

# WHAT IS LAW FOR THE EUROPEAN COURT OF HUMAN RIGHTS?

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## ABSTRACT

*This Article will suggest that judges of the European Court of Human Rights (ECtHR) take into account both legal and non-legal considerations when deciding “hard” cases. This Article focuses on these legal considerations, emphasizing the legal, rather than the political, personality of the ECtHR. Legal considerations can be further divided into internal and external ones. The former originate from within the European Convention on Human Rights (Convention) system, such as the ECtHR case law or the law and practice of the Contracting Parties to the Convention. The latter are provisions borrowed from outside of the realm of the Convention, such as international treaties or laws and practices from nations outside of the Council of Europe. This Article will argue that reliance on internal, as opposed to external, sources can help minimize the challenges that the ECtHR is currently facing in regard to its legitimacy.*

I. INTRODUCTION . . . . .	89
II. SOURCES OF EUROPEAN HUMAN RIGHTS LAW . . . . .	94
A. <i>Internal Sources</i> . . . . .	99
B. <i>External Sources</i> . . . . .	106
C. <i>European Union Law</i> . . . . .	118
III. THE CHOICE OF SOURCES: A QUESTION OF LEGITIMACY. . . . .	121
IV. CONCLUSION . . . . .	133

## I. INTRODUCTION

The European Court of Human Rights (ECtHR or Court) is a court of law which relies on legal sources in its reasoning. At the same time, the ECtHR is a constitutional tribunal that interprets abstract provisions of the European Convention on Human Rights (ECHR or

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Convention).<sup>1</sup> At times, the Court is faced with difficult decisions that cannot be clearly deduced from the meaning of the Convention. This Article analyzes the legal aspects of the Court's activities and considers which law is appropriate to apply in order to interpret the Convention. This Article will also reject the notion of the "legal realism," which argues that courts use laws to justify decisions that have been made on the basis of separate considerations.<sup>2</sup> Although it is debatable whether room exists for non-legal considerations,<sup>3</sup> the ECtHR is arguably mainly a court of law that applies legal sources.<sup>4</sup> In order to boost its legitimacy, the Court must clearly establish that its activities are not arbitrary, but rather based in and bound to the law.

The Convention itself is the only binding authority on the Court; the impact of all other arguments and legal sources that the Court deploys for interpretation is for the Court to determine.<sup>5</sup> This Article argues that the ECtHR uses a variety of legal sources to support its reasoning. Despite this, however, the Court does not always apply these sources systematically and consistently, which is necessary in order to enhance the clarity and foreseeability of its judgments.

The Court has not built a clear hierarchal structure of possible sources of interpretation of the Convention, which, on the one hand, leaves the Court with some flexibility in their application but, on the other hand, opens it up to possible accusations of arbitrary and non-transparent decision-making.<sup>6</sup> A straightforward system of legal considerations

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1. See, e.g., Fiona de Londras, *Dual Functionality and the Persistent Frailty of the European Court of Human Rights*, EUR. HUM. RTS. L. REV. 38 (2013); Steven Greer & Luzius Wildhaber, *Revisiting the Debate about "Constitutionalising" the European Court of Human Rights*, 12 HUM. RTS. L. REV. 655 (2012).

2. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930). See also Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991 (1997).

3. Fiona de Londras & Kanstantsin Dzehtsiarou, *Managing Judicial Innovation in the European Court of Human Rights*, 15 HUM. RTS. L. REV. 523, 534-541 (2015).

4. The term "sources" in this Article is not used in any formal sense usually deployed by international law, for example, treaties or customary international law. "Sources" are any legal provisions that are established by international and domestic bodies involved in law-making or interpretation of law.

5. Bomhoff argues that "[b]ecause judges must justify their decisions through explicit reasoning, and because, in this process, they will generally have a choice as to what arguments to use, any argument's correctness, usefulness, appropriateness, or any other normative qualification that a local interpretative community uses, will always have to be understood as relative to that of other forms of argument." MAURICE ADAMS & JACOB BOMHOFF, *PRACTICE AND THEORY IN COMPARATIVE LAW* 83 (2012).

6. Transparency and clarity are often named as key factors of process legitimacy of international law. See, e.g., Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 926 (2004).

applied by the Court will clarify the modus operandi of legal reasoning deployed by the Court and demystify it.<sup>7</sup> The purpose of this Article is to suggest a relative value to various sources that the Court is using and systematize the Court's approach without overly restricting its maneuvering space. This Article will build on the current practice of the ECtHR, and both suggests and justifies a clearer hierarchy of legal sources that the Court can utilize in its practice. It also offers a normative argument that a clearer hierarchy might enhance the legitimacy of the Court's rulings.<sup>8</sup> This Article is concerned only with the impact of legal sources on the outcome of a case. It is not argued here that the Court should stop utilizing any other sources in its judgments, but instead that their comparative weight should be carefully considered.

The Article starts by suggesting that the Court uses non-legal considerations in its case law. This, however, does not mean that such considerations are the key ones in determining the outcome of a case. Moreover, this Article does not dwell on the question of priority between legal and non-legal considerations. Without access to the deliberation room, answers to this question are predominantly speculative.<sup>9</sup> This Article focuses on legal sources which are explicitly acknowledged in the judgments and available for analysis. Legal sources used by the ECtHR to interpret the Convention can be divided into two groups: internal and external. Internal sources originate from within the Strasbourg system of human rights protection and include the case law of the ECtHR, laws and practices of the Contracting Parties to the Convention, and legal documents produced by the Council of Europe. External legal sources include treaty-based and customary international law, reports of international organizations, and laws and practices of states outside the Council of Europe. Of course, there is an overlap between internal and external sources. Some international laws can find their way into national legal system through implementation or accession. Having said that, it is possible to establish whether a

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7. This issue was highlighted by the report of the Group of Experts of the Council of Europe on the long-term future of the ECtHR. See *The Longer-Term Future of the System of the European Convention on Human Rights, Report of the Steering Committee for Human Rights*, COUNCIL OF EUR., [http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Report-LT-future-ECHR\\_en.pdf](http://www.coe.int/t/DGHL/STANDARDSETTING/CDDH/REFORMECHR/Publications/Report-LT-future-ECHR_en.pdf) (last visited Sept. 5, 2016).

8. For factors that can enhance process legitimacy of the ECtHR, see Kanstantsin Dzehtsiarou, *Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights*, PUB. L. 534, 538 (2011); Thomas M. Franck, *Why a Quest for Legitimacy*, 21 U.C. DAVIS L. REV. 535 (1987).

9. According to Rule 22 of the Rules of Court, the Court deliberates in private. Its deliberations remain secret.

particular legal norm is predominantly external or internal. To this end, the sources' primary origin is taken into account for this study.

Both internal and external sources serve various functions in the reasoning of the Court. These functions range from informational to persuasive; the former helps the Court to understand the background of the cases while the latter function explains and justifies the Court's reasoning. The core argument of this Article about the priority of internal sources is predominantly applicable when it comes to the persuasive function of legal sources. Both internal and external sources are equally helpful in explaining the context of the judgment when they are used for informational purpose only.

This Article argues that the ECtHR uses both internal and external legal sources in its reasoning. The term "use" requires some clarification here. Sometimes judges mention legal sources and they only play a minor part in their reasoning.<sup>10</sup> In some other cases, judges rely extensively on legal sources but decide to distinguish the case at hand from the outcome supported by these sources.<sup>11</sup> There are other instances in which such an outcome is confirmed by the Court.<sup>12</sup> It is argued here that in all these cases the Court used legal sources. Therefore, the extent and result of the deployment of sources is not particularly important for the descriptive part of this Article as the Court uses sources even if it mentions them in passing.

The normative claim of this Article is that reliance on external sources is less legitimate than on the internal ones. This justifies the suggested hierarchy of sources that prioritizes the former over the latter. In recent years, the Contracting Parties were urging the Court to pay more attention to the decisions they take at the national level.<sup>13</sup> The

10. Christopher McCrudden, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 512 (2000).

11. In its judgment in the case of *A, B & C v. Ireland*, the Court decided to depart from an outcome supported by European consensus. *A, B & C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010). For a more detailed analysis, see Fiona de Londras & Kanstantsin Dzehtsiarou, *Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010*, 62 INT'L COMP. L. Q. 250 (2013).

12. See, e.g., *Tekeli v. Turkey*, App. No. 29865/96, Eur. Ct. H.R. (2004). In this case the result supported by consensus was confirmed by the ECtHR.

13. Following the High-Level Conference on the *Implementation of the European Convention on Human Rights, our shared responsibility*, the Brussels Declaration was adopted, which, among other things, reiterated "the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities, namely governments, courts and parliaments, and their margin of appreciation in guaranteeing and protecting human rights at national level." *Brussels Declaration*, COUNCIL OF EUR., [http://www.echr.coe.int/Documents/Brussels\\_Declaration\\_ENG.pdf](http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf) (last visited Sept. 5, 2016).

Court's legitimacy is narrated in terms of subsidiarity and substantive dialogue with the Contracting Parties.<sup>14</sup> Consequently, the key challenges to the Court's legitimacy are defined in terms of its remoteness from the matter at hand and lack of democratic input.<sup>15</sup> Although this narrative is damaging to the Court, it cannot be accepted that democratic legitimacy is the only source of legitimacy in general and the Court's legitimacy in particular.<sup>16</sup> Indeed, unpopularity of a judgment is not a definite sign that the Court's legitimacy is problematic. Procedural legitimacy can act as a partial response to the lack of democratic legitimacy. The Court can refute at least some challenges to its legitimacy by claiming that it mainly applies law with clarity and predictability.

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14. Interlaken, Izmir, Brighton, and Brussels declarations mention subsidiarity as the key principle of the functioning of the ECtHR. Former president of the ECtHR Dean Spielmann has also acknowledged that subsidiarity is the key structural principle of the Convention system. Dean Spielmann, President, Eur. Court of Human Rights, Keynote Speech at the Conference at the Paulinerkirche Gottingen: Judgments of the European Court of Human Rights Effects and Implementation (Sept. 20, 2013), [www.echr.coe.int/Documents/Speech\\_20130920\\_Spielmann\\_Gottingen\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20130920_Spielmann_Gottingen_ENG.pdf). Judge Spano called the new era in development of the ECtHR "the age of subsidiarity." Robert Spano, *Universality or Diversity of Human Rights?* 14 HUM. RTS. L. REV. 487, 487 (2014). Helfer states that "[n]ormatively, subsidiarity helps to legitimize ECtHR review by providing a measure of deference to national actors in situations where such deference is appropriate." Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 128 (2008). See also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

15. See LIZE GLAS, *THE THEORY, POTENTIAL AND PRACTICE OF PROCEDURAL DIALOGUE IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM* 109-111 (2016); Leonard Hoffmann, *The Universality of Human Rights*, 125 L. Q. REV. 416, 429, 431 (2009). Former British Prime Minister David Cameron stated that "[a]ll states agreed that the Court was, in some cases, too ready to substitute its judgment for that of reasonable national processes and all agreed that that was not its role." David Cameron, Prime Minister, Speech on the European Court of Human Rights (Jan. 25, 2012), [www.newstatesman.com/politics/2012/01/human-rights-court-national](http://www.newstatesman.com/politics/2012/01/human-rights-court-national). He also expressed the view that "we need to work together to ensure that . . . the Court remains true to its original intention: to uphold the Convention and prevent the abuse of human rights." *Id.* See also 10 Feb. 2011 Parl De HC (2011) col. 495, [www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm](http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm) (last visited Sept. 5, 2016). The former ambassador of Malta to the Council of Europe has also fiercely criticized the ECtHR. Joseph Licari, *Government by Foreign Courts*, TIMES OF MALTA, Sept. 15, 2013, [www.timesofmalta.com/articles/view/20130915/opinion/Government-by-foreign-courts.486215#.UpTOMD9uqSo](http://www.timesofmalta.com/articles/view/20130915/opinion/Government-by-foreign-courts.486215#.UpTOMD9uqSo).

16. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 367 (1990); Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 L. & PHIL. 451, 453 (2003); Dimitrios Kyritsis, *Representation and Waldron's Objection to Judicial Review*, 26 OXFORD J. LEGAL STUD. 733, 740 (2006); Annabelle Lever, *Is Judicial Review Undemocratic?*, PUBLIC LAW 280 (2007).

The Court is legitimate because it is based on an international treaty to which the Contracting Parties consented, and it protects human rights, which gives the Court a high moral standpoint. Having said that, the Court should not take legitimacy challenges lightly; where it is not detrimental to human rights protection, it should show that it considers the solutions that are taken at a national level by the Contracting Parties. From this perspective, in its interpretation of the Convention, the Court's reliance on internal sources, especially the laws and practices of the Contracting Parties, is within this legitimacy narrative. In circumstances where external sources point in the same direction as internal sources, their deployment in the reasoning of the ECtHR is not problematic. By deploying external sources, the Court merely reinforces the outcome that is also supported by internal legal sources. However, if the external sources clash with the interpretation accepted by the majority of the Contracting Parties, the Court's reliance on the former can arguably be challenged as illegitimate. Critics of the Court would use such a position of the Court to demonstrate that there is a legitimacy deficit of the Strasbourg system of human rights protection.

The main body of this Article is divided into two parts. Part II describes and analyzes the sources used by the ECtHR; it also identifies the key functions these sources serve in the reasoning of the Court. It concludes that the Court uses internal and external sources for informational or persuasive purposes. It also attempts to locate EU law within the system of legal sources. It is argued that EU law cannot be considered as internal law but can have a higher impact than purely external legal sources. The Court must take note of the developments in EU law, but these developments might not overshadow the approaches that are taken by the Council of Europe Member States. Part II suggests the hierarchy of legal sources, while Part III examines the legitimacy challenges that the ECtHR is facing and considers how internal (especially laws and practices of the Contracting Parties to the Convention) and external legal sources can enhance the perceived legitimacy of the judgments of the Court. Part III concludes that, in case of contradiction between the outcomes of the same case supported by internal and external sources, the Court should prioritize the internal ones, as this might enhance the legitimacy of judgments of the Court.

## II. SOURCES OF EUROPEAN HUMAN RIGHTS LAW

The ECtHR uses legal and non-legal considerations in its decision-making. Legal considerations are those arguments that can be linked to legal texts and which may include written legal regulations, judicial decisions, legal practice, and customary law—both domestic and

international. These considerations are the starting point for the Court's decision-making. If the law is clear and unambiguous, there is usually no need to look for any other considerations. However, if the law has significant gaps, and it often does, then non-legal considerations can be implicitly taken by the Court into account. Non-legal considerations do not originate directly from legal texts and can either fill the lacunae left by legal considerations or, in some limited circumstances, justify a diversion from some of them. Non-legal considerations might include political sensitivity of a given case, the possibility of a backlash from stakeholders, moral attitudes of the judges to a particular problem, and internal managerial reasons, such as a backlog and distribution of cases. Judicial decision-making in "hard cases"<sup>17</sup> is a product of interaction between legal and non-legal considerations.<sup>18</sup> However, it is almost impossible to determine to what extent the Court takes into account non-legal considerations due to the fact that these considerations are not usually explicitly acknowledged by the Court. While it is possible that these non-legal considerations play some role in the decision-making process, this Article does not aim to engage with the complex task of exploring this aspect of the adjudicatory process of the ECtHR<sup>19</sup> Thus, the classification of legal and non-legal considerations is useful for the purposes of this Article because it helps to remove

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17. Tamanaha argues that "[w]hat jurists refer to as 'hard cases' usually fall into one of the two . . . categories: cases involving gaps, conflicts, or ambiguities in the law, and cases involving bad rules or bad results." BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 192 (2010).

18. It cannot be proved with certainty that a particular judgment was a product of non-legal considerations or that non-legal considerations played a significant role in decision-making because they are not usually explicitly mentioned in the judgments. There are signs that make it possible to assume that some political and strategic reasons were taken into consideration. For example, in the case of *Lautsi v Italy*, the Grand Chamber of the Court overruled the judgment of the Chamber ruling that the mandatory display of crucifixes in Italian state schools violates the ECHR. *See Lautsi and Others v Italy*, App. No. 30814/06, Eur. CT. H.R. (2011). This judgment was heavily criticized by media, politicians, and even the Pope. A major number of Contracting Parties intervened as third parties and the Grand Chamber has reversed the judgment of the Chamber and found no violation in this case. It is plausible to suggest that the Court has taken the hostile reaction to the Chamber judgment into account and obviously this reaction is clearly beyond law. Of course, the Court did not refer to any non-legal considerations in the judgment explicitly but the judges who take part in social life could consciously or sub-consciously reflect on non-legal considerations in deliberations. *See Dominic McGoldrick, Religion in the European Public Square and in European Public Life—Crucifixes in the Classroom?*, 11 HUM. RTS. L. REV. 451, 452 (2011); Nick Pisa, *Vatican's Fury as Court Bans Crucifixes in Italian Classrooms Because They "Breach Religious Rights of Children,"* DAILY MAIL (Nov. 3, 2009, 7:38 PM), <http://www.dailymail.co.uk/news/article-1224954/Vaticans-fury-court-bans-crucifixes-Italian-classroom-breach-religious-rights-children.html>.

19. *See de Londras & Dzehtsiarou, supra* note 3.

any non-legal considerations from its focus and examine only the functionality of legal considerations.

Legal considerations are those arguments that derive from legal sources. They, in turn, are divided into internal and external considerations.<sup>20</sup> Internal legal considerations originate from within a particular legal order. These legal considerations usually have clearly established legal force and are often binding on courts. External legal considerations originate from outside of the legal order and lack binding effect. In legal orders of national states, it is easier to separate internal and external legal considerations.<sup>21</sup> To do so on a regional or international level is more complex because the international legal system is less hierarchical and less populated with legal provisions.<sup>22</sup> Within a particular state, all legal provisions that come from the national law-making institutions ought to be considered internal. They are placed in a hierarchy of norms with, more or less, clear rules of subordination, which are normally provided by national constitutions. Legal rules “produced” by national parliaments are usually at the apex of such a system.

This clarity is less obvious on the European level because the European human rights protection machinery lacks some of the elements that are available on the national level. There is no European Parliament that would be akin to a national parliament,<sup>23</sup> and would also be able to produce a constant flow of updated legal regulations of the highest legal force. There is no direct hierarchy between the laws of the Contracting Parties on the one hand and legal provisions emanated from the Council of Europe and the ECtHR on the other; their relations are pluralist.<sup>24</sup> The ECtHR judgments and legal responses to these judgments by the Contracting Parties influence the development of the

20. Christopher McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, 15 CAMBRIDGE Y.B. EUR. LEGAL STUD. 383, 385 (2013).

21. JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 41 (2012).

22. Krisch argued that international and national laws “do not form an integrated whole, neatly organised according to rules of hierarchy and a clear distribution of tasks.” Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 184 (2008).

23. The Parliamentary Assembly of the Council of Europe is not a legislative body. Pursuant to Article 23 of the Statute of the Council of Europe, “it may discuss and make recommendations upon any matter within the aim and scope of the Council of Europe.” GLAS, *supra* note 15, at 22. It shall also discuss and may make recommendations upon any matter referred to it by the Committee of Ministers with a request for its opinion. It does not adopt binding legal rules. *Id.* at 22-23.

24. Greer & Wildhaber, *supra* note 1; NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (Martin Loughlin et al. eds., 2010).



legal order of the Convention indirectly.<sup>25</sup> Therefore, there are no clear boundaries between internal and external legal sources in the Strasbourg system.

Additionally, it is not entirely possible to separate the ECHR from the context in which it operates. This also blurs the distinction between internal and external legal considerations. The Convention is an international treaty and therefore some rules of interpretation of international treaties are applicable. The ECHR is the only binding source of law for the ECtHR and it does not clearly instruct the Court as to which sources of law should be used to interpret the Convention.<sup>26</sup>

This Article claims that only those sources which are directly connected to the Council of Europe legal order can be called internal. McCrudden argues that “[i]nternal sources are those that relate to those jurisdictions to which the relevant court has direct relevance and those jurisdictions that are considered part of the same legal system. For the ECtHR, this would include the 47 countries that are parties to the European Convention on Human Rights.”<sup>27</sup> It seems that internal sources are not exhausted by legal provisions coming from the forty-seven Contracting Parties to the Convention. It is argued here that treaties and soft law instruments developed by the Council of Europe as well as the case law of the ECtHR should be considered as internal sources. They originate from within the legal order of the Convention.

External legal sources, meanwhile, include domestic legal norms of the states outside the Council of Europe, customary and treaty-based international legal norms, and decisions of other regional organizations and tribunals. International legal norms which are implemented in the domestic legal systems of the Contracting Parties to the Convention become internal legal sources. One can argue that there are at least some international legal norms that have been adopted by all Contracting Parties to the Convention and this means that they have explicitly consented to such rules of international law. This argument is only valid in relation to treaty-based international law and it is not applicable in relation to other external sources such as soft law mechanisms

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25. See *Al-Khawaja & Tahery v. United Kingdom*, App. Nos. 26766/05 & 22228/06, Eur. Ct. H.R. (2011) (Bratza, J., concurring).

26. Some constitutions have more precise rules on what legal sources should be taken into account in interpretation of their Bills of Rights. For instance, the South African Constitution in Article 39 states that when interpreting the Bill of Rights, a court, tribunal, or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; (b) must consider international law; and (c) may consider foreign law. Constitution of the Republic of South Africa May 8, 1996, ch. 2, art. 39.

27. McCrudden, *supra* note 20, at 385.

and domestic laws of the states from outside the Council of Europe. Also, this argument is only worth dealing with if the majority of the Contracting Parties have ratified a particular treaty and it has come into force.<sup>28</sup> This is not always the case. In *Marckx v. Belgium*, the Court drew inspiration from conventions which had not even entered into force in the material time.<sup>29</sup>

Part II will consider the circumstances in which the Court uses internal and external legal sources and how impactful they are on the final judgment, as well as how these sources interact. This will be illustrated by references to the judgments of the Grand Chamber of the Court. This analysis focuses on the Grand Chamber for two main reasons: 1) the most impactful “hard” cases are decided by the most authoritative formation of the Court—the Grand Chamber,<sup>30</sup> and 2) external sources are routinely considered by the Grand Chamber.<sup>31</sup> Much fewer references to external legal considerations can be found in the Chamber judgments.<sup>32</sup> The ECtHR allocates more resources and reserves more time for the Grand Chamber judgments.<sup>33</sup> In other words, lawyers of the Court’s Registry staffed on Grand Chamber cases

28. Vienna Convention on the Law of Treaties art. 31 (3) (c), May 23, 1969, 1155 U.N.T.S. 331.

29. *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. ¶ 41 (ser. A) (1979).

30. The Grand Chamber of the ECtHR consists of seventeen judges and deals with the most serious standard-setting cases. These cases are selected either by the committee of five judges (referral) or by the chamber of the Court (relinquishment).

31. See KANSTANTISIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 92 (2015) [hereinafter EUROPEAN CONSENSUS].

32. In 2014, the ECtHR released nineteen judgments of the Grand Chamber which are available on the Court case law database, “HUDOC.” Two of the judgments are related to interstate complaints and are not taken into account; four contend with issues of admissibility, compliance, or just satisfaction and also disregarded. All judgments on merits contained the survey of international or comparative law. This number was compared to the number of the Chamber judgments that utilized comparative law. Due to the fact that there are 664 judgments in English from 2014 available on HUDOC, it was not possible to review every judgment, so the database search was used instead. The following keywords were used: “relevant international law,” “comparative law,” “comparative material,” and “international material.” While some judgments in which international or comparative law were used could have been overlooked, this survey illustrates the general trend that Chamber uses comparative and international law much less often per judgment than the Grand Chamber. Only in fifty-one Chamber judgments did the Court describe the state of international comparative law (less than 8% of all judgments). Moreover, some of these descriptions are very short and basic (see, e.g., *Zinchenko v. Ukraine*, App. No. 63763/11, Eur. Ct. H.R. ¶ 49 (2014), <http://hudoc.echr.coe.int/eng?i=001-141633>) and some cases just refer to previous Chamber or Grand Chamber judgments (see, e.g., *Fozil Nazarov v. Russia*, App. No. 74759/13, Eur. Ct. H.R. ¶ 25 (2014), <http://hudoc.echr.coe.int/eng?i=001-148638>).

33. This statement should not be understood in absolute terms but refers only to the allocation of resources per judgment.

have more opportunities to consider comparative and international law.<sup>34</sup> This Article will rely on a comprehensive analysis of the Grand Chamber case law from 2014, as it provides numerous examples of both internal and external legal sources used by the ECtHR. This comprehensive review will exclude a selection bias.

It is hardly possible to clearly establish what weight is given to different sources in a judgment. This study tries to rely on what the ECtHR states in its judgments. For example, if internal sources justify broader margin of appreciation and instead the Court relies on external ones to limit this margin it means that external sources were given priority. However, it also means that the Court used both internal and external sources. Part II will first discuss examples that show that the Court uses internal legal sources and how they influence the outcome of the adjudicatory process in the ECtHR. It will then consider the impact of external sources on the Court's decision making. Finally, the peculiar position of EU law will be under scrutiny. It is concluded here that EU law cannot be perceived as an internal legal source for the ECtHR until the EU accession to the ECHR is complete.

#### A. *Internal Sources*

Internal sources are defined as originating from the legal order of the Court. It includes: 1) the Convention, 2) the Court's own case law, 3) the national laws of Contracting Parties, and 4) the treaties and soft law adopted by the Council of Europe. This subsection mainly discusses the role of the national laws of Contracting Parties through a comprehensive analysis of cases, and concludes that the Court does consider the result of comparative legal studies of the laws and practices of the Contracting Parties.

The primary internal source for the ECtHR is the Convention.<sup>35</sup> It is the only binding legal source on the ECtHR and it empowers the Court to interpret it.<sup>36</sup> The ECHR does not specify the sources that the ECtHR should deploy in interpreting the Convention.

The Court's references to its own case law are the least controversial and require little explanation here. In almost every decision and

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34. The Registry of the Court assist in the preparation of the judgments. According to Article 24 of the ECHR, its functions are laid down in the rules of the Court. Convention for the Protection of Human Rights and Fundamental Freedoms art. 24, Nov. 4, 1950, E.T.S. 005.

35. According to Article 19 of the ECHR, "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights . . ." *Id.* art. 19.

36. *Id.* art. 32.

judgment, the ECtHR refers to its own case law; while the Court is not formally bound by its previous judgments, on a number of occasions it has acknowledged that, in the interests of legal certainty, it should not depart from its jurisprudence without a good reason.<sup>37</sup> The status of the case law of the ECtHR as the proper source of the ECHR law was also reinforced by Protocol 14, which introduced a simplified adjudicatory procedure in cases in which the matter at issue is covered by the well-established case law.<sup>38</sup> The case law of the ECtHR is not homogenous in its impact on future cases. Although the Court has never explicitly adopted any hierarchy, the most authoritative judgments are delivered by the Grand Chamber followed by the those of the Chamber.<sup>39</sup> Despite the fact that there is no strict doctrine of *stare decisis* in the Court's practice, ECtHR case law often plays a decisive role in interpreting the Convention. This case law is an internal legal source which originates from the heart of the Strasbourg system of human rights protection.

The ECtHR references the national laws of Contracting Parties to the Convention and legal regulations emanating from the Council of Europe in its case law.<sup>40</sup> In 2014, nineteen judgments delivered by the Grand Chamber were published.<sup>41</sup> Six of these judgments were admissibility decisions, or judgments dealing with only just satisfaction or judgments made in inter-state cases.<sup>42</sup> There were thirteen judgments on the merits in cases of individual applications.<sup>43</sup> Each of these judgments

37. See generally, Mamatkulov & Askarov v. Turkey, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R. ¶ 121 (2005).

38. According to Article 28(1) of the ECHR, the committee of three judges can declare an application admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention, is already the subject of well-established case law of the Court. Convention for the Protection of Human Rights and Fundamental Freedoms art. 28(1).

39. See de Londras & Dzehtsiarou, *supra* note 3, at 532-534.

40. For example, in *A, B & C v. Ireland*, the Court quoted Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1903 in paragraph 106, PACE Resolution 1608 in paragraph 107, and laws of the Contracting Parties in paragraph 112. *A, B & C v. Ireland*, *supra* note 11, ¶¶ 106-107, 112.

41. See HUDOC database of the ECtHR, <https://hudoc.echr.coe.int>.

42. *Georgia v. Russia (I)*, App. No. 13255/07, Eur. Ct. H.R. (2014); *Cyprus v. Turkey* (just satisfaction), App. No. 25781/94, Eur. Ct. H.R. (2014); *Vistiņš & Perepjolkins v. Latvia* (just satisfaction), App. No. 71243/01, Eur. Ct. H.R. (2014); *Vucoković & Others v. Serbia* (preliminary objection), App. Nos. 17153/11 & 29 other cases, Eur. Ct. H.R. (2014); *Kurić v. Slovenia* (just satisfaction), App. No. 26828/06, Eur. Ct. H.R. 321 (2014); *Gross v. Switzerland*, App. No. 67810/10, Eur. Ct. H.R. 463 (2014).

43. *Jaloud v. Netherlands*, App. No. 47708/08, Eur. Ct. H.R. 229 (2014); *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R. 195 (2014); *Jeunesse v. Netherlands*, App. No.

contains references to international or comparative law.<sup>44</sup> As this section concerns internal sources, only those cases in which the Court makes references to the laws of the Contracting Parties or documents produced by the Council of Europe will be considered.

The Court included the summary of the laws of the Contracting Parties in the following cases: *Svinarenko and Slyadnev v. Russia*,<sup>45</sup> *Hämäläinen v. Finland*,<sup>46</sup> *SAS v France*,<sup>47</sup> *Fernandez Martinez v. Spain*.<sup>48</sup> For instance, in *O’Keeffe v. Ireland*, the Court quotes the relevant recommendations of the Parliamentary Assembly of the Council of Europe.<sup>49</sup> While it is relatively easy to locate references to the laws of the Contracting Parties and the documents of the Council of Europe in the judgments, it is much more difficult to determine what role these sources played in the reasoning of the ECtHR and how impactful they are on the outcome of the respective case. The impact often depends on whether there are similarities between the Contracting Parties concerning the legal regulation of a particular issue. If such similarities can be established, the Court might conclude that there is a European consensus on the matter at issue and limit the margin of appreciation of the

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12738/10, Eur. Ct. H.R. (2014), *Mocanu and Others v. Romania*, App. No.10865/09, Eur. Ct. H.R. 345 (2014); *Hassan v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. 1 (2014); Ctr. for Legal Res. *ex rel* Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. (2014); *Svinarenko & Slyadnev v. Russia*, App. Nos.32541/08 & 43441/08, Eur. Ct. H.R. (2014); *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. 369 (2014); *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. (2014); *Martínez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. (2014); *Marguš v. Croatia*, App. No. 4455/10, Eur. Ct. H.R. (2014); *O’Keeffe v. Ireland*, App. No. 35810/09, Eur. Ct. H.R. (2014); and *Ališić v. Bosnia & Herzegovina*, App. No. 60642/08, Eur. Ct. H.R. 213 (2014).

44. *Jaloud v. Netherlands*, App. No. 47708/08, Eur. Ct. H.R. 229 ¶¶ 90-104 (2014); *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R. 195 ¶ 47 (2014); *Jeunesse v. Netherlands*, App. No. 12738/10, Eur. Ct. H.R. ¶¶ 73-75 (2014); *Mocanu & Others v. Romania*, App. No.10865/09, Eur. Ct. H.R. ¶¶ 190-192 (2014); *Hassan v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. ¶¶ 33-38 (2014); Ctr. for Legal Res. *ex rel* Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. ¶¶ 64-72 (2014); *Svinarenko & Slyadnev v. Russia*, App. No. 32541/08 & 43441/08, Eur. Ct. H.R. ¶¶ 70-76 (2014); *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. ¶ 2 (2014) (*Ziemele, J.*, concurring); *S.A.S. v. France*, *supra* note 43, ¶¶ 35-39; *Martínez v. Spain*, App. No. 56030/07 Eur. Ct. H.R. ¶ 100 (2014); *Marguš v. Croatia*, App. No. 4455/10, Eur. Ct. H.R. ¶¶ 35-68 (2014); *O’Keeffe v. Ireland*, App. No. 35810/09, Eur. Ct. H.R. ¶¶ 93-96 (2014); and *Ališić v. Bosnia & Herzegovina*, App. No. 60642/08, Eur. Ct. H.R. 213 at ¶¶ 59-73 (2014).

45. *Svinarenko and Slyadnev v. Russia*, App. Nos.32541/08 & 43441/08, Eur. Ct. H.R. 369 (2014).

46. *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. 369 (2014).

47. *S.A.S. v. France*, *supra* note 43.

48. *Martínez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. (2014).

49. *O’Keeffe v. Ireland*, App. No. 35810/09, Eur. Ct. H.R. (2014).

responding state.<sup>50</sup> However, if no common ground exists, the Court allows a broader margin of appreciation and applies a looser test of proportionality to the situation at hand.<sup>51</sup> Therefore, the Court's conclusion regarding the presence or absence of consensus in Europe influences the outcome of the case, but does not automatically pre-determine it.<sup>52</sup>

The majority of judgments issued by the Grand Chamber in 2014 confirmed outcomes supported by a European consensus. In *Svinarenko and Slyadnev v. Russia*, the Court discussed whether the widespread Russian practice of confining suspects in a metal cage in courtrooms violates Article 3 of the ECHR.<sup>53</sup> The Court listed a limited number of former Soviet states which had adopted such a practice.<sup>54</sup> Although it did not explicitly rely on the consensus argument in its reasoning, the ECtHR nevertheless noted that even those states where cages were installed had begun removing them from the courtrooms.<sup>55</sup> As a result, the Court found a violation of the ECHR in this case and forced Russia to comply with European trend in this area.<sup>56</sup>

In *Hämäläinen v. Finland*, internal legal provisions of the Contracting Parties to the Convention also influenced the outcome of the case.<sup>57</sup> Here, the Court considered whether Finland had a positive obligation to simultaneously recognize both the new gender of a transgender individual as well as that individual's pre-existing marriage.<sup>58</sup> The applicant argued that this obligation stems from Article 8 of the ECHR that enshrines right to private and family life.<sup>59</sup> In Finland, same-sex marriage was not allowed at the material time, although another form of legal recognition of same-sex couples, namely civil partnerships, was

50. For example, the Grand Chamber judgment in *Bayatyan v. Armenia* in which the ECtHR observed the emerging consensus in acknowledging conscientious objections limited the respondent party's margin of appreciation in this area. *Bayatyan v. Armenia*, no. 23459/03, Eur. Ct. H.R. ¶ 122-123 (2011); for more detail of how consensus operates *see generally* EUROPEAN CONSENSUS, *supra* note 31, especially chapter 1.

51. In *Schalk and Kopf v. Austria* the Court pointed out that there is no consensus in Europe on the issue of same-sex marriages and allowed broad margin of appreciation. *Schalk v. Austria*, App. No. 30141/04, Eur. Ct. H.R. 409 (2010).

52. *See* EUROPEAN CONSENSUS, *supra* note 31, at 24-30.

53. *Svinarenko & Slyadnev v. Russia*, *supra* note 43.

54. *Id.* ¶ 75.

55. *Id.* ¶ 131.

56. *Id.*

57. *Hämäläinen v. Finland*, *supra* note 46, at 390-93.

58. *Id.*

59. *Id.* ¶ 34.

provided for by law.<sup>60</sup> The Court concluded that there is no consensus in Europe regarding this matter and, as a result, granted a wide margin of appreciation to the Finnish authorities, ruling that Article 8 had not been violated.<sup>61</sup>

A less traceable link between internal legal sources and a case's outcome can be found in *Fernandez Martinez v. Spain*.<sup>62</sup> In this case, the Court considered whether the termination of an employment contract with a priest who openly opposed celibacy violates Article 8.<sup>63</sup> The applicant taught religious ethics at a public school and was dismissed for criticising the church's stance on celibacy.<sup>64</sup> The Court stated that among the majority of Contracting Parties, the teachers of religious classes require authorization from the religious community.<sup>65</sup> While this information indirectly supports the Court's ultimate ruling that no violation exists, this comparative legal analysis is not explicitly featured in the Court's reasoning. In this case, the Court uses comparative law for informational purposes—the ECtHR illustrated its awareness of the current legal regulation of the matter at issue in Europe but did not explicitly rely on it in its judgment. Deployment of laws and practices of the Contracting Parties to the Convention for informational purposes seems appropriate and legitimate because it shows that the Court's decision-making is well informed and not arbitrary.<sup>66</sup>

An analysis of these three cases demonstrates how comparative law can be impactful, as well as how the link between the conclusions of comparative legal surveys and the particular outcome of the case is relatively easy to establish. At first glance, the case of *S.A.S. v. France* appears to be in line with this tendency—the Court could not establish a consensus in Europe and, therefore, found no violation of the Convention.<sup>67</sup> However, the case of *S.A.S. v. France* is exceptional in some respects and calls for a more detailed analysis. In *S.A.S.*, the Court was called to decide whether the French ban on wearing full-face veils

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60. *Id.* ¶ 24-30.

61. *Id.* ¶¶ 31, 74.

62. See *Martinez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. (2014).

63. *Id.* ¶ 2.

64. *Id.* ¶¶ 76-78.

65. *Id.* ¶ 66.

66. For a more detailed analysis of informational purpose of comparative law in the case law of the ECtHR, see Kanstantsin Dzehtsiarou & Vasily Lukashevich, *Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court*, 30 NETH. Q. HUM. RTS. 272, 278-81 (2012); EUROPEAN CONSENSUS, *supra* note 31, at 77-78.

67. *S.A.S. v. France*, *supra* note 43, ¶¶ 156-59.

in public violated Article 8 of the ECHR.<sup>68</sup> The Court's consideration of comparative law in this case is particularly curious. It established that "[t]o date, only Belgium has passed a law that is comparable to the French Law of 11 October 2010, and the Belgian Constitutional Court has found it compatible with the right to freedom of thought, conscience and religion."<sup>69</sup> It seems that this is a clear manifestation of consensus against such a ban. The Court has previously stated that when only two states deviate from the commonly-accepted standard, this indicates a very strong consensus.<sup>70</sup> In *S.A.S.*, however, the Court observed that the issue of headscarves is more pressing in some states than in others, and this must be taken into account when analyzing the results of comparative legal research.<sup>71</sup> Nevertheless, there are clearly more than only two countries in Europe with a substantial Muslim population.<sup>72</sup> The Court has rejected this argument and stated,

[C]ontrary to the submission of one of the third-party interveners, there is no European consensus against a ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member State of the Council of Europe has, to date, opted for such a measure. It must be observed, however, that the question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European States. In some it has been decided not to opt for a blanket ban. In others, such a ban is still being considered.<sup>73</sup>

It appears that, according to the majority, even the hypothetical possibility of adopting similar bans in other Contracting Parties is enough to undermine the European consensus. In the past, the Court would

68. *Id.* ¶ 74.

69. *Id.* ¶ 40.

70. *A, B & C v. Ireland*, *supra* note 11, ¶ 235.

71. *S.A.S. v. France*, *supra* note 43, ¶¶ 156-59.

72. Among member states of the Council of Europe, the following illustrate the percentage of Muslims out of the total population in the respective member states: 98.4% in Azerbaijan, 22.7% in Cyprus, 82.1% in Albania, 5.1% in Austria, 41.6% in Bosnia and Herzegovina, 13.4% in Bulgaria, 10.5% in Georgia, 5% in Germany, 18.5% in Montenegro, 5.5% in Netherlands, 34.9% in Macedonia, 11.4% in Russia, 4.9% in Sweden, 5.7% in Switzerland, 7.5% in France, and 6% in Belgium. None of the aforementioned countries introduced a ban on headscarves. Data is taken from Pew Forum on Religion and Public Life. *See* Muslim Populations by Country: How Big Will Each Muslim Population Be by 2030? THE GUARDIAN: DATABLOG, <https://www.theguardian.com/news/datablog/2011/jan/28/muslim-population-country-projection-2030#data>.

73. *S.A.S. v. France*, *supra* note 43, ¶ 156.



have given the respondent State a wide margin of appreciation where there was no consensus in Europe;<sup>74</sup> in this case, however, European consensus could have been identified. Thus, the broad margin of appreciation given to France in this case might be seen unjustified.

Despite some inconsistency in the identification of a European consensus in *S.A.S.*, it is possible to conclude that the Court took into account the results of comparative legal studies analyzing the laws and practices of the Contracting Parties. The Court's approach to comparative law in 2014 is consistent with its approach throughout the years.<sup>75</sup>

Another internal source of law is treaties and soft law mechanisms adopted by the Council of Europe. The ECHR is one such treaty that was concluded under the auspices of the Council of Europe.<sup>76</sup> While the Court is not designed to supervise the execution of any other conventions, resolutions, or recommendations, except for the ECHR, it is not contrary to ECHR law and the logic of the Strasbourg system for the ECtHR to use legal documents of the Council of Europe as persuasive authority.<sup>77</sup> The judgment in *O'Keeffe v. Ireland* illustrates this point. In this case, the Court considered whether Irish authorities fulfilled their positive obligation to protect children from sexual abuse at school.<sup>78</sup> The Court referred to the recommendations of the Parliamentary Assembly of the Council of Europe and the European Social Charter to establish the positive obligation of the Contracting Parties to protect children at school.<sup>79</sup> The ECtHR ruled that the Irish authorities failed to fulfil their positive obligations and, thus, found a violation of the Convention.<sup>80</sup>

The key legal challenge associated with the documents produced by the Council of Europe is that they are either non-binding or, even when binding, the Court does not have a mandate to enforce them. Despite this lack of binding legal force, these documents are internal sources of law that can have a considerable impact on the judgments issued by the ECtHR. The rationale for this suggestion derives from the

74. See *Schalk v. Austria*, *supra* note 51.

75. EUROPEAN CONSENSUS, *supra* note 31, at 86-97.

76. The European Convention on Human Rights is treaty No. 005 in the list. See COMPLETE LIST OF THE COUNCIL OF EUROPE'S TREATIES, <https://www.coe.int/en/web/conventions/full-list>.

77. Glas observes that "[t]he Court's reliance on soft-law instruments has been criticised. . .because it means the Court can transform these instruments into binding obligations by way of its judgments, something which may have a chilling effect on the states' willingness to adopt new soft-law instruments." GLAS, *supra* note 15, at 328.

78. *O'Keeffe v. Ireland*, App. No. 35810/09, Eur. Ct. H.R. (2014).

79. *Id.* ¶ 92.

80. *Id.*

object and purpose of the Convention.<sup>81</sup> The object of the ECHR is to further the realisation of human rights among the Contracting Parties.<sup>82</sup> At the same time, the Council of Europe itself and the treaties concluded under its auspices serve the purpose of further realizing human rights in Europe.<sup>83</sup> Thus, the ECHR and other Council of Europe documents are developed by the same international organization and designed to fulfil similar objectives. The treaties and soft law mechanisms adopted under the auspices of the Council of Europe inform the interpretation of the Convention and can be considered internal legal sources of the Strasbourg Court.

While not homogenous in their legal effect and structure, internal legal sources share a key feature, namely their origin from within the legal order of the ECtHR.

### B. *External Sources*

External legal sources used by the Court in its reasoning include the provisions of international law,<sup>84</sup> reports of international inter-state and nongovernmental organisations,<sup>85</sup> judgments of international and

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81. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, (ETS 5), 213 U.N.T.S. 222, *entered into force*, Sept. 3, 1953 [hereinafter European Convention for the Protection of Human Rights preamble].

82. *Id.*

83. According to the Preamble to the Convention, the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms. *See* European Convention for the Protection of Human Rights preamble.

84. International law includes both treaty-based law and customary international law. *See, e.g.*, *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A) at 15 (1979). The Court, for example, utilised a definition of torture from the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Selmouni v. France*, App. No. 25803/94, Eur. Ct. H.R. ¶ 97 (1999). The Court also used the Universal Declaration of Human Rights, *Al-Adsani v. the United Kingdom*, App. No. 35763/97, Eur. Ct. H.R. ¶ 26 (2001), International Covenant on Civil and Political Rights, *Makaratzis v. Greece*, App. No. 50385/99, Eur. Ct. H.R. ¶ 28 (2004), the Convention on the Rights of the Child, *Sommerfeld v. Germany*, App. No. 31871/96, Eur. Ct. H.R. ¶¶ 37-39 (2003), the Convention on the Elimination of All Forms of Discrimination Against Women, *Rantsev v. Cyprus and Russia*, App. No. 25965/04, Eur. Ct. H.R. ¶¶ 147-148 (2010).

85. The Court used findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Bouyid v. Belgium*, App. No. 23380/09, Eur. Ct. H.R. ¶ 48 (2013); reports of Amnesty International and Human Rights Watch, *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. ¶¶ 65-79 (2008); statements of the International Committee of the Red Cross, *El-Masri v. Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Eur. Ct. H.R. ¶ 122 (2012).

regional tribunals other than the ECtHR,<sup>86</sup> and the laws and practices of the states outside the Council of Europe.<sup>87</sup> Classifying these sources as external does not undermine their value; rather it shows that they are located outside the European system of human rights protection.

The Court itself has emphasised the importance of external sources by pointing out that “[t]he Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part.”<sup>88</sup> In *Demir and Baykara v. Turkey*, the Court concluded that it has “never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein.”<sup>89</sup> The ECHR is part of international law and some provisions of the Convention explicitly refer to it.<sup>90</sup> This, however, does not signify that every reference to international law affects the Court’s reasoning and forms a part of a substantive argument. References to international law can fulfil at least three distinct functions. First, the Court can use international law to determine the scope of its competence. Due to the special character of the ECtHR as a regional tribunal, it is unlikely that it would be able to draw inspiration from national laws of the Contracting Parties in relation to questions such as whether it can, for example, award just satisfaction in inter-state cases. National courts and tribunals are unlikely to deal with comparable situations. The second function presents itself when international law is used as a fact

86. The Court used judgments of the International Court of Justice, *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (2001-IV), ¶ 86, the Inter-American Court of Human Rights, *Zolotukhin v. Russia*, App. No. 14939/03, Eur. Ct. H.R. ¶ 40 (2009), the Inter-American Commission of Human Rights, *Issa & Others v. Turkey*, App. No. 31821/96, Eur. Ct. H.R. ¶ 71 (2004), the Human Rights Committee and other bodies of the United Nations, *Folgerø and Others v. Norway*, App. No. 15472/02, Eur. Ct. H.R. ¶ 45 (2007), the International Military Tribunal in Nuremberg, *Kononov v. Latvia*, App. No. 36376/04, Eur. Ct. H.R. ¶¶ 118-199 (2010).

87. The Court examined the laws of the following countries: Australia, Canada, South Africa, Hong Kong, Mauritius, Namibia, New Zealand, the United States, and Israel. *Neulinger & Shuruk v. Switzerland*, App. No. 41615/07, Eur. Ct. H.R. ¶ 72 (2010); *Hirst v. United Kingdom*, App. No. 74025/01, Eur. Ct. H.R. ¶¶ 35-38 (2005); *Vinter & Others v. United Kingdom*, App. Nos. 66069/09, 130/10 & 3896/10, Eur. Ct. H.R. ¶ 73 (2013); *Evans v. United Kingdom*, App. No. 6339/05, Eur. Ct. H.R. ¶ 49 (2007).

88. *Marguš v. Croatia*, App. No. 4455/10, Eur. Ct. H.R. ¶ 129 (2014).

89. *Demir and Baykara v. Turkey*, App. No. 34503/97, Eur. Ct. H.R. ¶ 67 (2008).

90. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 7, 15, & 35, Nov. 4, 1950, Eur. TS No. 5, 213 U.N.T.S. 221. The CDDH has discussed a proposal to include in the Preamble to the Convention “... the general principle that the Convention as a whole should be interpreted in harmony with other principles of international law.” COUNCIL OF EUR., *supra* note 7, at 101. It has, however, rejected this proposal because it would be time consuming while the added value would be limited. *Id.*

explaining the circumstances in a case at hand. This function is similar but not identical to informational purpose. The latter one describes the standards and broader context of a particular application of the Convention. International law can also be used as a source of information about the legal context in a particular area. Finally, international law can form a part of a substantive argument. International law can be used together with internal sources supporting the same outcome or can be used as an independent argument. These three functions will now be discussed in turn using examples from 2014 Grand Chamber judgments.

The first function of international law is to support the Court's rulings about its procedural competence. International law is important here, as national law does not often provide appropriate comparative materials for the Court. This function is less challenging than the others are as it reflects the obvious nature of the ECtHR as a regional court; it is also unproblematic as it does not directly impact interpretation of the substantive articles of the Convention. Two key criteria for this function of international law should be acknowledged: first, it concerns *sui generis* issues of international law and second, these rules can have only indirect impact on the merits of the case, namely they cannot prejudice the outcome. The following examples explain these criteria in more detail.

The Grand Chamber of the Court has made references to international law in all of its judgments on merits in 2014.<sup>91</sup> The following analysis will focus mainly on the meritorious judgments in individual cases, although some judgments in interstate cases contain references to international law as well. For example, the Court adjudicated on the issue of just satisfaction in the "old" case of *Cyprus v. Turkey*.<sup>92</sup> In this case, the Court had to justify its competence to award just satisfaction in inter-state cases.<sup>93</sup> Just satisfaction awards in cases of individual

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91. *Jaloud v. Netherlands*, App. No. 47708/08, Eur. Cr. H.R. (2014); *Tarakhel v. Switzerland*, App. No. 29217/12, Eur. Ct. H.R. (2014); *Jeunesse v. Netherlands*, App. No. 12738/10, (2014); *Mocanu v. Romania*, App. No.10865/09, Eur. Ct. H.R. (2014); *Hassan v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. (2014); Ctr. for Legal Res. *ex rel* Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. ¶¶ 64-72 (2014); *Svinarenko & Slyadnev v. Russia*, App. Nos.32541/08 & 43441/08, Eur. Ct. H.R. (2014); *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. (2014); *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. ¶¶ 25-26 (2014); *Martínez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. ¶¶ 48-66 (2014); *Marguš v. Croatia*, App. No. 4455/10, Eur. Ct. H.R. (2014); *O'Keeffe v. Ireland*, App. No. 35810/09, Eur. Ct. H.R. (2014); and *Ališić v. Bosnia & Herzegovina*, App. No. 60642/08, Eur. Ct. H.R. (2012).

92. *Cyprus v. Turkey*, *supra* note 43.

93. *Id.*

applications is a well-established practice;<sup>94</sup> however, until this case, the Court had never granted just satisfaction in inter-state cases. In *Cyprus v. Turkey*, the Court used references to the case law of other international tribunals, such as the Permanent Court of International Justice and the International Court of Justice, to establish its competence in awarding just satisfaction.<sup>95</sup> Here, the Court could not rely on the practice of national tribunals, as there was no appropriate comparator. In such a scenario, it is only useful to make comparisons with other international judicial institutions.

Another aspect of the same function presents itself when the Court contends with setting the scope of its jurisdiction. International legal norms played an important role in *Jaloud v. Netherlands*, in which the Court discusses the issue of its extraterritorial jurisdiction in Iraq.<sup>96</sup> In *Jaloud*, the applicants' relatives were killed as a result of the military operation conducted by Dutch troops.<sup>97</sup> In order to determine whether the Court had jurisdiction over the issue, it used treaty-based and customary international law, providing a helpful insight into the procedural and admissibility phases of a case.<sup>98</sup> In *Hassan v. the United Kingdom* and *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*,<sup>99</sup> the Court also used references to international law to determine its own jurisdiction. While domestic courts sometimes discuss extraterritorial application of national laws,<sup>100</sup> this occurs in a different legal context, and national law cannot fully reflect all the challenges that international tribunals face in this respect. For example, extraterritorial application of the Convention inevitably leads to broadening the scope of obligation by the Contracting Parties to which they might claim they have never consented. The issue of consent is much less to the forefront at the national level.

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94. See ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 408-09 (2010).

95. See *Cyprus v. Turkey*, *supra* note 42, ¶ 41.

96. *Jaloud v. Netherlands*, App. No. 47708/08, Eur. Ct. H.R. (2014).

97. *Id.*

98. *Id.* ¶ 140-145.

99. *Hassan v. United Kingdom*, App. No. 29750/09, Eur. Ct. H.R. (2014); *Ališić v. Bosnia & Herzegovina*, App. No. 60642/08, Eur. Ct. H.R. (2014).

100. See, e.g., *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) (considering the application of the Alien Tort Statute, 28 U.S.C. § 1350).

In a similar vein, international law was used in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*.<sup>101</sup> The key issue in this case was whether a human rights NGO, which was not a direct victim of the violation, can submit an application to the Court on behalf of an underage and mentally disadvantaged applicant.<sup>102</sup> It is a well-established rule of the ECHR that only victims have standing and can submit their applications to the Court.<sup>103</sup> In this case, however, the Court compared how this issue is dealt with by various tribunals established by international law and concluded that the Centre for Legal Resources (CLR) can be granted standing here.<sup>104</sup>

In *Centre for Legal Resources on behalf of Valentin Câmpeanu*, the victim had severe mental disabilities and was HIV positive.<sup>105</sup> His mother had abandoned him at birth, and he died in grossly inadequate conditions in the care of the state.<sup>106</sup> The Court described those conditions as follows:

On 20 February 2004 a team of monitors . . . noticed Mr Câmpeanu's condition [. . .] Mr Câmpeanu was alone in an isolated room, unheated and locked, which contained only a bed without any bedding. He was dressed only in a pyjama top. At the time he could not eat or use the toilet without assistance. However, the staff at the [hospital] refused to help him, allegedly for fear that they would contract HIV. Consequently, the only nutrition provided to Mr Câmpeanu was glucose, through a drip. The report concluded that the hospital had failed to provide him with the most basic treatment and care services.<sup>107</sup>

There were no relatives who could bring the case to the Court on behalf of the deceased. The ECtHR had to consider whether a nongovernmental organization, the CLR, could apply on his behalf. The CLR was neither the direct nor indirect victim of this violation and had no power of attorney from the deceased. A strict application of the rules

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101. Ctr. for Legal Res. *ex rel* Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. (2014).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Ctr. for Legal Res. *ex rel* Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. ¶ 23 (2014).

would suggest that the application ought to have been deemed inadmissible. The Court, however, came to a different conclusion, stating:

[I]n the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr Câmpeanu, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law. Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the Convention, nor with the High Contracting Parties' obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.<sup>108</sup>

The Court effectively adopted a position similar to that of the UN Human Rights Committee, which exceptionally granted standing to representatives acting on behalf of an applicant who was unable to submit his or her application by him/herself.<sup>109</sup>

It follows from this brief analysis that international law can play an important role in determining the scope of the jurisdiction of the ECtHR. This is an important, but technical, function of international law. It seems that the Court can legitimately deploy external sources in its determination of procedural competencies for the following key reasons. First, as has been previously pointed out, there are usually no other appropriate comparable internal legal sources on which the Court can rely. Second, the Court adopts the approaches that have already been tested by other international tribunals. In so doing, the ECtHR reduces the risk of resistance and criticism by the Contracting Parties because these practices are not novel to international law it has some pedigree

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108. *Id.* ¶ 112.

109. *Id.* ¶ 66.

and traction.<sup>110</sup> Moreover, such reliance on international law can preclude its further fragmentation.<sup>111</sup>

The second function of international law is one of factual evidence. In the previously mentioned case, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, the Court considered the report of the United Nations Special Rapporteur on the Right to Health on Romania to enhance its understanding of the legal and factual situation with human rights protection of mentally disable people in the respondent state.<sup>112</sup> The Court often uses reports of various international bodies and institutions, as evidenced in the so-called extradition cases, where the Court examined whether the applicant faces the real risk of torture or inhuman and degrading treatment in the receiving state.<sup>113</sup> This function is important as international law allows the Court to be better informed in issuing judgments.

If an international legal source is treated as a fact, it explains the matter at issue and assists the Court in describing a case's background. In *Slivenko v. Latvia*, which concerned the status of former Soviet citizens in Latvia, the Court quoted the Latvian-Russian treaty on the withdrawal of Russian troops.<sup>114</sup> The Court did not use this treaty support its reasoning;<sup>115</sup> the compliance of the provisions of that treaty with the Convention was considered by the judges.<sup>116</sup> Another example is *Prince*

110. See SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 131-35 (2015).

111. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); Anthony E. Cassimatis, *International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*, 56 INT'L & COMP. L. Q. 623 (2008); Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT'L L. 1 (2009).

112. Ctr. for Legal Res. *ex rel* Valentin Câmpeanu v. Romania, App. No. 47848/08, Eur. Ct. H.R. ¶ 78 (2014).

113. See, e.g., Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. ¶ 65-94 (2008); Dzhurayev v. Russia, App. No. 71386/10, Eur. Ct. H.R. ¶ 102-107 (2013).

114. *Slivenko v. Latvia*, App. No. 48321/99, Eur. Ct. H.R. ¶ 64-67 (2003).

115. *Id.* ¶ 116.

116. The Court has stated that “the withdrawal of the armed forces of one independent State from the territory of another, following the dissolution of the State to which they both formerly belonged, constitutes, from the point of view of the Convention, a legitimate means of dealing with the various political, social and economic problems arising from that dissolution. The fact that in the present case the Latvian-Russian treaty provided for the withdrawal of all military officers who after 28 January 1992 had been placed under Russian jurisdiction, including those who had been discharged from the armed forces prior to the entry into force of the treaty (which in this respect therefore had retroactive effect), and that it also obliged their families to leave the country, is not in itself objectionable from the point of view of the Convention and in particular Article 8. Indeed, it can be said that this arrangement respected the family life of the persons



*Hans-Adam II of Liechtenstein v. Germany*, in which the Court referred to international legal provisions. Here again, international law did not form part of a substantive argument but was included to explain the legal regime from which the legal matter had emerged.<sup>117</sup>

Finally, international law can act as an external legal source in supporting a substantive argument developed in the reasoning of the Court; hence, it can directly influence the outcome of the Court's judgment on merits. The main argument of this Article, namely that the Court must prioritize internal sources over external, relates mainly to this function. The case of *Marguš v. Croatia* offers an example of such function.<sup>118</sup> There the applicant was granted amnesty after the Yugoslavian civil war.<sup>119</sup> Ten years later, the decision to grant amnesty was annulled and the applicant was convicted for crimes committed during the war.<sup>120</sup> The applicant argued that this revocation amounted to punishing twice for the same crime, which is prohibited by Article 4 of Protocol 7.<sup>121</sup> The Court considered the rules of international law dealing with pardoning of grave international crimes.<sup>122</sup> It acknowledged the growing trend in international law prohibiting amnesty in such circumstances.<sup>123</sup> The Court quoted case law of the Inter-American Court of Human Rights and various international criminal tribunals.<sup>124</sup> It also mentioned the U.N. Convention on Prevention and Punishment for Genocide.<sup>125</sup> Most of these legal instruments prohibit amnesties for war crimes, crimes against humanity and genocide. This trend is clear in international law; it influenced the reasoning of the ECtHR in this case. For instance, the Court pointed out that "[a] growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights."<sup>126</sup> This was one of the reasons why the Court did

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concerned in that it did not interfere with the family unit and obliged Russia to accept the whole family within its territory, irrespective of the origin or nationality of the individual family members." *Id.*

117. Prince Hans-Adam II of Liechtenstein v. Germany, App. No. 42527/98, Eur. Ct. H.R. ¶ 23-37 (2001).

118. *Marguš v. Croatia*, *supra* note 43.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* ¶ 35-68.

123. *Id.* ¶ 130.

124. *Id.* ¶ 131-138.

125. *Id.* ¶ 42.

126. *Id.* ¶ 139.

not find a violation of the Convention in this case. It is safe to suggest that the Court used international legal sources as a substantive argument that influenced the outcome in this case. Meanwhile, the position of national laws of the Contracting Parties to the Convention had not been consulted. In spite of the relevance to international law, it is plausible that the Contracting Parties to the Convention have specific rules of granting amnesties. Conceivably, these rules would prevent granting amnesties where grave crimes were committed. Having said that, the Court decided not to use internal sources to support its findings and relied solely on international law. One reason for this could be that the Court dealt with a specific post-war transitional situation in Croatia, which is not often taken into account in national laws of European states. In contrast, many international criminal law tribunals were specifically established to deal with similar situations.<sup>127</sup> A more pragmatic reason is that international law is more accessible and can replace a more work intensive and complicated comparative analysis.<sup>128</sup> This is even more so when comparative analysis is likely to support the same outcome as the one established as a result of consideration of international law.

While *Marguš v. Croatia* relied solely on international law, the Grand Chamber refers to both the laws of the respective Contracting Parties to the Convention as well as international law in its other judgments.<sup>129</sup> In 2014, the Court did not consider any clashes between internal and external legal sources and, therefore, did not have to contend with the conflict of laws. In *Svinarenko and Slyadnev*, the Court pointed out that even those few Contracting Parties that allowed metal cages in the courtrooms have begun to abandon this practice.<sup>130</sup> The Court also referred to such external sources as the case law of the UN Human Rights Committee, UN Standard Minimum Rules of Procedure of international criminal tribunals, and the Amnesty International Fair Trial Manual.<sup>131</sup> These various sources support the finding that confinement in metal cages in courtrooms violates the Convention. The Court came to the same conclusion through its analysis of internal sources. Therefore, deployment of these materials in this case is

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127. For example, International Criminal Tribunal for Former Yugoslavia or International Criminal Tribunal for Rwanda.

128. EUROPEAN CONSENSUS, *supra* note 31, at 95.

129. *See Part III below.* Section C of Part II analyzes the Court's choice of law and reviews the legitimacy of selecting the competing legal provisions.

130. *Svinarenko & Slyadnev v. Russia*, *supra* note 43, ¶ 122.

131. *Id.* ¶ 132.

uncontroversial, as the Court does not need to choose between internal and external sources.

Another external source utilized by the Court is the laws and practices of states outside the Council of Europe. Because the Grand Chamber of the Court did not rely on these sources in 2014, the following examples will be drawn from other judgments of the Court. The Court has previously relied on laws,<sup>132</sup> court judgments,<sup>133</sup> and legal practices of states outside the Council of Europe. The ECtHR used these sources for informational, factual, and persuasive purposes.

“Informational purpose” signifies that the domestic laws outside of the Council of Europe are described by the Court but they do not explicitly form a part of a substantive argument of the Court and these laws are not mentioned in its reasoning.<sup>134</sup> The case of *Neulinger and Shuruk v. Switzerland* can illustrate this function.<sup>135</sup> The applicants in this case were a mother and her son—the concern being that the son would be returned to his biological father in Israel.<sup>136</sup> The Court was called upon to decide whether such a removal would violate the applicants’ rights under Article 8.<sup>137</sup> The Court relied on the rules of international law, as well as case law from Australia and the United States in relation to inter-state custodial disputes.<sup>138</sup> Despite referring to the case law, the Court did not explicitly rely on the laws and practices of Australia and the United States in its reasoning.<sup>139</sup> Thus, reference to these legal rules was included for informational purposes only.

The second purpose for the deployment of foreign laws is factual; in other words, foreign laws are used to explain the particularities of a foreign legal system relevant to the case at hand. The difference between an informational and a factual purpose is that a factual purpose allows for the opportunity for foreign laws to impact the outcome of a particular case—though they cannot influence the standard setting function of the Court. In other words, foreign law as a fact cannot affect the mode of application of the ECHR in future cases. It seems that foreign law included for informational purposes can also impact the outcome of the case; however, the ECtHR does not explicitly rely on such sources

132. See *Goodwin v. United Kingdom*, App. No. 28957/95, Eur. Ct. H.R. (2002).

133. See *Hirst v. United Kingdom*, *supra* note 87.

134. See Kanstantsin Dzehtsiarou & Vasily Lukashevich, *Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court*, 30 NETH. Q. HUM. RTS. 272, 278-81 (2012).

135. *Neulinger & Shuruk v. Switzerland*, App. No. 41615/07, Eur. Ct. H.R. (2010).

136. *Id.*

137. *Id.*

138. *Id.* ¶ 70-74.

139. *Id.* ¶ 72, 74.

in its reasoning. In cases of factual purpose of foreign laws, the ECtHR analyses them explicitly in its reasoning. For instance, if the Court considers whether extradition to a state outside the Council of Europe should be allowed, foreign law used for a factual purpose may be crucial to the outcome of the case at hand but cannot prejudge similar cases in the future. For example, in *Soering v. the United Kingdom*, the first case in which the Court prohibited extradition of a wanted criminal to the State of Virginia in the United States, the Court acknowledged that the applicant could be placed on death row were he to be extradited to Virginia.<sup>140</sup> This, in turn, would violate Article 3 of the ECHR.<sup>141</sup> The judgment contains a detailed description of relevant laws in Virginia.<sup>142</sup> The Court considered this description when deciding extradition in *Soering*.<sup>143</sup> The Court decided that, because the applicant could be placed on death row in Virginia, the United Kingdom is prohibited from extraditing him.<sup>144</sup> This, however, does not mean that every suspect is prohibited from being extradited to Virginia. Virginian law did not influence the interpretation of the Convention, but rather helped the Court apply it to the case at hand.

Foreign legal provisions may also form a part of a substantive argument, and can, therefore, be used for persuasive purposes. Unlike the deployment of external sources as information or facts, this function of external sources is particularly problematic because it may influence the Court's reasoning. In *Hirst No 2 v. the United Kingdom*, for example, the Court considered whether the blanket ban of prisoner voting violated Article 3 of Protocol 1.<sup>145</sup> In this case, the Court described and relied on the then-two recent judgments from the highest courts of Canada and South Africa.<sup>146</sup> Both judgments condemned the disenfranchisement of prisoners.<sup>147</sup> The Court established that the blanket ban that existed<sup>148</sup> in the UK violates the Convention, despite the fact that there was no clear European consensus supporting this outcome at

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140. *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (1989), ¶ 93-99.

141. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”).

142. *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (1989), ¶ 39-48.

143. *Id.* ¶ 98-99.

144. *Id.*

145. *Hirst v. United Kingdom*, *supra* note 87.

146. *Id.* ¶ 35-39.

147. *August v. Electoral Commission* 1999 (3) SA 1 (CC) ¶ 22 (S. Afr.); *Sauvé v. the Attorney General of Canada* [2002] S.C.T. 519 (Can. S.C.C.).

148. And it still exists at the moment of writing of this Article (5 January 2018).

that time.<sup>149</sup> The dissenting judges criticized this approach to interpretation of the Convention, stating:

The majority submit that “it is a minority of Contracting States in which a blanket restriction on the right of serving prisoners to vote is imposed or in which there is no provision allowing prisoners to vote”. The judgment of the Grand Chamber—which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa—unfortunately contains only summary information concerning the legislation on prisoners’ right to vote in the Contracting States.

According to the information available to the Court, some eighteen countries out of the forty-five Contracting States have no restrictions on prisoners’ right to vote. On the other hand, in some thirteen States prisoners are not able to vote either because of a ban in their legislation or *de facto* because appropriate arrangements have not been made. It is essential to note that in at least four of those States the disenfranchisement has its basis in a recently adopted Constitution (Russia, Armenia, Hungary and Georgia). In at least thirteen other countries more or less far-reaching restrictions on prisoners’ right to vote are prescribed in domestic legislation, and in four of those States the restrictions have a constitutional basis (Luxembourg, Austria, Turkey and Malta). The finding of the majority will create legislative problems not only for States with a general ban such as exists in the United Kingdom. As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention, the judgment in the present case implies that all States with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention.<sup>150</sup>

The Court’s reliance on external legal sources is among the key reasons why prisoner voting case law is so controversial and widely

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149. *Hirst v. United Kingdom*, *supra* note 87.

150. *Id.* ¶ 6 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

discussed. Even thirteen years since it was delivered, the *Hirst No 2* judgment has not yet been implemented by the UK government.<sup>151</sup>

### C. European Union Law

European Union law is *sui generis* in its relations vis-à-vis the law of the ECHR. All EU member states are, at the same time, Contracting Parties to the Convention.<sup>152</sup> Some of EU laws are directly effective, supreme and enforceable on the territory of EU member states. In other words, EU law is not external *stricto sensu* for the EU member state, and at the same time it does not originate from these Contracting Parties, but was instead imposed by the EU. For that reason, EU law cannot be considered an internal legal source and, in a hierarchy of sources, should be placed between internal and external sources—less influential than the former but more so than the latter. Such a conclusion does not diminish the role of EU law, and the Court should be informed of its state in relevant cases. Additionally, in the unlikely event of a clash between EU law and internal legal sources, it is more legitimate to prioritize the latter.

The Court has used various sources of EU law in its jurisprudence. The involvement of the EU in human rights matters has rapidly increased in the last few decades and has culminated in the adoption of the EU Charter of Fundamental Rights (Charter).<sup>153</sup> The ECtHR has referred to EU law on a number of occasions even before the Charter entered into force.<sup>154</sup> The ECtHR has quoted EU law for both informational and persuasive purposes,<sup>155</sup> and has used various sources of EU law, including case law of the Court of Justice of the European Union,<sup>156</sup> the Charter,<sup>157</sup> the Treaty of the European

151. Kanstantsin Dzehtsiarou, *Prisoner Voting and Power Struggle: a Never-Ending Story?*, VERFASSUNGSBLOG (Oct. 30, 2017), <http://verfassungsblog.de/prisoner-voting-and-power-struggle-a-never-ending-story/>, K. Dzehtsiarou, *Prisoner Voting Saga: Reasons for Challenges*, in ELECTORAL RIGHTS IN EUROPE (H. Hardman & B. Dickson eds., 2017).

152. This is true until the United Kingdom exits the European Union following the referendum in 2016.

153. K. Dzehtsiarou & P. Repyeuski, *European Consensus and the EU Accession to the ECHR*, in THE EU ACCESSION TO THE ECHR, 313-314 (V. Kosta, N. Skoutaris & V. Tzevelekos eds., 2014).

154. *See* *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361, ¶ 16 (1999).

155. Tobias Lock, *The Influence of EU Law on Strasbourg Doctrines* (2016) 41 European Law Review 804, 811.

156. *See* *Delfi AS v. Estonia*, 586 Eur. Ct. H.R. ¶ 52-57 (2015); *Nada v. Switzerland*, 1691 Eur. Ct. H.R. ¶ 82-87 (2012).

157. *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, Eur. Ct. H.R. (2005), at ¶ 78; *Micallef v. Malta*, App. No. 17056/06, Eur. Ct. H.R. ¶ 32 (2009).

Union,<sup>158</sup> various European Union Council directives,<sup>159</sup> regulations<sup>160</sup> and decisions,<sup>161</sup> as well as resolutions of the European Union Parliament.<sup>162</sup>

At least some of these sources are legally binding and can effectively be considered laws of the twenty-eight Contracting Parties to the Convention.<sup>163</sup> Some commentators have been quick to argue that when the EU rules on a particular issue, such a ruling effectively forms a European consensus. Former ECtHR Judge Christos Rozakis points out,

It is undeniable that evidence of the existence of a European consensus in situations where an advanced protection is offered by the EU legal order is easily detectable. The evidence that the EU Member States consent to an advanced protection suffices, I think, to prove the existence of a European consensus since the Member States of the EU constitute the majority of the states parties to the ECHR, and given that the real meaning of consensus is not identical to a unanimous consent of all states participating in the ECHR system.<sup>164</sup>

Such an approach effectively equates EU law with internal legal sources and nearly automatically converts human rights-related decisions of the EU into emerging European consensus. However, Tobias Lock argues that this approach is problematic.<sup>165</sup> First, as detailed in Part III, one reason for the increased value of internal sources is that they are adopted with the rights enshrined in the Convention in mind. Therefore, at least in theory, laws of the Contracting Parties to the Convention undergo the internal process of checking their compliance

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158. *Avotiņš v. Latvia*, App. No. 17502/07, Eur. Ct. H.R. ¶ 36-37 (2014).

159. *Nachova and Others v. Bulgaria*, App. Nos. 43577/98 & 43579/98, Eur. Ct. H.R. ¶ 80 (2005); *Stec & Others v. United Kingdom*, App. Nos. 65731/01 & 65900/01, Eur. Ct. H.R. ¶ 38 (2006).

160. *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01, EUR. CT. H.R. ¶ 36-38 (2007).

161. *Greens & M.T. v. United Kingdom*, App. Nos. 60041/08 & 60054/08, Eur. Ct. H.R. ¶ 52-54 (2010).

162. *Karner v. Austria*, App. No. 40016/98, Eur. Ct. H.R. ¶ 36 (2003).

163. The EU is formed of 28 Member States which are at the same time the Contracting Parties to the Convention. On 23 June, 2016, the UK voted to leave the European Union. This statement remains true until the UK is no longer a member of the EU.

164. Christos Rozakis, *The Accession of the EU to the ECHR and the Charter of Fundamental Rights: Enlarging the Field of Protection of Human Rights*, in *THE EU ACCESSION TO THE ECHR* 331 (Basiliki Kosta et al. eds., 2014).

165. Lock, *supra* note 155, at 824.

with the ECHR.<sup>166</sup> However, the EU is not under a direct obligation to ensure compatibility of its laws with the ECHR. Although the ECtHR has declared on a number of occasions that the EU complies with similar standards of human rights protection as the Council of Europe, the EU is not a Contracting Party to the Convention.<sup>167</sup> While this fact in itself does not signify that EU law falls short of human rights standards adopted by the ECtHR, it does suggest that the EU might deviate from the standards adopted under the ECHR. Moreover, a group of experts of the Council of Europe, in their report on the long-term future of the ECtHR, has indicated that there is a danger associated with diverging interpretations of human rights by the Court of Justice of the European Union and the ECtHR.<sup>168</sup> One possible reason for this is that the Luxemburg court is not strictly bound by the norms of the ECHR and the Charter is not a mirror copy of the ECHR. Until the EU accedes to the Convention, EU law should be deemed external to the Convention system.

Another, and even possibly stronger, reason for not treating EU law as an internal source of law is that it might marginalise the legal practices of non-EU members of the Council of Europe. Undoubtedly, consent is one of the key legitimizing factors in international law.<sup>169</sup> Convention law is binding because the Contracting Parties agreed to be bound by it; they also agreed to establish a system of collective enforcement of human rights, as specified in the Preamble to the Convention.<sup>170</sup> Nevertheless, the Contracting Parties have not agreed to

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166. Human Rights Act 1998, c. 42 § 19 (UK), <https://www.legislation.gov.uk/ukpga/1998/42/section/19> (“A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (‘a statement of compatibility’); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.”).

167. Adoption of the Treaty of Lisbon and Protocol 14 to the made it possible for the EU to accede to the ECHR. The process of accession is in a state of flux at the moment following the negative assessment of the accession treaty by the Court of Justice of the European Union in Opinion 2/13 of 18 December 2014. For a detailed analysis see Piet Eeckhout, *Opinion 2/13 on EU Accession to the and Judicial Dialogue: Autonomy or Autarky*, 38 *FORDHAM INT’L L. J.* 955, 956 (2015).

168. COUNCIL OF EUR., *supra* note 7, at 96.

169. See, e.g., Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT’L AFFAIRS* 405, 412-13, 439 (2006).

170. See European Convention on Human Rights preamble (“the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”).



be governed by rules originating from a different regional organisation—the EU.

If the EU accedes to the ECHR,<sup>171</sup> this will resolve the issue of divergent standards, though it will exacerbate other challenges like marginalisation of the non-EU members of the Council of Europe.<sup>172</sup> Regardless, before the EU accedes to the ECHR, it must be recognized that the assumption that EU law is an internal source is unsound, as it is only in part internal to a distinct group of the Contracting Parties to the Convention, and not all of them.<sup>173</sup> Thus, the Court should not deem EU law as an internal legal source.

### III. THE CHOICE OF SOURCES: A QUESTION OF LEGITIMACY

Commentators have suggested that referring to sources other than the Court's own case law is beneficial to the quality of the Court's reasoning and also facilitates a broader outreach of the judgments.<sup>174</sup> Some have argued that the ECtHR positions itself as a court whose ambition to set human rights standards spreads beyond the borders of the Council of Europe. In order to be influential outside Europe it is important for the Court to take into account global tendencies in human rights protection.<sup>175</sup> Part III will argue that, although these aspirations are undoubtedly important, the Court should focus on its main role as guardian of human rights in Europe, which would justify its treatment of external legal sources as persuasive considerations of secondary importance in comparison to internal sources.

At the outset, it is important to distinguish between two ways the Court can utilize legal sources—by concentrating on either the outcomes or reasons of the legislative processes. Illustrative of the difference between the two is the example of the French prohibition of full-face veils.<sup>176</sup> The first approach focuses on the number of states that have a similar ban in place without consideration of the reasons for this prohibition. In the majority of cases, the Court uses this approach,<sup>177</sup>

171. Lock, *supra* note 155, at 808.

172. Dzehtsiarou & Repyeuski, *supra* note 153, at 319.

173. It seems that only those provisions of EU law that are directly effective within the EU member states can be considered internal for that member states.

174. Sandra Fredman, *Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law*, 64 INT'L & COMP. L.Q. 631, 634 (2015); WALDRON, *supra* note 21, at 3.

175. EUROPEAN CONSENSUS, *supra* note 31, at 76-77.

176. S.A.S. v. France, App. No. 43835/11, Eur. Ct. H.R. ¶ 156-59 (2014).

177. See, e.g., Bayatyan v. Armenia, App. No. 23459/03, Eur. Ct. H.R. (2011); A, B & C v. Ireland, App. No. 25579/05, Eur. Ct. H.R. (2010); Leyla Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2005).

and this Article is mostly relevant to the deployment of the face value outcomes of the legislative or judicial processes.

The second approach pays less attention to the outcomes of the legislative decisions and is more concerned with the reasons for these decisions. Using the example of the French full-face veil ban, the Court would have to establish why full-face veils are prohibited in some countries and then accept or reject the application of these reasons in the case at hand. This approach is sometimes labelled as a deliberative approach, and the Court has been criticized for not living up to the standards of deliberative judging.<sup>178</sup> Although a deliberative approach tends to solve some challenges related to the divide between internal and external sources, it brings some fresh challenges to the table. If a deliberative approach is adopted, then it does not matter where the reasons originate—more important is how convincing these reasons are. Moreover, how many judgments are analyzed and which jurisdictions are considered matter less. However, this approach is rarely applied by the ECtHR, as the ECtHR more frequently utilizes the results of various legal regulations rather than looking into the reasoning behind them.<sup>179</sup> A deliberative approach also leaves a wide scope of discretion to the judges because they are invited to decide whether a particular reason is convincing or not. In this case the hierarchy of sources is less important because it is possible that more convincing argument is taken from subordinate sources. Since this Article suggests a hierarchy of sources, it mostly focuses on the outcomes of judicial and legislative practice, rather than the reasons behind them. Moreover, it is not always possible due to lack of information or available resources to establish the reasons behind introduction of a particular legal regulation.

It is more legitimate to deploy internal legal sources than alternative external legal sources for persuasive purposes. The Court's reputation and impact mostly depend on how effective and well-respected its

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178. Fredman, *supra* note 174, at 631; Sandra Fredman, *From Dialogue to Deliberation: Human Rights Adjudication and Prisoners Right to Vote*, PUB. L. 292, 310 (2013); see Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY 17-33 (Alan Hamlin & Philip Pettit eds., 1989).

179. Fredman argues that "Once it is recognized that the function of comparative law is deliberative rather than binding, the force of many of the criticisms falls away. Because comparative materials are not binding precedents, they need only be chosen for the force of their reasoning, rather than for their legal status in foreign countries. This undercuts the basis of the cherry-picking critique: judgments can be chosen from those countries where there is relevant and valuable material, and dissents could be preferred to majorities." Fredman, *supra* note 174, at 634.

judgments are among the member states of the Council of Europe.<sup>180</sup> While the Court's impact outside the frontiers of the Council of Europe is an important additional feature, the Court's primary role is to persuade the Contracting Parties to the Convention to conform their practice to ECtHR judgments.

It is almost impossible to prove conclusively that references to national laws of the Contracting Parties can enhance the persuasive effect of the Court's judgments. While some judges of the ECtHR seem to believe so,<sup>181</sup> it is an extremely laborious task to statistically substantiate this claim. Proof would involve statistical analysis of whether the Contracting Parties implement the Court's judgments in which national laws are referred to more eagerly than the judgments without such references. To be of any statistical significance, such a study would need to consider a high volume of judgments. Moreover, the execution of ECtHR judgments can depend on a number of non-legal factors which are hard to account for.<sup>182</sup> Very often, effective implementation of judgments depends on the political will of the Contracting Parties. This Article does not suggest that the Court's reliance on external sources is so fundamentally problematic that it would immediately undermine the legitimacy of the judgment. Instead, it is only argued that the Court must clearly establish that if there exists a contradiction between internal and external sources, the former should be given priority in the Court's reasoning. In many of its judgments, the Court has used internal legal sources as persuasive reasons which, in turn, created

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180. See DOTHAN, *supra* note 110; Shai Dothan, *How International Tribunals Enhance Their Legitimacy*, 14 THEORETICAL INQUIRES IN L. 455, 458-59 (2013).

181. Only a few of the thirty-three interviewed judges were sceptical of the persuasive effect of reliance on national law of the Contracting Parties and European consensus. Judge Vincent De Gaetano pointed out, "That should be the common sense approach. It is true that if out of 47 states, let's say 40 states have this particular provision in their law then it should seem reasonable that the other 7 states should try to introduce a provision not exactly identical but similar." Former Judge Kalaydjieva explained that "in hinting the existing practices or consensus in Europe as a whole you would probably facilitate the national authorities' steps to amend their legislation or practices accordingly." Former judge Mahoney was also of the opinion that there is a chance that reliance on national law of the Contracting Parties to the Convention can persuade the respondent state: "The reason why there is more information given in the judgment is precisely to make the judgments more convincing; that is why material goes into the judgment." Former Judge Popovic was more cautious in assessing the effects of consensus by stating that persuasion is "the idea behind the use of consensus. Whether it has a proper effect is not for me to assess."

182. See Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights* 66 INT'L & COMP. L. Q. 467, 467 (2017).

expectations that such sources would be referenced in future cases. The Court has built a framework in which an evolutive interpretation of the Convention should normally be supported by the traceable changes in the domestic laws of Contracting Parties. The Court's reliance on external sources, rather than searching for a tendency confirmed by the internal legal sources, can be perceived as illegitimate.<sup>183</sup> For example, in *Christine Goodwin v. the United Kingdom*,<sup>184</sup> the Court could not rely on European consensus in interpreting of the Convention because, in a similar previous case, *Sheffield and Horsham v. the United Kingdom*, the Court ruled that, although there was an emerging legislative trend in Europe in favour of legal recognition of new sexual identity, it could not establish European consensus.<sup>185</sup> Instead, the Court had to look outside Europe to justify a progressive reading of the Convention, and referred to a continuing international trend in favour of legal recognition of the new sexual identity of post-operative transsexuals.<sup>186</sup> The Court had never used this approach before, and it arguably undermines the coherence and predictability of its reasoning and, consequently, its legitimacy.<sup>187</sup> Internal legal sources are the decisions made by the Contracting Parties themselves—they consented to the Convention and the Court, and they adopted certain standards throughout their national legislative processes, arguably with the ECHR in mind. The states are members of the club, sharing certain values. The common interest of the member states should be taken into account by the Court. If a Contracting Party deviates, it is asked to conform its laws to the rules accepted by the other members of the club.<sup>188</sup> Therefore, internal legal sources are more legitimate tools of the Court's reasoning than the external ones.

It is difficult to conclusively establish what improves the legitimacy of an international human rights tribunal; it is easier to identify the reasons why its legitimacy can be undermined.<sup>189</sup> It seems that the

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183. During the backbenchers' debate on prisoner voting case the fact that the UK was not the last country in Europe with prisoner voting ban was discussed. Mr Paisley MP asked "[i]s it not the case that in the European Community, six other member states have an outright ban on prisoners voting, and 13 impose varying limits on the right to vote?" 523 Parl Deb HC (6th ser.) (2011) col. 508 (UK), <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm>.

184. *Goodwin v. United Kingdom*, App. No. 28957/95, Eur. Ct. H.R. (2002).

185. *Sheffield & Horsham v. United Kingdom*, Eur. Ct. H.R. ¶ 16 (1996).

186. *Id.* at ¶ 50.

187. EUROPEAN CONSENSUS, *supra* note 31, at 65-71.

188. *See Tekeli v. Turkey*, *supra* note 12, ¶ 61.

189. EUROPEAN CONSENSUS, *supra* note 31, at 143.

challenges to the Court's legitimacy are twofold. First, there are those challenges linked to the fact that the Court is an international tribunal and the ECtHR is therefore perceived as foreign by national authorities and the public.<sup>190</sup> These challenges may be referred to as international constitutional challenges. These challenges are constitutional because they are common to broadly-defined human rights tribunals dealing with individual complaints. Second, because the ECtHR is sometimes called to review the decisions made by democratically legitimate bodies, it also faces a democratic legitimacy deficit, which is often labelled as a counter-majoritarian difficulty.<sup>191</sup> These challenges may be referred to as national constitutional challenges.

To counter international constitutional challenges, the Court must ensure that its interpretation does not fall outside the consent of the Contracting Parties, it relies on clear and predictable sources, and its subsidiary role is fully observed.<sup>192</sup>

International law has its own toolkit on treaty interpretation. This toolkit is described in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT). Article 31(3) is important here because it explains what sources should be taken into account for the interpretation of treaties.<sup>193</sup> When interpreting a treaty, Article 31(3)(b) invites judges to take into account the subsequent practice of the

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190. During the backbenchers debates on prisoner voting Mr Philip Hollobone, MP pointed out, "How has it come about that we, in a sovereign Parliament, have let these decisions be taken by a kangaroo court in Strasbourg, the judgments of which do not enjoy the respect of our constituents?" 523 Parl Deb HC (6th ser.) (2011) col. 537 (UK), <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0002.htm>. See also Licari, *supra* note 15.

191. See Adrienne Stone, *Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review* 28 OXF. J. LEG. STUD. 1, 1-2 (2008). See also, Jeremy Waldron, *Deliberation, Disagreement and Voting*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHT (H.H. Koh & R.C. Slye eds., 1999); Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law* 65 U. CHI. L. REV. 689 (1995); Robert Bork, *Neutral Principles and Some First Amendment Problems* 74 IND. L.J. 10 (1971).

192. After Protocol 15 enters into force references to subsidiarity and margin of appreciation will be added to the Preamble to the Convention.

193. According to Article 31(3):

There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

signatories.<sup>194</sup> In other words, Article 31(3)(c) allows the Court to use internal legal sources in interpreting the Convention.<sup>195</sup> This is useful because it gives some traction to the argument that what this study characterizes as “internal sources” can and should be used. This, however, does not prove that internal sources should have priority over external sources. Proving the latter is the ambition of Part III.

This argument requires reference to Article 31(3)(c) of the VCLT, according to which the interpreter can take into consideration any relevant rules of international law that are applicable in the relation between the parties.<sup>196</sup> These are rules that are extraneous to the ECHR. Indeed, at first glance, 31(3)(c) mainly concerns rules of international law, which, using the terminology of this Article, are external sources to the ECHR.

Article 31(3)(c) appears to not only include external sources, but also internal sources.<sup>197</sup> The International Law Commission has, rather unsurprisingly, recommended applying general international law (predominantly external source from the perspective of this Article) through the so-called principle of systemic integration.<sup>198</sup> According to the International Law Commission, the rationale for such prioritization is to avoid the fragmentation of international law.<sup>199</sup> The International Law Commission has criticized the interpretation that fails to open the treaty under interpretation to the broader system of international law (encompassing—taking especially into account the broad way in which the ECtHR has used Article 31(3)(c)—both internal and external sources).<sup>200</sup> However, it is clear that the critique by the International Law Commission is not unbiased, as its main preoccupation and the reason

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194. *Id.*

195. *See, e.g.*, Georg Nolte, Int’l Law Comm’n, Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, U.N. Doc. A/CN.4/671 at ¶ 40 (2014).

196. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331(3)(c).

197. Vassilis Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology - Between Evolution and Systemic Integration*, 31 MICH. J. INT’L L. 621, 651, 688 (2010).

198. Martti Koskeniemi, Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, ¶ 415 (2006).

199. *Id.* at ¶ 423. *See also*, Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of The Vienna Convention*, 54(2) Int’l & Comp. L.Q. 279 (2005); PANOS MERKOURIS, ARTICLE 31(3)(c) VCLT AND THE PRINCIPLE OF SYSTEMIC INTEGRATION (2005).

200. PANOS MERKOURIS, ARTICLE 31(3)(c) VCLT AND THE PRINCIPLE OF SYSTEMIC INTEGRATION (2005).

why it is suggesting using Article 31(3)(c) is to avoid the fragmentation of international law.

This is counter to the argument developed in this Article. Although the prevention of fragmentation must be taken into account by international tribunals, it should not be done to the detriment of the protection of human rights<sup>201</sup> or the legitimacy of the tribunal in question. The Court must prevent fragmentation of international law as much as possible, though its primary goal is to be at the frontline of human rights protection. Moreover, legally speaking, the VCLT does not clearly establish any hierarchy on supplementary sources of interpretation. As Tzevelekos rightly points out,

[V]aluable as it may be, Article 31(3)(c) is of very limited usefulness in the case of conflict of norms . . . . Its function is limited to bringing the conflicting rules in ‘contact’, ie allowing the ECtHR to open the windows of the *Palais des droits de l’homme* and let extraneous to the ECHR rules get into its normative environment. Yet, after employing Article 31(3)(c), . . . conflicting rules remain . . . conflicting. This means that the Court must employ other tools and techniques to solve conflicts.<sup>202</sup>

This Article suggests that internal sources should have a priority over external and the following normative reasons can justify this prioritisation.

Reliance on internal sources can demonstrate to the Contracting Parties that the ECtHR is not a foreign or arbitrary decision-maker. The Court’s reliance on national legal provisions is designed to prove that it takes the solutions adopted by the Contracting Parties into account. Conversely, external sources emphasize, rather than minimize, the international nature of the ECtHR. This is irrelevant when external sources underpin the position supported by the internal ones. A more challenging scenario is when the Court is facing the conflict of laws,

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201. Rachovitsa argues, for example that systemic integration might “hinder the progressive development of other interests and concerns [other than prevention fragmentation] in international law and cause our imaginative space to become stagnant preventing us from looking beyond the present human rights regime(s).” Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law* 66 INT’L & COMP. L.Q. 557, 573 (2017). See also, Tzevelekos, *supra* note 197, at 663, 686.

202. Vassilis Tzevelekos, *The Al-Dulimi Case before the Grand Chamber of the European Court of Human Rights: Business as Usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration*, Questions of Int’l Law Zoom-In 5 (2017).

namely when internal law points to one direction and external sources provide for a different solution. The previously-mentioned case of *Hirst No 2* serves as an example of such a situation. In *Hirst No 2*, the Court prioritized the case law from the Canadian and South African highest courts and ruled that the blanket ban on prisoner voting is incompatible with the Convention.<sup>203</sup> The Court established that there was a lack of European consensus,<sup>204</sup> which usually means that a broad margin of appreciation is reserved to the respondent Party. That, in turn, means that no violation is found in such cases.<sup>205</sup> Regardless, the Court found a violation of the Convention and restricted the margin of appreciation.<sup>206</sup> Although it is hard to attach certain weight to different persuasive arguments with mathematical precision—here, internal sources pointed in one direction and external in the opposite—the Court chose an outcome that was supported by the latter sources. With a certain degree of simplification, one may suggest that *Hirst No 2* is an example of prioritizing external sources. The line of case law that emanated from *Hirst No 2* is one of the most controversial and threatening to the Court’s legitimacy.<sup>207</sup> In *Christine Goodwin v. the United Kingdom*, the Court also disregarded the lack of European consensus.<sup>208</sup> The Court relied on the “continuing international trend,” drawing its conclusion from the developments in the laws and practices of some

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203. *Hirst v. United Kingdom*, *supra* note 87, ¶ 80.

204. *Id.* ¶ 81.

205. The Court stated,

Where [...] there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities’ direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation.’ There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights.

*Dickson v. the United Kingdom*, App. No. 44362/04, Eur. Ct. H.R. at 24 (2007).

206. *Hirst v. United Kingdom*, *supra* note 87.

207. It includes a major number of cases and forceful resistance of the Contracting Parties. Among still unenforced judgments dealing with this matter are: *Hirst v. United Kingdom*, *supra* note 87; *Greens & M.T. v. United Kingdom*, n 161 above; *Anchugov & Gladkov v. Russia*, App. Nos.11157/04 & 15162/05, Eur. Ct. H.R. (2013); *Söyler v. Turkey*, App. No. 29411/07, Eur. Ct. H.R. (2013); for a general overview, see *Dzehtsiarou, Prisoner Voting Saga: Reasons for Challenges*, *supra* note 151.

208. *Goodwin v. United Kingdom*, App. No. 28 957/95, Eur. Ct. H.R. (2002).



predominantly common law states worldwide.<sup>209</sup> Although there are not many cases in which the Court prioritises external sources, the few cases in existence may be sufficient to cause a legitimacy crisis, as illustrated by the prisoner voting saga.<sup>210</sup> Reliance on external sources is highly problematic and might lead to strengthening the perception of the ECtHR as a foreign court.

If there is a standard accepted by the majority of the Contracting Parties, it should be prioritized by the ECtHR as having a strong persuasive effect on the Court—a proposition supported by a number of reasons. First, the dialogue between the ECtHR and the Contracting Parties is crucial for the effectiveness of the Strasbourg system of human rights protection.<sup>211</sup> This dialogue arguably minimizes the tension between the Court and the Contracting Parties, where the former finds the Contracting Parties violating the Convention. The Court must effectively rely on the good will of the Contracting Parties found in violation of the Convention to execute its judgment. Legitimacy concerns of the Contracting Parties are often formulated as a request to the Court to take the national decisions and priorities seriously.<sup>212</sup> Therefore, a logical response to such legitimacy challenges may include prioritizing the laws and practices of the Contracting Parties to the Convention, as well as other internal sources. A result of an analysis of internal sources may be the reaching of European consensus. European consensus facilitates a dialogue between the Contracting Parties to the Convention and the Court and reinforces the subsidiarity of the ECtHR.<sup>213</sup> European consensus signifies that the standard confirmed by the Court is a standard shared by the vast majority of the Contracting Parties. The Court listens to what the Contracting Parties have to say and applies this common voice in its case law. By the same token, this means that the Court acknowledges its subsidiary role and defers to the collective shared decisions made by the Contracting Parties. None of this is applicable to external legal sources; the court is not expected to establish a dialogical mode with other international tribunals or with the states worldwide.

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209. Jeffrey Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113 (2004); EUROPEAN CONSENSUS, *supra* note 31, at 65-71.

210. See Dzehtsiarou, *Prisoner Voting and Power Struggle*, *supra* note 151.

211. GLAS, *supra* note 15, at 127-147; M. Amos, *The Dialogue between United Kingdom and the European Court of Human Rights*, 61 INT'L & COMP. L. Q. 557 (2016).

212. This was requested from the Court by the Brighton and Brussels declarations.

213. EUROPEAN CONSENSUS, *supra* note 31, at 165-167.

The second reason for prioritizing internal legal sources is closely linked to the first one. The ECtHR is a subsidiary mechanism to internal systems of human rights protection that exist among the Contracting Parties. When Protocol 15 enters into force, subsidiarity and the margin of appreciation will appear in the Preamble to the Convention. Subsidiarity means that the opinion of the Contracting Parties must be taken into account in the decision-making of the Court. The role of the Contracting Parties as the main guarantors of human rights will be even more emphasized. The rhetoric of internal legal sources is a symbol that reflects the Court's respect for the hard political choices that have been made on the national level. The departure from the solutions supported by internal legal sources is profoundly problematic. Internal sources offer a middle ground between doing too much and not doing enough—between unjustifiable judicial activism and excessive judicial self-restraint. They allow the Court to be creative and innovative, and, at the same time, take its subsidiary role seriously.<sup>214</sup>

Third, there is a presumption that internal legal sources are in compliance with the Convention. Laws and practices of every Contracting Party take the Convention into account.<sup>215</sup> Therefore, the development of the legal systems of the forty-seven Contracting Parties is conditioned, at least to some extent, by the rights enshrined in the Convention. The laws and practice of the Contracting Parties implement and develop the provisions of the Convention, while the states outside Europe are under no obligation to give any effect to the Convention rights.<sup>216</sup>

Fourth, the Preamble to the Convention states its aim as the achievement of a greater unity among the European states through better

214. Spano, *supra* note 14.

215. In all Contracting Parties, the ECHR has some legal effect, and all laws should be adopted in compliance with the Convention. For example, in the United Kingdom, the Human Rights Act 1998 implemented the ECHR into the national legal order. Human Rights Act 1998, c. 42 § 19 (UK), <https://www.legislation.gov.uk/ukpga/1998/42/section/19> (“(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill— (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill. (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.”).

216. This is true even if the states outside the Council of Europe have Bills of Rights similar to the ECHR. Fredman argues that “[j]udgments based on a legal text with important differences in wording may not be as persuasive as those based on more similar constitutional texts.” Fredman, *supra* note 174, at 635, 642.

protection of human rights.<sup>217</sup> Common understanding of human rights can be developed only if the ECtHR listens to what the Contracting Parties have to say by considering their laws and practices in its decision-making. It seems that internal legal norms form the European public order of which the ECHR is a constitutional instrument.<sup>218</sup> Conversely, external legal sources can contribute to the development of European public order, but not change it.

Fifth, the Contracting Parties are the main addressees of the judgments and are instrumental for the legitimacy and effectiveness of the ECtHR. The Court should provide the Contracting Parties with an avenue of collective direct impact on the decisions of the ECtHR by integrating the national laws of the Contracting Parties into the prioritized legal sources of interpretation of the Convention. This argument does not mean that the Contracting Parties are granted powers to use their domestic laws to justify the breach of the ECHR. Such an approach would clearly contradict to Article 27 of the VCLT.<sup>219</sup> The domestic laws of individual Contracting Parties are not binding on the Court, but rather used as a collective standard to interpret the Convention and affect the outcome of the case through the proxy of the Convention. Collective protection of human rights in Europe should be clearly reflected in interpretation of the Convention.

Sixth, the Court began to rely on the laws of the Contracting Parties beginning with the very early cases.<sup>220</sup> It may be argued that it is a well-established method of interpretation of the Convention. There is an unwritten understanding between the ECtHR and the Contracting Parties that their legal opinions are taken into account and the Court must adhere to its part of the understanding.

Finally, internal sources reintegrate the notion of consent in the Court's decision-making process. While the text of the Convention and, to some extent, the case law, can be considered by the Contracting

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217. According to the Preamble to the Convention the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms.

218. *Banković and Others v. Belgium and Others*, App. No. 52207/99, Eur. Ct. H.R. ¶ 23 (2001).

219. Pursuant to Article 27 of the Vienna Convention on the Law of Treaties a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

220. Traces of consensual analysis one can find in such early cases of the European Commission and the ECtHR as *Greece v. United Kingdom*, App. No. 176/56, Eur. Conv. H.R. ¶ 179 (1960); *Golder v. United Kingdom*, App. No. 4451/70 Eur. Ct. H.R. ¶ 15 (1975); *Handyside v. United Kingdom*, App. No. 4451/70, Eur. Ct. H.R. ¶ 24 (1976).

Parties at the moment of ratification, it is arguable whether the Court's reliance on the laws of the Contracting Parties shows that the Court is seeking an updated tacit consent to its rulings.

International law may offer a response to international constitutional challenges if it is duly implemented by the Contracting Parties to the Convention. However, even if treaty-based international law is ratified by all of the Contracting Parties, it is safe to suggest that the Court can still prioritise the internal sources. First, the provisions of international conventions might be abstract and require implementation mechanisms. If so, it is more legitimate for the Court to rely on more precise and concrete domestic legal regulations. Second, if an international legal provision is legally binding, then it should have been adopted by the Contracting Parties—and there cannot be contradictions between internal and external legal sources.

References to external sources are unlikely to offer a response to the international constitutional challenges of the ECtHR. International law cannot bring the Court closer to the Contracting Parties, which is exactly what is required to rebut the accusations of the Court being remote and foreign. International law cannot “shorten the distance” between Strasbourg and the member states of the Council of Europe. Reliance on abstract norms of international law and on the laws and practices outside the Council of Europe might bolster an argument made by those who consider the Court as indifferent to the interests of the Contracting Parties.

Finally, national constitutional challenges to the ECtHR emphasise the counter-majoritarian and perceived anti-democratic character of judicial review. It questions the legitimacy of a group of judges to review the decisions adopted by democratically legitimate parliaments. These challenges are more prominent in relation to national constitutional courts that can strike down the acts of parliaments.<sup>221</sup> Although the ECtHR cannot directly declare national laws void, it, nevertheless, can pronounce that an act of Parliament has violated the Convention.<sup>222</sup> Therefore, some lighter form of national constitutional challenges is also applicable here. The ratification of the ECHR itself provides some democratic legitimacy to the ECtHR. However, after years of operation,

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221. For example, if the U.S. Supreme Court declares an act unconstitutional it immediately loses its legal force. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803), Judiciary Act of 1789, ch. 20, 1 Stat. 73.

222. There are plenty of examples. The Court can even declare a provision of a national constitution incompatible with the Convention. *See Sejdić & Finci v. Bosnia & Herzegovina*, App. Nos. 27996/06 & 34836/06, Eur. Ct. H.R. ¶ 28-34 (2009); *Anchugov and Gladkov v. Russia*, App. Nos. 11157/04 & 15162/05, Eur. Ct. H.R. (2013).

the text of the Convention and rulings of the Court might become somewhat disconnected. By relying on internal legal sources, the Court injects some elements of majoritarian decision-making and increases the democratic legitimacy of its judgments. The Court considers what understanding of the Convention rights are adopted by the majority of the Contracting Parties. All of the Contracting Parties to the Convention are at least nominally democracies and, therefore, the inclusion of democratically adopted decisions into the Court's decision-making process would offer some response to the counter-majoritarian difficulty. International law is unlikely to provide a sound response to the national constitutional challenges, as it is sometimes accused of being non-democratic itself. International law can, therefore, suffer from counter-majoritarian difficulty and democratic deficit; it is a result of compromises between different regimes worldwide and very rarely approved through democratic mechanisms.

To sum up, reliance on external sources for persuasive purposes cannot offer a clear answer to the legitimacy challenges the ECtHR is facing; at the same time prioritizing internal legal sources allows the Court to share responsibility of human rights protection with the Contracting Parties to the Convention.

#### IV. CONCLUSION

The Court deploys various legal and non-legal considerations in issuing judgments in hard and controversial cases. This Article centers on legal considerations, which are divided into two broad groups: internal and external considerations. Internal legal considerations originate from within the Convention system and comprise of the Convention's text, ECtHR case law, laws of the Contracting Parties, and the legal documents produced by the Council of Europe. External legal considerations are developed outside the Council of Europe and include treaty-based and customary international law, as well as the laws and practices of states worldwide. The Court uses these sources for various purposes, ranging from mere informational functions to persuasive arguments that have the potential of influencing the final judgment.

This Article makes the normative claim that reliance on external sources for persuasive purposes is problematic when these sources contradict, or substantively deviate, from the internal ones. Reliance on internal sources supports the Court's argument against legitimacy challenges; external sources cannot offer the same support. While factors such as dialogue, subsidiarity, and the consent of Contracting Parties define the framework in which the legitimacy of the ECtHR has been discussed in recent years, the reliance on external legal sources

goes against this narrative and, instead, emphasizes the Court's character as foreign and indifferent to the solutions accepted by the Contracting Parties. Overreliance on these sources might give a symbolic argument to the opponents of the ECtHR and undermine its claim to legitimacy.