# Chapter 6: Establishing Consensus (II): International Law as European Consensus

## *I. Introduction*

In the justification of its judgments, the ECtHR routinely refers to norms of international law. These references are manifold and varied. To pick a few almost at random: they include references to the human rights treaties developed within the United Nations as well as their interpretation by the relevant committees on subjects such as conscientious objection[851] and the distinction between torture and inhuman or degrading treatment,[852] as well as general principles of international law on access to courts.[853] They also include reference to regional norms based, for example, on Council of Europe (CoE) materials pertaining to whistleblowing,[854] gay rights and trans rights,[855] and many subjects besides.

An in-depth study of the ECtHR's references to international law would easily fill entire volumes.[856] Their context and purposes are manifold, and it is not my intention to catalogue them exhaustively here: I will leave aside entirely, for example, references to international law that are explicit in certain provisions of the ECHR,[857] references to international law

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851 ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 105.

852 ECtHR (GC), Appl. No. 25803/94 – *Selmouni v. France*, Judgment of 28 July 1999, at para. 97.

853 ECtHR (Plenary), Appl. No. 4451/70 – *Golder v. the United Kingdom*, Judgment of 21 February 1975, at para. 35.

854 ECtHR, Appl. No. 28274/08 – *Heinisch v. Germany*, Judgment of 21 July 2011, at paras. 73 and 80.

855 ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others*; ECtHR, Appl. No. 14793/08 – *Y.Y.*, at para. 110; ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 125.

856 See e.g. Forowicz, *The Reception of International Law in the European Court of Human Rights*; Anne van Aaken and Iulia Motoc, eds., *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018); for Council of Europe materials, the best overview is Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents".

857 For example, Article 1 of Protocol 1: "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by

which are treated as facts of the case rather than (fact-based) legal arguments,[858] and references to international law which are intended specifically to bolster only a historical approach to interpretation.[859] Instead, I will focus exclusively on those cases in which references to international law form part of the ECtHR's justification of its decisions (particularly insofar as substantive rather than procedural aspects are concerned), and specifically on their relation to the establishment of European consensus. As the ECtHR itself put it in *Mosley v. the United Kingdom*, international law is considered "relevant to the interpretation of the guarantees of the Convention and in particular to the identification of any common European standard in the field".[860]

There has been relatively little academic analysis of the role which international law plays in relation to European consensus – sometimes it is ignored altogether, sometimes it is accepted as a matter of course but not further analysed, sometimes it is mentioned in passing as a particularity.[861] One reason why the spotlight has so seldom been directed at references to international law in this context might be that, despite the explicit link made by the ECtHR in cases such as *Mosley*, they are regarded as less relevant to European consensus than to other doctrinal figures such as the systemic integration of international law. Without seeking to diminish the importance of the latter, I therefore begin by substantiating the connection between international law and European consensus, both within the ECtHR's case-law and on a more conceptual level (II.).

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law and by the general principles of international law"; see Merrills, *The Development of International Law by the European Court of Human Rights*, at 207-217.

858 See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 46; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 112; Lock, "The Influence of EU Law on Strasbourg Doctrines" at 807.

859 See Merrills, *The Development of International Law by the European Court of Human Rights*, at 218.

860 ECtHR, Appl. No. 48009/08 – *Mosley v. the United Kingdom*, Judgment of 10 May 2011, at para. 110.

861 For example, Peat, *Comparative Reasoning in International Courts and Tribunals*, at 143 explicitly excludes references to international law from the scope of his analysis; Nikos Vogiatzis, "The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court," (2019) 25 *European Public Law* 445 at 450 claims that only a comparative analysis of domestic laws "can truly be viewed as European consensus", though without explaining why.

If international law is accepted as relevant to European consensus – as a way of establishing "common ground" or lack thereof among the States parties – then it can be understood as a form of ethical normativity giving expression to a pan-European ethos. It is notable, however, that proponents of the morality-focussed perspective often welcome references to international law as preferable to domestic law, though usually without setting out in great detail why this should be the case or what the implications might be.[862] My goal will therefore be to provide a rough overview of the way in which references to international law fit into the tensions between the morality-focussed and the ethos-focussed perspective (III.).

Such an account can only be tentative and fragmented – much depends, inter alia, on the substantive background of any given case, on the way in which both domestic law and international law are approached, and on the kind of international materials referred to. With regard to the latter, I will provide at least a few examples of distinctions between different kinds of international law and the differing approaches to a pan-European ethos which they imply. This also involves revisiting the numerical issues discussed in the previous chapter in light of different procedures within international organisations such as the CoE, which may lead to Europe-wide norms decided upon by only a minority of States parties (IV.). These shifts, in turn, account in part for the possible tensions between consensus established by reference to international law and consensus based on a comparative overview of domestic law: from the perspective of the morality-focussed perspective, the prior is arguably perceived as more "progressive" partly because it sometimes lessens the asymmetry in favour of the rein effect which forms part of the conventional account of consensus (V.). References to international law thus complicate the triangular tensions between individual national ethe, a pan-European ethos, and moral normativity, but it also allows for a form of pragmatic convergence between the two latter kinds of normativity at the expense of the former (VI.).

## *II. European Consensus and Systemic Integration*

To begin with, I must substantiate the connection between the ECtHR's references to international law and European consensus. Against this connection, Andreas Føllesdal has given voice to a common sentiment by ar-

862 Most explicitly Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy".

guing that references to international law should be considered "not part of the consensus practice" but rather "attempts at a systematic integration in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties".[863] On this account, then, any references to international law should not be considered through the lens of European consensus (thus situating them, in particular, in relation to the notion of a pan-European ethos), but rather in the context of the principle of systemic integration of international law. As popularised, in particular, by Martti Koskenniemi's report for the International Law Commission on fragmentation in international law, that principle demands that the interpretation of any given treaty takes into account other norms of international law which constitute its "normative environment".[864] The justification of any interpretative decisions reached thus "refers back to the wider legal environment, indeed the 'system' of international law as a whole".[865]

If the ECtHR's references to international law are approached through the lens of systemic integration, then they are interesting not primarily for epistemological reasons or because of their relation to the States parties, but because they have the potential to introduce "a sense of coherence and meaningfulness" with regard to other norms of international law[866] – for example as part of the attempt to ensure that international human rights law as a whole "develops consistently" so that "it is possible to speak of 'human rights law' at all, and not simply the provisions of particular conventions".[867] The ECHR would then be understood as "part of a broad network of rules and interpretations of international human rights law" as a whole,[868] and this understanding would be reflected in its interpretation. This approach is often connected to Article 31 (3) lit. c VCLT, which supports its pull towards coherence in international law by providing that interpretation of international treaties should take into account any "relevant rules of international law applicable in the relations between the parties".

863 Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 197.

864 E.g. Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" (UN Doc. A/CN.4/L.682, 2006), at paras. 415 and 419.

865 Ibid., para. 479.

866 Ibid., para. 419.

867 Merrills, *The Development of International Law by the European Court of Human Rights*, at 224.

868 Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 115.

While the particulars remain controversial,[869] Koskenniemi's report proposed that Article 31 (3) lit. c VCLT constitutes an "expression" of the principle of systemic integration, and they are now often cited in tandem.[870]

Against this background, it is easy to find traces of systemic integration within the ECtHR's jurisprudence. For one thing, Article 31 (3) lit. c VCLT has been cited in a great variety of cases since its first appearance in the Court's case-law in *Golder v. the United Kingdom*.[871] More specifically, the standard formulation by which it is often introduced carries strong connotations of systemic integration: while it does emphasise the ECHR's "special character as a human rights treaty", it also urges that it "cannot be interpreted in a vacuum" and that the Court must "take the relevant rules of international law into account" and indeed, so far as possible, interpret the Convention "in harmony with other rules of international law of which it forms part".[872] Finally, Koskenniemi's fragmentation report itself has been cited by the ECtHR in the context of its attempts to harmonise

869 See e.g. 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?" at 632, with further references.

870 Koskenniemi, "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" at para. 423; see also Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention," (2005) 54 *International and Comparative Law Quarterly* 279 at 280; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Leiden and Boston: Brill, 2015), at 4-5; Geir Ulfstein, "Evolutive Interpretation in the Light of Other International Instruments: Law and Legitimacy," in *The European Convention on Human Rights and General International Law*, ed. Anne van Aaken and Iulia Motoc (Oxford: Oxford University Press, 2018) at 83.

871 ECtHR (Plenary), Appl. No. 4451/70 – *Golder*, at para. 35; in that case, it was also noted (at para. 29) that the VCLT, not being retroactive (Article 4 VCLT), does not apply directly to the ECHR, but that "its Articles 31 to 33 enunciate in essence generally accepted principles of international law"; see also ECtHR, Appl. No. 65542/12 – *Stichting Mothers of Srebrenica and Others v. the Netherlands*, Decision of 11 June 2013, at para. 144, specifying that Article 31 (3) lit. c VCLT is one of the provisions which "codify pre-existing international law".

872 ECtHR (GC), Appl. No. 35763/97 – *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001, at para. 55; see also e.g. ECtHR (GC), Appl. No. 15318/89 – *Loizidou v. Turkey*, Judgment of 18 December 1996, at para. 43; ECtHR, Appl. No. 31045/10 – *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, Judgment of 8 April 2014, at para. 76; ECtHR (GC), Appl. No. 29750/09 – *Hassan v. the United Kingdom*, Judgment of 16

potentially "diverging commitments" under international law.[873] It comes as no surprise, then, that Article 31 (3) lit. c VCLT is regarded by many as a solid justification for the ECtHR's references to international law,[874] and that these references are conceptualised in relation to systemic integration.[875]

My intention here is not at all to contest this reading of the Court's case-law, but merely to contest the *additional* claim that it *excludes* the conceptualisation of references to international law as part of European consensus – as Føllesdal implies when he suggests viewing them as an attempt at systemic integration *instead* of being "part of the Consensus practice".[876] If this claim were correct, then there would be little sense in further dis-

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September 2014, at para. 77; particularly strong also in ECtHR (GC), Appl. No. 51357/07 – *Naït-Liman v. Switzerland*, Judgment of 15 March 2018, at paras. 173-204.

873 ECtHR (GC), Appl. No. 10593/08 – *Nada v. Switzerland*, Judgment of 12 September 2012, at para. 170.

874 Most emphatically Forowicz, *The Reception of International Law in the European Court of Human Rights*, at 25, suggesting that "Article 31(3)(c) became an implicit basis of the Strasbourg bodies' reasoning in *all* cases referring to international law" (emphasis added); see also e.g. Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights" at 271; Legg, *The Margin of Appreciation*, at 141; Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" at 121; Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 114; Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 151-152; and in great detail 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?", passim.

875 Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights" at 271-275; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 126; Tzevelekos and Dzehtsiarou, "International Custom Making" at 318; see also Çalı, "Specialized Rules of Treaty Interpretation: Human Rights" at 542.

876 Supra, note 863; it is relatively rare that this claim is made explicitly, but the dichotomy between European consensus and systemic integration comes through, for example, in Forowicz, *The Reception of International Law in the European Court of Human Rights*, at 9; 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?" at 640, 645 and 661; Tzevelekos and Kapotas, "Book review of Dzehtsiarou, 'European Consensus'" at 1147; contrast Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 115, who suggests both rationales for the ECtHR's references to CoE

cussing references to international law in the present context. However, the ECtHR's case-law itself casts doubt on this claim, since the Court has explicitly situated such references in relation to consensus. In the leading case *Demir and Baykara v. Turkey*, for example, it cited domestic and international law side by side and held that it

> can and must take into account elements of international law other than the Convention […] and the practice of European States reflecting their common values. The *consensus emerging from specialised international instruments and from the practice of Contracting States* may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.[877]

As Hanneke Senden has noted, this "probably comes closest to a definition the comparative method in the entire case law of the Court",[878] and indeed it constitutes a rare instance in which the ECtHR, openly and deliberately, sets out its "methodology".[879] *Demir and Baykara* can be backed up with other cases that set its references to international law in relation to European consensus,[880] but as an unusually forthright and unanimous Grand Chamber judgment, it in any case carries significant weight in elucidating the ECtHR's approach.

Reading (some of) the ECtHR's references to international law as part of European consensus also explains its relative lack of interest in whether the respondent State is bound by the norms of international law referred to. In *Demir and Baykara*, the ECtHR ruled that "it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case con-

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materials; Gerards, *General Principles of the European Convention on Human Rights*, at 97, who cites Article 31 (3) lit. c VCLT in the context of international law as European consensus.

877 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 85 (emphasis added).

878 Senden, *Interpretation of Fundamental Rights*, at 225.

879 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 60.

880 E.g. ECtHR (Plenary), Appl. No. 6833/74 – *Marckx*, at para. 41; ECtHR (GC), Appl. Nos. 52562/99 and 525620/99 – *Sørensen and Rasmussen v. Denmark*, Judgment of 11 January 2006, at paras. 70-75; ECtHR (GC), Appl. No. 21906/04 – *Kafkaris*, at para. 101; ECtHR (GC), Appl. No. 7/08 – *Tănase v. Moldova*, Judgment of 27 April 2010, at para. 176; ECtHR (GC), Appl. No. 41615/07 – *Neulinger and Shuruk v. Switzerland*, Judgment of 6 July 2010, at para. 135; ECtHR, Appl. No. 48009/08 – *Mosley*, at para. 110.

cerned".[881] While it does seem to sometimes attach *additional* weight to instruments by which the respondent State is bound,[882] its case-law at large confirms this approach: norms of international law have repeatedly been referred to even when they do not bind the respondent State.[883]

Against the background of the prevailing interpretations of Article 31 (3) lit. c VCLT, this approach seems questionable;[884] in that vein, for example, Turkey argued in *Demir and Baykara* that the ECtHR should refer to international law only "if it complied with the criteria set out in [Article 31 (3) lit. c VCLT], and, in particular, if account was taken only of those instruments by which the State concerned was bound".[885] Whatever one

881 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 86; see also para. 78.

882 Even in *Demir and Baykara*: See ibid., at paras. 123-124 and 166; see also e.g. ECtHR, Appl. No. 39051/03 – *Emonet and Others v. Switzerland*, Judgment of 13 December 2007, at para. 65; when the ECtHR can point to international legal commitments of the respondent State, it is clearly able to mobilise the argument of self-contradiction: particularly clear e.g. in ECtHR (GC), Appl. No. 7/08 – *Tănase*, at para. 176, where the ECtHR somewhat reproachfully points to obligations under the European Convention on Nationality which Moldova had "freely undertaken"; see generally Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence" at 84.

883 Including the classic case of ECtHR (Plenary), Appl. No. 6833/74 – *Marckx*, at para. 41; quite explicitly e.g. in ECtHR, Appl. No. 35853/04 – *Bajrami v. Albania*, Judgment of 12 December 2006, at paras. 53, 55 and 65-67.

884 Traditionally, it is assumed that either all States parties to a treaty or at least the parties to the dispute (in this case, the respondent State) must be bound by the international norm being referred to: see e.g. Ulf Linderfalk, "Who Are 'the Parties'? Article 31, Paragraph 3(C) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited," (2008) *55 Netherlands International Law Review* 343 at 345; Oliver Dörr, "Article 31," in *Vienna Convention on the Law of Treaties. A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach (Berlin: Springer, 2018) at 610 (all parties); Koskenniemi, "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" at para. 472; Duncan French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules," (2006) *55 International and Comparative Law Quarterly* 281 at 305-307 (parties to the dispute); on this basis, it would seem fair to assume that Article 31 (3) lit. c VCLT does *not* cover all the ECtHR's references to international law: in that vein e.g. Senden, *Interpretation of Fundamental Rights*, at 243; and, more critically, von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 333; Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 254.

885 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 61.

makes of this approach within the framework of the VCLT,[886] the issue resolves itself into a familiar tension if the references to international law are conceptualised as part of European consensus: for better or for worse, the notion of a pan-European ethos shifts the focus from the position of the individual respondent State to a more general consideration of the *collectivity* of the States parties.[887] This is precisely the point made by the ECtHR in *Demir and Baykara*, where it states that while ratification by the respondent State is not necessary, it will instead pay attention to whether

> the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, *mutatis mutandis*, *Marckx*, cited above, § 41).[888]

The connection to European consensus comes through clearly here – in the dual reference to norms of international law and domestic law, but especially in the orientation towards the "majority" of the States parties which is taken to denote "common ground", and not least in the citation of *Marckx*.

On this approach, obligations of the States parties under international law are conceived of, in parallel to the position of their domestic legal systems, as a way of establishing (lack of) European consensus. Just as domestic laws may be tallied up to construct "common ground", so may ratification of treaties, votes cast to create secondary international law, and the like: they, too, create "common ground" or "common international-law standards".[889] The way in which international documents are tied back to the States parties' positions comes through quite clearly, for example, in the case of *M.C. v. Bulgaria*, in which the ECtHR referred to certain standards for the protection of women against violence (specifically, that showing "signs of resistance" against non-consensual sexual acts is not necessary to trigger such protection) as set forth in a recommendation of the CoE's Committee of Ministers (CoM). The ECtHR cited these standards not only

886 For an argument in favour of a more flexible approach than the traditionalist picture sketched in footnote 884, see Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights" at 274.

887 Chapter 3, IV.3.

888 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 86.

889 Both formulations are used in ECtHR, Appl. Nos. 48151/11 and 77769/13 – *National Federation of Sportspersons' Associations and Unions (FNASS) and Others*, at para. 181.

by direct reference to the CoM itself, but rather, tellingly, as an agreement among "the member States of the Council of Europe, *through* the Committee of Ministers".[890] The international document is thus taken to reflect back on the States parties. In light of all this, then, it would seem that the ECtHR – at least in some contexts – views norms of international law as an indication of the States parties' values,[891] and thus places them in relation to European consensus.[892]

Again, consensus need not be the *only* framework applicable to the ECtHR's references to international law. I have aimed to demonstrate in this section that such references can, rather, be viewed within *different* frameworks. In particular, they can be read as referring back to general international law in the interest of coherence of a larger system (systemic integration) or as part of an assessment as to whether there is common ground on a certain issue among the States parties (European consensus). The framework of systemic integration can be applied, based on dominant interpretations of Article 31 (3) lit. c VCLT, to those cases in which all States parties to the dispute including the respondent State are bound by the international norm at issue; the framework of European consensus, since it builds on "common ground" but not unanimity among the States parties, can be applied in a broader range of cases.

I would suggest that both frameworks are present within the ECtHR's case-law: while the ECtHR sometimes refers to international law without further specifying its rationale for doing so and sometimes – as showcased above – connects it to either consensus or systemic integration, either rationale may be in evidence regardless of whether it was made explicit by

890 ECtHR, Appl. No. 39272/98 – *M.C.*, at para. 162 (emphasis added); see also, e contrario, ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 75; further on CoM recommendations infra, IV.3.

891 Von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 331.

892 For accounts mentioning international law in relation to European consensus, see e.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 46 and 49; Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 161-162; Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 362-363; Koch and Vedsted-Hansen, "International Human Rights and National Legislatures - Conflict or Balance?" at 12; Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 251.

the ECtHR, depending on the international norm at issue and whether it binds all States parties to the ECHR or not. Where an analysis based on systemic integration would regard the ECtHR's international law references as evidence of an overarching system of international law (horizontal connections between different treaties, as it were), approaching them through the lens of European consensus connects norms of international law back, vertically, to the States parties to the ECHR. Systemic integration and European consensus thus form different perspectives which often overlap,[893] though they may also conflict with one another.[894] My focus here will be less on the possible tensions between the two frameworks; rather, having established that the ECtHR's references relate, inter alia, to European consensus, I will focus in the following sections on the continuing tensions *within* that framework, particularly those between the morality-focussed and the ethos-focussed perspective.

### *III. Ethos-focussed and Morality-focussed Perspectives on International Law*

The vertical connection of norms of international law to the States parties to the ECHR, I have argued, allows them to be understood as "common ground" and thus supplies the backdrop for inclusion of international law references in the establishment of European consensus. Because international law references are read through the lens of commonality, this approach resonates with the kind of relative normativity undergirding the ethos-focussed perspective. In line with the internationalist precommitment that is typical of European consensus, the search for "common ground" at the transnational level shifts the focus from individual States to the collective will of a majority of the States parties, which builds on individual national ethe but may also stand in conflict with them.[895]

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893 See Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, chapter 5, for an analysis of consensus-based reasoning that is also very strongly driven by anti-fragmentation concerns.

894 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?" at 664.

895 Hence the criticism by von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 332-334, though framed in more doctrinal terms, coheres with her larger framework based on the principles of sovereignty and democracy; see also Tzevelekos, "The Use of Article 31(3)(C) of

As for the democratic concerns underlying the ethos-focussed perspective, even when developed by reference to a pan-European ethos, there is room for differentiation. Intuitively, international law seems more removed from democratic procedures at the national level than domestic law – accordingly, it comes as no surprise that some proponents of the ethos-focussed perspective are more sceptical of the prior than the latter.[896] We might say that the positions taken by States in international law are *externalised* from their domestic procedures. The details will depend on the kind of international law at issue;[897] but the paradigmatic example of an international treaty demonstrates that this need not necessarily signal a *disconnect* from democratic procedures at the national level, for example in the form of parliamentary assent to treaty ratification.[898]

Even when the connection to democratic procedures at the national level is more tenuous – for example, by virtue of democratic accountability of the executive representatives making decisions at the transnational level – any international norms that can be connected back to the States parties of the ECHR can be considered, in some sense, grounded in State will. They thus represent not only the ethical-volitional orientation of the ethos-focussed perspective, but also its aversion to moral-cognitive reasoning which privileges the views of some over others despite reasonable disagreement.[899] Vestiges of these epistemological concerns can perhaps be found in *Demir and Baykara*, when the ECtHR notes that it relies on the "common international or domestic law standards of European States", i.e. European consensus, when it "is called upon to clarify the scope of a Con-

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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?" at 655, who points out that, for "a traditional international lawyer", *Demir and Baykara* "absolutely neglects states' will": this is true insofar as it refers to *individual* States' will; given the voluntarist element inherent in international law (which I will expand on in a moment), it is less evident with regard to the *community* of States parties; for the parallel to consensus based on domestic law with regard to possible counter-arguments based on "contextual factors" within individual national ethe, see Brems, *Human Rights: Universality and Diversity*, at 421; on that point, see further Chapter 8, III.3.

896 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 254.

897 See further infra, IV.

898 For a global overview demonstrating the involvement of parliaments in international law-making, see Oona A. Hathaway, "Treaties' End: The Past, Present, and Future of International Lawmaking in the United States," (2008) 117 *Yale Law Journal* 1236 at 1362-1372.

899 See generally Chapter 3, II.

vention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty".[900] If one understands the "more conventional means of interpretation" to include the kind of substantive reasoning preferred by the morality-focussed perspective, then European consensus, *including consensus based on international law*, supplies a more ethically grounded counterpoint to its epistemological weaknesses which the ECtHR implicitly admits to. In Geir Ulfstein's words: "One reason for relying on international instruments is that such practice represents objective factors, rather than the Court's subjective assessment or its own 'moral reading' of the Convention".[901]

Conversely, the morality-focussed perspective's epistemology leads it to be wary of the ethical-volitional aspect of international law. International law is no less politically determined than domestic law, and hence stands in tension to the morality-focussed perspective's focus on protecting *prepolitical* rights. It is based, after all, at least in part on the will of States,[902] perhaps most clearly in the case of treaties which showcase "the voluntarist element in international law (the right to decide which treatises to sign up to, pull out of, or enter reservations to)".[903] Even human rights treaties are politically determined in this sense: while they "may be allowed to operate in discreet [legal] regimes, they ultimately do so at the discretion of the very subjects they seek to constrain",[904] and their content is likewise mediated by State consent – thus embodying a paradox very similar to that criti-

900 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 76.

901 Ulfstein, "Evolutive Interpretation in the Light of Other International Instruments: Law and Legitimacy" at 92.

902 On the tension between will and knowledge in international law, see generally Chapter 1, IV.3.

903 Saladin Meckled-García and Başak Çalı, "Lost in Translation. The Human Rights Ideal and International Human Rights Law," in *The Legalization of Human Rights. Multidisciplinary Perspectives on Human Rights and Human Rights Law*, ed. Saladin Meckled-García and Başak Çalı (London and New York: Routledge, 2006) at 24; see also Legg, *The Margin of Appreciation*, at 104; see further the volitionally oriented definition of treaties as "contracts between sovereign states" by Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 253; the voluntarist element of international law is (over-)emphasised by Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 14.

904 Mégret, "The Apology of Utopia" at 470; see also Matthew Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law," (2000) 11 *European Journal of International Law* 489 at 493; Martti Koskenniemi, "The Pull of the Mainstream," (1989-1990) 88 *Michigan Law Review* 1946 at 1951.

cised by the morality-focussed perspective in the context of consensus based on domestic law.[905]

Because international law is thus based, at least in part, on the will of States – determined either by the same majoritarian procedures which are criticised in the context of consensus based on domestic law, or otherwise by State elites who are unlikely to be attuned to minority concerns – it is unlikely to be free from moralistic preferences or, more broadly, the perpetuation of various prejudices.[906] Accordingly, proponents of the morality-focussed perspective tend to view references to international law as merely concurrent to substantive normative reasoning, and retain a position from which to criticise international law, including international human rights law.[907]

Like consensus based on domestic law, then, references to international law are viewed, in principle, only as a "secondary source supporting the interpretation already warranted by other sources".[908] However, a brief glance at the primary proponents of the morality-focussed perspective in the academic literature on European consensus also makes it apparent that references to international law are commonly deemed more acceptable than consensus based on domestic law, as when George Letsas approvingly notes the ECtHR's turn to "evidence of common ground and trends of evolution in international law materials".[909] Where reliance on domestic law is read as retroactive, international law is more likely to be read as "progressive".[910] Why?

I would submit that international law is perceived as more "progressive" than domestic law by proponents of the morality-focussed perspective for two interrelated reasons, which we might call *form* and *content*. With regard to form, the *externalisation* of international law from domestic procedures constitutes its key characteristic: because international law is exter-

905 See Chapter 2, II.2.

906 See more generally the human rights critiques cited in Chapter 11, II. and III. – although such accounts typically stand diametrically opposed to the morality-focussed view in that they do not seek to establish certain standards as prepolitical, and their critique is accordingly not limited to the voluntarist elements within international law.

907 E.g. very clearly Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 539-540; Griffin, *On Human Rights*, at 5 and 192.

908 Koch and Vedsted-Hansen, "International Human Rights and National Legislatures - Conflict or Balance?" at 12 (on international soft law).

909 Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 116.

910 E.g. Radačić, "Rights of the Vulnerable Groups" at 605 and 608; see generally Chapter 2, III.

nalised as a standard which the States parties *should* adhere to – by contrast to their domestic laws *as they stand* – it carries a formally more aspirational quality. Where consensus based on domestic law is perceived as merely rubber-stamping the status quo,[911] international law may form part of the status quo but *also* retains an aspirational quality by virtue of the demands it makes of States. Differently put: although the volitional element inherent in international law connects it back to the States parties, its simultaneous externalisation from them opens up space for scenarios in which "the current domestic practice of states does not yet conform to [its] lofty aspiration".[912]

Because this line of reasoning relates to formal points only, however, its significance remains limited: the depiction of international law as aspirational only holds true so long as the standards set by international norms are also deemed substantively valuable. This is where the *content* of the ECtHR's references to international law enters the picture: while the ECtHR does not always use them to argue in favour of broad interpretations of the ECHR,[913] it does refer most often to other norms of international *human rights* law,[914] and these tend to cohere with the positions advocated for by proponents of the morality-focussed perspective and usually gathered under the banner of "liberalism".[915] So long as this rough coherence in substance persists, the ECtHR's references to international (human rights) law can be deemed both formally and substantively aspirational by proponents of the morality-focussed perspective.

In sum, references to international law as part of European consensus can be understood as a form of ethical normativity by reference to a pan-European ethos – in principle similar to European consensus based on domestic law, but with some measure of caution called for depending on the way in which international law is externalised from democratic procedures

911 See Chapter 2, II.3.

912 Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 162.

913 See infra, V.

914 One of its standard introductory formulations (often when citing Article 31 (3) lit. c VCLT) is that it takes into account relevant rules of international law, and "in particular" those of human rights law: see e.g. ECtHR, Appl. No. 31045/10 – *National Union of Rail, Maritime and Transport Workers*, at para. 76; ECtHR, Appl. Nos. 78028/01 and 78030/01 – *Pini and Others v. Romania*, Judgment of 22 June 2004, at para. 138; ECtHR (GC), Appl. No. 51357/07 – *Naït-Liman*, at para. 174.

915 As with Dworkin's theory and its application to the ECHR by Letsas, discussed in Chapter 2.

at the national level. From the morality-focussed perspective, conversely, it is the volitional element contained in international law which calls for caution, whereas its aspirational quality makes it a more acceptable reference point than domestic law; accordingly, allegiances between the morality-focussed perspective and international law are more common than when consensus based on domestic law is at issue.[916]

Gerald Neuman has aptly summarised the resulting ambiguities: on his account, references to international law contain different aspects, including "consensual" aspects – i.e. the consensual acts of State will which give "positive force as international law" to treaties – and "suprapositive" aspects, i.e. the "moral authority" which human rights provisions claim "independent of or prior to their embodiment in positive law".[917] Because norms of international (human rights) law combine these aspects and reference to them may, accordingly, "be justified from any of these […] perspectives, individually or in combination", they perpetuate the tension between what I have been calling the morality-focussed perspective and the ethos-focussed perspective.[918] The following section will delve into this tension in more depth by considering some of various norms of international law which the ECtHR refers to and their different ways of establishing ethical normativity at the pan-European level.

## *IV. Different Kinds of Regional and International Law*

### 1. Taxonomies of International Law References

The ECtHR refers to a number of different instruments of international law in its efforts to establish European consensus – indeed, it has acknowledged the "[d]iversity of international texts and instruments used for the

916 See generally Chapter 4, III.3.

917 Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 111; a similar distinction is between the form and function of human rights treaties: see Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law" at 493; Neuman also refers to a third, "institutional" aspect which I leave aside here; it partly overlaps, however, with the argument of consensus as legitimacy-enhancement which I consider in more detail in Chapters 9 and 10.

918 Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 111.

interpretation of the Convention".[919] Various taxonomies have been proposed: Magdalena Forowicz, for example, has distinguished between legal texts relating to the European Union (EU), the CoE, and the global international legal order.[920] Others have also distinguished between what could loosely be described as different kinds of sources of (primary or secondary) international law[921] – for example, between treaties, customary international law, the decisions of judicial or quasi-judicial bodies, and various declarations or resolutions.

The reason for distinguishing sources along these lines lies in the different ways in which they are established and in the differing number of States parties sharing any given position, which in turn means that they relate in different ways to the triangular tensions between moral normativity and ethical normativity at the national and the pan-European levels. The ECtHR itself does not usually distinguish, at least not explicitly, between different sources of law or the organs, procedures or contexts from which they originate.[922] Yet there are clear differences in the way different kinds of international law can (or cannot) be understood as an expression of a pan-European ethos: for example, in the case of treaties, the measure of "common ground" depends on the number of ratifications, which may vary according to the treaty; and for secondary law of international organisations, it depends on the voting rules and procedures of the organisation at issue.

My intention here is neither to provide any kind of exhaustive taxonomy nor a detailed empirical assessment of the ECtHR's case-law with regard to its manifold references to international law. Instead, I would merely like to briefly discuss some instances so as to consider, by way of example, the conceptual implications for European consensus if different kinds of international law are referred to – in particular, the differing implications for

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919 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, chapeau to para. 69.

920 Forowicz, *The Reception of International Law in the European Court of Human Rights*, at 3; echoed e.g. by Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 150; similarly Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 363.

921 These distinctions are sometimes mentioned in passing, though often entangled with the previously mentioned differences in scope of applicability: see e.g. Legg, *The Margin of Appreciation*, at 130; Senden, *Interpretation of Fundamental Rights*, at 256; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 48-49.

922 See Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 103-104.

the way in which a pan-European ethos is expressed. I begin by tracing Forowicz's distinction between EU law (2.), materials originating in the CoE (3.), and global international law (4.), in each case discussing the numerical issues involved insofar as generalisations can be made. I then briefly discuss the special case of soft law (5.). For all their differences, I would argue that the comparative materials mentioned thus far can be understood as the basis of a pan-European ethos in some sense, since it is plausible to connect them back to the States parties of the ECHR in such a way that they can be read as vertically established "common ground". I close this section by considering a counter-example (6.): materials such as judgments, quasi-judicial decisions and expert reports do not purport to be representative of the States parties' positions and are therefore less closely related to ethical normativity.

## 2. Law of the European Union

Let me begin, then, with EU law. It clearly occupies a distinct position on several grounds, the most important of which in the context of European consensus is the fact that it binds, in principle, only 27 of the 47 States parties to the ECtHR.[923] While it has been argued that norms of EU law, *in and of themselves*, suffice to "prove the existence of European consensus" in favour of the applicant and operationalise the spur effect because "the Member States of the EU constitute the majority of the states parties to the ECHR",[924] the discussion of numerical issues involved in establishing consensus casts some doubt on this:[925] while it might be a possible approach on the basis of the morality-focussed perspective emphasising a "trend", the ethos-focussed perspective would usually demand a significantly higher percentage of States parties to establish consensus in favour of the applicant rather than a lack of consensus.[926]

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923 I leave aside the complexities of, for example, certain EU norms not applying to all Member States or, conversely, the indirect applicability of certain EU norms to non-Member States via the European Free Trade Association (EFTA).

924 Rozakis, "The Accession of the EU to the ECHR and the Charter of Fundamental Rights: Enlarging the Field of Protection of Human Rights in Europe" at 331.

925 See also Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 19.

926 Chapter 5, III.1.

Furthermore, it should be noted that there is room for further differentiation based on the source within EU law. Whereas primary law such as the Charter of Fundamental Rights (CFR)[927] is, in principle, based on the consent of all Member States, secondary EU law[928] follows different procedures. The implications are manifold and complicated, all the more so when the European Parliament is involved; but their gist can be summarised by Tobias Lock's assessment that "legislation can usually be adopted with a qualified majority of Member States voting in its favour, so that sole reliance on numbers may not even reflect the true consensus among EU Member States"[929] – let alone, it is implied, among CoE Member States.[930] Even though secondary EU law binds *all* Member States (and despite its primacy and direct effect[931]), then, it may be *based* on the preferences of only some of them, thus further weakening any claim to pan-European ethical normativity based on it.

Giving strong weight to consensus in favour of the applicant based only on EU law, then, would amount to a form of ethical normativity which is noticeably disconnected from pan-European ethical normativity understood as relative to (all) the States parties of the ECHR while strongly de-emphasising the importance of national ethe, particularly but not exclusively those of non-EU Member States.[932] Given the rather obvious element of transnational homogenisation at play here, it comes as no surprise that cases in which the ECtHR refers to EU law as the sole or clearly de-

927 Referred to e.g. in ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at paras. 60-61; ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 106.

928 Referred to e.g. in ECtHR (GC), Appl. No. 30078/06 – *Konstantin Markin*, at paras. 63-64 and 140; ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, at para. 187; ECtHR (GC), Appl. Nos. 50541/08, 50571/08, 50573/08 and 40351/09 – *Ibrahim and Others v. the United Kingdom*, Judgment of 13 September 2016, at paras. 259, 261 and 264.

929 Lock, "The Influence of EU Law on Strasbourg Doctrines" at 823.

930 Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 19.

931 Emphasised by Lock, "The Influence of EU Law on Strasbourg Doctrines" at 821; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 118.

932 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 120 also notes the danger of "marginalis[ing] the legal practices of non-EU members of the Council of Europe", though his concern is primarily with sociological legitimacy; Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 160 notes consensus based on EU (then EC) law as an instance in which national ethe should be given more weight relative to European consensus due to "geo-political distinctions".

cisive element in establishing consensus are relatively rare[933] – often, consensus based on domestic law or on other international norms are cited alongside EU law.[934]

### 3. Council of Europe Materials

CoE materials, for present purposes, can be understood to include both treaties developed under the auspices of the CoE and resolutions or recommendations decided on by organs of the CoE without need for further ratification by the States parties. There seems to be an intuitive sense of congruence between CoE materials and European consensus. One might argue that the ECHR itself is historically connected to the CoE, having been developed under its auspices; furthermore, all Member States of the CoE are party to the ECHR and vice versa,[935] thus avoiding the numerical issues which, as just discussed, plague EU law from the outset.

More importantly, however, there is a more teleologically loaded sense of kinship: for example, Dzehtsiarou connects the use of CoE materials sensu stricto to the "logic" of the Strasbourg system and suggests that because "the ECHR and other Council of Europe documents are developed by the same international organization and designed to fulfil similar objectives", the latter can be used to inform the interpretation of the prior.[936] Daniel Klocke similarly sees a "connection" between the ECtHR and the CoE with regard to the task of developing human rights standards and

933 Lock, "The Influence of EU Law on Strasbourg Doctrines" at 824; Gerards, *General Principles of the European Convention on Human Rights*, at 102-104.

934 E.g. ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 106; there are quite a few borderline cases, however: consider e.g. ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 61 where the ECtHR argues that "[r]egard being had to Article 9 [CFR], therefore, the Court would no longer consider that the right to marry enshrined in Article 12 [ECHR] must in all circumstances be limited to marriage between two persons of the opposite sex" – *in spite of* a lack of consensus in domestic law (although the latter was ultimately more decisive in preventing a violation); see in more detail on *Schalk and Kopf* Chapter 1, II.; see also e.g. ECtHR (GC), Appl. No. 41615/07 – *Neulinger and Shuruk*, at para. 135 where the Court refers to different comparative materials but gives particular emphasis to the CFR.

935 As noted in ECtHR (Plenary), Appl. No. 4451/70 – *Golder*, at para. 34.

936 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 105-106; see also Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 222-223.

concludes that the prior must take into account standards set by the latter.[937] Notably, the theme of harmonisation, familiar from the spur effect of European consensus,[938] resurfaces here: both the retroactive and the prospective element are captured within Article 1 of the Statute of the Council of Europe (CoE Statute), which establishes as the CoE's aim "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage". The provisions on resolutions and recommendations by the CoE organs reflect this aim;[939] the prior, in particular, thus constitute an encouragement to the Member States "to develop harmonious policies on matters of common interest, including human rights".[940]

Traces of the special significance of CoE materials can also be found within the ECtHR's case-law. Not only does it refer to such materials extensively and with great frequency,[941] it sometimes explicitly assigns them particular weight. In that vein, it has stated that it takes into account "relevant international instruments and reports, and *in particular* those of other Council of Europe organs, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field".[942] While confirming the relevance of international instruments more generally, CoE materials are thus deemed particularly relevant in establishing a "common European standard". Although he acknowledges the differing roles assigned to them within the ECtHR's reasoning, Klocke has even gone so far as to compare the relevance of CoE materials to that of the ECtHR's own precedent.[943]

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937 Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 163-164.

938 Chapter 3, IV.4.

939 Articles 15 and 23 lit. (a) CoE Statute, respectively.

940 Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 163; the PACE's recommendations do so less directly since they are addressed to the CoM (see infra, note 960).

941 Just a few examples, all Grand Chamber judgments: ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at paras. 103-104 and 122; ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 107; ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, at para. 182; ECtHR (GC), Appl. No. 35810/09 – *O'Keeffe v. Ireland*, Judgment of 28 January 2014, at paras. 92 and 147; ECtHR, Appl. No. 25965/04 – *Rantsev*, at paras. 158-174.

942 ECtHR (GC), Appl. No. 7/08 – *Tănase*, at para. 176 (emphasis added).

943 Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 157-158.

Empirical research by Lize Glas has shown that certain CoE materials referred to by the ECtHR become by far the most relevant during the proportionality assessment, particular in cases pertaining to Article 8 ECHR.[944] Glas suggests that this might because the matter of proportionality in these cases is "comparably difficult to resolve in the sense that it is open to interpretation to a great extent"[945] and pertains to "usually sensitive" matters.[946] This reflects the more general rationale mentioned above for references to international law as the alternative to morality-focussed reasoning:[947] given disagreement about the ("sensitive") substantive issues, international law – and, in this case, CoE materials – supply an alternative form of normativity which is more volitionally oriented, grounded in a pan-European ethos instead of substantive reasoning.

It should be noted, however, that the number of States on whose will such a pan-European ethos is based vary widely depending on the CoE materials in question.[948] This is most evidently the case with regard to treaties developed under the auspices of the CoE, since their acceptance by the States parties ultimately hinges on their subsequent ratification. Some treaties, such as the Convention on Action against Trafficking in Human Beings[949] or the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[950] enjoy unanimous or near-unanimous ratification – although this was not necessarily the case when the ECtHR first referred to them in its leading cases.[951] Still, in more recent cases references to treaties such as these can be reconciled with the ap-

944 Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 107.

945 Ibid., 108.

946 Ibid., 111; on sensitivity in the sense of the ethos-focussed perspective, see Chapter 5, III.2.

947 Supra, III.

948 See also Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 19.

949 CETS No. 197, treaty of 16 May 2005, entry into force on 1 February 2008.

950 CETS No. 108, treaty of 28 January 1981, entry into force on 1 October 1985; see also the Protocol recently opened for signature: CETS No. 223 of 10 October 2018.

951 E.g. ECtHR (GC), Appl. No. 27798/95 – *Amann v. Switzerland*, Judgment of 16 February 2000, at para. 65; ECtHR, Appl. No. 25965/04 – *Rantsev*, at para. 160; my impression is that many of the CoE treaties referred to are not all that broadly ratified, at least initially: see the overview provided in the report by the Research Division of the ECtHR, "The use of Council of Europe treaties in the case-law of the European Court of Human Rights", available at <https://www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf>; contrast later

proach of the ethos-focussed perspective based on a pan-European ethos because it clearly constitutes "common ground" in the sense of (at least) a supermajority of States parties.[952] By contrast, a treaty with significantly fewer ratifications – such as the European Convention on the Legal Status of Children born out of Wedlock referred to in *Marckx* – shifts the focus away from a pan-European ethos and towards a sense of directionality based on morality-focussed considerations,[953] even if "concluded within the Council of Europe".[954]

With regard to resolutions or recommendations by the CoM and the Parliamentary Assembly (PACE), the picture is even more complicated. For one thing, they are not legally binding, an issue I will return to in a moment.[955] For another, they are based on different Member State representatives – the ministers of foreign affairs and their deputies in the CoM, members of national parliaments in the case of the PACE.[956] Finally, the voting procedures leading to the adoption of the relevant materials may involve the endorsement by quite a varying number of States. Recommendations by the CoM, for example, are sometimes said to have a "direct connection" to European consensus and a particularly appropriate basis for pan-European standards, for Article 20 lit. (a)(i) CoE Statute requires unanimity for such resolutions.[957] If this was the case, then CoM recommendations would reflect positions taken by the representatives of all Member States, even the respondent State in any proceedings before the ECtHR. In practice, however, a two thirds majority of those voting and a simple majority of those entitled to vote is sufficient for the unanimity rule not to be invoked,[958] thus introducing the possibility of CoM recommendations

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citations of e.g. the Anti-Trafficking Convention in ECtHR, Appl. No. 21884/15 – *Chowdury and Others v. Greece*, Judgment of 30 March 2017, at paras. 42, 88, 93, 100, 104 and 126; ECtHR (GC), Appl. No. 60561/14 – *S.M. v. Croatia*, Judgment of 25 June 2020, inter alia at paras. 294-295 (now in force for all States parties except Russia).

952 See generally Chapter 5, III.1. and, for international law, supra, II.

953 See Chapter 5, IV.

954 ECtHR (Plenary), Appl. No. 6833/74 – *Marckx*, at para. 20.

955 Infra, IV.5.

956 Articles 14 and 25 lit. (a) CoE Statute, respectively.

957 Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 156.

958 519bis meeting of 4 November 1994; see Marten Breuer, "Establishing Common Standards and Securing the Rule of Law," in *The Council of Europe. Its Laws and Policies*, ed. Stefanie Schmahl and Marten Breuer (Oxford: Oxford University Press, 2017), mn 28.37.

closer to the kind of majority-without-unanimity usually associated with European consensus.

Recommendations by the PACE are usually regarded as a less authoritative base for European consensus than those by the CoM,[959] in large part because they are not directed directly at the Member States, but rather at the CoM.[960] But with regard to their relation to diverse positions among the States parties, there are also significant limitations as to the number of States represented by any given recommendation. The requisite majority is two thirds of the representatives casting a vote (for resolutions, even a simple majority is sufficient).[961] Since the number of representatives differs from State to State (ranging from two e.g. for Andorra and Liechtenstein to eighteen e.g. for Germany and Turkey), the PACE departs from the traditional international law perspective of equality of States.[962] More importantly, the quorum (if it is even invoked) is reached with only one third of the representatives present.[963] Recommendations can therefore be made based on the positions taken by the representatives of only a small minority of States, and indeed some recommendations which the ECtHR has referred to were based on affirmative votes by representatives of less than half the States parties.[964] Of course, in all these cases resolutions and recommendations may also be passed by larger majorities up to and including unanimity, so the evaluation depends on the documents at issue – although the ECtHR rarely mentions the underlying majorities within the CoE when it cites them.[965]

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959 Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 163; Klocke, "Die dynamische Auslegung der EMRK im Lichte der Dokumente des Europarats" at 161.

960 Article 22 CoE Statute.

961 Article 29 (i) CoE Statute; for resolutions, see Michaela Wittinger, *Der Europarat: Die Entwicklung seines Rechts und der "europäischen Verfassungswerte"* (Baden-Baden: Nomos, 2005), at 142-143.

962 Article 26 CoE Statute.

963 Rule 42.3., Rules of Procedure of the Assembly, originally adopted as Res. 1202 (1999) and subsequently modified; available at <http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp>.

964 E.g. PACE, "Putting an end to coerced sterilisations and castrations", Resolution 1945 (2013): representatives of 23 States at least partly in favour, cited in ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at paras. 76 and 125.

965 See Breuer, "Impact of the Council of Europe on National Legal Systems", mn 36.92.

In any case, none of this is to say that the ECtHR should not refer to CoE materials within its reasoning, even if one restricts one's assessment to the ethos-focussed perspective. Compared to other vertically comparative references, they carry both advantages and disadvantages. For example, particularly in the case of the PACE as the CoE's "deliberative organ" (Article 22 CoE Statute), one might argue that there is a greater sense of jointly developed ethical normativity for the pan-European level than when the States parties' disparate domestic laws are simply added up to produce (lack of) European consensus.[966] In that sense, CoE materials can indeed be considered "convincing evidence of a developing *regional* perspective on individual rights" and thus emblematic of a pan-European ethos,[967] as opposed to domestic positions which merely happen to overlap.[968] However, this perspective does not negate the disadvantages, including the less direct connection to democratic procedures at the national level and the numerical issues just discussed, which make it more difficult to justify imposing a pan-European ethos on the national ethe of those States parties with differing positions. Therefore, claims that CoE materials may be regarded as "an expression of the collective will of the community of European States",[969] while certainly defensible in a sense, should also be treated with caution.

### 4. Global International Law

The ECtHR also references international instruments of broader geographical application than the ECHR itself[970] – "texts of universal scope", as it

966 But see ibid., mn 36.93; more generally on "deliberation and debate" in "representative fora" such as the General Assembly of the United Nations as the basis for "global public discourses" Wheatley, "The Legitimacy of International Human Rights Regimes" at 108-109.

967 Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 162 (on CoE treaties, emphasis added).

968 See critically Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 34, who notes that in contrast to national Supreme Courts, the ECtHR deals with "forty-seven distinct *demoi*" (emphasis in original).

969 Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 105-106, citing Polakiewicz, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe" at 248.

970 Brems, *Human Rights: Universality and Diversity*, at 414; Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 286.

has dubbed them.[971] Here, one might expect to encounter a problem that is diametrically opposed to that described above in the context of EU law: where the latter encompasses "too few" States for the conventional account of European consensus, the prior might be thought to encompass "too many". Differently put: when global rather than European treaties are at issue, it may at first seem somewhat counter-intuitive to establish a *European* consensus by reference to (global) *international* law.[972] One might hypothesise that this intuition is based on the connection between European consensus and the desire for some kind of specifically European identity as reflected within regional human rights law – an identity which would then be derived in part negatively,[973] by virtue of a contrast between "us" Europeans (part of European consensus) and non-Europeans "others" (not part of European consensus, not even indirectly by reference to global international law).

In that vein, for example, Hanneke Senden has classified such references as part of the "*external component* of comparative interpretation" together with references to national jurisdictions outside of Europe, while (only) references to the domestic legal systems of the States parties are seen as the internal component of comparative interpretation.[974] While acknowledging that the boundaries may be blurry, Dzehtsiarou has proposed a very similar distinction, arguing that "only those sources which are directly

971 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 72.

972 Although, given the European hegemony in establishing the universal, there is perhaps less of dichotomy here than it may at first seem; see generally Dorothy Makaza, "Towards Afrotopia: The AU Withdrawal Strategy Document, the ICC, and the Possibility of Pluralistic Utopias," (2017) 60 *German Yearbook of International Law* 485 at 488-489 and, in the context of human rights, Golder, "Varieties of Universalism" at 37; Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side," (2006) 28 *Sydney Law Review* 665 at 673-674.

973 See generally Said, *Orientalism*, at 54; see also Chapter 1, IV.3.

974 Senden, *Interpretation of Fundamental Rights*, at 115-116; see also von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 331, who similarly cites references to international law and those to non-European domestic legal systems in tandem and refers to them as "foreign legal orders", and Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 154-155, who does the same under the heading of comparative references "beyond Europe"; this resonates, to some extent, with the alternate framework of systemic integration, which could be said to foreground "horizontal" rather than vertical harmonization: see Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights" at 271.

connected to the Council of Europe legal order" – understood as including Council of Europe documents and the domestic laws of the States parties – "can be called internal", while "customary and treaty-based international legal norms", so long as they are not implemented in the domestic legal systems of the States parties, are deemed to constitute "[e]xternal legal sources" together with domestic laws of non-States parties and non-European norms of regional law.[975]

Yet from within the framework of European consensus, such an externalisation of international law hardly seems necessary – after all, as Mónika Ambrus has put it, "the member states of the Council of Europe are also part of [the] international legal system" being referred to".[976] References to global international law can thus be thought of as vertical in a similar sense to references to CoE materials since the prior, too, relate to the States parties of the ECHR, regardless of what other States the norms at issue apply to.[977] The ECtHR itself has occasionally used formulations which indicate this kind of perspective on global international law, as when it refers to the Convention on the Rights of the Child in *Hadzhieva v. Bulgaria* and notes that it "has binding force under international law on the Contracting States, *including* all of the member States of the Council of Europe".[978]

In other words, European common ground (or lack thereof) might be discerned even if it is not *particular* to Europe: what matters from within this approach is the number of States parties within Europe which subscribe to any given norm of international law, not necessarily the number of States (if any) outside of Europe who likewise do so. This is not to say that references to CoE materials and to "texts of universal scope" are considered identical within the ECtHR's case-law – as discussed above, the prior are sometimes deemed to be of particular importance.[979] For all the intuitive connections between the notion of a pan-European ethos and CoE

975 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 97; this also seems to be the position of McCrudden, "Using Comparative Reasoning in Human Rights Adjudication" at 387.

976 Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 365.

977 On verticality, see generally Chapter 1, III.; clearly, this framework brackets as non-vertical any non-European regional treaties such as the Inter-American Convention on Human Rights, though these could still be referred to on other grounds (e.g. based on general arguments in favour of any kind of comparative law, or systemic integration). I will not take up these broader issues here.

978 ECtHR, Appl. No. 45285/12 – *Hadzhieva v. Bulgaria*, Judgment of 1 February 2018, at para. 43 (emphasis added).

979 Supra, IV.3.

materials, however, global international can likewise be connected back to the Member States of the CoE. Even if there are non-negligible differences between the two kinds of norms, then, they do not seem so stark as to render global international law qualitatively different from distinctly European law, as when it is classified as "external" together with the domestic laws of non-European States.

### 5. Soft Law

Whatever the geographical scope of application of comparative materials referred to, some of them may not, in and of themselves, be considered legally binding. As one dissenting opinion summarised it: "In the Court's jurisprudence, three factors are relevant in order to determine the existence of a European consensus: international treaty law, comparative law and international soft law".[980] The aforementioned resolutions and recommendations by organs of the CoE, in particular, constitute non-binding yet standard-setting documents.[981] Given their classification as "mere" soft law, however, it is sometimes disputed whether such documents should play a role in the establishment of (lack of) European consensus: by transposing the standards set by soft law into the context of interpreting the ECHR, it is argued, originally non-binding standards become indirectly binding, thus subverting States' intentions to avoid legal obligations.[982]

While there is a certain logic to this kind of argument, it is worth noting that it goes well beyond the usual criticisms levelled at soft law, which simply note that resolutions and recommendations "*in themselves* […] do not

980 ECtHR (GC), Appl. No. 43835/11 – *S.A.S.*, joint partly dissenting opinion of Judges Nussberger and Jäderblom, at para. 19; this taxonomy could be elaborated on (e.g. by reference to other forms of international law besides treaties), but as a rough summary I think it is quite accurate and helpful.

981 See Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 97.

982 Koch and Vedsted-Hansen, "International Human Rights and National Legislatures - Conflict or Balance?" at 12; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention*, 6th ed. (München: Beck, 2016), § 5 mn 12; the criticism by Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 256 also seems to go in this direction; see also Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 98-99, although the doubts she mentions are ultimately based more on prudential reasons.

constitute the formal source of new norms".[983] On Jean d'Aspremont's account, this means that soft law documents should be considered legal facts rather than legal acts in the positivist sense.[984] But this does not mean that they are legally irrelevant; indeed, according to d'Aspremont it is "undisputed, even by positivists", that soft law may, for example, "play a role in the internationalization of the subject-matter" or "provide guidelines for the interpretation of other legal acts".[985] Both of these roles are clearly relevant in the case of soft law as European consensus.

The ECtHR, in any case, does not seem bothered by the idea of indirectly transforming soft law into "hard" law. Quite to the contrary, it is unapologetic about doing so,[986] and has repeatedly emphasised that it even "attaches considerable importance" to certain instruments "despite their non-binding character".[987] Judge Pinto de Albuquerque has even gone so far as to describe soft law as "the most important source of crystallization of the European consensus".[988] While I think this is, on the whole, somewhat of an exaggeration, the connection between soft law and European consensus certainly holds true, with the prior sometimes used as "evidence of a common standard" adopted by the States parties.[989]

Within the framework of European consensus, this seems adequate insofar that, "even though an instrument does perhaps not bind the states, it

983 Prosper Weil, "Towards Relative Normativity in International Law?," (1983) 77 *American Journal of International Law* 413 at 417 (emphasis omitted and added).

984 Jean d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials," (2008) 19 *European Journal of International Law* 1075 at 1083.

985 Ibid., 1082.

986 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 74.

987 ECtHR, Appl. Nos. 15018/11 and 61199/12 – *Harakchiev and Tolumov v. Bulgaria*, Judgment of 8 July 2014, at para. 204; see also e.g. ECtHR, Appl. No. 33834/03 – *Riviere v. France*, Judgment of 11 July 2006, at para. 72; ECtHR, Appl. No. 41153/06 – *Dybeku v. Albania*, Judgment of 18 December 2007, at para. 48; ECtHR, Appl. No. 44084/10 – *Gülay Çetin v. Turkey*, Judgment of 5 March 2013, at para. 130.

988 Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" at 123; see also in great detail ECtHR (GC), Appl. No. 7334/13 – *Muršić*, partly dissenting opinion of Judge Pinto de Albuquerque, at para. 14 and passim; contrast Nußberger, "Hard Law or Soft Law - Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR", emphasising differences between the ECtHR's references to hard and soft international law.

989 Koch and Vedsted-Hansen, "International Human Rights and National Legislatures - Conflict or Balance?" at 12; Gerards, *General Principles of the European Convention on Human Rights*, at 98-99.

can give an indication of their intent and practice".[990] Such instruments may thus be non-binding, but they can be understood as "common actions" by the States parties.[991] From this perspective, the criticism that references to soft law subvert the intention of States to avoid legal obligations seems at least partly off the mark: like references to binding international law, so too can references to soft law avoid substantive reasoning of the kind preferred by the morality-focussed perspective, instead providing a connection to materials based, at least in some sense, on States' will.[992] After all, the connections between the ECtHR's vertically comparative reasoning and the materials it refers to can always be questioned: in the case of soft law due to its lack of legally binding force, but also in the case of international law due to the ECtHR's lack of mandate to enforce it,[993] and even in the paradigmatic case of domestic law since any given position within domestic legal systems does not necessarily imply that it should be internationalised as a human rights obligation.[994]

My point is not to disparage any of these arguments in substance, but merely to suggest that they operate within a different logic to that which drives European consensus, at least if the latter is understood as an expres-

990 Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 111.

991 Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" at 125.

992 See Nußberger, "Hard Law or Soft Law - Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR" at 49 on the use of soft law as "guidelines for interpretation and filling in gaps in the text of the Convention" where its provisions are "vague and open".

993 As sometimes stressed by the ECtHR when it wishes to distance itself from certain norms of international law: see e.g. ECtHR, Appl. No. 31045/10 – *National Union of Rail, Maritime and Transport Workers*, at para. 106; see also von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 332; for the parallel between soft law and international law sensu stricto in that regard, see Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 105.

994 Ulfstein, "Evolutive Interpretation in the Light of Other International Instruments: Law and Legitimacy" at 92; this point of criticism is also at least implied by Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 43, who cautions that national legislation (as opposed to constitutional law or international treaties) "may reflect no more than local compromises"; see also Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence" at 88; for a defence, see Seibert-Fohr, "The Effect of Subsequent Practice on the European Convention on Human Rights: Considerations from a General International Law Perspective" at 74.

sion of a pan-European ethos. On that account, the crucial aspect is simply to identify European positions which are in some sense – however imperfectly – "shared" rather than arrived at by virtue of substantive reasoning open to the charge of paying insufficient attention to disagreement about moral matters. This does not imply that distinctions cannot be made between soft law and international law sensu stricto (by assigning them differing argumentative weight within the ECtHR's reasoning); for example, given the democratic concerns which ultimately underlie the ethos-focussed perspective's interest in State will,[995] one might argue that treaty ratifications are more likely to be democratically bolstered than soft law documents.[996] So long as soft law instruments are in some way supported by a super-majority of the States parties, however, it seems to me that their inclusion in the establishment of (lack of) European consensus is not per se contrary to the logic of ethical normativity developed within a pan-European ethos – it merely demonstrates that ethical normativity can be established in different ways.

### 6. Non-Representative Documents

The ECtHR goes even further: as it summarised its approach in *Demir and Baykara*, its references to soft law, particularly in the context of the CoE, have led it "to support its reasoning by reference to norms emanating from other Council of Europe organs, *even though those organs have no function of representing States Parties* to the Convention, whether supervisory mechanisms or expert bodies", including e.g. the Venice Commission or the European Commission against Racism and Intolerance.[997] The same is true at the global level, with references to the supervisory bodies of the various global human rights treaties being particularly common.[998] Furthermore, such non-representative materials need not be limited to soft law: they also

995 See Chapter 3, IV.2.

996 Jan Klabbers, *The Concept of Treaty in International Law* (The Hague et al.: Kluwer, 1996), at 160; see also Nußberger, "Hard Law or Soft Law - Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR" at 43.

997 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 75 (emphasis added); see e.g. ECtHR (GC), Appl. No. 310/15 – *Mugemangango v. Belgium*, Judgment of 10 July 2020, at paras. 32-34 and 106-107 for references to the Venice Commission.

998 See e.g. supra, note 851.

encompass, for example, legally binding judgments by other European or international courts. While emphasising the "distinct character" of its own judicial review compared to other supervisory procedures,[999] the ECtHR regularly takes them into account.

What all these various documents (judgments, quasi-judicial decisions, expert reports, and many more) have in common is the lack of direct connection to positions taken by the States parties in a way which can be considered in some sense part of their democratic process: instead, like judgments of the ECtHR itself, they are the product of only a few individuals' reasoning.[1000] As such, they are open to the general criticism made by the ethos-focussed perspective of the morality-focussed perspective's epistemology: in light of reasonable disagreement, individual views should not be preferred over the outcome of a democratic process, even those views are put forward as interpretations of e.g. a treaty signed by a super-majority of the States parties.[1001] Whatever one makes of this criticism in substance, I would submit that it shows a certain disconnect between non-representative materials and ethical normativity: the prior are relatively far removed from the positions developed by the States parties themselves,[1002] even if they may apply to them as a matter of international law or soft law.

This is not to say, of course, that other potential rationales for reference to non-representative materials cannot be adduced. The principle of systemic integration discussed above, for example, provides one rationale for such references – if one aims to achieve a harmonious system of international (human rights) law, then at least legally binding norms should be taken into account regardless of whether they are representative of the States parties or not.[1003] For both supervisory mechanisms and other reports, deference on the basis of "expertise" may also play a role, as when the ECtHR deems the Committee of Independent Experts established by

999 ECtHR, Appl. No. 31045/10 – *National Union of Rail, Maritime and Transport Workers*, at para. 98.

1000 Of course, they may in turn employ consensus-based reasoning, but the level of scrutiny required to establish whether this is the case is rarely if ever performed by the ECtHR.

1001 Chapter 3, II.

1002 See also Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 123; see generally Chapter 1, III.

1003 This rationale seems to be motivating e.g. Legg, *The Margin of Appreciation*, at 130-135; Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 255 insofar as references to other international courts or tribunals are at issue.

the European Social Charter to be a "particularly well-qualified" body in the area of labour rights.[1004] Finally, as with any more representative form of consensus, non-representative documents may be referred to concurrently to other forms of argument, as when the morality-focussed perspective uses it to bolster results already reached by way of independent reasoning.[1005]

### V. *Consensus based on International Law versus Consensus based on Domestic Law*

My argument thus far has been that various kinds of international law (with the exception of the non-representative documents just discussed) can be considered a kind of ethical normativity developed within a pan-European ethos. The preceding section considered some of the different procedures which might lead to the expression of such a pan-European ethos: for example, the ratification of treaties tends to remain relatively close to democratic procedures within individual States parties, whereas the secondary law of international organisations such as the CoE is more disconnected from them but also involves more active deliberation and decision-making by the States parties as a whole, as opposed to disparate domestic laws. Needless to say, different norms of international law may provide conflicting guidance on any given issue before the ECtHR, and in such cases different kinds of ethical normativity at the pan-European level may be considered in conflict. Any kind of (lack of) consensus based on international law can, furthermore, potentially point in a different direction than (lack of) consensus based on domestic law. In this section, I will consider the ECtHR's case-law on this latter issue, which will shed further light on the way in which references to international law relate to the tensions between the morality-focussed and the ethos-focussed perspective.

Before turning to the relation between consensus based on international and domestic law, respectively, let me briefly provide some examples of the latter fulfilling the typically Janus-faced function of consensus – what I have been treating under the headings of "rein effect" and "spur effect".[1006]

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1004 ECtHR, Appl. No 28602/95 – *Tüm Haber Sen and Çinar v. Turkey*, Judgment of 21 February 2006, at para. 39; see also Gerards, *General Principles of the European Convention on Human Rights*, at 97.

1005 See generally Chapter 2, III.

1006 Chapter 1, III.

The spur effect appears to be the most prominent within the ECtHR's case-law: These are the paradigmatic cases such as *Demir and Baykara* in which the ECtHR considers international law to demonstrate common ground among the States parties in favour of the applicant's position, and privileges this super-majoritarian commonality over the national ethos of the respondent State.[1007] Conversely, there may be common ground in favour of the respondent State when international law is geared at allowing a certain practice,[1008] or even *prohibits* States from taking an expansive approach to human rights of the kind demanded by the applicants before the ECtHR, as was the case (on the ECtHR's reading of international law) in a number of high-profile judgments concerning State immunity from civil suits. In these cases, the ECtHR held that "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court",[1009] thus making the normative effect of international law in favour of the respondent State particularly clear.[1010]

Finally, there are cases involving a *lack* of consensus within international law, i.e. those in which international law is in some way equivocal about the issue before the ECtHR. This issue is even more complex than when lack of consensus within the States parties' domestic legal systems is at issue, and there are several different situations which the ECtHR might describe as lack of consensus. For example, ratification by only a small number of the States parties can be interpreted as lack of consensus,[1011] as can the fact that treaties on a similar subject-matter "are silent" on the matter

1007 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at paras. 85-86.

1008 E.g. unannounced doping tests based on a duty to disclose sportspersons' whereabouts: ECtHR, Appl. Nos. 48151/11 and 77769/13 – *National Federation of Sportspersons' Associations and Unions (FNASS) and Others*, at para. 184.

1009 ECtHR (GC), Appl. No. 35763/97 – *Al-Adsani*, at para. 56; ECtHR (GC), Appl. No. 37112/97 – *Fogarty*, at para. 36; ECtHR (GC), Appl. No. 31253/96 – *McElhinney v. Ireland*, Judgment of 21 November 2001, at para. 37.

1010 The ECtHR itself framed the issue primarily as one of systemic integration (unsurprisingly, given the possibility of a direct norm conflict with other areas of international law if it had found a violation of the Convention). As argued above (II.), however, there is an overlap between the frameworks of European consensus and systemic integration; and thus I would argue that the international law of State immunity can *also* be considered common ground among the States parties and read through the prism of verticality.

1011 See e.g. ECtHR, Appl. No. 39051/03 – *Emonet and Others*, at para. 84; but see also ECtHR (GC), Appl. No. 19010/07 – *X and Others*, at paras. 50 and 149-150

at issue.[1012] The most common occurrence of lack of consensus based on (lack of) international law within the ECtHR's case-law seems to be that an issue was in some way debated within international fora *and yet* no agreement was reached – somewhat unsurprisingly, perhaps, because these cases make the disagreement among States more explicit than those previously mentioned. For example, in *Chapman v. the United Kingdom*, the ECtHR interpreted the lack of precise standards in the various international instruments cited by the applicant as showing that "the signatory States *were unable to agree* on means of implementation" of the general goal to protect minorities – there was, in other words, a lack of consensus – which reinforced the Court's view that "the complexity and sensitivity of the issues" involved should lead to its supervisory role being largely reduced.[1013] A similar approach is in evidence in the more recent case of *Animal Defenders v. the United Kingdom*: here, the ECtHR noted that "[s]uch is the lack of consensus" with regard to the regulation of paid advertising that the CoM repeatedly "declined to recommend a common position on the issue", which led to a broad margin of appreciation for the respondent State.[1014]

In principle, then, international law in favour of the applicant leads to the spur effect and international law in favour of the respondent State or lack of consensus in international law leads to the rein effect. This mirrors the conventional account of consensus based on domestic law, including,

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for a case in which few ratifications were associated with lack of common ground, yet the "narrowness of [the] sample" prompted the ECtHR to not draw any normative conclusions from this; contrast the joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos, at para. 18.

1012 ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, at para. 107 (with regard to CoE conventions); see also ECtHR (GC), Appl. No. 61827/00 – *Glass v. the United Kingdom*, Judgment of 9 March 2004, at para. 75; ECtHR (GC), Appl. No. 57592/08 – *Hutchinson v. the United Kingdom*, Judgment of 17 January 2017, at para. 49; finally, see ECtHR (GC), Appl. No. 51357/07 – *Naït-Liman*, at para. 178, relying on the relative *ambiguity* of certain provisions.

1013 ECtHR (GC), Appl. 27238/95 – *Chapman*, at para. 94; the ECtHR later changed its interpretation of this passage in *D.H.*: see infra, note 1022; on the switch between levels of generality within its comparative reasoning, see further Chapter 7, III.2.

1014 ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 123; the explanatory memoranda to the relevant CoM recommendations explicitly mentioned the lack of a common standard based on "the different positions on this matter": see ibid., at paras. 74-75; see also ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, at para. 107 (with regard to Directive 2004/23/EC).

in principle, the asymmetry in favour of the rein effect.[1015] However, the two types of consensus need not necessarily point in the same direction. Cases of conflict between them are seldom made explicit within the ECtHR's reasoning[1016] – somewhat unsurprisingly, both because one can expect at least a rough coherence between the States parties' positions in domestic and international law and because the flexibility in determining whether there is a consensus or lack of consensus allows the ECtHR to iron out any incoherence if it so wishes. Nonetheless, different implications of consensus based on international law and domestic law, respectively, sometimes shine through; and especially if one reads various majority opinions against submissions by the applicants, the respondent State and intervening parties or in contrast to dissenting opinions, it becomes clear that either domestic law or international law may be prioritised depending on the case at issue.

The ECtHR itself has simply stated that it is "for the Court to decide […] how much weight to attribute" to various international instruments[1017] – a statement that is self-evidently true in the sense that the ECtHR itself decides on the judicial reasoning it will deploy,[1018] but of little help if one is looking for guidance as to general standards on how European consensus is established at the interface between domestic and international law. In some cases, the majority ruling quite clearly gives priority to consensus (or lack thereof) in domestic law, while consensus based on international law is either not mentioned or quickly passed over.[1019] For example, in the case of *A.P., Garçon and Nicot v. France*, the ECtHR glossed

1015 See generally Chapter 5, III.1.

1016 See e.g. ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 98; ECtHR (GC), Appl. Nos. 52562/99 and 525620/99 – *Sørensen and Rasmussen*, at paras. 70-75; ECtHR (GC), Appl. Nos. 66069/09, 130/10 and 3896/10 – *Vinter and Others*, at paras. 114-118; ECtHR, Appl. No. 16130/90 – *Sigurdur A. Sigurjónsson v. Iceland*, Judgment of 30 June 1993, at para. 35.

1017 ECtHR (GC), Appl. No. 7/08 – *Tănase*, at para. 176; see also ECtHR (GC), Appl. No. 310/15 – *Mugemangango*, at para. 99 (not "decisive"); contrast ECtHR (GC), Appl. No. 60561/14 – *S.M.*, at para. 290.

1018 Emphasised by Tzevelekos and Dzehtsiarou, "International Custom Making" at 325.

1019 E.g. ECtHR (Plenary), Appl. No. 10843/84 – *Cossey*, at para. 40 (contrast with the dissenting opinion of Judge Martens, at paras. 5.5. and 5.6.2.; see also similarly ECtHR (GC), Appl. Nos. 22985/93 and 23390/94 – *Sheffield and Horsham*, dissenting opinion of Judge van Dijk, at para. 3); ECtHR (GC), Appl. No. 42326/98 – *Odièvre v. France*, Judgment of 13 February 2003, at para. 47 (contrast with the joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, at para. 15);

over international materials in favour of the depathologisation of trans identities, despite having applied some of them in an earlier part of the judgment dealing with other issues.[1020] Accordingly, there is some support for Koch and Vedsted-Hansen's statement that the ECtHR "usually" examines domestic law as the "primary source of reference", only taking international treaties into account "[i]n addition" to this primary source.[1021]

Yet, conversely, a number of cases may be identified in which more weight was attached to international law than to consensus based on domestic law.[1022] The case of *D.H. and Others v. the Czech Republic* makes this particularly clear, for different passages in the judgment give different weight to different types of consensus: the respondent State built its case based in part on lack of consensus in domestic legislation,[1023] the majority judgment instead relied on consensus in favour of the applicant based on international law,[1024] and the dissenting opinion of Judge Jungwiert in turn criticised the majority's reliance on international texts.[1025] As Føllesdal has summarised it: the ECtHR "sometimes, but not always, seems to put greater weight on [international law] than on a consensus among European states".[1026]

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ECtHR (GC), Appl. No. 21906/04 – *Kafkaris*, at para. 104 (contrast with the joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens, at para. 4).

1020 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 139; see critically Damian A. Gonzalez-Salzberg, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France," (2018) 81 *Modern Law Review* 526 at 534; on this case, see also Chapter 5, IV. and Chapter 7, III.2.

1021 Koch and Vedsted-Hansen, "International Human Rights and National Legislatures - Conflict or Balance?" at 12.

1022 See e.g. Radačić, "Rights of the Vulnerable Groups" at 605, citing ECtHR, Appl. No. 73316/01 – *Siliadin v. France*, Judgment of 26 July 2005 and highlighting the tension between international materials referred to by the ECtHR and the domestic legal orders of the States parties at the time.

1023 ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, at para. 155.

1024 Ibid., at para. 181.

1025 ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, dissenting opinion of Judge Jungwiert, at para. 5; see also Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 58-59 and, for more detail on *D.H.*, see Chapter 7, III.2.

1026 Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 197.

It thus becomes clear that the multiplicity of potential sources for establishing European consensus further contributes to its malleability.[1027] Mónika Ambrus, for example, has argued that "the choice of the concrete source is decisive for the result of comparison" and that "the application of the sources of comparison" should therefore be "consistent across the cases".[1028] In a similar vein, Kanstantsin Dzehtsiarou has urged the ECtHR to "clarify its methodology for deciding between consensus based on international treaties", on the one hand, and "European consensus based on a comparative analysis of laws and practices of the Contracting Parties", on the other, when they "point in different directions".[1029] He admits, however, that the question of which source should take priority is "nearly impossible to answer […] in the abstract" and that its answer "may depend on the facts and context of the case, clarity of the trend of rules and applicability of the principles to the case".[1030]

Based on the analysis above and the framework which I introduced over the course of the preceding chapters, I would suggest that it further depends on whether the ECtHR foregrounds the ethos-focussed perspective or the morality-focussed perspective within its reasoning. These two perspectives may conflict or intermingle with one another in complex ways, and I argued above that consensus based on international law occupies an ambivalent position within these tensions since it is grounded in volitional elements yet also read as carrying a more aspirational quality.[1031] We might also consider international law as a specific instance of the numerical issues discussed in the last chapter. Most straight-forwardly, as the example of *Marckx* has shown,[1032] the influence of the morality-focussed perspective may lead to shifts in the number of States required to establish consensus in favour of the applicant: notions of directionality such as a

1027 Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 251.

1028 Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 365; on consistency, see also Nußberger, "Hard Law or Soft Law - Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR" at 50.

1029 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 57.

1030 Ibid., 58-59.

1031 Supra, III.

1032 Chapter 5, IV., and supra, IV.3.

"continuous evolution" of norms[1033] or a "growing measure" of common ground[1034] can be and have been applied to international law as well as to domestic law, providing for a morality-focussed element in the very establishment of consensus.

More interestingly, however, in some cases these numerical shifts are already woven into the procedures leading to the establishment of international norms. As discussed above, PACE recommendations may be decided upon with the support of less than half the States parties to the ECHR, let alone a supermajority.[1035] One might nonetheless take them to be an expression of a pan-European ethos because they were decided by the deliberative organ of the CoE, and thus as a volitionally grounded alternative to the morality-focussed perspective.[1036] But one might also regard them as too fragile a base for ethical normativity at the pan-European level, too easily setting aside the national ethe of those States who did not support them. In this case, the invocation of such recommendations would be more likely to also be based on morality-focussed considerations, as a way of bolstering normative results reached by way of moral-cognitive reasoning rather than an expression of ethical normativity worth supporting.

The choice between this kind of consensus based on international law and an antithetical lack of consensus based on domestic law, then, turns out to be a choice between different kinds of normativity – and it comes as no surprise that lack of consensus based on domestic law, in this kind of case, is sometimes re-interpreted as a "trend" so as to smooth away the conflict.[1037] This is not to say that the ECtHR should not provide "reasons for preferring one [type of consensus] over the other"[1038] and thus "clarify why it has chosen a particular source of comparison";[1039] but since the choice of such reasons itself depends on the kind of normativity undergirding them,

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1033 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 86.
1034 ECtHR, Appl. No. 16130/90 – *Sigurdur A. Sigurjónsson*, at para. 35.
1035 Supra, IV.3.
1036 Supra, text to notes 944-947.
1037 E.g. ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others*, at para. 91; conversely, international law may also push the ECtHR to favour the rein effect, finding "no common approach" among domestic legal systems despite a "significant" majority in favour of the applicant: ECtHR, Appl. No. 19840/09 – *Shindler v. the United Kingdom*, Judgment of 7 May 2013, at para. 115 (and paras. 110-114 for international law).
1038 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 59.
1039 Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 365.

the more foundational tension between the morality-focussed perspective and the ethos-focussed perspective, as well as different approaches to the latter, in any case persists.

The scenario just described and the numerical issues it involves also help to further explain the relative lack of hostility towards international law references among proponents of the morality-focussed perspective:[1040] because of the procedures involved, international law can sometimes (but by no means always) be used to *lessen the asymmetry in favour of the rein effect*, thus making "progressive" positions more easily available. These procedures may, in a sense, also be defensible as an expression of a pan-European ethos; but they certainly shift the focus away from individual national ethe, i.e. the reason why the ethos-focussed perspective would usually demand a supermajority rather than (at the very least) a simple majority at the transnational level.

## *VI. Interim Reflections: International Law as Grounded Yet Aspirational*

We are left with a complex picture. References to international law may support both the rein effect and the spur effect, with shifting boundaries between the two depending on angle from which it is approached, the kind of international norm at issue, and the procedures behind it. So long as it can be considered in some way representative of the States parties to the ECHR, it represents a form of ethical normativity; but differences remain, for example with regard to the level of democratic accountability within individual States, the amount of joint deliberation and decision-making at the transnational level, and the number of States behind any given norm of international law. Some rough hierarchies between different kinds of international law have been proposed in response – hard law over soft law, CoM resolutions over PACE recommendations – but they remain tentative and dependent on the case and the precise materials at issue. Furthermore, while international law references are often accepted as a concurrent form of reasoning by proponents of the morality-focussed perspective, the volitional elements involved ultimately remain secondary to independent, moral-cognitive reasoning, and as such support for any given norm of international law may depend simply on its substantive content.

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1040 Supra, III.

Many of these distinctions have not been discussed at length until now, at least within the framework of European consensus. This may be in part because the ECtHR's references to international law are read instead as (exclusively) an instance of systemic integration, setting aside the vertical connection to the States parties' positions; it may also be because the ECtHR itself does not usually comment on the "character, tasks or compositions" of the organs from which international documents referred to originate, nor "on the character of a document which it mentions",[1041] nor yet on its deeper rationale for referring to international law in the first place.

I also suspect that the role of international law within European consensus has so far escaped critical scrutiny because it performs a delicate balancing function between the ethos-focussed perspective (by reference to a pan-European ethos) and the morality-focussed perspective. From the perspective of the prior, reasoning grounded in State-made international law seems preferably to purely moral-cognitive reasoning. It may even provide a pragmatic short-cut to ascertaining the States parties' positions since norms of international law are often easier to identify than the domestic law of 47 different States parties.[1042] From the perspective of liberal proponents of the latter, references to international human rights law, in particular, seem a helpful resource to prod the ECtHR in the "right" direction. Within the progress narrative of international human rights law,[1043] the States parties are deemed to have externalised aspirational standards which

1041 Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 103-104

1042 Von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 331; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 95; Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 114; Lock, "The Influence of EU Law on Strasbourg Doctrines" at 821; Laura Van den Eynde, "The Consensus Argument in NGOs' *Amicus Curiae* Briefs: Defending Minorities through a Creatively Used Majoritarian Argument," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 110; see also Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 109; for an example from the ECtHR's case-law, see e.g. ECtHR, Appl. No. 37222/04 – *Altinay v. Turkey*, Judgment of 9 July 2013, at para. 43, in which international materials seem to be used to substantiate a trend within domestic law.

1043 See generally Authers and Charlesworth, "The Crisis and the Quotidian in International Human Rights Law" at 26; Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" at 668-673.

they do not yet live up to, and reference to these standards rather than the domestic laws of the States parties thus constitutes a step forward. In particular, certain kinds of international law may be viewed as an expression of "modern European society",[1044] with the implication that those States not part of the consensus it establishes are less developed, less progressive, and must change their policies accordingly to "catch up".[1045] Thus, the perception of international law as both grounded and aspirational caters, to some extent, to the concerns of both the ethos-focussed and the morality-focussed perspective – with the prior focussing on a pan-European ethos in such a way that it side-lines individual national ethe, arguably more so than consensus based on domestic law usually does.

For all these pragmatic convergences between ethical normativity developed by reference to a pan-European ethos, on the one hand, and moral normativity, on the other, international law should not be understood as supplying a straight-forward solution to the problem of how concrete norms set by the ECtHR can be justified: instead, the multiplicity of international norms and the different procedures underlying them as well as the possibility of conflict with consensus based on domestic laws all contribute to the further malleability of establishing (lack of) consensus, in addition to the more general numerical issues discussed in the previous chapter. The triangular tensions between ethical normativity by reference to a pan-European ethos and individual ethe as well as moral normativity are not solved by international law, but rather complicated further by introducing different procedures which can be taken to express a pan-European ethos. To further destabilise the notion of a pan-European ethos, the following chapter discusses another crucial aspect of how consensus is established: its level of generality.

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1044 ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 106 (in the context of "the unanimous recognition of the right to conscientious objection by the member States of the European Union": see supra, IV.2.), invoking the idea of "modern societies" already present in ECtHR (Plenary), Appl. No. 6833/74 – *Marckx*, at para. 41; the designation as "modern" could be seen as fulfilling a similar function as the reference to "progressive" consensus: see Chapter 2, III.

1045 See generally on this dynamic in connection with European progress narratives David Kennedy, "Turning to Market Democracy: A Tale of Two Architectures," (1991) 32 *Harvard International Law Journal* 373.