e-legal

Revue de droit et de criminologie
de l'Université libre de Bruxelles

When the European Court of Human Rights refers to External Instruments to interpret the European Convention

Par Dorothea Staes

e-legal, Volume n°1

Pour citer l'article :
Dorothea Staes, « When the European Court of Human Rights refers to External Instruments to interpret the European Convention », *in e-legal, Revue de droit et de criminologie de l'ULB,* Volume n°1, janvier 2018.

Adresse de l'article :
http://e-legal.ulb.be/volume-n01/theses/when-the-european-court-of-human-rights-refers-to-external-instruments-to-interpret-the-european-convention

This article presents the outcome of Dorothea Staes' doctoral research, focusing on the European Court of Human Rights' use of external instruments to interpret and apply the European Convention on Human Rights. On the basis of an examination of 136 Grand Chamber cases, it both maps and evaluates the practice of external referencing. The results shed light on the quantitative and qualitative characteristics of external referencing, as exercised by the European Court of Human Rights. This addresses two important research gaps. Firstly, it comprehensively analyses the referencing practice based on an exhaustive case study (*all* the Grand Chamber cases between the Court's key-case of *Demir and Baykara v. Turkey* of 12 November 2008 and the end of 2015). Secondly, the work evaluates the phenomenon of external referencing both from a users' and a legality perspective. Doing so, it includes a (legal) framework to support (and to put boundaries to) the referencing practice, addressing some of the criticism that the Strasbourg Court has faced in legal doctrine.

My doctoral research roots in the inter-university project on "human rights integration" and focuses, more particularly, on the issue of normative integration in the context of the European Court of Human Rights.

When having a look at the architecture of this Court, situated in Strasbourg, you will see a well-structured and neat building. Metaphorically, this design sketches the Court's *internal* normative context, which is plain and straightforward: the Court interprets and applies the European Convention on Human Rights and its Protocols. When we focus on the *external* normative context, however, the image is more complex, rather comparable to a jungle.[1] In the global fragmented legal setting, multiple normative instruments circulate, such as international treaties, recommendations, opinions of legal experts, case law of various judicial bodies, and so on.[2] For decades already, the European Court of Human Rights makes use of this unstructured and pluralist context, i.e. by importing external instruments to support the interpretation and application of its principal legal source, being the European Convention on Human Rights. We call this phenomenon the Court's

“external referencing practice”.

Some aspects of the European Court on Human Rights’ referencing practice are controversial, criticized not only by States but also by legal doctrine. Several authors point at the lack of coherence and transparency of the method of referencing, which is not anchored in a clear legal basis. It is said that the practice is one of “cherry-picking”, whereby the Court selectively “picks and chooses” those external instruments that support a certain preferred outcome to a case, while ignoring others. Critical voices also echo loudly when the Court uses non-ratified legal « sources » or soft instruments as a means to push forward – to “evolve” – the interpretation of the European Convention on Human Rights. Such external references go against an international scholarship that teaches us how « the law » should be backed up by binding State consent.[3]

Admittedly, the European Court of Human Rights aimed at a better explanation of its referencing practice in the case of *Demir and Baykara v. Turkey*.[4] This judgment brought a right to collective bargaining between employers and employees under the scope of Article 11 of the European Convention on Human Rights, on the freedom of association. In 2006, a Chamber of the Court supported this evolutive interpretation by referring to two articles of the European Social Charter – an external instrument. This was controversial since Turkey had explicitly refused to ratify both of these provisions. In 2008, the Grand Chamber in *Demir and Baykara v. Turkey* upheld the outcome of the Chamber’s judgment. To demonstrate the international developments on the right to bargaining collectively, the Grand Chamber referred to additional external instruments such as the European Union Charter of Fundamental Rights and several Conventions of the International Labour Organization. The Grand Chamber also included in its judgment a separate heading, entitled: “Interpretation of the ECHR in the light of other international instruments”, in which it aimed to explain and illustrate its practice of importing external instruments. The Grand Chamber said in particular that the Court

> …in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.[5]

Regarding the ratification record of the relevant external instruments, the Court

added that

> [I]n this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[6]

The Grand Chamber case of *Demir and Baykara v. Turkey* represents the first and only occasion on which the European Court of Human Rights elaborates extensively on its technique of external referencing. Although a clarification of the methodology was more than welcome, the Grand Chamber, in *Demir and Baykara*, did not succeed in achieving that goal. When looking at this case in further detail, it appears that the Grand Chamber did not provide much more than a disjointed enumeration of interpretation principles and scattered illustrations of instruments that had been imported in earlier Strasbourg cases. In our estimation, the paragraphs on "Interpretation of the ECHR in the light of other international instruments" as they appear in *Demir and Baykara*, do not suffice in meeting the expectations of the reader who wants to gain a good insight into the referencing practice. Firstly, the legal basis of the referencing practice lacks precision. Secondly, the categorization of imported "international instruments" is confusing. Thirdly, the Grand Chamber does not address the specific challenges relating to the soft or non-binding character of the imported instruments.[7] Fourthly, there are mixed messages as to whether or not the references are obligatory. Finally, the Grand Chamber is not very systematic in defining the functions of the referencing practice.

Thus, the Strasbourg Court's elaboration on its referencing practice is incomplete, not precise and unconvincing. It does not offer a comprehensive understanding of the external referencing practice including its underlying method and neither does it reflect an adequate response to criticisms of cherry-picking and judicial activism. These shortcomings have inspired the central research questions of the doctoral thesis. The first goes as follows: What exactly are the characteristics of the Court's external references? The second question addresses whether and how the referencing practice can be embedded in a justifying framework.

An omnipresent, comprehensive and diverse referencing practice

To map the Strasbourg Court's references to external instruments, my doctoral research builds on a case study that exhaustively includes all the Grand Chamber cases issued between *Demir and Baykara* of 12 November 2008 and the end of 2015 – 136 cases in total. It covers all the references that appear in the judgments' "law" section, where the Court – after the section that elaborates on the "facts" – develops its legal argumentation.

Quantitatively, the Grand Chamber of the European Court of Human Rights refers to external instruments in about 70 percent of its cases. This happens on a constant basis, without visible peaks or troughs over the years. In all its specific forms and functions, the referencing practice thus occurs in a large majority of judgments. The following table shows the exact number and percentage of Grand Chamber cases that refer to external instruments.

	2009	2010	2011	2012	2013	2014	2015
Number of Grand Chamber cases referring to external instruments	13	13	12	17	10	12	15
Percentage of Grand Chamber cases referring to external instruments	72 %	68 %	80 %	65 %	77 %	63 %	65 %

Qualitatively, the thesis demonstrates that the Grand Chamber of the European Court of Human Rights has a comprehensive view on the external normative setting: it imports instruments of a very diverse nature. *Ratione materiae*, the Court references instruments that are situated both within the human rights domain (such as, for example, the United Nations Convention on the Rights of

Persons with Disabilities[8]) and outside the human rights domain (such as, for example, various instruments on international humanitarian law[9]). *Ratione personae*, the cited materials are often tailored to specific groups of persons such as the protection of prisoners[10], children[11], workers[12], etc. The Court imports instruments of a national[13], regional[14] and universal[15] scope, which are issued by different actors such as States[16], international organisations[17], independent expert groups[18], or non-governmental organisations[19]. Finally, the Grand Chamber finds an argumentative support in instruments of a varying legal status. It is striking how both binding[20] and non-binding[21] instruments influence the Court's interpretation of the European Convention on Human Rights. The approach of the European Court of Human Rights to its legal sources and interpretative tools is thus more open, more global and less state centric than a formal positivist stance would suggest.[22]

The examination of Strasbourg Grand Chamber cases further shows that the referencing practice is not unequivocal, but covers diverse functions. The practice is not necessarily coordinative: the Court sometimes dismisses the external instruments. This means that it cites them but, at the same time, ignores or contradicts their content.[23] The dismissive references, contrary to what you might expect, do usually not protect the interpretation of the European Convention on Human Rights from detrimental external influences. Rather, because of dismissing of external standards offering a higher protection, they prevent a progressive development of the European Convention.[24] Besides the references with a dismissive character, the normative importations generally fit a spirit of coordination and convergence. For instance, external instruments are used to define notions of the Convention, such as « torture »[25] or '(racial) discrimination'[26]. They are also helpful to stress and define notions that are not mentioned in the Convention, such as « genocide »[27], « child's best interest »[28], or »non-refoulement"[29]. In addition, external instruments serve to specify some « positive » requirements under the Convention, such as a State's positive obligation to combat stereotypes.[30] References also support the establishment of a European or international consensus or trend in human rights protection. A State not following such a trend, will generally receive less freedom of discretion from the European Court of Human Rights.[31] European or international developments (leading, for example, to the observation of a « trend », a « consensus » or an « evolution of society ») receive even more weight when they stimulate an evolutive interpretation of the European Convention on Human Rights. Based on external normative developments, the Court has acknowledged, for example, a principle of "retrospectiveness" of a more lenient criminal law[32], a right to object the military service for reasons of conscience[33], the right of legally incapacitated persons to direct access the courts to seek restoration of their capacity[34], and a prohibition of discrimination between male and female military personnel regarding rights to parental leave.[35] Finally, the external referencing practice may pursue a

“harmonious interpretation”, which mostly appears when a respondent State invokes external international obligations to justify its interference with human rights.[36]

The analysis of the characteristics of the Court’s referencing practice adds to pre-existing research since it goes beyond an examination of certain particular references. Instead, it offers data on the overall prevalence rate of the practice, on the full range of imported instruments, and on every single function that these instruments fulfill in the Court’s reasoning. As a result, the research examines the phenomenon of external referencing in a manner that exceeds its controversial aspects. In fact, it shows – and this is a key finding of the research – that the most controversial phenomenon of the Court explicitly expanding the interpretation of the Convention on the basis of non-binding instruments is extremely rare. Moreover, it demonstrates that explicit evolutive interpretations based on a mix of non-binding and binding external instruments, do no longer occur in the Grand Chamber’s most recent judgments.[37] The dynamic effects of the Court’s references are often more implicit or subtle, influencing very specific arguments and legal criteria.

Finally, the systematic character of the study has strengthened insights on the position of the external instruments in the process of interpretation. The work argues that they hold a position in between the “facts” and the “law” of the case. For that reason, it recommends the inclusion of a separate heading in the Court’s judgments – in between the “facts” and the “law” – entitled “relevant external instruments”. To our opinion, this section should mention all the instruments that, in a particular case, exercise a normative effect on the interpretation of the European Convention on Human Rights. This recommendation does not come out of the blue; it had been inspired by the Strasbourg case of *Ališić and Others v. Bosnia and Herzegovina and Others*, where the Court – to my knowledge for the first and only time – created an additional heading in between the “facts” and the “law” of the case, entitled “relevant international law and practice”.[38]

A justification for the referencing practice

As is well known, the methodology of the referencing practice lacks clarity and structure. Neither the case of *Demir and Baykara v. Turkey* nor the cases issued after this judgment offer a comprehensive justification for the varying functions that external instruments may have in a legal reasoning. How could we close this validity gap? The doctoral thesis, inspired by the outcome of the case study, creates a normative framework that justifies the referencing practice from a users' perspective and then seeks to improve its methodology from a legality perspective.

The users' perspective

The inter-university project on "human rights integration"[39], in which my research is embedded, has suggested the following research angle: the study of human rights law through the perspective of its users.[40] When reasoning from a users' perspective, the actors that practically engage with human rights are put in the center of attention.[41] These actors are called "human rights users", alluding to "any individual or composite entity who engages with (uses) human rights"[42] and thus to "those individuals and entities whose interest in human rights law is not of a scholarly nature, but of a utilitarian one: human rights law is something they need to, or want to work with".[43]

Introducing this perspective, the doctoral thesis develops arguments that justify the referencing practice by the needs and the lived experiences of the users of the law, including rights holders, judges and duty bearers (i.e. the States). The main arguments relate to the principles of the universality and the indivisibility of human rights.[44]

The Strasbourg Court, when importing instruments providing a higher or a more specific human rights protection standard (compared to the one that applies under the European Convention), usually adapts its own standard accordingly, or it narrows the States' freedom of discretion on that basis.[45] The references thus progressively serve the ideal of treating like cases alike, stimulating the development of a global *ius communis*.[46] This works to the advantage of the universality of human rights, as well as to the interests of human rights holders in receiving a consistent and fair administration of fundamental rights.[47] From a rights holders' perspective, it would be invalid not to expand the effects of external higher protection levels. According to Letsas, universality (and legality) require treating like cases alike and extending the benefit of the moral principles justifying human rights equally to all.[48] Laurence Burgorgue-Larsen holds in this context that

> Il est tantôt question d'assurer la cohérence de systèmes dont les principes de fonctionnement sont similaires: on >retrouve alors ici la logique de système,

> c’est l’idéal systémique; tantôt il s’agit in fine de faire prévaloir une vision >commune des droits de la personne humaine voire de leur degré de protection, c’est l’idéal humaniste.[49]

Besides stressing the universality of human rights, external referencing strengthens the principle of the indivisibility of human rights, namely when the European Court on Human Rights makes use of social and economic human rights for the interpretation of the Convention (which itself mainly includes civil and political rights). For example, in *Demir and Baykara v. Turkey*, the Court, with the help of the European Social Charter and some Conventions of the International Labour Organization, revised its case law by integrating a right to collective bargaining into the right to freedom of association protected by Article 11 of the European Convention on Human Rights.[50] Such an approach highlights the interdependence of (different generations of)[51] human rights and avoids a fragmented view on the experiences and identities of the rights holders.[52]

The external instruments also offer the users of human rights a valuable tool for adding strength to their arguments. Indeed (Third) parties and judges introduce external instruments to persuade their respective audiences, profiting from the “persuasive authority” of the cited references.[53]

The referencing practice has the potential to serve the users’ interests. Regrettably, this does not imply that the European Court of Human Rights always lives up to this potential. For example, while some of the Court’s references increase the protection standards under the Convention (to the benefit of certain human rights users), it also happens that the Court does not give any effect to the higher standards that it imports.[54] Moreover, the referencing practice is prone to some inertia in human rights protection. In some cases, indeed, the Court does not feel the urge to move forward in human rights protection because other (judicial) bodies or normative instruments are not moving forward either.[55] Such a spirit upholds the lowest common denominator in the protection of fundamental rights. Another risk *vis-à-vis* human rights protection exists when the external instruments point at other – possibly conflicting – States’ obligations or public interests, such as, for example, the need to criminalize environmental offences.[56] Such obligations or public interest do not necessarily stimulate the human rights protection, but might rather excuse a State’s interference with human rights.

The legality perspective

In order to keep the Court’s credibility high in the eyes of all the users of human

rights law, the Court should enhance its method of referencing. The use of a transparent legal framework could be of help. So far, however, the Court did not do sufficient efforts in creating such a justifying basis. To strengthen the legality of the references, the doctoral thesis develops a comprehensive interpretative framework that consists of three dimensions.

The *first dimension* mobilizes Article 53 of the European Convention on Human Rights.[57] This provision reflects a rule of interpretation functioning as a "human rights safeguard": it ensures a peaceful coexistence between the European Convention and higher external human rights standards. In a national context, Article 53 prevents a conflict of norms and requires the national authorities to give precedence to the highest applicable level of protection.[58] Article 53 of the Convention is not often addressed, nor by the Court's case law nor by legal doctrine.[59] What does this provision require from the Strasbourg judges? The doctoral thesis suggests that the message of Article 53 – in a context of the Strasbourg judges interpreting the European Convention – is twofold. In its procedural aspect, it allows the Court to sanction States that refer to standards of the European Convention in order to explain why they do not live up to their other – higher and applicable – human rights obligations. In its substantive aspect, Article 53 of the European Convention on Human Rights justifies the integration of higher levels of protection into the interpretation of the Convention.[60] There is one main condition: the higher standards have to be ratified and applicable in each and every Member State of the Council of Europe. Thus, soft law and non-ratified conventions do not reflect a "higher external human rights standard" in the sense of Article 53. Article 53 of the European Convention also hinders external instruments offering lower standards to instigate a downward spiral in the interpretation of the European Convention on Human Rights. Accordingly, the human rights' safeguard of Article 53 of the European Convention blocks a referencing practice that leads to a race-to-the-bottom in human rights protection.[61]

The *second dimension* makes use of Article 31 paragraph 3 © of the Vienna Convention on the Law of Treaties, which aims at a systemic integration through harmonious interpretation.[62] This provision mandates the Court to integrate external norms applicable between the parties. The doctoral thesis argues that this provision covers external *human rights* instruments too[63] under the condition they are ratified by all the Member States of the Council of Europe.[64] As such, it forces the Court to interpret the European Convention in the light of higher or more specific human rights standards that are enshrined in other instruments such as, for example, the United Nations International Covenant on Civil and Political Rights or the United Nations Convention on the Rights of the Child – which are ratified by all Member States of the Council of Europe.

The Court, surprisingly and regrettably, almost never uses Article 31 paragraph 3

© of the Vienna Convention on the Law of Treaties for this purpose. Instead, it limits the relevance of the provision to a systemic integration between human rights law and general international law (and thus not between provisions of the Convention and standards that appear in other human rights treaties). Usually, the Court cites Article 31 paragraph 3 © for a very specific purpose, namely to stress the importance of "harmonious interpretation" – and of not reading the European Convention "in a vacuum" – when rules of international law risks to conflict with obligations under the European Convention on Human Rights.[65] The legal doctrine that has criticized the Court for (mis)using Article 31 paragraph 3 © to import non-ratified treaties or soft law to push for dynamic interpretations, thus somewhat misses ground.[66] Our expansive study of Strasbourg cases shows that, generally, the Grand Chamber does not use Article 31 paragraph 3 © of the Vienna Convention on the Law of Treaties for that aim.[67]

The *third dimension* of the framework combines the general rules of treaty interpretation of the Vienna Convention, which cover the following elements: the *text* of the treaty, the importance (of some degree of) *State consent*, the *internal* and *external context* of the treaty, and the *object and purpose* of treaty.[68] A holistic reading of these rules may justify a referencing method that leads to an evolutive and-or an effective treaty interpretation.[69] At the same time, the holistic approach puts boundaries to the referencing practice. It *inter alia* requires the Court to pay due respect to the object and purpose of the Convention (which implies, *inter alia*, the prohibition of backward – "regressive" – interpretations[70]) as well as to the perspective of the States, as an aspect of consensual interpretation. In the specific area of human rights protection, some flexibility is nonetheless allowed. Human rights law is a *lex specialis* fuelled by values of human dignity capable of transcending the dictates of States.[71] For this reason, we are of the opinion that a dynamic human rights interpretation should not necessarily be backed up by a *full* State consent. This seems of high relevance in a context of adjudicating human rights, which are often broadly framed, have specific "aims and objects" and have evolved as a result of States voluntarily giving up some aspects of their sovereignty.[72] On the other hand, the interpretation of the European Convention – an international treaty with a subsidiary role[73] – must respect the rules of the Vienna Convention on the Law of Treaties. Therefore, some boundaries are necessary.

Such boundaries can be set by requiring evolutive interpretations to reflect "*opinio juris* under the Convention".[74] The concept of "*opinio juris* under the treaty" corresponds to a combined reading of the rules of the Vienna Convention, without losing sight of the specificity of human rights law. Under this interpretative framework, an evolutive interpretation can be based on an emerging or an ambiguous State consensus, which can be demonstrated by external (and internal[75]) 'hard' instruments. In addition, the incomplete – emerging or ambiguous – consensus has to be confirmed by an *opinio juris*. To proof an *opinio*

juris, a wide diversity of external instruments can be useful, including those of a judicial, soft and non-binding nature. Here, soft instruments pointing at some 'State practice' or 'State agreement' can be of particular relevance. Article 31 paragraphs 3 (a) and (b) of the Vienna Convention indeed require to take such instruments into account (without obliging to give them a binding effect).[76]

While the first and second dimension *mandate* a coordinative integration of law applicable in all the Member States, the third dimension *allows* references to a wide diversity of instruments as a persuasive support to a dynamic argument or position.

Summarized in a table, the proposed legal framework looks as follows:

	Article 53 of the European Convention on Human Rights (substantive aspect)	**Article 31 paragraph 3 © Vienna Convention on the Law of Treaties**	**Holistic reading of Articles 31–32 Vienna Convention on the Law of Treaties**
Underlying principle	Safeguarding human rights	Harmonious interpretation, systemic integration, anti-fragmentation	Mainly: evolutive and effective interpretation
Type of external provision	Human rights provisions applicable in all the Member States	All external provisions applicable in all the Member States	Binding, non-binding, and soft provisions
Force of the external context	A mandatory coordinative integration (binding force)	A mandatory coordinative integration (binding force)	Optional and persuasive integration, under the condition of an emerging or ambiguous consensus confirmed by *opinio juris* (no binding force)

We started this article by comparing the Court's external normative context to a jungle. The thesis shows how the Strasbourg judges are using the lianas of this jungle to connect with the other organisms, for instance with other treaties, with judgments of other Courts, or with recommendations issued by other organisations. This is a valuable practice. Organisms do not live in isolation, but

they are part of a wider ecosystem. There is also a “law of the jungle”, which the Court, however, does not take sufficiently into account. If the European Court of Human Rights would embed referencing practice in a more consistent and precise legal framework, its external importations would bring some structure to the jungle. This does not mean that the forest should suddenly be transformed into a neatly organized cornfield. The art is not to replace pluralism by unity. Some diversity in protection mechanisms is inevitable and useful. The art is to coordinate and to find a balance between tendencies of divergence and convergence in a manner that does justice to the interests of the users of human rights.

---

1. The notion of a ‘jungle’ is used in a similar context by Hespel S., Put J., and Rom M., “Navigate the Maze. The interrelation of International Legal Norms, with Illustrations from International Juvenile Justice Standards”, *in HR&ILD*, Vol. 6, 2012, pp. 329–351, p. 330. ↩

2. On the issue of ‘fragmentation’ in the international law doctrine, see among others: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Koskenniemi M., UN doc. A/CN.4/L.682 (13 April 2006); Martineau A.-C., *Le débat sur la fragmentation du droit international. Une analyse critique*, Brussels, Bruylant, 2016, 584 p.; Simma B., “Fragmentation in a Positive Light”, *in Mich. J. Int’l L.,* Vol. 25, 2003–04, pp. 849–863; Pauwelyn J., “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands”, *in Mich. J. Int’l L.*, Vol. 25, 2004, pp. 903–917; Abi-Saab G., “Fragmentation or Unification: Some Concluding Remarks”, *in N.Y.U. J. Int’l L. & Pol.*, Vol. 31, 1999, pp. 919–933; Hafner G., “Pros and Cons Ensuing from Fragmentation of International Law”, *in Mich. J. Int’l L.*, Vol. 25, 2004, pp. 849–863; Koskenniemi M. and Leino P., “Fragmentation of International Law? Postmodern Anxieties”, *in LJIL*, Vol. 25, 2002, pp. 903–917. ↩

3. For legal doctrine that includes criticism on the referencing practice of the European Court of Human Rights, see Tulkens Fr., Van Drooghenbroeck S. and Krenc F., “Le soft law et la Cour européenne des droits de l’homme: questions de légitimité et de méthode”, *in RTDH*, No. 91, 2012, pp. 434–489, pp. 455 *et seq.;* Allard J. and Garapon A., *Les juges dans la mondialisation*, Paris, Seuil, 2005, pp. 71 *et seq.*; Forowicz M., *The Reception of International Law in the European Court of Human Rights*, Oxford, Oxford University Press, 2010, p. 2; Istrefi K., “R.M.T. v. The UK: Expanding Article 11 of the ECHR Through Systemic Integration”, put online on 12 May 2014, visited on 7 June 2016 in (http://www.ejiltalk.org/r-m-t-v-the-uk-expanding-article-11-of-the-echr-through-systemic-integration/); McCrudden C., “Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights”, *in Oxford journal of legal studies*, Vol. 20, 2000, pp. 499–532, pp. 506–507; Pitea C., “Interpreting the ECHR in the Light of “Other” International Instruments: Systemic Integration or Fragmentation of Rules of Treaty Interpretation?”, *in* Boschiero N. et al. (eds), *International Courts and the Development of International Law*, The Hague, T.M.C. Asser Press, 2013, pp. 545–559, pp. 548–550; Barkhuysen T. and van Emmerik M.L., “Ongebonden binding: verwijzing naar soft law standaarden in uitspraken van het EHRM”, *in NJCM-Bulletin*, Vol. 35, 2010, pp. 827–835, p. 834; Senden H., *Interpretation of Fundamental Rights in a Multilevel Legal System: an Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Cambridge/Antwerp/Portland, Intersentia, 2011, pp. 224–226; Arato J., “Constitutional Transformation in the ECTHR: Strasbourg’s Expansive Recourse to External Rules of International Law”, *in Brook. J. Int’L L.*, Vol. 37, 2012, pp. 349–388; Van Drooghenbroeck S., “Les frontières du droit et le temps juridique: la Cour européenne des droits de l’homme repousse les limites. En marge de l’arrêt de Grande Chambre du 12 novembre 2008 rendu en l’affaire *Demir et Baykara c. Turquie*”, *in RTDH*, Vol. 79, 2009, pp. 811–850; Marguenaud J.-P. and Mouly J., “L’avènement d’une Cour européenne des droits sociaux (*à propos de CEDH, 12 novembre 2008, Demir et Baykara c. Turquie*)”, *in Editions Dalloz*, 2009, pp. 739 *et seq.*; Schlütter 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 Legitimacy*, Cambridge, Cambridge University Press, 2012, pp. 261–319, p. 302; Bailleux A., “Human Rights in Network”, *in E.J.H.R.-J.E.D.H.*, Vol. 3, 2014, pp. 293–325, pp. 298 *et seq.* ↩

4. ECtHR, *Demir and Baykara v. Turkey*, appl. no. 34503/97, 21 November 2006; ECtHR, *Demir and Baykara v. Turkey*, appl. no. 34503/97, Grand Chamber, 12 November 2008. ↩

5. ECtHR, *Demir and Baykara v. Turkey*, appl. no. 34503/97, Grand Chamber, 12 November 2008, para. 85. ↩

6. ECtHR, *Demir and Baykara v. Turkey*, appl. no. 34503/97, Grand Chamber, 12 November 2008, para. 86. ↩

7. Admittedly, the Grand Chamber suggests that non-binding instruments might be 'applicable' and that such instruments can equally be relevant in the search of a 'common ground' or a 'continuous evolution'. The Grand Chamber thus gives the message that the non-binding character of external instruments could be no hurdle to their importation. However, when and how could such non-binding instruments play a role in the interpretation process? Should such instruments be accompanied by binding instruments to arrive at the conclusion of a 'common ground' or an 'evolution'? Could non-binding instruments independently receive a status of 'applicable law'? Such specific questions had not been addressed by the Grand Chamber in *Demir and Baykara*. ↩

8. See ECtHR, *Stanev v. Bulgaria*, appl. no. 36760/06, Grand Chamber, 17 January 2012, para. 244; ECtHR, *Bouyid v. Belgium*, appl. no. 23380/09, Grand Chamber, 28 September 2015, para. 89. ↩

9. See, for example, ECtHR, *Varnava and Others v. Turkey*, appl. nos. 16064/90, 16065/90, *et seq.*, Grand Chamber, 18 September 2009, para. 185; ECtHR, *Hassan v. the United Kingdom*, appl. no. 29750/09, Grand Chamber, 16 September 2014, paras. 101 *et seq.*; ECtHR, *Marguš v. Croatia,* appl. no. 445/10, Grand Chamber, 27 May 2014, para. 132. ↩

10. With references, for example, to the Council of Europe Committee of Ministers' Recommendation (2006)2 on the European Prison Rules, adopted in 2006 (*inter alia* in ECtHR, *Salduz v. Turkey*, appl. no. 36391/02, Grand Chamber, 27 November 2008, para. 53; ECtHR, *Stummer v. Austria*, appl. no. 37452/02, Grand Chamber, 7 July 2011, paras. 107 and 130–132; ECtHR, *Khoroshenko v. Russia*, appl. no. 41418/04, Grand Chamber, 30 June 2015, paras. 134 and 145); the Council of Europe Committee of Ministers' Recommendation R(82)16 on Prison Leave of 1982 (in ECtHR, *Boulois v. Luxembourg*, appl. no. 37575/04, Grand Chamber, 3 April 2012, para. 103); UN Standard Minimum Rules for the Treatment of Prisoners of 1957 (*inter alia* in ECtHR, *Svinarenko and Slyadnev v. Russia*, appl. nos. 32541/08 and 43441/08, Grand Chamber, 17 July 2014, para. 132; ECtHR, *Khoroshenko v. Russia*, appl. no. 41418/04, Grand Chamber, 30 June 2015, para. 143). ↩

11. With references, for example, to the United Nations Convention on the Rights of the Child (*inter alia* in ECtHR*, Salduz v. Turkey*, appl. no. 36391/02, Grand Chamber, 27 November 2008, para. 60; ECtHR, *Neulinger and Shuruk v. Switzerland*, appl. no. 41615/07, Grand Chamber, 6 July 2010, para. 132; ECtHR, *Tarakhel v. Switzerland*, appl. no. 29217/12, Grand Chamber, 4 November 2014, para. 99); the Parliamentary Assembly of the Council of Europe's Recommendation 561 on the Protection of Minors against ill-treatment (ECtHR*, O'Keeffe v. Ireland*, appl. no. 35810/09, Grand Chamber, 28 January 2014, para. 147); Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 (ECtHR*, Bouyid v. Belgium*, appl. no. 23380/09, Grand Chamber, 28 September 2015, para. 109). ↩

12. With references, for example, to various Conventions of the International Labour Organization and, more particularly, to Convention No. 87 on Freedom of Association and Protection of the Right to Organize (in ECtHR*, Sindicatul "Păstorul cel Bun" v. Romania*, appl. no. 2330/09, Grand Chamber, 9 July 2013, para. 142), Convention No. 98 concerning the Right to Organize and to Bargain Collectively (in ECtHR, *Demir and Baykara v. Turkey*, appl. no. 34503/97, Grand Chamber, 12 November 2008, paras. 100, 102 and 123–125). ↩

13. With references, for example, to case law of the Supreme Court of South Africa (in ECtHR, *Gäfgen v. Germany*, appl. no. 22978/05, Grand Chamber, 1 June 2010, para. 174; ECtHR, Al-Kwahaja and Tahery v. the United Kingdom, appl. nos. 26766/05 and 22228/06, *Grand Chamber, 15 December 2011, para. 136; ECtHR,* Scoppola v. Italy (No. 3), *appl. no. 126/05*, *Grand Chamber*,* 22 May 2012, para. 95). ↩

14. With references, for example, to instruments of the European Union (*inter alia* in ECtHR, *Sergey Zolotukhin v. Russia*, appl. no. 14939/03, Grand Chamber, 10 February 2009, para. 79; ECtHR, *Scoppola v. Italy (No. 2)*, appl. no. 10249/03, Grand Chamber, 17 September 2009, para. 105; ECtHR, *Bayatyan v. Armenia*, appl. no. 23459/03, Grand Chamber, 7 July 2011, para. 107). ↩

15. See, for example, the references to the United Nations Convention against Torture (*inter alia* in ECtHR, *Gäfgen v. Germany*, appl. no. 22978/05, Grand Chamber, 1 June 2010, paras. 90 and 108; ECtHR, *Marguš v. Croatia,* appl. no. 445/10, Grand Chamber, 27 May 2014, para. 132). ↩

16. Including references, for example, to multilateral treaties, such as the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (*inter alia* in ECtHR, *Neulinger and Shuruk v. Switzerland*, appl. no. 41615/07, Grand Chamber, 6 July 2010, para. 99). ↩

17. Including references, for example, to various instruments of the United Nations, such as the Convention against Torture. For examples of references to this external instrument, see *supra*. ↩

18. Including references, for example, to instruments of the Venice Commission (i.e. the European Commission for Democracy through Law), including its Code of Good Practice in Electoral Matters of 2003 (in ECtHR, *Tănase v. Moldova*, appl. no. 7/08, Grand Chamber, 27 April 2010, para. 168; ECtHR (GC), *Scoppola v. Italy (No. 3),* appl. no. 126/05, Grand Chamber, 22 May 2012, para. 95). ↩

19. Such as a reference to the Amnesty International Fair Trials Manual (in ECtHR, *Svinarenko and Slyadnev v. Russia*, appl. nos. 32541/08 and 43441/08, Grand Chamber, 17 July 2014, para. 132). ↩

20. See, for example, the references to the United Nations Convention on the Rights of the Child, which is ratified by all Council of Europe Member States. For examples of references to this external instrument, see *supra*. ↩

21. For example, the Court refers to instruments of the European Union in cases where the respondent State is not a member of the European Union (see *inter alia* in ECtHR, *Sergey Zolotukhin v. Russia*, appl. no. 14939/03, Grand Chamber, 10 February 2009, para. 79; ECtHR, *Demir and Baykara v. Turkey*, appl. no. 34503/97, Grand Chamber, 12 November 2008, paras. 105 and 150; ECtHR, *Bayatyan v. Armenia*, appl. no. 23459/03, Grand Chamber, 7 July 2011, para. 107). ↩

22. Traditionalist positivist views insist on the presence of a formal binding State consent as a basis for (the interpretation of) States' obligations. See Hart H.L.A., "Positivism and the Separation of Law and Morals", *in Harv. L. Rev.*, Vol. 71, 1955, pp. 593–629; Hart H.L.A., *The Concept of Law*, Oxford, Clarendon Law Series, 1961; Kelsen H., *Théorie pure du droit*, transl. Ch. Eisenmann, Brussels/Paris, Bruylant L.G.D.J, 1999 (originally from 1953). ↩

23. See, for example, ECtHR, *Stummer v. Austria*, appl. no. 37452/02, Grand Chamber, 7 July 2011, paras. 104–110 and 128–132 (in which the Court ignores the message of the 2006 European Prison Rules), or ECtHR, *Sabri Güneş v. Turkey,* appl. no. 27396/06, Grand Chamber, 29 June 2012, para. 21; ECtHR, *Perinçek v. Switzerland*, appl. no. 27510/08, Grand Chamber, 15 October 2015, para. 267, and ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece*, appl. no. 42202/07, Grand Chamber, 15 March 2012, paras. 72–73 (in which cases the Court refuses to give effect to certain instruments because of their lack of ratification or because of their 'soft' character). ↩

24. This appeared, for example, in *A. and Others v. the United Kingdom*, in which the Court did not follow some cited external standards offering a higher human rights protection (see ECtHR, *A. and Others v. the United Kingdom*, appl. no. 3455/05, Grand Chamber, 19 February 2009, paras. 132 and 178). Similar observations apply in relation to the cases of *SAS v. France* and *Stummer v. Austria* (ECtHR, *SAS v. France*, appl. no. 43835/11, 1 July 2014, Grand Chamber, paras. 147–151, and *Stummer v. Austria*, appl. no. 37452/02, Grand Chamber, 7 July 2011, paras. 104–110 and 128–132). ↩

25. See ECtHR, *Gäfgen v. Germany*, appl. no. 22978/05, Grand Chamber, 1 June 2010, para. 90, with reference to the United Nations Convention Against Torture. ↩

26. See ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, appl. nos. 27996/06 and 34836/06, Grand Chamber, 22 December 2009, para. 43, with reference to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination and to a policy recommendation of the European Commission against Racism and Intolerance. ↩

27. See ECtHR, *Perinçek v. Switzerland*, appl. no. 27510/08, Grand Chamber, 15 October 2015, paras. 52–54. ↩

28. See ECtHR, *Neulinger and Shuruk v. Switzerland*, appl. no. 41615/07, Grand Chamber, 6 July 2010, paras. 134–138. ↩

29. See ECtHR, *Hirsi Jamaa and Others v. Italy*, appl. no. 27765/09, Grand Chamber, 23 February 2012, paras. 134–135. ↩

30. ECtHR, *Aksu v. Turkey*, appl. nos. 4149/04 and 41029/04, Grand Chamber, 15 March 2012, paras. 75 and 85, including references to instruments of the European Commission against Racism and Intolerance. ↩

31. See, for example, the case of *S. and Marper v. the United Kingdom*, where the Court, with the help of external instruments, establishes a strong consensus regarding the need for carefully balancing the potential benefits of the extensive use of modern techniques in criminal justice systems against important private-life interests (protected by article 8 of the European Convention on Human Rights). Relying on this strong consensus, the Court acknowledged a narrowed margin of appreciation to be "…left to the respondent State in the assessment of the permissible limits of the interference with private life in this sphere", see ECtHR, *S. and Marper v. the United Kingdom*, appl. nos. 30562/04 and 30566/04, Grand Chamber, 4 December 2008, para. 112. ↩

32. ECtHR, *Scoppola v. Italy (No. 2)*, appl. no. 10249/03, Grand Chamber, 17 September 2009, paras. 103–106. ↩

33. ECtHR, *Bayatyan v. Armenia*, appl. no. 23459/03, Grand Chamber, 7 July 2011, paras. 105–107. ↩

34. ECtHR, *Stanev v. Bulgaria*, appl. no. 36760/06, Grand Chamber, 17 January 2012, paras. 244–245. ↩

35. ECtHR, *Konstantin Markin v. Russia*, appl. no. 30078/06, Grand Chamber, 22 March 2012, para. 140. ↩

36. See, for example, ECtHR, *Cudak v. Lithuania*, appl. no. 15869/02, 23 March 2010, paras. 50, 56–57, 64–67; ECtHR, *Nada v. Switzerland*, appl. no. 10593/08, Grand Chamber, 12 September 2012, paras. 102–103, 169–172, 195–197; ECtHR, *Hassan v. the United Kingdom*, appl. no. 29750/09, Grand Chamber, 16 September 2014, paras. 87–90, 99–111. ↩

37. From the Grand Chamber cases between 2009 and the end of 2015, the judgment of *Konstantin Markin v. Russia* issued on 22 March 2012, is the final case in which this phenomenon occurs. As a reminder I have not examined the Court's cases from 2016, 2017 or 2018. ↩

38. ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"*, appl. no. 60642/08, Grand Chamber, 16 July 2014, paras. 59 *et seq*. ↩

39. See http://hrintegration.be/. ↩

40. Desmet E., "Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and Research Agenda", *in HR&ILD*, Vol. 2, 2014, pp. 121–141, p.125. For reflections on external referencing and the application of a users' perspective, see Staes D., "The Use of Documents Other than the European Convention on Human Rights and Its Protocols in Cases Before the European Court of Human Rights: Reflections from and upon a Users' Perspective", *in HR&ILD*, Vol. 2, 2014, pp. 186–215. ↩

41. Such a perspective might be called 'internal' since it addresses those people who actually engage in legal argumentations. See Barzun C.L., "Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship", *in Public Law and Legal Theory Research Paper Series 2014–16*, University of Virginia School of Law, October 2014, pp. 35 and 68, visited on 7 June 2016 in (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507260), referencing the work of Dworkin. ↩

42. See Desmet E., "Analysing Users' Trajectories in Human Rights: A Conceptual Exploration and Research Agenda", *in HR&ILD*, Vol. 2, 2014, pp. 121–141, p. 125. ↩

43. Brems E., "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *in E.J.H.R.–E.J.H.R.*, Vol. 4, 2014, pp. 447–470, p. 451. ↩

44. See also Brems E., "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *in E.J.H.R.–E.J.H.R.*, Vol. 4, 2014, pp. 447–470. ↩

45. There exist some counterexamples. See, for example, *A. and Others v. the United Kingdom*, where the Court did not follow some external standards offering a higher human rights standard (see ECtHR, *A. and Others v. the United Kingdom*, appl. no. 3455/05, Grand Chamber, 19 February 2009, paras. 132 and 178). ↩

46. Jeremy Waldron speaks of a *ius gentium* reflecting "a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems". Waldron J., *Partly Laws Common to All Mankind. Foreign Law in American Courts*, Yale, Yale University Press, 2012, pp. 133–134. See also Van den Eynde L., "Interpreting Rights Collectively. Comparative Arguments in Public Interest Litigants' Briefs on Fundamental Rights Issues", doctoral thesis defended in November 2015 at the Université libre de Bruxelles, p. 474. ↩

47. There is a legitimate concern of the rights holders "about inconsistencies and disparities in the administration of fundamental rights and to complain of unfairness of like cases not treated alike in the world". Waldron J., *Partly Laws Common to All Mankind. Foreign Law in American Courts*, Yale, Yale University Press, 2012, p. 133. ↩

48. Letsas G., *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2007, pp. 5 and 8. ↩

49. Burgorgue-Larsen L. « De l'internationalisation du dialogue des juges – Missive doctrinale à l'attention de Bruno Genevois », *in Le dialogue des juges – Mélanges en l'honneur de Bruno Genevois*, Paris, Dalloz, 2009, p.121 ↩

50. ECtHR, *Demir and Baykara*, appl. no. 34503/97, Grand Chamber, 12 November 2008, paras. 147–150. ↩

51. The categorization of rights in generations is in itself controversial since it alludes to economic, social and cultural rights having a "secondary" status. See Alemahu Yeshanew S., *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System. Theory, Practice and Prospect*, Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 300–301. ↩

52. Principles of indivisibility, interdependence and interrelatedness of human rights call for a unified understanding of rights, instead of putting them in rather artificial categories. Alemahu Yeshanew S., *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System. Theory, Practice and Prospect*, Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 300–303. See also Brems E., "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *in E.J.H.R.–E.J.H.R.,* Vol. 4, 2014, pp. 447–470, pp. 452 *et seq.* and pp. 466 *et seq*. Arguments for the interdependence of human rights often rely on the 1993 Vienna Declaration stressing that "all human rights are universal, indivisible, interdependent, and interrelated", see *The Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN doc A/CONF. 157/24 (1993), 32 ILM 1661, part 1, para. 5, visited on 21 September 2016 in (http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx). The Strasbourg Court already in its early cases acknowledged the possibility of integrating other "generations" of human rights. See, for instance: ECtHR, *Airey v. Ireland*, appl. no. 6289/73, 9 October 1979, para. 26. ↩

53. Schauer F., "Authority and Authorities", *in Virginia Law Review*, Vol. 94, 2008, pp. 1931–1961, p. 1952. See also Frydman B., "Le dialogue international des juges et de la perspective idéale d'une justice universelle", in *Le dialogue des juges. Les cahiers de l'Institut d'Etudes sur la Justice*, Brussels, Bruylant, 2007, pp. 147–168. ↩

54. See, for example, the case of *National Union of Railway, Maritime and Transport Workers v. the United Kingdom* (ECtHR, *R.M.T. v. the United Kingdom*, appl. no. 31045/10, 8 April 2014, paras. 76–78), in which the Court – unlike its arguments in *Demir and Baykara v. Turkey* – limited the weight of the external instruments when examining the proportionality of the State's interference with human rights. In the *R.M.T.*-case, the Court with the help of external references recognized a right to secondary strike under the Convention. Nevertheless, *in concreto*, the Court did not give effect to this abstract recognition; it did not consider the national measures prohibiting a secondary strike as a disproportionate action under the Convention. On this case, see Van Drooghenbroeck S., Krenc F. and Van der Noot O., "Questions of Method: the Use of "External Sources" in National Union of Rail, Maritime and Transport Workers v. the United Kingdom", *in* Brems E. and Desmet E. (eds), *Integrated Human Rights in Practice. Rewriting human rights decisions*, Cheltenham, Edward Elgar Publishing, 2017, pp. 31–71. ↩

55. For instance, in *Sitaropoulos and Giakoumopoulos* (ECtHR, *Sitaropoulos and Giakoumopoulos v. Greece*, appl. no. 42202/07, Grand Chamber, 15 March 2012, para. 71) the Court did not consider the absence of a national procedure to enable Greek national residents overseas to vote in parliamentary elections as a violation of the Convention. When examining international and comparative law, the Court noted a lack of evolution in the external normative context.. The content of other human rights catalogues, not pointing at a certain evolution, thus refrained the Court from progressively developing its view on the protection of voting rights for residents living overseas. ↩

56. For example, in *Mangouras v. Spain*, the Grand Chamber examined a high level of recognizance to secure release on bail under Article 5 of the ECHR (the right to liberty and security). The bail concerned a Master of a ship who faced criminal charges in an oil pollution case. In its judgment, the Court held that it "cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States' powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them (see "Relevant domestic and international law" above). A tendency can also be observed to use criminal law as a means of enforcing the environmental obligations imposed by European and international law" (ECtHR, *Mangouras v. Spain*, appl. no. 12050/04, Grand Chamber, 28 September 2010, para. 86). The Court attached relevance to normative developments (expressed by various external

instruments) in the area of environment law in order to point at the interest of preventing and (criminally) prosecuting pollution cases. The observation of this external approach seemed to have guided the Court towards a more flexible reading of the Article 5 ECHR. By acknowledging that the "…new realities have to be taken into account in the interpretation of the requirements of Article 5 paragraph 3" (para. 87), the Court allowed the State a considerable freedom in the measures taken to respond to the new demands of efficiently combating environmental offences. There was no violation of Article 5 ECHR. ↩

57. Article 53 European Convention on Human Rights: "Nothing in this Convention shall be construed as limiting or derogating from 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". Before the entry into force of Protocol 11 to the Convention (on 1 November 1998), Article 53 used to be Article 60 of the European Convention on Human Rights. The European Union Charter (Article 52, paragraph 3), the European Social Charter (Article 32), the United Nations Covenant on Economic, Social and Cultural Rights and the United Nations International Covenant on Civil and Political Rights (Article 5 paragraph 2 in both Conventions) contain analogous provisions. On the meaning of Article 53 of the European Convention in a context of human rights integration (interpreted more broadly compared to my arguments), see Brems E., "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *in E.J.H.R.–E.J.H.R.*, Vol. 4, 2014, pp. 447–470, p. 464. ↩

58. The European Convention on Human Rights offers minimum standards and only plays a subsidiary role. Rosoux G., *Vers une "dématerialisation" des droits fondamentaux? Convergence des droits fondamentaux dans une protection fragmentée, à la lumière du raisonnement du juge constitutionnel belge*, Brussels, Bruylant, 2015, pp. 516–521 and pp. 562–564. ↩

59. For some relevant contributions, see the previous footnote and Velu J. and Ergec R., *Convention européenne des droits de l'homme*, Brussels, Bruylant, 2014, p. 60; Bering Liisberg J., "Does the EU Charter on Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot", The Jean Monnet Center for International and Regional Economic Law & Justice, 2001, visited on 28 November 2015 in (http://jeanmonnetprogram.org/archive/papers/01/010401–04.html); Van den Heyning C., "No Place Like Home: Discretionary space for the domestic protection of fundamental rights", *in* Popelier P., Van den Heyning C., and Van Nuffel P. (eds), *Human Rights Protection in the European Legal Order: the Interaction between the European and the national courts*, Antwerp, Intersentia, 2011, pp. 65–96; Decaux E., "Article 60", *in* Pettiti L.E., Decaux E. and Imbert P.H. (eds), *La Convention européenne des droits de l'homme – Commentaire article par article*, Paris, Economica, 1995, pp. 897–803. ↩

60. See also Cariat N., "Article 53 – Niveau de protection", *in* Picod F. and Van Drooghenbroeck S. (eds), *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article,* Brussels, Bruylant, 2017, pp. 1143–1160, p. 1146. Cariat discusses the meaning of Article 53 of the EU Charter, which had been inspired by Article 53 of the European Convention on Human Rights. He stresses that this provision requires a harmonious interpretation between the EU Charter and other "common" human rights norm – i.e. norms that are binding in all the Member States of the EU. ↩

61. This approach is coherent with arguments that developed in other contexts. Article 53 of the Charter of the European Union which is inspired by Article 53 of the European Convention on Human Rights, for example, is interpreted as including a standstill-principle (see Rosoux G., *Vers une "dématerialisation" des droits fondamentaux? Convergence des droits fondamentaux dans une protection fragmentée, à la lumière du raisonnement du juge constitutionnel belge*, Brussels, Bruylant, 2015, p. 557). Also the Inter-American human rights mechanism inspired my view. The Inter-American Court of Human Rights frequently uses other international (human rights) instruments to interpret and apply the American Convention on Human Rights. The latter instrument contains, in Article 29 (b), a human rights safeguard similar to Article 53 of the European Convention. Interestingly, and comparable to our argument, the ACtHR in an advisory opinion of 1985, used this safeguard to resist external referencing that would lead to a 'race-to-the-bottom'. The Inter-American Court of Human Rights noted that Article 29 (b) of the ACHR includes an obligation not to incorporate restrictions from other systems. It argued explicitly that external referencing could not reduce the limit of protection as offered by the American Convention on Human Rights. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, 13 November 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985), visited on 3 December 2015 in (https://www1.umn.edu/humanrts/iachr/b_11_4e.htm). ↩

62. For this argument, see also Brems E., "Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration", *in E.J.H.R.–E.J.H.R.*, Vol. 4, 2014, pp. 447–470, p. 454. Article 31 paragraph 3 ©, as a general rule of interpretation, provides that "[t]here shall be taken into account, together with the context: any relevant rules of international law applicable in relations between the parties". See, *inter alia*, Tzevelekos V.P., "The Use of Article 31 (3) © of the VCLT in the Case Law of the ECtHR: An effective Anti-fragmentation tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between evolution and systemic integration", *in Mich. J. Int'l L.*, Vol. 31, 2010, pp. 621–690, p. 631; McLachlan C., "The Principle of Systemic Integration and

Article 31 (3) c of the Vienna Convention", *in ICLQ*, Vol. 53, 2005, pp. 279–320; Merkouris P., *Article 31 (3) © VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Queen Mary Studies in International Law, Vol. 17, Martinus Nijhoff/Brill, Leiden, 2015, 350 p. ↩

63. This view accords with the most prevalent approach in legal doctrine, which says that Article 31 paragraph 3 © refers both to external rules touching on the same subject matter as the treaty under interpretation and to other rules that might affect the interpretation. See Arato J., "Constitutional Transformation in the ECTHR: Strasbourg's Expansive Recourse to External Rules of International Law", *in Brook. J. Int'L L.*, Vol. 37, 2012, pp. 349–388; pp. 373 *et seq.*; Tzevelekos V.P., "The Use of Article 31 (3) © of the VCLT in the Case Law of the ECtHR: An effective Anti-fragmentation tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between evolution and systemic integration", *in Mich. J. Int'l L.*, Vol. 31, 2010, pp. 621–690, pp. 624, 631 and 635; Vanneste F., *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia, 2009, p. 220; *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN doc. A/CN.4/L.702 (18 July 2006), p. 14; Corten O., *Méthodologie du droit international public*, Brussels, Editions de l'Université de Bruxelles, 2009, p. 229. ↩

64. This accords to a *maximalist* understanding, which says that account should be taken of external instruments under the condition that 'every party' to the treaty under interpretation is also a member to the imported instrument. A *minimalist* position is less demanding and requires taking account of instruments that bind the litigants to the case. On this distinction, see Van Drooghenbroeck S., "Les frontières du droit et le temps juridique: la Cour européenne des droits de l'homme repousse les limites. En marge de l'arrêt de Grande Chambre du 12 novembre 2008 rendu en l'affaire *Demir et Baykara c. Turquie*", *in RTDH*, Vol. 79, 2009, pp. 811–850, pp. 825–826. In a context of human rights adjudication, a maximalist view is most often put forward. See *inter alia* French D., "Treaty Interpretation and the Incorporation of Extraneous Legal Rules", *in ICLQ*, Vol. 55, 2006, pp. 281–314, p. 305; Corten O., *Méthodologie du droit international public*, Brussels, Editions de l'Université de Bruxelles, 2009, p. 229; Linderfalk U., "Who Are 'the Parties'? Article 31 § 3© of the 1969 Vienna Convention, and the 'Principle of Systemic Integration' Revisited", *in Netherlands International Law Review*, Vol. 55, 2008, pp. 343–364; Istrefi K., "R.M.T. v. The UK: Expanding Article 11 of the ECHR Through Systemic Integration", 12 May 2014, visited on 7 June 2016 in (http://www.ejiltalk.org/r-m-t-v-the-uk-expanding-article-11-of-the-echr-through-systemic-integration/); *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN doc. A/CN.4/L.682 (13 April 2006), paras. 470–472. ↩

65. See, for example, ECtHR, *Cudak v. Lithuania*, appl. no. 15869/02, 23 March 2010, para. 56; ECtHR, *Neulinger and Shuruk v. Switzerland*, appl. no. 41615/07, Grand Chamber, 6 July 2010, para. 131; ECtHR, *Nada v. Switzerland*, appl. no. 10593/08, Grand Chamber, 12 September 2012, para. 169; ECtHR, *Hassan v. the United Kingdom*, appl. no. 29750/09, Grand Chamber, 16 September 2014, para. 102. ↩

66. See, *inter alia*, Arato J., "Constitutional Transformation in the ECTHR: Strasbourg's Expansive Recourse to External Rules of International Law", *in Brook. J. Int'L L.*, Vol. 37, 2012, pp. 349–388; pp. 356–357 and p. 363; Van Drooghenbroeck S., "Les frontières du droit et le temps juridique: la Cour européenne des droits de l'homme repousse les limites. En marge de l'arrêt de Grande Chambre du 12 novembre 2008 rendu en l'affaire *Demir et Baykara c. Turquie*", *in RTDH*, Vol. 79, 2009, pp. 811–850, pp. 828–829. ↩

67. In my view, *Demir and Baykara v. Turkey* does not offer a precedent allowing to take account of Article 31 paragraph 3 © of the Vienna Convention in order to justify references to non-binding or soft instruments for evolutive purposes. Admittedly, this judgment stresses that the Court is permitted to make use of non-binding or soft external instruments, but it does not explicitly put this argument in the sphere of Article 31 paragraph 3 ©. ↩

68. Article 31 of the Vienna Convention on the Law of Treaties: "1. 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. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; © any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended." ↩

69. For an overview of the different schools of interpretation, see Corten O., *Méthodologie du droit international public*, Brussels, Editions de l'Université de Bruxelles, 2009, pp. 209 *et seq*. and Vanneste F., *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia, 2009, pp. 217–218 and pp. 221 *et seq*. A holistic approach combines different 'schools' or methods of interpretation such as textual interpretation, teleological interpretation, intentional (and consensual) interpretation, and systemic and contextual interpretation. ↩

70. Vanneste F., *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia, 2009, pp. 253–254 and p. 265. ↩

71. Helfer L. and Slaughter A.-M., "Towards a Theory of Effective Supranational Adjudication", *in Yale Law Journal*, Vol. 107, 1997, pp. 273–391, p. 287; Letsas G., *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2007, pp. 19 *et seq.* and pp. 57 *et seq*.; Benvenisti E., "Margin of Appreciation, Consensus and Universal Standards", *in New York University Journal of International Law and Politics*, Vol. 31, 1998–1999, pp. 843–854, p. 852. ↩

72. It is important to realise that the provisions of the European Convention are open-ended, setting objectives rather than precise rules and that when the Court has to clarify these standards or objectives, it almost naturally has a certain discretion. See Mahoney P., "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", *in H.R.L.J.*, Vol. 11, 1990, pp. 57–88, p. 61; de Blois M., "The Fundamental Freedom of the European Court of Human Rights", *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*, Leiden, Martinus Nijhoff Publishers, 1994, p. 51. ↩

73. Therefore, when 'hard' European and international regulations do not point in a certain direction – demonstrating an absence of an emerging consensus – a revision and/or evolution in the Court's reasoning could hardly be justified at that point of time. See Dzehtsiarou K., *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, Cambridge University Press, 2015, pp. 126–128. Dzetsiarou acknowledges that "[i]t seems fair to suggest that the Contracting Parties should have some input when the Court intends to add new rights. If the Court unilaterally decides for the States, it may negatively influence the legitimacy of the ECtHR". ↩

74. On "*opinio juris* under the treaty" and how it is constructed, see Vanneste F., *General International Law Before Human Rights Courts. Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia, 2009, pp. 262 *et seq*. ↩

75. For example, national legislation of the Member States. ↩

76. Recently, the UN Special Rapporteur Georg Nolte has finalized four reports of the International Law Commission on "subsequent agreement and subsequent practice in relation to the interpretation of treaties": *First report on subsequent agreements and subsequent practice in relation to treaty interpretation,* Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/660 (19 March 2013); *Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties,* Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/671 (26 March 2014); *Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties,* Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/683 (7 April 2015); *Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties,* Report of the International Law Commission by Special Rapporteur Georg Nolte, UN doc. A/CN.4/694 (7 March 2016). See also: *Subsequent agreements and subsequent practice in relation to the interpretation of treaties. Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading*, International Law Commission, UN doc. A/CN.4./L.874 (6 June 2016). ↩