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Exporting the European Convention on Human Rights

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Exporting the European Convention on Human Rights

PhD Thesis

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Απαγορεύεται η αντιγραφή, αποθήκευση και διανομή της παρούσας εργασίας, εξ ολοκλήρου ή τμήματος αυτής, για εμπορικό σκοπό. Επιτρέπεται η ανατύπωση, αποθήκευση και διανομή για σκοπό μη κερδοσκοπικό, εκπαιδευτικής ή ερευνητικής φύσης, υπό την προϋπόθεση να αναφέρεται η πηγή προέλευσης και να διατηρείται το παρόν μήνυμα.

Οι απόψεις και θέσεις που περιέχονται σε αυτήν την εργασία εκφράζουν τον συγγραφέα και δεν πρέπει να ερμηνευθεί ότι αντιπροσωπεύουν τις επίσημες θέσεις του Εθνικού και Καποδιστριακού Πανεπιστημίου Αθηνών.

Summary

Under the global spread of human rights instruments, the European Convention on Human Rights (ECHR) remains the ultimate beacon for the protection of human rights worldwide. As a horizontal study of regional and global systems, the present thesis seeks to document the unequivocal influence of the ECHR and the jurisprudence of the European Court of Human Rights(ECtHR) within the confines of other legal orders.

Part I examines the exportation of ECHR to the EU legal order and thus, addresses the interrelationship of the ECtHR with the Court of Justice of the European Union (CJEU). Post-Lisbon, the academic and institutional conversation concerning the ambitious accession of the EU to the ECHR has marked the recent jurisprudence of both mechanisms. This examination is twofold: Chapter A of this thesis sheds light on the direct application of the ECHR by the CJEU. Chapter B continues with exploring the CJEU's judgments in which human rights are prioritized over EU rules and the occasions on which this Court has treated the ECHR as a restriction mechanism of EU law.

In Part II, the research aims to ascertain the form that the normative and jurisprudential influence of the ECHR to regional and global human rights systems has taken. Chapter A adresses the direct application of Strasbourg human rights norms by the IACtHR and the convergence or the divergence that occurs. The first section addresses the direct import of ECtHR's standards by the said Court that go across horizontally the entire compendium of the IACtHR's cases. The second section traces the legal fields in which the latter has broken new ground and has achieved to expand the protection correspondingly offered by its European peer. Subsequently, Chapter B is devoted to the tacit interplay between the ECtHR and the Human Rights Committee.

This thesis discusses whether, how and with what legal consequences the ECHR norms, as interpreted by the Strasbourg Court, affect other regional or global legal orders as well as the methodology of the judicial dialogue between their enforcement mechanisms. Overall, it draws useful conclusions from the special features of such a dialogue so as to explore what does this indicate about the overall functioning of the international human rights law discourse.

Περίληψη

Στο πλαίσιο του γενικότερου *πλουραλισμού* των δικαιοδοτικών μηχανισμών στο πλαίσιο του διεθνούς δικαίου των δικαιωμάτων του ανθρώπου, η Ευρωπαϊκή Σύμβαση των Δικαιωμάτων του Ανθρώπου (ΕΣΔΑ) αποτελεί διαχρονικά τον φάρο της προστασίας των ανθρωπίνων δικαιωμάτων παγκοσμίως. Ως μια οριζόντια μελέτη των σχετικών περιφερειακών και παγκόσμιων συστημάτων, η παρούσα διατριβή επιδιώκει να μελετήσει την *εξαγωγή* της ΕΣΔΑ και της νομολογίας του δικαστηρίου του Ευρωπαϊκού Δικαστηρίου των Δικαιωμάτων του Ανθρώπου(ΕΔΔΑ) σε άλλες έννομες τάξεις.

Το Μέρος Ι εξετάζει την επιρροή της ΕΣΔΑ στην έννομη τάξη της ΕΕ και, ως εκ τούτου, εξετάζει την επίδραση τόσο του κειμένου της ΕΣΔΑ όσο και της νομολογίας του ΕΔΔΑ σε αυτή του Δικαστηρίου της Ευρωπαϊκής Ένωσης(ΔΕΕ). Μετά την υιοθέτηση της Συνθήκης της Λισαβόνας, η ακαδημαϊκή και θεσμική συζήτηση σχετικά με τη φιλόδοξη προοπτική της ένταξης της ΕΕ στην ΕΣΔΑ διαμόρφωσε την πρόσφατη νομολογία και των δύο μηχανισμών. Η μελέτη της σχέσης των δύο συστημάτων κινείται σε δύο άξονες: αρχικά, το Κεφάλαιο Α αναδεικνύει την άμεση εφαρμογή του ΕΣΔΑ από το ΔΕΕ. Ακολούθως, το Κεφάλαιο Β διερευνά τις αποφάσεις του ΔΕΕ, στις οποίες δίνεται προτεραιότητα στα ανθρώπινα δικαιώματα σε σχέση με τους κανόνες της ΕΕ και τις περιπτώσεις κατά τις οποίες το ΔΕΕ αντιμετώπισε την ΕΣΔΑ ως *μηχανισμό περιορισμού* της νομοθεσίας της ΕΕ.

Στο Μέρος ΙΙ, η έρευνα στοχεύει να διακριβώσει την μορφή που έχει λάβει η κανονιστική και νομολογιακή επιρροή της ΕΣΔΑ στην διεθνή εννομη τάξη μελετώντας περιφερειακά και παγκόσμια συστήματα ανθρώπινων δικαιωμάτων. Το Κεφάλαιο Α εστιάζει στην άμεση εφαρμογή των κανόνων της ΕΣΔΑ ή της νομολογίας του ΕΔΔΑ από το Διαμερικανικό Δικαστήριο των Δικαιωμάτων του Ανθρώπου(ΔΑΔΔΑ) και στις τυχόν συγκλίσεις ή αποκλίσεις που παρατηρούνται. Ειδικότερα, ερευνάται, σε πρώτη φάση, η άμεση υιοθέτηση προτύπων και νομολογιακών τάσεων του ΕΔΔΑ από το ΔΑΔΔΑ. Έπειτα, η έρευνα εντοπίζει τα νομικά πεδία στα οποία το τελευταίο έχει επιτύχει να επεκτείνει την προστασία που προσφέρει αντίστοιχα το ΕΔΔΑ. Ακολούθως, το Κεφάλαιο Β είναι αφιερωμένο στην λανθάνουσα αλληλεπίδραση μεταξύ του ΕΔΔΑ και της Επιτροπής του Διεθνούς Συμφώνου για τα Ατομικά και Πολιτικά Δικαιώματα.

Συμπερασματικά, η παρούσα διατριβή πραγματεύεται το εάν, πως και με ποιές νομικές συνέπειες οι επιταγές της ΕΣΔΑ επηρεάζουν άλλες, περιφερειακές και παγκόσμιες έννομες τάξεις καθώς και την εν γένει μεθοδολογία του δικαστικού διαλόγου μεταξύ των δικαιοδοτικών μηχανισμών αυτών. Η μελέτη αυτή αντλεί χρήσιμα συμπεράσματα από τον τρόπο με τον οποίον πραγματοποιείται τελικά ο δικαστικός διάλογος μεταξυ των μηχανισμών προστασίας προκειμένου να καταλήξει στο τι σηματοδοτεί αυτός για την εν γένει εφαρμογή του διεθνούς δικαίου ανθρωπίνων δικαιωμάτων.

Στο Ασπασάκι

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This PhD thesis was written with love and pure interest for research. Looking back on 5 years of exhaustive work, the content of which was finalized in September 2019, I realize how absolutely passionate I was about this topic along the way. Thinking of this way, it is full of bitter-sweet souvenirs of an unforgettable time which is now gone and is never coming back in my life: the unstoppable bibliographic research, the conferences, the long working hours at the library, the stimulating discussions with friends, colleagues, librarians and most importantly, all those moments of "despair" when you feel completely lost and all those moments of enthusiasm when you see that light at the end of the tunnel!

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List of Abbreviations

ACHR	American Convention of Human Rights
AComHPR	African Commission of Human and Peoples' rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACtHPR	African Court of Human and Peoples' rights
AFDI	Annuaire Français de Droit International
Afr. Hum. Rts. L.J.	African Human Rights Law Journal
Afr. J. Int'l & Comp. L.	African Journal of International and Comparative Law
Afr. Y.B. Int'l L.	African Yearbook of International Law
AFSJ	Area of Freedom, security and Justice
AG	Advocate General
AJIL	American Journal of International Law.
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law and Policy
Am.U.L.Rev.	American University Law Review
Amsterdam L.F.	Amsterdam Law Forum
Ariz. J. Int'l & Comp. L.	Arizona Journal of International and Comparative Law
Art.	Article
ASIL Insights	American Society of International Law Insights
Aust. YBIL	Australian Yearbook of International Law
Birkbeck L. Rev.	Birkbeck Law Review
Braz. J. Int'l L.	Brazilian Journal of International Law
C.M.L.Rev.	Common Market Law Review
Cambridge L.J.	Cambridge Law Journal
Cambridge Student L. Rev.	Cambridge Student Law Review
Canadian Lab. & Emp. L.J.	Canadian Labour & Employment Law Journal
Cardozo L. Rev.	Cardozo Law Review
CAT	Committee Against Torture
CEAS	Common European Asylum System
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CETS	Council of Europe Treaty Series
CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
Child & Fam. L. Q.	Child and Family Law Quarterly
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Colum. Hum. Rts. L. Rev.	Columbia Human Rights Law Review
CRC	Committee on the Rights of the Child
CUP	Cambridge University Press
CYELP	Croatian Yearbook of European Law and Policy
CYELS	Cambridge Yearbook of European Legal Studies
Cyprus Hum. Rts. L. Rev.	Cyprus Human Rights Law Review

Dick. J. Int'l L.	Dickinson Journal of International law
Direito Gv L.Rev.	Direito Getulio Vargas Law Review
Duke J. Comp. & Int'l L	Duke Journal of Comparative & International Law
E.L.Rev.	European Law Review
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECommHR	European Commission of Human Rights
ECR	European Court Reports
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EEC Treaty	Treaty establishing the European Economic Community
EHRLR	European Human Rights Law Review
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
Envtl. L. Rev.	Environmental Law Review
ESIL	European Society of International Law
ETS	European Treaty Series
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
EuConst	European Constitutional Law Review
Eur. Comm'n H.R. Dec. & Rep	European Commission of Human Rights Decisions and Repository
Eur. Data Prot. L. Rev.	European Data Protection Law Review
Eur. J. Legal Stud	European Journal of Legal Studies
FD	Framework Decision
Fordham Int'l L.J	Fordham International Law Journal
FRY	Federal Republic of Yugoslavia
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GDPR	General Data Protection Regulation
Geo. Wash. Int'l L.	George Washington International Law Review
German L.J.	German Law Journal
German Y.B. Int'l L.	German Yearbook of International Law
Goettingen J. Int'l L	Goettingen Journal of International Law
Harv. Hum. Rts. J.	Harvard Human Rights Journal
Harv. Int'l L.J.	Harvard International Law Journal
Hastings Int'l and Comp L Rev	Hastings International and Comparative Law Review
Heidelberg J. Int'L.	Heidelberg Journal of International Law
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
Hum. Rts. & Int'l Legal Discourse	Human Rights and International Legal Discourse
Hum. Rts. L. Rev.	Human Rights Law Review
HumRtsQ	Human Rights Quarterly
IACommHR	Inter-American Commission of Human Rights

IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
IALS Student Law Review	Institute of Advanced Legal Studies Student Law Review
ICCPR	International Covenant of Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ICTY	International Criminal Tribunal for the former Yugoslavia
IJHR	International Journal of Human Rights
IJMinority & Group rights	International Journal of Minority & Group rights
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILO	International Labour Organisation
ILSA J. Int'l & Comp. L.	International Law Students Association Journal of International and Comparative Law
ILSA Quart.	International Law Students Association Quarterly
Ind. J. Global Legal Stud	Indiana Journal of Global Legal Studies
Indon. J. Int'l & Comp. L	Indonesian Journal of International & Comparative Law
Int. Law: Rev. Colomb. Derecho Int. Bogotá	International Law: Revista Colombiana de Derecho
Inter-Am. & Eur. Hum. Rts. J.	Inter-American and European Human Rights Journal
Intercultural Hum. L. Rev	Intercultural Human Rights Law Review
Int'l Bus. L.J.	International Business Law Journal
Int'l Hum. Rts. L. Rev	International Human Rights Law Review
Int'l J. on Minority & Group Rts	International Journal on Minority and Group Rights
Int'l L.F. D. Int'l	International Law FORUM Du Droit International
Int'l Org. L. Rev.	International Organizations Law Review
Irish J. European L	Irish Journal of European Law
Italian Y.B. Int'l L.	Italian Yearbook of International Law
J Antitrust Enforcement	Journal of Antitrust Enforcement
J. Int'l L & Int'l Rel.	Journal of International Law and International Relations
JHA	Justice and Home Affairs
JICJ	Journal of International Criminal Justice
Jimma U. J.L.	Jimma University Journal of Law
JYIL	Japanese Yearbook of International Law
Law & Bus. Rev. Am.	Law and Business Review of the Americas
Legal Issues of Econ. Integration	Legal Issues of Economic Integration
LJIL	Leiden Journal of International Law
LGBT community	Lesbian, gay, bisexual, and transgender community
Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
LSEU	Lund Student EU Law Review
Mich. J. Int'l L	Michigan Journal of International Law
Mich. St.U.-DCL J. Int'l L.	Michigan State University-DCL Journal of International Law
Miskolc J. Int'l L.	Miskolc Journal of International Law

MoA	Margin of Appreciation
MS	Member State
NATO	North Atlantic Treaty Organization
Neth. Q. Hum. Rts.	Netherlands Quarterly of Human Rights
New J. Eur. Crim. Law	New Journal of European Criminal Law
Nnamdi Azikiwe U. J. Int'l L. & Juris.	Nnamdi Azikiwe University Journal of International Law & Jurisprudence
NGO	Non-Governmental Organization
Nord. J. Hum. Rights	Nordic Journal of Human Rights
Nordic J. Int'l L	Nordic Journal of International Law
NQHR	Netherlands Quarterly of Human Rights
Nw. U. J. Int'l Hum. Rts.	Northwestern Journal of Human Rights
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
O.A.S.T.S	Organization of American States Treaty Series
OAS	Organization of American States
OJ	Official Journal
OJLR	Oxford Journal of Law and Religion
OJLS	Oxford Journal of Legal Studies
Or. Rev. Int'l L.	Oregon Review of International Law
OUP	Oxford University Press
PNR	Passenger name record
Polish Y.B. Int'l L.	Polish Yearbook of International Law
PWD	Posted Workers Directive
Revista IIDH	Revista Instituto Interamericano de Derechos Humanos
RGDIP	Revue Générale de Droit International Public
RTDH	Revue Trimestrielle des droits de l'homme
RUDH	Revue Universelle des droits de l'homme
Santa Clara L. Rev	Santa Clara Law Review
SUR - Int'l J. on Hum Rts.	Sur - International Journal on Human Rights
Swiss. Rev. Int'l & Eur. L.	Swiss Review of International and European Law
TCNs	Third Country Nationals
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
U. Miami Inter-Am. L. Rev.	University of Miami Inter-American Law Review
U. Pa. J. Int'l L.	University of Pennsylvania Journal of International Law
U.K. Const. L. Blog	UK Constitutional Law Association Blog
U.N.T.S	United Nations Treaty Series
UN	United Nations
UN WGAD	United Nations Working Group on Arbitrary Detention
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
Utrecht L. Rev.	Utrecht Law Review
VAT	Value-Added Tax
VCLT	Vienna Convention on the Law of the Treaties

VEA	Veteran Entitlement Act
Wis. Int'l L.J.	Wisconsin International Law Journal
Yale Hum. Rts. & Dev. L.J.	Yale Human Rights and Development Law Journal
YARS	Yearbook of Antitrust and Regulatory Studies
YIntlEnvL	Yearbook of International Environmental Law

Table of Treaties

UN Conventions and Treaties

ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957 (ILO Convention 107) 328 U.N.T.S 247

Vienna Convention on Consular Relations(VCCR), 24 April 1963, 596 U.N.T.S 261

International Covenant on Civil and Political Rights(ICCPR), 16 December 1966, U.N.T.S 999

International Covenant on Economic, Social and Cultural Rights(ICESCR), 16 December 1966, U.N.T.S 993

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

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, 1249 U.N.T.S 13

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment(CAT), 10 December 1984, 1465 U.N.T.S 85

ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), 27 June 1989, 1650 U.N.T.S 383

Convention on the Rights of the Child(CRC), 20 November 1989, 1577 U.N.T.S 3

Optional Protocol to the International Covenant on Civil and Political Rights, 5 November 2008, CCPR/C/GC/33

Council of Europe

Statute of the Council of Europe, 5 May 1949, ETS No.001

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), 4 November 1950, ETS No.5; 213 U.N.T.S 221

European Convention on the International Validity of Criminal Judgments, 28 May 1970, ETS No.070

European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, ETS No.073

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Introduction

Following the World War II and during the Cold War years, human rights discourse was heralded as the ultimate counterweight to the lack of political stability and the impunity of state-actors. Numerous regional regimes of human rights protection operating in radically diversified socio-political and legal settings were mandated to guide national jurisdictions when implementing shared human rights norms. Under the global spread of human rights instruments, the European Convention on Human Rights (hereinafter ECHR)[1] remains the ultimate beacon for the protection of human rights worldwide. Its interpretation as a *living instrument* by its supervisory organ, namely the European Court of Human Rights (hereinafter ECtHR), has elaborated on the constant evolution of the entire system and has built upon the enrichment of its normative force outside Europe.

Besides, the never-ending enrichment of the Convention through its 16 Protocols[2] has permitted to the oldest text in the context of international human rights law to reorient itself towards new legal fields that merit its guidance, to keep up with all contemporary challenges and thus, remain constantly at the forefront of the effective observance of human rights universally. All 47 Contracting Parties to the ECHR are obligated to enforce and guarantee the peaceful enjoyment for their nationals of a wide collection of core, non-derogable rights (e.g. right to life, prohibition of torture and inhuman or degrading treatment) and civil and political rights and freedoms which need to be balanced with competing interests. National jurisdictions are guided in this task by the ever-evolving jurisprudence of the Court whose interpretative toolkit and famous doctrines hammered out common European standards in the spirit of the Universal Declaration on Human Rights (UDHR).[3]

Being an unusual construction of international law,[4] the mere text of the ECHR and the entire Strasbourg architecture inspired the formulation and pattern of equivalent regional regimes; for instance, the Inter-American and African Human Rights systems. In the wake of the atrocities of the World War II, European states were ready to accept the supranational authority of a body, the binding judgments of which would urge them to undertake their international obligations. In its 69 years of life, the Strasbourg Court was confronted with

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), ETS No.5; 213 U.N.T.S 221,4 November 1950. The Convention was drafted and adopted under the auspices of the Council of Europe (hereinafter CoE). The Convention entered into force in September 1953 and its implementation was, at first, monitored by two organs; namely the European Commission of Human Rights (hereinafter ECommHR) and the European Court of Human Rights(ECtHR). The right of individual application came into force in 1955. Due to the emerging complexity of the system, the Commission was abandonded pursuant to Protocol No.11 which entered into force in November 1998.
CoE, Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms restructuring the control machinery established thereby, ETS No. 155, 4 May 1994.

[2] SCHABAS W., *The European Convention on Human Rights-A Commentary*, OUP 2015, pp.3-32; BATES E., *The Evolution of the European Convention on Human Rights*, OUP 2010, p. 49; STEINER E., Some Reflections on the Process Which Led to the Preparation of the European Convention on Human Rights (ECHR) in SPIELMANN D., TSIRLI M., VOYATZIS P.(eds.), *La Convention européenne des droits de l'homme; un instrument vivant, Mélanges en l'honneur de Christos Rozakis*, Brussels: Bruylant 2011, pp.597-623.

[3] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, 10 December 1948.

[4] Compared with other treaties of traditional international law, the special nature of the ECHR has been repeatedly confirmed over time. See the VAN AAKEN A., MOTOC I., JUSTUS VASEL J., Introduction: The European Convention on Human Rights and General International law in VAN AAKEN A., MOTOC I.(eds.), *The European Convention on Human Rights and General International law*, OUP 2018, p.3.

political constraints, severe workload and remarkable hardships which derived from the system's expansion eastwards raising warranted doubts on the effectiveness and the future of the entire CoE system.[5]

Generating an abundant jurisprudence which covered -and still covers- numerous areas of legal practice, the ECtHR influences all of its counterparts both at the global and at the regional level. It is upon this premise that the research question of this dissertation was built. How are Strasbourg-made human rights norms, doctrines and methods of interpretation exported to equivalent systems also entitled to enact the protection of fundamental rights? In other words, the main aim of this work is to map out the shapes or forms that the judicial-or *quasi* judicial- dialogue of the ECHR system with comparable legal orders is taking.

Given the already extensive academic literature on the theoretical foundations and the judicial practice of the most fundamental human rights Court of our time, the present thesis aims to contribute to the whole academic discussion around fragmentation of international human rights law. Through a horizontal and holistic -yet not exhaustive- study of regional and global systems it seeks to document the unequivocal influence of the Strasbourg Court within the confines of their jurisprudence. The present analysis sets out not only to discuss whether, how and with what legal consequences the ECHR norms, as interpreted by the Strasbourg Court, affect other regional or global legal orders but also to explore what does this indicate about the overall functioning of the international human rights law discourse. To this end, the main focus remains on the judicial or *quasi*-judicial mechanisms enforcing civil and political rights without overlooking-when necessary- the parallel or comparable work of treaty bodies. In this context, this study could not but concentrate on the systems presenting the most vivid or creative judicial dialogue with the ECtHR, particularly assessing the characteristics of the endorsement of the Stasbourg's loans by each mechanism.

Part I examines the *exportation* of ECHR to the EU legal order and thus, addresses the interrelationship of the ECtHR with the Court of Justice of the European Union (hereinafter CJEU) which constitutes an issue of considerable controversy for some time now. Post-Lisbon, the academic and institutional conversation concerning the ambitious accession of the EU to the ECHR has marked the recent jurisprudence of both mechanisms. This examination is twofold: Chapter A of this thesis sheds light on the direct application of the ECHR by the Luxembourg Court with regard to the right to private and family life, the interpretation of the procedural principles within the EU system, and the application of the *ne bis in idem* principle.

[5] CoE consists today of 47 members, 28 of which are EU Member States.Founded in the wake of the World War II, its mandate was at the time to foster the democratization and rule of law in the continent which passes through the supranational enforcement of human rights. The enormous caseload, however, was not easily manageable and urged further reform of the Strasbourg's arsenal. Protocol 14 was adopted to alleviate these hardships bringing, however, severe political backlash. CoE, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No.194, 13 May 2004. See in this regard BOWRING B., Russia and Human Rights: Incompatible Opposites, 1 *Göttingen Journal of International Law* 2009, pp. 257-278 ; LAUPRECHT P., Innovations in the European system of Human Rights Protection : is Enlargement Compatible with Reinforcement?, 8 *Transnational Law and Contemporary Problems* 1998, pp. 313-336; BOWRING B., Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR, 2 *Göttingen Journal of International Law* 2010, pp. 589-617 ; ANTONOV M., Conservatism in Russia and Sovereignty in Human Rights 39 *Rev Cent & E Eur L* 1, 2014, pp.1-40 ; CAFLISCH L. , The Reform of the European Court of Human Rights: Protocol No. 14 and beyond 6 *HRLR* 2, 2006, pp. 403-415.

Having mapped the direct dialogue between the two bodies, this study continues with exploring the CJEU's judgments in which human rights are prioritized over EU rules and the occasions on which this Court has treated the ECHR as a restriction mechanism of EU law. Hence, Chapter B revolves around the restriction of internal market freedoms of the European Union, data protection legislation, UN sanctions as well as the application of ECHR when it comes to the Dublin Regulation.

In Part II, the research aims to ascertain the form that the normative and jurisprudential influence of the ECHR to regional and global human rights systems has taken. Inevitably, the Inter-American Court of Human Rights (hereinafter IACtHR) and the UN Human Rights Committee (hereinafter HRC) loom large among the judicial mechanisms borrowing from the long-standing experience of the Strasbourg system. Modelled on the structure and function of the Convention's legal order, the IACtHR has applied extensively the aspirations of the European Convention in order to draw legitimacy from the latter and enforce core human rights in a region plagued with the brutalities of totalitarian regimes. Nevertheless, the mere particularities witnessed in the Americas forced the Court to outreach the European paradigm and offer adequate protection of human rights.

Chapter A adresses the direct application of Strasbourg human rights norms by the IACtHR and the convergence or the divergence that occurrs. The analysis here is both horizontal and vertical. The first section addresses the direct import of ECtHR's standards by the said Court that go across horizontally the entire compendium of the IACtHR's cases including the use of positive obligations, the principle of subsidiarity as well as the protection in emergency cases while the vertical perspective covers the legal treatment of freedom of expression and the rights of irregular migrants. The second section traces the legal fields in which the Inter-American Court has broken new ground and has achieved to expand the protection correspondingly offered by its European peer. In this realm, we also seek to detect whether there is room for cross-fertilisation in terms of mutual citation of each other's judgments. Again, the approach is, first, horizontal examining the novelty of the IACtHR which increasingly denotes *jus cogens* norms and the pioneer approach of the Court regarding reparations. Secondly, the perspective becomes vertical focusing on enforced disappearances and the rights of indigenous populations.

Subsequently, Chapter B is devoted to the "*unorthodox"* interplay between the ECtHR and the HRC. The central argument put forward here is as follows: notwithstanding the persistence of the Committee to remain loyal to its lonely road not citing external legal sources and its denial to embrace the Stasbourg's understanding of specific human rights, obscure signs of *quasi* judicial dialogue with the ECtHR can be still traced. Section 1 is about the horizontal dimension of this interaction and concerns in particular, the procedural point of interaction which impedes the Committee to rule on a case if the "*same thing*" has already been examined by the Strasbourg Court and the margin of appreciation within the jurisprudence of the Committee. Finally, Section 2 discusses the specific areas of law that an implied dialogue between the two institutions can be discerned providing mostly conflicting interpretations of equivalent standards. These areas are, first, religious freedom and freedom of expression, second, women's reproductive rights and LGBTI rights and finally, the rights of migrants. Throughout this part of the dissertation, some references to the African Court on Human and People's Rights and the rest of the UN human rights treaty bodies are also made, as appropriate.

This thesis concludes that the examination of the methodology of the judicial dialogue between the ECtHR and its partners in human rights adjudication substantiates the undoubted impact of the Court's ubiquitous output on the international law-making. Local particularities shaping the strengths and weaknesses of each system are also building upon this methodology which varies accordingly. Yet, even in instances where only conflicting interpretations and inconsistencies are witnessed, a court-to-court dialogue in realistic terms can be achieved and competition between human rights systems can be eventually retrieted. To be functional, such a dialogue requires due respect of the specificities of each jurisdiction often dictating diverse legal responses and hence, vindicates the complementarity of human rights fora instead of their fragmentation.

I. *Exporting* the ECHR to the EU legal order

Introduction

Despite the fact that the European Union does not constitute a Contracting party to the Convention, the interplay between the two European judicial mechanisms, namely the Court of Justice of the European Union and the European Court of Human Rights has, notably, strengthened over time.

Thus, following the CJEU's strong persistence to preserve the *sui generis* features of the common market within EU, from the 1970s onwards, the Luxembourg Court has progressively incorporated fundamental rights into the EU legal order as it repeatedly acknowledged that the European Convention on Human Rights has "special significance", which "must be taken into consideration in Community law" when applied.[1] There is no "formal linking" between the two legal orders and the Treaties remained silent on the matter of human rights. As such, the CJEU initially used the Convention as "a point of orientation"[2] to "inspire" and guide the EU protection of fundamental rights rather than directly applying the ECHR. It did so through the general principles of EU law[3] on the grounds of the protection of the *direct effect* doctrine[4] as a manifestation of the supremacy of EU law.

The Court, therefore, indirectly applied the ECHR by extrapolating this instrument and applying the Convention's provisions as EU principles on a *case by case* basis, in an attempt to interpret the *vague*[5] text of the ECHR in order to develop its own autonomous protection of rights through a rich and dynamic jurisprudence. Thus, it is due to the absence of such a link, that the two European jurisdictions have gradually established a relationship based on informal comity and "co-operation". However, this informal judicial dialogue between the two courts has not ensured that they adopt the same interpretation as overlapping jurisdiction and divergent interpretations have inevitably occurred in several fields of EU law.

In particular, at an early stage of this interaction, the Court acknowledged the necessity of respect for human rights but in a rather loose, undefined way in which most rights were recognized as meriting protection by the EU. *Direct effect* and supremacy were the initial fundamental principles of the EU which had the common market as its vision. Nevertheless, since the common market was gradually achieved, human rights started to become a foundation

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[1]Case 4/73 *Nold v Commission* [1974] ECR 491.

[2]DAUSES M., The protection of fundamental rights in the community legal order, 10 *E.L.Rev* 398, 1985, p.401.

[3]Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle for Getreide und Futtermittel*, [1970] ECR 1125.

[4]The direct effect doctrine was first held by the CJEU in its landmark decision in Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] 00003.

[5]"The vagueness of the text, which has been interpreted by the two separate courts with no formal links between them, means that there is a risk of diverging interpretations of the Convention. (…) The ECJ and the ECtHR are entirely different courts with no formal link between them to ensure harmonious and complementary interpretations. Instead, the two courts are interpreting the vague text of the Convention with the "same teleological method" of interpretation. The ECtHR therefore interprets and applies the Convention with the sole consideration of human rights; whereas, the ECJ, in "furthering the objectives of the Community", interprets this text in conjunction with a variety of other considerations, including those of an economic and social nature." BALFOUR A.D J, Application of the European Convention on Human Rights by the European Court of Justice(2005), *Harvard Law School Student Scholarship Series*, Paper 4, 2005, available at http://lsr.nellco.org/harvard_students/4.

as well.[6] At the same time, its Strasbourg peer has also drawn inspiration from EU legal sources in the aim of interpreting Convention rights and intensified, therefore, even more this mutual cross-reference. From the Strasbourg's perspective, the ECtHR famously introduced in the 90s its *equivalent protection* principle in its *Bosphorus* ruling[7] presuming that the EU legal system provides human rights protection which is considered equivalent to that of the ECHR in the sense of "comparable" and not "identical" protection. Citing each other, both the Luxembourg and the Strasbourg Court have progressively armored their legitimacy and supremacy *vis-à-vis* the national jurisdictions.[8]

It is in this context that the relationship status between the two European systems has surprisingly evolved over the decades from their parallel and separate development in the 1950s to the institutional and political endeavour pursuing the EU's accession to the ECHR.[9] The question around the latter is not a recent one. It has been discussed in great detail and depth in academic circles as it was a long-awaited advancement which was anticipated to bridge the gaps between the two regimes in the field of human rights protection.

Arguably, by scrutinizing national actions within the scope of EU law, the ECtHR might be competent to exercise an external and indirect review of primary or secondary EU law. Furthermore, EU citizens would be allowed to challenge the EU actions before the Strasbourg Court.[10] In practice, accession would provide an external review for the EU institutions' actions when it comes to the application of Convention rights.

On the long road to the ambitious achievement of accession ,[11] numerous political and legal issues stood out[12] and firstly, Opinion 2/94[13] of the Luxembourg Court on the Union's legal competence of acceding to the ECHR. In the aforesaid Opinion, the judges of the Luxembourg Court, having repeated that "fundamental rights form an integral part of the general principles of law whose observance the Court ensures" and that the Convention has *special significance*" within the context of the EU legal architecture, concluded that "the Community has no competence to accede to the ECHR because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field and such accession cannot be brought about by recourse to Article 235 of the Treaty."[14]

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[6]See DOUGLAS-SCOTT S., A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, 43 *C.M.L.Rev*. 3, 2006, p.629.
[7]ECHR, *Bosphorus Hava Yollari Turizm v Ireland*, Application No. 45036/98, 30 June 2005.
[8]WHITE S., Accession of the European Union to the European Convention on Human Rights, *Amicus Curiae* 86, 2011, p.8.
[9] For a thorough analysis in regard of the phases of the institutional maturity of human rights within the EU legal framework see DE BURCA G., The road not taken: The European Union as a global human rights actor, 105 *Am. J. Int'l L.* 649, 2011.
[10]See relatively TORRES PEREZ A., Too many voices? The prior involvement of the Court of Justice of the European Union, 4 *Journal européen des droits de l'homme*, 2013, p.566-7.
[11]See European Commission, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210, 2 May 1979, *Memorandum Bulletin of the European Communities Supplement 2/79*.
[12]JACQUE J-P., The Accession of the European Union to the European Convention on human rights and fundamental freedoms, 48 *C.M.L Rev.* 4, 2011, p.1002, LOCK T, Walking on a Tightrope: the Draft Accession Agreement and the Autonomy of the EU Legal Order, 48 *C.M.L Rev.*4, 2011, pp. 1025-1054.
[13]Opinion 2/94, [1996] ECR 1759.
[14]Ibid., para 5.

The ECtHR responded to this sign of restraint from the CJEU's part on the occasion of the *Matthews* litigation.[15] After the complaint submitted by a resident of Gibraltar alleging a violation of her right to vote in the European Parliament elections under the 1976 EC Act which excluded Gibraltar from the suffrage, the ECtHR famously reaffirmed its *M & Co* pronouncement[16] and concluded that a human rights violation could be attributable to states even though they had transferred sovereign power in that particular field to an international organization. The Strasbourg Court further elucidated that "acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party" and held that "the Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer." [17]

At any rate, the impact of the landmark *Matthews* ruling, as argued by several commentators, is summarized in the fact that the latter introduced a certain review exclusively for those EU acts which had the status of international treaties within the EU legal framework. This case, thus, constituted a decisive step towards the idea that an action of the EU could be subject to a test of compatibility with the ECHR. Hence, according to the Court's appraisal, Strasbourg has definitely a word -even if it is not the last one- when it comes to the application of Convention rights by the EU institutions, notwithstanding the fact that the EU is not a Contracting party to the ECHR.

Originally drafted to promote economic integration within the EU context, it is true that the Treaties did not provide for the possibility of an accession. Their modification appeared as the solution to remove all the legal impediments, as indicated by the CJEU, and pave the way to the long-expected accession. In this direction, the requested legislative amendments were provided by the Treaty of Lisbon. Therefore, Article 6(2) TEU laid down that the EU "shall accede" to the Convention. From the CoE perspective, after the entry into force of Protocol No. 14 ECHR, Article 59 of the Convention was also modified to leave the door open for the EU's accession.

As a result of numerous meetings amongst the representatives of the Committee of Ministers and the European Commission in the context of exhaustive negotiations which started in July 2010, the development of an ad hoc group called '47+1', and a whole package of documents framing the entire accession process, a draft agreement incorporating the final consensus of the two institutions was elaborated and published in 2013.[18]

Released in April 2013, the anticipated draft agreement sought to enunciate coherently the means and the legal parameters of the EU's accession to the Convention. In the text of the draft agreement, the EU's respect for human rights was particularly underlined. It also

[15]ECtHR, *Matthews v. The United Kingdom*, Application No. 24833/94, 18 February 1999.
[16]ECtHR, *M & Co vs. Federal Republic of Germany* (Decision on Admissibility), Application No. 13258/87, 9 February 1990.
[17]Supra note 15, *Matthews* judgment, para 32.
[18]See in relation with the elaboration and the content of the Draft Agreement LOCK T., End of an Epic? The Draft Agreement on the EU's Accession to the ECHR, 31 *Yearbook of European Law* 1, 2012, pp. 162–197; FABBRINI F., LARIK J., The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights, *Yearbook of European Law* 2016, pp.1–35.

proclaimed that the EU's accession aims to enhance coherence in the field of human rights protection paying meticulous attention to the special features of the EU legal order.

The main institutional modification proposed by the said Draft Agreement is, definitely, the *co-respondent mechanism* under Article 3 which also provided the *prior involvement* of the Luxembourg Court in cases brought before the ECtHR against the EU. In the context of the *co-respondent mechanism,* the EU and one or more of its Member States may constitute parallel parties to the proceedings before the Strasbourg Court following either an invitation of the latter or the Court's decision upon a request by the Member State, when a question of compatibility of EU law provisions with ECHR rights arises.[19]

The practical repercussion of the EU becoming a co-respondent alongside the respondent MS in a dispute before the ECtHR is to allow the EU to enjoy all the prerogatives of being a party to the judicial proceedings in order to preserve the proper interpretation of the contested provisions of EU law and of the ECHR.[20]

Nonetheless, bearing in mind that a third-party intervention mechanism under Article 36 ECHR already exists it goes without surprise that this novel scheme raised a chorus of criticism with regard to its complexity and the mere necessity of establishing a brand-new mechanism. Its incorporation in the Draft Accession Agreement was legitimized since "it recognizes the Union as an autonomous legal order, and secondly it respects the distinctiveness and the specificities of this legal order together with the exclusivity of the CJEU's jurisdiction. It was also seen as a means to prevent the ECtHR from interpreting the Treaties and deciding upon competences."[21]Within the context of the co-respondent mechanism, Article 3(6) of the Draft Agreement provides for a prior involvement of the CJEU before the final pronouncement of the Strasbourg Court in cases in which the compatibility of EU law with the ECHR is under discussion. The said *prior involvement mechanism* was initially suggested in the Joint Communication of President Jean-Paul Costa (ECtHR) and President Vasileios Skouris (CJEU) in 2011[22] so as the principle of subsidiarity of the ECtHR will be safeguarded. In this respect, the basic *rationale* of this procedure is to ensure that the CJEU may carry out an internal review of the EU actions before the ECtHR carries out its external compatibility review.[23] More specifically, under the relative provision of the Draft Agreement,[24] this

[19]CRAIG P., EU Accession to the ECHR: Competence, procedure and substance, 36 *Fordham Int'l L.J.* 1114, 2013, p.1122, 1123.

[20]See relatively GAIA G., The 'Co-respondent Mechanisms' according to the Draft Agreement for the Accession of the EU to the ECHR in KOSTA V., SKOUTARIS N., TZEVELEKOS V. (eds.), *The EU accession to the ECHR*, Hart Publishing 2014, pp.341-347.

[21]ANDREADAKIS S., Problems and Challenges of the EU's Accession to the ECHR: Empirical Findings with a View to the future in MORANO-FOADI S., VICKERS L.(eds), *Fundamental Rights in EU*, Hart Publishing 2015, p.60.

[22]Joint communication of Presidents J-P. Costa(ECtHR) and V. Skouris (CJEU) of 17 January 2011 available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

[23]See on the prior involvement mechanism BARATTA R., Accession of the EU to the ECHR: The rationale for the ECJ's Prior involvement mechanism, 50 *C.M.L. Rev.* 5, 2013, pp.1305–1332.

[24]Article 3(6) Draft Agreement reads as follows : "In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are

mechanism would be triggered in cases that the Union is a co-respondent and national measures strictly implementing EU law and affecting individuals' rights are called into question.

The *raison d'être* of this mechanism is inextricably linked with the subsidiary character of the ECtHR pursuant to Articles 1 and 35 of the Convention under which the applicant is expected to exhaust all the domestic remedies before lodging an application before the Court. The subsidiarity of the Strasbourg Court is built upon the idea that the supreme responsibility for human rights protection lies with the Member States and this cannot also be undermined in the context of the accession. The concept was recently reinforced as evinced by the Copenhagen Declaration on the reform of the European Convention on Human Rights system, adopted in 2018.[25] According to the Declaration "strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention. Notes, in this regard, that the most effective means of dealing with human rights violations is at the national level, and that encouraging rights-holders and decision-makers at national level to take the lead in upholding Convention standards will increase ownership of and support for human rights."[26]

However, individuals after challenging MS authorities' acts in the enforcement of EU provisions on the basis of their human rights complaints cannot have direct access to judicial redress before the EU Courts as it depends on the national courts to make -or not- for a preliminary reference before the CJEU and EU citizens have no way of putting pressure on the domestic courts to trigger the EU's *ex ante* supervisory judicial instrument. Logically, if this is not the case, individuals are likely to lodge an application before the Strasbourg Court without the Luxembourg Court having had the chance to pronounce on the validity or the right interpretation of the EU law provisions at stake.

Hence, this is exactly the *lacuna* that the *prior involvement* mechanism came to fill. Nonetheless, former Presidents Costa and Skouris had already, interestingly, declared in their Joint Communication that the preliminary reference cannot be regarded as a legal remedy to be exhausted by the applicant.[27] In this regard, Aida Torrez Perrez notably pointed out the paradox situation in which "the EU would participate in the process as a co-respondent and the

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not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court." These two conditions are considered to be cumulative.

[25]The Copenhagen Declaration on the reform of the European Convention on Human Rights system has been formally adopted by all 47 member states of the Council of Europe following a high-level conference in Copenhagen attended by more than 20 Ministers of Justice on 12-13 April 2018.The text is available at https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf ; See also on the final document GERARDS J., *The final Copenhagen Declaration: fundamentally improved with a few remaining caveats*, Strasbourg Observers 2018 available at https://strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats/ .

[26]Ibid., para 10.

[27] This is also elucidated by the wording of the Explanatory report attached to the Draft Agreement according to which "[s]ince the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered a legal remedy that an applicant must exhaust before making an application to the Court.", CoE, Draft Agreement on the Accession of the EU to the European Convention on Human Rights, FIFTH NEGOTIATION MEETING BETWEEN THE CDDH AD HOC NEGOTIATION GROUP & THE EUR. COMM'N ON THE ACCESSION OF THE EUR. UNION TO THE EUR. CONV. ON H.R. app. 5, para. 39 (2013) [hereinafter Draft Explanatory report], available at https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf, para. 65.

co-respondent position implies that the applicant does not need to exhaust internal remedies with regard to that party. Thus, the principle of subsidiarity does not even apply in this situation. If the co-respondent were a Member State, domestic remedies would not need to be exhausted within the state and no prior involvement of the highest domestic courts is envisaged."[28] This is exactly the situation that touches upon the most significant critique to this mechanism which is based on the understanding that it grants to the CJEU a privileged position in comparison to the national supreme or constitutional courts.[29]

Be that as it may, the subsidiarity concept is the only element that appears to give a convincing explanation to the incorporation of this *prior involvement* formula to the Draft Agreement concluded by the two European institutions in 2013. According to the former Judge of the CJEU Christiaan Timmermans, who admits that the preliminary reference procedure is only a prerogative of the domestic judicatures ,"once the EU is a party to the Convention, the principle of exhaustion of legal remedies must be applied in such a way that, even when an action of the EU can only be challenged indirectly through the national courts, in principle where serious questions of validity of an EU act are involved, the CJEU must first have been able to examine this question before the Strasbourg Court judges the case."[30] In support of his statement, Timmermans clarified by giving specific examples that he finds unacceptable "that questions of respect of fundamental rights of such importance as raised in cases like *Boshorus, Kadi,* or *Advocaten voor de Wereld* would be decided by the Strasbourg Court without the CJEU, which has the competence to examine the validity of the EU act in question, having had the opportunity to address these questions first."[31]

Besides the subsidiarity argument, this insistence pertaining to the need of the *prior involvement mechanism* in case of successful accession of the EU to the ECHR system is undoubtedly deep-rooted to the autonomy concept which is intimately linked to the *sui generis* nature of the EU. The mere institutionalization of this mechanism implies the reluctance of the Luxembourg Court to accept the competence of the Strasbourg Court as the last instance court to rule on human rights issues arising in the context of cases dealing with EU law.

This question around the principle of autonomy within the Union's legal order, which will be discussed further along on the occasion of the rejection of this Draft Agreement, brings us to the second ground of justification of this mechanism. On the one hand, in the post-Lisbon era, the level of EU human rights protection was enhanced not only by the removal of barriers offered by the modification of the Treaties -and most importantly, of Article 6(2) of the TEU on the accession-[32] but also by the entry into force of the Charter of Fundamental Rights of the EU. On the other hand, having overcome the tensions of judicial politics, the long negotiation

[28] TORRES PERREZ A., Too many voices? The Prior Involvement of the Court of Justice of the European Union in KOSTA V., SKOUTARIS N., TZEVELEKOS V.(eds), *The EU Accession to the ECHR*, Hart Publishing 2015, p.36.
[29] Ibid., p.40,41.
[30] TIMMERMAANS C., Some personal Comments on the Accession of the EU to the ECHR in KOSTA V., SKOUTARIS N., TZEVELEKOS V.(eds.), *The EU Accession to the ECHR*, Hart Publishing 2015, p.333-339.
[31] Ibid, p.335
[32] Article 6(2) TEU reads as follows: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties." Consolidated Version of the Treaty on European Union art. 6 [2012] OJ C 326.

procedure purporting to the elaboration of the famous Draft Agreement also revealed the ever-growing concern about the post-accession autonomy of the EU legal order.

To this end, *Protocol No 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms*[33] laid down in Article 1 explicitly that this agreement "shall make provision for preserving the specific characteristics of the Union and Union law". The notion of the Union's autonomy is rather multidimensional. In practice, the autonomy concept of the EU system, firstly, revolves around the idea that the validity of EU law relies solely to the Treaties as interpreted by the CJEU, irrespective of the rules of any other national or international legal order. Thus, this perception of autonomy leads us to the interpretive autonomy which means that the competence to interpret the constitutional and legal rules of EU legislation exclusively belongs to EU institutions and ultimately to the Luxembourg Court. Last but not least, the principle of autonomy suggests that the allocation of powers between the EU and Member States cannot be determined by any other judicial mechanism outside the Union's legal order.

However, the main objection to this autonomy-based justification of the prior involvement mechanism is the mere fact that accession would not impinge upon the monopoly of the CJEU, due to the fact that the ECtHR would only rule on the compatibility of EU legislation with the Convention's provisions and not on the validity of EU legislation, as it is also admitted by the Explanatory Report.[34]Indeed, even if the ECtHR declared an EU provision to be contradictory to the ECHR, embarking, perhaps, on a soft review or a minimal interpretation of EU law, it would be up to the EU organs to proceed to all the legislative amendments pursuing the enforcement of the Strasbourg's ruling. Therefore, it is highly unlikely that any constraint on the CJEU's exclusive role to rule on the EU acts or omission could be imposed.[35]

Notwithstanding the technical complexities of the abovementioned mechanism and the significant concern regarding the increasing risk of open confrontation between the two judicial *fora* in the event of interpretative inconsistency, for the drafters of the Agreement and the supporters of this formula, the latter aims "to preserve the primary role of both Courts in their respective domains, on the assumption that the protection of human rights requires the two Courts to be not rivals for primacy, but rather complementary partners for progressive evolution in the interest of improving individual protection."[36]

Nevertheless, the good intentions paving the way to accession have proven to be not enough as the Draft Agreement was famously dropped by the CJEU's Opinion 2/13,[37]

[33] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 26 October 2012, OJ C 326.

[34] According to the Explanatory Report "It should also be recalled that the Court in its judgments rules on whether there has been a violation of the provisions and not on the validity of an act of a High Contracting party or of the legal provisions underlying the act or omission that was the subject of the complaint.", Supra note 27, para 62.

[35] TORRES PERREZ, supra note 28, p.33.

[36] Supra note 24, p.1332.

[37] Opinion 2/13 of the Court, 18 December 2014, ECLI:EU:C:2014:2454. Yet, in its 2016 Report on the application of the EU Charter of Fundamental Rights the European Commission declared the EU's commitment

delivered in December 2014. Having found a number of flaws in the agreement which regulated the particular aspects of the accession process, the Court, in its complex ruling, raised severe controversy and left numerous issues open, mostly grounded on the supremacy of the EU legal system *vis- à-vis* the Strasbourg jurisdiction.

At this point, it appears necessary to take a step back from this analysis and expound the overall landscape in which the said Opinion was delivered. Besides the amendment of the Treaties, namely the modification of Article 6(2) TEU related to the accession of the Union to the ECHR, the Treaty of Lisbon entered into force and therefore, the Charter of Fundamental Rights (EUCFR or CFR)[38] was granted binding force elevating it to primary EU law. Following the example of the ECHR and incorporating the national legal traditions of the Member States, the codification of the rights and principles as guaranteed under EU legislation and the CJEU emphasized that the human rights protection was henceforth a priority within the Union's system. As such, it clearly constituted the legal foundation of legality not only for the MS but also for the EU institutions and bodies when it comes to the elaboration of important policies in several legal fields or to the mere implementation of EU law.[39] Notably, in the aftermath of the Lisbon Treaty, as Louise Halleskov Storgaard observed that "fundamental rights protection in Europe today is made up of a 'crowded house' of profoundly overlapping national, international and supranational human rights norms each of which is supervised by its own authoritative judicial body." [40]

Although it cannot be denied that the ECHR long played a decisive role in the protection of EU citizens, the CJEU's case law has also developed high protection standards after the entry into force of the Charter. In effect, the Court opted for using more and more the latter as a legal basis reinventing, thus, the relationship with the ECHR and its Strasbourg peer. It is noteworthy that, in this new legal framework, Article 6(3) TEU now acknowledges the human rights enshrined in the ECHR as general principles of EU law, which have direct effect in the domestic legal orders of Member States. In addition, Article 52(3) of the EU Charter provides that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention" providing also the possibility of EU law to offer more extensive protection than the Strasbourg Court.

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to the accession plan. Ever since, the latter appears in several EU documents. See *inter alia* 2016 Report on the application of the EU Charter of Fundamental Rights COM(2017) 239.
At this point, we should not oversee the most recent development that signals that the entire accession project is not abandoned and the renegotiation of the relevant documents (Draft agreement and Explanatory Report) is in process. The document summarises the proposed amendments of the co-respondent mechanism which purport to ease the autonomy-related fears of the EU system and the "codification" of the recent case law of the CJEU on the principle of *mutual trust*. Of course, all these points are yet to be negotiated and approved both by the EU Member States and the State Parties to the ECHR. See EU RESTRICTED note on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 20 September 2019, available at http://www.statewatch.org/news/2019/sep/eu-council-acession-coe-12349-19.pdf?fbclid=IwAR2TTxS_aClr0GETVlyDEsGUfXaaSuh3pbZR3fQLbO3eSNHiBtX-iMCHSRE.

[38] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[39] See relatively DI FEDERICO G.(ed.), *The EU Charter of Fundamental Rights, from declaration to binding instrument*, Springer 2011.

[40] HALLESKOV STORGAART L., EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR, 15 *Hum. Rts. L. Rev.*3, 2015, p.486.

Hence, in this context, Opinion 2/13 occurred in the post-Lisbon era which was marked by a multi-level human rights protection and, most importantly, by the use of the EU Charter as the main legal source of fundamental rights protection within the EU legal order. This is probably the reason why the CJEU felt that the accession presented a clear danger for the *sui generis* autonomous dimension of the Union.

Indeed, after declaring the case admissible, the Court of Justice examined, in substance, the specific elements of the Draft agreement which rendered the latter incompatible with EU law.

At the outset, the Court set the scene as it observed for the first time that the EU is not a state as well as the importance of guaranteeing the primacy and *effet direct* of EU law, referring also to the EU's aim of achieving an 'ever closer union.'

Regardless its famous *Melloni* jurisprudence[41] delivered shortly before the Opinion leaving no room for national courts to apply higher human rights standards than the ones provided by the EU Charter, the Court held that the draft agreement failed to preserve the primacy and unity of EU law[42] since there is a similar provision under ECHR, namely Article 53.[43] More specifically, it stressed relatively that "in so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised."[44]Surprisingly, since the Strasbourg Court is engaged in enforcing the Convention's standards and not those applied by the domestic legal orders, the concern of the Court at this point seems unrealistic as it appears to be unlikely that the ECtHR will promote, in practice, the application of national standards of protection higher than the Convention's, especially when the MS involved is already bound by the Charter's level of protection.

In the same spirit, the Court subsequently focused on the specificities of EU law which, in its view, were disregarded by the Draft Agreement starting from the *mutual trust* principle in Justice and Home Affairs (JHA) matters. This rule is based on the presumption that the MS stick to their international human rights obligations, including the ECHR, and therefore, constitutes the cornerstone of the EU harmonized legal framework pertaining to immigration or judicial criminal cooperation. In this respect, the CJEU assessed that, under the *mutual trust* principle, only in "exceptional circumstances" are the national authorities of a MS allowed to evaluate whether another MS sufficiently safeguards fundamental rights as guaranteed by the

[41] Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, [2013] published in the electronic Reports of Cases.
[42] PEERS S., *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection,* EU Law Analysis 2014, available at http://eulawanalysis.blogspot.gr/2014/12/the-cjeu-and-eus-accession-to-echr.html.
[43] Article 53 ECHR reads as follows "[n]othing in this Convention shall be construed as limiting or derogating fro.m any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."
[44] Opinion 2/13, supra note 37, para 189.

EU. For the Luxembourg Court, the mere fact that the Draft Agreement failed to prevent the situation in which the Strasbourg Court may "(…) require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[45]

Additionally, the Court of Justice observed with regard to Protocol 16 to the ECHR,[46] which offers the opportunity to national courts to address questions to the Strasbourg Court concerning the interpretation of the Convention's provisions, that this newly instituted mechanism would result in side-stepping the similar preliminary ruling procedure of the Union's legal order. In the Court's view, this would allow the ECtHR to adjudicate claims with relation to EU law, before its Luxembourg counterpart.

According to the Opinion, the draft accession agreement is also incompatible with Article 344 TFEU providing that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein", due to the fact that the Draft Agreement undercuts the Court's monopoly on inter-state dispute settlement regarding EU law between MS as it failed to prevent the ECtHR from exercising the same power to settle such disputes instead.[47]

Subsequently, the Court examined the compatibility with EU law of the previously analyzed mechanisms which were set up in the agreement, namely the *co-respondent* and the *prior involvement mechanism*. As for the former, the Court fears that it would allow the Strasbourg Court to proceed to an interpretation of EU law when ruling on the admissibility of requests to trigger the said mechanism. It also underlined that the possibility of a Strasbourg's decision on the joint responsibility of both the Union and its MS would impinge on MS reservations to the Convention under Article 57 ECHR and would also violate Article 2 Protocol 8 on the accession providing the duty to ensure that nothing affects the situation of MS in relation to the ECHR.

Hence, in the Court's view, the ECtHR should not interfere with the allocation of responsibilities between the EU and MS even when the issue at stake touches upon an infringement of the Convention seeing the fact that only the CJEU can decide on matters related to EU law. In this regard, expressing once again its objection pertaining to the EU autonomy doctrine, the Court clarified in paragraph 234 of the Opinion 2/13 that "(…) even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR

[45]Ibid., para 194,195.

[46]The Court of Strasbourg issued its very first Advisory Opinion under Protocol 16 answering the questions asked by the French Court of Cassation pertaining to surrogacy. ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Requested by the French Court of Cassation*, Request no. P16-2018-001, 10 April 2019.

[47] Opinion 2/13, supra note 37, paras 201-214.

to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction."[48]

Moving, then, to the *prior involvement* formula, the Court of Justice found it similarly incompatible with the Union's law on two grounds. First, it fails to give to the EU the power to pronounce on whether the Luxembourg Court has already delivered a judgment on an issue, and secondly, it hinders the CJEU from deciding for the interpretation, not just the validity, of EU law.[49]

Last but not least, the provisions of the Draft Agreement regarding the Common Foreign and Security Policy (CFSP) also run counter to EU law as it is not acceptable for the CJEU a judicial body which is outside the institutional and the judicial framework to scrutinize EU acts in this field, notwithstanding the fact that the CJEU has no such jurisdiction itself as regards a number CFSP issues.[50]

In light of all the above, the Court famously concluded that "the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms."

Following to this blatant rejection of the Draft Agreement, it becomes evident that the latter will be renegotiated by all 47 Contracting Parties to the ECHR and the EU institutions since the obligation of accession is now engraved in the Treaties. In any case, the consensus on the accession, if ever reached, requires all 47 ratifications in order to come into force, let alone the unanimous approval by the EU Council and the European Parliament.[51]

For some of the distinguished scholars who highly value human rights protection within the EU, the Court's judgment was considered as an "unmitigated tragedy".[52] The EU accession to the ECHR intended to safeguard an effective external control of the EU acts and MS acts when implementing EU law without, though, complicating EU human rights law. Integrating the Union in the ECHR system with a clear recognition of the direct effect of the Convention would contribute to constantly keep the focus of EU human rights law on what matters: the more effective protection of the EU citizens' rights.

Thus, given the post-Lisbon legal framework of the EU and the dynamic jurisprudence of the Luxembourg Court, it is self-evident that the Union has sought to become one of the most crucial actors on the international stage of fundamental rights. "By signing up to the

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[48]Ibid., para 234.
[49]Ibid., paras 236-248.
[50]Ibid., paras 249-257.
[51] See in relation to the difficulties in redrafting a new agreement on accession the reactions and comments of Prof. Besselink and Prof. Douglas-Scott respectively. BESSELINK L., *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, VerfBlog 2014, available at http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/. DOUGLAS-SCOTT S., *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, U.K. Const. L. Blog 2014, available at https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/ .
[52] See on the contrary *inter alia* ISIKSEL T., European Exceptionalism and the EU's Accession to the ECHR, 27 *EJIL* 3, 2016, pp. 565–589.

ECHR the EU would subject itself to the very standards it requires of others. Its own legitimacy would therefore be enhanced. More importantly, an accession of the EU to the ECHR would close an important gap in the external control exercised by the European Court of Human Rights (ECtHR). Therefore, it is high time that the Union itself acceded in order to foster its credibility on human rights issues."[53]

However, it flows from the spirit of the whole reasoning of the Court of Justice, as illustrated in its Opinion 2/13, that it is one thing to refer or even directly apply the Convention and the ECtHR's jurisprudence in a legal context in which neither the former nor the latter have binding force; it may be another to acknowledge that the EU judicial system is actually bound by the Strasbourg's jurisprudence. And that is exactly what brings us to the Court's major fear: a relationship of equals to suddenly turn into an "unwelcome hierarchical constellation,"[54]seriously destabilizing the autonomous architecture of the EU system.

Consequently, it is in this context that the generalized chorus of criticism was raised in the aftermath of the Court's ruling.

Looking back, even from the very early stage, the Luxembourg Court started, in its famous *Costa v. ENEL* case,[55] founding the supremacy of the EU legal order on the autonomy concept establishing, thus, the distinction of the EU system from both the international legal order and the domestic legal orders. In its Opinion 1/91 regarding the first draft agreement on the European Economic Area, emphasized the autonomy of the EU *vis-à-vis* international law stressing particularly that "this exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty."[56] However, in parallel with the development of the autonomy doctrine, the CJEU also developed its judicial dialogue concept in relation not only with the domestic courts but also, and most significantly, with the Strasbourg Court.

In this light, the Court's robust objections appear highly problematic as this Opinion clearly halted the fruitful judicial dialogue of the CJEU with its peer. It appears to express great difficulty in digesting the possibility to allow, post accession, the external control of EU actions from the ECtHR. This reasoning seems rather ironic if we recall the *Matthews* or the *Bosphorus* litigation which strikingly prove that the Strasbourg Court was never deterred from reviewing the EU's interference with the rights of individuals when these rights, as embodied in the Convention, were in danger of being violated.

As for the Court's appraisal regarding the power given to the ECtHR to engage in making pronouncements on the allocation of competences between the EU and its MS, it comes as an aftereffect of the accession that, within the confines of Strasbourg's external review function, the latter will naturally dig into EU law in order to guarantee the most effective

[53] Supra note 12, LOCK T., p. 1026.
[54] EECKHOUT P., The European Convention on Human Rights and Fundamental freedoms as an integral part of EU law-Some reflections on status and effect in GOVAERE I., LANNON E., VAN ELSUWEGE P. and ADAM S.(eds), *The European Union in the World, Essays in Honour of Marc Maresceau*, Brill 2013, pp. 87-100.
[55] Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.
[56] Opinion 1/91, Re- draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079, para 35.

observance of human rights and the proper redress for victims of confirmed violations. However, this in no way can be construed as a green light to the ECtHR to substantially determine this division of powers. Even if the Strasbourg Court concludes that EU law is somehow incompatible with the Convention, it cannot modify this problematic provision. The exclusive authority for the interpretation of EU law or the decision on the amendment of the Treaties remains to the CJEU and cannot be transferred to a non-EU Court. This is actually the *raison d'être* of the *co-respondent* and the *prior-involvement* mechanisms which may be triggered so as the Luxembourg Court is prompted to pronounce on these puzzling issues. In any case, as Piet Eeckhout emphatically put it "no student of EU law will deny that the borders between EU and national law are often uncertain. That uncertainty should not however undermine the need to respect Convention rights and freedoms. It is submitted that, instead of seeking to preclude the ECtHR from entering those borderlands, the EU and the CJEU should encourage a proper dialogue with the ECtHR of precisely where the borders may lie in specific cases."[57]

With respect to the CJEU's concerns in view of the CFSP and AFSJ areas, these reveal the Court's "indifference" regarding the guidance that the Strasbourg Court has to offer in the controversial field of irregular migration and asylum so as the fundamental rights of individuals who seek for international protection within the EU borders could receive sufficient protection. At this point, we should not lose sight of the crucial role that the ECtHR had already played in the development of EU human rights law in relation with asylum and migration law, as will be seen, on the occasion of the Dublin Regulation. Post accession, the key role of the Strasbourg's guidance will be of utmost importance as it is logically expected to be more litigation relating to the contentious CFSP and AFSJ areas of EU before the ECtHR. Therefore, despite its character as cornerstone of European integration, the EU value of mutual trust should not impede the fundamental rights protection within the Union.

All that said, it is not surprising[58] that Steeve Peers assessed the rejection of the draft agreement on the accession as "a clear and present danger to human rights protection"[59] and Sionaidh Douglas-Scott bitterly recalled the old critique against the Luxembourg Court according to which the Court does not take human rights seriously.[60]

Regardless how long the accession road is at this juncture and the ongoing *bras de fer* between the two judicial mechanisms, it remains undeniable that the *exportation* of the Convention and the Strasbourg's case law to the EU legal order offered to the latter the power to observe more successfully the rights of individuals submitted to EU law. Post Lisbon, if we zoom closer, we can argue that the ECtHR jurisprudence maintains its position in the EU system due to the new provisions of Article 6(3) TEU and Article 52(3) of the EU Charter and

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[57] EECKHOUT P., *Opinion 2/13 on EU Accession to the ECHR and judicial dialogue – autonomy or autarky?*, Jean Monnet Working Paper 01/15, available at http://www.jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf, p.30.

[58] See *inter alia* for a critique in the same spirit LOCK, supra note 18; FABBRINI F. and LARIK J.,; KRENN C., Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13, 16 *German L.J.* 1, 2015, pp. 147-168. On the contrary, for an analysis in favour of the Opinion 2/13 see HALBERSTAM D., It's the autonomy stupid! A modest defense of Opinion 2/13 on EU Accession to the ECHR and the way forward, 16 *German L.J.* 1, 2015, pp.105-146.

[59] PEERS, supra note 42.

[60] DOUGLAS-SCOTT, supra note 51.

the mere jurisprudence of the CJEU notwithstanding the tensions developed in view of the failed accession project. In this context, this research will focus on the fertile dialectic relationship between Luxembourg and Strasbourg in order to monitor how the influence of the Convention and the ECtHR marked the development of the EU human rights law, initially, through the direct application of the ECHR by the CJEU **(Chapter A)** and secondly, through the restriction of the EU rules in the name of the Convention's provisions **(Chapter B)**.

A. The direct application of the ECHR by the Luxembourg Court

1. Article 8 ECHR in the CJEU case law: The overlapping and divergent jurisprudence

As for the right to protect one's private and family life as enshrined in Article 8 ECHR,[61] the Court provided the very first explicit reference to the ECHR in *Rutili v. Minister for the Interior*.[62] *In casu*, the Convention was conceived as a source of inspiration within the Union's legal order as well as a human right standard for determining the legality and legitimacy of the acts of MS applying EU law. Therefore, the ECJ applied the ECHR as a clear human rights standard to also interpret the "public policy" exception to the free movement of workers, justifying Member States to restrict this freedom only to the extent authorized by the ECHR, that is, when it is necessary for the protection of the interests of national security or public safety "in a democratic society".[63] As Rick Lawson clarified, "thus, if national authorities restrict one of the fundamental freedoms under the EEC Treaty, the ECJ holds that in order to be justified, the restriction should comply inter alia with the provisions of the ECHR.(…)"[64]

This landmark case illustrates how the CJEU has progressively shaped its autonomous human rights case law, inspired, though, by the ECHR and by the common constitutional traditions of EU Member States.[65]The Luxembourg Court managed, thus, to establish a much broader human rights review over their actions and to pave the way for a much clearer reference to the Convention's provisions as a *material source* of EU legal order rather than a *source of inspiration.*[66]

Nonetheless, besides the consensus in this field, conflicts and inconsistencies between the two European jurisdictions have not been sidestepped. In some cases, in which the CJEU invoked the fundamental right to protect private and family life there has been a flagrant conflict between the case law of the Luxembourg and the Strasbourg Court providing divergent interpretations of Article 8 ECHR, as it will be analysed in the following section.[67]

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[61] Article 8 ECHR states that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[62]Case 36/75, *Rutili v. Minister for the Interior*, [1975] ECR 1219.

[63] See also the Opinion of AG Trabucchi in Case 118/75 *Lynne Watson and Alessandro Belmann* [1976] ECR 01185.

[64]LAWSON R., Confusion and Conflict? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg, in LAWSON R. and DE BLOIS M.(eds.), *The dynamics of the protection of human rights in Europe ,Essays in honour of Henry G. Schermers ; vol. 3*, Dordrecht ; Boston : M. Nijhoff 1994, p.225, also available at https://openaccess.leidenuniv.nl/handle/1887/3137. A few years later this revolutionary approach was reaffirmed in the *ERT* judgment, discussed below.

[65]GARCIA R, The General Provisions of the Charter of Fundamental Rights of the European Union,8 *European Law Journal* 2, 2002, pp. 492-514.

[66]DENYS S., Des influences réciproques entre CJCE et CEDH : "je t'aime, moi non plus"?, *Pouvoirs n°96 - Les cours européennes. Luxembourg et Strasbourg*, 2001, pp.31-49.

[67] The ECtHR clarified the criteria of interpretation of the Article 8 of ECHR stating in its *Silver and others v. The United Kingdom* judgment that: "On a number of occasions, the Court has stated its understanding of the

a) The right to private life of business premises and legal persons

The Court of Justice had the opportunity to apply directly the provisions of Article 8 ECHR in a wide variety of cases making, therefore, a much more frequent use of Strasbourg's jurisprudence and expanding the Court's review in new fields of the EU legal order. Nonetheless, the dual interpretation of the provisions of Article 8 resulted in a jurisprudential conflict between the two Courts relevant to the application in two particular domains, namely business premises and legal persons.

According to the affirmative expression in the second paragraph of the Convention, the exercise of the right to private and family life is not an absolute right, and the interferences by a public authority entail a violation of this provision if they do not fall within one of the exceptions provided in paragraph 2. Hence, when this right is at stake, the Strasbourg Court has to examine whether the interferences are *in accordance with the law*, whether they have an *aim or aims that is or are legitimate* under the second paragraph of Article 8 and whether such aims, namely national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, and protection of the rights and freedoms of others were necessary in a democratic society.

The CJEU refused to apply Article 8 ECHR to business premises in the famous *Hoechst*[68] case in which the CJEU, for the first time, admitted the *particular significance of the European Convention on Human Rights among international treaties*. This application for annulment of three Commission decisions concerned an investigation under suspicions of existence of agreements or concerted practices concerning the fixing of prices and delivery quotas between certain producers and suppliers of PVC and polyethylene in the Community. The applicant refused to submit to that investigation and alleged that it constituted an unlawful search and invoked the right to privacy. The CJEU, in a rather narrow interpretation of Article 8 ECHR, held that "the protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises."[69]The Court,

phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarize certain principles: (a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary","useful", "reasonable" or "desirable" (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, § 48); (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (ibid., p. 23, § 49); (c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (ibid., pp. 22-23, §§ 48-49); (d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above-mentioned Klass and others judgment, Series A no. 28, p. 21, § 42). 98. The Court has also held that, in assessing whether an interference with the exercise of the right of a convicted prisoner to respect for his correspondence was "necessary" for one of the aims set out in Article 8 § 2 (art. 8-2), regard has to be paid to the ordinary and reasonable requirements of imprisonment (see the above-mentioned Golder judgment, Series A no. 18, p. 21, § 45). Indeed, the Court recognises that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention." ECtHR, *Silver and others v. The United Kingdom*, Applications Nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, 25 March 1983, para 97.

[68] Joined Cases C-46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 02859, para.13.

[69] Ibid par.18.

in order to support its earlier position also stressed that there was no case law by the ECtHR relevant to this matter ignoring the *Chappell* decision[70] of the Strasbourg Court ruled six months earlier.

The *Chappell* case concerned an alleged violation of Article 8 ECHR due to controls in Mr. Chappell's video-rental undertaking on the grounds of several allegations for copyright infringement and rental of obscene video material. "Before the Court, the Government accepted that there had been an "interference" with the exercise of the applicant's right to respect for his "private life" and "home". Mr Chappell, for his part, conceded that the interference had the aim, which was legitimate under paragraph 2 of Article 8 (art. 8-2), of protecting "*the rights of others*" (…). The Court sees no reason to differ on either of these points."[71]Thus, the Court expressly admitted that Article 8 was indeed applicable to the business premises of a private individual. Additionally, the CJEU insisted on its position for non-application of the protection of privacy on business premises in *Dow Benelux* case and *Dow Chemical Ibérica* case[72].

Another discrepancy presented between Luxembourg and Strasbourg Court concerning the interpretation of Article 8 of the Convention revolves around its applicability to legal or juristic persons. Earlier, in its judgment in the *National Panasonic* case,[73] the CJEU dealt for the first time with this matter and left it undecided applying a very generic criterion.[74]

Three years later, the ECtHR clarified the issue in *Niemietz* giving a rather extensive scope of the right to private life. The claimant was a German lawyer who invoked Article 8 on the grounds of the warrant issued by the Munich District Court to search his law office premises. In his application before the European Commission, Niemietz submitted that the search had violated his right to respect his home and correspondence guaranteed in Article 8 ECHR, among other provisions of the Convention. The German Government opposed to the applicant's allegations, explaining that Article 8 did not offer protection against searches of professional offices or premises since the Convention drew a clear distinction between private life and home, on the one hand, and professional life and business premises, on the other.

In this case, the ECtHR's maximalist interpretation of Article 8 made clear that this provision is applicable to professional or business premises as well, rejecting the CJEU's ruling in *Hoechst* that the Strasbourg Court even cited in its decision. Indeed, although the Court did not consider necessary to define *private life*, it held that "it would be too restrictive to limit the notion to an "*inner circle*" in which the individual may live his own personal life as he chooses

[70] ECtHR, *Chappell v. The United Kingdom,* Application No. 10461/83, 30 March 1989.
[71] Ibid, para 51.
[72] Case 85/87, *Dow Benelux v. Commission*, [1989] ECR 3137, paras 28-30, and Joined Cases 97-99/87 *Dow Chemical Ibérica and Others v. Commission,* [1989] ECR 3165, paras 14-16.
[73] Case 136/79, *National Panasonic (UK) Limited v Commission of the European Communities*, [1980] II-02033
[74]"The ECJ merely stated that the interference with the "assumed" private life of Panasonic had a legitimate aim as required by the ECHR, namely, the economic well-being of the country, and left undecided whether the investigation had been "necessary in a democratic society". The Court held that the investigation powers given to the Commission by Article 14(3) of Regulation No. 17 are to enable it to carry out its duty under the EC Treaty of ensuring that the rules of competition are applied in the common market. In these circumstances, the Court held that it did not appear that Regulation No. 17, by given the Commission the powers to carry out investigations without previous notification, infringed the right invoked by applicant". RINCON – EIZAGA L., Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts Regarding interpretation of Article 8 of the European Convention on Human Rights, 11 *Int. Law: Rev. Colomb. Derecho Int. Bogotá*,2008, p. 142.

and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not. Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time."[75]

The Strasbourg Court concluded to a disproportionate infringement of Article 8 as it also stated that the search in the law office of Mr. Niemietz was *not necessary in a democratic society* and was *disproportionate* putting the actual execution of the search under scrutiny[76] as well. The fact that the CJEU did not found a breach of Article 8 in *National Panasonic* explicitly denying to apply this article in a case of inspection to business premises in *Hoechst* under similar conditions [77] but, at the same time, it was prepared to afford *protection against arbitrary or disproportionate intervention as a general principle of Community law,* raises the question whether this general principle would satisfy the test of proportionality of *Niemietz*.[78]

In 2002, the CJEU in the *Roquette Frères* case delved again into this conflicting issue after a preliminary ruling from the French *Cour de Cassation*. Roquette Frères was required by the Commission to submit to agreements or concerted practices violating EU competition law. The Luxembourg Court, in a rather revolutionary ruling, taking clearly into consideration –and even citing- the recent jurisprudence of the Strasbourg Court following to the *Hoechst case* held specifically that "according to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in Colas Est and Others v. France, No 37971/97 in the Reports of Judgments and Decisions, § 41)[79] and, second, the right of interference established by Article 8(2) of the ECHR 'might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case."[80]

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[75]ECtHR, *Niemietz v.Germany* , Application No. 13710/88,16 December 1992, paras 29-31

[76]The Court found a violation of Article 8 in that case due to three factors: a) *the search in the lawyer's office was drawn in broad terms as it was for a seizure of documents without any limitation* b) the abovementioned control took place *without the presence of an independent observer* and c), *the search impringed on professional secrecy to an extend that it was disproportionate in the circumstances, taking into account that a lawyer was involved.*

[77]At this point, we cannot neglect the fact that in *National Panasonic,* the Commission's decision for investigation was excessively broad and in *Hoechst* ruling the Court itself stated that the Commission is required to "clearly indicate the presumed facts which it intends to investigate". Supra note 68, p.2930. Similarly to the *Niemietz* case, in *National Panasonic* the investigation was carried out to a large extend without the presence of the undertaking's solicitor violating basic procedural safeguards.

[78] Rick Lawson finds this doubtful. See LAWSON, supra note 64, p.244-245.

[79] ECtHR, *Colas Est and Others v. France,* Application No. 37971/97, 16 April 2002.

[80] Case C-94/00, *Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, [2002] ECR I-09011, para 29.

Despite this noticeable progress made in terms of a broader protection of private life, the Luxembourg Court reiterated its interpretation in *Hoechst*, and developed its reasoning around the *general principle of Community Law* that recognizes the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities, rather than around the criteria of Article 8 ECHR. This principle is applicable both to natural and legal persons, according to the CJEU.

Thus, the problem arises when assessing the Strasbourg's interpretation of Article 8 and the scope of this "general principle of Community law" as interpreted by the CJEU. Notwithstanding the clarifications offered by the ECtHR regarding the inviolability of the private life of legal persons,[81]that both the order of the investigation and the circumstances of the investigation's execution must fulfill the requirements of necessity and proportionality to the legitimate aims pursued by the investigation itself, the Luxembourg Court took another road. It only examined the necessity of the decision and ruled that the wrongful execution of the search has no influence on the legality of the decision and thus cannot lead to its annulment.

As a result, like in *Hoescht,* the review and standard of protection offered by the Court is in danger of not meeting the requirements of the right to privacy as enshrined in Article 8. "This means that although the ECJ generally follows the jurisprudence of the ECtHR, there have been divergences between the two Courts on the proper interpretation of the right to private and family life under Article 8 of the ECHR, which places Member States in a difficult situation since they might be found to have breached the European Convention when fulfilling their obligations under Community law."[82]

This approach encouraged scholars to make specific proposals in order to strengthen fundamental rights protection within the EU legal order and build up a more comprehensive and integrated system for such protection within the continent.[83]

[81] In particular, the Court provided specific guidance on this matter since its judgment in the *Chappell* case.
[82] RINCON – EIZAGA, supra note 74, p. 126.
[83] See DEFEIS E., Human Rights and the European Union: Who Decides? Possible Conflicts between the European Court of Justice and the ECtHR, 19 *Dick. J. Int'l L.*2001, pp. 301- 329.

b) The right to a name

In the field of the interpretation of Article 8 made by the CJEU, we must, therefore, refer to a particular angle of the right to private life, namely the right to a name.[84] Actually, this domain is highly regulated by national regimes and the EU has no competence herein. Nevertheless, national rules on the spelling of the EU citizens' names may inflame several inconsistencies or obstacles to the exercising of basic EU freedoms such as their free movement rights, as illustrated by the cases discussed further below.

At first, in the *Konstantinidis* case,[85] a violation of the right to a name was invoked by the applicant as an expression of Article 8 of the ECHR, despite the fact that the Luxembourg Court denied to directly apply the Convention and extend its review in such a case. *Christos Konstantinidis* was a Greek citizen, established in Germany. Upon his marriage in 1983, his name was entered into the German marriage register as *Christos Konstadinidis*, a spelling to which he objected on the grounds that it did not properly reflect the correct pronunciation of his name as appeared in his Greek passport. After his failed attempts to change his name according to the correct spelling, a translation of his name was ordered by the Amstgericht Tubingen, using the system of transliteration. As a result, Mr. Konstantinidis' name was wrongly written in latin and the German authorities ordered this spelling to replace that originally recorded in the marriage register. Mr. Konstantinidis also objected to this latter spelling since it deformed the pronunciation of his name due to personal and professional reasons and invoked an infringement of his freedom of establishment under Community law.

At this point, the pioneering opinion of Advocate General Jacobs should not be overlooked, as he clearly introduced a significant extension of the CJEU's case-law noting that even if a Member State's action takes place within the requirements of Community law when that action breaches the fundamental rights of an individual exercising his or her Community principles as enshrined in the Treaties (in that case freedom of movement and establishment), on that ground alone it should be declared incompatible with the Community's legal system.[86]However, the Court adopted a much more restricted approach completely neglecting the fundamental rights dimension and remained silent concerning that crucial issue touched by the Advocate General.[87]

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[84] The right to a name is explicitly provided by the UN International Covenant on Civil and Political Rights in Article 24(2) which reads as follows "[e]very child shall be registered immediately after birth and shall have a name." However, even though the ECHR does not refer *expressis verbis* to this right, the latter falls within the scope of application of Article 8 according to the position of the Strasbourg Court.

[85]Case C-168/91, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt* [1993] I-01191.

[86]"In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that . . . he will be treated in accordance with a common code of fundamental values . . . . In other words, he is entitled to say "civis europeus sum" and to invoke that status in order to oppose any violation of his fundamental rights." CJEU, Opinion of Advocat General Jacobs in the *Konstantinidis* case, Recital 45-46.

[87]BINDER D., *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action,*1995, available at http://www.jeanmonnetprogram.org/archive/papers/95/9504ind.html .

On the other hand of that unwillingness of the CJEU to examine and conclude to a potential infringement of the right to a name under Article 8 ECHR, the Strasbourg Court was open to enlarge its scope of application. The right to protect one's private life was routinely invoked by transsexuals as the applicants, having undergone a gender reassignment operation stated a violation of the right to a name.[88] In a recent series of cases[89] where a change of a name, effectuated for a number of reasons, was involved, the Strasbourg organs faced again the question of the extent to which the Convention protects the right to respect for a name. Particularly, in *Burghartz and Schnyder Burghartz* v. *Switzerland,* the Commission explicitly noted that "the right for private life as enshrined in Article 8 § l ECHR ensures a sphere within which everyone can freely pursue the development and fulfillment of the personality."[90] As such, it encompasses the right to identity and by extension, the right to a name.

Yet, the cases that followed the adoption of the EU citizenship concept[91] point out the reluctance of the Court to intrude into a field of clear national authority such as the sensitive matter of spelling names and, when this is absolutely necessary for the Court, to examine this domain basing its judgments on the free movement freedom[92] or the degree of inconvenience in exercising the said freedom.[93] In this context, the Luxembourg Court, in the *Runevič-Vardyn* case,[94] which gave rise to a heating political debate even affecting the Lithuanian-Polish diplomatic relations, took a different path. The case concerned a Lithuanian national, member of the Polish minority who requested her name to be spelt according to the Polish alphabet on her Lithuanian marriage certificate. The CJEU opted for a much more distant look to the delicate matter of spelling names of ethnic minorities within the EU as it confirmed the disproportionate breach to the free movement rule but avoided to even proceed to the proportionality test leaving this task to the Lithuanian State. As Egle Dagilyte, Panos Stasinopoulos and Adam Łazowski emphasized in their article "having in mind the expected accession of the EU to the ECHR, it is quite possible that the CJEU might have been influenced indirectly by the ECtHR judgment in *Metzen v Latvia,*[95] which left wide discretion for national courts and other institutions on how to spell the names of ethnic minority Latvian nationals."[96]

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[88] ECtHR, *Rees v. the United Kingdom*, Application No. 9532/81,17 October 1986 ; *Cossey v. the United Kingdom* Application No. 10843/84, 27 September 1990.

[89] For Rick Lawson: "it should be noted that all these cases concern individuals who themselves wanted a change of name. In contrast, in Konstantinidis it was the authorities who decided to impose a new transcription on an existing name - a most obvious interference with the individual's rights under Article 8. Moreover, in testing whether this interference could be justified under the ECHR, the Convention organs would not follow the predominantly economic approach of the European Court of Justice. They would of course examine the extent to which daily inconveniences occur, but they would not narrow the scope of the issue by requiring the applicant to prove any specific injury in the exercise of his profession." LAWSON, supra note 64, p.249-250.

[90] Before the AG Jacobs delivered its opinion. ECommHR, *S. Burghartz and A. Schnyder Burghartz v. Switzerland,* Application No. 16213/90, 21 October 1992, para 47.

[91] Treaty on European Union (Consolidated Version), Treaty of Maastricht adopted on 7 February 1992, [2002] OJ C 325/5.

[92] See Case C-148/02, *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

[93] See Case C-353/06, *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639; Case C-208/09, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] I-13693.

[94] Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* [2010] I-13693.

[95] ECtHR, *Mentzen v. Latvia*, (Decision on admissibility),Application No. 71074/01, 7 December 2004.

[96] DAGILYTE E., STASINOPOULOS P., LAZOWSKI A., The importance of being earnest: spelling of names, EU citizenship and fundamental rights, *CYELP 11*, 2015, p.22.

To conclude, despite the fact that, as reflected in the *Konstantinidis* case, the Court acknowledged the right to a name as strongly related to the right to self-determination and personal identity and as a dimension of the protection of private life even citing the relevant Strasbourg's case law, it rather refused to take the fundamental rights road. The judges of the CJEU saw these *name cases* through the lens of the strong EU citizenship concept without discussing the human rights angle as they consider the EU citizens as subjects of individual economic freedoms within the internal market rather than subjects of fundamental rights within the EU. This is even more noticeable in the post-Lisbon era which laid the foundations of a more enriched constitutional dialogue between the EU and the Member States, as the CJEU by following this approach far from the traditional position of the ECtHR "avoided the risk of being accused of stepping into domestic competence in such a sensitive area and using the Charter as a Trojan horse".[97]This tendency of the Court appears even more strikingly obvious on the occasion of data protection, further examined in the following section.

c) The right to private life and EU Data Protection

The European data protection is definitely the most luminous example of creative legal evolution during the latest decades. In response to the emerging developments in the field of information technology in the 1960s, the concept of privacy in the context of Article 8 of the ECHR, formulated in 1950, needed to be revisited in order to meet with the new technological challenges and to guarantee the protection of the individuals' personal data. As a response to this growing need, the Council of Europe[98] adopted, at first, various resolutions with reference to Article 8 ECHR and, in 1981, adopted the Convention on Personal Data[99](Convention 108), a legally binding instrument providing with specific safeguards against abuses from private actors or the state's authorities concerning the fair and lawful collection, storage and automatic processing of personal data. In this respect, the Strasbourg Court applied broadly the notion of private life expanding the protection offered by the Convention, at first, to cases related to interception of telephone communications in *Klass*[100] in 1978 and in *Malone*[101] judgment in 1984 and progressively to cases with regard to data stored in computers, to video-surveillance in *Peck*[102] or storage of such data to secret registers as it was the case in *Leander*[103] and *Rotaru.*[104]

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[97] Ibid, p.32.

[98]CoE, Committee of Ministers (1973), Resolution (73) 22 on the protection of the privacy of individuals *vis-a-vis* electronic data banks in the private sector, 26 September 1973; CoE, Committee of Ministers (1974), Resolution (74) 29 on the protection of the privacy of individuals *vis-a-vis* electronic data banks in the public sector, 20 September 1974.

[99]CoE, Convention for the Protection of Individuals with regard to automatic processing of personal data, 28 January 1981, ETS 108. The recently adopted Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data aims to modernize the provisions of this Convention in the light of the ever-evolving technological advancements. CoE, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 10 October 2018, CETS No.223.

[100]ECtHR, *Klass and Others v. Germany*, Application No. 5029/71, 6 September 1978.

[101]ECtHR, *Malone v. the United Kingdom*, Application No. 8691/79, 2 August 1984.

[102]ECtHR, *Peck v. the United Kingdom*, Application No. 44647/98, 28 January 2003.

[103]ECtHR, *Leander v. Sweden*, Application No. 9248/81, 23 March 1987.

[104]ECtHR, *Rotaru v. Romania* [GC], Application No. 28341/95, 4 May 2000.

At this point, it should be highlighted that the Strasbourg Court also found the provisions of Article 8 ECHR applicable in cases with no relevance to the private home and the intimate sphere. Therefore, the notion of "private life" might embrace the development of interpersonal relationships and protect not only the domestic sphere; it might also concern data related to personal actions taking place in the public sphere which might amount to a clear intrusion to the individual's *inner circle*. For instance, in *Peck*, the disclosure to the media of footage filmed in public by a closed-circuit television camera, showing the applicant exercising suicide was deemed as a violation of Mr Peck's right to private life due to the fact that "the applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues. As a result, the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation (…)".[105]

The applicability of the protection offered under Article 8 ECHR to legal persons troubled the Court from a data protection perspective as well; it finally held in *Société Colas Est* following to the *Niemietz* litigation that "building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises". [106]

This never-ending evolution on the interpretation of the concept of private life towards a more effective protection of personal data made by the Strasbourg Court along with the numerous regulatory transformations of the EU Member states created the conditions under which the EU adopted several legal instruments with the aim to harmonise the national data protection legislations of its Member States. To this end, the EU *Data Protection Directive*,[107] adopted in 1995, was seen as "the leading force of globalizing data protection" [108]incorporating most of the principles and the requirements of the CoE system.[109]The Directive was later followed by the EU *Regulation 45/2001*[110] addressing EU legal bodies and by two more Directives covering more specified fields of the legal protection of personal data, namely the *Directive on privacy and electronic communications* [111] and the *Data Retention*

[105]Ibid, paras 62-63.
[106]ECtHR, *Société Colas Est and others v. France*, Application No. 37971/97, 16 April 2002, para 41.
[107]Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(Data Protection Directive), OJ 1995 L 281.
[108]BIRNHACK M., The EU Data Protection Directive: An Engine of a Global Regime, 24 *Computer Law & Security Report* 2008, p.508, 512.
[109]For the connection between the Convention 108 and the Data Protection Directive see the *Handbook in European Data Protection*,2014, available at http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf ,p.18.
[110]Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the institutions and bodies of the Community and on the free movement of such data, OJ 2001 L 8. Regulation (EC) 45/2001 was repealed by the Regulation (EU) 2018/1725, which came into force in 11 December 2018. Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ 2018 L 295.
[111]Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ 2002 L 201.

Directive. [112] Under the said legal framework, the CJEU, in the light of the dynamic jurisprudence on the matter of its Strasbourg counterpart, enlarged the scope of application especially of the Data Protection Directive and went so far as to apply its provisions outside the area of the internal market.[113] Therefore, in *Rechnungshof,*[114] in a case in which the Luxembourg Court pronounced on the applicability of the Directive with regard to the disclosure of data on employees' salaries,[115] it had also the opportunity to clarify that the implementation of the Directive's provisions by the national authorities should conform with the right to private life as contained in the ECHR. The Court particularly held that "(…) for the purpose of applying Directive 95/46, in particular Articles 6(1)(c), 7(c) and (e) and 13, it must be ascertained, first, whether legislation such as that at issue in the main proceedings provides for an interference with private life, and if so, whether that interference is justified from the point of view of Article 8 of the Convention."[116] The Court, in order to ascertain the existence of an interference which might constitute a breach of Articles 6 and 7 of Directive 95/46 and to determine whether this is justified, made use of the tools of the Strasbourg's case law applying the necessity and the proportionality test and balancing the competing interests under the scope of Article 8 ECHR.[117]

Moreover, the CJEU, in the famous *Lindqvist*[118] ruling delivered in the same year, took further steps to establish a more flexible interpretation of the Directive. *In casu*, a Swedish citizen published for charity reasons on the Internet personal data -and some sensitive ones- of her colleagues without their consent. Despite the negative approach of AG Tizzano[119] on the applicability of the Data Protection Directive, the Luxembourg Court reiterated in paragraph 42 that "cannot depend on whether the specific situations at issue in the main proceedings have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty".[120]To this respect, the Court, clearly influenced from the margin of appreciation doctrine of the ECtHR, in its attempt to weight up the main objective of the Directive, namely the free movement of personal data within the context of the internal market with the protection of private life, stated that "measures taken by the Member States to ensure the protection of personal data must be consistent both with the provisions of Directive 95/46 and with its objective of maintaining a balance between freedom of movement of personal data and the protection of private life. However, nothing prevents a Member State from extending the scope

[112] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC,(Data Retention Directive), OJ 2006 L 105, invalidated on 8 April 2014.

[113] DE HERT P., GURTWIRTH S., Data protection in the case law of Strasbourg and Luxemburg: constitutionalisation in action in GUTWIRTH S., Y. POULLET, P. DE HERT, J. NOUWT & C. DE TERWANGNE (eds.), *Reinventing Data Protection ?*, Springer Science Dordrecht 2009, p.18,19.

[114] Joined cases C-465/00, C-138/01, *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* [2003] ECR I-04989.

[115] See AKRIVOPOULOU C., Personal Data Privacy and Protection in a Surveillance Era: Technologies and Practices, *IGI GLOBAL* 2010, p.285-287.

[116]Supra note 114, para 72.

[117] LAUDATI L., *EU Court decisions relating to data protection*, OLAF DPO, 2014, available at http://ec.europa.eu/anti_fraud/documents/dataprotection/dpo/ecj_decisions_relating_data_protection_en.pdf .

[118] Case C-101/01 *Bodil Lindqvist,* [2003] I-12971.

[119] Opinion of Advocate General Tizzano in *Bodil Lindqvist*, delivered on 19 September 2002.

[120] Ibid, para 42.

of the national legislation implementing the provisions of Directive 95/46 to areas not included in the scope thereof provided that no other provision of Community law precludes it."[121]

Thus, despite the requirement of complete harmonisation deriving from the Directive, the national regimes enjoy, according to the Court's position, a wide *margin for manoeuvre* while implementing this legal instrument to areas not included to the scope of the internal market, taking always into serious consideration the maintenance of the balance between the conflicting rights of individuals.[122]It is clear that the Luxembourg Court rejected the more reserved path taken by the AG and refused to deem the fundamental right to the protection of private life as a secondary purpose or means for the achievement of the objectives of the Directive 95/46. Hence, the *Lindqvist* judgment could be positively appreciated "(…) for succeeding in making the 'successful marriage' between fundamental rights and fundamental freedoms, as established by the Community legislator in the Data Protection Directive, even more solid and stronger."[123]

However, apart from the guarantees provided by the EU secondary law with regard to the right to data protection, its explicit recognition as a fundamental right of equivalent value within the EU legal framework came with the adoption of the Charter of Fundamental Rights of the Rights of the European Union.The Charter, which came into force on 1st December 2009, not only contained a provision pertaining to the respect for private and family life, but also established independently the right to data protection.[124]Drafted a few years after the adoption of the Data Protection Directive, Article 8 of the Charter must be deemed as mirroring pre-existing EU data protection law and relevant jurisprudential principles. In this regard, the Charter, not only ensures the right to data protection in the first paragraph, but also establishes key data protection principles in the following paragraphs related to the consent of the data subject, the establishment of independent authorities supervising the implementation of the abovementioned principles and the access to documents.[125] The latter reflects the famous pronouncements of the ECtHR in the *Leander* and *Rotaru* cases.

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[121] Ibid, para 99.

[122] The Court was asked also whether the application of the Directive in the present case infringes Article 10 ECHR(freedom of expression) and ruled that " the provisions of Directive 95/46 do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order". Supra note 118, para 90.

[123] See *inter alia* TZANOU M., Balancing Fundamental Rights: United in diversity? Some reflections on the recent case law of the European Court of Justice on Data Protection, 6 *CYELP* 2010, p.63.

[124]The Article 8 of the EU Charter reads as follows: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority."

[125] Handbook on European data protection law, European Union Agency for Fundamental Rights and Council of Europe, 2014, available at https://fra.europa.eu/en/publication/2014/handbook-european-data-protection-law-2014-edition, p.20-21.

As previously analysed, the right to data protection does not constitute an "absolute prerogative and can be subject to restrictions in the general interest".[126] Besides its application in the context of the CoE system, data protection needs to be enforced in the EU system with respect for the scope of other competing rights. Nonetheless, the Luxembourg Court, even though it incorporated the lessons learned from the ECtHR jurisprudence, found it difficult to carry out this balancing task as outlined in the *Promusicae*[127] and *Satamedia*[128]cases.

Firstly, in *Promusicae,* in 2008, the Court was asked to reconcile the right to property and the right to an effective remedy with the data protection rules using as a source of inspiration the provisions of the Charter, since the latter lacked legally binding effect at that time. Subsequently to the refusal of Telefonica, a telecom network, to disclose to Promusicae, a NPO of holders of intellectual property rights, personal data of a number of persons against whom Promusicae intended to initiate civil actions, the Spanish Court asked for a preliminary ruling and particularly, whether the required data must be communicated under not only the provisions of the EU data protection secondary law but also of Articles 17 and 47 of the Charter. The CJEU ruled that "Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order."[129]As for the implementation of the Directives, the Luxembourg Court underlined that "the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality."[130]

Hence,the Court, after having sought for a clear response within the EU legal regime, namely the aforementioned Directives and the Charter,[131] showed a strong reluctance to provide the national court with an assessment on how the equilibrium between the conflicting human rights should be accomplished leaving enormous discretion to the Member States. The "blank check" approach of *the margin of appreciation* doctrine was heavily criticized on the basis of its future implications specifically in a field heavily regulated by the EU legislation.[132]

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[126] PEERS S., Taking Rights Away? Limitations and Derogations in PEERS S. and WARD A.(eds.), *The EU charter of fundamental rights politics, law and policy, essays in European Law*, Hart Publishing, Oxford and Portland Oregon 2004, p.141.

[127]Case C-275/06, *Productores de Música de Espana (Promusicae) v. Telefónica de Espana SAU* [2008] ECR I-00271, paras 54 and 60.

[128] Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECR I-09831.

[129] Supra note 127, para 70.

[130] Ibidem.

[131]After the adoption of the Charter, the Luxembourg Court treated this instrument, along with the ECHR, as a source of inspiration. Nevertheless, as Maria Tzanou correctly underlines: "[i]n *Promusicae*, however, the fact that the protection of personal data was enshrined in the Charter was enough for the Court of Justice to identify it as an autonomous fundamental right". Supra note 123, TZANOU, p.68. See also DOUGAN M., The Treaty of Lisbon 2007: Winning Minds, not Hearts, 45 *C.M.L.Rev.*, 2008, p.661-662.

[132] Ibid., TZANOU, p.68, See also KOSTA V., *Fundamental rights in EU Internal Market legislation*, Bloomsbury Publishing 2015.

The *laissez-faire* approach of the CJEU was reiterated in the *Satamedia* case. The Court attempted to resolve the conflict between data protection and freedom of expression and more particularly freedom of the press in the context of the interpretation of Article 9 of the *Data Protection Directive*,[133]which is designed to guarantee the compatibility with Article 10 ECHR as pointed out in the recital 37 of the preamble. The issue at stake was the Markkinapörssi and Satamedia's dissemination of the tax data of 1.2 million natural persons, made publicly available by the Finnish tax authorities. More specifically, these personal data related to the tax returns of the persons involved were collected to be published to the regional Veropörssi newspaper, or distributed using a text-messaging system through mobile phones.

After concluding that the activities of Markkinapörssi and Satamedia fall within the notion of *processing of personal data* as defined in the Directive 95/46, the Court overly expanded the notion of *journalistic purposes* apt to result in an exception or derogation in relation to the protection of personal data according to Article 9 of the Directive. In particular, the Court held that "in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Secondly, and in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary".[134]Moreover, the Court adopted the position of the AG Kokott that these rules are not applicable only to media undertakings but also to every person engaged to journalism and the journalistic activities may be undertaken for profit-making reasons.[135] At this point, we should focus on the AG's assertion on the present case who providing a solid human rights reasoning[136] reminded that, in respect of the provisions of Article 8(2) and Article 10(2) and the Strasbourg's jurisprudence, the EU has "by means of the Data Protection Directive, extended data protection to processing by individuals" and subsequently, pointed out that "the restriction of both fundamental rights is in principle permissible, subject to comparable conditions. It must be laid down by law, it must conform with one or more of the legitimate aims of Article 8 or Article 10 of the ECHR and it must be necessary in a democratic society, that is to say, an imperative need may justify interference if it is in reasonable proportion to the legitimate aim in question."[137]

As both the AG and the Luxembourg Court confirmed that within the broad discretion conferred to the national authorities by the Directive, a fair balance between the freedom of expression and the protection of personal data must be found, the failure of the Court to confine the concept of journalism solely to matters of public interest raised questions with regard to its

[133] Article 9 of the Data Protection Directive provides that: "Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."
[134] Supra note 128, para 58.
[135] Ibid., para 61.
[136] Opinion AG Kokott paras 38-44.
[137] Ibid, paras 41-42.

compatibility with the invoked Strasbourg's case law[138] and the spirit of the Data Protection Directive. For Oliver "the problem is that the Court's open ended ruling appears to allow national courts virtually unfetted discretion in defining the concept of 'journalism'. That is especially unfortunate, given that the Data Protection Directive is based on Article 95EC, which provides for the adoption of legislation designed to remove obstacles to trade within the internal market (…)".[139]

The case law left unanswered questions concerning the effective implementation of EU harmonization measures[140] such as the Data Protection legislation since the Court of Justice has given large room for *manoeuvre* granted to the Member States.[141]The latter was confirmed in the judgment of the ECtHR of 21 July 2015 on the same case[142] in which the Strasbourg Court concluded that the Finnish authorities struck a fair balance between the data protection legislation and the freedom of expression as it ruled that no violation of Article 10 ECHR had occurred. The Strasbourg Court, after having referred to the preliminary ruling of the CJEU, reaffirmed the criteria of its case law applicable in cases in which fundamental rights enshrined in the Convention come in conflict with each other.[143] Confirming explicitly the wide *margin of appreciation* afforded to the domestic courts by the CJEU, the ECtHR accepted the pronouncement of the Finnish Supreme Administrative Court that the publication of personal tax data by the applicants could not be considered as journalistic activity, particularly due to the fact that the exceptions for journalistic purposes as established in the Personal Data Act and Article 9 of the Data Protection Directive require a rather narrow and strict interpretation.[144]

Nevertheless, given the previous jurisprudential position of the Court and the fact that ,in the present case, the personal data were already available in the public domain[145] the ECtHR failed to offer helpful guidance to the national authorities concerning the reasons for which "a more limited publication of the taxation data in other media is acceptable under the exception

[138] In its recent jurisprudence, the ECtHR reaffirmed its well-established criteria when seeking to reconcile the right to freedom of expression with the right to respect for private life, namely whether the event that the published article concerned was of general interest: the arrest and conviction of a person was a public judicial fact and therefore of public interest, whether the person concerned was a public figure, how the information was obtained and whether it was reliable. ECtHR, *Axel Springer AG v. Germany* [GC], Application No. 39954/08, 7 February 2012, paras 90 and 91.

[139] OLIVER P., The protection of privacy in the economic sphere before the European Court of Justice, 46 *C.M.L.Rev.* 5, 2009, p.1463.

[140]As Magdalena Forowicz underlines the EU harmonization is "directly linked to the level of discretion attributed to States by the [CJEU] and its willingness to attribute additional room for manoeuvre for States", FOROWICZ M., State Discretion as a Paradox of EU Evolution, *EUI Working Papers MWP2011/27*, 2011, p.19.

[141]See particularly for the application of the margin of appreciation doctrine to the EU system in MENA PARRAS F. J., From Strasbourg to Luxembourg? Transposing the margin of appreciation concept into EU law, Centre Perelman de Philosophie du Droit, *Working Paper 2015/7*, p.15-16.

[142] ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland,* Application no. 931/13, 21 July 2015.

[143] ECtHR, *Von Hannover v. Germany* (no. 2) [GC], Application Nos. 40660/08 and 60641/08, 7 February 2012; *Armellini and Others v. Austria,* Application No. 14134/07,16 April 2015, para 42.

[144] Ibid, para 70.

[145]The ECtHR had previously followed a clear-cut appraisal on the matter since it had amounted to a breach of Article 10 (freedom of expression) in cases in which journalists or editors were found to have published information giving particular emphasis to the principles of responsible journalism or professional ethics. ECtHR, *Observer and Guardian v. the United Kingdom*, Application No. 13585/88,26 November 1991; *Fressoz and Roire v. France*, Application No. 29183/95, 21 January 1999.

of journalistic activity, and why precisely, from what extent onwards or under what type or form of journalistic presentation, the publication of the taxation data becomes illegal."[146]

Another case brought before the CJEU, in which the reconciliation of conflicting human rights was at issue with the needed guidance offered by the CoE system,[147] is the famous *Bavarian Lager* case.[148]In this case, the Court pronounced on a Commission's appeal seeking annulment of the General Court judgment.[149] The latter, having applied the Article 8 ECHR test, annulled a Commission's decision denying the Bavarian Lager, a company importing German beer into the UK, the access to a copy of the full minutes of a meeting organised by the Commission including personal data of the attendees on the basis of Article 4(1)(b) of *the Access to Documents Regulation.*[150] Furthermore, it is worth mentioning, at this point, that AG Sharpston paid in her Opinion [151] particular attention to the use of the necessity and proportionality test within the meaning of Article 8 ECHR. In fact, in order to determine which EU Regulation is applicable in case of request for access to documents, he distinguished two separate categories of documents.[152] The first one (B-1) contains documents with an incidental mention of personal data, where the primary purpose of compiling the document has little to do with personal data since the aim of the collection of such documents is to store information in which personal data are of little importance. The second category consists of documents incorporating a large number of personal data as the aim is to actually collect such personal data. Therefore, "for b-1 documents, the procedure established in Regulation No 1049/2001 will be followed. However, because they also contain personal data, it will be necessary to apply the Article 8 ECHR test on a precautionary basis in order to assess whether access to the full, unexpurgated text of the document should be refused because such unrestricted disclosure would violate the data subject' s privacy. The obligation to apply that test derives from Article 4(1)(b) of the Access to Documents Regulation, which requires account to be taken of the privacy and integrity of the data subject."[153]On the other hand, "requests for b-2 documents, on the other hand, will be subject in their entirety to the procedure outlined in Regulation No 45/2001."[154]

As the accomplishment of an equilibrium between the *Access to Documents Regulation* and the *Data Protection Regulation* was actually under sought, the CJEU did not seem to adopt

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[146]VOORHOOF D., *ECtHR accepts strict application of data protection law and narrow interpretation of journalistic activity in Finland*, Strasbourg Observers Blog 2015, available at https://strasbourgobservers.com/2015/08/12/ecthr-accepts-strict-application-of-data-protection-law-and-narrow-interpretation-of-journalistic-activity-in-finland/ .

[147]See also the CoE, Committee of Ministers (2002), Recommendation Rec(2002)2 to member states on access to official documents, 21 February 2002; Council of Europe, Convention on Access to Official Documents, CETS No. 205, 18 June 2009.

[148]Case C-28/08 P, *European Commission v. The Bavarian Lager Co. Ltd*, [2010] ECR I-06055.

[149]T-194/04, The *Bavarian Lager Co. Ltd v. Commission*, [2007] ECR II-04523.

[150] According to Article 4(1)(b) of the *Access to Documents* Regulation "The institutions shall refuse access to a document where disclosure would undermine the protection of: privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data". Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145.

[151] Opinion of the AG Sharpston in *Bavarian Lager* delivered on 15 October 2009.

[152] Ibid, paras 163-166.

[153] Ibid., para 164.

[154] Ibid., para 165.

the AG' appraisal, set aside the judgment of the General Court[155] and particularly held that the Access to Documents Regulation provided "a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public".[156] Furthermore, the Court emphasized the consent of five participants at that meeting, and it finally ruled that "as Bavarian Lager has not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission has not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced",[157] as required by the Data Protection Regulation.

As the freedom of expression is nowadays applied in the modern media environment, balancing this fundamental right with the right to the protection of the private life of individuals interacting in the digital world is constantly causing severe hardships to both the European legal mechanisms. It is in this context that the famous *Google Spain* case[158] should be examined with regard to the applicability of data protection legislation to internet search engines. In the light of several post-Lisbon judgments of the CJEU recognizing the *valeur juridique* of the EU Charter and enhancing the individuals' protection through a rather strict interpretation of the data protection law, [159] this milestone ruling of the Court was seen by some scholars[160] as conferring to the data subjects the right to be forgotten and to control, therefore, their online reputation. Particularly, in *Google Spain,* M. Gonzalez who asked for the deletion of the published information in the online version of La Vanguardia newspaper regarding his personal data related to his participation to a real-estate auction held in 1998, alleged *inter alia* that when an internet user searched for his full name in the Google search engine, he would obtain access to two links to the newspaper's website on which the announcements with his personal data appeared. As the publisher of La Vanguardia and Google Spain, which in the meantime forwarded M. Gonzalez's request to the Google Inc., denied to remove or rectify the relevant information, he, subsequently, addressed his complaint to the Spanish DPA. The latter rejected the request as far as the newspaper was concerned; nevertheless, it ordered Google Spain to delist the aforementioned information from its search results.

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[155] The Court of First Instance (now General Court) adopted the threshold theory, specifically inspired from the ECtHR reasoning in similar cases, and concluded in para 123 that "the mere fact that a document contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected, even though professional activities are not, in principle, excluded from the concept of 'private life' within the meaning of Article 8 of the ECHR". Supra note 154, para 123. Unlike *Osterreichischer Rundfunk*, the disclosure of the names of persons acting as members of a collective body, whose personal opinions cannot be identified does not necessarily amount to a violation to the right to protection of private life.

[156] Supra note 148, para 60.

[157] Ibid., para 78.

[158] Case C-131/12, *Google Spain SL και Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] published in the electronic Reports of cases.

[159] See inter alia *PNR*, *Volker* and *Digital Rights Ireland* cases, discussed below.

[160] IGLEZAKIS I., *The Right To Be Forgotten in the Google Spain Case (case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?*,2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472323;POST R., Data Privacy and Dignitary privacy:Google Spain, the Right to be forgotten, and the construction of the public sphere, 67 *Duke Law Journal* 2018, pp. 981-1072.

In this factual context, the Court was expected to pronounce on the material scope[161] of the Data Protection Directive and particularly on whether the activity of internet search engines, namely the indexing automatically, storing temporarily and finally making available information published on different websites to internet users according to a particular order of preference,[162] fall within the notion of "processing personal data" according to Article 2(b) of the Directive. The Court found the latter applicable to search engines operators like Google as it considered them as controllers of the processing stating specifically that "[i]t is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the 'controller' in respect of that processing pursuant to Article 2(d)."[163]In response to the Google's allegations that no personal data processing relating to its search engine took place in Spain and that its processing was exclusively carried out by Google Inc., the Court, examining, hence, the territorial scope of the said legislation adopted an extraterritorial interpretation and ruled that "the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable."[164]In other words, the activities of the subsidiary are "inextricably linked" to those of the search engine operator such as the activities of the Google headquarters in the U.S.A in view of the fact that these activities allow the Google Inc. to be economically workable.[165]

Finally, the Court was asked about the extent of the responsibility of the search engines operators and therefore, the applicability in the present case of Articles 12(b) and 14(1)(a) of the Data Protection Directive establishing the right to erasure, rectification or blocking of the processing of personal data. Unlike the position of the AG Jääskinen on the matter,[166] according to the CJEU's assertion, these provisions should be interpreted as to grant to the data subject the right to have a search engine delist from its search results the links (related to his name) to websites published by third parties. However, the Court emphasizes that this right must be balanced with the legitimate interests of the internet searchers with regard to the relevant provisions of the Charter, namely Articles 7 and 8 of the Charter. Additionally, the CJEU stated "whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data

[161] Regarding the material scope of the Directive's application see also KULK S. and ZUIDERVEEN BORGESIUS F., *Google Spain v. González*: Did the Court Forget about Freedom of Expression?, *European Journal of Risk Regulation* 2014,p.3 and KUNER C., *The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines*,LSE Law, Society and Economy Working Papers 3/2015 also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496060##, p.7.
[162] Supra note 158, *Google Spain*, paras 20-21.
[163] Ibid, para 33.
[164] Ibid, para 55.
[165] Ibid, para 56.
[166] Opinion of AG Jääskinen in *Google Spain* delivered on 25 June 2013.

subject' s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life."[167]

This almost absolute priority given to data protection rights over the interests of the internet users or the economic interests of the search engines operators was later justified by the judges of the Luxembourg as they underlined the dangers of the digital age stating that "[g]iven the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites."[168]

From the fundamental rights perspective, even though it is clear that, especially after the attribution of full legal effect to the Charter, the CJEU sought to ensure a higher level of protection for the EU citizens with regard to the data protection law opting for a broader interpretation of the relevant legislation, this ruling caught many by surprise. The Luxembourg Court, in *Google Spain*, definitely made some bold pronouncements of paramount importance. For the first time -and before the adoption of the General Data Protection Regulation- explicitly recognised the right of an individual to have personal data suppressed from the list of search results made available by an internet search engine and based on a search made on the individual's name. Nevertheless, the Court's judgment dealt with only one aspect [169]of the right to be forgotten as enshrined for the first time in Article 17 GDPR since it only focused on its application to Internet search engines and thus, it seems inaccurate to misinterpret the decision as concluding to a comprehensive recognition of the right to be forgotten.[170]To this regard, Christofer Kuner explains that "[a] careful reading shows that the right affirmed by the Court is that of obliging the operators of Internet search engines to suppress links to web pages from the list of search results made on the basis of a person' s name (see para. 100), not a right to have data itself deleted from the Internet. Indeed, search engines could not themselves delete information from the web sites that they index, since these reside on servers hosted by other parties."[171]

In addition to this critique, the judgment is deemed to have severely neglected the freedom of expression, particularly in the aftermath of several cases that required a fair balance between the right to privacy, the right to data protection and the freedom of expression. Despite the fact that the Court gave particular attention to the fundamental rights dimension of the present case acknowledging the implementation of the relevant data protection regime through the Charter's lens (Articles 7 and 8), the Court contented itself with a brief reference to the need of reconciliation between the right of a person to have information related to him erased with the right of the Internet users and the economic interests of the providers without even an

[167] Ibid, para 81.
[168] Ibid, para 84.
[169] This actually constitutes one of the limitations of the judgment. Judging from the notion of Internet search engines as seen in the Google Spain decision, search engines like Google, Yahoo etc are covered but it remains unclear whether a number of others are left out. For instance, the question remains open for websites with large-scale search function such as social networks, Internet archives, news databases, which are also overly used by millions of individuals.
[170] IGLEZAKIS I., supra note 160, p.12
[171] KUNER C., supra note 161, p. 7.

explicit reference to the freedom of expression also guaranteed by the Charter in Article 11[172] or the relevant provision of the ECHR. Clearly prioritizing the right to data protection over the freedom of expression of multiple parties, the Luxembourg Court seemed to ignore not only its prior case law but also the Strasbourg's approach in similar cases according to which "as a matter of principle these rights deserve equal respect."[173]

Nevertheless, the CJEU examined all the issues raised by the referring court from the data protection perspective. In fact, the CJEU avoided to refer to the specific criteria[174] laid down in the jurisprudence of its Strasbourg counterpart when weighting Article 8 and Article 10 which particularly includes the right to receive and impart information. It is more than clear that the suppression of search results may amount to an interference with the freedom of expression[175] of the original publishers of information and the public's right to find information of general interest on the web.[176]In this context, the fact that the CJEU gave de facto "*as a general rule*" the primary role to the right of data protection, in clear contrast with the well-established case law of the ECtHR, "implies an unfortunate departure from the case law on balancing of the ECtHR".[177]

To sum up, the key judgment in *Google Spain* perfectly mirrors the readiness of the CJEU to enhance the data protection legal standards[178] while implementing the Lisbon

[172]The provision of Article 11 CFR reads as follows: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected."

[173] See supra note 143, para 106.

[174] After the acknowledgment of the need of reconciliation of the conflicting rights, the CJEU mentions, in paragraph 81, as an aspect which needs to be taken into account, that "the role played by the data subject in public life". See supra note 158, para 81.
This reference is a clear influence from the Strasbourg's position on similar cases since the ECtHR examines, inter alia, How well known is the person concerned. See also the Axel case of the ECtHR, supra note 138, paras 89-95.

[175]Van Hoboken pointed out that "[t]he protected interests of information providers under the right to freedom of expression can be best understood as the freedom to be included in the search engine's index and to find their way to an audience." VAN HOBOKEN J, *Search Engine Freedom. On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines,* Alphen aan den Rijn: Kluwer Law International, 2012, p. 351.

[176]At this point we should also point out the warnings expressed by the AG according to whom "[t]his would entail an interference with the freedom of expression of the publisher of the web page, who would not enjoy adequate legal protection in such a situation, any unregulated 'notice and take down procedure' being a private matter between the data subject and the search engine service provider. It would amount to the censuring of his published content by a private party", Opinion of Advocate General Jääskinen in *Google Spain*, para.134.

[177] KUNER, supra note 161, p.8.

[178] Whilst the GDPR is now in force, the Luxembourg Court drew inspiration from the *Google Spain* and went further to enhance the protection offered since it expanded the concept of controller in case of joint controllers as it is the case of Facebook fan pages in Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* [2018], published in the electronic Reports of Cases. Recently, it also applied the EU data protection legislation to the data collected by Jehovah witnesses while exercising door-to door preaching. The Court recalled the well-established broadness of the definition of personal data enshhined in the Directive and held that the manner with which the said data was structured by Jehovah witnesses amounts to a "filing system" in the sence of the Directive. Case C- 25/17, *Tietosuojavaltuutettu v Jehovan todistajat*[2018], published in the electronic Reports of Cases. See also the judgment of the CJEU in *Nowak* in which it ruled that exams scripts also fall under the scope of application of the Data Protection Directive and the GDPR. Hence, some limitations to the access to this type of data can be implemented. Compare with the ECtHR's case against *Montenegro.* In a case in which the core issue was the camera surveillance of academic lectures in a university, the Strasbourg Court saw the case also through the lens of academic freedom as an aspect of freedom of expression. Case C-434/16, *Peter Nowak v Data Protection Commissioner* [2017], published in the

framework particularly in the light of the new EU General Data Protection Regulation[179] in 2012.[180]However, its implications raised questions as the Court seemed reluctant to shed light to several issues with regard to the disproportionately broad scope of the Directive's application and the exercise of balancing of the individuals' fundamental rights. Hence, as Kuner correctly deduced "the judgment provides a strong affirmation of online data protection rights, but fails to indicate a way forward for their effective implementation and realization, the development of which will likely be a struggle for data controllers, DPAs, and courts".[181]

d) The right to private and family life in migration and asylum cases

Similarly to the CJEU's approach in the new field of data protection, the enormous migration flows forced the CJEU to halt from prioritizing the internal market values and to engage with another new area which needed to be also regulated by the EU legislation.

In fact, as far as the EU legislation is concerned, a person seeking asylum or protection from expulsion is subjected to diverse treatment according to his/her nationality or citizenship, and this provokes, consequently, a hierarchical classification of rights between different people living within the EU. Therefore, there is a hierarchy of legal residents, with the Union citizens at the apex and Third Country Nationals (hereinafter TCNs)[182] with no connection with EU citizens at the bottom of the ladder.[183] EU citizens and their family members, including TCNs, enjoy, thereby, a privileged position as they are protected by EU citizenship/free movement legislation and thus, are very rarely subjected to expulsion or refusal of entry. Regarding EU citizens and the wide scope of the right of free movement they enjoy, they may be subjected to some derogations to this principle,[184] as these are enshrined in Article 45(3) TFEU, and in the

electronic Reports of Cases. ECtHR, *Antovic and Mirkovic v Montenegro*, Application no. 70838/13, 28 November 2017. See on these cases WOODS L., *Facebook fan pages and EU data protection law: the implications of Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH*, EU Law Analysis Blog 2018, available at http://eulawanalysis.blogspot.com/2018/07/facebook-fan-pages-and-eu-data.html ; PEERS S., *Privacy and data protection in universities: recent ECJ and ECtHR rulings*, EU Law Analysis Blog 2017 available at http://eulawanalysis.blogspot.com/2017/12/privacy-and-data-protection-in.html ; PEERS S., *Is Data Protection Coming Home? The CJEU on data protection law and Jehovah's Witnesses – and political canvassing?*, EU Law Analysis Blog 2018, available at http://eulawanalysis.blogspot.com/2018/07/is-data-protection-coming-home-cjeu-on.html .

[179] The EU General Data Protection Regulation explicitly enshrines the "right to be forgotten" in Article 17.

[180] This tendency of the CJEU is equally illustrated in several recent judgments and especially in the *Digital Rights Ireland* which will be discussed in the following Chapter.

[181] KUNER, supra note 161, p.21.

[182] Third Country Nationals(TCNs) are basically transnational migrants and their legal status differs from EU citizens and it is determined from their conditions of entry or residence.

[183] MORANO-FOADI S. and ANDREADAKIS S., The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence, 22 *EJIL* 4, 2011, p. 1076.

[184] Despite the broad scope of the right of free movement, there are some exceptions to this principle. These are laid out in Article 45(3) TFEU and in Article 27 of the Free Movement Directive 2004/38 which provides specific circumstances in which EU citizens can be expelled from or refused entry to another Member State and refers to grounds of public policy, public security, or public health, but these grounds cannot be invoked to serve economic ends.

Free Movement Directive.[185] According to the abovementioned legal framework, EU citizens can be expelled or refused to entry *on the grounds of public policy, public security, and public health*.

The Luxembourg Court reaffirmed the position of the EU institutions and refused to restrict the mobility of the Union's citizens within the borders of the Union (through the measure of the expulsion or deportation) unless justified and stated that they have the benefit of an equivalent legal status to the Member State's own nationals. These derogations are only related to the personal conduct of the individual concerned. Previous criminal convictions are not in themselves grounds for expulsion. In *Adoui and Cornuaille* [186] the CJEU ruled that Member States, exercising a non-discrimination test, may not order an expulsion from their territory or a refusal of entry to a national of another Member State or refuse entry by reason of criminal conduct which, as the Court underlined in para. 52, "when attributable to their own nationals, does not give rise to genuine and effective or repressive measures intended to combat such conduct." In 2003, the Court extended the guarantees concerning deportation. Thus, the CJEU held, in *Oulane*, that "detention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement."[187]

The CJEU had also the opportunity in *Orfanopoulos and Oliveri case* [188]as well as in the more recent *Tsakouridis* ruling, to clarify the sense of *imperative grounds of public security*. Through its jurisprudential approach in *Orfanopoulos and Oliveri*, the Court specified the requirements of a lawful expulsion which are listed in Articles 27 and 28 of the *Citizenship Directive.*[189] The CJEU held that an expulsion order must not only be based on a previous criminal conviction as such a measure is not compatible to EU law and it ruled that "the concept of public policy presupposes the existence in addition to the perturbation of the social order involving any infringement of the law of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[190]

Confronted with vast migration flows, the EU regime faced also the necessity to protect particularly the fundamental rights of third country nationals, whose protection against

[185] Directive 2004/38/EC of the Council and European Parliament on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive), OJ 2004 L 158/77.
[186] Joined cases C-115 and 116/81, *Adoui and Cornuaille v. Belgium* [1982] ECR 1665.
[187]Case C-215/03, *Salah Oulane v. Minister voor Vreemdelingenzaken en Integratie* [2005], ECR I–01215 para 40; See also Case C-157/79, *Pieck* [1980] ECR I–2171 paras 18 and 19; Case C-265/88, *Messner* [1989] ECR 4209 para 14; Case C–459/99, *Mouvement Contre le Racisme, l'antisémitisme et la Xénophobie ASBL (MRAX) v. Belgian State* [2005] ECR I–6591 para 78.
[188] Joined Cases C-428 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg* [2004] ECR I–5257.See also Case C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis*[2010] I-11979.
[189] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizenship Directive), OJ 2004 L158/77.
[190] Ibid, paras 66-67.

expulsion is definitely more complex and is carried out on a lower level of protection.[191] Within this legal context, the *Directive on Third Country Nationals* [192]who are Long-Term Residents was adopted by the Council including guarantees for a secure residence right and free movement for either economic or other purposes across the EU for (most) TCNs, who have completed five years' lawful residence in a Member State's territory.

However, the migration jurisprudence revolves mostly around family reunification cases as the phenomenon of TCNs who are family members of EU citizens invoking the EU legislation as well as Article 8 of the ECHR, is more and more frequent.[193]It is in this particular field,that a significant convergence with the Strasbourg Court occurred.[194]

Notably, for some scholars the Strasbourg Court's case law[195] is mainly integrated in the aforementioned Directive on the protection of family reunification.[196]

Moreover, the *Baumbast* ruling[197] in 2002 constituted the leading case in the area of free movement as it paved a new route of social solidarity within the EU borders. Mr. Baumbast, a German citizen who, after having pursued an economic activity in the UK, was hired by German companies outside the EU. The UK authorities refused to renew Mr. Baumbast's residence permit as he did not qualify anymore in the UK as a migrant worker and did not satisfy the conditions for a general right of residence but his family lived in the UK and his children went to school there. The issue at stake in this case was whether persons living in a Member State as family members of an EU migrant worker continue to enjoy the protection offered by the provisions of EU law when he or she no longer constitutes a migrant worker. The Luxembourg Court held that the Treaty does not require that citizens of the Union should necessarily have a professional or trade activity in order to enjoy the right of free movement in the EU. Consequently, simply as a national of a Member State, Mr. Baumbast was allowed to invoke the right to reside in the country's territory emphasizing in its direct effect. In this case, the children of an EU worker were allowed to exercise the right to residence in the UK in order to complete their education even after their father ceased to work there. Hence, the Court

[191] Nevertheless, at this point, we have to distinguish between third- country nationals who are family members of EU citizens and Turkish nationals who are covered by the EEC Turkey Association Agreement- Decision 1/80 of the Association Council and other third-country nationals.

[192] Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents, OJ 2004 L16/44.

[193] See DE BRUYCKER P. and LABAYLE S., *The influence of ECJ and ECtHR case law on asylum and immigration*, Study of the Policy Department C: Citizens' rights and constitutional affairs, European Parliament, 2012, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462438/IPOL-LIBE_ET%282012%29462438%28SUM01%29_EN.pdf .

[194] The first case of CJEU with reference to the Article 8 ECHR was the *Rutili* case. Case 36/75, *Rutili v. Ministre de l'intérieur* [1975] ECR 1219.

[195] Reluctant to admit the severe impact of CJEU's case law on its own jurisprudence, the ECtHR cited for the first time a Luxembourg's decision in 2005.

[196] "The Court's criteria for the protection of family life may serve as the human rights standard for the Family Reunification Directive, while its jurisprudence on the protection of the long-term residence status would become the parameter for the rights of long-term residents under Directive 2003/109.73 More specifically, the eight '*Boultif* criteria' may guide the interpretation of the public order provisions present in Article 17 of Directive 2003/8674 and Article 12 of Directive 2003/109.", MORANO-FOADI and ANDREADAKIS, supra note 183, p.1083.

[197] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002], ECR I-07091.

adopted clearly the approach of the Advocate General Geelhoed who saw the entire case in the light of the Article 8 ECHR in order to protect the right to family life of these children.[198]

The same latitude in the interpretation of similar provisions is observed in the recent *Ruiz Zambrano* case[199] in which the applicants challenged similar circumstances and the CJEU seized the opportunity to contribute to the development of the concept of the EU citizenship. More specifically, it assumed that EU citizenship law not only precludes Belgian authorities from refusing Mr. Ruiz Zambrano, a TCN, the right of residence and work permit, but also from depriving his minor children, EU citizens and totally dependent on their parents, of the right to stay within the EU territory.

In the same spirit, the *Carpenter* case [200]was one of the cases that rendered the CJEU's approach most evident, and presented a really concrete fundamental rights-based doctrine. In this case, Mrs. Carpenter, a national of the Philippines applied for a permit to stay in the UK, as a spouse of a British national but her application was rejected and a deportation order was issued. Yet, the Luxembourg Court, after having examined whether the breach declared meet the requirements of Article 8 as they have been illuminated by the Strasbourg case law (accordance with the law, necessary in a democratic society), within the context of the provision of services by Mr. Carpenter who was running a business in UK, held that EU law recognises the right to family life of the Article 8 ECHR and that the deportation of Mrs Carpenter does not constitute a fair balance since it would definitely cause a separation of the applicant's family. More precisely, the Court pointed out that the deportation would amount to "an interference with the exercise by Mr. Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter "the Convention"), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in

[198] The CJEU confirmed this appraisal in Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] I-01107 and in Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] I-09925.See also the recent case of the CJEU in which the latter dived into the notion of 'direct descendants' in the sence of the EU Citizenship Directive and the CFR.The factual basis of the case concerned the child-guardian relationship under the *kafala* system(a form of guardianship in Algeria) and whether this falls under the scope of family life. The Court responded in the affirmative and relied on the similar pronouncements of the Strasbourg Court in *Chbihi Loudoudi and Others v. Belgium* and *Harroudj v. France.* Case C-129/18, *SM v Entry Clearance Officer, UK Visa Section*,[2019] published in the electronic Reports of Cases, para 66; ECtHR, *Harroudj v. France*, Application No. 43631/09, 4 October 2012; *Chbihi Loudoudi and Others v. Belgium* Application No. 52265/10, 16 December 2014; PEERS S., *Guardianship, free movement and the rights of the child: the SM judgment*, EU Law Analysis Blog 2019,available at https://eulawanalysis.blogspot.com/2019/03/guardianship-free-movement-and-rights.html?fbclid=IwAR30Xpr9yQYl5okNYBnqgwmFWlrLrvZ7A_00jl62pbgqqtFkYUWgf8nSMEc .

[199]Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi*, [2011] ECR I-01177. See also Case C-202/13, *McCarthy v. Secretary of State for the Home Department*,[2014] published in the electronic Reports of Cases; Case C- 256/09, *Murat Dereci and Others v Bundesministerium für Inneres*[2011] ECR I-11315, RICHARDS T., Zambrano, McCarthy and Dereci: Reading the Leaves of EU Citizenship Jurisprudence, 17 *Judicial Review* 3, 2012, pp. 272-285. See also the most recent judgment of the Court in which it reviewed the denaturalization regime of the Netherlands touching upon some core issues of EU citizenship. Case C-221/17, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken,* [2019] published in the electronic Reports of Cases.

[200]Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279. Similar position has been adopted by the Luxembourg Court in its MRAX case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State,* [2002] ECR I-06591.

Community law".[201]In other words, drawing from the ECtHR's interpretation, the measure was declared disproportionate with its aim and for that reason, void.

Therefore, in the realm of the direct application of certain rights of the ECHR such as the right to private and family life, we should not oversee the fact that the CJEU seems to have been obviously influenced by the *margin of appreciation* doctrine introduced by the Strasbourg Court in the 90's leaving more and more discretion to the Member States to balance the EU law provisions with the fundamental rights at risk.[202]

Having said all the above, it becomes apparent that Article 8 of the Convention along with its enlargement of its scope of application in order to incorporate and thus, protect, different notions of private or family life, offered a field of law apt to encourage not only the judicial dialogue between the Luxembourg Court and its Strasbourg peer but also the intrusion of the Court into areas, partially regulated by EU law, in which, however the proper observance of fundamental rights was not easily accomplished.

[201] Ibid., para 41.
[202]See *Bodil Lindqvist,* supra note 118 and *Österreichischer Rundfunk* case, supra note 114.

2. Articles 6 and 13 ECHR within the EU system: The interpretation of the procedural principles

It goes without saying that the right to a fair trial enshrined in Article 6 ECHR[203] as well as the right to an effective remedy under Article 13 ECHR[204] are of paramount importance due to the fact that, besides the fundamental human rights prescribed in the said articles, they also guarantee the enforcement of the other provisions of the Convention and thus, the embodiment of the rule of law formed by the ECHR.[205]

Looking from the Luxembourg's perspective, the different aims and objectives of the two European legal jurisdictions provided originally little room for interplay regarding the protection of the individuals' legal position in light of Articles 6 and 13 ECHR. However, the CJEU started *petit à petit* to examine thoroughly the allegations of the parties which concerned procedural guarantees, as ensured by the ECHR and the rich jurisprudence of the Strasbourg Court on the matter, forcing the CJEU to apply the Convention's standards to cases covered mostly by EU law. The direct application of the ECHR's provisions related to procedural guarantees under Articles 6 and 13 has recently changed its form, though, in the post-Lisbon era in which, the EU Charter was granted legally binding force, the rights to an effective remedy and to a fair trial evolved from *general principles of EU law*, through the interpretation of the CJEU in the light of the ECHR, to fundamental rights codified in Articles 47 and 48 of the EU Charter.[206]

Focusing more on the Charter's corresponding safeguards we should highlight that the remarkable influence of the ECHR on the language of Article 47 EUCFR is more than obvious[207] as the first paragraph guarantees the right to an effective remedy before a court

[203] Article 6 ECHR provides that: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[204] The notion of the right to an effective remedy as enshrined in Article 13 ECHR is defined as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[205] See the Preamble to the Convention.

[206] Article 47 of the Charter reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". Article 48 of the Charter provides: "1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed."

[207] Explanations related to the Charter of Fundamental Rights, OJ 2007/C 303/02.

formulated similarly to Article 13 ECHR and the second paragraph covers similar ground as Article 6(1)ECHR. As also confirmed by the explanatory document of the Charter, notwithstanding the differences with regard to the scopes of application of the aforementioned safeguards, "*the guarantees afforded by the ECHR apply in a similar way to the Union*".[208]Finally, the last paragraph concerning the right to legal aid has its echo in the well-established case law of the Strasbourg Court, even though it is not *expressis verbis* laid down in the ECHR. The Strasbourg's jurisprudence needs to be taken into account in order to determine the content and scope of the Charter's provisions according to the wording of Article 52(3) CFR.[209]Additionally, the presumption of innocence and right of defence, as enshrined in Article 48 CFR, correspond to the rights laid down in Article 6(2)(3) and have the same meaning and scope as the rights guaranteed by the ECHR.[210] Moreover, while Article 6 ECHR is engaged to the determination of civil rights and criminal charges, Article 47 CFR covers not only rights and freedoms guaranteed by the Charter but also rights emanating from the entire EU legal order (the secondary law included).[211]It should be also highlighted that the procedural rules stemming from the abovementioned provisions cover not only individuals but also Member States when challenging decisions of the EU bodies before the CJEU. In these terms, the protection offered by the Charter is considered to be more extensive[212] than the protection guaranteed by the Convention.

In this multi-level context, it would be helpful to examine the protection offered by the Luxembourg Court in the field of these procedural guarantees in a twofold manner. At first, we should focus on the *proper procedural safeguards* that the Court endeavoured to ensure with a particular emphasis to the core components of the Convention's and then the Charter's specific rules such as the fairness of the hearing and the elements which actually render a remedy effective for the litigants. Secondly, we will discover the position of the Luxembourg Court towards the *minimum standards for defence rights* which play the central role of fundamental tools in the hands of both individuals and, in some cases, of the EU system as a whole.

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[208] Ibid., Explanation on Article 47 EUCFR.

[209] Article 52 EUCFR on the scope of the guaranteed rights provides: "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." See also the Explanation on Article 52 EUCFR.

[210] See Explanation on Article 48 EUCFR.

[211] "Further in light of the principle of the indivisibility of rights that is inherent in the whole Charter of Fundamental Rights, the requirement for judicial review and possibility for reparation exists equally for social and economic rights protected either by the Charter directly or governed measures of Community law. Thus Article 47 potentially renders a variety of social and economic rights justiciable." CARIOLOU L., Article 47, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, available at http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf ,p.360.

[212] See also regarding the sources and the field of application of the right to a fair trial PERAKIS M., *The judicial protection of fundamental rights in the European Union*[in Greek], Nomiki Vivliothiki 2015,p. 317-318.

a) The core elements of fair trial and effective remedy: The protection of legal persons

Starting from the *Johnston* case[213] in which it noted that the principles of effective judicial control as laid down in the ECHR "*must be taken into consideration in Community law*",[214] the Luxembourg Court, in fact, reiterated this approach [215] applying more and more, in the years that followed, these procedural safeguards outside the scope of their traditional field of application, as this was initially formulated by the ECtHR's case law.

The latter, applying the right to a fair trial not only to civil proceedings but most importantly to 'criminal charges' clarified the extent of this concept in the leading *Engel and Others v. the Netherlands* case[216] where it shaped three criteria in view of determining whether the so-called criminal limb of Article 6 ECHR is applicable. According to the ECtHR's position these criteria are the classification of the offence in domestic law, the nature of the offence and the severity of the penalty.[217]Therefore, offences not traditionally classified as criminal with respect to their special nature or the severity of the penalty imposed on the offender might fall within the scope of application of Article 6 of the Convention. This soft approach permitted to the Strasbourg Court to gradually broaden the criminal head to cases not strictly related to criminal law, for example to administrative penalties.[218]As the Court noted, following the autonomous interpretation of this provision, "it is self-evident that there are criminal cases which do not carry any significant degree of stigma"[219] and therefore fall outside the hard core of criminal law such as the competition cases.[220]

Surprisingly, the CJEU, since its early cases, found the procedural safeguards laid down in the ECHR as applicable to EU competition law. Although these safeguards were firstly established in order to guarantee the fairness of the hearing when natural persons were accused of committing a crime and threatened with imprisonment, they were progressively invoked by entities alleging violation of their rights in the context of investigations under competition law. It is in this legal area, and more precisely, as regards the privilege against self-incrimination of undertakings, that the two European jurisdictions interlocked concluding, however, to divergent interpretations on the matter. At this point, we should observe that notwithstanding the fact that the right to remain silent and the protection against self-incrimination are not openly laid down in Article 6 ECHR, the Strasbourg Court has declared them as part of its actual substance since, according to the Court's pronouncement in *Saunders*, they are "(…)generally recognised international standards which lie at the heart of the notion of a fair

[213] Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] I-01651.
[214] Ibid., para 18.
[215]Case C-222/86, *Union nationale des entraîneurs et Cadres techniques professionnels du football (Unectef) v Georges Heylens and Others*,[1987] ECR 04097,p.4097 ; Case C-97/91,*Oleificio Borelli SpA v Commission of the European Communities* [1992] ECR I-06313. See also TZEMOS V., *The Charter of fundamental rights of the EU*[in Greek], Nomiki Vivliothiki 2015, p.523-534.
[216] ECtHR, *Engel and Others v. The Netherlands*, Application No. 5100/71,5101/71,5102/71,5354/72,5370/72,8 June 1976.
[217] For a more thorough analysis of the Engel criteria see SCHABAS W., T*he European Convention on Human Rights A Commentary*, OUP 2016, p.277-279.
[218] ECtHR, *Jussila v. Finland* [GC], Application No.73053/01, 23 November 2006, para 43.
[219] Ibidem.
[220] Ibid., See also ECtHR, *Société Stenuit v. France*, Application No. 11598/85, 27 February 1992.

procedure under Article 6 (art. 6). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6)(…)".[221] In this context, they are intimately linked to the presumption of innocence as provided by Article 6(2).

In 1989, the Luxembourg Court delivered the famous *Orkem* judgment[222] which concerned an undertaking that challenged a request for information made by the Commission on the grounds of Article 11 of Regulation No. 17.[223]According to the allegations of the Orkem company the questions asked breached "the general principle that no one may be compelled to give evidence against himself."[224]In fact, as previously mentioned, the privilege against self - incrimination is not explicitly guaranteed by the wording of Article 6 ECHR, nonetheless, it is generally accepted that it flows from the right to a fair trial.

Yet, the CJEU after pointing out that the right to remain silent -and the right not to incriminate oneself- is not incorporated in the aforementioned Regulation, concluded that "as far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Right[225] indicate that it upholds the right not to give evidence against oneself."[226]Nevertheless, the Court underlined the significance of fundamental rights of defence conferred to natural and legal persons by pointing out that the Commission's powers of investigation are not

[221] ECtHR, *Saunders v the United Kingdom,* Application No. 19187/91 ,17 December 1996, para 68.
[222] Case C- 374/87, *Orkem v Commission*, [1989] ECR 3283.
[223] Pursuant to Article 11 of the Council Regulation No.17 "1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15 (1) (b) for supplying incorrect information.4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15 (1) (b) and Article 16 (1) (c) and the right to have the decision reviewed by the Court of Justice.6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.
[224] Supra note 222, para 18.
[225] Neither the right to remain silent nor the privilege against self-incrimination is expressly established by the ECHR. Nonetheless, the above-mentioned safeguards are enshrined in Article 14(3)(g) ICCPR and Article 8(2)(g) of the ACHR. Actually the right to remain silent is broader in sense compared with the privilege against self-incrimination, as interpreted by the ECtHR. Additionally, as Nicolas Croquet correctly pointed out "the ECtHR has also based the *raison d'dtre* underpinning these two rights of the defence upon the need to protect the accused against the risk of "improper compulsion" by the police and judicial authorities and ultimately upon the objective of preventing miscarriages of justice. The right not to self-incriminate and the right of silence have strong links with the presumption of innocence in the ECtHR's perspective." CROQUET N., The right of silence and not to self-incriminate under the European Convention on Human Rights: to what extent are they qualified, 4 *Cambridge Student L. Rev.* 214, 2008, p.220.
[226] Supra note 222, para 30.

unlimited.[227]Shortly after the *Orkem* case, the Strasbourg Court filled the gap of its case law, also previously cited by the CJEU, and ruled that the privilege against self-incrimination forms a part of the notion of a fair procedure under Article 6 of the European Convention.[228]In the *Funke* ruling, [229]the Strasbourg Court followed a different path and initiated a divergent jurisprudential approach in this field since it held that the imposition of fines by the French Custom authorities to an individual on the grounds of his denial to produce potentially incriminating statements concerning financial transactions amounted to a breach of Article 6(1) ECHR.[230]In particular, the ECtHR concluded that the special character of customs law which was invoked by the French government "cannot justify such an infringement of the right of anyone *charged with a criminal offence*, within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself."[231]

Hence, although the *Funke* case concerned an individual and not a legal person, the ECtHR clearly abandoned the *Orkem* principles laid down by the CJEU since it seemed to interpret Article 6 as allowing an undertaking in the context of an investigation not only to decline to openly provide information which could have been potentially incriminating, but also any documentary evidence. With this far-fetched approach, [232] the ECtHR not only acknowledged that the right not to self-incriminate is embodied in the scope of Article 6 of the Convention but also interpreted broadly the latter and the right to remain silent as it seemed to leave open the possibility to apply these safeguards to any type of evidence.[233]

Nicolas Croquet made a fair point by emphasising that "the absence of dissenting opinion in this case is an apparent indication that the large scope attributed to the right not to self-incriminate did not pose great theoretical difficulties within the ECtHR."[234]Additionally, for some scholars, judging from the absence of a comprehensive reasoning justifying the application of these principles to this specific factual basis, the Court appeared unprepared to take such a position on the matter.[235]

After the *Funke* judgment which initiated an inconsistency with the case law of the Luxembourg Court, the ECtHR reiterated its stance in the *Murray*[236] and *Saunders*[237] rulings, restraining, though, the right to remain silent and the privilege against self-incrimination on the grounds of implied exceptions provided with regard to their application.

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[227] Ibid, para 32.
[228] VESTERDORF B., Legal professional privilege and the privilege against self-incrimination in EC law: recent developments and current issues, 28 *Fordham Int'l L.J.* 1179, 2004, p.1192.
[229]ECtHR, *Funke v. France*, Application No. 10828/84, 25 February 1993.
[230]For a thorough analysis of the reasoning of th *Funke* case and its connection to tax law see also FROMMEL Stefan, The European Court of Human Rights of the accused to remain silent: Can it be invoked to tax payers?, *Int'l Bus. L.J.* 671,1994
[231] Supra note 229, para 40.
[232] VESTERDORF, supra note 228, p.82.
[233] CROQUET, Supra note 225.
[234] Ibid, p.222.
[235]For a critique of the judgment see also NAISMITH S.H, Current Topic: Self-Incrimination Fairness or Freedom, 3 *EHRLR* 229, 1997.
[236] ECtHR, *John Murray v. the United Kingdom*[GC], Application no.18731/91,8 February 1996.
[237] Supra note 221. The Strasbourg Court also confirmed the broader protection offered to the applicants (in comparison with the protection offered by the CJEU) in ECtHR, *Heany and McGuiness v. Ireland,* Application no. 34720/97,21 December 2000 and *JB v. Switzerland,*Application no. 31827/96, 3 May 2001.

Firstly, in *Murray*, the Strasbourg Court clarified that "whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 6) is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation."[238]In addition to that, a few months later, in *Saunders*, the Court seemed to come in line with the CJEU case law[239] as it ruled that "the right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."[240]

Hence, this judgment of the Strasbourg Court introduced the criterion *of "'independence' of evidence collecting from the accused' s will"* since it relied on the mode of production of the evidence at stake rather than its nature and limited this right to situations requiring the accused' s active cooperation.[241] In general though, the Strasbourg Court confirmed subsequently[242] the broader protection offered to the applicants in comparison with the protection offered by the CJEU, in *Heany and McGuiness* [243]and in *JB.*[244]

More recently and in the wake of the jurisprudential developments of the ECtHR regarding the extent of application of the privilege of self-incrimination, the CJEU revisited this issue always in the context of competition cases.[245] The Luxembourg Court dealt with these cases in light of the considerable evolutions in the ECtHR's relevant case law, as stated in the famous *PVC II*[246] case. According to the Court's appraisal these developments must be taken into account by the Community judicature when interpreting fundamental rights.[247] Notwithstanding its aforementioned position, the Court concluded that "however, both the Orkem judgment and the recent case-law of the European Court of Human Rights require, first, the exercise of coercion against the suspect in order to obtain information from him and,

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[238] Supra note 236, para 47.
[239]See ASHWORTH A., *Self-incrimination in European Human Rights Law—A Pregnant Pragmatism?*, 30 *Cardozo L. Rev.*, 2008, pp 751-774.
[240] Supra note 221, para.69.
[241] CROQUET, supra note 225, p.224.
[242]In *Jalloh v. Germany*, the Grand Chamber ruled that the privilege against self-incrimination may be outweighed due to the severity of the "the public interest in the investigation and punishment". Hence, surprisingly enough, the ECtHR seemed to adopt a type of a *proportionality test* that is not consistent with such a *hard-core* fundamental right as the right to a fair trial under Article 6 ECtHR, *Jalloh v. Germany,* Application No. 54810/00,11 July 2006.
[243] ECtHR, *Heany and McGuiness v. Ireland,* Application No. 34720/97,21 December 2000.
[244] ECtHR, *JB v. Switzerland,* Application No. 31827/96, 3 May 2001.
[245] SCHEECK L., Solving Europe's Binary Human Rights Puzzle.The Interaction between Supranational Courts as a Parameter of European Governance, 2005 Questions de Recherche / Research in Question N° 15, Centre d'Etudes et des Recherches Internationales, Sciences Politiques, available at http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/qdr15.pdf .
[246] Joined Cases C-238/00 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P. *Limburgse Vinyl Maatschappij (LVM) and Others v. Commission*, ECR [2002] I-08375.
[247] Ibid, paras 274-277.

second, establishment of the existence of an actual interference with the right which they define."[248]

The *SGL Carbon*[249] case also reaffirmed the general trend followed by the CJEU without losing sight of the Strasbourg's jurisprudence. This ruling was delivered following to an appeal of the Commission concerning *inter alia* the production of documents during a Commission investigation. The Court reiterated its reference to the developments in the ECtHR's case law and subsequently, established its dissimilar interpretation[250] with regard to the protection against self-incrimination arguing that "it does not follow from that case-law that the Commission's powers of investigation have been limited as regards the production of documents in the possession of an undertaking which is subject to investigation. The undertaking concerned must therefore, if the Commission requests it, provide the Commission with documents which relate to the subject-matter of the investigation, even if those documents could be used by the Commission in order to establish the existence of an infringement."[251]

Therefore, although in view of the Strasbourg's case law on the matter and the enhanced protection offered by Article 48 CFR the previously reported approach of the Luxembourg Court was questioned by numerous scholars and practitioners of EU law, the evolution of the EU competition framework[252] played a critical role in the process of developing procedural rules applied to all EU citizens which, have been, finally, codified as individual fundamental rights in the Charter.[253]As Hans Peter Nehl correctly observes "the Union court's approach could prove problematic in the light of Article 51(1)[254] of the Charter in so far as, when enforcing Articles 101 and 102 TFEU, national authorities and courts would be obliged to apply the 'lower' standard of protection under the Union concept of protection against self-incrimination notwithstanding the fact that their national laws provide for a 'higher' standard in line with that under Article 6(1) of the ECHR."[255]However, this potential conflict will be

[248] Ibid, para 275.
[249] Case C-301/04P, *Commission of the European Communities v SGL Carbon AG*, [2006] ECR I-05915.
[250] At this point, we should refer to the position of the *AG Gelhoed* in the *SGL Carbon* case who, after analyzing the relevant ECtHR case law and underlining the particular attention given to that case law, stated that "the Commission is only allowed to impose fines on undertakings and associations of undertakings for violations of Articles 81 EC and 82 EC. It is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings". For some scholars like Peter Oliver such an assertion should be welcomed on the grounds that it is not always appropriate to confer to undertakings the same fundamental rights conferred to natural persons. See OLIVER P., *EU Charter of Fundamental Rights as a binding instrument: five years old and growing(eds.),* Hart Publishing 2015, p.294.
[251] Supra note 249, para 44.
[252] The Council Regulation 1/2003 is the current legal framework with regard to competition law which reorganized the procedures and the bodies responsible for its implementation. The Regulation enhanced the Commissions powers of investigation in competition cases and granted, however, additional procedural guarantees to the undertakings involved. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1.
[253] GALERA S., The Right to a Fair Trial in the EU: Lights and Shadows, 87 *Revista de Derecho Politico,* 2013, p.69,70.
[254] Article 51(1) EUCFR provides that "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."
[255] NEHL H., The Principle of (Limited) Protection Against Self-incrimination in PEERS S., HERVEY T., KENNER J., WARD A. (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart Publishing 2014, p. 1295.

further discussed below on the occasion of the analysis of the famous *Melloni* ruling which manifestly raised similar issues.

At any rate, despite the fact that the Convention definitely enjoys a distinguished key-position as a source of fundamental rights within the Union's legal order given that it constitutes the most useful criterion for the interpretation of the Charter's provisions, the explicit references to the Convention are gradually diminishing in the post-Charter judicial practice of the CJEU. In fact, recently in the *Otis* case[256] in which the Court dealt with questions on the effective judicial protection, it seized the opportunity to clarify that given that Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR, it should, henceforth, refer only to that.[257] Furthermore, the AG Cruz Villalon in *Samba Diouf* [258] opined that "the right to effective judicial protection, as expressed in Article 47 of the CFREU, has, through being recognised as part of European Union law by virtue of Article 47, acquired a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR."[259]

On the other hand, looking from the Strasbourg's perspective, the ECtHR drew also inspiration from the Charter even before the latter was attributed legally binding force marking its willingness to bring new air to the ECHR-EU judicial interconnection within the post-Lisbon system. In the context of the application of the pure core of the fair trial principles, the Charter's influence in the ECHR legal order was made clear in the *Vilho Eskelinen and Others v. Finland* [260]and in the *Micallef v. Malta*[261] cases. Firstly, in the light of Article 47 EUCFR, the ECtHR extended the applicability of Article 6 ECHR to almost every civil servants dispute unless *the State in its national law has expressly excluded access to the court for the post or category of staff in question* or unless *it is justified on objective grounds in the State's interest*. Except for the careful analysis of the CJEU jurisprudence on the matter that the ECtHR used in its reasoning, the Court, remarkably enough, relied also upon the Explanations relating to the Charter stating that "they are a valuable tool of interpretation intended to clarify the provisions of the Charter"[262]and underlined that the Charter constitutes a codification of the existing case law of the Luxembourg Court.[263]In *Micallef,* the Court reversed its jurisprudential approach with regard to the non-applicability of Article 6 ECHR to interim measures stating the wider scope of application of the equivalent provisions of the EU Charter and taking, in parallel, into consideration that "[i]n *Bernard Denilauler v. SNC Couchet Frères* (ECJ, Case

[256] Case C-191/11, *Europese Gemeenschap v Otis NV and Others published in the electronic Reports of Cases*, para 47. See also Case C-386/10P, *Chalkor AE Epexergasias Metallon v European Commission,* [2011] I-13085, para 51.

[257] Under the title "Right to an effective remedy and a fair trial" Article 47 CFR reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.".

[258] Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration,* [2011], ECR I-07151.

[259] Opinion of the AG Cruz Villalon in *Samba Diouf*, para 39.

[260] ECtHR, *Vilho Eskelinen and Others v. Finland*[GC], Application No. 63235/00, 19 April 2007.

[261] ECtHR, *Micallef v. Malta*[GC], Application No. 17056/06, 15 October 2009.

[262] Supra note 260, para 30.

[263] Ibidem.

C 125/79, 21 May 1980) the European Court of Justice ("the ECJ") held that provisional measures given *ex parte* without hearing the defendant could not be recognised according to its case-law. This implies that such safeguards should apply also outside the context of final decisions."[264]

Hence, despite the formal link to the Convention enshrined in the Charter and the substantive analysis of the Strasbourg's *corpus* of cases that this legal instrument suggests, the CJEU actually tends to prefer lately an autonomous interpretation of the Charter even when these core procedural guarantees of fundamental character, powerfully defended by both Courts, are under dicussion. As in these disputes and according also to the opinion of Callawert "the problem is not that the CJEU disregards the Convention and its case law, but that it no longer deems it necessary to explain its reasoning to the matter, thus leaving it to the litigants to guess its substance".[265] It is also noteworthy that following to these cases the Strasbourg Court confirmed the strong influence of the Charter by mentioning in its judgment that "in the cases of *Christine Goodwin v. the United Kingdom* ([GC],no.28957/95, ECHR 2002-VI), *Vilho Eskelinen and Others v. Finland* ([GC],no.63235/00, ECHR 2007-II) and *Sørensen and Rasmussen* (cited above), the Court was guided by the European Union's Charter of Fundamental Rights, even though this instrument was not binding."[266]

Another meeting point of the two jurisdictions pertains to the interpretation of the core elements of Article 6 ECHR, and most importantly, the notion of the access to a court. In its recent *Dhabi*[267]and *Schipani*[268] cases the ECtHR treated the issue of whether the denial of the Italian Constitutional Court to address a preliminary ruling to the CJEU could result in the violation of Article 6 ECHR. In both its pronouncements, the ECtHR stated that the unjustified refusal by a national court of last instance to make a reference to the Luxembourg Court pursuant to Article 267 TFEU, *providing no reasoning at all when justifying its decision*, amounted to a breach of the right to a fair trial.

Particularly, in the *Schipany* case which, in contradiction with the *Dhahbi* judgment, was not unanimous, we should refer to the position of Judge Wojtyczek which underlined several important issues and thus, deserves our attention. According to his dissenting opinion, since the ECtHR traditionally examines the possibility of a breach of the right to a fair trial on a *case-by-case* basis especially when the main question revolves around the reasonable justification of a national court's refusal to make a reference, the adoption of an *automatic* criterion is not compatible with the interpretation of Article 6 ECHR, as established in its rich jurisprudence. Surprisingly, despite the wide *margin of appreciation* left to the national courts and especially, to the supreme national courts when enforcing the said safeguards and the wide discretion conferred by the CJEU to national authorities as regards the duty with reference to

[264] Supra note 261, para 32.
[265]CALLAWERT J., *The accession of the European Union to the European Convention on Human Rights*, Council of Europe, 2014, p.40.
[266] ECtHR, *Demir and Baykara v. Turkey [GC]*, Application No. 34503/97,12 November 2008, para 80.
[267] ECtHR, *Dhahbi v. Italy*, Application No.17120/09, 8 July 2014.
[268] ECtHR, *Schipani and Others v. Italy*, Application no.38369/09, 21 July 2015.

the preliminary reference procedure, enshrined in Article 267(3) TFEU, the Strasbourg's persistence to interpret this duty so strictly seems rather paradox.[269]

Nevertheless, "the developments in Strasbourg might prove that such way forward might not be a bad idea at all. Otherwise the Court of Justice might find itself having to reinterpret Article 267 in light of article 6 ECHR, pushed by the increasing pressure of the Strasbourg case-law in cases like *Dhahbi, Schipani* and others to come."[270]

This recent evolution in the ECtHR's case law should also be documented in the context of the open discussion on the EU's accession to the ECHR. The *Dhahbi* ruling was delivered in 2014, only a few months before the draft agreement on the accession by the CJEU was rejected and the *Schipani* judgment was delivered in the aftermath of the sonorous rejection under the *Opinion 2/13* of the Luxembourg Court. Therefore, the pronouncement of the ECtHR on a matter extremely close to the heart of the functioning of the CJEU with the view of reinforcing, though, the duty of the national courts to address request for preliminary rulings could be revealed as a sign of appreciation and rapprochement of the EU legal order despite the failure of reconciliation of the special features of the two legal systems.

b) Fair trial minimum guarantees: Legal aid and Presence at the trial

Returning to the CJEU's position concerning the application of the new procedural safeguards in the new Charter era, the Luxembourg Court used the Strasbourg's jurisprudence to venture into uncharted waters with special regard to *minimum standards* pertaining to the rights of defence which operate as *new tools* for the enforcement and the vindication of the core requirements of fair trial and the principle of effectiveness. These tools, some of which are at the disposal of EU citizens and some of the EU institutions, rendered the Luxembourg Court apt to go beyond the protection standards of its counterpart in the field of procedural guarantees as illustrated in cases touching upon the issues of legal aid and European Arrest Warrant (EAW) scheme.

i. Legal aid

The EU Charter embodied legal aid as an ancillary component for the realisation of the effective remedy requirement. The point of departure of the provision is linked to two main aspects: the implementation of the EU law, and the nuanced jurisprudence of the ECtHR on the matter, as verified by the explanatory document of the Charter.[271] The baseline of the relevant Strasbourg's case law as reflected in the landmark *Airey v. Ireland* [272]revolves around the understanding that whether the provision of legal representation to an individual is required

[269]See relatively MARIAN C., *Case Watch: A tale of two European Courts*, Open Society Foundations Blog 2014, available at https://www.opensocietyfoundations.org/voices/case-watch-tale-two-european-courts .
[270] SARMIENTO D., *Schipani v Italy: When does the ECHR require national courts to refer questions to the CJEU?*,EU Law Analysis Blog 2015,available at http://eulawanalysis.blogspot.gr/2015/09/schipani-v-italy-when-does-echr-require.html.

[271] Explanations on the EU Charter, supra note 207.
[272] ECtHR, *Airey v. Ireland*, Application No. 6289/73, 9 October 1979.

in order to guarantee the litigant's effective access to justice relies on the specific background of the case. In particular, it is deemed as crucial the capacity of the individual to present properly and satisfactorily his case without a legal representation, without neglecting the personal characteristics of the applicant and the specific type of the legal aid at hand.[273] However, this is not an absolute right as the obligation to grant legal aid to the litigants is susceptible to certain restrictions which are, similarly to other human rights, acceptable if they *'pursue a legitimate aim and are proportionate'*.[274]

Within the context of the Union's legal framework, the determination of the scope of this provision is a rather complicated task as national authorities enjoy wide discretion with regard to the way in which the access to legal aid is planned and hence, it varies according to the legal traditions of each Member State.

Recently, the Luxembourg Court seized the opportunity to elucidate the notion of legal aid under Article 47(3) EUCFR as it pronounced on the matter in *DEB*[275], where the Court has been asked for the first time whether the mechanism for legal aid covers not only individuals but also legal persons. DEB sought legal aid to bring a lawsuit against German government for damages made as a result of the non-implementation by German authorities of the EU Directives on energy market liberalisation. The litigant was unable to make advance payment of court fees due to the serious lack of income, assets and employees. The CJEU following to an extremely lengthy examination of the Strasbourg's case law on the matter[276] according to which, as far as undertakings are concerned, only non-profit making companies may enjoy the principle of legal aid, concluded that "it is apparent from the examination of the case-law of the European Court of Human Rights that the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned."[277]

Finally, the Court clearly concluded that "the principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer."[278]Moreover, addressing the scope of the provision the Court ruled that in order to determine whether conditions for granting legal aid pursue a legitimate aim, national courts must take into account the subject matter, the prospect of success, what is at stake and the complexity of law. At this point, we should also highlight that despite the fact that the Luxembourg Court acknowledged that in the field of the enjoyment of fundamental rights, companies deserve less protection in comparison with natural persons or non-profit making undertakings, it correctly broadened this protection

[273] See ECtHR *McVicar v United Kingdom*, Application No. 46311/99,7 February 2002, paras 48-55 and ECtHR, *Steel and Morris v United Kingdom*, Application No. 68416/01, 15 February 2005, para 61.
[274] See *Steel and Morris*, Ibid., paras 60-72.
[275] Case C-279/09,*DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, [2010] ECR I-13849.
[276] Ibid., paras. 45-52.
[277] Ibid, para 52.
[278] Ibid, para 59

with regard to the right of access to a court granted to entities since economic rights constitute the core values of EU law.[279]

Following to the *DEB* judgment, the CJEU confirmed its prior approach in *GREP*.[280] The case at hand concerned the order for enforcement of a judgment issued by a German court in Austria, pursuant to the *Council Regulation 44/2001 on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I).* [281]The Court repeated the same reasoning as in DEB in order to apply the same criteria for legal aid to enforcement proceedings.

Notwithstanding the fact that the Strasbourg's case law in account of legal aid constituted the point of departure for the legal aid provisions within the EU legal system not only in terms of primary law, namely the provision under Article 47(3) of the Charter, but also in terms of secondary legislation,[282] *the very essence* of this particular provision under the Charter seems slightly different from the one developed under Article 6 ECHR. While in *Airey v Ireland*, legal aid is perceived as a right with implications of social or economic nature, and thus, intimately related to the financial situation of the particular state, the Charter's seems to be of the nature of a procedural principle. In *DEB*, the Court of Justice pointed out that Article 47 is found under Title VI relating to justice together with other procedural principles, and not under Title IV of the Charter relating to solidarity. As Liisa Holopainen underlined "classification as a procedural principle makes the right to legal aid less susceptible to arguments concerning budgetary restraints in the provision of legal aid."[283] Moreover, the CJEU achieved to develop a more advanced approach in this field as it definitely extended the concept of legal aid since it found that the latter is also applicable to legal persons.[284]

Apparently, this extended protection offered by the Luxembourg Court with regard to the legal aid as an essential tool for the actualisation of the access to justice was not succeeded by the judges of the CJEU when addressing the issue of presence at trial in light of another important tool, namely the EAW legislation. Interpreting the said legislation, the Court has persistently taken a more "lonely" road, as discussed in the following section.

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[279]See also OLIVER P., Case Note on Case C-279/09 DEB v Germany (Judgment of the Grand Chamber of 22 December 2010), 48 *C.M.L.Rev.* 2011.

[280] Case C-156/12 *GREP GmbH κατά Freitstaat Bayern* (Order), [2012] published in the electronic Reports of Cases.

[281] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12.

[282] The concept of legal aid in the EU legal framework is further developed by express provisions in numerous Directives and Regulations covering different areas of EU law. More precisely we can find provisions regarding legal assistance and representation of litigants in the so-called 'the Maintenance Regulation','the Asylum Procedures Directive' and 'the Return Directive'.

[283] HOLOPAINEN L., Art.47(3): Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice, in PEERS S., HERVEY T., KENNER J., WARD A. (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart Publishing 2014, p.1270.

[284] See also PEERS S., *Europe to the Rescue? EU Law, the ECHR and Legal Aid*, European Area of Freedom Security & Justice, Free Group 2016, available at https://free-group.eu/2016/03/09/europe-to-the-rescue-eu-law-the-echr-and-legal-aid/.

ii. Presence at the trial requirements: European Arrest Warrant

Actually, the requirement of the presence at trial and the one of representation by a lawyer both constitute matters that became object of a whole new network of secondary law provisions introduced by the EU legislator, namely the *Roadmap Directives*.[285]This *Roadmap* aimed to articulate the minimum defence rights, as provided also by Article 6(3) ECHR, and is entitled to serve as an instrument in order to render the core of the *fair trial,* in its pure sense, real and effective. In the field of EU cooperation in criminal justice, and, most precisely, in the field of the EAW, which reflects the EU mechanism the most closely linked to the procedural requirement of not to be tried *in absentia*, the CJEU found the opportunity to revisit the interrelationship between the EU legal system with the one of the ECHR.

As the EAW Framework Decision seemed to ignore the possibility of a violation of procedural guarantees within the surrender mechanism, first, in the *Radu* case[286] the CJEU was asked for the compatibility of the EAW with the right to be heard before a court as provided by the aforementioned provisions of the Charter and the ECHR, concluding that EAW does not require the requested person to be heard before the issuing of the EAW. Given that the EU legislation was aiming to rationalize and speed up the surrender procedures of persons convicted or suspected of having breached criminal law, the Luxembourg Court strongly defended the EAW framework on the basis of the principle of mutual recognition and the presumption of confidence between MS.[287] At this point, we should emphasize that the Court seemed to obviate the web of fundamental issues raised by the referring court and by the Opinion of the AG *Sharpston.*[288] The latter seemed to have accepted that the problem of defence rights within the surrender procedure remains -even after its recent reform- a weak point and thus, addressed the questions posed providing a quite rational and complete response. In her view, "[w]hile the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice".[289] Notably, the AG Sharpston also elucidated that the fundamental

[285] The so-called Roadmap Directives are: the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings,OJ 2010 L280/1; the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L142/1; the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L294.
[286] Case C-396/11, *Ciprian Vasile Radu*, [2013], published in the electronic Reports of cases.
[287] The Court held in para 33: "It should also be recalled that, as is apparent in particular from Article 1(1) and (2) of Framework Decision 2002/584 and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition". Ibid., para.33.
[288] Opinion of AG Sharpston delivered on 18 October 2012 in the *Radu* Case.
[289] Ibid, para 41.

rights dimension should not be sidestepped within the execution of a EAW by arguing in paragraphs 69 and 70 of his Opinion that "[h]owever, I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the case-law. Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning – otherwise, possibly, than as an elegant platitude." [290]

Therefore the AG reached to the conclusion that when applying the FD on the execution of the EAW, the judicial authority of a Member State can oppose to such an execution solely based on "exceptional circumstances" when the surrender of the person involved would amount to an infringement of his defence rights as laid down in the Charter and the Convention, particularly when the infringement could *destroy the fairness of the process*.

Nevertheless, dealing with a matter which raised great controversy and divergent interpretations at the Member States' level, the Court rejected the position expressed by the AG opting for a more narrow and procedural reasoning by prohibiting to the MS to deny the execution of a EAW on the grounds of a breach of the suspect's defence rights and thus, leaving the national authorities without useful answers and clarifications on the matter. [291] Consequently, the Court's pronouncement in the *Radu* case proves that when questions are posed in a way that could impugn the validity or that could leave room for the progressive destabilization of the mere function of the EAW scheme, the CJEU feels that it should defend it since the whole architecture of the mutual trust and cooperation is at risk.[292]

The CJEU reiterated its appraisal remaining loyal to the literal application of the EAW procedural rules in the famous *Melloni* case[293] in which the Court revisited also the interplay between the Charter's and the Convention's system. For a more detailed analysis of the Court's judgment we should also refer to the main facts of the case. Mr. Melloni, an Italian businessman prosecuted for bankruptcy fraud, tried to escape its conviction by hiding in Spain[294] and as a result, he was sentenced in absentia to 10 years' imprisonment. In 2004, the Italian authorities issued a EAW aiming to execute the Mr. Melloni's sentence. After his arrest by the Spanish police, Mr Melloni opposed his extradition to Italy claiming that in case of his surrender taking place, it would be impossible to appeal against his sentence imposed in his absence. At first instance, the Spanish Court rejected Mr. Melloni's arguments and held that Melloni's rights of defence had been respected.

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[290] Ibid, paras 69,70.

[291] As regards the possible roots of the Court's reserved ruling see DAVIES A., *Radu-A case of failed dialogue*, EUtopia Law Blog 2013, available at https://eutopialaw.com/2013/02/05/radu-a-case-of-failed-dialogue/ .

[292] MARIN L., Effective and legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant,5 *New Journal of European Criminal Law* 3, 2014, p.337.

[293] Supra note 41.

[294] Despite the fact that he was well aware of the time and place of the trial in Italy, Mr Melloni opted to be represented by his lawyers instead of attending personally the entire criminal process until the case was brought before the Italian Supreme Court.

However, Mr. Melloni insisted and subsequently applied to the Spanish Constitutional Court on the grounds of Article 24(2) of the Spanish Constitution which establishes the right to a fair trial. According to its well-established jurisprudence, this right under the Spanish Constitution requires that, in case of a person's conviction in his absence, an extradition based on the execution of his sentence must be made conditional on the right to appeal so as its rights of defence would be sufficiently guaranteed, even if he had been effectively represented by a lawyer at the trial. On the other hand, according to Article 4a(1)(b) of Framework Decision on the EAW 2002/584/JHA as amended by Framework Decision 2009/299/JHA "the executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State: being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial."[295]

Due to the obvious contradiction between its own jurisprudence and the EU legal framework in the field of EAW, the Spanish Constitutional Court decided to refer to the CJEU for a preliminary ruling.

The Luxembourg Court, in its landmark ruling, held that "Article 4a(1) of Framework Decision 2002/584 must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State." [296] As for the compatibility of the abovementioned provisions of the Framework Decision with Articles 47 and 48 of the Charter, the Court stated that although the right of the accused to attend personally at his trial constitutes a crucial component of the concept of fair trial, that right is not absolute. Furthermore, it stressed that "the accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counselor to whom he had given a mandate to do so."[297]

The Court of Justice, after having mentioned the correspondence of the Charter's procedural safeguards to Article 6(1) and (3) ECHR, expressly referred to the Strasbourg's judgments delivered under similar circumstances [298] and concluded that in the case at hand,

[295] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 L 81.
[296] Ibid, para 46.
[297] Ibid, para 49.
[298] ECtHR, *Medenica v. Switzerland*, Application No. 20491/92, § 56 to 59, 14 June 2001, *Sejdovic v. Italy* [GC], Application No. 56581/00, paras 84, 86 and 98, 10 November 2004, and *Haralampiev v. Bulgaria*, Application No. 29648/03, para 32 and 33, 24 April 2012.

Mr. Melloni waived from his right to be present at his trial and consequently, he was not entitled to invoke the benefit of retrial having been informed for the details of his trial and represented by a counselor according to the conditions established by Article 4(a)1 of Framework Decision. Hence, the right to an effective judicial remedy and the rights of the defence, as enshrined to the Charter, have been respected in the context of the application of the relevant EU legislation.

Nonetheless, the CJEU partly referred to the Strasbourg's case law according to which, even in the case that a person was adequately notified and without profound reason chose to be tried *in absentia*, that person should not be deprived of the right to be represented by a lawyer.[299] However, as the ECtHR held in *F.C.B. v Italy,*[300] despite the fact that the person had been represented by a lawyer, Article 6 ECHR had been breached since "it does not appear that Mr F.C.B., whether expressly or at least in an unequivocal manner, intended to waive his right to appear at the trial and defend himself."[301] Thus, the surrender of a person within the EAW who, being informed of the trial and represented by a lawyer, was convicted *in absentia* without the possibility to obtain a retrial could, in exceptional cases, amount to an infringement of the ECHR.

Most importantly, the Court of Justice, while answering the final question of the Spanish Constitutional Court, focused on whether Article 53 EUCFR should be interpreted as offering a general authorisation to the MS to apply higher standards of protection of fundamental rights than those provided by the Charter. For the judges of the Court, given that such an interpretation would seriously undermine the well-established principles of primacy and effectiveness of EU law, stated that "Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution."[302] In the *Melloni* case, the Court seized the opportunity to add some bold statements aiming to provide the national Courts with the *correct* understanding of the said provision.

It goes without saying that the interpretation of Article 53 EUCFR made by the Spanish Constitutional Court is *prima facie* in accordance with the spirit of the provision overly extending the human rights protection offered to EU citizens. "Instead, the curious result of its *Melloni* judgment is that the ECJ *prohibits a national constitutional court from providing for a higher level of fundamental rights protection because that would infringe the primacy and uniformity of Union law!* The perverse result of this approach is that the ECJ effectively allows Member States to adopt Union law measures – which may potentially be in violation of their own constitutions but which are in line with the Charter of Fundamental Rights – without the national (constitutional) courts being able to do anything against it."[303] It remains unclear, though, how these two contradictory approaches can be reconciled in the context of the highest

[299] ECtHR, *Pelladoah* v. *The Netherlands,* Application No. 16737/90, 22 September 1994, *Lala* v. *The Netherlands,* Application No. 14861/89, 22 September 1994.
[300] ECtHR, *F.C.B.* v. *Italy,* Application No. 12151/86,28 August 1991.
[301] Ibid, para 33.
[302] Supra note 41, para 64.
[303] LAVRANOS N., The ECJ's judgments Melloni and Åkerberg Fransson: Un ménage à trois difficulté, 4 *European Law Reporter* 2013, p.140.

possible level of fundamental rights protection promoted not only by Article 53 EUCFR but also by the entire post-Lisbon scheme. Notwithstanding the fact that not only in *Melloni* but also in *Akerberg Fransson*, which constitutes another landmark decision delivered on the same day, the Luxembourg Court seemed to perceive the Charter as the most valuable tool within the harmonization of national standards of human rights protection, it opted for a paradox interpretation which is not in line with the abovementioned purpose of preserving the *sui generis* character of EU law.

From the EU perspective, this approach of the CJEU is understandable, especially at a time of an enormous discussion and controversy concerning the Charter –ECHR relationship in the light of the accession of EU to the ECHR, since the Court preferred to promote the Charter to the top of the ladder of legally binding instruments. Looking through the mutual trust lens, seen as the *raison d'être* of the Union, the Court seems to use the Charter and the EAW framework as the ultimate normative tools for the ensurement of the mutual trust principle among the MS. That is the reason why the latter was considered by the Luxembourg Court as one of the key-points and the major concerns expressed in the Opinion 2/13 on the draft accession agreement of the EU to the ECHR in which the Court stated that "in so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[304]Thus, it is common ground that the CJEU sought to avoid giving to the national jurisdictions, in case of the accession taking place, new ammunition and new argumentative grounds to revisit the heating debate that the Court had hoped to have left behind in *Melloni*.[305]

Such grounds for unbalancing the sensitive EU-MS equilibrium could also be provided through the equivalent provision of Article 53 of the Charter, that is the Article 53 ECHR,[306] which sets the interpretative limits of the Convention in account of the scope of domestic fundamental rights. According to the CJEU's wording in the Opinion 2/13,[307] whereas seemingly establishing a similar approach to that sensitive matter, the two articles may create a conflict in theory. As construed by the Strasbourg Court, Article 53 does not dictate a uniform standard since the Convention constitutes a minimum level guarantee. Nevertheless, the need of enforced harmonization in several fields of EU law requires a coherent understanding of

[304] Opinion 2/13, supra note 37, para 194.
[305] See on this matter KRENN, supra note 5, p.158.
[306] Article 53 ECHR holds that "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental 28 29 freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."
[307] "In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.", Opinion 2/13, supra note 37, para 189.

fundamental rights protection to safeguard the primacy and uniformity of the Union's legal order. The main concern of the EU legislator here is that, post-accession, this conflicting level of fundamental rights protection may result in revisiting the *Melloni* type situation since higher standards of protection prescribed by national legislation may be applicable even in a field completely regulated by EU law, while not addressing a preliminary referral to the CJEU.[308] Nonetheless, if we ask ourselves whether there is an actual menace to the uniformity and primacy of EU law under the aforementioned circumstances we should note that, undoubtedly, -and in reality- the Strasbourg Court is traditionally engaged with the enforcement of the Convention and not of higher national standards of protection. Thus, this conflict is mostly virtual than a real one and in these terms this wide perception of conflict cannot be construed as the point of departure every time that the compatibility of international agreements that the EU intends to conclude, with the EU Treaties is being questioned. This approach of the Court might be proved extremely restrictive as regards the participation of the Union in international lawmaking since there will always be similar conflicts.[309]

Overall, while analogous questions were asked in the *Akerberg Fransson* -which will be discussed further below- the position of the CJEU in the famous *Melloni* for Xavier Groussot and Ingrid Olsson is aptly summarized as follows "on the one hand, it reflects the pluralist nature of EU law by recognising the cumulative application of several layers of fundamental rights binding Member States and mandates the ECJ to engage in a dialogue with the national constitutional courts. On the other hand, it strongly protects the level of protection of the Charter and the effectiveness and uniformity of EU law."[310]

Finally, at this point, we should highlight that, following the CJEU's ruling in *Melloni*, the Spanish Constitutional Court adopted a rather concluding than defensive approach pointing out that it used the jurisprudence of the CJEU and the ECtHR only as *hermeneutical tools*. Therefore, the Spanish Constitutional Court accepted to reverse its appraisal on the matter, but appeared unwilling to accept its *defeat* and portrayed its outcome as its own autonomous reasoning , avoiding thus to properly justify and defend it.[311]

The Luxembourg Court unquestionably opened a new chapter in the book of the judicial dialogue with the domestic constitutional Courts with regard to the application of EU mechanisms in the joint cases *Aranyosi and Căldăraru* [312] which, unlike *Melloni,* touched upon the absolute prohibition of torture, inhuman or degrading treatment of Article 3 ECHR in view of the inadequate detention conditions in the requesting state and the grounds on which the examination of such conditions must take place. This decision of the Court, which is the first EAW decision delivered after the Opinion 2/13, appears as a turning point of the jurisprudence

[308] Or, even worse, turning to the Strasbourg Court for an advisory opinion under Protocol 16.
[309] EECKHOUT, supra note 57, p.13.
[310]GROUSSOT X. and OLSSON I., Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni, 2 *LSEU,* 2013, p.35
[311]TORRES PEREZ A., *Melloni* in three Acts: From Dialogue to Monologue,10 *EuConst* 2014, p.321.
[312] Joined Cases C-404/15, C-659/15 *Pál Aranyosi και Robert Căldăraru*[2016] published in the electronic Reports of Cases. See also Case C-237/15, *Minister for Justice and Equality v. Francis Lanigan*[2015] published in the electronic Reports of Cases (Court Reports - general). In line with the *Aranyosi and Căldăraru* case, the CJEU delivered in October 2019 its *Dorobantu* judgment concerning detention conditions and the execution of EAW in which it reaffirmed that the ECHR, as interpreted by the Strasbourg Court, directly applies in the EU legal order. Case C-128/18, *Dorobantu Dumitru-Tudor Dorobantu v Generalstaatsanwaltschaft Hamburg* [2019], not yet published, para. 71

of the CJEU. In the case at hand, the Court of Justice held that an EAW should not be enforced if the individual runs the risk of been subjected to a treatment incompatible with Article 3 ECHR and the corresponding right of Article 4 CFR. A reconciliation, therefore, of fundamental rights and *mutual recognition* principle in the light of the Strasbourg's detention standards appeared preferable for the Court. Arguably, the judgment signaled the departure of the judges of the Court from the conception of mutual trust as blind trust. When it comes to the secondary legislation concerning the EAW, its execution lies upon a more fundamental rights-oriented interpretation of this principle.[313] Yet, whether this openness will, as time goes by, the consistent approach of the Court- also when procedural safeguards are in question- remains to be seen.

Besides, the recent debate inflated by the new Polish legislation which interferes with the judicial independence in the country and which inevitably led to the European Commission's proposal for activation of Article 7 TEU[314] imposed severe strains on the domestic and European rule of law[315] and by extension, to the sustainability of the mutual recognition principle. Indeed, the European Commission has referred Poland to the Court of

[313] BOVEND'EERDT, K., The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?32 *Utrecht Journal of International and European Law* 83, 2016, pp.112–121; PRECHAL S., Mutual Trust Before the Court of Justice of the European Union, 2 *European Papers* 1, 2017, pp. 75-92; LENAERTS K., La vie apres l' avis: Exploring the Principie of Mutual (yet not blind) Trust, 54 *C.M.L.Rev*.3, 2017, p. 839; MADSEN SORENSEN H.-B. , *Mutual trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant,* EU Law Analysis Blog 2016,available at http://eulawanalysis.blogspot.com/2016/02/mutual-trust-blind-trust-or-general.html, PEERS S., *Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?* EU Law Analysis Blog 2016, available at http://eulawanalysis.blogspot.com/2016/11/human-rights-and-european-arrest.html; On most recent developments see CORTES-MARTIN J., The Long Road to Strasbourg: The Apparent Controversy Surrounding the Principie of Mutual Trust, 11 *Review of European Administrative Law* 5 2018, pp. 5-36 ; GRAAT J., *Human rights v the European Arrest Warrant? The legality of surrender detention after 90 days*, EU Law Analysis Blog 2018, available at https://eulawanalysis.blogspot.com/2018/10/human-rights-v-european-arrest-warrant.html?fbclid=IwAR3_eAxF3nZBR4ea93PK7mTiUsb7adwTLFpsAfDOfDOdBtHZQNRObAUt4nE .

[314] Article 7 TEU reads as follows "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply. 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations. 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State. 4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed. 5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union." The said procedure was first triggered by the European Commission publishing on the 20th of December 2017 its reasoned proposal in accordance with article 7(1) of the Treaty of the European Union regarding the rule of law in Poland.

[315] PECH L. and LANE SCHEPPELE K., Illiberalism Within: Rule of Law Backsliding in the EU, 19 *CYELS* 3, 2017, pp. 3-47.

Justice challenging the said legislation in September 2018.[316]As a result, the Court pronounced on the matter in October 2018 with its order to grant interim measures. Poland was therefore ordered to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges.[317] The anticipated decision of the Court of Justice pertaining to the so-called "reform" of the Polish judicial system was delivered on 24 June 2019.The Court concluded that it was actually within its competence to rule on the "judicial reform" since the latter jeopardizes the independence of the judiciary and by extension the effective legal proptection as ensured by EU law.

However, the Court had already faced the legal repercurssions emerging from the EU "rule of law crisis" with regard to the solid enforcement of EU criminal law. Thus, the potential suspension of an EAW, issued by the Polish authorities, was placed at the center of a heated legal discussion concerning the future of mutual trust in the *LM* case. [318]The Irish Supreme Court specifically asked the CJEU whether the executing state should take the *Aranyosi* road and in case of "cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law". It was also called to determine whether it should "make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial?"[319]

Indeed, the Court replied in the affirmative should the existing conditions in the issuing state do not comply with the fair trial standards, albeit in a rather narrow manner. It accepted that the *Aranyosi* test is applicable when the right to fair trial is at stake. It was, therefore, safer

[316] See the Press Release pubished by the European Commission on 24 September 2018 at http://europa.eu/rapid/press-release_IP-18-5830_en.htm.

[317] Order of the Vice President in Case C-619/18 R *Commission v Poland,* 19 October 2018. Case C-619/18 *European Commission v Republic of Poland* [2019], published in the electronic Reports of Cases; For a thorough analysis of the judgment and its impact see PECH L. and PLATON S., *The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case),* EU Law Analysis Blog 2019, available at http://eulawanalysis.blogspot.com/2019/06/the-beginning-of-end-for-polands-so.html

[318] Case C-216/18 PPU, *Minister for Justice and Equality v. LM* [2018] published in the electronic Reports of Cases. See also the *Pirozzi* ruling of the Strasbourg Court on EAW. ECtHR, *Pirozzi v. Belgium,* Application No. 21055/11, 17 April 2018.Only a few months ago, in the *Romeo Castaño v Belgium* case the ECtHR ruled that the denial of the Belgian Government to execute an EAW invoking the risk of the convicted person to be subjected to ill treatment if extradited to Spain which was not duly reasoned or based on an individualised review of the case, amounted to a violation of the procedural positive obligation of the Belgian State under Article 2 ECHR to cooperate in an investigation with the issuing state respecting the guarantees set by Artcle 3 ECHR. In line with the *Aranyosi* standards and its own earlier case law, the Strasbourg Court seized the opportunity to evolve its extradition jurisprudence when an EAW is involved finding, for the first time, a State accountable for not extraditing the accused or convicted person on human rights grounds. Besides the protection of Article 3 ECHR, the Court vindicated in the case at hand the utmost importance of the procedural duty of cooperation in the investigation between the issuing and the executing authorities of an EAW which touches upon the principle of mutual cooperation, the cornerstone of the entire EAW scheme.
What is particularly noteworthy here is also the concurring opinion of Judge Spano, also joined by Judge Pavli. They underlined the so called "souci de symmetrie" between the ECHR legal order and the EU legal order and the perennial need for solutions meticulously elaborated, preserving the nature and integrity of the former without destabilizing the delicate institutional balance and the fundamental elements of the latter. See in this respect ECHR, *Romeo Castaño v Belgium,* Application No.8351/17, 9 July 2019; ZAMBONI M., Romeo Castaño v Belgium and the Duty to Cooperate under the ECHR, EJIL Talk! 2019, available at https://www.ejiltalk.org/romeo-castano-v-belgium-and-the-duty-to-cooperate-under-the-echr/.

[319] Ibid., para 25.

for the Court to build on the *Associação Sindical dos Juízes Portugueses* [320] case law and emphasise the importance of the independence of justice so as fair trial and effective judicial protection could be ensured.[321] Drawing an analogy from the *Aranyosi* judgment, both a systemic and an individual/specific assessment was deemed necessary. In the context of the latter, the Luxembourg Court appeared to have entrusted a certain dialogue between the executing and the issuing state of the EAW. Hence, the issuing judicial authorities are bound to provide "any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned."[322]If all fail, the mutual trust can be waived and the execution of the EAW can be suspended. According to the cautious wording of the Court, this suspension emerges when "where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."[323]

This emphasis on the individual test has particularly brought a remarkable storm of criticism as the Court missed the opportunity to see this case through the prism of the present-day rule of law crisis in Poland. Having highlighted the relevance of the Reasoned Proposal by the European Commission, the Court opted for not having a word on the on-going political upheaval around the preservance of the rule of law in the European Union.[324] At the level of the second stage of the individual test, the Court leaves room for a *case-by-case* examination of the mutual trust while disproportionate burden is reserved to individuals and to the executing judicial body to cooperate with a possibly unreliable counterpart which is actually reviewed for not respecting the fundamental values of the EU and human rights. This position of the CJEU partly mirrors the fears expressed in the Opinion 2/13 pertaining to limitations to the principle mutual trust.

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[320] Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, [2018] published in the electronic Reports of Cases (Court Reports - general)
[321] Supra note 318, paras 64-67.
[322] Ibid., paras 75-78.
[323] Ibid., para 79.
[324] BARD P. and VAN BALLEGOOIJ W., Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM, 9 *New J. Eur. Crim. Law* 3 ,2018, pp.1-13; SUBIC N., Executing a European Arrest Warrant in the Middle of a Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality, 21 *Irish J. European L.* 98, 2018, pp.98-109; FRACKOWIAK-ADAMSCA A., *Mutual trust and independence of the judiciary after the CJEU judgment in LM – new era or business as usual?* EU Law Analysis Blog 2018, available at http://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html .

At any rate, the Court itself is in the middle of a substantial crisis touching upon the core values of the EU with both legal and political implications and is confronted with the task to find the fragile balance between proper function of the presumption of mutual cooperation and loyalty to its constitutional role to offer precise guidance to national judiciaries. Probably, the latest judgments of the Luxembourg Court are only illustrating the beginning of a judicial saga with regard to rule of law and EU human rights law. The Court will definitely be obliged to delve into the rule of law debate setting precise limits in this field.

3. The *ne bis in idem* principle in the CJEU jurisprudence: The new challenges in the post-Lisbon era

In its essence, the *ne bis in idem* principle establishes a prohibition against being tried or punished twice for the same offence. Its source in EU law is found in both Article 4 of Protocol No.7 ECHR and the constitutions of many EU Member States. Recognised explicitly by the Luxembourg Court as a *general principle of EU law*, it has also been incorporated into some international agreements concluded by the Member States, i.e. the Convention on the protection of the European Communities' financial interests[325] and the Convention on the fight against corruption,[326] as well as in the Convention implementing the Schengen Agreement (CISA).[327] Last but not least, following the entry into force of the Treaty of Lisbon, the *ne bis in idem*, was also incorporated in the EU Charter(Article 50). Although it was originally applicable mainly in criminal cases, it is now applied in various legal areas exceeding the scope of the three abovementioned Conventions.

Certainly, the *ne bis in idem* principle is deeply rooted in both national and international criminal and human rights law and it is reflected in a wide range of constitutional and international legal instruments. However, the scope of application of the prohibition of multiple trials for the same offence as developed in the EU legal system is significantly differentiated from the one of the Convention, which constituted its central and absolute source. That said, it remains motivating for the needs of this research to dive into the Strasbourg's and the Luxembourg's jurisprudence and to examine their attempt to build a solid and coherent approach reconciling the different *ne bis in idem* standards and taking into account multiple legal traditions in criminal law developed by the European states. For this reason, the focus will be on the manner that the two European jurisdictions -with particular emphasis on the CJEU- viewed the application of this right in pure criminal cases, in cases where a combination of criminal and administrative proceedings is at stake, let alone in competition cases.

[325]Convention on the protection of the European Communities' financial interests, OJ 1995 C 316.
[326]Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ 1997 C195.
[327] Convention on Implementing the Schengen Agreement (CISA) OJ 2000 L239/19.

a) The need of harmonization of the ne bis in idem application: The particular case of mutual cooperation

In order Article 4 Protocol No.7[328] to be applicable, there must be two sets of proceedings of criminal character in nature. The first procedure should be completed but also a final conviction is required. However, it suffices that the second proceedings have begun in order to establish a breach of the abovementioned provision.

Despite the fundamental character of the *ne bis in idem* principle as enshrined in Article 4 of Protocol No.7 and the fact that it was added to the Convention in 1984, the Protocol has not yet been ratified by all Contracting Parties.[329]For numerous scholars,[330] this is partially outweighed by the fact that, as the human rights laid down in the Convention are deemed to be among the general principles of EU law according to the CJEU's case law, the EU Member States which have not ratified the 7th Protocol are *de facto* bound by its provisions and thus, the sphere of influence of Article 4 Protocol No.7 ECHR also extends to their legal orders, at least when implementing EU rules.

In clear contradiction to the equivalent provision recently embodied in the EU Charter, Article 4 is only engaged in the national *ne bis in idem* and not the international or transnational *ne bis in idem* as it only applies within the domestic legal orders of the states which have ratified the said Protocol and are bound by its provisions. The retinence of some Contracting Parties to ratify Protocol No. 7 is actually based on the different approaches of the Contracting Parties to the actual essence of the right not to be tried twice for the same offence.

At first, observing carefully the concept of the *ne bis in idem* as interpreted by the Strasbourg Court it is evident from the wording of Article 4 of Protocol No. 7 that the provision has limited the principle to domestic walls and, hence, the cases in which individuals are prosecuted for trans-border crimes fall out of its scope of application, as it states that one should not be tried or punished "under the jurisdiction of the same State". Since Article 4 of Protocol No. 7 ECHR traditionally concerns criminal offences, the ECtHR applied the *Engel criteria* (the classification of the offence in domestic law, the nature of the offence, and the severity of the penalty that is at risk), similarly to the Court's interpretation of Article 6 ECHR, so as to ascertain whether the *ne bis in idem* principle is applicable *rationae materiae*. As a result, it progressively developed a rather flexible approach extending the concept of *idem* and *bis*. For the judges of the Strasbourg Court, in order Article 4 of Protocol No. 7 to be applicable, the judicial proceeding should be of criminal character and should definitely result in an

[328] Article 4 of Protocol No. 7 reads as follows: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

[329] Belgium, Germany, the Netherlands, Spain and Turkey have signed but not ratified the Protocol, the United Kingdom has not signed it.

[330] VAN BOCKEL W- B., *The Ne Bis In Idem Principle in EU Law, a conceptual and jurisprudential analysis*, Doctoral Thesis- Leiden University 2009, available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/13844/000-diss-VanBockel-26-05-2009.pdf?sequence=1, p.17.

See also LUNDEHOLM C., *The Principle of Ne Bis In Idem: Human Rights and the Enforcement of European Union Competition Law*, Master Thesis-Lund University, 2011, available at http://www.konkurrensverket.se/globalassets/forskning/uppsatser/uppsats_2013_carl_lundeholm.pdf .

irrevocable decision meaning that no ordinary remedies are available under national legislation and hence, the first decision has acquired the force of *res judicata.*[331]

However, the cases brought before the ECtHR touched not only upon pure criminal matters but also simultaneous pending of criminal and administrative proceedings having, though, a criminal character in most of the cases, under the national legal traditions. One way or another, the key point within the ECtHR's case law is definitely its position on the element of *idem* as the majority of the cases presented before the Strasbourg Court focuses on this particular aspect of *ne bis in idem* concept.

Within this ambit, while the Court in the *Gradinger v. Austria* case[332] disregarded the legal classification under national law and concluded to an infringement of Article 4 of Protocol No. 7 due to the fact that both administrative and criminal sanctions were applied on account of the same factual act, in *Oliveira v. Switzerland,*[333] the ECtHR partially overturned its prior position. Notwithstanding the fact that the Court confirmed that the same act, by violating several norms, might result in two proceedings and two relative sanctions, the Strasbourg Court, in order to justify its precedents, held that the *ne bis in idem* principle prohibits double criminal proceedings for the same offence.[334]In the Court's words "there is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concours idéal d'infractions*) one criminal act constitutes two separate offences."[335] However, in *Fischer v. Austria*[336]opted for reconciling those two contradictory approaches on the matter, relying on the "same action" element, nevertheless, in the successive judgment *Göktan v. France*.,[337]the Court took mainly into account the legal *idem* concluding that the prohibitive proceedings should be defined on the basis of the *Engel* criteria.

The looming legal uncertainty prompted the Strasbourg Court to harmonise its earlier jurisprudence, shifting to the position of other supranational jurisdictions such as the Inter-American Court of Human Rights and the CJEU, verifying their judicial dialogue once again. Therefore, in 2009, in its landmark *Zolotukhin v. Russia* ruling, [338] the ECtHR attempted to clarify its fragmented jurisprudence and thus, adopted a broader interpretation of *idem* pursuant to the principle of effectiveness of the Conventional rights.[339]The Court defined in detail the notion of "same offence" stating that "accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same. The guarantee enshrined in Article 4 of Protocol No. 7 becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*.

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[331] Explanatory Report to the Protocol N.o. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.117, para 22.
[332] ECtHR, *Grandinger v. Austria*, Application No. 15963/90, 23 October 1995.
[333] ECtHR, *Oliveira v. Switzerland* , Application No. 25711/94, 30 July 1998.
[334] See GIACOMELLI G., *The ne bis in idem principle profiles in EU criminal law,* Master Thesis- Universita Degli Studi Firenze, 2013-2014, p.61-62.
[335] Supra note 333, *Oliveira* case, para 26.
[336] ECtHR, *Josef Fischer v. Austria,* Application No. 33382/96, 17 January 2002.
[337] ECtHR, *Goktan v. France,* Application No. 33402/96, 2 July 2002.
[338] ECtHR, *Sergey Zolotukhin v. Russia,* Application No. 14939/03, 10 February 2009.
[339] PYRGAKIS D., Article 50 in TZEMOS V., The Charter of Fundamental Rights of the EU, Nomiki Vivliothiki 2015, p.574.

At this juncture, the available material will necessarily comprise the decision by which the first "penal procedure" was concluded and the list of charges leveled against the applicant in the new proceedings. Normally, these documents would contain a statement of facts concerning both the offence for which the applicant has already been tried and the offence of which he or she stands accused (…) The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings".[340] Nevertheless, this cutting-edge view of the *idem factuum* as defined by the Strasbourg Court was not followed by several national supreme and constitutional Courts, such as the Swedish Supreme Administrative Court and the Austrian Constitutional Court on the grounds of the specific features of each legal system.[341]

Within the legal context of the Council of Europe, numerous efforts have been made during the latest decades to inaugurate a regional-international *ne bis in idem* principle with regard to mutual legal cooperation framework, especially in extradition cases. However, as John Vervaele underlines "in this cooperation framework the ne bis in idem principle only applies inter partes, which means that it can be or must be applied between the Contracting States in case of a concrete request. It is not considered to be an individual right erga omnes."[342] Thus, the *ne bis in idem* principle was enshrined in Article 9 of the milestone multilateral Extradition Convention of the Council of Europe of 13 December 1957[343] which applied the principle not only to final judgments, acquired the force of *res judicata*, but also to final decisions of a procedural nature. The Extradition Convention reads the *ne bis in idem* in an intergovernmental context between the requesting and requested Contracting Party. Nonetheless, in a series of legislative instruments entitled to establish the mutual cooperation within the CoE framework as regards criminal matters, the prohibition of double jeopardy is totally absent.[344] Whereas the latter is included as mandatory ground for refusal in several Conventions, namely to those engaged in the International Validity of Criminal Judgments[345] and the Transfer of Proceedings in Criminal Matters,[346] those texts received a rather low ratification rate and numerous exceptions to the particular provisions containing the *ne bis in idem* principle.

That said, the legislative efforts of the CoE mechanisms and the jurisprudential attempts of the Strasbourg Court to establish common standards in the field of the *ne bis in idem* application proved to be a rather puzzling balancing task as a coherent position was

[340] Supra note 338, *Zolotukhin* judgment, paras 82-84.
[341]See relatively GRABENWARTER C., *European Convention on Human Rights Commentary*, C.B Beck, Hart, Nomos Helbing Lichtenhahn Verlag, 2014, p.439.
[342] VERVAELE J., Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?, 9 *Utrecht L. Rev. 4*, 2013, p.215.
[343]Article 9 of the aforementioned Convention reads as follows: "Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.", Council of Europe, *European Convention on Extradition*, 13 December 1957, ETS No 24.
[344] For instance in the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters as well as in the the Additional Protocol of 1978 or that of 2001.
[345] CoE, European Convention on the International Validity of Criminal Judgments, 28 May 1970, ETS No.070.
[346] CoE, European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, ETS No.073.

accomplished only in the field of extradition cases. Even when the ECtHR succeeded to unify its jurisprudential approach with regard to the *idem* component of the provision, its *Zolotukhin* judgment was not entirely respected.

Despite this fragmented protection of the right not to be tried twice for the same offence, the Strasbourg Court was definitely inspired to align its case law with regard to the application of the *ne bis in idem* principle to the CJEU's case law[347] pursuant to Article 54[348] of the Convention Implementing the Schengen Agreement(CISA).[349]More precisely, the latter in *Van Esbroeck*[350] interpreted this provision in the light of the free movement principle in the context of European integration and held that "the only relevant criterion for the purposes of the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked".[351]Hence, the Court ruled out,[352] in this case, the legal classification of the action under scrutiny as the criterion which determines the application of the *ne bis in idem* principle is the factual identity. In the context of the *Schengen acquis,* even though the Contracting Parties recognized the possibility of a severe increase of cross-border crime particularly in a borderless area, it would have been incompatible with the aim of freedom of movement of EU citizens to be subjected to double prosecution for the same offence. As a result, MS established a legal provision laying down a multilateral treaty-based *ne bis in idem* norm targeting also to harmonise the differentiated national legal schemes in this field and enhance the mutual trust among EU Member States.[353]

This tendency of the Luxembourg Court to broadly apply this principle for the abovementioned purposes has become obvious in *Gözütok and Brügge* case.[354] In that case, the CJEU saw "the *ne bis in idem* principle as a principle having proper effect, independent from matters of procedure or form, like the approval by a court. In the absence of an express indication to the contrary in Article 54, the principle of *ne bis in idem* must be regarded as

[347] As Haspenter Mock correctly added concerning the potential implications of this dialectic approach of the the two systems on this matter : "Le fait que la Cour de Strasbourg se soit ralliée à l'interprétation de celle de Luxembourg en reprenant le critère de l'identité des faits comme déterminant de l'idem devrait contribuer à simplifier la tâche des juridictions nationales du continent européen appelées à appliquer la notion *ne bis in idem* dans le cadre de la Convention européenne des droits de l'homme d'une part et de la Convention de l'application de l'accord Schengen d'autre part et cela même si le champ d'application et le libellé de ces deux textes ne sont pas les mêmes", MOCK H., Ne bis in idem : Strasbourg tranche en faveur de l'identité des faits, 20 *RTDH* 79, 2009,p.878.

[348] Article 54 CISA provides that: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.".

[349]Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA), OJ 2000 L239/19.

[350]Case C-436/04, *Van Esbroeck*, [2006] ECR I-02333.

[351] Ibid, para 36.

[352] See also Case C-469/03, *Criminal proceedings against Filomeno Mario Miraglia*, [2005] ECR I-02009; Case C-150/05 *Van Straaten v. the Netherlands and Italy*, [2006] ECR I-09327; Case C-288/05, *Criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-06441.

[353] VAN DEN WYNGAERT C. and STESSENS G., The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions, 48 *ICLQ* 4,1999, p.787.

[354] Joined Cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*, [2003] ECR I-5689.

sufficient to apply."[355]The way to the enhancement of the mutual recognition passes also through the application of the *ne bis in idem* in the field of the FD on the EAW. Article 3 and 4 of the FD determined precisely the grounds for mandatory non-execution of the EAW[356] and the grounds for optional non-execution of the EAW.[357]In particular, the Luxembourg Court clarified its position in the context of Article 3 FD EAW in its *Mantello*[358] ruling pointing out that this provision as well as the Article 54 CISA should be interpreted in the same way. Initially, AG Bot held concerning the character of the provision that "it is settled case-law that the Member States, when implementing EU law, must do so in a manner consistent with fundamental rights. That case law is not limited to measures adopted in the context of the EC Treaty. It applies to all the measures taken in the context of the European Union, since, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States".[359]

Subsequently, the Court followed the conclusions of the AG and held that "whether a person has been 'finally' judged for the purposes of Article 3(2) of the Framework Decision is determined by the law of the Member State in which judgment was delivered. Thus, a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union (see, by analogy, *Turanský*, paragraph 36)."[360]After having concluded to the autonomous concept of the "same acts" within the EU law, the Court explained that "in response to a request for information within the meaning of Article 15(2) of that Framework Decision made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) of the Framework Decision, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal

[355] VERVAELE J., The transnational *ne bis in idem* principle in the EU, Mutual recognition and equivalent protection of human rights, 1 *Utrecht L. Rev.* 100, 2005, p.113.

[356] Under Article 3 FD on EAW: "The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:(…)2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State."

[357] Under Article 4 FD on EAW: "The executing judicial authority may refuse to execute the European arrest warrant (…)2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; 3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;(…)5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;(…)".

[358] Case C-261/09, *Gaetano Mantello* [2010] ECR I-11477.

[359]See Opinion of Advocate General Bot in the *Mantello* case delivered on 7 September 2010, para 87.

[360] Supra note 358, paras 46-47.

proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) of the Framework Decision."[361]

Therefore, the autonomous transnational *ne bis in idem* concept, as formulated by the nuanced interpretation of the provisions in the area of freedom, security and justice, was made in the light of the mutual trust principle and found also its place among the fundamental rights incorporated in the Charter. While Article 50 CFR[362] is actually lacking an enforcement clause in clear contrast with the provision of CISA, the fundamental nature of this principle is also confirmed by its appearance in a wide range of different forms and EU legal contexts providing sometimes conflicting interpretations.

At any rate, in the aftermath of the Lisbon Treaty, the codification of the right not to be tried or punished twice for the same act in the Charter aimed to also unify the application of this concept within the Union's legal order. However, the most striking example of its application is the controversial *Åkerberg Fransson* judgment[363] of the Luxembourg Court which posed questions not only pertaining to the notion of the *ne bis in idem* under Article 50 CFR but also with the controversy in relation with the ECHR-Charter interaction .

In casu, Mr. Åkerberg Fransson, a Swedish fisherman, initially subjected to financial penalties (tax surcharges) in the context of administrative proceedings, was also prosecuted for tax fraud facing a criminal sanction. Mr. Åkerberg Fransson then appealed to the civil court submitting that, in essence, the *ne bis in idem* principle, read in the light of the ECHR provisions and the Strasbourg's case law, along with Articles 50 and 52(3) CFR, would preclude the Swedish court system from permitting double proceedings as this would amount to double punishment for the same conduct.

In contrast with the CJEU's approach, AG Cruz Villalón first examined the relationship between Article 4 of Protocol No. 7 and Article 50 CFR as institutionalized under Article 52(3) CFR.[364] He further highlighted that since there is considerable lack of agreement between the Member States of the EU concerning the lawfulness of the imposition of both administrative and criminal penalties in respect of the same offence, the Court should opt for a partially autonomous interpretation of Article 50 CFR. According to the AG's position, this lack of consensus is rooted to the fact that not all Member States have ratified Protocol No. 7 to the ECHR and some that have, have done so with reservations restricting the scope of application of Article 4 only to criminal matters maintaining the dual – administrative and criminal – power to prosecute. Nevertheless, the evolutive jurisprudence of the ECtHR on the matter rejected that duality precluding the double punishment on the basis of both administrative and criminal

[361] Ibid., para 51.

[362]Under Article 50 CFR "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

[363]C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013, published in the electronic Reports of Cases.

[364]Article 52(3) CFR reads as follows "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

penalties in respect of the same acts.[365] For all the aforementioned reasons, the AG concluded that "[c]learly, regard must be had to the current state of the case-law of the European Court of Human Rights but the protective threshold which the Court of Justice is required to respect must be the result of an independent interpretation which is based exclusively on the wording and scope of Article 50 of the Charter."[366]

However, the Luxembourg Court deliberately denied to examine the relationship between the *ne bis in idem* in the system of the ECHR and the one of the EU and turned its attention to the scope of application of the Charter. Particularly, the CJEU recalled that "that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law."[367]

As for the substantive question, the Court provided little guidance to the MS since despite the fact that it reaffirmed implicitly the application of the *Engel* criteria and that a tax offence may be of criminal nature, it left the matter open to the national courts to determine whether the *ne bis in idem* is applicable. More precisely, the Court held that "it is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (…)".[368]The CJEU also made clear that sanctions for the evasion of VAT, as in the present case, fall within the implementation of EU law and should respect EU fundamental rights. However, as discussed earlier, in order the Charter's provision to be fully applicable the contested national legislation should fall within the scope of EU law. As AG Kokott and Sobotta correctly pointed out "taken literally, this pronouncement is extremely broad. Today, it is very difficult to imagine a situation that does not in some way come within the scope of European Union law. For example, all EU tourists are exercising their free movement rights when they visit other Member States. Does that mean that anything they do comes under EU fundamental rights? If the Court meant to say that all such situations completely fall within the ambit of EU Fundamental Rights law, there would remain very little room for the operation of the Fundamental Rights laws of Member States. Additionally, EU control of Member State action would appear to be significantly extended."[369]Nevertheless, since this pronouncement of the Court arguably creates great uncertainty on the matter, AG Kokott and Sobotta, subsequently,

[365] The divergence regarding this matter and the relationship ECHR-Charter in expanded to the judges of the CJEU. In a case presenting great resemblance to the *Akerberg Fransson*, namely the *Bonda* case, the AG Kokott referred to the lack of consensus concerning the interpretation of Article 4 Protocol No.7 ECHR. Nonetheless, she laid more emphasis on the proximity of the Charter with the ECHR and the requirement for homogeneity, under which the rights contained in the Charter are to have the same meaning and scope as the corresponding rights guaranteed by the ECHR. Case C- 489/10, *Łukasz Marcin Bonda,* [2012] published in the electronic Reports of Cases. See particularly the Opinion of AG Kokott in *Bonda*, paras 43,44.
[366]Opinion of AG Cruz Villalón, paras 86-87.
[367] Supra note 363, para 17.
[368] Ibid., para 36.
[369] KOKOTT J. and SOBOTTA C., Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection, 34 *Yearbook of European Law*1, 2015, p.12.

stressed that the actual meaning of the Court's approach was that, in order to trigger the Charter's protection, the situations under scrutiny should be regulated or governed and not only touched upon, in general, by the EU legislation .

The *Åkerberg Fransson* case also gave rise to interesting and complex issues regarding the interpretation of Article 52(3) CFR. In this context, the Court held that "as regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (…)."[370]

Surprisingly enough, the Luxembourg Court concluded that "European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter."[371]

Whereas the AG paid particular attention to the "homogeneity clause" which is also reaffirmed by the provision of Article 52(3), the Court of Justice opted for a rather minimalistic approach of this Article and therefore, an autonomous interpretation of the *ne bis in idem* principle in EU system.[372]

Overall, the Court finds EU fundamental rights system applicable if there is a connection between the national legislation and EU law. However, given the gradual and never-ending expansion of the Union law to new fields of law, it would be impossible in a few years to identify an area of national law untouched by the EU system and thus, totally regulated by the national legislation of the MS. As a result, due to this significant expansion of the scope of application of the EU Charter, the CJEU might be given the opportunity to use the latter as a tool for controlling and gradually harmonising the multiple standards of fundamental rights protection within all Member States when it comes to the enforcement of EU rules. In these terms, the Court of Justice probably seeks to gradually render the EU Charter the exclusive referring text while shaping a more coherent level of EU human rights protection, giving the Article 51 of the Charter the key role, instead of using the general principles and the ECHR, as it was the case until recently. This tendency of the Court, expressed only a few months before its negative Opinion 2/13 on the accession was delivered, inevitably raised complicated issues

[370] Supra note 363, *Åkerberg Fransson*, para 45.
[371] Ibid, para 47.
[372] KOKOTT and SOBOTTA, supra note 369, p.18-19.

regarding the relationship and legal hierarchy between the Charter as primary EU law and the ECHR.[373]

Having said all the above, in its *Åkerberg Fransson ruling*, the Court felt that, at first, it should preserve the autonomous perception of the *ne bis in idem* concept along with its transnational effect, under the EU Charter. Thus, the *ne bis in idem* provision of Art 50 EUCFR, applied in a setting of national enforcement of EU law, protects from all-both and administrative and criminal- punitive sanctions in line with the aforementioned Engel criteria. But most importantly, in this landmark case of the Court, which was, interestingly enough, delivered on the same day with the *Melloni* judgment, the CJEU appeared willing to minimize the ECHR' role signaling the supremacy of the Charter as interpretative tool within the Union's architecture. The Court excluded the conversation around the ECHR possibly in the aim of avoiding the thorny issue of compatibility of EU standards with the Convention, particularly in an era marked by severe ambiguity developed regarding the future coexistence of the two legal instruments. On the other hand, this expansionist approach of the Luxembourg Court, which actively enlarged the scope of application of the Charter, seemingly suggests a brand new beginning for EU human rights law.[374] However, the risk of the ECHR being overshadowed or sidestepped- at least from the national courts' perspective- is even more present in the light of the Opinion 2/13, which confirmed the *Melloni* and *Åkerberg Fransson* principles.

However, the recent jurisprudence fleshed out by the ECtHR and the CJEU has tested the waters of the inter-judicial dialogue between the two adjudicative bodies as regards the duplication of criminal and administrative procedures for the same action. Indeed, the controversial *A and B. v.Norway*[375] delivered by the Strasbourg Court added a new criterion introducing an exception from the *ne bis in idem* principle. *In casu*, the scope of the prohibition appears to be interpreted as indissolubly connected with the temporal and substantial relation between the two procedures. The Grand Chamber, hence, held precisely that "for the Court to be satisfied that there is no duplication of trial or punishment (bis) as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been 'sufficiently closely connected in substance and in time'. In other words, it must be shown that they have been combined in an integrated manner so as to form a coherent whole." [376]

The said finding of the Court signals a remarkable departure from its previous *Zolothukin* and *Engel* jurisprudence and a step back from the extensive protection offered thereof. The narrowness but also the vagueness of the new criterion introduced by the Grand Chamber was doubted by Judge Pinto De Albuquerque in his extended dissenting Opinion as he criticised the transformation of the initial *ratio* of the provision from an individual guarantee

[373] LAVRANOS, supra note 303, p. 139.
[374] See also DOUGLAS-SCOTT S., *The relationship between the EU and the ECHR five years on from the Treaty of Lisbon*, Legal Research Paper Series ,University of Oxford, Paper XX/2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207, p.19-20.
[375] ECtHR, *A and B v Norway*, Application Nos. 24130/11 and 29758/11, 15 November 2016; See also ECtHR, *Johannesson and Others v. Iceland*, Application No. 22007/11, 18 May 2017; *Jussila v. Finland*, Application No. 73053/01, 23 November 2006, para 43.
[376] Ibid., *A and B v. Norway*, para 130.

to an enforcement tool of tax authorities. In his own words, the Judge stressed in this respect that "after turning the rationale of the ne bis in idem principle upside down, the present judgment opens the door to an unprecedented, Leviathan-like punitive policy based on multiple State-pursued proceedings, strategically connected and put in place in order to achieve the maximum possible repressive effect."[377] Interestingly, the dissenter Judge underlined the risks that this conclusion of the majority could bring to the destabilization of the looming coherence that the ECtHR and the CJEU are striving to achieve, as derives from the *Åkerberg Fransson* case law. For the Judge "the progressive and mutual collaboration between the two European courts will evidently once again be deeply disturbed, Strasbourg going the wrong way and Luxembourg going the right way."[378]

Right or wrong, the Court of Justice of the EU indeed has taken a different road while fulfilling its moral obligation to consistently reply to analogous questions with regard to the corresponding right of Article 50 CFR and its interrelationship with the threshold of Article 7 Protocol No. 4 ECHR. Therefore, in three similar cases involving parallel procedings of criminal and administrative nature against VAT in the *Menci* case,[379] in *Garlsson et al.*[380] and in *Di Puma,*[381] all delivered on the same day the CJEU seized the opportunity to reshape the controversial interpretation of the *ne bis in idem* principle. Indicative of the presence of the ECHR and its respective interpretation by the Strasbourg Court within the EU legal order, the *AG Sánchez-Bordona's* opinions had already highlighted all the negative repercussions of the *A and B v. Norway* and analysed the reasons why the Court should not abandon its *Akerberg Fransson* legacy following the Strasbourg Court in this new unsafe path.[382] In fact, the Advocate General in all the three cases implicitly criticised the option of the ECtHR to grant discretion to the states and to rely extensively on the Italian legal framework allowing the duplication of the criminal and administrative proceedings for VAT offenses.[383] In light of the balance between the two instruments that Article 52 CFR has introduced on the basis of the level of protection , the AG stressed that "since the judgment in *A and B v. Norway* limits the guarantees for individuals derived from that provision, by permitting the duplication of

[377] Dissenting Opinion of Judge Pinto de Albuquerque in *A and B v Norway*, para. 79.
[378] Ibid., para.80.
[379] Case C-524/15, *Menci*[2018], not yet published.
[380] Case C- 537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*,[2018] published in the electronic Reports of Cases.
[381] Case C-596/16, *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa (Consob) and Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca* [2018], published in the electronic Reports of Cases.
[382] He relatively refers to the vagueness of the criteria of the Strasbourg Court and observed that "[t]he ECtHR is less precise when it comes to the criteria for establishing that there is a sufficiently close connection in time between the proceedings. The ECtHR merely states that it is not necessary for the criminal and administrative proceedings to be conducted simultaneously from beginning to end, adding that the greater the time difference between the two sets of proceedings, the more difficult it will be for the State to justify that difference."
Opinion Advocate General M. Campos Sánchez-Bordona in *Menci* delivered on 12 September 2017, para.55.
[383] See the analysis of the opinions of the AG in *Menci*, *Garlsson Real Estate* and others and *Di Puma* by Michele Simonato. See *inter alia* SIMONATO M., *Two instruments but a difficult relationship? Some upcoming decisions of the CJEU on the Ne bis in idem*, European Law Blog ,15 November 2017, available at http://europeanlawblog.eu/2017/11/15/two-instruments-but-a-difficult-relationship-some-upcoming-decisions-of-the-cjeu-on-the-ne-bis-in-idem/ ; MAULET L., Le principe ne bis in idem, objet d'un « dialogue » contrasté entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme, 109 *RTDH* 2017, pp.107- 130 ; MILANO L., Le principe *non bis in idem* devant la Cour de Luxembourg, vers un abaissement de la protection accordée au principe, 117 *RTDH* 2019, pp.161-177.

proceedings, punishments and administrative penalties of a substantively criminal nature, in the circumstances indicated above, the Court will ensure a higher level of protection, in the context of Article 50 of the Charter, by maintaining without reservations its previous case-law in line with its judgment in Åkerberg Fransson."[384]

The same goes with the opinions of the Advocate General in *Garlsson* which concerned the *ne bis in idem* principle under the Italian legislation on market manipulation and in *Di Puma* in relation to market abuse. In the same vein, the Advocate General strongly supported the autonomous interpretation of the *ne bis in idem* concept independently from the *A and B. v. Norway* in the context of Article 52 CFR.[385] Instead, he emphatically invited the Court to remain loyal to the application of the *Engel* criteria and to take into consideration the criminal character the CJEU to have more influence on the determination of the criminal and punitive nature of the sanction imposed.[386]

In the wake of the opinions of the Advocate General, the Court of Justice pronounced on the matter on 20 March 2018 and delivered its three judgments in the aforementioned cases.[387]In essence, the Court refrained to remain close to the *Engel* approach and went on to genuinely rebuilt its jurisprudence in this regard and acknowledge that some restrictions to the *ne bis in idem* prohibition are indeed allowed. Neither the road of the AG nor the one of the Strasbourg Court is entirely taken since the Court felt that in order to ascertain whether the double prosecution of both administrave and criminal character amount to a breach of Article 50 of the Charter paid particular attention to a necessity assessment, strictly applied. In the Court's view, three requirements need to be met so as the impugned legislation to reach the Charter's threshold successfully. For this reason, this legislation should : a) pursue an objective of general interest which justifies such a duplication of proceedings and penalties, b) contain rules ensuring coordination which limits to what is *strictly necessary* the additional disadvantage which results from a duplication of proceedings for the persons concerned, and c) provide for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.[388]

Certainly the Court has always in mind the Strasbourg's findings and underscored that its criteria are also compatible with the ECtHR's standing in the recent *A and B v. Norway.*[389]

In the *Garlsson* case, the Court took a further step to elucidate what is deemed as an excessive burden that goes beyond the necessity test and held relatively that "[i]n those

[384] Opinion of the Advocate General Campos Sánchez-Bordona in *Menci*, para 77.
[385] Opinion of the Advocate General Campos Sánchez-Bordona in *Garlsson Real Estate*, para 77.
[386] Supra note 379, para.96.
[387] For most insightful comments on the three decisions of the Court see LO SCHIAVO G., The principle of ne bis in idem and the application of criminal sanctions: of scope and restrictions: ECJ 20 March 2018, Case C-524/15, *Luca Menci* ECJ 20 March 2018, Case C-537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)* ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, *Enzo Di Puma v Consob and Consob v Antonio Zecca*, 14 *EuConst* 3, 2018, pp. 644–663.
[388] Supra note 379, para. 63.
[389] In the Court's words in Menci "therefore, the conditions to which Article 50 of the Charter, read in conjunction with Article 52(1) thereof, subjects a possible duplication of criminal proceedings and penalties and of administrative proceedings and penalties of a criminal nature, as is apparent from paragraphs 44, 49, 53, 55 and 58 of the present judgment, ensure a level of protection of the ne bis in idem principle which is not in conflict with that guaranteed by Article 4 of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights." Ibid., para 62.

circumstances, it seems that the act of bringing proceedings for an administrative fine of a criminal nature under Article 187b of the TUF exceeds what is strictly necessary in order to achieve the objective referred to in paragraph 46 of the present judgment, in so far as the final criminal conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner, which it is for the referring court to determine."[390]

Overall, the abovementioned *corpus* of cases decided by the two European Courts imply that there is an on-going struggle to establish coherent standards,[391] however each of them approach the issue differently. The Strasbourg Court opened the door of permissible derogations from the *ne bis in idem* concept and the CJEU, later on, passed through that door and turned the other way. In other words, the ECtHR's *rationale* was anchored to the requirement of the parallel criminal and administrative proceedings shaping a uniform set of legal actions while the CJEU examined the *bis* condition through the lens of proportionality.

The underlying aim of the Luxembourg Court to promote openness pertaining to the existence of binary proceedings on the same offence might be connected to the initial mandate of the EU to safeguard the sound preservance of EU economic interests as it explicitly flows from the press release published on the occasion of the issuance of the three decisions.[392]At any rate, the correct assessment is left to the Member States' hands. The discretionary powers for this balancing task are probably granted to national authorities since the preliminary rulings do not involve questions close to the validity or the core of EU legislation.[393] Be that as it may, the CJEU managed to cautiously frame this context and provide Member States with useful guidance in this respect for future disputes.

Hence, this proportionality-centered approach of the CJEU which sets reasonable and legitimate limits to the *ne bis in idem* prohibition appears to be more in line with the intimate interplay between the concept and legal certainty both in international and domestic settings.

To date, the ECtHR seems to distance itself from the consolidation of legal guarantees setting the limits for the legitimate restriction to the *ne bis in idem* principle in line with its *Zolothukin* and *Engel* case law which constituted the milestones of its work for over a decade and whose echoes to Luxembourg resulted in the reconstruction of the latter's jurisprudence correspondingly. In any case, the Strasbourg's case law inevitably remains the first and foremost point of departure for its Luxembourg peer as illustrated both explicitly with its reference to the *A and B v. Norway* and implicitly with the preservance of the *Fransson* reasoning and the adoption of the *Engel* criteria.[394] The Court of Luxembourg's findings in the three recent judgments, delivered in the era that accession cannot be achieved in the

[390] Supra note 380, paras 59 and 61.
[391] BARON J. and POELMAN E., The Principle of Ne Bis in Idem: On the Ropes, but Definitely Not Defeated, 46 *Intertax* 10,2018, p. 809.
[392] PEETERS B., The Ne Bis in Idem Rule: Do the EUCJ and the ECtHR Follow the Same Track?, 4 *EC Tax Review* 181, 2018, p. 185; See also the recent EU framework on the market abuse. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), Recital 23, OJ 2014 L 173.
[393]LUCHTMAN M., The ECJ's recent case law on *ne bis in idem*: implications for law enforcement in a shared legal order, 55 *C.M.L.Rev* 6, 2018, p. 1748.
[394]See LOSCIAVO, Supra note 387.

foreseeable future, has autonomous perception of the application of the said principle, writing a whole new page in the book of the inter-judicial dialogue between the two Courts.[395]

The autonomous *ne bis in idem* concept with specific regard to its transnational nature had already been explored in the *Spasic* judgment,[396] in which the mutual trust, the cornerstone of the EU, seems to be doubted in the field of the area of freedom, security and justice.[397] Adopting a more security-oriented approach, the CJEU seemed to reconsider the notion of mutual recognition as it stressed that "while it is true that those mechanisms are capable of facilitating the execution of decisions within the European Union, their use is nevertheless subject to various conditions and depends, in the end, on a decision of the Member State in which the court that delivered a decision on a definitive sentence is located, since that Member State is not obliged under EU law to ensure the effective execution of the penalties arising from that sentence. The options made available to that Member State by those Framework decisions cannot ensure that, in the area of freedom, security and justice, persons definitively convicted and sentenced in the European Union will not enjoy impunity if the State which imposed the first sentence does not execute the penalties imposed."[398]Unlike AG Jaaskinsen who underlined the necessity of an interpretation of the EU *ne bis in idem* concept in the light of the corresponding provisions of the ECHR,[399] the CJEU declined the possibility to scrutinize the key element of this case, the *enforcement condition* of CISA, in this context and mostly ignored the hesitations of AG who stated that the CISA *ne bis in idem* concept should be absolutely compatible with the level of the extended protection offered by Article 50 CFR always understood in accordance with the ECHR's non-derogable standards. He also held that Article 54 CISA definitely introduces a limitation to the application of *ne bis in idem* as interpreted under the Charter's wording which puts its transnational character especially in the field the EU mutual trust system into jeopardy. Nevertheless, the Court automatically applied the Explanations of the Charter[400] and moved to the entirely opposite direction declaring that the enforcement condition comes hand-to-hand with the right as enshrined in the EU Charter.[401]

However, this surprising appraisal of the Luxembourg Court was partially offset by two rulings which both dealt with the notion of the final judgment when interpreting the autonomous EU *ne bis in idem* provision. More precisely, in the *M* case[402], the Court held that the sole fact that a case could be reopened, if new evidence emerge, does not necessarily mean that the decision should be considered as final pursuant to Article 54 CISA. It also stated that the CISA standard on the matter must be interpreted in the light of Article 50 of the EU Charter,

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[395] See also VETZO M., The Past, Present and Future of the Ne Bis In Idem Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma, 11 *Review of European Administrative Law* 2, 2018, pp. 55-84.
[396] Case C-129/14 PPU, *Zoran Spasic*, [2014] published in the electronic Reports of Cases.
[397] See MARLETTA A., *The CJEU and the Spasic Case: Recasting Mutual Trust in the area of freedom, security and justice?*, European Law Blog 2015, available at http://europeanlawblog.eu/?p=2655.
[398] Ibid, para 69.
[399] AG Jaaskinsen posed once again the question what happens when a provision of the ECHR, with which the Charter's provision must be compatible, is not binding in all Member States. Nevertheless, he approached the matter with great caution stating that non ratification by some MS cannot have any bearing on the interpretation, since it does not change the scope of this provision.
[400] Explanations on the Charter, supra note 207, paras 55-57.
[401] For a thorough analysis see VERVAELE J., Schengen and Charter-related *ne bis in idem* protection in the Area of Freedom, Security and Justice: *M* and *Zoran Spasic*, 52 *C.M.L.Rev* 5 ,2015, p.1354, 1355.
[402] Case C-398/12, *Criminal proceedings against M.*, [2014] published in the electronic Reports of Cases.

since both these provisions share the same meaning and scope as Article 4 of Protocol No.7 ECHR. In order to conclude to that more lenient approach of the notion of *final decision,* the Court explicitly based its reasoning to the cornerstone *Zolotukhin* judgment of the Strasbourg Court pointing out that "in this respect, it was held in the judgment of the European Court of Human Rights ('the ECtHR') in *Sergey Zolutukhin v. Russia*, no. 14939/03, § 83, ECHR 2009, that Article 4 of Protocol No 7 to the ECHR 'becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*.' On the other hand, extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the 'final' nature of the decision does not depend on their being used".[403]

Once again, in its *Kossowski* judgment,[404] delivered in June 2016, the question revolved around whether an unapplied order of the Polish Prosecutor issued without examining the case in the merits constituted a *final* judgment for the German judicial authorities apt to trigger the application of the prohibition of double prosecution. The reasoning of the CJEU in the case at hand, appears more convincing as the Court, in accordance with its prior case law and the AG Bot's Opinion,[405] ruled that since the Polish authorities did not hear any witness in order to shed light to the victim's conflicting statements and as a result, did not really examine the merits of the case. On these grounds, the Court rejected the *final* nature of the Polish prosecutor's decision. All that said, the CJEU seems to revisit the EU concept of the final character of a decision, which was until recently totally based on the mutual recognition and mutual trust framework. However, this road could be proved quite unsafe, particularly in the area of freedom security and justice in which the mutual recognition standards provided an area where the suspects or convicted persons enjoyed a cross-border and thereby, more protective version of the *ne bis in idem* principle.

Post-Lisbon, both judicial mechanisms strive to identify the proper balance between them prioritising the more effective observance of fundamental rights in Europe. The differentiated understanding of *ne bis in idem* within EU law having a transnational character stood out again before the ECtHR which was recently invited to review its alleged breach under the Convention. Having already pronounced on this familiar case brought against France some years ago[406] the applicant this time alleged that its previous conviction in Germany should have prevented its retrial in France. This decision on admissibility of the ECtHR is of merit since it crystallizes the extremely cautious and respective standing of the Court of Strasbourg towards its Luxembourg peer. The Court held, in the *Krombach* decision on admissibility, that the fact that France and Germany are EU Members and therefore, the transnational concept of the *ne bis in idem* principle within the EU legal order do not affect the application of the corresponding provision of the ECtHR.[407]

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[403] Ibid., para 39.
[404] Case C-484/16, *Piotr Kossowski* [2016] not yet published.
[405] SIMONATO M., *Ne bis in idem in the EU: Two important questions for the CJEU (Opinion of the AG in C-486/14 KUSSOWSKI*), European Law Blog 2016, available at http://europeanlawblog.eu/?p=3071 .
[406] ECtHR, *Krombach v. France*, Application No. 29731/96, 13 February 2001.
[407] ECtHR, *Dieter Krombach v. France* (Decision on Admissibility), Application No 67521/14, 29 March 2018, para.38.

The Court went further to declare that it does not have competence to apply rules contained in EU law or to pronounce on an alleged violation of those rules, except where a violation of an EU rule incidentally also violates a Conventional right. It is, hence, up to the MS and in particular the national judiciary to interpret and apply national law in line with the provisions of EU law, and the Strasbourg Court is not in a position to rule on a potential violation of EU law. The role of the Court is limited to determining whether the effects of their decisions are compatible with the Convention. The Court found that it was not therefore for the latter in this case to rule on whether the applicant's prosecution in France and his subsequent conviction violated the Union's law. On these grounds, the application was declared inadmissible.[408] The Strasbourg Court, here, refused to decide on the admissibility of a case under EU rules. But most importantly, it manifested the distinct applicable standards when it comes to *ne bis in idem* and drew that distinction signaling its unwillingness to enter the soveireign territory of EU law from the "*back door*". Delivered almost five years after the milestone of the EU-ECHR relationship, namely the Opinion 2/13, the Strasbourg Court still feels in the case at hand that it should timidly approach such sensitive matters touching the allocation of powers between the Luxembourg and the Strasbourg Court.[409]

b) The CJEU's inconsistent application of ne bis in idem in competition cases

While the combination of the *ne bis in idem* provisions of the Charter and of the CISA system, as described earlier, raised the level of protection of the right not to be tried or punished twice, in the field of the EU competition legal framework, the *ne bis in idem* principle does not protect the EU citizens from being subjected to multiple procedures for the same acts introduced either by the European Commission or the national authorities. More precisely, in competition law, this principle precludes the initiation of proceedings or the imposition by a Competition authority (or even the European Commission) of an antitrust penalty against an undertaking for an anti-competitive conduct given that it has already been penalized by a prior unappealable decision.

The reform of the competition enforcement system with the adoption of the Council Regulation 1/2003 [410] instituted a brand new system of parallel enforcement aiming to coordinate actions of both the Commission and the national competition authorities (NCAs) as well as actions between particular NCAs.[411] Notwithstanding the criminal nature that the fines in antitrust proceedings have, in accordance with the broad interpretation followed by both European jurisdictions and the application of the *Engel criteria* accordingly, the Luxembourg

[408] Ibid., para.39

[409] VAN BOCKEL B., *Krombach Returns to Strasbourg*, ECHR Blog 2018, available at http://echrblog.blogspot.com/2018/05/guest-blog-commentary-on-ne-bis-in-idem.html

[410] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2002 L 1.

[411] Pursuant to Article 11(1) of Regulation 1/2003 the Commission and the competition authorities of the Member States shall apply Community competition rules in close cooperation. The priority in this field is definitely given to the Commission in conducting proceedings under Articles 101 and 102 TFEU since the initiation by the Commission of an antitrust procedure releases the NCAs of their competence to apply the EU competition rules. Additionally, the Commission may also initiate proceedings when a particular national authority is already acting on a given case, but only after consulting with that national authority.".

Court opted for a conceptualisation of the *ne bis in idem* principle profoundly different from that followed in the AFSJ. It, thereby, kept its distance from the jurisprudential evolution of the Strasbourg court. By contrast, in the realm of EU competition law cases, the Court has repeatedly ruled that the application of the *ne bis in idem* principle is subject to the threefold condition of identity of facts, unity of the offender and unity of the legal interested protected. Due to the different perspectives of national and EU competition legal standards, parallel prosecutions of national authorities and the European Commission may each serve distinct legal interests and hence, will not automatically be outlawed by the prohibition of *ne bis in idem* principle. However, the requirement of the identity of the legal interest protected under each anticompetitive proceeding limits significantly the scope of protection enjoyed by the defendant and underpins the fundamental rights dimension of the *ne bis in idem* principle.

The most striking example of the CJEU approach is the landmark *Toshiba* judgment,[412]in 2011. In the case at hand, the AG Kokott strongly critisised the former position of the CJEU[413] prioritizing the uniformity of the Union's legal order as well as the homogeneity of the Court's jurisprudence with the Strasbourg's jurisprudence with particular attention to the ECtHR's ruling in *Zolothukhin* case.[414]More precisely, for the AG Kokott, as far as the requirement of homogeneity is concerned, "it follows from that requirement that rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. In other words, Article 4(1) of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights (ECtHR), describes the minimum standard that must be guaranteed in the interpretation and application of the *ne bis in idem* principle in EU law. Whereas the case law of the ECtHR on the meaning of *idem* had lacked uniformity for a long time, the ECtHR held, in a landmark judgment in 2009, that Article 4 of Protocol No 7 to the ECHR prohibits the prosecution or trial of a second offence in so far as it arises from identical facts or facts which are substantially the same. This means that the ECtHR has regard only to whether the facts are identical and not to the legal classification of the offence. Moreover, in so doing, it is itself guided primarily by the case-law of the Court of Justice on the area of freedom, security and justice. In addition, the form of words used by the ECtHR to define the meaning of identical facts is very similar to that employed by the Court of Justice. There is nothing to indicate that the ECtHR might be inclined to the view that the scope of the guarantee provided by the *ne bis in idem* principle is less extensive specifically in the area of competition law".[415]

However, the CJEU reaffirmed its insistence on the threefold requirement ignoring the criterion of the material identity of facts which constitutes the key element apt to determine the

[412]Case C-17/10, *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže,*14 February 2012, published in the electronic Reports of Cases.
[413] See Case C-238/99 P, *Limburgse Vinyl Maatschappij and Others v Commission*, [2002], I-08375, Case C-204/00 P, *Aalborg Portland and Others v Commission*, [2004] I-00123.
[414]See for a more complete analysis on the application of the *ne bis in idem* in competition and anti-trust cases PRZEMYSLAW K., The *ne bis in idem* Principle in Proceedings Related to Anti- Competitive Agreements in EU Competition Law, 5 *YARS*, 2012, pp. 111-135.
[415]Opinion of Advocate General J. Kokott in the C-17/10 *Toshiba* case delivered on 8 September 2011, para. 120-121.

application of the *ne bis in idem* as applied pursuant to the CISA provision.[416] As Jonathan Tomkin emphasized "(i)ndeed, it is submitted that it is difficult to identify the theoretical basis that justifies such a differentiated application of the *ne bis in idem* principle in competition law. If the *ne bis in idem* principle precludes the repeated prosecution of the same act of drug trafficking, then it is not apparent why it should permit repeated prosecution of the same anti-competitive conduct".[417] Moreover, within the context of internal market, allowing domestic competition authorities and the Commission to conduct multiple investigations against the same undertakings in relation to the same facts while both enjoying wide discretion on the matter is precisely what the *ne bis in idem* concept seeks to prohibit.[418]

To conclude, the appearance of the *ne bis in idem* principle in various different forms and areas of EU law is revealing of the fundamental character of this particular right. At the same time, it is this fundamental character that requires the CJEU to urgently review this jurisprudence and set aside the divergent interpretations to which this right was exposed, particularly after its codification in the EU Charter as a general principle of EU law.

It flows, therefore, from the above analysis that the interaction between the Strasbourg and the Luxembourg Court was not sufficient to provide the EU citizens or undertakings with a horizontal harmonising effect regarding the application of the *ne bis in idem* principle. Since not all Member States of the EU have ratified the Protocol No. 7, the ECtHR has recently reversed its prior case law moving towards a coordinated interpretation of the provision. Nevertheless, the problem remains due to the fact that the aforementioned harmonising effect offered by the Strasbourg jurisdiction, not to mention the fragmented protection of the international human rights instruments, is not binding in all EU Member States. On these grounds, it appears today more crucial than ever, that the CJEU should, within the existing EU legal framework, recognise the need to opt for a reconciliation of the values of the European Union that would not undermine the unified application of the *ne bis in idem* principle.

Conclusion

In conclusion, through the analysis of the first part of this research, we endeavoured to shed some light to the specific terms of the direct application of the European Convention on Human Rights by the judicial mechanism of the EU, the Court of Justice. Besides the unquestionable influence of the Convention's principles to the formulation of EU human rights law, the judicial interplay between the Strasbourg and the Luxembourg Court provided the latter with useful responses in legal fields in which the effective protection of fundamental rights was not a given, notably, in a setting where common market and economic integration played the key roles. Therefore, despite the discrepancies observed, the CJEU, on the basis of the Convention's rules, developed and gradually improved the human rights dimension of its growing jurisprudence particularly with regard to the protection of private life, the procedural

[416] Supra note 412, para 97. The recent judgment of the Court of Justice maintained its firm position on the matter in the *Powszechny* case. Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, [2019] published in the electronic Reports of Cases.

[417] TOMKIN J., Art.50 Right not to be tried or punished twice in PEERS S., HERVEY T., KENNER J., WARD A. (eds.), *The EU Charter of Fundamental Rights: A Commentary,* Hart Publishing 2014, p. 1412.

[418] NAZZINI R., Fundamental rights beyond legal positivism: rethinking the *ne bis in idem* principle in EU competition law, 2 *J Antitrust Enforcement* 2,2014, p.293.

requirements of fair trial and, last but not least, the *ne bis in idem* principle. Post Lisbon, despite the enhanced skepticism around the complexity of the dual fundamental rights protection within the European legal space, the ECtHR remains the benchmark of EU human rights law and with the requirement of accession which is now engraved in the Treaties, the Court of Luxembourg always pays meticulous attention to the relevant pronouncements of the ECtHR. Even though the road to Strasbourg proves to be remarkably long and all inconsistencies in terms of interpretation and standards of protection stand out, the Luxembourg Court strives to foster the "peaceful" coexistence of the Charter with the Convention offering new grounds for hope of a "peaceful" coexistence of their respective monitoring bodies accordingly in case of success of the perpetual accession project.

B. The application of the ECHR as a restriction mechanism of EU law

Besides the direct application of ECHR by the EU system, the fundamental rights' echo was also used by the Luxembourg judicature as a restriction mechanism with relation to the interpretation of the Union's rules, even in the most traditional fields of EU law.

More precisely, when the direct application of the ECHR provisions had dominantly become the *conditio sine qua non* parameter in cases that the CJEU touched upon the fundamental rights dimension of the EU legislation, the Court took in the latest decades, the further step of applying these provisions in order to determine whether several aspects of EU law are compatible with the fundamental rights doctrine, as already developed by the Luxembourg Court, in the sense of *general principles of EU law*. The adoption of the EU Charter brought also new air in this area, since it gave to the judges of the CJEU the possibility to control more effectively the EU legislator with regard to human rights. Through the pages of the following chapter, I will embark on the analysis of limitations posed to the core principles of internal market in the name of the standards of the ECtHR **(1)**. This will be followed by an examination of the analogous implications of the Strasbourg's echo to the EU data protection regime **(2)**, the practice of EU institutions **(3)**, and the migration policies under the Dublin legislation **(4)**.

1. The ECHR as a ground for derogation from the internal market freedoms of the EU

a) The equilibrium between fundamental rights and EU fundamental freedoms

The attempt of the Luxembourg Court to reconcile the fundamental freedoms of the EU internal market, the cornerstones of the Union's architecture, with the fundamental rights already incorporated in the EU system is the most striking example of the restricting effect of the ECHR with regard to the EU legal order. Even from the *ERT* case, the Luxembourg Court had famously declared that when Member States derogate from the exercise of the freedom to provide services, they must provide a justification compatible with -and interpreted in light of- the general principles of law and in particular, the fundamental rights giving specific attention to the interpretation under ECHR.[419]

In the wake of the *ERT* litigation,[420] the CJEU subsequently found itself in the challenging position to balance the fundamental rights as embodied in the ECHR, which constituted the crucial material source of human rights in the EU until the adoption of the CFR, with the economic freedoms of the integrated common market.

[419] Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Siotirios Kouvelas*, [1991] ECR I-2925, paras 41-45.
[420] See also BARCELLO III, John J., ECJ Review of Member State Measures for Compliance with Fundamental Rights, *Cornell Law Faculty Working Papers. Paper* 93, 2009, pp.1-8.

The famous *Schmidberger* judgment[421] is a *locus classicus* in this field. Schmidberger, a German haulage company based in southern used to transport goods to Italy *via* Austria. More precisely, to this aim, it used the Brenner Pass, to head to Italy. Due to a demonstration, organized under the authorization given by the Austrian authorities on the Brenner motorway by an environmental group, the Transitforum Austria Tirol, Schmidberger's lorries were kept stationary and consequently, considerably delayed for four days. Hence, Schmidberger brought proceedings against Austria on the grounds that the Austrian authorities had failed to effectively guarantee free movement of goods in accordance with the EC Treaty, claimed damages in respect of the aforementioned grounds and sought compensation since the company's vehicles were prevented from operating on their normal route to Italy in contravention of the EU free movement rules. The Austrian Courts rejected the company's allegations[422]since the latter was fully aware of the time and the location of the demonstration to be on the Brenner motorway and they should have predicted its damaging effects or they should have chosen an alternative transit route to Italy. The demand of the national court for a preliminary ruling concerned whether free movement of goods actually requires a state to keep open major motorways used for those purposes. In the context of the enforced judicial dialogue between the two European jurisdictions, the Austrian Court was, arguably, encouraged to ask the Luxembourg Court whether that requirement takes precedence over the protection of fundamental rights such as the freedom of assembly, as guaranteed by the Austrian Constitution and Article 11 ECHR.

In the light of -but quite differently[423] from- its previous *Commission v. France ruling,*[424] it held that not banning a demonstration by individuals on a transport route constituted *prima facie* a restriction to the free movement of goods. However, with regard to possible justification for this restriction, the CJEU ruled that "even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods,(…) that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State."[425]

As for the Austrian authorities' motivation to permit the demonstration on grounds of fundamental rights protection as laid down in its constitution and the ECHR, the CJEU stated, after referring to its *ERT* doctrine on fundamental rights, that "since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by

[421]Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659.
[422] For a further analysis of the facts of the case see Matthew Humphreys's case note in HUMPHREYS M.**,** Free Movement and roadblocks: The right to protest in the single market, Case C- 12/00 *Schmidberger Internationale Transporte and Planzige v Austria* [2003] ECR 1-5659, *6 Envtl. L. Rev. 190*,2004, pp.190-195.
[423] Supra note 421, paras 84-89.
[424] Case C-265/95, *Commission v. France* [1997] ECR I-6959.
[425] Supra note 421, para 66.

Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".[426]

Confirming that common market freedoms are subjected to certain restrictions, the Luxembourg Court sought the right equilibrium between the requirements of fundamental rights protection on the one hand, namely the freedom of expression under Article 10 ECHR along with the freedom of assembly under Article 11 ECHR, and the EU freedom of movement on the other. To that aim, it adopted a Strasbourg-centered examination of the Austrian authorities' position using an interpretational parallel of the two rights which do not constitute absolute rights and are, thereby, subjected to limitations. On this basis, taking into account the wide *margin of appreciation* that the State enjoys on this matter, the Court of Justice applied a Strasbourg-type proportionality test and thus, concluded that "the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade."[427]

For numerous scholars,[428] the present case is a case in which the Court of Justice "put the ECHR on top of EU's normative hierarchy"[429] and, seemingly, that is the case. As previously stated, the CJEU, under the increasing pressure to take human rights seriously, clearly favoured the fundamental rights' protection over the economic freedom at stake applying the proportionality test and taking the ECtHR road when it comes to examine the exceptions under paragraph 2 of Articles 10 and 11 as followed by the Strasbourg Court, particularly in cases where conflicting rights need to be weighted. Nevertheless, a closer look to this milestone ruling might give us another insight of the judges' delicate approach of the matter and the objectives they sought to serve. Notwithstanding the constant struggle of both the Strasbourg and the Luxembourg Court to conclude to the most suitable test as regards the the degree of discretion afforded to the States, the CJEU makes only a slight reference to the equivalent test of the ECtHR, pointing out, though, that the potential derogations should definitely be *in accordance with the law*, *motivated by legitimate aims*, *necessary in a democratic society and proportionate to the aim pursued*.[430]

The ECtHR applies such a test in similar cases highlighting in every case, though, the wide discretion that the national authorities enjoy in this field. Besides, in the context of the application of Article 11 ECHR, the Strasbourg's case law also gave particular emphasis to the positive obligations that the States have in order to protect similar demonstrations from violent acts aiming to restrict or prevent their exercise and thus, secure the peaceful enjoyment of the

[426] Ibid., para 74.
[427] Ibid., para 93.
[428] See SCHEECK L., Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European Court as a Constitutional Actor of the European Union in CHRISTOFFERSEN J., MADSEN M.,*The European Court of Human Rights between law and politics*, OUP 2011,pp. 164-180; TRIDIMAS T., *The European Court of Justice and the draft Constitution: a supreme Court for the Union?*,2004, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=490603 , p.34-38.
[429] Ibid., SCHEECK L., p.174.
[430] For a complete review of the *Schmidberger* case see BROWN C., Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court,2003, 40 *C.M.L.Rev.* 6, pp. 1499-1510.

right to assembly.[431]From this point of view, it is clear that both positive and negative actions of a Member State are relevant as a matter of protection of Article 11 ECHR. However, in contrast with the ECtHR's overall approach, the CJEU's tendency to look only at the State's intention to authorise the demonstration rather than also take into account the aim or the purpose of the demonstrators appears potentially insufficient when examining whether or not state liability under EU law existed. Additionally, the margin of appreciation, granted to the national authorities when the freedom of assembly is at stake, stands closely linked to the nature of the demonstration held. Accordingly, the Strasbourg Court has ruled *inter alia* that political speech is given enhanced protection under ECHR in comparison with commercial or artistic speech and hence, a violation of the former requires stronger and more solid justification.[432]

That said, it is unexpected that the CJEU denied shedding light to the actual purpose of the demonstration finding the latter irrelevant. As Brown correctly pointed out relatively, "clearly, if demonstrators had decided to use the Brenner motorway as a space for performing drama or for promulgating neo-Nazi opinions, the authorities would, it is submitted, have been under an obligation, as a matter of both Community and Convention law, to weigh that purpose in the balance."[433] Such an approach risks to grant an extremely wider *marge de manœuvre* than the one offered by the Strasbourg Court to national authorities when balancing common market freedoms with fundamental rights.[434]

Besides, despite the fact that *Schmidberger* is one of the rulings in which the ECHR and the human rights embodied therein constituted the guiding principles for delimiting EU internal market freedoms, the approach of the Court of Justice created a certain ambiguity.[435] More precisely, the mere fact that the CJEU considers the protection of fundamental rights a legitimate interest which, *in principle*, constitutes *a justification for the restriction of the obligations imposed by EU law*,[436] leaves the matter open as regards whether the protection of fundamental rights is a mandatory requirement for the Court or a derogation, exceptionally accepted, from the EU common market values which must be justified by those wishing to exercise their fight to freedom of assembly and expression. At any rate, this is a matter of who bears the burden of proof. While in the ECHR system, the proponents of economic rights might have to justify a restriction on human rights, according to the Luxembourg Court, those who invoke the fundamental rights' protection need to justify their actions and establish that the derogation from the free movement is justified in the name of fundamental rights.[437]

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[431] See *inter alia* ECtHR, *Plattform "Ärzte für das Leben" v. Austria*, Application No 10126/82, 25 May 1988, ECtHR, Ouranio Toxo and others v. Greece, Application No. 74989/01, 20 October 2005.

[432] See e.g. ECtHR, *Castells v. Spain,* Application No. 11798/85, 23 April 1992*; Oberschlick v. Austria,* Application No. 11662/85, 23 May 1991; *Lingens v. Austria,* Application No. 9815/82, 8 July 1991; *Markt Intern Verlag v. Germany,* Application No. 10572/83, 20 November 1989; *Muller v. Switzerland* Application No. 10737/84, 24 May 1988.

[433] Supra note 430, BROWN., p.1505

[434] MORIJN J., Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution, 2006, 12 *European Law Journal 1*, p.30.

[435] PERISIN T., Interaction of Fundamental (human) rights and fundamental (market) freedoms in the EU, *2 CYELP 69*, 2006, p. 89-90.

[436] Supra note 421, para 74.

[437] DE VRIES S., Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice,9 *Utrecht L.Rev.* 1, 2013, p. 187

All that said, although the Luxembourg Court appeared to give precedence to the freedom of assembly and the freedom of expression over the exercise of the free movement of goods within the Union *with a heavy heart*,[438] *Schmidberger* was the first from a series of cases that offered the CJEU the opportunity to dive into new fields and represented new challenges for the EU system. Thus, the need for harmonization as regards the national standards,[439]the necessary ingredient of the economic integration in the EU common market, pushed the Luxembourg Court to use the ECHR and the Strasbourg's reasoning, even only ostensibly, as a vehicle to reconcile the economic freedoms of the EU architecture when clashing with human rights.

The Court of Justice soon revisited similar dilemmas in *Omega*.[440] Omega was a German undertaking operating the facility called "*Laserdrome"* in Germany, where laser games were practiced. Among these games, the players had also access to a murder simulation game with modern laser weapons during which they were encouraged to shoot at sensory tags placed on the jackets of other players. The German police issued an order prohibiting the abovementioned games on the grounds that they constituted a danger to public order *since the acts of simulated homicide and the trivialisation of violence thereby engendered were contary to fundamental values prevailing in public opinion*. The company invoked *inter alia* that the police order was contrary to EU law and specifically the free movement of services as these games were imported from the UK as Omega was contractually connected with *Pulsar*, a British company.

The Luxembourg Court held that the free movement of services was clearly restricted, but the said restriction could be justified.[441] According to the Court, the aforementioned exploitation of laser games involving simulated murders clearly violated human dignity, a fundamental value enshrined in the German constitution. In its judgment, the CJEU aligned its approach with the AG's approach on the matter[442] and emphasized also that human dignity constitutes a general principle of the Union's law stating "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can

[438] Brown also observed with regard to the justification of the State's conduct "using the language of *prima facie* breach or restriction of economic rights suggests that, even if the restriction is ultimately justified, it remains something which is at its heart "wrong", but tolerated. This sits rather uneasily with the State's usually paramount constitutional obligation to protect human rights. Supra note 430, p. 1508. In relation with the reluctance to scale fundamental rights and fundamental freedoms in a hierarchical order see also KOMBOS C., Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity, 12 *Eur. Pub. L.* 433, 2006, p.449.

[439]Laurent Scheeck revealed another parameter in the Court's position of giving precedence to the human rights protection over the economic freedoms protection as it underlined that "with regard to national actors, the Convention is a means to show national constitutional courts that the ECJ is respecting Europe's most prominent human rights instrument, which all Member States have ratified, including their own and it might thus help to tame their resistance." SCHEECK, supra note 428, p.174

[440]Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin des Bundesstadt Bonn,* [2004] ECR I-9609.

[441] For a thorough analysis of the Court's judgment see the Case note of ACKERMANN T., Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbiirgermeisterin der Bundesstadt Bonn,* Judgment of the Court of Justice (First Chamber) of 14 October 2004, 2005, 42 *C.M.L. Rev.* 1107, pp.1107–1120.

[442] See Opinion of Advocate General STIX-HACKL in *Omega* delivered on 18 March 2004, paras 81-92. The AG seeking to assess the nature of human dignity in the EU legal architecture based its argumentation on the particular significance of this principle in the ECHR legal order since the Strasbourg Court has ruled that respect for human dignity is the very essence of the Convention. See ECHR, *Pretty v. United Kingdom*, Application No. 2346/02, 29 April 2002, para 64.

therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right".[443]In its attempt to ascertain whether the restriction to the free movement of services was proportional in the light of the protection of human dignity, the Court of Justice on the basis of its prior *Schmidberger* and the Opinion of the AG, clarified that "the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State".[444] To put it otherwise, there is no need for one common conception of the principle of human dignity in all Member States when it comes to the level of protection offered by EU law.

In the light of this pronouncement, the Court concluded to a fundamental rights-compliant position according to which "the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities."[445]As Sybe de Vries pointed out "the particular nature of this case is that the Court first defined a typically *German* concept of human dignity as a general principle of *EU* law, and then, while applying the proportionality test, it demonstrated a predominantly Member State-friendly approach."[446]

However, contrary to the *Schmidberger* case, in *Omega*, the Court was criticized for softly having applied the proportionality test[447] limiting its review of the German order on laser games to the first element, namely the suitability giving thereby, to the Member States large discretion *vis-à-vis* the protection of the economic interest of free movement. This is probably justified by the fact that the Luxembourg Court found itself in the uncomfortable position to rule on a matter than not only concerns the conflict between fundamental freedoms and fundamental rights in the EU but also lies in the heart of the sensitive area of constitutional pluralism. Thus, the CJEU opted for a state-centric position since it focused particularly on the German constitutional particularity with regards to human dignity and consequently, denied to impose a common legal concept of human dignity on the EU Member States.[448]

Interestingly enough, the Court, using the fundamental rights' reasoning of the AG who thoroughly explored the status of human dignity,[449]combined and linked the human dignity with the public policy rule, which is most of the times used to restrict and not protect human rights even under ECHR, in order to justify the derogation from the exercise of freedom of services within the EU internal market.

Showing great resemblance with the *Omega case*, the *Sayn-Wittgenstein*[450]is another case of the Luxembourg Court in which the latter drew inspiration from the ECHR and its Strasbourg counterpart when balancing fundamental rights with internal market freedoms. In

[443] Supra note 440, para 34.
[444] Ibid., para 38.
[445] Ibid., para 39.
[446] DE VRIES, supra note 437, p.179.
[447] Ibidem.
[448] AUGENSTEIN D., Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law, 14 *German L.J.* ,2013, p.1933-1934.
[449] The AG also referred to the provision of human dignity embodied in the EU Charter in Article 1 which reads as follows: "Human dignity is inviolable. It must be respected and protected." It is also worth mentioning that the Court made no reference to this provision.
[450] Supra note 93, *Sayn-Wittgenstein* judgment.

this respect, the question of *constitutional pluralism* posed difficulty to the Court of Justice and the right to a name was invoked once again. In the case at hand, the litigant, Ms Ilonka Sayn-Wittgenstein, an Austrian citizen residing in Germany after her adoption by Mr Lothar Fürst von Sayn-Wittgenstein, a German citizen, obtained the new surname with the title of nobility in the form "Fürstin von Sayn-Wittgenstein" ("Princess of Sayn-Wittgenstein"). Despite the fact that upon her adoption was registered in Austria with her new name, subsequently, the civil registrar of Vienna decided to erase the title of nobility from the litigant's birth certificate and to correct the previous registration to "Sayn-Wittgenstein".

Having used this name continuously for fifteen years, she challenged this decision before the Austrian courts as the aforementioned decision obliged her to use different names in two Member States and to prove her identity every time she crossed the borders. Ilonka von Sayn-Wittgenstein also alleged that the Austrian authorities' decision breached her right to a name as particular aspect of the protection of family life. The Austrian Supreme Administrative Court asked the CJEU whether the non-recognition of the name, granted to her as a result of her adoption, amounted to an infringement of the freedom of movement [451] pursuant to Article 21 TFEU.[452]

At first, the CJEU admitted that the refusal of Austrian authorities to recognise the noble elements of the litigant's surname posed a *serious inconvenience*[453] and as a result, a limitation on her right for protection of private life under Article 7 EUCFR and Article 8 ECHR and her freedom of movement. Focusing on the reconciliation of the latter with the Austian authorities' allegations on the grounds of the constitutional status of the abolition of nobility and the constitutional principle of equality of Austrian citizens, the CJEU interpreted this fundamental right, also enshrined in Article 20 CFR,[454] in the light of the public policy concept, using the example of the *Omega* case.[455]

More specifically, the Court noted relatively that "[t]he justification relied upon by the Austrian Government by reference to the Austrian constitutional situation is to be interpreted as reliance on public policy. Objective considerations relating to public policy are capable of justifying, in a Member State, a refusal to recognise the surname of one of its nationals, as accorded in another Member State (…)*".*[456] The Court reaffirmed once again its option for a stricter application of the concept of public policy when used as a justification for the

[451] See also BESSELINK L., Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010, 49 *C.M.L. Rev.*2, 2012, pp. 671-694.
[452] Article 21 TFEU provides that "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament."
[453] The Court made special reference to its previous case law and most importantly, to the *Grunkin and Paul* ruling, Case C- 353/06, *Stefan Grunkin and Dorothee Regina Paul*, [2008], ECR I-07639.
[454] Article 20 EUCFR reads as follows: "[e]veryone is equal before the law."
[455] See also LENAERTS K., EU Values and Constitutional Pluralism: The EU system of Fundamental Rights Protection, 34 *Polish Y.B. Int'l L.* 135, 2014, p.155-157.
[456] Supra note 93, para 83.

derogation from a fundamental freedom, *only if there is a genuine and sufficiently serious threat to a fundamental interest of society.*[457] After having repeated the wide margin of appreciation of the national authorities and the fact that the Union respects the national identities[458] of its Member States in the sense of the particular constitutional values as provided also by Article 4 (2)TEU,[459]it concluded that the refusal of the Austrian State to permit the acquisition or the use of titles of nobility by its nationals, in the aim of protecting the principle of equal treatment, was not disproportionate.[460]

Following once again the ECtHR's example in order to balance conflicting rights and freedoms applying the proportionality test, the Luxembourg Court referred, this time, to the element of national identity in the general context of the sensitive constitutional pluralism that the Court attempted to safeguard. According to Sybe de Vries, in this case, "the ECJ on the one hand embraces the idea that Member States have considerable leeway in protecting their national constitutional space and identity, yet on the other that national identity is subject to a balancing approach where tensions arise with the economic freedoms."[461]

The search of the ideal balance between fundamental rights and common market values in the sense of fundamental freedoms in the EU system was continued in the *Dynamic Medien* case, in 2008.[462] In the case at hand, the similar prevalence to fundamental rights was given over the free movement of goods in the EU internal market in a dispute which revolved around the importation of Japanese cartoons to Germany, the sale of which was prohibited pursuant to German Legislation due to the fact that they have not been examined and classified by the German competent authority and thereby, they did not bear an age-limit label corresponding to such a classification. Thus, the referral Court asked whether this prohibition was in compliance with the free movement of goods and, in such a case, whether it could be justified. In this respect, the CJEU favoured the protection of the rights of the child on the basis of various international instruments which, according to the Court's appraisal should be taken into serious consideration when applying the general principles of EU law.[463]

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[457] Ibid, para 86.

[458] For more on the protection of national identity within the EU jurisprudence see VON BOGDANDY A. and SCHILL S., Overcoming Absolute Primacy: Respect for national identity under the Lisbon Treaty, 48 *C. M. L. Rev.* 5, 2011, pp.1417- 1453.

[459] According to Article 4(2) TEU as modified upon the adoption of the Lisbon Treaty: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

[460] The Court came to the conclusion that :"Article 21 TFEU must be interpreted as not precluding the authorities of a Member State, in circumstances such as those in the main proceedings, from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law, provided that the measures adopted by those authorities in that context are justified on public policy grounds, that is to say, they are necessary for the protection of the interests which they are intended to secure and are proportionate to the legitimate aim pursued." Supra note 93, para 95.

[461]DE VRIES, supra note 437, p. 189.

[462] Case C-244/06, *Dynamic Medien Vertriebs GmbH v Avides Media AG*, [2008] ECR I-505.

[463] Ibid, paras 39,40.

In the present case, the Court *inter alia* referred particularly to the Union's specific provision of Article 24 CFR[464] incorporating the rights of children in the EU law.

Assessing the proportionality of the abovementioned protective measure, taken pursuant to German legislation in the aim of protecting children's well-being against information and materials injurious to them, limitations to the free movement of goods are acceptable when they correspond to the aim pursued and are, thereby, proportionate. The Court reiterated the wide discretion that the MS enjoy in this field due to the different levels of protection of the national rules with regard to the children's interests. In this context, the CJEU confirmed its position in *Omega* stating that "as regards the examination procedure established by the national legislature in order to protect children against information and materials injurious to their well-being, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the national provisions enacted to that end. Those provisions must be assessed solely by reference to the objective pursued and the level of protection which the Member State in question intends to provide."[465]

Notably, the proportionality test[466] applied in *Dynamic Medien* is also seen from the procedural angle,[467] as the Luxembourg specifically added that the authorization procedure which usually results in the measure at issue should be a readily accessible one which can be completed within a reasonable period of time, together with the condition that a refusal should also be easily challenged before a tribunal.[468]

Apart from the aforementioned added value with relation to the nature of the test exercised by the national authorities, the Court of Justice, with its explicit reference to the Charter, verified that this instrument may play the crucial role since it can render a fundamental right a mandatory ground for justification of a restriction on free movement, as it is the case of Article 24 of the Charter in *Dynamic Medien*. Additionally, the protection of fundamental rights is not absolute either. Their enjoyment may be restricted when weighted with the internal market freedoms of the EU as previously analyzed with regard to the Luxembourg's case law on the matter. The jurisprudential values of this balancing approach of the Court of Justice are actually illustrated in Article 52(1) of the Charter as well as in Article 52(3) and Article 4(2) TEU which entail that the Court must take always into account the provisions of ECHR and the Strasbourg's case law, let alone the national constitutional limits. However, as Sybe de Vries correctly put it "although the Charter reinforces the fundamentality and universality of EU fundamental rights, which should steer the orientation and interpretation of free movement

[464] Article 24 EUCFR under the title "The rights of the child" provides that "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primaryconsideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."
[465] Supra note 462, para 49.
[466] For a critical approach on the reasoning of the Court in *Dynamic Medien* see GARDE A., The best interests of the child and EU Consumer Law and Policy: a Major Gap between Theory and Practice? in DEVENNEY J. and KENNY M.(eds.), *European Consumer Protection: Theory and Practice*, CUP 2012, p.177-179.
[467] PRECHAL S., Topic One: National Applications of the Proportionality Principle Free Movement and Procedural Requirements: Proportionality Reconsidered, 35 *Legal Issues of Econ. Integration* 201, 2008, p. 204.
[468] Supra note 462, para 50.

rules in this field, the exact added value in conflicts between fundamental rights and the internal market freedoms remains unclear." [469]

At any rate, the abovementioned cases illustrate that the influence of the ECHR permitted to the Luxembourg Court to transform fundamental rights and non-commercial interests into self-standing restrictions to cross-border trade protected on the basis of the fundamental freedoms in common EU market.[470] Nevertheless, the position of the Court is not consistent as the latter is struggling[471]-just like the ECtHR- to conclude to the most suitable test and to further delimit the *margin of appreciation* of the Member States in this field.

b) The particularity of social rights: Inconsistent approaches

This struggle for the fairest *reconciliation* of the competing rights and freedoms within the Union is even more evident when it comes to the interpretation of social (fundamental) rights which clash with the economic freedoms of the EU. Although, the CJEU saw the questions related to collective action in the context of the inspiration already drawn from the ECHR system, as previously discussed in *Schmidberger* and *Omega*, its approach seems differentiated in the social rights field. In fact, this inconsistency clearly derives from the CJEU's position in the benchmark rulings in *Viking* [472]and *Laval* [473] in which the Court has been called upon to assess the nature of the right to strike in EU law and to weight it up with the exercise of the economic freedom to provide services.

In the *Viking* case, Viking, a Finnish firm owning a ferry named "Rosella" sought to reflag its vessel and re-register it in Estonia in view of the higher wages applicable according to the collective bargaining agreement under Finnish labour legislation, with the Finnish Seamen's Union. On the basis of the 'flag of convenience' policy, the International Transport Workers' Federation asked its affiliates to boycott the vessel and to take solidarity industrial action. Following to this, let alone the Finnish Seamen's Union threat of taking strike action, Viking invoked the EU freedom of services and the freedom of establishment provisions seeking an injunction before the English High Court.

After affirming the applicability of the abovementioned economic freedoms also to trade unions,[474]the Court further held that collective bargaining and collective action were inseparably linked, and, hence, collective action also fell within the scope of Article 43

[469] DE VRIES S., The EU Single Market as "Normative Corridor" for the Protection of Fundamental Rights: The example of Data Protection in DE VRIES S., BERNITZ U., WEATHERILL S.(eds), *The EU Charter of Fundamental Rights as a Binding Instrument, Five years old and growing*, Hart Publishing 2015, p.241.
[470] For an overall analysis see also WEATHERILL S., From Economic Rights to Fundamental Rights in DE VRIES S., BERNITZ U., WEATHERILL S.(eds), *The Protection of Fundamental Rights in the EU after the Lisbon Treaty,* Oxford Hart Publishing 2013, p.11.
[471] "The Court's discomfort is highlighted by the fact that neither the analysis adopted in Schmidberger nor that applied in Omega, establish the precise type of justification that fundamental rights embody in the complex framework of rules applicable to the free movement provisions." GURZON S., Internal Market Derogation in Light of the newly binding character of the EU Charter of Fundamental Rights in DI FEDERICO G.(ed), *The EU Charter of Fundamental Rights, from declaration to binding instrument,* Springer 2011, p.152.
[472] Case C-438/05, *International Transport Workers' Federation v Viking Line,* [2007] ECR I-10779.
[473] Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet,* [2007] ECR I-11767.
[474] Supra note 472, paras 36,37.

TEU.[475]In this regard, the CJEU emphasized that "the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures".[476] Nevertheless, the exercise of this right is not excluded from certain limitations. The Court, interestingly, reminded the fact that the right to take collective action is also guaranteed by Article 28 of the EU Charter.[477]

As regards the question of justification, the Court, having already emphasized the fundamental character of the said right taking into account the international law instruments ensuring the right to strike, namely the relevant provisions of the European Social Charter and of the ILO Convention No.87 on Freedom of Association and the Right to Organize, underlined "that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty."[478] Subsequently, the CJEU declared the social purpose of the Union[479]and the need of reconciliation of the latter with the economic freedoms protected by EU law. In this light, the Court left to the national authorities extremely large lenient to apply the justification test[480] and it further referred to the Strasbourg's case law to build the appropriateness of the trade union's action stating "that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge* v *Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others* v *United Kingdom* of 2 July 2002, 2002-V, § 44)."[481] Nevertheless the Court abstained from giving great guidance to the national courts in this respect and contented to highlight, in clear contradiction to its prior *Schmidberger* approach,[482] the aim of the collective action focusing on whether the collective action indeed served the protection of workers. In this light, the Court in order to establish a potential

[475] Article 43 TEU provides "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital."

[476] Supra note 472, para 44.

[477] Article 28 EUCFR reads as follows "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.".

[478] Supra note 472, para 77.

[479] Ibid., para 79.

[480] Ibid., paras 85,87.

[481] Ibid., para 86.

[482] Indeed, this position of the CJEU stands in striking contrast to the one adopted in *Schmidberger*, where the Court denied to examine the purpose of the action which amounted to an infringement of the EU free movement provision, namely the environmental protection, but rather emphasised the national authorities' obligation to respect fundamental rights as enshrined in both the ECHR and the national constitution under which the MS determines whether to allow such a restriction to be imposed on one of the EU fundamental freedoms.

justification required that there was a serious threat to jobs or conditions of employment at issue.[483]

Before shedding light to the most interesting elements of the *Viking* ruling, it seems preferable to zoom closer to the factual basis of the *Laval* ruling which bears great resemblance to the former. In this case, the crucial question revolved around the right to strike in view of the heating problem of social dumping [484] and the interpretation of *Posted Workers Directive*(hereinafter PWD).[485] Laval was a Latvian company, which operated in Sweden for a school renovation and, in that purpose, it sent workers to Sweden who earned significantly lower wages in comparison with their Swedish colleagues. Under these circumstances, the trade union started negotiations with the company with the ultimate objective of applying the existing collective agreement to the posted workers and thus, allowing the trade union to demand minimum wages on their behalf. In the aftermath of the negotiations' failure and the blockade of Laval's building sites, Laval addressed the Swedish Labour Court to challenge the collective action in the name of the free movement of services and to seek compensation for the losses it had suffered.

In response to the questions raised by the Swedish court, the Luxembourg Court followed mostly its reasoning in *Viking*. In doing so, it reiterated the fundamental character of the right to strike stating at the same time that "it must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified."[486]

Examining the conditions which form a context permitting a limitation to economic freedoms reaffirmed that such a limitation "is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest"[487]In this regard, the Court of Justice acknowledged that "the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest (…)."[488]

With regard to the PWD,[489]although not applicable in the present case since directives lack horizontal effect, the Court included the latter in its proportionality test. Nevertheless, since, according to the Court's appraisal the aim of the collective action was to require from

[483] Supra note 472, para 81.
[484] For a critical analysis of the risk of social dumping as faced by the CJEU in *Laval* see BARNARD C., Social Dumping or Dumping Socialism?, 67 *Cambridge L.J.* 262, 2008, pp. 262-264. For a general overview of the notion of social dumping see DEFOSSEZ A., *Le Dumping Social dans l'Union Européenne,* Editions Larcier 2014 ; BUELENS J. and RIGAUX M., *From social competition to social dumping*, Intersentia 2016.
[485]Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 2007 L1/18. In March 2016, the European Commission published a proposal amending the Posting Workers Directive available at file:///C:/Users/USER/Downloads/COM_2016_128_F1_PROPOSAL_FOR_A_DIRECTIVE_EN_V8_P1_842424.pdf. The proposal was adopted on 28 June 2018. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 2018 L 173/16.
[486] Supra note 473, para 96.
[487] Ibid., para 101.
[488] Ibid., para 103.
[489] In essence, the Posted Workers Directive (PWD) 96/71 required host states to apply "a nucleus of mandatory rules for minimum protection" in the areas listed in Article 3(1)(a) –(g) PWD.

the company to sign the collective agreement for the building sector so as to adopt working conditions going beyond the minimum protection provided by the PWD,[490] the Court came to the conclusion that "the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State."[491]

The Court, surprisingly enough, also ruled that such collective actions cannot be justified in cases in which negotiations on pay form part of a national legislative context lacking sufficient precision and accessibility "that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay".[492]Overall, the Court of Justice concluded to a non-justification of the aforementioned restriction.[493]Last but not least, in a social policy case of the Luxembourg Court, the *Alemo-Herron* case,[494] it denied once again to prioritize social rights over economic interests protected under EU law. More precisely, the Court interpreted the (economic) freedom to conduct a business, enshrined in Article 16 EUCFR, so as to rule that so-called dynamic clauses of collective agreements were not enforceable against the transferee in case of the transfer of an undertaking, despite the fact that also the Transfer of Undertaking Directive[495] allows Member States to enact legislation promoting collective agreements which are more favourable to employees.[496] In line with the *Viking* and *Laval* case law, even when the Charter came into play, the Court was contented to a rather narrow interpretation of the legislation at stake, sidestepping, thus, the Charter's effect in this field.

The Viking and Laval cases, greatly debated in academia, they signified a *revirement* in the case law of the Luxembourg Court with regard to the balancing exercise between fundamental freedoms and rights, raising multiple questions in multiple levels.

Firstly, in these cases, the right to strike and the right to take collective action were treated differently by the Court, in comparison with the other fundamental rights when clashing with the EU economic freedoms. The mere fact that the right to strike cannot be seen by the CJEU as a self-standing ground for justification of a potential restriction of a common market freedom but only in the wider goal of worker protection seems problematic, especially in the light of the previous jurisprudence of the Court. In this respect, the social rights at issue must also be assessed under the proportionality test in order to be determined whether no less

[490] The CJEU dealt with questions revolving around the application of the PWD in *Ruffert* and *Luxembourg* cases.Case C-346/06, *Dirk Rüffert v Land Niedersachsen* , [2008] ECR I-01989; Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxemburg*, [2008] ECR I-04323.
[491]Supra note 473, para 108.
[492]Ibid., para 110.
[493]Ibid., paras 116-120.
[494] Case C- 426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd,* [2013] reported in the Electronic Reports of Cases.
[495]Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ 2001 L 82.
[496] Article 8 of the said Directive reads as follows "[t]his Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.".

restrictive measures are available. The enjoyment of the right to collective action appears, therefore, as a last resort, and this approach seems also detrimental for the fundamental character of this social right.[497]

When examining the Court's methodology, particularly on the question of the proportionality test, we can easily deduce that the Court did not look into the collective action as a fundamental right being in direct conflict with a common market freedom, but rather focused to the aim pursued during the exercise of this right, namely *the protection of workers which,* according to the Court's view, is one of *the overriding reasons of public interest recognized by the Court*. In this context, it is not surprising the fact that when it comes to the objectives that need to be reconciled the Court refers to the market freedoms on the one hand and to social policy objectives on the other. Therefore, "the *fundamentality* of the right at issue is lost out of sight and the balancing is essentially undertaken between the free movement provision and an 'overriding reason of public interest'- a narrow exception to the free movement rule which thus has to be interpreted strictly."[498]In other words, in contrast with the way the Court dealt with the right to assembly and freedom of expression (*Schmidberger*) or human dignity(*Omega*), in *Viking* and *Laval* cases the Luxembourg Court opted for a defensive recognition of social rights. For the judges of the Court of Justice, when trade unions are being found to be in breach of the EU free movement provisions for taking collective action, it is up to them to defend themselves and justify this breach under extremely strict terms.[499]

In addition to this, Stephen Weatherill correctly revealed another element of this *u-turn* approach of the Court in relation to the strict application of the social rights in these cases, observing that "it follows also from the Court application of the justification test that only action aimed at protecting the jobs of union members is recognized as capable of being justified under EU law. The Court appears to have excluded the possibility of more long-term strategic action taken by unions insofar as it impedes cross border economic activity. This constitutes a dramatic incursion into the scope of collective labour rights as they have been developed-and fought for-over time."[500]

For several scholars a potential explanation of this overly criticized approach of the Court of Justice could rely on the personal movement rights of EU citizens, which were under scrutiny in these cases, bearing in mind that trade unions could easily touch upon social protectionism leading to retaliatory measures and eventually to fragmentation. In other words, measures were at issue, albeit socially legitimate, which potentially cloaked protectionism and hence jeopardized the fundamental value of protectionism. [501] At the same time, the Luxembourg Court might have been motivated by the fact that trade unions are not regulated by public law and as a result, they should not enjoy equally wide discretion as Member States. Actually, in *Laval* the CJEU held that trade unions, "not being bodies governed by public law, (…) cannot avail themselves of that provision by citing grounds of public policy in order to

[497]BARNARD C., *The substantive law of the EU: the four freedoms*, OUP 2010, p.259.
[498]KOSTA V., *Fundamental rights in EU Internal Market Legislation*, Bloomsbury 2015, pp.221-222.
[499]DAVIES A.C.L., One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ, 37 *Industrial Law Journal* 2, 2008, p.139.
[500] WEATHERILL S., Protecting Internal Market from the Charter in DE VRIES S., BERNITZ U., WEATHERILL S.(eds.), *The EU Charter of Fundamental rights as a Binding Instrument Five Years Old and Growing*, Hart Publishing 2015, p.224.
[501] DE VRIES, supra note 437, p.189.

maintain that collective action such as that at issue in the main proceedings complies with Community law."[502]

Justified or not, the CJEU's perception of social rights as illustrated in *Viking* and *Laval* diverges from the Strasbourg's judicial practice which was also marked, during the same period, by a *revirement juriprudentiel* held in 2008. Until then, the Strasbourg Court had repeatedly affirmed[503] that it did not consider the right to collective bargaining and the right to enter into collective agreements as an inherent element of Article 11 ECHR.[504]Arguably, one may argue that this could be explained by the fact that, within the system of the Council of Europe, a clear distinction [505]was made between the civil and political rights enshrined in the ECHR and social and economic rights embodied in the European Social Charter (ESC).[506]

Among the others, the ESC provides explicitly the right to bargain collectively under Article 6 ESC/RESC[507] which, unlike its previous interpretation, constituted the legal source for this new approach of the ECtHR clearly revealed in the benchmark ruling *Demir and Baykara v Turkey*[508]and confirmed in *Enerji Yapi-Yol Sen v Turkey.*[509]In these cases, the Strasbourg Court interpreted Article 11 in the context of its *living instrument* doctrine and also used international instruments to overturn its prior case law and conclude that "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions".[510] The Court, interestingly enough relied to specific international sources -among which we can also find the Article 28 CFR- not only because they contributed to the recognition of the right under the

[502] Supra note 473, para 84.

[503] The ECtHR delimited the scope of application of Article 11 ECtHR due to the existence of the relative provision of the ECR of Article 6 and thus, denied to apply the former in cases where the right to take collective action was at stake. See ECtHR, *Sweedish Engine Drivers' Union v SWE*, Application No. 5614/72, 6 February 1976, §39, ECtHR, *Schmidt and Dahlstrom v SWE,* Application No 5589/72, 6 February 1976 para. 34; ECtHR, *The N.U.J and others v UK*, Application No.30668/96, 2 July 2002, para. 44.
More recently the ECtHR insisted in its position in ECtHR, *UNISON v the United Kingdom*, Application No. 53574/99, 10 January 2002.

[505] As regards the classical perception of civil-political rights and social-economic rights see KOCH I., *Human rights as indivisible Rights, The protection of social-economic demands under the European Convention on Human Rights*, Martinus Nijhoff Publishers 2009, pp 5-9.

[506] The European Social Charter (ESC) was adopted in 1961 and its revised version was adopted in 1996 and entered into force in 1999.The ESC was accompanied by a light supervisory "regime", the European Committee on Social Rights, an expert body entitled to supervise compliance with the (ESC) which was also brought back to life after the revision of the text of the Charter. It is noticeable that the jurisprudence of the Committee reveals great interaction with EU law especially after the entry into force of the EUCFR. CoE, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

[507] Pursuant to Article 6 ESC: "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: 1. to promote joint consultation between workers and employers; 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements; 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

[508] Supra note 266, *Demir and Baykara* case.

[509] ECtHR, *Enerji Yapi-Yol Sen v Turkey,* Application No. 68959/01, 21 April 2009.

[510] Supra note 266, *Demir and Baykara*, para 154.

Convention, but also because they constituted crucial elements for the determination of whether a restriction to Article 11 is necessary in a democratic society, and therefore, proportionate.

Arguably, if we examine comparatively the perception of social rights of the two European legal systems it flows that, notwithstanding the influence of the Strasbourg's Court to the CJEU, the inconsistency with regard to the general structure of the balancing exercise is more than clear.

Firstly, in methodological terms, as Albertine Veldman successfully put it in her article, "where the ECtHR is compelled to scrutinize the lawfulness of the particular *restriction* or even a ban on the fundamental right to strike, the ECJ must assess the lawfulness of *resorting* to the fundamental right to strike when it considers the particular strike action to be an infringement of a fundamental economic freedom".[511] Clearly, for the Strasbourg Court the starting point is the possible breach of the fundamental right to strike, whereas for the CJEU the starting point is the possible breach of a fundamental common market freedom. Secondly, when the question of proportionality arised, unlike the *Schmidberger* and *Omega* cases[512]and the ECtHR's test, the Court of Justice opted for a rather strict application of the test requiring a sufficient cause for strike action, and more specifically, '*a serious threat to jobs or employment conditions*', as well as the exhaustion of all other means to resolve the dispute.

Last but not least, the incoherence in the application of social rights by the two European judicial fora led also to different potential limitations to social rights afforded by the two systems. For the ECHR system, economic interests do not constitute an acceptable ground justifying a restriction of social rights since they are not considered to normally amount to a pressing social need under Article 11(2). On the other hand, the exercise of a fundamental social right as such is not an adequate ground for justification, however, taking collective action may potentially fit the EU scheme of limitations on free movement provisions depending on the circumstances of the case. At any rate, in the EU system, the protection of employers' economic interests of establishment or to provide services in the field of the internal market might rank over fundamental social rights.

Nevertheless, taking into account the new social objectives embodied in the Treaties[513]and the Charter's provisions (Articles 28 and 29 EUCFR), the increased importance given to these rights becomes apparent in the context of the post-Lisbon framework. Even though the Charter put social rights and economic rights on an equal footing, the primordial question here is what is the added value of the Charter in this respect. Since the Charter is addressed to the MS when implementing EU law without extending the field of application of

[511] VELDMAN A., The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR, 9 *Utrecht L. Rev* 1, 2013, p.113.
[512]The Court here departed from its previous longstanding position according to which great lenient was granted to the MS in the context of this assessment.
[513] Indeed, after the adoption of the Lisbon Treaty, Article 3 TEU was modified so as to provide that "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

the latter or granting it any new or modifying any existing power, its application in social rights cases seems problematic given that this is a territory mainly regulated by national legislation with restricted competence of the EU in the field.[514]Besides, since *Demir and Baykara,*[515] the ECtHR covers the right to take collective action, Article 28 CFR [516]has to be interpreted as a corresponding right of the ECHR providing –at least- the same level of protection. Hence, given that the Strasbourg Court bases its reasoning on universal and regional instruments[517] for determining the notion and the content of the right, the conclusion could be drawn that the same could be expected within the EU legal system as well.

All that said, the adoption of the Charter does not seem to indicate, as we speak, a new era as regards the hierarchical order between social rights and economic rights/freedoms. In addition to this, the distinction of the Charter's provisions between rights and principles[518] makes apparently this classification more complicate as some of the social rights of the IV Chapter of the Charter under the title "Solidarity" are generally accepted that belong to the category of *principles*. However, in a recent case of the Luxembourg Court, namely the *AMS* case,[519]the latter faced this dilemma -right or principle- concerning the implementation of a Directive[520] potentially giving horizontal (and direct effect) to Article 27 EUCFR[521] which provides for the worker's right to information and consultation within undertaking.

[514] O'GORMAN R., The ECHR, the EU and the Weakness of Social Rights Protection at the European Level, 12 *German Law Review* 10, p.1857; See also Article 5(2), (3) TFEU. The EU's competence hence, is neither exclusive or shared. In the spirit of Article 5 TFEU, the EU exercises a kind of coordination competence to provide arrangements within which EU member states must coordinate social policies.

[515] EWING K., HENDY J., The Dramatic Implications of Demir and Baykara, 15 *Canadian Lab. & Emp. L.J.* 165, 2009-2010, pp.165-209.

[516] Article 28 CFR reads as follows: "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

[517] It is worth mentioning that the Court did not consider it necessary that the international texts referred to have been ratified by Turkey. Supra note 266, para 78.

[518] According to the Explanation of the Charter on Article 52(5):"Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the 'precautionary principle' in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of 11 September 2002, Case T-13/99 Pfizer v Council, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 Van den Berg [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34." Supra note 207.

[519] Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014], published in the electronic Reports of Cases.

[520] Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, could be relied upon in a horizontal dispute between an employee and his employer so as to set aside a national law implementing the Directive, OJ 2002 L 80.

[521] Article 27 EUCFR provides that "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices."

Notwithstanding the fact that the Court rejected the revolutionary proposal of the AG Cruz Villallon[522] who suggested to indeed allow some sort of horizontal direct effect of a Directive implementing a 'principle' in the Charter of Fundamental Rights, this issue remains open for the Court.[523] This suggestion could actually enhance the legal effectiveness of the social rights within the EU system and as De Vries and Veldman observed on the matter "the *AMS* case might give rise to a hope that the Court will assess direct (and horizontal) effect on the wording of the particular Charter right, irrespective of the category it belongs to".[524]At any rate, in the current situation, in cases in which economic fundamental freedoms come into conflict with social rights, the Charter is not likely to upset the traditional context of assessing national measures triggering the free movement legislation in light of the *Viking & Laval* jurisprudence. Whether the accession of the EU to the ECHR, if finally achieved, will reposition this balance, giving to the former a more human rights-friendly dimension as regards the protection of social rights within the Union, is still under discussion.

It emerges out of this analysis, that fundamental protection has been placed, during the latest decades, in the heart of the Luxembourg Court's jurisprudence. However, the new element is the fact that the CJEU faced the new challenge of reconciling human rights' protection with the EU economic fundamental freedoms. Sometimes successfully (*Schmidberger* and *Omega* case law) and sometimes less successfully (*Viking* and *Laval* case law), this balancing task, influenced by the scheme that the ECtHR traditionally uses to reconcile -in an analogous manner- conflicting rights, gave to the CJEU the opportunity to accept, even in an inconsistent manner, that fundamental rights may outweigh the internal market freedoms so as to restrict the application of the EU rules. We should not, though, sidestep that this asymmetry is deep-rooted in the systemic conditions for an autonomous interpretation of fundamental rights in the name of the *sui generis* character of the Union, whose ultimate foundation is the internal market.[525]

Nevertheless, there is also the opposite reading of this jurisprudential approach of the Court expressed vividly by the ex-President of the CJEU, Judge Vassilios Skouris. President Skouris stressed that "there is no hierarchy between fundamental rights and fundamental freedoms as far as Community law is concerned" and as for the balancing procedure he explained its point remarking that "we have to keep in mind that this only occurs when fundamental rights are used as a countercheck to the application of the rights resulting from the four economic freedoms. When a fundamental right is seemingly fully applicable along with a conflicting fundamental freedom then the role of the Court is that of balancing conflicting interests and not that of balancing conflicting principles of law. In addition, the task of the Court becomes even more delicate when fundamental rights are used to interpret and expand the scope of a fundamental freedom."[526]

[522]Opinion of the AG Cruz Villalon in *AMS* case delivered on 18 July 2013.
[523] Supra note 519, para 45.
[524] VELDMAN A. and DE VRIES S., Regulation and enforcement of economic freedoms and social rights: a thorny distribution of sovereignty in VAN DEN BRINK T., LUCHTMAN M., SCHOLTEN M.(eds), *Sovereignty in the shared legal order of the EU*, Intersentia 2015, p.91.
[525]AUGENSTEIN, supra note 448, p.1937.
[526] SKOURIS V., Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance *17 Eur. Bus. L. Rev. 225*, 2006, p.239.

Whatever approach we adopt, judging from the evolutive jurisprudence of the Court in light of the ECtHR's methodology, the development of a new *mechanism* of protection of fundamental rights in the EU legal order was revealed not only as the necessary complement to the transformation of the four economic freedoms of the EU treaty but also as a counterweight to the latters in the aim of finding their right position within the EU architecture, even if that requires the subordination of economic freedoms to fundamental rights.

The emerging question, however, is whether the Union will continue to be ruled mainly by an economic concern with fundamental rights in the internal market, or "whether fundamental rights will succeed in giving voice to a genuine political debate about what is entailed in having a market in common."[527]

2. The ECHR standards of protection: the impact to EU data protection law and jurisprudence

Data protection definitely constitutes an area of law that potential conflicts between opposing fundamental rights may emerge, as also illustrated by the ECtHR's case law, and therefore, the EU legislator recently was confronted with the increasing need to regulate this new chapter of the book of the Union's legislature. Unavoidably, the CJEU incorporated *petit à petit* the fundamental rights' dimension according to the Strasbourg's standing, in its jurisprudence in order to achieve a fairer and more human rights-oriented application of the EU *secondary law* with regard to data protection. But what happens when fundamental rights do not function as a hermeneutical tool or a complement of the said legislation and run counter to the latter?

Hence, within the context of the ongoing technological advancements and the cross-border exchange of information, especially via Internet, the multiple challenges posed to human rights in relation to the protection of personal data could not have been ignored by the EU legal order. Looking at the case law of the Luxembourg Court in those cases, the Court seems to have departed from its reserved position, initially adopted, especially after the coming into play of the Charter. One could find the first signs of this effect in the *Volker and Schecke* case[528] in which the CJEU invalidated some clauses of a regulation for breaching the provisions of the Charter on privacy.[529]

More precisely, in the case at hand, an agricultural partnership complained against the publication of the details of the financial aid that it was receiving pursuant to the Regulation No 259/2008, seeking to ensure transparency, particularly as regards the use of Community funds within the context of the Common Agricultural Policy. As the validity of the Regulation was at issue in light of the violation of the respect of private life and the right to personal data protection under Articles 7 and 8 EUCFR respectively, the Court reiterated, at first, that, in this

[527] AUGENSTEIN, supra note 448, p.1938.
[528] Joined Cases C- 92-93/09, *Volker und Markus Schecke GbR v Land Hessen,* [2010] ECR I-11063.
[529] For a thorough analysis of this case see BOBEK M., Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgement of the Court of Justice (Grand Chamber) of 9 November 2010 N.Y.R., 48 *C.M.L.Rev.* 6, 2011, pp. 2005-2022.

balancing exercise between the objective of transparency and the guarantee of the fundamentality of the protection of privacy, it must take into account the application of the corresponding right under Article 8 ECHR. More precisely, according to the Court, at this point "it must be considered that the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual (see, in particular, European Court of Human Rights, *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II, and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000-V) and the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the Convention." [530] Nevertheless, since this ruling was delivered only a few months after the Charter was granted binding force, it does not appear surprising that the Luxembourg Court relied mostly on the provisions of the Charter to answer the preliminary question. However, referring to the ECtHR's jurisprudence,[531] the CJEU interpreted broadly the notion of "private life" so as to incorporate also activities in the professional sphere such as information on income received by natural persons in their business capacity. In its ruling, at first, the Court held that the interference with the rights enshrined in Articles 7 and 8 EUCFR within the implementation of the Regulations at issue was, undoubtedly, provided for by law. Secondly, it acknowledged that the aim pursued by the aforesaid legislation was to serve the general interest of transparency stated in Articles 1 and 10 TEU and in Article 15 TFEU.[532]

Subsequently, the CJEU, examining the proportionality of the measure, recalled the *Satamedia* case[533] stating that "it is thus necessary to determine whether the Council of the European Union and the Commission balanced the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular. The Court has held in this respect that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary(…)".[534] The Court further highlighted that taxpayers had the right to be kept informed of the use of public funds, but also stressed the necessity of striking a proper balance between the conflicting interests and more specifically in this case, the necessity of ascertaining whether publication on a website of the names of beneficiaries and the amounts of agricultural aid received did or did not go beyond what was absolutely necessary for achieving the legitimate aims pursued. In light of Articles 7 and 8 EUCFR, the CJEU underlined that, since the publication was effected with no distinction with regard, e.g., to the duration, frequency, nature, or amount of aid received, the Council and the Commission had not taken into account alternative -and less onerous- methods of publishing information.

Therefore, the Court concluded that there is no automatic priority given to the objective of transparency pursued by the EU policies and ruled that "Article 44a of Regulation No 1290/2005 and Regulation No 259/2008 must be declared invalid to the extent to which,

[530] Ibid., para 52.
[531] See accordingly the previous chapter with regard to the direct application of Article 8 ECHR by the CJEU in cases where legal persons were involved.
[532] Ibid., paras 67,68.
[533] See the *Satamedia* judgment in this respect, supra note 128.
[534] Ibid, para 77.

with regard to natural persons who are beneficiaries of EAGF and EAFRD aid, those provisions impose an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof."[535]

As discussed in the previous section, striking the correct balance is not a new territory for the EU judges but now, it is under the *umbrella* of the Charter that this exercise will be constantly carried out and this time, not only between fundamental rights and EU internal market freedoms, but also between conflicting fundamental rights both embodied in the EU Charter.[536] Nevertheless, the Court was critisised since, even though it appeared to follow the proportionality test under Article 52 (1) EUCFR, it finally followed a 2-steps proportionality test avoiding to examine the *stricto sensu* proportionality of the publication at stake as it contented itself to put the appropriateness and the necessity of the latter under scrutiny. The added value of this case in this field is that the Luxembourg Court emphasized the *strict necessity* requirement when shedding light to the potential limitations or derogations in relation to the protection of personal data[537] and avoided therefore, the tough balancing exercise in the context of the narrow proportionality concept. For most scholars, the Luxembourg Court transferred the two-paragraphs structure of Article 8 ECHR into Article 8 of the Charter, suggesting that Article 8(1) should be read as laying down the right to personal data protection, whereas Article 8(2) and 8(3) would introduce the conditions for any lawful restriction to the right.[538]If that position-the one neglecting the particular structure of Article 8 EUCFR- is indeed taken consciously by the CJEU, serious questions are raised not only concerning the very existence of Article 52 EUCFR and its relation with the abovementioned rights but also with regard to the very essence of the right to data protection.[539]Despite the critique on this newly adopted approach of the Court,[540] the *Volker and Schecke* case definitely constitutes a

[535] Ibid., para 89.

[536] FONTANELLI F., The European Union's Charter of Fundamental Rights two years later, 3 *Perspectives on Federalism* 3, 2011, pp. 22-47.

[537] For Anna-Sara Lind and Magnus Strand "Hypothetically, the Court of Justice took the view that there was only one fundamental right (the right to private life in general and to protection of personal data in particular) at stake in *Schecke*, making it easier to have recourse to a "strictly necessary test". Such an approach would at a first glance mirror the approach of the Strasbourg Court to any limitation of Article 8 of the ECHR: it must be in accordance with law and necessary in a democratic society", LIND A. and STRAND M., A New Proportionality Test for Fundamental Rights?The Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen, *European Policy Analysis 7*, 2011, p.6., also available at http://uu.diva-portal.org/smash/get/diva2:441211/FULLTEXT01.pdf

[538]GONZALEZ FUSTER G., Fighting For Your Right to What Exactly? The Convoluted Case Law of the EU Court of Justice on Privacy and/or Personal Data Protection, *2 Birkbeck L. Rev. 263*, 2014, p.269.

[539] Herke Kranenborg stressed relatively that "the approach of the Court, taking Art.7 and 8 of the Charter together and concentrating on the lack of consent of the beneficiaries for moving to an assessment under Article 52(1), comes close to an understanding of the right to data protection as a right of informational self-determination, which, as explained, would be contrary to the intention of the legislator.". KRANENBORG H., Article 8 in PEERS S., HERVEY T., KENNER J., WARD A. (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart Publishing 2014, p.261.

[540] Apart from the abovementioned objections expressed in academia, Herke Kranenborg also critisised not the aim of the Court but rather the manner of the CJEU's approach as he highlighted the fact that the Court made no reference to the relative EU secondary law on data protection. In this context, he further stressed that "by ignoring part of the text of Article 8 of the Charter and the relevant secondary legislation, and by assessing the matter under Article 52(1), the Court perhaps took a too fundamental approach. It might be that the Court felt more comfortable in staying close to the classical assessment of a justification of a limitation of the right to privacy, as developed

dynamic step in the road that the CJEU has apparently taken towards a much stricter scrutiny of the EU legislation related to the data protection, a field of law that the EU legal system has taken over leaving restricted lenient to the national authorities to exercise in this context.[541]

The said tendency was manifestly confirmed in the landmark *Digital Rights Ireland* ruling,[542]in which the Luxembourg Court did not restrict itself to invalidate some aspects of the EU legislation under scrutiny but opted for striking down the Data Retention Directive[543] in its entity. In the case at hand, the preliminary reference procedure, initiated by the Irish High Court and by the Austrian Verfassungsgerichtshof, touched upon the legality and thus, the validity of the said Directive in light of Articles 7 and 8 of the Charter. In the aftermath of the terrorist attacks in Europe, the Directive placed an obligation on Internet and telephone service providers of *publicly available electronic communications services* and *public communications networks* to retain specific types of data relating to the communications of individuals for the purposes of the "prevention, detection and investigation of serious crime". These data retained were telecommunications traffic data with regards to e-mails, internet access and internet telephony, location data, and data needed to identify a subscriber or registered user. Despite the fact that the *Data Retention Directive* did not provide the providers with a legal basis for retaining the content of these telecommunications, the whole background of the Directive appeared problematic. For instance, notwithstanding the fact that the text of an e-mail was not retained, the date, time and identifiers relating to its sender and recipient had to be retained for a period of time of at least six months and at most two years.[544]

The Court focused, first and foremost, on the validity of the Directive at stake in light of the rights to privacy, data protection and freedom of expression as embodied in the EU Charter. After having declared the relevance of Articles 7 and 8 with regard to the validity of the Directive and putting aside the examination of Article 11 EUCFR, the CJEU stated that "those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them."[545]

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by the ECtHR under Article 8 ECHR. However, by doing so, the Court disregarded the fact that the right to privacy and goes beyond informational self-determination." Ibidem.

[541] See also Case C-468/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) (C-468/10) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) (C-469/10) v Administración del Estado,*[2011] ECR I-12181.See also the relevant judgments that followed the *Volker* case concerning the conformity with Articles 7 and 8 of the Charter of the EU legislation providing the possibility to include fingerprints in passports and travel documents, Case C-291/12, *Michael Schwarz v Stadt Bochum*[2013], published in the electronic Report of cases, Case 446/12, *W. P. Willems and Others v Burgemeester van Nuth and Others,* [2015],published in the electronic Report of cases.

[542] Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others,*[2014] published in the electronic Reports of Cases.

[543] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, O.J. 2006 L 105/54.

[544] See LYNKSEY O., The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: *Digital Rights Ireland***,** Joined Cases C-293 & 594/12, *Digital Rights Ireland Ltd and Seitlinger and others*, Judgment of the Court of Justice (Grand Chamber) of 8 April 2014, nyr., 51 *C.M.L.Rev.* 6, 2014.

[545] Supra note 542, para 27.

Therefore, the Court ruled that the obligations deriving from the Directive to retain data as well as the access to that data by the MS's authorities constituted an interference with the right to privacy and since the Directive was providing for processing of personal data, it also violated the right to the protection of personal data.

As concerns the justification of the infringement, the CJEU examined the proportionality of the violation pursuant to Article 52(1) EUCFR and stressed that the essence of the rights at stake was respected. Subsequently, it attempted to ascertain whether the *Data Retention Directive* satisfied an objective of general interest and did not go beyond what was suitable to achieve its purpose. In this respect, the Luxembourg Court held that "the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest"[546] and that "data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organised crime"[547] concluding that the Directive under scrutiny in the present case fulfilled this purpose.

With regard to the final element of the necessity stage of the proportionality test, the CJEU reiterated that derogations from fundamental rights should be only accepted when strictly necessary and held that the Directive did not provide clear and precise rules regarding the extent of the interference. In particular, the Court observed the mass surveillance danger as it held "the directive requires the retention of all traffic data concerning fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony. It therefore applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. Furthermore, in accordance with Article 3 of Directive 2006/24, the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population."[548] The EU legislature did not require a clear and strong connection between the data retained and serious crime or public security.[549] Additionally, the Directive failed to provide particular both substantive and procedural conditions posing limits to the access and use of the data retained by competent national authorities. Nor did the Directive provided with objective criteria, on the basis of which, the time period of the retention of the data is determined.[550] Regarding data security, the Directive lacked clear safeguards for the protection of the retained data. Moreover, the Directive abstained from clarifying that the data must be retained within the European Union and therefore, within the control of national Data Protection Authorities. On these grounds, the Directive was declared *ab initio* invalid by the Court.

The Court, for the first time, blatantly used the EU Charter as a vehicle to strike down an entire EU Directive and to put severe pressure to EU institutions in order to modify the legal context of the retention of data confirming the tremendous significance of the protection of privacy and data protection within the EU.

But what are the implications of the Court's pronouncement in *Digital Rights Ireland* for the EU legal order? Can this ruling signify a new era for the EU legal framework in the context

[546] Ibid., para 42.
[547] Ibid., para 44.
[548] Ibid., para 56.
[549] Ibid., para 59.
[550] Ibid., para 64.

of which the EU Charter is the absolute human rights guardian and a major tool at the disposal of the judges of the CJEU in order to scrutinize more effectively the EU legislation?

The first and more practical consequence of this milestone judgment relies on its immediate effect. Since the Court's judgment manifestly declared the data retention legal scheme incompatible with the EU Charter, all legislative measures adopted by the member states in the aim of the implementation of the Data Retention Directive will not bear judicial scrutiny as well. National courts can also strike down the legislation implementing the Directive with no need of additional preliminary reference to the Luxembourg Court. Thus, as Federico Fabbrini noted relatively "the effects of the ECJ judgment, therefore, are likely to spill over into the national legal system, ensuring a new advanced standard of protection for privacy and personal data throughout the EU".[551]

As for the reasoning which the Court did provide, while, during the latest decades, the European judicial *fora* were confronted repeatedly with cases in which human rights were clashing with public interest objectives, the surprising aspect of the CJEU's appraisal in the present case is the analysis of the interplay between the 'essence' of the right and the concept of proportionality. It is definitely noteworthy that the Court clearly makes a distinction between the two: respecting the very essence of a right is not sufficient because even if the latter is respected, the legislation at stake can still be disproportionate.

Another significant element of the *Digital Rights Ireland* ruling as Steve Peers correctly stressed is "the development of a doctrine indicating when strict scrutiny of the EU legislature's interference with fundamental rights should apply."[552] That definitely relies to the ECtHR's jurisprudence, that the Court cited many times when presenting its reasoning.[553] Nevertheless, the application of the Charter by the CJEU gave the opportunity to the Luxembourg Court to raise even more the standards posed by its Strasbourg Court which, as we thoroughly discussed in the previous chapter, clearly served as "springboard" for this evolution of the CJEU's case law in this field as it expanded significantly the application of Article 8 ECHR.[554] However, the Luxembourg Court, unlike its Strasbourg counterpart, has recently recognized a restricted margin of appreciation to Member States when implementing data protection rules even when national security comes into play.[555] "The strong stand embraced by the ECJ in *Digital Rights Ireland*, and its determination to render data privacy law effective also in inter-private relations, suggest instead that in the field of digital rights the ECJ has vested with confidence the clothes of a human rights court."[556]

Last but not least, concerning the severe criticism that the CJEU raised in relation to the simultaneous application of Articles 7 and 8 EUCFR without distinction after the *Volker and*

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[551] FABRINI F., *Human Rights in the digital age, The European Court of Justice ruling in the Data Retention Case and its lessons for Privacy and Surveillance in the U.S.*, Tilburg Law School Studies Research Paper Series No15/2014,available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482212 , p.26.

[552] PEERS S., *The data retention judgment: The CJEU prohibits mass surveillance*, EU Law Analysis Blog 2014, available at http://eulawanalysis.blogspot.fr/2014/04/the-data-retention-judgment-cjeu.html.

[553] Supra note 542, paras 35, 47, 54–55.

[554] PETKOVA B., Towards an Internal Hierarchy of Values in the EU Legal Order, Balancing the Freedom of Speech and Data Privacy, 23 *Maastricht Journal of European and Comparative Law* 3, 2016, p.431.

[555] Supra note 542, para 47.

[556] FABRINI F., *The EU Charter of fundamental rights and the rights to data privacy: the EU Court of Justice as a human rights Court*, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576214 , p.20

Schecke case, the Court's judgment in *Digital Rights Ireland* might have taken this critique into serious consideration as it assessed separately the violation of Articles 7 and 8 of the Charter, and whether the *essence* of each right has been affected.[557]

In a nutshell, this ruling definitely opened the door for a stricter scrutiny exercised by the Luxembourg Court particularly in cases in which digital rights are affected. In this respect, despite the granted impact of the ECtHR, the Charter appears to be the game-changer in this area and this is also reaffirmed by another milestone data protection case, the Facebook case or the *Schrems* case,[558] delivered by the CJEU in 2015.

In this case, the emerging issue of the protection of personal data, available through social networks, was at issue. In light of the Edward Snowden revelations and the heating discussion on mass surveillance conducted by US intelligence services, Maximillian Schrems, an Austrian national and a Facebook user, addressed a complaint to the Irish DPA as he argued that his transferred personal data were subjected to mass surveillance in the United States. The legal basis of such transfers of personal data was the EU/US 'Safe Harbour' agreement, reached back in 2000. The latter was built upon a Commission decision adopted under the Data Protection Directive which declared the United States as an *adequate* destination for personal data as far as American companies were willing to enforce this agreement (by signing up) through a self-certification mechanism guaranteeing compliance with a set of data protection rules equivalent to those incorporated in EU Data Protection legislature.

The Irish data protection authority refused to pronounce on the applicant's complaint, so he, subsequently, challenged the DPA's decision before the Irish High Court, which clearly expressed doubt that the "Safe Harbour" legal framework was compatible with EU law. Thus, it addressed a preliminary question to the CJEU asking whether the DPAs of Member States should have the power to oppose to data transfers to the US in similar cases.

The CJEU first dealt with the conditions under which a country is declared adequate for data transfers and then, in case of an adequacy decision as in the case under discussion, upon the competence of the national authorities to control these transfers.[559]

Addressing the first issue, in line with the Opinion of the AG,[560] the Court ruled in adopting the view of the Advocate General, that the term *adequate level of protection* of the Data Protection Directive should be interpreted as "requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the EU."[561] Additionally, the CJEU relied on the independent character of the DPAs in order to reaffirm the ongoing obligation for the European Commission or competent DPA to review

[557] Nonetheless, the Court did not distinguish the two rights when it examined the required intensity of judicial control, and connected once again Articles 7 and 8 of the Charter when applying the proportionality test.
[558] Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, [2015] published in the electronic Reports of Cases. See also the most recent Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*, [2018] published in the electronic Reports of Cases.
[559] For an analysis of the background of the case see COHEN N., The privacy follies: a look back at the CJEU's invalidation of the EU/US Safe Harbor Framework, 1 *Eur. Data Prot. L. Rev.* 240, 2015, pp. 240-244.
[560] Opinion of Advocate General Bot delivered on 23 September 2015.
[561] See the first *Schrems* case, supra note 558, para.73.

any adequacy decision in light of any changes in circumstances having arisen after the decision's adoption.

In the case at hand, the European Commission was contented to only examine the adequacy of the Safe Harbor agreement ignoring "the biggest picture" of applicable US law[562] and its conformity with relevant international agreements. Hence, the decision under discussion failed to guarantee a sufficient level of data protection in the US equivalent to the one formulated by the EU law requirements laid down by EU data protection law.

As for whether DPAs are empowered to investigate data transfers, such as these in the *Schrems* case, which have been made lawful pursuant to a binding European Commission adequacy decision, the Court of Justice confirmed "that the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down by Directive 95/46."[563]

Therefore, the CJEU underlined that provisions of the Data Protection Directive must be applied in conformity of the fundamental human rights as ensured by the EU Charter and most importantly the rights to a private and family life, the protection of personal data, and the right to an effective remedy and to a fair trial. In this regard, despite the fact that the Commission's decisions "are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality(...) a Commission decision adopted pursuant to Article 25(6) of Directive 95/46, such as Decision 2000/520, cannot prevent persons whose personal data has been or could be transferred to a third country from lodging with the national supervisory authorities a claim" and hence, "a decision of that nature cannot eliminate or reduce the powers expressly accorded to the national supervisory authorities by Article 8(3) of the Charter and Article 28 of the directive."[564]In the context of the limits of mass surveillance declared in its prior *Digital Rights* judgment, the additional element of the absence of effective judicial redress was not compatible with the EU Charter either.

According to the Court's reasoning, the restriction of the DPAs competence to review data transfers in order to determine whether the level of data protection in the USA within the context of the Safe Harbour Agreement is adequate or not, was also considered as another legal flaw of the EU Commission's Decision. All that said, the Court of Justice invalidated the entire Decision.

Looking more carefully to the basic aspects of the case, it is more than evident that following to the Court's findings in *Google Spain* and *Digital Rights Ireland,* which arguably strengthened the CJEU's data protection standards in the EU legal order, the Court now declares that even when a separate regime for external transfers is under scrutiny, an almost identical level of protection is required so as to be compatible with the EU Charter's provision related to data protection. However, as Steve Peers observed "with respect, the Court's

[562] Ibid, para 43.
[563] Ibid., para 47.
[564] Ibid., paras 52,53.

interpretation is not convincing, since the word 'adequate' suggests something less than 'essentially equivalent', and the EU Charter does not bind third States. But having said that, the American rules on mass surveillance would violate even a far more generous interpretation of the meaning of the word 'adequate'."[565]

The CJEU's standing not only reveals its belief that, in the post-Lisbon era, an even higher level of data protection is required under the Charter but also its option for an application of such an enlarged protection as regards data transfers to third countries, introducing, thus, an extraterritorial effect of the Charter's provisions regarding digital rights.

"By defining the standard that third countries must meet to be declared "adequate" as that of essential equivalence with EU law, the CJEU has set the global data protection bar at a high level."[566] As a result, many third countries willing to conclude to similar agreements to the Safe Harbour Agreement need to revisit their data protection legislation and practice in order to meet the standards set out in *Schrems*.

In this regard, the Court did not follow the path taken by the AG Bot who opted for a more thorough interpretation of the grounds for restricting the Charter's provisions, but rather restricted itself to conclude to an unjustifiable violation of the rights on the grounds of the general mass surveillance of the content of communications which affected the 'essence' of the rights at issue. Nevertheless, this is indicative of the fact that the Court takes the right to privacy so seriously that reaches the conclusion that extended access to personal data by public authorities law enforcement authorities, even in the name of national security, affect the "essence" of the right to private life under Article 7 of the Charter. Thus, in this respect, no proportionality test or balancing exercise involving other rights and freedoms is required as far as the core of this right is breached.[567]

Despite the fact that the EU Charter appears as the ultimate measure of data protection- applied in line with the standards of the Strasbourg Court- the post Lisbon legal architecture might create an ambiguity particularly with regard to the application of the Charter's data protection standards when national security is involved. More particularly, on the one hand, under Article 4(2) TEU [568] the competence of national security weight entirely upon Member States, whereas on the other, the Charter sets a significantly high standard for the data protection within the EU in the *Schrems* judgment.[569] Consequently, this divergence cannot be

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[565] PEERS S., *The party's over: EU data protection law after the Schrems Safe Harbour judgment*, EU law analysis Blog 2015, available at http://eulawanalysis.blogspot.gr/2015/10/the-partys-over-eu-data-protection-law.html.

[566] KUNER C., Reality and Illusion in EU Data Transfer Regulation Post Schrems, 18 *German L.J.* 4, 2017, p. 893.

[567]Nonetheless, it is striking how the Luxembourg Court concluded to a violation of the essence of right to private life under Article 7 EUCFR but not to a violation of the essence of the right to the protection of personal data as enshrined in Article 8 EUCFR.

[568] Article 4(2) reads as follows: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

[569] As Christopher Kuner explains "[i]n many or most situations involving data protection rights either EU law applies or there is an overlap between EU and Member State law, which results in application of EU law and thus of the Charter. However, when EU law does not apply, such situations are governed solely by Member State

easily resolved since it is not always possible to distinguish situations in which personal data are processed for national security purposes. In numerous cases, personal data are collected and transferred for purposes totally irrelevant to national security reasons, such as commercial purposes, and are subsequently subjected to an assessment exercised by national intelligence agencies.

Notably, the invalidation of the Safe Harbour Agreement, despite its fundamental rights dimension, had also considerable political implications and risked to cause a severe transatlantic rift with regard to the applicable data protection policy as more than 5.000 American and EU undertakings were using the invalidated agreement as a legal foundation to legally transfer personal data to US servers.[570] As a result of a two-years negotiation, the new EU-US Privacy Shield which came to replace the previous framework representing a serious attempt to enhance the level of protection of individual digital rights in line with the *Schrems* judgment, was reached in February 2016.[571]

Providing a rather detailed and weighty agreement regarding transatlanting exchange of data, the EU-US Privacy Shield imposes "strong obligations on companies handling data", "clear safeguards and transparency obligations on US government access", "effective protection of individual rights" along with an "annual joint review mechanism."

Nevertheless, several doubts have already been expressed in academia as regards whether it is possible that real guarantees for an effective protection of the right to data protection and to private life may actually occur in the context of the transfer of data to the US as long as there is no legislative shift to provide for the *essentially equivalent* degree of data protection required by the *Schrems* judgment.[572] Whether the new agreement will be seen as offering increased trust in this field or as another piece of verbose documentation offering restricted protection for the individuals that needs to be challenged before the Luxembourg Court, remains to be seen.

In this context of the enlarged protection offered by the CJEU in the data protection field, as illustrated by the nuanced case law of the CJEU, the European Parliament decided to refer the proposed EU/Canada agreement on passenger name record (PNR) data to the CJEU, on the basis of a unique procedure, questioning its compatibility with the rights to privacy and data protection. That judgment will have enormous implication on the legislative as well as on the political level since the separate EU/USA and EU/Australia treaties on PNR data and the proposed PNR Directive will be, as a result, placed under discussion too.

This not the first time that a PNR judgment is delivered by the Court. In 2004, the CJEU was asked to rule on the original EU/USA. Passenger Name Records (PNR) contain information provided by passengers and collected by airlines for commercial purposes, i.e ,

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constitutional law. This could produce a gap in protection if Member State law produces a lower level of protection than the Charter." KUNER, supra note 566, p.897.

[570] SHACKELFORD S., *Seeking a safe harbour in a widening sea: unpacking the EJC's Schrems decision and what it means for transatlantic relations, Seton Hall Journal of Diplomacy and International Relations*, 2016, Forthcoming, Kelley School of Business Research Paper No. 15-78 also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2680263 .

[571] The European Commission adopted the EU-US Privacy Shield in July 2016. European Commission, *European Commission launches EU-U.S. Privacy Shield: stronger protection for transatlantic data flows*, Press release of 12 July 2016 available at http://europa.eu/rapid/press-release_IP-16-2461_en.htm .

[572] See KUNER, supra note 566; PEERS, supra note 565.

passenger names, dates and itinerary of trip and even hotel bookings, car rentals, train journeys, travel associates, etc. This may permit profiling, under specific circumstances, as it definitely gives a massive insight into the personal data and thus, into the passenger's private life.

Surprising as it is nowadays, notwithstanding the fact that the question of privacy was also raised back then, the Luxembourg Court opted for a rather restricted analysis and contented to rule that the EU/USA treaty had an inappropriate legal basis for an antiterrorist measure, which has taken the form of an international agreement.[573] However, the recently delivered Opinion of the Advocate General Mengozzi[574] reveals the constant effort of the EU judicial system to come up with the correct equilibrium between privacy and national interest as this question is always on the table in light of the present terrorist danger. Examining the degree of intrusiveness of this type of data, the AG Mengozzi observed that PNR schemes amount to an interference which is *of a considerable size* and of *not insignificant gravity.*[575]Nevertheless, the interference does not reach a level where the essence of the fundamental rights is harmed, because the processing of the PNR data "do not permit to draw precise conclusions concerning the essence of the private life of the persons concerned".[576]

Thus, developing his reasoning, the AG stated that in the context of the proportionality concept, the measures adopted should be not only the less intrusive but also *sufficiently effective*. However, the notion of the sufficiently effective measures was not defined by the two European jurisdictions. In the light of the recent pronouncement of the Strasbourg Court in *Zacharov,* in which the ECtHR sought for the *reasonable suspicion* to permit an interference with the right to private life, the Advocate General highlighted, nevertheless, that in the balancing process the specificity of PNR data should also be taken into consideration. More particularly, these data are designed to be based on profiling methods even though they are not collected for surveillance purposes. Therefore, the main issue here with PNR schemes is that the suspicion is not prior to the collection and processing of PNR data but realized following to the collection and processing of the data.[577] Pursuant to the EU-Canada PNR agreement, as well as to the new PNR Directive, air carriers companies are not obliged to proceed to an analysis of the data by themselves, but to leave the processing to the Canada Border Services Agency or to the new 'Passenger Information Units'. There are no guarantees, thus, that it is from this data processing that suspicions will then emerge and then, be further analysed by law enforcement authorities. The AG also relied to the lack of a fully independent and impartial supervisory authority entitled to review potential infringements of the agreement providing, therefore, efficient safeguards to the passengers to reveal another point of incompatibility of the EU –Canada PNR agreement with the provisions of the EU Charter.

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[573] SKANDAMIS N.,SIGALAS F. & STRATAKIS S., *Rival Freedoms in terms of Security: The Case of Data Protection and the Criterion of Connexity*, Challenge, Liberty and Security Research Paper No.7, December 2007,available at http://aei.pitt.edu/7588/1/Cp7.pdf, p.15.

[574] Opinion of Advocate General Mengozzi delivered on 8 September 2016 on the anticipated Opinion 1/15 of the Court.

[575] Ibid, paras 169-176.

[576] Ibid, para 186.

[577] LASSALE M.,*Opinion 1/15: AG Mengozzi looking for a new balance in data protection,* European Law Blog 2016, available at http://europeanlawblog.eu/?p=3395.

Hopefully, the Court of Luxembourg issued its *Opinion 1/15* in July 2017[578] in which it confirmed the line of reasoning of the AG and held that the impugned agreement *prima facie* interfered with Articles 7 and 8 of the Charter and hence, it exercised a lengthy proportionality test to ascertain whether this interference could be permitted in the name of public security. Having examined every part of the draft agreement and the specific aspects of the individual rights of the passengers, the Court considered that the measures enshrined therein do not meet the necessity criterion (*stricto sensu*) providing in practice the MS with strict guidelines for re-drafting the agreement.[579]

At any rate, the legal context of data protection within the EU post-Lisbon architecture particularly after the adoption of the EU Charter, is totally different. Despite the emerging need of extended antiterrorist protection in Europe, the mass surveillance jurisprudence of the Luxembourg has taken lately the form of *domino effect* [580]with significantly effective results in the field of data protection not only within the EU legal order.

At this point, we should not neglect the Strasbourg's perspective which is quite revealing of the judicial dialogue between Luxembourg and Strasbourg in the data protection field. The Strasbourg Court in two major cases probably felt the need to align its case law with the one developed by CJEU, particularly after the *Digital Rights Ireland* and *Schrems* doctrine and hence, to enhance the protection offered to individuals in the era of mass surveillance.

At first, in the *Roman Zakharov* case,[581]the Russian legislation was at issue since the applicant challenged the surveillance practices of the Russian intelligence agencies claiming mass interception of all telephone communications in the name of national security. The ECtHR sidestepped the "victim status" issue that arose as the Court's task is not normally to review *in abstracto* a Contracting party's legislation due to the mere existence of the secret surveillance methods elucidating particular conditions which justify this deviation from the general rule of admissibility. Subsequently, the Court, in light of the *Digital Rights Ireland,* which was included in the section mentioning the applicable law, moved on to specify minimum safeguards that need to be established in the context of mass surveillance legal framework in order the latter to be in line with Article 8 CFR. The national legislation should offer sufficiently clear rules as regards the categories of people which are likely to have their communications intercepted, the duration of the measures, the procedures for storing, collecting and destroying data, the rules concerning the authorisation and supervision of surveillance, and the notification of surveillance measures related to the availability of effective remedies. Therefore, the Strasbourg Court, taking a strong position against secret surveillance

[578] Case Opinion 1/15, Opinion of the Court (Grand Chamber) of 26 July 2017, published in the electronic Reports of Cases.

[579] See e.g. TAMBOU O., Opinion 1/15 on the EU-Canada Passenger Name Record (PNR) Agreement: PNR Agreements Need to Be Compatible with EU Fundamental Rights', 23 *European Foreign Affairs Review* 2, 2018, pp. 187–202 ; KUNER C., International Agreements, Data Protection, and EU Fundamental Rights on the International State: Opinion 1/15, EU-Cananda PNR, 55 *C.M.L. Rev.* 3, 2018, pp. 857-882 ; VEDASCHI A. and GRAZIANI C., PNR agreements between fundamental rights and natural security: Opinion 1/15, European Law Blog 2018, available at http://europeanlawblog.eu/2018/01/23/pnr-agreements-between-fundamental-rights-and-national-security-opinion-115/.

[580]PEERS S., *The Domino Effect: how many EU Treaties violate the rights to privacy and data protection?*,EU Law Analysis Blog 2014, available at http://eulawanalysis.blogspot.fr/2014/11/the-domino-effect-how-many-eu-treaties.html.

[581] ECtHR, *Roman Zakharov v. Russia*[GC], Application No. 47143/06,4 December 2015.

practices, it not only developed its own jurisprudence so as to set new rules with regard to the protection of personal data when interpreting Article 8 ECHR but also it has definitely raised questions about the validity of a whole surveillance system. "Indeed, the four principles created by the court referring to the circumstances in which authorities are empowered to resort to secret surveillance measures, the duration of such measures, the procedures for authorising interception as well as for storing and destroying the intercepted data and the supervision of the interception, could be used as a blueprint to analyse if other systems respect fundamental values".[582]

Additionally and on the same page, the ECtHR delivered in *Szabo and Vissy v Hungary*[583] in which the Court had the opportunity to review the Hungarian secret surveillance system when two activists challenged sweeping legislation that permits to the Hungarian authorities to search houses, postal mail, and electronic communications and devices without judicial approval in the name of anti-terrorism purposes. The Court reiterated its reasoning and applied the criteria laid down in its prior *Zakharov* judgment to determine whether the interference with Article 8 is justified or not. In this judgment, the Strasbourg Court referred *expressis verbis* to the jurisprudential developments of the CJEU and more particularly to the *Digital Rights Ireland* case as well as to the recently delivered *Schrems* ruling reaffirming its tendency to align its case law with the high standards of protection offered within the EU legal order. The Strasbourg Court followed the traces of the CJEU in *Schrems* in which the safeguards of an entire surveillance regime of a particular State were under scrutiny, weighted against fundamental rights protection.

Nevertheless, in a time when the increased terrorist threats are still present and antiterrorist policies are among the major priorities of most European governments, the strict minimum standards set by both the European Courts will be tough for any European mass surveillance legislature to live up to. Despite this pessimistic perception of the current situation, the *Zakharov* and *Szabo and Vissy* cases constitute significant revelations of this evolutive position of the Strasbourg Court which is to be welcomed since the latter used its tools and the Luxembourg's rulings as a source of inspiration to elucidate the incompatibility of such mass surveillance measures with the provisions of the ECHR.[584]

All that said, we should probably draw the conclusion that in these cases, as Cole and Vandendriessche observed "the European Court of Human Rights has taken the deep pass into the box from the CJEU that had originally profited from an opening pass by the ECtHR and has scored a clear goal with these two judgments".[585] Thus, despite the *lacunae* in the data protection field in Europe and the numerous questions seeking for answer in the mass surveillance era, the interrelationship between the two judicial mechanisms appears to be a good sign of heading in the right direction for a more effective protection of personal data even

[582] DE HERT P. and BOCOS P., *Case of Roman Zakharov v. Russia: The Strasbourg follow up to the Luxembourg Court's Schrems judgment*, Strasbourg Observers 2015, https://strasbourgobservers.com/2015/12/23/case-of-roman-zakharov-v-russia-the-strasbourg-follow-up-to-the-luxembourg-courts-schrems-judgment/ .
[583] ECtHR, *Szabo and Vissy v Hungary*, Application No. 37138/14, 12 January 2016.
[584] COLE M. and VANDENDRIESSCH A., From *Digital Rights Ireland* and *Schrems* in Luxembourg to *Zakharov* and *Szabb/Vissy* in Strasbourg: What the ECtHR Made of the Deep Pass by the CJEU in the Recent Cases on Mass Surveillance, *Eur. Data Prot. L. Rev.* 121,2016.
[585] Ibid., p.128.

in the hardest of times. In addition to this, although the Charter is now the game-changer as regards the level of protection offered to the EU citizens, the power of the ECHR is still *alive and kicking* within the EU legal order. This is also verified by the recently delivered Opinion of the AG Saugmandsgaard Øe in the joined cases of *Watson and Tele2* [586]concerning the new data retention regime in which the Court is asked *inter alia* whether the famous *Digital Rights Ireland* extended the scope of Article 7 and/or Article 8 of the Charter beyond that of Article 8 of the ECHR, as interpreted by the ECtHR. The AG reaffirmed in light of the jurisprudence of the Strasbourg Court the paramount importance of the level of protection offered by the ECHR which should be the main regulatory element when the Luxembourg Court interprets the provisions of the Charter which correspond to the Convention. In effect, the AG took the view that "the meaning of that expression 'provided for by law' used in Article 52(1) of the Charter needs to be the same as that ascribed to it in connection with the ECHR, for the following reasons. First of all, pursuant to Article 53 of the Charter and the explanations relating to that provision, the level of protection afforded by the Charter must never be inferior to that guaranteed by the ECHR. This rule that the 'ECHR standard' must be attained means that the Court's interpretation of the expression 'provided for by law' used in Article 52(1) of the Charter must be at least as stringent as that given to it by the European Court of Human Rights in connection with the ECHR. Secondly, in view of the horizontal nature of this requirement for a legal basis, which applies to a variety of types of interference, with reference both to the Charter and to the ECHR, it would be inappropriate to impose different criteria on the Member States depending on which of those two instruments was under consideration." [587]

This position taken by the AG seems even more thought-provoking after the Opinion 2/13 and the freezing of the accession's process since it appears to have "unleashed the power of the European Convention on Human Rights (ECHR)".[588]

It is within this spirit that we should examine its leading *Big Brother Watch v. UK* case.[589] In this long anticipated pronouncement judgment, the Court seized the chance to reshape the data protection jurisprudence of the latter in more realistic terms adopting at the same time a remarkably integrating approach towards the applicable standards of EU data protection law. Having again as a starting point the Snowden's revelations, fourteen NGOs submitted jointed applications to the Court challenging the mass interception activities exercised by the UK intelligence services and alleging that they led to an unlawful interference with Article 8 ECHR. The Court ruled that the impugned actions of the UK intelligence services constitute a breach of the Convention; however, it also attempted to rationalize the approach of its case law when it comes to the requisite reconciliation of the protection of data protection with state surveillance practices. The Strasbourg Court emphasized the utility parameter and recalling the wide *margin of appreciation* that States enjoy when identifying the most appropriate measures to safeguard national security the Court stressed that "bulk interception regimes did not per se fall outside this margin."[590]Pertaining to the distinction between bulk and targeted interception

[586] Opinion of AG Saugmandsgaard ØE delivered on 19 July 2016 in Joined Cases C-203/15 and C-698/15.
[587] Ibid., paras 140-143.
[588] WHITE M., *The new Opinion on Data Retention: Does it protect the right to privacy*?, EU Law Analysis Blog 2016, available at http://eulawanalysis.blogspot.fr/2016/07/the-new-opinion-on-data-retention-does.html.
[589] ECtHR, *Big Brother Watch v. UK*, Applications Nos. 58170/13, 62322/14 and 24960/15,13 September 2018.
[590] Ibid., para 314.

the Court elucidated that "while the Court does not doubt the impact of modern technology on the intrusiveness of interception, and has indeed emphasised this point in its case-law, it would be wrong automatically to assume that bulk interception constitutes a greater intrusion into the private life of an individual than targeted interception, which by its very nature is more likely to result in the acquisition and examination of a large volume of his or her communications."[591]It is noteworthy that the Court recalls specific standards set out in its *earlier judgments*: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; limits on the duration of interception;the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties and the circumstances in which intercepted data may or must be erased or destroyed.[592]

Throughout its argumentation, the Strasbourg Court could hardly overlook the Luxembourg's standards, largely formulated on the occasion of the implementation of EU law. The Court, nevertheless, refused to enrich the list of minimum standards with which an interception scheme should comply; namely the need to provide evidence of reasonable suspicion before intercepting communications, the presence of judicial authorisation, and the obligation to notify the individuals subject to interception. These requirements were introduced in the *Watson* decision of the Luxembourg Court.[593] However, the Court in light of their earlier observations held that "although the Court would agree that the additional requirements proposed by the applicants might constitute important safeguards in some cases, for the reasons set out below it does not consider it appropriate to add them to the list of minimum requirements in the case at hand."[594]

Even though this lengthy judgment of the ECtHR in *Big Brother Watch* appear to constitute a departure from the stringent approach of bulk interception policies that both the European institutions have adopted in the past, the judgment's added value is also related to the safeguards it pronounces.[595] Without losing sight of the CJEU's relevant case law,[596] the Court of Strasbourg used as a point of orientation the latter and took a further step to say something that Luxembourg perhaps wishes to admit. Strasbourg appears to draw a distinction between mass surveillance and bulk surveillance which is not less intrusive than targeted surveillance to protect from terrorist attacks and to ensure the criminal punishment of the perpetrators. [597]As it flows from the outcome of the *Big Brother Watch* decision this new perception of surveillance is, as it must be, inextricably linked to specific safeguards and the traditional 'necessity test'. Given the fact that the said ruling was later on referred to the Grant

[591] Ibid., para 316.
[592] Ibid., para 307.
[593] See supra note 586.
[594] Ibid. para 316.
[595] Ibid., para 328-347. See also MURRAY D. and FUSSE P., Bulk Surveillance in the Digital Age:Rethinking the Human Rights Law approach to bulk monitoring of communications data, 52 *Israel Law Review* 1, 2019, p.55.
[596] Ibid. para 224-236, 463,467.
[597] CELESTE E., The Court of Justice and the Ban on Bulk Data Retention: Expansive Potential and Future Scenarios, 15 *EuConst* 1,2019, p.155,157. For an analysis of the said judgment see also MILANOVIC M., *ECtHR Judgment in Big Brother Watch v. UK*, EJIL Talk! 2018, available at https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/; VERMEULEN J., *Big brother may continue watching you*, Strasbourg Observers Blog 2018, available at https://strasbourgobservers.com/2018/10/12/big-brother-may-continue-watching-you/#_ftn4 .

Chamber, this is not probably the last word on the Starsbourg's understanding of mass surveillance and most importantly, of bulk data retention in the digital age.

However, the existing dialogue between the two legal systems will, hopefully, allow the CJEU to overcome its own inconsistencies in its relevant case law[598] so as to delimit the grey area of the contours of the right to privacy and the right to data protection not only with regard to their substance and their inter-relation as established by the Charter but also with relation to the proper interpretation of Article 8 ECHR. It also remains to be seen whether the Court of Justice will align with the more pragmatist standing on interception methods as mirrored in the recent jurisprudential trends of the ECtHR.

In conclusion, despite the criticism initially raised against the Court of Justice for not taking fundamental rights seriously enough and its reluctance in producing bold judgments in this area of law, post Lisbon, its case law on the Article 7 and 8 of the Charter reveals its tendency to be a frontrunner in data protection law, particularly in the digital age. Yet, this task is certainly not a *walk in the park*. In fact, the CJEU's position on the matter needs to be further clarified, especially when the Court is actively interacting with its Strasbourg peer.

3. The ECHR as an impediment to fundamental rights violations exercised by EU institutions: The example of UN sanctions

The issue of a stricter review of the actions of the EU institutions from the human rights angle was brought to light by the CJEU on the occasion of another sensitive area influenced by the enhanced anti-terrorism policies, namely the application of the UN sanctions within the EU legal space. This review, required by the Court, raised the debate about the discrepancies on human rights protection between the two judicial fora and encouraged the CJEU to revisit their relationship confronting new challenges in rather difficult times.

a) The Bosphorus case formulating the interrelationship of the two judicial systems

The *Bosphorus* saga[599] was one of the leading cases illustrating the initial approach of both the CJEU and the ECtHR when dealing with the delicate issue of the application of UN sanctions. The famous *Bosphorus* case concerned an application brought by a Turkish airline charter company, Bosphorus Airways. In 1993, an aircraft, leased by the company from Yugoslav Airlines (JAT), was impounded by the Irish authorities during its presence in Ireland according to Article 8 of the Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro)[600] implementing at Community level sanctions imposed by the UN

[598] See GONZALEZ FUSTER, supra note 538.

[599] For an analytical review of the lengthy litigation of the Bosphorus case before the CJEU and the ECtHR see DOUGLAS-SCOTT S., *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application No. 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R.,43 *C.M.L. Rev.*1, 2006, pp. 243-254.

[600] Article 8 of the Council's Regulation provided that "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member

on the Federal Republic of Yugoslavia, Serbia and Montenegro. The company challenged the aircraft's seizure, invoking a violation of its fundamental right to property pursuant to Article 1 Protocol No.1 ECHR since the Turkish airline had the complete day-to-day management and control of the aircraft under a "dry lease" signed with the JAT. The Irish Supreme Court which has dealt finally with the case made a preliminary reference to the CJEU asking whether the Council's Regulation and the UN sanctions incorporated therein were applicable in the present case.

The CJEU, in its judgment delivered in 1996,[601] responded to this question in the affirmative elucidating that there is no reason under the relevant UN Security Council Resolution and Article 8 of the EU Council Regulation justifying a distinction between the owner of the aircraft and the person/undertaking having the controlling interest of the aircraft. Despite reaffirming the significance of fundamental rights in the EU legal order, the Court held, in the context of the proportionality test applied, that "it is settled case law that fundamental rights are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community, and that the interference with fundamental rights invoked by Bosphorus is proportionate in the light of the important aims pursued by the sanctions, namely bringing about an end to the state of war and human rights violations in the relevant area."[602]

Later on, the Bosphorus company lodged an application before the ECtHR alleging that its aircraft's seizure amounted to an infringement of its property rights as enshrined in Article 1 Protocol No.1 of the ECHR. In its rather short judgment,[603] the Court accepted its jurisdiction to rule in this case but, as the CJEU did, rejected the applicant's claim.

At first, the Strasbourg Court took into serious consideration the CJEU's judgment on the case at hand and examining the legal basis of the interference with of Article 1 Protocol No.1 ECHR[604] held rather quickly that "the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93."[605] Examining Bosphorus' right to property in the light of Ireland's obligations as arising by the EU Council's contested regulation, the ECtHR proceeded to consider the applicant's claim under Article 1 Protocol No.1 ECHR. Thus, the Court stated that the sanctions regime resulted in a "control of use" rather than a "deprivation" of property. As regards the justification of the seizure, the ECtHR opted to see the action of the Irish Government in the light of its

States." Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ 1993 L 102.

[601] Case C-84/95, *Bosphorus v. Minister for Transport, Communications et al.,* [1996] ECR I-3953.

[602] Ibid., para 21.

[603] ECtHR, *Bosporus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No.45036/98, 30 June 2005.

[604] The right to property under Article1 Protocol 1 ECHR provides that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.".

[605] Supra note 603, para 148.

responsibilities under EU law. The Strasbourg Court found that Ireland had no discretion to act according to its legal obligations flowing from EU law since the contested legislation implementing the UN sanctions against the Federal Republic of Yugoslavia(FRY) was *generally applicable* and *binding in its entirety* highlighting also its –by nature- direct application in the domestic legal order. Therefore, the Court emphasized that the general interest pursued by the impugned action was in conformity with the Irish State's obligations under the Union's law. After recalling that the interpretation of the Convention is made in light of relevant international law principles[606] such as the *pacta sunt servanda* rule, and the increasing weight that the Court gives on international co-operation and the proper functioning of international(and supranational) organizations -as it is the case of the European Union-,[607] the Court emphasized that there must be a proportional relationship between the means selected by the authorities and the aim pursued. Hence, a fair balance is required between the demands of the general interests of society and the interests of the individual company concerned. In this respect, the state enjoys wide *marge de manoeuvre*.

Most importantly, in this ruling the Court seized the opportunity to outline with detail its *equivalent protection* doctrine[608] and reexamine its interplay with the EU legal system concerning the standards of fundamental rights' protection. After reaffirming that the Convention does not prohibit its contracting parties from transferring sovereign powers to international organizations in the name of international cooperation, the Court reiterated that "State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[609]

In this regard, the Court assessed if it could be presumed that Irish authorities acted in compliance with its ECHR requirements in fulfilling such obligations.[610] For that purpose, the Court paid particular attention to the human rights protection within the EU legal framework.

Given the numerous and repeated references by the CJEU to the ECHR, the adoption of the Charter of the fundamental rights of the EU, as well as the enforcement mechanism offered by the EU legislation, the Strasbourg Court came to the conclusion that "[i]n such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises

[606] Article 31(3)(c) of the Vienna Convention on the Law of Treaties(VCLT) which is generally conceived as the main weapon of international law against fragmentation, was also invoked by the ECtHR in its ruling. Supra note 603, para 150; UN, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. For a horizontal analysis of the principle of systemic integration as incorporated in the text of Article 31(3)(c) VCLT see MERKOURIS P., *Art. 31(3)(c) VCLT and the principle of systemic integration-Normative Shadows in Plato's Cave*, Brill Nijhoff 2015.

[607] Ibid., para 150.

[608] This famous doctrine of the Court was introduced in the ECHR legal order in *M & Co v Federal Republic of Germany* and *Mathews* judgments.

[609] Supra note 603, para 155.

[610] THOR BJORGVINSSON D., The role of the European Court of Human Rights in the changing European human rights architecture in MJOLL ARNADOTTIR O. and BUYSE A.(eds.), *Shifting Centres of Gravity in Human Rights Protection, Rethinking relations between the ECtHR, EU, and national legal orders*, Routledge 2016, p.34, 35.

that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community."[611]

Nevertheless, according to the Court's appraisal, such a pronouncement of equivalence should always be open to review in the light of any relevant developments in the field of fundamental rights' protection. Hence, the presumption of equivalent protection is rebutted "in the circumstances of a particular case, it is considered that the protection of the Convention's rights was manifestly deficient".[612]Arguably, the key point of the aforementioned review is the *ensemble* of particularities that result in the characterization of a legal system as '*manifestly deficient'*. At any rate, the Strasbourg Court found that that was not the case under the present circumstances and, thus, the Bosphorus' right to property under Article 1 Protocol No.1 ECHR had not been breached.

The approach of the Court is generally accepted to have been influenced by the famous doctrine of the German Federal Constitutional Court (Bundesverfassungsgericht) enunciating the concept of constitutional pluralism in the EU and reestablishing the relation between the national Courts and the EU law in the *Solange I* [613]and the sequel, the *Solange II* case.[614]In the *Solange* jurisprudence, the Court, expressed severe hesitations, in its first ruling, with regard to the EU protection of human rights which was, however, revisited by the Court as it surmounted its initial skepticism and declared that fundamental rights are adequately protected within the context of the EU legal order acknowledging, thus, the primacy of the EU law. [615]

Notably, in the echo of the *Solange* doctrine[616]which paved the way of the establishment of the national-EU hierarchy, the *Bosphorus* case sought to discover the regional(ECHR)-EU

[611] Supra note 603, para 165.
[612] Ibid., para 166.
[613] 1974, BverfGE 37, 271 (280), ('Solange I').
[614] 1987, BverfGE 73, 339 (379), ('Solange II').
[615] The principal lesson out of the *Solange* saga is that despite the fact that, at first, the German Federal Constitutional Court reserved to itself the last word when it comes to review secondary EU law against the application of the fundamental rights obligations under German Basic Law, it, subsequently, ruled in its 'Solange II' decision of 1987 that it would abstain from doing "[s]o long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights" Ibidem, para. 48. Therefore, the German Federal Constitutional Court appeared to be convinced by the evolution of the CJEU fundamental rights' jurisprudence guaranteeing that rights will be protected within the legal order of the European Union at a level substantially equivalent to that provided by the German Law. Having announced this presumption of compatibility of EU law with the national standards of human rights protection under German law, the German Federal Constitutional Court announced that it would henceforth scrutinize the compatibility of EU law with the abovementioned requirements only in cases in which the applicant bases his allegations on elements indicating that the general level of protection of fundamental rights -- beyond the specific case concerned -- has not been satisfactory according to the 'Solange II' standards as developed by the Court.
[616] For a more extended analysis of this distinguished doctrine and its implications in EU and international law see *inter alia* LIMBACH J., La coopération des juridictions dans la future architecture européenne des droits fondamentaux. Contribution à la redéfinition des rapports entre la Cour constitutionnelle fédérale allemande, la Cour de justice des Communautés européennes et la Cour européenne des droits de l'homme, 12 *RUDH*, 2000 pp. 369-372, LAVRANOS N., The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals, 30 *Loy. L.A. Int'l & Comp. L. Rev*. 275, 2008, pp. 275-334; VON BOGDANDY A., KOTTMANN M., ANTPOHLER M., DICKSCHEN J., HENTREI S., SMRKOLJ M., Reverse Solange – Protecting the essence of fundamental rights against EU Member States ,*49 C.M.L.Rev.* 2,2012, pp. 489–519; DE SCHUTTER O., The Two Lives of Bosphorus: Redefining the Relationships between the European

balance with enormous implications in this field. Being one of the most important cases that offered a true paradigm of overlapping jurisdiction, the *Bosphorus* saga before the Luxembourg and the Strasbourg Court allowed us to draw useful conclusions with regard to the interaction between the two judicial mechanisms.

In this respect, the issue of the Court's jurisdiction in the *Bosphorus* case is of paramount importance, particularly as it is an element of the judgment that it contributes to the tension between the two European judicial mechanisms. Remarkably, the Court, in order to confirm its jurisdiction in the case under Article 1 of the ECHR, opted for a delicate approach focusing, at first, on the territorial scope of application of the Convention and then, to the concrete national implementation of the EU rule rather than directly scrutinizing the legality of the EU Regulation. Therefore, it overlooked not only the EU obligations but also the responsibitity of the Security Council.[617] Kathrin Kuhnert observed relatively that "[i]ndeed, this can be considered a step forward as compared to the *M. & Co.* decision. However, as EC law also applies on the territories of the EC Member States (Article 299 of the EC Treaty), this interpretation fails to provide a convincing answer to the question of whether the EC (or a Member State) is bound by the ECHR in the implementation of Community acts."[618]

Secondly, the fact that the European Court of Human Rights did not decline jurisdiction to deliver its ruling in a case already discussed before the Court of Justice, raised a number of vexed issues at the time. As Sionaidh Douglas-Scott correctly pointed out in relation with the overlapping jurisdiction of the two Courts "[i]f one adds the jurisdiction of national courts and their role in hearing human rights cases, one might say that Europe currently has a rich, fertile, or perhaps even an excessive, focus on human rights."[619]

On the contrary, the ruling of the Strasbourg responded to the problems that arose during this lengthy litigation of the *Bosphorus* saga, which lasted more than ten years, providing, though, some problematic issues as well. As discussed earlier, the privileged position that the Strasbourg Court reserved for the EU legal order since, departing from its *M & Co* and *Matthews* doctrine, it clarified that the '*equivalent protection*' presumption, developing also the '*manifestly deficient*' concept, meant that this presumption can be rebutted only in exceptionally severe violations of fundamental rights. Despite the fact that the Court's approach should be seen in the general context of the political and institutional tension caused in the light of the failure of the EU Constitution's adoption, which explicitly provided for the EU accession to the ECHR,[620]it is more than evident that the Court introduces a significantly high threshold leaving the door open for low standards of fundamental rights protection which appear to be acceptable by the ECtHR.

In addition, even though the Court underlined that this is a *case-by-case* review, the manner that it selected to exercise this *in abstracto* review in *Bosphorus,* by examining the EU

Court of Human Rights and the Parties to the Convention, *4 Journal européen des droits de l'homme,*2013, pp. 584-624.

[617] REINISCH A., Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions, 95 *AJIL* 4, 2001, pp.851-872.

[618] KUHNERT K., Bosphorus – Double standards in European human rights protection?, 2 *Utrecht L. Rev*., 2006, p. 184.

[619] DOUGLAS-SCOTT S., A tale of two Courts: Luxembourg, Strasbourg and the growing European Human rights *acquis, 43 C.M.L.Rev.* 3, 2006, p.630.

[620]KUHNERT, supra note 618, p.188.

legal system as a whole without evaluating the specific status of the property rights' protection within the EU legal system, appeared rather alarming even for some of the Judges of the Court. In their concurring opinion, the Judges stressed that "[i]n spite of its relatively undefined nature, the criterion 'manifestly deficient' appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under the European Convention on Human Rights. Since the Convention establishes a minimum level of protection (Article 53), any equivalence between it and the Community's protection can only ever be in terms of the means, not of the result. Moreover, it seems all the more difficult to accept that Community law could be authorised, in the name of 'equivalent protection', to apply standards that are less stringent than those of the European Convention on Human Rights when we consider that the latter were formally drawn on in the Charter of Fundamental Rights of the European Union, itself an integral part of the Union's Treaty establishing a Constitution for Europe."[621]

As a result, the judges also gave particular emphasis to the danger of developing double standards of protection under the ECHR as the *Bosphorus* judgment seems to have made a distinction with regard to the level of protection between the Contracting Parties which are EU Member States and those which are not, leaving the formers outside the stringent scrutiny usually applied by the Court.[622]

As EU Member States are required, according to the CJEU, the ECtHR and the EU Charter's provisions, to take into account the ECHR standards when examining the lawfulness of their actions, it remains problematic why the Strasbourg Court granted a certain degree of immunity to its Contracting Parties when they act pursuant to EU obligations without the necessary definitions or clarifications.[623]

Overall, it goes without saying that this ruling of the Strasbourg Court was innovative expressing *a priori* its trust to the EU standards as it acknowledged that the level of protection guaranteed by the EU is equivalent to what the ECHR offers itself. The Court perhaps felt that it had to respond to the main concern articulated by the European Commission, during its intervention in the case, stressing that the accession would be seriously jeopardized if the ECtHR declared jurisdiction to put ordinary EU acts under scrutiny.[624]Nevertheless, the way that the ECtHR selected to do so -sidestepping the EU obligation to implement Security Council economic measures lying under the national act- leads us to the conclusion that, in practice, the *Bosphorus* judgment left plenty of room for the ECtHR to scrutinize scrutiny of the actions of EU institutions, regardless of accession. This conclusion was subsequently reaffirmed by the evolution of the *equivalent protection* doctrine, more specifically in the

[621] Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelesky and Garlicki on the *Bosphorus case*, para 4.
[622]Ibidem.
[623]COSTELLO C., The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe, 6 *Hum. Rts. L. Rev*. 87, 2006, p. 106,107.
[624] "The Commission considered that the application concerned in substance a State's responsibility for Community acts: while a State retained some Convention responsibility after it had ceded powers to an international organisation, that responsibility was fulfilled where there was proper provision in that organisation's structure for effective protection of fundamental rights at a level at least "equivalent" to that of the Convention. The Commission therefore supported the approach adopted in *M. & Co.* (cited above) and urged the Court to adopt this solution pending accession to the Convention by the European Union. Thereafter, any Convention responsibility, over and above the need to establish equivalent protection, would only arise when the State exercised a discretion accorded to it by the international organisations." Supra note 603, para 122.

Dublin cases, where the latter did not impede the Court's will to reconsider emerging issues and to exercise a greater control over EU law.

Despite the fact that the *equivalent protection* doctrine was introduced and developed during a time that the accession was highly desirable and signaled the enhanced trust and cooperation between the two European legal systems, the question whether this doctrine will be deprived from its substance after accession inevitably arises. For Olivier De Schutter "there will be no argument to justify the survival of the doctrine in its current form following the accession of the EU to the ECHR, as this would establish the EU in an unduly privileged position vis-à-vis the other parties to the Convention. But if it is to die in its current incarnation, the *Bosphorus* presumption-of-compliance doctrine may re-emerge in an expanded and different guise." [625]

At any rate, taking all the above into consideration and in light of Opinion 2/13, the interesting question arises as to whether the Strasbourg Court will maintain the position taken in similar cases. The pronouncement of the ECtHR in *Avotiņš v. Latvia*[626] judgment of 2016 signals, however, that the Court is not yet ready to leave behind the *equivalent protection* presumption. In its recent and most awaited judgment, the Strasbourg Court not only applied its relevant doctrine but also it did so for the first time in a case concerning obligations of mutual recognition under EU law. This is even most noteworthy due to the main concerns expressed by the CJEU in its Opinion 2/13 according to which the EU accession to the ECHR gestures a significant threat to the mutual trust principle and as a result, the underlying balance of the EU and the autonomy of EU law would be imperiled.[627]

In particular, in the present case, M. Avotiņš alleged that the Latvian Supreme Court had violated his right to a fair hearing under Article 6 ECHR, while acting in the context of enforcement of a Cypriot judgment pursuant to the *Brussels I Regulation*, [628] which was, according to his view defective due to the fact that it had been delivered in breach of his rights of defence.

As regards the applicability of the *Bosphorus* presumption, the Court reiterated that, besides its jurisprudence that repeatedly found the substantive protection of human rights equivalent, within the EU legal architecture, this is also confirmed by Article 52(3) providing the consistent interpretation with ECHR of the corresponding rights. Subsequently, the Court also stressed that the "absence of any margin of manouvre" on the part of the Latvian authorities while implementing the particular EU law obligation, as well as the "deployment of the full potential of the supervisory mechanism" provided by EU law, was also fulfilled.[629]

The Strasbourg Court, after having underlined the fact that the *Brussels I Regulation* relies upon the principle of mutual trust, and therefore, the paramount importance of this

[625] The author in its article proposes the three possible post-accession scenarios that could give new meaning to the *equivalent protection* doctrine of the Strasbourg. DE SCHUTTER O., Bosphorus Post-Accession: Redefining the relationships between the European Court of Human Rights and the Parties to the Convention in KOSTA V., SKOYTARIS N. and TZEVELEKOS V.(eds.), *The EU Accession in the ECHR,* Hart Publishing 2014, p.178.
[626] ECtHR, *Avotiņš v. Latvia,* Application No. 17502/07, 23 May 2016.
[627] See Opinion 2/13, supra 37, para 194.
[628] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2000 L 12.
[629] Supra note 626, paras 105,106.

principle in EU law (para 113), examined the specific elements of the case and concluded that not only the equivalent protection doctrine is applicable in the case at hand but also it cannot be rebutted as fundamental rights protection cannot be considered as *manifestly deficient.*[630] Nevertheless, the Court seemed rather unconvinced as regards the automatic application of the EU mutual recognition mechanism by the domestic courts when the simultaneous application of the *Bosphorus* presumption and the weight that this twofold national obligations brings to the effective protection of fundamental rights in Europe come into play.[631]

Needless to say that, post accession, the Strasbourg system will be tempted to reassess its pronouncements in the *Bosphorus* litigation. In any event and under the present circumstances, this might not occur overnight, however, the Court might be motivated to take slow steps away from its prior position so as to better define the standards of human rights protection in the implementation of EU law by the national jurisdictions. After all, it also flows from the *Bosphorus* ruling that the states' acts and omissions fall definitely within the scope of application of the Convention's provisions irrespective of the origin of the relevant legislation.

b) The decisive step: The Kadi saga

Nevertheless, it was not until 2008 that the CJEU "rocked the boat" providing, for most commentators, its more important ruling in decades in the ground-breaking *Kadi* case pertaining, this time, to the targeted economic sanctions of the Security Council against individuals.

Arguably, "the atrocious terrorist attacks of 11 September 2001 and the wave of counter-terrorism measures that followed together constitute the worst backlash in human rights protection of the whole period since the breakthrough of the concept of human rights in the aftermath of Nazism and the Second World War."[632] During this long period starting after 11/9, both states and the entire international community introduced a wide range of measures of all types to tackle this alarming situation. Nevertheless, the counter terrorism strategies appeared to simply disregard human rights voices. In this context, the Security Council also took immediate action as it declared the phenomenon of international terrorism as a threat to international peace and security, and imposed an extensive and mandatory counter-terrorism agenda upon states through Resolution 1373(2001)[633]pursuant to the provisions enshrined in Chapter VII of the UN Charter.

Besides, the United Nations, through the Security Council, have resorted to economic sanctions against individuals who were known or suspected terrorists. Therefore, in this respect, the redaction of the so-called terrorist lists containing individuals and entities amounted most of the times to the freezing of assets or financial transactions with the listed

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[630] Ibid., paras 113-127.

[631] See *inter alia* JOHANSEN S., *EU law and the ECHR: the Bosphorus presumption is still alive and kicking - the case of Avotiņš v. Latvia* , 2016, available at http://eulawanalysis.blogspot.fr/2016/05/eu-law-and-echr-bosphorus-presumption.html, BERGE J-S, *Avotins ou le calme qui couve la tempête,*2016 available at http://www.gdr-elsj.eu/2016/05/26/cooperation-judiciaire-civile/avotins-ou-le-calme-qui-couve-la-tempete/ .

[632] SCHEININ M., Counter-terrorism and human rights in SHEERAN S. and Sir RODLEY N.(eds.), *Routledge Handbook of International Human Rights Law,* Routledge 2013, p.581.

[633] UN Security Council, Security Council resolution 1373 (2001) on threats to international peace and security caused by terrorist acts, 28 September 2001, S/RES/1373 (2001).

individual or entity, or even to the prevention of any international travel by an individual who is also a presumed terrorist. The *ratio* of such UN sanctions was based on their preventive effect with regard to the financing of terrorism. These sanctions were intended to function as disincentives to the persons involved, so as they would abstain from taking part in terrorist acts.[634]

Due to its implementation, the UN sanctions regime was, undoubtedly, characterized by significant shortcomings which raised great human rights-based criticism. [635] The aforementioned scheme of the terrorist listing was also brought into the spotlight of the EU legal order as it became part of the EU legislation and challenged before the EU judicial *fora* in the famous and rather lengthy *Kadi* litigation which -as discussed below- not only delimited the external relations of the EU with international organizations and more specifically, with the United Nations, but also initiated a new field of interaction with the Strasbourg Court.

As this particular case is among the most well-known cases in academia, we will attempt to resume briefly the basic facts of the *Kadi* case. Since Yassin Abdullah Kadi was a presumed supporter of Usama Bin Laden and Al Qaeda, he was, thus, listed by the Sanctions Committee amounting in a freezing of his assets. Following this, the EU transposed this UN sanction by the Council Regulation 467/2001 [636] and the Commision Regulation 2062/2001 [637] which ordered M. Kadi's listing and the freezing of his funds. As a result, he contested the said EU legislation before the General Court of the EU claiming a breach of his right to property under Article 1 Protocol No.1 ECHR, and the lack of effective judicial remedy.

At first instance,[638] the General Court had a rather defensive approach towards the Security Council as it refused to examine the lawfulness of the EU regulation because, given that the said legislation was adopted so as to give effect to the Security Council Resolutions

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[634] In this aim, the Security Council Resolution 1267 sanctions regime was initially used to give effect to these economic measures. The SC sanctions' scheme originally concerned the Taleban leaders in Afghanistan, but it was, subsequently, expanded through Security Council resolution 1390 in order to include a global list of persons associated with Al-Qaeda or the Taleban. As the relevant Security Council resolutions (SC Resolution 1988, SC Resolution 1989) have been adopted under Chapter VII of the UN Charter, they laid down binding legal obligations for all member states and are said to enjoy primacy in respect of other international obligations of the same states, pursuant to Article 103 of the UN Charter.

[635] For this critique see *inter alia* REINISCH A., Should Judges Second-Guess the UN Security Council?, 6 *Int'l Org. L. Rev*. 257, 2009, pp. 257-291; GROSSMAN A., *A Critical Assessment of the 1267 Sanctions Committee*,2012, available at http://www.e-ir.info/2012/03/03/a-critical-assessment-of-the-1267-sanctions-committee/ ; TZANAKOPOULOS A., *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ*, EJIL Talk Blog 2013, available at http://www.ejiltalk.org/kadi-showdown/. See also for the general concept of the Responsibility of International Organisations see DOUSSIS E., Revisiting the Responsibility of International Organizations: Taking Stock and Looking Forward, in SKOUTERIS T.-VAGIAS M. (eds.), *International Organizations and the Protection of Human Rights, Essays in honor of Professor Paroula Naskou-Perraki*, Themis publications, 2014, pp. 47-62.

[636]Council Regulation (EC) no. 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, OJ 2001 L 67.

[637] Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000, OJ 2001 L 277.

[638]Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-3649 and Case T-306/01 *Yusuf and Al Barakoat International Foundation v. Council and Commission* [2005] ECR II-3533. See relatively PAPADOPOULOU R.-E, "Smart sanctions' and EC law: the hovering step of the EC judge. Reflections on the judgments of the CFI Kadi and Yusuf / Al Barakaat of 21 September 2005[in Greek], *Efarmoges Dimosiou Dikaiou* II/2006, pp. 447-473.

and hence, to comply with international obligations, no *margin of appreciation* was left to the EU institutions. According to the Court's appraisal, this would result in a direct review of the economic sanctions imposed by Security Council which enjoyed immunity from judicial review. Nevertheless and rather paradoxically, the General Court accepted the challenge of reviewing the regulation under scrutiny only through the lens of a potential violation of *jus cogens* norms of international law, that is to say that it took a totally new and dangerous path incorporating, in its reasoning, a question unfamiliar with regard to the body of EU rules. Assessing, therefore, whether the Security Council had respected *ius cogens* norms[639] in the field of fundamental and non-derogable rights, it held relatively that there was no such breach. Subsequently, Kadi appealed the General Court's ruling before the CJEU.

As Giuseppe Martinico correctly observed "[t]he *Kadi* saga responds to a double logic: on the one hand, it develops from a strong perception of EU law autonomy, while on the other hand it reflects the idea of the existence of a mature system in terms of fundamental rights protection. These ideas of autonomy and maturity has been used by the CJEU as a fundamental premise to justify its intervention in a rather sensitive case from legal (and geopolitical) point of view."[640]

This was clearly reflected when the Luxembourg Court handed down its long-anticipated decision in 2008, the so-called *Kadi I* decision[641] which loudly overturned the first-instance decision of the General Court. The CJEU was in line with the AG Maduro's Opinion[642] who expressed severe criticism regarding the latter and urged the Court to pronounce on the lawfulness of the regulations at issue ensuring the effective protection of fundamental rights within the EU. The AG emphasized that the indefinite maintenance of the contested sanctions, despite the fact that the shortage of available information and the lack of effective judicial recourse amounted probably to the conclusion that they were proportionate or misdirected, constituted an "anathema in a society that respects the rule of law", as he emphatically put it.[643]

In its judgment on appeal, the CJEU exercised a complete *u-turn* with regard to the General Court's approach and opted for a different path. It reviewed the lawfulness of the EU regulation transposing the resolution. Its central argument was that the protection of fundamental rights forms part of the very foundations of the Union legal order. Accordingly, all Union measures must be compatible with fundamental rights. The Court reasoned that this does not amount to a review of the lawfulness of the Security Council measures. The review of lawfulness would apply only to the Union act that gives effect to the international agreement at issue and not to the latter as such. Having established that, the review for compliance with fundamental rights was a relatively simple task. The claimant had not been informed of the grounds for his inclusion in the list of individuals and entities subjected to the sanctions. Therefore, he had not been able to seek judicial review of these grounds, and consequently his

[639] Ibid., para 226.
[640] MARTINICO G., The autonomy of EU law, A joint celebration of *Kadi I* and *Kadi II* and *Van Gend en Loos* in AVBELJ M., FONTANELLI F., MARTINICO G. (eds.), *Kadi on Trial, a multifaceted analysis of the Kadi Trial,* Routledge 2014, p.162.
[641] Joined cases C-402/05P & C-415/05P *Kadi & Al Barakaat International Foundation v. Council and Commission,*2008, [ECR] I-06351.
[642] Opinion of the Advocate General Maduro delivered on 16 January 2008.
[643] Ibid., para.53.

right to be heard as well as his right to effective judicial review and the right to property had been infringed.

The CJEU rejected the CFI's reasoning[644] by accepting the challenge of scrutinising the EU action despite the fact that the latter was decided in the context of the implementation of the Security Council sanctions. It then opted for moving the spotlight from the previous question which troubled the General Court concerning whether to exercise external judicial review to a more nuanced and delicate one of how to proceed in doing so. After searching for the proper legal basis for the enforcement of these measures in the Union, the Court felt that, when it comes to the human rights protection it had to clarify the blunt question that it arose concerning the relationship between EU and international law. In this regard, the Luxembourg Court highlighted that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."[645]

Having established that, the Court drew the line between the international agreement and the EU measure that aims to implement the former, elucidating that while scrutinizing the lawfulness of the Security Council Resolutions it is not among the responsibilities of the EU judicature, it maintained that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law."[646]

While underlining the EU's respect for international law in the exercise of its powers, in order to justify why the control of the contested sanctions was also not excluded from its competence, the Court relied on the autonomous character of the EU[647] in relation with the international legal order. Within this context, the Luxembourg Court reminded that the former is among the three constitutional values that EU, namely the rule of law, the autonomy of the EU legal order and –last but not least- the respect for fundamental rights and then it attempted to examine whether these principles could be reconciled with international agreements. In this respect, despite the binding character of the UN resolutions, the Court emphasized that the UN Charter left great lenient to the Members of the United Nations to choose among the various possible models regarding the transposition of those resolutions into their domestic legal orders.

Therefore, under the international legal order, no judicial review of the internal lawfulness of the contested regulation was excluded by virtue of the fact that it gave effect to

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[644] For a thorough overview of the *Kadi II* judgment of the Court of Justice see *inter alia* FEINAUGLE G., The Kadi case, *Law Ukr. Legal J.* 318, 2013, pp.318-326; TZANOU M., Case-note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities,10 German L.J.* 123, 2009, pp. 123-154; PAPADOPOULOU R.-E., "Smart sanctions" and EC law: unrolling the "Ariadne's thread". The ECJ judgment of 3 September 2008 in Kadi and Al Barakaat[in Greek], *Efarmoges Dimosiou Dikaiou I* 2009, pp.21-59.

[645] Supra note 641, para 285.

[646] Ibid., para 288.

[647] The autonomous nature of the EU legal order was famously announced in the *Van Gend en Loos* case in 1963. Supra note 4.

a Security Council resolution adopted under Chapter VII UN Charter. Additionally, such an immunity for EU measures, like the contested in the present case, lacks legal basis in the EU Treaty.[648] Even in this part of its argumentation, the Luxembourg Court drew an analogy from the control of the Security Council decisions as exercised by the Strasbourg's case law [649]and more specifically, the *Behrami and Saramati* position[650] of the ECtHR which also grappled with similar questions of debatable UN actions.

Interestingly, only a few years after the *Bosphorus* case, in the joined case *Behrami and Saramati* the Court of Strasbourg denied jurisdiction *rationae personae* since the applicants, and more specifically the Behramis complained for the death and severe injury of two children in Kosovo after the explosion of undetonated cluster bombs dropped by NATO, and Mr Saramati contested for his extra-judicial detention by the Kosovo Force (KFOR) which constituted the security force established in Kosovo by UNSC Resolution 1244(1999). After having exercised a widely critisized "ultimate authority and control test",[651] the Court of Justice held in its debatable reasoning of the admissibility decision that the UN actions were completely attributable to the UN and thus, declared the applications inadmissible. For this reason, this case was clearly used in favour of the CJEU's findings in the case at hand as it was clearly distinguished from the facts of the *Kadi* stating that "the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter. In addition and in any event, the question of the Court's jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances."[652]

On this basis and having drawn this distinction, the Court was allowed to conclude that "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement."[653]

Unsatisfied by the mere existence of the re-examination procedure before the Security Council Committee and given the particular significance of fundamental rights forming an integral part of the general principles of Community law, the Court concluded that the EU

[648] Supra note 641, paras 290-300.
[649] AUVRET-FINCK J., Le contrôle des décisions du Conseil de Sécurité par la Cour Européenne des Droits de l'Homme in RIDEAU J., GREWE C., BALMOND L., ARCARI M.(eds.), *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne, Equilibres et déséquilibres de la balance*, Bruylant, 2010, pp.213-243.
[650] Joined Cases *Behrami and Behrami v. France* () and *Saramati v. France, Germany and Norway*, Application No. 71412/01 and Application No. 78166/01) [GC], 31 May 2007.
[651] See relatively *inter alia* MILANOVIC M. and PAPIC T., As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law, 57 *Int'L & Comp. L.Q.* 267, 2008, pp. 267-296; MUJEZINOVIC LARSEN K., Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test, 19 *EJIL* 3, 2008, pp. 509-531.
[652] Supra note 641, paras 314,315.
[653] Ibid., para 316.

courts had to ensure the -in principle- full review of the lawfulness of all actions carried out by EU organs in the light of this sensitive area of law.[654]

In regard with the human rights allegations of the applicants, the Court stressed that in the light of the present conditions surrounding the listing of persons and entities whose funds were to be frozen, it was to be observed that their rights of defence, namely the right to be heard, and the right to effective judicial review of those rights, were blatantly not respected. In particular, it held that since the Council neither communicated to the appellants the evidence used against them in order to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period, after those measures were enacted, the appellants had no access to an effective remedy in order to challenge the said measures. For all the above reasons, their right to an effective legal remedy had also been infringed.[655]

That said, the Luxembourg Court went on to examine whether the freezing of Mr. Kadi's and Al Barakaat's funds constituted an unjustified breach of Mr. Kadi' s right to property in light of Article 1 Protocol No.1 ECHR. Although the contested restrictions of property rights stemming from the restrictive measures imposed by the EU regulations could, in principle, be justified, the Court used once again the proportionality test of the Strasbourg Court to come to the conclusion that the regulation in question was adopted without furnishing any guarantee enabling Mr. Kadi to put his case to the competent authorities. However, given that the latter constitutes also a procedural guarantee inherent in the substance of Article 1 Protocol No.1 ECHR as illustrated by the ECtHR's case law, a comprehensive view of the procedures under scrutiny as regards the general application and continuation of the freezing measures affecting him, was, therefore, considered necessary in order to ensure respect for the appellant's right to property.[656]Taking all the above into consideration, the Court annulled the Council regulation inasmuch as it froze Mr. Kadi's and Al Barakaat's funds.

It flows from a thorough overview of the case that the CJEU clearly followed a Strasbourg-type reasoning to approach the fundamental rights complaints of Mr. Kadi and Al Barakaat. Nonetheless, it was unexpected that, although it clearly took into account the highly debatable position of the ECtHR in *Behrami and Saramati* and emphasized the pivotal difference between the two approaches, the CJEU passed by this slip in the Strasbourg's case-law without providing a more detailed and in-depth argument. Taking this road, it appeared to have prefered to avoid any discrepancy with the ECtHR *vis-à-vis* the competence of reviewing UN actions. For Katja Ziegler "[i]t could have made a conceptually stronger point if it had tapped into the resources available from the ECtHR's own case law, namely that the delegation or conferral of powers does not provide a *carte blanche* for delegating responsibility."[657]

Despite the obvious reluctance of raising a differentiated voice, the Court seemed to have not, nevertheless, missed the opportunity to influence indirectly the ECtHR case law. The mere fact that the Court took the step to order the annulment of an EU regulation penalizing the

[654] Ibid., para 326.See also the argumentation of the Court in paras 321-325 in which it further explained the reasons for the abovementioned distinction. See in this respect PAPADOPOULOU, supra note 644, p.51.
[655] Ibid., paras 348,349.
[656] Ibid., para 368.
[657] ZIEGLER K., Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights, 9 *Hum. Rts. L. Rev.* 288, 2009, p.299.

actions of the Council solely on human-rights grounds signals that it is always tempted to verge into new territories such as the EU-international law limits, especially when the sensitive questions pertaining to national security and counter-terrorism measures are on the table.

The *Kadi I* openly inspired the ECtHR to distance itself from its *forgiving* approach towards the UN and the Security Council measures and fuelled the cross-fertilisation between the two institutions.[658] The Strasbourg Court, initially, denied, in its prior case law, its competence on this matter without keeping the safety net of a 'Solange caveat'[659] and it was inevitably criticized for embracing a remarkably low degree of protection *vis-à-vis* the UN sanctions for a so prestigious international human rights Court.[660]Following the *Kadi* litigation, it certainly leveraged the Luxembourg's bold position in this field and reached its landmark GC judgment in *Nada v. Switzerland.*[661]

In this case, the Court was confronted with the issue of the legality of measures taken to enforce targeted sanctions stemming from the UN Security Council. Therefore, by relying explicitly on the *Kadi I* decision of the CJEU, concluded to violations of the applicants' rights in this context. The applicant was an Egyptian-Italian national residing in a small Italian exclave surrounded by Swiss territory, who was listed under Resolution 1267 of the UN sanctions regime, and was, therefore, subjected to an enter and transit ban as well as a freezing of his assets. Having exhausted every possibility of judicial recourse after the rejection of his human rights allegations by the Swiss Federal Court, the applicant sought the ultimate review of his case before the Strasbourg Court claiming, in particular, that the addition of his name to the blacklist, which resulted in his travel ban, had infringed his right to liberty pursuant to Article 5 ECHR, his right to respect for private and family life under Article 8 ECHR, and his right to an effective remedy under Article 13 ECHR. He additionally complained that the aforementioned restrictions were tantamount to ill-treatment and were, thus, falling under the scope of Article 3 ECHR as well as under the scope of Article 9 ECHR since the applicant alleged to have been deprived of his freedom to manifest his religion or beliefs.

The ECtHR took a different approach in this case,[662] and concluded, in substance to a violation of Mr. Nada's right to private and family life under Article 8 ECHR. It did so since the Swiss authorities, remarkably enough, failed to inform the Security Council's Sanctions Committee for a long period of four years for the discontinuance of the domestic investigations against Mr. Nada and the lack of reasonable suspicion concerning his involvement in terrorist

[658] In its *Behrami and Saramati* case, the Court based its admissibility decision on a rather narrow and restricted interpretation of the main objective of the UN, the one of the maintaining peace and international security, as "imperative", implying, therefore, that since the operations authorized by Security Council resolutions are designed to serve the aforesaid purpose, cannot in any way be put under scrutiny by the ECtHR.
[659] KOKOTT J., SOBOTTA C., The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?, 23 *EJIL* 4, p.1018.
[660] Supra note 658.
[661] ECtHR, *Nada v Switzerland*, [GC] Application No. 10593/08, 12 September 2012.
[662] For a thorough analysis of the facts of the *Nada* case see *inter alia* GUGGISBERG S., The Nada Case before the ECtHR : a new milestone in the European debate on Security Council targeted sanctions and human rights obligations, *8 Croatian Y.B. Eur. L. & Pol'y 411,* 2012 as well as the post by Marco Milanovic, MILANOVIC M., *European Court Decides Nada v. Switzerland*, EJIL Talk! Blog 2012, available at http://www.ejiltalk.org/european-court-decides-nada-v-switzerland/ ; THIENEL T., *Nada v. Switzerland: the ECtHR does not pull a Kadi (but mandates it for domestic law)*, Invisible College Blog(Leiden University) 2012, available at http://invisiblecollege.weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/.

activities.[663] In addition to this, the Court took into serious consideration facts that were neglected by the Swiss authorities, namely "the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health. It further finds that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein"[664]

Nevertheless, the Court left unclear whether the UN Charter did or did not prevail over the Convention and whether Switzerland was allowed to directly disobey the Security Council. The Court avoided the issue by concentrating on violations committed just outside the sanctions regime.[665]

As regards the breach of the right to an effective remedy as enshrined in Article 13 ECHR, the Court appeared even more critical to the Swiss Federal Court which had declined to scrutinize any of the UN sanctions by virtue of Swiss human rights law. In this respect, the Court followed *expressis verbis* the *Kadi I* judgment of the Luxembourg Court in stressing that UN law did not prevent judicial review of the domestic implementation of sanctions. The Court felt in para 212 of the *Nada* judgment that it should directly quote the finding of the Luxembourg Court which has provided "it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (see the *Kadi* judgment of the CJEC, § 299, paragraph 86 above)." By analogy, the ECtHR adopted the same position in relation with the review of the national implementation of the targeted sanctions and the conformity of the latter (implementation) with the Convention. Thus, the Court implied that national authorities should ensure the application of the Convention's provisions even if this could possibly amount to a non-compliance with the Security Council Resolutions adopted under the UN Charter. This conclusion gave the opportunity to the Court to rule in favour of the applicant and conclude to a violation of Article 13 ECHR.

However, it should be highlighted that it derives from the ECtHR's appraisal that the latter put itself in the shoes of the national jurisdiction in order to circumvent a potential direct ECHR-UN conflict in the light of Article 103 UN.[666]In fact, the Court considered that the requirement for the judicial control exercised by the domestic courts is not removed by the mere fact that contested measures are giving effect to UN sanctions removing, though, the tension from the ECHR-UN to the national-UN level.

[663] Supra note 661, para 188.
[664] Ibid., para 195.
[665] Ibid., para 197. See also ISTREFI K., The application of Article 103 of the United Nations Charter in the European Courts: The quest for regime compatibility on fundamental rights, 5 *Eur. J. Legal Stud*. 100, 2012, pp. 81-93.
[666] MILANOVIC and THIENEL, supra note 662.

Notwithstanding the aforementioned problematic point of the Court's argumentation, looking at the *Nada* judgment as a whole we should not disregard its more progressive stance in comparison with its former one, as depicted in *Behrami and Saramati* and even in the *Al-Jedda*[667] in the aim of ensuring a more effective human rights protection when it comes to targeted sanctions. This jurisprudential evolution of the ECtHR could be properly understood in the context of the whole accession process which was already in progress when the *Nada* case was under judicial review before the Court. Additionally, the echo of the *Kadi* case law played apparently a significant role. In the whole context of the looming-at this time- accession combined with the anxiety of each Court to preserve its jurisprudential *acquis*, the Strasbourg Court, in order to avoid being side-lined by the Luxembourg Court in this field, is all the more motivated not to fall behind the standards established by the EU Courts.[668]

Actually, emphasizing particularly the positive obligations not fulfilled by the Swiss authorities,[669] the Strasbourg Court appeared to offer in this case a more extended protection than the one offered by the CJEU in the *Kadi* jurisprudence so as to take over the role of vanguard from the CJEU in this area.

This willingness of the Strasbourg Court to scrutinise the substantial and procedural guarantees offered by the Security Council regime to individuals subjected to counter-terrorism measures was also confirmed in the *Al-Dulimi v Switzerland* judgment.[670] In the light of the *Kadi* saga, the ECtHR, in this case dealt, once again, with the implementation of the UN SC Resolution 1483 by the Swiss authorities.[671]The Court, examining a potential infringement of Article 6 ECHR found it necessary to engage in a direct assessment of the guarantees afforded by the UN system, comparing them with those secured by the Convention. In doing so, the Strasbourg Court applied its long-established *equivalent protection* test and concluded that the UN framework does not meet the standards of such a (equivalent) protection. Remarkably, the Grand Chamber[672] in its judgment, departed partially from its previous approach and opted for a more balanced approach stating that there was no conflicting obligations puzzling the respondent State as the contested resolution's wording left the door for domestic judicial review wide open. The core conclusion of the Grant Chamber summarises as follows : as long as a real normative conflict between clashing obligations in a hierarchical order does not exist, the *equivalent protection* test does not apply and the State is expected to proceed with the judicial

[667] In *Al-Jedda*, the ECtHR expressed for the first time a clear reluctance to assume to the SC's intention to limit international human rights standards disproportionately through its binding resolutions. The case concerned the issue whether the internment without trial of a British/Iraqi national by British forces in Iraq in 2004 violated Article 5(1) of the Convention. ECtHR, *Al-Jedda v. United Kingdom*[GC], Application. No. 27021/087, 7 July 2011, paras 101-102.

[668] FABRINNI F. and LARIK J., Global Counter-terrorism sanctions and European due process rules, The dialogue between the CJEU and the ECtHR in AVBELJ M., FONTANELLI F., MARTINICO G.(eds.), *Kadi on Trial, a multifaceted analysis of the Kadi Trial,* Routledge 2014, p. 149-150.

[669] Supra note 661, para 196.

[670] ECtHR, *Al-Dulimi & Montana Management Inc. v Switzerland,* Application no. 5809/08, 26 November 2013.

[671] See relatively the Anne Peters's post in EJIL: Talk!, PETERS A., *Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is There a Way Out of the Catch-22 for UN Members?* EJIL: Talk! Blog 4 December 2013, available at http://www.ejiltalk.org/targeted-sanctions-after-affaire-al-dulimi-et-montana-management-inc-c-suisse-is-there-a-way-out-of-the-catch-22-for-un-members/ .

[672] ECtHR, *Al-Dulimi & Montana Management Inc. v Switzerland* [GC], Application no. 5809/08, 21 June 2016.

review of the UNSC and the latter's action could be also scrutinized by the ECtHR for their conformity with the ECHR. [673]

At any rate, the *Kadi* dispute was not concluded until the pronouncement of the Luxembourg Court in its *Kadi II* judgment of 18 July 2013, in which it famously ruled out the appeals against the decision of the General Court of 30 September 2010, insisting on the annulment of the Commission regulation re-listing Mr. Kadi. In its ruling, the CJEU reaffirmed the judicial dialogue between the two Courts as it openly cited the decision of the Strasbourg Court in *Nada* only once to uphold its argument that, notwithstanding the improvements in the UN sanctions machinery for listing and delisting suspected terrorists, the Security Council still did not ensure effective judicial recourse for the "blacklisted" people.

At this point, it is noteworthy that one of the most significant practical implications of the *Kadi* trial is the reform of the UN sanctions regime. In particular, the SC introduced, in 2008, the narrative summary which is normally published for every listing, giving in short the main grounds for each inclusion in the list. However, the most significant development in this field is the establishment of the office of an independent Ombudsperson whose main task is to process the requests of individuals or entities to be deleted from the list by collecting data, by communicating with petitioners, and drafting reports to the Sanctions Committee. In case of refusal, the Ombudsperson informs the petitioner of the reasons of this decision, if they are not confidential. At first, it was within the competences of the Sanctions Committee to decide on a possible delisting after the proposal of the Ombudsperson. Nevertheless, as the latter depends on the Committee's unanimous decision, it is obvious that any individual state could easily block such a removal from the list, despite the potentially favorable position of the Ombudsperson.

In this light, the Grand Chamber of the CJEU, notably, resisted the pressure of the AG Bot [674]who, following this reform of the UN sanctions arsenal, suggested to the CJEU to set aside the General Court's ruling. Although the second *Kadi* case was decided in the context of the abovementioned developments of the UN sanctions, the Court of Justice was not convinced for the sufficiency of the said advancements. In particular, it stressed in paragraph 66 of the *Kadi II* judgment that" [v]arious factors, set out in paragraphs 291 to 327 of the *Kadi* judgment, were advanced in support of the position stated by the Court in that judgment, and there has

[673] For instance, Marco Milanovic observed that the application of the equivalent protection test presupposes the absolute disassociation of the Convention's legal order from the international legal order as a whole. In his own words "[D]oing so requires an implicit assertion of autonomy of the Convention legal order from that of international law, since a hierarchically subordinate norm (the Convention vis-a-vis Article 103 of the Charter) cannot impose conditions on the application of the superior norm. Of the judges in the minority, only Judge Keller would have followed the *Bosphorus* approach *simpliciter* (which, as I said, is methodologically difficult)". See inter alia MILANOVIC M., *Grand Chamber Judgment in Al-Dulimi v. Switzerland,* 23 June 2016, available at http://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/ and the Concurring Opinion of Judge Sicilianos in *Al-Dulimi* Judgment of the Grand Chamber, para 7; For an insightful overview of the GC judgment see also TZEVELEKOS V., 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, 19 *Questions of International Law* 1, 2017, pp. 5-34.

[674] According to the Opinion of the Advocate General Bot the improvements applied by the UN were sufficient to guarantee the right balance between the interest in collective security and the protection of human rights. Opinion of AG Bot, delivered on 19 March 2013 in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi.*

been no change in those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law (see Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 44, and judgment of 26 June 2012 in Case C-335/09 P *Poland* v *Commission*, paragraph 48), by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union."[675]

The CJEU clarified that the effective enjoyment of the right to defence and to effective remedy required that the "the competent [EU] authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the [UN] Sanctions Committee."[676] Subsequently, the CJEU highlighted that it is among the tasks of the Court to guarantee that sanctions decisions are "taken on a sufficiently solid factual basis" and that, "[t]o that end, it is for the Courts of the [EU], in order to carry out that examination, to request the competent EU authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination."[677] After having reiterated that the confidentiality of that information or evidence is not an acceptable ground for *objection,*[678] the Court focused on the duty of the EU institutions to exercise an in-depth scrutiny of the targeted sanctions imposed by the UN Security Council. In this regard, the Court referred to the standards laid down in the *Nada* judgment of the ECtHR, confirming that it is on the same page with its counterpart on this matter the CJEU as it concluded that "[s]uch a review is all the more essential since, despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and *ex officio* re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, *Nada* v. *Switzerland* (No 10593/08, not yet published in the *Reports of Judgments and Decisions*)."[679]

As the *Kadi II* ruling of the Grand Chamber of the Court was handed down only a few months after the *Nada* case, it appears that the CJEU was not willing to backtrack[680] from its prior approach in *Kadi I* whose echo inspired the Strasbourg Court in the *Nada* case law.

In short, it held that the actions of the European Commission and EU States, cannot be afforded immunity[681] from EU jurisdiction on the sole ground that they were simply

[675] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*[GC] [2013] published in the electronic Reports of Cases, para 66.
[676] Ibid., para 111.
[677] Ibid., para 119,120.
[678] Ibid., para 125.
[679] Ibid., para 133.
[680] See for a different reading of the *Kadi II* judgment LAVRANOS N. and VATSOV M., *Kadi II*: backtracking from *Kadi I*? in AVBELJ M., FONTANELLI F., MARTINICO G.(eds), *Kadi on Trial, a multifaceted analysis of the Kadi Trial*, Routledge 2014, pp. 108-121.
[681] See inter alia the analysis of Bruce Rashkow in his article RASHKOW B., Immunity of the United Nations Practice and Challenges, 10 *Int'l Org. L. Rev.* 332, 2014, pp. 332-348.

implementing binding Security Council's resolutions, as the United Nations failed to provide an appropriate forum for judicial redress within the framework of the targeted sanctions having their origins in Chapter VII of the UN Charter.

In doing so, the Court, using also the Charter as the ultimate human rights tool, managed to cultivate a stringent standard of a thorough EU control over the evidentiary basis of the said sanctions taken in the implementation of SC binding decisions of the Security Council and directly affecting individuals who may have *locus standi* before the EU Courts. Arguably, even from different perspectives,[682] both the *Kadi* and the *Nada and Al-Dulimi* case law pointed out that the two European jurisdictions adopted a coherent and rather critical approach towards the insufficient protection of core human rights in the context of the UN system with regard to Security Council sanctions. Nevertheless, for Erika de Wet "the approach of the CJEU carries with it the risk of the devaluation of international human rights law, as well as of legal uncertainty. Its benchmarks for judicial protections are based purely on EU law and leave unanswered the question whether and to what extent the UNSC has to act in accordance with international human rights standards. The exclusive reliance on EU law further fuels the perception that an irreconcilable norm conflict exists between a UNSC sanctions regime and domestic or regional regimes that value the protection of human rights —a conflict which could only be resolved by rejecting UNSC obligations."[683]

If we look more carefully at the *Kadi II* judgment as a judgment of tremendous constitutional value, notably in the light of the Opinion 2/13 which manifestly prioritized the concept of autonomy of the EU legal order, we may deduce that even though the CJEU maintains its judicial dialogue with international courts -as it is the case of its interaction with Strasbourg-, the limits with the international organizations are in sight and the judicial dialogue with international Courts are to be made with great persistence in its own terms.

The whole autonomy architecture of the EU as construed by the Luxembourg Court is clearly linked to the *Solange I-type* argument adopted by the General Court[684] and the denial to move on to a *Solange II-type* argument, in other words a *Bosphorus-type* argument as the Strasbourg Court did in many cases while revisiting the ECHR-EU relationship. Despite the significant practical repercussions[685] of this position of the EU Courts *vis-à-vis* international law, the latter also contains a great *antiphasis* if we take into consideration the relative objections of the Luxembourg Court in the Opinion 2/13.

Consequently, the CJEU, undeniably influenced by the ECtHR way of working and *vice versa*, proceeded to an-arguably-external judicial review of the Security Council sanctions in

[682] As for the inconsistencies in the approaches of the Luxembourg and the Strasbourg Court while reviewing the human rights guarantees of the Security Council resolutions see DE WET E., From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions, 12 *Chinese Journal of International Law* 4, 2013, p. 801,802.

[683] Ibid., p.799.

[684] In the General Court's words "[t]hat must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, as the Court of Justice considered to be the case at paragraph 322 of *Kadi*", Case T-85/09, *Yassin Abdullah Kadi v. European Commission* [2010] ECR II-5177.

[685] TZANAKOPOULOS A., The Solange argument as a justification for disobeying the Security Council in the Kadi judgments in AVBELJ M., FONTANELLI F., MARTINICO G.(eds), *Kadi on Trial, a multifaceted analysis of the Kadi Trial,* Routledge 2014, p.134.

the name of a more effective protection of fundamental rights, however, it strongly objected to the potential exercise of a similar judicial review of EU actions by the Strasbourg Court.[686] Utterly, it is evident that this adoption of double standards of protection and the divergent approach of the external review concept not only strengthens the legal uncertainty which already derived from the *Kadi* litigation[687] but also raises serious doubts concerning the motivation of these judicial pronouncements of the Court.

The main question that seeks for an answer in the near future is whether the level of fundamental rights protection varies as a by-product of the main EU aims related to the autonomy of EU law and of the CJEU or, for as long as the accession is not in sight, this option will continue to tip the balance favouring human rights.

4. The restriction of the EU asylum rules in the light of the ECtHR's case law: The Dublin cases

As it has been already observed, despite their institutional differences, the two separated legal systems created a spontaneous dialogue between them with regard to the sensitive field of asylum cases as well. Taking into consideration that the European human rights legacy has been traditionally built on the Convention and its application by the Strasbourg Court, the EU's gradual evolution from a common European market to an area of freedom, security and justice, the CJEU gradually rendered the protection of human rights within the Union an absolute priority. Additionally, the entry into force of the EU Charter of Fundamental Rights following the Lisbon Treaty has definitely encouraged a closer nexus between Strasbourg and EU legal system in the human rights context[688] and offered to the EU organs and the Luxembourg Court the opportunity to enhance the fundamental rights' dimension of the EU legislature, particularly when it comes to the heating question of migration and asylum.

Given that asylum policy is a relatively new EU competence,[689] the increasing law-making activity of the EU legal order and the CJEU case law with regard to asylum issues has engaged the two institutions in a dialectic model, in the sense of a mutual attempt to avoid divergent interpretations of their respective legal instruments. Thus, as the field of asylum is definitely an illuminative example of such interaction, this one was even more intense as far as the Dublin Regulation is concerned.

Despite the ECtHR's lack of competence to monitor Member States' actions in the EU policy on asylum, the Court could not avoid dealing with the *lacunae* of the EU legislation concerning the Dublin System as more and more applicants invoked the provisions of the Convention in order to attack national authorities' actions in the context of the Dublin II

[686] OVADEK M., External Judicial Review and Fundamental Rights in the EU: A Place in the Sun for the Court of Justice, EU Diplomacy Papers 2/2016, Department of EU International Relations and Diplomacy Studies, available at https ://www.coleurope.eu/research-paper/external-judicial-review-and-fundamental-rights-eu-place-sun-court-justice.
[687] EECKHOUT, supra note 57, p. 6.
[688] See MOUZOURAKIS M., The Dublin-Strasbourg-Luxembourg Triangle :Getting the European Courts dialogue on the suspension of Dublin Regulation transfers right, Rights in Exile Blog 2014, available at http://rightsinexile.tumblr.com/post/78228286353/the-dublin-strasbourg-luxembourg-triangle-getting.
[689] Only in 2008 the first case was brought to the CJEU with regard to asylum issues.

Regulation,[690]designed to spread the asylum burden within the borders of the EU. Moreover, in this context, the CJEU felt it should be inspired by its Strasbourg counterpart and to move towards a more human rights-oriented interpretation of the Dublin rules introducing the need of several reforms of this particular framework.

First and foremost, the Dublin rules initially appeared in the form of the Dublin Convention,[691] signed in 1990. In 2003, this Convention was replaced by the *Dublin II Regulation*. That Regulation was recently replaced by the *Dublin III Regulation,* adopted in 2013, applicable to all asylum applications made after 1 January 2014.

Under the Dublin Regulation, only one MS is responsible for examining an asylum application. The aim pursued is to avoid asylum seekers from being sent from one country to another, and to deter multiple asylum claims. Therefore, the MS designated as responsible for the asylum application must take charge of the applicant and process the application. If a Member State to which an asylum application is lodged deems that another MS is responsible, it can call on that Member State to examine this application. The Dublin system's logic is based on *mutual trust* between EU Member States and on the presumption that, under the same standards of protection, they are all considered safe for the asylum seekers. However, the practice clearly illustrated severe deficiencies of this system as returning an applicant to an EU country under the Dublin legal framework would cause an infringement of his/her human rights. This led to the suspension of the Regulation and its replacement by a less strict legislation on this issue, subsequent to an intervention from the domestic legal institutions.

a) ECtHR: paving the way of Dublin's reform

The Strasbourg Court first paved this route to suspension by developing a dynamic case law relevant to Dublin cases in its *TI* and *K.R.S* judgments before its leading decision in *M.S.S. v. Belgium and Greece*.

The *TI v.UK*[692] judgment concerned an asylum seeker from Sri Lanka who left Germany and entered the UK's territory. The British authorities requested that Germany accept responsibility on the basis of the Dublin Convention. Even though the Court found the application inadmissible, it carried out an empirical appraisal of the applicant situation and held: "that the justification for inter-state trust be rebuttable, especially in the face of risks of direct or indirect *refoulement*. The merit of the Court's decision in *T.I.*, albeit failing to indicate the extent to which it should be considered warranted in each particular case, lies precisely on the fact that it recognizes the refutability of the presumption."[693]

By contrast, in its ruling in *K.R.S v. UK,* Strasbourg refused to order the suspension under Article 34 of the ECHR of an Iranian asylum seeker to Greece on the grounds that Greece

[690] Council Regulation (EC) No 343/2003 of 18 February 2003 (Dublin II Regulation) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.
[691] As Steve Peers states that: "it was agreed because Member States feared that loosening or abolishing internal border checks would lead to an increase in multiple asylum applications", PEERS S., *EU Justice and Home Affairs Law*, Oxford: Oxford University Press 2006, p. 318.
[692] ECtHR, *T.I. v. the United Kingdom*, Application No. 43844/98, 7 March 2000.
[693] MORENO-LAX V., Dismantling the Dublin System: MSS v Belgium and Greece, 14 *EJML* 1, 2012, p.11.

would comply with its obligation to provide effective protection to the applicant so as to freely lodge an application under the provision of this article. "In reaching this conclusion the Court would also note that the Dublin Regulation, under which such a removal would be effected, is one of a number of measures agreed in the field of asylum policy at the European level and must be considered alongside Member States' additional obligations under Council Directive 2005/85/EC and Council Directive 2003/9/EC to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption must be that Greece will abide by its obligations under those Directives."[694]The ECtHR's questionable appraisal raised numerous critical objections mainly due to the fact that Strasbourg wrongly considered too strong presumption of Dublin compatibility with human rights, without assessing the specific risk faced by the individual involved or any consideration of the practical application of the dysfunctional Greek asylum system.

This jurisprudential inconsistency of the Strasbourg Court was overruled in the pivotal case *M.S.S v. Belgium and Greece*[695] in 2011. The applicant was an Afghan asylum seeker who entered the EU via Greece and following this, moved to Belgium, where he applied for asylum. Implementing the Dublin II Regulation, the Belgian authorities asked the Greek authorities to take responsibility for the asylum application. Subsequent to its transfer back to Greece, the individual was placed in an overcrowded detention centre with appalling sanitary and hygiene conditions. The applicant denounced his detention conditions, and alleged that he had no effective remedy in Greek law in order to support his claims in the context of the deficient asylum proceeding. Additionally, he complained that Belgian authorities had exposed him knowingly to the risks arising from the *lacunae* in the asylum procedure in Greece to which asylum seekers were subjected and invoked both the provisions of the Articles 3 and 13 of the Convention.

In this light, the Court declared that both Greek and Belgian authorities breached these provisions of the ECHR and particularly stated that the sovereignty clause in the Dublin Regulation precludes the application of a *Bosphorus*-type presumption[696] as was the case in *K.R.S* judgment, given that Member States are not bound to transfer an asylum seeker to another country.[697]The Strasbourg Court, in its ruling revisited its formalist appraisal adopted in *K.R.S* as it held that "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."[698] Having said this it further clarified "that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had

[694] ECtHR, *K.R.S. v the United Kingdom*, Application No. 32733/08, 2 December 2008, p.17.
[695] ECtHR, *M.S.S. v Belgium and Greece*[GC], Application No. 30696/09, 21 January 2011.
[696] VOSYLIUTE L., *The ECtHR and the ECJ Overlapping Jurisdictions on Common EU Asylum Policy Issues: What Matters?*,2011, available at https://www.academia.edu/2706355/ECtHR_and_ECJ_Overlapping_Jurisdiction_on_Common_EU_Asylum_Policy_Issues_What_Matters
[697] Supra note 695, *M.S.S.* ruling, para 338.
[698] Ibid, para 353.

they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3".[699]Instead, in this judgment the ECtHR reiterated its well-established case law regarding expulsions and its Article 13 jurisprudence on suspensive effect.[700]The Strasbourg's case law with regard to Dublin II, in this ruling, clearly evolved from its initial position and intensely questioned *the safe country concept* providing a solid and complete reasoning. As a result, more and more Member States halted Dublin returns to Greece due to the *systemic deficiencies* of the national asylum procedure declared by the Court.

b) Luxembourg's defence of the Dublin legislation

A few months later, the Luxembourg Court had the opportunity to re-examine[701] the dialectic relationship shaped between the European legal orders, in *NS* ruling[702] under similar circumstances. Even though, at first, the CJEU seemed to follow the recent *M.S.S* reasoning, it did not avoid the discrepancies in its attempt to interpret the said judgment of the Strasbourg Court.

As the judgment concerned again an Afghan asylum seeker at risk of a Dublin transfer to Greece, the Luxembourg Court endorsed the conclusions of the ECtHR on the grounds of the poor detention conditions, the ineffective asylum proceeding and, most importantly, on the refutability of safe country presumption. Particularly, the Court held that "the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."[703]

Concerning the real risk of being subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights, the Court diverged from the opinion of Advocate-General Tristenjak who considered any breach of human rights as a sufficient ground to preclude a Dublin return. The Court did not declare the slightest infringement of fundamental right to be sufficient in order to prevent the transfer of an asylum seeker to the Member State primarily responsible. By contrast, the transfers operated under Dublin II Regulation should be suspended within the strict boundaries of violations of the Article 4 of the Charter concluding to inhuman or degrading treatment. For Costello, "there are many legally innovative paths not taken. The AG reads the right to asylum in terms of non-

[699] Ibid., para 359.
[700] See COSTELLO C., Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored, 12 *Hum. Rts. L. Rev* 2 ,2012, p.324.
[701] The CJEU had already dealt with the implementation of the Dublin Regulation in *Petrosian* case. In that case the Court oversaw the fundamental rights' dimention and on the basis of the margin of appreciation doctrine borrowed from the Strasbourg case-law allowed a wide discretion for the national authorities. Case C-19/08 *Migrationsverket v Edgar Petrosian and Others* judgment [2009] I-00495.
[702] Joined Cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.
[703] Ibid, para 94.

refoulement, avoiding its transformative potential as an individual right to be granted asylum (in contrast to the orthodox right to seek asylum). The judgment is strikingly economical, in that the CJEU traces a path already worn by Strasbourg".[704]

This decision, hence, seems disloyal to its aim to mirror the scope and meaning of the applicants' human rights under Article 52(3) of the Charter which formally institutionalized the dialogue between the two legal orders. Furthermore, as Minos Mouzourakis correctly suggests in his analysis "one could inquire, on the contrary, whether the possibility of EU law offering more extensive protection than the ECHR should be pertinent in that context."[705]

In *NS* the preliminary ruling revolved also around the matter of *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers. The Court clearly chose a paradox route to respond to that question of the domestic Court. Although, it explicitly invoked the Strasbourg Court's criteria of *MSS* test and reckoned that the reception and detention conditions in Greece constituted systemic deficiencies within that sense, subsequently, seemed to confuse requisite conditions to amount to a violation of the Article 4 of the Charter as it held that: "the Member States, including the national courts, may not transfer an asylum seeker to "the Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and reception conditions for asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment within the meaning of Article 4 of the Charter."[706]

As it is resulted from above, the systemic deficiencies constitute a *conditio sine qua non* for the ECtHR in order to prevent a Dublin transfer to a country, whereas according to the Luxembourg Court's appraisal is a necessary condition but, in no case, a sufficient one. Highly criticized by the scholars, the *NS* ruling was seen as a sign of introspectiveness due to the fact that its narrow interpretation is definitely not in line with the ECtHR's interpretation of the prohibition of inhuman and degrading treatment.

This divergent approach of the returns to a declared 'unsafe' country under the Dublin II Regulation was reaffirmed in two recent cases of the CJEU. In *Puid*[707] case the Court reiterated its finding in NS judgment considering the *systemic deficiencies* of the asylum proceeding in question, a necessary condition to oppose to Dublin transfer to Greece, it left, however, great discretion to the Member States to determine the existence of those deficiencies and their gravity.[708]Interestingly enough, the recent *Abdullahi* case,[709] the Luxembourg Court revisited this issue without, though, moving from its previous narrow position in the aforementioned case law regarding the *systemic flaws concept* as it held in paragraph 60 of this judgment that 'the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure (…)'. [710]

[704] COSTELLO, supra note 700, p.333.
[705] MOUZOURAKIS, supra note 688.
[706] Supra note 702, *NS*, para 94.
[707] Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, 14 November 2013, published in the electronic Reports of Cases.
[708] Ibid, para 31.
[709] Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, 10 December 2013, published in the electronic Reports of Cases.
[710] Ibid, para 60.

However, in practice the *systemic flaws* criterion can be proved problematic despite the fact that the number of incidents caused by a flaw may matter for the assessment of a Dublin removal obstacle as traditionally the corollaries of a flaw will often, but not always, increase the probability that the situation of the applicant will be affected. Nevertheless, the case in which the individual risks to be affected by an occasional incident that amounts to a deficiency of the whole asylum system.[711]

c) Last breath for Dublin?

The famous ruling of the Strasbourg Court in the *Tarakhel case*[712] concerning the Italian reception conditions of the asylum seekers only a few months after the *Sharifi* judgment,[713] was the decision considered by numerous scholars as the one which probably put the final "nail in the coffin" of the problematic Dublin system. This case revolved around the refusal of the Swiss authorities to give asylum to an Afghan couple and their six children and their decision to transfer them back to Italy. Particularly, the applicants invoked Article 3 ECHR on the grounds that if they were returned to Italy *in the absence of individual guarantees concerning their care*, they would be subjected to inhuman and degrading treatment due to the existence of *systemic deficiencies* of the Italian asylum procedure. They also invoked Article 8 and the right to an effective remedy under Article 13 ECHR.

The ECtHR relied upon the *M.S.S* judgment and its prior case law in order to build its appraisal. Therefore, the ECtHR made a special reference to the CJEU's systemic deficiencies test established in the *NS* judgment, ignoring, however, the recent *Abdullahi* ruling of the Luxembourg Court. In this context, the Strasbourg Court stated that these tests had to be applied in the light of the applicant's individual situation in conjunction with *the overall situation prevailing* in the receiving state.

The applicants in this case particularly focused their complaints on the slowness of identification procedures, the lack of enough places for the asylum seekers and most importantly, the reception conditions within the available facilities in Italy. The ECtHR held that "although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S.*, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded".[714]Examining the individual situation of the applicants during, the Court denied to equate this case with the *MSS* case as it was not the Italian asylum system under scrutiny but the living conditions in the reception centre where the Tarakhel family was accommodated. It

[711] See relatively LUBBE A., Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?, 27 *IJRL*, 2015, p.135-140.
[712] ECtHR, *Tarakhel v. Switzerland*, Application No 29217/12, 4 November 2014.
[713] In the recent *Sharifi* judgment, the ECtHR insisted that Italy's interception of asylum seekers from Greece in the Adriatic, and their forced return to Greece, violated Article 3, 13 and Article 4 Protocol No. 4 of the ECHR. Thus, it reaffirmed its approach in *MSS* case according to which Member States violate the Convention when they stop asylum seekers fleeing an unsafe country directly from crossing their borders, giving asylum seekers the freedom to travel between Schengen countries. ECtHR, *Sharifi v Austria*, Application no 60104/08, 14 April 2014.
[714] Supra note 712, para 120.

also refused to generally ban the Dublin transfers. However, we can observe an attempt by the Court's part to define differently the term of 'systemic deficiency' of an asylum proceeding. The Court in *Tarakhel* seems to conclude to *systemic deficiencies* of an asylum system not only when this system is declared as totally deteriorated, but also in case of a particular *aspect's* of the asylum procedure regular malfunction, as it was the case for the reception conditions of asylum seekers in Italy.

For Steeve Peers, "[t]he clear message from the *Tarakhel* case is that there is not a simple binary distinction between cases when all Dublin transfers should stop, on the one hand, and cases when all Dublin transfers should go ahead at full speed, on the other. Instead, like a traffic light, yesterday's judgment creates an intermediate category of cases in which national administrations must proceed with caution."[715]

At this point, another recent case of the Strasbourg Court should be read in conjunction with the Court's findings in *M.S.S* and *Tarakhel*. In *A.M.E v. The Netherlands*[716] a Somali national who fled Somalia due to his refusal to join a terrorist organisation. After a short period in Italy where he applied for asylum and received subsidiary protection, he travelled to the Netherlands and filed a second application which was later rejected as Italian authorities were determined responsible for processing his asylum application, pursuant to the Dublin rules. The applicant feared that his transfer to Italy would result to his removal to Somalia on account of the lack of judicial guarantees and effective remedies in Italy and he invoked not only Article 3 ECHR, but also Article 5, 6 and 13 ECHR. In response to the applicant's allegations, the Court focused on his own statements to the Italian authorities that he was an adult and his deliberate attempt of misleading the authorities. The Court subsequently noted that the facts of the case are in no way identical to the conditions of *Tarakhel* case as "the applicant is an able young man with no dependents". Furthermore, the Strasbourg Court reiterated in its reasoning that the reception arrangements in Italy are also not comparable to that of Greece as described in its key ruling *M.S.S.*, and that the applicant has not proved a sufficiently real and imminent risk enough to reach the threshold of Article 3 ECHR.

Therefore, in *A.M.E.*, the ECtHR confirmed the *lacunae* of the Dublin architecture. It built its appraisal, though, in the light of *Tarakhel* with regard to the issue of 'vulnerability' in Dublin cases, and suggested that "the applicant is an able young man with no dependents," which was not the case in *Tarakhel* due to the particularly vulnerable age of the children of the family. Unfortunately, at this point the Court seemed reluctant to clarify the urgent matter of the relation or the distinction between different levels of vulnerability, and even different levels of particular vulnerability.[717] This debatable issue remains under discussion, especially following the Partly Dissenting Opinion[718] in *Tarakhel* which criticized the Court's position to reverse the recent case law in which the Court held that there was no reason to believe that an

[715] PEERS S., *Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?'*, EU Law Analysis Blog 2014, available at http://eulawanalysis.blogspot.gr/2014/11/tarakhel-v-switzerland-another-nail-in.html .
[716] ECtHR, *A.M.E. v The Netherlands*, Application no. 51428/10, 13 January 2015.
[717] PERONI L. and SMET S., *Another episode in the Strasbourg saga on the Dublin System to determine the State Responsible for Asylum Applications*, Strasbourg Observers Blog 2015, available at https://strasbourgobservers.com/2015/02/20/another-episode-in-the-strasbourg-saga-on-the-dublin-system-to-determine-the-state-responsible-for-asylum-applications/#more-2771.
[718] Adopted by the Judges Casadevall, Berro-Lefèvre and Jäderblom in *Tarakhel.*

asylum seeker and her two young children would not have received adequate support had they been sent back to Italy under the Dublin Regulation in *Mohammed Hussein and Others v. the Netherlands and Italy.*[719]

Having said all that, the Strasbourg's aim is traditionally to ascertain, on a *case-by-case* basis whether the individual risk of the applicant had been duly considered without focusing only on the systemic or not flaws[720] of the asylum architecture in question. In contrast, the persistence of the CJEU to the Dublin's initial objectives and the principle of mutual trust, which was repeatedly reaffirmed in the case law which followed *Abdullahi,* severely impeded the dialogue with Strasbourg. In fact, the Court seemed to have granted to Article 4 EUCHR[721]a much narrower scope of application than the corresponding prohibition of torture of Article 3 ECHR which constituted for decades the cornerstone of the asylum seekers' protection. The lower threshold afforded by the Luxembourg Court seems to be incompatible with the provision of the EU Charter in Article 52 EUCFR that requires that the level of protection offered by the Charter should be at least the same as the one offered by the Convention.[722]

However, having in mind the absolute character of the principle of *non-refoulement*, rooted in Article 3 ECHR, and the extended protection against indirect *refoulement*, we can assume that the CJEU opts for a rather restricted version of the latter, meaning an intra-EU "*non-refoulement*" principle.[723]

As Julia Vicini correctly underlined, "judging from the Court's approach, this principle seems to be only applicable to intra-EU transfers. The violation of this principle is only triggered when a Member State, to which an individual has to be returned, suffers from systemic deficiencies that make it highly likely (if not certain) that he/she would face inhuman and degrading treatment upon return. This intra-EU principle of *non-refoulement* is clearly different and less protective than the one inferred by the ECtHR from Article 3 of the Convention." [724] As a result, insofar as both the Courts admit that mutual trust is not, in practice, blind upholding that the presumption is rebuttable and as the *Bosphorus* equivalent protection doctrine is not applicable to Dublin cases, the MS' actions in compliance with this newly created principle of *non-refoulement* renders the latter susceptible to ECtHR scrutiny.

In any case, the recast Dublin Regulation (*Dublin III*),[725] which inaugurated the second phase of the CEAS, came to remedy the aforementioned lacunae. In this aim, it adopted a less strict approach towards the asylum seekers moving within the EU borders as it set up a much more reasonable timetable regarding the applicants' transfers, including a personal interview establishing, thus, a *humanitarian clause*. It also codified the previous *systemic deficiencies*

[719] ECtHR, *Mohammed Hussein and Others v the Netherlands and Italy*, Application no. 27725/10, 2 April 2013
[720] This wording ("systemic flaws" instead of systemic deficiencies) was also incorporated in Article 3 par.2 Dublin III Regulation.
[721] Article 4 EUCFR reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[722] See the opinion expressed by Cathryn Costello. Supra note 700, COSTELLO C.
[723] VICINI J., The Dublin Regulation between Strasbourg and Luxembourg: Reshaping *non-refoulement* in the name of mutual trust?, *8 Eur. J. Legal Stud. 50,* 2015, p.66.
[724] Ibidem.
[725] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) (Dublin III Regulation) [2013] OJ L180/31.This Regulation became applicable on 1 January 2014.

case law of the Luxembourg Court in accordance with the relative provisions laid down in the Charter,[726] provided useful clarifications on the rights of asylum seekers as well as an early warnings mechanism. It also extended the protection offered to in the *Dublin III* regulation, protection of the family unit in the case of minors is extended to the legal presence of siblings or other relatives[727]in an attempt to align with the Strasbourg's standards of protection on the matter.

It is beyond any doubt that this reform of EU asylum instruments attempted to restore the malfunctions of the Dublin II Regulation in the field of the human rights protection of asylum seekers. However, the ongoing refugee crisis which started in 2015 with thousands of people travelling through the Mediterranean Sea in rough conditions in order to reach the EU borders-mostly the Greek and Italian ones- in order to seek for asylum severely aggravated the situation. Thus, its immediate practical, political and legal repercussions revealed the unsustainability of the Dublin system which was initially designed to provide a fair distribution of responsibilities as far as people seeking for international protection are concerned. Nonetheless, given the unprepared EU institutions and national governments to handle the enormous mixed flows of undocumented migrants, the credibility alone of the Union has lately raised great controversy.[728]

Hence, it is surprising that, in the middle of the ongoing refugee crisis, the Luxembourg Court, in the *Mirza* case [729] concerning the right of Member State to send an asylum seeker to his country of origin, opted for an alarmingly *laissez-faire* interpretation of Article 3(3) of the Dublin III Regulation, finding that any Member State may apply the "safe third country" provision at any point in the process without time limitations even before assessing the Dublin criteria.[730]As a result, asylum seekers may be in danger of being returned to a third country without due consideration being paid to their individual fundamental rights including the right to family life. The ECRE[731] relatively observed that "[t]he interplay of this concept in the application of the Dublin system already raises critical protection concerns, given that safe country concepts *per se* are liable to violate international obligations."[732]

In the meantime, following to the huge refugee crisis of historic proportions with which Europe is confronted and the closure of the European states' borders along the Western

[726] Article 3 of the Dublin III Regulation provides that "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible".
[727] Article 8 of the Dublin III Regulation.
[728] See *inter alia* DI FILIPPO,The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System, Policy Brief , International Institute of Humanitarian Law, January 2016 available at http://statewatch.org/news/2016/feb/eu-from-dublin-to-athens-reforming-dublin-reg-1-16.pdf.
[729] Case C-695/15 PPU, *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal,* [2016] published in the electronic report of cases.
[730] Especially when the designation of a country as "safe" is based on national criteria.
[731] European Council of Refugees and Exiles (ECRE).
[732] See for this new version of the Dublin Regulation the ECRE Comments on the Commission Proposal for a Dublin IV Regulation, October 2016, available at http://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf.

Europe,[733] the EU institutions needed to respond immediately to these ever-growing needs and manage the major influx of migrants, particularly, of the thousands of Syrians who, following to the aggravation of the situation in Syria, [734] arrive in Europe *via* the Mediterranean routes.

Under these alarming circumstances, the European institutions and MS opted for obtaining cooperation from Turkey in order to manage the enormous migration flows. Having included Turkey into a European common list of safe countries of origin, the EU institutions negotiated with Turkey in the context of the joint action plan already being energized in November 2015 and concluded to an EU-Turkey statement[735] apparently aiming to reduce the number of asylum seekers reaching the EU borderline. As expected, this agreement provoked a heated debate due to the political and legal particularities in Turkey with emphasis to the persecution and the human rights standards of protection.[736]Within the Council of Europe system, the Parliamentary Assembly expressed severe concerns with regard to the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016.[737]Among others, the latter highlighted in its Resolution substantive and operational human rights issues in relation with the deficiencies of the Greek asylum system concerning timely registration of asylum applications, detention conditions of asylum seekers in the "hotspots" on the Aegean islands and most significantly, returns of Syrian asylum seekers /refugees to Turkey as "first country of asylum" or "safe third country" due to the fact that "Turkey may not ensure protection that is 'sufficient', according to the position of the Office of the United Nations High Commissioner for Refugees (UNHCR), and there have been reports of onward *refoulement* of Syrians."

However, under all this aforementioned pressure, a few months later, the EU Commission published its proposal for a *Dublin IV Regulation*[738] without, nonetheless, addressing the flagrant weaknesses of this framework.[739] Instead, this recast of the Dublin rules

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[733] See relatively the recent judgment of the ECtHR, *Ilias and Ahmed v. Hungary*, Application No. 47287/15, 14 March 2017. In its ruling, the Strasbourg Court severely condemned Hungary on the basis of Article 3,5, and 13 ECHR for practices which led to the *de facto* deprivation of the applicants' liberty and universal forced return to Serbia on the grounds of the "safe third country" doctrine emphasizing the shortcomings of the asylum proceedings in Serbia. To cut the long story short, the Court's appraisal sends a rather clear message to both the Hungarian and Serbian authorities doubting, in this way, the lawfulness of Dublin returns to these countries in line with its *MSS* jurisprudence, particularly, in light of the risk of chain *refoulement* practices. See on this judgment KILIBARDA P., *The ECtHR's Ilias and Ahmed v. Hungary and Why It Matters*, EJIL Talk! Blog 2017, available at https://www.ejiltalk.org/the-ecthrs-ilias-and-ahmed-v-hungary-and-why-it-matters/#more-15080.

[734] The ongoing civil war in Syria started in 2011and resulted in the enormous refugee crisis which still affects Europe, despite the decrease in arrivals of migrants during the last few months.

[735] European Council, EU-Turkey statement, 18 March 2016, available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. See on the final statement PEERS S., *The final EU/Turkey refugee deal: a legal assessment*, EU Law Analysis Blog 2016, available at http://eulawanalysis.blogspot.gr/2016/03/the-final-euturkey-refugee-deal-legal.html.

[736] See *inter alia* GOGOU K, The EU-Turkey deal: the Europe's year of shame, 20 March 2017,Amnesty International, available at https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/.

[737] CoE, Parliamantery Assembly (2016), Resolution 2109 on the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016, 20 April 2016.

[738] European Commission, Proposal for a [Dublin IV Regulation], COM (2016) 270, 4 May 2016, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf .

[739] See on this new reform of the Dublin Regulation POON J., *The EU Commission on 'Dublin IV': Sufficient Safeguards for Asylum Claimants?*, ESIL Reflections, Volume 5, Issue 9 , http://www.esil-

pursues a more effective allocation through repressive measures and penalties aiming to deter mass influx of irregular migrants despite some *corrective initiatives* retaining gatekeeper responsibilities to the States of first entry. [740] In the nutshell, the Commission's proposal, setting aside human rights issues, rigorously sticks to the idea or hope that claimants will abstain from choosing the state of their initial destination. By all means, this strategy remains in clear contrast with the principal objectives of the CEAS architecture as laid down in Article 78(1) TFEU.

Against this background, at the same time, the CJEU seemed more willing to extend the right to appeal in the context of the Dublin rules as the *Ghezelbash*[741] and *Karim*[742] rulings (both delivered on the 7th June 2016) on the right to challenge the Dublin transfers departing from its restrictive approach confirmed in *Abdullahi*. In the cases at hand, the Luxembourg Court interpreted Article 28(4) Dublin III Regulation [743] in the light of the EU Charter's provisions regarding the right to an effective remedy and ruled that the claimants have the right to appeal against Dublin transfers on the basis of the misapplication of the Regulation's criteria which could amount to potential violations of fundamental rights.

It is also noteworthy that the opposite reading would fall below the standards set out Article 13 ECHR. According to the Strasbourg Court in Dublin cases, such a violation could be related to the availability of remedies against e.g. *refoulement* practices which are likely to expose the asylum seeker to inhuman or degrading treatment -irrespective of whether or not there are "systemic flaws" of the asylum proceeding-, interfering with family life within the meaning of Article 8 ECHR (irrespective of whether the criteria are respected), or raising an issue under Article 3 or 8 ECHR due to the state of the applicants' health. Additionally, as stated in ECRE's comments on the new Dublin IV proposal "[t]he proposed restrictions on the sovereignty clause also raise problems of compatibility with the ECHR. Although little-used, the sovereignty clause is a key element of the Dublin system that allows Member States to renounce a transfer if it would breach fundamental rights. The limitations flowing from recital 21 and Art.19(2) DIVP would make this impossible, and would place EU Law on a collision course with the ECHR."[744]

Leaving this critique aside, it is generally accepted that the Dublin legislation has incorporated in a great extend many of the Strasbourg's positions in asylum cases paving the way for its Luxembourg peer to interpret these rules in conformity with the Convention's provisions and lately, with the Charter's provisions as well.

Nevertheless, while the discussion regarding the definitive abolition of the Dublin legislation and its replacement by a more effective and fairer allocation system is gaining ground, some new developments on the matter, appear to be in the wrong direction. In particular, the order

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sedi.eu/sites/default/files/ESIL%20Reflections%20Jenny%20Poon%20-%20Nov%202016%20Revision%20-%2020161109%20%28clean%29_1.pdf.

[740] For a thorough analysis of the new schemes proposed by the European Commission in the Dublin IV Proposal see the study MAIANI F., *The Reform of the Dublin III Regulation,* Policy Department C - Citizens' Rights and Constitutional Affairs , June 2016 , available at http://www.europarl.europa.eu/supporting-analyses .

[741] Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*,7 June 2016, not yet published.

[742] Case C-155/15, *George Karim v Migrationsverket*, 7 June 2016, not yet published.

[743] This article was introduced in the *Dublin III* after the Abdullahi ruling.

[744]ECRE Comments on the Commission Proposal for a Dublin IV Regulation, COM(2016) 270.

of the General Court, a year after the EU-Turkey statement, shockingly denied jurisdiction to pronounce on the actions brought by three asylum seekers who challenged this statement.[745]

However, not only the intense dissonance of the two Courts in relation to the Dublin system but also the recent jurisprudential and legislative developments seeking mostly to put an impediment to migration flows rather than dealing with emerging human rights issues raised on the occasion of this ongoing refugee crisis, clearly unbalanced the sole endeavor to alleviate the problems documented in this field.

It was this well-documented dissonance between the two Courts and the blatant lack of coherence pertaining to European standards of protection that the recent judicial activity of the CJEU came to remedy. Under the pression of the ECtHR enhanced guarantees in asylum cases, the Luxembourg case law has revealed some signs of reconciliation with the degree of protection offered by its sister judicial institution in 2017. Apparently, the Court of Justice felt in *C.K* case[746] that it should retain its willingness to "sacrifice" mutual trust when absolute fundamental rights are at stake, as also expressed in the *Aranyosi Căldăraru* judgment.[747] In *casu*, the Court was asked by the Slovenian Supreme Court whether the individual's risk to be a victim of ill-treatment due to his/her deteriorated health could suffice for the suspension of a Dublin transfer on these grounds.

Most importantly, the CJEU revisited its position on the connection between the risk of inhuman/degrading treatment and the existence of systemic deficiencies. Having applied for asylum in Slovenia, a couple with their baby brought their case to Slovenian Courts when their claim was rejected since Croatia was deemed responsible to examine the application under the Dublin legislation. They alleged that the fragile medical condition of the mother who, after giving birth to her child, was suffering from serious depression and periodic suicidal tendencies, was about to worsen if leaving the country.

Pursuant to Article 52(3) CFR, the Court used Article 3 ECHR and the respective enforcement by the ECtHR in its *Paposhvili* jurisprudence as an interpretative tool to read accordingly the corresponding provision of Article 4 CFR.[748] According to the recent judgment of the Strasbourg Court severe illness can reach the high threshold of Article 3 ECHR in similar conditions. In its words "the suffering which flows from naturally occurring illness may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible".[749]Taking a step back from its *NS* findings, the Court held that within the meaning of Article 4 of the Charter "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum,

[745]Case T-192/16, *NF v European Council*(Order) [2017], not yet published.
[746]Case C-578/16 PPU, *C. K. and Others v Republika Slovenija* [2017], published in the electronic Reports of Cases.
[747] Supra note 309, *Aranyosi Căldăraru* judgment.
[748] Supra note 731, *C.K.* judgment, para 68.
[749] ECtHR, *Paposhvili* v. Belgium, Application No. 41738/10,13 December 2016, para 174,175. In the aftermath of the *Paposhvili* judgment, the Luxembourg Court has built further in *MP* and enlarged the scope of subsidiary protection encompassing also former victims of torture or inhuman and degrading treatment who, upon return, are intentionally deprived of necessary medical treatment by the authorities in their country of origin in light of Article 4 of the Charter. Case C-353/16, *MP v Secretary of State for the Home Department* [2018] published in the electronic Report of Cases.

the transfer of an asylum seeker within the framework of Regulation No 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article."[750]

In other words, while in the past the Luxembourg Court had strongly defended the "systemic deficiencies" test as the only reliable criterion to suspend a Dublin transfer the *C.K* appears to draw an analogy from *Aranyosi Căldăraru* and incorporate the *Tarakhel* principles of the Strasbourg Court introducing some exceptions[751]from the total domination of the mutual trust among EU Member States. However, these exceptional circumstances occur when a fundamental right of absolute character needs to be prioritized.[752] The overall meaning of the case should not definitely be construed as leaving room for priritising every human right over the mutual trust.[753] In any rate, probably the Court has recently acknowledged that the smooth functioning of the mutual trust architecture passes through the effective protection of fundamental rights as the ECtHR has also manifested in *Avotiņš v. Latvia.*[754]For the President of the CJEU, Koen Lenaerts, "the successful operation of the principle of mutual trust and the

[750] Supra note 731, *C.K.* judgment.

[751] Nevertheless, the Court sought to underline that its overall conclusion is perfectly compatible with its mutual trust concept in para 95. According to the Court's reasoning "that interpretation fully respects the principle of mutual trust since, far from affecting the existence of a presumption that fundamental rights are respected in each Member State, it ensures that the exceptional situations referred to in the present judgment are duly taken into account by the Member States. Moreover, if a Member State were to proceed with the transfer of an asylum seeker in such situations, the resulting inhuman and degrading treatment would not be attributable, directly or indirectly, to the authorities of the Member State responsible, but to the first Member State alone."

[752] See also on "exceptional circumstances" Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247. Compare with ECtHR, *Povse v. Austria*, Application No. 3890/11, 18 June 2013 and ECtHR, *M.A. v. Austria*, Application No. 4097/13,15 January 2015.

[753] Even within the scope of Article 3 and its equivalent Article 4 of the Charter, the absolute protection offered by the said provisions is not given as a *carte blanche*. The CJEU in its attempt to define the accepted threshold for suspending the Dublin return of an asylum seeker to the responsible State, emphasized the need for a reliable individual-based examination of the situation in the case at hand when the applicants invoked to challenge their Dublin transfer to Italy. Hence, it recalled its *C.K.* standards and drew inspiration from the ECHR's standards for Article 3 and concluded that " EU law must be interpreted as meaning that the question whether Article 4 of the Charter of Fundamental Rights of the European Union precludes the transfer, pursuant to Article 29 of Regulation No 604/2013, of an applicant for international protection to the Member State which, in accordance with that regulation, is normally responsible for examining his application for international protection, where, in the event of such protection being granted in that Member State, the applicant would be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights, on account of the living conditions that he could be expected to encounter as a beneficiary of international protection in that Member State, falls within its scope. Article 4 of the Charter of Fundamental Rights must be interpreted as not precluding such a transfer of an applicant for international protection, unless the court hearing an action challenging the transfer decision finds, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, that that risk is real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty". Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* [2019], published in the electronic report of cases, para. 98; Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Taus Magamadov*[2019], published in the electronic report of cases,para.101; See also GALEA A., *The Jawo case: the limits of the principle of mutual trust*, European Law Blog 2019, available at https://europeanlawblog.eu/2019/05/13/the-jawo-case-the-limits-of-the-principle-of-mutual-trust/.

[754] See the aforementioned *Avotiņš* case, supra note 626.

effective judicial protection of fundamental rights require the national courts, the ECtHR and the ECJ to engage in a constructive dialogue."[755]

Ultimately, while the Court of Justice avoided explicit reference to the *Tarakhel* influence, it definitely seemed willing to keep its relationship with the Strasbourg Court alive. This being so, if read together with the seminal *Aranyosi* judgment with relation to EAW and EU criminal law , also delivered in the post-Opinion 2/13 era, the *C.K* ruling can be perceived as a positive sign apt to ease the tension between the two systems arisen by the said Opinion – at least- as regards human rights protection within the Dublin framework.[756]

In a nutshell, in front of uncontrolled migration flows the EU judicature alarmingly prioritized the protection of the allocation mechanism at any cost in a coercion-oriented direction[757] instead of guaranteeing the fundamental rights of the most vulnerable in this time of crisis. In fact, the hypocritical standing of EU institutions which initially declared Turkey as a safe third country on the basis of a political exchange[758] and only a year after the EU-Turkey deal, adopted a *Pontius Pilate* approach, *washing their hands* while reviewing the latter, revealed that the Union's system had a rather faulty and unprepared reaction to the current situation. For the CJEU, rethinking its understanding of mutual trust under exceptionally pressing conditions for human dignity and thus, reshaping its human rights standards was lately revealed as a new road that should be probably taken.

In light of all the above, the Dublin system seems to be stagnated, unable to remedy all the malfunctions of the past. The responses of the EU institutions, as the proposal for the Dublin's reform flagrantly illustrated, failed to address the thorny spots of this scheme that hugely arose in the recent past and might arise again in case of new migratory challenges. The political upheaval around the sustainability and the future of the Dublin has inevitably locked up the entire machinery and the "*dirty job*" is currently being done through the EU's temporary arrangements serving as a bridge to the new recast Dublin IV Regulation.[759]

Seemingly, the EU legal order apparently still needs the human rights guidance by its Strasbourg counterpart in order to bear this additional burden, so as the dialogue and the balance of powers between the two Courts could be consistently re-adjusted.

Conclusion

In sum, there is no doubt that the EU human rights law was formulated and developed under the shadow of the European Convention on Human Rights. Arguably, the two European

[755] LENAERTS, supra note 313, p.838.
[756] GILL-PEDRO E. & GROUSSOT X., The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?, 35 *Nord. J. Hum. Rights* 3, 2017, pp. 258-274; IMAMOVIC S. and MUIR E., The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?, 2 *European Papers* 2, 2017 pp. 719-728; RIZCALLAH C.*, The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection*, EU Law Analysis Blog 2017, available at http://eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html.
[757] See relatively DEN HEIJER M., RIJPMA J. AND SPIJKERBOER T., Coercion, Prohibition, and Great Expectations: The continuing failure of the Common European Asylum System, 53 *C.M.L.Rev.*3 2016, pp.607–642.
[758] For relieving the uneven burden at the external borders of the EU in the context of this cooperation, Turkey was incentivized with visa liberalization and re-energizing the accession process to the EU.
[759] European Commission, *Managing Migration: Commission calls time on asylum reform stalling*, Press Release of 4 December 2018, available at https://europa.eu/rapid/press-release_IP-18-6627_en.htm.

judicial fora followed convergent interpretations and sometimes dissimilar, approaches due to the distinct legislations on the protection of fundamental rights and their different objectives. Overall, as analytically discussed in this part of the present research, the impact of the Strasbourg system to the EU legal order was realised not only through the direct application of the Convention's provisions in several fields of EU law, but also through the restriction of the scope of application of the EU normative framework in the light of the ECHR and the relevant ECtHR case law. The latest failed attempt for the EU's accession to the ECHR along with the overshadowed role of the Charter readjusted the judicial dialogue of the Luxembourg and the Strasbourg Court, advanced some controversial issues and left, thus, open a number of key questions in the area of EU human rights law. Some of these questions are currently being revisited by both the adjudicative bodies and hence, call for further reflection both within the confines of the EU judicial process and the CoE system.

II. *Exporting* the ECHR to the International legal order

In the era of phenomenal proliferation of interrelated human rights judicial and *quasi*-judicial fora, the ECtHR has remarkably set the paradigm of building a self-standing, autonomous interpretation of an international human rights text with the rich endorsement of external sources of law, normative and jurisprudential. As the ultimate gatekeeper of regional human rights protection and the frontrunner in international law-making in these terms, the Strasbourg Court provided a robust case law whose echo has remarkable implications on the judicial practice of its counterparts both at the regional (regional to regional) and the global level (regional to global).

A. Regional to Regional: The impact of the ECtHR case law to the human rights protection in the Americas

In the realm of international human rights law, the fruitful interaction between the European and the Inter-American human rights systems offers the most luminous example of a meaningful judicial dialogue. The main monitoring mechanism of the latter construed the American Convention on Human Rights as a legal instrument that needs to be interpreted with remarkable openness to other legal orders borrowing, when deemed necessary, valuable tools in order to fight against the strenuous vulnerabilities of this troubled region and to foster the rule of law. While the main focus of the following Chapter is put on the Inter-American Court of Human Rights, some analogies enlightening the manner in which the African Court on Human and Peoples' Rights(hereinafter ACHPR) imports the ECHR norms are also drawn, as appropriate.

Introduction

The Inter-American system was originally founded on the Charter of the Organization of American States[760] in 1948 (hereinafter OAS) containing also -among others- core human rights provisions. At the same time, the American Declaration of the Rights and Duties of Man[761] was adopted and the American Convention on Human Rights[762](hereinafter ACHR) followed, in 1969, in order to entrench the protection of individuals from gross human rights

[760] The OAS was created in 1948 with the signing in Bogotá(Colombia)of the Charter of the OAS, which entered into force in 1951 and was later amended by a number of Protocols (the Protocol of Buenos Aires in 1967¸the Protocol of Cartagena de Indias signed in 1985, the Protocol of Managua, signed in 1993 and the Protocol of Washington, signed in 1992). Today, the OAS brings together 35 independent states of the Americas and constitutes the main political, juridical, and social governmental forum in the Hemisphere. In particular, these states are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Barbados, Trinidad and Tobago, Jamaica, Grenada, Suriname ,Dominica (Commonwealth of), Saint Lucia, Antigua and Barbuda, Saint Vincent and the Grenadines, The Bahamas (Commonwealth of), St. Kitts & Nevis, Canada, Belize and Guyana.

[761] OAS, General Assembly, American Declaration of the Rights and Duties of Man, OR OEA/Ser.L/V/II.82/Doc. 6, rev. 1 (1992) at 25.

[762] American Convention on Human Rights, 22 November 1969, O.A.S.T.S. No. 36 (entered into force 18 July 1978).

violations, generalized in the Americas. Besides the particularities of this part of the world due to a long tradition of brutal dictatorships, violent repression of political enemies, forced disappearances and terrorism, the OAS played a politically pivotal role. It had also to tackle a certain dislocation within the region, between the United States of America and Canada and the rest since the system can be easily characterized as a Latin-American one judging from the rare presence of the northern American states. [763]

It was in the context of OAS, whose main challenge was to defend peace, human rights and state sovereignty, that the first supervisory organ of the said normative instruments came into being, namely the Inter-American Commission on Human Rights. [764] However, notwithstanding the institutionalization of the Inter-American Commission as an autonomous mechanism of the OAS (1959), it was the American Convention on Human Rights that gave true meaning to the Commission's arsenal. The American Convention on Human Rights (or Pact of San José),[765]signed in San José (Costa Rica) in 1969, constitutes ever since its adoption the most solid normative basis for the protection of individuals in the Americas. Greatly modeled on the ECHR and inspired to a certain extent from the International Covenant of Civil and Political Rights(ICCPR), the ACHR managed to provide a distinguishable legal instrument in the aim of ensuring human rights standards and remedies for human rights violations.

The American Convention incorporated a long and detailed catalogue of civil and political rights, richer than the one of the ECHR, since the American text established more advanced and enlightened guarantees echoing the particularities of the region.[766] As regards the institutional framework of the entire system, the Inter-American Convention followed the paradigm of the Council of Europe which relied on the European Commission and the European Court of Human Rights to guarantee the implementation of the ECHR.[767] By the

[763] HARRIS D., Regional Protection of Human Rights: The Inter-American Achievement in HARRIS D., LIVINGSTONE S.(eds), *The Inter-American System of Human Rights*, Clarendon Press Oxford 1998.

[764] In the aftermath of the Bogota conference, despite the political pressure on the OAS in order to establish mechanisms for dealing with human rights problems, it was not until 1959, when the Fifth Meeting of Consultation of Ministers of Foreign Affairs, on the basis of Article 5 (j) OAS Charter, adopted a resolution mandating the creation of the Inter-American Commission on Human Rights. The OAS Council adopted the Statute of the Commission, elected its seven members in 1960 and the Commission began its activities that very year.

[765] The American Convention on Human Rights was signed in 1969 but entered into force in July 1978 following to the eleventh ratification.

[766] In the ACHR we can find human rights provisions that are difficult to be detected in other international human rights treaties. For instance, the American Convention enshrines the right to juridical personality, the right to a name etc.

[767] Similarly to the Inter-American regime of human rights protection, the African human rights system has extensively borrowed its structure from the European architecture whilst it has presented its own novelties since its dawn. The cornerstone of the African system is arguably the African Charter on Human and Peoples' Rights (also known as the "*Banjul Charter*"), adopted on 27 June 1981 under the auspices of the African Union (former Organisation of African Unity - O.A.U.) and entered into force on 21 October 1986. The African Charter is an international human rights instrument is entitled to promote and protect fundamental rights and freedoms in Africa. On this basis, the African Commission on Human and Peoples' Rights was institutionalized in 1987 and its headquarters are now situated in Banjul, Gambia. Engaged in the promotion of human rights and peoples in the continent, its quasi-judicial mandate is to interpret the Banjul Charter, examine national reports and make recommendations to the States. Besides its structure and mandate, the African Commission has echoed the practices and standards of its European sister instistution, albeit in a restricted manner. Given the openness of the African system pursuant to Articles 60 and 61 of the Charter that legitimize the use of external legal sources, the Commission has referred spontaneously to the ECtHR and IACtHR case law in cases touching upon the freedom of expression or the *ne bis in idem* principle so as to assess correctly the allegations of the parties. It has also used the approaches of the said tribunals as interpretative tools for the similar approaches of the Charter or to fill the

same token, the Inter-American Convention mandates the creation of two supervisory organs entrusted with the legal protection of human rights, namely the Inter-American Commission and the Inter-American Court of Human Rights.[768]

The Commission's role[769] in the promulgation of human rights standards was based not only on the examination of individual petitions but also on on-site visits and drafting thematic reports of its findings with regard to the situation of the OAS member states.[770]Furthermore,

gaps of the latter.Nonetheless, the African Commission has revealed its tendency to refer more emphatically to its Latin American counterpart or the HRC.That said, the non-binding character of the pronouncements of the Commission reflected the weaknesses of the system and, hence, the adoption of a protocol to the Charter providing the creation of a judicial forum apt to effectively enforce human rights was, thereby, considered as a necessary tool for this aim. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights was adopted in 1998 and the African Court on Human and Peoples' Rights (hereinafter ACtHPR) was set up. However, the protocol came into effect in 2005 and the Court came into being in 2006 and a few years of inactivity followed until its first judgment *in merito* was issued in 2009. Headquarted in Arusha (Tanzania), the ACtHPR is conferred with its function to deliver orders of provisional measures and reparations and most importantly, judgments on the merits with binding force and it is entitled to act both in a contentious and an advisory capacity. In 2008, the merge of the ACtHPR and the Court of Justice of the African Union was decided, as laid down in the Protocol on the Statute of the African Court of Justice and Human Rights. Albeit not yet in function, the new mechanism is intended to adjudicate disputes falling within the scope of both human rights law and general international law. See Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) adopted on 27 June 1981; Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998.

For an overview of the evolution of the African human rights system, and the specificities of its mechanisms see *inter alia* NMIEHIELLE V., *The African human rights system-Its laws, practice and institutions*, Brill-Nijhoff 2001; NASKOU-PERRAKI P., African Court on Human and People's Rights - A New Institution to Enforce Human Rights Protection in Africa, 56 *Revue Hellenique de Droit International* 2003,pp. 305-323 ; LAMBERT-ABDELGAWAD E., Le rayonnement de la jurisprudence de la Cour Européenne de la jurisprudence à l'égard de la Commission Africaine des Droits de l'homme et des peuples in COHEN-JONATHAN G. and FLAUSS J-F .(eds.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l' homme*, BRÜYLANT 2005 , pp.139-187; SARKIN J., The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People's Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and the Organization of American States, 1 *Inter-Am. & Eur. Hum. Rts.* J. 199, 2008, pp. 199-242; OGWEZZY M.C, Challenges and Prospects of the African Court of Justice and Human Rights, 6 *Jimma U. J.L.* 1, 2014; UDU E-A., Re-Positioning the African Court of Human and Peoples's Rights in the Enforcement of Human and People's Rights in Africa, 8 *Nnamdi Azikiwe U. J. Int'l L. & Juris.* 2017, pp. 173- 191; VILJOEN F., Understanding and overcoming challenges in accessing the African Court on human and peoples' rights, 67 *ICLQ* 1,2018, pp. 63–98;

[768] See on the duality of human rights protection in the ambit of Inter-American system CONTERAS-GARDUNO D., The Inter-American system of human rights, in MIHR A., GIBNEY M., *The SAGE Handbook of Human Rights*, Chapter 33, SAGE Publications 2014, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545091 .

[769]The Inter-American Commission is headquartered in Washington DC and composed of seven members elected from OAS State Parties. The Commissioners act in their own capacity, not representing-thus- their countries of origin. See on the evolution of the Inter-American Commission' role BARRA J., Commission Watch: The Inter-American Commission on Human Rights, 15 *ILSA Quart.*,2006, pp.15-16; PAUL A., The Inter-American Commission on Human Rights' Initial Review of Petitions, Its Backlog, and the Principle of Subsidiarity, 49 *Geo. Wash. Int'l L. Rev.*, 2016, pp.19-52.

[770] According to the wording of Article 41 ACHR, the Commission is assigned to : "a. to develop an awareness of human rights among the peoples of America; b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights; c. to prepare such studies or reports as it considers advisable in the performance of its duties; d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights; e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request; f. to take action on petitions and

the Commission is also responsible for making specific recommendations to American states so as to promote compliance with international human rights norms, but most importantly, it functions as a filter of the cases brought before the Inter-American Court of Human Rights.[771] As regards individual complaints filed with the Commission, the latter is the first to examine the petition and, after having found the latter admissible, seeks for a friendly settlement between the parties. If such a settlement cannot be achieved, the Commission, through a fact-finding procedure, concludes -or not- to a breach of the Convention's provisions, it may make recommendations to the respondent State with which the latter needs to comply within three-months period. If that is not the case, the Commission may submit the case to the Inter-American Court [772] or the State Party may challenge the Commission's attribution of international responsibility before the Court. By analogy, interstate cases must first be considered by the Inter-American Commission before they can be referred to the Court.[773]

Hence, the Court adjudicates the human rights obligations set forth in the ACHR and, in case of a violation, it provides legally binding rulings and orders the responsible State to make reparations in this respect. Despite the distinct, but complementary, roles that the Commission and the Court serve, the structural and normative complexity of the Inter-American system brought severe inequalities and inconsistencies. Since, during the first decade of its short life, the IACtHR did not exercise its competence to resolve contentious disputes it restricted itself to only issue advisory opinions. Given that the Commission operated, for almost twenty years, as an autonomous OAS organ charged with monitoring the overall protection of human rights in the absence of a regional treaty of binding character or a regional tribunal, it initially expressed a certain reluctance to forward individual cases to the Court.[774]As a result,

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other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and g. to submit an annual report to the General Assembly of the Organization of American States."

[771] As explicitly laid down in Article 44 ACHR, *locus standi* to file a complaint has not only the direct victim of the violation but also "any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

[772] The Inter-American Commission can refer an individual case to the Court only if the respondent State has accepted the contentious jurisdiction of the Court. See IACtHR, Article 45 of the Rules of Procedure of the Inter-American Commission on Human Rights, adopted on 13 November 2009, modified on 2 September 2011.

[773] Conversely, the *rationae personae* jurisdiction of the African Court has been mapped in a different manner in comparison with the one of the European and the Inter-American Human Rights Court. Besides the traditional preconditions related to the ratification of the Charter and of the Protocol to the African Charter on the establishment of the ACtHPR, in order to hear a case brought by individuals or NGOs against a State, the latter needs to have already made a special declaration recognizing the competence of the ACtHPR to rule on cases lodged by individuals and NGOs under Article 34(6) of the Protocol on the African Court. As it was expected, the said admissibility requirement has severely hamstrung the overall contentious competence of the African Court restricting enormously the possibility of direct access to justice both for individuals and NGOs acting on behalf of victims of human rights abuses since only 8 out of 55 State Parties to the Charter have cumulatively met the aforementioned conditions. However, unlike the ECHR, the African Charter leaves room for *actio popularis*. At any rate, taking all the above into account the law-making of the African Court still remains remarkably limited. See on the matter, VILJOEN, supra note 767, p. 66, 67; ABDELSALAM M.-A, Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights, 8 *Mich. St.U.-DCL J. Int'l L.*1999, pp.377-396.

[774] As Gerald Neuman outlined "[r]ivalry between the Court and the Commission marred the Court's early years, and some elements of competition still operate. The long-established Commission did not welcome a new Court that might impair its autonomy and undermine its prestige. At first, the Commission refused to refer contentious cases to the Court at all, and the Court's activities were limited to advisory opinions. Relations improved in the 1990s, and the case load grew modestly, although the Court sometimes rejected the Commission's interpretation

the Court notably, during this age, contributed to international law exercising its advisory competence under the American Convention engaging in the interpretation not only of the said Convention but also of other human rights instruments.[775] Unlike[776] its European peer,[777] the broad application of the IACtHR's consultative mechanism can be triggered by all OAS Member States -irrespective of whether or not they have ratified the Convention- and by the OAS organs, including the Commission. In this context, the Court ruled on truly sensitive issues that incite great controversy in international law such as the application of death penalty,[778] the reciprocity in human rights treaties[779] or the derogation of procedural guarantees in times of emergency.[780]

As widely accepted in international law,[781] the necessity of advisory opinions emerges from doctrinal and interpretative differences pertaining to international treaties and for that reason they may significantly contribute to an international common law.[782] Therefore, this alternative function of the Court[783] played a key role: it offered to the State parties the opportunity to engage in the proper application of the ACHR and core international human rights norms using a non-confrontational practice while resolving human rights disputes and

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of its own powers. The Court also asserted its independence by disagreeing with the Commission on matters of fact or substantive law.", NEUMAN G., Import, Export, and Regional Consent in the Inter-American Court of Human Rights, 19 *EJIL* 1, 2008, p.103.

[775] Article 64 ACHR reads as follows: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments." The Inter-American Court is not the only judicial forum that has conceived its advisory competence as a golden chance to develop or clarify its normative environment. The ICJ constitutes the "master of the game" on this matter apparently inspiring similar approaches at a regional level. For a thorough analysis of its advisory role see PAZARTZIS P., The Ambit and Limits of the Advisory Function of the International Court of Justice in RIETER E. and DE WAELE H.(eds.), *Evolving principles of International Law-Studies in Honour of Karel C. Wellens*, Brill Nijhoff 2012, pp.265-280.

[776] For a thematic comparison of the regional human rights systems see BUERGENTAL T., The American and European Conventions on Human Rights: Similarities and Differences, 30 *Am.U.L.Rev.*1, 1980; HEYNS C. and KILLANDER M., Universality and the Growth of Regional Systems in SHELTON D.(ed), *The Oxford Handbook of International Human Rights Law*, OUP 2013, p.523.

[777] Under Article 47(1) ECHR, only the Committee of Ministers, the organ mainly entrusted with monitoring the States' compliance with the ECtHR's judgments, may invoke the advisory jurisdiction of the said Court.

[778] IACtHR, *Restrictions to the Death Penalty*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3.

[779] IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A No. 5.

[780] IACtHR, *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of 6 October 1987 Series A No. 9.

[781] Except for the ACHR, the UN Charter and the ECHR provides for an advisory practice of the International Court of Justice and the European Court of Human Rights respectively. Protocol 16 of the ECHR extending the competence to issue of advisory opinions upon request of the Contracting Parties was signed on 2 October 2013 and entered into force on 13 April 2018. See supra note 46.
As regards the advisory competence of the ICJ see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, [1950] ICJ Rep 65, para. 71.

[782] See PASQUALUCCI J, *The practice and procedure of the Inter-American Court of Human Rights*, CUP 2012, p.38

[783] The broad scope of application as well as the tendency of the Inter-American system to fully integrate international human rights norms was reflected in one of its earliest advisory opinions. See relatively, IACtHR, *Other treaties subject to the Consultative Jurisdiction of the Court* (Art.64 American Convention on Human Rights), Advisory Opinion OC-1-82 of 24 September 1982, Series A No.1, para 41.

circumventing, thus, the formalism or the sanctions linked to the contentious jurisdiction of the IACtHR.[784]

Against this background, the San José Court, even before delivering its first decision on a contentious dispute, had managed to establish *pétit-à-pétit* its jurisdiction *vis-à-vis* national authorities and international human rights law.[785]In fact, the extensive advisory competence of the Inter-American Court and the frequency observed of advisory opinions delivered, paved, to a great extent, the way of its ground-breaking jurisprudence in contentious cases as well.

Notwithstanding the fact that it took almost a decade to the Court to deliver its very first pronouncement on a typical individual complaint in the landmark *Velásquez Rodríguez v. Honduras*,[786] this judgment set the scene of the Court's intentions. In particular, while grappling with systemic enforced disappearances in Honduras, the San José Court seized the opportunity to manifest its individual-centric approach. In its seminal judgment, the IACtHR attempted to enlarge the scope of application of the American Convention so as to respond successfully to the present needs deriving from the specificities of the region, establish an effective contentious regional jurisdiction in the Americas and therefore, accomplish the true legal recognition of human rights within the Inter-American system.

Thus, under its competence to conduct contentious proceedings, the Inter-American Court applied, mainly, the American Convention[787] using the interpretative rules of the VCLT, which specifies in Article 31(1) that "a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[788]Furthermore, the Court's perception of human rights moves away from a traditionalist perception of international human rights law dictating the use of the *pro homine* principle.[789] Under the latter, the dignity of individuals is of utmost importance when interpreting the rights enunciated in international human rights instruments and more specifically, in the ACHR.[790] Text aside, human dignity is judicially guaranteed through the *effet utile* principle of the said Convention.

Unlike the Strasbourg Court, the Inter-American Court, in its early life, expressed, in a rather dynamic manner, its intention to greatly incorporate international law norms within its interpretation of the ACHR. As Raphaele Rivier correctly underlined analyzing the stance of both the control mechanisms of the ACHR, "[b]y basing their conclusions on customary law or referring to the decisions of international courts of general jurisdiction, the Inter-American

[784]Supra note 778, para 43.
[785] See with regard to the advisory competence of the Inter-American Court of Human Rights BUERGENTHAL T., The Advisory Practice of the Inter-American Human Rights Court, 79 *Am. J. Int'l L.* 1,1985, pp. 1-27.
[786] IACtHR, *Velásquez Rodríguez v. Honduras* (Merits) 29 July 1988, Series C No. 4.
[787] The Inter-American Court felt that it should clarify that when applying the ACHR principles takes also into serious account the *corpus iuris* of international human rights law which comprises a set of international instruments of varied content and juridical effects. Moreover, like the Strasbourg Court, the IACtHR sees the Convention as a *living instrument* constantly contributing to its evolutive interpretation. See relatively IACtHR, *The Right to information on consular assistance in the framework of the Guarantees of the due process of law*, Advisory Opinion OC-16/99 of 1 October 1999, Series A No.16, para. 112-114.
[788]Article 31(1) VCLT.
[789] For the *pro homine* principle see *inter alia* RIBEIRO D. & DE OLIVEIRA MAZZUOLI V., The Pro Homine Principle as a fundamental aspect of International Human Rights Law, 3 *Indon. J. Int'l & Comp. L.* 77, 2016, pp. 77-100.
[790] IACtHR, *Vargas Areco v. Paraguay* (Merits, Reparations, and Costs), 26 September 2006, Ser. C No. 155, para. 85.

Court and Inter-American Commission have sometimes sought to escape from the limited role assigned to them by Inter-American law. This tendency to locate the interpretation and application of the texts of which they are the guardians within general international law manifests itself in particular in cases raising issues of State responsibility."[791]

This approach of the Court is indissolubly connected to the Court's three-fold conception of human rights under the auspices of the whole Inter-American framework. At a really early stage, the Court declared that "the concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it."[792]Fundamental rights, their guarantees and the rule of law in the context of representative democracy [793]constitute the three pillars of the system.[794] This idea along with the Court's dialogue with the Strasbourg Court and with international law in general encouraged the former to tackle vigorously the major issues of this troubled region and overcome, up to a point its own difficulties.[795]To date, the American continent still suffers from widespread poverty, rampant human rights violations, generalised illiteracy, not to mention domestic judicial systems reluctant to keep up with the principles of the two Inter-American control mechanisms. Nevertheless, the Inter-American Court in its almost 300 decisions and advisory opinions has initiated significant progress in the overall human rights situation and it has also set "precedents for the entire *corpus* of international human rights law"[796] at the international level.

Certainly, the Inter-American judicial mechanism greatly copied the pioneer human rights protection offered by the ECtHR, the case law of which constituted the substantial archetype of the Inter-American system. However, this is not just a mutual interaction in the sense of mutual cross-citation between the two systems and the Strasbourg's jurisprudence is more than a point of reference for the San José Court.

Since the main focus of this enquiry is the exertion of the ECHR's influence to other regional human rights regimes, we should, firstly, trace the manner in which the IACtHR integrated the Strasbourg's perspective of fundamental rights' legal protection. In this part of research, we should determine whether and in which fields of law, this well-established influence takes the shape of analogy or constitutes the point of departure towards a diversification pertaining to the IACtHR's approach of matters also greatly treated by the ECHR system.

Secondly, the present study will aim to shed light on the legal fields in which the Inter-American Court attempted, to extend the human rights protection in the continent. In this

[791] RIVIER R., Responsibility for violation s of human rights obligations: Inter-American mechanisms in CRAWFORD J., PELLET A., OLLESON S.(eds.), *The law of International Responsibility,* OUP 2010, p.741.
[792] IACtHR, *Habeas Corpus in Emergency Situations, (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights),* Advisory Opinion OC-8/87 of 30 January 1987, Series A No.8, para.26.
[793] IACtHR, *"The Word 'Laws" (Article 30 of the American Convention on Human Rights),* Advisory Opinion OC-6/86 of 9th May 1986, Series A No. 6, para 32.
[794] See relatively DAVIDSON S., *The Inter-American Court of Human Rights*, Darmouth Publication, 1992, p.181 *et al.*
[795] To date, the substantial problems of the Court are the significant lack of funding and low rates of compliance with its judgments not to mention the blatant absence of Canada and of United States of America.
[796] SHELTON D., The Jurisprudence of the Inter-American Court of Human Rights, 10 *Am.U.L.Rev.*1 ,1996, p. 371.

context, we seek to ascertain whether this severe extension can lead, in some cases, to a true judicial interaction and cross-fertilisation between the two leading regional systems.

1. Importing ECtHR's human rights norms: analogous application or differentiated appraisal?

As already mentioned, in this chapter we intend to spark attention on the different cross-citation patterns through which the key standards of European human rights law are exported to the Inter-American system and the receptive -or unrecepteptive- approach adopted by the latter. In methodological terms we need to draw, at the outset, a distinction between the doctrinal tools that cover horizontally the corpus of cases delivered by the San José Court(**a**-horizontal perspective) and then, specific legal treatment of equivalent human rights norms by the European and the Inter-American Court (**b**-vertical perspective).

a) The horizontal perspective

i. Positive obligations under the ACHR: A "telle quelle" approach of the ECtHR case law

Given the duality that characterizes the nature of human rights law encompassing not only the corpus of human rights proclaimed in human rights treaties but also the necessary specification of the relative obligations of their holders, the emergence of the *positive obligations* doctrine marked the law-making of the Strasbourg Court and the true consolidation of Conventional rights. While the European Court of Human Rights affirmed, at a very early stage, [797] that the ECHR aims to safeguard "not rights that are theoretical or illusory but rights that are practical and effective" , it suggested that the scope of state obligations is both negative and positive in nature, imposing not only on a state the duty to abstain from interfering with the enjoyment of the right, but also to take all the affirmative steps so as the right at stake could be effectively protected from third parties as well.[798] It is within this *effet utile* that the European Court developed progressively its positive obligation doctrine.

Initially, both negative and positive obligations are intimately connected with the vast concept of international responsibility.[799] However, at the European level, the textual basis of

[797] ECtHR, *Airey v. Ireland*, Application No. 6289/73, 9 October 1979, para.24.

[798] Aside from that basic-or even elementary distinction-there is also the distinction between obligations of prevention and obligations of repression or- pertaining to the content- obligations of means and obligations of result. See *inter alia* COMBACAU J., Obligations de résultat et obligations de comportement: quelques questions et pas de réponse, *Mélanges offerts à Paul Reuter*, Paris: Pédone 1981, pp. 181-204; ECONOMIDES C-P., Content of the Obligation: Obligations of Means and Obligations of Result, in CRAWFORD J, PELLET A., OLLESON S. (eds.), *The Law of International Responsibility*, OUP 2010, pp. 371-381.

[799] Prior to its development within the context of international human rights law, the positive obligations doctrine made its appearance in the field of diplomatic protection. Dinah Shelton recalled with regard to the origins of the entire positive obligations concept that "[m]ore generally, the law of state responsibility has long required a state to cease the breach and make reparations when it fails to comply, through an act or omission attributable to it, with an obligation under international law. The breach may come from the injurious actions of state officials

positive obligations of States under the European Convention on Human Rights is, by all means, the first article providing that national authorities shall secure to everyone within their jurisdiction the rights and freedoms enshrined therein. Arguably, the Strasbourg Court began to invoke the positive duties of the States when enforcing core and non-derogable human rights under Articles 2 and 3 of the ECHR containing both substantial and procedural aspects. Nevertheless, the said doctrine was rapidly expanded so as to cover the right to private life, the right to a fair trial or the freedom of expression mapping slowly but surely specific obligations of the States in order to guide them to take preventive measures and truly embrace almost every provision of the text.

Against this background, the Inter-American Court of Human Rights, in its attempt to raise the standards of human rights protection in the Latin –American countries, naturally, espoused the positive obligations in order to enhance human rights protection in the entire region. The right to life, under Article 4 ACHR, [800]provided the most fruitful domain for the development of the positive obligations doctrine since the vast majority of the disputes brought before the Court revolved around gross human rights violations and severe atrocities in countries struggling to leave behind the nightmare of cruel dictatorships. Hence, the San José Court relied to the nuanced interpretation of the right to life by the Strasbourg Court which formulated a broad range of positive obligations of both substantial and procedural nature. Since absolute rights also embody fundamental values protected in all respects against encroachment from every possible actor, they can create legal responsibilities for third parties as well. Read in conjunction with the horizontal effect that the drafters of the ECHR aimed to give to the latter, this principle draws inspiration from the German constitutional tradition and the legal theory of *Drittwirkung* which was not neglected by the European Court.[801] Such a

directly or from the failure of the state to perform its international duty to take all reasonable and adequate measures to prevent private wrongs, including the duty to arrest and bring an offender to justice. The state is not held directly and primarily responsible for the private wrongs, because such an approach would have the effect of making the state an insurer of the safety and well-being of aliens." SHELTON D. and GOULD A., Positive and Negative Obligations in SHELTON D.(ed), *The Oxford Human Rights Handbook in International Human Rights Law*, OUP 2013, p.1.

[800] Article 4 ACHR reads as follows "1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.3. The death penalty shall not be reestablished in states that have abolished it.4. In no case shall capital punishment be inflicted for political offenses or related common crimes.5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

[801] Frédéric Sudre remarked on this matter : "Quoique intimement liée à la théorie des obligations positives, la question dite de l' «effet horizontal» de la CEDH (ou de toute autre convention internationale de protection des droits de l'homme) en est cependant distincte. L' «effet horizontal» consiste dans l'application de la Convention dans les relations privées et s'analyse comme «une extension de l'opposabilité des droits de l'homme aux rapports inter-individuels»(...). Inspirée de la théorie allemande de la Drittwirkung («effets vis- à- vis des tiers»), selon laquelle les droits fondamentaux définis dans les textes constitutionnels doivent être respectés aussi bien par les pouvoirs publics que par les particuliers *vis-à-vis* d'autres particuliers, cette construction prétorienne vise à assurer l'effectivité des droits protégés ; y compris contre les agissements des tiers.(…)Lorsque l'attente au droit protégé n'est pas directement imputable à l'Etat mais est le fait d'un tiers- personne privée -, l'effet horizontal de la

perception of the third party effect of the American Convention was also selected by the Inter-American Court. For the latter "[t]his obligation has been developed in legal writings, and particularly by the Drittwirkung theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals."[802]

In any case, given the content of the disputes brought before the IACtHR, for the judges of the San José Court, the State remains the basic bearer of both negative and positive obligations putting them on an equal footing even since its first contentious case, the seminal *Velásquez Rodríguez*.[803] The IACtHR set the scene of its own positive duties doctrine[804] giving true meaning to its legal basis, namely Articles 1(1) and 2 ACHR[805] laying down the principle obligations of the Member States to the ACHR. The drafters of the Convention felt that they should encompass explicitly in the first article not only the negative aspect of these obligations described as the duty to respect the human rights and freedoms but also the positive one, to ensure their true enjoyment by all individuals within the jurisdiction of the States bound by the American Convention.

In its aforementioned landmark decision, the IACtHR clarified relatively that "the second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation(…)The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation --it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights."[806]The Court, nonetheless, underlined that it cannot provide an exhaustive catalogue of such preventive measures. At any rate, this dimension of the positive obligations doctrine is

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Convention permet la mise en jeu de la responsabilité de l' Etat si la législation de ce dernier rend possible la violation d'un droit garanti par cette personne privée.'' SUDRE F., *Droit européen et international des droits de l'homme*, 8e édition revue et augmentée, PUF 2006, p.244-245.

[802] IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, Series A No.18, para.140. See on this doctrine indicatively BLECKMANN A., General Theory of Obligations under Public International Law, 38 *German Y.B. Int'l L*. 26, 1995, pp. 28-30; ENGLE E., Third Party Effect of Fundamental Rights (Drittwirkung) 5 *Hanse Law Review* 2, 2009, pp. 165-173.

[803] Supra note 786.

[804] LAVRYSEN L., Positive obligations in the jurisprudence of the Inter-American Court of Human Rights, 7 *Inter-Am. & Eur. Hum. Rts. J.*, 2014, pp. 94-115.

[805] Article 1 of the American Convention on Human Rights reads as follows "1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.2. For the purposes of this Convention, "person" means every human being." Furthermore, Artıcle 2 goes further beyond providing that "where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[806] Supra note 786, paras 166-167.

identified as the duty of the State to build up a legislative and administrative framework apt to effectively prevent human rights violations. In addition to this general facet of the State's preventive obligation, a more specific obligation derived from the development of the Inter-American Court's case law which is analyzed to the duty to provide operational prevention measures when particular human rights might be at stake. According to the Court, the positive obligation of the State is broad enough to involve not only legislators, but all State institutions and those who must protect security and in particular, its police and armed forces.[807]

At this point, it should be further noted that the Court, which does not hesitate to refer to external sources of international law,[808] opted for seeing positive obligations under the prism of the concept of due diligence [809] playing the key role while attributing international responsibility to State organs.[810] Hence, pursuant to the rules of customary international law, the question of positive obligations derives from the lack of due diligence in cases where the contested interference with the right at stake emerged not directly by State agents but mainly by private persons or circumstances due to external factors, such as emergency situations, environmental risks, or –in general- dangerous activities. In the Court's words "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[811]As a whole, this technique not only offers to the judges the opportunity to impose action obligations on the domestic authorities; it also acknowledges the Court's competence to monitor their implementation and to name –besides the obligations of prevention – obligations of reparation as well. In doing so, the ECtHR succeeded to give true horizontal effect to the Convention while revisiting the notion of "jurisdiction" in the sense of Article 1 ECHR.

With regard to use of the due diligence principle, the ECtHR, even when it is not inferred as such, made clear that it is the background in which serious violations are examined, particularly related to individuals which are in a vulnerable position. For instance, in the landmark case *Osman v United Kingdom*[812] in which it also turned sight on its Inter-American

[807] IACtHR, *Juan Humberto Sanchez v. Honduras* (Preliminary Objections, Merits, Reparations and Costs), 7 June 2003, Ser. C No.99, para. 110.

[808] Stéphanie Pavageau notes in this respect that "La Cour de Costa Rica est, pour sa part, plus réceptive aux dispositifs normatifs extérieurs est donc plus largement ouverte aux influences européennes comme l'illustrent les nombreux renvois qu'elle fait à la jurisprudence européenne y compris s'agissant des obligations positives'', PAVAGEAU S., Les obligations positives dans les jurisprudences des Cours européenne et Inter-americaine, 6 *Int. Law : Rev. Colomb. Derecho Int. Bogotá* 2005, p.208. See also TRIGOUDJA H., L'autonomie du droit applicable par la Cour interamericaine des droits de l'homme : en marge d'arrêts et avis consultatifs récents, 52 *RTDH* 2002.

[809] The ECtHR has repeatedly connected positive obligations to the due diligence concept, yet avoiding to name it. There are only a few references to due diligence when it comes to the State's positive duties. See WAISMAN V., Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard, 33 *Hastings Int'l and Comp L Rev* 385,2010, p.415.

[810] SHELTON D. and GOULD A., supra note 799, p. 4,5. See also on this issue CONFORTI B., Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights, 13 *Italian Y.B. Int'l L.* 3 ,2003, pp. 3-10.

[811] Supra note 786, para 172.

[812] ECtHR, *Osman v. the United Kingdom,* Application No. 23452/94, 28 October 1998.

counterpart, the Strasbourg Court did not accept "that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (...) Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2."[813] More recently, the ECtHR, in a case touching the sensitive issue of domestic violence [814]against women, recalled that the Inter-American Court's interpretation of Article 1(1) ACHR passes though the due diligence rule to prevent human rights violations, to investigate and sanction perpetrators or to provide appropriate reparations to their families.

On the other side of the Atlantic a similar approach was adopted in the famous *Cotton Field* decision with regard to the violent abuse and murder of three women in Juarez which revealed the blatant failure of the Mexican government to protect women's rights. In paragraph 258, the IACtHR confirmed its standing with regard to women in need of protection invoking the said rule and specified that "[t]he foregoing reveals that States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. The prevention strategy should also be comprehensive; in other words, it should prevent the risk factors and, at the same time, strengthen the institutions that can provide an effective response in cases of violence against women. Furthermore, the State should adopt preventive measures in specific cases in which it is evident that certain women and girls may be victims of violence."[815]

Another illustrative point of the Strasbourg Court's approach exported to the Inter-American Court in this field is the acknowledgment that under no circumstances are the State's positive obligations unrestricted. First, the ECtHR had stepped cautiously on this road as it felt in the *Osman* ruling that this type of obligations should be clearly described; otherwise it would

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[813] Ibid, para 116.

[814] ECtHR, *Opuz v. Turkey,* Application No. 33401/02, 9 June 2009, paras. 83-84.

[815] IACtHR, *González et al. ("Cotton Field") v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs) 16 November 2009, Series C No.205, para.258. In the field of the generalised violence against women, the Court delivered a landmark decision in 2018 that built upon its earlier findings and offered the opportunity to the court to break new ground to the adjudication of such disputes. Hence, in the *López Soto v Venezuela,* the IACtHR added the gendered dimension of the impugned actions of private actors and declared that due diligence is required by the State even in cases of sexual esclavage and torture when committed also by non-state actors. By the mere fact of the victim's abduction the authorities of Venezuela should have attentively investigated the case and prosecuted the perpetrator as the abduction is deemed in itself as a form of violence against women. Hence, according to the Court's perspective there is no need of established routine of gender-based violence to be existent in order to conclude to the accountability of the State. See IACtHR, *López Soto et al. v. Venezuela* (Merits, Reparations and Costs) 26 September 2018, Series C No. 362; *Women Victims of Sexual Torture in Atenco v. Mexico* (Prelimary Objection, Merits, Reparations and Costs) 28 November 2018. Series C No. 371;KRAVETZ D., *Holding States to Account for Gender-Based Violence: The Inter-American Court of Human Rights' decisions in López Soto vs Venezuela and Women Victims of Sexual Torture in Atenco vs Mexico*, EJIL Talk!2019, available at https://www.ejiltalk.org/holding-states-to-account-for-gender-based-violence-the-inter-american-court-of-human-rights-decisions-in-lopez-soto-vs-venezuela-and-women-victims-of-sexual-torture-in-atenco-vs-mexico/ ;HEFTI A., *López Soto v Venezuela: The Inter-American Court of Human Rights' answer to violence against women,* OxHRH Blog 2019, available at https://ohrh.law.ox.ac.uk/lopez-soto-v-venezuela-the-inter-american-court-of-human-rights-answer-to-violence-against-women/.

be impossible for the States not to be found guilty for breaches of the Conventional rights.[816] This holding brings us back to the distinction between obligations of means and obligations of result. In this respect, the Court has resolved the issue concluding that the concept of positive obligations endorses solely obligations of means. The President of the ECtHR, Linos-Alexandre Sicilianos pointed out in this regard that "states have an obligation to try to avoid the risk, not a strict obligation to achieve the desired result. They have an obligation to make an effort - a diligent effort - but not necessarily an obligation to succeed in saving human lives. This is not uncommon in international law. Most international obligations are obligations of means. Such situation holds true also for the ECHR. It can be explained simply by the existence of unpredictable factors in most human activities. Imposing a strict obligation to achieve a given result in such (unpredictable) circumstances would create an impossible task for States. (…)"[817] Hence, the prudence of the Court not to impose a disproportionate burden to the national authorities when taking the appropriative measures in order to safeguard the right to life of individuals led the Court to gradually specify the necessary conditions for the attribution of responsibility to the State and, undoubtedly, inspire its Inter-American colleague to espouse analogous position as illustrated in several cases.[818]

Therefore, in *Pueblo Bello Massacre v. Colombia*,[819] the Court underlined the non-automatic nature of the mechanism of attribution adopting the language as well as the argumentation of the Judges of Strasbourg. It recalled the ECtHR's answer to this balancing challenge and explained that "the nature *erga omnes* of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State, because the specific circumstances of the case and the execution of these guarantee obligations must considered."[820] Subsequently, in the *Sawhoyamaxa Indigenous Community v. Paraguay*[821]

[816] In paragraph 116 of the Osman ruling the ECtHR stated that "bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising." Supra note 812.

[817] SICILIANOS L-A., Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR, 3 *Cyprus Hum. Rts. L. Rev.* 117, 2014, pp.117-129.

[818] With regard to this crucial question in international law the Inter-American Court replied in the affirmative in the aforementioned *Cotton Field* case and held that "The Court has established that the obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences. It is also clear that the obligation to prevent is one of means or conduct, and failure to comply with it is not proved merely because the right has been violated." Supra note 815, para 252.

[819] IACtHR, *Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs), Series C No 140, 31 January 2006.

[820] Ibid., para.123.

[821] IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Series C No. 140, 29 March 2006.

applied the criteria also developed by the European Court when it sought to ascertain when the State's omission amounted to the breach of its positive obligation under Article 2 ECHR.[822]Thus, in this case, the Court affirmed that the crucial factor that determines whether the State acted in compatibility with the positive obligations arising from the ACHR is, firstly, the knowledge of the situation posing immediate and certain risk to the life and secondly, whether the appropriate -or not- response of the States in terms of the measures taken to circumvent the risk.[823] Normally, since the use of these basic standards was proliferated by the Strasbourg judges not only in relation to the inalienable right to life but also to the whole construction *prétorienne* of positive obligations, the Inter-American Court seemed to embrace the broad conception of these principles when a potential violation of human rights -other than the right to life- occurs. As Lavrysen correctly observed "[t]he Court has not explicitly applied the Sawhoyamaxa test in every area of the ACHR, such as, for example, with respect to the specific preventive obligation to protect the freedoms of movement, association or expression. However, the broad formulation of this principle in the Cotton Field judgment - in which the test was applied to examine the obligation to protect women against violations of their rights to life (Article 4 ACHR), humane treatment (Article 5 ACHR) and liberty (Article 7 ACHR) - does seem to suggest that the Sawhoyamaxa test is a general principle that is relevant for the examination of the specific preventive obligation under all Convention provisions."[824]

On these grounds, we can safely deduce that the IACtHR developed its positive obligations agenda in a manner analogous with the one of the European Court of Human Rights. This is reflected not only in the tendency of the IACtHR to start steadily imposing positive duties to the States in order to enhance the effective enforcement of the said rights on the basis of the first provisions of the American Convention and the core principles that constituted the normative foundations of the positive obligations doctrine. It is also revealed by the evolution of the concept parallel to the evolution of the Inter-American jurisprudence and the expansion of requirements of substantive and procedural character pertaining to the positive duties of States. The IACtHR, hence, acknowledged the existence of positive obligations in respect of the freedom of expression, the right to effective judicial remedies, right to private life et al.

In doing so, it applied this concept of vulnerability encouraged by its European peer, though in a more emphatic manner, in order to facilitate and legitimize such an expansion. Given the realities of the region, the Court expressed great sensitiveness with regard to women,

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[822] See *inter alia* ECtHR, *Osman*, cited above, para. 11*, Kiliç v Turkey*, Application No. 22492/93, 28 March 2000 paras. 62-63; *Mahmut Kaya v Turkey*, Application No. 22535/93, 28 March 2000, para. 86; *Akkoç v Turkey*, Application Nos. 22947/93 22948/93, para. 78, 10 October 2000; *Keenan v the United Kingdom*, Application No. 27229/95, 3 April 2001 para. 90; *Mastromatteo v Italy* [GC], Application No. 37703/97, 24 October 2002, para. 68; *Gongadze v Ukraine,* Application No. 34056/02, para. 165,8 November 2005*; Branko Tomalit and Others v Croatia,* Application No. 46598/06, paras. 50-51, 15 January 2009*; Medova v Russia,* Application No. 25385/04, para. 96, 15 January 2009*; Fedina v Ukraine*, Application No. 17185/02, para. 53, 2 September 2010*; Giuliani and Gaggio v Italy [GC]*, Application No. 23458/02, 24 March 2011, para. 246*; Tsechoyev v Russia*, Application No. 39358/05, 15 March 2011, para. 136, *Shumkova v Russia,* Application No. 9296/06, para. 90, 14 February 2012; *Marro and Others v Italy (dec.),* Application No. 29100/07, para. 41, 8 April 2014; *Tikhonova v Russia,* Application No. 13596/05, 30 April 2014 para. 69*; Amadayev v Russia,* Application No. 18114/06, 3 July 2014, para. 71.

[823] Supra note 821, para.155.

[824] LAVRYSEN, supra note 804, p.105.

children, people suffering from mental disabilities, indigenous communities and undocumented migrants. In most of the cases in which the Court has declared the existence of a positive obligation, it had earlier confirmed that the applicant was in a vulnerable situation or was a member of one of the abovementioned vulnerable groups. Therefore, it may be deduced that, in the Court's words, vulnerability is considered a precondition of most positive obligations. Vulnerability applies as the foundation for an umbrella-general obligation which can create specific positive obligations for the States in every possible respect as depicted by the broadness of the Court's language whenever it invokes the vulnerable status of the applicants.[825]

To conclude, this part of this thesis cannot cover the numerous aspects of the multifaceted influence of the ECtHR's positive obligations tradition to the IACtHR equivalent doctrine. Suffice it to say that the San José Court followed the guidelines of the Strasbourg Court with regard to the content, the legal nature and the justification of the positive duties deriving from the American Convention. At the same time, the ECHR was also inspired by the particularities of the application of the IACtHR. In most recent instances, the Strasbourg Court followed the practice introduced by the IACtHR and felt free to use Article 1 ECHR in order to fortify and legitimize the effectiveness of its judgments entailing –sometimes – harsh positive obligations for the Contracting Parties to the Convention.[826]

Overall, having taken for granted the severe influence of the Strasbourg's case law to the formulation of the Inter-American version of the positive obligations, one might say that the positive obligations doctrine under the American Convention has been reaffirmed and even facilitated by the introduction of the aforementioned *conventionality control.* The successful exercise of the latter presupposes the conformity of national authorities of general positive obligations and in particular, of the ones of procedural character.[827] At any rate, the ups and downs observed with regard to the manner that the San José often opts for incorporating the relevant principles of the ECtHR have fuelled the debate concerning whether we stand before a true and ever-evolving judicial dialogue with its European counterpart in this field. The vagueness that characterizes the quality of references have undoubtedly, reinforced this approach. As Martin Nicolas Montoya Céspedes correctly put it "(…) with very few exceptions, most of it is rather vague or can be found as *obiter dictum* which is even more

[825] See relatively IACtHR, *Ximenes-Lopes v. Brazil*, (Merits, Reparations and Costs), 4 July 2006, Series C No. 149, para. 103; *Perozo et al. v. Venezuela*, (Preliminary Objections, Merits, Reparations, and Costs), 28 January 2009, Series C No.195, para. 118.

[826] See *inter alia* ECtHR, *Assenov et al v. Bulgaria*, Application No. 90/1997/874/1086,28 October 1998, para.102; *MC v Bulgary* Application No. 39272/98, 4 December 2003, para. 311; *Storck v. Germany*, Application No. 61603/00, 16 June 2005, para.102; *Siliadin v. France* Application No. 73316/01, 26 October 2005, para 77*; Broniowski v. Poland*, Application No. 31443/96, 22 June 2004, para 149.

[827]"On the surface, the conventionality control is just another negative obligation in which national judges abstain from doing something that might infringe human rights. Yet, there are two elements that show that it does entail an interesting mix of negative and positive obligations. First, national judiciaries are expected to carry out a conventionality control even of the parties do not request them to do so. Second, national judges must follow the IACtHR's case law when they carry out the conventionality control. Other than reinforcing the importance of the Inter-American case law, the conventionality control encourages national judges to interpret domestic law in accordance to state obligations under the Convention. Undoubtedly, this constitutes a major positive obligation." MONTOYA CESPEDES M-N., The Inter-American Court of Human Rights' positive obligation doctrine, Between unidirectional influence and judicial dialogue in HAECK Y., RUIZ-CHIRIBOGA O. and BURBANO HERRERA C.(eds.), *The Inter-American Court of Human Rights*, Intersentia 2015, p. 774.

alarming because it leaves the impression that the Court has not fully developed its reasoning, yet it contents itself with making a general statement that does not clarify the obligations under the ACHR(…)On the other hand, however, the vagueness of most of the positive obligations doctrine in the IACtHR's case law also makes it practically impossible for the state not to violate them."[828]

Despite the witnessed irregularities and inconsistencies in the Inter-American case law, the latter has greatly evolved from its starting point, namely the recognition of positive obligations solely under the right to life. Hence, as far as positive obligations are concerned, it managed to cover the realities of the region which amounted to gross human rights violations and deep-rooted impunity that required the Court's guidelines so as social or political rights could be effectively ensured. In an analogous manner with its European colleague, the IACtHR seeks to build a concrete context of positive obligations as illustrated by its brand new jurisprudence. In its recent Advisory Opinion on Environment and Human Rights, released on 7 February 2018, the San José Court identified for the first time positive-and negative-obligations under international environmental law and human rights law in the transboundary context.[829]In any case, this is also indicative of the willingness of the IACtHR to seize the opportunity, whenever is given, to grapple with new issues offering valuable clarifications, now that it has consolidated its jurisprudence in relation to blatant violations of inalienable rights. This being so, the lastly observed attitude of the Court encourages us to suggest that it seems highly possible that the Court will not be shy to move on delineating the precise boundaries of the State's positive duties in order to even more enhance its persuasiveness in this field of human rights law.

ii. The principle of subsidiarity: The MoA doctrine in the IACtHR case law

The ECtHR constitutes the most powerful judicial body in the field of international human rights law and, as previously discussed, it *de facto* influenced other regional human rights Courts with its nuanced case law. It did so through several doctrines which remarkably contributed to the solid consolidation of the Court's jurisdiction and the constant interpretation of the ECHR as a *living instrument*. Moreover, in the Europe of political stability the debate continues as to whether international judicial bodies should have the authority to review national legal frameworks dealing with sensitive rights or whether democratically elected governments should have the final word in the process of adoption and implementation of domestic policies.

Hence, it was within this context of the tension between national deference and international supervision that the famous *margin of appreciation* doctrine (MoA)[830] was

[828] Ibid., p.782.
[829] FERIA-TINTA M. and MILNES S., *The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights*, EJIL: Talk! Blog 26 February 2018, available at https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/ .
[830] For an overview of the several uses of the *margin of application* see *inter alia* BREMS E., The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, 56 *Heidelberg J. Int'L* ., 1996,

introduced by the Strasbourg Court serving as a significant device in the Court's hands when engaged with this tension or with balancing tasks in sensitive cases related to conflicting rights. Inevitably, the MoA doctrine goes *hand-in-hand* with the long-established principle of subsidiarity of international fora.[831] "The doctrine of subsidiarity provides one framework for the allocation of power in global governance. Subsidiarity comes into play as a mechanism that helps address some of the problems that the rise of international authority creates, particularly the increased perception that international authority has a democratic deficit."[832] Nevertheless, this traditional notion of subsidiarity seems rather problematic when it comes to human rights protection in international law. If international tribunals take a step back so as principles of sovereignty and political self-determination are to be sufficiently respected, their *hands are tied* in addressing human rights violations stemming from domestic actions.

In any case, the *margin of appreciation* formula[833] derives from the basic perception of the subsidiary function of international human rights tribunals, however, its delicate use by these courts reveals their intention to rather reconcile the aforementioned conflicts.

At the outset, the Strasbourg Court initiated the MoA doctrine that allows a certain *marge de manoeuvre* in the restriction of human rights. More specifically, the ECtHR gave

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pp. 240-314 ; BIENVENISTI E., Margin of appreciation, consensus, and universal standards, 31 *N.Y.U. J. Int'l L. & Pol* 1999, pp. 841-854; CREMA L., Disappearance and New Sightings of Restrictive Interpretation(s), 21(3) *Eur. J. Int'l L.* 3, 2010, pp. 681-700; DZEHTSIAROU K., *European Consensus and the legitimacy of the Strasbourg Court*, CUP 2015.

[831] In the context of the protection of the core right to fair trial, the African Court on Human and Peoples' Rights has timidly expressed its willingness to adhere to the position of the European Court as regards the application of the *margin of appreciation* doctrine. More specifically, in the *Mohamed Abubakari v. Tanzania* the factual basis revolved around the issue of whether the accused's trial had been fair when his conviction was based on the testimony of a single witness. In response to the stance of the Respondent State which urged the ACtHPR to apply the doctrine of 'margin of assessment', namely the same doctrine technically developed by the Strasbourg Court, the former abstained from explicitly invoking this tool. However, as regards the fact that the applicant's complaint of its conviction lies upon the testimony of a single witness the Court, apparently, feels that this does not necessarily amounts to a violation of the right to a fair trial (Article 7 of the Banjul Charter) on the precondition that the said witness is *reliable*. Thus, it left enough latitude to the national juridictions to apply their own criteria to conclude to the reliability of the court witnesses as, for the Court, it is not among its powers to prescribe the reasoning of the domestic criminal Courts. It clarified, nevertheless, that "it retains the power to determine whether, in general, the manner in which the national court has evaluated the evidence is compliant with the provisions of the applicable human rights instruments." In this respect, Jamil Ddamulira Mujuzi has observed pertaining to the echo of the MoA concept in the case law of the African Court as regards the right to fair trial (single witness testimony) that "it is not far-fetched to argue that, given the rate at which the Court is relying on the jurisprudence of the European Court of Human Rights in interpreting the African Charter, there is a possibility that it could sooner or later, directly or indirectly, invoke that doctrine in its jurisprudence." See ACtHPR, *Mohamed Abubakari v. Tanzania*, Application No. 007/2013, Judgment of 3 June 2016, para 173. MUJUZI J.-D., The African Court on Human and Peoples' Rights and Its Protection of the Right to a Fair Trial, 16 *The Law and Practice of International Courts and Tribunals* 2017, p.214.

[832] CONTESSE J., Contestation and deference in the Inter-American System of human rights, 79 *Law and Contemporary Problems* 2016, p.125.

[833] "The national margin of appreciation or discretion can be defined in the European Human Rights Convention context as the freedom to act, manoeuvring, breathing to elbow room or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees. It has been defined as the line at which international supervision should give away to a State Party's discretion in enacting or enforcing its laws." YOUROW H.-C., *The margin of appreciation doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publishers 1996, p.13.

birth[834] to its famous doctrine in the European Commission's case law revolving around the *Cyprus* cases.[835]Article 15 ECHR offered the initial basis for the MoA doctrine in the sense of national derogations from Convention guarantees in emergency situations. However, the doctrine's echo has expanded encompassing almost all ECHR articles and mainly, Articles 8-11 containing limitations and requiring a balancing procedure from national authorities so as adequate human rights protection can be guaranteed. These non-absolute rights, the enforcement of which correspond to specific prohibitions for the states, have also endorsed, through the nuanced jurisprudence of the ECtHR, positive obligations to be implemented by national authorities. Given the nature of those positive duties, states enjoy a certain discretion to concretize those rights by adopting different normative schemes. In this regard, there is no single correct pattern of implementation and hence, the Court approaches these rights with careful steps on a *case-by-case* basis.

This being so, when national authorities are under scrutiny for determining whether they struck a fair balance between national interests and human rights, they are granted a certain latitude which is not permitted within the scope of application of the "core" human rights.

Accordingly, as clarified by the Strasbourg judges "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them."(…)

At the same time, the Court feels that it should underline, in its first decision leaving considerable leeway to the UK in a freedom of expression case, that "[t]he domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court".[836]

Since this pronouncement of the Court as well as its following rulings in *Sunday Times v. United Kingdom*[837] and *Marckx v. Belgium*[838] the Strasbourg Judges developed this formula in order to delve into a wide variety of dissimilar cases while exercising the proportionality test. The Court's attempt is, thus, to ascertain whether a pressing social need dictating the impugned measures exists in order to pronounce on the proportional character of the latter with regard to the legitimate aim pursued. Thus, the threshold of protection afforded to the rights embodied in the Convention constituted progressively the key factor to regulate the extent of

[834] Actually, "the origins of the margin doctrine lie in both classical martial law doctrine and in the jurisprudence of the French *Conseil d'Etat* and other equivalent continental institutions in their modes of review of the legality of administrative action and discretion. The French notion of the *marge d'appréciation* can be compared to the German principles of Beurtrilungspielraum; Ermessenfehler, Ermessensspielraum, Ermessensmisbrauch, Ermessensuberscheitung and unbekannte- or unbestimmte- Rechtbegriffe.", Ibidem, YOUROW, p.14.

[835] ECommtHR, *Greece v. the United Kingdom*, 1958-59, (The Cyprus Case), 2 Yearbook of the European Convention on Human Rights, pp.172-197.

[836] ECtHR, *Handyside v United Kingdom*, Application No 5493/72, 7 December 1976, paras 48–49.

[837] ECtHR, *Sunday Times v. United Kingdom,* Application No. 6538/74, 26 April 1979.

[838] ECtHR, *Marckx v. Belgium*, Application No. 6833/74, 13 June 1979.

national discretion allowed in every case. More specifically, the Court has denied granting margin of appreciation-or it has severely delimited its extent- in cases touching upon the right to life, human dignity on in general, non-derogable rights.[839]

However, when national authorities need to weight up competing political or social rights, all protected by the Convention's provisions, their latitude is significantly wider in the scope of the limitation clauses of Articles 8-11 ECHR. The domestic assessment of the relevant facts is reviewed, nevertheless, the Court exercises a less stringent control on the basis of the subsidiary nature of the Court and the respected sovereignty of the Contracting parties. In addition, the ECtHR decides on the width of the margin offered on a *case-by-case* basis since the political or schematic realities of each State or the characteristics of each individual application must be definitely taken into consideration. The Court also revisits its own decisions leaving wide margin to the States when the discretionary standards applied are not wisely met.

As McGoldrick correctly pointed out in this regard " [t]he MoA is not an instrument of surrender or abdication. Even if the applicable MoA is wide, it is not all-embracing. European supervision is not limited to ascertaining whether the state exercised its discretion reasonably, carefully and in good faith. These elements are necessary but not sufficient. The ECtHR commonly uses the language of whether the state has remained within, or not overstepped, an 'acceptable' MoA.(…) The ECtHR has to satisfy itself that the standards applied by national authorities were in conformity with the principles embodied in the substantive ECHR norms and decisions must have been based on an acceptable assessment of the relevant facts.(…)"[840]

During the latest decades, the Strasbourg Court used -and still uses- in various manners its seminal doctrine some of which raised severe criticism.[841] Judge Rozakis, former judge of the ECtHR, condemned the fact that the Court often opts for an automatic manner of application of the MoA scheme, particularly in cases in which similar clashes of conflicting interests are solved through the Court's well-established case famously admitted that "the Court should carefully reconsider the applicability of the concept of the margin of appreciation, avoid the automaticity of reference to it, and duly limit it to cases where a real need for its applicability better serves the interests of justice and the protection of human rights."[842] In addition, for

[839] The *margin of appreciation* is largely used by the Strasbourg judges when ruling on cases related to freedom of exression, freedom of religion, the right to private life, political rights etc. See indicatively ECtHR, *X v. the United Kingdom*, Application No. 7215/75, 5 November 1981; *Leander v. Sweden*, Application No. 9248/81, 26 March 1987; ECommHR, *Ochsenberger v. Austria*, Application No. 21318/93, 2 September 1994; ECtHR, *Kokkinakis v. Greece* , Application No 14307/88, 19 April 1993; *Laskey, Jaggard and Brown v. the United Kingdom*, Application No. 21826/93, 21627/93, 21974/93, 19 February 1997; *Hirst v. the UK* (No. 2), Application No. 74025/01, 6 October 2005 ; *S.H. and Others v. Austria* [GC], Application No. 57813/00, 3 November 2011.

[840] McGOLDRICK D., Affording States a Margin of Appreciation: Comparing the European Court of Human Rights and the Inter-American Court of Human Rights in BUCKLEY C., DONALD A., LEACH P.(eds), *Towards Convergence in International Human Rights Law ,Approaches of Regional and International Systems*, Brill Nijhoff 2013, p.330.

[841] Academia incrementally started giving the use of the MoA doctrine a rather hostile and critical reception. For instance, Letsas expressed severe doubts about the mere necessity of some of the doctrine's applications and making a clear distinction between the 'structural' and the 'substantive' margin. See FEINGOLD, C.S., The Doctrine of Margin of Appreciation and the European Convention on Human Rights, 53 *NotreDameLRev* 90, 1977, pp. 90-106; LETSAS G., Two Concepts of the Margin of Appreciation, 26 *OJLS* 4,2006, pp. 705-732.

[842] ECtHR, *Egeland and Hanseid v Norway*, Application No. 34438/04, 16 April 2009, Concurring Opinion of Judge Rozakis.

instance, the empty reference of "a certain margin of appreciation" without specifying its extent in the conclusion of judgments[843] comes to reinforce the abovementioned approach.

In any case, the flexibility of such a semi-theoretical and semi-technical structure fuelled the mere jurisprudential evolution of the Court and showed the way of applying state discretion standards to international tribunals[844] and most importantly, to regional human rights courts.

This being so, the Inter-American Court could not, in any case, bypass the most famous doctrinal creation of the Strasbourg Court notwithstanding the specificities of the region dictating a rather adjusted approach in this respect. The corpus of cases of different nature and severe gravity with which the San José Court is confronted as well as the lack of regional consensus in the Americas do not offer fertile ground for international deference. On the contrary, they bespeak a stricter supranational judicial control so as the State's conformity with human rights obligations can be reassured.

Consequently and similarly to its Strasbourg counterpart, the Inter-American Court of Human Rights applies the *margin of appreciation* concept, albeit in a different manner. The former has dealt mostly with cases involving arbitrary arrests or detentions, forced disappearances and extrajudicial killings or, in general terms, violations of the right to life, to personal liberty, and to the right to personal integrity. Additionally, in contradiction with European well-functioning democracies, the IACtHR, due to the lack of sufficient democratic credentials of American States, seemed reluctant to apply such a formula to States experiencing military dictatorships or even fragile democracies with low rate of judicial independence.[845]However, the Court, in its first years, looked into the possibility of granting a *margin of appreciation* to domestic authorities in the context of its advisory powers. Firstly, the Court grappled with this issue in 1984, in its advisory opinion concerning proposed amendments to the constitutional rules regulating naturalization in Costa Rica.[846] The Court was asked to opine on the Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica. The latter State asked, specifically, whether the amendments[847] establishing different naturalization standards on the basis of the place of birth were incompatible with the right to nationality and the right to equal protection under the American Convention.[848]

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[843] KRATOCHVIL J., The Inflation of the Margin of Appreciation by the European Court of Human Rights, 29 *NQHR* 3, 2011, p. 340.

[844] SHANY Y., Toward a General Margin of Appreciation Doctrine in International Law?, 16 *Eur. J. Int'l L*. 5, 2006, pp. 907-940.

[845] FOLLESDAL A., Exporting the margin of appreciation: Lessons for the Inter-American Court of Human Rights, 15 *ICON* 2, 2017, p.368, 369.

[846]IACtHR, *Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, Ser. A No. 4.

[847] The amendment required a different period of residence as condition for someone to acquire the Costa Rican nationality, "depending on whether the applicants qualify as native-born nationals of 'other countries of Central America, Spaniards and Ibero-Americans' or whether they acquired the nationality of those countries by naturalization."

[848] Article 20 ACHR provides the right to nationality. "1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality." Following to this, Article 24 ACHR reads as follows "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

The Court, initially, stated that it is among the sovereign powers of the State to regulate the legislative framework pertaining to naturalization. Furthermore, while reaching its conclusion, it made explicit reference to the MoA formula clarifying "that the Court is fully mindful of the margin of appreciation which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with." However, for the judges of the Court, its opinion cannot be considered as a *carte blanche* on this matter and it definitely "should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and unjustified degree the political rights of naturalized individuals. Most of these situations involve cases not now before the Court that do, however, constitute clear instances of discrimination on the basis of origin or place of birth, unjustly creating two distinct hierarchies of nationals in one single country."[849]

Regardless of the fact that the Court circumvented to openly refer to the origins of the formula, it recognized that the Costa Rican authorities retain- to some extent- the sovereign control over constitutional amendments related to nationality and naturalization.

In this case, the Court overstepped its reluctance to restrict itself to its subsidiary nature [850] when asked by Costa Rica -one of the most enthusiastic supporters and source of funding of the Court- and went on to look into the application criteria of naturalization of Costa Ricans paying particular attention to the fact that the case touched upon constitutional questions close to the core of sovereign powers of the said State. If we, however, look at the bigger picture, this openness of the Court in its early years is rooted to the fact that this was the fourth time that the Court delivered its opinion in the context of its consultative mechanism without having, by that time, pronounced on a contentious dispute.[851]Subsequently, the Inter-American Court struggled to establish its international jurisdiction as a human rights tribunal providing international supervision *vis-à-vis* the democracies of the region. Hence, there was little room for deference in this context and more importantly, within the power of the Court to decide contentious disputes. According to the respectful position of the former President of the Court, Antonio Cançado Trindade "[h]ow could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity?(…)".[852]

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[849] Supra note 846, para 60.

[850] CONTESSE J., *Subsidiarity in inter-American human rights law*, 2016, available at <https://law.yale.edu/system/files/documents/pdf/SELA15_Contesse_CV_Eng.pdf>; The Inter-American Court declared its subsidiary character through the application of the fourth instance formula and the exhaustion of local remedies. See relatively DUHAIME B., Subsidiarity in the Americas, What room is there for deference in the Inter-American System? in GRUSZCZYNSKI L., WERNER W.(eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, OUP 2014, pp. 289-315.

[851]CONTERAS P., National Discretion and International Deference in the Restriction of Human Rights: A Comparison between the Jurisprudence of the European and the Inter-American Court of Human Rights, 11 *Nw. U. J. Int'l Hum. Rts.* 82, 2012, pp.27-82.

[852] CANCADO TRINDADE A-A., El derecho internacional de los derechos humanos en el siglo XXI, *Editorial Jurídica de Chile*, 2008, p.380; CANCADO TRINDADE A-A, Reflexiones sobre el Futuro del Sistema Interamericano de Proteccion de los Derechos Humanos, in MENDEZ J. & COX F.(eds.), EL FUTURO DEL

Certainly, Cançado Trindade's thesis is inextricably related to both the universality of the very notion of human rights and the nature of cases brought before the Court. The absolute manner that he opted for manifestly rejecting this doctrine is based on the fact that human rights in the sense of *jus cogens* obligations for the states leave no room for relativism in the application of such standards; and the truth is that the lack credibility of Latin American states comes in support of this idea.

This total prohibition of domestic deference inflated a huge debate around this matter since already new types of disputes are being adjudicated by the Court. Nevertheless, and in spite of the echo of such a perception of the MoA doctrine, the Inter-American Court revisited its hesitation of granting national discretion in a freedom of expression case[853] in 2004. In *Herrera Ulloa v. Costa Rica*,[854] the Court treated the conviction of a reporter of a newspaper for criminal defamation stemming from the publication of offenses against a Costa Rican diplomat.

The IACtHR, for the first time in its contentious career, reviewed the proportionality of the restrictive response of the State, namely the application of criminal defamation legislation. Giving particular attention to the democratization of the region and more importantly, to the role of the mass media and journalism in relation to freedom of thought and expression hereof, the Court cited relatively the *jurisprudence constante* of the Strasbourg Court[855] in cases that freedom of expression clashes with reputational rights and acknowledged that "[d]emocratic control exercised by society through public opinion encourages the transparency of State activities and promotes the accountability of public officials in public administration, for which there should be a reduced margin for any restriction on political debates or on debates on matters of public interest."[856]Finally, the Court found the measure disproportionate since it espoused the *pressing social need* formula which did not justify such a restriction of the freedom of the journalistic speech and repeated in its final conclusions that "[w]hile States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right to appeal a judgment."[857]

The Court had already clarified that its fears related to the destabilization, that the use of the MoA doctrine might cause are *alive and kicking*. There is no doubt, therefore, that the thoughtful and limited use of the margin's concept by the San José Court aims, in fact, to reduce

SISTEMA INTERAMERICANO DE PROTECCION A LOS DERECHOS HUMANOS, San José: IIHR 1998; Supra note 845, FOLLESDAL, p.362; Ibid. p.62.

[853] Freedom of expression is protected under Article 13 ACHR which reads as follows: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.(…)"

[854] IACtHR, *Herrera-Ulloa v. Costa Rica*, (Preliminary Objections, Merits, Reparations and Costs), 2 July 2004 Ser. C No. 107.

[855] Ibid., para 125.

[856] Ibid., para 127.

[857] Ibid., para 161.

national latitude as much as possible in similar cases.[858] Therefore, the overall meaning of this case is that national authorities enjoy some latitude in the selection of the necessary judicial remedies but they are always subject to international supervision which comes to guarantee that the very *essence* of the right is being impaired.

The MoA was reinvented in another case adjudicated by the Inter-American Court against -once again- Costa Rica. In the *Artavia-Murillo*[859]case, the protection of the right to life was at issue when in vitro fertilization (IVF) comes to play. The claimants were infertile couples who, after the declaration of in vitro fertilization as unconstitutional by the Costa Rican judiciary, were denied access to any form of assisted reproductive methods and thus, alleged a violation of their right to private and family life under the American Convention. Costa Rica claimed that enjoys a margin of appreciation on the basis of the language of Article 4(1)[860] and of the lack of regional consensus on IVF invoking the discretion that the ECtHR allows in such controversial cases.

The IACtHR cited the relevant case law of the European Court of Human Rights on the lack of European consensus as regards the beginning of the life of the foetus.[861]However, it used a number of interpretative tools to conclude to its conclusion on the proper reading of Article 4(1) and consensus on the application of IVF by the State Parties was one of them.[862] Nevertheless, the IACtHR denied to pronounce on the margin's issue stating that "[t]he Constitutional Chamber based itself on an absolute protection of the embryo that, by failing to weigh up or take into account the other competing rights, involved an arbitrary and excessive interference in private and family life that makes this interference disproportionate. Moreover, the interference had discriminatory effects. In addition, taking into account these conclusions about the assessment and the considerations concerning Article 4(1) of the Convention (supra

[858] This is, in fact, the reason why the Inter-American Commission corrected its initial willingness to offer greater latitude to Guatemala to regulate the legislative framework regarding electoral process and the right to participate in government in *Rios Montt*. Some years later, in a similar case, in *Andrés Aylwin et al. v. Chile* related to the prohibition of former members of dictatorships to be reelected, the Inter-American Commission after exercising a strict proportionality control pointed towards a stricter scrutiny of such legislation in contradiction with the more differential approach of the Commissioner Goldman.See respectively IACommHR, *José Ríos-Montt v. Guatemala*, Case 10.804, Report No. 30/93, OEA/Ser.L/V.85, doc. 9 rev. (1993); *Andrés Aylwin et al. v. Chile*, Case 11.803., Report No. 95/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1999).

[859] IACtHR, *Artavia-Murillo et al. v. Costa Rica* (Merits, Reparations and Costs, Preliminary Objections) 28 November 2012, Series C No. 257. See also the similar IACtHR, *Gómez Murillo et al. v. Costa Rica*, 29 November 2016, Series C No. 326. When the decision was delivered a friendly settlement between the parties had already been achieved and the impugned prohibition of IVF had already been lifted.

[860] Article 4(1) ACHR provides that "[e]very person has the right to have his life respected. This right shall be protected by law and, *in general*, from the moment of conception. No one shall be arbitrarily deprived of his life." The term "in general" was interpreted differently by the Inter-American Commission in its landmark decision *Christian B. White & Gary K. Potter v. United States of America.* In the very beginning of the system, the Commission interpreted the wording of the ACHR in light of the teleology of the Convention's drafters who added this expression in order to leave to each state the authority to regulate its legislative framework pertaining to abortion. IACommHR, *Christian B. White & Gary K. Potter v. United States of America Case,* Report No. 23/81, OEA/Ser.L/V/II.85, doc. 9 rev. 1 (1981)paras 20-30; CANDIA G., *Comparing diverse approaches to the margin of appreciation: the case of the European and the Inter-American Court of human rights*, Pontificia Universidad Católica de Chile, Law Faculty, 2014, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406705>.

[861] Supra note 859, para. 237,238.

[862] Ibid.,para 256,264; LIXINSKI L., The Consensus Method of Interpretation by the Inter-American Court of Human Rights, 3 *Canadian Journal of Comparative and Contemporary Law* 1, 2017, pp. 65-95, 79.

para. 264), the Court does not consider it pertinent to rule on the State's argument that it has a margin of appreciation to establish prohibitions such as the one established by the Constitutional Chamber."[863]

This part of the judgment was hotly debated in academia and by some of the Judges of the Court. According to the dissenting opinion of the Judge Vio-Grossi "[o]ther jurisdictional bodies have already highlighted the difficulty—and even the inappropriateness—of deciding an issue which is within the realm (although not exclusively) of medical science, an issue regarding which there is still no consensus, even in this particular field".[864]Indeed, as used by the Strasbourg Court, European consensus was not the *conditio sine qua non* for granting *margin of appreciation* to the states, but mostly, a factor determining the extent of it.[865]

Quite recently, in the *Atala-Riffo* case, the Court revisited its approach on the role of the presence or absence of regional consensus with regard to deference allowed to national judicial authorities. While adjudicating a sexual orientation case against Chile,[866] the Inter-American Court clarified that the lack of it cannot lead the latter to abstain from pronouncing on the matter at stake.[867] In the Court's words "[t]he alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively

[863] Ibid., para. 316

[864] Dissenting opinion of Judge Vio-Grossi in *Artavia-Murillo et al. v. Costa Rica*.

[865] As Andreas Follesdal clarifies "Consensus is not a condition for granting a margin of appreciation—indeed, closer to the reverse. If the infringement of a right is of the kind where the ECtHR may grant a margin, of appreciation, that margin will be narrower if the Court detects a (trend toward) consensus.", Supra note 845, FOLLESDAL A., p.370; DZEHTSIAROU K., European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, 12 *German Law Journal* 10, 2011, p. 1740; BIENVENISTI E., Margin of appreciation, Consensus, and Universal Standards, International Law and politics, 31 *N.Y.U. J. Int'l L. & Pol.* 843, 1999,pp. 422-444 ; CAVANAUGH K., Policing the Margins: Rights Protection And the European Court Of Human Rights, *EHRLR* 422, 423, 2006; O'DONNELL T., The Margin Of Appreciation Doctrine: Standards In the Jurisprudence Of the European Court Of Human Rights, 4 *HumRtsQ*, 1982, p. 479; DE LA RASILLA DEL MORAL I., The Increasingly Marginal Appreciation Of the Margin-of-Appreciation Doctrine, 7 *German Law Journal* 611,2006, p. 617. See also on the various prespectives of the daunting task of reaching European consensus KAPOTAS P. and TZEVELEKOS V.(eds.), *Building Consensus on European Consensus- Judicial Interpretation of Human Rights in Europe and Beyond*, CUP 2019.

[866] The Court of San José seized the opportunity to pronounce for the first time on LGBTI rights in *Atala-Riffo* case in which condemned Chile for refusing custody of her three daughters to a lesbian judge after her divorce. Quite recently, the IACtHR delved again into same sex couples' rights under the American Convention in a more bold manner while exercising its advisory capacity. In its Advisory Opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples delivered on 9 January 2018, the Court declared that the recognition of name change in conformity with gender identity and patrimonial rights deriving from same-sex marriage are protected by the ACHR which does not permit any discrimination on the basis of sexual discrimination despite the lack of consensus in the region. See accordingly IACtHR, *Atala-Riffo and Daughters v. Chile*, (Preliminary Objections, Merits, Reparations and Costs), 24 February 2012, Ser. C No. 239; IACtHR, *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights),* Advisory Opinion OC-24/17 of 24 November 2017, Ser. A No. 24.

[867] CANDIA, supra note 860, p.18.

to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention."[868]

Interestingly enough, judging from this general holding of the Court, the latter opted for clarifying its stance on the interconnection between regional consensus and deference in a case falling out of its "privileged territory". This being so, the San José Court appears less hesitant to leave a *marge de manoeuvre*, even a limited one, in cases that, social disagreement is gaining attention and little consensus can be achieved among Latin-American states. This is also confirmed by the tendency of the Court to, lately, grant national authorities significant deference when it comes to social rights.[869]

Bearing in mind that the political landscape in the Americas is, nowadays, different from the existent at the very beginning of the Inter-American system dictating a stringent review of domestic powers in the implementation of their human rights obligations, the question arises whether it is more preferable to go for other forms of deference.[870]As we speak, most of the Latin-American states have made successfully the transition to democracy[871] with independent judicial authorities; therefore the cases brought before the Court are, steadily, moving away from claims of mass atrocity to new type of disputes. This new reality led to the proliferation of academic voices calling for a shift in the IACtHR's position regarding the use of the doctrine since the IACtHR' difficulty to truly embrace its subsidiary character impedes the solid consolidation of the Court's jurisdiction.[872] This tendency of the Court is also emphasized by the recent adoption of the *conventionality control* concept.[873] This newly introduced doctrine of the Inter-American Court, indicative of its audacity and its judicial activism, puts the latter in the place of a supreme constitutional court since, pursuant to this scheme, state courts must review the compatibility of national legislation not only with national Constitutions but also with ACHR and its respected interpretation by the IACtHR. Despite the fact that this formula may serve as an additional tool in the hands of the Inter-American judge in order to foster the rule of law and democratization in the Americas, it has already fallen

[868] *Atala-Riffo* case, supra note 866, para 92.

[869] "Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation. It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case." IACtHR, *"Five Pensioners" v. Peru,* (Merits, Reparations and Costs*)*, 28 February 2003, Series C No. 98. See also on this matter DUHAIME, supra note 850, p.313.

[870] In *Castaneda- Gutman v. Mexico* in 2008, the Court reviewed Mexican laws interfering with the electoral rights of presidential candidates under Article 23 ACHR and without explicitly referring to the MoA formula it implicitly acknowledged that restricting such political rights within the limits of the American Convention is, in fact, a responsibility of the State.IACtHR, *Castañeda Gutman v Mexico* (Preliminary objections, merits, reparations and costs), 6 August 2008, Series C No 184, p.155.

[871] PINZON R., The Inter-American Human Rights System and Transitional Processes in HAMILTON M.& BUYSE A.(eds.), *Transitional Jurisprudence – The ECHR and Other Regional Human Rights Approaches to Transition*, CUP 2011, p.239, 242-3.

[872] See relatively CONTESSE, supra note 832, p.145.

[873] DULITZKY A., An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights, 50 *Texas International law Journal* 1, 2015, available at https://law.utexas.edu/faculty/adulitzky/69-inter-amer-constitutional-court.pdf .

under great criticism.[874]Combined with the already expressed hesitation of the Court to resort to the MoA formula, the conventionality control was seen by many scholars as another way to keep for itself the final word on domestic internal affairs concerning human rights issues as it intends to interfere with the domestic sovereign competence to adjudicate local cases.[875]

Within a constitutional environment that not exactly promotes interaction between national and international law, a horizontal and mechanical application or decision of non-application of the IACtHR's standards might have the adverse effects as some countries may use it so as disapply the said standards and denounce the Convention. Taking more into account the constitutional characteristics of each system (e.g concentrate of diffuse constitutional review)[876] and the overall human rights situation prevailing in the respondent State while applying the conventionality control or granting deference to the respondent State is more likely to provide fertile ground for the kind of integrative interpretation of the ACHR that the IACtHR seeks to impose.

Without exaggerating the perils associated to the stringent scrutiny that the IACtHR has opted for, we can maintain that the Court struggles to find its own path of fostering the domestic rule of law in the region. It has managed, therefore, to give extremely proactive and comprehensive responses to several topics, particularly, related to the causes of the deeply-installed impunity and injustice in the continent. However, the political and judicial backlash against the Court and the specific features of the latter's findings by the domestic judiciaries rather point towards a more dialectic pattern adjusted to the particularities of each domestic framework. In recent years, political pressure over the entire Inter-American system has strengthened. Trinidad Tobago and Venezuela have already denounced the American Convention and state discontent was powerfully expressed by Brazil, Peru and Dominican Republic posed an additional burden to the Court.[877] In any case, political hostility and lack of persuasiveness *vis-à-vis* national jurisdictions are not hardships that only the San José Court is facing. On the contrary, the ambiguity that stems from the questionable use of the MoA doctrine by the Strasbourg Court is also considered to result in an abdication by the latter in hotly debatable disputes. The ECtHR has recently responded to the expressed disapproval for

[874] MALARINO E., Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights, 12 *Int'l Crim. L. Rev.* 665, 2012.For an analysis in favour of this novel mechanism of the Inter-American focusing on its innovative aspects under international human rights law see *inter alia* MAC-GREGOR, E., *Conventionality Control the New Doctrine of the Inter-American Court of Human Rights*, AJIL Unbound, 109, 2015 available at https://www.cambridge.org/core/journals/american-journal-of-international-law/article/div-classtitleconventionality-control-the-new-doctrine-of-the-inter-american-court-of-human-rightsdiv/CC71A5517CAF78AA4F73FECEC1A041EC .

[875] RUIZ-CHIRIBOGA O., The Conventionality Control: Examples of (Un)Successful Experiences in Latin America, 3 *Inter-Am. & Eur. Hum. Rts. J.*, 2010, pp. 200-219.

[876] CONTESSE J., The final word? Constitutional dialogue and the Inter-American Court of Human Rights, 15 *ICON* 2,2017, p.424.

[877] SOLEY X. and STEININGER S., Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights, 14 *International Journal of Law in Context*, 2018, pp. 237–257; URUENA R., Double or Nothing: The Inter-American Court of Human Rights in an Increasingly Adverse Context,2018, 35 *Wis. Int'l L.J.* 398, pp. 398-425.

its inconsistent and mysterious approach of the *margin of appreciation* by explicitly incorporating[878] it in Article 1 of the new Protocol No. 15 ECHR. [879]

Yet, in the new political environment, the Inter-American Court may, indeed, benefit from affording greater trust to domestic tribunals to make the correct assessment in order to enhance their legitimacy and, by extension, the legitimacy and credibility of the IACtHR. As Follesdal correctly put it "the Doctrine may itself serve to promote democratic deliberation and independence of the judiciary, by "nudging" states to perform an independent proportionality test as a necessary condition for enjoying a margin of appreciation."[880] By the same token, the reconceptualization of the conventionality control in the sense of an inter-judicial dialogue between equals, allowing the Court to also count on domestic stakeholders for supporting a new era of human rights adjudication might be actually a *win-win* solution.[881]

It goes without saying that, the Inter-American Court, as a relatively new international tribunal and taking into account the specificities of the system, needs the support of Latin American states. Thus, embracing a less intimidating for a more collaborationist model of human rights enforcement might be proved more effective for the implementation of the Convention through encouraging reconnection with domestic judicial authorities.[882]

Ultimately, it appears that it is not only the aforementioned corpus of cases that calls for a change pertaining to the more effective application of the MoA doctrine but it is also the mere nature of the pioneer Inter-American Court as the ultimate guarantor of human rights in the Americas- which often dares to reinvent itself in order to fulfill its purpose- that points towards a more evolutive and less intrusive use of the MoA doctrine.

iii. Protecting fundamental rights in the Americas in cases of emergency

At this point of research, we should, definitely, take a look at some procedural aspects which constitute a significant part of the loans that the Inter-American Court has taken from its European peer. Hence, while times of urgency (i.e. coups, terrorist attacks or environmental damages) are more and more common in every corner of the world, human rights protection is occasionally endangered under these uncontrollable circumstances instead of being even more fortified. In this context, we should firstly, focus on the judicial behavior of the San José Court on the derogation from human rights provisions and secondly, on provisional measures.

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[878] On this matter see INGLESIAS VILA M., Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights, 15 *ICON* 2, 2017.

[879] According to the wording of Article 1 Protocol No.15 "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

[880] FOLLESDAL A., supra note 845, p.371.

[881] Bienvienisti and Downs highlighted the effects of judicial cooperation for the consolidation of democratic rule of law. BIENVENISTI E., DOWNS G., Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance, 46 *N.Y.U. J. Int'l L. & Pol*. 741, 2014, p.791.

[882]The non-use or the timid use of the said doctrine was also denounced, at a rather early stage of the Court's contentious jurisdiction, by the former president of OAS, César Gaviria. GAVIRIA C., Toward a New Vision of the Inter-American Human Rights System', 4 *Journal of Latin American Affairs*, 4, 1996, p.11.

a. The use of external soft-law instruments

Starting from the non-derogability of certain rights in times of emergency, the American Convention, just like the European one, endorses a derogation clause in Article 27(1) ACHR.[883] Following the same pattern as the ECHR, the said provision is structured in three paragraphs: the first outlines the circumstances that can be identified as amounting to an "emergency", the second enumerates the safeguards that cannot be suspended under any circumstances and the last one is dedicated to the procedural dimension of such derogation.

Hence, according to the American Convention "[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the grounds of race, color, sex, language, religion, or social origin." States parties are also required to guarantee that their national rules on states of emergency are in full conformity with all ACHR obligations and international law. Additionally, the temporary character of the measure needs to be guaranteed.

If we zoom closer to the wording of the American provision we may deduce that the drafters of the ACHR avoided apparently to use the most commonly used expression "threatens the life of the nation", selected by the drafters of the European Convention to the same end.[884] Referring solely to the *State Party* and not to the nation, the former seems to provide for a much lower threshold that the one offered by the text of the European Convention since cases in which political attacks or coups that -for instance- purport to overturn military regimes that do not fight for the nation's own benefit seem to be excluded.

Nevertheless, in the list of non-derogable rights, the ACHR contains rights that are not incorporated to the corresponding list of the ECHR, such as the judicial guarantees provided by the said instrument. The Court's standing in the famous Advisory Opinion *Habeas Corpus in Emergency Situations*[885] came to confirm the additional attention given within the Inter-American system to the judicial safeguards that reassure the full enjoyment of the core inalienable human rights. The Inter-American Court, in the said case, answered the Commission's question of whether the remedies of *habeas corpus* or *amparo* fall within the scope of Article 27 in states of emergency. Thus, the Court concluded that judicial guarantees for the protection of non-derogable rights contained in the Convention could not be suspended.

The writ of *habeas corpus* represents one of the most vital tools of the Latin –American constitutional tradition. Actually, the writ was initially introduced in the Anglo-saxon legal

[883] Conversely, analogous provision is absent form the African Charter. See on this matter SERMET L., The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion, 7 *Afr. Hum. Rts. L.J.* 142, 2007, pp. 142-161.

[884] For a thorough analysis of the language of Article 27 of the American Convention see relatively GROSSMAN C., A Framework for the Examination of States of Emergency Under the American Convention on Human Rights, 1 *Am.U.L.Rev.* 1, 1986, pp. 35-56; NORRIS R.-E and DESIO REITON P., The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the States Parties, 30 *Am.U.L.Rev.*1, 1980, pp. 189-224.

[885] See the Advisory Opinion *Habeas Corpus in Emergency Situations*, supra note 792. The legal basis of the said principle is found in Articles 7(6) and 25(1) of the American Convention on Human Rights.

systems and then, adopted by the Brazilians and integrated and proliferated within the Latin American continent.[886] *Habeas corpus* (meaning 'to produce the body') serves generally as a tool for detainees that are unlawfully or indefinitely deprived of their liberty allowing them to actually ask from national courts to issue such a writ so as the imprisoned person could actually access the court in order to challenge the administrative order of their detention. Moreover, the writ of *amparo*[887]which was given birth in the American region consists of a series of prompt and speedy judicial remedies the opportunity to individuals to raise constitutional claims against abusive actions of any state organ on the basis of all Conventional rights.[888]At this point, we should underline that regardless of its domestic echo, the writ of *amparo* was progressively enshrined in both global and regional relevant texts, namely in Article 18 of the American Declaration of the Rights and Duties of Man[889] and Article 8 of the Universal Declaration of Human Rights.[890] Under the American Convention on Human Rights, the *amparo* was laid down in Article 25[891] putting this judicial remedy at the center of the Latin-American fundamental rights protection.

Emphasizing these judicial arsenals of utmost importance, the Court, under the prism of "the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments", came to the conclusion that " '*habeas corpus'* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment."[892] Due to the intimate connection of the said

[886] See pertaining to the origins of the Writ of Habeas Corpus and its proliferation among the Latin American States ROSENN K. S., Judicial Review in Latin America, 35 *Ohio State Law Journal* 4, 1974, pp.785-819.
[887] See on the writ of *amparo inter alia* FIX ZAMUDIO H., The writ of amparo in Latin America, 13 *U. Miami Inter-Am. L. Rev*. 361, 1981, pp. 361-392; GENTILI G.,A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court, 29 *Penn St. Int'l L. Rev.* 705, 2010-2011, pp. 705-758; TSCHENTSCHER A. and LEHNER C., *The Latin American Model of Constitutional Jurisdiction: Amparo and Judicial Review*, Research Paper No. 2296004/2013, available at https://ssrn.com/abstract=2296004; SERNA DE LA GARZA J-M., *Amparo*, Max Planck Encyclopedia of Comparative Constitutional Law, September 2016, available at http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e200.
[888] In the IACtHR's words, "if the two remedies are examined together, it is possible to conclude that "amparo" comprises a whole series of remedies and that habeas corpus is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the State Parties, indicates that in some instances habeas corpus functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In order circumstances, however, habeas corpus is viewed either as the "amparo of freedom" or as an integral part of 'amparo'." Supra note 792, para 34.
[889] Article XVIII of the American Declaration of the provides that "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.".
[890] Article 8 UDHR provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.".
[891] Article 25 ACHR reads as follows "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.".
[892] Ibid., paras 35-36.

means of judicial review with the exercise of the core human rights related to the person's core substantive rights, the IACtHR confirmed that citizens of State Parties in state of emergency still enjoy their right to *habeas corpus*.[893]

Hence, the San José Court felt, even at its first steps, that relying on the wording of the Convention it should provide these safeguards with an additional safety net clarifying its rigorous stance even in emergency situations. For Davidson, it is apparent "that the Court's ideal political model in which human rights are protected and the reality of political and social organization in a number of states in the Western Hemisphere do not necessarily coincide. The names of certain totalitarian regimes and their leaders in Latin and Central America have become bywords for widespread and vicious violations of human rights. It would be surprising therefore if the Court had not recognized this reality in its work." [894]

The Court came to also elucidate the "dangerous" language of Article 27 pertaining to the threat to State party as a precondition for the suspension of human rights in times of emergency. As we previously mentioned, it occurs from the derogation clause that in the American system, a bloodless coup fighting an installed military regime could serve as a lawful ground for suspension since it might be considered as a threat to the respect for the rule of law, the constitutional order and the exercise of legitimate power. In any case, situations in which a putschist movement aiming to overturn a democratic government cannot invoke the protection provided by the provision of Article 27 as the Court explained relatively in its Advisory Opinion.

It further maintained that "given the principles upon which the Inter-American system is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from the 'effective exercise of representative democracy' referred to in Article 3 of the OAS Charter. (…) The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system."[895]

Therefore, according to the Court's approach, the principle of *effective exercise of representative democracy* pursuant to Article 3 of the OAS Charter[896] must be included in the deliberation of whether a government may invoke the suspension of guarantees clause in the ACHR. This would automatically exclude a government that is born out of a coup that ousted a democratic regime. This principle is also highly relevant in a situation where a government is menaced by a coup, as it would not allow them to take advantage of the situation to purge their political opponents or establish absolute rule.[897]

In similar cases, the ECtHR is not as rigid as we might have expected. Since 1961, when the ECtHR has enunciated the criteria of an "emergency situation" in *Lawless v.*

[893] See also the Court's Advisory Opinion OC-9/87 *Judicial Guarantees in States of Emergency*, supra note 780, para. 35.
[894]DAVIDSON, supra note 794, p.188,189. Furthermore, in the Court's words "the concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning." Supra note 792, para 26.
[895] Ibid., *Habeas Corpus in Emergency Situations*, paras 20-21.
[896] Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948.
[897] YORDAN NUGRAHA I., Human rights derogation during coup situations, 22 *IJHR* 2,2018, p.201.

Ireland,[898] the European Convention has not adopted the IACtHR's approach of 'implied non -derogable rights' when the textual basis lacks explicit reference of specific guarantees that ensure the unimpeded exercise of inalienable rights under Article 15 ECHR.[899]

For instance, this concept has been also espoused by the Human Rights Committee in the General Comment 29 pertaining to States of emergency declared on *habeas corpus,* that, as a specific element of the right to fair trial, is inherent to the principle of legality and rule of law that traverses the ICCPR as a whole. Hence, no derogation from this can be accepted. In the Commission's words "[t]he Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.(…)In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[900]

Besides the addition of judicial safeguards of *habeas corpus* and *amparo* in the sphere of the non-derogable rights, the Inter-American Court has approached boldly the realisation of the requirement of consistency of the selected measures in urgent situations with other international law obligations (Article 27(1) ACHR). For instance, during the latest decades, numerous international texts have endorsed international standards that should be respected in periods of public emergency, the UN Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights [901] and the Paris Minimum Standards[902] to name a few.

When examining the derogation of a State Party from the American Convention's provisions, the IACtHR has repeatedly invoked such international principles in order to interpret the derogation clause in line with international law. Regardless of the fact that these 'other obligations under international law' serve as subsidiary interpretative tools in the hands of San José Judges, the Inter-American Court does not hesitate to expressly refer to international soft law instruments, particularly when dealing with controversial cases emanating from brutal armed conflicts. For instance, the judicial organs of the Inter-American system have made special reference to humanitarian law texts or guidelines treating emergencies. In fact, the Commission used a double legal basis scheme in its *Juan Carlos Abella v. Argentina* case [903] since it maintained that in times of war, as it was the case in the Argentinian situation, not only Article 27 but also the humanitarian law conventions are

[898] The Strasbourg Court, in para 28, clarified the notion of "public emergency" an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed" ECtHR, *Lawless v. Ireland,* Application No. 332/57, 1 July 1961.
[899] See on the externalization of the non derogability of judicial guarantees by the Inter-American Court of Human Rights NEUMAN G., The external reception of Inter-American Human Rights Law, *Quebec Journal of International Law (Special Edition),*2011, p. 111,112.
[900] HRC, General Comment No. 29 States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev1/Add.11, at para. 16.
[901] UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4.
[902] LILLICH R., The Paris Minimum Standards of Human Rights in a State of Emergency, 79 *American Journal of International Law* 4, 1985, pp. 1072-1081.
[903] IACommHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report Nº 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997).

applicable and actually, as *lex specialis* "the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments.(…)It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other."[904]

On the same double legal basis logic adopted with regard to humanitarian legal instruments in conjunction with the ACHR, the Commission held that "[w]here there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.(…) Properly viewed, the close interrelationship between human rights law and humanitarian law also supports the Commission's authority under Article 29 (b) to apply humanitarian law, where it is relevant."[905]

Furthermore, in the famous *Las Palmeras* case[906] concerning once again the application of the Geneva Conventions of humanitarian law, the Inter-American Court followed the road taken by the Commission and reaffirmed that it could use them to assist its interpretation of the ACHR provisions. For Francesco Seatzu, the pronouncement of the Court in this judgment is interpreted as follows: "a state party that purports to derogate from obligations under the ACHR that are also required by another treaty would be in violation of both articles. Accordingly, a state could not adopt measures under Article 27 that might breach provisions in other human rights treaties to which it is a party, for example, that such other treaty encompasses no derogation provision or has a stricter derogation provision forbidding derogations from some rights for which derogation is allowed under Article 27."[907]

In spite of some inconsistencies [908] within the limits of the Latin American system on the role of soft law instruments coming from outside, the San José Court appeared hitherto more willing than its Strasbourg counterpart to encompass external legal sources to enhance its reasoning when examining claims of suspension of Convention's provisions. While analogous clause of conformity with "other international obligations" can be found also in Article 15 ECHR and reflects the general rule enshrined in Article 53 ECHR,[909] we can hardly find in its jurisprudence explicit references to external sources of international law, including hard law provisions. This tendency of the Strasbourg Court is also enriched by the "better position"

[904] Ibid., paras 159,160.
[905] Ibid., paras 165,166.
[906] IACtHR, *Las Palmeras v. Colombia* (Preliminary Objections) 4 February 2000, Series C No.67, paras 32-33. See also the most recent *Zambrano-Vélez* on the external sources of international law. IACtHR, *Zambrano-Vélez et al. v. Ecuador*, (Merits, Reparations and Costs), 4 July 2007, Series C No.166, para 51.
[907] SEATZU F., The Experiences of the European and Inter-American Courts of Human Rights with the International Standards on the Protection of Fundamental Rights in Times of Emergency in BOSCHIERO N., SCOVAZZI T., PITEA C., RAGNI C.(eds.), *International Courts and the Development of International Law*, Springer 2013, p.582.
[908] See, for example, IACtHR, *Neira-Alegría et al. v. Peru*, (Merits) 19 January 1995, Series C No.20; *Baena-Ricardo et al. v. Panama*, (Competence) 28 November 2003, Series C No 104. In these cases, the Court avoided the reference to relevant international law rules.
[909] Article 53 ECHR, under the title "Safeguard for existing human rights" provides that "[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental."

rationale, according to which national governments are in a better position of determining whether their nation is endangered and therefore, they enjoy, as previously discussed,[910]a wide *margin of appreciation* in this respect.[911]

The roots of this divergence can be sought in the different socio-political environment in which the two human rights tribunals operate as well in the general reluctance of the Strasbourg Court to even refer to external "hard law" instruments-such as the ICCPR-[912] let alone to non-binding texts on international humanitarian law.[913]

b. The provisional measures in the IACtHR case law

Pursuant to Article 63(2),[914] the Inter-American Court, in cases of extreme gravity and urgency, is entitled to issuing provisional measures[915] to combat gross human rights violations,

[910] See previous section with relation to the MoA doctrine and its origins.

[911] See the most recent ECtHR, *A and others v. the UK*[GC], Application No. 3455/05, 19 February 2009, para 180,184 and 186.

[912] ECtHR, *Branningan and Mc Bride v. the UK* [GC], Application No 14553/89, 26 May 1993.

[913] In contrast with other regional systems of human rights protection, the African Court's *rationae materiae* jurisdiction is - by default- broader according to Article 3(1) of the Protocol of the African Charter "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". In the recent judgment *Actions pour la protection des droits de l'Homme (APDH) v Mali*, the African Court made use of the jurisdictional flexibility that flows from the mere wording of the text. It, thereby, examined a contentious case revolving around the interference of the new Malian Family Code with the rights of women and children; however, not on the basis of the African Charter but on the basis of other treaties, namely the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol'), the African Charter on the Rights and Welfare of the Child (ACRWC) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). The audacity of this newly established Court might have been influenced by the boldness expressed by the ECtHR in the *Demir and Baykara v. Turkey* in which the Court applied the principles of the ESC, irrespective of the fact that Turkey has not ratified the Charter. According to the universalist approach of the European Court, the latter "in searching for common ground among the norms of international law, it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State". Supra note 266, *Demir and Baykara v. Turkey*.
This ruling opens the door for analogous pronouncements in the following years and it is expected to also encourage applicants to invoke a handful of international human rights instruments before regional Courts and even reinforce the inter-judicial dialogue among human rights fora so as greater coherence concerning universal human rights principles could be ensured. ACtHPR, *Association pour le progrès et la défense des droits de femmes maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali,* Application No. 046/2016, Judgment of 11 May 2018; BURGORGUE LARSEN L., Interpreting the European Convention: What can the African Human Rights system learn from the case law of the European Court on the Interpretation of the European Convention? 5 *Inter-Am. & Eur. Hum. Rts. J.*, 2012, p.93,94; DAVI T. , *African Court on Human and Peoples' Rights Delivers Landmark Ruling on Women's Rights and the Rights of the Child in Mali*, EJIL Talk, 27 August 2018 available at https://www.ejiltalk.org/african-court-on-human-and-peoples-rights-delivers-landmark-ruling-on-womens-rights-and-the-rights-of-the-child-in-mali/;

[914] Article 63(2) of the Convention reads as follows: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

[915] The Inter-American Commission may also order measures of preventive nature, which are called "precautionary measures" and should be distinguished from the provisional measures issued by the Court. Pursuant to Article 25(1) of the Rules of Procedure of the IACommHR, the latter may, at the request of a party or on its own initiative, request that a State takes precautionary measures to prevent irreparable harm to individuals. However, the Commission is not obliged to first request precautionary measures on its own before filing a request to the IACtHR to order provisional measures. For instance, when a State has not complied with the Commission's

the dreadful scourge of the region. In the aim of preventing irreparable damage, a situation which has been proved extremely common in Latin America, the San José Court has used provisional measures as a tool to protect especially the right to life and the right to personal (physical, mental and moral) integrity.

By all means, the issuance of measures of provisional character is not a new mechanism in international law. Almost all international treaties or conventions authorize the bodies reviewing the compliance with the relevant instruments to order provisional measures so as irreparable damage could be circumvented. The International Court of Justice (ICJ) has preceded and showed the way for the European and Inter-American Human Rights Courts. Its legacy contains the heating debate among academics on the binding -or not- nature of its provisional measures which only recently has come to an end with the ICJ's pronouncements in the seminal *LaGrand* case.[916] In the said case, the ICJ interpreted widely the term "decisions" in Article 94(1) UN Charter[917] regulating compliance with the Court's decisions so as to attribute binding force to the provisional measures issued by the Court and remedy the linguistic softness of Article 41 of the Statute of the ICJ on provisional measures [918] which fuelled this controversy on the context of the provision. Similarly, the human rights system of the CoE was also troubled with this debate of binding nature of provisional measures, as will be further discussed.

Conversely, within the Inter-American system, the matter was made clear from the very beginning since the drafters of the American Convention felt that they should not leave any ambiguity on this and laid down the provision of Article 63(2). [919] Arguably, it is absolutely indicative of the specificities that apply in this part of the world that the American Convention on Human Rights is the only international human rights instrument to expressly provide for judicially enforceable measures of provisional nature.[920]

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recommendations in other instances the Commission may refer directly to the Court so as a time-consuming procedure of non-binding precautionary measures could be circumvented.

[916] ICJ, *LaGrand Case (Germany v. United States of America)* [2001] ICJ Rep 466 , para 109.See *inter alia* KAMMERHOFER J., The Binding Nature of Provisional Measures of the International Court of Justice: the 'Settlement' of the Issue in the LaGrand Case, 16 *LJIL*, 2003, pp. 67–83; FROWEIN J. A., *Provisional Measures f by the International Court of justice - The LaGrand Case*, 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2002, available at http://www.zaoerv.de/62_2002/62_2002_1_a_55_60.pdf.

[917] Article 94(1) UN Charter provides "1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which is a party". See OELLERS-FRAHM K. 'Article 94' in SIMMA B., KHAN D-E, NOLTE G., PAULUS A.(eds), *The Charter of the United Nations-A Commentary*, Third edition,Volume II,OUP 2012, pp. 1957-1971.

[918] Article 41 of the Statute of the ICJ reads as follows 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council. See OELLERS-FRAHM 'Article 41' in ZIMMERMANN A., TOMUSCHAT C., OELLERS-FRAHM K., TAMS C.(eds.), *The Statute of the International Court of Justice. A Commentary*, 2nd Edition, OUP 2012, p.1026-1073.

[919] For the history of formulating the said article which was not initially included in the draft text of the American Convention see BUERGENTHAL T., Interim Measures in the Inter-American Court of Human Rights in BERNHARDT R. (ed.), *Interim Measures Indicated by International Courts*, Springer 1994, pp. 48-51.

[920] Pertaining to the crucial role that provisional measures play in the Latin-American landscape, Thomas Buerguenthal stressed "that is so because the system applies to a region where unlawful governmental action or inaction causing "irreparable damage to persons" is not an uncommon occurrence. The Article 63(2) remedy must thus be seen as a procedural and normative innovation that is not only capable of saving lives, but one that has already saved lives." Ibidem.

As the former President of the Inter-American Court, Antônio Augusto Cançado Trindade has noted, provisional measures under the Pact of San José go beyond the judicial formalism around this issue. In his words, "provisional measures go much further in the matter of protection revealing an unprecedented scope and determining by reason of their compulsory character – the effectiveness of the right of individual petition itself at international level: in fact, such measures besides their essentially preventive character, effectively protect fundamental rights, in so far as they seek to avoid irreparable harm to the human person as subject of the international law of human rights. In the ambit of this latter which is essentially a law of protection of the human being, provisional measures reach effectively their plenitude, being endowed with a character, more than precautionary, truly tutelary."[921]

As for the binding nature of the said measures, their conventional basis and their inclusion of the 8th Chapter of ACHR under the title "Jurisdictions and Functions" underlined the intention of the drafters to give undisputed binding force.[922] In addition to this, the drafters of the cornerstone instrument of the IAHRS interestingly opted for the clarity of the phrase "shall adopt" instead of the traditional but controversial verb "indicate" that has created so much uncertainty on this issue. Hence, having examined the common requirements of extreme gravity, urgency and irreparable damage under international human rights law, the Court is entitled to pronounce on the matter of ordering provisional measures when a case is pending before the latter or at the request of the Inter-American Commission for a case which has not yet been brought before the IACtHR. The usual procedure of the former concerns, hence, precautionary measures of non-compulsory character. The Court delivers a decision on the need-or not- to issue provisional measures assessing the situation in the light of the aforementioned criteria. This decision is not subjected to appeal.[923]

From the case law perspective, the compulsory effect of the provisional measures ordered by the San José Court has never been doubted by the State Parties that have accepted the contentious jurisdiction of the Court. Indicatively, in the famous *Hilaire et al v. Trinidad ad Tobago* [924] in which the Court ordered provisional measures to prevent the death penalty that the applicants were facing, the respondent State did not deny that it had violated the provisional measures previously issued by the Court suggesting the recognition of their mandatory value.

Regardless the different starting point that distinguished the provisional measures under the ACHR(conventional basis) from the mechanism of interim measures of the Strasbourg system(regulatory basis), [925] the Inter-American Court followed a similar pattern and managed

[921] CANCACO TRINDADE A.A., The evolution of provisional measures of protection under the case-law of the Inter-American Court of Human Rights (1987-2002), 24 *HRLJ* 5-8, 2003, p.163.
[922] BURBANO HERRERA C. and HAECK Y., Letting States off the Hook - The Paradox of the Legal Consequences following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights Systems, 28 *Neth. Q. Hum. Rts*. 332, 2010, p.336; Ibid. p.164.
[923] For an overview of the provisional measures policy of the IACtHR see PASQUALUCCI, supra note 782, p.251.
[924] IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* (Merits, Reparations and Costs), 21 June 2002, Series C No 94.
[925] The possibility of ordering provisional measures is only enclosed in the Rules of Procedure of the ECtHR in Article 39 of the Rules of Procedure of the Court. The said article reads as follows "1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim

to render such measures a significantly common and ever-evolving tool for the human rights protection in the Americas. In the spirit of the relevant case law of the Strasbourg Court on interim measures, the Inter-American Court developed, mostly in the 2000s, its jurisprudence so as to cover urgent situations that stem from expulsions, extraditions[926] or freedom of expression cases, which is a common practice for the ECtHR as well.[927]Both the human rights tribunals have expanded their jurisprudence on urgent measures taking, simultaneously, each other's case law into consideration.[928]

Thus, some traces of cross-fertilization could be detected pertaining to the issue of the provisional measures' binding force since it constituted a point of interrogation for the Strasbourg Court as well. As previously mentioned, the wording of Article 39 of the Rules of Court [929] leaves room for ambiguity on the matter which was also supported by the inconsistencies in the ECtHR jurisprudence.

In the *Cruz Varas* case, the Strasbourg blatantly abstained from affirming the binding character of the interim measures in a deportation case issued to protect from inhumane and degrading treatment under Article 13. It did so on the basis of the same uncertainty that characterizes similar rules of international law. In the Court's words "no assistance can be derived from general principles of international law since, as observed by the Commission, the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform legal rule exists."[930] Thus, the Court deduced that the binding nature of the measures under scrutiny cannot be inferred by the right to individual petition let the States to "decide whether it is expedient to remedy this situation by adopting a new

measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the [Council of Europe] Committee of Ministers. 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated. 4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.".

[926] See relatively IACtHR, *Expelled Dominicans and Haitians v. Dominican Republic*, (Preliminary Objections, Merits, Reparations, and Costs), 28 August 2014, Series C No. 282; *Community of San Jose de Apartado v. Colombia* (Order), 24 November 2000, Series E No 2.

[927] For a general overview of interim measures ordered by the Court see the Factsheet of the ECtHR on Interim Measures published in February 2018 available at https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf ; BURGORGUE-LARSEN L., Interim Measures in the European Convention System of protection of Human Rights, 2 *Inter-Am. & Eur. Hum. Rts. J*. 99, 2009, pp. 99-118.

[928] In a parallel manner, the analogous question of binding nature of provisional measures has arisen-albeit timidly- in the purview of the African human rights system. See on the matter JUMA D., Provisional measures under the African Human Rights system: the African Court's order against Libya, 30 *Wisconsin international law journal* 2, 2012, pp. 366-367.

[929] Rule 39 provides as follows: "1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated. 4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."

[930] ECtHR, *Cruz Varas and Others v. Sweden*, Application No. 15576/89, 20 March 1991, para 101.

provision notwithstanding the wide practice of good faith compliance."[931]Some years later, the Court remained faithful to its approach in relation to its own interim measures in the *Conka* case[932] until its spectacular *revirement* on the matter in the famous *Mamatkulov* judgment.[933]

In the latter the judges of the Court felt ready to endorse the *LaGrand* principles as well as the Inter-American Court's position to support its complete opposition to the *Cruz Varas* standing. Relying on the *living instrument* doctrine and on the preservation of the right to individual petition, the Strasbourg Court managed to build up on its credibility and authority *vis-à-vis* the Contracting parties as it explicitly declared the mandatory force of the interim measures issued by the Court. In the case at hand, the two Uzbecks nationals, both arrested by the Turkish authorities were later extradited in Ouzbekistan on the basis of a bilateral convention on extraditions between the two states despite the decision on interim measures issued by the President of the ECtHR (Article 39 Rules of Procedure) to prevent the extradition of the applicants. Besides the substantial grounds that amounted to the violation of Article 3 ECHR due to serious risk of torture or inhuman/degrading treatment in case of extradition to their home country,[934] the non-compliance to the Court's interim measure as well as the lack of contact with their legal representatives resulted in a violation of the ECHR since their extradition severely undermined the applicants right to individual petition.[935] The Court emphasized the vital role that the interim measures played in avoiding irreversible damage being caused that would prevent the Court from properly examining the applicants' claims and therefore, would hinder them in enjoying; in effect, the ECHR's rights.

Importantly, the Strasbourg Court managed to overcome its traditional hesitations with relation to the use of external legal sources and referred in length not only to the ICJ's standing on the matter but also to its Latin-American peer.[936] In the Court's words, "[i]n various orders concerning provisional measures, the Inter-American Court of Human Rights has stated that in view of the fundamental objective of the American Convention on Human Rights, namely guaranteeing the effective protection of human rights, "States Parties [had to] refrain from taking actions that may frustrate the *restitutio in integrum* of the rights of the alleged victims"

[931] Ibid., para 102.
[932] ECtHR, *Čonka v Belgium*, Application No. 51564/99, 5 February 2002.
[933] ECtHR, *Mamatkulov and Abdurasulovic v. Turkey,* Application No. 46827/99, 46951/99, 6 February 2003. The findings of the Chamber were, subsequently, reiterated in the Grand Chamber judgment ECtHR, *Mamatkulov and Askarov v. Turkey*,[GC] Application No. 46827/99; 46951/99,4 February 2005.
[934] See also the seminal *Soering v. the United Kingdom* case of the Strasbourg Court in which the applicant invoked that he suffered *death row conditions* which constituted, in the Court's words, inhuman treatment in the sense of Article 3 ECHR. ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88, 7 July 1989.
[935] TIGROUDJA H., La force obligatoire des mesures provisoires indiquées par la Cour européenne des droits de l'homme, 3 *RGDIP* 2003, pp. 601-633.
[936] See supra note 933, paras 50-53. However, the use of international jurisprudence as an additional yardstick legitimizing its reasoning does not seem convincing for some scholars. For instance, Hélène Trigoudjia stressed, in this respect, that "La comparaison avec la pratique interaméricaine est encore moins justifiée. Certes, les juridictions européenne et interaméricaine agissent bien dans un même type de contentieux, mais là encore la différence fondamentale qui existe entre les Conventions européenne et interaleéricaine sur la question des mesures provisoires interdit tout emprunt des raisonnelents des organes interaméricains. L'article 63§2 de la Convention de San José reconnaît expressément à la Cour le pouvoir d'*ordonner* (et non simplement «indiquer» des mesures provisoires. Leur force contraignante n'a jamais été contesté par les Etats. Dans l'affaire Hilaire et autres, l'Etat ne conteste pas qu'il leur reconnaît bien une valeur obrigatoire." Ibid. p.615.

(see the orders of 25 May and 25 September 1999 in James et al. v. Trinidad and Tobago)"[937] and having said all the above, the Grand Chamber concluded that il flows from the examination of the appraisal of all the previously cited jurisdictions that "(…)whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending (see, mutatis mutandis, *Soering*, cited above, p. 35, § 90)". [938]

At this point, we need to remark that one of the benchmarks of the Inter-American Court's case law on provisional measures is the *pacta sunt servanda* rule of international law. As the Court has noted in *James and others v. Trinidad and Tobago,* it also applies to the procedural elements of an international obligation, connecting, thus, the issue explicitly with the attribution of international responsibility to the State. [939] Nevertheless, the San José appeared, to date, reluctant to derive a violation of an individual right from the refusal of a State to comply with binding provisional measures.[940] Paradoxically, the Court abstained from dealing with the disrespectful attitude of States in cases in which provisional measures have been ordered before the Court and examined the case on the merits.It has contented itself to state that "this situation is aggravated because the victim was protected by Provisional Measures ordered by this Tribunal, which expressly indicated that his execution should be stayed pending the resolution of the case by the Inter-American human rights system." [941] Hence, the State's failure to successfully implement the provisional measures does not amount to a separate violation of the right to petition under the American Convention as it is the case of the ECHR system following to the *Mamatkulov* jurisprudence.

A potential justification of the Court's standing could lie on the Commission's competence to request from the Court to adopt such measures. In that sense, it cannot be said that the right to individual petition of the beneficiaries of provisional measures is breached.[942] If the Court, following to an order of provisional measures, pronounces on the contested dispute without concluding to a violation of a substantial right, the potential non-compliance of the State with the said order remains totally unpunished.This position seems to soften the figure given to such measures by the San José Court on the basis of the conventional guarantees.Thus, the effective protection of individuals-beneficiaries of provisional measures from irreparable damage under the ACHR appears *theoretical and illusory,* which is exactly the case that the ECtHR has repeatedtly attempted to avoid. It goes without saying, therefore, that the standing of the Inter-American Court favouring State's latitude also contradicts with its refusal to leave some leeway to the States in less grave cases as the non-use of the MoA doctrine by the same Court has already revealed.

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[937] Ibid., para 116; DE SCHUTTER O., The Binding Character of the Provisional Measures adopted by the European Court of Human Rights, 7 *Int'l L.F. D. Int'l* ,2005, p.21.
[938] Ibid. para 124.
[939] See IACtHR, *James et al v. Trinidad Tobago* (Order for provisional measures) 28 February 2005*;* supra note 924, para 38.
[940] This reluctance is easily detected in IACtHR, *Bamaca Velasquez v Guatemala* (Merits) 25 November 2000, Series C No. 70, paras 65-70. However, the Court, with its order, maintained the provisional measures. IACtHR, *Bamaca Velasquez v Guatemala* (Order of Provisional Measures) 27 June 2009, Series C No 194; IACtHR, *Luisiana Rios and Others v Venezuela*, 28 January 2009, Series C No 194, paras 57-59 and 125.
[941] Ibid., para.198.
[942] See PASQUALUCCI, supra note 782, p. 293.

To conclude, as Burbano Herrera and Haeck correctly put it "unlike the road travelled by the current and former supervisory organs under the European system, which, since they started to function, have only after strong and lengthy legal debate developed interesting opinions and judgments with regard to the legal force of provisional measures, none of this can be found in the Inter-American system."[943]

In any case, as the Strasbourg Court stated, in every judicial system, the proper administration of justice -national or international- implies the possibility of indicating measures with suspensive effect so as all human rights claims can be safely brought before the Court with particular vigilance when there is serious risk of irreparable damage.[944] It remains to be seen, hence, if the Inter-American Court can truly draw from the Strasbourg's *revirement,* since it has all the necessary tools to do so.

b) The vertical perspective

i. *The consolidation of free speech in the Americas: The influence of ECtHR*

In a region that the consolidation and preservation of democratic values is of utmost importance, the jurisprudential evolution of the Strasbourg Court in relation with the thorny issues of political speech, the role of journalism and prior censorship, undeniably, constituted the cornerstone of the Inter-American Court case law on this matter. Under international law,[945] the freedom of expression is a multidimensional right as it contains the freedom of political and journalistic speech, artistic expression, the right to information and some positive obligations of the States as well. The American Convention embodies freedom of expression in Article 13 ACHR[946] in a more descriptive and expansive manner than the ECHR setting

[943] BURBANO HERRERA and HAECK, supra note 922, p. 356.

[944] Gérard Cohen-Jonathan recalls the very essence of provisional measures stating that "[o]rdonner des mesures conservatoires est un pouvoir inhérent à toute fonction de caractère judiciaire, et correspond au droit de chacun à un tribunal et à un procès equitable qui soit effectif sur le plan national et européen. Comment veut-on alors que, dans ces conditions, les mesures conservatoires jugées indispensables par le tribunal ne soient pas revetûes de la force obligatoire?" COHEN-JONATHAN G., Sur la force obligatoire des mesures provisoires-L'arrêt de la Grande Chambre de la Cour Européenne du 4 février 2005, *Mamatkulov et Askarov contre Turquie,*109 *RGDIP* 2, 2005, p.434.

[945] American Declaration incorporates freedom of expression in Article IV; Universal Declaration in Article 19; ICCPR in Article 19; European Convention in Article 10, Arab Charter in Article 32, African Charter in Article 9; EU Charter in Article 11.

[946] Article 13 ACHR reads as follows: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any

explicitly the limits of the allowed restrictions within the enjoyment of the said freedom. Within the entire Inter-American system freedom of expression is given particular attention not only under the Inter-American Democratic Charter[947] but it is also embodied in the Declaration of Principles on Freedom of Expression, adopted in 2000.[948]

Most importantly, the duality of the freedom of expression is the aspect that gives to this right its crucial role within a democratic regime. This duality is manifested since freedom of expression consists, firstly, of the right to hold an opinion and to share information and ideas "of all kinds". Further, the freedom equally guarantees the right to "receive" such information— and, to "seek" it making a uniquely emphatic reference to the right to seek State-held information. Hence, setting forth this collective strand of freedom of expression, the drafters of ACHR attempted to establish that the right is not only addressed to those purporting to disseminate opinions or information but also to the public audience as a whole who deserves to take note of information affecting the daily life of individuals.

In the light of the robust safeguards that the ECHR and the Strasbourg's jurisprudence, the San José Court adopted the dual function of this right even more generously. At first, in the context of the individual dimension, the Inter-American seized the opportunity to manifestly declare the fundamental role of journalistic speech in a democratic society in a number of cases just like its European peer. According to the well-established case law of the European Court of Human Rights, "[f]reedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. (…)These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[949]

In order to serve such a role, media should be protected not only as far as the content of the information disseminated is concerned ; the means through which such information is channeled is also covered by the protection offered by the ECHR. Aside the limits of journalistic speech with regard to reputational rights and the right to private life,[950] the decisive role of media within a democratic framework is the one that allows tolerance and

grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

[947] The Inter-American Democratic Charter was adopted by the member states of the OAS at a special session of the General Assembly held on September 11, in Lima, Peru, 2001. OAS, General Assembly, Inter-American Democratic Charter, 11 September 2001. OEA/Ser. P/AG/RES. 1 (XXVIII-E/01).

[948]Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular period of sessions, held from October 2 to 20, 2000 and adopted in 2000.

[949] See, in this respect, the reasoning of the ECtHR in ECtHR, The *Sunday Times v. The United Kingdom* Application no. 13166/87, 26 November 1991, para.50; *Goodwin v. the United Kingdom*, Application no. 28957/95, 11 July 2002, par.39; *Bladet Tromso and Stensaas v. Norway*, Application No. 21980/93, 20 May 1999.

[950] VOORHOOF D., Freedom of Expression versus Privacy and the Right to Reputation How to Preserve Public Interest Journalism in SMET S., BREMS E.(eds.), *When Human Rights Clash at the European Court of Human Rights Conflict or Harmony*?, OUP 2017, pp.148-170.

broadmindness pertaining to a certain exaggeration when it comes to transmission of information that might offend, shock or disturb.[951]Journalistic sources are also covered by the scope of the Convention's provision so as the press could be freely expressed and proceed to the necessary revelations related to issues of general interest promoting, hence, transparency in public and political life.[952] Thus, under Article 10 ECHR, whose field of application was enlarged through the jurisprudential evolution of the Strasbourg Court, media enjoy a widely exercised freedom of expression. As a result, the ECtHR remains apt to effectively review governmental actions and put pressure to States pertaining to the collective aspect of freedom of expression in the sense of the right to have access to State-held information and to demand disclosure of such information from state organs.

Since in the American continent, journalists are frequently in a vulnerable position being intimidated or even persecuted, more and more cases concerning the freedom of the press were brought before the Inter-American Commission and recently, before the Inter-American Court.[953] Naturally, the IAHRS saw these cases in the light of the safety net offered by the ECtHR to journalists taking into account the ever-evolving conditions of the public debate nowadays.

Both the Commission and the Court have been proved quite over-protective towards the unhindered function of the press issuing precautionary or provisional measures in order to immediately tackle situations in which journalists are found kidnapped or even murdered. [954]The Inter-American Court, in its landmark decision *Ivcher Bronstein v. Peru*, [955]reiterated the dual nature of the said right and declared that " (…)[t]he importance of this right is further underlined if we examine the role that the media plays in a democratic society, when it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions. Furthermore, it is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their function comprehensively, because it is they who keep society informed, and this

[951] ECtHR, *Lingens v. Austria,* Application No. 9815/82, 8 July 1986, par.41. In the *Radio France* case the Court reiterates its position on the broad limits of the media highlighting that "(…)the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, for example, Bladet Tromsø and Stensaas, cited above, § 65, and Colombani and Others, cited above, § 65). Nevertheless, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see, in particular, Bladet Tromsø and Stensaas, cited above, § 59). Moreover, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas", ECtHR, *Radio France v. France*, Application No. 53984/00, 30 March 2004 par. 37.
[952] ECtHR, *Sanoma Uitgevers B.V. v. The Netherlands*, Application No. 38224/03, 14 September 2010, par.100.
[953] From a very early stage, in the context of its advisory competences, the Inter-American Court underlined the role of the media as the most important manifestation of freedom of expression which, according to the language of the Court, constitutes the *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. See supra note 779, paras 70,71.
[954] See *inter alia* IACommHR*, Sánchez Cerezo v. Mexico,* Precautionary Measures 5/ 15, (2015)*;* IACtHR, *"Globovisión" Television Station v. Venezuela,* (Order of Provisional Measures) 4 September 2004*; Luisiana Ríos et al. v. Venezuela*,(Order of Provisional Measures) 8 September 2004.
[955] IACtHR, *Ivcher Bronstein v. Peru*, (Merits, Reparations, and Costs), 6 February 2001, Series C, No. 74. The Court reiterated its findings and its emphasis on free press in the more recent IACtHR, *Vélez Restrepo and family v. Colombia*, (Preliminary objection, merits, reparations and costs), 3 September 2012, Series C No.248.

is an indispensable requirement to enable society to enjoy full freedom."[956] As for the role that pluralism plays within a democracy, it goes without saying that the standing of the Strasbourg judges in similar cases constituted the principle source of inspiration for its American colleagues.[957]

In any case, the added value of the Inter-American system is the explicit prohibition of prior censorship which was deemed necessary by the drafters of the American Convention.[958]If we examine closely the political history of the region, it is not surprising that the leading case on this matter was brought against Chile. The latter is one of the Latin American states where the transition from a brutal authoritarian regime to a well-functioning democracy in the 90s was, in fact, a rather difficult task. Actually, this transition was, unfortunately combined with the proliferation of judicial censorship of films, books, plays or television programs on an every-day basis. The *ratio* of such measures was the national doctrine of the Chilean courts according to which the right to honour prevails over freedom of expression when those two rights are clashing.[959] Naturally, the Inter-American Court seized the opportunity to grapple with this issue in the landmark decision, *Olmedo Bustos et al v Chile*[960] also known as *The Last Temptation of Christ.* The present case[961] concerned the well-known film of Martin Scorsese which was censored on the basis of the Chilean Constitution for the moral protection of children. The Court shed light to the notion of prior censorship prohibition and the limits within which the exceptions under the American Convention are to be applied. In paragraph 70, the Court held that "[i]t is important to mention that Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents. In all other cases, any preventive measure implies the impairment of freedom of thought and expression".[962]

Against this background, the Court, in the general context of the existing system of prior censorship in Chile which allowed the banning of the film, the actual decision in the instant case was not, in principle, rooted on the exception allowed by the Convention but on

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[956] Ibidem, paras 149,150.

[957] In *Perozo et al. v Venezuela* the wording of the Inter-American appears as a "loan" from the famous description given by the ECtHR in *Handyside* of the actual function and impact of the freedom of expression within a democratic society and the risks of wide restrictions of freedom of expression. See IACtHR, *Perozo et al. v. Venezuela*, (Preliminary Objections, Merits, Reparations and Costs), 28 January 2009, Series C No. 195, par.116 in comparison with the *Handyside* judgment of the ECtHR, *Handyside v. the United Kingdom*, Application No. 5493/72, 7 December 1976, para. 49.

[958] Article 13(2) ACHR is worded as follows "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.". Paragraph 4 of the said Convention also provides that "[n]otwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence."

[959] BURGORGUE-LARSEN L., UBEDA DE TORRES A., The right to the freedom of thought and expression in BURGORGUE-LARSEN L., UBEDA DE TORRES A.(eds.), *The Inter-American Court of Human Rights-Case Law and Commentary*, OUP 2011, p.549.

[960] IACtHR, *Olmedo Bustos et al v. Chile* (The Last Temptation of Christ), (Merits, Reparations and Costs), 5 February 2001, Series C No.73.

[961] For a general overview of this leading case pertaining to prior censorship see McCORMICK J., "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile, 38 *Loy. L.A. Int'l & Comp. L. Rev.* 2016, pp. 1189-1203.

[962] Ibid., para 70.

the "name of [°] Jesus Christ" and of "the Catholic Church "[963]which was dishonoured according to the allegations of the applicants before the national Courts of Chile. Further, the Court restrictively applied the exception related to prior censorship whose prohibition is the rule and not the exception. In this sense, for the judges of the Court the morals of childhood could be easily protected by the authorities by taking less restrictive measures than prior censorship- for instance to ban the entrance of children to the cinemas where the film was played.

Taking into account all the above, the Court concluded to an infringement of Article 13 ACHR. Notably, it seized the chance to rule on the attribution of international responsibility to the State arising from decisions of the judicial authorities since the Chilean government alleged that the violation of freedom of expression in the present case was not attributable to the state on the basis of the non-interference of the executive. In particular, the Court clarified that "the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State, in violation of the norms of international human rights law engages the international responsibility of the State. In this case, it was engaged because article 19(12) of the Constitution establishes prior censorship of cinematographic films and, therefore, determines the acts of the Executive, the Legislature and the Judiciary."[964]Hence, according to the Court's holding the specific position of the actor does not mitigate or affect the determination of the State's responsibility. [965] Following to this groundbreaking decision on prior censorship, Chile was forced to proceed to a Constitutional reform so as to protect freedom of expression as enshrined in the ACHR.

However, we should not neglect the fact that the extreme measure of prior censorship, as it may be, cannot be entirely excluded within the meaning of Article 13(3) of the American Convention. In this regard, according to Amaya Úbeda de Torres "strict adherence to the principle of no prior censorship may become problematic, as the existence of special circumstances could require restriction of this principle. Examples of such circumstances include emergency situations, such as threats to national security or public order, and situations that threaten other rights. Although the Inter-American Commission and Court do not normally deal with cases in which two rights or interests must be balanced, faced with this kind of situation, they will have to evaluate the possibility of considering valid limitations to the prior censorship principle."[966]In any case, to date, the Court has pronounced on such a sensitive matter in up-front censorship cases, which have not touched the limits of the exceptions on the grounds of national security or public order. Against this background, it remains surprising that

[963] Ibid., para 71.
[964] Ibid., para 72.
[965] See on this matter PASQUALUCCI J., supra note 782, p. 183; For a detailed analysis of the IACtHR's standing on the attribution of international responsibility arising from human rights violations which is greatly invoked by the Court in its attempt to foster the effectiveness of human rights in the region see *inter alia*, RIVIER R., supra note 791, pp. 740-761.
[966] ÚBEDA DE TORRES A., Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights, 10 *Human Rights Brief* 2 ,2003, p. 6-9, 12.

the IACtHR saw several cases related to the renewal of television station's license[967] or the persecution of journalists through the lens of "indirect" restrictions pursuant to Article 13(3)[968] bypassing, thus, the potential link of those cases to prior censorship.[969]

From the Strasbourg Court's perspective, a similar loud prohibition of practices constituting prior censorship does not exist. Therefore, the European Court examined the imposition of *prior restraints* to the press in the light of the general provisions of Article 10(2) ECHR pertaining to the legitimate restrictions to the freedom of expression.[970] Initially, the Strasbourg Court dealt with such cases in two similar cases against the UK, namely the *Sunday Times (No. 2)*[971] and *Observer and Guardian* .[972] These cases concerned the general imposition of a permanent injunction restraining the British newspapers from any further domestic publication of extracts from a book telling the story of a former member of the British Security Service for the protection of national security. The Court held that "does not in terms prohibit the imposition of prior restraints on publication (…) the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[973] Subsequently, the Court has reiterated its standing regarding prior restraints on publications in several cases.[974]

Aside from the individual dimension of freedom of expression, as earlier discussed, the collective strand of the right constitutes another crucial aspect whose social impact is beyond any doubt. Therefore, the American Convention also provides explicitly for the right and freedom to seek, receive and impart information and ideas of all kinds,[975] and most importantly, of the State-held information not only for the sake of individuals but also for the

[967]IACtHR, *Granier et al. (Radio Caracas Television) v. Venezuela*, (Preliminary Objections, Merits, Reparations, Costs), 22 June 2015, Series C No. 293.
[968] Supra note 955, *Vélez Restrepo and Family* judgment; *Cepeda Vargas v. Colombia*, (Preliminary Objections, Merits, Reparations, and Costs), 26 May 2010, Series C. No. 213.
[969] In this spirit, "[t]he Court, then, avoids an expansive concept of censorship, likely because the consequences are severe: censorship almost always violates Article 13, and States cannot escape responsibility by arguing a "legitimate" objective or the presence of mitigating circumstances." ANTKOWIAK T., GONZA A., *The American Convention on Human Rights -Essential rights*, OUP 2017, p.245.
[970] For a detailed analysis of the protection with regard to freedom of expression with particular emphasis to the rights of the press under the ECHR see VOORHOOF D. et al. et al and Mc GONAGLE T. (Ed. Sup.), *Freedom of expression, media and journalists, Case-law of the European Court of Human Rights*, IRIS Themes Vol. III, European Audiovisual Observatory, Strasbourg, 2015.
[971] ECtHR, *The Sunday Times v. The United Kingdom* (No. 2), Application No. 13166/87, 26 November 1991.
[972] ECtHR, *Observer and Guardian v. The United Kingdom*, Application No. 13585/88, 26 November 1991.
[973] Ibid., para 60.
[974]See among others, ECtHR, *Ekin Association v. France*, Application No. 39288/98, 17 July 2001*; Editions Plon v. France*, Application no. 58148/00,18 March 2004; *Ürper a.o. v. Turkey*, Applications Nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20 October 2009; *Mouvement Raelien Suisse v. Switzerland*, Application no. 16354/06, 13 July 2012. See also on that matter STAVRINAKI T., Article 10-Freedom of Expression in SICILIANOS L.-A. (general editor), *The European Convention on Human Rights- 2nd edition, Commentary by Article, Rights –Admissibility-Just Satisfaction- Execution* [in greek], Nomiki Vivliothiki 2017, pp.503-517.
[975] Article 13(1) ACHR provides that "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

public interest. This strand of the American perception of freedom is well-described in the famous *Claude Reyes* judgment[976] of the Inter-American Court.

With its relatively recent ruling, the IACtHR became the first international court to recognize the right to access to public information as a fundamental human right protected by human rights treaties that require states to comply with its positive obligations in this respect. In this case, Marcel Claude Reyes, the main claimant asked for information from Chile's Foreign Investments Committee on the Río Cóndor project, a forestry exploitation plan since the environmental impact of the latter was under discussion. However, he received only a part of the information requested. The Court, with regard to this dimension of free expression manifested that Article 13 "by expressly stipulating the right to "seek" and "receive" "information," protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case." [977]The Court also took a further step and underlined that "[t]he information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied." Hence, the Court, at this point, offered a broader interpretation than the one given by its Strasbourg peer in this respect. Particular emphasis was also given to the social impact of the right to seek State-held information since according to the judgment "[t]he delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."[978]In the context of a democratic society, the Court stated that national authorities "are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions."[979] Naturally, on the basis of inadequate information unjustifiably offered -or not- by the Chilean authorities to the petitioner the Court concluded to a violation of Article 13ACHR. [980]

The Inter-American Court has, thus, significantly extended the scope of application of Article 13 enhancing the protection provided under its umbrella. Interestingly enough, the IAHRS has also incorporated in the field of this right the principle of *habeas data*, [981] namely

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[976] IACtHR, *Claude Reyes et al. v. Chile*, (Merits, Reparations, and Costs), 19 September 2006, Series C No. 151.
[977] Ibid., para 77.
[978] Ibidem.
[979] Ibid., para 92.
[980] See for this case and for a general overview of the right to seek State-held information IACommHR, *The Inter-American legal framework regarding the right to access to information*, Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12, 2nd Edition, 7 March 2011, available at https://www.oas.org/en/iachr/expression/docs/publications/2012%2009%2027%20access%20to%20information%202012%20edits.pdf.
[981] IACtHR, Report on Terrorism and Human Rights. OAS/Ser.L/V/ll.116, Chapter III, Section E, 22 October 2002 available at: http://www.cidh.oas.org/Terrorism/Eng/toc.htm; See also on this matter BURGORGUE-LARSEN L. and UBEDA DE TORRES A., supra note 959, p.546 ; It is absolutely indicative that the Special

the right of individuals to have access to their personal data.[982] In that way, it actually interlinked two fundamental rights that are traditionally clashing in the human rights legal practice at both national and international level. For the IACtHR which does not acknowledge the enjoyment of free expression to legal persons,[983] the right to privacy of the investor in this case - since the confidentiality of business data was the basis of the Company's argument- comes second when the right to access government-held information is on the table.[984]

According to the well-established practice under international human rights law, freedom of expression, as a non-absolute right, is subjected to restrictions when necessary.[985] It goes without saying that the peaceful and unobstructed enjoyment of the right to express oneself freely might be in conflict with the exercise of other fundamental rights such as the right to have one's honour respected and one's dignity recognized (Article 11 ACHR) and the right to private and family life (Article 17 ACHR). The two main categories of restrictions laid down therein echo, to a great extent, the permitted limitations under the ECHR, and are based

Rapporteur for Freedom of Expression in its annual report of 2001 also recommended "the promulgation of laws permitting access to state-held information and supplemental provisions regulating the exercise of such access, as well as the promulgation of laws providing for the right of individuals to obtain access to personal data through the action of habeas data, taking international standards into account in this regard." IACtHR, Annual Report 2001, Report of the Office of the Special Rapporteur for Freedom of Expression, Chapter III, OEA/Ser/L/V/II.114 doc. 5 rev. 16. April 2002. Vol. II.

[982] However, the legal basis upon which the right to personal data lies under the ECHR is Article 8 establishing the right to private and family life. Within the field of application of Article 8, the Strasbourg Court developed its data protection jurisprudence, as discussed in Part I of this dissertation. On the contrary, according to the Special Rapporteur "[a]lso, it is interesting to note that the right of access to state-held information is recognized more explicitly in the Inter-American System than in the European Human Rights System. Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the European Convention"), says: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The word "seek" is absent from this formulation of the right to free expression.(…) But despite this difference, the European Court has held in two recent cases that individuals do have the right to access state-held records, grounding it in the right to private or family life instead of the freedom of expression. Article 13 of the American Convention, by contrast, explicitly protects the "freedom to seek, receive and impart information and ideas of all kinds."(…) Given that the freedom to receive information should prevent public authorities from interrupting the flow of information to individuals, the word seek would logically imply an additional right." Ibid., para. 28.

For the Strasbourg Court's perspective see ECtHR, *Leander v. Sweeden*, Application No. 9248/81, 26 March 1987; Nevertheless, the Court built up its positive obligations doctrine under Article 8 ECHR and specifically, the positive obligation of the State to provide access to information when it comes to environmental cases. See for instance ECtHR, *Guerra v.UK*, Application No. 14967/89, 19 February 1998.

[983] Only individuals can enjoy rights protected under the American Convention. As a result, the media- ranging from the written press to television or radiovisual companies- cannot as such submit a complaint to the Commission invoking infringements of their press rights as enshrined in the ACHR. Access to the judicial remedies within the Inter-American system is solely permitted to journalists or members of the press in general.

[984] As Sarah Joseph correctly put it "clearly, investor interests (including, arguably, its human rights, if one believes that companies have human rights) in this case gave way to countervailing human rights." JOSEPH S., Trade law and Investment law in SHELTON D.(ed.), *The Oxford handbook of International human rights law*, OUP 2013.,p.13; KARAMANIAN S., Human Rights Dimensions of Investment Law in DE WET E. and VIDMAR J. (eds), *Hierarchy in International Law: The Place of Human Rights,* OUP 2012, p.243

[985]Article 13(2) ACHR reads as follows: "The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals."

firstly, on the reputational rights of others and secondly, on the protection of national security, public order or public health or morals. [986]

To date, the San José Court has mostly touched upon freedom of expression cases where the said right should be weighted up with the reputational rights of individuals or public officials invoking defamation. Most importantly, the Court has approached the matter of limitations with great caution,[987] especially, as far as journalistic speech is concerned given the significance of the role of press within a democratic society, as previously discussed. However, in the Court's words in the famous *Kimel* case [988] "journalists have the duty to verify reasonably, though not necessarily in an exhaustive manner, the truthfulness of the facts supporting their opinion. Therefore, it is valid to claim equity and diligence in the search for information and the verification of the sources… (…)Therefore, journalists have the duty to keep a critical distance from sources and match the information against other relevant data."[989]

The *Kimel* case concerned the conviction of Eduardo Kimel, a historian and a journalist for a publication criticizing the actions of the national judiciary during the military dictatorship in Argentina. The Inter-American Court felt that it should apply the proportionality test to ascertain whether a restriction to free expression is acceptable in the name of the protection of the reputation and honour of the judges targeted in the book authored by Mr Kimel. After having explained how *information pluralism* works in a democracy and taking into consideration the equity which must *governs the flow of information*, the Court concluded that strict proportionality criteria must apply.

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[986] Article 13(5) sets also forth some explicit limitations pertaining to war propaganda and hate speech. More specifically it provides that "[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law." Nevertheless, the Inter-American Court has not pronounced yet on such sensitive issues already brought before the ECtHR, profoundly, for historical reasons. Since the drafters of the American Conventions opted for specific conditions under which propaganda or hate speech could provide a legitimate justification for a limitation to free expression, the possibility for a broader interpretation of the aforementioned provision is rather dubious. It should be noted that the ECtHR sometimes saw the hate speech cases under the scope of Article 17 prohibiting the abuse of rights embodied in the Convention since it excluded these cases *per se* from the protection under Article 10(1) and thus, denied to examine whether there is room for a permissible restriction according to the second paragraph of the said provision. See relatively the controversial ECtHR, *Jersild v. Denmark* [GC], Application No. 15890/89, 23 September 1994. For an overall analysis of the "corrections" of the Strasbourg Court on the matter see also the Factsheet of the ECtHR on hate speech, February 2018, available at www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf ; TULKENS F., *When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, European Court of Human Rights – European Judicial Training Network Seminar on Human Rights for European Judicial Trainers, July 2015, available at http://www.ejtn.eu/Documents/Administrative%20Law%202015/5)%20ECtHR%20for%20Judicial%20Trainers/ECtHR%20and%20hate%20speech%20(paper).pdf ;With regard to the interconnection of Article 17 ECHR and Article 10 see SHELTON D., Balancing Rights and responsibilities: Human Rights Jurisprudence on Regulating the Content of Speech in WAHLGREN P.(ed.),Human Rights: Limitations and Proliferation, 55 *Scandinavian Studies in Law* 2010. p.222-225.

[987] Speaking of restrictions, we should not sidestep the interpretational guidelines provided by the American Convention in Article 30 establishing that "the restrictions, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

[988] IACtHR, *Kimel v. Argentina* (Merits, Reparations and Costs), 2 May 2008, Series C No. 177.

[989] Ibid, para. 79.

Hence, the IACtHR held that it should "i) verify whether the legal definition of the crime of defamation affected the strict legality which is to be observed when restricting the freedom of thought and expression by means of criminal proceedings; ii) examine whether the protection of the reputation of judges serves a legitimate purpose, in accordance with the provisions of the Convention and determine, if appropriate, the suitability of a criminal penalty in order to achieve the purpose sought; iii) assess whether such measure is necessary, and iv) examine the strict proportionality of such measure(…)"[990] In doing so, notwithstanding the fact that according to the wording of the decision there is still room left for criminal libel laws to be viable under more protective standards,[991] the Court made clear its pedagogic nature and described analytically that a limitation to a provision of the Convention can be compatible if it respects the four abovementioned conditions. Those four stages of the proportionality test under the American Convention- instead of three under the ECHR- indicate the willingness of the Court to minimize the potential restrictions to the absolutely necessary. It is within the context of this last condition of *stricto sensu* necessity that the principle of proportionality applies[992]according to the reading of the Strasbourg Court, whereas for the Inter-American Court of Human Rights the necessity of the measure under scrutiny (third condition) is distinct from its proportionality (which constitutes clearly the fourth condition) and has to be reconciled with respect to the aim pursued .

Needless to say that the Inter-American Court relied on the case law of its Strasbourg peer in order to build its jurisprudence when it has to rule upon permissible limitations of the rights under discussion. The Court had, already, reiterated its source of inspiration and indicated the path that it was willing to take in *Herrera –Ulloa.*[993]It thus clarified the content of the necessity imposing the measure and embodied, once again,[994]the concept of pressing social need holding that "in its interpretation of Article 10 of the European Convention, the European Court of Human Rights ruled that "necessary," while not synonymous with "indispensable," implies "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable.""[995]

In the same year, this tendency of the Court was reaffirmed in several freedom of expression cases. For instance, the same road was also taken in the *Uson Ramirez,*[996]a case which concerned the right to protect the honour of armed forces, in the classic *Tristan Danoso*

[990] Ibid., para 58.

[991]As Eduardo Andrés Bertoni correctly stated "In obiter remarks at [78], the Court notes that the use of criminal law against certain expressions and opinions may not be contrary to the Convention and signals that the introduction of an actual malice doctrine and shifting of the burden of proof may be sufficient to "cure" criminal libel laws. This obiter dictum is unfortunate because it could be read as contradicting the rest of the decision." BERTONI E-A., The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expressions standards, 3 *EHRLR*, 2009, p.344.

[992] For a detailed presentation of the principle of proportionality as a core instrument of international customary law see COTTIER T., ECHANDHI R., LIECHTI-McKEE R., PAYOSOVA T., SIEBER C., The Principle of Proportionality in International Law: Foundations and Variations, 18 *Journal of World Investment & Trade*, 2017, pp. 628-672.

[993] Supra note 854.

[994] See the Court's Advisory Opinion OC-5, supra note 779.

[995] Ibid., para 122.

[996] IACtHR, *Uson Ramirez v. Venezuela,* (Preliminary Objections, Merits, Reparations and Costs), 20 November 2009, Series C No.207, paras 49.

case[997] as well as in the famous *Claude Reyes*, earlier discussed. In the latter case, the Court clarified that the State has the burden of proof to show that it has complied with the established requirements when enforcing restrictions to the freedom of expression and in the instant case, to the State-held information.[998]

Having said all the above, it is more than evident that the Inter-American Court opted for drawing extensively from the Strasbourg standards when dealing with disputes affecting the freedom of expression in the American States notwithstanding the different emphasis given to several aspects of the interests protected under the ACHR and the ECHR. Given the specificities of the region, the IACtHR considered that the European jurisprudence set a minimum threshold. As already mentioned, the Court, by itself, acknowledging that the European Convention constitutes its basic source of inspiration, deemed that the wording of Article 13 ACHR has been designed to be more generous than the corresponding provision of the ECHR. Therefore, as Eduardo Andreas Bertoni correctly mentioned "the interpretation of Art.10 by the European Court may provide a minimum standard for the interpretation of Art.13, but never a ceiling."[999]

At any rate, and despite the recent decrease in the number of references of the San José judges to the European level of protection in freedom of expression cases, [1000] in reality, European case law is deeply-rooted in the Inter-American understanding of free speech and constitutes the *lighthouse* that crucially contributed to its development. It flows from this analysis that the nascent democratic regimes in Latin-America would have plunged into chaos without the European precedent giving-the initial- shape to the entitlements of the American Convention. Last but not least, the parallel and pioneer development of the Inter-American case law in this field could not pass unnoticed by the European Court of Human rights which explicitly referred to the leading *Claude Reyes* ruling of the IACtHR. Thus, the Grand Chamber of the ECtHR delivered the *Stoll v. Switzerland*[1001] judgment enhancing its argumentation which revolved around the "even greater importance of press freedom in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature."[1002]

Naturally, while contributing to the democratization of the continent, the IACtHR largely borrowed from the Strasbourg Court when adjudicating one of the most crucial type of disputes in this respect, namely freedom of expression cases. Taking the parallel road, the San

[997] IACtHR, *Tristan Danoso v. Panama* (Preliminary Objections, Merits, Reparations and Costs), 27 January 2009, Series C No.193. Mr. Tristan Danoso, organized a press conference in order to denounce the discovered wiretapping against him by the Panama authorities and the disclosure of the content of the conversations.
[998] Supra note 976, paras 92, 93.
[999] See relatively BERTONI, supra note 991, p. 352.
[1000] In the *Danoso* case, *Perozo et al. v. Venezuela* or *Velez Restrepo y Familiares* we can hardly find a reference to the Strasbourg precedent on the matter. See *inter alia* supra note 997; IACtHR, *Perozo et al. v. Venezuela* (Preliminary Objections, Merits, Reparations, and Costs) 27 January 2009, Series C No. 195; *Velez Restrepo y Familiares* (Preliminary Objections, Merits, Reparations, and Costs), 3 September 2012, Series C No. 248.
[1001] ECtHR, *Stoll v. Switzerland,* Application No. 69698/01, 10 December 2007. The ECtHR held in paragraph 111 that "[s]imilarly, the Inter-American Commission on Human Rights has taken the view that the disclosure of State-held information should play a very important role in a democratic society because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests (see the submissions to the Inter-American Court of Human Rights in the case of Claude Reyes and others v. Chile, 19 September 2006, paragraph 43 above)."
[1002] Ibidem, para.110

José judicature managed to dynamically interpret the American Convention incorporating the ECtHR's criteria of lawful derogations from the freedom of expression and inspiring, thereby, transjudicial communication in this field of law even more.

ii. The divergent legal treatment of irregular migrants: The rights of detainees

The particularly vulnerable case of migrants in an irregular situation [1003]is, universally, at the center of attention of both governmental authorities and non-governmental institutions. Having already been repeatedly affected by large displacement of populations within its territory during the past years, Europe was once again confronted with the on-going refugee crisis which clearly unbalanced even more the institutional endeavour to alleviate the problems already documented in this field.[1004] Despite having breached migration law, irregular migrants remain in a legal limbo for undefined duration, and as a particular vulnerable group of people should be entitled to enhanced protection under international human rights law. Unauthorised migration has, hitherto, provoked contentious political debates. However, the meager responses given by policy-makers of States and international organisations reveal the important role of international human rights courts to map irregular migrants' rights and, specifically, define their content and scope.

It comes as no surprise that in the land that major internal conflicts have repeatedly uprooted populations, the dominant regional human rights mechanism could not have ignored the most troubled aspect of international migration law. Hence, the Strasbourg Court has significantly developed its case law on irregular migration rendering it one of the most dynamic facets of its jurisprudence related to the protection of people seeking for international protection. In addition, it influenced the decision-making process not only at the domestic level but at the EU level as well. In its landmark decisions it has shaped its own standards pertaining to the prohibition of inhuman and degrading treatment, the right to asylum and the right to effective remedy when it comes to irregular migrants. However, the European Court of Human Rights was subjected to critical approaches with regard to the inconsistencies of its jurisprudence on the matter[1005] and its hesitation to touch upon some core issues of a field dominantly regulated by domestic powers with the same sensitiveness that approaches other

[1003] At this point, we should note the observation of Elspeth Guild. In her words, "irregular migrant is not a legally defined category, but rather a residual category of those people who do not fit prescribed criteria of lawfully recognized migrants". See GUILD E., Who is an Irregular Migrant? in BOGUSZ B., CHOLEWINSKI R., CYGAN A. and SZYSZCZAK E.(eds.), *Irregular migration and human rights: theoretical, European and international perspectives*, Brill 2004, pp.3-28.

[1004] For a more thorough analysis of the conditions and the legal implications of the recent refugee crisis triggered after the Syrian "catastrophe" which forced thousands of migrants in an irregular situation at sea to seek a humane future in the European shores see MANN I., *Humanity at sea, Maritime Migration and the Foundations of International Law*, CUP 2016; MORENO-LAX V. and PAPASTAVRIDIS E.(eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach Integrating Maritime Security with Human Rights*, Brill 2016.

[1005] See in this respect LAVRYSEN L., *Is the Strasbourg Court tough on migration?*, Strasbourg Observers Blog 2012, available at https://strasbourgobservers.com/2012/12/05/is-the-strasbourg-court-tough-on-migration/.

aspects of migration or refugee law. Immigration detention offers an illustrative example of the ECtHR' s standing in this regard.[1006]

The Inter-American Court of Human Rights, regardless of its slow start, it looked into a wide breed of migration cases ranging from disputes on the nationality/naturalization agenda to the peremptory norms of equality and non-discrimination. Using the Strasbourg's human rights standards on migration, the San José Court attempted to mete out rulings that form its own safeguards, mostly, inspired by the *pro homine* principle that dominates its jurisprudence. The latter is even more understandable with regard to the detention of migrants.

At any rate, the initiation of IACtHR into migration cases was made with a couple of advisory opinions which offered the opportunity to the Court to make some important statements in this field. Its first case affecting the rights of migrants was the Advisory Opinion 4/84 on the *Proposed Amendment to the Naturalisation Provision of the Constitution of Costa Rica*, earlier discussed [1007]on the occasion of the Court's position on the *margin of appreciation* granted to States. Citizenship complaints raising human rights issues, which are still timidly approached by the ECtHR [1008]since they are situated in the heart of national sovereign powers, constituted the basis upon which the Inter-American Court moderately built its migration case law.

From the migrants' rights perspective, notwithstanding the initial borrowing of the *margin of appreciation* formula from its Strasbourg peer concerning the proposed amendment of the national Constitution, the IACtHR seemed to opting for a differentiated position on nationality issues placing them in the center of human rights migration law. The first observation of the Court in this respect is indicative. In the Court's words, "[i]t is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.".[1009] Thus, the State enjoys some latitude on these matters; nevertheless, its discretional powers emanating from national sovereignty are not unlimited. Hence, human rights are not perceived as an exception to the rule of state sovereignty, while human rights come first and state

[1006] For an overview of the Strasbourg Court's case law on this matter see the ECtHR's factsheet on "Migrants in detention", March 2018, available at https://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf.
[1007] See the Advisory Opinion OC-4/84, supra note 846.
[1008] On the occasion of the *Ramadan* judgment of the ECtHR, Marie-Bénédicte Dembour brought to light the reluctance of the Strasbourg Court to embrace nationality's human rights facets. DEMBOUR M-B., *Ramadan v. Malta: When will the Strasbourg Court understand that nationality is a core human rights issue?*, Strasbourg Observers Blog 2016, available at https://strasbourgobservers.com/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/.
[1009] Supra note 846, para.32

sovereignty follows since the Inter-American Court commences building its argumentation by affirming the human right to nationality.[1010]

Marie-Bénédicte Dembour doubted the looming intention of the San José Court to replicate the discretional approach of the Strasbourg Court in general and maintained instead that "[i]n this early ruling the Inter-American Court shows itself speaking with a distinct voice of its own .This is a voice which is propitious to a potentially broad interpretation of migrants rights, as a state powers in the field of naturalization are recognized, but are nonetheless viewed as significantly limited by human rights norms."[1011]

And, thus, this broad interpretation of migrants' rights was subsequently reaffirmed by another Advisory Opinion[1012] touching specifically more pressing issues that directly affect irregular migrants.

In this case, the IACtHR felt that it should elaborate on the vulnerability of undocumented migrant workers.[1013] Looking through the lens of "equality" and "non-discrimination", recognized by the Court as *jus cogens* norms, the latter declared that undocumented migrants enjoy *equal* labour rights with nationals, irrespective of their status. According to the Court, the right to work offers a protective net of *erga omnes* obligations binding all States and "in this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment."[1014] However, novel as these pronouncements may seem, they remain quite controversial in academia.[1015] In any case, we can draw the chasm regarding the legal treatment of similar issues between the San José and the Strasbourg Court. Interestingly, the IACtHR only at the end of its reasoning felt that it should balance the peremptory status of *equality* and *non-discrimination* with the long established duty of the State to regulate its migratory policies.[1016] For the Court "in the exercise of their power to establish migratory policies, it is licit for States to establish measures relating to the entry, residence or departure of migrants who will be engaged as workers in a specific productive sector of the State, provided this is in accordance with measures to protect the human rights of all persons and, in particular, the human rights of the workers(…)States may take different measures, such as granting or denying general work permits or permits for certain specific work, but they must establish mechanisms to ensure that this is done without any discrimination, taking into account only the characteristics of the productive activity and the individual capability of the workers."[1017]

[1010] The Inter-American Court of Human Rights confirmed its position in relation to nationality issues in IACtHR *Ivcher Bronstein v. Peru,* (Merits, Reparations and Costs), 6 February 2001, Series C No.74.

[1011] DEMBOUR M-B., *When Humans Become Migrants, Study of the European Court of Human Rights with an Inter-American Counterpoint*, OUP 2015, p.131.

[1012] Supra note 846.

[1013] Ibidem, para 111-117.

[1014] Ibidem, para 134.

[1015] For the "so-called" misuse of *jus cogens* norms when equality of irregular migrants is concerned see BEDUSCHI A., The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges,34 *Refugee Survey Quarterly*, 2015, pp. 45–74. The overall approach of the concept of *jus cogens* by the Inter-American Court of Human Rights will be analyzed in following chapter.

[1016] DEMBOUR, supra note 1011, p.299, 300.

[1017] See also in this respect Advisory Opinion OC-18/03, supra note 802, paras 169.See also the recent judgment of the IACtHR that constitutes the benchmark of labour rights and protection of workers in Brazil, namely the *Workers of the Hacienda Brasil Verde v Brazil* case. In the case at hand, the San José Court treated the generalised

Subsequently, the aforementioned chasm was clearly illustrated in the celebrated *Velez Loor v. Panama,*[1018] the first contentious case of the Inter-American Court on irregular migration in 2010. In the present case,[1019] the claimant, citizen of Ecuador was arrested in Panama in 2002 , transferred to a detention center with poor detention facilities, where the Director of the National Migration Office sentenced him to two years of imprisonment for violation of previous deportation orders. The alleged victim revealed that he was not informed of the decision or of his right to consular assistance and was not provided the applicant neither with a counsel nor with the opportunity to challenge the deportation before administrative authorities. After sentencing, he was transferred to another detention center with blatantly poor facilities. Mr. Vélez Loor complained that, during his ten month detention, was subjected to severe physical and mental abuse and tortures, not to mention that he was deprived from basic judicial guarantees.

On the occasion of the assessment of the particular detainee's situation, the IACtHR opted for mapping the human rights standards of migrants' detention significantly contributing, thus, to the protection of migrants in the Americas. In a similar way to the one it concluded to its appraisal on the abovementioned Advisory Opinion on migrant workers, the Court focused extensively on the vulnerability of this group that requires special attention shedding light, as well, to the cultural aspects that often impede the smooth integration of irregular migrants within societies.[1020] Moving to the lawfulness of the claimant's arrest and its compatibility with the American Convention, the Court held that the protection offered by this instrument is not limited when it comes to the detention of migrants in clear contrast of the ECHR's relevant provision.[1021]The Court felt, at this point, that it should draw a clear distinction from the limitations imposed on the right to liberty by the drafters of the European Convention in view of migrants' unauthorized entry and deportation or extradition.

Thereby, for the Court, the American Convention dictates a more human rights-oriented approach of migration procedures according to which detention is subject to prompt and

practice of recruiting poor workers, mostly Afro-descendants, to work under conditions of servitude in plantations. The Court borrowed the definition of "servitude" given by the Strasbourg Court and based its conclusions on its similar findings in relevant disputes. It particularly recalled that for the latter the definition of trafficking falls within the *concept* of slavery and servitude and that due diligence of the State is required so as to investigate effectively and penalize any act designed to keep a person in a situation of slavery, servitude or forced labour irrespective of the existence of complaint. IACtHR, *Workers of the Hacienda Brasil Verde v Brazil*, (Preliminary Objections, Merits, Reparations and Costs), 20 October 2016, Series C No. 318, paras 280,287,288, 365.

[1018] IACtHR, *Vélez Loor v. Panama* (Preliminary Objections, Merits, Reparations and Costs), 2010 Series C No. 218, para. 139.

[1019] For an analysis of the *Vélez Loor* ruling see inter alia MASON A., Interpretation of the American Convention in Latin America: The Impact of the Inter-American Court of Human Rights' Decision in *Velez Loor v. Panama* on Irregular Migrant Rights, 18 *Law & Bus. Rev. Am*. 71, 82, 2012, pp. 71-82; DE LEON G., Contributions and Challenges for the Inter-American Court of Human Rights for the Protection of Migrants' Rights: The Case of Velez Loor v. Panama, 7 *Inter-Am. & Eur. Hum. Rts. J.*, 2014, pp. 39-53.

[1020] Supra note 1018, para 98.

[1021] According to the wording of Article 5(1)(f) ECHR: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." See also BOLANI L.-M, Article 5-The Right to personal freedom and security in SICILIANOS L.-A(ed.), *The European Convention on Human Rights-2nd Edition-Commentary by Article, Rights-Admissibility-Just Satisfaction –Execution*[in Greek], Nomiki Vivliothiki 2017, p. 192-197.

effective review given the special vulnerability of detainees.[1022]In the subsequent paragraphs of the ruling, the Court crystallised its additional requirements applied so as each detention could be deemed lawful under Article 7(5),[1023] namely the independence and impartiality of the judicial body. Finally, the Court clarified that in order the judicial review to be acceptable a personal evaluation by the relevant authority of the clarifications that the detainee may eventually provide is required before the issuance of the decision that maintains the deprivation of liberty.[1024]

Subsequently, after having found a violation of Article 7(5) since the applicant was not informed of the judicial means at his disposal, the Court examined the potential justification of the decision resulting in Mr. Loor's detention and the effectiveness of the judicial remedies apt to challenge the disputed order of detention. Therefore, for the Inter-American Court, specific time limits[1025] and available and accessible remedies (including legal aid)[1026] provided by the administrative authorities in charge are considered indispensable so as the detention to be compatible with the ACHR. Additionally, the Court expanded its standards with regard to the right to consular assistance.[1027]

More importantly, the Court took a further step in order to improve the enforcement of migrants' rights in the Americas since it heavily rejected the penalization of measures. At this point, it seems important to quote the Court's language according to which "in a democratic society punitive power is exercised only to the extent that is strictly necessary to protect fundamental legal rights from serious attacks that may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State." Furthermore, it stated that "according to this principle, it is clear that detaining people for non-compliance with migration laws should never involve punitive purposes. Hence, a custodial measure should only be applied when it is necessary and proportionate in the specific case, to the purposes

[1022] In paragraph 107, the Court emphatically declared that "Therefore, under the principle pro persona, this guarantee must be met whenever the person's detention or arrest is based on his or her migratory status, in accordance with the principles of judicial control and procedural immediacy.107 In order to establish a true mechanism of control in the face of unlawful and arbitrary detentions, the judicial review must be carried out promptly and in such a way as to guarantee compliance with the law and the detainee's effective enjoyment of his rights, taking into account his special vulnerability", Supra note 1018, para 107.

[1023] The American Convention on Human Rights provides in Article 7(5) that: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

[1024] Supra note 1018, para 109.

[1025] Ibid., para 117. Examining the alleged arbitrariness of Mr. Loor' s detention, the Court remarked in relation to the undefined duration of the measure: "Finally, there were no clear limits to the powers of the administrative authority, which favors undue prolongation of the detention of immigrants, turning these into a punitive measure."

[1026] On the basis of the observations of the Special Rapporteur on the Human Rights of Migrants, the Court clarified on the *effet utile* of the remedies to challenge the legality of the detention "these remedies must not only formally exist in the legislation but they must be effective, that is to say, must comply with the purpose of obtaining, without delay, a decision on the lawfulness of the arrest or detention." Ibid., para 129.

[1027] Following to its relevant Advisory Opinion OC-16/99 on "the right to information on consular assistance in the framework of the guarantees of the due process of law" in which it highlighted the importance of consular rights of migrants, the Court in para 153 summarised the three facets of this requirement that needs to be met: "1) the right to be informed of his rights under the Vienna Convention;2) the right to have effective access to communicate with the consular official and 3) the right to the assistance itself." As usual, the Court makes specific reference to the international legal instruments and in this case, to the Vienna Convention on Consular Relations and Article 36(1)(b)., UN, Vienna Convention on Consular Relations(VCCR), 24 April 1963, 596 U.N.T.S 261 .

mentioned supra and only for the shortest period of time."[1028] Thus, the principle of proportionality plays, once again, the major role in the selection of the suitable measure while regulating irregular entry of migrants.

Moreover, the non-punitive character of the measures aiming to control migration should be reflected to the detention conditions in the sense of separation of criminal convicted persons in penitentiary centers from persons detained for non-complying with domestic migration laws. For the Court, different purposes of detention require different detention facilities.[1029]

All these considered, the Court condemned Panamanian authorities for violating Mr. Loor' s right to personal liberty under Article 7 ACHR, the right to fair trial under Article 8 ACHR and the right to humane treatment under Article 5 ACHR.

This ruling brought emphatically to light the divergence on this matter with the ECtHR which is much more restricted in acknowledging such an extended protection from detention to irregular migrants.[1030] Notably, the Strasbourg Court does not consider the necessity of the detention an indispensable component of compatibility with Article 5(1)(f) ECHR.[1031]

On the contrary, necessity is a common requirement for all sub-categories covered by Article 5(1). Interestingly enough, the only exception is the last one pertaining to persons effecting an unauthorized entry into the territory of a Contracting party or persons against whom action is being taken with a view to a deportation or an extradition. The rule of the prohibition of arbitrariness applies here, however, the level of protection offered by the European system appears severely poorer than the American.

As Xavier-Baptiste Ruedin observes "[b]esides, if detention is not necessary in a particular case (i.e. if the public interest deportation or extradition of a person can be guaranteed by less severe measures), it is difficult to understand how detaining that person all the same could be deemed free from arbitrariness. In such a case, detention would simply be a gratuitous act by the State"[1032]

In two landmark cases against the United Kingdom the European Court concretised its restricted criteria applicable when it comes to the detention of migrants. In the *Chalal*[1033] case delivered in 1996, the Strasbourg Court famously admitted that "Article 5 para. 1 (f) (art. 5-1-f) does not demand that the detention of a person against whom action is being taken with a

[1028] Supra note 1018, *Vélez Loor v. Panama*, paras 170-171.
[1029] Ibid., paras 207,208.
[1030] From the textual perspective, in contrast with the European Convention, the right to asylum is explicitly recognized as a human right within the context of Inter-American system. Both the fundamental texts of the IASHR enshrine the right to asylum. Article 22(7) ACHR reads as follows "[e]very person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes." Under Article XXVII of the American Declaration of the Rights and duties of Man "[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."
[1031] Nevertheless, this *lacuna* deriving from the lack of the necessity requirement for the detention of irregular migrants could be covered by national legislation, the legality of which-as previously mentioned- is scrutinized by the Court.
[1032] RUEDIN X.-B, Aliens' and Asylum Seekers' Detention under Article 5(1)(f) ECHR, 20 *Swiss. Rev. Int'l & Eur. L.*2010, p. 490.
[1033] ECtHR, *Chalal v. the United Kingdom*[GC], Application No. 22414/93, 15 November 1996.

view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 para. 1 (f) (art. 5-1-f) provides a different level of protection from Article 5 para. 1 (c) (art. 5-1-c). Indeed, all that is required under this provision (art. 5-1-f) is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5 para. 1 (f) (art. 5-1-f), whether the underlying decision to expel can be justified under national or Convention law".[1034]Nevertheless, the Court stressed that deprivation of liberty is not justified for unlimited duration but only for as long as deportation proceedings are in progress with reference to the principle of due diligence that also applies. Similar pronouncements can also be found to almost every decision of the Court on migrant detention.

As Dembour relatively observed "taking into account the absence of a necessity test, a judge would have no reason to find the detention of a person to be deported unlawful under the Convention(as long as there is a real prospect that the deportation is being pursued and will take place)."[1035] In the most recent *Saadi v. the UK*[1036]case the Court clarified with regard to the first limb of Article 5(1)(f) that "until a State has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so can be, without any distortion of language, to 'prevent his effecting an unauthorised entry'. It does not accept that as soon as an asylum-seeker has surrendered himself to the immigration authorities, he is seeking to effect an 'authorised' entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f)."[1037] At this point, the Court explained that the opposite interpretation would disproportionately restrict the national powers to control migration flows arriving at their borders.[1038]

Given the wording of Article 5 ECHR, the only possible way of finding that his detention had not violated the Convention was to find that it was covered by the first limb of the exception provided in Article 5(1)(f). Hence, the critical issue became the following: had the applicant been detained in order to prevent him from effecting unauthorized entry to the UK? The Court deemed it appropriate to establish the criteria that characterize a non-arbitrary detention. In the Court's words "such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing

[1034] Ibid. para 112.
[1035] DEMBOUR, supra note 1011, p.376. See also CORNELISSE G., *Immigration Detention and Human Rights: Rethinking Territorial Soveireignty*, The Hague: Martinus Nijhof,2010.
[1036] ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, 29 January 2008.
[1037] Ibid., para 65.
[1038] See also the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention pursuant to its mandate, http://www.unhcr.org/refworld/docid/503489533b8.html. These Guidelines replace UNHCR, Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999.See with regard to the ever-evolving standards of protection of the Strasbourg Court when it comes to the detention of migrants KTISTAKIS Y., *Protecting Migrants under the European Convention on Human Rights and the European Social Charter-A handbook for legal practitioners*, Council of Europe Publishing 2013, pp. 23-46.

for their lives, have fled from their own country"(…); and the length of the detention should not exceed that reasonably required for the purpose pursued."[1039]

As anticipated, the stance of the Court was greatly criticized, both inside and outside the Court. On the basis of international human rights law and EU directives, Judges Rozakis Tulkens, Kovler, Hajiyev, Spielmann[1040] denounced the majority's approach on the necessity test and famously interrogated "whether it is permissible today for the European Convention on Human Rights to provide a lower level of protection than that which is recognized and accepted in the other organizations."

Nevertheless, the Court attempted with its subsequent case law, particularly, when the detention of children is being reviewed[1041] and more obviously, following to its seminal *MSS v. Greece and Belgium* to reverse its rather reserved stance. In 2012, in the aforementioned decision, the Court revisited the vulnerability aspect and recognized the *inherent vulnerability* to the situation of irregular migrants and that is also function of previous experience or trauma.[1042]Despite some signs of second thoughts on the application of its *Saadi* standards ,[1043] the Strasbourg Court does not seem ready to reach the Inter-American ones or to elucidate the legal obligations of domestic authorities when it comes to the deprivation of liberty of migrants which is for the Strasbourg Court outlined, to a great extent, by the will of the States.[1044]

Its *Velez Loor* ruling constitutes the major contribution of the Inter-American Court of Human Rights to the promotion of migrants' rights in the troubled Latin American region. The judges of the Court used the occasion of such a multifaceted violation of the applicant's rights so as to meticulously analyze all the requirements emanating from the American Convention and its *pro homine* guarantees pertaining to the most vulnerable migrants, namely the irregular migrants.

In contrast, since the ECtHR' s tendency with regard to immigration detention is not compatible to the values generally applied to detention cases, namely the presumption of liberty and the existence of specific grounds justifying the measure, Cathryn Costello concluded that "[t]he ECtHR could adopt a different approach, as is hinted at in its cases on alternatives to detention. It could abandon *Saadi v UK*, and commit to a presumption of liberty for migrants. The conditional right of residence of those whose refugee status is being determined could be treated as immunizing them from detention, except in exceptional cases. That approach could be extended to all those who are in a process in which their right to stay is subject to

[1039] Supra note 1036, para.74.
[1040] See the joint dissenting opinion Judges Rozakis Tulkens, Kovler, Hajiyev, Spielmann.
[1041] See ECtHR, *Munilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 41442/07, 19 January 2010, para 55.
[1042] See the relevant paragraphs of the seminal *M.S.S.* judgment of the ECtHR, supra note 695, paras 232,233,259 *et al*.
[1043] See on the use of "less stringent measures" criterion in the ECtHR's recent case law added to the one of close connection of the detention to the grounds of detention invoked by the authorities, LAVRYSEN L., *Less stringent measures and migration detention: overruling Saadi v. UK?*, 2012, available at https://strasbourgobservers.com/2012/01/25/less-stringent-measures-and-migration-detention-overruling-saadi-v-uk/ .
[1044] See *inter alia* the critique expressed by Cathryn Costello and Violeta Moreno- Lax, COSTELLO C., Immigration Detention: The Grounds beneath our feet Current Legal Problems, 68 *Current Legal Problems* 143, 2015, pp.143–177, ; MORENO LAX V., Beyond Saadi v. UK : Why the unnecessary detention of asylum seekers is inadmissible under EU law, 5 *Hum. Rts. & Int'l Legal Discourse* 166, 2011, pp. 166-206.

adjudication.(…)To be meaningful and effective, it would have to be accompanied by enhanced in judicial oversight of detention, in order to check that the practice confirmed with the new law."[1045]

In any case, the ECtHR, despite the fact that with its compendium of landmark rulings on pressing issues of migration law changing human rights protection of migrants, it, actually, fell short in drawing clearly the line between the State's right to regulate its migration policies and the effective promotion of the rights of irregular migrants in detention.[1046]

These stark differences between the European and Inter-American Courts on the matter are perhaps entrenched in their contrasting judicial *habitus*. Besides the textual divergence, each judicial mechanism has adopted its own way of responding to these questions. The observed continuity in this respect, particularly as far as the Strasbourg Court is concerned, seems to be incompatible with its *living instrument* doctrine. While the detention limits pertaining to asylum seekers are set, when it comes to migrants in an irregular situation without this status the legal treatment of their detention remains unclear.

All of the above being considered, the IACtHR appeared, within the context of its contentious powers, compatible with its prior jurisprudential lines as reflected in its advisory opinions regardless of the high non-compliance rates of its rulings. Therefore it developed a forward-looking case law aiming to enrich the received human rights protection of irregular migrants with a clear and firm set of obligations upon domestic authorities. While the Strasbourg Court adopted a rather uneasy position towards deprivation of liberty of unauthorized migrants, the San José Court has proved willing to take further steps and managed once again to use the occasion of the *Vélez Loor* case in order to conclude to overall conclusions delivering a judgment with general implications and significant impact worldwide.[1047]

Conclusion

Besides its structural paradigm, the ECHR system offered to its sibling institution in the Americas the normative clarity as well a remarkable interpretative toolkit emanating from the Strasbourg's judicial practice to combat the entrenched atrocities of the region. Inevitably, human rights adjudication therein passes through the direct invocation of the European Convention's provisions and the relevant standards of the Strasbourg Court. At first glance, parallel approaches of common human rights challenges can be easily traced in the work of both judicial mechanisms. The Inter-American Court felt free, since its dawn, to apply extensively the ECtHR's standards in an analogous manner so as to shape the proper interpretation of the American Convention and to foster the credibility of the organ itself in the troubled legal landscape of the American Convention. The Court was inspired, thus, by the

[1045] Ibid, p.176.

[1046] In its recent case law regarding detention of migrants the Court attempted to rationalize the "unauthorized entry" requirement and revisit the *Saadi* pronouncements. However, the standards applied in these cases are still unclear. See relatively ECtHR, *Rusu v. Austria*, Application No. 34082/02, 2 October 2008; *SD v. Greece*, Application No. 53541/07, 11 September 2009 ; *RU v.Greece*, Application No. 2237/08, 07 September 2011; *Yoh-Ekale Mwanje v. Belgium*, Application No.10486/10, 20 December 2011; *Musa v.Malta* Application No. 42337/12, 9 December 2013.

[1047] On the impact of the *Velez Loor* ruling on jurisdictions outside the Latin American sphere see BEDUSCHI, supra note 1015.

ECtHR's application of Conventional rights in freedom of expression cases and from the Strasbourg Court's doctrinal approach, by and large, of the States' positive obligations. Nevertheless, an adjusted approach of the Strasbourg's standards has been documented in several legal fields (e.g detention of irregular migrants) or in the horizontally applied legal treatment of the IACtHR's corpus of cases (e.g the MoA application and the judicial behaviour of the San José Court in times of urgency). Overall, it appears rather difficult to find a judgment of the Inter-American Court without quoting the relevant case law of the ECtHR. At any rate, the IACtHR borrowed in an extremely creative manner from its counterpart without overlooking the particular features of national judicatures and left, at the same time, enough room for cross-fertilisation with the European Court which also seeks to constantly adapt to new exigencies.

2. The expansion of human rights protection by the IACtHR: Any room for cross-fertilisation?

Crucially, the Inter-American Court has not contented itself to step into the road already taken by the European Court. Leveraging the experience of the latter, it paved new roads of human rights adjudication covering also the paucity of international human rights law in challenging fields in need of groundbreaking responses. In the following pages, these fields are covered both horizontally, including the doctrinal appraisals of the Court irrespective of the alleged violations in each and every case and vertically, emphasizing particular categories of disputes.

a) The horizontal dimension

i. The proliferation of jus cogens norms in the IACtHR case law

In the context of the Latin American region, that has been largely plagued by impunity, the IACtHR felt that the emboldement of *jus cogens* norms[1048]in the sense of identification of specific human rights as peremptory norms of international law could enhance the effects of the ACHR's safeguards within its dynamic jurisprudence.

In general, the concept of *jus cogens* [1049]was debated for decades with relation to the work of the International Law Commission(ILC) on the law of Treaties which was, subsequently, accepted almost unanimously and codified in Article 53 VCLT and Article 64 VCLT.[1050] Until its addition to the 'positive law' family and the formal definition embedded in

[1048] For Christos Rozakis the *ratio legis* of the *jus cogens* concept lies on the aim "to protect some common concerns of the subjects of law. A contractual arrangement, despite its being inter partes, may nevertheless affect such general values and interests as are considered indispensable by a society at a given time. In an organized legal order, therefore, the function of the jus cogens norms is to protect the society and its institutions from harmful consequences of individual agreements." ROZAKIS C., *The concept of Jus Cogens in the Law of Treaties*, North-Holland Publishing Company, 1976, p.1-2.

[1049] *Jus cogens* contradicts to *Jus Dispositivum*, which contains norms which are not imperative and from which derogations are permissible under specific circumstances. Nevertheless, as Lauri Hannikainen holds in this respect, "the efforts to strengthen the status of jus cogens in international law should not lead to the weakening of respect for norms of *jus dispositivum*, i.e., those norms from which derogation is permissible on certain grounds, the primary ground being an *inter se* treaty. That *jus cogens* a category of norms of great importance does not imply that the rules of *jus dispositivum* constitute a kind of 'soft law'. States must observe in good faith all their international legal obligations." HANNIKAINEN L., Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status, Helsinki : Finnish Lawyers' Pub. Co., 1988, p.727.See also on this matter VERDOSS A., Jus Dispositivum and Jus Cogens in International Law, 60 *AJIL* 1, 1966, pp. 55-63 and for a throrough overview of the nature and application of peremptory norms see ORAKHELASHVILI A., *Peremptory norms in International Law*, OUP 2006.

[1050] Article 53, under the title "TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")" provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general in ternational law having the same character". Article 64 VCLT, under the title

the Vienna Convention, it constituted a fundamental rule of international customary law.[1051] Hence, as peremptory norm of international law can be considered a norm accepted and recognized by the international community of States(as a whole), from which no derogation is permitted. Its modification is, thus, only operated by a subsequent norm of general international law having the same character.

Despite the generalized effort both in academia and the judicial practice of international courts, the content of *jus cogens* norms and their *modus* of identification remain ill-defined until now. However, the concept of *jus cogens* has exceeded the limits of the law of treaties and constitutes an illustrative example of the hierarchy of rules[1052] as a general principle of international law.[1053] To date, the fuzziness that revolves around instances of peremptory norms and the particular problem of who has the judicial power to determine them has not been resolved by the International Court of Justice, which is, by definition, in a better position to provide binding interpretations of international law rules, greatly respected within international community.[1054]

When it comes to human rights, most of the human rights treaties have endorsed core and basic guarantees as non-derogable fundamental rights which the member States cannot suspend even in emergency situations, such as the right to life and the prohibition of torture or inhuman and degrading treatment, arbitrary detention and so on. Conversely, can we suggest that such non-derogable human rights obligations should take the shape of *jus cogens* norms? In reply, as Stefan Kadelbach stated relatively that "if such treaty obligations are recognized also in international customary law, a strong case can be made for them to belong to international jus cogens."[1055] In any case, the identification of a right as non-derogable in an international human rights convention would be one of the most crucial factors to grant the *jus cogens* title to this right, albeit not the only one.

At any rate, as regards the issue of which judicial organ is capable to pronounce on the existence of a *jus cogens* norm we can trace a certain decentralization accruing such a power

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EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW("JUS COGENS") reads as follows "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[1051] For an overview of the nature, origins of the functions of the jus cogens concept see SHELTON D., Sherlock Holmes and the Mystery of Jus Cogens in DEN HEIJER M. and VAN DER WILT N.(eds.), 46 *Netherlands Yearbook of International Law* 2015, p.23.

[1052]See on the problem of hierarchical order of norms in international law ROUCOUNAS E., Engagements parallèles et contradictoires, *Recueil des cours de l'Académie de droit international (VI)* 1987, pp.56-70.

[1053] ROUCOUNAS E., *Public International Law* [in Greek], Nomiki Vivliothiki 2015, p.162.

[1054] The ICJ seemed to indirectly refer to Jus cogens through naming core human rights obligations as *erga omnes* obligations contributing to the well-established confusion between *jus cogens* norms and *erga omnes* rules under international law. For instance, in the landmark *Barcelona Traction* case and the more recent *East Timor* case. In its Barcelona Traction judgment, the ICJ referred to *erga omnes* obligations of States naming the prohibition of genocide as such as well as the basic rights of the human person such as the prohibition of slavery and racial discrimination. Subsequently, the right of peoples to self determination was added to the list.
ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, [1970] ICJ Rep 3 at p. 32, paras. 33 and 34; ICJ, *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12, at p. 68, para. 162; ICJ, *East Timor* (Portugal v. Australia), [1995] ICJ Rep 90 at p. 102, para 29.

[1055] KADELBACH S., Jus Cogens, Obligations Erga Omnes and other rules- The identification of fundamental norms in TOMUSCHAT C. and THOUVENIN J-M.(eds.), *The fundamental rules of the International legal order, Jus Cogens and Obligations erga omnes*, Martinus Nijhoff Publishers 2006, p.31; VIRALLY M., Réflexions sur le 'jus cogens' *AFDI* 12, 1966, pp. 5-29.

not only to the International Court of Justice but also to other international judicial bodies, mostly international criminal tribunals[1056] and regional human rights courts. Focusing on the latter category, Europe has approached the matter with similar reluctance. The Strasbourg Court, in the *Al-Adsani v. UK* case, [1057]in which state immunities in civil proceedings in respect of alleged torture were on the table, refused to put the *jus cogens* character of torture at the center of its legal reasoning. *In casu*, a British-Kuwaiti national who was allegedly tortured in Kuwait, after having returned to the United Kingdom, brought a civil action seeking for compensation against the British government invoking his rights under the ECHR. The ECtHR did not offer a favorable response to his claims and held that the peremptory rule of the ban of torture, which was acquired the status of *jus cogens,* does not suffice to deprive a state from the immunity that enjoys in civil procedures even when specific acts of torture are under scrutiny. In the Grand Chamber's words, "[n]otwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[1058] The Court advanced its posture by drawing clear distinction from criminal liability and refused to draw an "automatic" legal inference from the peremptory character of the prohibition of torture, fuelling though the ambiguity as regards the practical effects of *jus cogens*.

Nevertheless, for some scholars, this ambiguity concerning the exact notion of *jus cogens*, its identification rules as well as its overall role in international law do not cause serious problems to the evolution of the said concept. In this spirit, Paul Tavernier stated that "the uncertainties surrounding the identification of the basic rules do not hamper their development in contemporary international law, and the vagueness resulting from this indeterminacy may even favour, in this field like in others, progress of the law."[1059] If that is the case, the nuanced jurisprudence of the Inter-American Court pertaining to *jus cogens* norms could be seen under this prism. In particular, the entire IAHRS revealed its willingness to touch upon this conflicting issue since its early cases. In 1993, in the *Aloeboetoe* [1060] case the Court, following to the Commission's decision, manifestly declared that the treaty between a group of indigenous peoples and the Netherlands is *ab initio* null and void irrespective of its controversial nature empowering this group to capture and sell slaves to the Dutch. Its decision

[1056] ICTY, *Prosecutor v Anto Furundzija*, IT-95-17/1-T, 10 December 1998.
[1057] ECtHR, *Al-Adsani v. United Kingdom* [GC] Application No. 35763/97, 21 November 2001.See on this case *inter alia* BATES E., The Al-Adsani case, state immunity and the international legal prohibition on torture, 3 *Hum. Rts. L. Rev.* 2, 2003, pp.193-224.
[1058] Ibid., para 61. For the legal treatment of state immunities in connection with *jus cogens* norms before national courts and most particularly, on the Distomo case before the Greek Supreme Court, Areios Pagos see GAVOUNELI M. and BANTEKAS I., Prefecture of Voiotia v. Federal Republic of Germany, case no. 11/2000, Areios Pagos (Hellenic Supreme Court), May 4, 2000, 95 *AJIL* 1, 2001, pp.198-204
[1059] TAVERNIER P., L'identification des règles fondamentales un problème résolu? in TOMUSCHAT C. and THOUVENIN J-M.(eds.), *The fundamental rules of the International legal order, Jus Cogens and Obligations erga omnes*, Martinus Nijhoff Publishers 2006, p.20.
[1060] IACtHR, *Aloeboetoe and others v. Suriname* (Reparations and Costs), 10 September 1993, Series C No. 15, para 57.

is vindicated by the fact that the latter contradicts with *jus cogens superveniens*, and thus, it cannot be brought before an international human rights forum.[1061]

Later on, the San José Court revisited the *jus cogens* and managed to enlarge the concept at the regional level so as to incorporate the right to *equality and non-discrimination* as depicted in the *Advisory Opinion 18/03 on the Juridical Condition and Rights of Undocumented Migrants* [1062] pertaining to migrants' rights in the workplace. The IACtHR after having recalled the initially close nexus of the *jus cogens* with the law of Treaties, it reaffirmed that the concept of peremptory norms has largely developed in the realm of general international legal order. Having said that, the Court followed a reasoning anchored in natural law and more particularly, to the connection of equality with the respect for human dignity that should permeat all domestic States under the ACHR. Therefore, due to the horizontal and holistic character of such imperative obligations and according to the Court's appraisal, this rule gives rise not only to the negative obligation of States to refrain from actions that directly or indirectly create situations of *de facto* or *de jure* discrimination. It also creates positive obligations for the states that may improve equality standards among the State's nationals restoring long established injustice against particular groups of individuals.[1063]

However, the reliance of the Court to natural law[1064] in its attempt to establish a newly introduced strand to the timidly used *jus cogens* scheme within international legal community gave rise to serious skepticism around the credibility of the concept. This basis of the Court's position on the peremptory nature of the principle of equality is well described in the separate opinion of the former President of the Inter-American Court of Human Rights, Antônio Augusto Cançado Trindade. He interestingly linked this origin of *jus cogens* to law's intertemporal aim to fulfill its purpose: law should serve individuals and not states since the latter emanates from human conscience and not from states' will which is traditionally in the center of the making of general international law.[1065]

Progressive as this approach may seem, does not appear entirely convincing among academics. Andrea Bianchi underlined in this regard that given the vagueness that caracterises the said concept "any excess in characterizing rules as peremptory ones, without carefully considering whether or not such characterization is shared by the international community, risks undermining the credibility of jus cogens as a legal category, distinct from natural law

[1061] Ibid., paras 56,57. However, Dina Sheldon expressed its doubts on the horizontal and rigorous application of the said rule saying that "But it seems hardly reasonable that the entire UN Charter, for example, would be declared void for an action of the UN Security Council that was held to violate jus cogens." SHELTON, supra note 1051, p.36.

[1062] Supra note 802.

[1063] Ibid., paras 97-100. See also DE A. F. R. CARDOSO SQUEFF T. and DE ALMEIDA ROSA M., Jus cogens: An european concept? An emancipatory conceptual review from the inter-american system of human rights, 15 *Revista de Dereito Internacional* 1, 2018, p.132

[1064] DE WET E., Jus Cogens and Obligations Erga Omnes in SHELTON D.(ed.), *The Oxford Handbook of International Human Rights Law*, OUP 2013, p. 544.

[1065] See in this respect the legal analysis of the former President of the Court, Judge Cançado Trindade in its Separate Opinion. Talking about the law, he opined that "this latter does not emanate from the inscrutable "will" of the States, but rather from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the opinio juris communis of all the subjects of International Law (the States, the international organizations, and the human beings). Above the will is the conscience.", para 87

and apt to perform important systemic functions." [1066] Dinah Shelton also highlighted in relation with the justification that the Court selected that notwithstanding the use of numerous international treaties containing provisions on equality it opted for building upon a higher obligation that seems to emerge more from common sence that calls for essential human dignity. [1067] The Court, at this point, appears to follow the road taken by the Inter-American Commission. While affirming that the right to life has the *jus cogens* status, the Commission stated that the latter "is derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or of nations. The norms of jus cogens have been described by public law specialists as those which encompass public international order."[1068]

Arguably, all of these conclusions pinpoint the basic issue that arises which is the following : whether the justification that lies on the identification of non-discrimination and equality as *jus cogens* -since they permeat all Conventional rights- could be more consensual rather than grounded on positive law. The Court invoked a wide variety of instruments, in particular, nineteen treaties and fourteen soft law texts in order to concretise the universal approval of the principle of non-discrimination as a peremptory norm of international law. However, there are cases of *de jure* inequalities which cannot, hence, be covered by the absolute and holistic character of *opinio juris* in terms of positive international law.[1069]

At any rate, as it can easily deduced by the observance of the IACtHR' s jurisprudence, the latter has been quite active in describing as a violation of *jus cogens* almost every grave violation of non-derogable rights provided by the text of the American Convention. Particularly during the presidency of Antônio Augusto Cançado Trindade,[1070] it seems that the Court clearly deemed self-evident that besides the prohibitions on slavery, which are among the peremptory norms of *jus cogens* nature as decided in *Aloeboetoe*,[1071] the absolute prohibition of physical and psychological torture belong also to this category.[1072] Likewise, the physical punishment

[1066] BIANCHI A., Human Rights and the Magic of Jus Cogens, 19 *EJIL* 3, 2008, p.507.
[1067] SHELTON D., Normative Hierarchy in International Law, 100 *AJIL 299*, p.313.
[1068] IACommHR, *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Report No. 47/96, OEA/ Ser.L/V/II.95, doc. 7 rev. 179 (1996). Analogous is the legal reasoning of the Court of First Instance (at the time) in *Kadi v. Council and Commission*, supra note 622, paras 226-242.
[1069] Gerard Neuman takes as an example the unequal treatment of coastal fishermen and open sea-fishermen as well as the one of drug traffickers. Supra note 774, p.120.
[1070] For some academics, this over-expansive approach of *jus cogens* rules by the Inter-American Court can be deemed as partially occasional as it is inextricably linked to the composition of the Court.Arguably, it is worth mentioning that the major contribution to the jurisprudential evolution of such norms within the context of the Latin-American case law was made by its former President Antônio Augusto Cançado Trindade. Furthermore, the selection of the Judges is another factor of paramount importance since the Judges of the IACtHR are selected from the State Parties that have accepted the compulsory jurisdiction of the Court. By contrast, Judges of the ICJ which, as previously noted, is mostly unwilling to grapple with the explicit identification of *jus cogens* norms, are designated from all UN countries which actually make it difficult for the Judges to apply local noms deriving from (local specificities) as illustrated by the recent example of Judge Cançado Trindade in the case *Germany v. Italy* adjudicated by the ICJ. In his dissenting opinion, which, apparently, was not adopted by the Court, he saw the actions of nazi forces during World War II related to slavery and deportation as violations of *jus cogens* of a *delicti imperri* nature that they should not be trumped by state immunity. See ICJ, *Jurisdictional immunities of the State: ICJ, Germany v. Italy*, ICGJ 434 (ICJ 2012); Dissenting Opinion Judge Cançado Trindade. 2012, part. V; DE A. F. R. CARDOSO SQUEFF T. and DE ALMEIDA ROSA M., supra note 1063, p.131.
[1071] Supra note 1060.
[1072] IACtHR, *Maritza Urrutia v. Guatemala*, (Merits, Reparations and Costs) 27 November 2003, Series C No. 103, para 91,92.

to a person suffering from mental disease was treated as a form of inhuman and degrading treatment which is under the *jus cogens* umbrella [1073]as it is also the case of crimes against humanity as declared in the *Almonacid-Arellano* case[1074]and of relevant violations.

In most of these cases, the separate opinions of the former President of the Court Cançado Trindade can be extremely enlightening as regards the legal reasoning of the Court on the matter. In his famous separate opinions, he also included in the realm of peremptory norms the right of access to justice for all violations of rights,[1075] as well as the minimum guarantees of international human rights law and international humanitarian law due to their universality,[1076] and the disrespect of personal honor and beliefs. [1077]

Articulating both fundamental and derogable human rights obligations as *jus cogens* norms in international human rights law,[1078]the Court has proved equally over-expressive pertaining to its feelings for *jus cogens* when a certain category of violations came into play, namely enforced dissapearances.[1079] This multi-faceted violation under international law[1080] was in-depth treated by the Inter-American judicial mechanism due to the frequency with which claims of gross human rights breaches were brought before the Court. Hence, the IACtHR was given the opportunity to provide a whole new breed of cases and develop its criteria and principles by enhancing the level of protection in cases of enforced disappearances through *jus cogens.*

While the Court dealt with this category of crimes even from the very first steps of its compulsory jurisdiction,[1081] it explicitly manifested the *jus cogens* nature of the prohibition of enforced disappearances in the *Goiburú et al. v. Paraguay*[1082] citing the preamble of the Inter-American Convention on Forced Disappearances of persons[1083]and invoking the gravity of the violations and the fundamental character of the rights infringed. *In casu*, the victims were arbitrarily detained, tortured and forcibly disappeared during the General Alfredo Stroessner's dictatoric regime in Paraguay in an attempt of the latter to overturn political opposition. The Court, after having underlined the continuing and serious nature of the said criminal activity concluded that "the prohibition of the forced disappearance of persons and the corresponding

[1073] IACtHR, *Ximenes-Lopes v. Brazil*, (Merits, Reparations and Costs), 4 July 2006, Series C No. 149, para. 126; IACtHR, *Caesar v. Trinidad and Tobago*, (Merits, Reparations and Costs), 11 March 2005, Series C, No. 123, para 70.
[1074] IACtHR, *Almonacid-Arellano et al v. Chile*, (Preliminary Objections, Merits, Reparations and Costs) 26 September 2006, Series C No. 154, paras 99,153.
[1075] See the Separate opinion of Judge Cançado Trindade in the *Ximenes-Lopes* Case, paras 19 – 21.
[1076] See the Separate opinion of Judge Cançado Trindade in the *Serrano Cruz Sisters* Case, para 40, IACtHR, *Serrano-Cruz Sisters v. El Salvador*, (Preliminary Objections) 23 November 2004, Series C, No. 118.
[1077] See Separate Opinion of Judge Cançado Trindade in *Plan de Sanchez Massacre v. Guatemala*, (Merits) 29 April 2004, Series C No. 105, para. 30.
[1078] See among others Supra note 774, NEUMAN G., p.118.
[1079] CANCADO TRINDADE A.-A, Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights, 81 *Nordic J. Int'l L.*, 2012, pp. 507-536.
[1080] The general expansion of the protection offered from enforced disappearances by the San José Court will be further discussed in the following section.
[1081] See the seminal first case of the Inter-American Court, namely the *Velásquez Rodríguez* case. Supra note 786.
[1082] IACtHR, *Goiburú et al. v. Paraguay* (Merits, Reparations and Costs), 22 September 2006, Series C No.153.
[1083] The Inter-American Convention on Forced Disappearances of Persons was adopted in 1994 under the auspices of the Organisation of American States(OAS) and entered into force in 1996. OAS, *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994, O.A.S.T.S No. 68, 33 *ILM* 1429 (1994).

obligation to investigate and punish those responsible has attained the status of jus cogens."[1084] Furthermore, in the context of the severity and the multi-dimensional status of the prohibition of enforced disappearances, the Court took a further step in this case to declare the access to justice a peremptory norm of international law in the name of the fight against impunity.[1085]

It can be deduced, thus, that the procedural obligation to investigate and punish the perpetrators is intimately linked to the fundamental right of access to justice which was also attributed the *jus cogens* status. Nevertheless, naming also the obligation of effective investigation and punishment as a *jus cogens* norm and equating to the core prohibition of enforced disappearances can even weaken, for some academics, the meaning of this bold pronouncement of the Court. The mere labeling of such an obligation, which has a concretized content within the jurisprudence of the Inter-American Court, as a peremptory norm of international law as a -mostly- theoretical construction gives rise to only opaque practical effects in terms of international legal practice.[1086]

However, according to the IACtHR' s legal reasoning, it seems that the one has led to the other and, hence, *petit à petit* the expansion of the *jus cogens* concept was understood even more on the occasion of the combat of enforced disappearances. Despite the controversy that this issue has raised, there are still voices that vote for the audacity expressed by the San José Court on this matter. Moreover, the stability and the clarity of the said case law is needed and may offer a potential paradigm to other international judicial bodies. Particularly in the Americas, as far as the generalized practice of enforced disappearances is concerned, *jus cogens* has a preventive role to play against large-scale impunity. Notwithstanding the lack of exact repercussions of such characterization, the symbolic power of the scheme lies to the understanding that for all members of international community -both states and individuals- this prohibition is absolute and no exception is allowed. Importantly, the same goes for the states as regards the obligation to investigate, judge and punish those responsible for the said crimes.

However, it is clear that now the prohibition of enforced disappearance and the corresponding obligation to investigate and punish those responsible are granted the character *jus cogens* norm. Furthermore, on the basis of its universal acceptance, codifying the aforementioned prohibition to domestic criminal law could actually carry serious legal consequences as more litigation could be expected.[1087]

Overall, the *jus cogens* case law of the Inter-American Court serves as an amazing example of judicial activism when it comes to basic human rights guarantees. On the one hand, the wide perspective of the IACtHR was seen as an act of rebellion against the deeply routed Euro-centralised epistemological legacy pertaining to the overly cautious use of *jus cogens* not

[1084] Supra note 1082, para 84.
[1085] In the Court's words, "[a]ccess to justice is a peremptory norm of international law and, as such, gives rise to obligations erga omnes for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so." Ibid., para.131.
[1086] KYRIAKOU N., An affront to the Conscience of humanity: enforced disappearances in the case law of the Inter-American Court of Human Rights, 7 *Inter-Am. & Eur. Hum. Rts. J.* 2014, p.37.
[1087]SARKIN J., Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law, 81 *Nordic J. Int'l L.* 537, 2012, p.582.

only in the realm of general international law but also of international human rights law.[1088] On the other hand, skeptics view this visionary-or even abusive- use of peremptory norms by the San José Court as a potential danger for their credibility and rather opt for the restraint of the Strasbourg Court[1089] -also adopted by the ICJ- defending mostly their subsidiary role and states' will.[1090]

Sustainable or not in the contemporary legal practice or reality, these explicit common references to *jus cogens* aiming to enforce more effectively human rights obligations in the Americas constitute the benchmarks upon which human rights defenders can rely before diverse international fora,[1091] taking, thus, progressively human rights protection one step ahead.

ii. The "endless story" of reparations in the IACtHR case law and the role of the ECtHR

According to Article 63(1) of the American Convention on Human Rights "if the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party." This broad wording of the said provision[1092] constituted the starting point of the famously developed jurisprudence of the San José Court which, indeed, deserved the attention that received in this regard.

[1088] Relatively, Tatiana de A. F. R. Cardoso Squeff and Marina de Almeida Rosa, who are overly defensive of the said audacity of the Inter-American Court to identify more and more human rights as *jus cogens* norms of international law added also the colonialist dimension stating that "[t]his way of coloniality refers to the epistemological legacy of the Europeans in the South peoples, so that they would not be "authorized" to think and create their own knowledge, but only to reproduce the Eurocentric epistemology, becoming a real impediment to the comprehension "[of] the world from the own world".It means that since that coloniality dimension, the epistemological diversity would be inexistent, as would any other experience that escaped the European standard, since only "one way of producing knowledge" would exist, which must be globally repeated", See DE A. F. R. CARDOSO SQUEFF T. and DE ALMEIDA ROSA M., supra note 1063, p.134.

[1089] As far as the European Court of Human Rights is concerned this is clearly illustrated in its MoA jurisprudence. On the contrary, as largely analysed in a previous chapter, this is not the case for this Court which leaves extremely restricted latitude to the States.

[1090] As Erika De Wet emphatically dercribed the most important danger emanating from the excessive use of *jus cogens* "[t]he vague natural law arguments of the Courts above, combined with their scant reliance on state practice, arguably pose some of the biggest threats to the credibility of peremptory norms as representing the core values of the international community as a whole. The decisions open the door for the inclusion of a wide variety of arbitrarily selected norms on the jus cogens list and for potential abuse by courts, states, and other actors claiming to serve the interests of the international community." DE WET, supra note 1064, p. 547.

[1091] DEMBOUR, supra note 1011, p. 312.

[1092] Despite the resemblance with the corresponding provision of the European Convention on Human Rights, namely Article 50 ECHR, the drafting procedure of the American Convention reveals the will of the States to confer greater latitude to the Inter-American mechanisms when deciding on reparations. See respectively, BUERGENTHAL T. and NORRIS R., *Human Rights: The Inter-American System*, Dobbs Ferry, NY: Oceana Publications, Inc., 1984-) (looseleaf publication from 1982), ii, bk. 13, p. 20; As a matter of procedure, in the absence of an agreement between the Inter-American Commission and the respondent State within the time limits fixed by the judgment *in merito*, the Court, frequently, delivers a separate judgment solely on reparations and costs.

Nonetheless, this is not the case under general international law since the international responsibility of the State towards individuals is indeed a topic missing from the Articles on responsibility of States for internationally wrongful acts adopted in 2001 by the United Nations International Law Commission,[1093] which codified norms of customary law and was mainly focused on the international responsibility for inter-state disputes.[1094] Hence, under general international law the ILC Articles on state responsibility constitute the main source of remedial provisions that influenced several judicial bodies when seeking for just redress for human rights violations.

The ambiguity that covers the term[1095] is greatly caused by the extended and varied use of the said wording encompassing both the narrow interpretation, in the sense of monetary damages and the broader referring to a wide variety of remedies available for a breach of an international obligation. Regardless of the meaning given to the term *reparations* the aim is always the same: to turn back the clock. In other words, reparations generally aim to place the injured state at the existing situation before the occurrence of the wrongful act, namely the restoration of the *status quo ante*.

From the international law perspective, the notion was famously described in the *Chorzów Factory* (Indemnity) decision delivered by the Permanent Court of International Justice (PCIJ). In particular, the PCIJ held that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."[1096]Certainly, the same judgment offered a globally accepted definition in page 47 according to which "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[1097]

In this context, specific types of reparation were established in Article 34 ILC Articles.[1098] Taken separately or altogether. Thus, these forms of reparation contain restitution

[1093] ILC 'Articles on Responsibility of States for Internationally Wrongful Acts' [hereinafter ILC Articles] in 'Report of the International Law Commission on the Work of its 53rd Session' (2001) UN Doc. A/56/10. For a multifaceted overview of contemporary challenges for state international responsibility see PAZARTZIS P., MERKOURIS P.(eds.), *Permutations of Responsibility in International Law*, Leiden: Brill/Nijhoff 2019.
[1094] PIACENTINI DE ANDRADE I., *La réparation dans la jurisprudence de la Cour interaméricaine des droits de l'homme*, Université Paris 2 Panthéon-Assas, Thèse de doctorat,2013, pp. 19-23.
[1095] HAASDIJK S., The Lack of Uniformity in the Terminology of the International Law of Remedies',5 *Leiden Journal of International Law* 2, 1992, pp.245-263.
[1096] PCIJ, Factory at *Chorzów Case* (Germany v. Poland) (Merits) (1928) Series A No 17, p. 21; See also the most recent judgment of its successor supra note 900, ICJ, *LaGrand*, para. 48.
[1097] Ibid., p.47.
[1098] Article 34 ILC Articles on State Responsibility reads as follows "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

(*restitutio in integrum*) enshrined in Article 35,[1099] compensation in Article 36[1100] and satisfaction in Article 37.[1101] While compensation is targeted to remedy material damage, satisfaction seeks to repair mostly moral damage; however, both come into play when, given the restrictions of possibility and proportionality, *restitutio in integrum* is not achievable.[1102] In practice, the latter has proved a rather challenging task and for this reason, compensation or satisfaction can actually serve as more appropriate solutions to bring back the *status quo ante*.

Divergent approaches of restitution between international and domestic norms may amount to weaken the effects of this means of reparation and the enforcement of this part of a judgment within the domestic legal order. Furthermore, circumstances at the time that a decision on reparations is delivered may impede the restitution, in its pure essence. For these -and a number of others- reasons, restitution is not, always, the preferable in international dispute settlement.[1103]

From the international human rights law perspective, the ILC Articles, the principle instrument of general international law pertaining to state responsibility, did not remain silent when the question of its application to the disputes between individuals was posed. According to the commentary of Article 33(2) ILC Articles on State responsibility, the International Law Commission has cautiously extended the scope of international obligations and incorporated the said Articles stating "[t]his Part is without prejudice to any right, arising from the international responsibility of a State, *which may accrue directly to any person* or entity other than a State." [1104]

However, state responsibility under human rights treaties entail obligations that require reparations directly addressed to the victims rather than the injured state of which the individual who suffered the violation is national. In this spirit, the specificity of human rights in terms of state responsibility was mirrored in the *Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights law and serious violations of International Humanitarian law*, adopted by the UN General Assembly in 2005 as a result of the work produced by the Sub-Commision for the Promotion and

[1099] Article 35 ILC Articles on State Responsibility provides that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

[1100] Article 36 ILC Articles on State Responsibility provides that "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

[1101] Article 37 ILC Articles on State Responsibility provides that "1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."

[1102] BUYSE A., Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law, 68 *Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches Recht und Völkerrecht)* 2008, p. 132. See also *Chorzów Factory* (Merits), supra note 1096, p. 48. See the ILC's Commentary, p. 239.

[1103] See relatively the doubts expressed by Christine Gray in her monograph GRAY C., *Judicial Remedies in International Law*, Oxford: Clarendon Press 1990, p. 13.

[1104] See, in this respect, SHELTON D., *Remedies in international human rights law*, OUP 2015, p.37; See BUYSE supra note 1102, p.134.

Protection of Human Rights.[1105] The General Assembly reaffirmed the importance of the principle of proportionality and the conformity of the selected means of reparation with the State's domestic laws and international legal obligations, as regards the gravity of the violations. The text also acknowledged restitution, compensation, satisfaction and guarantees of non-repetition as modes apt to restore the harm caused by gross human rights violations. However, the obligation to rehabilitate the victim was added in the *corpus* of reparations in the international human rights law regime.

The said instrument specified some of the satisfactory measures and some of the measures guaranteeing non-repetition of the violating action of the State types of that the injured party may select. Satisfaction can take, cumulatively the form of (a) effective measures aimed at the cessation of continuing violations; (b) verification of the facts; (c) the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) public apology, including acknowledgement of the facts and acceptance of responsibility; (f) judicial and administrative sanctions against persons liable for the violations; (g) commemorations and tributes to the victims; (h) inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[1106]

In view of guaranteeing the non-repetition of a wrongful act, the state, when appropriate, must firstly ensure effective civilian control of military and security forces and that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; strengthen the independence of the judiciary; protect persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; provide, on a priority and continued basis, human rights and international humanitarian law education; promote the observance of legality in several fields; prevent and monitor social conflicts and their resolution; review and reforming relevant legislation.[1107]

Furthermore, as Dinah Shelton stated in relation to the main objectives that reparations serve in international human rights law that "[i]nternational remedies serve to further an additional aim. In the absence of a collective sanctioning or enforcement authority, the injured party claiming reparations acts to uphold the public interest or legal order by punishing and deterring wrongdoing."[1108]

[1105] UNGA, Basic principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights law and serious violations of International Humanitarian law, 21 March 2006, A/RES/60/147. The Basic Principles lack binding force and serve as general guidelines in the field of reparations. In fact, as Christian Tomuschat observed "modification to the text during the drafting process make clear that this is ultimately a collection of recommendations, and not a codification of existing customary law." TOMUSCHAT C., Chapter 67: Individuals in CRAWFORD J., PELLET A, OLLESON S.(eds.), *The Law of International Responsibility*, OUP 2010, p.988.

[1106] Ibid., GA Basic Principles, No 22.

[1107] Ibid., No 23.

[1108] Ibid., p.34.

At any rate, notwithstanding the declaratory character of the said instrument, the GA Basic Principles signaled the need for expansion of the discussion on reparations that the international community has to be reckoned with.[1109] Particularly, in corners of the world that societies are struggling with political instability in post-war situations, or armed conflicts accompanied by grave human rights violations, reparations could serve as the ultimate tool of social reconstruction and political reconciliation.[1110]

It is in this particular background that the European Court of Human Rights reviewing the implementation of the ECHR, adopted in the wake of the Second World War, contented itself to award mainly monetary compensation to the victims of human rights violations. The relevant provision of Article 41 ECHR is indicative of the less rigorous approach of the CoE system on reparations: "[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, *if necessary*, afford just satisfaction to the injured party." Apparently, the question of subsidiarity governs, once again, the whole reparation mechanism under the Convention. It stems, indeed, from the broadness of the Convention's provision that the Court's competence to grant just satisfaction is subsidiary to remedial measures under national law. In line with the language of the ECHR, the Court restricted itself, in a range of cases, to acknowledge that the mere issuance of a decision declaring a human rights violation suffices as reparation to the victim of the said violation. Otherwise, the Court orders monetary compensation as just satisfaction in the spirit of Article 41 ECHR.

In its *Scozzari and Giunta v. Italy* judgment, the Court highlighted the elements and conditions shaping its interpretation of just satisfaction stating that "the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied."[1111] This pronouncement of the Court illustrated the extreme caution of the Starsbourg Court when it comes to remedial measures. Until recently, the almost sole perception of just satisfaction was the monetary compensation. Discretionary powers are granted to the States to decide on further means of reparation to remedy non pecuniary or moral damage of the applicants. In particular, the Court has refused repeatedly to award satisfaction to the injured party if, in its view, the latter has been engaged in some sort of reprehensible activity or on the basis of sufficient proof of a causal link between the violation and the damage caused. Actually, the Court on numerous occasions denied to award the sum of compensation claimed by the applicants and rejected requests of remedial approaches other than just satisfaction in the sense of monetary indemnification. In fact, the Court was not convinced to order investigation in cases in which the prohibition of torture or ill-treatment was infringed.[1112]

[1109] Antoine Buyse observed on this issue that "maybe it is here that one of the main merits of the Basic Principles is to be found; they emphasize a legal approach, but leave room for specific application in specific national situations and for specific rights. In that respect their relative weakness could be their strength.", Supra note 1102, p.143.

[1110] VAN BOVEN T., The need to repair, 16 *IJHR* 5, June 2012, pp.694 –697.

[1111] ECtHR, *Scozzari and Giunta v. Italy*, Application Nos. 39221/98, 41963/98, 13 July 2000, para 250.

[1112] The Strasbourg Court, in an enforced disappearance case in which the applicants requested that the State should conduct an effective investigation in the context of the execution of the Court's judgments under Article 46 ECHR responded that "The Court reiterates that, in the context of the execution of judgments in accordance

In addition, the Court was hesitant to declare that the respondent State which was found responsible for the violation was bound to refrain from corporal punishment of children, to take preventive steps as guarantees of non-repetition in the future[1113] or even to respond favorably to family reunification requests made by applicants who have suffered arbitrary expulsions.[1114]

Within the boundaries of the ECtHR's subsidiary role, the Court expressed its persistence to leave substantial leeway to the State Parties as for the methods selected to redress the violation. This stance of the Court is, probably, reinforced by the execution mechanism of its judgments functioning under the auspices of the Council of Europe, namely the Committee of Ministers.[1115] The Committee is a decision-making body mandated to define and specify the enforcement *formulae* deriving from the Court's decisions and to monitor their execution.[1116]

Therefore, since every rule has its exceptions we should not sidestep the fact that the Strasbourg Court has notably declared the utmost importance of the principle of *restitutio in integrum* in the *Papamichalopoulos* case in which it stated that "it follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."[1117]

That said, the Court had already left the door open to go beyond its first but well-established remedial strategy, in particular, in expropriation cases. In the light of the Court's evolutive jurisprudence on property rights, it decided that the return of the land constitutes a measure apt to bring the applicants "in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (P1-1)."[1118]

Besides the aforementioned *Scozzari* judgment,[1119] the Court started to acknowledge the insufficiency of monetary compensation as a means of full restitution in cases of grave

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witt Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (restitutio in integrum). However, its judgments are essentially declaratory in nature and, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's. . ..This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1)" ECtHR, *Kukayev v. Russia,* Application No. 29361/02, 15 November 2007.

[1113] See ECtHR, *Campbell and Cosans v. United Kingdom*, Application No. 7511/76; 7743/76, 25 February 1982, para. 16; *McGoff v. Sweden*, Application No. 9017/80, 26 October 1984, para. 31; *Dudgeon v. United Kingdom,* Application No. 7525/76, 24 February 1983, para.15; *Gillow v. United Kingdom*, Application No. 9063/80, 14 September 1987, para. 9.

[1114] ECtHR, *Mehemi v. France*, Application No. 85/1996/704/896, 26 September 1997, Reports 1997-VI, p. 1959

[1115] SCHNEIDER J., *Reparation and enforcement of judgments: a comparative analysis of the European and Inter- American human rights systems*, PhD Thesis University of Mainz, 2015, available at https://www.ssoar.info/ssoar/bitstream/handle/document/45633/ssoar-2015-Schneider Reparation_and_enforcement_of_judgments.pdf?sequence=3, p. 81.

[1116] For an overview of the role and the function of the Committee of Ministers see PALMER S. The Committee of Ministers in SCHMAHL S. and BREUER M. (eds.), *The Council of Europe: its Law and Policies*, 2017. See also Chapter IV of the Statute of the Council of Europe which entered into force in 1949, ETS No.001.

[1117] ECtHR, *Papamichalopoulos v. Greece(Art.50)*, Application No. 14556/89, 31 October 1995, para 34.

[1118] ECtHR, *Hentrich v. France*, Application No. 13616/88 22 September 1994, para. 71; Ibid., para 38.

[1119] Paradoxically, the Court just before concluding to the restrictive meaning given to Article 41 ECHR in *Scozzari*, the Court has admitted that "[i]t follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation *not just to pay those concerned the sums awarded by way of just satisfaction,* but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if

moral damage. For instance, in a case concerning the continuing violation of Article 5 ECHR since Georgian authorities were continually ignoring the orders of release issued by the domestic Courts due to the arbitrary detention of Georgian national in the *Assanidze v. Georgia,*[1120] the Strasbourg felt that, naturally, "[h]owever, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it" [1121]and thus, ordered Georgia to release the applicant at the earliest possible date. In the case at hand, while it is for the respondent State to opt for the appropriate remedial scheme so as the damage caused could be successfully restored, it was also for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.[1122]Hence, slowly but cautiously, the Court took the first steps towards seeing legislative amendments as potential modus of redress.

From this point onwards, the Court felt that slowly but steadily may consent to some exceptions from its, initially documented, restraint on the matter. The critical point was, once again, the expansion of the Council of Europe eastwards. Since the 90s the Court was, as earlier analysed, repeatedly forced to grapple with the pressing issue of enforced disappearances. The complexity of the phenomenon led the Court to follow a more stringent strategy pertaining to the reparative methods. Indicatively, in a significant number of cases against Russia emanating from the continuing Chechen conflict the Court went on to specify the reparative measures required in *obiter dictum*.In these cases, the Court has delved into the prompt way to conduct an effective investigation.[1123]

Furthermore, the freshly embraced pilot-judgment procedure offered the opportunity to the European Court to interpret differently Article 41 in conjuction with Article 46 ECHR[1124] mapping the executions of its judgments. The latter has lately served as a more valuable legal basis for the renewed remedial strategy of the Strasbourg Court. The said formula which was

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appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects." para 249.

[1120]ECtHR, *Assanidze v. Georgia*[GC], Application No. 71503/01, 8 April 2004.

[1121] Ibid., para 202.

[1122] Ibid, para 198; ECtHR, *Maestri v. Italy*, Application No. 39748/98, 17 February 2004, para 47.

[1123] ECtHR, *Bazorkina v. Russia*, Application No. 69481/01, 27 July 2006, paras. 117-119; Jean Paul Costa wondered as regards the unimpeded function of the European judicial mechanisms and particularly of the ECtHR "how will these European mechanisms, of which we can be proud, fare when confronted with grave human rights violations, such as in the Balkans, Kurdistan or Chechnya?" COSTA J-P., Responsibility for violations of human rights obligations: European Mechanisms" in CRAWFORD J., PELLET A., OLLESON S., *The law of international responsibility*, OUP 2010, p.774; See also the dissenting opinion in ECtHR, *Medova v. Russia*, Application No. 25385/04, 15 January 2009, partly dissenting opinion of Judge Spielmann.

[1124] Article 46 ECHR reads as follows: "Binding force and execution of judgments 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee. 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1. 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

institutionalized in 2011 so as the extreme caseload of the Court could be unburdened[1125]was, mostly, used by the Court in cases in which systemic violations of procedural rights occurred on the basis of dysfunctional domestic judiciaries. Pertaining to reparations, since the contested disputes, often, concerned the lack of effective remedies, the right to fair trial as well as the prohibition of lengthy or arbitrary detention. The Court's seminal pilot judgment *Maria Atanasiu and others v. Romania* [1126]offers an illustrative example of the tendency of the Court to indicate specific measures that the respondent States should adopt in order to fulfill the principle of *restitutio in integrum* besides monetary relief.

Combining these recent trends within its jurisprudence, the Strasbourg Court, in 2012, in an enforced disappearance case was presented more willing to bring new air to its case law on reparations, in the light of the present-day conditions in some of the Contracting Parties. More specifically, in *Aslakhanova and others v. Russia*,[1127] it observed that the lack of effective investigations in disappearances is the outcome of systemic problems for which there is no effective remedy available domestically. Hence, the situation, as described *in casu*, "it affects core human rights and requires the prompt implementation of comprehensive and complex measures." For the Strasbourg Court, such measures can be organized in two distinct categories: the first, addressing the suffering of the relatives of the victims and the second, addressing the effectiveness of the investigative process.

The Court's proposal included, indicatively, the establishment "of a single, sufficiently high-level body in charge of solving disappearances in the region of Northern Caucasus, which would enjoy unrestricted access to all relevant information and could compile and maintain a unified database of all disappearances". Additionally, the European Court underlined "the pressing need of allocating specific and adequate resources required to carry out large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites, the collection storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databases." Interestingly, the Court delt with the financial compensation paid to the victims' families and as regards the question of effectiveness held that "it is of utmost importance that the disappearances which have occurred in the region in the past become the subject of a comprehensive and concentrated effort on the part of the lawenforcement authorities. In view of the clear patterns and similarities in the occurrence of such events, it is vital to adopt a time-bound general strategy or action plan to elucidate a number of the questions that are common to all the cases where it is suspected that the abductions were carried out by State servicemen. The plan should also include an evaluation of the adequacy of the existing legal definitions of the criminal acts leading to the specific and widespread phenomenon of disappearances."[1128]

[1125] For an overview of the *corpus* of pilot judgments delivered by the Court under Article 61 of the Rules of Procedures of the Court see the relative factsheet on pilot judgments, available at https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf .

[1126] ECtHR, *Maria Atanasiu andothers v. Romania*, Application Nos. 30767/05 et al., 12 October 2010, paras. 195-242.

[1127] ECtHR, *Aslakhanova and others v. Russia*, Application Nos. 2944/06,8300/07, 50184/07,332/08 and 42509/10, 18 December 2012, paras 217, 220.

[1128] Ibid., paras 223-237.

Nonetheless, notwithstanding the fact that the Court emphatically put the systemic character of these particular human rights abuses in the center of its reasoning, it appears as it has deliberately refrained from defining the said judgment as pilot judgment [1129] nor it included the indicated measures in the dispositive part of its decision.[1130]While the Strasbourg Court has surely evolved on the matter through the years, the content under the heads of "pecuniary damage", "non-pecuniary damage", "costs and expenses" or "default interest" remains more or less the same. Monetary compensation still remains the main remedial practice of the European Court. [1131]

All that said, the blatant unwillingness of the Court to be more welcoming to varied forms of reparations has, arguably, received great academic attention. For Tomuschat, "it is difficult to maintain that the individual holds a true right to reparation under article 41 of the European Convention."[1132] Actually, the Strasbourg Court appears to be a victim of its own success. Trapped in a huge backlog of applications, it paved, from the very beginning, its narrow road to the land of reparations with stringent requirements and pure conservatism. The increasing occurence of egregious human rights breaches[1133] still present in Europe along with, perhaps, the alternatives given by other regional(e.g Inter-American Court of Human Rights) or global (e.g.Human Rights Committee) bodies in terms of remedial approaches have left room for further improvements.

In general terms, the Strasbourg Court continues to have a minimalist approach to redress. It probably adopted its reserved interpretation of its remedial powers due to the fact that the individual was not the absolute focus of the system at its inception.[1134]This perception of the Court's approach could be one of the roots of the discrepancies witnessed in the field of reparations between the former and the Inter-American Court of Human Rights, which, since its dawn, has captured a wide variety of vitally crucial dimensions of remedies, as identified under international human rights law and general international law.

[1129] Recently, the Court has developed the concept of 'Art.46 judgments" or "quasi-pilot judgments". See in this regard LEACH P., No longer offering fine mantras to a parched child? The European Court's developing approach to remedies in FØLLESDAL A., PETERS B. and ULFSTEIN G.(eds.), *Constituting Europe,The European Court of Human Rights in a National, European and Global Context*, CUP 2013, p.166-171.

[1130] CITRONI G., Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts, 5 *Inter-Am. & Eur. Hum. Rts. J.* 49, 2012, p.64, 65.

[1131] "The Court's awards, if any, will normally be in the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention)." Practice Directions on Just Satisfaction Claims issued by the President of the Court, Rules of Court – 1 August 2018, available at https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf .

[1132] TOMUSCHAT, supra note 1105, p.987.

[1133] As Philip Leach correctly remarked pertaining to the suitability of the redress that the ECtHR systematically selects that "(…) these cases are not just about individual justice; much broader questions arise about wider societal healing and the relevance of principles of restorative justice, such as reintegration and rehabilitation." LEACH P., supra note 1129, p.171.

[1134] SHELTON, supra note 1104, p.215; "The original purpose of the Convention was not primarily to offer a remedy for particular individuals who had suffered violations of the Convention but to provide a collective inter-state guarantee that would benefit individuals generally by requiring the national law of the contracting parties to be kept within certain bounds.": HARRIS D., O'BOYLE M., and WARBRICK C., *Law of the European Convention on Human Rights*, 2nd Edition, OUP 2015, p. 33.

Against this background, the contribution of the San José Court not only to the universalization of its enlarged Inter-American notion of reparations[1135] but also to the development of peacebuilding processes and conflict management patterns in the region can be examined, at first, in the light of the reconceptualization of the usual remedial practice followed by international tribunals and secondly, through the lens of the broadness of the measures ordered by the IACtHR.

Pertaining to the San José perception of reparations,the first signs appeared in its first contentious case, the landmark *Vélasquez Rodriguez case*[1136] in which the San José Court bravely dinstanced itself from the rigorous conception of subsidiarity,[1137] persistently followed by its Strasbourg counterpart.

At the end of the day, the Court awarded only monetary indemnification for the violation of multiple rights in this case,[1138]however, given the expansion of its reparation jurisprudence the Inter-American Court of Human Rights would have opted for even more effective and wide-ranging remedies under the circumstances of the present case.[1139] In essence, the autonomous character of the obligation of the State to repair, which also derives from Article 1 ACHR has been declared from the very beginning along with the acceptance that the mere failure of the State Party to provide effective remedies for human rights breaches constitutes in itsef a breach of the IACHR's provisions.[1140] Thus, it flows from the Court's understanding of reparations that among the obligations of the State is its duty to take all appropriate measures to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify and punish the perpetrators of the violations and to provide the necessary guarantees of the victim's adequate compensation.[1141]

In stark contrast with its European counterpart,[1142] the San José Court is not hesitant to interpret Inter-American human rights law in the spectre of international law of state

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[1135]BONNEAU K., La jurisprudence innovante de la Cour Interaméricaine des Droits de l'Homme en matière de droit à réparation des victimes de violations des droits de l'homme in HENNEBEL L., TRIGOUDJA H.,(eds.) *Le particularisme interaméricain des droits de l'homme*, Pédone, 2009, p. 380.

[1136] IACtHR, *Velásquez-Rodríguez v. Honduras*, (Reparations and Costs), 21 July 1989 Series C No 7; See in relation to damage awards in the first Honduran cases FONTANA B., Damage Awards for Human Rights Violations in the European and Inter-American Courts of Human Rights, 31 *Santa Clara L. Rev.*, 1991, pp.1127-1169.

[1137] Ibid., para. 30.

[1138] The Honduran government was ordered to pay 750,000 Honduran lempiras to the victim's family. Due to the significant delay on the basis of the devaluation of the currency, the Inter-American Court delivered an interpretive judgment. Ever since, it routinely orders payment of monetary compensation in a strong currency such as US dollars or their local currency equivalent.

[1139]CASSEL D., The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights in BOSSUYT M., LEMMENS P., DE FEYTER K., and PARMENTIER S. (eds.), *Out of the Ashes: Reparations for Gross Violations of Human Rights,* Intersentia, 2006, p.97.

[1140] For the Court "[a]ccording to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking." *Judicial Guarantees in States of Emergency* (Articles 27(2), 25 and 8, American Convention on Human Rights), Advisory Opinion OC-9/87 of 6 October 1987, Series A, No. 9, para. 24; *Constitutional Court v. Peru* (Merits, Reparations, and Costs), 31 January 2001, Series C, No. 71, para 89.

[1141] See for instance the *Velásquez Rodríguez* Case, supra note 786, para 174.

[1142] At this point, it is noteworthy that according to the early drafting process of the American Convention, Article 63 was patterned on Article 50 ECHR.However, some states felt that the language of the Article could be strengthened and hence, it was fleshed out with the additional elements that shaped its final form. OAS, Inter-

responsibility both classic and customary[1143] or of other regional or universal instruments. Thus, it managed to reinforce and ensure more effectively the protection offered within the limits of the Inter-American system, irrespective of the fact that the latter does not contain judicial organs of general competence.[1144]

As the Court has repeatedly stated "Article 63(1) of the American Convention embodies an accepted tenet that is a fundamental principle of the contemporary International Law on the responsibility of States. The occurrence of a wrongful act that is attributable to a State gives rise to the State's international liability, and its resulting duty to make reparation for and remove the consequences of the violation. The obligation to compensate is governed by International Law and it may be neither modified nor disregarded by the State in reliance upon its domestic law."[1145] Additionally, the Court has repeatedly stated that the cornerstone of the Inter-American jurisprudence on reparations, namely the provision of Article 63 (1) ACHR, is governed in its entity by international law.[1146] Therefore, since the obligation to repair must be understood as imposing international legal obligations, derogations from which are not permitted on the basis of the State's invocations of national provisions.[1147]

Particularly active and original in the judicial production of remedies, the Inter-American jurisprudence has considerably contributed to fill the abovementioned lacuna in the law of international responsibility of States towards individuals in terms of regional human right protection. Within the mere limits of the Inter-American system, the concept of reparations has outstandingly evolved overtime. This evolution can also be greatly explained by the choices of the Inter-American Court in terms of the procedure. Admittedly, the authorization of the victims' representation before the Court, the lesser evidentiary burden and burden of proof, the enlargement of the notion of victim status and the control of the execution of its judjments are all manifestations of the strong will of the San José Court to more effectively repair the damage caused in favour of the victims.[1148] Unlike its European peer, the Inter-American human rights system has not endorsed a supervisory organ of the execution of the Court's judments, equivalent to the Committee of Ministers. Forced to delve into the practical elements of the implementation its judgments, the San José Court has developed, since

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American Council of Jurists, Fourth Meeting, Santiago, Chile, Aug.–Sept. 1959, OAS Doc. 128, Rev. (1959), reprinted in BUERGENTHAL and NORRIS, Human Rights: The Inter-American System, vol.3, bk. 16(1) at 26, 57, 86 available at http://www.corteidh.or.cr/tablas/1868.pdf ; SHELTON D., supra note 1104, p.228.

[1143] The Court cited the Factory at Chorzów jurisprudence of the ICJ to declare the customary nature of the state's international obligation to repair. See IACtHR, *Velásquez Rodríguez* Case, Compensatory Damages (Art. 63(1) of the American Convention on Human Rights), 21 July 21, 1989. Series C No. 7, para. 25; *Godínez Cruz* Case, Compensatory Damages (Art. 63(1) of the American Convention of Human Rights), Judgment of July 21, 1989, Series C No. 8, para. 23; *Aloeboetoe et al. Case*, Reparations (Art. 63(1) of the American Convention on Human Rights), 10 September 10, 1993, Series C No. 15, para. 43; *El Amparo v. Venezuela*, (Reparations and Costs) Series C No. 28, 14 September 1996, para 14.

[1144] See RIVIER R., supra note 791.

[1145] See indicatively IACtHR, *La Cantuta v. Peru*, (Merits, Reparations and Costs) 29 November 2006, Series C No 162, para 200 ; *Almonacid Arellano y otros v. Chile*, (Preliminary Objections, Merits, Reparations and Costs) 26 September 2006, Series C No 154 para 135 ; *Juan Humberto Sanchez c. Honduras*, (Preliminary Objections, Merits, Reparations and Costs) Series C No 99, 7 June 2003, para 148; *Manuel Cepeda Vargas v. Colombia*, (Preliminary objections, merits, reparations and Costs) 26 May 2010, Series C No 213, para 211.

[1146] Entity is undersood, here, as containing all aspects that have accorded to international law its special nature and supported its function: its scope, specific characteristics and beneficiaries.

[1147] Supra note 1136, para 30.

[1148] BONNEAU, supra note 1135, p. 354 *et al.*

the late 1980s, a progressive case law on reparations so as true relief for large-scale human rights abuses can be ensured in Latin America.

The main objective of the Inter-American reparations regime is full restitution (*restitution in integrum*) which lies on the core of the sense of reparation. In the Court's words "reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and nonpatrimonial damages, including emotional harm."[1149]

Taking advantage of its enlarged remedial powers to order reparation measures pursuant to Article 63(1) ACHR, the Court has also routinely stated that "full restitution (restitutio in integrum), which consists in restoring a previously-existing situation. If not feasible, the international court will then be required to define a set of measures such that, in addition to ensuring the enjoyment of the rights that were violated, the consequences of those addition, there is also the State's obligation to adopt affirmative measures to guarantee that no injurious occurrences such as those analyzed in the case at hand will take place in the future."[1150]

Nevertheless, the Court had already acknowledged that, in practice, due to the very nature of the cases adjudicated by the Court in many instances touching upon the right to life of the victim (e.g. cases of enforced disappearances, extrajudicial kilings etc.) full restitution is out of question. In this spirit, in *Aloeboetoe case,* a case in relation with human rights abuses of this type, the Court stressed that restitution can also take alternative forms such as pecuniary compensation.[1151]Hence, despite the fact that restitution was the preferred means of reparation when a breach of an obligation under Inter-American law occurs, the Court will opt for another remedial measure if the restoration of the situation existing prior to the violation is impossible, insufficient or inadequate.[1152]

Mapping the outter boundaries of restitution, the San José Court recalled the principle of proportionality on which all reparative measures rely on. Hence, in the process of determining the most suitable form of reparation in the aim of *restitutio in integrum*, the Court should take into consideration the specificities of each dispute and each violation inflicted on a *case by case* basis. Remarkably, the Court seemed to carefully approach the issue and reiterated its *jurisprudence constante* on the matter making a synthesis of its early case law and of its recent, more delimited understanding of reparations.[1153] Therefore, on the occasion of its landmark *Cotton Field* Case, the Court clarified the exact content of the concept of "integral reparation" (restitutio in integrum) saying that the latter "entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused (…)Similarly, the Tribunal recalls that the nature and amount of the reparations ordered depend on the characteristics of the violation and

[1149] Supra note 1136, para 25.
[1150] IACtHR, *La Cantuta v. Peru* case, supra note 1145, para 201.
[1151] In the present case, the Court has made a dinstinction between the measures inflicted to the State in order to repair the damage caused in the past and the measures that guarantee the non-repetition of similar violations in the future. See, in this regard, IACtHR, *Aloeboetoe et al v Suriname*, (Reparations and Costs), 10 September 1993, Series C no 15, para 46,49-50.
[1152] IACtHR, *Gangaram-Panday v. Suriname*, (Merits, Reparations and Costs) 21 January 1994, Series C No.16. RIVIER R., Supra note 791, p.749.
[1153] See PIACENTINI, supra note 1094, p.150.

on the pecuniary and non-pecuniary damage caused. Reparations should not make the victims or their next of kin either richer or poorer and they should be directly proportionate to the violations that have been declared."[1154]

Another element of the Inter-Ameican protection offered in terms of reparation stems from the Court's reference to the *life plan (proyecto de vida)* which was, originally, introduced in the *Loayza Tamayo v. Peru*.[1155]This case concerned the arbitrary arrest and detention of Professor Maria Elena Loayza Tamayo of the Universidad San Martín de Porres by the Peruvian authorities on suspicion of having terrorist activity. The victim was brought before military "faceless" courts then, again before civilian courts in violation of the *ne bis in idem* principle. During her 4-years imprisonment, Ms Loayza Tamayo was subjected to cruel, inhuman, and degrading treatment. The Inter-American Court in its decision on reparations dedicated a whole chapter with ten paragraphs to describe the damage to the *life plan.* In this light, the notion of *life plan* is "akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself."[1156] Defined as the anticipated personal accomplishment of the individual which is both reasonable and attainable in practice, its loss or severe diminution, in a manner that could be irreparable or hardly reparable cannot be ignored by the IACtHR.[1157]

Since the victim, in the case under scrutiny, was kept in captivity for several years, the Court felt that this particular damage should have been taken into serious consideration. Consequently, *besides the order of her release*,[1158]the Court ordered the State to reinstate the victim to her former teaching positions. Even though the Court abstained from awarding monetary damage to Ms Loayza Tamaro, it particularly ordered that its salarial status should be restored at the level that the victim enjoyed at the time of her detention, "adjusted to its value as of the date of this Judgment."[1159]

Having said all the above, we should shed light to the *specific content* of the extraordinary reparations ordered by the Inter-American Court, largely influenced by the particularities of the disputes adjudicated by the Court. The cornerstone pronouncement of the *Vélasquez Rodriguez* judgment[1160] mirroring the basic principle of international law according to which "every violation of an international obligation which results in harm creates a duty to make adequate reparation", has been fleshed out with a variety of different types of reparations.[1161]The main general categories under which all specific measures of relief may fall are restitution, rehabilitation, satisfaction and compensation. In the Inter-American case law, we can also find more theoretical remedial measures such as the naming of the Court's decision

[1154] See the *Cotton Field* case, supra note 815, para 450.
[1155] IACtHR, *Loayza-Tamayo v. Peru*, 27 November 1998 (Reparations and Costs), Series C No 42, paras 144-154.
[1156] Ibid., para 148.
[1157] Ibid., para 150, See also SHELTON D., supra note 1104, p.350.
[1158] On the provisional and remedial measures decided in the *Loayza Tamaro* case see PASQUALUCCI J., Supra note 782, p. 199, 322. Following to the said judgment, Peru amended its anti-terrorism legislation.
[1159] Supra note 1155, para 113.
[1160] See *Velásquez-Rodríguez v. Honduras* (Reparations and Costs), Supra note 1136, para. 25.
[1161] For an extremely thorough overview of the *plethora* of different reparative measures ordered by the Inter-American Court of Human Rights see PASQUALUCCI J., Supra note 782, pp.188-251.

per se as a form of reparation[1162] and more practical ones such as the obligation of the Court to investigate, prosecute and punish[1163] and the guarantees of non-repetition, deterring potential human rights abuses and paving a safer route for the future.

However, within these wide-ranging categories the major distinction that could be drawn is the one between (a) individual-oriented measures and (b) public-oriented measures.For the aims of the present contribution, the focus is on the most complex forms of reparations which need to be further analysed.

Hence, as regards measures targeted to redress the individual's situations, the main objective is the full restitution of the existing situation prior to the occurrence of the violation at hand. Hence, in the realm of measures of restitution, the Court has incorporated for instance, the release of persons who were wrongfully detained and their reinstatement of employment in use of the life plan concept, as it was the case in the-previously analysed-*Loayza Tamaro* against Peru. The Inter-American Court has, also, ordered the restitution of property in cases in which the Court concluded that this unlawfully seized property should be returned to the victims,[1164] the expungement of public records when it comes to criminal offences,[1165] or guarantees for displaced victims due to internal conflicts to return to their homes.[1166]

Secondly, rehabilitation constitutes another form of remedy that the Court has utilized in cases in which the victims were subjected to extreme physical and/or psychological suffering or harm. These rehabilitative measures may include the provision of appropriate and effective health care with specific provisions on both medical and psychological treatment.[1167] The

[1162] The "*Last Temptation of Christ"* judgment offers an illustrative example of this type of redress. See "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile), supra note 960, para. 99. However, the large-scale brutal violations that dominated the region (e.g. enforced disappearances, extrajudicial killings, acts of torture) required also, in most of the cases, additional pecuniary and non-pecuniary(moral) measures of compensation. See in this regard, IACtHR, *Myrna Mack Chang v. Guatemala*, (Merits, Reparations and Costs) 25 November 2003, Series C No. 101, para 260, 330; *Paniagua Morales et al. v. Guatemala*, (Reparations and Costs), 25 May 2001, Series C No. 76, para. 105; *Castillo-Páez v. Peru*, (Reparations and Costs) Series C No. 43, 27 November 1998, para 84.

[1163] This obligation is also seen by the San José Court as part of its reparations regime due to the systemic deficiencies in investigation authorities of many State Parties. See IACtHR, *Velásquez-Rodríguez v. Honduras* (Reparations and Costs), Supra note 1136, para. 33; Series C No. 213, para. 216. The said obligation of the State lasts until the latter has totally fulfilled its obligations. See relatively IACtHR*, Trujillo Oroza v. Bolivia* (Reparations and Costs), 27 February 2002, Series C No 92, para. 111.

[1164] See *inter alia* IACtHR, *Cantoral-Huamaní and García-Santa Cruz v. Peru* (Preliminary Objection, Merits, Reparations, and Costs), 10 July 2007, Series C, No. 167, para. 187; IACtHR, *Palamara Iribarne v. Chile* (Merits, Reparations, and Costs), 22 November 2005, Series C, No. 135, para. 250.

[1165] "It is self-evident to this Court that the verdict of conviction that the Supreme Court delivered against Mr. Cantoral Benavides and the other decisions adopted in the proceedings to which he was subjected, were rendered on the basis of a law that was not compatible with the American Convention and that in the conduct of the respective proceedings the rights to judicial protection and to due process of law, recognized in the Convention, were violated. Consequently, in this Judgment on reparations, this Court must order that the State nullify, in accordance with its domestic law, the conviction that the Peruvian Supreme Court delivered against Luis Alberto Cantoral Benavides." IACtHR, *Cantoral Benavides v. Peru* (Reparations and Costs), 3 December 2001, Series C, No. 88, para.77.; *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (Preliminary Objections, Merits, Reparations, and Costs), 21 November 2007, Series C, No. 170, para. 260; *Palamara Iribarne v. Chile* (Merits, Reparations, and Costs) 22 November 2005, Series C No. 135, para. 253.

[1166] See, mostly, in this respect the following Colombian judgments: Supra note 819, para. 287; IACtHR, *"Mapiripán Massacre" v. Colombia*, (Merits, Reparations, and Costs), Series C No. 134, 15 September 2005, para. 313; *Ituango Massacres v. Colombia* (Preliminary Objections, Merits, Reparations, and Costs), 1 July 2006, Series C, No. 148, para. 404;

[1167] IACtHR, *Chitay Nech et al. v. Guatemala*, (Preliminary Objections, Merits, Reparations, and Costs), 25 May 2010, Series C No 212, paras 253-256.

treatment must be adequate, free of charge, personalized,[1168] and provided by experts on the particular kind of harm that the victim has endured.[1169]

As for satisfaction, this is conceptualized as encompassing non monetary acts that seek to offer moral relief to the victims. Some of them are, often, public in nature and serves to repair not only the personal harm of the victim and of his family but also serves as an example for the entire society. In this sense, public acts of the State to acknowledge responsibility[1170] or a state's apology covered by the media[1171] constitute types of reparations that attempt to restore the dignity of the victims, rectify the misinformation that may have been disseminated about them or about the events in question, and which could be of utmost importance for their relatives and friends. In the same spirit, the broad publication of the judgment or of a critical part of its pronouncements[1172] also serves the same purpose.

While there are some -restricted in number- measures of satisfaction that are solely addressed to individuals,[1173] most of the aforementioned remedial strategies of satisfaction offer relief individually but have also a tremendous effect to the society as well.

However, reparations to individuals can also take the form of compensation, namely the most common, traditional and, sometimes, the most effective type of pecuniary remedy

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[1168]Ibid., See also, *inter alia, Manuel Cepeda Vargas*, supra note 1145, para. 235; *Ituango Massacres v. Colombia*, Supra note 1166, para. 403, operative para. 16.

[1169] IACtHR, *The Barrios Family v. Venezuela* (Merits, Reparations, and Costs) 24 November 2011, Series C No. 237, para. 330; *Anzualdo Castro v. Peru* (Preliminary Objection, Merits, Reparations, and Costs), 22 September 2009, Series C, No. 202, para. 203. See SHELTON D., Supra note 1104, p. 394,396 and PASQUALUCCI J., Supra note 782, p.202,203

[1170] Recently, Brazil was obliged to make such a public acknowledgment of its international responsibility under the following conditions: "the Court deems that the State must carry out a public act of acknowledgment of its international responsibility, in relation with the facts of the present case, referring to the established violations in the present Judgment. The act should be carried out during a public ceremony, in the presence of high-ranking national authorities and of the victims in the present case. The State should agree on the terms of compliance of the public act of acknowledgment with the victims or their representatives, as well as the particularities required, such as location and date for it to be carried out. Said act should be disseminated via the media, and the State has a period of one year as of the notification of the present Judgment to carry out the act." IACtHR, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 219, 24 November 2010, para 277; See also, IACtHR, *Rosendo Cantú et at v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs)31 August 2010, Series C, No. 216, para 226; *Serrano Cruz Sisters v. El Salvador* (Merits, Reparations, and Costs), 1 March 2005, Series C, No. 120, para 194.

[1171] IACtHR, *Tibi v. Ecuador* (Preliminary Objections, Merits, Reparations, and Costs), 7 September 2004, Series C, No. 114, para. 261.

[1172] IACtHR, *Radilla Pacheco v. Mexico*, (Preliminary Objections, Merits, Reparations, and Costs), 23 November 2009, Series C, No. 209, para 350; *Kawas-Fernández v. Honduras* (Merits, Reparations and Costs) 3 April 2009, Series C No. 196 para 199.

[1173] For instance, the order of the Court to the State *to locate and identify the victims* of enforced disappearances are seen as means of satisfaction. IACtHR, *Ticona Estrada et al. v. Bolivia*, (Merits, Reparations and Costs) Series C No. 191, 27 November 2008, para. 155; *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, 2010), para. 240. See also IACtHR, *Gelman v. Uruguay*, (Merits and Reparations), 24 February 2011, Series C No 221, para. 79. Moreover, despite the fact that the death penalty is not prohibited in all instances, under the American Convention on Human Rights, the San José Court has ordered in several occasions the State to abstain from executing detainees that are alleged to have been wrongfully tired and detained. See *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, supra note 924, para 105; *Raxcaco Reyes v. Guatemala* (Merits, Reparations, and Costs)15 September 2005, Series C, No. 133, para 133.
In addition, in cases in which victims of human rights violations are deprived of their liberty at an early age, the Court may order the State to cover the expenses of education or special training programs for the injured party. See, indicatively, IACtHR, *Cantoral-Huamaní and García-Santa Cruz v. Peru*, (Preliminary Objection, Merits, Reparations and Costs), 10 July 2007, Series C No 167, para 194.

under international law. Arguably, the concept of pecuniary damages entails the loss of earnings and benefits of the applicant and any consequential loss having a causal link with the harmful situation to which the victim was entitled.[1174]Inextricably linked to the protection of human dignity which resides in the center of the Inter-American case law and it is also routinely acknowledged by the European Court as the milestone of European human rights law, [1175] non-pecuniary measures may be ordered to offer consolation for moral damage.

Under Inter-American human rights law, "non-pecuniary damages may include both suffering and affliction caused to the direct victims and their next of kin, such as detriment to very significant personal values, as well as non-pecuniary alterations in the conditions of existence of a victim or his or her family."[1176] Subsequently, the Court has observed that since there is no room for precise monetary calculation of the equivalent to non-pecuniary damages, "it can only be the object of compensation in two forms. First, through payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Tribunal will establish through reasonable application of judicial discretion and equity. And, second, through acts or works which are public in their scope or effects." [1177]

However, it is noteworthy that irrespective of the fact that the Inter-American Court doesn't share the same views on victim status with the Court of Strasbourg,[1178] it appeared that the former used the ECtHR's criteria in order to enhance its reasoning regarding cases in which family members are considered as direct victims of the violation and hence, are entitled to redress. In the *Bámaca-Velásquez v.Guatemala* case[1179] the Court recalled the findings of the Strasbourg Court in the *Kurt* case as enriched by its *Timurtas* and *Çakici* jurisprudence against Turkey.[1180] Thus, when ascertaining whether the next of kin of a direct victim are also victims, the Court needs to examine "the closeness of the family relationship, the particular circumstances of the relationship with the victim, the degree to which the family member was a witness of the events related to the disappearance, the way in which the family member was involved in attempts to obtain information about the disappearance of the victim and the State's

[1174] IACtHR, *Bámaca-Velásquez v. Guatemala* (Reparations and Costs), 22 February 2002, Series C, No. 91, para. 43; Supra note 1018, para 299.
[1175] ECtHR, *Goodwin v. United Kingdom* [GC], Application no. 17488/90, 27 March 1996, para. 90; *VC v. Slovakia*, Application No. 18968/07, 8 November 2011 para 105.
[1176] IACtHR, *Acosta-Calderón v. Ecuador* (Merits, Reparations, and Costs), 24 June 2005, Series C, No. 129, para 158.
[1177] Ibidem.
[1178] For an overview of the expansion of the notion of victim, within the context of the Inter-American jurisprudence, see RODRIGUEZ PINZON D., The "Victim" requirement, the fourth instance formula and the notion of the "Person" in the individual complaint procedure of the Inter-American human rights system, 7 *ILSA* J. *Int'l & Comp. L.*, 2000-2001, pp. 369-383; SANDOVAL-VILLALBA C., The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations in FERSTMAN et al (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against the Humanity*, Koninklijke Brill NV 2009, pp. 243-282; CONTERAS-GARDUNO D. and FRASER J., *The identification of victims before the Inter-American Court of Human Rights and the International Criminal Court and its impact on participationand reparation : a domino effect?*, SSRN Electronic Journal, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545000,.
[1179] Supra note 1174, paras 162,163.
[1180] ECtHR, *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998 paras 130-134; *Timurtas v. Turkey*, Application No. 23531/94 ,13 June 2000, para 95; ECtHR, *Çakici v. Turkey*, Application No. 23657/94, 8 July 1999, para 98.

response to the steps undertaken."[1181] These criteria have contributed to the enlargement of the concept by the Court so as the family members of direct victims whose right to life or right to humane treatment is infringed could be equally protected.

Besides individual-oriented measures, the Court has ordered also the State responsible for the breach of the American Convention to take measures restoring the well-being of a whole community whose interests are at stake or in general, affecting the whole population of the State. Against this backdrop, the Inter-American Court, respective of its thoughtfulness pertaining to the communal traditions in the Americas, has been proved extremely attentive with communities, especially the indigenous and tribal ones. In this regard, it has taken community-based reparative measures aiming to offer true relief not only to the individuals involved in the *sub judice* case but also to the community as a whole or to smaller communities whose existence needs to be reassured. Hence, in terms of measures of *restitution* the return of land, the demarcation and award of title to the ancestral land of indigenous populations was considered as the most appropriate strategy in this respect. In most of the cases mentioned in the previous section, the Court, due to the spiritual linkage of indigenous peoples with their traditional lands, ordered the State to return or demarcate and title their land in order to ensure their ownership.[1182] Furthermore, the Court has felt that in order to achieve the principle aim of *restitutio in integrum* in cases that the cultural traditions of a particular group could be in peril as a result of grave brutalities, orchestrated by the State, it should order more targeted measures. For instance, in the seminal case *Plan de Sánchez Massacre v. Guatemala* which concerned the massacre of 268 members of the Mayan community in Guatemala, the Court particularly emphasized that "with the death of the women and elders, oral transmitters of the Maya-Achí culture, their knowledge could not be transmitted to the new generations and, today, this has produced a cultural vacuum. The orphans did not receive the traditional education handed down from their ancestors."[1183] In addition, the severe repression and militarization of the region that the members of the community suffered, enhanced the cultural vacuum therein and impeded the free enjoyment of the Mayan ancient practices. Therefore, the Inter-American Court opted for ordering also educational measures for the preservation of the Mayan culture, maintenance and improvement of the road systems between the affected communities and the municipal capital as well as the construction of health infrastructure etc. to combat with the extinction of the said indigenous group.[1184]

However, the Court is extremely enthusiastic and inventive when it comes to measures seeking to commemorate the victims and community-based measures of satisfaction.[1185] Being

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[1181] Ibidem.

[1182] See IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (Merits, Reparations and Costs) Series C No. 79 , 31 August 2001, paras 168, 173, resolution 4; *Yakye Axa Indigenous Community v. Paraguay*, (Merits, Reparations, and Costs) Series C No. 125, 17 June 2005, para 215; *Sawhoyamaxa Indigenous Community v. Paraguay,* supra note 821, para 210; *Xákmok Kásek indigenous Community v. Paraguay* (Merits, Reparations, and Costs) Series C No. 214, 24 August 2010 para 281; *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), 15 June 2005 Series C No 124, para 133, 209; *Saramaka People v. Suriname*, Preliminary Objections (Merits, Reparations, and Costs) Series C No 172, 28 November 2007, para 95.

[1183] IACtHR, *Plan de Sánchez Massacre v. Guatemala* (Reparations and Costs),19 November 2004, Series C, No. 116, para 49(12).

[1184] Ibid., See, in particular, (Operative paragraphs), para 9.

[1185] ATTANASIO D., Extraordinary reparations, legitimacy, and the Inter-American Court, 37 *U. Pa. J. Int'l L.* 813, pp.861-870.

symbolic in nature, these measures are addressed to the society as a whole. As for the first, a wide variety of such remedial group, building monuments or naming streets or routes[1186] and the designation of a day in the memory of victims of human rights violations[1187] are only some of the main measures that the Court repeatedly ordered the States to remind people of the crimes commited and thus, ensure that similar human rights abuses never again occur. This is exactly the element that makes it, often, extremely difficult to make a clear distinction between this type of satisfaction for moral injury and the guarantees of non-repetition. [1188]

Moving to the only future-oriented form of reparation, namely the guarantees of non-repetition, the Court has indicated the adoption of some practical measures designed to deter future violations of the same character and extend. Training of police authorities, judges and attorneys taking part in investigation procedures[1189] have served as preventive reparations of this kind. In several instances, the IACtHR ordered the responsible State to reform its legislative framework [1190] so as the latter will be in conformity with the American Convention. Nevertheless, the recent jurisprudential approach of the Court on preventive reparations reveals that, perhaps, the Court feels more ready to *petit-à-petit* leave some room to the States, at least when they attempt to enable their internal system to ensure effective guarantees of non-repetition. In some recent cases concerning Colombia, a country that have struggled to make some progress in terms of political stability and democratic legitimacy, the IACtHR seems to be reinventing its role. In the *Santo Domingo Massacre* case, the San José Judges opted for recognizing the steps taken by the Colombian authorities and most importantly, the new reparative mechanism institutionalized to offer true relief to the millions of victims following to the Colombian armed conflict. Hence, in the cases against Colombia which were adjudicated by the Inter-American Court during the last decade, the latter refrained from examining domestic reparation regime from its own perspective as usual, now, opted for transferring the entire responsibility for determining compensation measures to the Colombian new administrative justice institutions.[1191]

[1186] IACtHR, *"Street Children " (Villagran-Morales et al.) v. Guatemala* (Reparations and Costs), 26 May 2001, Series C, No. 77, paras 103, 115(7); *Trujillo Oroza v. Bolivia* (Reparations and Costs) 27 February 2002, Series C No. 92, operative paras 6 and 4; *Mack Chang v. Guatemala* (Merits, Reparations and Costs) 25 November 2003, Series C No. 101, paras 126, 146, 285; *Gómez-Paquiyauri Bros. v. Peru*, (Merits, Reparations and Costs) 8 July 2004, Series C No. 110; IACtHR, *Contreras et al v. El Salvador* (Merits, Reparations and Costs) 31 August 2011 Series C No. 232, para 208.

[1187] IACtHR, *Serrano Cruz Sisters v. El Salvador*, (Merits, Reparations and Costs), 1 March 2005, Series C No. 120, para 196; Ibid., *Contreras et al. v. El Salvador*, para 52.

[1188] Specifically, Dina Shelton has observed on the matter that: "a decision calling for prosecution and punishment of the perpetrators has considerable precedent in the awards of satisfaction issued by arbitral tribunals for injury to aliens. To the extent this ensures the perpetrator will not repeat the violation, it can be considered a guarantee of non-repetition and is frequently indicated as such in judgments of the Inter-American Court." SHELTON D., supra note 1104, p.397

[1189] See, *inter alia,* IACtHR, *Gelman v. Uruguay*, supra note 1173, para. 278; *Fernández Ortega et al. v. Mexico* (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 215, 30 August 2010, para 260.

[1190] IACtHR, *"The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, supra note 960, paras. 97–8, operative para. 4; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, supra note 924, paras. 86, 212, operative para. 8; *Raxcacó-Reyes v. Guatemala*, (Merits, Reparations and Costs) Series C No. 133, 15 September 2005, para. 89; *YATAMA v. Nicaragua*, (Preliminary Objections, Merits, Reparations and Costs), 23 June 2005, Series C No. 127, paras. 258–59, 267.

[1191] See relatively IACtHR, *Santo Domingo Massacre* (Preliminary objections, merits and reparations), 30 November 2012, Series C No. 259, paras 28,38,336-337; *Afro-descendant Communities displaced from the*

For Geneviève Lessard "[i]nstead of invoking subsidiarity to empower itself once domestic justice has failed, the court now uses this principle at the outset of proceedings to self-inhibit. In this sense, the duty-bearer is no longer the state with respect to rights, but rather the court with respect to states. Indeed, the court relinquishes its own autonomous faculty to assess in a domain that has been its specific area of expertise: non-repetition oriented reparations".[1192] Was the Strasbourg Court the source of inspiration for this shift in the stance of the Court? Unfortunately, there is no obvious response to this inquiry.At any rate, this newly introduced standing on reparations will, seemingly, contribute to reinstall the interrelationship between the IACtHR and national judiciaries, which is more likely in Europe given the classic perception of subsidiarity of the Strasbourg Court.

All that said, the apparent divergence between the two judicial fora pertaining to their remedial practices has, seemingly, its roots to their structural differences and to the divergent perception of their role. Functioning in the context of the Council of Europe which has institionalised a specialized organ monitoring the execution of its judgments, namely the Committee of Ministers, the Strasbourg Court sticked to its *stricto sensu* subsidiary role and saw, from the very beginning, its remedial competence from some distance. Persistent to award monetary compensation to the applicants within the limits of Article 41 ECHR, the European Court only recently has reoriented its understanding when it ventured in new territories of systemic violations which required effective adjudication.

By contrast, the Inter-American Court which dealt with rampant human rights violations since its dawn, has been proved more invasive of state sovereignty. Unlike the Strasbourg system, the Inter-American one lacked a mechanism of enforcement of its judgments and as a result, came up with a whole new *ensemble* of diverse reparations apt to cover the *lacunae* of domestic remedial justice. Article 63 afforded to the Court broader powers to the Court in this respect. From the *pro homine* principle perspective, financial relief that tolerates the wrong and leaves room to the perpetrators to buy off injustice is not in comformity with the Inter-American standards on reparations, particularly, when complaints of core, inalienable human rights are under dicussion.[1193] On the other hand, since the rate of compliance with the remedial orders in the Inter-American system is remarkably lower than in the European system,[1194] deciding merely symbolic measures or combining measures of symbolic nature with remedies entailing hands-on effects can be often difficult to implement. In any case, the Court's specificity in adjudicating the most suitable type of redress encouraged domestic authorities to rethink their political practices and, the Court itself to exercise its wide reparative competence even more enthusiastically as time was passing by. Having incorporated

Cacarica River Basin (Operation Genesis), (Preliminary objections, merits, reparations and costs) 20 November 2013, Series C No.270, paras 469-476.

[1192] LESSARD G., Preventive reparations at a crossroads. The Inter-American Court of Human Rights and Colombia's search for peace, 22 *IJHR* 9, 2018, pp.1209-1228.

[1193] For a balanced analysis of the advantages and shortcomings of the reparations strategy of the Inter-American Court from a phycological point of view see DANOSO G., Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach, 49 *Revista IIDH* 29, 2009, pp.29-68.

[1194] HAWKINS D. AND JACOBY W., Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights, 6 *J. Int'l L & Int'l Rel*. 35, 2010-2011, pp.35-85 ; FORTAS A.-C, *La surveillance de l'exécution des arrêts et décisions des Cours européenne et interaméricaine des droits de l'homme*, Editions A. Pedone 2015.

the values of international law on state responsibility, the Inter-American judicial forum has definitely fuelled international reparations for damage affecting private persons with wide-ranging jurisprudential creations. [1195]

Recent developments of the jurisprudence on reparations of both Courts reveal their will to embark, in several cases from their initial positions and hence, they will possibly meet in the middle. The openness of the Stasbourg Court to new reparative patterns on the one hand and the leeway attributed by the IACtHR to States, on the other hand, that have proved their systemic impovements and they may guarantee - at some extent- the sufficient domestic remedies could reinstall the interjudicial dialogue between the two mechanisms on the benefit of the victims.

b) The vertical dimension

i. Expansion of the protection from enforced disappearances by the IACtHR: Lessons for the ECHR?

It goes without saying that it is due to the proliferation of military dictatorships across the Latin American continent and the full-scale impunity which was dominant therein for decades that the issue of enforced disappearances was so commonly treated by the Inter-American Court of Human Rights. For decades, in the Americas, the notion of human dignity, seen as the pure essence of human rights, was far from being protected due to the dominant political landscape. Indeed, the *democratic spring* of the latest decades and the clear normative evolution was mostly accomplished as Latin American States have incorporated international human rights instruments into their legal orders. They have similarly endorsed the human rights language in their legal architecture in order to achieve domestically a more complete enforcement of human rights. This shift was clearly dictated by the previous explosion of numerous *coups d'état* in the region, particularly, in the 1950s and the 1960s that installed, in most of the cases brutal military dictatorships.

The said regimes were largely authoritarian expressing almost absolute intolerance on freedom of expression let alone political opposition in the name of national security. Hence, systemic violations of human rights were commonplace for so many years since political repression was organized primarily on the basis of state-sponsored enforced disappearances, extra-judicial assasinations and in general, acts of torture. In the absence of any form of rule of law, as Juan E.Méndez and Catherine Cone emphatically described "the numbers of the

[1195] The Inter-American Court's principles have, apparently influenced the 2005 UN Basic Principles and the Updated Set of Principles to Combat Impunity. UN GA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005*, 21 March 2006, A/RES/60/147; UN, Economic and Social Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, doc. E/CN.4/2005/Add.1 of 8 February 2005, recommended by the Commission on Human Rights Resolution 2005/81 of 21 April 2005.See also on the matter CITRONI G., Supra note 1130, p. 69,70; CONTERAS-GARDUNO D., Defining Beneficiaries of Collective Reparations: The Experience of the IACtHR,4 *Amsterdam L.F.* 40, 57, 2012, p.47.

disappeared, the murdered, the tortured, the banned, and the exiled far exceeded any reasonable estimates of the strength of the armed insurgent movements, even at their highest."[1196]

As such practices have resulted in new patterns of human rights violations excessively generalized in this Hemisphere, these problems were considered more as unique to the region than they are European or even universal.[1197] That is exactly the reason why the Inter-American Court had, undoubtedtly, a better understanding of the overall legal, political and cultural landscape and opted for fulfilling its role by expanding tremendously the protection not only of persons forcibly disappeared but also of victims' families. In contrast, the European Court of Human Rights only recently was confronted with the brutality and the complexity that enforced disappearances entail, particularly with claims which concern, mainly, Russia and Turkey.

In this context, the main attempt of the present research is to ascertain whether the sweeping approach of the San José Court pertaining to enforced disappearances has contributed to the more effective protection of individuals from such a type of brutal violence and to a potential cross-fertilization with its European peer in cases concerning the right to life.

This pattern of kidnappings taking the form of torture and amounting to the alleged death of the victims was firstly originated in Guatemala. It was, subsequently, transferred to Argentina where it was largely employed by the dictators that governed Argentina from 1976 to 1983 as its principal counter-measure to supposedly balance the actions of their political opponents. The said tactics were rapidly proliferated and systematically applied in the entire region and, more intensely, in Chile, Brazil, Honduras, Peru.[1198] The brutality alongside with the persistence of the phenomenon raised awareness among human rights defenders for the need to come up with evidence so as to disclose such practices and to reach agreement as regards its main features.

Having as central goal to cement public obedience, governments exercised enforced disappearances on a daily basis. The *modus operandi* was more or less the same. The victims were kidnapped from their homes in front of their families' eyes or even in public places in broad daylight. Later on, they were arbitrarily detained, tortured and in most of the cases, executed. As Ioanna Prevou mentioned in her article, in these cases "torture was not an interrogation method but rather a means of dehumanizing the detainees, before death. The military applied unlimited torture, although they did not aim to extract information or obtain confessions from the victims. They viewed torture as part of their mission to cleanse society politically; opponents had to be punished before executed."[1199]

This situation raised the concern of the Inter-American Commission on Human Rights (IACommHR). After making reference to Argentina's "disappeared" in 1978 it began to report

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[1196] For an overview of the phenomenon of enforced disappearances and the ways that Latin American populations seek to put an end to impugnity and restore the rule of law see MENDEZ E.J. and CONE C., Human Rights make a difference: lessons from Latin America in SHELTON D.(ed.), *The Oxford Handbook of International Human Rights Law*, OUP 2013, p.957.

[1197] BUERGENTHAL T., The American and European Convention on Human Rights: Similarities and Differences, 30 *Am.U.L.Rev.*, 1980-1, p.156.

[1198] For an in-depth analysis of th historical background of enforced disappearances see PERVOU I., The Convention for the Protection of All Persons from Enforced Disappearance: Moving Human Rights Protection Ahead, 5 *Eur. J. Legal Stud* 1, Spring/Summer 2012, p. 145,148.

[1199] Ibid., p. 122.

on disappearances in Guatemala and Chile, encountering unsurprisingly the regimes' unwillingness to cooperate. However, the enforced disappearances do not constitute a unique regional method of suppression.[1200] Hence, the contested nature of the phenomenon and the profound unwillingness of some States to cooperate and prosecute perpetrators alarmed the international community[1201] and called for its immediate response which came with the creation of a still-existing body targeted to smuggle the plague on a global scale, namely the UN Working Group on Enforced or Involuntary Disappearances, in 1982[1202] since the lack of consensus on the topic previously impeded the adoption of a universally binding text.

In 1992, the adoption the Declaration on the Protection of all Persons from Enforced Disappearances,[1203] signaled the readiness of the international human rights system to combat impunity and raise awareness on the matter. As a result, the Working Group was also mandated to monitor the States' compatibility with the obligations flowing from the said Declaration.

However, in the regional level the situation varies according to the special features that arise in each corner of the earth. While in the context of the Council of Europe the present day

[1200] The practice of enforced disappearances is not unknown to the African continent and hence, its mechanisms enforcing human rights have already grappled with the issue. At the outset, the African Commission has dealt with an enforced disappearance case in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, in which the Commission concluded on grave human rights abuses since the civil war in Chad did not provide sufficient grounds for derogation from the provisions of the Charter since the latter does not contain a derogation clause. ACommHPR, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Merits, Communication No 74/92, 11 October 1995; ACommHPR, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, 11 May 2000.
At this point, the Court has not pronounced yet on the matter; however, in its very first case examined on the merits it has embraced, in the context of the examination of its temporal jurisdiction, the continuing violation doctrine -as will be dicussed earler- which could be the initial step for a legal treatment of enforced disappearances in the pattern of the Inter-American one. ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre and Rev. Christopher R. Mtikila v. the United Republic of Tanzania*, Application No. 009/2011 and 011/2011, 14 June 2013, para 84.
As regards the present-day depiction of the enforced disappearances phenomenon in Africa see the Press release of Amnesty International "*The day of the disappeared : enforced disappearances persist globally*", 23 August 2016, available at https://www.amnesty.org/en/press-releases/2016/08/the-day-of-the-disappeared-enforced-disappearances-persist-globally/.

[1201] CITRONI G. and SCOVAZZI T, Recent Developments in International law to combat enforced disappearances, 3 *Revista Internacional de Direito e Cidadania*, 2009, pp.89-111; VITKAUSKAITE-MEURICE D., ŽILINSKAS J., The concept of enforced disappearances in International Law, 2 *Jurisprudence* 120, 2010, pp. 197–214.

[1202] The UN Working Group on Enforced or Involuntary Disappearances consists of five experts in this field was, first, institutionalized in 1982 following to the adoption of a UN Resolution of the Human Rights Commission. UNCHR 'Question of Missing and Disappeared Persons' (1980) UN Doc E/CN.4/Res/1980/20, operative clause 1 available at, https://www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-1980-20_XXXVI.pdf. The UNWGEID submits annual reports on the level of protection from enforced disappearances to the Human Rights Council. The last update of the Working Group's mandate was made with the last Resolution adopted by the Human Rights Council on 28 September 2017,A/HRC/RES/36/6, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/36/6.

[1203] UNGA Res 47/133 (18 December 1992) UN Doc A/47/49. Within the UN system, the HRC constituted the first body having pronounced on the matter in its first enforced disappearance case which concerned Uruguay in 1982, the case *Bleier v. Uruguay* case. Ever since the Committee constituted a universal forum hearing cases related to disappearances and most importantly for individuals not falling under the protective scope of regional human rights instruments and systems. HRC, *Bleier v. Uruguay*, Communication No. R. 7/30, 29 March 1982. See also for a complete review of the most important views of the Committee in this field see SCOVAZZI T. and CITRONI G., *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Martinus Nijhoff 2012, pp.101-131.

conditions have not yet pointed towards the adoption of a similar text,[1204] within the Inter-American system the adoption of a legal instrument was deemed as a tool of paramount important for the San José judges that led to the Inter-American Convention on forced disappearances of persons[1205] adopted in 1994 under the auspices of OAS.

The recently adopted International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance in Article 2 as "(…)the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."[1206]

The elements of this definition were formulated through the conclusions of the UN Working Group and confirmed by the jurisprudence of IACtHR and ECtHR. Nevertheless, defining the phenomenon brought to light serious controversies as its very nature remained unclear for some decades. Such disappearances were also characterized as enforced, forced, political, involuntary etc. For instance, the Strasbourg Court approached differently the situation in terms of defining the specific features of the crime. As it derives from the ECtHR's case law concerning cases against Turkey, it appears that the European Court sees such a disappearance more as "aggravated form of arbitrary detention". Hence, the Court mostly insisted on the fact that the victims are arbitrarily kept in custody by governmental forces.[1207]

The European Court has not, yet, elaborated a definition of enforced disappearance. That brings us back to the lack of a widely accepted definition of the said crime within the CoE limits. As a matter of fact, the existence or absence of a definition for enforced disappearances is shaping at a great extend the method applied by the Courts when touching upon relevant individual complaints, the argumentation and by extension, the protection offered. In particular, the Inter-American Court of Human rights has examined these cases as entailing the violation of multiple rights and such an approach is in conformity with the complexity of enforced disappearances.Even from its very first contentious case, its landmark *Velásquez Rodríguez* ruling, the Court declared that "the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated

[1204] Hannah Russel examines thoroughly the possibility and the –potential- necessity of such a convention on the European level in her article, particularly following to the encouragement of the Parliamentary Assembly of the CoE to State Parties to consider the "consider launching the process of drawing up a European convention for the protection of all persons from enforced disappearance, based on the achievement of the UN Convention". According to Hannah Russell "[t]his is a welcome step given the lukewarm reception that the ICED has received, the long-armed approach that the ECtHR takes to international treaties, and the fact that the ECHR is limited in its application to enforced disappearances, with the exception of Article 2". See RUSSEL H., STRIVING FOR 'NEVER AGAIN'- A European Convention for the Protection of All Persons from Enforced Disappearance and the Veiled Protection of Article 2 of the ECHR, 9 *Inter-Am. & Eur. Hum. Rts. J.* 2, 2016, p. 499.

[1205] Supra note 1083.

[1206] See *inter alia* on the UN International Convention on enforced disappearances TAXIL BERANGERE, À la confluence des droits: la convention internationale pour la protection de toutes les personnes contre les disparitions forcées, 53 *Annuaire français de droit international* 129, 2007, pp. 129-156; NOWAK M., Monitoring Disappearances - The difficult path from clarifing past cases to effectively preventing future ones, 4 *European Human Rights Law Review* 348, 1996, pp.348-361.

[1207] See ralatively ECtHR, *Orhan v Turkey*, Application No. 25656/94, 18 June 2002, paras 265, 278; *Tekdag v Turkey*, Application No. 27699/95, 15 January 2004, paras 66, 68.

to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty(…)."[1208]

On the contrary, the European Court is not on the same page with its American counterpart. The same position was also taken by the Human Rights Committee even from a very early stage of its case law on this matter.[1209] The ECtHR is more cautious in deciding that an enforced disappearance amounts a priori to multiple and parallel infringements of conventional rights. In other words, since an action of enforced disappearance does not necessarily amounts to a breach of several rights, it, hence, examines the alleged violations of each right separately regardless of the fact that they have resulted from the same action.

It is noteworthy that the Strasbourg Court profoundly refers to the Inter-American definition and pays attention to the legal treatment of this Court as it flows from the first dispute of this character, the *Kurt v. Turkey* case,[1210] in which it refers to the integral approach of the San José Court on this topic.[1211]

The bad news here is that, the judicial restraint of the Strasbourg Court to examine enforced disappearances through the lens of the autonomous right renders enforced disappearances a blind spot within the European human rights system. Indeed, in many instances, the Court refuses to find a violation of important rights such as the right to be free of inhuman and degrading treatment. Ophelia Claude observed in this respect that "the European Court should address the specificity of enforced disappearance by first making an effort to define the phenomenon within the ambit of the European system, and second, by triggering a debate among judges as to whether the phenomenon should entail the adoption of a specific method when reaching a conclusion."[1212]As a crime that is not easily traced with perpetrators who- in most cases- remain unpunished, it definitely creates the need for the reinvention of a more flexible argumentation and a less conservative legal reasoning so as the dilemmas of evidence with which the ECtHR is confronted could be outreached.

Indeed, that is the field that the Inter-American Court used to produce novel case-law on enforced disappearances, and most importantly the legal identification of such practices, the use of evidentiary standards and the burden of proof in this type of disputes. Unlike the ECtHR,

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[1208] Supra note 786, para 155.

[1209] At the same time, the Human Rights Committee's practice has demonstrated that in such cases the HRC has mostly concluded that an enforced disappearance may conclude to Article 6 ICCPR (right to life), Article 7 ICCPR (prohibition of torture, cruel or degrading treatment), Article 9 ICCPR (right to liberty and security), Article 2(3) ICCPR (right to an effective remedy. Since the *Kimouche* case the Committee has commenced declaring also a breach of Article 19 of the Covenant providing the right to recognition everywhere as a person before the law. HRC, *Messaouda Kimouche and Mokhtar Kimouche v. Algeria*, Communication No. 1328/2004,10 July 2007.

[1210] Supra note 1180.

[1211] In the *corpus* of the said judgment, which is the first that the European Court of Human Rights treated the issue of enforced disappearances, the Court recalled the definition of the Amnesty International and remarkably referred to the Inter-American Court's jurisprudence and its understanding as regards enforced disappearances.However, the observation of Judge Pettiti in his Dissenting Opinion according to which "the Kurt case occurred in a different context to the one that led to the decisions of the Inter-American Court" mirrors the resistance of the Strasbourg Judges to fully embrace the entire reasoning of the IACtHR. Ibid, paras 68-71.

[1212] CLAUDE O., A Comparative approach to enforced disappearances in the Inter-American Court of human rights and the European Court of Human Rights Jurisprudence, 5 *Intercultural Hum. L. Rev* 407, 2010, p. 433.

the Inter-American Court dealt with the epidemic outburst of enforced disappearances in Latin America even from the first cases adjudicated within its contentious powers. In its attempt to formulate its legal response to this plague, the Court created the canvas of the crime of enforced disappearance identifying the exact criteria that lead to the establishment of a pattern or a practice of enforced disappearance. Such an establishment is, by all means, intimately linked with the aforementioned appraisal of the IACtHR when it comes to evidentiary burden and the burden of proof.

In the seminal *Velásquez Rodríguez* case, the Commission provided evidence in order to establish that enforced disappearances constituted a deep-rooted official practice that was conducted or clearly tolerated by the Honduran authorities. Hence, as it flows from paragraph 126 of this decision,[1213] one of the necessary requirements of a proven violation is the link of the claimant to the said practice.

Such evidence included testimony from victims of arbitrary detentions during the relevant period, interviews with family members whose relatives were disappeared, and general country reports produced by independent, non-governmental organizations. From this evidence, the IACHR concluded a pattern or practice of enforced disappearance existed in Honduras. In the Court's words "when the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference.Otherwise, it would be impossible to prove that an individual has been disappeared."[1214] The Court remarkably highlighted the difficulty that the fact-finding procedure in Latin America endorses due to the suppressive objectives of governmental authorities since we cannot expect from the victims or the victims' relatives to present evidence that they cannot access. This declaration of the San José Court appears to be of utmost importance as it paves the road for its more lenient approach when it comes to the evidence[1215]required to conclude to a systematically applied pattern of enforced disappearance and thus, to determine who bears the burden of proof in this types of disputes. In the present case, the Court examined evidence such as interviews of arbitrarily detained persons as well as interviews of relatives of the victims and NGO's reports on the overall situation in Honduras.[1216] It goes without saying that the flexibility on the matter in view of greater success on the merits of disappearance cases was seen by the Court as the bedrock of a more effective enforcement of the victims' rights.

In its first unanimous ruling, the Inter-American Court explicitly opted for a manifestly lower evidentiary threshold in this field due to the specific nature of the phenomenon and justified its stance declaring that always in consistency with the facts of the case,

[1213] According to the IACtHR's strong pronouncement in Velásquez Rodríguez, "if it can be shown that there was an official practice of disappearances in Honduras, carried out by the government or at least tolerated by it, and if the disappearance of Manfredo Veldsquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required." Supra note 786, para 126.

[1214] Ibid., para.124.

[1215] For an overall analysis of the Court's approach on evidence see PASQUALUCCI J., Supra note 782, pp. 153-171.

[1216] At the same time the Court, admitted private hearings, following to the Honduran government invoking national security reasons. More specifically, the Honduras asked the Court to accept the testimony of members of the Honduran military in a closed hearing. See again Supra note 786, para 31.

"[c]ircumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim." [1217] As it was expected, the IACtHR has built, ever since, upon this bold pronouncements its subsequent case law and presented similar argumentation concluding to violations of the ACHR's right.[1218]

Conversely, the fact-finding is rigorously shaped and regulated within the ECHR architecture and unfortunately, the pattern of enforced disappearances does not make an exception. In particular, while the rule of *free evaluation of evidence* applies[1219] and in theory, the Court leaves significant lenient to itself to accept different types of evidence in order to ascertain the facts of each case,[1220] the overall standing of the Strasbourg Court pertaining to disappearances seems to be far from the one of the IACtHR. Arguably, the former has not acquired the lengthy experience of the latter in enforced disappearances. In any case, especially following to the abolition of the European Commission which was the mechanism responsible with the fact-finding function, the Strasbourg Court was found weighted with the need to settle *de nouveau* its methodology in order to deal with disappearances.

However, even in disappearances attributed to Turkey, the Court has expressed its hesitation to take into consideration universally accepted evidence as it was the case of the reports conducted by the UN Working Group on Enforced and Involuntary Disappearances, including a 1994 report supporting that Turkey had the highest number of alleged forced disappearance cases worldwide. Shockingly enough, the Court rejected the allegation establishing the frequency of the phenomenon with a brief phrasing and was not persuaded that the evidence that the applicant has adduced substantiated the claim regarding the existence of systematic pattern of disappearances in Turkey.[1221]The ECtHR's appraisal in this regard was considered at least unsatisfactory since the Court failed to fulfill its *mission educatrice* on the matter and to provide the future applicants in similar disputes with helpful guidance as to what types of evidence can be admitted and examined by the Court.[1222]

[1217] Ibid., paras 130,131.

[1218] IACtHR *Blake v. Guatemala*(Merits) 24 January 1998, Series C No. 36, para 49; *Loayza-Tamayo v. Peru* (Merits) 17 September 1997, Series C No. 33, para 38; *Caracazo v Venezuela*, (Merits) 11 November 1999, Series C, No 58; *Cantoral-Benavides v. Peru*, (Merits, Reparations and Costs)18 August 2000, Series C No. 69, 45; *Blanco Romero v Venezuela*, (Merits, Reparations and Costs) 28 November 2005, Series C No. 137.

[1219] The Court clarified in the *Nachova* ruling that "[i]n the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties'submissions. ECtHR, *Nachova v. Bulgaria*, Application Nos. 43577/98 and 43579/98, 6 July 2005, para. 147. See also LEACH P., PARASKEVA C., UZELAC G., International human rights and fact-finding, *Report by the Human Rights and Social Justice Research Institute at London Metropolitan University*,2009, p.12.

[1220] HARRIS D. J., O'BOYLE M. and WARBRICK C., *Law of the European Convention on Human Rights*, Butterworths, 1995, p. 598; ROGGE K., Fact-Finding in MACDONALD R. St. J., MATSCHER F. and PETZOLD H. (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff Puiblishers, 1993, p. 698.

[1221] Supra note 1180, paras 168,169.

[1222] Gobind Singh Sethi commented in this regard that "The ECHR's handling of this question was inadequate in two ways. First, the ECHR's analysis of the evidence presented was cursory. Only two paragraphs, 168 and 169, were dedicated determining whether a pattern or practice of forced disappearances existed, and the decision did

In the same vein, the Court of Strasbourg in the cases that followed found it difficult to attribute accountability to State Parties in the absence of direct and specific evidence as regards the allegations of torture or inhuman and degrading treatment under Article 3 ECHR. The instance of the *Çiçek v. Turkey*[1223] is quite illustrative. In the case at hand, two brothers, Tahsin and Ali Ihsan Çiçek were kidnapped and detained by the Turkish military forces. They have vanished leaving behind no trace of their fate for six and a half years. Interestingly, the Court, on the basis of the overall situation in south- east Turkey at this period and the complete lack of information of the victims' whereabouts concluded to their presumed death and therefore, to a violation of Article 2 ECHR. However, the evidence provided was not deemed as sufficient to reach the high threshold of Article 3 and then, establish a violation of the prohibition of torture.

The same goes with almost every relevant complaint against Turkey brought by Kurds [1224] and even within the context of the inter-state dispute *Cyprus v. Turkey*. [1225] Accordingly, ECtHR remained unwilling to declare a breach of Article 3 for quite some time in the absence of direct evidence, despite the state-sponsored character of disappearances and consequently, the extremely difficult conditions of accessing them due to governmental efforts to erase them.

More recently, in its enforced disappearance cases concerning Chechnya,[1226]the Court expressed its intention to reconsider its stance and draw from the Inter-American holding and hence, to rely also on circumstantial evidence deriving from the surrounding facts when adjudicating disputes related to disappearances.[1227]

At any rate, the enforced disappearances have served to test the limits of both the Inter-American and the European Court of Human Rights with regard to their so-called flexible rules of admission of evidence. However, the restraint of the ECtHR needs, perhaps, to be revisited in the light of the pronouncements of the long-experienced Inter-American Court in this field.[1228]

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not address why the 1994UN report was insufficiently suggestive or reliable. Second, the ECHR did not give any guidance as to what evidence would be necessary to establish a pattern or practice. Rather, the court simply stated the evidence presented was not sufficient to establish a practice or pattern." See in this regard SINGH SETHI G., The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances, 8 *Human Rights Brief* 3, 2001, pp 29-31.

[1223] ECtHR, *Çiçek v. Turkey*, Application No. 25704/94, 27 February 2001.

[1224] On the Kurds' cases before the European Court of Human Rights see SALAH HELALI M., La question Kurde devant la Cour européenne des droits de l'Homme, *Civitas Europa 2015/1 (N° 34*), pp. 55-69.

[1225] ECtHR, *Cyprus v. Turkey*, Application Nos 25781/94, ECtHR [GC], 10 May 2001; ECtHR, *Varnava and Others v. Turkey*, [GC], Application Nos 16064/90, 16065/90, 16066/90 .., , 18 September 2009.

[1226] See in this respect *Bazorkina v. Russia*, supra note 1123; *Luluyev and others v Russia*, Application no. 69480/01, 9 November 2006; *Imakayeva v. Russia*, Application No. 7615/02, 9 November 2006. On the overall situation arising from the armed conflict in Chechnya see the enlightening report of Human Rights Watch Worse Than a War:"Disappearances" in Chechnya—a Crime Against Humanity", Human Rights Watch Briefing Paper (March 2005) available at https://www.hrw.org/legacy/backgrounder/eca/chechnya0305/chechnya0305.pdf .

[1227] "This marks a great step forward for the Court: when the ECtHR addressed enforced disappearances in Turkey, it took six years (from 1998 to 2004) and over twenty cases to reach a similar result. This has allowed the Court to move swiftly in developing its analysis of the paradigmatic Chechen enforced disappearance case, i.e., when "anonymous" military or paramilitary forces forcibly take a victim into detention", BARRETT J., Chechnya's last hope? Enforced Disappearances and the European Court og Human Rights, 22 *Harv. Hum. Rts. J.*, 2009 p.139.

[1228] CLAUDE, Supra note 1212, p. 412-414.

Flexibility is the rule as regards the burden of proof in these cases as well.[1229] According to the Inter-American Court's perception of the generalized practice of enforced disappearances in the Americas, even from its very early decisions, the applicants cannot bear the burden of proof in such cases and thereby, reversed the traditional rule.[1230] Hence, once the governmental practice of disappearances has been established as well as its causal link with the case at hand it is, then, up to the respondent State to prove otherwise. In *Velásquez Rodríguez*, the Court endorsed the Commission's argumentation which lied on the presumption that the policy of disappearances which is, in most of the cases, supported or tolerated by the regime in power, is consequently, anticipated to be linked to the concealement or the destruction of available evidence which, as previously discussed, led the San José Court to the acceptance of circumstantial, indirect evidence or by logical inference.[1231]

Nevertheless, the obstacles that reality puts in the road to proof when it comes to disappearances cases led the IACtHR to declare emphatically that regardless of the fact that the Inter-American Commission produces the evidence and stands with the plaintiff in these cases "[t]he Court feels that it is not up to the Inter-American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the time, the prisons and then the investigations were under the exclusive control of the Government, the burden of proof therefore corresponds to the defendant state. This evidence was or should have been at the disposal of the Government had it acted with the diligence required."[1232]

Hence, the Commission established that kidnappings of persons, who were alleged to jeopardise national security such as student or labor leaders, were commonplace in the Honduras during that time(1981-1984). Then, it sufficed to demonstrate that the victim was a student leader kidnapped under similar circumstances by military personnel in civilian clothes, not to mention the investigation orchestrated by the Honduran State. The latter, thus, failed to prove otherwise and thus, was found accountable for the disappearance of Manfredo Velásquez in the case at hand.[1233]

[1229] See *inter alia* PAUL A., An overview of the Inter-American's Court evaluation of evidence in HAECK Y., RUIZ-CHIRIBOGA O., BURBANO HERRERA C., *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, Intersentia 2015; BUERGENTHAL T., Judicial Fact-Finding: Inter-American Human Rights Court, in LILLICH R.(ed.), *Fact-finding before international tribunals*, Brill | Nijhoff 1992, pp. 261-274.

[1230] Analogous reversal of the burden of proof can be detected in the case law of the HRC. See for instance, HRC, *Quinteros v. Uruguay*, Communication No. 107/1981, 15 October 1982, para 11.; HRC, *Sarma v. Sri Lanka*, Communication No. 950/2000, 16 July2003, para 9.2. For a complete comparative analysis of the approaches that the Strasbourg Court and the Committee have selected see KELLER H. and CHERNISHOVA O., Disappearance Cases before the European Court of Human Rights and the UN Human Rights Committee: Convergences and Divergences', 32 *HRLJ* 2012, pp. 237- 249.

[1231] Supra note 787, paras 135-136 and 147 -148. See, also, in this regard IACtHR, *Godínez-Cruz v. Honduras*,(Merits) 20 January 1989, Series C No 10, paras. 114–122.

[1232] IACtHR, *Neira Alegría and Others*, (Reparations and costs), 17 September 1996, Series C No 29. See also BOVINO A., Evidential issues before the Inter-American Court of Human Rights, 2 *SUR - Int'l J. on Hum Rts.* 3, 2005.

[1233] PASQUALUCCI, supra note 782, p.173.

Regarding the shift of the burden of proof to the Respondent State, the Inter-American Court in its *Bamaca Velasquez v. Guatemala*[1234] referred to the similar holding of the HRC.[1235] By analogy, given the unique character of the phenomenon, the existence of a *prima facie*[1236] state practice of enforced disappearances generalized in the territory of the State along with the proved link with the victim's situation at the time of the disappearance, the Court held that "either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then this specific disappearance may be considered to have been proven".[1237]

However, the IACtHR has not been consistent enough as regards the evidence accepted in disappearance cases[1238] as regards this two-stage approach that results in the shift of the *onus probandi* in these cases.[1239] Despite the already stated human-centered approach of the Court and its profound sympathy for the victims of enforced disappearances in these instances, it has also applied a particularly low threshold as a minimal standard of proof , undermining, perhaps, the accuracy of the whole evidentiary process and, hence, the mere persuasiveness of the IACtHR.

As for its European counterpart, the Court managed to overcome its initial hesitation to shift the burden of proof in disappearances and to overcome its traditional adherence to the "*beyond reasonable doubt*" principle. When it comes to the examination of an alleged breach of the right to life under Article 2 ECHR, the Court in another case against Turkey, the *Timurtas*

[1234] IACtHR, *Bámaca-Velásquez v. Guatemala*(Merits), 25 November 2000, Series C No. 70, para. 152; *Gomez-Palomino v. Peru*, 2005, 22 November 2005 Series C No. 136, para. 52. In terms of burden of proof, in the seminal *Bamaca* case (para 153), the Inter-American Court referred to the findings of the Human Rights Committee in the *Hiber Conteris v. Uruguay* case in paras 182-186. HRC, *Hiber Conteris v. Uruguay*, Communication No. 139/1983, 17 July 1985. The Committee, even since its early cases, in 1983, had taken the view that in such cases there is perennial need to reverse the burden of proof. Hence in the landmark *Quinteros* views, related -once again- to Uruguay declared that the burden to prove their case is often unbearable for the victims' families given the lack of cooperation and responsiveness to their petitions by the national authorities which are bound to fulfil their positive obligation to ingestigate thoroughly these cases. HRC*, Quinteros v Uruguay*, Communication No. 107/1981, 21 July 1983, para 11.
Nonetheless, the enforcement results of the pronouncements remained rather limited at the time. The subsequent confirmation of this case law coming from a judicial body came as an added value to the persuasiveness of the Committee's developments and the formulation of more universal protection standards which would contribute to the overall endeavour of international community to move the protection from enforced disappearance ahead. See PERVOU, supra note 1198, p.125.

[1235] In the HRC's words, "[t]he burden of proof cannot fall solely on the author of the communication, considering, in particular, that the author and the State Party do not always have equal access to the evidence and that, frequently, it is only the State Party that has access to the pertinent information. . . . In cases when the authors have presented charges supported by attesting evidence to the Committee . . . and in which subsequent clarification of the case depends on information that is exclusively in the hands ofthe State Party, the Committee may consider that those charges are justified unless the State Party presents satisfactory evidence and explanations to the contrary." HRC, *Hiber Conteris v. Uruguay*, Communication No. 139/1983, paras. 182–86, quoted by the IACtHR in *Bamaca Velasquez v. Guatemala*, Ibid., para 15.

[1236] "This occurs when the facts display a situation that is apparently the result of a violation of human rights. Similarly, the ECtHR has considered that when "there is prima facie evidence in favour of the applicant's version of events", the burden of proof may shift to the respondent Government. In order to constitute *prima facie* proof, evidence requires a certain degree of cogency. The ECtHR usually requires a higher threshold than the IACtHR for considering a fact to be proved prima facie. Particular instances of *prima facie* violation will be analysed in the following section dealing with presumptions. See PAUL, supra note 1229, p.40.

[1237] Supra note 1234, para. 130.

[1238] PASCUALUCCI, supra note 782, p.173.

[1239] See the aforementioned *Timurtas v. Turkey*.Supra note 1180.

v. Turkey,[1240] has also drawn the assumption that a missing person can be, actually, presumed dead if he has been detained by unidentified State agents without any subsequent aknowledge of the detention. Besides the lower evidentiary burden that the Court provided *in casu*, it also paved the road for its following case law regarding Turkey[1241] in which the Court explicitly held that the said presumption signals the reversal of the burden of proof as far as the right to life is concerned, since it gives rise to a *prima facie* case.[1242] Therefore, it applied the same rules to the cases brought before it concerning Chechnya.[1243] In the Court's words "it would then be for the Government to discharge their burden of proof either by disclosing the documents in their exclusive possession or by providing a satisfactory and convincing explanation of how the events in question occurred."[1244]

While the Inter-American Court is, once again, more lenient while assessing that a claimant has made a *prima facie* case, in the sence of a situation that is profoundly the outcome of a violation of human rights, the ECtHR opted for a higher threshold respectively.[1245] In the spirit of the famous *Bazorkina v. Russia* jurisprudence,[1246] the first case arising from the armed conflict in Chechnya, the Court felt that it should enumerate the criteria for a *prima facie* violation of Article 2 of the European Convention: firstly, the respondent State must not deny the detention of the alleged victim, secondly, witnesses must confirm his detention under life threatening conditions and thirdly, no reliable news for the person's whereabouts must have come to light since his disappearance. In fact, the seemingly flexible approach of the Strasbourg Court is more rigorous than it appears since the said requirements are not cumulatively met at ease.[1247]

Furthermore, a reversal of the burden of proof is also on the table when the Court is faced with the non-disclosure of the crucial facts of the case and therefore, is impeded in reaching a conclusion as the Court clearly put it in *Musayeva.*[1248] This appraisal of the

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[1240] In this case, however, the Court retained a high standard of proof to conclude to the detention of the disappeared individual since it relied to a report that that the father of the detainee introduced to the Court verifying the detention of the victim. Since, every applicant is not fortunate enough to have at his disposal such proof, the said stance of the Court brings us back to the main concern raised around these cases: the lack of access to state-controlled evidence.

[1241] ECtHR, *Akkum v. Turkey*, Application No. 21894/93, 24 June 2005, para 211, *Togcu v. Turkey*, Application No. 27601/95, 31 May 2005.

[1242] A *Prima facie* case is a case in which the facts are sufficient to establish strong presumptions unless rebutted.

[1243] ECtHR, *Bopayeva and Others v. Russia*, Application No. 40799/06, paras 71–75, 7 November 2013; *Bazorkina v. Russia*, supra note 1123; *Imakayeva v. Russia*, Application No. 7615/02, 9 November 2006 ; *Luluyev and Others v. Russia*, Application No. 69480/01,12 June 2012; *Akhmadova and Sadulayeva v. Russia*, Application No. 40464/02, 10 May 2007; *Velkhiyev and Others v. Russia*, Application No. 34085/06, 5 July 2011; *Akhmatov and Others v. Russia*, Application Nos. 38828/10, 2543/11, 2650/11, 2685/11, 7409/11, 14321/11, and 26277/11, 16 January 2014, para. 203.

[1244]Ibid., para.202; See also ECtHR, *Bopayeva and Others v. Russia*, Application No. 40799/06, 7 November 2013, para. 70; *Aziyevy v. Russia*, Application No. 7626/01, 20 March 2008 para. 74; *Utsayeva and Others v. Russia*, Application No. 29133/03, 29 May 2008, para.160; *Khutsayev and Others v. Russia*, Application No. 16622/05, 27 May 2010, para. 104.

[1245] For instances of *prima facie* cases in the case law of the Inter-American Court, supra note 1229, See PAUL A., supra note 1229, p. 43.

[1246] Supra note 1123, para 110. See also the 3 judgments delivered by the Court on the same day ECtHR, *Umarov v Russia*, Application No. 12712/02, 3 July 2008, *Musayeva v Russia*, Application No. 12703/02, 3 July 2008; *Akhiyadova v Russia*, Application No. 32059/02, 3 July 2008.

[1247] See CLAUDE O., Supra note 1212, p. 419.

[1248] ECtHR, *Musayeva and Others v. Russia*, Application No. 12703/02, para. 100, 26 July 2007.

European Court was also confirmed in similar cases adjudicated by the latter.[1249] "As a 'logical development' of this shift in the burden of proof, a failure by the Government to provide the documents necessary for establishing the facts and explaining events leads to 'strong inferences' in favour of the applicant being drawn."[1250]It was for this reason that the Court corrected its stringent criteria and admitted a *prima facie* case only based on witnesses testimonies.[1251]

By contrast, the allegations of ill-treatment under Article 3 ECHR is again another story. Therefore, when the Strasbourg Court examines claims of torture in the context of an enforced disappearance case it has not discharged this burden for an applicant who attempts to hold a State accountable for violating the right to be free from torture under Article 3 ECHR.[1252] However, this particular standing appears to neglect the, well-known to the Court, obstacles that the States often pose to the fact-finding function of international tribunals.[1253] To assess this evidence, the Court maintained the standard of proof *beyond reasonable doubt* but highlighted "that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"[1254]

Nevertheless, the European Court seems much more compassionate when the question revolves around the contested ill-treatment of the victim's family.[1255] While the Court denied repeatedly to conclude to a violation of Article 3 with regard to the victim's detention conditions on the basis of the lack of direct evidence, even since the *Kurt* case, it has acknowledged the deep suffering in view of the negligence that the authorities expressed towards the victim's mother leaving her with the extreme "anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time." [1256]As expected, the Court deduced it could not approach the families of the victims in a vague manner and identified certain elements that need to be taken into consideration when the applicants invoke indirect inhumane or degrading treatment under Article 3.

Accordingly, in disappearance cases the Strasbourg Court holds that "(…) the proximity of the family tie – in that context, a certain weight will attach to the parent-child

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[1249] See ECtHR, *Varnava* ruling, supra note 1225, para. 183; *El-Masri v. the former Yugoslav Republic of Macedonia*, Application no.39630/09, 31 December 2012, para 152; *Salman v. Turkey*, Application No. 21986/93, 27 June 2000, para 100; *Rupa v. Romania* (No. 1), Application No. 58478/00, 16 December 2008, para 97.

[1250] KELLER H. and HERI C., Enforced Disappearance and the European Court of Human Rights, A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors', 12 *JICJ* 2014, p.739.

[1251] ECtHR, *Betayev and Betayeva*, Application No. 37315/03, 29 May 2008, para. 6; *Ibragimov and Others v. Russia*, Application No. 34561/03, 29 May 2008, para. 80.

[1252] ECtHR, *Zaurbekova and Zaurbekova v. Russia*, Application No. 27183/03, 22 January 2009, paras. 91, 92. See also in this respect, CITRONI G, *Missing persons and victims of enforced disappearance in Europe*, Issue paper published by the CoE Commissioner for Human Rights, 2016, available at https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c, p.39.

[1253] KELLER H. and HERI C., supra note 1250.

[1254] See again the *Bazorkina* judgment, supra note 1123, para.130.

[1255] See on this matter among others NEEDHAM A., Putting the Victim's families first: The comparative analysis of the Inter-American Court of Human Rights and the European Court of Human Rights on the Right to be Free from Torture in cases of Enforced Disappearances, 3 *IALS Student Law Review* 1, 2015, pp. 33-47; MURRAY A., Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts, 2 *Int'l Hum. Rts. L. Rev*, 2013, pp.57-87.

[1256] ECtHR, *Kurt* case, supra note 1180, para 133.

bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries (Orhan, § 358, Çakıcı, § 98, and Timurtaş, § 95 - all cited above). The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see Çakıcı, cited above, § 98)."[1257]

Overall, notwithstanding some alarming inconsistencies,[1258] the Court expressed its inclination to enhance the protection offered to the victim's relatives perhaps, in an attempt to counterbalance the rigidity of its standards applied with regard to the victims of enforced disappearances while examining a claim under Article 3. Being faithful to its evidence-centered approach, it is possible that the Court could make an exception from its traditionally requisite high threshold of direct evidence to prove the ill treatment of the alleged victim only when the indirect victim's suffering is *ipso facto* self–evident.

In any case, the Inter-American has clearly drawn from its European peer as illustrated in the *Bámaca-Velásquez* case in which it referred to its prior *Street Children* jurisprudence.[1259]It relied on the Strasbourg standing on the matter with emphasis to the objective criteria that the ECtHR established in order to evaluate in a more reliable way the contested disputes concerning the relatives in enforced disappearance cases.[1260]

Hence, the Inter-American Court evaluated the extreme suffering emanating more often from the deficient investigation exercised by State authorities and thus, unfinished anguish of the victims' families without requiring anything more than the profound close family ties with the alleged victim. According to the *jurisprudence constante* of the IACtHR, the enforced disappearance of a person is likely to constitute a violation *per se* of the prohibition of torture. Nonetheless, in its *Heliodoro Portugal v. Panama*[1261] in 2008, the San José Court seemed to take the Strasbourg's path towards a more *encadré* manner[1262] of assessment of such claims.[1263]

[1257] ECtHR, *Ipek v. Turkey*, Application No. 25760/94, 17 February 2004, para. 181; *Osmanoglu v. Turkey*, Application No. 48804/99, 24 January 2008, para. 96; *Sangariyeva and Others v. Russia*, Application No. 1839/04, 29 May 2008 para. 90.

[1258] ECtHR, *Şeker v. Turkey*, Application No. 52390/99, 21 February 2006, See also CLAUDE O.,supra note 1212, p.445.

[1259] Supra note 1186, para 162.

[1260] Supra note 1234, paras 161-163.

[1261] IACtHR, *Heliodoro Portugal v. Panama*, (Preliminary objections, Merits, Reparations and Costs), 12 August 2008, Series C No. 186.

[1262] Whereas the Court of Strasbourg needs to review also the responsiveness of domestic authorities, the Human Rights Committee appears to be on the same page with the Inter-American Court and to content itself with assessing the extreme pain and anguish of the families in order to declare Article 7 ICCPR to be breached due to the prolonged period of *incommunicado*. Compare, for instance, *Kurt v. Turkey*, supra note 1180, paras 133 and 134 with ECtHR,*Akdeniz v. Turkey*, Application No. 25165/94, 31 May 2005, paras 122-125 with *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, 24 March 1994, para.5.4.See also on this matter KYRIAKOU N., *An Affront to the Conscience of Humanity: Enforced disappearance in international human rights law*, PhD Thesis, European University Institute 2012, available at http://cadmus.eui.eu/handle/1814/22700, p.94.

[1263] Ibid., para 163.

At any rate, the IACtHR, in 2010, reiterated its previous standards according to which the close next of kin of the relatives in this type of cases provides sufficient ground so as they can be presumed to be ill-treated in the sense of Article 3 ECHR. [1264]

The restraint of the European judiciary was recently confirmed in respect of the temporal elements emanating from enforced disappearance cases as well. The controversial *Janowiec and Others v. Russia* case[1265] had been brought by the family of individuals detained by the Soviet armed forces in 1940. On the basis of non-existence of the ECHR at the time of the alleged violations, the Strasbourg Court held that it lacked jurisdiction *rationae temporis* to assess the complaints raised under Article 2 of the Convention. It is, nonetheless, noteworthy the fact that the European Court had approached the issue differently in its previous *Varnava v. Turkey* ruling,[1266] an enforced disappearance case that concerned the Turkish invasion to Cyprus in 1974, citing the liberal standing of its Latin American sister Court.[1267] Back then, it had extensively cited the relevant case law of the Inter-American Court with particular emphasis to the continuing nature of that particular type of criminal activity.

For Corina Heri there is a constant struggle between two schools of thought : "an overly lax approach to temporal jurisdiction will lead to allegations of 'judicial activism' and dissatisfaction by states; on the other, an overly stringent approach risks undermining the effective protection of individual human rights, and thus causing a loss of credibility."[1268]Via its jurisprudence of "continuing violation", the Inter-American Court appears to have found the golden solution while adjudicating ongoing State's obligations arising from human rights

[1264] IACtHR, *Chitay Nech et al. vs Guatemala*, Judgment of May, 25 2010, Series C No. 212, para 220; See also on the legal treatment of victims'relatives in enforcement disappearances RAIMONDO G.-C., *Redress for Victims of Enforced Disappearances: A Comparative Perspective,* Thesis-McGill University, December 2014, p.56. See MURRAY, supra note 1255; See also NEEDHAM, supra note 1255.

[1265] "As the Court has established, the events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence. The Court therefore upholds the Chamber's finding that there were no elements capable of providing a bridge from the distant past into the recent post entry into force period" ECtHR, *Janowiec and Others v. Russia* [GC], Application No.55508/07 and 29520/09, 21 October 2013, para 160.

[1266] See *Varnava* judgment, supra note 1225, paras 93-98.

[1267] Signs of cross-fertilisation between the two Courts were recently also revealed with regard to amnesty laws. In 2014, in its *Marguš v. Croatia* (2014), relied widely on the relevant case law of the Inter-American Court (*Barrios Altos v. Peru, Almonacid Arellano v. Chile, La Cantuta v. Peru, Anzualdo Castro v. Peru, and Gelman v. Uruguay*) to conclude to a non-violation of the *ne bis in idem* principle was not violated in the case at hand since "[i]n the present case the applicant was granted amnesty for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child, and the County Court's reasoning referred to the applicant's merits as a military officer. 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. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.(…)The Court considers that by bringing a fresh indictment against the applicant and convicting him of war crimes against the civilian population, the Croatian authorities acted in compliance with the requirements of Articles 2 and 3 of the Convention and in a manner consistent with the requirements and recommendations of the above-mentioned international mechanisms and instruments.". ECtHR, *Marguš v. Croatia*, Appication No. 4455/10, 27 May 2014, paras 139–141.

[1268] HERI C., Enforced Disappearance and the European Court of Human Rights' ratione temporis Jurisdiction, A Discussion of Temporal Elements in *Janowiec and Others v. Russia,* 12 *JICJ,* 2014, p.758.

breaches that predated their *ratione temporis* jurisdiction.[1269] For the San José judges enforced disappearances entail human rights violations that continue until the fate and whereabouts of the disappeared are established.[1270] In other words, the "continuing or permanent" character of the contested violation permits to the Court to scrutinise almost any procedural claim under Article 2 ECHR even if it arises from facts committed before the jurisdiction of the Court was established.

Enforced disappearances constituted for decades a brutal plague that was immensely nourished by the political support and the total abuse of power that the perpetrators enjoyed. This abominable practice lies in the heart of the notion of human dignity. In light of the intensity of the phenomenon that afflicted several regions of the world, the international community was actually forced to take significant steps in order to outlaw this deep-rooted practice, particularly in the Americas. Besides the normative response of the UN human rights regime, enforced disappearances were treated as continuous and multi-faceted international crime both by the IACtHR and the ECtHR. Their attention was sparked in the *terrain* of the insurmountable impediments in the fact-finding procedure which mapped the reaction of the two judicial mechanisms respectively.

It goes without saying that the nuanced jurisprudence of the Inter-American Court had the key role in the formulation of the concept of enforced disappearances while the ECtHR adopted a more conservative approach while reviewing such cases. In all of the aforementioned aspects of the proceedings, namely the evidentiary burden, the standard of proof and the legal treatment of the relatives' claims of indirect violations, the Strasbourg Court's level of protection appeared to be always a step back in comparison with the one offered by its Latin American peer.[1271] A potential explanation could be that the ECtHR sees enforced disappearances as a practice deriving from the armed internal conflicts that constituted the context in which the facts of the cases brought before it arose. In other words, it is the armed

[1269] The temporal element of disputes emanating from enforced disappearances has presented itself as one of the most contentious issues cutting across the case law of the judicial and quasi-judicial human rights bodies.Besides the approach of ECtHR and IACtHR, the HRC, at the outset, established the continuing nature of the violations that stem from the impugned practice in *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, in which the Committee held that although the alleged removal and subsequent disappearance of the author's son had taken place before the entry into force of the Optional Protocol for Sri Lanka, the *ratione temporis* objections were to be rejected due to the continuing character of the violations *in casu.* By contrast, in the famous *Yurich v. Chile,* it reconsidered its standing in relation to its temporal jurisdiction and held that due to the specific declaration of the Chilean State upon the ratification of the Optional Protocol to the Covenant the communication should be declared inadmissible. The Committee reiterated its stance relatively in subsequent jurisprudence. See HRC, *Mr. S. Jegatheeswara Sarma v. Sri Lanka* Communication No. 950/2000, 31 July 2003, para 6.2; HRC, *Yurich v. Chile,* Communication No. 1078/2002 2 November 2005, para. 6.4; HRC, *Cifuentes Elgueta v. Chile,* Communication No.1536/2006, 28 July 2009, para. 8.5; See *inter alia*, VERMEULEN M., Enforced Disappearance Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance 51 *Human Rights Research Series,* Intersentia 2012, p. 189-193; HERI, supra note 1268, p.758,759.

[1270] See IACtHR, *Case of Blake v. Guatemala*, Preliminary Objections, 2 July 1996, Series C No. 27, para 7*; Heliodoro Portugal v. Panama*, supra note 1076*; Rio Negro Massacres v. Guatemala*, (Preliminary objection, merits, reparations and costs) 4 September 2012, Series C No.250, para 37.

[1271] In the same vein, for the analogy that can be drawn from the comparison of the ECtHR's legal treatment of the enforced disappearances cases which occurred during the armed conflict(1992-1995) in Bosnia Herzegovina with the approach of HRC. See e.g. available at DURMUS B., *Two paths to Transitional Justice: A comparison of the European Court of Human Rights and the Human Rights Committee's approaches to Bosnian Enforced Disappearance Cases,* Koç University Blog 2017 available at https://kuremer.ku.edu.tr/en/two-paths-transitional-justice-comparison-european-court-human-rights-and-human-rights-committees.

conflict that creates a life-threatening situation rather that this systematically applied pattern that causes *per se* an aggravated human rights violation.[1272] The recent evolution of the ECtHR's case law along with the systematic citation of the pioneer Inter-American Court pointed out the inclination of the former to enhance the inter-judicial dialogue relatively in order to find its own coherent and more comprehensive approach of enforced disappearances.

ii. The Inter-American protection of indigenous rights instead of the ECtHR's formalism

The rights of indigenous populations have formed one of the fields of international human rights law that the Inter-American Court has proved to be the ultimate trailblazer, mostly, through its expansive interpretation of property rights. Due to the significant number of indigenous peoples in the Americas, the Inter-American Court was greatly preoccupied with the pressing need of enforcing effectively their right to property of indigenous when it comes to their ancestral lands, the natural resources therein[1273] and their cultural identity as part of their communal property. Conversely, notwithstanding the fact that Europe is a multicultural land that has been home for diverse minorities for centuries, claims of indigeneity brought mostly by Sami people of Northern Europe (Scandinavia) and the Nenets of Western Siberia residing in Russia[1274] have traditionally received a non-favorable outcome before the ECtHR.

[1272] CLAUDE, supra note 1212, p. 421. Analogous approaches can be traced under national legislations as well. For instance, the Greek legislator who has amended the Greek Criminal Code to provide criminal conviction for the crime of enforced disappearances (Article 322CC) has introduced a temporal limitation in paragraph 4. According to the latter, the limitation period of the crime is suspended when the crime is committed under a state of unlawful authority. The explanatory memorandum of the said provision justified it stating that "the crime of enforced disappearance is mostly committed under oppressive regimes and in the context of abnormal situations affecting the institutions of the State". Although the Greek legislator appeared to accept the continuing nature of the crime, he added the political dimension to the entire concept that risks to exclude other types of enforced disappearance, not connected to political instability. See in this respect the Observations by the Greek National Commission for Human Rights (GNCHR) on Greece's Initial Report on the Implementation of the International Convention for the protection of all Persons from Enforced Disappearance(adopted by the GNCHR plenary on 29.11.2018. Rapporteurs: Professor Maria Gavouneli,1st Vice-President(now President), GNCHR, Eva Tzavala, Legal Officer, GNCHR, Ioanna Pervou, Dr. Jur (AUTh), External Scientific Advisor), November 2018,p.15.

[1273] With regard to the inextricable link of the property rights of indigenous covering also the natural resources of their traditional lands see among others FITZMAURICE M., Tensions Between States and Indigenous People over Natural Resources in light of the 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries and the 2007 UN Declaration on the Rights of Indigenous Peoples (including relevant national legislation and case-law), *The Yearbook of Polar Law* IV, 2012, pp. 227–260 ; In particular, as regards the human right to water as an expression of the right to property of indigenous peoples comprising also natural resources see TZATZAKI V.-M., *The water under public international law*[in greek],Nomiki Vivliothiki 2012, p.180-189; HAMMER L., Indigenous peoples as a Catalyst for applying the human right to water, 10 *Int'l J. on Minority & Group Rts* 2003, pp.131-161.

[1274] Stefan Kirchner explains "In Russia, Norway, Sweden and Finland, the Sami are an indigenous people.' 7 Speakers of Inari Sami are a linguistic minority within the Sami people and within Finnish society overall. 8 The drawing of borders has resulted in the presence of national minorities in many European countries, although the intervening time and assimilation processes can impact whether a group considers itself a national minority or 'only' a linguistic minority. While some national minorities relate to existing nation states (for example the Danes in Northern Germany or the Germans in Poland), the existence of a nation state is not a requirement for being a national minority (one case in point being the Frisian people) - although there is no universally recognized definition of what constitutes a national minority. On the other hand are large immigrant communities (such as Moroccans in the Netherlands or Turks in Germany) usually not considered to form a national minority, but a

Due to the diverse legal standards and the lack of consensus on the legal recognition, the rights of indigenous peoples attracted universal attention and was actually achieved through global legal instruments,[1275] albeit only recently. Interestingly, the first to codify the rights of indigenous populations was the International Labour Organisation in two relevant texts, namely the *Convention 107 concerning the Protection and Integration of Indigenous and Tribal Populations and other Tribal and Semi-tribal Populations in Independent Countries* (hereinafter ILO Convention No.107)[1276] and the *International Labour Organization (ILO) Convention on Indigenous and Tribal Peoples* (hereinafter ILO Convention No.169).[1277] Initially, the latter was adopted under the auspices of the International Labour Organisation, however, it went far beyond the protection of labour rights since it contains novel provisions on indigenous' participation as well as on land and resource rights, targeted to ensure their self-identification as well as their cultural identity.

Under general international law, the legal treatment of the rights of indigenous peoples, was not exactly tailored to their needs, until recently. However, the property rights of indigenous rights are protected under Article 1(2) of the International Covenant on Civil and Political Rights providing "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."[1278] Moreover, Article 27 of the Covenant reads as follows "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Hopefully, the decisive step in the context of the United Nations' regime was taken with the *2007 UN Declaration on the Rights of Indigenous Peoples* (hereinafter UNDRIP).[1279]

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minority in the wider sense of the term.", KIRCHNER S., Conceptions of Indigenousness in the Case Law of the European Court of Human Rights, 38 *Loy. L.A. Int'l & Comp. L. Rev.*2016, p.171.

[1275] See SWEPSTON L., Indigenous Peoples in international law and international organisations in CASTELLINO J. and WALSH N., *International Law and Indigenous Peoples*, Martinus Nijhoff Publishers Leiden /Boston 2005, pp.53-66; See also *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9/Rev.2, U.N. Human Rights office of the High Comm'r 9, 2013, available at http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf .

[1276] ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 26 June 1957 (ILO Convention No.107) 328 U.N.T.S 247. The Convention was adopted in 1957 and entered into force in 1959. Some of the shortcomings of the said instrument, which was criticized in academia for being extremely assimilationist, were, subsequently, remedied by the ILO Convention No.169.

[1277] ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 1650 U.N.T.S. 383 (ILO Convention No. 169). The said convention was adopted in 1989 but entered into force on the 5th of September 1991. See in this respect FEIRING B., *Indigenous and Tribal Peoples' Rights in Practice a Guide to ILO Convention No. 169*, 2009, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf; YUPSANIS A., ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009 : an Overview, 79 *Nordic J. Int'l L* 3, 2010, pp. 433 – 456.

[1278] SCHEININ M., Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights in International law and Indigenous Peoples in CASTELLINO and WALSH (eds.), *International Law and Indigenous Peoples*, Martinus Nijhoff Publishers Leiden /Boston 2005, pp. 3-16.

[1279] UNGA, Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295. For an overview of the Declaration see *inter alia* WIESNER S., Indigenous Self-Determination, Culture, and Land : a

Albeit not legally binding, the most comprehensive instrument in the field of indigenous rights built on already long-existing human rights provisions and acknowledged the same rights to these groups with particular emphasis to the right to self-determination, their participatory rights in decision-making processes and the rights to their ancestral lands, territories and resources as well as their rights to culture, intimately linked with the preservation of indigenous peoples' identity.

By contrast, in the realm of the Council of Europe, indigenous peoples do not receive sufficient attention as regards the enjoyment of their traditional rights. First of all, it is also a matter of numbers since the indigenous populations in Europe are much fewer than in other corners of the earth, as previously discussed. As a result, to date, limited progress has been observed in this field due to the restricted number of applications heard by the European Court of Human Rights and the even more restricted number of decisions on indigenous peoples' contested claims *in the merits*. Since the ECtHR is structured to rule on individual petitions denying the possibility of *actio popularis*, complaints of the indigenous peoples' collective rights can hardly find a favorable assessment within the Strasbourg system, as illustrated by the jurisprudence of the European Commission and the European Court of Human Rights.[1280] Besides some minority-protecting mechanisms,[1281] the particularities of the indigeneity could only be sufficiently sheltered under the binding umbrella of the European Convention on Human Rights and its enforcement mechanism, namely the Strasbourg Court.[1282]

The first case pertaining to the rights of indigenous was brought before the European Commission of Human Rights in 1983, namely the *G. & E. v. Norway.* [1283] *In casu*, the Lapps filled an application before the Commission alleging that the construction of hydroelectric power station, authorized by the Norwegian State, impeded the rendeer herding and fishing in their traditional lands and therefore, it breached their right to private and family life as well as their right to property under Article1 Protocol No.1 ECHR. In a rather abstract manner, the European Commission of Human Rights concluded that only a small area of the applicants' traditional herding area was truly affected and, hence, on the basis of the proportionality test, rejected the alleged violations. This notwithstanding, the Commission appeared, in this *in merito* examination of indigenous peoples' complaints, willing to accept the possibility of an interference with the property rights and the enjoyment of the particular lifestyle of indigenous

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Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples in PULITANO E.(ed.), *Indigenous Rights in the Age of the UN Declaration*, CUP, 2012; ALLEN S., XANTHAKI A.(eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, 2011; HOHMANN J. and WELLER M.(eds), *The UN Declaration on the Rights of Indigenous Peoples, A Commentary*,OUP, 2018.For a thorough analysis of the enforcement of indigenous rights within the context of the United Nations architecture, see relatively, UN Human Rights System, Office of the High Commissioner, Fact Sheet No. 9/Rev.2 "Indigenous Peoples and the United Nations Human Rights System", 2013, available at https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf.

[1280] KOVACS P., Indigenous Issues under the European Convention of Human Rights, Reflected in an Inter-American Mirror, 48 *Geo. Wash. Int'l L. Rev.* 2016, pp.781-806.

[1281] Some of the instruments adopted under the auspices of the Council of Europe are the following: CoE, European Charter for Regional or Minority Languages, 4 November 1992, ETS 148 and CoE, Framework Convention for the Protection of National Minorities, 1 February 1995, ETS 157.

[1282] See *inter alia* KIRCHNER S., Supra note 1274; OTIS G. and LAURENT A., Indigenous land claims in Europe: The European Court of Human Rights and the decolonization of property, 4 *Arctic Review on Law and Politics* 2, 2013, pp. 156–180.

[1283] ECommHR, *G. & E. v. Norway*, Application No. 9278/81, 35 *Eur. Comm'n H.R. Dec. & Rep*. 30, 1983.

populations.[1284]The said understanding of the rights invoked by Sami peoples in the present case fuelled severe criticism among academics since the question of the preservance of cultural identity seemed to be totally sidestepped in the present case.[1285]

A few years later, the Commission was, once again, confronted with similar claims of Sami people revolving around their access to justice without successful outcome for the applicants.[1286]Interestingly enough, a number of decisions of the ECtHR followed denying the examination of the case in the merits and rejecting the allegations of indigenous peoples as inadmissible. This is an illustrative example of how procedural elements of the cases brought before the Strasbourg Court by indigenous populations can actually affect, overall, the substantial protection offered to them by the Court in this field. As expected, since these disputes touch upon group rights,[1287] the victim status of the claimants was found in the spotlight of the respective argumentation of the Court. Nevertheless, the case of indigenous rights encompasses a novelty in the sense of the mixed character of these rights which are both individual and collective. In this light, the UNDRIP is a luminous example of a contemporary synthesis of group, individual and mixed rights in a text which mirrors the present-day tendencies and the long road made since the adoption of the milestone instruments in human rights law, the Universal Declaration of Human Rights strongly promoting the individual nature of human rights.[1288]

Before the Strasbourg Court, there is no way that a collective complaint(*actio popularis*) can be filed since the applicant always need sto show that he/she has been the victim (direct or indirect) of the contested national measure and hence, of an infringement of a specific fundamental right enshrined in the Convention or its Protocols.[1289]The Court's intolerance to collective applications has found its meaning in indigenous cases which by default raise collective rights issues.

In *Konkima and 38 Other Saami Villages Against Sweden,*[1290]a group of Sami villages challenged the new Swedish legislation on hunting and fishing, alleging that the new licensing procedure violated their property rights as well as their access to justice and the principle of non-discrimination. With particular emphasis on the complaint of the right to property, the

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[1284] "The Commission is prepared to accept that the consequences, arising for the applicants from the construction of the hydroelectric plant, constitute an interference with their private life, as members of a minority, who move their herds and deer around over a considerable distance. It is recalled that an area of 2,8 km2 will be covered by water as a result of the plant. In addition, it must be acknowledged that the environment of the said plant will be affected. This could interfere with the applicants' possibilities of enjoying the right to respect for their private life. Nevertheless, in comparison with the vast areas in northem Norway which are used for reindeer breeding and fishing, the Commission considers that it is only a comparatively small area which will be lost for the applicants, for such purposes, as a result of the Alta river project." Ibid., para 35.

[1285] See KIRCHNER S., Supra note 1274, p.182; THORNBERRY P., *Indigenous peoples and human rights*, Manchester University Press, 2002, p.298; KOIVUROVA T., Jurisprudence of the ECHR regarding indigenous peoples: retrospects and prospects, 18 *Int'l J. on Minority & Group Rts* 1, 2011, p.10.

[1286] ECommHR, *O.B. & Others v. Norway*, Application No. 15997/90, 8 January 1993.

[1287] For an insight of the entire philosophy and enforcement of indigenous peoples' rights in terms of collective rights see XANTHAKI A., Collective rights: the case of indigenous peoples, 25 *Amicus Curiae Issue,* 7 March 2000, pp.7-11.

[1288] See, in this regard, SICILIANOS L.-A., *The Human Dimension of International Law: Interactions between General International law and Human Rights*[in Greek], Nomiki Vivliothiki 2010, p. 334,335.

[1289] See for an overview of the Court's understanding of the victim status SCHABAS W., Supra note 214, p.738

[1290] ECommHR, *KÖNKÄMÄ and 38 other Saami villages against Sweden*, Application No. 27033/95, 25 November 1996.

Commission admitted that "the exclusive hunting and fishing rights claimed by the applicant Saami villages in the present case can be regarded as possessions within the meaning of Article 1 of Protocol No.1". Pertaining to the victim concept, the Commission saw the villages that filed the application as non-governmental organisations and observed that the Swedish legal framework, namely the Reindeer Herding Act, "are responsible for the herding within their respective areas and represent their members in such matters. Moreover, the rights designated in that Act can be exercised by a Saami only as a member of a Saami village." [1291]Despite the aforementioned less rigorous approach of victim status, the Commission rejected their claims on pure procedural grounds, since they failed to exhaust local remedies.

By the same token, in the *Johtti Sapmelaccat Ry and others against Finland*, [1292]the Strasbourg Court denied to enlarge the conception of the non-governmental organisations' *locus standi* since it held that " – unlike the villages' status in respect of the herding of reindeer in the case of Könkämä and 38 other Sámi villages v. Sweden (no. 27033/95, Commission decision of 25 November 1996) – the first applicant association is not responsible for fishing within its respective area and does not represent its members in such matters. Moreover, the rights designated in the Fishing Act can be exercised by a Sámi only as a private individual." The latter pronouncement restricts disproportionately the admissibility requirements, particularly when minority or community rights are at stake. In this respect, as Timo Koivurova correctly wondered "how can private individuals, like those in these cases be the appropriate complainants in a dispute related to indigenous property rights, which by definition belong to the community?"[1293]

At any rate, the European Court reiterated its strict application of admissibility rules in several cases shaping a similar factual basis with the abovementioned cases[1294] in which applicants failed to surpass the admissibility threshold. During the latest decades, the infrequency of cases seeking adjudication before the judicial organs of the CoE system in conjuction with their scant willingness to substantially assess the contested human rights violations point towards a hesitation of the entire system to truly grapple with the marginalization of human rights land claims that indigenous populations face.

However, in the context of the ongoing evolution of international human rights standards- albeit non binding- and the extended protection offered by other regional systems as regards the rights of indigenous peoples, the persistency of the Strasbourg Court to narrowly interpret the Convention's provisions seems totally isolated. [1295]Therefore, it is in this spirit that

[1291] Ibidem.
[1292] ECtHR, *Johtti Sapmelaccat Ry and Others against Finland*, Application No. 42969/98, 18 January 2005.
[1293] KOIVUROVA T., supra note 1285, p.8.
[1294] See for instance ECommHR, *Halvar FROM Against Sweden*, Application No. 34776/97,(1998); ECtHR, *The Muonio Saami Village v. Sweden*, Application No. 28222/95, 15 February 2000; ECtHR, *HINGITAQ 53 Against Denmark*, Application No. 18584/04, 12 January 2006; ECtHR, *Handölsdalen Sami Village and Others v. Sweden* , Application No. 39013/04, 30 March 2010 ; ECtHR, *Chagos Islanders v. the United Kingdom*, Application No. 35622/04, 11 December 2012. For an analysis of the last three decisions on admissibility delivered by the European Court of Human Rights see GISMONDI G., Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1, 18 *Yale Hum. Rts. & Dev. L.J*. 1, 2017.
[1295] By contrast, according to Ghislain Otis and Aurélie Laurent, "on the whole, while the main issue of the recognition of ancestral indigenous tenure may yet remain unresolved, the work done by the ECtHR is far from inconsistent with the advancement of indigenous rights in Europe. Indeed, indigenous peoples are being welcomed

Giovanna Gismondi highlighted that "[t]he European Court's narrow interpretation of Protocol 1 continues to undermine the cultural preservation of indigenous peoples because indigenous peoples who fall within the responsibility of European states have very limited means of redress available in the global arena."[1296] As the recent indigenous rights jurisprudence evinced, the Strasbourg Court, which constitutes the only judicial forum which can serve as a nuanced enforcement mechanism for indigenous populations residing in Europe, failed to embrace an autonomous conception of their property rights. In a nutshell, insofar ancestral lands of indigenous peoples cannot fall within the meaning of "existing possessions", regardless of the notion's traditional meaning under national regimes,[1297] the peaceful enjoyment of their right to property as well as of all rights connected to their physical and cultural integrity remain unsatisfactorily ensured under the ECHR.

By contrast, the Inter-American Court of Human Rights afforded to these populations a more dynamic protection introducing a differentiated approach to indigenous land tenure on the basis of the particularities of the region. While numerous indigenous peoples have found their traditional lands within the territorial limits of the American continent, the relevant disputes were brought before the judicial *fora* of the Inter-American system under the umbrella of general provisions protecting, mostly, the right to property,[1298] the right to equality[1299] and the right to private life.[1300] Admittedly, the textual and the jurisprudential emphasis given to *vida digna* enlarged the scope of the said provisions so as contemporary attacks against individuals or minorities can be circumvented. However, only recently the Inter-American system achieved consensus on the matter after years and years of strenuous negotiation. Hence, the American Declaration on the Rights of Indigenous Peoples became a reality in 2016.[1301] As the most recent instrument in the area of rights of indigenous peoples, the Declaration was

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into the system established under the ECHR as the Court recognizes their entitlement to judicial protection and access to courts, a right which carries a special meaning in the context of the international protection of these groups." See OTIS G. and LAURENT A., supra note 1281, p.173.

[1296] GISMONDI, supra note 1294, p.52.

[1297] "Moreover, a claim itself can be regarded as a possession if, even though theremay be no material possession, the claim is certain, or there is a legitimate expectation that a legal ownership right will be recognized under domestic law. Thus, generally speaking, the decisive element of a legitimate expectation resides in the existence of a "sufficient basis in domestic law, as interpreted by the domestic courts, for the applicant's claim to qualify as an 'asset' for the purposes of Article 1 of Protocol No. 1". As is the case with an "existing" possession, however, protection under the Convention remains highly dependent on domestic law." OTIS and LAURENT, supra note 1295, p. 176

[1298] Article 21 ACHR provides that: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.3. Usury and any other form of exploitation of man by man shall be prohibited by law."

[1299] Article 24 ACHR reads as follows: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[1300] Article 11 ACHR reads as follows: "1. Everyone has the right to have his honor respected and his dignity recognized.2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.3. Everyone has the right to the protection of the law against such interference or attacks."

[1301] OAS, American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16), adopted on 15 June 2016 by the General Assembly of the Organisation of American States. For a first evaluation of the Declaration's legal impact in this field, see ERRICO S., The American Declaration on The Rights of Indigenous Peoples, 21 *ASIL Insights* 7, 2017, available at https://www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples.

targeted to clarify the scope and tackle violations of a wide series of both individual and collective fundamental rights that are prerequisites for the indigenous peoples' survival with human dignity, well-being and integral development.

In the meantime, the Inter-American Court had already developed the jurisprudential standards of protection for indigenous populations pursuant to the American Convention on Human Rights. In the Latin-American sphere, due to the plethora of claims raised by indigenous populations in the Americas and its side-effect, namely the significant number of decisions delivered by the Inter-American Court, the latter was forced to see these cases through the lens of its *pro homine* doctrine.

In this light, the San José system found the opportunity to grapple in depth with these issues more successfully than its European peer. The famous *Saramaka* case[1302] offers the most luminous example in this respect. As earlier discussed, in the lack of specialised instruments the Inter-American human rights system started formulating the regional level of protection from both the procedural and the substantial perspective.[1303]Initially, the Court opted for an expansive understanding of the victim status as it flows from the rejection of the preliminary objections of the State of Suriname which challenged the *locus standi* of the applicants pursuant to Article 44 of the ACHR[1304] on the basis of general customary rules of treaty interpretation and the *effet utile* principle.[1305]

The applicants were members of a tribal group living in their traditional territory of Suriname since the 1700s who had developed strong spiritual and cultural bonds with their land and its natural resources. When the State of Suriname, following to a constitutional amendment, granted authorization for logging and mining to private enterprises severely affecting the traditional lands without consultation or the prior consent of the community, its members lodged an application before the Inter-American Court invoking their rights. Having legitimized the petition of the applicants, the Court of San José proceeded to some bold pronouncements recalling also the international human rights obligations of the respondent State under the ICCPR and the UNDRIP.

Indeed, in the Court's words, tribal communities as well as indigenous ones have the right "to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied. Thus, in the present case, the right to property protected under Article 21 of the American Convention, interpreted in light of the rights recognized under common Article 1 and Article 27 of the ICCPR, which may not be restricted when interpreting the American Convention, grants to the members of the Saramaka community the right to enjoy

[1302]Supra note 1182.

[1303] See for an in-depth analysis of the Saramaka case BRUNNER L., The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights, 7 *Chinese Journal of International Law* 3 ,2008, pp.699–711.

[1304]According to Article 44 ACHR: "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

[1305] Supra note 1182, para 22-25. See on the puzzling issue of interpretation of the customary rules of treaty interpretation in international law MERKOURIS P., Interpreting the Customary Rules on Interpretation. 19 *International Community Law Review*1, 2017, pp.126-155.

property in accordance with their communal tradition."[1306]Hence, the State is bound to take all positive measures in order to guarantee the non-violation of their property rights as broadly interpreted by the Court.

Since the natural resources that lie on and within their traditional land constitute one of the guarantees of the community's very survival,development and very continuation the Court, in the present case, underlined that "[t]his connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property."[1307]

In this aim, the Court laid down specific guarantees that apply in the context of any similar investment plan related to the effective participation of the interested community in the decision-making process in conformity with their customs and traditions, the ensurement of reasonable benefit from any such plan for the indigenous population being affected and the performance of prior environmental and social impact assessment in this respect.[1308] The *Saramaca* decision's significance[1309] lies, mainly, on the confluence of indigenous and tribal human rights protection[1310] and on the explicit recognition of the rights of indigenous peoples to natural resources. Only a few months after the adoption of UNDRIP, this case offered to the members of indigenous groups an additional potential argument in disputes in which the State's economic interests need to be balanced with the rights to property of indigenous populations including their ancestral lands and their rich natural resources.

The Inter-American had already acknowledged the rights of indigenous peoples to communal property since the famous *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* case.[1311] In stark contrast with its sister judicial mechanism which seems to have abandoned its *living instrument* perspective when it comes to the notion of property, the San José Court manifestly referred to this concept to strengthen its argumentation in this regard. In the Court's words "[t]he terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions".[1312]

Moreover, the San José Court opted for expanding the notion of property using as main tools its *pro homine* principle and the *vida digna* doctrine of the respective Court, which are also interrelated within the latter's case law.[1313]

[1306] Ibid., para 95.
[1307] Ibid., para 122.
[1308] Ibid., para 129.
[1309] For this case see also ANTKOWIAK T.M., Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court, 35 *U. Pa. J. Int'l L.*1, 2014, pp. 113-188.
[1310] On this issue, see the critique raised by Dinah Shelton in relation with the negligence of the tribal groups' specificities in SHELTON D., The Jurisprudence of the Inter-American Court of Human Rights, 10 *Am. U. J. Int'l L. & Pol'y* 333, 1994-1995, p. 367.
[1311] Supra note 1182.
[1312] Ibid., para 146.
[1313] Judge Sergio Garcia Ramirez emphasized that : "[w]hen exercising its contentious jurisdiction, the Inter-American Court is duty-bound to observe the provisions of the American Convention, to interpret them in accordance with the rules that the Convention itself sets forth ....It must also heed the principle of interpretation that requires that the object and purpose of the treaties be considered (article 31(1) of the Vienna Convention), referenced below, and the principle *pro homine* of the international law of human rights - frequently cited in this

As for the first, the Inter-American Court of Human Rights, used the *pro individual* (or *pro homine*) approach to conclude that the field of application of Article 21 ACHR is to be interpreted as including also the rights of members of the indigenous communities to communal property. This approach of the Court is anchored to the communitarian tradition which lies on the core of the mere existence of indigenous ownership concentrating not upon the individual but upon the community as a whole.[1314]

In this context, the *vida digna* concept that the IACtHR utilized could be deemed as a particular expression of the said *pro homine*–based argumentation of the Court in indigenous cases. Using the *Yakye Indigenous Community v. Paraguay*[1315] as a starting point, this jurisprudential enlargement of the right to life so as to encompass the ensurement of the right to decent life (*vida digna*) constituted the reconceptualization of some of the most important indigenous ethics such as the cultural identity, the right to education etc.

Having affirmed that " the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations", the Court clarified that " [p]roperty of the land ensures that the members of the indigenous communities preserve their cultural heritage.". Hence, "[d]isregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members".[1316]

Reiterating the same principles, the San José Court found a violation of the right to property and of the right to life of indigenous populations in another case concerning Paraguay, the *Xákmok Kásek indigenous Community v. Paraguay*.[1317]In the case at hand, the Court was found in front of another land claim brought by the said indigenous group against the State of Paraguay. The latter was condemned for having sold the traditional territory ignoring the community's rights when an investment plan was called into question. The Court reaffirmed the interplay between traditional land and the cultural identity of the indigenous community.[1318]The Court held that the lack of access to their traditional land which amounts to the lack of self-sufficiency and autonomous sustainability and the State's failure to respond adequately to the indigenous population's needs for water, education, health services and food,

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Court's case-law - which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement" , GARCIA RAMIREZ, Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment on the Merits and Reparations in the 'Mayagna (Sumo) Awas Tingni Community Case', 19 *Ariz. J. Int'l & Comp. L.* 1, 2002, pp.449-454.

[1314] DE OLIVEIRA MAZZUOLI V. and RIBEIRO D., Indigenous Rights before the Inter-American Court of human rights, A call for a pro individual interpretation, 2 *Indon. J. Int'l & Comp. L.* 522, 2015, p.538

[1315]Supra note 1182.

[1316] Ibid., paras 146,147; On the cultural element of the case and the options of the IACtHR when deciding on reparations see NOVIC E., *The concept of cultural ethnocide: an international law perspective*, OUP 2016, p.227,228.

[1317] Supra note 1182.

[1318] See also in this respect IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations, Judgment), 27 June 2012, Series C No. 24.

breached the community's right to a decent existence as a particular manifestation of the right to lead a life with dignity.[1319]

At this point, it can be deduced from the cases, earlier discussed, that for the Inter-American Court communal property encompasses the notion of possession which "does not focus on individuals but on the group and the community". Hence, under Inter-American human rights law, communal property may not be in conformity with the diverse national legal standards of ownership and possession. Nevertheless, little deference is acquired to the States within the context of the requisite balancing task between domestic economic interests and property, cultural rights of indigenous groups, indispensable for their decent existence and their communal integrity. As Elisa Ruozzi emphatically put it "the difference with the jurisprudence of the European Convention is striking: in the cases concerning Sami populations, the discrepancy between the kind of property claimed by Sami people and the one existing in internal legal orders was used by the Court in order not to recognize indigenous rights, unless these rights found some kind of recognition in the internal legal order itself".[1320]In this spirit, it is remarkable the recent *marge de manœuvre* left to the State at the stage of the assessment of what constitutes adequate 'just compensation' when expropriation of indigenous peoples' land for commercial purposes comes into play, albeit timidly-restricted only to the matter of reparation measures.[1321]

Besides the over-protective attitude of the Inter-American Court as regards indigenous populations, its stance on the matter fuelled the ambiguity as regards its effectiveness and the real protection standards that the Court can ensure for the indigenous peoples of Latin America. Regardless of how far the Court can go with the progressive legal treatment of indigenous populations, the remarkable compliance deficit pertaining to its judgments still remains an open end.[1322] In addition, the close nexus between indigenous communities and their ancestral lands, perhaps, impedes the further development of their claims in case of a potential revisit of the negativism that coincides with the mere possibility of any form of exploitation of their lands.[1323] In sum, unlike the Strasbourg Court which, when dealing with cases interfering with the right to property, examines these claims through the lens of the broad *margin of appreciation* attributed to national authorities, the Inter-American Court opted for taking sides, albeit differently. Within the Latin-American system, the right to indigenous property is clearly prioritized over economic and commercial interests of state or non-state actors. The notion of

[1319] Ibid., para 217.

[1320] RUOZZI E., *Indigenous rights and international human rights courts : between specificity and circulation of principles.*, APSA 2011 Annual Meeting Paper, 2011, p.12 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902900.

[1321] After recalling the stance of its sister European judicial mechanism in expropriation cases that just compensation is required, the Inter-American Court held that "the Court considers that, in expropriation cases, in order for the just compensation to be adequate, the trade value of the property prior to the declaration of public utility must be taken into account and also, the fair balance between the general interest and the individual interest as referred to in this Judgment", IACtHR, *Salvador-Chiriboga v. Ecuador* (Preliminary Objection and Merits), 6 May 2008, Series C No. 179, paras 96, 97.

[1322] See KOVACS, supra note 1280, p. 801; RAISZ A., Indigenous Communities before the Inter-American Court of Human Rights-New Century, New Era?, 5. *Miskolc J. Int'l L. No. 2*., 45, 2008 ; ANTKOWIAK T., A dark side of virtue: the Inter-American Court and reparations for indigenous peoples, 25 *Duke J. Comp. & Int'l L.* 1, 80 ,2014, pp.1-80.

[1323] See ANTKOWIAK, supra note 1303, p.160.

indigenous property, in its pure essence, is not destined for being compensable, in contrast with the individual property.

All that said, the Inter-American Court approached innovatively the problematic enforcement of the rights of indigenous peoples in Latin America.[1324] Even if it seems, at some point, willing to take into consideration the European liberal approach of property, the general rule is the previously analyzed overprotective standing on the matter. The open-minded interpretation of the American Convention made by the San José Court was inspired by customary principles related to indigenous populations and normative international human rights law instruments that progressively diverged from the traditional approach to these rights, considering them as minority rights. However, the Strasbourg appeared unwilling to delve into the core issues arising from the allegations of indigenous peoples due to its sharp interpretation of formal admissibility requirements. In any case, the ever-growing evolution of the ECtHR case law and the, increasingly, fruitful interjudicial dialogue on the matter, as the paradigm of the African human rights system recently illustrated,[1325] may encourage the Strasbourg Court to adopt a more welcoming tactic as regards indigenous claims.

Conclusion

It flows from this part of the present analysis that despite the epidemic violation of multiple human rights that dominated Latin America for years, the Inter-American human rights system has managed to give extremely proactive and comprehensive responses to several

[1324] For an insight into the overall evolution of the rights of indigenous peoples within the Inter-American see PASQUALUCCI J., The Evolution of International Indigenous Rights in the Inter-American Human Rights System, 6 *Hum. Rts. L. Rev.* 2, 2006, pp. 281-322. See also the most recent decisions IACtHR, *Kaliña and Lokono Peoples v. Suriname*, (Merits, Reparations and Costs) Series C No. 309, 25 November 2015. IACtHR, *Xucuru Indigenous people and its members v. Brazil* (Preliminary Objections, Merits, Reparations and Costs), Series C No 346, 5 February 2017; OAS, Report No. 44/15, Case 12.728, Xucuru Indigenous people-Brazil, OEA/Ser.L/V/II.155, Doc. 24, 28 July 2015.

[1325] An illustrative example of the impact of inter-judicial dialogue on the human rights protection of the most vulnerable groups is offered by the seminal *Endorois* decision of the African Commission of Human and Peoples' Rights pertaining to the eviction of a pastoralist group from its ancestral land in Kenya due to a project of ruby mining on the land. The Commission extensively cited the findings of the IACtHR as well as the basic principles of the protection of indigenous peoples under international law when adjudicating land claims of this type. The Commission embraced the criteria set forth in the *Saramaka* and the *Moiwana* jurisprudence of the Inter-American Court against Suriname as well as the European understanding of 'possessions' and hence, of property rights as laid down in the relevant case law of the ECtHR against Turkey. ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2010), Application No 276/2003; PAPAIOANNOU M., Harmonization of International Human Rights Law through Judicial Dialogue: The Indigenous Rights' Paradigm, 3 *Cambridge J. Int'l & Comp. L.*, 2014, pp.1037-1059. Recently, the African Court drew inspiration from the UNDRIP to interpret Article 14 of the African Charter and held that the expulsion of the Ogiek group "without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land (…)." Hence, it incorporated the UN principles related with the involvement of indigenous peoples to their own economic, social and cultural development. ACtHPR, *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012, Judgment of 26 May 2017. See also DAVI T., *The African Court on Human and Peoples' Rights: Reflections on Recent Progress*, Peace Palace Library Blog 2018, available at https://www.peacepalacelibrary.nl/2018/03/the-african-court-on-human-and-peoples-rights-reflections-on-recent-progress/ ;TAMUNO P, "New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa, 61 *Journal of African Law* 305, 2017; GILBERT J., Litigating indigenous peoples' rights in Africa: potentials, challenges and limitations, 66 *ICLQ* 2017, pp.657–686; RACHOVITSA A., The African Court on Human and Peoples' Rights: A Uniquely Equipped Testbed for (the Limits of) Human Rights Integration? in BRIBOSIA E., RORIVE I., & CORREA A. M. (eds.), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation*, 2018 Intersentia, pp.69-88.

topics, particularly, related to the causes of the deep-installed impunity and injustice in the continent. Modeled on the European human rights system, the San José Court, to date, appears to be the student who has become the master in several fields of human rights protection. Hence, the Court's conceptual creations related to human dignity have led the latter to prove itself as the true trailblazer in topics such as enforced disappearances, the protection of indigenous groups, and its generous approach of its powers to order reparations and to identify human rights obligations as peremptory norms. Certainly, the main source of inspiration remains the Court of Strasbourg, as it is routinely indicated by the Inter-American Court itself.

Irrespective of the inconsistencies that still may come up in the case law of the IACtHR[1326] touching upon the most frequently adjudicated types of disputes, the Court has recently felt ready to also verge into new legal fields[1327] as revealed by its passionate pronouncements in the historic Advisory Opinion on environmental protection.[1328]The Court, on the occasion of a request from Colombia concerning the state's responsibility arising from transboundary environmental harm dealt, thus, with the extraterritorial application of the American Convention since the aftereffects of the construction of the harmful infrastructure

[1326] See for instance the recently documented inconcistencies of the Court's jurisprudence with regard to the admissibility of evidence PAUL A., Admissibility of Evidence before the Inter-American Court of Human Rights, 13 *Direito Gv L.Rev.* 2017, pp. 653-676.

[1327] See indicatively the *Wong Ho Wing* case of the San José Court which its first extradition case. Pronouncing for the first time on relevant matters the IACtHR relied extensively on the lengthy jurisprudence of the Strasbourg Court in this field crystallizing the exact safeguards accompanying extraditions under international human rights law. IACtHR, *Wong Ho Wing v. Peru* (Preliminary objection, merits, reparations and costs) 30 June 2015, Series C No.297;

While mainly protecting civil and political rights the Court was also triggered to rule on the implementation of social and labour rights under the ACHR. Hence, the IACtHR in the *Lagos del Campo* case considered that Article 26 ACHR (progressive development) is not carved in stone and could serve as a valuable tool to protect from unlawful dismissal. Through the lens of the relevant case law of its European colleague, it activated the said provision to conclude to the violation of a number of rights embodied in the Convention.

Similarly, the Court reaffirmed its judicial activism and in a recent case on collective dismissals it dared once again to declare the justiciability of Article 26 ACHR and the evolutive and expansive understanding of labour rights.Additionally, having opened the door of Article 26 for the more sophisticated approach of social rights, the Court applied in *Cuscul Piraval et al v. Guatemala* the said provision to hold accountable the State of Guatemala for not safeguarding the right to health of HIV patients. IACtHR, *Lagos del Campo v. Peru* (Preliminary Objections, Merits, Reparations and Costs), 31August 2017, Series C No. 340; IACtHR, *Dismissed Employees of Petroperú et al. v. Peru* (Preliminary Objections, Merits, Reparations and Costs) 23 November 2017, Series C No. 344; DE PAZ GONZALEZ I., *The Social Rights Jurisprudence in the Inter-American Court of Human Rights-Shadow and Light in International Human Rights*, Elgar 2018, p.162-165; IACtHR, *Cuscul Pivaral et al. v. Guatemala*, (Preliminary Objection,Merits, Reparations and Costs) 23 August 2018, Series C No. 359.

[1328] IACtHR, *Environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity- interpretation and scope of Articles 4(1) and 5(1) of the American Convention on human rights)* Advisory Opinion OC-23/17 of 15 November 2017, Series A No. 23; PAPANTONIOU A., Advisory Opinion on the Environment and Human Rights. American Journal of International Law, 112 *AJIL* 3, 2018 , pp. 460-466; VEGA-BARBOSA G, ABOAGYE L., *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL:Talk!Blog, 2018, available at https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/ ; BANDA M., Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, 22 *ASIL Insights* 6, May 2018, available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human. Besides human rights law, international environmental law has significantly evolved during the latest decades and has a tremendous impact on the pursuit of sustainable development which is the key goal of global environmental governance of our times. For an insightful analysis of the major legal aspescts see DOUSSIS E., Does International Environmental Law Matter in Sustainable Development?, 28 *YIntlEnvL*,2017,-14.

would interfere with the rights of the entire Caribbean region. The Court responded in the affirmative and seized the opportunity to declare that Article 26 ACHR on progressive development, [1329] should be interpreted as endorsing an autonomous right to a healthy environment—a right fundamental for the existence of humankind.[1330] Having invoked the relative case law of the ECtHR on extraterritoriality and its understanding of the right to environment coupled with international environmental law instruments, the Court attempted to build up its own scope of environmental duties for the States. It did so emphasizing and hence, encouraging the interconnection between inalienable human rights and environmental law litigation.

At this juncture, there is no doubt that the Inter-American Court is exercising its contentious and advisory powers in a political hostile environment. Nonetheless and despite the criticism that it received on the void application of subsidiarity, some of the domestic authorities of the region, such as Mexico, Uruguay, Guatemala, came up with systemic improvements of their legal frameworks and took remarkable steps in the right direction. Strikingly, the Court has attempted recently to reconsider, on the occasions previously analysed, its restricted use of the MoA doctrine in the light of the ever-evolving jurisprudence of its peer, and has significantly reduced its advisory competence to reinforce its subsidiary role.[1331] Following the evolution of the political landscape over the latest decades, the Court appears to be more ready to integrate this progress into its nuanced case law. Against this background, the Inter-American Court might be proved more willing to largely borrow from the normative and jurisprudential experience of the European system in order to also dive into legal territories that pose new challenges in Latin America.[1332]Overall, it goes without saying that both legal systems have been engaged in a multifaceted horizontal judicial dialogue which has brought new air to the human rights protection in the American continent.[1333] Hopefully, despite the distinct legal traditions, the European Court will continue to be the guiding light for regional human rights Courts so as a more harmonized and therefore, more effective model of protection could be achieved.[1334]

[1329] According to Article 26 of the Convention "[t]he States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

[1330] Supra note 1328, para 59.

[1331] See on the objectives of this new tendency of the Inter-American Court, *inter alia* CANDIA FALCO G., Unenumerated Rights and the Inter-American Court of Human Rights: A Reflection in the Light of the Rule of Law, 42 *Revista Chilena de Derecho* 873, 2015, pp. 873-902; BAILLIET C.M., The Strategic Prudence of the Inter-American Court of Human Rights: Rejection of Requests for an Advisory Opinion, 15 *Braz. J. Int'l L.* 255, 2018, pp.255-276.

[1332] WOLFSON J., The Expanding Scope of Human Rights in a Technological World - Using the Inter-American Court of Human Rights to Establish a Minimum Data Protection Standard across Latin America, 48 *U. Miami Inter-Am. L.Rev*. 188, 2017, pp.188-232.; PASQUALUCCI J.M, The Inter-American Human Rights System: Progress Made and Still to Be Made, 52 *German Y.B. Int'l L. 181*, 2009, pp. 181-230.

[1333] FERRER MAC-GREGOR E., What Do We Mean When We Talk about Judicial Dialogue: Reflections of a Judge of the Inter-American Court of Human Rights, 30 *Harv. Hum. Rts. J.* 89, 2017, pp. 89-127.

[1334] The unfettered influence of the Strasbourg Court looms also large in the nuanced jurisprudence of the sub-regional African Courts including the East African Court of Justice (EACJ), the Court of Justice of the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC) Tribunal. The easier access of individuals to these Courts emanating from the lack of the rule of prior exhaustion

B. Regional to global : Exporting the ECtHR's norms to the Human Rights Committee

Introduction

Besides its tremendous regional impact, the European Convention on Human Rights and its understanding as mapped in the jurisprudence of the Strasbourg Court echoes universally. In particular, traces of this echo can be found as well in the work of the monitoring body of the younger sibling of the ECHR, namely the International Covenant on Civil and Political Rights(hereinafter ICCPR).[1335] Adopted under the auspices of the United Nations in 1966, the Covenant came into force ten years later. Not unsurprisingly, the practice of the Human Rights Committee (hereafter referred as HRC or the Committee), which is entitled to review the implementation of the ICCPR, is looming among the monitoring bodies of the UN treaties grappling with the enforcement of human rights of all categories and kinds. Pursuant to Article 28 ICCPR, the Committee is composed by eighteen independent experts and its mandate it is twofold: first, to assess reports from the States Parties on the improvements made to give effect to the provisions of the ICCPR and second, to elaborate Genaral Comments seeking to clarify the exact notion of human rights embodied in the Covenant and the specific obligations arising from its text.

In addition, State Parties may also sign the two Optional Protocols of the ICCPR. The first has offered the HRC the powers to receive and examine individual complaints,[1336] the so-called *communications* scheduled during the sessions of the Committee as well as inter-state complaints. Its quasi-judicial mandate amounts to the delivery of the HRC's *views*,[1337]which despite their non-binding nature *vis-à-vis* the State Parties has offered a favourable forum for

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of domestic remedies have attracted numerous human rights complaints. That being so, both the EACJ and ECOWAS have expanded their initial economic mandate and went on to deliver important judgments delving into flagrant human rights questions (prohibition of slavery and torture, freedom of expression, child rights and right to health). See on the matter EBOBRAH S. T., Litigating Human Rights before Sub-Regional Courts in Africa: Prospects and Challenges, 17 *Afr. J. Int'l & Comp. L.* 79, 2009, pp. 79-101; NKATHA MURUNGI L., GALLIINETTI J., The Role of Sub-Regional Courts in the African Human Rights System, 13 *SUR - Int'l J. on Hum Rts.* 119, 2010, pp.119-140; JANSEN REVERNTLOW N. *Strategic Litigation Before the African Regional Courts: Great Potential for Progressive Protection of Human Rights*,published online on 12 March 2018 available at https://grojil.org/2018/03/12/strategic-litigation-before-the-african-regional-courts-great-potential-for progressive-protection-of-human-rights/. See for the bigger picture HUNEEUS A. and RASK MADSEN M., Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems, 16 *ICON* 1, 2018, pp. 136–160.

[1335] UNGA, International Covenant on Civil and Political Rights, 16 December 1966, U.N.T.S 999, p.171. On the same day the International Covenant on Economic, Social and Cultural Rights was adopted as well. UNGA, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, U.N.T.S 993, p. 3.

[1336] For a thorough analysis of the competences and the function of the HRC see the Civil and Political Rights: The Human Rights Committee factsheet, No.15, 2005, available at https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf .

[1337] For an analysis of the legal nature of the HRC's *views* see *inter* alia General Comment No 33,The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 5 November 2008, CCPR/C/GC/33, paras 11 and 13. See also ULFSTEIN G., The Legal Status of Views Adopted by the Human Rights Committee – From Genesis to Adoption of General Comment No 33, in EIDE A., MOLLER JT and ZIEMELE I(eds.), *Making Peoples Heard:Essays in Honour of Gudmundur Alfredsson*, Martinus Nijhoff 2011, p.166.

claimants of human rights abuses and has been fleshed out as a successful machinery for the development of the concept of core human rights on a global scale.

Having served as the main source of inspiration of the principal UN quasi-judicial mechanism, the ECtHR was silently incorporated in the argumentation of the HRC as expressed in its views. In stark contrast with the regional human rights tribunals, as previously discussed, the global voice of the Committee abstains persistently to expressly speak the words of ECtHR despite the fact that both the authors and State Parties routinely invoke the Strasbourg's case law in order to enhance their legal reasoning.[1338]

Indeed, the denial of the HRC to explicitly refer to its sources of inspiration has probably its roots to the fact that its membership represents all parts of the world. Thus, the body prefers seeing human rights norms from a universal perspective, not through a restricted geographical lens. The Committee has, thus, felt even from its very first pronouncements that this approach may strengthen its weaknesses emanating from the non-binding force of its views. However, this negative stance of the Committee[1339] towards regional human rights systems has met severe reactions in academia.[1340]

This remoteness of the HRC from other systems, as illustrated by the non-use of extrernal sources of law other than the ICCPR and its interpretation[1341] by the Committee itself, is not in comformity with the theory of the global system of international tribunals and the intensified *dialogue des juges,*[1342] particularly in the realm of international human rights law. Despite the said particularity of the HRC, the latter has been largely influenced by the European

[1338] ROBERTSON A.H. et MERRILLS J.G., Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights, Manchester University Press, Manchester, 3rd Edition, 1989, p. 62, 63; A.-M. SLAUGHTER, A typology of Transjudicial Communication », 29 *University of Richmond Law Review*, 1994, p. 106HENNEBEL L., Cross-Fertilization between International Human Rights Courts (Les Références Croisées Entre Les Juridictions Internationales Des Droits De L'Homme – in French) in MARTENS P. et al.(eds.), *Le dialogue des juges*, Bruylant 2007, pp.31-77.

[1339] The approach of the Committee has been emphatically described in several reports. "The Committee also expresses its concern over the apparent preference accorded, in the domestic law as well as in legal doctrine and jurisprudence, to the European Convention for the Protection of Human Rights and Fundamental Freedoms as against the International Covenant on Civil and Political Rights. In that regard, the attention of the State party is drawn to the fact that the latter guarantees a number of human rights not protected under the former and that permissible restrictions are less broad-based." Report of the Human Rights Committee 1994, Vol. 1, 21 September 1994, para. 76. In addition, the antagonistic standing towards the Strasbourg Court is reflected in some of the dissenting opinions of the Committee's members. See for instance, the laconic declaration of Nisuke Ando without any justification according to which "I do not think it proper for the Committee to quote here a judgment of the European Court of Human Rights in footnote 59", See HRC, *Francisco Juan Larrañaga v. The Philippines*, Communication No. 1421/2005,24 July 2006, Individual Opinion by Committee member Mr. Nisuke Ando, para 2.

[1340] For Antoine Buyse, the position of the HRC on this matter reveals a certain "jalousie de métier" when it comes to the European Court of Human Rights. See BUYSE A., Tacit Citing - The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases in McGONAGLE T. and DONDERS Y.(eds.), *The United Nations and Freedom of Expression and Information: Critical Perspectives*, CUP 2015, p.443-446.

[1341] For the methods of interpretation that the UN Treaty Bodies use to apply see PETERS B., Aspects of Human Rights Interpretation by the UN Treaty Bodies in KELLER H. and ULFSTEIN G. (eds), *UN Human Rights Treaty Bodies, Law and Legitmacy*, CUP 2012, pp. 261-319.

[1342] See on this matter the collective volume PARARAS P.(ed.), Dialogue des juges Interactions entre Tribunaux nationaux et internationaux-The Dialogue between the European Court of Human Rights and National Courts, *Annuaire International Des Droits De L'Homme - VIX*, vol. 9, Sakkoulas Publications 2018.

gatekeeper of human rights protection silently taking into consideration its jurisprudential trends.

Assessing the potential convergences and divergences between the UN and the ECHR system is revealed as the main objective of this part of the research with particular focus on the HRC's communications in which complainants have largely invoked the Strasbourg's standards of protection.

For the needs of this section, attention will be, firstly, drawn to the points of interaction between the two regimes that cover their law-production in a horizontal manner. It is, thus, deemed necessary to elaborate on the choice of the HRC to adjudicate disputes also adjudicated by the Strasbourg Court despite the admissibility limitation of the "same thing being examined before" (procedural). Additionally, it would be noteworthy to shed light to which extent the Committee has imported the MoA doctrine of the ECtHR or has, in general, granted some deference to the State Parties to the Covenant(substantive). This impediment often arises before the Human Rights Committee since all of the Council of Europe members are State Parties to the ICCPR **(1)**.[1343]Secondly, the focus will turn again to specific issues that have been assessed within the limits of the two architectures and have been treated similarly or differently in the light of the parties' allegations before the HRC. Migration issues, the rights of vulnerable groups including women's reproductive rights and the rights of the LGBTI community as well as issues touching upon the religious freedom and freedom of expression are among fields of law greatly addressed by both the ECtHR and the HRC with interesting and often, conflicting conclusions **(2).**

1. The horizontal dimension of the interaction between the HRC and the ECtHR

a) HRC: The "same thing being already examined" by the ECtHR

Due to the multiplication of international and regional procedures of judicial review with overlapping jurisdictions, the phenomenon of *forum shopping* has alarmed not only national jurisdictions but it has also been discussed at the level of international adjudication. Pursuant to Article 5(2)(a) of the Optional Protocol to the International Covenant on Civil and Political Rights "the Committee shall not consider any communication from an individual unless it has ascertained that: (a) the same matter is not being examined under another procedure of international investigation or settlement". However, since all State Parties to the

[1343] Interestingly, both these two parameters are constituent elements of the theoretical construction of Anne Marie Slaughter who has initiated and firmly supported the conception of a "global community of Courts" with which HRC seems to be in sharp contradiction. Anne Marie Slaughter supported the idea of forum shopping in her famous article stating that "first, litigants move relatively freely across borders, carrying their disputes with them and choosing a particular national forum subject to judicial review of their choice. Second, judicial deference to foreign courts is based on efficiency, fairness, and the "ends of justice" rather than on sovereign prerogatives. These traits lead to "judges judging judges." That is, in the interest of seeking out the best forum. That is, in the interest of seeking out the best forum, judges not only assess the relative interests of the parties but also the "fitness" of the forum, including its jurists, to hear the case." SLAUGHTER A-M, A global community of Courts, 44 *Harv. Int'l L.J.* 1, 2003, p. 210.

ECHR are also bound by the ICCPR, quite a number of the HRC's communications are failed attempts of the authors to receive a favourable outcome from the ECtHR and its capacity to enforce its judgments.

The avoidance of the said phenomenon lies at the heart of the existence of specific rules governing coexistence with other international human rights legal orders. Hence, the European Convention in Article 52 provides in this respect that "[t]he High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

The coexistence of the two texts brought, nevertheless, some complications since some State Parties to both instruments reacted to their potential review by both the ECtHR and the Committee for the same complaint supporting that the Strasbourg Court's conclusions on a case are final and second reexamination of the same facts would amount to a *de facto appeal* under the UN regime. As a result, they entered reservations to the Optional Protocol[1344]excluding individual petition which had already been considered under another system of international adjudication from the purvue of the Human Rights Committee. At any rate, the Geneva system has engaged with a remarkable approach of the objections usually raised by State Parties when it comes to a case already been examined by the ECtHR.[1345]

In numerous communications in which this objection has arisen, the Committee has not easily abstained from scrutinizing the claims brought before it on these grounds. Looking at the basic elements of this restriction, as regards the notion of the "same matter" the Human Rights Committee has taken the view that this has to be understood as including the *same claim* built upon the *same facts* and strictly concerning the *same individual* who brought it before the ECtHR or someone filing the complaint on his behalf.

The convergence on the matter between the two mechanisms is obvious when it comes to the examination of the same claims by different litigants. In a case dealing with the religious freedom of students in a Norwegian school, the Strasbourg Court found the application admissible even though the case had already been decided by the Human Rights Committee, in *Leirvag and others v Norway*.[1346] On the merits, the Court referred largely to the views of

[1344] HRC, CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, CCPR/C/21/Rev.1/Add.6. See *inter alia* on the history on reservations to the Optional Protocol of the Covenant and the General Comment No 24 that the HRC has adopted to tackle the increased number of reservations made by the State Parties SCHEININ M., Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee in ZIEMELE I.*(ed.) Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation Ineta Ziemele*, Nijhoff 2004 ; REDGWELL C., Reservations to Treaties and Human Rights Committee General Comment No. 24(52), 46 *ICLQ* 2, 1997, pp.390-412.

[1345] HEFFERNAN L., A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights, 19 *Hum. Rts. Q.* 78 1997, p.103,104; OPSAHL T., Ten Year's Coexistence Strasbourg-Geneva in MATSCHER F. and PETZOLD H. (eds.), *Protecting Human Rights: The European Dimension*. Essays in Honour of Gérard Wianda, Carl Heymanns, Koln, 1990.

[1346] The concept of the "same matter" does not cover the cases that although arising from the same factual basis are initiated by different persons. See relatively HRC, *Leirvag and others v Norway*, Communication No.1155/2003, 3 November 2004, paras 10.3, 10.4.

the Committee and revisited its traditional standing that prioritizes the wide margin of appreciation in cases where freedom of religious expression is concerned.[1347] Thus, it concluded to a violation of Article 9 ECHR. However, the slim majority (nine judges) which concluded in favour of the applicants was accompanied by the dissenting minority of eight judges who were strongly opposed to the mere pronouncement of the Court regarding the admissibility of the claim on the grounds of the previously delivered views of the HRC.[1348]

The said dissenting opinions clearly challenged the coexistence of the UN and the ECHR system and highlighted the risk of conflicting decisions within the confines of the international human rights adjudication; the avoidance of which is exactly the objective of the procedural safeguards.[1349]The previously analysed example is indicative of how matters that touch mostly upon procedural aspects can be endorsed from the back door as elements of substantive nature that can significantly affect the said systems accordingly.

Although many provisions of the ICCPR have their equivalent in the ECHR, they may not be interpreted in the same way by the Human Rights Committee and the ECtHR. Hence, most petitioners relied upon the divergent interpretations given by both instances on corresponding provisions reaching, therefore, different conclusions.

Overall, the Human Rights Committee has clearly opted for having the last word in cases seeking for its examination despite being already brought before the Strasbourg system. It persistently attempted to define restrictively this limitation set forth by the Optional Protocol interpreting as "same matter" the same complaint, based on the same facts and events, by the same person, invoking violations of the same substantive rights.[1350]

Similarly, the notion of "examination" was approached in an equal manner. In this spirit, the basic rule for the Committee seems to be the following: cases declared inadmissible by the European Court on purely procedural grounds are generally declared admissible by the Human Rights Committee.[1351]For instance, where the case was declared inadmissible by the ECtHR because of the non-exhaustion of domestic remedies or because it was submitted after

[1347] ECtHR, *Folgerø and Others v Norway*[GC], Application No.15472/02, 29 June 2007, para. 45,100.

[1348] See separate opinion of Judges Zupančič and Borrego Borrego and the dissenting opinion of Judges Wildhaber, Lorenzen, Bîrsan, Kovler, Steiner, Borrego, Hajiyev and Jebens.

[1349] See relatively LIXINSKI L., Choice of Forum in International Human Rights Adjudication and the Unity/ Fragmentation Debate: Is Plurality the Way Ahead? 9(1) *University College Dublin Law Review* 23, 2009, p. 38; WALKER S., International Human Rights Law: Towards Pluralism or Harmony? The Opportunities and Challenges of Coexistence: The View from the UN Treaty Bodies in McGOLDRICK D. and HARRIS D., *Towards convergence in international human rights law*, Brill Nijhoff 2016, p.507,508.

[1350] The Committee recalled its perception of the "same matter" concept in the recent HRC, *Nikolai Alekseev v. the Russian Federation*, Communication No. 1873/2009, 25 October 2013; HRC, *Wallmann et al. v. Austria*, Communication No. 1002/2001, 1 April 2004, para. 8.4; PHUONG C., Relationship between the European Court of Human Rights and the Human Rights Committee: Has the Same Matter Already Been Examined, 7 *Hum. Rts. L. Rev.* 385, 2007, p. 390; The "same matter" issue has also arisen in disputes brought before the CAT Committee. Following the HRC's paradigm, the CAT has examined these cases *in merito*. See e.g. CAT, *S v. Sweden*, Communication No. 691/2015; 6 February 2019; *IE v. Switzerland*, Communication No. 683/2015, 26 December 2017.

[1351] See indicatively HRC, *Pauger v Austria*, Communication No.716/1996, 30 April, 1999, para. 6.4.; *Bertelli Gdlvez v Spain*, Communication No.1389/2005, 25 July 2005, para. 4.3; *Wdowiak v Poland*, Communication No.1446/2006, 31 October 2006, para. 6.2.; *O.E v Norway*, Communication No.158/1983, 26 October 1984, para. 5.2; *Soltes v Czech Republic and Slovak Republic*, Communication No 1034-5/2001, 28 October 2005, para. 7.2; and *Diesl v Austria*, Communication No 1060/2002, 23 August 2004 at para. 10.2. See also CEDAW, *X and Y v. Georgia,* Communication No. 24/2009, 25 August 2015 at paras 6.1-6.7.

the six-month deadline imposed by Article 35 of the ECHR, the Committee decided that it had not been examined.

Interestingly, in *Cassanovas v. France,* the Committee took a further step and treated similarly the invocation of the "same matter" argument on the basis of the complaint's rejection by the European Commission on the grounds of *rationae materiae* jurisdiction of the Court. The European Commission had stated that the European Convention on Human Rights does not cover procedures governing the dismissal from employment of civil servants and the State Party alleged that Article 6 ECHR and Article 14 ICCPR are identical. Nevertheless, the Committee decided that "since the rights of the European Convention differed in substance and with regard to their implementation procedures from the rights set forth in the Covenant, a matter that had been declared inadmissible ratione materiae had not, in the meaning of the reservation, been 'considered' in such a way that the Committee was precluded from examining it."[1352]

Progressively, the Committee clarified -and ever since systematically concludes- that even a slight or limited assessment of the factual basis of the case *in merito* carried out by the Strasbourg Court suffices for the Committee to declare the communication inadmissible as it has been in a way examined by the Court.[1353] For Catherine Phuong "[t]hus, over the years, the Committee has had to adapt its jurisprudence in response to the changes in the content and presentation of the decisions of the ECtHR. It has correctly rejected a simplistic distinction between decisions on admissibility and decisions on the merits, and considered that some decisions on admissibility have actually involved an examination by the Court that went beyond purely procedural criteria and addressed the substance of the complaint, albeit very succinctly."[1354]

In this spirit of evolution, the most illustrative instance as regards the evolution of the interaction between the two mechanisms in this field can be traced in the views adopted by the Committee in the context of the landmark *Correia de Matos v. Portugal* communication.[1355]*In casu*, Mr Correia de Matos, a portuguese lawyer, complained for being prevented from enjoying his right to defend himself in court without a lawyer pursuant to Article 14(3)(d) of the Covenant since the Portuguese criminal law contained an abstract and statutory prohibition of defending oneself without a lawyer.[1356] This was made possible by the fact that Portugal had not formulated a reservation to Article 5(2)(a) of the Optional Protocol.[1357] However, the European Court had rejected the said application as manifestly ill-founded concluding to a non-violation of Article 6(3)(c) ECHR given the *margin of appreciation* afforded to the State Parties to the Convention when it comes to such procedural requirements of a national criminal legal framework.

Conversely, the Committee considered that there had been a violation of the right to defend oneself in person under Article 14(3)(d). It goes, though, without surprise the deafening

[1352] HRC, *Casanovas v France,* Communication No 441/1990, 26 July 1994, para. 5.1.
[1353] HRC, *Mahabir v Austria,* Communication No 944/2000, 26 October 2004, para. 8.3.
[1354] PHUONG, supra note 1350, p.392.
[1355] HRC, *Correia de Matos v Portugal*, Communication No 1123/2002, 28 March 2006.
[1356] ECtHR, *Correia de Matos v Portugal,* Application No. 48188/99, 15 November 2001; See also the case note Correia de Matos v. Portugal, 12 *Human Rights Case Digest,* 2001, pp.1069-1070.
[1357] Supra note 1355, para 6.2.

silence of the Committee with regard to the judgment of the Strasbourg Court. Indeed, despite recognizing a certain amount of deference granted to the Portuguese state on these matters, the HRC explained that the Portuguese legislation made no exceptions pertaining to the status of the accused, the seriousness of the charges or the behaviour of the accused.[1358]

Regardless of the fact that the said approach of the Geneva system has implications on the internal coherence within the Committee's own jurisprudence,[1359] some of the HRC's members also highlighted the risks deriving from the divergent jurisprudence of the two international human rights regimes that can be developed when actually examining "the same matter", particularly when one keeps ignoring the other's conclusions.[1360]

Only a few months earlier, the Grand Chamber of the European Court of Human Rights re-examined the same case and this latter judgment of 2018 brought to light once again the *problématique* fuelled by the parallel or consecutive review of identical cases by more than one international instances.[1361] In line of its previous judgment, the ECtHR has given particular emphasis on the Portugal's *margin of appreciation* and held that the justifications of the Government for the requirement to be assisted by a counsel had been both relevant and sufficient.[1362]Thus, the Grand Chamber found that the criminal proceedings involving the applicant did not amount to an infringement of Article 6 ECHR. In sharp contradiction with the practice followed by the HRC confirmed in its prior pronouncement on this exact same case, the Strasbourg referred to the equivalent provision of the ICCPR and the aforementioned views of the HRC in paragraph 133.[1363] Therefore, it implicitly declared that it took into account the relevant rules under the UN system, also applicable in the relations between the parties citing Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties. Nonetheless, while the ECHR is not interpreted "in a vacuum" according to the classic phrasing of the Court, this appears to be here an *obiter dictum* since the latter elucidated that "even where the provisions of the Convention and those of the ICCPR are almost identical, the interpretation of the same fundamental right by the HRC and by this Court may not always correspond".[1364]

Bearing in mind how a rather procedural restriction as the one of the "same matter being already examined" could have extensions of substantive nature, this rather controversial finding of the Court brings us back to the main question around the fragmentation of international human rights adjudication. It appears that the progressive interpretation of Article 14 given by the Committee as regards the same authoritative requirement to be assisted by a counsel does not represent for the Grand Chamber an international development providing a higher level of protection with which it should align its jurisprudence. [1365] On the basis of these "international developments under public international law" calling for a narrower margin of appreciation, three of the Judges of the ECtHR dissented and observed that this judgment constitutes a rather missed opportunity to signal a remarkable contribution to the harmonization

[1358] Ibid., para 7.5.
[1359] See for instance HRC, *Walter Kollar v. Australia*, Communication No. 989/2001, 30 July 2003.
[1360] See the Dissenting opinion of Mr Nisuke Ando, Mr Michael O'Flaherty and Ms Elisabeth Palm; Dissenting opinion of Sir Nigel Rodley, ibid.
[1361] ECtHR, *Correia de Matos v. Portugal*[GC], Application No. 56402/12, 4 April 2018.
[1362] Ibid., paras 143 and 159.
[1363] Ibid., para 133.
[1364] Ibid., para 135.
[1365] Ibid. para.134

and coherence in international human rights law.[1366] In this spirit, as Dorothea Staes allegorically put it comparing the pluralist normative framework to a jungle"(...) the Court should make use of the lianas to connect with other organisms, such as the HRC. Organisms are not isolated but part of a wider ecosystem. Within this system, the law of the jungle forces the organisms to live together in harmony. Harmony does not necessarily imply unity."[1367]

As the example of the *Correia de Matos v. Portugal* case illustrates, dissimilar interpretation of the same rules of international human right protection can also cause severe hardships to legal certainty. This could also make State Parties to opt for the lower level of protection and to deter them from developing more human rights-friendly domestic legislation giving them ammunition for not aligning their legal frameworks with the decisions which are not in favour of them due to extended fragmentation.[1368]

In a nutshell, given the fact that neither of the two systems is bound by the decisions of the other and the fact that conflicting jurisprudence might not constitute a problem in itself, their pronouncements on the matter are indicative of the unwillingness of Geneva and Strasbourg to urge themselves to initiate a meaningful dialogue between them. By the same token, the openness of the Human Rights Committee to assess (same) matters already being examined by the ECtHR remains a blind spot of their interrelationship.

b) The MoA of the States before the HRC: Acceptance or opposition?

As also demonstrated in the previous section, the *margin of appreciation* doctrine lies at the center of the interaction between the HRC and the Court of Strasbourg as it is the case of the relationship of the latter with the Inter-American Court of Human Rights.[1369] The famous doctrine was definitely tailor-made to the needs of the European human rights protection. However, this does not preclude it from being applied to other international human rights instances. Therefore, we need to examine how the Human Rights Committee has incorporated within its quasi-judicial powers such a dynamic concept which, as a reflection of the principle of subsidiarity, mirrors the interplay between the international judicature and the national authorities.[1370]

[1366] Joint Dissenting Opinion of Judges Tsotsoria, Motoc and Mits; MOTOC I. and VOLIKAS M., The ECHR and the UN Human Rights Committee: Je t'aime plus, moi non-plus. Some remarks about Correia de Matos v. Portugal and the right to defend oneself in person, in DECAUX E., MOTOC I., and GILLIBERT P.(eds.) *Mélanges in tribute to Judge Christine Chanet*(forthcoming),2018, available also at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3217771.

[1367] STAES D., *Correia de Matos v. Portugal: Fragmented protection of the right to defend oneself in person*, Strasbourg Observers Blog, 24 May 2018, available at https://strasbourgobservers.com/2018/05/24/correia-de-matos-v-portugal-fragmented-protection-of-the-right-to-defend-oneself-in-person/ .

[1368] "The Portuguese legislature has not amended the Portuguese legislation to date in order to provide for the possibility for defendants, in certain circumstances, to defend themselves in person, in accordance with the Views adopted by the HRC. In their fourth periodic report submitted under Article 40 of the ICCPR in January 2011, the Portuguese authorities referred to the "very awkward position regarding the fulfilment of [Portugal's] international human rights obligations" caused by the differences between the case-law of this Court and the decision of the HRC in respect of the same case", Ibid. para 70.

[1369] See the previous chapter on the subsidiarity in the Americas.

[1370] Stressing emphatically "that as a doctrine of international law, the margin of appreciation has a great future behind it", Eirik Bjorge attempted to follow the evolution of the doctrine over the years within the limits of international law. BJORGE E., Been There, Done That: The Margin of Appreciation and International Law, 4 *Cambridge J. Int'l & Comp. L.* 181 2015, p.190.; SPIELMANN D., Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European

As an expression of the respect for the diversity of historical developments, national legal traditions, cultural backgrounds and constitutional values coexisting within the Council of Europe's human rights system, the *margin of appreciation* doctrine has met serious resistance from the Human Rights Committee. Its rejection by the latter runs through its entire jurisprudence irrespective of the field of law within the limits of which the State Party has invoked its application.[1371] As it happens with the resistance of the Inter-American Court, this stricter standing of the Committee *vis-à-vis* the State Parties to the Covenant is greatly explained by the significantly greater legal diversity and the democratic deficit when it comes to some States that have acceded to the Covenant. In its attempt to entrench its legitimacy within the inconsistent and often, hostile background of the universal human rights law system, the Committee has deemed unwise to extensively make use of the MoA doctrine while attempting to harmonise the standards of the ICCPR's implementation among 172 State Parties. This would severely hinder the elaboration of universally feasible legal standards and common practices, manageable in the sense of being subjected to review by judicial or quasi-judicial bodies.[1372]

What's more, such a concept does not appear to enhance the already weak legal effects of the non-binding nature of the Committee's decisions and arguably, does not add to the persuasiveness of the body. In a similar vein to the Latin American case, it is unexpected from the HRC to depart from the well-established choice of closely monitoring wide ranging and – in many instances- politically unstable domestic decision-makers.

Nonetheless, some of the views adopted by the HRC actually echo the well-known jurisprudential construction of the Strasbourg Court. More precisely, apart from the right to life (Article 6 ICCPR) and the prohibition of torture, inhuman or degrading treatment (Article 7 ICCPR), understood by the Committee as requiring the absolute protection, it can be argued that this phenomenally complete rejection of the HRC has been at some point contramesured

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Review, 14 *Cambridge Y.B. Eur. Legal Stud*.2011-2012, pp.381-418; CAROZZA P. G, Subsidiarity as a Structural Principle of International Human Rights Law, 97*AJIL* 2003, pp.38-61.

[1371] See *inter alia* how Hellen Keller and Leena Grover have explained it distinguishing this denial of the HRC to afford the famous *margin of appreciation* to the States from the principle of subsidiarity. They stressed relatively that "some form of a subsidiarity principle seems to be operating,which recognizes that it is for theCommittee to define the scope of a right but that states parties possess discretion as to how rights will be given effect domestically and violations of them remedied.While the distinction might be fine in some cases,it is important to note that subsidiarity is distinct from granting states parties a 'margin of appreciation' to interpret the scope of rights, a concept that does not expressly appear in any of the General Comments and has been rejected by the Committee in its discussions"in KELLER H. and GROVER L., General Comments of the Human Rights Committee and their Legitimacy' in KELLER H. and ULFSTEIN G. (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy*, CUP 2012, p.125; SHEERAN S., Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics, 34 *Mich J Int'l L* 491, 2013, p.539; KINGSBURY B., Is the Proliferation of International Courts and Tribunals a Systemic Problem?, 31 *NYU J Int'l L & Pol*, 1999, p.695.

[1372] "Such a doctrine dilutes human rights protection. Furthermore, it may be noted that the doctrine is often applied under the ECHR when no common practice regarding the specific right at issue can be discerned throughout the State Partiesto the ECHR. It is unwise to apply such a doctrine under the ICCPR, where a common practice would rarely be discerned among the very different States Parties to this universal treaty." JOSEPH S. and CASTAN M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, OUP 2013, 3rd Edition, p.625; See also HRC, General Comment 34, Article 19: Freedoms of opinion and expression, 12 September 2011, U.N. Doc CCPR/C/GC/34; SHANY Y., All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee, 9 *Journal of International Dispute Settlement* 2, 2018,p.190.

by some MoA-like approaches in the words of Professor Yuval Shany, Member of the Human Rights Committee.[1373] Notwithstanding the fact that HRC blatantly refused to embrace the *margin of appreciation* doctrine as such, it can be deemed that it has felt appropriate to use instead comparable terms and thus, to *de facto* allow some deferential moves to the States echoing the tendency of the Strasbourg Court,[1374] particularly in cases that traditionally fall within the limits of national regulatory policies.

One of the sets of cases that has provided fertile ground for a certain leeway left to the State Parties is shaped by deportation, expulsion or extradition cases.[1375] In particular, the traditional reluctance of the Court to grant a significant *marge de manoeuvre* to the national authorities is often yielded when the assessment of facts comes up.[1376]This approach bears great resemblance to the *better position* argumentation which has been one of the structural elements of the MoA concept of the Strasbourg judicature[1377] and a "transnational device."[1378]When it comes to the fact-finding aspects of communications grappling with migration issues national authorities are in a better position to obtain and assess local knowledge. Otherwise, the Committee, which lacks fact-finding powers, runs the risk of misjudging the mere existence or the significance of facts or domestic administrative procedures.

In particular, this possibility arises while assessing the lawfulness of the deportation or extradition decisions as regards the risk of irreparable harm of the person subjected to the order at the country of destination.[1379] Indeed, in such cases the Committee felt that national authorities should be entrusted with the exercise of this risk-assessment test invoking the rejection of the *fourth instance formula*.[1380] In the Committee's words, "the decision shall be

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[1373] Ibid., p.191.

[1374] In the Preface of the Yutaka Arai-Takahashi's book, James Crawford observed on the matter that "the Committee has been 'speaking silently' the language of the MoA doctrine", ARAI-TAKAHASHI Y., *The Margin of Appreciation Doctrine and the principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia 2002, ix.

[1375] See principally as regards the deferential moves of the HRC in deportation cases ENGSTROM V., Deference and the Human Rights Committee, 34 *Nordic J. Int'l L* 2, pp.73-88.

[1376] Supra note 1372, SHANY, p. 191.

[1377] "By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them" ECtHR, *Handyside v UK*, Application No. 5493/72, 7 December 1976, para 48.

The *better position* rationale was reiterated by the Court in numerous cases to support the discretion accorded to national authorities. See inter alia ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, 18 January 1978, para 207; *Brannigan and McBride v. the United Kingdom*, Application No. 14553/89; 14554/89, 26 May 1993, para 43.

[1378] GREER S., *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Human Rights files No.17, Council of Europe Publishing, p. 34.

[1379] Interestingly, in the same General Comment in para 7 it is declared that "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large." HRC, General Comment No 31[80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para 7.

Hence, the Human Rights Committee seems to grant some latitude to the domestic authorities with the aim to settle the scope of national executive and administrative difference while reviewing the States in the context of the reporting procedure. However, the HRC's stance in the context of individual communications appears to be another story.

[1380] See in this respect ENGSTROM, supra note 1375, p.79.

taken by a public authority which has competence in the matter, and in accordance with procedure prescribed by law. The decision shall also be taken on the basis of legal provisions or rules which lay down the conditions for expulsion. On the other hand, the interpretation of national law must primarily be the task of the competent national authorities. In this regard the task of the Human Rights Committee should be limited to an examination of whether the national authorities interpreted and applied the law in good faith and in a reasonable manner."[1381]Recently, the HRC further held that "(…) considerable weight should be given to the assessment conducted by the State party, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice, and that it is generally for organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists."[1382]The Geneva system has applied these standards in cases also challenging administrative measures resulting in the deportation of the authors from Canada to Pakistan. In such cases, though, the risk of a violation of Articles 6 and 7 ICCPR is in sight when the Committee finds that the local immigration authorities have not accorded sufficient weight to serious procedural defect either omitting to consider an important risk factor, or concluding to a deportation decision which is manifestly unreasonable or arbitrary in nature. [1383]

It comes as no surprise that in similar cases, inconsistencies did emerged in Geneva. For instance, while, in *Masih Shakeel v. Canada,* the majority reaffirmed in its own words "the deference to be given to the immigration authorities in assessing the evidence before them",[1384] and reached the conclusion that the author, if deported to Canada, would risk to be subjected to irreparable harm. The Committee re-examined the author's allegations with regard to the factual core of the case slightly justifying why the evaluation of the material presented before the Canadian authorities was found therein manifestly unreasonable and which were the irregularities detected in the procedures. Distinguished members of the Committee opined in the opposite direction observing that the latter should not have abandoned its well-established jurisprudence in this respect.[1385]

In another expulsion case against Canada, Prof. Ruth Wedgwood, a HRC member, opposed to the views adopted by the majority on similar grounds. In the controversial *Dauphin v. Canada,* she correctly attempted to shed light to the reasons why deferential loans from the ECtHR cannot be asserted as attacks to the universality of human rights and hence, significant

[1381]HRC, *Anna Maroufidou v Sweden*, Communication No 58/1979, 9 April 1981, paras 6.2, 10.1. See similar pronouncements of the Committee in *G v Canada*, Communication No 934/2000, 8 August 2000 para 4(3); *Mansour Ahani v Canada*, Communication No 1051/2002, 15 June 2004, para 10.5. With regard to the requisite re-evaluation of evidence, the HRC left little room for itself to delve into this procedure according to the General Comment 32 that maintained that "it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to amanifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality(…)." HRC, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, para.26.

[1382] HRC, *RG v Denmark*, Communication No 2351/2014, 1 April 2015, at paras 7.4–7.6.; *X v Norway*, Communication No 2474/2014, 5 November 2015, at para 7.5; *FM v Canada*, Communication No 2284/2013, 5 November 2015, at paras 9.5–9.6.

[1383] HRC, *Mehrez Ben Abde Hamida v Canada*, Communication No.1544/2007, paras 8.4–8.6, and *Ernest Sigman Pillai et al v Canada*, Communication No 1763/2008, 9 May 2011, paras 11.2–11.4.

[1384] HRC, *Masih Shakeel v. Canada*, Communication No. 1881/2009, 24 July 2013, para 8.4.

[1385] See also the dissenting opinion of Prof.Yuval Shany et al and of Prof. Iwasawa, both criticizing the step-back of the HRC in this regard.

room for a more flexible international scrutiny should be left pertaining to national immigration and naturalization policies. In the case at hand, the expulsion of an Haitian national, convicted in Canada for robbery with violence, was at stake since the author alleged the family ties with his relatives to reverse the expulsion decision.

For Ruth Wedgwood "even in a globalized world, the regulation of immigration is a matter of importance to nation States. It includes not only the right to set conditions for obtaining citizenship, but also for longterm residence. The Committee has never purported to suggest that the Covenant contains a detailed code for how States can regulate both matters." While the Committee has considered in the past that a violation of the right to family life might serve as the outer boundary in these cases since the deportation of a non-national parent would leave a citizen child without full parental care, she recalled the jurisprudence of the European Court of Human Rights,[1386] which deferred severely to State decisions purporting to control the entry and residence of aliens convicted of criminal offences. According to this opinion, the Committee enters in troubled waters when opting for such a strict scrutiny in these cases.[1387]

Naturally, greater latitude has been justified in the realm of derogations in states of emergency[1388] particularly when fundamental rights of second generation are in question such as freedom of expression. Besides, the birth of the conceptual construction of the *margin of appreciation* in Strasbourg has been first detected in the context of the derogation in emergency situations under Article 15 ECHR or under human rights provided by articles comprising limitation clauses.[1389]Whereas in the relevant General Comments the HRC either abstained from referring to the *margin of appreciation* concept[1390] or openly denied its application to its decision-making procedure, [1391] the Committee has recognized in its views that for the interpretation of these clauses a certain amount of discretion could be allowed.

[1386] HRC, *Dauphin v. Canada*, Communication No. 1792/2008,28 July 2009. Dissenting opinion of the Committee member Ms. Ruth Wedgwood. She actually made a perfectly good description of the way in which ECHR is "exported" to the Geneva system and of the inter-balance between the two architectures.

[1387] Ibidem. As for the potential repercussions of the present position of the Committee she emphatically regarded that "this is an area where the Committee should tread cautiously. Rules can have unexpected consequences. And if the reference to family life is used as a method of creating a de facto ban on the consideration of criminal conduct in decisions on residence (and even, perhaps, on citizenship), States may react by rebuilding the borders that made emigration far more difficult for persons who wished to seek new economic or social opportunity."

[1388] Article 4 ICCPR provides that "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.".

[1389] In paragraph 114 of the seminal Greek case before the European Commission of Human Rights it is observed that "[t]he Sub-Commission considers that in the present case the burden lies upon the respondent Government to show that the conditions justifying measures of derogation under article 15 have been and continue to be met, due regard being had to the "margin of appreciation" which, according to the constant jurisprudence of the Commission, the Government has in judging the situation in Greece" ECommHR, *Denmark v Greece* (the Greek case), Application No. 3321/67, *Norway v. Greece*, Application No. 3322/67, *Sweeden v. Greece*, Application No. 3323/67, *The Netherlands v. Greece*, Application No. 3344/67,31 May 1968, para 114.

[1390] Surprisingly, no reference to any form of *margin of appreciation* can be found in the General Comment No.29 with regard to derogations during a State of emergency. HRC, General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11.

[1391] In the General Comment pertaining to the freedom of expression, "the Committee recalls that the scope of this freedom is not to be assessed by reference to a "margin of appreciation" and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the

It was within this context of the protection of human expression that the HRC has made one of the scarcest explicit references to *margin of appreciation* in these actual words while determining to what extent broadcast media can be lawfully censored on the basis of protecting public morals, within the limits of freedom of expression pursuant to Article 19 ICCPR. In its views in the famous *Leo Hertzberg et al. v. Finland*, [1392] the Committee seems more open to adopt the Strasbourg's approach on acknowledging some latitude to States in such cases and held that "the Committee feels, however, that the information before it is sufficient to formulate its views on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities."[1393]

The wide-ranging public morals play the role of the regional consensus in the CoE system and thus, constitute the basis upon which the invocation of deferential powers is made by the Committee in a handful of cases touching upon the right of states to derogate from or impose restrictions on the freedom of expression [1394] and the right to private life.[1395]

Nevertheless, the overall reserved understanding of subsidiarity and deference was, as previously stated, reiterated by the most recent General Comment 34. Dominic McGoldrick provided in his article a comprehensive catalogue of potential explanations for the distance taken by the HRC from deferential practices ranging from the protection of human rights' universality to anti-Eurocentrism or misunderstanding of the MoA and the lack of trust in decisions made by the States.[1396]

Along these lines, the complex and sometimes rhetorical understanding of the MoA doctrine, as documented in the ECtHR's case law, has propably contributed to the hesitation of other bodies to happily verge into the territory of this particular shape of deference. Irrespective of the roots of the Committee's restraint, the path of subsidiarity and deference, if taken, might lead to the more successful embracement of legal plurality universally as one could expect from a universal forum to incorporate a certain flexibility in the context of its competences. Accordingly, the balanced approach of the ECtHR endorsing incrementalism together with a cooperative form of subsidiarity as institutionalized with the adoption of Protocol 15 [1397] expanded the stength of the regime and enhanced significantly its interrelationship with national systems, seen as parts of a united whole not as perils for the legitimacy of the Court's adjudication *vis-à- vis* State parties.[1398]

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threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression", HRC, CCPR General Comment No. 34 Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.

[1392] HRC, *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, 2 April 1982.

[1393] Ibid., para 10.3.

[1394] HRC, *Länsman et al v Finland*, Communication No 511/1992, 26 October 1994, para 9.4.

[1395] HRC, *Toonen v Australia*, Communication No 488/1992, 31 March 1994, para 8.6.

[1396] McGOLDRICK D., A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee, 65 *ICLQ* 21 ,2016, p. 52 *et al.*

[1397] GERARDS J., Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights,18 *Hum. Rts. L. Rev.*3, 2018, pp. 495–515.

[1398] Perhaps, as Shany puts it, the Strasbourg Court might take this option playing it safe. In his words "[t]hus, whereas the HRC may feel reluctant to embrace a legal doctrine that would further dilute the legal effects of the weak set of decisions it issues, and which is not even mentioned in its constitutive instruments, the ECtHR can afford to indulge in a 'victor's generosity' and offer a MoA as a concession designed to calm those democratic decision-makers and constituencies who are apprehensive about the broad scope of its powers."

During the latest decades and despite the fact that this construction has a great future behind it under international law,[1399] new fields of international law other than human rights litigation are timidly experiencing the repercussions of the application of MoA.[1400]

Within the context of providing remedies, for instance, the Committee has appeared willing to take a step back from the determination of specific measures of reparation. Hence, it leaves room to the State Party to calculate the compensation to be paid to the victims of the violations[1401] or on most occasions, uses a general wording according to which the State needs to provide effective remedy for the victim and to take all appropriate measures to quarantee the non-repetition of similar violations in the future.[1402]

In sum, the voluminous case law of the Human Rights Committee providing bold pronouncements on a vast variety of human rights questions reveals the tendency of the body to restrict the regulatory space afforded to the States as to which domestic measures should be taken to align with the provisions of the Covenant. Conversely, a closer look brings to light the Committee's openness to offer discretional powers to the States on several occasions without expressly adopting the MoA language. Indeed, while the Committee operates in a more complex legal landscape in which it struggles to delineate the justiciability of the ICCPR's provisions and -by extension- reinforce the role of the body, its standing appears as absolutely indicative of the fact that probably the Committee is not ready yet to engage in a more fruitful dialogue with the European Court.

[1399] See in this respect INGLESIAS VILA M., Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights, 15 *ICON* 2, 2017, pp.403-405; SMET S., When Human Rights Clash in 'the Age of Subsidiarity': What Role for the Margin of Appreciation? in AGHA P.(ed.), *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts*, 2017, pp. 55-70.

[1400] DYE V., "Deference as respect" in WTO standard of review, 12 *Journal of International Trade Law and Policy* 1, 2013, pp.23-41; RAGNI C., Standard of Review and the Margin of Appreciation before the International Court of Justice in GRUSZCZYNSKI L. and WERNER W.(eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, OUP 2014, pp. 319-336; GRUSZCZYNSKI L. and VADI V., Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration, Converging Parallels? in GRUSZCZYNSKI L. and WERNER W.(eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, OUP 2014, pp.152-172; EL BOUDOUHI S., A Comparative Approach of the National Margin of Appreciation Doctrine Before the ECtHR, Investment Tribunals and WTO Dispute Settlement Bodies, *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/27*, also available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625625; ZARRA G. Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay, 14 *Braz. J. Int'l L.* 95, 2017.

[1401] In its early years, the Committee had also adopted more specific and intrusive remedial approaches as it had ordered legislative amendments, compensation, release, medical care, permission to leave the country etc. In line with the initial standing of HRC as regards remedial deference, the CEDAW gives specific recommendations to the States proposing legislative improvements to the administrative framework so as similar violations of womens' rights would not occur. CONNORS J.,'Optional Protocol' in FREEMAN M.,CHINKIN C. and RUDOLF B.(eds.), *The UN Convention on the Elimination of All forms of Discrimination Against Women: A Commentary*,OUP 2012, p.656.

[1402] NEUMAN G., Subsidiarity in SHELTON D.(ed), *The Oxford handbook of International human rights law*, OUP 2013, p.374.

2. The vertical dimension of the interaction between HRC and ECtHR: Moving in parallel, deciding in contrast

a) The divergence in freedom of religion and freedom of expression cases

It goes without saying that reaching conflicting conclusions while applying similar human rights standards does not constitute an unprecedented phenomenon within the purvue of international human rights law. Both the provisions of the ICCPR providing for the freedom of religion and the freedom of expression encouraged the more liberal approach of the HRC in comparison with its counterpart across the Atlantic. For methodological reasons, it was deemed necessary to examine the legal treatment of these fundamental freedoms together in the context of the following subsection.

i. Freedom of religion

Certainly, the intensity and the durability of this jurisprudential disagreement between the Strasbourg Court and the Human Rights Committee pertaining to religious symbols might also raise questions around the emerging deficit of legal certainty when it comes to the universal and indivisible application of similar fundamental rights standards.

Both institutions are called to interpret analogous provisions purporting to protect freedom of thought, conscience and religion.[1403]The slightly different wording of the relevant articles does not seem to explain the stark conflicting application of the said right. Most often, the older Strasbourg system is routinely confronted with extremely sensitive cases grappling with cases in which either others' conventional rights clash with one's right to manifest his religious beliefs as one of the constituent elements of the freedom of religion or with the controversial concept of public safety and public order upon which State's interests are based.[1404] Amid these contrasts, conflicting interests need to be balanced in the spirit of the limitation clause of Article 9(2).

[1403] Article 9 ECHR provides that: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2.Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."
The language of the ICCPR is slightly different, albeit in the same spirit. Hence, according to Article 18 ICCPR "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

[1404] For an overview of the ECtHR's jurisprudence see the ECtHR's Factsheet on freedom of religion, published in June 2011, available at https://www.echr.coe.int/Documents/FS_Freedom_religion_ENG.pdf .

Within this context, the particular territory of religious symbols, also treated repeatedly by the HRC as well as by the European Court of Human Rights, instead of exemplifying the field of interaction in their case law, provided a clear illustration of their absolute divergence in this respect.[1405]

In our contemporary multi-cultural societies, the "connective tissue" of which is the co-existence of diverse religious and cultural traditions, States are often confronted with the requisite balancing exercise. More precisely, States with long constitutional values of state neutrality and secularism[1406]-such as France and Belgium- are repetitively called upon to determine whether it is possible to impose a horizontal prohibition to people wearing religious symbols in public areas as a manifestation of their religious beliefs without interfering disproportionately with the respect for their religious expression.

Following to the pioneer -at the time- *Kokkinakis* jurisprudence[1407] where the Court of Strasbourg was extremely protective when reconciling the freedom of religion of the applicant with the rights and freedoms of others in disputes, the ECtHR still affords alarmingly extended deference to national authorities to pose severe restrictions to religious expression. Since the latter has undeniably both an individual and a collective dimension, the "necessity" for such restrictions[1408] to preserve public order or public security has pointed towards a *carte blanche* given by the ECtHR to the States. The Strasbourg Court has either rejected many of these cases posing sensitive questions as manifestly ill-founded or has taken a clear and rather solid position in similar cases.

In particular, these difficult but increasingly far-reaching questions were inevitably addressed in cases in relation to the wearing religious symbols at school(concerning teachers or students), at work[1409] or at courtrooms. Therefore, when the principle of secularism [1410] was at stake, the Court felt that the *ordre public* justifies the embracement of the vague *living together* concept which is not included in the limitation clause of Article 9 ECHR, it is encompassed nonetheless in the "protection of rights and freedoms of others" criterion of

[1405] BREMS E., BRIBOSIA E., RORIVE I.; VAN DROOGHENBROECK, S., Le port de signes religieux dans l'espace public: vérité à Strasbourg, erreur à Genève ? 131 *Journal des Tribunaux* 6489, 2012, p.602, 603.

[1406] Daniel Philipott explains in his article in what respect religious freedom is such a disruptive principle. PHILIPOTT D., Religious Freedom and the Undoing of the Westphalian State, 25 *Mich. J. Int'l L* 2004, pp. 981-998.

[1407] ECtHR, *Kokkinakis v. Greece*, Application No. 14307/88, 25 May 1993.For a thorough overview of the salient jurisprudence of the Strasbourg Court pertaining to the protection of religious belief under Article 9 ECHR see KTISTAKIS Y., The protection of forum internum under Article 9 of the ECHR in SPIELMANN D., TSIRLI M. and VOYATZIS P.(eds.), *La Convention européenne des droits de l'homme, un instrument vivant: mélanges en l'honneur de Christos L. Rozakis*, Brussels: Bruylant,2011, pp. 285-303.

[1408] With regard to the legal treatment of the necessity clause in cases concerning freedom of religion before the European Court of Human Rights and Human Rights Committee see PARKER T., The freedom to manifest religious belief: an analysis of the necessity clauses of the ICCPR and the ECHR, 17 *Duke Journal of Comparative & International Law*, 2006, pp.91-130.

[1409] See in this regard ECtHR, *Eweida and Chaplin v. the United Kingdom*, Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10,15 January 2013; *Ebrahimian v. France*, Application No. 64846/11, 26 November 2015.

[1410] The principle of secularism has the sense of strong separation between State and church. The Strasbourg Court has also affirmed the duty of States to remain neutral. ECtHR, *Hasan and Chaush v Bulgaria* [GC], Application No. 30985/96, 26 October 2000. For an in-depth review of the principle of secularism and the notion of neutrality in the case law of the European Court of Human Rights see RINGELHEIM J. State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach, 6 *OJLR*, 2017, pp. 24–47.

paragraph 2. The Court, in the most controversial *S.A.S v. France* case,[1411] held that the blanket French ban pursuant to the *Loi no 2010–1192 interdisant la dissimulation du visage dans l'espace public* which interfered with a Muslim woman's right to wear the *niqab* or *burqua*(full faced Islamic veil) not systematically but in public, is in conformity with the Convention. In the Court's words "(…) the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question".[1412] However, the caution with which the Court stepped in this path is mirrored in its declaration in the same judgment that "the flexibility of the notion of 'living together' and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation."[1413] Notwithstanding the abovementioned caution, the Court recently reiterated the *living together* concept as a legitimate justification of similar restrictions imposed to the religious freedom of individuals in two cases delivered on the same day concerning Belgium: the *Dakir v. Belgium* case [1414] and *Belcacemi and Oussar v. Belgium* case.[1415]

Be that as it may, it seems that the Court felt that the *living together* justification should be prioritized *in casu* over the French republican virtues of *laïcité*. Obviously, the starting point of the Court's jurisprudence on religious symbols is the embracement of the role of the State as "a neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society."[1416] Despite its overly liberal approach on freedom of religion cases[1417] and its own concerns on islamophobic outbursts that potentially affected the adoption of the impugned legislation,[1418] when secular ideology is "on the table" the State is left with a wide margin of discretion and the ECtHR abstains from exercising stringent review of the evidence or the necessity of the particular interference with the individual's freedom of religion.[1419]

Only a few months ago, the Human Rights Committee pronounced on the exact same piece of French legislation and decided in favour of the applicants. Hence, in its views adopted

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[1411] ECtHR, *S.A.S v. France*, Application No. 43835/11, 26 June 2014.
[1412] Ibid., para 122.
[1413] Ibidem.
[1414] ECtHR, *Dakir v. Belgium*, Application No. 4619/12, 11 July 2017.
[1415] ECtHR, *Belcacemi and Oussar v. Belgium*, Application No. 37798/13, 11 July 2017.
[1416] ECtHR, *Leyla Sahin v. Turkey* [GC], Application No.44774/98, 10 November 2005, para 107.
[1417] See for an overview the Court's factsheet on diverse aspects of religious freedom available at https://www.echr.coe.int/Documents/FS_Freedom_religion_ENG.pdf .
[1418] Supra note 1411, para. 149.
[1419] For more on this controversial case see OUALD CHAIB S., *S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil*, Strasbourg Observers Blog, July 2014 available at https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women wearing-a-face-veil/ ; BERRY S., *SAS v France: Does Anything Remain of the Right to Manifest Religion?*, EJIL Talk! Blog, 2 July 2014 available at https://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/. ; DALY E., Fraternalism as a Limitation on Religious Freedom: The Case of S.A.S. v. France, 11 *Religion and Human Rights*, 2016, pp.140–165 ; PINTO DE ALBUQUERQUE P. and SCOSERIA KATZ A., Is religion a threat to human rights? Or is it the other way around? Defending individual autonomy in the ECtHR's jurisprudence on freedom of religion in UERPMANN-WITTZACK R., LA-GRANGE E., and OETER S.(eds.), *Religion and International law: living together*, Brill Nijhoff 2018, pp.277-293.

in 2018 in the *Yaker v. France*[1420] and the *Hebbadi v. France*,[1421] dealt with the same legislative framework and reaffirmed its dissonance with the ECtHR's approach. The Committee emphatically rejected the abstract *living together* concept introduced by the Strasbourg Court in *S.A.S* as it cannot be construed as a manifestation of the "protection of the rights and freedoms of others" given that those rights affected are not identified in the Court's judgment.

"Nor has the State party explained why such rights would be "unfairly" obstructed by wearing the full-face veil, but not by covering the face in public through the numerous other means that are exempted from the Act. The right to interact with any individual in public and the right not to be disturbed by other people wearing the full-face veil are not protected by the Covenant and therefore cannot provide the basis for permissible restrictions within the meaning of article 18 (3)."[1422]

In any event, even if the *living together* aim is a legitimate one, the French government failed to prove that the impugned measure was actually proportionate or that it was the least restrictive means that is protective of religion or belief.[1423] The added value of the *Yaker* decision of the Committee is that the latter saw the said violation also through the lens of the prohibition of discrimination pursuant to Article 26 ICCPR[1424] as it concluded that the blanket ban of burqua constitutes intersectional discrimination. According to the concurring opinion of five members of the HRC, "less intrusive measures" could be adopted so as Muslim women would not be marginalized and their individual autonomy can also be respected in the context of the manifestation of their religious beliefs.[1425]

However, this divergence had already been boldly depicted on the occasion of the *Singh saga* adjudicated by both regimes. After having his case dismissed as inadmissible by the European Court of Human Rights,[1426] the applicant, a practising Sikh, who challenged the requirement to appear bareheaded in the identity photograph of his driving license on religious freedom grounds made his case all the way to Geneva. In clear contradiction with the Court of

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[1420] HRC, *Sonia Yaker v. France*, Communication No 2747/2016, 17 July 2018.
[1421] HRC, *Miriana Hebbadj v. France*, Communication No 2807/2016, 17 July 2018.
[1422] Ibid. para 8.10.
[1423] Ibid. para 8.11.
[1424] Article 26 ICCPR reads as follows "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.".
[1425] "On this matter, we are of the view that the State party has not demonstrated to the Committee that less intrusive measures than the blanket ban, such as education and awareness-raising against the negative implications of wearing the full-face veil, criminalizing all forms of pressure on women to wear such a veil and a limited ban enforced through appropriate non-criminal sanctions on wearing the full veil in specific social contexts, underscoring the State's opposition to the practice (such as prohibiting the full-face veil for teachers in public schools or government employees addressing the public), would not have resulted in sufficient modification of the practice of wearing the full veil, while respecting the rights to privacy, autonomy and religious freedom of the women themselves, including those who choose to wear the veil." Joint opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany (concurring) in the *Yaker* judgment Supra note 1398, para.3. See the analysis of the recent views adopted by the Committee in BERRY S., *The UN Human Rights Committee Disagrees with the European Court of Human Rights Again: The Right to Manifest Religion by Wearing a Burqa*, EJIL Talk! Blog, 2019 available at https://www.ejiltalk.org/the-un-human-rights-committee-disagrees-with-the-european-court-of-human-rights-again-the-right-to-manifest-religion-by-wearing-a-burqa/ .
[1426] ECtHR, *Mann Singh v. France* App no 24479/07, 13 November 2008; *Jasvir Singh v France*, Application No. 25463/08, 30 June 2009; *Ranjit Singh v France*, Application No. 27561/08, 3 June 2009.

Strasbourg for which such measures are justified in the name of public safety and public order within the limits of the State's wide MoA, the HRC decided otherwise. Besides acknowledging that the State party's need to ensure and verify, for the purposes of public safety and order, that the person appearing in the photograph on a residence permit is in fact the rightful holder of that document represents a legitimate purpose, it also maintained in the context of the proportionality test that "the State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded, since he wears his turban at all times. Nor has the State party explained how, specifically, identity photographs in which people appear bareheaded help to avert the risk of fraud or falsification of residence permits."[1427]

Under the same factual basis, the Committee sought for a full 3-stage proportionality test which the French government failed to successfully pass.[1428] It needs to be highlighted at this point that the different *synthesis* of the two systems might sufficiently elucidate their diametrically opposite standing : European states have a predominantly Christian or secular religious tradition and Islamic groups are only religious minorities whereas the Committee hears cases from a much wider range of States with diverse religious traditions.

In the same vein, ECtHR and HRC treated differently muslim students wearing headscarfs at school on the basis of submissions calling into question the French law of 2004 which prohibits the wearing of ostentatious religious symbols in state schools. The constitutional principle of *laïcité* constituted one of the cornerstones of the French Republic since the French Revolution, the preservance of which was the first and foremost aim of the drafters of the said legislation.[1429] Against this background, in its views in the *Bikramjit Singh* communication [1430] which concerned the expulsion of the Sikh applicant from state schools for refusing to remove the *keski*,[1431] the Committee examined the specific aspects of the case in order to strike a fair balance between the competing interests.

At the outset, the HRC recognized that upholding the principle of *laïcité* pursues the legitimate aim to protect the rights and freedoms of others since the latter represents "a means

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[1427] HRC, *Ranjit Singh v France*, Communication No 1876/2009, 27 September 2011, para 8.4; *Mann Singh v France*, Communication No 1928/2010, 26 September 2013.

[1428] See also on this case and the dissonance that occurred between HRC and ECtHR, BERRY S., Freedom of Religion and Religious Symbols: Same Right – Different Interpretation?, EJIL Talk !Blog , October 2013 available at https://www.ejiltalk.org/freedom-of-religion-and-religious-symbols-same-right-different-interpretation/ ; OUALD CHAIB S., *Ranjit Singh v. France: The UN Committee asks the questions the Strasbourg Court didn't ask in turban case*, Strasbourg Observers Blog, 2013 available at https://strasbourgobservers.com/2012/03/06/ranjit-singh-v-france-the-un-committee-asks-the-questions-the-strasbourg-court-didnt-ask-in-turban-case/ .

[1429] French literature has strongly opposed to this reform and shed light to the alarming repercussions of this rather aggressive form of laïcité, especially in the context of public educational institutions. See *inter alia* PENA RUIZ H., *Qu'est-ce que la laïcité ?* Editions Gallimard (Collection Folio Actuel n°104), 2003 ; DEBRÉ J-L., *La laïcité à l'école – un principe républicain à réaffirmer, Rapport de la mission de l'Assemblée nationale*, Odile Jacob, 2004; RENAUT A.,TOURAINE A., *Un débat sur la laïcité*, Paris:Stock 2005 ; JACQUEMAIN J., Dix arguments laïques contre l'interdiction législative du voile in JACQUEMAIN M. ,ROSA-ROSSO N.(eds.), *Du bon usage de la laïcité*, Bruxelles : Aden, 2008.

[1430] HRC, *Bikramjit Singh v France*, Communication No. 1852/2008, 1 November 2012.

[1431] According to the of the Sikh confession, a Sikh is not allowed to cut his hair which is regarded as a sacred, inherent and intrinsic part of the religion, hence, the *keski* (similar to the turban but for younger men) cannot be seen as an external religious symbol of faith but is rather intended to protect the long uncut hair of the believer.

by which a State party may seek to protect the religious freedom of all its population" and affirmed that "the adoption of Act No. 2004-228 responded to actual incidents of interference with the religious freedom of pupils and sometimes even threats to their physical safety."[1432]

Subsequently, the Committee exercised a rigorous scrutiny to ascertain the proportionality of the measure of the author's expulsion in the present case and concluded to a violation of Article 18 ICCPR taking into account the nature of the *keski*, its mandatory character for Sikhs males and the State's failure to persuade the body that the student actually posed a threat to the rights and freedoms of other pupils or to the order at school. In the Committee's words "the State party imposed this harmful sanction on the author, not because his personal conduct created any concrete risk, but solely because of his inclusion in a broad category of persons defined by their religious conduct."[1433]On these grounds, the interference with the author's right to manifest its religious belief was considered disproportionate with the purpose pursued.

Under analogous conditions, the European Court has reiterated its almost absolute deference to secularism in cases grappling with the delicate issue of students wearing Islamic headwear at school.[1434]In the Court's decision on admissibility, the definitive expulsion of girls and boys who denied to remove their headwear was considered proportionate to the legitimate aim of protecting the public order and the rights and freedoms of others.[1435]Hence, the Court found no reason to revisit its earlier case law on the matter when it was called to put under scrutiny the controversial French legal framework. It flows from its brief reasoning that the sole invocation of *laïcité* suffices for the Court to sacrifice the right to manifest one's religion.

For Stephanie Berry, what plays the most crucial role in the context of the impugned *prohibitions* is not the principle of the French version of state neutrality itself but the mere fact that "the 2004 law signaled a shift towards a hostile form of secularism that seeks to eliminate religion from the public sphere rather than upholding individual religious freedom. In the absence of a demonstrable threat posed by the presence of religion in society, this is incompatible with a good faith interpretation of the right to manifest religion."[1436]

At any rate, the recent *Lachiri* judgment,[1437] delivered in September 2018 by the Court of Strasbourg on the expulsion from courtroom of the applicant wearing the *hijab* remains in line with its prior case law on the use of religious symbols in courtrooms.[1438] It further

[1432] Supra note 1410, para 8.6.
[1433] Ibid, para 8.7.
[1434] See *inter alia* ECtHR, *Dogru v. France* and *Kervanci v. France*, Application Nos. 31645/04 and 27058/05, 4 December 2008.
[1435] ECtHR, *Aktas v. France*, Application No. 43563/08, 30 June 2009; *Bayrak v. France,* Application No. 14308/08, *Gamaleddyn v. France,* Application No. 18527/08*; Ghazal v. France* Application No. 29134/08*; J. Singh v. France* Application No. 25463/08 and *R. Singh v. France* Application No. 27561/08, 30 June 2009.
[1436] BERRY S., A 'good faith' interpretation of the right to manifest religion? The diverging approaches of the European Court of Human Rights and the UN Human Rights Committee, 37 *Legal Studies* 4, p.692.
[1437] ECtHR, *Lachiri v. Belgium*, Application No. 3413/09, 18 September 2018; See also on this case RINGELHEIM J., *Lachiri v. Belgium: Headscarf ban imposed on a civil party in a courtroom in violation of religious freedom*, Strasbourg Observers Blog 2018, available at https://strasbourgobservers.com/2018/11/23/lachiri-v-belgium-headscarf-ban-imposed-on-a-civil-party-in-a-courtroom-in-violation-of-religious-freedom/ .
[1438] In the same spirit see ECtHR, *Hamidović v. Bosnia and Herzegovina*, Application No. 57792/15, 5 December 2017.

maintained that the court is not a public place compared with the street or square but the respect for the principle of neutrality is crucial for the impartial exercise of the judiciary in a democratic society and hence, it can prevail over the right to manifest one's beliefs as it is the case of public educational establishments.[1439]

Notwithstanding of the fact that the Court concluded that in the case at hand the mere presence of the applicant wearing in public the Islamic headgear cannot be considered neither disrespectful towards the judiciary nor disruptive of the proper conduct of a hearing, some of its pronouncements create severe confusion in this respect. The Court, thus, felt that it should implicitly emphasize -once again- its absolute submission to state neutrality and clarify that "comme il ne résulte pas des pièces de la procédure que l'objectif poursuivi en l'espèce par l'exclusion de la requérante de la salle d'audience aurait été la préservation de la neutralité de l'espace public, la Cour limitera son examen au point de savoir si cette mesure était justifiée par le maintien de l'ordre. (…)"[1440]

Having said all the above, unlike the Strasbourg's approach on religious symbols in the public sphere, the Human Rights Committee's understanding of the freedom of religion stands on the exactly opposite side. In all the abovementioned cases heard by the Committee, the State had referred to the favourable outcome produced by the ECtHR and the Committee seemed to have measured the arguments on the necessity of secularism. Be that as it may, the HRC blatantly denied to follow the path taken by the Strasbourg Court and purported to disregard the *margin of appreciation* in these cases and "to interrogate the relevant issues more vigorously by displaying a fresh willingness to "stand in the shoes" of those who wish to manifest their faith through the religious attire of their choice."[1441] On the contrary, it flows from the recent case law of the Strasbourg Court that the latter remains consistent with its option of totally supporting a perception of strict secularism perceived as an aggressive form of neutrality in the sense of a complete exclusion of religion from the public sphere rather than a neutrality perceived as lack of coercion or an absence of State preference.[1442] Certainly, reaffirming the concept of strict secularism without proposing alternatives or providing national authorities with specific standards to reconcile domestic religious tensions strikingly contradicts with the interpretation of the Convention as a living instrument (*living instrument* doctrine) and can easily thrust the exacerbation of these tensions.

Conversely, there is another aspect of freedom of religion that was found in the heart of heated legal discussion and provided a field of judicial interaction between the two bodies. Hence, the right to conscientious objection and its legal recognition by the HRC upon the basis of Article 14 ECHR created the conditions for a significant *revirement* of the ECtHR's case law in this regard. The recent *Bayatyan* judgment of the Grand Chamber[1443] decided by the Court of Strasbourg brought to the fore the controversy pertaining to the legal basis of the right

[1439] Supra note 1437, para 45.
[1440] Ibid. para 46.
[1441] CUMPER P. and LEWIS T, Empathy and Human Rights: The Case of Religious Dress, 18 *Hum. Rts. L. Rev*., 2018, p. 63.
[1442] RINGELHEIM J., State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach, 6 *OJLR* 2017, p.32.
[1443] ECtHR, *Bayatyan v. Armenia* [GC], Application No. 23459/03, 7 July 2011. For a thorough analysis of the judgment of the Grand Chamber see MUZNY P., Bayatyan v Armenia: The Grand Chamber Renders a Grand Judgment, 12 *Hum. Rts. L. Rev.* 135, 2012.

to conscientious objection to military service.[1444] Until then, the right of conscientious objectors to legitimately deny military service could not fall under the scope of Article 9 ECHR. According to the pattern of the European Commission, these applications which were principally submitted by Jehovah's witnesses, were examined under the prism of Article 9 but in conjunction with Article 4 (3)(b) according to which "for the purpose of this Article the term 'forced or compulsory labour' shall not include any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service". Since the *Grandrath v. the Federal Republic of Germany*,[1445] in 1966, the European Commission on Human Rights in 1966 had maintained that the phrase "in countries where they are recognized" leaves a certain leeway to the State Parties to penalize the conscientious objection to military service in legitimate terms.[1446]

By the same token, the ECtHR preferred to avoid examining cases concerning conscientious objection to military service in light of Article 9 ECHR and assessed the applicants' claims with reference to other Convention rights.[1447]The Court was forced to engage in an unclear position with regard to the legal treatment of conscientious objection in the light of the erroneous interpretation of the provision Article 4(3)(b). Recently, the Court's jurisprudence has evolved so as to meet a turning point in the light of the *Bayatyan* case in which the Court seemingly took the view of the Human Rights Committee as categorically expressed in the Korean cases.[1448] First off, the HRC was confronted with the issue in *Yeo-Bum Yoon v. Republic of Korea* and *Myung-Jin Choi v. Republic of Korea*,[1449] in which it reconsidered its position pertaining to the assessment of such claims under the scope of Article 8(3) ICCPR which shares the similar wording with Article 4(3)(b) ECHR. In these cases, two Jehovah's Witnesses were convicted for exercising their right to conscientious objection to military service. For the HRC, "[i]t follows that the article 8 of the Covenant itself neither recognizes nor excludes a right of conscientious objection. Thus, the present claim is to be assessed solely in the light of article 18 of the Covenant(…)."[1450]

[1444] For an overview of a whole range of aspects in the context of international human rights law related to the conscientious objection in military service see HEVAL ÇINAR Ö., *Conscientious Objection to Military Service in International Human Rights Law*, Palgrave McMilan 2013.

[1445] ECommHR (Report), *Grandrath v. Federal Republic of Germany*, Application No. 2299/64, 12 December 1966, 10 *Yearbook of the European Convention on Human Rights* 626.

[1446] EComHR (Decision), *X v. Austria*, Application No. 5591/72, 2 April 1973, 43 *Collection des Décisions,* para.161.

[1447] See for instance the seminal ECtHR, *Thlimmenos v. Greece*, Application No. 34369/97, 6 April 2000.

[1448] For an analysis of the evolution made by the Strasbourg Court on this subject see YIANNAROS A., From Grandrath to Bayatyan: The Development of European Jurisprudence on Conscientious Objection to Military Service, 9 *Inter-Am. & Eur. Hum. Rts. J.* 428, 2016, pp.428-455. See also BURBERGS M., Recognizing the right to conscientious objection – Part I – correcting a mistake, Strasbourg Observers Blog 2011, available at https://strasbourgobservers.com/2011/07/20/recognizing-the-right-to-conscientious-objection-%E2%80%93-part-i-%E2%80%93-correcting-a-mistake/.

[1449] HRC, *Yeo-Bum Yoon and Myung-Iin Choi v. Republic of Korea*, Communication nos. 1321/2004 and 1322/2004, 23 January 2007. On these cases see also CHO K., Conscientious Objection to Military Service in Korea: The Rocky Path from Being an Unpatriotic Crime to a Human Right, 9 *Or. Rev. Int'l L.* 187, 2007.; KESSLER J., The Invention of a Human Right: Conscientious Objection at the United Nations, 1947-2011, 44 *Colum. Hum. Rts. L. Rev*. 753, 2013.

[1450] Ibid. para 8.2.

Echoing these developments in the HRC's case law, the Grand Chamber in *Bayatyan* relied on these developments to reverse the Chamber's reading of the dispute at hand.[1451]It specifically referred explicitly to the findings of the Committee in the Korean cases and analysed the evolution of its relevant case law. It reiterated this modification of the HRC's standing so as to justify its "living instrument" reading of the Convention and the adjustment of its position to the current tendencies in regional human rights law.[1452]

The emerging interaction of the two mechanisms, namely the HRC and the Strasbourg Court, with regard to this particular dimension of religious freedom, serves as an example of what an "open-minded" *quasi* judicial dialogue can bring in a more creative interpretation of the conventional texts which can be ultimately proved in favour of a well-functioning human rights protection.

ii. Freedom of expression

Even subjected to derogations, freedom of expression is one of the constituent elements of a democratic society in which human rights can flourish. At the UN level, the freedom of expression was acquired special importance since it is enshrined in Article 19 ICCPR[1453] and a General Comment was dedicated to its concise interpretation, namely the General Comment 34.[1454]The text of the Covenant is more minimalist if compared to the provision related to the freedom of expression in Article 10 ECHR.[1455]While the clarification as regards potential restrictions to the freedom of expression that must be necessary "in a democratic society" is absent from the wording of Article 19 ICCPR, the said justification appears, in practice, to be interpreted equally as the equivalent provision of the ECHR. Conversely, the more detailed list of justifications for a legitimate derogation from freedom of expression signals the wider latitude granted to national authorities while reconciling freedom of expression with conflicting rights or interests.[1456]

As observed in the majority of legal fields in which the legal treatment by the two adjudicative bodies could present some resemblance, in the context of freedom of expression

[1451] ECtHR, *Bayatyan v. Armenia*, Application No. 23459/03, 27 October 2009.
[1452] Ibid. para 109.
[1453] Article 19 ICCPR reads as follows: "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:(a) For respect of the rights or reputations of others;(b) For the protection of national security or of public order (ordre public), or of public health or morals."
[1454]HRC, General comment no. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34.
[1455] On this basis, France and Belgium deposed reservations at the stage of the ratification of the ICCPR elucidating that the said provision as well as Articles 21 and 22 ICCPR on freedom of assembly and freedom of association would be enforced in conformity with the corresponding articles of the European Convention.
[1456] For an analysis of the legal interpretation of Article 19 ICCPR made by the HRC on the basis of the General Comment and the and the *corpus* of its views see TYAGI Y., *The UN Human Rights Committee: Practice and Procedure*, CUP 2011, p.743; O'FLAHERTY M., Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34, 12 *Hum. Rts. L. Rev.*4, 2012, pp.627–654.

cases the Committee insists on applying its regular practice of not reference to the ECtHR's standards despite the repeated invocations of the Strasbourg's case law by both the applicants and respondent States.[1457]

The said tactic of the HRC was illustrated in a handful of important cases ranging from disputes pertaining to antisemitism and public speech touching upon historical facts to classic cases related to media freedom. Among these cases there are some instances in which the HRC has made no reference in its views while both parties have extensively relied on the jurisprudence of the European Court calling for an analogous conclusion of the HRC. On the other hand, there are cases in which the Committee took the Strasbourg's path and it flows from its reasoning that it certainly took into account the conclusions of its European counterpart, however this does not appear to provide sufficient ground for an explicit reference to the ECtHR's jurisprudence.

At the outset, the focus was set on cases which concerned Holocaust denial. In *Faurisson v. France,* [1458]the facts of the case were related to the conviction of a French professor on the grounds of his offensive, antisemitic comments related to the existence of gas chambers during the Nazi occupation. While the French government invoked the approach of the European Commission of Human Rights, later also followed by the European Court, the HRC examined the case *in merito* under Article 19 ICCPR and found no violation of the article. It is noteworthy that the European Court of Human Rights followed an exceptional pattern of examining all cases with regard to convictions of racist applicants inadmissible within the scope of Article 17 ECHR[1459] on the abuse of rights.[1460] Despite the fact that the respondent

[1457] With regard to cases in which freedom of expression clashes with the principle of non-discrimination, we should also make special reference to the significant opinion adopted by the CERD Committee in *TBB v. Germany*. In the case at hand, the petitioner, a Turkish association brought a case before the CERD Committee since the German prosecutors rejected its demand to prosecute Mr. Sarrazin who made offensive comments against the Turkish population in an interview. Remarkably enough, despite the fact that the State Party claimed that it was in a better place to investigate the case and it deserved some degree of latitude in this respect, the Committee contented itself in a two-paragraph assessment to conclude to a violation of the Convention without engaging in a balancing review, as it is the case when conflicting rights are on the table. Nevertheless, the CERD Committee agreed with the Strasbourg Court in relation to the use of the "victim status" criterion in the *Jewish Community of Oslo v. Norway*. In casu, the applicant extensively used the European Court's case law and the Committee accepted its allegations of being a potential victim in this light without acknowledging its influence. CERD, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, 4 April 2013; CERD, *Jewish Community of Oslo v. Norway*, Communication No. 30/2003, 22 August 2005, para 7.3. See also GOLDMANN M., SONNEN M., Soft Authority against Hard Cases of Racially Discriminating Speech: Why the CERD Committee Needs a Margin of Appreciation Doctrine, 7 *Goettingen J. Int'l L.* 131, 2016; MILANOVIC M., CERD and Hate Speech, EJIL Talk!Blog 2013, available at https://www.ejiltalk.org/cerd-and-hate-speech/comment-page-1/ ..

[1458] HRC, *Robert Faurisson v. France*, Communication No. 550/1993, 8 November 1996. See JOSEPH and CASTAN, supra note 1372, p. 638-644.

[1459] Article 17 ECHR under the title provides that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[1460] The European Court apparently initiated this practice to provide States with a more solid justification serving as an additional weapon against the racist speech, especially in the early years of its function during which the Court felt that democracy in Europe must be guaranteed. However, the risks arising from an automated rejection on admissibility grounds Article 17ECHR might have alarming repercussions and lead to the abuse that seeks to prevent. See *inter alia* LOBBA P., Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime, 26 *EJIL*1, 2015, pp. 237–253.

invoked Article 5 ICCPR[1461] which is the corresponding right of Article 17 ECHR, the Committee opted for taking the safe path of freedom of expression and rejected the claims of the applicant. This notwithstanding, the Committee highlighted that a comparable factual basis could -under other conditions- amount to an infringement of the Covenant's provisions.[1462]

Later on, the Committee, in similar cases to those emanating from the Holocaust denial,[1463] actually aligned with the European Court's position and stressed that the measure of dismissal of a teacher who shared discriminatory opinions with his students can be restrictive of his freedom of expression without referring to the similar case invoked by the applicant. It, however, drew implicitly a distinction from the case adjudicated by the European Court since the latter concerned the anti-communist opinions of the teacher in contradiction with the anti-jewish views of the teacher in the communication before the HRC. Hence, the Committee declared the measure necessary for building up an educational system free from bias, injustice and intolerance and compatible with the Covenant.

When it comes to journalistic speech, the HRC has agreed with the Strasbourg Court and assessed these cases through this prism. In its views, the language resembles with the language of the Strasbourg Court, however, the HRC avoided to mention the analogous appraisal of its European peer. For instance, in the famous *Bodrozic* case,[1464] the facts regarded the criminal conviction of a Serbian journalist for publishing an offensive article for a politician. The applicant, as usual, relied on four seminal freedom of expression judgments of the ECtHR but the HRC sidestepped these invocations and relied on its own jurisprudence instead.[1465] The same goes for a significant number of cases in which the HRC refrained, on purpose, to import the pronouncements of the Strasbourg Court. [1466]

Arguably, the overall picture of the corpus of cases related to freedom of expression decided by the Human Rights Committee reaffirms the unspoken influence of the Strasbourg's jurisprudence in its case law and at the same time, its well-documented hesitation to openly

[1461] Article 5 ICCPR on the abuse/distruction of rights reads as follows "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

[1462] Nevertheless, the Committee in its General Comment attempted to revisit the issue and clarify its position in this aspect. According to the General Comment 34 "[l]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20.", Supra note 1372, para 49.

[1463] See the case *Malcom Ross v. Canada* in which the applicant based his argumentation on the *Vogt v. Germany* adjudicated by the European Court of Human Rights. HRC, *Malcolm Ross v. Canada*, Communication No. 736/1997, 18 October 2000; ECtHR, *Vogt v. Germany* [GC], Application No. 17851/91, 26 September 1995.

[1464] HRC, *Zeljko Bodrozic v. Serbia and Montenegro*, Communication No. 1180/2003, 31 October 2005.

[1465] In the Committee's words "The Committee observes, moreover, that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.", Ibid., para 7.2.

[1466] See *inter alia* HRC, *Lovell v. Australia*, Communication No. 920/2000, 24 March 2004; *HRC, Anthony Michael Immanuel Fernando v. Sri Lanka*, No. 1189/2003, 31 March 2005. See also the most recent *Fedotova v. Russia*, Communication No. 1932/2010, 31 October 2012.

interplay with the Strasbourg Court on these matters. On the contrary, the latter has expressed no fear to cite the findings of the Committee when necessary to enhance its legal reasoning.[1467] As Antoine Buyse vividly put it "the current ways of 'tacit citing', learning from regional systems without too openly acknowledging it may be the highest attainable form of dialogue at this point in time."[1468]Consequently, only time will tell whether the HRC will feel strong enough in the future to engage in a more welcoming standing towards external sources of law and most importantly, the relevant case law of the European Court of Human Rights.[1469]

b) The dissonance regarding the rights of the most vulnerable: Women's reproductive rights and LGBTI rights

Sensitive human rights-related issues have raised complex legal questions with which the respective adjudicative bodies are confronted with on a regular basis. Among these matters, the lack of coherence with regard to domestic rules on abortions at the European and universal level has amounted to divergent approaches before the regional and international judicial fora.

i. Women's reproductive rights

The right to safe and legal abortion is not yet incorporated in any human rights bill of rights, mainstream or specialized. Having developed an extremely nuanced case law in the field of human reproduction, the Strasbourg Court has repeatedly elucidated that a right to abortion cannot be construed as being encompassed in neither Article 2 ECHR since it would signal a *contra legem* interpretation of the provision[1470]nor within the scope of the right to private life under Article 8 ECHR.[1471]Only recently, an indicative step was made which points towards the official recognition of a right to an abortion since the Parliamentary Assembly of the Council of Europe adopted in 2008 a Resolution on the access to safe and legal abortion in Europe.[1472] It goes without saying that this Resolution is not exactly in line with the traditional standing of the Strasbourg which has routinely adopted an overall *laissez-faire* standing when it comes to national legal frameworks on abortions. Even extremely restrictive rules related to abortion were treated by the European Court despite the political pressure on the States that have adopted such frameworks.

[1467] BUYSE A., supra note 1340.
[1468] Ibid., p. 462.
[1469] On the contrary, the Strasbourg Court looked into the *corpus* of views adopted by the HRC in freedom of expression cases under Article 19 ICCPR and in cases grappling with hate speech under Article 20 ICCPR. At any rate, these references were made with no particular content or *rationale* other than supporting its reasoning by mentioning the similar approach of the Committee on the matter. See, for instance, ECtHR, *Groppera Radio AG and Others v. Switzerland* [GC], Application No. 10890/84, 28 March 1990, para. 61; *Balsytė-Lideikienė v. Lithuania*, Application No. 72596/01, 4 November 2008, para.78; Ibid., p.449-454.
[1470] ECtHR, *Pretty v. United Kingdom*, Application No. 2346/02, 29 April 2002, paras 39, 40.
[1471] ECtHR, *A. B. & C. v. Ireland* [GC], Application No. 25579/05, 16 December 2010; See also PUPPINCK G., Abortion and the European Convention on Human Rights, 3 *Irish Journal of Legal Studies* 2, 2013, p. 156-162.
[1472] Resolution 1607 (2008) Access to safe and legal abortion in Europe, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638.

The Court acknowledged a broad *margin of appreciation* in cases touching upon the criminalization of abortion, the so-called "abortion tourism" and the increasing numbers of clandestine abortions while deciding sensitive cases in which the rights of the unborn and the rights of the mother or even, the father come into conflict. At first,[1473]the complete lack of *consensus* in this area of law deteriorated the situation and it was mainly invoked by the ECtHR as a justification for leaving this field to the regulatory powers of the State. Hence, general approach of the Strasbourg Court is summarized as follows: despite the domesticity of this legal field, both national and international mechanisms were -and still are- challenged to alleviate the negative repercussions for the women's life and health emerging from unsafe abortions and of the criminalization of abortions.

Testing the limits of its subsidiary character, the Strasbourg Court managed to reconcile the right to life of the mother with the right of the unborn(foetus) or the rights of the parthner and actually prioritized the former over the latter. [1474] Having recapitulated its relevant jurisprudence, the Court, in the famous *Vo v. France,* maintained that "the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests."[1475] The same goes with the right of the mother to decide for her own body and private life.[1476]

In parallel, when the lawfulness of abortion laws is under scrutiny, the diverse legal standards among State Parties have deterred the Court from pronouncing squarely on such delicate matters that fall traditionally within the sovereign powers of domestic authorities.[1477]This deep-rooted reluctance of the Strasbourg Court was clearly evinced in the seminal *A. B. & C. v. Ireland*[1478] which blatantly revealed a series of controversial aspects of the Court's understanding regarding abortion-related cases.[1479]In the case at hand, the three applicants were forced to travel to the United Kingdom to get an abortion since such an operation was illegal under Irish law. The Court found no violation of the Conventional rights invoked by the applicants, namely Articles 2,8 or 14 ECHR, since it relied mostly on the democratic deliberation and by extension, on the democratic legitimacy of the Court that

[1473] For the significant steps forward that were made in relation to abortion laws universally see A. MITRA, We're Always Going to Argue about Abortion: International Law's Changing Attitudes towards Abortion, 1 *NZWLJ* 142, 2017.

[1474] ECommHR, *Bruggemann and Scheuten v Federal Republic of Germany*, Application No. 6959/75, Commission Report, 12 May 1977. *RH. v Norway* Application No. 17004/90, Commission Report, 19 May 1992; ECtHR, *Boso v Italy* Application No 50490/99, Admissibility, 5 September 2002; *Tysiqc v Poland*, Application No. 5410/03, 20 March 2007; Supra note 1471, *A, B and C v Ireland* [GC].

[1475] ECtHR, *Vo v France*, Application No. 53924/00, 8 July 2004, para.80.

[1476] See, e.g, Supra note 1471*; P. & S. v. Poland,* Application No. 57375/08, 30 October 2012.

[1477] On this thorny balance in the context see relatively COSENTINO C., Safe and Legal Abortion: An Emerging Human Right: The Long-Lasting Dispute with Sovereignty in ECHR Jurisprudence, 15 *Hum. Rts. L. Rev.*, 2015, pp. 569-589.

[1478] Supra note 1471.

[1479] See on this controversial case WICKS E., A, B, C v Ireland: Abortion Law under the European Convention on Human Rights,11 *Hum. Rts. L. Rev.* 3, 2011, pp.556-566; CALT S., A., B. & C. v. Ireland: 'Europe's Roe v. Wade'? 14 *Lewis & Clark Law Review* 3, 2010, p. 1189; WEINSTEIN B., Reproductive Choice in the Hands of the State: The Right to Abortion under the European Convention on Human Rights in Light of A, B & C v. Ireland, 27 *Am.U.L.Rev*., 2012, pp. 391-438; LONDONO P., Redrafting abortion rights under the Convention: A, B and C v. Ireland' in BREMS E. (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, 2013, pp. 95-120.

preceded the adoption of the Irish law on abortions albeit acknowledging the personal stigma and the psychological burden that "abortion tourism" entails for the applicants.

Additionally, the lack of common practice in Europe was also measured by the Strasbourg Court. However, the focal point of the Court's judgment was the apparent lack of European consensus as regards the beginning of life[1480] and the foetus's right to life instead of taking into consideration the looming existence of consensus as regards the legal recognition of the access of the mother to a legal abortion.[1481] Additionally, the Court's standing was fairly criticised for not shedding light to the global trends settled by other international and regional human rights bodies.[1482] The Court has once again opted for a pattern of "non-interference" and only found a breach of the procedural of the non-implementation of the relevant legal framework. States are afforded, thus, wide *margin of appreciation* in view of the highly moral and ethical questions arisen.

The Court, recently, reiterated its stance as regards the beginning of life in *Lambert et al v. France* in which the Grand Chamber highlighted in line with its prior case law that "when addressing complex scientific, legal and ethical issues concerning in particular the beginning or the end of life, and in the absence of consensus among the member States, the Court has recognised that the latter have a certain margin of appreciation."[1483]

On the contrary, the HRC paid particular emphasis to the detrimental results of anti-abortion legislation[1484] instead of determining whether the unborn enjoys the right to life as a subject of rights under the ICCPR. Actually, the recently adopted General Comment 36 on the right to life[1485] makes special reference to abortions and particularly stressed in paragraph 8 that "States parties must provide safe access to abortion to protect the life and health of pregnant women, and in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or when the foetus suffers from fatal impairment. States parties may not regulate pregnancy or abortion in a manner that runs contrary to their duty to ensure that women do not have to undertake unsafe abortions.[For example, they should not take measures such as criminalizing

[1480] Supra note 1471, *A. B. & C. v. Ireland*, para.237.
[1481] See the Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvela, Malinverini and Poalelung, para 2.
[1482] Supra note 1455, COSENTINO C., p.578.
[1483] See ECtHR, *Lambert et al v. France*, Application No. 46043/14, 5 June 2015, para.144; *Evans v the United Kingdom*[GC], 10 April 2007, para. 54-56; *Mehmet Şentürk and Bekir Şentürk v. Turkey*, Application No.13423/09, 9 April 2013, para.107-109.
[1484] In numerous Concluding Observations, the Committee has expressed real concern with regard to the detrimental effects of unsafe clandenstine abortions. See Concluding Observations on Ireland of 1993, UN Doc. CCPR/C/79/Add.21, para. 15; its Concluding Observations on Azerbaijan of 2001, UN Doc. CCPR/CO/73/AZE, para. 16; its Concluding Observations on Vietnam of 2002, UN Doc. CCPR/CO/75/VNM, para. 15; its Concluding Observations on Mali of 2003, UN Doc. CCPR/CO/77/MLI, para. 14; or its Concluding Observations on Poland of 2004, UN Doc. CCPR/CO/82/POL, para. 9., Concluding Observations on Morocco of 1999, UN Doc. CCPR/C/79/Add. 113, para. 13; its Concluding Observations on Mongolia of 2000, UN Doc. CCPR/C/79/Add. 120, para. 8; or its Concluding Observations on Guatemala of 2001, UN Doc. CCPR/CO/72/GTM, para. 19.
[1485] HRC, General Comment No. 36(2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, CCPR/C/GC/36; See also the earlier General Comment No.28 concerning equality between men and women which specifically raises the issue of the clandestine abortions, forced abortions and forced sterilization. HRC, CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), adopted at the Sixty-eighth session of the Human Rights Committee, 29 March 2000, CCPR/C/21/Rev.1/Add.10,.

pregnancies by unmarried women or applying criminal sanctions against women undergoing abortion or against physicians assisting them in doing so, when taking such measures is expected to significantly increase resort to unsafe abortions]."

Notwithstanding the critique raised with regard to the contested hesitation of the Committee to give rise to specific recommendations to State Parties, the HRC elucidated its standing regarding anti-abortion laws in the *Llantoy Huamán v. Peru* [1486] in which it found the Peruvian State responsible under the Covenant for denying to a 17 year old girl to undergo an abortion given the fact that she was pregnant to an anencephalic foetus which amounts to a fatal abnormatlity. Although the Peruvian legislation provided the possibility of lawful abortion in cases of poor maternal health, the director of the hospital feared that giving his permission for a "therapeutic abortion" would give rise to a breach of Peruvian legislation on the matter. Since the girl was forced to give birth to her baby girl and to also breastfeed her for the 4-day period of its short life, was left in deep depression when her baby inevitably died. [1487]

The case was brought to the Human Rights Committee which refrained from examining the dispute in the light of Article 6 of the Covenant on the grounds that it found a violation of the prohibition of inhuman and degrading treatment under Article 7 ICCPR. The fact that the director of the hospital and the local authorities exposed knowingly the pregnant girl to tremendous psychological suffering amounted to cruel and degrading treatment within the meaning of the aforementioned provision of the Covenant. As Fleur van Leeuwen stated concerning this approach of the Committee "[t]his decision of the HRC seems to indicate that it is rather reluctant to formulate obligations for states parties in light of abortion; it will only address abortion-related matters, when it can relate these to high maternal death rates. However, this might not be the case for an exception to a general prohibition in those situations where the pregnancy results from rape or incest."[1488]

Although the Committee concluded to many of the breaches that the complainant alleged, namely the one of the right to private life[1489] and of her rights as a minor under Article 24 ICCPR,[1490] it profoundly felt unready to assess the non-discrimination dimension of the claim.[1491] In particular, Mrs Llantoy Huamán stressed in her application that her different treatment as reproductive rights and access to health care due to her sex and due to the well-established prejudices prevented her from the unimpeded enjoyment of her rights on an equal footing with men.[1492]

Nonetheless, the initially documented hesitation is clearly incompatible with the posision of the Committee on the Elimination of Discrimination against Women (CEDAW),

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[1486] HRC, *Llantoy Huamán v. Peru*, Communication No. 1153/2003, 17 November 2005.
[1487] For an overview of the case see JOSEPH S., United Nations Human Rights Committee: Recent Cases, 6 *Hum. Rts. L. Rev*.2, 2006, pp.361-377.
[1488] VAN LEEUWEN F., A Woman's Right to Decide - The United Nations Human Rights Committee, Human Rights of Women, and Matters of Human Reproduction, 25 *Neth. Q. Hum. Rts*. 97, 2007, p.112.
[1489] Supra note 1486, paras 6.3,6.4.
[1490] Article 24 ICCPR reads as follows "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality"; Ibid., para 6.5
[1491] JOSEPH, supra note 1487, p.362.
[1492] Supra note 1486, para. 3.2.

the monitoring body of the Convention on the Elimination of All Forms of Discrimination against Women.[1493]The CEDAW had already declared that restrictions on abortions constitute a form of sex discrimination in its General Recommendation on Article 12[1494] containing provisions for women healthcare as well as in its General Recommendation No. 19 with regard to violence against women.[1495]

However, in its more recent jurisprudence, the Committee's protection has evolved so as to enlarge its abortion-related standards of protection including discrimination on grounds of sex on the occasion of two communications against Ireland in the *Mellet v. Ireland* case[1496] and *Whelan v. Ireland* case.[1497]

In the first of these cases, the Committee took a clear view pertaining to the Irish abortion legal framework which retained serious limitations in this field. Hence, in *Mellet*, the applicant complained for being prohibited to undergo an abortion despite the fatal abnormality of the foetus.[1498] The Irish government based its reasoning on the *A. B. & C. v. Ireland* of the European Court and maintained that since "Irish law permitted travel abroad for the purposes of abortion, and appropriate access to information and health care was provided, the European Court did not consider that the prohibition on abortion for reasons of health and/or well-being exceeded the margin of appreciation accorded to Member States." The State also recalled that the Strasbourg Court concluded to a fair balance struck by national authorities between the profound moral views of the Irish people about the nature of life as a basis for the rights of the foetus and the right to private life of the applicants.[1499] Far from being surprising, the Committee examined extensively the allegations of the claimant pursuant to Article 7 on the cruel and degrading treatment, Article 17 on the right to private and family life and Article 26 on equality before the law and prohibition of any form of discrimination.

Unlike its Strasbourg peer, the Committee seized the opportunity to evince the incompatibility of Irish anti-abortion legal framework with international human rights law in and beyond circumstances of fatal foetal abnormality, and to demonstrate the perennial need for a substantial constitutional reform in Ireland[1500] that would improve the situation of women

[1493] The CEDAW Committee constitutes a body of 23 independent experts CEDAW Committee consists of 23 experts on women's rights from around the world. Patterned on the HRC's architecture, its mandate comprises the review of the implementation of the Convention through the examination of state reports and addresses its recommendations to the State party in the form of concluding observations. The Committee also receives communications, initiates inquiries regarding grave or systematic violations of women's rights and formulates general recommendations directed to States providing clarifications articles or themes in the Convention. The Convention has been adopted in 1979 and entered into force on the 3rd of September 1981. UN GA, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, U.N.T.S 1249, p. 13.

[1494] See CEDAW, General Recommendation No. 24 on Article 12: Women and Health, 2 February 1999, A/54/38/Rev.1 at Chapter I; 6 IHRR 909 (1999), paras 14 and 31(c); See also CEDAW, *T.P.F. v. Peru*, Communication No. 22/2009, 25 November 2011.

[1495] CEDAW, General Recommendation No. 19, Violence against Women, 29 January 1992, A/47/38; 1-1 IHRR 25 (1994).

[1496] HRC, *Amanda Jane Mellet v. Ireland*, Communication No. 2324/2013, 9 June 2016.

[1497] HRC, *Siobhán Whelan v. Ireland*, Communication No. 2425/2014,12 June 2017.

[1498] For a complete and solid analysis of the case see e.g. DE LONDRAS F., Fatal foetal abnormality, Irish Constitutional law, and Mellet v. Ireland, 24 *Medical Law Review* 4, 2016, pp. 591–607.

[1499] Supra note 1496, para 4.3.

[1500] The decisive step was taken recently following to the Irish plebiscite which took place in May 2018. Irish people were asked on the abolishment of the 8th Amendment of the Constitution (Article 40.3.3) providing equal rights for the foetus's life and the pregnant woman's life. This constitutional provision, inserted in the Irish legal

in Ireland who remained extremely restricted in terms of their ability to make real choices as to whether to continue a pregnancy or not.

The UN monitoring body sought, thus, to shed light at first to the claim with regard to the cruel and degrading treatment. The HRC emphasised the vulnerable position of the woman being aware that her pregnancy was not viable is forced to travel carrying her dying unborn child without the psychological support of her family, let alone bearing the social stigma emerging from the criminalisation of abortion. On these grounds, it found the Irish State responsible for the infringement of Article 7 ICCPR.[1501]

As regards the rights to privacy, the Committee also held that the facts *in casu* resulted in an arbitrary restriction of the author's right to private life, contrary to Article 17 of the Covenant. Interestingly enough, the HRC went on to assess also the discrimination complaint of the author in the case at hand for the first time under Article 26 ICCPR. Having acknowledged that "the State party's criminalization of abortion subjected her to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination",[1502]the HRC compared the situation of the claimant with similarly situated women who opt for continuing their pregnancy.

At this point, it is noteworthy that some of the Committee's members have expressed their dissonance in relation to the path taken by the HRC in order to take the view that Article 26 of the Convention was breached. The principal *critique* is associated with the choice of the Committee to defend the formal equality over the substantial equality.[1503] In particular, for some of its members and some scholars the Committee should have opted for comparing the unfavourable condition of pregnant women carrying an ill-fatal foetus with men and not with, simply, other women since the criminalization imposed on a reproductive health-related option of women has no equivalent in terms of men reproduction methods and hence, results in gender-based discrimination.[1504]

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order after the referendum of 1983, had been enormously critisised for failing to ensure the woman's autonomy regarding reproductive rights. In the referendum held on 18 May 2018, the 66.4% of the Irish electorate voted in favour of the draft legislation which purports to overturn the near-total ban of abortions.

[1501] Ibid., paras 7.4-7.6.

[1502] Supra note 1496, para.7.11.

[1503] See also in this respect SEKOWSKA-KOZLOWSKA K., A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of Mellet v. Ireland and Whelan v. Ireland, 26 *Reproductive Health Matters* 54, pp.25-31.

[1504] As Yadh Ben Achour clearly put it (in French) "L'interdiction de l'avortement en Irlande, par son effet contraignant, indirectement punitif et stigmatisant, vise les femmes en tant que telles et les place dans une situation spécifique de vulnérabilité, discriminatoire par rapport aux personnes de sexe masculin". On top of that, in their separate opinion(partly dissenting), Víctor Rodríguez Rescia, Olivier de Frouville and Fabian Salvioli maintained that the Committee should have given even more comprehensive responses to the discrimination questions and that the prohibition of abortion as stipulated in the Irish legal order is *per se* discriminatory since it places the burden of criminal liability primarily on the pregnant woman.(para 8) In her concurring opinion in the *Mellet* decision of the HRC, Sarah Cleveland appeared to be on the same page with her colleages and unequivocally opined that "Women's unique reproductive biology traditionally has been one of the primary grounds for de jure and de facto discrimination against women. This is true when women are treated differently from men based on stereotyped assumptions about their biology and social roles, such as the claim that women are less able to take full time or demanding jobs than men. It is equally true when apparently gender-neutral laws disproportionately or exclusively burden women because they fail to take into account the unique circumstances of women. Both types of laws subject women to discrimination.(…) Ireland's near-comprehensive criminalization of abortion services denies access to reproductive medical services that only women need, and imposes no equivalent burden on men's access to reproductive health care. It thus clearly treats men and women differently on the basis of sex

In the same vein, similar facts led to the similar conclusions of the Human Rights Committee in *Whelan v. Ireland.* The overall standing of the HRC[1505] on abortions reveals its crystal clear divergence with the ECtHR whose findings in abortion-related disputes are always covered by the extremely narrow *margin of appreciation,* granted to the States notwithstanding the existing consensus regarding the restrictions in abortions regimes alongside European countries. While the ECtHR paid meticulous attention to the blurred lines of the beginning of foetal life adopting a highly deferential approach of domestic limitations in terms of reproductive matters,[1506] the Committee appeared recently more determined than ever to read these cases from a different angle. Indeed, the recent Irish plebiscite and the following reform of the contested prohibition in the country on abortions confirmed the HRC's ground-breaking pronouncements in this respect.[1507]

ii. LGBTI rights

However, pertaining to intimately sensitive legal field of the same sex couples' rights, the standards of protection appear to be -at least phenomenally- the same before two human rights fora as regards mainly, the right to marry of homosexual couples and their parental rights. Indeed, in many corners of the world, homosexual intercourse is penalized and LGBTI rights, in general are far from being formally recognized and enforced.[1508]In this framework, the absence of an explicit provision prohibiting discrimination on the basis of sexual orientation or acknowledging the enjoyment of the right to have a family to same sex couples left enough room for the domestic regimes to decide their own approach of LGBTI rights.

Indissolubly linked with discrimination claims, the cases adjudicated by the *quasi* judicial body monitoring the implementation of ICCPR forced the latter to grapple seriously with the inequalities emerging, at first, from the legal treatment of this vulnerable group of individuals. In line with the ECtHR's position[1509] in similar manifestations of same sex couple's rights, the HRC pronounced on the *Toonen v. Australia* case.[1510]The Committee has chosen to see these cases mostly through the lens of Articles 2(1) and 26 ICCPR. In the case at hand, Nicholas Toonen challenged Tasmanian laws for criminalizing homosexual activity

for purposes of article 26. Such differential treatment constitutes invidious sex and gender discrimination unless it reasonable and objective to a legitimate purpose under the Covenant – requirements that the Committee found were not satisfied here". See also Ibid., p.27-29.

[1505] See the analogous position taken by the Committee in HRC, *L.M.R. v. Argentina,* Communication No. 1608, 28 April 2007.

[1506] See also FENWICK, D., "Abortion jurisprudence" at Strasbourg: deferential, avoidant and normatively neutral? 34 *Legal Studies* 02, 2014, pp. 214–241.

[1507] See supra note 1500 on the recent constitutional reform of the Irish legislation on abortions.

[1508] To date, sexual activity between partners of the same sex is still illegal in 72 countries. In addition, eight countries maintain the death penalty in these cases, namely Afghanistan, Iran, Iraq, Mauritania, Pakistan, Saudi Arabia, Sudan and Yemen.

[1509] ECtHR, *Sutherland v United Kingdom*, Application No 25186/94, 1 July 1997; *Salgueiro da Silva Mouta v Portugal*, Application no 33290/96, 21 December 1999.

[1510] HRC, *Toonen v Australia*, Communication No 488/1992, 31 March 1994; See also a previous sexual orientation case, however, examined under Article 19 providing the freedom of expression. HRC, *Hertzberg and Others v Finland*, Communication No 61/1979, 2 April 1982. Surprisingly, *in casu*, the Committee granted wide *margin of appreciation* to the national authorities when protecting public morals due to the lack of universally accepted common standards.

seeking to effectively control the spread of HIV virus. The author also relied on the well-established jurisprudential precedent of the Strasbourg Court having repeatedly reaffirmed that the continuing criminalization of same-sex conduct was in breach of the right to respect for private life under Article 8 ECHR.[1511]Given that the impugned legislation was inactive for decades and the Committee was not persuaded that there is actually a causal link between the expansion of the HIV virus and the sexual activity of same sex couples, it held that in the sense of Article 2(1) which precludes any distinction in terms of race, colour, sex etc., sexual orientation should be interpreted as being included in the notion of "sex".[1512]

In the same spirit, the subsequent case law is to be read similarly since the Committee adopted analogous approaches with regard to the discrimination claims of the authors, albeit assessed under Article 26 ICCPR. For instance, cases in which the facts revolved around pension rights of same sex couples gave the opportunity to the HRC to elucidate its position pertaining to critical aspects of the protection of LGBTI rights. In *Young v Australia,*[1513] after the death of his life-time male partner who was a war veteran, Mr Young was denied receiving his pension due to the literate interpretation of the word "couples" contained in the Veteran's Entitlement Act. Since this is not the case for widows or even unmarried heterosexual couples who could be beneficiaries of the said allowance, the author supported that his right to equal treatment before the law as an effect of the discrimination determined by VEA in relation with his sexual orientation was breached in the sense of Article 26 ICCPR. As a result, the Committee maintained that "it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria." Thus, the HRC was not finally convinced by the State's arguments that this distinction excluding from such benefits is reasonable and objective and therefore, found that "the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation."[1514]

By the same token, in *X v Colombia,*[1515] the factual basis of the communication concerned a survived partner of a same-sex couple alleging that he was denied the pension benefit following to the death of his partner by the Social Welfare Fund of the Colombian Congress despite the neutral wording of the domestic legislation. The impugned action of the Colombian state was reviewed for a potential breach of the principle of equality before the law pursuant to Article 2(1), (3) and Article 26 ICCPR. In the aftermath of *Young v. Australia,* the

[1511] ECtHR, *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981, paras 64-70; *Norris v. Ireland*, Application No. 10581/83, 26 October 1988, paras 39-47; *Modinos v. Cyprus*, Application No. 15070/89, 22 April 1993, paras 20-25.
[1512] Supra note 1510, para 8.7.
[1513] HRC, *Young v. Australia*, Communication no. 941/2000, 6 August 2003; For an analysis of the whole sexual orientation jurisprudence of the HRC and particularly this case see PALADINI L., Same-Sex Couples Before Quasi-Jurisdictional Bodies: The Case of the UN Human Rights Committee in GALLO D., PALADINI L., PUSTORINO P., *Same-Sex Couples before National, Supranational and International Jurisdictions*, Springer 2014, pp.536-556.
[1514] Ibid., para 10.4.
[1515]HRC, *X v. Colombia*, Communication no. 1361/2005, 30 March 2007.

Committee found the distinction between same-sex partners who are not entitled to pension benefits and unmarried heterosexual partners who receive such a benefit to be unjustified and thus, condemned the Colombian state under Article 26 ICCPR.[1516]Nevertheless, the Committee has a looming difficulty in reaching an unanimous agreement when the rights of sexual minorities are on the table.[1517]

In this area of law, the ECtHR has appeared applying its traditional standards of protection under Articles 8 and 14 ECHR in a rather inconsistent way. While under analogous conditions the Strasbourg Court declared the *Mata Estevez v. Spain* case[1518] manifestly ill-founded invoking the wide *margin of appreciation* of the State,[1519] in cases revolving around the succession to a tenancy for the same-sex partner of the deceased, it found that Article 8 in conjunction with Article 14 were breached and denied to acknowledge any form of discretion to domestic authorities.[1520]

Another important strand of the rights of LGBTI rights is the right to marry. The Strasbourg's standing in this respect [1521]is crystal clear as famously demonstrated in the landmark case of the Court *Schalk and Kopf* .[1522] *In casu*, the right of a homosexual couple to marry was discussed and the Court entered into troubled waters while adjudicating this dispute against Austria.[1523] The said couple challenged the national legislation providing for a registered partnership but not for a marriage. The applicants submitted their application under Article 12 ECHR enshrining the right to marry and Articles 8 and 14 as usual pushing the Court

[1516] Ibid., para 7.2.

[1517] The dissenting opinions in this case revealed the lack of unanimity on this sensitive matter even within the system of the HRC. See in this respect the dissenting opinion of the Committee Members Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil in this case in which they called into question the concept of 'family unit' as accepted by the majority. "The HR Committee's inability to reach a level of agreement on the very status of sexual orientation as an aspect of a protected human right norm could have a chilling effect on any possibility of developing of a General Comment relating to the rights of sexual minorities, because General Comments are adopted by consensus" GERBER P. and GORY J., The UN Human Rights Committee and LGBTI Rights: What is it Doing? What Could it be Doing? 14 *Hum. Rts. L. Rev*.3, 2014, p.431; For Elena Abrusci "[t]his strong position, even if marginal and representative of the opinion of only two members, is a significant step backwards in the development of a progressive concept of family, key for the enjoyment of sexual orientation rights. Indeed, it showed that even on the basic notion of family there is no unanimity within the HRC on whether it should be inclusive of homosexual couples." ABRUSCI E., A Tale of Convergence? Discrimination based on Sexual Orientation in Regional Human Rights Bodies and the Human Rights Committee, 35 *Nord. J. Hum. Rights* 3,2017, p.245.

[1518] ECtHR, *Mata Estevez v Spain*, Application No. 56501/00, 10 May 2001.

[1519] This position of the Court was reiterated in another Spanish case ECtHR, *Aldeguer Tomas v Spain*, Application No 35214/09, 14 June 2016, para.90,91.

[1520] ECtHR, *Karner v Austria*, Application No. 40016/98, 24 October 2003; *Kozak v Poland*, Application No. 13102/02, 2 June 2010; *PB and JS v Austria*, Application No. 18984/02, 22 July 2010.

[1521] For a thorough analysis of the application of this right to same sex couples see PUSTORINO P., Same-Sex Couples Before the ECtHR: The Right to Marriage in GALLO D., PALADINI L., PUSTORINO P., *Same-Sex Couples before National, Supranational and International Jurisdictions*, Springer-Verlag Berlin Heidelberg 2014, pp. 399-409.

[1522] ECtHR, *Schalk and Kopf v. Austria*, Application No.30141/04, 24 June 2010.

[1523] See *inter alia* on this BUYSE A., *ECtHR judgment: states not obliged to allow homosexual marriages*, ECHR Blog, 24 June 2010 available at http://echrblog.blogspot.com/2010/06/ecthr-judgment-states-not-obliged-to.html; HODSON L., A marriage by any other name? Schalk and Kopf v. Austria, 11 *Hum. Rts. L. Rev.* 1, 2011, pp. 170–179; MILANOVIC M., *No Right to Same-Sex Marriage under the ECHR*, EJIL Talk! Blog 2010, available at https://www.ejiltalk.org/no-right-to-same-sex-marriage-under-the-echr/; BAMFORTH N., Families but Not (Yet) Marriages - Same-Sex Partners and the Developing European Convention Margin of Appreciation, 23 *Child & Fam. L. Q.* 128, 2011, pp.128-143;

to engage in a more pioneer interpretation of the said provision including the marriage of same-sex couples. Being the frontrunner of the protection of sexual minorities in Europe for years and years[1524] the Court was expected to follow the road which is in conformity with its *living instrument* doctrine. Hence, in contrast with its prior novel jurisprudence on the right to marry of post-operative transsexuals -in which less importance was acquired to the lack European consensus on the impugned matter and no *margin of appreciation* was acknowledged-[1525] the Court denied to apply the same standards to homosexual couples.

Pursuant to Article 12 ECHR "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Due to the restrictive wording of the provision, the Court was of the view that the right to marry is not applicable to gay marriage concerning the denial of permission to marry for a homosexual couple. While stating the progress made as regards the legal recognition of some of the same sex couples living in a de facto partnership-falling under the notion of "family life" in some of the State Parties-[1526] it nevertheless maintained that since Austria had already provided for a same-sex partnership, the State was not obliged to also provide a right to gay marriage. The Strasbourg justified its standing by holding that "there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes."[1527]

In the similar vein, the HRC had already adopted the non-application of the high-level protection accorded to same-sex partners as illustrated some years ago in *Joslin v. New Zealand*.[1528] In 2002, the Committee dealt with its first same-sex marriage case and have probably paved the way for the subsequent findings of the Strasbourg Court. As Malcolm Langford emphatically put it, the Committee delivered this ruling elaborating its reasoning "in its familiar skeletal, oracular and somewhat cryptic style," [1529] and remained consistent with the gendered language of Article 23(2) ICCPR acquiring the right to marry to *men and*

[1524] ECtHR, *Christine Goodwin v. United Kingdom*, Application No. 28957/95, 11 July 2002. The Court in the landmark *Goodwin* case expanded the field of application of the right to marry incorporating the case of post-operative transsexuals (transsexuals having undergone sex reassessment surgery). Interestingly enough, the Court initiated the psychological criterion and held respectively that "[i]t is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria" and went on to observe that "[t]here have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual." Interestingly, in order to support its reasoning, the Court opted for citing the relevant provision of the CFR stressing that the removal of the explicit reference to man and woman in the recently adopted text was made deliberately (Article 9 CFR). Ibid., para 100.

[1525] Ibid., para 100,103.

[1526] Supra note 1522, para 93.

[1527] Ibid., para 105. See also the most recent *Chapin and Charpentier v. France* judgment in which the Court reiterated its approach of gay marriage as formulated in *Schalk and Kopf*. ECtHR, *Chapin and Charpentier v France*, Application No. 40183/07, 9 June 2016. See also SHAHID M., The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments concerning Equal Marriage Rights, 10 *Erasmus L. Rev.* 184, 2017.

[1528] HRC, *Joslin et al v New Zealand*, Communication No 902/1999, 17 July 2002.

[1529] LANGFORD M, Same-Sex Marriage: Revisiting Joslin v New Zealand (HRC) in Polarised Times in BREMS E., DESMET E., *Integrated Human Rights in Practice, Rewriting Human Rights Decisions*, Elgar 2017, p.119.

women.[1530]In this spirit, the Committee, finally, ruled that the "[u]se of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."[1531] The strictly grammatical hermeneutical path taken by the Committee is not a new one and does not preclude other UN monitoring bodies, such as the CERD Committee or the CEDAW Committee to decide otherwise as regards same-sex couples'right to marry.[1532]

Albeit also reaffirmed by the Strasbourg Court a few years later, this narrow understanding of marriage adopted by the Committee contradicts with the overall standing of this body towards the enforcement of equality rights of the LGBTI community. In any case, the Committee may revisit this restraint in the foreseeable future under the pressure of the present-day conditions of its role as a pioneer interpreter of a universal bill of human rights as a *living instrument.*[1533]

Concluding this sub-section, we should highlight that the manner that both adjudicative bodies have opted for treating the intimate issue of the protection of same-sex couples is a scarce instance of convergence between them. Without citing each other, the Strasbourg Court and the Human Rights Committee have fleshed out similar standards of protection. It is no surprise that this convergence brings to mind the never-ending battle between the universality of human rights and the fragmentation that extensively affects international human rights law. Nevertheless, the two mechanisms approach differently discrimination cases on the basis of sexual orientation: in contrast with the Committee, the ECtHR did not consider it necessary to include a dispute touching upon the sexual orientation of the applicant within the notion of "sex" in order to protect him from discrimination. For some scholars, a General Comment is perhaps needed to enlighten some of the blind spots of the HRC's appraisal on these matters.[1534]Overall, it flows from the above analysis that the legal issues that grapple with family planning and its novel challenges are still issues that generate huge global debate and only time will tell whether coherence with international standards will be defeated by compromise with domestic moral tensions.

[1530] Article 23(1) ICCPR reads as follows: "The right of men and women of marriageable age to marry and to found a family shall be recognized".
[1531] Supra note 1528, para 8.2.
[1532] See relatively PALADINI, supra note 1513, p.544-547. For a critique of this case see also SAIZ I., *Bracketing Sexuality: Human Rights and Sexual Orientation- A Decade of Development and Denial at the UN*, Sexuality Policy Watch, Working Papers, No. 2, November 2005 available at http://www.sxpolitics.org/es/wp-content/uploads/2009/03/workingpaper2.pdf .
[1533] GERBER and GORY, supra note 1517, p.431. At any rate, the concurring opinion of two Members of the Committee, Mr. Lallah and Mr. Scheinin signaled that the invocation of the self-standing right of Article 26 ICCPR would offer same sex couples living in long-lasting partnerships who seek to defend their right to marriage in an analogous manner with heterosexual couples. See also for the duet and the diverse legal effects that the invocation of Articles 23(2) and 26 of the Covenant can bring see CROMBIE N., A Harmonious Union? The Relationship Between States and the Human Rights Committee on the Same-Sex Marriage Issue, 51 *Columbia Journal of Transnational Law* 3,2013, pp.701-708.
[1534] GERBER and GORY, supra note 1517, p.428.

c) Migration issues before the HRC: Too close or too far from Strasbourg?

The intense political turbulence that characterized the reaction of international community when confronted with pressing migration issues coupled with the unprepared responses to far-reaching questions led international organisations and the judicial fora to take real action in this regard. At the UN level, the *Global Compact for Refugees* (GCR)[1535] and the *Global Compact for Safe, Orderly and Regular Migration* (GCM)[1536] were hammered out at the dawn of extensive negotiations between the UN High Commissioner for Refugees and Member States. Finally adopted in December 2018, they were added to the bulk of normative tools regulating this area another one purporting to address some of the existing *lacunae* in international protection of refugees and migrants.[1537]

In recent years, the jurisprudence of the Human Rights Committee concerning human rights-related petitions of migrants has remarkably increased. Hence, the Committee is rather in process of developing its own threshold of protection regarding the risk of migrants to be subjected to torture or cruel and degrading treatment. If we zoom closer to cases with regard to expulsions and deportations, not necessarily falling under the scope of the recent European refugee crisis, one could maintain that the Committee has given significant attention to the overly developed case law of the Strasbourg Court on migration issues; it however attempted to be presented as a reliable forum offering adequate human rights protection to individuals in mobility, often subjected to blatant violations of their fundamental rights. Significant work is also made by the UN Working Group on Arbitrary detention which has repeatedly engaged thoroughly with the arbitrary detention of migrants in several instances since 1997.[1538]

In this context, two bunches of cases looming in this field worth our attention: first, immigration detention cases, mainly against Australia and second, expulsion and deportation

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[1535] UN Report of the United Nations High Commissioner for Refugees (Global compact on refugees), December 2018, A/73/12 available at https://www.unhcr.org/gcr/GCR_English.pdf.

[1536] UNGA Resolution (Global Compact for Safe, Orderly and Regular Migration), A/RES/73/195 available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195.

[1537] See relatively GAVOUNELI M., *Legislating by Compacts? – The Legal Nature of the Global Compacts*, EJIL Talk! 2019, available at https://www.ejiltalk.org/legislating-by-compacts-the-legal-nature-of-the-global-compacts/ ; GUILD E., The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights? 30 *IJRL* 4, 2019, pp.661-663; NEWLAND K.; *The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement*, 30 *IJRL* 4, 2019, pp.657-660.

[1538] UN Working Group on Arbitrary detention (UNWGAD) has recently published its revised deliberation No5, Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, available at https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf.
Addressing the pressing issue of the vulnerability of women migrant workers who are detained, CEDAW Committee has repeatedly urged States to take safeguarding measures to ensure protection from discrimination or gender-based violence and access to appropriate health-care services. See Article 12 CEDAW and CEDAW, General Recommendation 26 on women migrant workers, /C/2009/WP.1/R, 5 December 2008, para 26j; ALLINSON K., STEFANELLI J., and WEATHERHEAD K., Immigration Detention in GUILD E., GRANT S., GROENENDIJK C.A.(eds.), *Human Rights of Migrants in the 21st Century*, Routledge 2018, p.30.
Inevitably, migration issues have concerned likewise the Committee on the Elimination of Racial Discrimination (CERD) which called upon States to ensure that guarantees against racial discrimination apply equally to citizens and non citizens. See relatively CERD, CERD General recommendation XXX on discrimination against non-citizens, 1 October 2002. See in this regard UN, Report of the Committee on the Elimination of Racial Discrimination Sixty-fourth session (23 February-12 March 2004), Sixty-fifth session (2-20 August 2004), General Assembly Official Records, Fifty-ninth session Supplement No.18, A/59/18. WANI J. I., International Migration and Human Rights, 16 *Afr. Y.B. Int'l L.* 197, 2008, p.205.

cases concerning Denmark. In essence, migrants, regular or irregular, are stuck in the middle between the state's struggle to preserve and defend its sovereign powers when regulating entry control and international human rights law bodies purporting to harmonise the applicable standards of aliens' protection.

When challenging Australian Migration Act before the Human Rights Committee, the authors of the relevant complaints were often persons having overstayed their visas or having illegally entered the country. Famously, in *A v. Australia*,[1539] the Committee commenced formulating the necessary criteria pursuant to the proper interpretation of Article 9 ICCPR.[1540] In contravention with Article 5 ECHR, Article 9 ICCPR does not denote specifically the legitimate purposes of detention.

The mandatory detention policy of Australia for unauthorized entrants was at stake *in casu*, affecting also "boat people" [1541]as it was the case of the author in *A v. Australia*. In practice, the Australian authorities have used extensively and routinely the measure of detention in an arbitrary and prolonged manner to all asylum seekers arriving irregularly on the Australian shores, without offering a substantive review of their detention by any judicial forum, and without setting specific time limits to the duration of the detention.[1542] The author, a Cambodian who arrived by boat to Australia without a visa was denied asylum on the basis of the said policy of the Australian Government amounting to "human deterrence" according

[1539] HRC, *A v. Australia*, Communication No. 560/1993, 3 April 1997.

[1540] Article 9 of the Covenant reads as follows "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[1541] As admitted in the relevant report (dedicated to the detention of "boat people") of the Parliament of Australia "Australia's mandatory detention policy for all unauthorised entrants and people without valid visas may be unique. Other features of our migration culture which set us apart from other countries include a lack of land borders, relatively low levels of illegal/asylum seeker inflows, a highly managed and historically significant immigration program, and a universal visa system.". Parliament of Australia, *The Detention of Boat People*, Current Issues Brief No.8,2000-01 available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0001/01CIB08.

[1542] As Claire Higgins correctly underlined, since the same policy "is not applied to the thousands of asylum seekers who arrive each year with a valid visa (usually by plane), the policy discriminates against boat arrivals on account of their mode of entry, in contravention of the principle of non-discrimination set out under international refugee and human rights instruments."HIGGINS C., The (Un-)sustainability of Australia's Offshore Processing and Settlement Policy in MORENO-LAX V. and PAPASTAVRIDIS E., supra note 1004, pp. 303-326, 305,306; CHIA J.; McADAM J.; PURCELL K., Asylum in Australia: Operation Sovereign Borders' and International Law, 32 *Aust. YBIL* 33, 2014.For an overview of the statistics of boat arrivals and boat "turnbacks" see PHILLIPPS J., *Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics*, 2017, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks.

to the allegations of the petitioner.[1543] He, thus, complained for being arbitrarily detained within the scope of Article 9(1) ICCPR.

The HRC did not oppose to the concept of immigration detention *per se*. Instead, the Committee focused on the individual conditions of detention in the instant case and essentially, attempted to define its own understanding of the broad notion of "arbitrariness". Hence, having maintained that the latter "must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice",[1544] it elaborated on particular factors that, if lacking, could amount to the arbitrariness of the detention. These factors are, for instance, the *likelihood of absconding* and *lack of cooperation.*[1545] This demanding approach was also reiterated in the subsequent case law of the Committee which revolved around claims of "boat migrants" against Australia.[1546]

In the same spirit, the added value of the *C v. Australia*[1547] is actually the proportionality road that the Committee took in the statement of the Committee according to which "(…)the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1."[1548]

In sum, despite the weak non-judicial context in which the Committee operates, the latter managed to develop a "relatively robust line of jurisprudence" in the words of Cathryn Costello.[1549] Along the similar lines with the Strasbourg Court as regards the lawfulness of the detention, when it comes to arbitrariness the Committee requires elements of inappropriateness, injustice and lack of predictability as well as reasonableness and necessity applying the proportionality test as well. Therefore, in conformity with the well-established criteria of its previous jurisprudence, the Committee held in *Jalloh v. Netherlands*,[1550] that "considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable to have detained the author for a limited time until the administrative procedure relating to his case was completed. Once a reasonable prospect of expelling him no longer existed his detention was terminated."[1551]The abovementioned developments of the Committee's in terms of protection

[1543] Supra note 1539, para 3.2.
[1544] HRC, *C v. Australia,* Communication No. 900/1999,13 November 2002, para. 9.2.
[1545] Ibid., para. 9.4. See also on this case JOSEPH S. and CASTAN M., supra note 1372, p.352-354.
[1546] HRC, *Shams et al v. Australia*, Communication No 1255,1256, 1259,1260,1266, 1268,1270,1288/2004,11 September 2007; *Shafiq v. Australia*, Communication N. 1324 /2004, 13 November 2006.
[1547] Supra note 1544, *C v. Australia.*
[1548] Ibid., para. 8.2.
[1549] COSTELLO C., Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law, 19 *Ind. J. Global Legal Stud*. 257, 2012, p.273.
[1550] HRC, *Samba Jalloh v. Netherlands,* Communication No. 794/1998, 15 April 2002.
[1551] Ibid., para. 8.2.

from arbitrary detention have been codified in the recently adopted General Comment No.35 on the right to liberty and security and security of the person.[1552]

Crucially, the approach of the Strasbourg Court on the matter differs at some point from the HRC's perception of migrants in detention since, at the outset, the Convention has enumerated the criteria for the legitimate detention within the meaning of Article 5.[1553] As earlier discussed on the occasion of the divergence between the Inter-American Court of Human Rights and the European Court,[1554] the ECtHR fell short in reconciling national migration policies with the effective observance of the rights of irregular migrants in detention.

The Court's well-known conclusions in *Chalal v.UK*[1555] in relation with prolonged detention under Article 5(1)(f) and in *Saadi v. UK*[1556]on detention to prevent anauthorised entry, mirrored the willingness of the latter to grant a lower level of protection pertaining to asylum and immigration which, in "social and human terms, are the most crucial issues facing us in the years to come".[1557] Strikingly, it remains noteworthy that the Court in the most recent *Rusu* reaffirmed its lower standards and brought to life the *Chalal* case law stating that the only requirement for the detention is the fact that the detention is ordered in view of the individual's deportation. Whether the impugned decision is reasonably necessary is irrelevant for the Court, whereas the due diligence requirement is present.[1558]In fact, the Court felt that it should give additional attention to the potentiality of the deportation's occurrence. In this spirit, in *A v. UK[1559]* decided otherwise since it concluded that the applicants in the instant case were detained for being suspected terrorists rather than in view of being deported. Strikingly, the Grand Chamber clarified that "it is true that even the applicants who were detained the longest were not held for as long as the applicant in Chahal (cited above), where the Court found no violation of Article 5 § 1 despite his imprisonment for over six years. However, in the *Chahal* case, throughout the entire period of the detention, proceedings were being actively and diligently pursued, before the domestic authorities and the Court, in order to determine whether it would be lawful and compatible with Article 3 of the Convention to proceed with the applicant's deportation to India. The same cannot be said in the present case, where the proceedings have, instead, been primarily concerned with the legality of the detention."[1560]

What is more, the *Saadi* standards are also "*alive and kicking*" and summarized in *Suso Musa v. Malta*[1561] where the Strasbourg Court admitted that when the State Party has enacted

[1552] HRC, General Comment No. 35: Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35, 16 December 2014, paras 14,15. See also SHANY Y., A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention, 93 *International Law Studies* 102, 2017, p.118,119.
[1553] For the whole picture on lawful detention and the authorized deprivations of liberty under Article 5 par.1 ECHR and its implementation by the Strasbourg Court see the Guide on Article 5 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights, 2018, last updated on 31 December 2018 available at https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf
[1554] See earlier the sub-section on the rights of detainees and the disagreement between the European Court and the Inter-American Court of Human Rights in this respect.
[1555] Supra note 1033.
[1556] Supra note 1036.
[1557] Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvela in the *Saadi v. UK* judgment of the ECtHR.
[1558] ECtHR, *Rusu v. Austria*, Application No. 34082/02, 2 October 2008, para.52.
[1559] ECtHR, *A. v. United Kingdom*, Application No. 3455/05, 19 February 2009.
[1560] Ibid., para.169.
[1561] ECtHR, *Suso Musa v. Malta*, Application No. 42337/12, 23 July 2013, para 90.

legislation authorizing the entry or stay of irregular migrants until their asylum application being examined their detention might give rise to issues related to the lawfulness of the measure.[1562]

It also deserves our attention that the dissenting minority in *Saadi* referred to the Committee's level of protection. Far from being an *obiter dictum*, the dissenters recalled that the ECHR is not applied *in a vacuum* and appeared open to the HRC's more protective approach towards migrants in detention as reflected in the Committee's case law. Essentially, the minority imported the position of the HRC on the concept of lawfulness as conceived in the Human Rights Committee's case-law "to mean that detention must not simply be lawful, but must also not have been imposed on grounds of administrative expediency (see Hugo van Alphen v. the Netherlands, Communication no. 305/1988, CCPR/C/39/D/305/1988 (1990)". They also recalled the abovesaid requirements of the Committee presented in the landmark *A. v. Australia* and in *Bakhtiyari v. Australia*,[1563] in which (the latter) the Committee had concluded that the lack of substantive review does not meet the requirements of Article 9 para 4 ICCPR.

The wide perception of arbitrariness that the HRC applied so as to decide in favour of the claimants appears to sit comfortably with the international human rights standards of refugee law recognizing the particular vulnerability that characterizes migrants in an irregular situation who seek for humane conditions of living and- by all means- for international protection. Since the Court has, in general terms, provided migrants and asylum seekers with high-level protection that has had significant normative and practical effects,[1564] taking the proportionality road concerning the detention of migrants and endorsing specific derogations would add to the legal certainty and the solidification of its methodology. As Costello correctly put it "constructive human rights pluralism is evident in the minority opinion in Saadi. The minority opinion shows that appropriate engagement with the external standards of the HRC and RC, would have led to a different result."[1565]

Probably, the Court is afraid of being a real trailblazer in this special category of migration/asylum cases due to the different amount of sensitivity among European States as regards immigration detention. Indeed, during the latest decades, European States have extensively anchored their hard-line migration policies to the combat of terrorism. Perhaps the stringent position of some of the State Parties to the Convention led the Court to incorporate this *laissez-faire* standing granting lower standards of protection or a certain degree of *margin of appreciation* without, however, denoting it as such.

By contrast, the Human Rights Committee seems to be ready to venture into this territory of migration and asylum cases even more since the amount of the relevant cases, recently adjudicated by the said UN body, have multiplied due to the the recent refugee crisis

[1562] Ibid., para. 97; ECtHR, *O.M. v. Hungary*, Application No. 9912/15, 5 July 2016, para 47. See also Factsheet of the European Court of Human Rights on "Migrants in detention", last version published in March 2019, available at https://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf.

[1563] HRC, *Bakhtiyari v. Australia*, Communication No 1069/2002, 6 November 2003. See also on the limb of Article 9 para 4; HRC, *Baban v Australia*, Communication No 1014/2001, 18 September 2003.

[1564] At this point, it is deemed necessary to remind the immediate repercussions that the bold pronouncements of the Strasbourg Court had on the matter of Dublin trasfers and the revision of the entire system in the light of the pioneer jurisprudence of the ECtHR.

[1565] COSTELLO, supra note 1549, p.288.

in Europe. Conforming with its usual attitude towards the Strasbourg case law, the Committee has inevitably turned to the nuanced jurisprudence of the ECtHR on the matter, albeit implicitly. In a number of cases raised against Denmark, the jurisprudential trends of the HRC have been fleshed out drawing, sometimes, from the Strasbourg's long experience in the field and sometimes, have disagreed on the quality features of the human rights standards awarded to migrants or asylum seekers.

During the latest years, a whole new *compendium* of cases was brought before the Committee touching the pressing issues of the enormous influx of mixed migration flows reaching the European shores. The Committee was, thus, confronted with the same challenges as the European Court of Human Rights and thus, implicitly imported many of the Strasbourg's values. Hence, in cases concerning deportations to a "safe country", the Committee was called to delimit the protection afforded to aliens facing deportation who claim to face the risk of cruel, inhuman or degrading treatment within the meaning of Article 7 ICCPR.[1566] Notably, both the parties have routinely invoked the same cases, used as the major argumentative tools to convince the Committee to respond accordingly. Hence, in a great number of cases in which authors seek to challenge a deportation to Italy have invoked the Strasbourg's seminal pronouncements in *M.S.S v. Greece and Belgium* and in the most recent *Tarakhel v. Switzerland* in which the ECtHR treated in depth the constituent elements of the Italian asylum system.[1567]

For instance, starting from the views of the HRC in *Jasin v. Denmark* [1568], the Committee has replied -ever since- in an almost automatic manner to the automatically repeated argumentation of the disputants. In the case at hand, a Somali national who was about to be returned to Italy (first country of asylum) relied heavily upon her vulnerable position of being a homeless single mother of three children seeking for asylum and upon her past experience in Italy. During that time, she argued that while she was granted subsidiary protection she was forced to leave the reception center. She remained homeless with no access to medical and social care and no funds to renew her residence permit while pregnant. Later on, she moved to

[1566] In its landmark General Comment No. 31 the Committee stressed that "Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory,where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.", HRC, General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004.

[1567] It is also noteworthy, that the UN Committee Against Torture(CAT) has equally developed abundant case law in deportation cases, patterned on the HRC's manner of approaching such cases. Since the prohibition of torture has constituted the cornerstone of the protection of asylum seeker bringing their cases before the Strasbourg Court, the parties have naturally based their claims on the Strasbourg's seminal cases in more than 64 views adopted by the CAT Committee. As it is the case of the HRC, the CAT Committee applied the standard of the personal risk of the applicant who, if deported to his country of origin, will be a victim of ill-treatment or torture. In this aim, it took into consideration the invocation of the Strasbourg Court's criteria in similar cases without explicitly citing the relevant findings of its sibling institution. See *inter alia* CAT, *EKW v. Finland*, Communication No. 490/2012, 04 May 2015; *G.I v. Denmark*, Communication No. 625/2014 ,21 September 2017; *I.E v. Switzerland*, Communication No. 683/2015, 26 December 2017; *N.A.A. v. Switzerland*, Communication No. 639/2014, 16 June 2017; *A.N. v. Switzerland*, Communication No. 742/2016, 21 September 2018.

[1568] HRC, *Warda Osman Jasin et al v Denmark*, Communication No 2360/2014, 4 September 2015.

Denmark and applied for asylum but her application was rejected and she faced deportation to Italy. On these grounds, the author claimed that her return to this country would amount to a breach of Article 7 ICCPR due to systemic failures of the Italian asylum system in the sence of the aforementioned jurisprudence of the Court of Strasbourg. The Danish government invoked the *Samsam Mohammad Hussein and Others v. the Netherlands and Italy*[1569] according to which "while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings, it has not been shown to disclose a systemic failure to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece*"[1570]

However, in the subsequent *Tarakhel* judgment [1571] the Court of Strasbourg had reiterated the distinction which needs to be drawn between the absolute deterioration of the Greek asylum procedures(*M.S.S.*case) and the Italian ones(*Tarakhel* case). However, it was the individual vulnerable position of the applicants (family with six children) and the living conditions in the Italian detention center that mattered significantly in the instant case. Logically, the Committee agreed with the *Tarakhel* standards without, however, saying so. The Committee appears having endorsed the reasoning of the Strasbourg Court and emphasized that states must exercise an individual assessment of the risk that the applicant is personally facing if deported to Italy rather than examining the overall situation of the asylum system. Also in line with the *Tarakhel* judgment of the Court, the Committee held that "it has also failed to seek proper assurance from the Italian authorities that the author and her three minor children would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under article 7 of the Covenant."[1572]

The Committee although having imported some of the most crucial findings of the ECtHR case law signaling the end of the Dublin architecture as crystalised at the impugned time period approached cautiously the matter. Interestingly, it opted to refer only to the State's invocation of the Strasbourg's jurisprudence which was later blatantly rejected and not to the similar approach of its counterpart, also extensively invoked by the author and equally adopted by the body itself.[1573]

[1569] In this case, the author also invoked the ECtHR, *Samsam Mohammad Hussein and Others v. the Netherlands and Italy*, Application No. 27725/10, 2 April 2013.
[1570] Supra note 695, para 78.
[1571] Supra note 712, para 122.
[1572] Supra note 1568, *Jasin* case, para. 8.9.
[1573] Besides the HRC's contribution to the establishment of human rights guarantees in the field of migration and asylum law, the UN Committee on the rights of the Child has also delved into the protection of the immigrant children rights. Despite the level of protection that the Strasbourg Court has afforded to children in immigration status, only in two instances of the CRC's adopted views can we trace citations of the European Court of Human Rights. In both cases, while the parties have widely relied upon the similar position of the ECtHR, the Committee preferred elaborating on the complex standard of "best interests of the child". Indeed, the relevant case-law of the Court has repeatedly been in the center of serious academic criticism particularly when a fair balance between the broad concept of the "best interests of the child" and national interests is at stake. On the contrary, the Committee has insisted on a rights-based assessment of potential exceptions to the prohibition of returning separated children to the country of origin in General Comment No. 6. It stated that "exceptionally, a return to the home country may be arranged after careful balancing of the child's best interests and other considerations, if the Latter are rights-based and override the best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the state or to the society. Non rights-based arguments, such as

The exact same arguments with the exact same wording were presented before the HRC in a number of similar cases in which the Committee routinely reaffirmed its standards adopting also the same language.[1574] Nevertheless, in some of the instances, strong objections occurred in the form of dissenting opinions. In the dissenting opinion of Committee Members Prof. Yuval Shany,Prof. Christof Heyns and Prof. Photini Pazartzis, the real threshold of Article 7 ICCPR was raised. In fact, the factual basis *in casu* differs essentially from the landmark *Jasin* ruling at the point that the dissenters highlighted that "recognizing all individuals facing poverty and limited social assistance as potential victims of article 7 of the Covenant, has little support in the case law of the Committee or in State practice, and would extend the protection of article 7 and the non-refoulement principle (which are absolute in nature) to breaking point."[1575]

In this context, the unconscious-like application of the HRC's position appears contradictory with the mere context of the State's mandate to engage in an individual-centered review of each deportation case focusing on the vulnerability of each asylum-seeker. Notwithstanding the fact that the Committee also applies the *fourth instance* formula, the said standing of the majority of the HRC's members coupled with the lack of specific criteria with regard to the enforcement of the absolute prohibition of Article 7 ICCPR might be proved risky in these terms. Being in conformity with the overall position of the Committee to grant a limited degree of discretion to national regimes, the Committee has probably lowered the traditionally high threshold for treatment falling within the scope of the said provision[1576] in order to provide sufficient redress to asylum seekers.

In effect, should every exacerbation of the alien's personal situation in the receiving state can trigger the removing State's responsibility as regards the principle of *non-refoulement*[1577] and the provision of Article 7 ICCPR, this absolutist approach of the

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those relating to general migration control, cannot override best interests considerations". See *inter alia* CRC, *I.A.M v. Denmark*, Communication No. 3/2016, 8 March 2018; *Y.B. and N.S. v. Belgium*, Communication No. 12/2017, 5 November 2018; UN Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23; UN CRC, General Comment No. 14 (2013), The right of the child to have his or her best interests taken as a primary consideration (art 3, para.3), 29 May 2013, CRC/C/GC/14; CRC, General Comment No. 6 (2005), Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6, para. 86; SMYTH C., The Best Interests of the Child in the Expulsion and First-entry Jurisprudence of the European Court of Human Rights: How Principled is the Court's Use of the Principle?17 *European Journal of Migration and law*,2015, pp. 70-103; DRAGHICI C., *The Legitimacy of Family Rights in Strasbourg Case Law*, Hart Publishing 2017, p.392.

[1574] HRC, *Abdilafir Abubakar v. Denmark*, Communication No. 2409/2014, 16 June 2016; *Obah Hussein Ahmed v. Denmark*, No. 2379/2014, 22 September 2016; *R.A.A and Z.m V. Denmark*, Communication No. 2608/2015, 28 October 2016; *Raziyeh Rezaifar v. Denmark*, Communication No. 2512/2014, 10 April 2017; *RIH and SMD v. Denmark*, Communication No. 2640/2015 13 July 2017; *YAA and F.H.M v. Denmark*, Communication No. 2681/2015, 26 November 2017; *MAS LHB v. Denmark*, Communication No. 2585/2015, 18 December 2017; *MP v. Denmark*, Communication No. 2643/2015, 22 December 2017.

[1575] See HRC, *Hibaq Said Hashi v. Denmark*, Communication No. 2470/2014, 9 October 2017. Joint dissenting opinion of Committee members Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting), para.5.

[1576] HRC, *Vuolanne v. Finland*, Communication No. 265/1987, 7 April 1989.

[1577] In the General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment), adopted in 30 May 1982, the Committee did not make any reference to the principle of non-refoulement dimension of Article 7 ICCPR. When replaced by General Comment 20 (adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992), the Committee provided that "[s]tates parties must

Committee might also discourage States Parties to effectively proceed to a thorough examination of the individual risk in each case. In the same spirit, it can also have adverse effects as regards the States' attempts to harmonise their standards to their international obligations pursuant to the Covenant.[1578]

Some signs of inter-judicial dialogue between the two mechanisms can also be traced in several expulsion cases revolving mostly around the proper implementation of Article 7 ICCPR.[1579] As expected, the applicants who fear that expulsion would expose them to ill-treatment often used the case-law of the Strasbourg Court to receive protection from its UN counterpart. For instance, in the *Pillai v. Canada* [1580] the conclusions of the Committee appear having resulted from the extensive invocation of the ECtHR's abundant case law on the matter, also used by the petitioner. In addition, as it is the case of the death row *Soering* jurisprudence which played central role in the relevant jurisprudence of the Committee,[1581] its conclusions

not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."

[1578] However, in two recent decisions against Canada concerning deportation cases, the Committee expressed less restraint in relation with the State's competence to regulate this area. In *W.K. v. Canada*, the HRC emphasized that "the Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice". See HRC, *W.K. v. Canada*, Communication No. 2292/2013, 12 June 2018, para 10.3. Interestingly, the Committee in another case in which the author acclaimed that he would be subjected to ill treatment in the country of removal if deported due to its sexual orientation, recalled the high threshold of the Article 7 ICCPR and agreed with the State's assessment. See *S v. Denmark*, Communication No. 2642/2015, 29 June 2018, para.8.2 and *X. v. Sweden*, Communication No. 1833/2008, 17 January 2012, para. 5.18.

[1579] In her extremely insightful post in EU Immigration and Asylum Law Blog, Espelth Guild has also delved into an analysis of how the two human rights bodies have treated the individual's right to leave a country. See GUILD E., *To protect or to forget? The Human Right to Leave a Country*, EU Immigration and Asylum Law Blog, 2017, available at http://eumigrationlawblog.eu/to-protect-or-to-forget-the-human-right-to-leave-a-country/.

[1580] HRC, *Pillai v. Canada*, Communication No. 1763/2008, 9 May 2011. See the concurring opinion of Committee members Ms. Helen Keller, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flahertyn and Sir Nigel Rodley (concurring). In their words "the degree of certainty suggested by these early Views contrasts with the standard set forth in Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits sending a person to "another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (emphasis added). (…) This Committee has also concluded that Article 7 requires attention to the real risks that the situation presents, and not only attention to what is certain to happen or what will most probably happen. General Comment No. 31, quoted above, demonstrates this focus. So do the Committee's Views and Decisions of the past decade. The phrasings have varied, and the Committee continues to refer on occasion to a "necessary and foreseeable consequence" of deportation. But when it inquires into such consequences, the Committee now asks whether a necessary and foreseeable consequence of the deportation would be a real risk of torture in the receiving State, not whether a necessary and foreseeable consequence would be the actual occurrence of torture."

[1581] The dissonance between the HRC and the ECtHR in extradition cases in which the *death row* phenomenon had arisen, illustrated the hesitation of the Committee regarding the utilisation of the ECtHR's interpretation into the HRC'S corpus of views. In *Kindler v. Canada*, the Committee respectfully took into consideration the Strasbourg's criteria to examine whether the situation of the applicant being in a *death row* situation for years amounts to an ill-treatment. Conversely, starting from the Kindler, the Committee found repeadetly itself on the opposite side as it concluded that long periods of death row do not necessarily violate the Covenant, unless "compelling circumstances" or psychological aspects dictate another approach as highlighted in *Clement Francis v. Jamaica*. The issue was also reconsidered by the UN body on the occasion of the *Oçalan* case law of the ECtHR. Later on, in the *Lanarraga* decision with regard to death penalty after an unfair judicial procedure, the HRC has ostensibly imported the Strasbourg's standards of protection and took the path of its European peer and concluded to a violation of Article 7 ICCPR citing the said judgment of the Grand Chamber.
See supra note 934, *Soering* ruling; HRC, *Joseph Kindler v. Canada*, Communication No. 470/1991, 30 July 1993, para.15; *George Graham and Arthur Morrison v. Jamaica*, Communication No. 461/1991, 25 March 1996, para.

were equally applied in extradition cases in an implicit manner.[1582] Time and time again, the ECtHR practice has sparked the attention of the UN body, however the latter did not feel that its source of inspiration deserved an explicit reference.

For Antoine Buyse, "external citations are, in line with what Slaughter has argued, used to increase the persuasiveness and quality of the case-law. Openly acknowledging existing external jurisprudence contributes to more nuanced and refined discussions and allows for new points of view, even if these are not automatically incorporated."[1583] As the previous analysis has evinced, this happens to be systematically avoided by the Human Rights Committee[1584] even in disputes in which the parties have solely based their argumentation to the reasoning of the European Court in similar cases. Instead, the Committee prefers internal references in an attempt to fortify its own interpretative tools even when these clearly mirror the Strasbourg's findings.

Conclusion

Starting its challenging work during the Cold War, the Human Rights Committee has been consistently revealed as a universally accepted forum of utmost importance in the realm of human rights adjudication. As the most experienced monitoring body at the UN level, it has managed, to give extremely proactive and comprehensive responses to several topics, related to the causes of the deeply-installed impunity and injustice in many corners of the world. Crucially, the Committee's pronouncements are of major significance particularly for individuals living in countries not belonging to a regional system of protection of human rights, for instance Asian countries or Australia and New Zealand.

However, the well-known weakness of Geneva's non-binding views coupled with the lack of an enforcement mechanism have normally exarcerbated the openness of the Committee to external sources of international human rights law. Some scholars have interpreted this resistance as a "*certain jalousie de métier*"[1585] towards the European Court of Human Rights.

10.3; *Clement Francis v. Jamaica*, Communication No. 606/1994, 25 July 1995; see also *Munguwambuto Kabwe Peter Mwamba v. Zambia*, Communication No. 1520/2006, 10 March 2010, para. 6.8.; See also the *Fransisco Juan Larrañaga*, supra note 1339.

[1582] See for instance, the *Kindler* decision of the HRC in which for the first time interconnected the principle of non-refoulement with the individual's risk to be subjected to cruel, inhuman or degrading treatment to Article 7 ICCPR; Ibid.; HRC, *Ng v. Canada*, Communication No. 469/1991, 5 November 1993; *A.R.J. v. Australia*, Communication No. 692/1996, 28 July 1997; *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, 25 October 2006. The latter also echoes the Strasbourg's standing as formulated in the *Chalal* jurisprudence in relation with the quality of assurances. See also the Joint Concurring opinion of Committee members Gerald L. Neuman and Yuji Iwasawa in HRC, *B.L. v. Australia*, Communication No. 2053/2011, 7 January 2015.See on this issue the extraordinary analysis of Antoine Buyse who argues that although the Committee has moved from the absolute ignorance of the Strasbourg's practice, it still denies to let the ECtHR's jurisprudence to largely revervrate into its work.

[1583] See BUYSE A., Echoes of Strasbourg in Geneva — The Influence of ECHR Anti-Torture Jurisprudence on the United Nations Human Rights Committee —, 59 *JYIL* 2016, pp. 81-98, 98.

[1584] Absolutely indicative of the unwelcoming position of some of the Committee members towards the invocation of the European human rights standards of protection is the fact that, in his individual opinion in *Larrañaga* the Committee member Mr. Nisuke Ando found regrettable the explicit reference of HRC to the ECtHR's case law. See also for instance HRC, *S.F v. Denmark*, Communication No. 2494/2014, 17 May 2019.Supra note 1339.

[1585] BUYSE, supra note 1340, p.449.

Yet, the HRC sometimes seems to be forced by the parties to be in a relationship with Strasbourg which has to be avoided at any cost in order to preserve its persuasiveness and the stand-alone nature of the Covenant's guarantees. In the vast majority of cases, despite the numerous references of the disputants to analogous cases decided by its European counterpart, the HRC scarcely cites the relevant case law. At any rate, without acknowledging its influence, the case law of the Strasbourg Court is still present in Geneva as reflected by the comparable style of reasoning and the concurring and dissenting opinions of distinguished Members of the Committee.[1586]Notwithstanding the adverse findings in many fields of law, we can certainly argue that the HRC has taken into consideration the European Court's practice and safeguards as developed throughout its rich jurisprudence. While it remains unknown whether explicit citing of the ECtHR's jurisprudence would serve as an effective tool for the Committee's combat to foster its credibility both inside and outside Europe, in practice, the transition from an on-purpose concealed conversation to an open and balanced dialogue would be proved a rather *win-win* solution with manifold results. At the global level, it would enhance legal certainty in international human rights law, while at the regional level, it could put additional pressure to European States to reach the highest attainable level of human rights enforcement and stimulate States "standing" under no regional human rights *umbrella* to do so.

Concluding remarks

There is no doubt that the remit of international human rights protection is inevitably fragmented. A plethora of regional and supranational regimes of human rights adjudication containing normative analogies coexist often in the very same region feeding into the well-established debate between fragmentation and unity[1587] in the realm of international law. The

[1586] See for instance, the concurring opinion of the Committee Member Sarah Cleveland citing the ECtHR case law in relation to the rights of same-sex couples in the key judgment *C. v. Australia*. See also the dissenting opinion of Ruth Wedgwood in *Dauphin v. Canada* in which she admits that the Convention constitutes a source of inspiration. Ruth Wedgwood particularly stressed that "[t]he jurisprudence of the European Court of Human Rights, including its dissenting opinions, at times seems to be a source of inspiration to the Committee -- albeit those cases arise under a different convention and have no direct authority in our construction of the Covenant." HRC, *C v. Australia,* Communication No.2216/2012, 1 November 2017; *Dauphin v. Canada,* Communication No. 1792/2008, 7 September 2009.
However, only a few days ago the Committee pronounced for the first time on the impact of environmental pollution on the enjoyment of human rights in *Portillo Cáceres v. Paraguay* and expressed a surprising openness to the regional responses to similar problems. The Committee timidly admitted that it has considered the case law of the ECtHR-and the recent findings of the IACtHR- on the matter which is cited in the footnotes of its views. In this spirit, perhaps the latest attitude of the Committee echoes a more collaborationist standing as regards the external norms-related dilemma especially while the HRC is navigating uncharted legal territory. Undeniably, the HRC's fresh approach comes in support of the fact that signs of coherence and interaction between the mechanisms add to the legal certainty and an *ethos* of complementarity particularly when new types of disputes are coming to the fore. HRC, *Portillo Cáceres v. Paraguay*, Communication No 2751/2016, 9 August 2019; See also REEH G., *Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect*, EJIL Talk!2019, available at https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/.

[1587] Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), Draft conclusion of the work of the Study Group, U.N. Doc. A/CN.4/L.682/Add.1 (May 2, 2006); Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International

regionalization of human rights protection as well as the proliferation of global *quasi*-judicial regimes with general or specialized mandate led unavoidably to the issuance of multiple decisions on the same or similar disputes as it has already arisen between the Strasbourg and the Luxembourg Court or the Strasbourg Court and the HRC. Due to the willingness of each system to entrench its autonomy and self-contained character, their dynamic jurisprudence encouraged, in several instances, divergent interpretations of the same human rights values highlighting, though, the diversified needs of humans and peoples within the confines of diversified regional contexts.

The well-documented perils that fragmentation poses to the unity of the international legal order -which is wished to function in a unified form of serene consistency as regards the application of general principles of public international law and interpretative methods of similar normative rules- have been intensely expressed by ICJ judges and within academic circles.[1588] The ideal of universality gains paramount importance when it comes to international human rights protection since the structural construction of human rights system is anchored to the values and principles endorsed in the provisions of the Universal Declaration of Human Rights. It is also to be kept in mind, however, that none of the existing regional or global systems is, in practice, self-sufficient system[1589] since they all bear witness to their intimate connection not only with general international law[1590] but also amongst each other. Hence, somehow the conceptual universality perceived as the *raison d'être* of human rights legal discource is absolutely indicative of the fact that consistency in terms of normative and jurisprudential unity can be hardly accomplished.

The present study, thus, comes in support of the argument built upon the falseness of this dilemma.[1591] Besides the great expectations revolving around the vague concept of the unity of international legal order which seemed to be jeopardized *in abstracto* by the ever-evolving fragmentation,[1592] the risks can apparently be mitigated by other co-existing trends of international law. It goes without saying that judicial dialogue, in the sense of engaging with other court's pronouncements or influencing other mechanisms can serve as an arsenal apt to

Law, U.N. Doc. A/CN.4/L.702 (July 18, 2006); DUPUY P-M, A Doctrinal Debate in the Globalisation Era: On the Fragmentation of International Law, 1 *Eur. J. Legal Stud.* 25, 2007.

[1588] BUERGENTHAL T., Proliferation of International Courts and Tribunals: is it good or bad?,14 *LJIL* 267, 2001, pp. 267-275.

[1589] AJEVSKI M., Fragmentation in International Human Rights Law – Beyond Conflict of Laws, 32 *Nord. J. Hum. Rights* 2, p.88; CANCACO TRINDADE A.-A, The European Convention on Human Rights and General International Law: Concluding Reflections on the 2015 Strasbourg Conference, in VAN AAKEN A. and MOTOC I.(eds.), *The European Convention on Human Rights and General International Law*, OUP 2018, p.303.

[1590] For the particular case of the European Court of Human Rights see CALFLISCH L., L'application du droit international général par la Cour européenne des droits de l'homme in BUFFARD I., CRAWFORD J., PELLET A.,WITTICH S., (eds.), *International law between Universalism and Fragmentation*, Martinus Nijhoff 2008, pp.627-647; See also for instance how the Strasbourg judges talk with the UN Security Council in SICILIANOS L.-A., The UN Security Council, State Responsibility and The European Court of Human Rights: Towards an Integrated Approach? in VAN AAKEN A. and MOTOC I.(eds.), *The European Convention on Human Rights and General International Law*, OUP 2018, pp.213-229.

[1591] Recently, Anne Peters in her article on fragmentation emphatically observed that it is about time that we put aside the 'f' word. PETERS A., The refinement of international law: From fragmentation to regime interaction and politicization, 15 *ICON* 3, 2017, pp. 671–704.

[1592] KOSKENNIEMI M., Fragmentation of International Law? Postmodern Anxieties, 15 *LJIL* 553, 2002, p.574,575.

empower the enrichment of traditional international law offering new means of interpretation when common normative rules are on the table.[1593]

This inter-regional judicial interaction lies on the flipside of the negative aspects of fragmentation in international human rights law through the law-making of human rights adjudicative bodies.[1594]

Therefore, putting the legal practice of the Strasbourg architecture at the center of this research, the thesis attempted to shed light to what extent the judicial (or *quasi* judicial) institutions taking part in human rights adjudication have borrowed from the ECHR system.

It is in this spirit of systemic harmonisation, that the present dissertation has attempted to discuss in depth how the ECHR and its supervisory organ, the Court of Strasbourg has provided a robust case law in the field which is *exported* to other legal orders in terms of cross-references, methodology and outcomes. At first, outlining the progressive work of the Luxembourg Court in the human rights area the emphasis was put to the manner with which the latter makes recourse to the Convention's provisions or ECtHR's jurisprudence, either in a direct or an indirect manner. Secondly, the following chapter explored the branches of the EU law in which the Court of Justice used the Strasbourg's argumentation to revisit EU legislation touching upon human rights issues. Throughout this analysis, the overall complex relationship with both antagonistic and sympathetic features was the key factor in this first part. Consequently, the Opinion 2/13 and the entire conversation fuelled pertaining to the future co-existence of the two institutions coupled with the fortified role of the Charter within the EU human rights law reshaped the interplay between the CJEU and the ECtHR. The hegemonic tendency of the CJEU prevailed in their relationship for quite some time since in its Opinion it was felt that it should strongly defend its own normative and interpretative tools with which it is endowed, notably after the adoption of the Lisbon Treaty. Despite the heavy shadow of the "endangered" EU supremacy that has led the Court of Justice to restrict itself when citing the ECHR and to designate the Charter as the ultimate guarantor and gatekeeper of fundamental rights within the EU borders, a more attentive look to the Luxembourg's case law reveals that the Strasbourg Court has still a strong say with regard to the proper realization of human rights within the EU limits.

Hence, untouched by the Court of Justice legal fields or those giving rise to litigation under extremely pressing conditions such as the regulation of migration flows or data protection in relation with EU privacy practices are among the areas that the CJEU leveraged extensively the Strasbourg's guidance. The more the human rights adjudication was gaining ground within the realm of the EU judicial practice, the more the CJEU was confronted with the perennial need to reconcile the fundamental freedoms and common internal values serving for decades as cornerstones of the EU market and political integration with fundamental rights. This reconciliation is not necessarily crowned with success as the *NS* jurisprudence revealed pertaining to the mutual trust principle in Dublin cases; whereas it was more achievable in

[1593] See on this matter TZANAKOPOULOS A., Judicial Dialogue as a means of interpretation in AUST H-P. and NOLT G.(eds.), *The Interpretation of International Law by Domestic Courts-Uniformity, Diversity, Convergence*, OUP 2016, pp.72-94.

[1594] FOLLESDAL A., Fragmentation in International Human Rights Law– Beyond Conflict of International Courts in a State of Nature Foreword in AJEVKSI M.(ed.), *Fragmentation in international human rights law: Beyond conflict of laws*, London Routledge, 2015, pp. xi-xxi.

cases, for instance, with regard to economic freedoms as it was the case of the *Schmidberger* or the *Viking* and *Laval* disputes.

Recently, the CJEU has revisited some of the thorny issues related to the autonomy of EU law, also underlined in the famous Opinion 2/13. Hence, the controversial *mutual trust* concept in the AFSJ is better identified through the latest jurisprudential developments of the Luxembourg Court[1595] in cases related to the *ne bis in idem* principle, the Dublin Regulation, the EAW mechanism etc. Departing from several judgments manifesting the autonomy and supremacy of European legal order[1596]when EU values are clashing with human rights under the CFR and the ECHR, the Court lately opted to delimit the notion of mutual trust when the latter needs to be balanced with absolute rights. In any case, the reconciliation with its Strasbourg counterpart is also reaffirmed by President Lenaerts(CJEU) and former President Spielmann(ECtHR)[1597] and can be possibly explained by the fact that discussions on the EU's accession to the ECHR have recommenced and this option is also embedded in the recent Copenhagen Declaration of the CoE.[1598]

However, this *rapprochement* could be also conceived as a proof that the accession is no more needed and the requisite *equilibrium* is to be achieved one way or another and in any shape or form.[1599]At any rate, it follows from the research of the present dissertation that, post-Lisbon, the Court of Strasbourg still provides its Luxembourg peer with useful insights and an interpretative toolkit particularly when the latter enters uncharted territories.[1600] Yet, the fact

[1595] See e.g. LENAERTS K., Supra note 313; PRECHAL S., Supra note 313; CORTES-MARTIN J., Supra note 313; See also GILL-PEDRO & GROUSSOT X., The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension? 35 *Nord. J. Hum. Rights* 3, 2017, pp. 258-274.

[1596] See for instance the *Melloni* case, supra note 41; the *NS* case, supra note 702 and the *Abdullahi* case, supra note 709.

[1597] LENAERTS K., *The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection, Speech of the President of the Court of Justice of the European Union* in the context of the Solemn hearing at the ECtHR for the opening of the Judicial Year on 26 January 2018 available at https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf. See also in the same spirit SPIELMANN D., *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13*, lecture of the Judge at the General Court of the European Union and Former President of the European Court of Human Rights, organised by FRAME and the Leuven Centre for Global Governance Studies, 27 March 2017 available at http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf .

[1598] Supra note 25.

[1599] See on this argument and its inconsistencies CALLEWAERT J., Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences, 55 *C.M.L.Rev.*, 2018, pp.1685–1716.

[1600] See, for instance, the *Al Chodor* case in which the CJEU relied upon the Strasbourg's definition of "a significant risk of absconding" which if ill-defined offers ground for unlawfull detention of asylum seekers. Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others*,[2017], published in the electronic reports of cases. See also the *Bougnaoui and ADDH* case on religious freedom, a new field for the EU judges. The Court based its reasoning on the well-established case law of the European Court of Human Rights when balancing the religious freedom of an employee wearing an Islamic headscarf in the workplace with the MS's duty to implement the Directive 2000/78 aiming to exclude discriminatory acts in the employment on the basis of religious beliefs. The CJEU assessed that the notion of 'religion' should be perceived as including both the *forum internum* (religious belief) and the *forum externum*(manifestation of religious beliefs). Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, [2017] reported in the electronic reports of cases, para. 30. BRIBOSIA E. and RORIVE I., Affaires Achbita et Bougnaoui : entre neutralité et préjugés, 112 *RTDH* 2017, pp. 1017-1037.

that Article 52(3) CFR establishing the ECHR as the minimum protection is, in effect, difficult to enforce coupled with the -often- absence of this test from the judicial discourse of the CJEU, inconsistencies and discrepancies flowing from the unidentified coexistence between the two instruments inescapably remain.

The above conclusions as well as the closer nexus between the two systems that seems to be targeted *de nouveau* point towards the "reactivation" of Article 6(2) in the foreseeable future. It readily appears from the jurisprudence of the CJEU that accession might not be feared any more in Luxembourg or in Brussels and the renegotiation of the accession project on a new basis is on the table.[1601] In the same vein, the ECtHR is more and more asked to rule upon human rights claims related to the enforcement of EU law. Given the state-like structure and legal philosophy of the CJEU which aims to preserve its constitutional features, as crystalised in the Opinion 2/13,[1602]the question remains: if the EU becomes a Contracting Party to the ECHR, is it possible for the findings of the CJEU to be excluded from the external control of Strasbourg, already operated when national acts in the context of EU law are challenged for comformity with human rights obligations?[1603] At the end of the day, the entire accession project was initiated so as consistency and coherence could be achieved in human rights adjudication in Europe and the necessary guidance to be offered to national judiciaries which often strive to find the right applicable standards of protection within the context of a multi-layered model of protection with no formal hierarchy between its components. Therefore, if the original aim is to be pursued, due consideration should be conferred upon the uniqueness of the EU legal order and its own human rights arsenal. Overall, this study takes the view that such an ambitious objective could actually add to the on-going struggle to preserve the universality and, in more practical terms, the coherent understanding of fundamental rights within the fragmented European protection of human rights.

In the second part of this research, the main objective was to discuss the echo of the European Court of Human Rights outside Europe. Unlike Europe, assessing the influence of the ECHR system to the international legal order, a distinction was drawn between the regional human rights Courts, with specific consideration to the IACtHR and the global mechanisms observing the enforcement of UN human rights treaties.

Initially, this study looked at the regional level where no overlapping jurisdictions need to be reconciled. The echo of the Strasbourg system was in-depth evaluated through the prism of the progressive jurisprudence of the IACtHR which operates in a continent where an international Court is forced to navigate through turbulent waters. In its attempt to entrench the democratic rule of law and to tackle the atrocities that were traumatizing the Americas for decades, the IACtHR relied heavily to the *modus operandi* of the Strasbourg Court. The analysis was twofold: first, it was concentrated on the examination of the areas of law in which

[1601] According to the statement of the European Commission in the 2016 Report on the Application of the EU Charter of Fundamental Rights "[he EU's accession to the European Convention on Human Rights remains a priority for the Commission, not least in view of its legal obligation under the Treaty. Accession will reinforce our common values, improve effectiveness of EU law and enhance the coherence of fundamental rights protection in the EU. Yet, the CJEU's December 2014 opinion (declaring the 2013 draft Accession Agreement incompatible with the Treaties) raised a number of significant and complex questions which require re-negotiating the draft on a series of points.", Supra note 37, p.8.

[1602] LINDEBOOM J., Why EU law claims supremacy, 38 *OJLS* 2, 2018, p.356

[1603] CALLEWAERT, supra note 1599, p.1713,1714.

the Latin–American Court endorsed Strasbourg's norms of protection either following an analogous pattern(e.g freedom of expression, positive obligations) or a different path of work(e.g. the application of the MoA doctrine, migration detention) in the light of the particularities of the politically hostile context in which it operates.

Despite this political backlash with which the Court is confronted, the latter has accomplished a remarkable expansion of the level of protection borrowed by the Strasbourg Court. At this point, the research was conferred with comparative characteristics when similar progress has not been documented across the Atlantic (e.g. proliferation of *jus cogens* norms) and it also aimed to trace signs of cross-fertilisation between the two judicial fora when such types of disputes have been also challenged before the ECtHR (e.g cases on indigenous rights, enforced disappearances). For methodological reasons, all the legal areas in the context of which tenacious inter-regional judicial interaction has occurred between the ECtHR and the IACtHR have been examined by distinguishing between the more doctrinal, affecting horizontally the Court's decision-making practices and those in need of being assessed in a specific, vertical manner.

At the outset, two main external factors have encouraged and essentially, shaped the progressive-and often revolutionary- jurisprudence of the Court: first, the deep-rooted impugnity for the brutal human rights violations and the overall political landscape of domestic resistance to the Court's decisions. The Court, thus, developed its *pro homine* principle, prioritizing the most favourable interpretation for the victims using, in numerous instances, external legal sources varying from principles or concepts of general international law to regional soft law instruments. In stark contrast with its openness to other legal orders outside Latin America, the Inter-American Court was found in the middle of a storm of criticism pertaining to its reluctance to engage in a fruitful dialogue with domestic judiciaries in the region. Naturally, the long totalitarian past of most of the State Parties discouraged the San José Court to afford significant *marge de manouevre* to national jurisdictions to make the right assessment in human rights disputes. In addition, the newly institutionalized *conventionality control* which orders national judges to review *ex officio* the compatibility of domestic provisions with the Convention reaffirms the reserved standing of the Court on the matter.

It also goes without saying that the judicialization of politics[1604] in Latin America is one of the specificities of the region. Thus, the unimpeded function of the Court was rendered a difficult task of utmost importance in order to provide the credentials of a more harmonious process of democratization in domestic settings. However, diversity in the legal treatment of human rights in some of the nascent Latin-American democracies dictate a rather adjusted approach by the Inter-American Court. Indicatively, while Costa Rica and Mexico have made rather successfully the transition to democracy, the extended outreach of the armed forces in Venezuela or of the drug cartels in Colombia still pose a real risk to the executive.

[1604] See generally on this matter HIRSCHL R., The Jucialization of Politics in WHITTINGTON K., KELEMEN D. and CALDEIRA G.(eds.), *The Oxford Handbook of Law and Politics*, OUP 2008, pp.119-141; For the specific case of Latin America with emphasis on the *revisiting* of Constitutional value of human rights at the domestic level in connection with the judicial politics in this hemisphere see COUSO J., The transformation of constitutional discourse and the judicialization of politics in Latin America in COUSO J., HUNEEUS A., SIEDER R.(eds.), *Cultures of Legality : Judicialization and Political Activism in Contemporary Latin America*, CUP 2010, pp.141-160.

In a nutshell, in the new political environment, the Court may benefit from affording greater trust to -some at least- domestic tribunals to make the correct assessment in order to enhance their legitimacy and, by extension, the credibility of the IACtHR itself. Irrespective of the fact that the Court has its reasons to step cautiously into this field, a prudent incorporation of the *margin of appreciation* concept could incentivize States to enforce democratic deliberation and guarantee judicial independence in the aim of enjoying a wider margin of *manoeuvre*.[1605]By the same token, the reconceptualization of the conventionality control in the sense of an inter-judicial dialogue between equals, allowing to the Court to also count on domestic stakeholders for supporting a new era of human rights adjudication might be actually a *win-win* solution.

The Inter-American Court, as a relatively new international tribunal whose case law takes into serious consideration the unique features of the system, needs the support of Latin American states to foster the rule of law over time. Besides gross human rights violations still going on in Latin America, the IACtHR is increasingly verging into new legal territories, such as gender equality, asylum, or environmental protection; this shift also encourages the endorsement of more flexible standards in the case law of the Court drawing influence from the law-making trends of its sibling institution in Europe. Along this process, the Strasbourg Court remains the main source of inspiration since the IACtHR has never quit referring to the ECtHR in the context of both its consultive and contentious jurisdiction, albeit not always consistently. By and large, the ECHR architecture offered to the Latin American system not only the paradigm but also the necessary normative and jurisprudential tools to expand its own mandate accordingly.

In the same spirit, sporadic references were also made in this part of the research to the interaction between the European Court of Human Rights and the case law of the African Court, the breadth of which allow us to conclude that remarkable loans have been received by its European and Inter-American counterpart in terms of structure and content with emphasis mainly to the legal treatment of indigenous claims or the right to fair trial.

Utterly, sight could not be lost of the intangible inspiration that the Strasbourg Court offered to the UN subsystems, the treaty bodies scrutinizing the enforcement of their respected conventions. At the UN level, the principle analogy to the ECHR system can be drawn from the ICCPR and the body that monitors its observance in domestic settings, namely the HRC. Putting the latter mechanism into perspective, the attentive analysis of the Committee's views highlighted the blatant absence of explicit reference to the ECtHR's norms notwithstanding the routinely repeated invocation of its jurisprudence by the disputants, both the States and the authors. Motivated by its endeavour to forge the legitimacy of its non-binding judicial production *vis-à-vis* the Parties to the Covenant, the HRC opted for taking not the same but a path parallel to the one leading to Strasbourg. As a general rule, the Committee tends to systematically overturn the procedural obstacle that may impede it from pronouncing on the *same matter*, already being judged elsewhere when it comes to disputes already been presented before the ECtHR. Along the same line, when States seek, in substance, for a certain degree of discretion, the HRC appears to prefer the Inter-American stringent understanding of the concept rather than the integrated approach of the Strasbourg Court.

[1605] FOLLESDAL, supra note 845, p.371.

Delving into the specific legal fields being adjudicated by both fora in the final chapter, conflicting approaches of human rights questions related to religious freedom, women's reproductive rights, LGBTI rights and migration policies could have not been circumvented. Nevertheless, even within the overall context of the Committee's distinct interpretative *rationale*, also followed by the rest of the UN human rights treaty bodies, the Strasbourg Court's level of protection remains, in many occasions, the implicit point of departure. The tacit endorsement of Strasbourg norms that the HRC has so far exercised hinders the development of an extended ambit of several human rights provisions influencing, therefore, their consistent observance across the Atlantic and the legitimization of their universal interpretation.

To conclude, the non-existence of a formal link between the ECHR and other regional or universal human rights instruments has increasingly armoured their informal dialogue. Notwithstanding the resistance still expressed by certain systems and the divergent interpretations that inevitably occur, the paradigm of ECHR norms proves that these are, nonetheless, greatly *exported* to other legal systems. These systems are, hence, encouraged to increasingly endorse normative developments from outside their legal backdrop. To do so, they may tacitly take into account external norms, use them as a justification of revisiting their own rules, or even restrict them. This court-to-court conversation does not necessarily undermine the strengths of their respective systems. Conversely, should we perceive judicial dialogue not as a form of mutual and unconscious transplant of every parallel approach but as a type of collaborative engagement in a fertile exchange of legal experiences, the overall impact on human rights adjudication would be significant. As it flows from the above analysis even competitive or isolationist tendencies, expressed by some of them, may partially yield to the general interest of a more effective observance of human rights, crucially, whenever these tendencies are lacking a compelling justification. One could infer that this premise also confirms the ever-evolving idiosyncracy of human rights instruments as *living instruments* which are constantly reinventing themselves to keep up with the multifaceted exigencies of human rights protection.

In a world marked by rapid changes, diversity in international human rights law discourse should not be feared as emasculating the ideal of universality of human rights. Instead, it goes *hand in hand* with the idea of complementarity of human rights systems which is increasingly gaining ground. Thus, the judicial dialogue will not seize to flourish within this mosaic of different human rights fora, in any shape or form, both antagonistic or sympathetic, explicit or implicit, consolidating the normative force of the ECHR worldwide and its luminous interpretation by the Strasbourg Court.

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