Part D.

Perspectives in different fields of international law

Chapter 8: The European Convention on Human Rights

A. Introduction

This chapter analyzes the interrelationship of sources in a centralized, treaty-based system, the ECHR, with its own judiciary, the European Court of Human Rights. The chapter will first explore the way in which the European Court interprets the ECHR and takes into account other rules of international law when interpreting states' obligations under the ECHR (B.). Subsequently, the chapter will demonstrate how the interpretation and application of customary international law and general principles of law can contribute to the interpretation of the ECHR and how the specific incorporation of these sources by the European Court can further and shape the development of general international law (C.). It is submitted that the European Court did not always just apply general international law "as it stands"[1]; in certain instances, the European Court establishes a relationship between the object and purpose of the ECHR and general international law which can influence the development of the latter.[2] Last but not least, the chapter will point to "functional equivalents" to concepts of general international law which are based on an interpretation of the ECHR (D.).

The purpose of this chapter is not to comprehensively address all questions on the relationship between international human rights law and the sources of international law. Since human rights law consists mainly of widely ratified universal and regional treaties, the debate on whether human rights can be justified as part of customary international law in spite of the existence of a practice of numerous human rights violations[3] has lost, at first sight, a certain

1 Cf. *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* App no 5809/08 (ECtHR, 21 June 2016) Diss Op Nußberger 145.

2 Cf. on the way in which public international law is perceived through the lenses of a special regime's quasi-judicial body, Michaels and Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' 349 ff.

3 For an overview, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989); Martti Koskenniemi, 'The Pull of the Mainstream' (1989) 88 Michigan Law Review 1947 ff.; Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' 83 ff.; Eckart Klein (ed), *Menschenrechtsschutz durch Gewohnheitsrecht: Kolloquium 26.-28. September 2002*

relevance. Reservations to human rights treaties, which in principle illustrate the continuing importance of customary international law as a source of human rights law, have become subject to an evaluation of the reservation's compatibility with the object and purpose of human rights treaties by treaty bodies,[4] and denunciations of treaty obligations have become subject to review by treaty bodies and were, according to a view expressed by the Human Rights Committee with respect to the ICCPR which does not include a provision on denunciation, impermissible.[5] The extraterritorial applicability of human rights treaties has increasingly received more acceptance, which also reduces to some extent the relevance of the question of whether human

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Potsdam (Berlin, 2003); Hugh W Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' (2015) 28(3) Leiden Journal of International Law 496 ff.; Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations, General Course on Public International Law' 84, referring to the Third Restatement on Foreign Relations Law and arguing that "literature on human rights tend to neglect the role, or potential role, of customary law"; Georg Schwarzenberger, *The Frontiers of International Law* (Stevens & Sons 1962) 130-145 on British practice to invoke human rights against other governments.

4 Human Rights Committee *General Comment No 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*; but see also *Report of the Human Rights Committee* UN Doc A/50/40 (3 October 1995) 130 ff. (observations by the United States of Ameria and by the United Kingdom of Great Britain and Northern Ireland); see Bruno Simma, 'Reservations to human rights treaties: some recent developments' in Alfred Rest and others (eds), *Liber amicorum Professor Ignaz Seidl-Hohenveldern in honour of his 80th birthday* (Kluwer Law International 1998) 659 ff.; Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96(3) AJIL 531 ff.; Alain Pellet and Daniel Müller, 'Reservations to Human Rights Treaties: not an Absolute Evil ...' in Ulrich Fastenrath and others (eds), *From bilateralism to community interest: essays in honour of judge Bruno Simma* (Oxford University Press 2011) 521 ff.; see Akbar Rasulov, 'The Life and Times of the Modern Law of Reservations: the Doctrinal Genealogy of General Comment No. 24' (2009) 14 Austrian review of international and European law 105 ff.

5 *General Comment No 26: Continuity of Obligations* CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997 para 5; cf. Yogesh Tyagi, 'The Denunciation of Human Rights Treaties' (2008) 79 BYIL 86 ff.; see also Eckhart Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in Ulrich Fastenrath and others (eds), *From bilateralism to community interest: essays in honour of Judge Bruno Simma* (Oxford University Press 2011) 477 ff, 484-487 (with reference to article 54(b) VCLT for the view that all parties together can terminate a treaty).

rights apply as a matter of customary international law outside a state's borders.[6]

Yet, it must be pointed out that the topic of human rights as customary international law or general principles of law has not lost all of its relevance.[7] Still, human rights treaties have not been ratified by all states. In addition, customary international law can be relevant for parties to human

6 On the extraterritorial application of human rights treaties see *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* Human Rights Committee CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para 10; *General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life Advanced unedited version* Human Rights Committee CCPR/C/GC/36 (30 October 2018) para 63; *Legal Consequences of the Construction of a Wall* [2004] ICJ Rep 136, 178-180 paras 107-111; *Armed Activities on the Territory of the Congo* [2005] ICJ Rep 168, 242-244 paras 216-217; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*) (Provisional Measures, Order of 15 October 2008) [2008] ICJ Rep 386 para 109; see already *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 54 para 118 ("physical control of a territory [...] is the basis of State liability for acts affecting other states"); according to Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 Chinese Journal of International Law 663, the Namibia opinion constituted a "a ground breaking decision on the extraterritorial application of human rights"; *Al-Skeini and Others v The United Kingdom [GC]* App no 55721/07 (ECtHR, 7 July 2011) paras 130-142; but see now *Georgia v Russia (II) [GC]* App no 38263/08 (ECtHR, 21 January 2021) paras 125-144; *Rights and Guarantees of Children in the context of migration and/or in need of international protection* IACtHR Advisory Opinion (19 August 2014) OC-21/14 para 61; *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights* IACtHR Advisory Opinion (15 November 2017) OC-23/18 paras 78-82; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, Oxford University Press 2019) 14-137; not recognizing the extraterritorial applicability of the ICCPR: US Department of Defense, *Law of War Manual June 2015 (Updated December 2016)* (Washington, D.C., 2016) 24, 758, 1035.

7 See for instance *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* Report of the Working Group on Arbitrary Detention (6 July 2015) UN Doc A/HRC/30/37, examining customary human rights law on arbitrary detention. On human rights rights as general principles see Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' 82 ff.

rights treaties. The Human Rights Committee rejected the permissibility of reservations to precisely those human rights obligations which were also protected under customary international law.[8] Custom remains also relevant for instance when it comes to state succession if one is of the view that a new state, while not being bound by treaty obligations, is at least bound by general international law.[9]

The question which this chapter addresses, however, is not whether human rights can be justified as freestanding customary international law[10] but whether and how international law, including customary international law and general principle of law, informs and is informed by the human rights law, in particular the ECHR.[11]

B. The interpretation of the ECHR

The interpretation of the ECHR is governed by the general rules of interpretation as set forth in the articles 31-33 VCLT.[12]

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8 Human Rights Committee *General Comment No 26: Continuity of Obligations*.

9 On the debate whether a successor is bound by human rights treaties of the predecessor see Akbar Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?' (2003) 14(1) EJIL 141 ff.; Menno Tjeerd Kamminga, 'State succession in respect of human rights treaties' (1996) 7(4) EJIL 469 ff.; Andreas Zimmermann, *Staatennachfolge in völkerrechtliche Verträge: zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation* (Springer 2000) 543 ff.

10 Both Meron and Cheng justify the importance of *opinio juris* (*generalis* as opposed to *conventionalis*) in the field of human rights not only by the subject-matter and its contrafactual character, but by the fact that states decided to conclude human rights treaties: Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 AJIL 367; Cheng, 'Custom: the future of general state practice in a divided world' 532-533; see also Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' 495 ff.

11 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; for an overview see Luzius Wildhaber, 'The European Court of Human Rights: The Past, The Present, The Future' (2007) 22 American University International Law Review 521 ff.

12 *Golder v United Kingdom [Plenum]* App no 4451/70 (ECtHR, 21 February 1970) para 29 (referring to the articles 31-33 VCLT as well as to article 5 VCLT prior to the Vienna Convention's entry into force); *Saadi v The United Kingdom [GC]* App no 13229/03 (ECtHR, 29 January 2008) paras 26, 61 ("31-33"); *Mamatkulov and Askarov*

These general rules leave the interpreter a certain "leeway" as to how they will be applied in the specific case[13] - the means of interpretation which form "the general rule of interpretation" according to article 31 VCLT need to be balanced against each other and applied in a "single combined operation".[14] This leeway opens the door to institutional preferences and incentives,[15] and the "normative *Missionsbewusstsein* or 'in-built bias'"[16] of the respective law-applying authority. Moreover, when interpreting the broadly framed rights of the Convention according to the rules of interpretation, it may be necessary to resort to second-order considerations when one has to make a

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v Turkey [GC] App no 46827/99 and 46951/99 (ECtHR, 7 February 2005) paras 39, 111 (31(3)(c)), 123 (31(1)); *Loizidou v Turkey (Preliminary Objections)[GC]* App no 15318/89 (ECtHR, 23 March 1995) para 73 (31(1), (3)(b)); *Banković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom [GC]* App no 52207/99 (ECtHR, 12 December 2001) paras 56-58 (31(1), (3)(b),(c), (32)); *Hassan v The United Kingdom [GC]* App no 29750/09 (ECtHR, 16 September 2014) paras 100-101 (31(3)); *Al-Adsani v the United Kingdom [GC]* para 55 (31(3(c)); *Soering v The United Kingdom [Plenum]* App no 14038/88 (ECtHR, 7 July 1989) para 103 (referring to "subsequent practice in national penal policy" without, however, explicitly referring to article 31(3)(b) VCLT); on the interpretation of the ECHR in more than one languages see *Wemhoff v Germany* App no 2122/64 (ECtHR, 27 June 1968) paras 7-8; *Brogan and others v United Kingdom* App no 11209/84; 11234/84; 11266/84; 11386/85 (ECtHR, 29 November 1988) para 59 (33(4)); *Stoll v Switzerland [GC]* App no 69698/01) (ECtHR, 10 December 2007) paras 59-61 (31(3), (4)); cf. William Schabas, 'Interpretation of the Convention' in William Schabas (ed), *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015) 35-36; Georg Nolte, 'Second Report for the ILC Study Group on Treaties over Time. Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 244-245.

13 Djeffal, *Static and evolutive treaty interpretation: a functional reconstruction* 351, 126-127.

14 *ILC Ybk (1966 vol 2)* 219; using this phrase as well: *Golder v United Kingdom [Plenum]* para 30; Djeffal, *Static and evolutive treaty interpretation: a functional reconstruction* 126-127.

15 Pauwelyn and Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' 445 ff.

16 Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20(1) EJIL 81; the latter phrase goes back to Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties' 567, 573; cf. also Peat, *Comparative Reasoning in International Courts and Tribunals* 18-21.

choice between different interpretation results to which one had been led by the general rules of interpretation.

In addition to this leeway inherent in applying the general rules of interpretation, the European Court has choices to make, for instance whether it bases its reasoning on general international law on international responsibility[17] or whether it develops functional equivalents based on an interpretation of the Convention, whether it invokes *jus cogens*[18] or whether it regards this concept as not relevant in the particular case and instead works with a "fundamental component of the European Public Order"[19]. These choices, in part, are just a consequence of the *lex specialis* principle, according to which rules of a special regime prevail *inter partes* over general rules, subject to *jus cogens*. These choices can be examined as to whether the European Court applies and refers to concepts of general international law or develops concepts based on an interpretation of the ECHR that are functionally equivalent and yet to some extent also different contentwise as compared to their counterparts in general international law.[20]

This section will first give an overview of how the European Court of Human Rights approaches the interpretation of the ECHR (I.). The section will then relate the Court's practice to the general rules of interpretation (II.). Subsequently, it will focus on the recourse to other principles and rules of international law for the purposes of interpreting the ECHR (III.).

I. The European Court's approach to interpretation

When it comes to the leeway inherent in applying the general rules of interpretation, the European Court developed a jurisprudence on how to approach the interpretation of the ECHR.

In particular, the European Court understands the ECHR as a "constitutional instrument of the European Public Order".[21] The terms of the ECHR

17 See below, p. 443.

18 *Al-Adsani v the United Kingdom [GC]* para 57 (prohibition of torture as jus cogens).

19 *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* paras 136, 145.

20 See below, in particular p. 443.

21 *Loizidou v Turkey (Preliminary Objections)[GC]* paras 75, 93; *Neulinger and Shuruk v Switzerland [GC]* App no 41615/07 (ECtHR, 6 July 2010) para 133 (invoked in order to argue that the ECHR has to be taken into account when implementing the obligations under the Hague Convention on the Civil Aspects of International Child Abduction); *Al-Skeini and Others v The United Kingdom [GC]* para 141 (invoked

are to be interpreted autonomously, meaning independent of the meaning in the respondent state's domestic law.[22] At the same time, the European Court stressed that the Convention "cannot be interpreted in a vacuum".[23] The ECHR is said to be "a living instrument which [...] must be interpreted in the light of present-day conditions".[24]

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in order to explain the extraterritorial application of the ECHR in order to prevent the existence of a vacuum in legal protection for human rights); in this sense already *Cyprus v Turkey [GC]* App no 25781/94 (ECtHR, 10 May 2001) para 78; *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* para 145 (invoked in order to ensure respect for the principle of the rule of law when implementing Security Council resolutions).

22 *Engel and others v The Netherlands* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) paras 80-88; *Frydlender v France [GC]* App no 30979/96 (ECtHR, 27 June 2000) paras 30-31; *Naït-Liman v Switzerland [GC]* App no 51357/07 (ECtHR, 15 March 2018) para 106; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 111 ("hardly surprising that the ECtHR defers very little to the state on such matters"); George Letsas, *A theory of interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 40-57; on this topic see also *Öztürk v Germany [Plenum]* App no 8544/79 (ECtHR, 21 February 2084) Diss Op Judge Matscher.

23 *Hassan v The United Kingdom [GC]* para 77.

24 *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 31; on the phrase "living instrument" see already Max Sørensen, 'Do the Rights Set forth in the European Convention on Human Rights in 1950 have the Same Significance in 1975? Report presented by Max Sørensen to the Fourth International Colloquy about the European Convention on Human Rights, Rome 5-8 November 1975' in Ellen Sørensen and Max Sørensen (eds), *Max Sørensen: en bibliografi* (Aarhus University Press 1988) 54-55; this rejection of originalism was criticized by Judge Sir Gerald Fitzmaurice: *Golder v United Kingdom [Plenum]* Sep Op Judge Sir Gerald Fitzmaurice paras 2, 24 ("the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle"); *Marckx v Belgium [Plenum]* App no 6833/74 (ECtHR, 13 June 1979) Diss Op Judge Sir Gerald Fitzmaurice; on Fitzmaurice's critique see Gerald Fitzmaurice, 'Some Reflections on the European Convention on Human Rights- and on Human Rights' in Rudolf Bernhardt (ed), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Springer 1983) 213-214; Ed Bates, *The Evolution of the European Convention on Human Rights. From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 361-365: "[Fitzmaurice participated] in eleven cases. He dissented in most of them [...]"; Mārtiņš Paparinskis, *The international minimum standard and fair and equitable treatment* (Oxford monographs in international law, Oxford University Press 2013) 150-151.

The jurisprudence of the European Court demonstrates that the interpretation of the European Convention has been informed by developments in the member states' legal order as well as in international fora,[25] and that the Court searches for the existence of a "consensus" within Europe[26] or internationally, for "a growing measure of agreement on the subject on the international level"[27] and "takes into account the international law background to the legal question before it."[28]

The existence of a rule of international law or of a "consensus" can have the effect of reducing the margin of appreciation which states can enjoy when they interpret their obligations under the ECHR and apply their domestic law.[29]

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25 See *Marckx v Belgium [Plenum]* para 41; *Tyrer v The United Kingdom* para 31; *Demir and Baykara v Turkey [GC]* App no 34503/97 (ECtHR, 18 November 2008) paras 69-86; cf. Humphrey Waldock, 'The Evolution of Human Rights Concepts and the Application of the European Convention on Human Rights' in *Mélanges offerts à Paul Reuter* (Pedone 1981) 535 ff.; Djeffal, *Static and evolutive treaty interpretation: a functional reconstruction* 328-336; on comparative treaty interpretation see Franz Matscher, 'Vertragsauslegung durch Vertragsrechtsvergleichung in der Judikatur internationaler Gerichte, vornehmlich vor den Organen der EMRK' in *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Springer 1983) 545 ff.; for a recent treatment of the European consensus see Thomas Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' (2017) 28(3) EJIL 871 ff. (discussing the relationship between European consensus and margin of appreciation); on the relationship between the judicial function and political discourses: Björnstjern Baade, *Der Europäische Gerichtshof für Menschenrechte als Diskurswächter: zur Methodik, Legitimität und Rolle des Gerichtshofs im demokratisch-rechtsstaatlichen Entscheidungsprozess* (Springer 2017).

26 See generally on European consensus Ineta Ziemele, 'European Consensus and International Law' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 23; Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' 879, 881. According to Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 36-37, "European consensus is a rebuttable presumption in favour of the solution adopted by a significant majority of the Contracting Parties, which is identified on the basis of comparative analysis of laws and practices of these Parties."

27 *Demir and Baykara v Turkey [GC]* para 77.

28 ibid para 76; *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) para 184, referring to *Saadi v The United Kingdom [GC]* para 63 (international law background).

29 On the margin of appreciation see generally William Schabas, 'Preamble' in William Schabas (ed), *The European Convention on Human Rights. A Commentary* (Oxford

The relationship between a European consensus and the margin doctrine was stressed in the *Handyside* case. The European Court held that it was "not possible to find in the domestic law of the various Contracting States a uniform European conception of morals" and that "[c]onsequently, Article 10(2) leaves the Contracting States a margin of appreciation."[30]

In the *Naït-Liman* case, the European Court had to decide on whether Switzerland had violated article 6 ECHR by refusing to open its courts to universal civil jurisdiction cases so that the applicant, a Tunisian national who has acquired Swiss nationality, could seek civil redress for acts of torture committed in Tunisia on the order of the then Minister of the Interior of Tunisia.[31] In determining whether the restriction on the applicant's right of access to a court was proportionate, the European Court made the margin of appreciation dependent on whether Switzerland was under an international obligation to provide a *forum* for the claims of the applicant. Since such obligation could be established neither under customary international law nor under the Convention Against Torture,[32] Switzerland enjoyed a wide margin of appreciation, and the European Court solely examined whether the interpretation of Swiss law was arbitrary or manifest unjust.[33]

The European Court can consider the existence of an international consensus to be more important than the lack of an European consensus, as the *Goodwin* case demonstrates where the Court decided that the United Kingdom had "failed to comply with a positive obligation to ensure the right

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University Press 2015) 78 ff.; the quality of domestic reasoning can also impact the width of the margin that is accorded to a state, see *Animal Defenders International v United Kingdom [GC]* App no 48876/08 (ECtHR, 22 April 2013) paras 108, 114-6; on this procedural dimension see Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control' 873 ff.

30 *Handyside v The United Kingdom [Plenum]* App no 5493/72 (ECtHR, 7 December 1976) para 48. But see *A, B and C v Ireland [GC]* App no 25579/05 (ECtHR, 16 December 2010) paras 234-241, holding that an existing consensus in the case at hand "*decisively* narrows the broad margin of appreciation of the State" (italics added). Thus, a European consensus can, but does not necessarily have to determine the outcome or reduces the margin of appreciation.

31 *Naït-Liman v Switzerland [GC]* paras 14-15, cf. para 176; *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 21 June 2016).

32 *Naït-Liman v Switzerland [GC]* paras 187-188, 201-202 (there was no obligation to exercise universal jurisdiction nor to provide a forum of necessity because of no available other fora).

33 ibid paras 209, 216.

of [...] a post operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment."[34] The European Court had held in earlier cases that "there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation."[35] In *Goodwin*, however, the European Court said that

> "the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising [...] The Court accordingly attaches less importance to the lack of evidence of a common European approach [...] than to the clear and uncontested evidence of a continuing *international* trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[36]

Similarly, the European Court noted in the *Hirst* case on prisoners' right to vote that "even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue."[37] In its section on relevant case-law, the European Court referred to a Canadian Supreme Court judgment and to a judgment of the Constitutional Court of South Africa, both affirming the right of prisoners to vote.[38]

When evaluating the existence of a European or international consensus, the Court considers and refers to treaties, including regional and non-regional human rights treaties[39], specific conventions concluded on a subject

34 *Christine Goodwin v the United Kingdom [GC]* App no 28957/95 (ECtHR, 11 July 2002) para 71.

35 *Rees v the United Kingdom [Plenum]* App no 9532/81 (ECtHR, 17 October 1986) para 37; see also *Sheffield and Horsham v the United Kingdom [GC]* App no (31–32/1997/815–816/1018–1019 (ECtHR, 30 July 1998) paras 57-58.

36 *Christine Goodwin v the United Kingdom [GC]* para 85 (italics added).

37 *Hirst v the United Kingdom (no 2) [GC]* App no 74025/01 (ECtHR, 6 October 2005) para 81.

38 ibid paras 35-39; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) Oxford Journal of Legal Studies 392-393.

39 *Soering v The United Kingdom [Plenum]* para 88; *Al-Adsani v the United Kingdom [GC]* para 60.

matter, for instance about legal status of children[40], about social rights[41], biomedicine[42] or environmental law[43]. These conventions were used in order to identify a general consensus in substance, without requiring high numbers of ratifications or even ratification by the party to a dispute.[44]

The European Court elaborated on this approach in the *Demir and Baykara* judgment on the right of civil servants to form unions and enter into collective agreements. It explained that the question of whether the specific respondent state did or did not sign or ratify a convention was not a decisive criterion on the basis of which a distinction between sources of law would be made.[45] It also stressed that it needed to consider "elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values."[46] The objective of this examination was to identify "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."[47]

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40 *Marckx v Belgium [Plenum]* para 20, para 41 and para 42; *Pini and Others v Romania* App no 78028/01 and 78030/01 (ECtHR, 22 June 2004) para 138 and para 139.

41 *Sørensen and Rasmussen v Denmark [GC]* App no 52562/99 and 52620/99 (ECtHR, 11 January 2006) para 37.

42 *Glass v the United Kingdom* App no 61827/00 (ECtHR, 9 March 2004) para 75.

43 *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004) para 59.

44 *Marckx v Belgium [Plenum]* para 20, para 41 and para 42, the court referred to two conventions, which Belgium had not ratified; *Vilho Eskelinen and Others v Finland [GC]* App no 63235/00 (ECtHR, 19 April 2007) para 29 and para 60, reference to the Charter of Fundamental Rights of the EU, not yet ratified; *Glass v the United Kingdom* para 75, shortly referring to the Council of Europe's Convention on Human Rights and Biomedicine, even though the instrument had not been ratified by all CoE states; *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005) paras 85-87 referring for the interpretation of article 4 ECHR to conventions which were ratified by France, namely the Forced Labour Convention, adopted by the International Labour Organisation, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and the International Convention on the Rights of the Child.

45 *Demir and Baykara v Turkey [GC]* para 78, paras 79-84.

46 ibid para 85.

47 ibid para 86. In the specific case, the Court held that Turkey had violated the right for municipal servants to form trade unions (article 11 ECHR) as Turkey did not sufficiently demonstrate that the absolute prohibition on forming trade unions met a pressing social need (para 120). Also, Turkey violated the right to bargain collectively with employers (article 11 ECHR) by the annulment of a collective agreement (para

II. Relating the European Court's practice to the general rules of interpretation

By and large[48], the European Court's approaches are not in conflict with the general rules of treaty interpretation. In particular, the evolutive interpretation can be traced to article 31.[49] According to article 31(3)(a) and (b), the interpreter shall take into account subsequent agreements and a subsequent practice that entails an agreement on the interpretation of the treaty. Such a subsequent agreement does not need to be binding;[50] even when a subsequent agreement on the interpretation of a given treaty is not shared among all parties to that treaty, it can still be considered in the process of interpretation as supplementary means under article 32 VCLT.[51]

It is true, however, that the European Court does not always demonstrate in its judgments that it had examined whether practices within European states indeed were, as article 31(3)(b) VCLT stipulates, "in the application of" the ECHR,[52] nor did states explicitly state that the application of domestic law was based on an agreement as to the interpretation of the ECHR. The lack of explicit invocation can be overcome, however, by the plausible assumption that the European Court "presumes that the member states, when acting in

154). Whilst taking into account conventions not ratified by Turkey, the European Court pointed also to instances of Turkish recognition domestically and internationally of a right of municipal servants to form trade unions and of a right to collectively bargain (paras 123-125, 152).

48 The purpose of this section is not to examine the adherence of each interpretation to the general rules of interpretation.

49 See also Bjørge, *The evolutionary interpretation of treaties* 188-189, concluding "that the evolutionary interpretation is, in common with other types of interpretation, an outcome of the process described in the general rule of interpretation"; see also Baade, *Der Europäische Gerichtshof für Menschenrechte als Diskurswächter: zur Methodik, Legitimität und Rolle des Gerichtshofs im demokratisch-rechtsstaatlichen Entscheidungsprozess* 168.

50 See *ILC Report 2018* at 29, 75 (conclusion 10), 77-78; Gardiner, *Treaty interpretation* 244; Philippe Gautier, 'Non-Binding Agreements' [2006] Max Planck EPIL para 14; d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' 1036-1037.

51 *ILC Report 2018* at 13 (conclusion 4), 33-36.

52 See also *First report on subsequent agreements and subsequent practice in relation to treaty interpretation by Georg Nolte, Special Rapporteur* 19 March 2013 UN Doc A/CN.4/660 16-17 para 37, also available in *ILC Ybk (2013 vol 2 part 1)* 61 para 37: "[T]he Court has referred to the legislative practice of member States without explicitly mentioning article 31(3)(b) of the Vienna Convention."

a particular way, are conscious of their obligations under the Convention and move in a way which reflects their bona fide understanding of their obligations."[53]

To the extent that the European Court refers to documents of the Council of Europe[54], article 5 VCLT, according to which the VCLT "applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization", might be considered as an additional ground that allows the interpreter to take into account documents of the Council of Europe as such "relevant rules of the organization".[55]

From the perspective of the VCLT, the most problematic references are references to practices of states who are not members of the Council of Europe, since these practices have no connection to the ECHR, and taking account of such practice can raise consent concerns.[56] If these practices gave expression to a rule of customary international law binding on the states parties to the ECHR as well, they would fall within article 31(3)(c)

53 Nolte, 'Second Report for the ILC Study Group on Treaties over Time. Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice' 266; *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties by Georg Nolte, Special Rapporteur* 26 March 2014 UN Doc A/CN.4/671 8-9 para 14 also available in *ILC Ybk (2014 vol 2 part 1)* 119 para 14; for a critique see Peat, *Comparative Reasoning in International Courts and Tribunals* 166: "It seems tenuous to suggest that the practice cited by the ECtHR reflects how states parties interpret or apply their obligations under the ECHR, nor is it clear that there is even a more attenuated link between the practice cited and the state's awareness of its obligations under the Convention [...]".

54 On this practice see *Tănase v Moldova [GC]* App no 7/08 (ECtHR, 27 April 2010) para 176.

55 See *Golder v United Kingdom [Plenum]* para 29, referring also to article 5 VCLT.

56 Heike Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?' (2014) 74 ZaöRV 207; Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' 357: "Demir [...] represents an assertion of competence to hold the Member States to norms they did not consent to, and cannot strictly control." Cf. also Adamantia Rachovitsa, 'Fragmentation of International Law revisited: Insights, Good Practices, and Lessons to be learned from the Case Law of the European Court of Human Rights' (2015) 28(4) Leiden Journal of International Law 868-871, 879, 881-883.

VCLT. However, it is questionable whether a preexisting rule of customary international law can always explain these references.[57]

It stands to reason that, as Heike Krieger has argued, references to other rules of international law in the sense of article 31(3)(c) VCTL cannot expose the European Court to the potential criticism of ECHR parties to have violated the principle of consent.[58] In this sense, the *Golder* judgment, "undoubtedly one of the most important cases in the history of the ECHR"[59], illustrates how the European Court at an early time based its reasoning on arguments of general international law. The European Court decided that article 6 ECHR[60] protects not only fair proceedings within an existing judicial proceeding but also the right to have a judicial proceeding in the first place.[61] The European Court, with reference to article 31(3)(c), submitted that it would be a general principle of law and expression of the prohibition of denial of justice that a civil claim must be capable of being submitted to a judge.[62]

However, even though a rule of international law in the sense of article 31(3)(c) VCLT certainly carries a particular weight,[63] the European Court is

57 See for instance Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* 119: "It is arguable that international trends ought to affect the European Convention if they are indicative of the emergence of a customary international norm. But this cannot be the case in Christine Goodwin v UK: the handful of states discussed can hardly be representative of the international community of states. Instead, they share in common the fact that they are liberal democracies."

58 Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?' 207-208 (arguing that article 31(3)(c) can exercise a greater legitimatizing effect than the dynamic-evolutive interpretation of the ECHR). A similar discussion can be observed in the context of international investment law where advocates of a continuing role of customary international law use this source for legitimacy reasons, see below, p. 609.

59 Letsas, *A theory of interpretation of the European Convention on Human Rights* 61.

60 According to its wording, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

61 *Golder v United Kingdom [Plenum]*; this decision was not adopted unanimously, as the dissenting opinions of Fitzmaurice, Verdross and Zekia demonstrated. The dissent was motivated by the concern that expansion of the court's jurisdiction would meet the resistance of the states parties.

62 ibid para 35.

63 For an example of interpreting a positive obligation under the ECHR in light of an applicable treaty see *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 June

not prevented from seeking inspiration from the experiences made in other legal orders in relation to similar problems.[64] As Björnstjern Baade has argued, references to other legal orders can constitute reasons, or persuasive authorities, and enhance the rationality of a judicial decision. They can guide the judges when they decide between several possible interpretations and when they concretize general rules by applying them to the individual case.[65] It is then for the European Court not only "to decide which international

2010) para 286 (referring to the Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (signed 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; Council of Europe Convention on Action against Trafficking in Human Beings (signed 16 May 2005, entered into force 1 February 2008) CETS 197; *Tănase v Moldova [GC]* para 176 (taking into account "the obligations which Moldova has freely undertaken under the ECN").

64 See Baade, *Der Europäische Gerichtshof für Menschenrechte als Diskurswächter: zur Methodik, Legitimität und Rolle des Gerichtshofs im demokratisch-rechtsstaatlichen Entscheidungsprozess* 225-228; Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* 131; McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' 400 (on the different ways in which use of foreign sources can countribute to the decision of the case: they can constitute primary reasons of an interpretation or just contribute to the reasoning); cf. generally Huber and Paulus, 'Cooperation of Constitutional Courts in Europe: the Openness of the German Constitution to International, European, and Comparative Constitutional Law' 292-293, commenting on the citation of the Supreme Courts of the USA and of Canada by the Federal Constitutional Court: "These citations do not mean, however, that the Federal Constitutional Court would feel itself bound by the decisions of other constitutional courts if its opinion were to deviate from them. Rather, the Court sees it as a matter of professionalism in a highly interwoven international (legal) world not only to be aware of legal concepts and ideas from other countries, but also to confront those concepts and ideas and interrogate them."

65 See Baade, *Der Europäische Gerichtshof für Menschenrechte als Diskurswächter: zur Methodik, Legitimität und Rolle des Gerichtshofs im demokratisch-rechtsstaatlichen Entscheidungsprozess* 227, 293-304; Björnstjern Baade, 'The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts' (2018) 31 Leiden Journal of International Law 346-347 (pointing out that "[c]ontrary to popular belief, the use of all these materials does, in principle, not extend the range of decisions the Court can take but actually restricts its interpretative freedom"). On the Kelsenian perspective according to which the application of law is not completely determined by the norm that is applied see above, p. 196 and below p. 668.

instruments and reports it considers relevant and how much weight to attribute to them"[66], but also to explain the interpretation which it arrived at and for which it considered these instruments to be relevant.

III. Recourse to other rules and principles of international law for content-determination

According to article 32 ECHR, the jurisdiction of the Court extends "to all matters concerning the interpretation and application of the Convention and the protocols thereto".[67]

Incidentally, however, the Court can, for the purposes of interpreting and applying the ECHR, take recourse to other rules of international law which, while not being "applicable law", are to be taken into account according to the general rules of treaty interpretation. Moreover, the European Court will examine a state's interpretation and application of international law if the ECHR is thereby affected. As the European Court held,

> "it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. This also applies where domestic law refers to rules of general interna-

66 *Tănase v Moldova [GC]* para 176.

67 A draft prepared by the European Movement had proposed that the envisioned court should apply next to the ECHR "(ii) the general principles of law recognised by civilised nations; (iii) judicial decisions and teaching of the most highly qualified publicist of the various nations as subsidiary means for the determination of rules of law; (iv) international conventions, whether general or particular, establishing rules expressly recognized by any State concerned." The proposal to specifically include the general principles of law was not adopted. According to the report of the Legal Committee of 24 August 1950, the "insertion of a specific clause to this effect was unnecessary" and according to David Maxwell Fyfe of the United Kingdom, Plenary Sitting on 25 August 1950, the Legal Committee "could not contemplate the organs or the machinery doing anything else. If they are going to work they must apply these principles, and it is in that spirit that we have made no suggestion for a specific inclusion." See Council of Europe, 'References to the notion of the "general principles of law recognised by the civilised nations" as contained in the travaux préparatoires of the Convention' [1974] CDH (74) 37 ⟨https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-PGD-CDH(74)37-BIL1678846.pdf⟩ accessed 1 February 2023; William Schabas, 'Article 32. Jurisdiction of the Court' in William Schabas (ed), *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015) 716, 719.

> tional law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention."[68]

This section will highlight three ways in which the interpretation and application can require the European Court to consider international law beyond the ECHR. The text of a provision can refer to other international law as it is, for instance, the case with respect to derogations under article 15 ECHR or the foreseeability of criminal liability under article 7 ECHR. A provision can impose positive obligations which, in effect, favour compliance with other obligations of international law. Moreover, the text of a provision can be "read down" and interpreted restrictively in order to reconcile the provision with other international principles and rules, as demonstrated in the *Hassan* case.

The text of the Convention may refer to other rules and principles of international law. For instance, article 15(1) ECHR provides that a party "may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, *provided that such measures are not inconsistent with its other obligations under*

68 *Markovic and Others v Italy [GC]* App no 1398/03 (ECtHR, 14 December 2006) para 108; *Waite and Kennedy v Germany [GC]* App no 26083/94 (ECtHR, 18 February 1999) para 54; *Prince Hans-Adam II of Liechtenstein v Germany [GC]* App no 42527/98 (ECtHR, 12 July 2001) para 50; *Van Anraat v the Netherlands* App no 365389/09 (ECtHR, 10 June 2010) para 79; see also *Slivenko v Latvia [GC]* App no 48321/99 (ECtHR, 9 October 2003) paras 105, 120, stating that "it is for the implementing party to interpret the treaty, and in this respect it is not the Court's task to substitute its own judgment for that of the domestic authorities", but a "treaty cannot serve as a valid basis for depriving the Court of its power to review whether there was an interference with the applicants' rights and freedoms under the Convention".

international law."[69] Article 15(2) ECHR excludes article 2 ECHR from derogation, "except in respect of deaths resulting from lawful acts of war".[70]

Of particular interest in the context is also article 7 ECHR. Article 7(1) ECHR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or *international law* at the time when it was committed,[71] whilst article 7(2) ECHR clarifies that article 7(1) ECHR is without prejudice to the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations. The European Court regarded both provisions to be "interlinked and [...] to be interpreted in a concordant man-

69 Italics added. One possible obligation in this regards concerns the derogation provision of article 4 ICCPR which requires an "officially proclaimed" derogation, William Schabas, 'Article 15. Derogation in Time of Emergency' in William Schabas (ed), *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015) 600-601. In *Brannigan and McBride v The United Kingdom [Plenum]* App no 14553/89, 14554/89 (ECtHR, 25 May 1993) paras 72-73, the European Court observed that "that it is not its role to seek to define authoritatively the meaning of the terms 'officially proclaimed' in Article 4 of the Covenant. Nevertheless it must examine whether there is any plausible basis for the applicant's argument in this respect. [...] In the Court's view the above statement, which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation. It therefore considers that there is no basis for the applicants' arguments in this regard."

70 According to a broad reading, "Lawful acts of war" can be interpreted as including not only the *ius in bello* but also the *ius ad bellum*, Schabas, 'Article 15. Derogation in Time of Emergency' 601-602; *Georgia v Russia (II) [GC]* Conc Opinion of Judge Keller paras 15-28. If this interpretation is accepted, the European Court will be competent address the *jus ad bellum*.

71 Italics added. The reference to international law includes international treaties, *Ould Dah v France* App no 13113/03 (ECtHR, 17 March 2009); *Jorgig v Germany* App no 74613/01 (ECtHR, 12 July 2007) paras 100-114 (deciding that German courts did not interpret the scope of the crime of genocide too broadly); Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law' (2006) 4 JICJ 414-415 (article 7(1) includes treaties and customary international law); *Korbely v Hungary [GC]* App no 9174/02 (ECtHR, 19 September 2008) paras 82-83 (deciding that the crime of humanity may no longer have required a nexus to an armed conflict in 1956 but must be part of a widespread systematic attack); but cf. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law' 413, commenting on *Kolk and Kislyiy v Estonia* App no 23052/04, 24018/04 (ECtHR, 17 January 2006).

ner."[72] One entry gate for the Court to examine other rules of international law in the context of an analysis under article 7 ECHR is the question of the foreseeability of the personal criminal liability.

In the *Border Guards* case, the European Court had to examine, *inter alia*, whether a conviction for the murder of people who had sought to escape from the German Democratic Republic (GDR) between 1971 and 1989 based on the law of the GDR was foreseeable, given the GDR's border-policing policy.[73] The Court decided that it was, and argued that the right of life had been protected by the law of the German Democratic Republic and that the border regime was in violation of GDR law and international law.[74] The European Court noted the "preeminence of the right to life in all international instruments on the protection of human rights"[75] and referred to the ICCPR and the UDHR:[76] "The convergence of the above-mentioned instruments is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights".[77] Considering that the crucial period (starting in 1971) predated the Covenant's entry into force in 1976 and the ratification by the GDR in 1973, the implicit assumption seemed to have been, as Grabenwarter has argued out,[78] that general international law or customary international law protected

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72 *Kononov v Latvia [GC]* App no 36376/04 (ECtHR, 17 May 2010) para 186; *Maktouf and Damjanović v Bosnia and Herzegovina [GC]* App no 2312/08 and 34179/08 (ECtHR, 18 July 2013) para 72 (article 7(2) ECHR is only a contextual clarification of article 7(1) ECHR, "included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war"); William Schabas, 'Article 7' in William Schabas (ed), *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015) 353-355 (on doubts as to the usefulness of article 7(2) ECHR and the tendency of the European Court not to comment on article 7(2) ECHR and instead addressing article 7(1) only).

73 *Streletz, Kessler and Krenz v Germany [GC]* App no 34044/96, 35532/97 and 44801/98 (ECtHR, 22 March 2001) paras 77-89.

74 ibid paras 102-104.

75 ibid para 85.

76 ibid paras 92-93.

77 ibid para 94.

78 See Grabenwarter's comment in Klein, *Menschenrechtsschutz durch Gewohnheitsrecht: Kolloquium 26.-28. September 2002 Potsdam* 164; on the rare references to customary international law by the European Court see Schabas, 'Interpretation of the Convention' 40; Frédéric Vanneste, *General International Law Before Human Rights Courts - Assessing the Speciality Claim of International Human Rights Law* (Inter-

the right to life as well and that therefore problems of retroactivity were precluded.

Moreover, the question of foreseeability can lead the European Court to examine international criminal law. For instance, in the *Jorgic* case, the question arose whether German courts had interpreted the crime of genocide too broadly by holding it sufficient for the intent to commit genocide to relate to the destruction of a group as a social unit, rather than to the physical destruction of a group in whole or in part. The European Court held that courts and tribunals, including the ICJ and the ICTY, preferred a narrow interpretation according to which the intent must refer to the physical or biological destruction; however, "there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts."[79] That interpretation "could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time."[80]

In the *Kononov* case, the European Court examined, and ultimately affirmed, that "by May 1944 war crimes were defined as acts contrary to the laws and customs of war" and that "States were at least permitted (if not required) to take steps to punish individuals for such crimes".[81]

In the *Anraat* case, the European Court examined the status of the prohibition of chemical weapons under customary international law. The applicant who had supplied to Iraq under Saddam Hussein "quantities in excess of eleven hundred metric tons of the chemical thiodiglycol"[82] was convicted of being an accessory to violations of the laws and customs of war.[83] The applicant questioned the "existence [...], knowability and foreseeability, of

sentia 2009) 377-384 and 398-401, reading the *Border Guards* case as an example of the use of general principles of law.

79 *Jorgig v Germany* para 113.

80 ibid para 114.

81 *Kononov v Latvia [GC]* para 213. In the view of the Court, "having regard to the flagrantly unlawful nature of the ill-treatment and killing of the nine villagers in the established circumstances of the operation on 27 May 1944 [...] even the most cursory reflection by the applicant would have indicated that, at the very least, the impugned acts risked being counter to the laws and customs of war as understood at that time and, notably, risked constituting war crimes for which, as commander, he could be held individually and criminally accountable." (para 238).

82 *Van Anraat v the Netherlands* para 3; cf. on this case Marten Zwanenburg and Guido den Dekker, 'Introductory Note to European Court of Human Rights: van Anraat vs. the Netherlands' (2010) 49 ILM 1268-9.

83 *Van Anraat v the Netherlands* para 82.

a rule of customary international law"[84] and submitted that later practice derogated from the 1925 protocol's[85] prohibition of chemical weapons, given "the reality of contemporary warfare".[86] The European Court found "nothing to suggest" that the 1925 Protocol was no longer of binding force, "[i]n fact, the precise opposite is the case."[87] The European Court affirmed the "norm-creating character" of the 1925 Protocol.[88] It observed that in the 1970s many parties withdrew their reservation to the protocol regarding no first use, and that the Biological Weapons Convention[89] which would have been ratified at the beginning of the Iraq war by "a considerable majority of the States then in existence" and continued to be ratified, affirmed the 1925 protocol.[90] Taking into account the instructions by states to their armed forces, the drafting of the Chemical Weapons Convention[91] and resolutions of the General Assembly and the Security Council condemning "the use in that war of chemical weapons"[92], the European Court found that "at the time when the applicant supplied thiodiglycol to the Government of Iraq a norm of customary international law existed prohibiting the use of mustard gas as a weapon of war in an international conflict"[93] and also "against civilian populations within their own territory"[94].

International law can also be relevant for interpreting positive obligations under the ECHR. In turn, positive obligations under the ECHR can strengthen

84 ibid para 73.

85 Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare (signed 17 June 1925, entered into force 9 May 1926) 94 LNTS 65.

86 *Van Anraat v the Netherlands* paras 73-74.

87 ibid para 87.

88 ibid para 89.

89 Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (signed 10 April 1972, entered into force 26 May 1975) 1015 UNTS 163.

90 "The Court takes these developments as proof not only of State practice consistent with the norm created by the 1925 Protocol but also of opinio iuris", *Van Anraat v the Netherlands* para 90.

91 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (signed 3 September 1992, entered into force 29 April 1997) 1975 UNTS 45.

92 *Van Anraat v the Netherlands* para 91.

93 ibid para 92.

94 Ibid para 94.

compliance with international law protecting or benefitting individuals.[95] Recently, the European Court decided in the *Hanan* case that the obligations to investigate the deaths in Afghanistan under international humanitarian law and domestic law, together with the retention of the exclusive jurisdiction over its troops by Germany, constituted special features which "trigger[ed] the existence of a jurisdictional link for the purposes of article 1 of the Convention in relation to the procedural obligation to investigate under Article 2."[96] This led to the result that the European Court could examine the compliance of Germany with article 2 ECHR when conducting investigations that were required under international humanitarian law.

Furthermore, the text can be "read down" and interpreted restrictively in order to accommodate other rules of international law. In the *Hassan* case, which concerned detentions for security reasons in a time when the rules of IHL governing international armed conflicts applied, the European Court did not apply the Third and Fourth Geneva Conventions. It applied article 5 ECHR, interpreted in light of the applicable IHL rules which provided for legal bases of a detention for security reasons.[97] Since such detentions were not reconcilable with the text of article 5 ECHR, article 5 was "read down" under consideration of its fundamental purpose to protect from arbitrariness and to accommodate the fact that taking of prisoners of war and the detention of civilians were an "accepted feature" in international armed conflicts.[98] This presupposes, however, that the Geneva Conventions were applicable and that the detention complies with the rules of IHL.[99]

C. Interpretative decisions in establishing the interrelationship

The preceding cases were examples in which the European Convention was more or less "at the receiving end" of trends in public international law. The present section will focus on the ways in which international law can be shaped through the interpretation and application of the European

95 See below, p. 436.
96 *Hanan v Germany [GC]* App no 4871/16 (ECtHR, 16 February 2021) para 142.
97 *Hassan v The United Kingdom [GC]* para 106.
98 ibid para 104.
99 ibid para 105; *Georgia v Russia (II) [GC]* para 237.

Convention.[100] This section will first illustrate the ways in which the European Court establishes a relation between the ECHR and other principles and rules of international law (I.). In particular, it will focus on the incorporation of customary international law and other treaties in a proportionality analysis and on the reconciliation of different obligations on the basis of underlying general principles, such as the prohibition of arbitrariness. At the end, this section will offer concluding observations (II.).

I. The construction of establishing a relation between the European Convention and other principles and rules of international law

1. Incorporation by proportionality analysis

States' actions in pursuance of their obligations under customary international law[101], UNSCR resolutions[102] or other international treaties[103] can constitute a *prima facie* interference with a Convention right and therefore need to be justified. A justification requires that the state pursues a legitimate aim and resorts to means in achieving this aim which do not disproportionately infringe the human right "in such a way or to such an extent that the very essence of the right is impaired."[104]

The European Court establishes a relation between the ECHR and other international law in a proportionality analysis. Proportionality analysis then favours the integration of both norms: The legal operator attempts to reconcile both norms with each other and to strike a pragmatic balance in which each norm is realised to a certain extent in the particular case (*praktische Konkordanz*[105]). Applied to the ECHR, this means that a state cannot confine

100 Eirik Bjørge, 'The Contribution of the European Court of Human Rights to General International Law' (2019) 79(4) ZaöRV 783 ("The influences (between the ECHR and general international law) go both ways").

101 *Al-Adsani v the United Kingdom [GC]* para 55 f.; *Jones and Others v The United Kingdom* para 186 f.

102 *Nada v Switzerland [GC]* App no 10593/08 (ECtHR, 12 September 2012) para 167 f.; *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* para 126 f.

103 *Neulinger and Shuruk v Switzerland [GC]* para 99 f.

104 *Al-Adsani v the United Kingdom [GC]* para 53; *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* para 124; *Naït-Liman v Switzerland [GC]* para 114.

105 Anne van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal' (2009) 16(2) Indiana Journal of Global Legal

itself to apply one rule, for instance article 6 ECHR, without having any regard to other rules of international law, for instance state immunity.[106] Proportionality analysis can be performed at two levels, at the level of the general norms and at the level of the application of general norms to the particular case. Thus, the structure of proportionality analysis leads to an examination of the application of immunity by the domestic court. Customary international law no longer then operates solely between states but is examined in the relationship between a state and an individual, with the state carrying the burden of justification for the interference with the right of the individual.

2. Proportionality analysis and customary international law

The case-law on state immunity sheds light on the promises and limits of proportionality analysis as performed by the European Court when it comes to the reconciliation of different norms.

a) Two different constructions

In contrast to British courts, the approach of which will be illustrated below, the European Court in *Al-Adsani* regarded the scope of article 6 ECHR to be engaged and interpreted article 6 ECHR in light of general international law on state immunity:

> "[M]easures 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 as embodied in Article 6 para 1. Just as the right of access to a court is an inherent part of the

Studies 501 ff.; on *praktische Konkordanz* see in particular Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn, Müller 1999) 28.

106 In this sense, see also *Fragmentation of international law: difficulties arising from diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi* 221 para 438: "It is useful to note that here the Court might have simply brushed aside State immunity as not relevant to the application of the Convention. But it did not do so. The conflict between article 6 and rules of customary international law on State immunity emerged only because the Court decided to integrate article 6 in its normative environment [...]".

> fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."[107]

Similarly, the European Court examined in *Jones* the proportionality of the restriction of article 6 ECHR when domestic courts recognized state immunity.[108]

In contrast to the approach adopted by the European Court of Human Rights, it is also possible to understand state immunity under customary international law as excluded from the scope of applicability of article 6 ECHR, precluding, therefore, any interference with the right and any need for a justification analysis. Such a view which separates state immunity and article 6 ECHR has been expressed in the jurisprudence of British courts.[109]

In *Holland v Lampen-Wolfe* before the House of Lord, Lord Millett reconciled the right to a court under article 6 ECHR and state immunity at the level of applicability rather than at the level of a justification: article 6 ECHR would presuppose "that the contracting states have the powers of adjudication [...] (b)ut it does not confer on contracting states adjudicative powers which they do not possess".[110] According to this argument, since the UK was bound by customary international law and the rules of state immunity, it had no legal capacity to exercise jurisdiction in the sense of article 1 ECHR, and article 6 ECHR was, therefore, not engaged.

Other justices later expressed their sympathy with Millet's position, even though one year after *Holland v Lampen-Wolfe*, the European Court published its *Al-Adsani* judgment, refuting the UK government's argument that article

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107 *Al-Adsani v the United Kingdom [GC]* para 56.

108 *Jones and Others v The United Kingdom* paras 186, 189; see also *McElhinney v Ireland [GC]* App no 31253/96 (ECtHR, 21 November 2001) paras 35, 38.

109 Philippa Webb, 'A Moving Target: The Approach of the Strasbourg Court to Immunity' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and general international law* (Oxford University Press 2018) 256-258; cf. earlier also Georg Nolte, 'Menschenrechtliches ius cogens - Eine Analyse von "Barcelona Traction" und nachfolgender Entwicklungen - Kommentar' in Eckart Klein (ed), *Menschenrechtsschutz durch Gewohnheitsrecht* (Berliner Wissenschafts-Verlag 2003) 144, 146, pointing out that the European Court rather than limiting the scope of applicability of article 6 ECHR, interpreted the scope broadly ("Es wird also keine tatbestandliche Eingrenzung des Schutzberechs des Art. 6 EMRK in Hinblick auf die Staatenimmunität vorgenommen (was durchaus begründbar gewesen wäre), sondern der Schutzbereich wird von vornherein weit gezogen [...]").

110 *Holland v Lampen-Wolfe* House of Lords [2000] UKHL 40, Lord Millett (section on State Immunity and the European Convention).

6 was not engaged. In *Jones*, Lord Bingham "confess[ed] to some difficulty in accepting" the European Court's position that article 6 ECHR was engaged in cases where a state applies the rules of state immunity.[111] Also Lord Hoffman was "inclined to agree with the view of Lord Millett [...] that there is not even a *prima facie* breach of article 6 if a state fails to make available a jurisdiction which it does not possess."[112] However, the justices did not insist on this point since the difference in construction did not lead to different results. In 2015, the Court of Appeal regarded itself to be

> "faced with conflicting authority. The decision of the House of Lords in Holland v. Lampen-Wolfe that Article 6 is not engaged where the grant of immunity is required by international law is binding on this court. However, the Strasbourg court has consistently held in a lengthy line of authority that Article 6 is engaged in these circumstances."[113]

The Court of Appeal found Lord Millett's reasoning "compelling" but did not consider it necessary to choose among the two approaches, as also according to Strasbourg jurisprudence state immunity constituted a proportionate restriction to article 6 ECHR and therefore did not violate article 6 ECHR. The UK Supreme Court saw no need to choose either.[114]

To summarize the different constructions: whereas the European Court regards the grant of state immunity as *prima facie* interference with the right to access to a court which requires justification, the view adopted by certain

111 *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* House of Lords [2006] UKHL 26 Bingham, para 14. He stressed that the UK had no jurisdiction over other states: "I do not understand how a state can be said to deny access to its court if it has no access to give." See also para 28.

112 ibid Hoffman para 64.

113 *Benkharbouche & Janah v Embassy of the Republic of Sudan* England and Wales Court of Appeal, QB [2015] EWCA Civ 33 para 16.

114 *Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janah (Respondent)* UKSC [2017] UKSC 62, Lord Sumption (with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Wilson agree) para 30: "In my view, there may well come a time when this court has to choose between the view of the House of Lords and that of the European Court of Human Rights on this fundamental question. [...] I would not be willing to decide which of the competing views about the implications of a want of jurisdiction is correct, unless the question actually arose."

British justices held that article 6 ECHR would not have been engaged in the first place.[115]

b) The operation of proportionality analysis

So far, this difference in construction may have looked more apparent than real since, as the European Court stressed, "measures [...] which reflect generally recognised rules of public international law on State immunity cannot *in principle* be regarded as imposing a disproportionate restriction."[116] As will be demonstrated in the next subsection, the European Court refrained from conducting its own balancing between the right to access to a court and state immunity; furthermore, the particularities of each case have not become outcome-determinative yet, but they may play a greater role in future cases.

aa) The *Al-Adsani* judgment

In the *Al-Adsani* case, the applicant had unsuccessfully attempted to obtain compensation for ill-treatment and acts of torture in Kuwait from the State of Kuwait before courts in the United Kingdom. The European Court held that "the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty."[117] It then assessed "whether the restriction was proportionate to the aim pursued".[118] Since the ECHR had to be interpreted in light of "any relevant rules of international law" according to the principle enshrined in article 31(3)(c) VCLT and therefore "so far as possible [...] in harmony with other rules of which it forms part"[119], it followed "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 to the right of access to a court."[120]

115 See also Andrew Sanger, 'State Immunity and the Right of Access to a Court Under the EU Charter of Fundamental Rights' (2016) 65(1) ICLQ 214, 219, 220.
116 *Al-Adsani v the United Kingdom [GC]* para 56 (italics added).
117 ibid para 54; *Jones and Others v The United Kingdom* para 188.
118 *Al-Adsani v the United Kingdom [GC]* para 55.
119 ibid para 55.
120 ibid para 55; *Jones and Others v The United Kingdom* para 189.

The doctrine of state immunity was regarded as inherent restriction on the right of access to a court.[121]

This conclusion was not altered by the fact that the applicants had sought compensation before British courts because of a violation of the prohibition of torture. The European Court took account of "a growing recognition of the overriding importance of the prohibition of torture"[122] and accepted "that the prohibition of torture has achieved the status of a peremptory norm in international law".[123] Yet, the European Court was "unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[124]

In conclusion, the European Court did not conduct a free balancing of the peremptory prohibition of torture, the right to access to a court and state immunity.[125] Rather, it considered the interpretation of the immunity doctrine in international practice, namely in international instruments and decisions rendered by judicial authorities.[126]

bb) The *Jones* judgment

The same approach was adopted later in the *Jones* case on the question of liability of Saudi Arabia and its state officials for ill-treatment and acts of torture in Saudi Arabia before courts in the United Kingdom. According to the applicants' submission, the European Court should take the *Jones* case as an opportunity to revisit its approach adopted in *Al-Adsani* where it "had failed to conduct a substantive proportionality assessment, including an assessment of the circumstances and merits of the individual case, and in particular to

121 *Al-Adsani v the United Kingdom [GC]* para 56.
122 ibid para 60.
123 ibid para 61.
124 ibid para 61.
125 According to the dissenting judges, the prohibition of torture should have prevailed against state immunity because of the former's character as jus cogens, ibid Joint Diss Op of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic para 2.
126 See also Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press 2010) 311 (speaking of a "traditional approach").

consider whether alternative means of redress existed."[127] The Chamber did not relinquish this case to the Grand Chamber. Instead, it examined whether there had been "an evolution in the accepted international standards as regards the existence of a torture exception to the doctrine of State immunity since its earlier judgment in *Al-Adsani*".[128] Here, the European Court relied on the then recent *Jurisdictional Immunities* judgment of the ICJ for that "no *jus cogens* exception to State immunity had yet crystallised."[129] The European Court then examined whether "the grant of immunity *ratione materiae* to the State officials reflected [generally recognised rules of public international law on State immunity]."[130] Based on an analysis of domestic and international decisions the European Court concluded that "State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself."[131] Having established this general rule, the Chamber addressed the question of whether a special rule or an exception existed in relation to acts of torture. Careful not to forestall any ongoing development,[132] the European Court pointed out that "a working group of the ILC acknowledged the existence of some support for the view that State officials should not be entitled to plead immunity for acts of torture", but "there was acknowledged not to be any consensus as yet."[133] There was "little national case-law concerning civil claims lodged against named State officials for *jus cogens* violations"[134] and ultimately, the European Court concluded that in spite of "some emerging support in favour of a special rule or exception [...], the bulk of the authority is [...] to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead."[135]

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127 *Jones and Others v The United Kingdom* para 193, and para 195.

128 ibid para 196.

129 ibid para 198. The ICJ had considered the jurisprudence of the ECtHR, *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 139 para 90.

130 *Jones and Others v The United Kingdom* para 201.

131 ibid para 204.

132 The European Court noted after the presentation of its conclusion that the grant of immunity reflected generally recognised rules of public international law: "However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States.", ibid para 215.

133 ibid para 209, see also para 212 where the criticism within the ILC was mentioned.

134 ibid para 210.

135 ibid para 213.

Finally, the European Court also took account of the individual case and stressed that the House of Lords judgment had "fully engaged with all of the relevant arguments [...] The findings of the House of Lords were neither manifestly erroneous nor arbitrary, but were based on extensive references to international-law materials and consideration of the applicants' legal arguments."[136]

c) Repercussion of the construction: the focus on the individual case

The case-law on immunities in the context of labour disputes, where the applicant used to work as employee in the embassy of a state on the territory of a third state, demonstrates that proportionality analysis, in particular the burden of justification imposed on states and the focus on the individual case, can have the potential of shaping the further development of customary international law.[137]

The European Court used to pay more deference to customary international law and immunities in the context of labour law disputes involving the personnel of embassies. In *Fogarty*, the European Court stated that

> "there appears to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether State immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission"[138].

The European Court was "not aware of any trend in international law towards a relaxation of the rule of State immunity as regards issues of recruitment to foreign missions."[139] The European Court's assessment began to change with the UN General Assembly's adoption of the 2004 United Nations Convention

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136 *Jones and Others v The United Kingdom* para 214, also noting that other domestic courts had found the judgment "highly persuasive"; *Jones House of Lords* [2006] UKHL 26 para 19 (Bingham on distinguishing Jones from Pinochet).

137 For a similar assessment Stephan W Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' (2012) 27(1) ICSID Review 115.

138 *Fogarty v The United Kingdom [GC]* App no 37112/97 (ECtHR, 21 November 2001) para 37.

139 ibid paras 34-39.

on Jurisdictional Immunities which was based on a draft of the International Law Commission.[140]

Article 11(1) of this convention stipulates:

> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State."

Article 11(2) provides for exceptions to this general rule, excluding, for instance, employees who perform functions in the exercise of governmental authority. Since the convention is to this date ratified by only 22 states, the question posed itself to what extent its provisions reflect customary international law.[141]

Taking this convention into account, the European Court modified its approach in *Cudak*. Even though the European Court began by distinguishing the *Cudak* situation on "dismissal of a member of the local staff of an embassy" from the *Fogarty* situation on recruitment,[142] the judgment did not stop at this distinction and paid regard to new developments concerning immunity reflected in the adoption of the UN convention.

The European Court examined whether "the impugned restriction to the applicant's right of access was proportionate to the aim pursued."[143] The European Court then noted that "the application of absolute State immunity has, for many years, clearly been eroded"[144] and that Article 11 of the 2004 UN Convention on Jurisdictional Immunities "created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contracts with the staff of its diplomatic missions abroad."[145] Furthermore, neither the respondent state nor the state of the embassy concerned, Lithuania, had objected to the wording

140 United Nations Convention on Jurisdictional Immunities of States and Their Property (signed 2 December 2004) UN Doc A/RES/59/38; Richard Garnett, 'State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?' (2015) 64 ICLQ 791-795.

141 For a detailed examination, see Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?' 264 ff.

142 *Cudak v Lithuania [GC]* App no 15869/02 (ECtHR, 23 March 2010) para 62.

143 ibid para 62.

144 ibid para 64.

145 ibid para 65.

of article 11 of the Convention and to the view that this provision reflected customary international law.[146] In addition, the respondent state had not demonstrated that the exceptions of article 11 of the Convention and as reflection of custom were relevant in the case.[147]

Thus, the case did not turn only on the identification and interpretation of customary international law, it was also important whether the respondent government had met the burden of reasoning and justification. Other cases illustrate that the grant of immunity in labour law disputes may constitute an unjustified violation of article 6 when it was not supported by a convincing reasoning. In the cases *Wallishauser* and *Sabeh El Leil*, the European Court argued that the domestic courts did not sufficiently examine the UN convention on jurisdictional immunities and its relation to customary international law.[148]

d) Evaluation

Proportionality analysis can be used as a tool for promoting harmonization as it provides a framework in which the ECHR can be reconciled with other international law. General international law becomes "part and parcel of the Convention's obligations"[149].

Moreover, it leads to an examination of the reasoning of domestic courts in relation to customary international law under consideration of the object and purpose of the ECHR. In other words, proportionality analysis directs the focus to the individual case and ensures that, as emphasized by the

146 *Cudak v Lithuania [GC]* paras 66-67.

147 ibid paras 70-73.

148 *Wallishauser v Austria* App no 156/04 (ECtHR, 17 July 2012) paras 70, 73; *Sabeh El Leil v France [GC]* App no 4869/05 (ECtHR, 29 November 2011) para 62 (French organs did not establish how duties of applicant were linked to sovereign interest of Kuwait), paras 63-64 (French Court of Appeal merely asserted additional responsibilities of applicant without further justification or reasoning), para 65 (Court of Cassation "did not give any more extensive reasoning on this point"), para 66 (both French courts failed to consider article 11 of the 2004 UN convention); see also *Oleynikov v Russia* App no 36703/04 (ECtHR, 14 March 2013) para 70; see also Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?' 272.

149 Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' 116.

European Court, the ECHR is an instrument of the European public order for the protection of the individual being. It is possible, therefore, that the interpretation and application of states' ECHR obligations can shape the future development of customary international law.

The European Court was reluctant, however, to conduct the balancing between the right to access to a court (article 6 ECHR) and customary international law on state immunity. Instead, it examined the balance struck in international practice, concluding that immunity remains "an inherent restriction" to article 6 and 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 to the right of access to a court."[150] Since the doctrine of state immunity was based on customary international law, the European Court had to examine international practice, careful not to forestall any ongoing developments.

These cases demonstrate that customary international law no longer operates between states only and that the effects of its application on the ECHR are examined, with the state carrying the burden of justification for any infringement to the right of the individual. The ultimate result of the particular case depends, *inter alia*, on the quality of reasoning of the respondent state. This construction which puts pressure on states may, in the long run, have an effect on the development of customary international law.[151]

One word of caution is needed, though: in cases where the reasoning of domestic courts was regarded insufficient and the infringement of a right under the ECHR was regarded to be not justified, no immunity existed in the view of the European Court. These cases concerned *acta jure gestionis* and labour law disputes. In contrast, in cases where immunity was recognized, the European Court did not hold that the infringement to a right under the

150 *Al-Adsani v the United Kingdom [GC]* para 55; *Jones and Others v The United Kingdom* para 189. Cf. *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 136 paras 82-83, where the ICJ argued that an exception to immunity based on the merits of the case presented "a logical problem" because of the preliminary nature of immunity. The Court then nevertheless examined whether an exception had developed in international practice.

151 Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' 115: "[These cases] are an example of the ECtHR actively using human rights law to influence and reduce the scope of State immunity, much like substantive investment treaty obligations could be used to reduce the scope of immunity doctrines."

ECHR was disproportionate on the basis of lack of reasoning or because of the particularities of the case. Yet, the possibility that the specific circumstances of the individual case may play a greater role is, in principle, implied by proportionality analysis and the focus on the individual case. The jurisprudence on state immunity in labour law disputes demonstrates both this possibility and the way in which cases before the European Court can contribute to a consolidation of a trend restricting immunities.

3. Proportionality analysis and treaty law

This construction of the European Court was used not only for customary international law but also for treaty law.

One example relating to treaty law concerns the Hague Convention on the Civil Aspects of International Child Abduction.[152] The convention provides for the speedy return of an abducted child, subject to the exceptions in article 13. According to this provision, a state is

> "not bound to order the return of the child if the person, institution or other body which opposes its return establishes that a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The case-law of the European Court illustrates the different aspects of the relationship between article 8 ECHR, the right to respect for private and family life, and the Hague Convention on the Civil Aspects of International Child Abduction.

The European Court can strengthen the compliance with the Hague Convention since delayed enforcement of a return order according to the Hague Convention can violate the positive obligations under article 8 ECHR.[153]

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152 Convention on the Civil Aspects of International Child Abduction (signed 25 October 1980, entered into force 1 December 1983) 1343 UNTS 89; for an in-depth analysis of the case-law in relation to this convention see Forowicz, *The Reception of International Law in the European Court of Human Rights* 107-148.

153 *Sylvester v Austria* App no 36812/97 and 40104/98 (ECtHR, 24 April 2003) para 72; Lara Walker, 'The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the UN

Yet, return orders can also be challenged as infringements to article 8 ECHR. Then, the question arises "whether a fair balance between the competing interests at stake - those of the child, of the two parents, and of the public order - was struck."[154] The European Convention can therefore require a refined interpretation of obligations under other treaties in order to give expression to "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings"[155].

The proportionality analysis leads to an examination of the particular facts of the case and can cut both ways.

In *Maumousseau and Washington*, the domestic authorities had not violated article 8 ECHR, as they had "conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person".[156]

In *Neulinger*, the European Court took into account developments "that have occurred since the Federal Court's judgment ordering the child's return".[157] An enforcement of a return order at "a certain time after the child's abduction [...] may undermine, in particular, the pertinence of the Hague Convention in such a situation, it being essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis."[158]

This jurisprudence exemplifies how the European Court can introduce human rights rationale and a focus on the individual to an international rule governing the relations between states.[159]

Human Rights Committee: The Danger of Neulinger' (2010) 6(3) Journal of Private International Law 658-659.

154 *Maumousseau and Washington v France* App no 39388/05 (ECtHR, 6 December 2007) para 62.

155 *Neulinger and Shuruk v Switzerland [GC]* para 133.

156 *Maumousseau and Washington v France* para 74.

157 *Neulinger and Shuruk v Switzerland [GC]* para 145.

158 ibid para 145.

159 For a discussion of the implications for the Hague convention see Linda J Silberman, 'The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe - Abbott, Neulinger, Zarraga' (2011) 63 Oklahoma Law Review 742 (critical), and Walker, 'The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: The

4. Reconciliation on the basis of general principles

Recourse to general principles can help in reconciling different obligations, as the European Court's case-law on international humanitarian law and on Security Council resolutions illustrates. The prohibition of arbitrariness performs a coordination function insofar as it offers a basis for a reconciliation of more specific obligations which offer different levels of protection. It can also provide for a framework in which the European Court can articulate the normative ambitions of the ECHR, and it can constitute a general benchmark for cases where states implement other international obligations, for instance the obligation to carry out decisions of the UNSC under article 25 of the UN Charter, and where more specific obligations are missing.[160]

a) The prohibition of arbitrariness and international humanitarian law

The *Hassan* case on the legality of the deprivation of liberty in an international armed conflict constituted a landmark decision concerning the relationship between the ECHR and international humanitarian law.[161]

Danger of Neulinger' 650, 681 (arguing that undermining the Hague convention was not the intention of the Court).

160 On the latter case see *Naït-Liman v Switzerland [GC]* paras 203, 216 (after having concluded that the actions of Swiss authorities could not be evaluated by a treaty obligation or customary international law, the European Court concluded that the Swiss authorities enjoyed a wide margin of appreciation and then examined the compliance with the prohibition of arbitrariness).

161 *Hassan v The United Kingdom [GC]*; in earlier cases in situations of non-international armed conflicts, the European Court interpreted and applied the ECHR without much modification by international humanitarian law: *Güleç v Turkey* App no 54/1997/838/1044 (ECtHR, 27 July 1998); *Ergi v Turkey* App no 540/1993/435/514 (ECtHR, 28 July 1998); *McCann and Others v United Kingdom [GC]* App no 18984/91 (ECtHR, 27 September 1995); *Özkan et al v Turkey* App no 21689/93 (ECtHR, 6 April 2004); *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005). Occasionally, the European Court framed its judgments in the terminology of international humanitarian law, *Ergi v Turkey* paras 79 ff. ("civilian population", "all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life"); *Özkan et al v Turkey* para 297. In 1975, the European Commission "has not found it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to

Whereas the rules of international humanitarian law, in particular article 21 of the Third Geneva Convention[162] and articles 42, 78 of the Fourth Geneva Convention[163], do not prohibit detentions and internments of prisoner of wars and of civilians for security reasons, article 5 ECHR explicitly sets forth six lawful grounds of detention which do not include security detentions. Article 5 ECHR is more specific than article 9 ICCPR[164] the wording of which prohibits only "arbitrary deprivation of liberty". Furthermore, whereas articles 5, 43 and 78 of the Fourth Geneva Convention provide for an internment review by a "competent tribunal" which does not have to be a court, article 5(4) ECHR stipulates that individuals must have access to a "court" which shall speedily decides on the lawfulness of the detention.

The European Court accommodated the apparently conflicting provisions with each other by striking a pragmatic balance under consideration of the prohibition of arbitrariness as common denominator.[165] Recourse to this general principle of law enabled the European Court not only to reconcile both rules with each other, it also informed the way in which the European Court articulated the normative ambitions of the ECHR in international armed conflicts by requiring procedural safeguards in order to "protect the individual from arbitrariness".[166]

The European Court took into account that the taking of prisoners of war and the detention of civilians were an "accepted feature" in international armed conflicts.[167] It adopted a restrained interpretation of article 5 ECHR and focused on the article's "fundamental purpose" which would consist in the protection of individuals from arbitrariness.[168] The European Court furthermore relaxed the procedural safeguards of article 5(2) and (4), "in

persons accorded the status of prisoners of war", *Cyprus v Turkey* App no 6780/74; 6950/75 (Commission Decision, 10 July 1976) para 313.

162 Geneva Convention, relative to the treatment of prisoners of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

163 Geneva Convention relative to the protection of civilian persons in time of war (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

164 International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

165 Rule 99 of the ICRC Customary Law Study (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Rules* (vol 1, Cambridge University Press 2005) 344) reads: "Arbitrary deprivation of liberty is prohibited."

166 *Hassan v The United Kingdom [GC]* para 105.

167 ibid para 104.

168 ibid para 105.

a manner which takes into account the context and the applicable rules of international humanitarian law."[169] Thus, the "competent body" periodically reviewing the detention according to articles 43 and 78 of the Fourth Geneva Convention would not need to be a "court in the sense generally required by Article 5 para 4"[170] since this "might not be practicable in an international armed conflict".[171] However, the competent body should "provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay."[172]

To summarize, security detentions in international armed conflicts will be considered lawful under article 5 ECHR if they keep within the fundamental purpose of article 5, the prohibition of arbitrariness. The European Court required not only compliance with the articles of the Geneva Convention but also additionally, as matter of human rights law, that the reviews stipulated in article 78 of the Fourth Geneva Convention provide for sufficient guarantees of impartiality and fair procedure to protect against arbitrariness.[173]

Subsequently, the UK Supreme Court based its interpretation of what is required under article 5 ECHR in a non-international armed conflict where a UN Security Council resolution authorized the use all necessary means on the *Hassan* standard[174] which was developed in the context of an international armed conflict and which itself was based on a combination of several elements: a restrained interpretation of article 5 ECHR under consideration of its fundamental purpose, the prohibition of arbitrariness, articles 43 and 78 of the Fourth Geneva Convention as minimum standard, and human rights law safeguards against arbitrariness (impartiality, fair procedure and the individual's participation therein).[175]

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169 *Hassan v The United Kingdom [GC]* para 106.

170 ibid para 106.

171 ibid para 106.

172 ibid para 106.

173 ibid 52-54 paras 102-107; for a more detailed analysis see Matthias Lippold, 'Between Humanization and Humanitarization?: Detention in Armed Conflicts and the European Convention on Human Rights' (2016) 76(1) ZaöRV 80 ff.; cf. recently *Georgia v Russia (II) [GC]* para 234-7.

174 See above, p. 438.

175 *Abd Ali Hameed Al-Waheed v Ministry of Defence and Serdar Mohammed v Ministry of Defence* UKSC [2017] UKSC 2; Lippold, 'The Interpretation of UN Security

b) Security Council Resolutions

A different example of the reconciliation of different obligations can be found in the jurisprudence on Security Council resolutions.

According to the European Court, there is a rebuttable presumption that UNSCR resolutions do not intend to authorize human rights violations. This presumption of compatibility does not derive from the European Convention but from the UN Charter's commitment both to peace and security and to human rights. In light of this presumption, the court held that the general authorization to use all necessary means could not have been intended to authorize indefinite detention without charge.[176]

When this presumption was rebutted by the explicit wording of a resolution, the European Court examined whether the resolution was implemented in a proportionate way in the specific case.[177] According to the European Court, "the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation."[178] Therefore, there was no need to examine the hierarchy of obligations under the ECHR and under the Charter.[179] The European Court built on this jurisprudence in *Al-Dulimi* on the legality of Security Council sanctions imposed by Switzerland in pursuance of its obligations under the UN Charter. The European Court rejected the argument that the right to access to a court was part of *jus cogens*.[180] However, it took the view that "[o]ne of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle".[181]

According to the European Court,

Council Resolutions between Regional and General International Law: What Role for General Principles?' 149 ff.

176 *Al-Jedda v The United Kingdom [GC]* App no 27021/08 (ECtHR, 7 July 2011) 60 para 102, 61 para 105. in part. 63 para 109: "[...] neither Resolution 1546 nor any other United Nations Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge."

177 *Nada v Switzerland [GC]* 54 paras 194 ff. and 59 para 213.

178 ibid 52-53 para 196.

179 ibid 53 para 197.

180 *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* 66 para 136.

181 ibid 69 para 145.

> "where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security."[182]

It was then held that Switzerland had not met this standard since the applicants had no "genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary."[183]

II. Concluding observations

As this section has illustrated, the European Court integrated the ECHR and other obligations under international treaties and customary international law within a proportionality analysis and, therefore, indicated that states have to give regard to the ECHR when they fulfil their further obligations under international law. The reason for not conducting a proportionality analysis in the *Hassan case* and for reconciling instead article 5 ECHR and the provisions of the Geneva Conventions on security detention on the basis of a common principle, the prohibition of arbitrariness, might have been related to the fact that both article 5 ECHR and the relevant provisions of the Geneva Conventions concerned the same subject-matter, the deprivation of liberty. The jurisprudence of the European Court illustrates the important function of the prohibition of arbitrariness not only as common denominator of more specific obligations but also as inspiration for a standard of review when the European Court examined states' compliance with the ECHR in

182 *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* 70 para 146.

183 ibid 71 para 151; for a critique see the dissenting opinion of Judge Nußberger, in her view, there was a conflict between the ECHR and the applicable UNSC resolution which is why the Charter obligation to implement the resolution should have prevailed according to article 103 UNC. In addition, she argued that the Swiss authorities had sufficiently conducted an arbitrariness review; the last view is shared by judge Ziemele in her partly dissenting opinion.

the implementation of other obligations under international law, as it was the case in relation to UNSC resolutions.

D. The relationship between the ECHR and the law of international responsibility: The development of functional equivalents

This section examines the relationship between the ECHR and the law of international responsibility. This relationship is complex because the European Court can, on the basis of an interpretation of the ECHR, develop functional equivalents to concepts of general international law which can make recourse to the latter unnecessary. In addition, the ECHR employs notions which, while being similar to notions under general international law, do not necessarily have the same meaning. As will be argued below, this complexity constitutes a particular challenge for future studies of general international law.

The purpose of this section is to highlight the complex relationship between the ECHR and concepts of general international law. The section will first address the relationship between jurisdiction in the context article 1 ECHR and jurisdiction in general international law (I.). Subsequently, this section will discuss the role of attribution in relation to the ECHR (II.) and point to the different notions of "control" in relation to jurisdiction under article 1 ECHR and to attribution under general international law (III.). The section will then raise the question of whether the European Court began to develop treaty-based functional equivalents to attribution under general international law (IV.). Last but not least, the section will engage with the Court's take of attribution analysis in the relationship between states and international organizations (V.).

I. "Jurisdiction" and the relationship between article 1 ECHR and general international law

There are different concepts of jurisdiction in general international law and in the context of the ECHR. According to article 1 ECHR, the parties to the ECHR "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Jurisdiction is a central concept of the European Convention as it determines the applicability and

the scope of the Convention and can raise questions of the interrelationship with other fields of international law.[184]

In *Banković*, the European Court interpreted this concept in light of the doctrine of "jurisdiction" under general international law and concluded that jurisdiction had to be primarily territorial.[185] As Milanovic has pointed out, however, differences between both concepts of jurisdiction exist:[186] the doctrine of jurisdiction under general international law serves the purpose of determining when a state has the competence to exercise its jurisdiction to prescribe, to adjudicate or to enforce; it delimits jurisdictional spheres between states. Jurisdiction in the sense of article 1 ECHR "is meant to denote solely a sort of factual power that a state exercises over persons or territory."[187] The concept of jurisdiction under general international law is therefore of limited guidance for interpreting the concept of jurisdiction in the sense of article 1 ECHR. Since *Banković*, the European Court has further developed its jurisprudence on the extraterritorial application of the ECHR. The Court held in *Al-Skeini*, that jurisdiction, which is primarily territorial,[188] will be exercised extraterritorially in two situations, namely, if a "state through its agents exercises control and authority over an individual"[189] or if a state "exercises effective control of an area outside that national territory".[190] The latter situation does not require the exercise of "detailed control over the policies and actions of the subordinate local administration", it suffices that the survival of the local administration depends on the Contracting State's

184 Cf. *Abd Ali Hameed Al-Waheed v Ministry of Defence and Serdar Mohammed v Ministry of Defence* [2017] UKSC 2 Lord Sumption (with whom Lady Hale agrees) para 48. Cf. now *Georgia v Russia (II) [GC]* para 141, where the Court supports its conclusion against jurisdiction in relation to military operations during the active phase of hostilities with the consideration of "the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict) [...]".

185 *Banković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom [GC]* paras 59-61.

186 Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) Human Rights Law Review 417-436.

187 ibid 417.

188 *Al-Skeini and Others v The United Kingdom [GC]* para 131.

189 ibid para 137.

190 ibid para 138.

"military and other support".[191] Criteria such as military, economic and political support for the local subordinate administration may be relevant for determining whether the state has effective control over an area.[192] Both situations require a certain degree of control, as the Court emphasized in its recent judgment in the proceeding between Georgia and Russia. Addressing the question of the Convention's applicability to military operations during the active phase of hostilities, the Court held that "the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no 'effective control' over an area".[193] The European Court distinguished the bombing and artillery shelling in the active phase of hostilities from "isolated and specific acts of violence involving an element of proximity", in relation to which the Court had applied the concept of "State agent authority and control".[194] The Court summarized recently its jurisprudence to the effect that the ECHR may apply extraterritorially based on the concept of State agent authority and control in case of physical power and control over the victim or in case of isolated and specific acts of violence involving an element of proximity which may include the beating or shooting by State agents of individuals or the extrajudicial targeted killing of an individual.[195]

191 ibid para 138. On the survival of a non-state entity by virtue of state support see already *Cyprus v Turkey [GC]* para 77. On the development of the survival-test see Milanovic, 'Special Rules of Attribution of Conduct in International Law' 349-355.

192 *Al-Skeini and Others v The United Kingdom [GC]* para 139.

193 *Georgia v Russia (II) [GC]* para 137. For the view that a certain degree of control is required and that an act of violence alone does not suffice in order to make the ECHR applicable, see *Al-Saadoon and Others v Secretary of State for Defence, and Rahmatullah & ANR v The Secretary of State for Defence* England and Wales Court of Appeal, QB [2016] EWCA Civ 811 paras 69-73; for the contrary view see *Al-Saadoon and Others v Secretary of State for Defence* England and Wales High Court of Justice, QB [2015] EWHC 715 paras 39, 95, 102, 107, arguing that Banković had been *de facto* overruled by the ECtHR. See now *Ukraine and the Netherlands v Russia [GC]* App no 8019/16, 43800/14 and 28525/20 (ECtHR, 25 January 2023) para 571.

194 *Georgia v Russia (II) [GC]* paras 131-132.

195 *Ukraine and the Netherlands v Russia [GC]* paras 568-570; *Carter v Russia* App no 20914/07 (ECtHR, 21 September 2021) paras 125-130, 170.

II. The role of attribution in relation to the ECHR

If one applies article 2 ARSIWA[196] rigidly, the questions of attribution and of jurisdiction will be posed in a successive order[197]: first, one has to establish whether the conduct of an entity is attributable to a state. Second, one must examine whether the state breached an international obligation. As far as an obligation under the ECHR is concerned, one has to determine, first, the applicability of the ECHR and, second, the violation of the ECHR. In principle and for the sake of analytical clarity, the law of state responsibility and the question of jurisdiction according to article 1 ECHR are to be distinguished.[198]

It may be necessary, however, to conduct multiple attribution analyses. If a case concerns the extraterritorial application of the ECHR, the Court will first determine whether a potentially jurisdiction-establishing conduct was attributable to the state before it will approach the question of whether a conduct which might have given rise to a violation of the ECHR could be attributed to the state. This was the case in *Jaloud*: The Court decided that the

196 "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

197 Marko Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 106: "[...] an attribution inquiry actually logically precedes the jurisdiction inquiry when it comes to the conduct which is itself constitutive of jurisdiction"; see also *Jaloud v The Netherlands [GC]* App no 47708/08 (ECtHR, 20 November 2014) paras 151-152.

198 *Catan and others v Moldova and Russia [GC]* App no 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 115; *Jaloud v The Netherlands [GC]* para 154: "[...] the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law [...]"; cf. generally Iulia Motoc and Johann Justus Vasel, 'The ECHR and Responsibility of the State: Moving towards Judicial Integration: a View from the Bench' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and general international law* (Oxford University Press 2018) 200 ff.; cf. for a different approach Martin Scheinin, 'Just another word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights' in Malcolm Langford (ed), *Global justice, state duties: the extraterritorial scope of economic, social and cultural rights in international law* (Cambridge University Press 2013) 213-215, questioning the significance of jurisdiction as independent criterion.

Netherlands had violated its positive obligation under article 2 ECHR, as the Netherland's investigation into the circumstances surrounding the applicant's death at a checkpoint in Iraq had failed to satisfy the requirements of article 2 ECHR.[199] The Court first held that the applicant fell under the jurisdiction of the Netherlands, as the "vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer".[200] In the next step, the European Court determined that the "alleged acts and omissions of Netherlands military personnel" as to the investigation into the applicant's death was attributable to the Dutch state.[201] The judges Spielmann and Raimondi criticized the majority for their examination of the "non-issue of 'attribution'" and for what they considered to be a conflation of jurisdiction under article 1 and state responsibility under general international law.[202] It is submitted that this critique is ultimately not convincing. The two judges have a point in that there is a difference between the ECHR as so-called primary law and the ARSIWA as so-called secondary law which presupposes a violation of primary law. However, both bodies of law are not unrelated compartments of international law, a distinction between primary rules and secondary rules should, therefore, not be overemphasized at the expense of acknowledging the interrelationship between both.[203] In particular, the rules of attribution apply in relation to the primary rules of the ECHR which is why it is submitted here that the majority's approach is not "conceptually unsound". Yet, the judges' concern as to "confusion in an already difficult area of law" is understandable as the relationship between the ECHR and the doctrine of attribution according to the ARSIWA is not without complexities,

199 *Jaloud v The Netherlands [GC]* para 227.

200 ibid para 152.

201 ibid para 155 (the headings in paras 112, 154 can misleadingly suggest that the European Court determines first jurisdction (without attribution) and then attribution); on the two attribution inquiries, see Milanovic, 'Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court' 106-107.

202 *Jaloud v The Netherlands [GC]* 81 ("Efforts to seek to elucidate the former by reference to the latter are conceptually unsound and likely to cause further confusion in an already difficult area of law").

203 See in particular below, p. 610; cf. now *Ukraine and the Netherlands v Russia [GC]* para 551; cf. for a strong emphasis of the integration between between the ECHR and general international law Motoc and Vasel, 'The ECHR and Responsibility of the State: Moving towards Judicial Integration: a View from the Bench' 201 ff.

and the European Court did not always make a clear distinction between the two interrelated and yet distinct concepts.[204]

III. Two notions of "control" in relation to jurisdiction and to attribution

The use of similar terminology, the notion of *control*, contributes to the complexity of the relationship between jurisdiction and attribution; because of functional differences, both should not be conflated. The *Loizidou* case offers an example in this regard. The case turned on the question (which would later be answered in the positive) whether Turkey violated the Convention when subsequent to the Turkish invasion of Cyprus refugees were prohibited to return to their home by Turkey or by a non-state entity (TRNC) which controlled part of the border. In the preliminary objection decision, the applicant presented a twofold argument, merging treaty interpretation and the interpretation of general international law: the applicant argued that Turkey was responsible on the basis of the general rules of state responsibility and the Convention's obligation to avoid a legal vacuum from emerging: "The principles of the Convention system and the international law of State

204 James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 179; Milanovic, 'Special Rules of Attribution of Conduct in International Law' 343-344; on different views in scholarship, cf. Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' 178, 190; according to Malcolm Evans, 'State Responsibility and the ECHR' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 159, the ECHR "makes the international principles of State responsibility irrelevant to its operation, so it is not clear why they should be referred to at all." See also at 160 where the author claimed that the ECtHR affirmed responsibility for the conduct of privates by adopting a broader test than the effective control test of the law of international responsibility; see also Scheinin, 'Just another word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights' 213-215, arguing that the notion of jurisdiction in the sense of article 1 ECHR is no independent concept and should be equated with an attribution analysis; Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford (ed), *Global justice, state duties: the extraterritorial scope of economic, social and cultural rights in international law* (Cambridge University Press 2013) 154, suggesting three steps to determine state responsibility in the context of human rights: attribution, breach, and "whether victims of human rights violations are within the 'jurisdiction' of a State".

responsibility thus converge to produce a regime under which Turkey is responsible for controlling events in northern Cyprus."[205]

The European Court distinguished the question of jurisdiction in the sense of article 1 ECHR from the question of state responsibility which belonged to the merits.[206] It held:

> "[...], the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[207]

Having affirmed jurisdiction, the European Court then stressed in its judgment at the merits stage one year later that the policies and actions of a non-state entity, the so-called Turkish Republic of Northern Cyprus (TRNC), was "imputable" to Turkey: it was not necessary to examine whether Turkey had exercised "detailed control over the policies and actions of the authorities of the 'TRNC'"[208], it sufficed

> "that her army exercises effective overall control over that part of the island. Such control [...] entails her responsibility for the policies and actions of the 'TRNC'. [...] Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1)."[209]

The European Court then concluded that the alleged misconduct "falls within Turkey's 'jurisdiction' within the meaning of Article 1 (art. 1) and is thus imputable to Turkey."[210] The European Court did not examine whether the access was denied by Turkish troops or by the TRNC and whether the conduct of the TRNC could be attributed to Turkey; instead, the European Court based its holding on Turkey's positive obligations that were triggered by Turkey exercising "effective overall control over that part of the island" and thus exercising jurisdiction.[211]

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205 *Loizidou v Turkey (Preliminary Objections)[GC]* para 57.
206 ibid para 61.
207 ibid para 62.
208 *Loizidou v Turkey (Judgment) [GC]* App no 15318/89 (ECtHR, 18 December 1996) para 56.
209 ibid para 56.
210 ibid para 57.
211 Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' 443; Crawford and Keene, 'The Structure of

The European Court used the notion of "control", namely "effective overall control" in order to determine whether Turkey had exercised jurisdiction, and not in order to establish attribution under the law of state responsibility.[212] Since the control related to a geographic area, it becomes clear that the adjective "overall" was not meant as alternative to the adjective "effective", it rather indicated a geographical point of reference.

Yet, perhaps because the European Court wrote that control "entails [Turkey's] responsibility for the policies and actions of the 'TRNC'", this standard of control was partly (mis)understood[213] as attribution test for the purpose of establishing a state's international responsibility. In this sense, the ICTY invoked the *Loizidou* jurisprudence in order to justify a deviation from the effective control standard under general international law for the benefit of a standard based on overall control.[214] The International Court of Justice rejected this interpretation and held that the overall control test was employed by the ICTY in order to determine the international character of the conflict for the purposes of the Geneva Conventions. According to the Court, the effective control test remained the decisive criterion for the purposes of attribution in the context of state responsibility. The overall control test was considered to be too broad and to undermine the "fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf."[215] The ICJ judgment can be read in support of a dis-

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State Responsibility under the European Convention on Human Rights' 193-194 (the Court did not apply the ARSIWA).

212 Cf. also Helmut Philipp Aust, *Complicity and the law of state responsibility* (Cambridge University Press 2011) 408, arguing that the European Court "did not have in mind 'effective control' in the sense of the ICJ's *Nicaragua* case"; cf. Olivier de Frouville, 'Attribution of Conduct to the State: Private Individuals' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 269.

213 For a critique of the European Court's terminology see Milanovic, 'Special Rules of Attribution of Conduct in International Law' 350-352.

214 See *Prosecutor v Dusko Tadić* ICTY AC Judgement (15 July 1999) IT-94-1-A paras 120-145; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 64-65 para 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 209-211 paras 402-407; see also Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) EJIL 649 ff.

215 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 210 para 406. Years later, one of the authors of the

tinction between attribution under the secondary rules of state responsibility under general international law and attribution based on an interpretation of primary rules of a particular treaty.

This standard for establishing whether a state exercises effective control over an area for the purpose of establishing jurisdiction in the sense of article 1 ECHR is different from criteria which determine effective control over an actor for the purpose of establishing attribution under the general law of international responsibility.[216] The effective control test that is employed in the context of state responsibility under article 8 ARSIWA is more demanding, as the "financing, organizing, training, supplying and equipping" of non-state actors, the selection of targets or the planning of operations does not suffice to affirm effective control over that actor.[217]

IV. A treaty-based functional equivalent to attribution under general international law?

The relationship between the ECHR and the law of state responsibility is complex in particular in light of the Court's jurisprudence on article 1 ECHR and positive obligations. Based on the concept of positive obligations, the European Court can evaluate whether a state violated its obligations under the ECHR by the failure to prevent a third entity from engaging in a certain conduct, without having to address the question of whether the conduct was attributable on the basis of the ARSIWA. In this sense and as will be illustrated below, the concept of positive obligations can be seen as an additional aspect to consider after an attribution according to general international law could

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Tadic decision, Antonio Cassese, argued that the "only point that perhaps Tadic did not sufficiently clarify relates to Loizidou: there the ECtHR inferred the finding that control over the authorities that had breached the claimant's rights was in fact exercised by Turkey from the fact that Turkey had overall control over the whole area of northern Cyprus [...] Thus, the Court preferred to refer to control over the area (from which it inferred control over the authorities operating there) rather than directly to control over the authorities that had violated Ms. Loizidou's rights." Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' 658 footnote 17.

216 Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' 195.

217 *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 64 para 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2007] ICJ Rep 43, 206-215 paras 396-415.

not be established, or as a functional equivalent that makes an attribution analysis or an analysis of the preconditions of complicity under general international law no longer necessary.[218]

In *Kotov*, an attribution analysis under general international law and the concept of positive obligations were applied in a successive order: The European Court decided that Russia was not responsible for the actions of a private creditors' body under the rules of state responsibility, yet Russia violated its positive obligations, which would have required "at least to set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and have them enforced".[219]

In certain cases, positive obligations functionally replaced an attribution analysis under general international law. The case *Costello-Roberts* concerned the use of corporal punishment in so-called independent, or private, schools which had to be registered by the state. The European Court examined solely a violation of positive obligations without any reference to attribution under the law of international responsibility.[220] Similarly, the decision of the case *O'Keeffe* on sexual abuse of a child in a school owned by the Catholic church was based on a violation of positive obligations without addressing attribution under the law of state responsibility.[221]

When it comes to (extra)territorial administrations, the relationship between the European Court's jurisprudence and general international law is difficult to determine. In *Ilaşcu*, the European Court held that the acts of a non-state actor, the so-called Moldavian Republic of Transdniestria (MRT), were "under the effective authority, or at the very least under the decisive influence, of the Russian Federation" and therefore within Russia's jurisdiction for the purposes of article 1 ECHR, while it remained unclear whether the conduct was attributed to Russia or whether Russia's failure to prevent the

218 On special rules of attribution of conduct see Milanovic, 'Special Rules of Attribution of Conduct in International Law' 366, arguing that, with reference to the *El-Masri* case, "[a]cquiescence and connivance could, but need not, be conceptualized as a special rule of attribution of conduct in the sense of Article 55 ASR." See also below, p. 454.

219 *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 3 April 2012) paras 107-108, 117.

220 *Costello-Roberts v The United Kingdom* App no 89/1991/341/414 (ECtHR, 23 February 1993) paras 25 ff.

221 *O'Keeffe v Ireland [GC]* App no 35810/09 (ECtHR, 28 January 2014) para 150; see Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' 181.

conduct was central.[222] In *Chiragov*, the majority held Armenia responsible on the basis of the latter's positive human rights obligations in relation to the Nagorno-Karabakh Autonomous Oblast (NKAO) over which it exercised jurisdiction.[223] The European Court held that "Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date" and that "the Armenian armed forces and the 'NKR' are highly integrated".[224] The European Court therefore concluded that "the 'NKR' and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin."[225] Hence, the Court concluded that Armenia was responsible for human rights violations caused by a non-state actors without an examination of the attribution standard according to the ARSIWA, even though it employed the notion of "effective control".[226] In the parallel case *Sargsyan v.*

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222 *Ilaşcu and others v Moldavia and Russia [GC]* App no 48787/99 (ECtHR, 8 July 2004) para 392. See Milanovic, 'Special Rules of Attribution of Conduct in International Law' 345-346. Moreover, Moldavia was responsible for failing to comply with its positive obligations under the Convention by letting MRT committing their acts, *Ilaşcu and others v Moldavia and Russia [GC]* paras 330-331; cf. Aust, *Complicity and the law of state responsibility* 411-412 ("[j]urisdiction finds itself decoupled from any understanding of effective control"); see the subsequent case *Catan and others v Moldova and Russia [GC]* paras 148, 150, where Russia was again held responsible, whereas the European Court held that Moldavia had complied with its positive obligations.

223 Cf. *Chiragov and others v Armenia [GC]* App no 132116/05 (ECtHR, 16 June 2015) para 192: "Given that the matters complained of come within the jurisdiction of Armenia [...] the question to be examined is whether Armenia is responsible for a violation of the applicants' rights to their possessions."

224 ibid para 180. "NKR" stands for "Nagorno-Karabakh Republic".

225 ibid para 186.

226 See also Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' 195 (noting that the Court undertook only a limited analysis of the control); Milanovic, 'Special Rules of Attribution of Conduct in International Law' 384; see also the different views expressed in individual opinions, *Chiragov and others v Armenia [GC]* Conc Op Motoc 80-85 (arguing that "this judgment represents one of the strongest returns to general international law", at 85); Partly Conc, Partly Diss Op Ziemele 86-91 (arguing that "[u]nlike the particularly scrupulous establishment of the facts normally carried out by the International Court of Justice (ICJ) in cases concerning disputes over territories, jurisdiction and attribution of responsibility, the Court appears to be

Azerbaijan, which concerned the NKAO as well, Azerbaijan was held to be responsible for human rights violations caused by the Nagorno-Karabakh Republic (NKR). Even though Azerbaijan had lost control over parts of its territory, it was under the positive obligation "to re-establish control over the territory in question, as an expression of its jurisdiction, and to measures to ensure respect for the applicant's individual rights."[227]

Recently, in *Russia v. Georgia (II)*, the Court held that Russia had exercised "*'effective control', within the meaning of the Court's case-law*, over South Ossetia, Abkhazia and the 'buffer zone' from 12 August to 10 October 2008 [...] Even after that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation, on whom their survival depends [...] indicate that there was continued 'effective control' over South Ossetia and Abkhazia."[228] In *Netherlands and Ukraine v. Russia*, the European Court examined the Russian "effective control over an area" in Ukraine and held that the acts and omissions of the local administrations were attributed to Russia which had Article 1 jurisdiction in relation to the areas concerned.[229]

Functional equivalents can also be observed in relation to complicity under customary international law as reflected in article 16 ARSIWA on aid or assistance in the commission of an internationally wrongful act. The *El-Masri* case is an example: In this case, the applicant was handed over by Macedonia to a CIA rendition team which then transferred him to Afghanistan where he suffered ill-treatment. The European Court argued that Macedonia exercised jurisdiction and "must be regarded as responsible under the Convention for acts performed by foreign officials on its territory *with the acquiescence or connivance* of its authorities."[230] The European Court did not attribute

watering down certain evidentiary standards in highly controversial situations", at 87); Diss Op Gyulumyan 106 ff. (referring to different attribution tests, at 108).

227 *Sargsyan v Azerbaijan [GC]* App no 40167/06 (ECtHR, 16 June 2015) para 131.

228 *Georgia v Russia (II) [GC]* para 174 (italics added). Russia was held "responsible" for violations of the ECHR committed by South Ossetian authorities, cf. paras 214, 222, 248, 252, 256, 276, 281, 301.

229 *Ukraine and the Netherlands v Russia [GC]* paras 560 ff., 564, 697 ("the finding that the Russian Federation had effective control over the relevant parts of Donbass controlled by the subordinate separatist administrations or separatist armed groups means that the acts and omissions of the separatists are attributable to the Russian Federation in the same way as the acts and omissions of any subordinate administration engage the responsibility of the territorial State").

230 *El-Masri v the former Yugoslav Republic of Macedonia [GC]* App no 39630/09 (ECtHR, 13 December 2012) para 206 (italics added).

the misconduct on the basis of the general rules of attribution, nor did it examine Macedonia's responsibility based on complicity under article 16 ARSIWA.[231] It held, however, that "[t]he respondent state must be considered *directly responsible for the violation of the applicant's rights* under this head, since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring"[232], which can be read as an attribution analysis based on the ECHR, rather than the ARSIWA.[233]

In respect of this jurisprudence, James Crawford and Amelia Keene expressed their "concern [...] that the development of positive obligations may have prevented the Court from asking the logically prior question as to whether the respondent State is directly responsible for the commission of the wrongful acts, rather than for a failure to prevent them only."[234] This can constitute a challenge for assessing the development of concepts of general international law. Interpreters may find less explicit invocations and applications of the rules of state responsibility and thus may be unable to point to the jurisprudence of the European Court unless they will consider to what extent interpretations of concepts of the ECHR can shape and elucidate, to some degree, the content of general international law. Such an analysis may be difficult to conduct when the Court's decisions are unclear as to whether a state is responsible for violations of third entities because it did not prevent these violations or because these violations were attributable to the state.[235]

231 Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' 188; cf. on functionally similar rules to article 16 ARSIWA in human rights law Aust, *Complicity and the law of state responsibility* 393 ff.

232 *El-Masri v the former Yugoslav Republic of Macedonia [GC]* para 211 (italics added).

233 Cf. Milanovic, 'Special Rules of Attribution of Conduct in International Law' 359-360, 362; Crawford and Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' 189.

234 ibid 183-184.

235 See also Milanovic, 'Special Rules of Attribution of Conduct in International Law' 343-344.

V. Attribution in the context of international organizations

1. The development of normative criteria for the delimitation of responsibilities

The jurisprudence of the European Court is of particular interest for the international responsibility of international organizations and for the remaining responsibility of states. So-called dual, or multiple or concurrent international responsibilities are only briefly addressed in the ARSIWA and the ARIO. Article 47 ARSIWA[236] recognizes the "plurality of responsible States" and provides that, "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." Likewise, article 48 ARIO[237] addresses the "responsibility of an international organization and one or more States or international organization" and provides that the responsibility of each State or organization bay be invoked in relation to an internationally wrongful act for which multiple international organizations or an international organization and a state are responsible."

The Court's jurisprudence indicates that normative criteria are used for the delimitation of responsibilities between international organizations and states, which can further develop general international law.[238] For instance, in *Bosphorus*, the European Court had to decide whether states can be held accountable for violations of the ECHR when these violations resulted from complying with obligations *vis-à-vis* an international organization, such as the European Community. The European Court used the framework of proportionality analysis in order to reconcile the general interests in international cooperation with the respect for rights of the individual. Through its jurisdiction over State parties the European Court integrated international

236 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)*.

237 *Draft Articles on the Responsibility of International Organizations (ARIO)* UN Doc A/66/10.

238 Cf. Samantha Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: the Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and general international law* (Oxford University Press 2018) 159-160, arguing that one may "consider concurrent-responsibility law under the ECHR itself as developing the general international law of State responsibility on the very particular and controversial issue of concurrent responsibility".

organizations indirectly into the human rights system by examining the balance struck between the general interest in international cooperation and the interests of the applicant with respect to his property rights.[239] The European Court held that it "would be incompatible with the purpose and object of the Convention" if states could completely be absolved from their obligations under the ECHR.[240] In the view of the Court, states' actions in compliance with legal obligations in international organizations is justified "as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[241] The European Court distinguished the requirement of equivalent protection from "identical" protection in order to accommodate the interests of the international organization concerned, and stressed that the assessment of equivalence continues to be susceptible to review.[242] The equivalence creates a rebuttable presumption that a state did not depart from the ECHR when it complies with legal obligations which it has assumed as a member of an international organization. This general presumption can be rebutted, however, if "in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient."[243] In particular, the presumption can be rebutted by showing a structural deficit in effective human rights protection beyond the single case.[244]

It is noteworthy that the European Court developed a jurisprudence which did not make an attribution to states solely dependent on effective control. Instead, the European Court's jurisprudence assumes a residual, continuing responsibility of states which will become relevant when the international

239 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland [GC]* App no 45036/98 (ECtHR, 30 June 2005) para 151.

240 ibid para 154; see already *Waite and Kennedy v Germany [GC]* para 67, see also para 68, where the European Court examined "whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention"; Cornelia Janik, 'Die EMRK und internationale Organisationen: Ausdehnung und Restriktion der "equivalent protection"-Formel in der neuen Rechtsprechung des EGMR' (2010) 70(1) ZaöRV 127 ff.

241 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland [GC]* para 156.

242 ibid para 156.

243 ibid para 156.

244 Cf. *Gasparini v Italy and Belgium* App no 10750/03 (ECtHR, 12 May 2009), rejecting a structural deficit of an internal review mechanism ("une lacune structurelle du mécanisme interne").

organization does not provide an equivalent protection of human rights. This way, the European Court avoids a legal vacuum and ensures an equivalent protection of the rights under the ECHR.

2. The United Nations as a special case

So far, the European Court has demonstrated a greater deferral towards the United Nations.

In *Behrami*, the European Court wrongly[245] decided that on the basis of the general rules of attribution conduct and omissions by French and Norwegian troops within a UN peacekeeping mission in Kosovo were attributable solely to the United Nations.[246] It is noteworthy that the European Court did not develop a functionally equivalent standard on the basis of an interpretation of the ECHR in order to establish attribution. In particular, the European Court considered but ultimately rejected to establish attribution based on the equivalent protection doctrine in such case because of the special importance of UN missions under Chapter VII of the UN Charter.[247]

The special importance of the United Nations was reaffirmed when the European Court found that the Netherlands had not violated the ECHR by granting immunity from trial to the United Nations according to article 105 UNC in the *Stichting Mothers of Srebrenica* case.[248] The European Court explicitly distinguished the case involving a dispute with the United Nations concerning a chapter VII mission from the cases belonging to the Bosphorus jurisprudence.[249] The European Court also rejected the argument "that in the absence of an alternative remedy the recognition of immunity

245 Milanovic, 'Special Rules of Attribution of Conduct in International Law' 349. For further critique see Marko Milanović and Tatjana Papć, 'As Bad As It Gets: the European Court of Human Rights's Behrami and Saramati Decision and General International Law' (2009) 58(2) ICLQ 267 ff.; Heike Krieger, 'A Credibility Gap: the Behrami and Saramati Decision of the European Court of Human Rights' (2009) 13(1-2) Journal of international peacekeeping 159 ff.; Caitlin A Bell, 'Reassessing Multiple Attribution: the International Law Commission and the Behrami and Saramati Decision' (2010) 42(2) NYU JILP 501 ff.

246 *Behrami and Behrami against France and Saramati against France, Germany and Norway [GC]* App no 71412/01 and 78166/01 (ECtHR, 2 May 2007) para 144.

247 ibid paras 145-152.

248 *Stichting Mothers of Srebrenica and Others against the Netherlands* App no 65542/12 (ECtHR, 11 June 2013) para 154.

249 ibid paras 152, 154.

is *ipso facto* constitutive of a violation of the right of access to a court".[250] The ICJ developed a similar interpretation in relation to state immunity under customary international law: state practice would not support that "international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress."[251] At the same time, however, alternative means to remedy violations were available in both cases. In the *Jurisdictional Immunities* case, the ICJ referred to the possibility "of further negotiations"[252]; in the *Stichting Mothers of Srebrenica* case, the European Court could not find that the applicants' claims against the Dutch state would necessarily fail.[253]

So far, the equivalent protection doctrine has been applied to the United Nations once by a chamber of the European Court in the *Al-Dulimi* case. The chamber held in a controversial 4:3 decision on the merits that in cases where the presumption of compatibility was rebutted and no implementation discretion was left, UNSC resolutions would not automatically prevail according to article 103 but only if the UN system provided a system of equivalent human rights protection, which was not said to be the case in the case under review.[254]

The Grand Chamber did not go this far, even though several judges endorsed the application of the equivalent protection doctrine in individual opinions,[255] while one judge spoke in favour of the application of article

250 ibid para 164.

251 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 143 para 101; see also Lorna McGregor, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?' (2013) 11(1) JICJ 125 ff.

252 *Jurisdictional Immunities of the State* [2012] ICJ Rep 99, 143-144 paras 102-104; cf. ibid Sep Op Judge Bennouna para 25: "To my mind, if Germany were to close all doors to such settlement — and there is nothing to suggest that it will — then the question of lifting its immunity before foreign courts in respect of those same wrongful acts could legitimately be raised again." On this aspect see McGregor, 'State Immunity and Human Rights: Is There a Future after Germany v. Italy?' 131, 138.

253 *Stichting Mothers of Srebrenica and Others against the Netherlands* para 167.

254 *Al-Dulimi and Montana Managment Inc v Switzerland* App no 5809/08 (ECtHR, 26 November 2013) 54-56 paras 114-122, 59 para 135. The decision was controversial because of the fact that the decision on admissibility and the decision on the merits were based on different majorities. In particular, Judge Sajó voted in favour of the inadmissibility of the case. On the merits, he voted, together with three other judges and against three other judges in favour of the applicant.

255 *Al-Dulimi and Montana Managment Inc v Switzerland [GC]*, Conc Op of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov 105 paras 54

103 UNC.[256] Ultimately, the Grand Chamber did not have to decide on this point since it arrived at the conclusion that the wording of the resolution in question did not rebut the presumption of compatibility, in other words, the obligation to freeze assets "without delay" and to "immediately transfer" to the Iraqi Development Fund would not prevent Swiss courts from examining the merits of a claim of the applicant.[257]

E. Concluding Observations

This chapter illustrated the dynamic interplay between the ECHR and the normative environment. It began by analyzing how the European Court approached the interpretation of the ECHR and considered other rules of international law when interpreting the ECHR.[258] Subsequently, it explored the European Court's interpretative decisions in establishing the relationship with other sources, with a particular focus on proportionality analysis and the prohibition of arbitrariness.[259] Furthermore, the chapter addressed the relationship between the ECHR and general international law on international responsibility, examining how and whether concepts of general international law were applied or functionally replaced with concepts based on treaty interpretation.[260]

In particular, it was demonstrated that the existence of written law does not make recourse to unwritten international law necessarily dispensable, nor is it necessary, however, to frame recourse to the normative environment within the terminology of customary international law and general principles of law. The examples of a European or an international consensus demonstrate that different doctrinal avenues were available to the European Court for such recourse.[261]

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ff.; Conc Op of Judge Keller, 131 paras 22-23; see also Conc Op of Judge Kuris 133 para 3 (referring to the opinion of Judge Pinto de Albuquerque). The European Court left this question open, 71 para 149.

256 *Al-Dulimi and Montana Managment Inc v Switzerland [GC]* Diss Op of Judge Nussberger 146.

257 ibid 71 para 149, 72 para 155.

258 See above, p. 406.

259 See above, p. 424.

260 See above, p. 443.

261 See above, p. 408.

The focus on the legal techniques of incorporating other international law may offer one explanation for phenomena that are described with the terms "mainstreaming of human rights"[262] or "humanization"[263] of (general) international law.[264] When the implementation of an international obligation leads to a restriction of a right under the ECHR, the legal technique of proportionality analysis establishes a relation between a human right and, for instance, a rule of customary international law, such as immunity. Thus, the interpreter has to examine the object and purpose of human rights law and of the rule of customary international law. It stands to reason that this perspective, which considers the question as to whether a proportionate relationship between the individual right and customary international law exists, can influence the further development of customary international law. When international law outside the ECHR protects or benefits individuals, the state may have a positive obligation under the ECHR to comply with this rule.[265] The prohibition of arbitrariness can be understood as common denominator of different norms, it can serve as a basis for reconciliation or as a standard for judicial review where no more specific obligations on states existed, where the interpretation of domestic law was concerned or where states implemented UNSC resolutions.

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262 Arnold N Pronto, '"Human-Rightism" and the Development of General International Law' (2007) 20 Leiden Journal of International Law 753 ff.; on the term "human rightism" see Alain Pellet, '"Human rightism" and international law' [2000] Gilberto Amado Memorial Lecture of 18 July 2000 ⟨https://digitallibrary.un.org/record/430167⟩ accessed 1 August 2022.

263 This notion was coined by Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94(2) American Journal of International Law 239.

264 Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' 528: "There is no return to an international law that puts on an indifferent face to human rights. Human rights can no longer be fenced in an exclusive domaine reservé; once their genie was out of the bottle, human rights necessarily transcended to the realm of general international law.", and citing William Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 872: human rights are "more than a piecemeal addition to the traditional corpus of international law" and bring about "changes in virtually every component"; see also Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 7, examining individual rights outside human rights law in other fields of international law.

265 See above, p. 423, p. 436.

Lastly, the chapter illustrates challenges for studying general international law.[266] A specific regime such as the ECHR may develop as a matter of treaty law concepts that functionally replace concepts of general international law. This can be challenging for different reasons. Firstly, the European Court is less likely to pronounce itself on concepts of general international law explicitly, which means that it does not refer to the terminology of general international law. Secondly, the European Court may employ similar notions, such as effective control or effective overall control, which assume a different function and meaning than in general international law. Thirdly, the challenge for future studies will consist in determining whether general international law has further developed in light of principles and evaluations expressed in the case-law of the European Court. To give an example: the European Court can hold member states responsible for human rights violations of private entities when these violations occurred within the state's jurisdiction and the state did not meet its positive obligation to prevent these violations. Technically, this legal construction does not attribute the conduct of non-state actors to the state: the state does not assume responsibility because of the conduct of the non-state actors but because of the failure to prevent it. What is attributed to the state is an omission, instead of an act.[267] From a normative standpoint, the end result is that the state will be responsible for violations of human rights by non-state actors over whom the state did not necessarily have effective control in the sense of the law of state responsibility. It is perfectly possible that both perspectives remain separate and independent from each other, that the European Court's approach remains a reflection of a *lex specialis*, a special regulation that differs from the general rules of attribution. It is also perfectly possible, however, that this special regulation may influence the development of general international law. All that can be done here is point to these possibilities; which one will realize itself must be the subject of a continuous examination.

266 See above, p. 443.

267 See also Milanovic, 'Special Rules of Attribution of Conduct in International Law' 315.