area, Moldova's obligations under the European Convention on Nationality (ECN)⁴ and various Reports and Opinions published by international bodies regarding Moldova's Electoral Code.

Article 17 (1) of the ECN provides that 'nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party'. The European Commission against Racism and Intolerance (ECRI) and the European Commission for Democracy through Law (Venice Commission) had critically reviewed Moldova's Electoral Code as being at variance with the ECN and the ECHR and recommended its immediate revision.⁵ The Court also cited the views of the Parliamentary Assembly's Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe and other international bodies, which were alarmed by Moldova's legislation.⁶

³ *Tănase and Chirtoacă v. Moldova*, 18 November 2008; *Tănase v. Moldova*, 27 April 2010, (Grand Chamber).

⁴ European Convention on Nationality (concluded on 6 November 1997; entered into force on 1 March 2000) ETS 166 (ECN).

⁵ ECRI, 3rd Report on Moldova (adopted on 14 December 2007; published on 29 April 2008) CRI (2008) 23, [16], [18], available at <http://www.coe.int/ecri>; Venice Commission, Joint Opinion on the Election Code of Moldova as of 10 April 2008, Opinion No 484/2008 (23 October 2008), CDL-AD (2008)022, [30]-[32], available at <http://www.venice.coe.int>.

⁶ *Tănase*, [36]-[39].

Moldova strongly contested not only the Chamber's final conclusion before the Grand Chamber, but also the methodology employed. It raised an objection *ratione materiae* concerning the use of PIL norms for interpreting the ECHR. Moldova's concern was that the significant weight accorded to its obligations under the ECN had no place within the scope and the interpretation of the ECHR.⁷ It further stressed that the ECN was ratified when there were fewer dual nationals and, consequently, it was not deemed necessary to enter a reservation under Article 17 ECN regarding the rights and duties of dual nationals. In any event, it continued, it had the discretion to denounce and/or re-ratify the ECN by inserting a reservation to the said provision.⁸ Moldova also criticised the Chamber's approach insofar as its inclusion of the views of other international bodies in its reasoning.⁹

On the other hand, the applicant argued that any emerging consensus among European States was a relevant factor for consideration by the Court and that the obligations assumed under the ECN, as well as the opinions of other international bodies, cannot be ignored when assessing the proportionality of the restriction to a right under the ECHR.¹⁰ The Romanian government, which was granted leave to intervene before the Grand Chamber, took the same position.¹¹

This is the second case in which a respondent State raises and strongly objects to aspects of the Court's practice of taking relevant PIL norms into account when construing the ECHR before the Grand Chamber. The first

⁷ *Tănase* (GC), [124].

⁸ *Ibid*, [135], [137].

⁹ *Ibid*, [138].

¹⁰ *Ibid*, [145].

¹¹ *Ibid*, [130], [152].

instance was the *Demir and Baykara* case in 2008, in which Turkey objected to the inclusion of the European Social Charter in the Court's reasoning.¹² The Grand Chamber responded to Moldova's concerns in the same vein that it had responded to Turkey in *Demir and Baykara*. It asserted that it has consistently held that it must take relevant PIL norms into account, in particular those stemming from the Council of Europe organs, in order to interpret the ECHR and to establish whether or not a common European standard exists. The Grand Chamber in *Demir and Baykara* had also stressed the search for 'common ground among the norms in international law'¹³ and for 'the common international or domestic law standards of European States'.¹⁴ The Court is particularly inclined towards conceptualising its reliance upon PIL norms by invoking consensus. Chapters 7 and 8 demonstrated, however, that the European consensus idea mainly serves as a rhetorical tool for legitimising the Court's judgments. Interestingly, the Court in *Tănase* took a step further and openly proclaimed that

[i]t is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them.¹⁵

It becomes clear that the Court is not willing to identify any concrete criteria or guidelines with respect to its methodology. Although it is indeed upon the Court to ascertain questions of relevance and weight afforded to external PIL

¹² *Infra* 7.4.

¹³ *Demir and Baykara v. Turkey*, 12 November 2008, (Grand Chamber), [78].

¹⁴ *Ibid*, [76].

¹⁵ *Tănase* (GC), [176].

norms, it is also obliged to give reasons for its judgments and guarantee a transparent and legitimate legal reasoning.¹⁶

Turning to the proportionality of the restriction to the applicant's right, the Court ascertained the existence of a consensus among member States which revealed that where multiple nationalities are permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as a member of the Parliament.¹⁷ Yet, a different approach could be justified where special historical or political considerations exist.¹⁸ However, such a different approach would be subject to the passage of time (the said restriction had been introduced since 1991) and, most importantly, to the broader context of Moldova's obligations and the practice of international bodies.¹⁹ The Grand Chamber, by way of endorsing the Chamber's reasoning, shared the concerns of the international bodies on the discriminatory impact of the Moldova's Election Code and the adverse effect on effective participation of various political forces in the democratic process. It also underlined Moldova's obligation pursuant to Article 17 of the ECN to provide the same rights to dual nationals²⁰ and, finally, found a violation of Article 3 AP 1.

The *Sejdić and Finci v. Bosnia and Herzegovina* case²¹ is a similar case to *Tănase*. The applicants complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on their ground of their Roma and Jewish origin. According to the Constitution of

¹⁶ According to Article 51 (1) ECHR 'reasons shall be given for the judgement of the Court'.

¹⁷ *Tănase* (GC), [171]-[172].

¹⁸ *Ibid*, [119]-[135], [123]-[128], [172].

¹⁹ *Ibid*, [176].

²⁰ *Ibid*, [177].

²¹ *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009, (Grand Chamber).

Bosnia and Herzegovina, only individuals declaring affiliation to one of ‘constituent peoples’ could run in elections.

The Grand Chamber followed the same legal reasoning. It accepted that the pertinent provisions of the State Constitution (which were provisions of the Dayton Peace Agreement) could provide for a legitimate restriction to the applicants’ right under Article 3 AP 1, serving the interest of the restoration of peace.²² In assessing the proportionality and the necessity of the restriction, however, the Court took a number of factors into account. The first was the passage of time; many positive developments have occurred in Bosnia and Herzegovina since the Dayton Agreement.²³ Secondly, the Court admitted that an automatic and total prohibition of the applicants’ ineligibility to stand for elections is, in principle, problematic.²⁴ Thirdly, and importantly for the present purposes, the proportionality of the restriction was assessed against various international obligations that Bosnia and Herzegovina had voluntarily undertaken. The ratification of a Stabilisation and Association Agreement with the European Union stipulated its obligation to amend the electoral legislation ensuring full compliance with the ECHR. The same obligation had been assumed by virtue of becoming a member State of the Council of Europe. Bosnia and Herzegovina had specifically agreed upon reviewing its legislation with the assistance of the Venice Commission. The Court also noted that the Parliamentary Assembly had repeatedly reminded the respondent State of its post-accession obligation and that the Venice Commission had issued a series

²² Also *infra* 6.3.

²³ *Sejdić and Finci* (GC), [47].

²⁴ *Ibid*, [48].

of detailed relevant Opinions.²⁵ It was concluded that and the impugned measure was disproportionate and thus Article 3 AP 1 had been breached. In both *Sejdić* and *Tănase* cases the consideration of PIL norms in assessing the proportionate of the restriction to the rights under the ECHR was material.

The last judgment that will be examined in this Chapter forms part of the series of cases related to the Hague convention on international abduction.²⁶ Chapter 8 discussed how the Grand Chamber in *Neulinger and Shuruk* reaffirmed the Court's practice of reading Article 8 ECHR in light of the Hague Convention.²⁷ It was demonstrated that the Court has incorporated the detailed provisions of the Hague Convention concerning the return of the abducted child into the positive obligations of Article 8 ECHR. This involves, for example, standards on the diligent and expeditious return of the child within a short period of time, and the enforcement of the decision to return it. In these cases, the common scenario before the Court is that the applicant is the left-behind parent. There are, however, instances where the applicant is the parent who abducted his/her child and who claims that returning it would be in violation of Article 8 ECHR. This was the case in *Neulinger and Shuruk*. The applicants – a mother who had abducted her son and her son - alleged that by ordering the child's return to Israel, the Federal Court of Switzerland had breached their right to respect for their family life under Article 8 ECHR. Their main argument was that their circumstances fell within the ambit of Article 13 (b) of the Hague Convention, which provides for an exception to the return. It reads that

²⁵ *Ibid*, [21]-[25], [49].

²⁶ Convention on the Civil Aspects of the International Child Abduction (concluded on 25 October 1980; entered into force on 1 December 1983) 1343 UNTS 89 (Hague Convention).

²⁷ *Neulinger and Shuruk v. Switzerland*, 6 July 2010, (Grand Chamber), [131]-[132]; *infra* 8.8.

[...] the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

[...]

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

They further argued that returning the child to Israel would be in breach of its best interests and that Article 8 ECHR should be also construed in light of the best interests of the child - a primary consideration according to Article 3 (1) Convention on the Rights of the Child.²⁸

In previous similar cases the Court had accepted that returning the child could be a restriction to the parent's (and child's) right to family life, but it always found this restriction to be proportionate and necessary. Although the Court applied a strict and rigorous standard of review when national authorities were applying the Hague Convention to the return of the child, it merely subjected the exceptions to its return – like Article 13(b) - to the 'arbitrary decision' standard. It refused to substitute the national authorities' assessment of facts and it did not engage with reviewing the interpretation and application of Article 13 of the Hague Convention, unless there was an arbitrary decision.²⁹ In *Maumousseau and Washington*, for example, the Court only asserted *in abstracto* that the interpretation of Article 13 (b) of the Hague Convention was compatible with the child's best interests without, however,

²⁸ Convention on the Rights of the Child (adopted by UNGA Res. 44/25 (20 November 1989) UN Doc A/RES/44/25; entered into force on 2 September 1990) 1577 UNTS 3 (CRC).

²⁹ *Eskinazi and Chelouche v. Turkey* (Admissibility Decision), 6 December 2005, 21-22; *Susanne Paradis and others v. Germany* (Admissibility Decision), 15 May 2003, 13.

examining the specific circumstances.³⁰ This is in direct contrast to the cases which were examined in Chapter 8, where the Court was not at all hesitant to strictly review and even *correct* the construction of the Hague Convention as employed by national courts when it came to the return of the child. In terms of the ECHR this means that the Court did not subject the (non-) application of Article 13 (b) by national authorities to the guarantees of Article 8 ECHR. The importance of effectively preserving and applying the Hague Convention and its aims were accorded significant weight in the Court's reasoning that it, perhaps, outweighed the guarantees under Article 8 ECHR.³¹

The Grand Chamber in *Neulinger and Shuruk* came to change this case law. It was made clear that the obligations under Article 8 ECHR should be interpreted by taking both the Hague Convention and the CRC into account. The Court also stressed that it must preserve the special character of the ECHR as an instrument of the European public order and, therefore, it should review whether or not the application of the Hague Convention by domestic courts was in compliance with Article 8 ECHR.³² It analysed the protection of the best interests of the child under Article 8 ECHR by relying on relevant PIL norms.³³ According to the Court 'a broad consensus, including in international law'³⁴ existed for considering this standard in every decision relating to children. It was highlighted that this standard was referred to in certain international instruments: Article 3 (1) CRC, the Declaration on the Rights of

³⁰ *Maumousseau and Washington v. France*, 6 December 2007, [71]; cf. Dissenting Opinion of Judge Zupančič joined by Judge Gyulumyan, 39-40. E. Sthoeger, 'International Child Abduction and Children's Rights: Two Means to the Same End' (2011) 32 *Michigan JIL* 511, 521-522.

³¹ *Maumousseau and Washington*, [73]; cf. Dissenting Opinion of Judge Spielmann in *Neulinger and Shuruk*, 8 January 2009, 41.

³² *Neulinger and Shuruk* (GC), [132]-[133], [138], [141].

³³ *Ibid*, [49]-[56], [135]-[136].

³⁴ *Ibid*, [135].

the Child,³⁵ Article 24 (2) of the EU Charter³⁶ and Articles 5 (b) and 16 (d) of the Convention on the Elimination of All Forms of Discrimination against Women.³⁷ Since none of these provisions further elaborate on the actual meaning of best interests the Court relied on a variety of PIL documents and academic authorities in order to identify tangible criteria. Among other material, mention was made to the Guidelines on Determining the Best Interests of the Child issued by the UN High Commissioner for Refugees and General Comments 17 and 19 of the Human Rights Committee. The Court asserted that the child is an individual, having rights, feelings and opinions of their own and that the ‘best interests’ refers to the child’s well-being as determined by its individual circumstances, such as age, level of maturity and experiences.³⁸ The Court did not neglect to underline that the ‘best interests’ of the child is a concern inherent in the Hague Convention.

Having discussed the scope of Article 8 ECHR in light of the best interests of the child in PIL, the Court made clear that it will scrutinise whether or not the conditions for the enforcement of the return of the child were in conformity with Article 8 ECHR and whether domestic courts examined and balanced the entire family situation.³⁹ On the basis of the facts it found that the return of the child, either with or, all the more, without his mother, to Israel would expose him to a serious psychological harm (Article 13(b) Hague Convention). It was concluded by an overwhelming majority of sixteen to one

³⁵ Adopted by UN General Assembly Resolution 1386 (XIV), 10 December 1959.

³⁶ Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 2000/C 364/01, 18 December 2000.

³⁷ Convention on the Elimination of All Forms of Discrimination against Women (concluded on 18 December 1979; entered into force on 3 September 1981) 1249 UNTS 13 (CEDAW).

³⁸ *Neulinger and Shuruk* (GC), [49]-[56].

³⁹ *Ibid*, [139]-[140].

that the return of the child would be a disproportionate restriction to both applicants' right to family life and in breach of the ECHR.

Although *Neulinger and Shuruk* involved quite exceptional circumstances, the Grand Chamber changed the Court's approach as a matter of principle, something that only Judge Zupančič admitted in his Dissenting Opinion. In the Court's previous case law, the aims, priorities and standards of the Hague Convention served a primary role in the Court's reasoning and the construction of Article 8 ECHR, radically upsetting the structure and priorities of the ECHR. The fact that Article 13 (b) of the Hague Convention is an exceptional 'escape clause' to the return of the child which had to be strictly interpreted had led the Court to not review the compatibility of a decision to return the child against the standards of the right to a family life under Article 8 ECHR. As the Grand Chamber stressed, the Hague Convention is, after all, an international instrument of a procedural nature and not a human rights treaty protecting individuals;⁴⁰ it is rather a jurisdictional mechanism which serves the need to reinstate the *status quo* prior to the removal of the child.⁴¹ Hence, in *Neulinger and Shuruk* the Court properly applied the proportionality test from a human rights law perspective. Interestingly, this happened by interpreting Article 8 ECHR in light of other relevant PIL norms, those regarding the best interests of the child. As it has been already noted - especially in *Rantsev*⁴² - it becomes clear, once again, how the construction of a new relevant PIL background to the case and the inclusion of new pertinent PIL norms lead to different interpretative outcomes. Yet the review of the

⁴⁰ *Ibid*, [145].

⁴¹ Sthoeger, (note 30), 513.

⁴² *Infra* 7.5.

application of the Hague Convention against the best interests of the child and Article 8 ECHR seems to be a source of unease for the Court. In many instances the Grand Chamber attempted to somehow affirm that its judgment in no way undermined the effective application of the Hague Convention.⁴³ This is also clear from the large number of Concurring and Separate Opinions attached to the judgment stressing the importance of applying the Hague Convention in the fight against child abduction.⁴⁴

Of interest is also that, in the particular circumstances, each set of relevant PIL norms (Hague convention and the PIL norms concerning the best interests of the child) leads to a different construction of the ECHR *vis-à-vis* PIL. More specifically, the consideration of the pertinent provisions of the Hague convention weakens the guarantees under Article 8 whereas the PIL norms on the child's best interests reinforce the effectiveness of Article 8 ECHR. In this sense, the use by the Court of these two different sets of relevant PIL norms not only informs the construction of Article 8 ECHR but also balances the equilibrium between the ECHR's receptiveness to PIL and the ECHR's effectiveness.

The cases discussed in this Chapter demonstrate that the Court's interpretative practice of construing the ECHR in light of PIL norms infiltrates every step of its legal reasoning, including the assessment of the proportionality of an interference to a right protected under the ECHR. The scrutiny of the impugned measure takes place against a series of relevant factors, but the reliance on PIL norms, for ascertaining whether or not the

⁴³ *Neulinger and Shuruk* (GC), [134], [137], [145].

⁴⁴ Concurring Opinion of Judge Lorenzen joined by Judge Kalaydjieva, 54; Concurring Opinion of Judge Cabral Barreto, 56; Concurring Opinion of Judge Malinverni, 57; Joint Separate Opinion of Judges Jočienė, Sajó and Tsotsoria, 61-62 (point 4).

restrictions to Article 3 AP 1 were disproportionate, serves a significant role in the Court's reasoning.

The *Tănase* case is the second time that the respondent State challenged the use of PIL before the Grand Chamber. This indicates that member States have started to directly question the Court's practice insofar the conditions that have to be met for considering PIL norms when interpreting the ECHR. Yet *Tănase* is in the same spirit, and follows the same methodological outline, as *Demir and Baykara*. The Court did not add much but suggests that it is not willing to adopt very transparent methodology.

The Grand Chamber in *Neulinger and Shuruk* paves the way to a more balanced approach toward the interpretative impact of the Hague Convention on the construction of the ECHR. The Court, for the first time, rigorously reviewed the proportionality of the application of the Hague Convention against the guarantees of the right to a family life under the ECHR by employing a second set of relevant PIL norms concerning the best interests of the child.

Final Conclusions

This thesis showed that the Court's practice of interpreting and applying the ECHR by taking cognisance of PIL norms penetrates every step of its legal reasoning. It was demonstrated that the Court employs PIL norms to define certain terms embodied in the text of the ECHR (Chapter 4) and to define certain concepts necessary for applying the Convention, for example, the concept of jurisdiction (Chapter 3). Chapter 7 discussed how PIL norms are used to enlarge the applicability of rights and freedoms under the ECHR, Chapter 8 analysed the ECHR's expansion *ratione materiae* by reading detailed positive obligations into its scope and Chapter 9 examined certain cases in which the consideration of PIL norms qualifies as an important factor when assessing the proportionality of a restriction to the ECHR. Moreover, the Court has a considerable practice of restricting the scope of the ECHR by finding recourse to and taking PIL norms into account. This aspect of the Court's jurisprudence is neglected in the existing literature, giving the impression that PIL norms are almost always concerned with the expansion of the ECHR. In this regard, Chapter 5 discussed the well-known cases related to the rule of State immunity and Chapter 6 presented many other instances where the Court restricts *ratione materiae* the scope of the rights under the ECHR by relying on PIL norms.

Therefore, this study concludes that taking PIL norms into account when construing the ECHR is a widely mainstreamed interpretative principle in the Court's reasoning. Legal reasoning, besides being a matter of technique,

also reflects the way in which the Court frames the relevant questions.¹ This means that the Court's style of reasoning reflects and enhances the harmonious placement of the ECHR within PIL. As it was argued in Chapters 1 and 2, if an international court's interpretation of its constitutive instrument is inclusive of and receptive to the consideration of other relevant PIL norms, it alleviates (many of) the difficulties which arise in the context of fragmentation of PIL. This is evidence that, in principle, the ECtHR does not endanger the unity of PIL.² Notably, the parties before the Court also frame their claims and arguments by using PIL norms, including the applicants (*Siliadin, D.H., M.C., Rantsev*), the NGOs which were granted leave to intervene as third parties (*Al-Skeini, Vo, D.H., Rantsev, Opuz, M.C.*) or other third-party interveners such as the Venice Commission in the *Bijelic* case.

1. The Court's interpretative practice to take cognisance of other PIL norms is an autonomous interpretative principle in its jurisprudence

The main conclusion of the present thesis is that the ECtHR has developed an autonomous interpretative principle of taking PIL norms into account when interpreting the ECHR. Contrary to the views supported in literature, it has been demonstrated that the Court employs this interpretative principle in a distinct fashion to other seminal interpretative principles, namely the comparative interpretation, the dynamic interpretation and the principle of effectiveness.

¹ J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press, Manchester, 1993) 29.

² *Infra* 1.4, 2.1.

The Court's practice of invoking this principle in a regular fashion witnesses that interpreting the ECHR by taking cognisance of PIL is one of the Court's priorities.³ Also, the fact that the principle has acquired certain autonomy to other principles of interpretation evidences that the Court has enriched and sophisticated its legal reasoning to accommodate PIL norms.

a) The synergetic relation of the interpretative principles

In many instances the Court invokes and applies all four interpretative principles together. The synergetic application of these principles leads to an expansion of the applicability and the scope *ratione materiae* of the rights and freedoms under the ECHR. This was shown in Chapters 4 (*Zolotukhin*) and 9 (*Tănase*) and in a series of cases in Chapter 7 (*Opuz, Scoppola, Demir and Baykara, D.H., Oršus, Rantsev*). Chapter 8 extensively discussed many cases in which the Court read detailed positive obligations into the scope of the ECHR by invoking the need for practical and effective rights, (occasionally) the dynamic interpretation and the principle of taking cognisance of PIL norms (*Öneryildiz, Opuz, M.C., Siliadin, Rantsev; Neulinger* and the case-law concerning the Hague Abduction Convention). Therefore, the specificities of the ECHR – the need for effective and practical guarantees and dynamic interpretation – harmoniously coexist with and are best served by reading the ECHR in light of other PIL norms.

Nonetheless, even when these four interpretative principles are applied as a matter of synergy, the distinctive nature and function of the interpretative

³ *Contra* M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, New York, 2010) 383.

principle of taking other PIL norms into account becomes clear. Firstly, the synergetic relationship between the interpretative principles and the weight accorded to each of them may evolve. This was analysed in Chapter 7 when the *Demir and Baykara* case was compared to the previous pertinent case-law.⁴ In the *Demir and Baykara* (judgment by the Chamber) and *Wilson, National Union of Journalists and others* cases, the Court took PIL norms into account in order to reinforce and confirm an interpretation of the ECHR in light of the specific circumstances of the applications. In contrast, the Grand Chamber, in the *Demir and Baykara* case, took the same PIL norms into account and expanded the scope of Article 11 ECHR as a matter of law. In all three cases, the Court cumulatively invoked the principle of effectiveness, the dynamic interpretation and the interpretation by taking PIL norms into account. Yet, in the *Demir and Baykara* case a greater weight was accorded to the Court's reliance upon PIL.

Secondly, and most importantly, it has been shown, in many instances, that the Court cumulatively invokes these principles, the driving force behind its reasoning is, in fact, the construction of the ECHR by taking cognisance of PIL norms. The instrumental impact of PIL in the interpretation process and in the final outcome of the case resulted in the Court overruling its previous case-law in the *Zolotukhin*, *Opuz*, *Scoppola*, *Demir and Baykara*, *D.H.*, *Oršus*, *Öneryildiz*, *M.C.*, *Siliadin*, *Rantsev*, *Neulinger* cases.

⁴ *Infra* 7.4.

b) Distinguishing the interpretative principle of taking other PIL norms into account from the comparative (or consensual) interpretation

One of the important findings of this study is that the interpretation of the ECHR by consideration of PIL norms is a separate interpretative principle to the comparative (or consensual interpretation). The idea of consensus, and in particular the European consensus, is seminal in the Court's reasoning insofar as the reliance upon PIL norms is concerned. The Grand Chamber in the *Demir and Baykara* and *Tănase* cases stated that the interpretation of the ECHR by taking PIL norms into account is based on the existence of a European consensus, namely common international and/or domestic law standards accepted by the vast majority of States. On certain occasions, this methodology involves the identification or the construction of an alleged consensus by conflating member States' practice and PIL norms; an early pertinent example is the *Marckx* case. This is why legal scholars treat the Court's practice of taking PIL norms into account as an integral part of the comparative interpretation. Nonetheless, the interpretative principle of taking other PIL norms into account should not be included under the comparative principle, nor should it be treated as a type of European consensus.⁵

The Court has moved away from defining commonly accepted standards as those found solely in the legislation and practice of member States. In Chapter 4 the analysis of the *Vo* and *Evans* cases demonstrated that

⁵ *Contra* C. Ovey, R. White (eds.), *Jacobs and White, The European Convention of Human Rights* (Oxford University Press, Oxford, 2010) 168; K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) *PL* 534, 548; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers, Leiden-Boston, 2009) 59.

the Court separately examined the absence of a common denominator in national and in international standards. Hence, even in instances where national legislation and practice converge with PIL norms, domestic and PIL norms are different sources of law and enquires.⁶ Chapters 7 and 8 proved that the consideration of PIL norms serves a decisive role in the Court's reasoning in the absence of common legal standards in national practice (*Opuz, Siliadin, M.C.*);⁷ or, all the more, when member States have contrary national practice (*M. C., Siliadin*).⁸ Chapter 8 additionally illustrated that the Court, on the basis of PIL steps into fields of law where States traditionally enjoy a great margin of appreciation, as in the area of whether the effective protection of the individual can be ensured only by means of criminal sanctions (*Öneryildiz, Opuz, M.C., Siliadin, Rantsev*), in environment related cases (*Taşkin, Öneryildiz, Tătar*) and in the immigration context (*Rantsev*). The Court has disassociated the consideration of PIL norms from national practice. It is not exceptional for the Court to rely on PIL norms in the absence of European consensus. PIL does not serve a role supplementary to the comparative interpretation, in establishing or strengthening or weakening the existence of State practice;⁹ rather its impact on the interpretation process is instrumental and autonomous to States' practice.

Moreover, the Court's practice of taking PIL norms into consideration is distinguished from the comparative interpretation and its European

⁶ Also, *Marckx* (Pl), [41]; *V. v. United Kingdom*, 16 December 1999 (Grand Chamber), [64], [73]-[77]; *Mangouras v. Spain*, 28 September 2010, (Grand Chamber), [59].

⁷ Also, *Goodwin v United Kingdom*, 11 July 2002 (Grand Chamber), [85]; Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Louciades, Cabral Barreto, Tulkens and Pellonpää in *Odièvre v. France*, 13 February 2003 (Grand Chamber), [15].

⁸ G. Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (2012), 8, 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836.

⁹ *Contra* F. Vanneste, *General International Law before Human Rights Courts* (Intersentia, Antwerp-Oxford-Portland, 2010) 276-277, 285 (footnote 1047).

consensus underpinnings, since the Court employs PIL norms which are not evidence of a *European* consensus. Chapters 4, 7 and 8 demonstrated that PIL norms have a determinative impact on the Court's reasoning, without being European developments or confirming the existence of a common regional perspective.¹⁰ Rather they were related to the IACHR and the case-law of the IACtHR or specialised regional treaties (for example, Inter-American Convention concerning the violence against women) or specific international instruments, such as the ICC Statute (*Vo, Zolotukhin, Scoppola, Opuz, D.H.*). Since in these instances, the European nexus is weak, if existent at all,¹¹ it is clear that the Court uses the European consensus as a rhetorical tool to legitimise the use of PIL in its judgments. The invoked consensus legitimises progress, giving the false and positivistic impression of the existence of common European standards which are to be found and not created by the Court.¹²

c) Distinguishing the interpretative principle of taking other PIL norms into account from the principle of effectiveness

The principle of effectiveness attains a cardinal place in the Court's jurisprudence in according to the rights and freedoms under the ECHR their full weight and effect. Even though that principle converges with the principle of taking PIL norms into account in many instances, there is a considerable proportion of case-law in which they diverge.

¹⁰ *Contra* L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell Intl LJ* 133, 161.

¹¹ G. Cohen-Jonathan, J.-F. Flauss, 'La Cour Européenne des Droits de l' Homme et Droit International (2009)' (2009) LV *AFDI* 765.

¹² Christoffersen, (note 5), 62; G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for an International Lawyer' (2010) 21 *EJIL* 509, 529-530; Dzehtsiarou, (note 5).

In Chapters 5 and 6 it was shown that the Court marginalises the principle of effectiveness in its reasoning when the interpretation of the ECHR by taking PIL norms into account restricts the scope of the rights under the ECHR. In fact, the Court hides the tension and conflict between the principle of effectiveness and the principle of taking cognizance of PIL norms. The reference to the guarantee of practical and effective rights is made, at best, in passing; the Court stresses, instead, the necessity of not applying the ECHR in a vacuum. Conversely, in instances where the relevant PIL norms reinforce the effective protection of the rights and freedoms under the ECHR the Court fully elaborates on the necessity of applying the principle of effectiveness (for example, *Demir and Baykara*). Hence, treating the interpretative principle of relying on PIL norms as part and parcel of the principle of effectiveness falls short of explaining these cases.¹³

It should be underlined that when the two principles diverge, the principle of effectiveness preserves the specificity of the ECHR and stresses its ‘self-contained’ function, in order to ensure the most practical and effective rights possible. This is an isolationist approach insofar as the relationship of the ECHR *vis-à-vis* PIL is concerned. On the other hand, taking PIL norms into account may restrict the scope of rights and freedoms, but ensures that the ECHR is read consistently, to the extent possible, to other relevant PIL norms. This evidences that the ECtHR prioritises the need to read the ECHR by taking cognizance of PIL norms even if this would mean following an interpretation that will not accord the possible full effect to the rights under the ECHR.

¹³ *Contra* Forowicz, (note 3), 12-13; D. Rietiker, ‘The Principle of “Effectiveness” in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of *Sui Generis*’ (2010) 79 *Nordic JIL* 245, 267 *et seq.*; Ovey, White (eds.), (note 5), 73 *et seq.*

However, it cannot go unnoticed that in the *Al-Adsani*, *Prince Hans-Adams*, and *Bosphorus* cases the Court inferred such a strong interpretative impact from the PIL norms on the construction of the ECHR that it effectively set aside the minimum, core guarantees of the ECHR. It is submitted that the Court should employ a more balanced application of the principle of effectiveness and the principle of taking PIL into account. This does not entail that PIL norms should not be taken into account when they restrict the scope of the ECHR.¹⁴ If it were to be accepted that PIL norms are pertinent only insofar as they expand the scope of the ECHR, fragmentation of PIL would be addressed and mitigated only on a selective basis. Yet, the Court itself proclaims that the ECHR should be read harmoniously to other PIL norms *to the extent possible*. The principle of effectiveness should serve as a limit to the impact inferred by PIL. In a similar way, Chapter 4 highlighted instances in which the Court subjected the interpretative aid of PIL norms to the specificity of the ECHR, as in the *Siliadin* and *Van der Mussele* cases.¹⁵ The present author noted in Chapter 5 that the Grand Chamber, in its recent jurisprudence (*Cudak*, *Sabeh El Leil*), appears to adopt a slightly different legal reasoning, attempting to better balance the simultaneous application of the principle of effectiveness and the principle of taking PIL norms into account.

¹⁴ *Contra* Forowicz, (note 3), 385-387, 391.

¹⁵ *Infra* 4.4, 4.7.

d) Distinguishing the interpretative principle of taking other PIL norms into account from the dynamic interpretation

Finally, the interpretative principle to interpret the ECHR by taking PIL norms into account is also distinct from the dynamic (or evolutive) interpretation.¹⁶ There is obviously a considerable overlap between these two principles and this is why many commentators subordinate the first to the second.¹⁷ Moreover, the dynamic interpretation, namely that the ECHR must be interpreted in light of the changing conditions in member States, is closely connected to reading the ECHR in-line with legal developments, including on the international level.

The Court, in most of the cases discussed in Chapters 7 and 8, invokes these two principles in a synergetic fashion (cumulatively). Chapter 8, in particular, noted that the Court reads detailed positive obligations into the scope of the ECHR by invoking the need for practical and effective rights, the principle of taking cognisance of PIL norms and *occasionally* the dynamic interpretation. The fact that the Court does not find it necessary to refer explicitly to the dynamic interpretation may indicate that the principle of taking cognisance of PIL norms has an ‘overwhelming’ effect on the dynamic interpretation and, hence, it is deemed sufficient to ground the Court’s reasoning.

On the other hand, the application of the two principles can diverge. First, the evolutive interpretation makes reference to sources of law other than

¹⁶ 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?’ (2010) *Michigan JIL* 621, 648, 659-660.

¹⁷ A. Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law’ (2009) 9 *HRLRev* 179, 193-194, 197.

PIL, such as national law or non-legal developments. Second, the consideration of PIL norms may function as a limitation to the application of the dynamic interpretation.¹⁸ Chapters 4 and 7 discussed cases in which PIL norms were considered insufficient so as to pursue and ground a dynamic interpretation of the Convention (*Vo, Evans, Champan*).¹⁹ Third, the principle of taking PIL norms into account does not share a fundamental characteristic of the evolutive interpretation. It is generally accepted – and there is nothing in the Court’s jurisprudence to suggest otherwise – that the changing conditions in the member States’ practice could not justify reducing the protective scope of rights under the ECHR.²⁰ Consequently, the evolutive interpretation follows the higher standards, which expand the scope of the ECHR. In contrast, the interpretation by taking PIL norms into account may restrict the scope of rights (Chapters 5 and 6).²¹ Hence, the dynamic interpretation may lead to different interpretative results to the interpretation of the ECHR by taking cognisance of PIL norms.

¹⁸ A. Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 *EHRLRev* 57, 68.

¹⁹ Also, *Stummer v Austria*, 7 July 2011, (Grand Chamber), [132].

²⁰ C. Warbrick, “‘Federal’ Aspects of the European Convention on Human Rights’ (1989) 10 *Michigan JIL* 698, 716; Mowbray, (note 17); Rietiker, (note 13), 266-267; K. Dzehtsiarou, ‘Consensus from within the Palace Walls’, UCD Working Papers in Law, Criminology and Socio-Legal Studies, Research Paper No. 40/2010, 14, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678424.

²¹ Also *Mangouras* (GC), [59]-[60].

2. The PIL Norms that the Court uses

An important question for this study is to ascertain what types of PIL norms the Court takes into account. Since this thesis did not exclude *a priori* from its scope and analysis any PIL norms, it can be assessed whether the Court is receptive only or mostly to a specific set of PIL norms or whether it places the ECHR within the totality of PIL.²² According to the distinction made in the Introduction, PIL norms may be part of general international law (customary international, general principles of law, widely ratified treaties which are open to all States), other treaties and non-binding material (soft-law). In the *Fogarty*, *McElhinney*, *Al-Adsani* and *Cudak* cases the Court took the customary international rule on State immunity into account. This is the only instance examined herein in which the Court considered and brought into play customary international law. The analysis in Chapter 5 underlined the Court's hesitance, and certain misgivings regarding the scope of the rule on State immunity and its exceptions.

In the *Bosphorus* case (Chapter 6) the Court took cognisance of general principles of international law. It is not uncommon for the Court to assert that general principles of international law are included in the PIL norms that ought to be taken into account when construing the Convention. In the *Bosphorus* case, however, no clarifications were provided regarding how the principle *pacta sunt servanda* informed the interpretation of the ECHR, besides highlighting the importance of Ireland's EU membership and the need for properly functioning of international organisations. The *Bosphorus* case has to be distinguished from other cases in Chapter 6 (*Prince Hans-Adam*, *Slivenko*,

²² Cf. Forowicz, (note 3), v-vii; Vanneste, (note 9).

Waite and Kennedy, Beer and Reegan, Al-Jedda and Carson). It is submitted that in these cases, the Court afforded significant weight to certain PIL norms because they served an important function in PIL or when they reflected a well-established practice of States in PIL. The difference lies in the fact that in these instances the Court took specific PIL norms into account, whereas in *Bosphorus* the Court neither mentioned specific PIL norms nor substantiated its reference to general principles of international law. Equally vague is the Court's reference in the *Banković* case to the concept of jurisdiction in PIL, omitting to refer to a source of PIL. The Court's legal reasoning was limited to citing a series of academic authorities. Subsequently, in the *Al-Skeini* case, the Court did not identify how other international courts (including the International Court of Justice) had developed general international law in the field of extraterritorial jurisdiction. The *Al-Jedda* (Chapter 6) and *Bijelic* (Chapter 3) cases stand out, in that the ECtHR followed a sound and transparent legal reasoning when engaging with the interpretation of the UN Charter, UNSC Resolutions and State immunity issues respectively. On these occasions the Court took a position and developed PIL. Overall, the Court resorts to customary international law and general principles of law, when necessary, and determines to what extent it will inform the ECHR by way of interpretation. From the cases examined, it appears that in certain instances the Court does not feel at ease, when having to pronounce on complex or unsettled questions. under general international law. Although a cautious position is welcome, it is stressed that the ECtHR has the authority to pronounce on such questions and any hesitance or cautiousness should not prevent it from discussing the cases and analysing the underlying issues.

On the other hand, international treaties qualify as the most common source of reference in the case-law. This is in contrast to the conclusions drawn from the short survey of the practice of international courts and tribunals in Chapter 2. International courts and tribunals – with the exception of the IACtHR – do not have an extensive practice of engaging with international treaties other than those at issue in the cases before them. Many of the treaties that the Court used form part of general international law, being widely ratified by and open to all States. As it was emphasised throughout the thesis, the Court reads the external to the ECHR treaty provisions into their treaty context. In practice, this means that the Court takes cognisance of the interpretation of these treaties by (if existent) their supervisory bodies. The alignment of the Court's jurisprudence with the practice of other supervisory bodies is a forceful argument before the Court, but in the *Al-Skeini* case with respect to the issue of exercising jurisdiction.

Examples from the Court's case law of such treaties is the United Nations Charter²³ and the International Covenant on Civil and Political Rights,²⁴ which was read in conjunction with the Human Rights Committee general comments²⁵ or its views in individual communications.²⁶ The Court also takes cognisance of UN treaties which have a specific subject matter, such as the Convention against Torture,²⁷ the Convention on the Rights of the Child,²⁸ the Convention on the Elimination of Racial Discrimination²⁹ and the

²³ *Infra* 6.2.1, 6.5.

²⁴ *Infra* 4.6, 5.2, 7.2.

²⁵ *Infra* 3.3, Chapter 9.

²⁶ *Infra* 7.3.1.

²⁷ *Infra* 4.3, 5.2.

²⁸ *Infra* 8.3, Chapter 9.

²⁹ *Infra* 6.2.2.

Convention on the Elimination of Discrimination against Women,³⁰ which was read in light of the Committee's general recommendations³¹ and its views in individual communications.³² Other examples of specialised treaties of a UN origin are the UN Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons,³³ the recent UN Convention on Jurisdictional Immunities of States³⁴ and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.³⁵

From the cases examined, it can be concluded that the Court refers to many international treaties which form part of general international law and have a specific focus, but they stem from other international organisations. One example is the International Labour Organisation and the Court's references to a series of ILO Conventions.³⁶ The Court placed these treaties against the background of the views of the ILO Committee of Experts,³⁷ the recommendations of the ILO Committee on Freedom of Association³⁸ and the ILO Committee on Freedom of Association.³⁹ The Court has also an extensive case-law referring to the Hague Convention on the Civil Aspects of International Child Abduction and its Explanatory Report.⁴⁰

The Court additionally uses international treaties that come from the Organisation of the American States. These are treaties of regional scope on

³⁰ *Infra* 7.3.1, 7.3.2., 8.3, Chapter 9.

³¹ *Infra* 7.3.1, 7.3.2., 8.3.

³² *Infra* 7.3.2, 8.3.

³³ *Infra* 7.5, 8.7.

³⁴ *Infra* 5.2.

³⁵ *Infra* 8.6.

³⁶ *Infra* 4.4, 4.5, 7.4.

³⁷ *Infra* 4.4, 7.4.

³⁸ *Infra* 7.4.

³⁹ *Infra* 7.4.

⁴⁰ *Infra* 8.8, Chapter 9.

the protection of human rights: the Inter-American Convention on Human Rights and the pertinent case-law of the IACtHR,⁴¹ the Inter-American Convention on the prevention, punishment and eradication of violence against women and the relevant practice of the IACmHR.⁴²

European Union (EU) law is also encountered in the Court's judgments. The Court had regard to primary EU law, namely the Schengen Agreement and the jurisprudence of the ECJ,⁴³ the Stabilisation and Association agreement between Bosnia and Herzegovina and the EU⁴⁴ and, in many instances, the EU Charter of Fundamental Rights⁴⁵ and its interpretation and application by the ECJ.⁴⁶ As far as secondary EU law is concerned, although it is binding on EU member States, it is not binding from a PIL perspective. The Court does not seem to draw a relevant distinction, since it has a widespread practice not distinguishing between sources of law in its case-law.⁴⁷ However, it does acknowledge a differing impact on its construction of the ECHR on the basis of whether or not the States had discretion in assuming and implementing an EU obligation. The Court proclaims that when a State freely enters into an international agreement, it exercises its discretion and, therefore, it should be held responsible for a violation of the ECHR. On the contrary, in cases in which a State complies with secondary EU law (binding from the perspective of EU law), such as EU Regulations, it does not exercise discretion and, hence, the Court attempts to accommodate this to the extent possible into the

⁴¹ *Infra* 4.2, 4.6, 7.3.1.

⁴² *Infra* 7.3.2, 8.3.

⁴³ *Infra* 4.6.

⁴⁴ *Infra* Chapter 9.

⁴⁵ *Infra* 4.6, 7.2, 7.4, Chapter 9.

⁴⁶ *Infra* 7.2.

⁴⁷ *Infra* 7.3, 7.5, 8.2, 8.5.

construction of a right under the ECHR.⁴⁸ This is an interesting finding since, in practice, EU secondary norms which are not binding from a PIL perspective (for example, Directives) seem to have a stronger impact on the interpretation of the ECHR to EU primary norms which are binding PIL rules (for example, the EU treaties).

A variety of treaties concluded under the auspices of the CoE are employed in the Court's legal reasoning. The thesis has examined cases involving the CoE Statute,⁴⁹ the European Social Charter and the observations by the Committee of Independent Experts,⁵⁰ the European Convention on Nationality,⁵¹ the European Convention on Mutual Assistance in Criminal Matters,⁵² the Convention on the Protection of the Environment through Criminal Law (Strasbourg Convention),⁵³ the Council of Europe (CoE) Convention on Action against Trafficking,⁵⁴ the Framework Convention on National Minorities and the opinions of the Advisory Committee,⁵⁵ the European Convention on State Immunity,⁵⁶ the Ovideo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine and the two Additional protocol attached thereto and their Explanatory Reports.⁵⁷

There is a widely mainstreamed view that the CoE treaties and soft-law instruments, which will be discussed below, serve a prominent role in

⁴⁸ *Infra* 6.5.

⁴⁹ *Infra* Chapter 9.

⁵⁰ *Infra* 7.4.

⁵¹ *Infra* Chapter 9.

⁵² *Infra* 8.7.

⁵³ *Infra* 8.2.

⁵⁴ *Infra* 7.5, 8.5, 8.7.

⁵⁵ *Infra* 7.3.1.

⁵⁶ *Infra* 5.2.

⁵⁷ *Infra* 4.2.

developing the Court's case-law and interpreting the rights and freedoms under the ECHR. This view reflects the position that the Court pursues a regional understanding of the ECHR.⁵⁸ The Court itself reasons its cases on the basis of a European consensus. The findings of this study, however, do not confirm this view. There is nothing to suggest that the references to norms stemming from the CoE are qualitatively or quantitatively different to other PIL norms in the jurisprudence. The Court places the ECHR against the background of many different PIL norms which originate from the UN, the ILO, the EU, the Hague Conference on Private International Law. The present author's conclusion, however, should be read together with two caveats. The first caveat is that the Court's practice is interpreting a given provision of the ECHR in light of many PIL norms without clarifying the weight accorded to every single PIL norm. This makes it very difficult, if not impossible, to discern whether the Court accords different value to PIL norms originating from the CoE. The second caveat is that if one were to read certain judgments in isolation, it is possible to say that the Court in its reasoning affords significant influence to the CoE treaties and soft-law. Nonetheless, many other cases may be easily found where other PIL norms had a significant impact on the construction of the ECHR.

The Court considers many other international treaties. From the international criminal law field, it has referred to the Statutes of the International Criminal Court⁵⁹ and the International Criminal Tribunal for the former Yugoslavia (ICTY)⁶⁰ as well as to judgments by the ICTY⁶¹ and the

⁵⁸ Vanneste, (note 9); Helfer, (note 10); Forowicz, (note 3), 372 *et seq.*,

⁵⁹ *Infra* 4.6, 7.2, 8.5.

⁶⁰ *Infra* 7.2.

International Criminal Tribunal for Rwanda.⁶² Further, a series of bilateral⁶³ and plurilateral⁶⁴ treaties were taken into account.

Lastly, on specific occasions, the Court included soft-law in its legal reasoning. Besides the EU soft-law discussed above, it gave account to the CoE Committee of Ministers recommendations⁶⁵ and Parliamentary Assembly resolutions⁶⁶ or recommendations.⁶⁷ Also, references may be found in the UN Declaration on the protection against torture,⁶⁸ the Universal Declaration on Human Rights,⁶⁹ the Rio Declaration,⁷⁰ the Declaration on the Rights of the Child,⁷¹ the ILC Draft Articles on Jurisdictional Immunities of States,⁷² Reports by UN Special Rapporteurs⁷³ or Guidelines by the UN High Commissioner on Refugees⁷⁴ and views of expert bodies, such as the ECRI⁷⁵ and the Venice Commission.⁷⁶ The Court's practice is in contrast to other international courts (with the exception of the IACtHR) which do not include, in principle, non-binding norms in their consideration.

⁶¹ *Infra* 4.5, 5.2, 8.3, 8.4, 8.5.

⁶² *Infra* 5.2.

⁶³ The bilateral Treaty on Legal Assistance in Civil, Family and Criminal Law matters between Russia and Cyprus (*infra* 8.7); the USA-UK Extradition Treaty (*infra* 6.2.1); the two bilateral treaties on the withdrawal of Russian troops from Latvia between Latvia and Russia (*infra* 6.3); the cooperation agreement on crime prevention between Italy and Tunisia (*infra* 6.3).

⁶⁴ The Commonwealth of Independent States Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (*infra* 6.3.1); the Settlement Convention on matters arising out of the war and the occupation, signed by the US, the UK, France and the Federal Republic of Germany (*infra* 6.3); the Dayton Peace agreement (*infra* 6.3, Chapter 9).

⁶⁵ *Infra* 7.3.2, 8.3, 7.4, 8.4, 8.5, 8.7.

⁶⁶ *Infra* 8.2, 8.6, Chapter 9.

⁶⁷ *Infra* 7.5, 8.5, 8.7.

⁶⁸ *Infra* 4.3.

⁶⁹ *Infra* 5.2.

⁷⁰ *Infra* 8.6.

⁷¹ *Infra* Chapter 9.

⁷² *Infra* 5.2.

⁷³ *Infra* 8.3.

⁷⁴ *Infra* Chapter 9.

⁷⁵ *Infra* 7.3.1.

⁷⁶ *Infra* 3.3, Chapter 9.

Overall, the PIL norms that the Court takes into account come from different bodies of law, may be multilateral, regional, plurilateral or bilateral. On the basis of the analysis in Chapters 3 to 9 there is nothing to suggest that it can safely and *a priori* be determined whether a specific norm attains a greater weight than another in the ECtHR's reasoning. An argument that is often raised is that the Court favours the global multilateral treaties, or more generally instruments, concerning the protection of human rights, emphasising in this way the effectiveness of the ECHR.⁷⁷ Again, many counter-examples highlight that the Court takes other PIL norms into account, which do not relate to human rights protection (including bilateral treaties); or substantially restrict the scope of the ECHR (Chapters 5 and 6); or that the Court attaches significant weight to specialised treaties concerning the protection of human rights, which nonetheless restrict the rights under the ECHR (*Jersild* case).

3. The concept of *relevant* PIL norms

In its jurisprudence the Court systematically refers to the *relevant* PIL norms which must be taken into consideration. Yet, it does not define or explain the concept of relevance. Neither the International Law Commission or legal commentators have addressed this issue when discussing the relevant rules that should be taken into account when applying Article 31 (3)(c) VCLT.⁷⁸ Chapter 2 showed that other international courts and tribunals do not

⁷⁷ Helfer, (note 10), 161-162; Forowicz, (note 3), 373, 377-382, 385-387.

⁷⁸ International Law Commission, 'Report of the Study Group of the International Law Commission finalised by M. Koskenniemi' (1 May-9 June and 3 July-11 August 2006) UN Doc A/CN.4/L.682 (ILC Final Rep.), [410]-[480]; J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, Cambridge, 2008) 263-264.

elaborate on their criteria when selecting a given set of PIL norms as relevant for the interpretation task.

An international court's perception of which PIL norms are relevant is important as it indicates whether, and what extent, the court places its constitutive instrument against the background of PIL. Judge Higgins, in her Separate Opinion in the *Oil Platforms* case before the ICJ, suggested that, on the basis of Article 31 (3)(c) VCLT, any relevant PIL rules should be part of the *context* of the treaty and, hence, the *type of the treaty* indicates what PIL norms are relevant.⁷⁹ This is a quite restricted perception of relevance, being very close to the notion of the same subject matter treaties (Article 30 VCLT), and therefore, leads to a smaller sphere of PIL norms which may be employed in the interpretation process. Interestingly, the notion of the specific context of a treaty appears to be crucial not only for justifying divergent interpretations of similar or identical rules of PIL by different international courts, as Chapter 1 discussed in detail, but also as a concept which may delimit the degree to which an international court's reasoning will be receptive to other PIL norms.

However, there is merit in the idea that the concept of relevance includes a greater spectrum of PIL norms, without being necessarily embedded within or directly related to the context of a treaty. Article 31 (3)(c) VCLT does not mention that relevant PIL rules should be part of the context of a treaty, but that they will be taken into account '*together with the context*'.⁸⁰

⁷⁹ Separate Opinion of Judge Higgins in *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, 6 November 2003, ICJ Rep. 2003, p. 161, [45]-[46]. *Infra* 7.5.

⁸⁰ J. Klabbbers, 'Reluctant *Grundnormen*: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of treaties and the Fragmentation of International Law', in M. Craven *et al* (eds.), *Time, History and International Law* (Martinus Nijhoff Publishers, Leiden-Boston, 2007) 141, 160 (footnote 102).

Moreover, the ICJ in the *Questions of Mutual Assistance* case did not rule out that one treaty may be relevant and have certain interpretative impact over another treaty, even if the two treaties not only have different subject matters, but also no substantial link connecting them.⁸¹ Of course, the less relevant a treaty is the more limited its impact will be over the interpretation of another treaty. Consequently, the notion of relevance may not be static. This model is inclusive of norms with *varying degrees of relevancy*. The finding of the present thesis is that the ECtHR is inclined towards this model.

The ECtHR adopts a very inclusive definition of the concept of relevance. It has regard to and uses in its reasoning a great variety of PIL norms which are not related or close to the context of the ECHR.⁸² Some examples are extradition treaties (*Soering*), bilateral or plurilateral treaties settling matters which arising of war or occupation (*Prince Hans-Adam, Slivenko, Sisojeva* cases), the European Convention on Nationality (*Tănase* case) or the European Convention on Mutual Assistance in Criminal Matters (*Rantsev* case). If a restricted view on relevance were to be adopted, it is doubtful that these PIL norms would qualify as relevant for the interpretation of the ECHR.

Moreover, Chapters 4, 7 and 8 illustrated the difficulties arising from the contextual nuances between international treaties which *appear to be* of the same context. Chapter 4 discussed the Court's cautiousness with respect to the contextuality of definitions found in ILO Conventions. Chapter 7 stressed that

⁸¹ *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France), Judgment, 4 June 2008, ICJ Rep. 2008, p. 177, [114]; B. Simma, T. Kill, 'Harmonising Investment Protection and International Human Rights: First Steps towards A Methodology', in C. Binder *et al.* (eds.), *International Investment Law for the 21st Century* (Oxford University Press, New York, 2009) 678, 696.

⁸² *Contra* Forowicz, (note 3), 372-373.

the right to strike attains different nuances and meanings when it stems from the ILO - a 'labour law' paradigm - the ESC, which reads in a more 'industrial relations' context, and the ECHR, which is first and foremost a civil and political rights' treaty. Chapter 4 discussed whether the purposive element of the definition of torture in CAT should be transposed in Article 3 ECHR, since CAT has a different structure and purpose to a treaty protecting human rights. The particularity of international criminal law and the definition of rape in the context of an armed conflict was a concern raised by the Court in the *M.C.* case (Chapter 8). The 'human rights law' and 'criminal law' paradigms concerning States' responses to human trafficking under the CoE Anti-Trafficking Convention and the UN Palermo Protocol were underlined in Chapter 8. These are some of the instances that reveal that the Court extensively engages with PIL norms, which are not directly related to the ECHR's context as a human rights treaty, protecting mostly rights and freedoms of a civil and political nature. The ECHR is interpreted by taking a great variety of relevant PIL norms into account, which, in principle, suggests that any danger of taking an isolationist or fragmented approach regarding its construction is avoided.

Although placing the ECHR against the background of a variety of PIL norms alleviates the danger of fragmentation, new challenges arise. Having a multiplicity of PIL norms which may be qualified as relevant then raises the question of selectiveness;⁸³ how will an international court choose which PIL norms are more relevant than others for interpreting a given treaty? Secondly, a model, which is inclusive of varying degrees of *relevant* norms, introduces legal uncertainty and the possibility of different treatment of similar cases. The

⁸³ Tzevelekos, (note 16), 676; Forowicz, (note 3), 383.

identification of different possible sets of relevant PIL norms may lead to different interpretations of the ECHR and, hence, advance a varying interpretative impact on the protective scope of a provision and States' obligations accordingly. Chapters 4 and 7 demonstrated that Article 4 ECHR, for example, is subject to different interpretations in light of different relevant PIL norms. Although *Siliadin* and *Rantsev* were both human trafficking related cases, the Court indicated different PIL norms as being relevant.⁸⁴ In *Siliadin* the Court used the Forced or Compulsory Labour Convention and the Slavery and the practices similar to Slavery Convention in its interpretation. In contrast, the Court in *Rantsev* explicitly acknowledged the human trafficking aspect and took cognisance of PIL norms which were more recent and specific to the subject matter of human trafficking, like the Palermo Protocol and the Anti-Trafficking Convention. The different relevant PIL norms not only had a different impact on the interpretation of Article 4 ECHR, but also resulted in imposing substantially different positive obligations incumbent on the respondent States.⁸⁵ A second pertinent example of how the relevant PIL norms and their impact may transform the interpretation of the ECHR is the *Neulinger* case (Chapter 9). The Grand Chamber, by way of changing its previous case-law, found that the Hague Convention on international child abduction was not the only one relevant for the interpretation of Article 8 ECHR. It added another set of relevant norms concerning the best interests of the child, hence transforming the interpretation of Article 8 ECHR.

⁸⁴ Cf. *infra* 4.5 and 7.5.

⁸⁵ Cf. *infra* 8.4 and 8.8.

4. The concept of PIL norms *applicable in the relations between the parties*

When the Court applies the principle of interpreting the ECHR by taking PIL rules into account it also refers to the condition that these rules must be ‘applicable in the relations between the parties’. This requirement is envisaged in Article 31 (3)(c) VCLT as well. As it was analysed in Chapters 2 and 7, legal scholars and international courts are divided as to whether ‘parties’ under Article 31 (3)(c) should involve only the parties to a given dispute or all contacting parties to the treaty under interpretation.⁸⁶

It is clear, however, that in its jurisprudence the Court adopts an altogether different position regarding the meaning of applicable rules. Its legal reasoning refers to treaties ‘applicable *in the particular sphere*’⁸⁷ or ‘applicable *in respect of the precise subject matter of the case concerned*’.⁸⁸ The term ‘applicable’ is attached to the subject matter of the case, rather than to the requirement that the rule has to be applicable in the relations between the parties. In this respect, the Grand Chamber explicitly dismissed Turkey’s preliminary objection in the *Demir and Baykara* case, that the relevant PIL norms should be applicable between the parties and, hence, binding on the respondent State. The Grand Chamber reinstated its position in the *Tănase* case. As a result, the Court does not hesitate to use treaties which are not binding on the respondent State either.⁸⁹ This is, arguably, one the weakest points of the Court’s methodology since it introduces legal uncertainty.

⁸⁶ *Infra* 2.3.1 and 7.4.

⁸⁷ *Demir and Baykara* (GC), [69] (emphases added).

⁸⁸ *Ibid*, [86] (emphases added).

⁸⁹ *Ibid*, [74], [78]; *Marckx* (Pl), [41]; *Öneryildiz* (GC), [93].

5. The different uses of PIL norms in the Court's reasoning

The interpretative principle of taking cognisance of other PIL norms has manifold functions in the Court's jurisprudence. It has been shown that PIL norms are used in every step of the Court's legal reasoning and have a number of different functions.

PIL norms may be employed in order to establish *a contrario* arguments. For example, the Court in its case-law previous to the *Demir and Bayakara* case used the ESC for arguing that, since the ESC was a treaty posterior to the ECHR and it did not include a given freedom, the ECHR could not be interpreted as including this freedom. Likewise, in the jurisprudence anterior to *Scoppola*, the Court concluded *a contrario* the non-applicability of the *lex mitior* principle to the ECHR, by comparing it to other treaties which explicitly prescribed it. Conversely, PIL norms may be used to draw analogies (*Sergey Zolotukhin* and *Scoppola* judgments).

The Court employs PIL norms in order to ascertain the ordinary meaning of a term under the ECHR (Article 31 (1) VCLT). Chapter 4 exemplified such instances, where the Court considered PIL norms, especially treaties, in order to define specific concepts in the ECHR's text. In line with the discussion in Chapter 2, this forms part of an established practice of international courts and tribunals to identify the common use of a term by States in PIL.⁹⁰ Such a practice establishes links and synergies between different treaties, enhances the adoption of consistent legal standards (as far as possible), and promotes coherent and harmonious international jurisprudence.

⁹⁰ *Infra* 2.3.1 and 4.7.

The Court finds recourse to PIL norms in order to define certain concepts which are necessary for applying the ECHR. The Court had recourse to the notion of jurisdiction under PIL for determining when a State exercises jurisdiction under Article 1 ECHR. Chapter 3 also discussed the question of how State succession impacts on the application of the ECHR and whether the general rule on the non-continuity of treaty obligations equally applies to human rights treaties.

PIL norms provide for supportive aid in the interpretation, or reinforce an interpretation, of the ECHR, which was reached by other interpretative means or on the basis of the facts of the case (*Bijelic, Wilson, National Union of Journalists and others, National Union of Belgian Police*, the judgment in *Demir and Baykara* by the Chamber). Alternatively, they can qualify as weighty factors in the proportionality assessment of a restriction to a right under the ECHR (*Sejdić, Tănase, Neulinger* cases).

An interesting use of PIL norms concerns the enlargement of the applicability of the ECHR. PIL norms establish the nexus between the rights and freedoms under the ECHR and other rights or interests. In these instances, the Court decides that the ECHR might come into play, addressing a legal or factual situation or interest, which did not qualify as a ‘human rights’ issue. The relevant PIL norms that the Court uses usually stem from specialised treaties or bodies of law (gender-based violence, environment, human trafficking) and consolidate the link between the scope of the ECHR and another legitimate interest in PIL. This use of PIL norms is important because it opens the way for different bodies of law to communicate. Not only is the meaning and content of the rights and freedoms of the ECHR read in light of

developments in PIL, but also specialised treaties and bodies of law are connected through interpretation to the (more) general ECHR. This comes to confirm the view taken in Chapter 1, that the relationship of *lex generalis* and *lex specialis* is not static. Interestingly, in such instances, the ECHR is closer to being *lex generalis*.⁹¹ This relationship between the ECHR and other treaties or bodies of law is further elaborated and developed by the ECtHR and, in the long term, it may lead to developments in PIL. In this ways, the ECtHR contributes to the development and enrichment of PIL.

An important conclusion of the present thesis is that, in the great majority of the cases discussed, the interpretative principle of taking cognisance of PIL was of fundamental importance in the Court's reasoning. This principle was the driving force behind the Court's reasoning, even when this principle was cumulatively invoked with other interpretative principles. The PIL norms were granted extraordinary weight to construing the ECHR and were dispositive of the cases before the Court.⁹² In fact, in many of the cases examined, the Grand Chamber departed from and overruled its previous case-law by relying on PIL norms. The *Sergey Zolotukhin*, *Opuz*, *Scoppola*, *Demir and Baykara*, *D.H.*, *Neulinger* cases are some examples. This finding lends support to the general trend in the practice of international courts and tribunals to duly appreciate the weight of other relevant PIL norms to their interpretation task (Chapter 2). Although other relevant PIL norms somehow always found their place in the reasoning and interpretation of international courts, it appears that there is a shift in this practice. International court and tribunals, and

⁹¹ *Infra* 1.4 and Chapter 2; ILC Final Rep., [460]; A.N. Pronto, "Human-Rightism" and the Development of General International Law' (2007) 20 *LJIL* 753.

⁹² Rietiker, (note 13), 271-275; Tzevelekos, (note 16); *Contra* Forowicz, (note 3), 385; Helfer, (note 10), 161.

especially the ECtHR, use PIL norms in order to *establish* the content of their constitutive instruments, not only to *confirm* it.⁹³

At this point, it should be admitted that, since the focus of the study is mostly the practice of the Grand Chamber, the possibility of encountering shifts in the case-law is augmented. After all, it is the Grand Chamber which, in principle, will decide on the route of the jurisprudence and on serious issues of the interpretation of the ECHR. Yet, this does not diminish the importance of, or alter the fact that, the role of the PIL norms was prominent in guiding and justifying such departures. Also, as it has been highlighted throughout the various Chapters, the new constructions of the ECHR and the line of reasoning are further mainstreamed in the Court's case-law. Therefore, the importance lies not only on the individual cases before the Grand Chamber, but also on the spill-over effect in the Court's jurisprudence. The thesis illustrated this point, to the extent possible, and within its confines, namely focusing primarily on the Grand Chamber's practice. It was stressed that the methodology of the *Al-Adsani* and *Demir and Baykara* cases has been widely mainstreamed in the case-law.⁹⁴

⁹³ Simma, Kill, (note 31), 689.

⁹⁴ *Infra* 5.3 and 7.4.

6. The (absence of the) role of Article 31 (3)(c) VCLT in the jurisprudence of the Court

Article 31 (3)(c) VCLT is a rare reference in the Court's practice. In the cases discussed, the provision has been referred to five times, in the *Banković*, *Al-Adsani*,⁹⁵ *Bosphorus*, *Demir and Baykara* and *Neulinger*⁹⁶ cases. Despite the Court's extensive practice of taking cognisance of PIL norms, it is clear that the Court does not share the enthusiasm of the ILC and international scholars on the use of Article 31 (3)(c) VCLT.

Some support the view that the Court applies the provision in an implicit or indirect way in its case-law.⁹⁷ The present author does not concur with this position for four reasons. First, such an assumption is a hypothetical exercise and, in any case, there is no reason that the Court would not explicitly invoke and apply the provision, if it was deemed necessary. Second, there is a current trend in literature to invoke Article 31 (3)(c) VCLT for every instance that a treaty is interpreted in light of other PIL norms, whereas there are also other interpretative rules envisaged in Article 31 VCLT and general interpretative principles to support and justify the resort to PIL.⁹⁸ Third, the present author argued that, in most of the cases in which Article 31 (3)(c) VCLT was invoked, there are serious doubts as to whether it was properly

⁹⁵ The reference to the *Al-Adsani* case includes also the *McElhinney* and *Fogarty* cases, since the Court's methodology was identical. It also includes the *Cudak* case insofar as the reasoning is the same (Chapter 5 analysed the differences).

⁹⁶ Some of the cases concerning the Hague Convention on international child abduction referred to in Chapters 8 and 9 invoke Article 31 (3)(c) VCLT, but the Grand Chamber's reasoning in *Neulinger* fairly represents them.

⁹⁷ Tzevelekos, (note 16), 651; Forowicz, (note 3), 356.

⁹⁸ I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, Oxford, 2009) 365, 375-376; R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2010) 265-266.

applied.⁹⁹ Fourth, and most importantly, it has been demonstrated that the Court's methodology when taking other PIL norms into account falls short of the requirements of Article 31 (3)(c) VCLT. The Court has made it explicit that it is free to take cognisance of non-binding norms and that the relevant PIL norms do not have to be applicable in the relations between the parties. Additionally, the text of the *Demir and Bayakara* and *Bosphorus* judgments strongly indicates that Article 31 (3)(c) is an inspirational and rhetorical reference for the Court (the provision is placed in brackets and is mentioned with pertinent case-law). Even more, in light of the alternative methodological framework of the European consensus idea that the Court strongly proclaims, it is concluded that the Court does not apply Article 31 (3)(c).¹⁰⁰

The crucial question is whether the non-application of Article 31 (3)(c) qualifies as a shortcoming in the Court's interpretative practice. In view of the present author, the answer is, in principle, that it does not. First, as far as customary international law and general principle of law is concerned, the non-use of Article 31 (3)(c) VCLT does not seem to be material. Chapter 2 showed that in the practice of international courts and tribunals the duty to interpret a treaty by taking customary international law and general principle of law into account forms part of the 'common sense' of the international judge.¹⁰¹ Second, Article 31 (3)(c) VCLT poses complicated problems regarding its interpretation.¹⁰² International courts and tribunals have different approaches with respect to the meaning of 'relevant' and rules 'applicable in the relations

⁹⁹ *Infra* 6.5, 7.4.

¹⁰⁰ *Contra*, among others, J. Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37 *Brook.J.Intl.L.* 349, 353, who thinks that the Court gives Article 31 (3)(c) an astonishingly broad construction.

¹⁰¹ ILC Final Rep., [468].

¹⁰² Forowicz, (note 3), 356.

between the parties' (Chapter 2). This adds merit to the view that when international courts and tribunals apply the same interpretative principle, they do it in different ways, due to their own specificities and due to the flexibility of the VCLT principles themselves.¹⁰³ Therefore, even if the ECtHR applied the provision, there would be leeway for its own interpretation of the provision. Third, since it has been established that the Court has a wide practice of taking PIL norms into account and has, in fact, qualified this practice as an autonomous interpretative principle in its case-law, the challenges of fragmentation of PIL are effectively confronted.

Preferably, international courts and tribunals should apply the VCLT framework. This enhances the adoption of common (to the extent possible) interpretative practices and a unified 'vocabulary' in addressing fragmentation. Yet, other, similar interpretative approaches, which may not follow Articles 31-33 VCLT strictly to the letter, cannot be *a priori* excluded. Besides, the VCLT, despite its flexibility, does not accommodate everything. By way of example, one of the points raised throughout this thesis was that the VCLT does not accommodate the development of treaties by way of interpretation by their supervisory bodies, which is, however, a significant challenge in the fragmentation of PIL context.¹⁰⁴ The ECtHR is correct, however, in its approach in placing treaties within the context of their progressive development by their supervisory bodies. Even if such an approach may not be

¹⁰³ J. Klabbers, 'Virtuous Interpretation', in M. Fitzmaurice *et al* (eds.), *Treaty Interpretation and the Vienna Convention: 30 Years On* (Martinus Nijhoff, Leiden, 2010), 17, 33; D. McRae, 'Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body', in S. Breitenmoser *et al* (eds.), *Human Rights, Democracy and the Rule of Law* (Verlag AG., Baden-Baden, 2007) 1407.

¹⁰⁴ *Infra* 4.4., 4.7, 7.3.1. M.T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law', in M.T. Kamminga, M. Scheinin (eds.), *The Impact of Human Rights on General International Law* (Oxford University Press, Oxford, 2009) 1, 8.

grounded on Articles 31-33 VCLT,¹⁰⁵ a different approach would fall short of grasping the fragmentation challenges, namely the evolving interpretation of PIL norms by different international bodies and the need to harmonise to the extent possible varying perceptions.

7. The limits to the interpretative principle of taking cognisance of other relevant PIL norms

The present study has identified areas where the interpretative principle to take cognisance of other relevant PIL norms finds its limits. These limits have been discussed throughout the thesis and some of them have already been mentioned in the present chapter, but they are worth a short, concise summary. The most obvious limit to the principle is the letter of the ECHR. The principle of interpreting the ECHR by taking PIL norms into account and the weight accorded to these norms cannot go beyond the clear textual limits of the Convention. The *Zolotukhin* and *Scoppola* cases (Chapters 4 and 7) are typical examples where the Court, by way of relying on PIL norms, employed an interpretation which distorted the clear language of the Convention.

Avoiding a possible conflict between the ECHR and another PIL norm through interpretation is not always a feasible task. The aim of harmonising and reading the ECHR consistent with PIL should be pursued to the extent possible. This is, of course, a matter of interpretation in light of the facts of the individual case, but other PIL norms must not have the effect of diminishing the core guarantees under the ECHR, as it appears to have happened in the *Al-Adsani* and *Prince Hans-Adam* cases (Chapter 5 and 6). Such a practice,

¹⁰⁵ But see *infra* 4.5 footnotes 64-66 and accompanying text.

besides being an inappropriate interpretation, it sets aside the applicable law before the Court and questions the limits of its jurisdiction.

Conversely, the Court's practice of drawing synergies and links between the ECHR and PIL norms is subject to the pertinent contextual nuances. This is a point that has been made already from Chapter 1. Construing an allegedly common denominator of different PIL norms could be problematic notwithstanding the existence of different 'paradigms' from which norms originate. Similar concerns were analysed with respect to the conflation of norms originating from the ILO and the ESC (*Demir and Baykara*) and the different variants of the concept of due diligence in the context of domestic violence (*Opuz*). It was noted that on certain of these occasions the Court develops PIL,¹⁰⁶ but one should not lose sight of the importance of different contexts. In view of the present author, drawing the line is a matter of interpretation in the specific instances.

Lastly, the interpretation of the ECHR by taking other PIL norms into account should not result in the incorporation of these norms under the ECHR. Especially in the *Rantsev*, and *Neulinger* cases (as well as the rich case-law on the international child abduction) the Court not only transposed very detailed standards in the scope of the Convention, but also, in practice, indirectly applied and supervising them. Such a practice also sets aside the applicable law before the Court and directly contravenes its jurisdiction which is limited to the interpretation and application of the ECHR.¹⁰⁷

¹⁰⁶ *Infra* 8.3, 8.5-8.9.

¹⁰⁷ Arato, (note 49), 353.

The aim of this thesis was to examine whether the ECtHR, as an example of an international court entrusted with limited *ratione materiae* jurisdiction, endangers the unity of PIL. From the cases examined, it may safely be said that, in principle, it does not. On the contrary the Court develops PIL on the whole. The fact that it has developed an autonomous interpretative principle in its jurisprudence evidences that mitigating the difficulties arising due to fragmentation of PIL, by taking cognisance of other PIL norms when interpreting the ECHR, is one of its priorities, even in instances in which other PIL norms restrict the scope of the rights of freedoms under the ECHR. The analysis illustrated that there are, of course, certain misgivings in the Court's methodology and, on some occasions, its reasoning is not convincing or transparent. One should not lose sight, however, of the challenging task to alleviate fragmentation of PIL and that developing PIL sometimes entails a degree of experimentation. The present author's view is that the Court will further improve and mainstream its interpretative practice in the future. The fact that, in the 2010 Interlaken Declaration by the High Level Conference on the Future of the European Court of Human Rights, member States explicitly underlined the importance of ensuring that the judges appointed to the Court have sufficient knowledge of PIL, will be proven crucial in this respect.¹⁰⁸

¹⁰⁸ High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, point 8 (a), available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf; Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM (2012) 40 Addendum Final, 29 March 2012, [27]-[28].

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