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On the Path to Universalism? The Role of External Instruments in the European Court of Human Rights Jurisprudence

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Abstract

In the multi-layered system of international human rights law, the European Court of Human Rights (ECtHR) uses not only its own case-law but also external instruments (EIs) when interpreting the European Convention on Human Rights (ECHR). This article explores the horizontal judicial borrowing practice of the Court until 2020. The landscape includes a wide range of different sources, but with a clear preference for Council of Europe instruments and secondly United Nations sources. Bridging what EIs are cited with how they are used, a case-study is performed investigating the functions that the EIs serve under Article 3 ECHR. Although it is uncommon, explicitly relying on EIs suggests that the Court views it to be legitimate. Yet, it is not uncontroversial. The Court's motivations in citing EIs can be understood as justified from a universal human rights perspective, and susceptible to criticism from the perspective that it could undermine State sovereignty.

Keywords

human rights – international human rights – external instruments – non-binding instruments – judicial borrowing – the European Court of Human Rights – the European Convention on Human Rights

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1 Introduction

During a dinner with his girlfriend's parents on the evening of 30 March 1985, Mr. Soering murdered them in the belief that it was necessary for his relationship with his girlfriend to survive. The parents opposed their relationship and therefore the couple decided to kill them, in a *folie à deux*. After the murder, the two lovers fled from the United States to England where they later were arrested. The couple faced extradition to the United States where Mr. Soering, a German national and 18-year-old, risked the death penalty. In a last ditch effort to overturn the decision of being surrendered to the American authorities, Mr. Soering turned to the European Court of Human Rights (ECtHR) claiming that implementing the decision of extradition violated Article 3 of the European Convention of Human Rights (ECHR) since living on death row would constitute inhuman or degrading treatment or punishment.[1] This was a novel issue under the jurisprudence of the Court since the death penalty had not yet been dealt with under Article 3 ECHR generally nor specifically in relation to extradition. Moreover, capital punishment was not forbidden by the Convention at this time.[2]

When resolving the case, the ECtHR did not only relied on its own case law to interpret the ECHR but also cited Article 3 of the United Nations Convention Against Torture (UNCAT) stating that "no State Party shall … extradite a person where there are substantial grounds for believing that he would be in danger of being subject to torture".[3] The Court continued by declaring that although Article 3 ECHR entails no such provision, it is the nature, the Convention in general and the underlying ideals stated in the preamble that provide an "inherent obligation not to extradite" when the applicant faces a concrete risk of torture, inhuman or degrading treatment or punishment. This statement repeats the content of Article 3 UNCAT. The Court also referred to the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) to support the relevance of age as a factor determining if living on death row constituted inhuman or

1 ECtHR (Plenary) *Soering v. the United Kingdom*, 7 July 1989, para. 76.

2 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty entered into force in 1985 with then five ratifications. The United Kingdom ratified it in 1999, ten years after *Soering v. the United Kingdom*. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances entered into force in 2003.

3 *Soering*, *supra note 1*, para. 88.

degrading treatment. The ECtHR concluded that an extradition would amount to a breach of Article 3 ECHR.

In *Soering*, the Court relied on external instruments (EIs) when interpreting the Convention. It was however not the first time. In fact, one of the earliest ECtHR judgments includes a citation to the Council of Europe (CoE)'s Committee of Ministers (CM).[4] Beyond general observations that the Court cites EIs, the full extent of the practice is not systematically reviewed.[5] There exists a knowledge gap concerning the types of EIs cited,[6] and especially how these are used. This is important to research because the type of sources that the ECtHR uses to interpret the ECHR obviously have implications for the development and protection of individual human rights.[7] Although the EIs are non-binding for the Court, they may still be given great weight in the legal reasoning.[8] Moreover, the ECtHR's use of some EIs, and in certain ways, might be viewed as problematic by the Convention States.[9]

There is a risk of backlash if States bound by the jurisprudence regard the Court as exceeding its mandate, adding obligations through an evolutive interpretation based on EIs, and thereby undermining State sovereignty. Member States might have intentionally opted for not ratifying certain

4 ECtHR *Lawless* v. *Ireland* (*No. 3*), 1 July 1961.

5 "Despite the perceived importance of cross-fertilization, the practice itself has rarely received the in-depth attention it deserves, leaving a gap in the literature …". M. L. Christensen, 'The use of external judicial decisions by regional human rights courts', Thesis, *European University Institute* (2021), p. 5.

6 The most comprehensive study to date is E. Voeten, 'Why Cite External Legal Sources? Theory and Evidence from the European Court of Human Rights', in C. Giorgetti, and M. Pollack (eds.), *Beyond fragmentation: Cross-fertilization, cooperation and competition among international courts and tribunals* (Cambridge University Press, 2022), but he uses the judgments as unit of analysis including EIs rather than having the EIs individually as unit of analysis. This study uses the latter which serves the purpose of studying the use of EIs better because each judgment may include several citations.

7 *See* M. L. Christensen, *supra note* 5, p. 4: "The practice shows what they invoke in their reasoning and can be linked to broader developments in their jurisprudence and their institutional context. Thus, the practice becomes a focal point from which to see broader developments in international human rights law […]".

8 See D. Staes, 'When the European Court of Human Rights refers to External Instruments. Mapping and Justifications', Thesis. *Université Catholique de Louvain* (2017), p. 35–36: "Because of the importance the Court gives to external referencing and because of the large discretion it has in this respect, there is a need for a comprehensive analysis and a convincing motivation and justification of external referencing."

9 *Cf.* R. Hirschl, 'Opting Out of "Global Constitutionalism"', *The Law & Ethics of Human Rights* (2018), p. 13: "In other words, much like in the U.S. and elsewhere, foreign reference is more likely to support a universalist position, while a rejection of such sources is more likely to support a particularism position."

international conventions but may nevertheless involuntarily become indirectly bound by those commitments if the ECtHR interprets it as part of the ECHR. The type of function that the instrument serves therefore matter. One strain of this criticism states that "[s]oft law is not law, and should not be taken into account, not even as a contextual element of interpretation of the Convention and its protocols".[10] On the other hand, the Court acts in an international environment and deals with universal human rights, and it is therefore arguably appropriate that it considers EIs when interpreting the ECHR.[11] It could be argued that it is the universality of fundamental rights that validates the use of EIs when interpreting these provisions.[12]

Thus, there is a need to systematically examine the types of sources employed, their origin and legal status, but also how they are applied. This article aims to address those questions by drawing upon the ECtHR's own metadata, stored into a dataset by Stiansen and Voeten,[13] where information about EIs cited have been collected for all judgments until 2020, except its low importance case law.[14] In addition, a second dataset was compiled focusing on the question of how EIs are used connected to Article 3 ECHR, but limited to the high importance judgments.

Article 3 ECHR was selected as a case-study because it is expected to be a most-likely case to include EIs. The prohibition of torture is an absolute

10 *See* a strand of criticism identified by P. Pinto de Albuquerque, 'Is the ECHR facing an existential crisis?', *Speech delivered at the Mansfield College University of Oxford* (2017).

11 This line of argument is not derived from the case law of the Court but is instead formulated as an approach to give a justification for the practice of cross-fertilisation. The discretion of the ECtHR to use EIs "permet tout autant de dialoguer avec ses homologues, ou à tout le moins de s'inspirer des solutions interprétatives proposes par les autres organs de protection, et de choisir la voie de la convergence jurisprudentielle en vue de construire un *jus commune* des droits de l'homme á vocation universelle". L. Hennebel, H. Tigroudja, 'Traité de droit international des Droits de l'homme', *A. Pedone,* (2018), p. 627.

12 The universality of human rights has been challenged but worth highlighting is the fact that different civilisations from around the world have contributed to what we today call human rights. *See* O. Bring, 'De Mänskliga Rättigheternas Väg: Genom Historien och Litteraturen' *Atlantis* (2011), pp. 23–63, 645. See also D. Shelton, 'Introduction', in D. Shelton (ed.), *The Oxford Handbook of international Human Rights Law,* Oxford University Press (2013), p. 3: "[F]rom these sometimes ancient legal texts from around the world, the idea of universality of human rights emerges, challenging the idea of an exclusively Western origin for concepts of justice and rights."

13 I am very thankful to Ø. Stiansen and E. Voeten for making their data available to other researchers. Ø. Stiansen and E. Voeten, 'ECtHR judgments', https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/OBYUO5, Harvard Dataverse, V3 (2019).

14 Judgments classified as importance level 3 cases merely repeat existing case law. *See* ECtHR, *HUDOC User Manual* (2017), p. 36.

right which may provide for a stronger incentive for the ECtHR to look abroad and align with other human rights bodies.[15] Voeten highlights that "there is a relatively extensive set of international legal documents and ruling on topics related to torture and inhuman and degrading treatment. … Moreover, [A] rticle 3 cases tend to be controversial. Thus, the benefit of exerting effort to justify conclusions is larger."[16] Moreover, when counting all individual words in the metadata, the top words clearly direct us to Article 3 as the most likely provision to include EIs.[17]

In sum, the aim of this article is to map the EIs cited by the ECtHR. Moreover, it describes how EIs affect the ECtHR's interpretation of Article 3 ECHR. In doing so, this piece also analyses the findings through a lens of universal human rights as justification for citing EIs, together with criticism arguing that this undermines State sovereignty.

1.1 *Outline*

The article has the following structure. First, it situates the present article within the existing empirical research, which is then followed by the methodological aspects of the study (section 2). Next, the legal basis for using EIs is described (section 3). Then, the findings of the empirical studies mapping what EIs are cited and how they are used are presented (sections 4 and 5). Subsequently, the findings are analysed through the lenses of justification and criticism (section 6). The article then concludes (section 7).

1.2 *State of the Art*

There have been a few important empirical studies conducted investigating the ECtHR's use of EIs concentrating on different parts of the issue.[18] The

15 The prohibition of torture belongs to customary international law in the form of *jus cogens*. *See Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), ICJ Reports 422, 2012; ECtHR (GC) *Al-Adsani* v. *the United Kingdom*, 21 November 2001, para. 61

16 Voeten, *supra* note 6, p. 168.

17 The top 25 most frequent words after removing stop words in order: 'european', 'council', 'committee', 'convention', 'report', 'europe', 'international', 'united', 'ministers', 'recommendation', 'nations', 'resolution', 'cpt', 'torture', 'assembly', 'treatment', 'parliamentary', 'prevention', 'commission', 'states', 'protection', 'punishment', 'inhuman', 'degrading' and 'civil'. Empirical evidence by Voeten also points to that conclusion. Voeten, *supra* note 6, pp. 176–177.

18 *See generally*, E. Voeten, *supra* note 6; E. Voeten, 'Borrowing and Non-Borrowing among International Courts', *Journal of Legal Studies* (2010); D. Staes, *supra* note 8, investigating all Grand Chamber judgments between 2008 and 2015 in the search for how the ECtHR uses EIs; L. R. Glas, 'The European Court of Human Rights' Use of Standard-Setting Council of Europe Documents, *Human Rights Law Review* (2017), identifying the use of

questions of central interest are what types of instruments are cited, how they are used and why the Court relies on EIs. To date, there has been no fully comprehensive study mapping the whole population of ECtHR case law and identifying all types of EIs employed. Researchers' degree of freedom concerning sample size, methodological options to capture the EIs and coding choices all influence the results.[19]

The study using the most comprehensive dataset to date is Voeten relying on all judgments between 1998 and 2016 excluding importance level 3 cases.[20] The judgments including EIs are captured by the ECtHR's own case details where the registry has for each case entered information about EIs cited. Because of the imperfect nature of the metadata, he complements the dataset by searching the judgments for four international courts.[21]

Voeten's unit of analysis is the judgment level and whether it includes EIs or not. The research in large part focuses on developing and testing a theory regarding the important question of why the ECtHR cites EIs. His approach also allows for counting the number of judgments including EIs. Furthermore, he notes whether these are from the EU, UN or CoE. Voeten's research does not however investigate in-detail the types of instruments referenced, the total number of individual EIs, nor how these are relied upon by the Court.[22]

The present study takes stock of the types of EIs cited and how instruments are used by the Court until 2020. It therefore fills a gap in the literature by

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CoE instruments in the Courts jurisprudence by collecting data on judgments between 1 September 2012 and 31 August 2015, excluding low importance judgments; M. Forowicz, 'The Reception of International Law in the European Court of Human Rights', *Oxford University Press* (2010) analysing how the ECtHR uses EIs concerning six types of 'special regimes', the law of the treaties, and the ICJ, but excluding the CoE and EU. It is however unclear from the book how the selection of judgments was conducted and what the sample of cases looks like; M. L. Christensen, *supra* note 5, focusing on the citation practice of the three regional human rights courts; W. Sandholtz, 'Human rights courts and global constitutionalism: Coordination through judicial dialogue' *Global Constitutionalism* (2020), similarly to the former cover the citation practice between the regional human rights courts, but also to the Human Rights Committee.

19 "scientific knowledge emerges from the confluence of theory and empirical work across many studies …". H. Aguini, M. Cronin, 'It's the Theory, Stupid', *Organizational Psychology Review* (2022), p. 16.

20 Voeten, *supra* note 6.

21 Voeten, *supra* note 6, p. 172.

22 Voeten, *supra* note 6, pp. 179–180: "this chapter has merely analyzed the occurrence or nonoccurrence of references to international legal materials. This is a limited approach. Ideally, we would also like to understand in what context the court engages with other international courts and whether it does so approvingly or disapprovingly."

providing the most extensive mapping to date of the individual EIs employed, while also adding knowledge to the 'how' question.

2 Method

2.1 *Mapping the Citations*

The main challenge for all studies investigating judicial borrowing is the issue of how to capture the EIs. This article is limited to studying the explicit use – represented by citations, even if the ECtHR might very well rely on EIs without acknowledging it.[23] The next challenge is to collect the relevant judgments including EIs. One way would be to read all the judgments manually and code for the appearance of instruments, but this is not feasible with the very extensive case law of the Court. It is simply overly laboursome walking into the forest and counting all individual trees. A much more efficient approach would be the use regular expressions or HUDOC's search engine. The problem is however the vast amount of potential EIs that the ECtHR could have used. We risk missing the forest for the trees because "searching the full text of judgments works only if you know exactly what you are looking for".[24]

Instead, the dataset employed in this article utilizes the Courts own categorization of EIs in the case details, where it has registered the citations of these instruments when included in a judgment. This information exists for all the Court's judgments except the cases of low importance. These are defined as "[j]udgments, decisions, and advisory opinions of little legal interest, namely judgments and decisions that simply apply existing case law, friendly settlements and strike outs (unless raising a particular point of interest)".[25] This exclusion should not inflict bias because there are no indications that this group of judgments includes EIs when simply applying existing case law.[26]

More problematic however is the diligence of the reporting in the case details. It is under-inclusive[27] and the attentiveness of the registry at the Court

23 This could be researched by investigating separate opinions witnessing the implicit use, or by interviewing judges. Separate opinions have been analyzed for the case-study because they can provide important information on how the majority has used the EIs.

24 Voeten, *supra* note 6, p. 172.

25 ECtHR, *supra* note 14, p. 36.

26 *See* Voeten, *supra* note 6; Glas, *supra* note 18.

27 When comparing the large dataset with the data for the case-study, 29 per cent (12 out of 42) of the judgments are not accounted for and the rate of false negatives for the total amount of individual EIs is likely even higher. See also Voeten, *supra* note 6, p. 172.

entering the EIs vary.[28] Therefore, this study fails, like the other studies so far, to identify the full population of EIs employed by the Court, but instead includes the very rich information of all the EIs reported by the ECtHR in the case details.

I benefitted from the compiling done by Stiansen and Voeten creating a dataset of all judgments between 1960-2020.[29] The unit of observation was transformed from judgment-level to one separate row in the dataset for each EI. The EIs were then manually cleaned because of inclusions of false positives such as domestic law from the CoE Member States.[30] These rather fall under the domestic law variable as coded in the Court's case details. I removed national legislation from the CoE Member States but kept such legislation outside the CoE. A reference to a Member State not part of the proceeding might potentially be viewed as something external, but these were excluded because of inconsistencies in the case details whether it was included in the EI's variable or falling under domestic law. Dummy variables were also added for the presence of the CoE, European Union (EU), UN, Organization of American States (OAS) and African Union (AU) instruments. Still, the main addition was a new variable where I manually tidied the naming of the same EIs, but also aggregated and standardized EIs such as the CoE CM recommendations making it possible to meaningfully count them.

2.2 *Mapping How the EIs Are Used*

A second dataset was compiled for the case-study answering how the Court uses EIs under Article 3 ECHR, but with a different data collecting strategy. The higher importance case law[31] was searched on the ECtHR's own database

28 When manually reading the information in the case details to fix errors, I noticed for example in ECtHR *Eski v. Austria*, 25 January 2007 that the registry of the Court had made the mistake to confuse the Council of Europe with the European Council.

29 Stiansen, Voeten, *supra* note 13.

30 The key variable in the case details for this study is titled 'International Law and Other Relevant Material' and is distinct from the 'Domestic Law' column. I removed sources originally included in the EI variable such as national reports by the respondents' authorities, the preparatory work of the ECHR because that is deemed to be a source of Convention law, and reservations to the ECHR. All other CoE instruments such as Conventions or reports by committee bodies are coded as 'EIs'.

31 The higher importance level cases are 'Key cases' which are the judgments of the highest level of importance, and cases of 'importance level 1'. These are judgments "which makes a significant contribution to the development, clarification or modification of its case law …". ECtHR, *supra* note 14, p. 35. It is the Bureau at the ECtHR that decides which

HUDOC, for EIs from the OAS[32] and the UN system between 1960 to 6 November 2020.[33]

The judgments were then manually read and categorized based on what functions the EIs fulfilled, and regarding where in the judgments the references to EIs are located. Including these two variables, position and function, aims mainly at capturing the influence (when or in what way) that EIs have on the broader ECtHR jurisprudence under Article 3 ECHR.

A reference to an EI can appear in two different parts of the judgment. It can be found under the heading 'the facts' and more specifically the subheading 'Relevant International Law', which restates norms that are relevant but not necessarily relied upon by the Court. According to Judge Nußberger, the section "may be compared to the bibliography in a research work as it shows what materials have been used".[34] Moreover, it is a way for the ECtHR to acknowledge its awareness of the EIs existence.[35] Furthermore, the citation can also occur under the heading 'the law' which is where the merits of the judgment are located. EIs can thus have a decisive weight and be part of the *ratio decidendi*, especially when used to support an evolutive interpretation.[36]

The ECtHR can have several purposes for including EIs in its judgments. The different functions identified,[37] briefly described, are:

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judgments should be classified as 'Key cases'. The Bureau consists of the President of the Court, the Vice-Presidents of the Court and the Section Presidents.

32 The American Convention on Human Rights (ACHR), IACtHR, the Inter-American Commission on Human Rights (IAC), the Inter-American Convention for the Prevention and Punishment of Torture (IACPPT).

33 UNCAT, CAT, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles), International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women (CEDAW).

34 A. Nußberger, 'Hard Law or Soft Law – Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR', in A. Van Aaken, I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (Oxford University Press, 2018), p. 48.

35 *See* Glas, *supra* note 18, p. 102.

36 *See* Glas, *supra* note 18, p. 49.

37 The coding was mutually exclusive.

- *Soft Use*: The ECtHR acknowledges different EIs in 'the facts' section of the judgments and the EIs do not necessarily influence the Court, but rather functions as window dressing.[38]
- *Integrated Definition*: The ECtHR integrates a definition from EIs into its case law, such as the prohibition of torture.[39]
- *External Validation*: The ECtHR reaches a conclusion and then states that the same interpretation is shared with other international and regional human rights bodies.[40]
- *Context*: The EIs are used to highlight the specific context and circumstances of the case at hand, e.g., the risk of torture in a receiving country when an applicant faces extradition.[41]
- *Evolutive Interpretation*: The ECtHR includes EIs to support an evolutive interpretation, and thereby transferring legal solutions from EIs into the ECHR system, updating the content of the Convention.[42]

3 Legal Basis

The ECHR neither explicitly allows nor forbids the use of EIs when interpreting the Convention.[43] The ECtHR derives its basis for the use of EIs from the different interpretation doctrines connected to international human rights law and general treaty interpretation methods found in the Vienna Convention on the Law of Treaties (VCLT). The Court has given some guidance on this topic in the judgment of *Demir and Baykara* v. *Turkey*[44] and emphasised that the ECHR cannot be applied "in a vacuum". This statement has been repeated in

38 *See* Nußberger, *supra* note 35, p. 48. *See also* M. O'Boyle, 'A European Respect for the Opinions of Mankind?', in C. Buckley, A. Donald, P. Leach (eds.), *Towards Convergence in International Human Rights Law* (Brill, 2016) p. 569.

39 *See* Nußberger, *supra* note 34, p. 49.

40 *See* Nußberger, *supra* note 34, p. 49. *See also* Glas, *supra* note 18, p. 108.

41 *See* Forowicz, *supra* note 18, p. 362.

42 *See* Staes, *supra* note 8, p. 324.

43 *See* J. Allard, L. Van den Eynde, 'Le Dialogue des Jurisprudences Comme Source du Droit Arguments entre Idéalisation et Scepticisme', in I. Hachez, et al (eds.), *Les Sources du Droit revisitées* (Anthemis, 2013) p. 308.

44 "The Grand Chamber case of *Demir and Baykara* includes some methodological guidelines, but it still leaves many questions open. … Based on *Demir and Baykara*, it is, therefore, difficult to say what 'external referencing practice' precisely entails". Staes, *supra* note 8, pp. 34–35.

several cases among others *Tănase v. Moldova*, where the Court added that "it must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field".[45]

It is generally agreed that the most relevant rule for the use of EIs is Article 31.3 (c) VCLT.[46] It states that along with interpreting treaties in their context, the interpretation shall also include "any relevant rules of international law applicable in the relations between the parties". This obliges the ECtHR to interpret the Convention in accordance with international law.[47] This provision also directs the Court to harmonise its interpretation with general international law and search for other specific human rights instruments applicable to the parties.[48] The ECtHR interprets Article 31.3 (c) in a very broad manner, including using EIs on the softer end of the scale.[49] The ECtHR also highlights that it is not necessary for the respondent State to have ratified all EIs that are applicable in the issue before the Court when interpreting a provision of the ECHR.[50]

The Court emphasises that the Convention must be interpreted in a way which "renders its rights practical and effective, not theoretical and illusory".[51] This is called the 'effective interpretation'.[52] Convention articles contain ambiguous terms that need to be filled out to fulfil the effective application, and here EIs can serve a guiding role. Moreover, the Court views the Convention as a living instrument and "has taken account of evolving norms of national and international law in its interpretation of Convention provisions".[53] The

45 ECtHR (GC) *Tănase v. Moldova*, 27 April 2010, para. 176.

46 Forowicz, *supra* note 18, p. 13; Staes, *supra* note 8, p. 452.

47 Forowicz, *supra* note 18, p. 13.

48 Steering Committee for Human Rights, *CDDH Report on the Place of the European Convention on Human Rights in the European and International Legal Order, adopted by the CDDH at its 92*nd *meeting (26–29 November 2019)* (2019), p. 103.

49 J. Arato, 2012, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law', 37:2 *Brooklyn Journal of International Law* (2012), pp. 383–384.

50 ECtHR (GC) *Demir and Baykara* v. *Turkey*, 12 November 2008, para. 86.

51 *Demir and Baykara*, *supra* note 50, para. 66.

52 G. Ulfstein, 'Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties', 24:7 *The International Journal of Human Rights* (2020), p. 919.

53 *Demir and Baykara*, *supra* note 50, para. 68.

Convention entered into force in 1953 and together with the broad language of the articles, the Court has developed a doctrine of evolutional interpretation to keep the ECHR up to date.[54] The ECtHR therefore searches for guidance, not only within the Member States and an 'European Consensus', but also outside of Europe for an international consensus emerging from international human rights bodies. It is important to emphasize that the ECtHR differentiates between provisions of international law and soft law. The Court underlines that it *must* consider international law when interpreting the Convention to avoid imposing conflicting obligations to the parties. In contrast, the Court *may* take into account a consensus emerging from specialised international instruments.[55] In sum, "[i]t is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them".[56]

4 Results Part I

4.1 *A Modest Use?*

The previous section set out the legal framework for using EIS, emphasising that there is a wide discretion at hand for the Court to include EIS when interpreting the ECHR. The following part showcase the types of EIS referenced by the Court across all cases,[57] mapping the extent of the practice and identifying their origin and source of law.

54 C. Rozakis, 'The European Judge as Comparatist', 80:1 *Tulane Law Review* (2005), pp. 260–261.

55 *Demir and Baykara*, *supra* note 50, para. 85. *See also* Nußberger, *supra* note 34, p. 58. *Cf.* the Partly Dissenting Opinion of Judge Pinto de Albuquerque to the case of ECtHR (GC) *Muršić* v. *Croatia*, 20 October 2016: "[T]here is no water-tight, binary distinction between hard law and non-law, since European human rights law evolves by means of a rich panoply of sources that do not necessarily share the classical, formal features of hard international law."

56 *Tănase v. Moldova*, *supra* note 45, para. 176.

57 Not including importance level 3 case law.

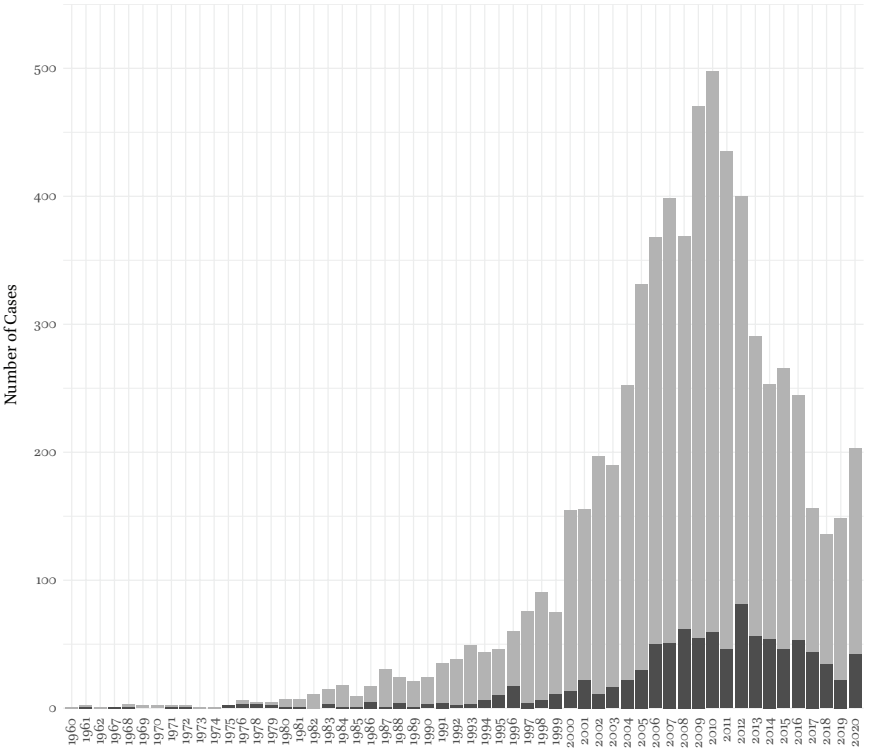

FIGURE 1 The proportion of judgments including EIs 1960-2020, except for importance level 3 cases. The unit of analysis here is the judgments including EIs in black and judgments without EIs in grey.

Overall, the ECtHR included EIs in 14.6 per cent (968 out of 6649)[58] of its case law,[59] under the higher importance levels, between 1960–2020, showcased in Figure 1. The portion of judgments containing EIs are modest at first glance, except for the years 1975–1979.[60] This confirms that the Court has consistently, and from the early days, included EIs in its judging. Apart from this conclusion, it is difficult to interpret the temporal dimension because of changes to how the Court operates.[61]

58 The frequency without cleaning the metadata is 17 per cent (1149 out of 6649).

59 This is captured relying on the classification done by the registry of the Court in the case details.

60 During that period, EIs were cited in 55 per cent (10 out of 18) of the judgments. The EIs concerns the CoE, UN, EU, Geneva Law and the Bonn-Paris conventions.

61 *See* Voeten, *supra* note 6.

The distribution of all judgments is right skewed. Excluding the tail, the distribution from the establishment in 1998 with the ECtHR as a permanent court and making individual applications available in all Contracting States,[62] but also with the addition of Member States resulted in a spike of incoming cases, which also was later partly tackled, looks somewhat normal.[63] The proportion of cases including EIs has however not increased but remains after the 1990s at a low level. There seem to be no general upward or downward trend but increases and decreases in the use of EIs over time. It might be however that the EIs are embedded in the Court's interpretation of the Convention, being invisible in judgments but that these rulings in turn refer to older ECtHR case law that originally cited EIs.

Therefore, one important nuance to remember when analysing the propensity is the type of judgments including EIs. The importance level seems to be, on average, positively correlated with inclusions of EIs, and the more complex the case, the higher the probability of the ECtHR citing these instruments.[64] Staes found 70 per cent of the Grand Chamber cases in her sample to reference EIs.[65] The impact of these sources might therefore be view as more prominent than at first glance, as a tool when the Court develops its case law.[66] The high importance judgments are then cited in other judgments, making EIs included indirectly reach a wider pool of cases.[67]

How does this compare? According to Judge Rozakis, the IACtHR is "the closest ally" to the ECtHR and makes for a suitable comparison.[68] Voeten finds that "the proportions are very low compared to the most comparable court in functional terms, the IACtHR, which cites international court rulings in virtually all of its judgments".[69] The literature shares this conclusion, but some goes even further and Killander has called the practice of the ECtHR as a "monologue".[70] However, it is also important to acknowledge the difference

62 *See* Protocol 11 ECHR.

63 *See* Protocol 14 ECHR.

64 Voeten, *supra* note 6, p. 177.

65 Staes, *supra* note 8, pp. 452–453.

66 'Key cases' and cases of 'importance level 1'. *Cf.* ECtHR (GC) *G.I.E.M. S.R.L. and Others v. Italy*, 28 July 2018, para. 252: "the Court would emphasise that its judgments all have the same legal value …". At the same time, the Grand Chamber often have more extensive analysis than the Chamber, and deal, according to Article 30 ECHR, with "serious questions affecting the interpretation of the Convention …". *See* also Article 43 ECHR.

67 *See* Glas, *supra* note 18, pp. 102–103.

68 Rozakis, *supra* note 54, p. 276.

69 Voeten, *supra* note 6, p. 173.

70 M. Killander, 'Interpreting Regional Human Rights Treaties', *International Journal on Human Rights* (2010), p. 154.

in number of judgements and experience when analysing the discrepancy in citing between the two courts.[71]

4.2 *The Convention Is Open to a Myriad of EIs*

The distribution of EIs cited looks similar to the distribution of judgments overall in Figure 1 with the influx of cases from 1998 onwards having more judgments that potentially could cite EIs. It seems like the Court always have had a clear preference for CoE instruments (1159 citations) and EIs from the UN (806 citations), but with an increase of sources from other organisations from 1994 and onwards, see Figure 2. The ECtHR also cite sources from the EU. What

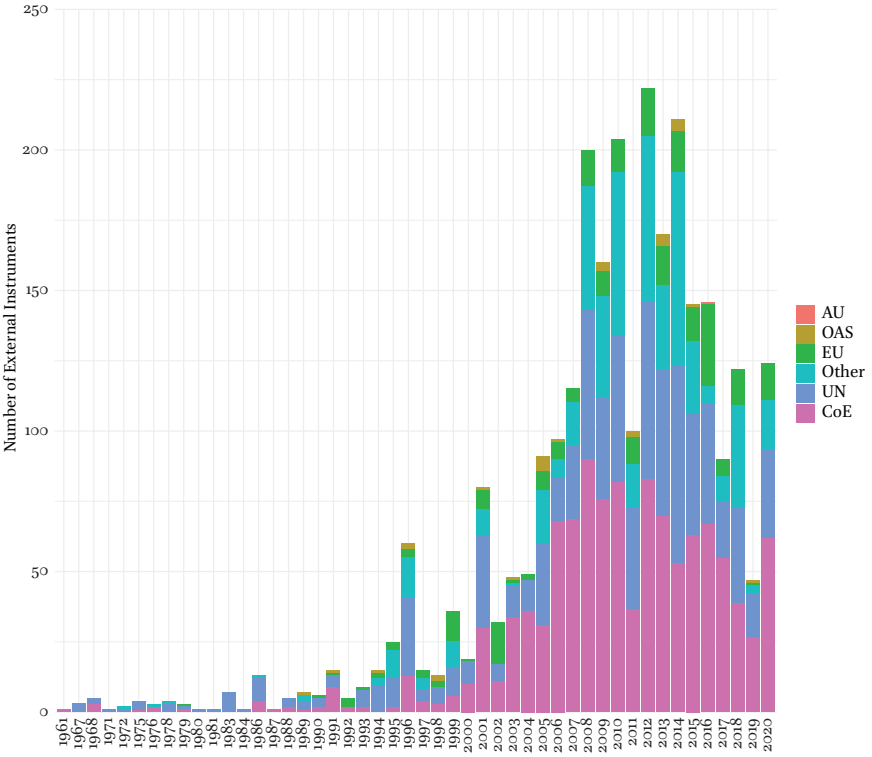

FIGURE 2 The origin of the EIs cited by the Court 1960-2020, except for importance level 3 cases. The unit of analysis here has shifted from figure 1 and now focuses on the number of EIs on the y-axis rather than number of cases including EIs.

71 Although facing problems of backlogs, the ECtHR has been effective and has delivered over 22,500 judgments. In contrast, the IACtHR decided around 400 cases. *See* ECtHR, *Overview* ECHR *1959–2019,* 2020; IACtHR, *Judgments,* 2020. Therefore, the ECtHR has fewer judgments to reference from the IACtHR.

is a bit surprising is the low number of citations to the "sister organization", the OAS. This might partly be explained by the imperfect nature of the dataset, because Voeten found that the reporting heavily missed citations to the Inter-American system.[72] Still, it is worth highlighting again that the IACtHR and the African Court of Human and Peoples' Rights have produced significantly less judgments than the ECtHR and there are therefore fewer cases to cite. The 'other' category is not particularly informative in the Figure because it encapsules a wide range of EIs. It is instead developed in Figure 3.

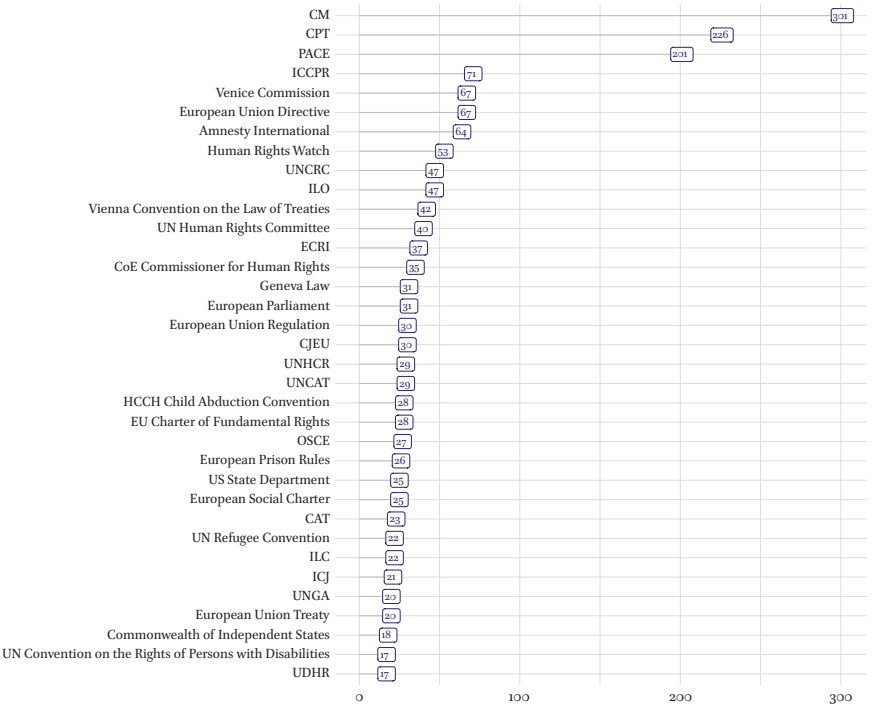

FIGURE 3 The top cited EIs

72 Voeten, *supra* note 6, p. 172: "For example, I found only eight judgments that referred to the Inter-American Convention, Commission, or Court in the case information sheets. Yet in the law section of judgments I found thirty-nine judgments that at least mentioned the Inter-American system (including the eight judgments picked up in case information)".

The list of the top 35 EIs referenced paints an interesting picture. It is the origin and nature (hard or soft law) that makes the cited external instruments interesting. The top three are all from the CoE with the CM, the European Committee for the Prevention of Torture and Inhuman or Degrading Treament or Punishment (CPT), and the Parliamentary Assembly of the Council of Europe (PACE) having significantly more citations than the rest. The group of EIs that the Court most often turn to is somewhat diverse, stemming from the CoE, the UN, the EU, but also includes NGOs, the Laws of War, the Hague Conference on Private International Law (HCCH), the Organization for Security and Co-operation in Europe (OSCE) and reports prepared by the US State Department largely connected to the war on terrorism. If we were to expand the list to all EIs having more than ten citations, it would also include, except for additional CoE, UN and EU sources, references to the International Criminal Court, the OAS and the International Committee of the Red Cross.[73] The number of individual EIs when collapsing them into similar groups such as CM are 438 (2441 unique observations in the original non-standardised variable). There is a great variarity of the legal status of these sources with international law mixed with soft law on the harder side of the scale, but also very soft law documents from different NGOs. For example, the conclusions of the CAT are non-binding in comparison to the hard jurisprudence of international courts having binding effects on the parties of the case.

The mapping of instruments favoured thus displays the reliance on CoE and UN instruments. This raises the question regarding the 'externality' of these EIs. For example, the ECtHR and the ECHR is part of the same institutional setting as the other CoE bodies and conventions. Therefore, "[i]t is unclear whether such instruments could actually be considered as 'international' in a literal reading of the term".[74]

Regarding the UN sources, they may be viewed as more external than the CoE instruments, but the connection to the ECHR system is still strong. The CoE took the "first steps for the collective enforcement of certain of the rights stated in the [Universal Declaration of Human Rights] UDHR",[75] but also certain UN conventions have roots at the European level. For example, the

73 The Laws of War are counted as Geneva law.

74 Staes, *supra* note 8, p. 32.

75 Preamble ECHR. *See also* C. Heyns, M. Killander, 'Universality and the Growth of Regional Systems', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), p. 675.

universally authoritative definition of the prohibition of torture is found in Article 1 UNCAT which can be traced back to *The Greek Case*.[76]

What is more is that the CoE Member States have ratified and are bound to several UN conventions such as the UNCAT, ICCPR and the ECHR, and there is a clear overlap with textual similarities between these. A closer look at these instruments therefore witnesses of a more complex picture and that the 'external' might not be that foreign after all.

5 Results Part II

The former section investigated the landscape of EIs referenced. It is possible to conclude that the statement in *Tănase* v. *Moldova*, where the Court held that, when interpreting the Convention, "it must take into account relevant international instruments and reports, and in particular those of other Council of Europe organs …",[77] seems to reflect the actual citation practice of the Court. The ECtHR is mainly highlighting CoE materials, but also sources from the UN.

This section of the article moves beyond the 'what' question and seek answers to 'how' the Court uses the EIs cited. Article 3 ECHR is employed as a case-study.

Overall, the ECtHR included EIs in 13 per cent (42 out of 320) of its Article 3 case law, under the higher importance levels, between 1960–6 November 2020.[78] Figure 4 provides an overview for how the Court utilise the diverse set of EIs.

It matters where the EIs are cited in the judgments. The law section consists of the legal reasoning. This suggests that the EIs were used by the judges when deciding the outcome of the case. When placed in 'the facts' section, it can be interpreted as a bibliography over all instruments reviewed or as a comparative outlook.[79] When found there, EIs functions as statements of awareness rather than implying that they had any effect on the merits. The most common position in the judgment was under 'the facts' section, in total 28 adding the judgments having the value of 'both ('the facts', and 'the law')'. Twenty-six judgments included EIs in 'the law' section including 'both'.

76 European Commission of Human Rights, *The Greek Case*, 24 January 1968. The text of Article 3 ECHR is in turn largely derived from Article 5 of the Universal Declaration of Human Rights. *See* Forowicz, *supra* note 18, pp. 190-231.

77 *Tănase v. Moldova*, *supra* note 45, para. 176.

78 This frequency should be interpreted with caution because of the limited number of EIs included in the collection of judgments.

79 Nußberger, *supra* note 34, p. 48.

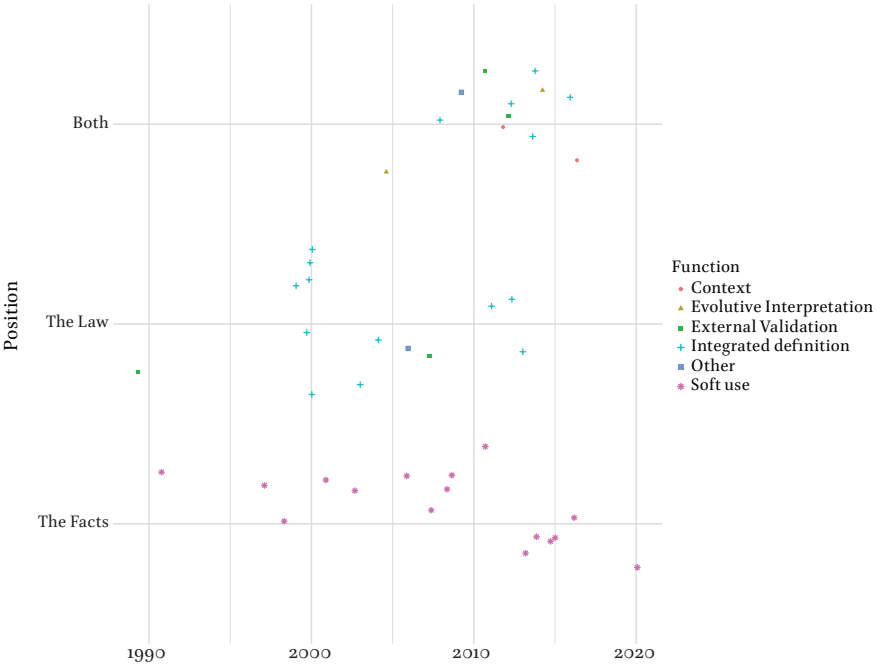

FIGURE 4 This graph illustrates an overview of the judgments that cited EIS under Article 3 with its content being dissected in different parts below. For enhanced readability, the observations do not line up perfectly along the y-axis. The y-axis shows the different parts of the judgment where the citing takes place. The x-axis highlights the development over time. The different colours and symbols highlight the functions of the citation. The total amount of judgments citing EIS in the majority opinion are 42 in the sample. In 14 judgments, EIS were referenced in a Separate Opinion.

The two most common purposes for the use of EIS was when defining Article 3 and citing relevant international instruments. This was done in 16 judgments respectively. For the value holding 'Integrated definition' 15 of these judgments cited UNCAT. The Court also frequently referred in 'the facts' section to relevant international law, a soft use since it did not explicitly rely on it in 'the law' section. Only four judgments included external validation where the Court reached a conclusion and then stated that the same interpretation was shared by EIS. The purpose of assisting the evolutive interpretation is not a common objective and only two judgments were identified. This points to a reluctance of the ECtHR to challenge its given mandate from the States, because this practice is the most controversial out of the different functions for the roles of EIS in the ECtHR jurisprudence.

There was no instance identified of the use of an EI in an explicitly dismissive manner. One reason for this might be that the Court is cautious not to openly disagree with other international human rights bodies,[80] perhaps fearing that it could add fuel to the fire in the ongoing backlash against international courts. This finding should however be nuanced since the Court may implicitly disagree, for example, with the legal reasoning of other human rights courts or bodies while not being vocal about it. There are areas of law where the ECtHR has not aligned itself with EIs when the opportunity did arise.[81]

5.1 *Soft Use*

Soft use can be described as judgments with EIs being no more than 'window dressing'. It can be that third-party interventions have provided materials and arguments, or the applicant/respondent, that calls for the Court to highlight that they have acknowledged the EIs referred to by these actors.[82] In 16 of the judgments, the Court listed the EIs without relying on them in the merits, at least not explicitly. In 12 judgments, the citing occurred both in 'the facts' and 'the law' having influence on the legal reasoning, but then it is the citation in the latter section that brings relevance to the outcome of the judgment and the overall jurisprudence of the Court.

5.2 *Defining Article 3 ECHR*

Human rights are characterised by general wording and unclear notions, and this holds especially true for Article 3 ECHR.[83] It is for the Court to dissect

80 "out of judicial comity they will simply omit to take cognizance of judgments that do not support the reasoning chosen. Citing to say 'they got it wrong' is generally avoided, even severely frowned upon." D, Terris, C. Romano, L. Swigart, 'The International Judge – An Introduction to the Men and Women Who Decide the World's Cases, *Brandeis University Press* (2007), p. 120.

81 *See for example* the Partly Dissenting Opinion of Judge Pinto de Albuquerque to the case of *Muršić, supra* note 55: "By failing to pay due attention to the Council of Europe's own sources of law, and ignoring the hardening of the soft law concerning prison standards in Europe and worldwide, the majority set a standard … leaving the door wide open to a slippery-slope regression of the human rights protection … With judgments of this kind, weakening as they do the Council of Europe's human rights protection system from within …"

82 O'Boyle, *supra* note 38, p. 570.

83 Hennebel, Tigroudja, *supra* note 11, p. 625. *See generally* Nußberger, *supra* note 34, p. 50; A, Buyse, 'Tacit Citing – The Scarcity of Judicial Dialogue between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases', in T. McGonagle, Y. Donders (eds.), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2013), pp. 443–444.

its specific meaning through different tools of interpretation.[84] What is the difference between torture, inhuman and degrading treatment? The Court has drawn upon EIS to clarify the vague terms of Article 3 ECHR, filling gaps, and adding elements to existing notions.[85] This is the case for the judgments that takes the value of integrated definition. EIS have been cited to distinguish torture from inhuman and degrading treatment, and when concluding that the threat of torture can itself be defined as torture. Specialised EIS, such as the UNCAT, can assist in interpreting the Convention in a practical and effective manner.[86] The partly dissenting opinion of Judge Zupančič in the judgment of *Rehbock* v. *Slovenia* highlights that the Court has "brought the UNCAT definition of torture into [its] own jurisprudence…".[87] Still, it is important not to lose sight of the fact that the ECHR itself makes these distinctions such as the difference between torture and other forms,[88] and for the threats principle,[89] and that the EIS add to the other forms of legal argumentation done by the Court referencing its own jurisprudence.

When determining if an act has constituted torture, in contrast to inhumane or degrading treatment, the Court has drawn from Article 1 UNCAT which describes the meaning of a purposive element, expressing that the act is undertaken with the intent of obtaining information or a confession, punishment or intimidation.[90] The ECtHR referred to Article 1 UNCAT in 15 of the judgments, in 'the law' section.[91]

84 Forowicz, *supra* note 18, pp. 228–229. *See* also K. McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or Hammer?', in S. Lagoutte, T, Gammeltoft Hansen, J. Cerone (eds.) *Tracing the Role of Soft Law in Human Rights* (Oxford University Press, 2016), p. 27.

85 *See* D. Rietiker, 'The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*', 79:2 *Nordic Journal of International Law* (2010), p. 263; Staes, *supra* note 8, p. 365.

86 Staes, *supra* note 8, pp. 341–342.

87 *See also* the Concurring Opinion of Judge Zupančič to the case of ECtHR (GC) *Jalloh* v. *Germany,* 11 July 2007.

88 *The Greek Case*, *supra* note 76.

89 ECtHR *Campbell and Cosans v. the United Kingdom,* 25 February 1982.

90 N. Mavronicola, 'Torture, Inhumanity and Degadation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs', *Hart Publishing* (2021), chapter 4: "Indeed, in delineating its own understanding of torture, the Court has frequently alluded to Article 1 of the UNCAT, which establishes that torture involves the 'intentional infliction' of pain or suffering."

91 *See* ECtHR (GC) *Salman v. Turkey*, 27 July 2000, para. 114 "In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of

The severity of the act is the other main leg when the ECtHR makes the distinction of torture.[92] In *Selmouni* v. *France* the Court stated that the ECHR seeks to distinguish between torture, inhuman and degrading treatment, as the Court had done in *Ireland* v. *the United Kingdom* by the prerequisite of severity. The ECtHR continued marking that such a distinction was also made in the UNCAT, specifically Article 1 and 16.[93] The Court then stated that "it remains to be established in the instant case whether the pain or suffering inflicted on Mr. Selmouni can be defined as severe within the meaning of Article 1 of the United Nations Convention".[94] It was highlighted that the ECHR is a living instrument and acts that earlier did not constitute torture, but inhuman or degrading treatment, could in the future amount to such a provision because of "increasingly high standards being required" for the safeguarding of fundamental human rights.[95] The ECtHR turned to the UNCAT to confirm its interpretation of the severity prerequisite along the *Ireland* v. *the United Kingdom* judgment. The Court stated that the requirement of "minimum severity" in Article 3 ECHR is equal to the "severe pain or suffering" in Article 1 UNCAT, being relative and dependent on all relevant circumstances in the case.[96] *Selmouni* v. *France* is the first judgment where the Court explicitly adopted the UNCAT definition, but it is not the only judgment where such legal reasoning and reference to UNCAT regarding the requirement of severity was included.[97]

It may however be argued that the inclusion of the UNCAT did not change much how the ECtHR defines the absolute prohibition of torture when diving a bit deeper into the issue. The 'intent' part of torture can be derived from the *Greek* case,[98] and the 'severity' leg from the judgment of *Ireland* v. *the United*

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obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations convention)."; ECtHR (GC) *Selmouni* v. *France*, 28 July 1999; ECtHR (GC) *Ilhan v. Turkey*, 27 June 2000; ECtHR *Dikme v. Turkey*, 11 July 2000; ECtHR *Mahmut Kaya v. Turkey,* 28 March 2000; ECtHR *Akkoc v. Turkey,* 10 October 2000; ECtHR *Aktaş v. Turkey,* 24 April 2003; ECtHR (GC) *Ilaşcu and Others v. Moldova and Russia,* 8 July 2004; ECtHR (GC) *Gäfgen v. Germany,* 1 June 2010; ECtHR *Nechiporuk and Yonkalo v. Ukraine,* 21 April 2011; ECtHR *Virabyan v. Armenia,* 2 October 2012; ECtHR (GC) *EL-Masri v. The Former Yugoslav Republic of Macedonia,* 13 December 2012; ECtHR *Husayn* (*Abu Zubaydah*) *v. Poland,* 24 July 2014; ECtHR *Al Nashiri v. Poland,* 24 July 2014; ECtHR *Nasr and Ghali v. Italy,* 23 February 2016.

92 ECtHR (Plenary) *Ireland* v. *the United Kingdom*, 18 January 1978.

93 *Selmouni*, *supra* note 91, para. 96.

94 *Ibid*, para. 100.

95 *Ibid*, para. 101.

96 *Ibid*, para. 100.

97 *See Dikme, supra* note 91; *Ilaşcu, supra* note 91; *Ilhan, supra* note 91; *Nasr and Ghali, supra* note 9; *Al Nashiri, supra* note 91; *El-Masri, supra* note 91; *Gäfgen, supra* note 91.

98 "The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment,

Kingdom. Although the Court has clearly included Article 1 UNCAT to the definition of torture in *Selmouni* v. *France*, with the UN Convention itself having traces from the ECHR system in the first place,[99] the two are not fully aligned. The ECtHR case law on torture also focuses on the 'special stigma' derived from "very serious and cruel suffering" to distinguish torture as formulated in *Ireland* v. *the United Kingdom*. What that judgment did, separating itself from the *Greek* case and the UN level, was shifting the focus away from the purposive side as the main element to concentrating predominantly on the severity of the act to define torture.[100] The *Ireland* v. *the United Kingdom* ruling still lives on and adds conservatism to the definition of torture under Article 3 ECHR. The way that the Court has approached severity and special stigma creates a high threshold to reach for finding violations against the prohibition of torture which might not reflect an accurate view on what torture really is.[101]

Gäfgen v. *Germany* also provides a different interesting example where the ECtHR cited UNCAT, CAT and the IACtHR when concluding that "a threat to torture can amount to torture".[102] The Court expressed that this interpretation was in line with earlier case law of the Court such as *Campbell and Cosans v. the United Kingdom*,[103] but also by referring to Article 1 UNCAT, as well as other EIs. It was a restatement of the ECtHR's position, and therefore the reliance of the EIs can be questioned. In fact, the IACtHR had cited the *Campbell and Cosans*

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and it is generally an aggravated form of inhuman treatment." *The Greek Case*, *supra* note 76.

99 *See* M. Nowak and E. McArthur, 'Oxford Commentaries on International Law The United Nations Convention Against Torture A Commentary', *Oxford University Press* (2008), pp. 28, 66 "The main elements of the definition of torture, which are based primarily on the previous case law of the European Commission and Court of Human Rights …".

100 *See* W. Schabas, 'The European Convention on Human Rights: A Commentary', *Oxford University Press* (2015), pp. 176–177 "Article 1 of the Convention Against Torture, adopted in 1984, develops the approach taken in article 1(1) of the 1975 Declaration, which of course also includes the purposive element that the European Court had ignored in the Ireland v. the United Kingdom case." *See also* E. Cakal, 'Assessing (and Making Sense of) Severity Conceptualising and Contextualising Torture's Core', 91 *Nordic Journal of International Law* (2022).

101 *See* M. Farrell, 'The marks of civilisation: The special stigma of torture', 22:1 *Human Rights Law Review* (2022), p. 11: "Modern democratic torture tries to conceal its harms. Furthermore, obstructed by its hermeneutic approach to the special stigma, the Court has been unable to see the evolution of torture and has contributed, as such, to an understanding of modern torture that overlooks its European manifestations. The special stigma has contributed to an understanding of torture that is not only narrow, slippery, and synonymous with savagery but also accommodates European state violence." *Cf.* Cakal, *supra* note 100, pp. *308–309*.

102 *Gäfgen*, *supra* note 91.

103 *Campbell and Cosans*, *supra* note 89, para. 26.

ruling concerning the threat of torture in its jurisprudence,[104] and therefore when the ECtHR highlights certain EIs, these in turn might have relied on the ECtHR case law in the first place.

5.3 *External Validation*

The external validation is categorised as part of the merits in which the Court reaches a conclusion with its own case law and then states that the chosen interpretation is shared by EIs. The difference to the integrated definition is that the interpretation of a provision seems not to be subject of influence from an EI, but before or after the interpretation is done, the Court cites EIs to add legitimacy to its findings. External validation was used in *Soering* v. *the United Kingdom*, *Gebremedhin* (*Gaberamadhein*) v. *France*, *Babar Ahmad and others* v. *the United Kingdom* and *V.C.* v. *Slovakia*. In *Soering* v. *the United Kingdom*, the Court used the principle of effective interpretation,[105] and prohibited extradition to the United States because of the risk of torture, degrading or inhuman treatment connected to the 'death row phenomenon'. The Court turned to Article 3 UNCAT that obligates not to extradite when the applicant faces torture. The ECtHR stated that the ECHR did not entail such a provision but that the general underlying objective of the ECHR provides such a prohibition under Article 3. Therefore, the Court did draw upon UNCAT to validate its interpretation of Article 3 ECHR to contain a prohibition to extradite. Similarly, in *Babar Ahmad and others* v. *the United Kingdom*, the Court stated that its interpretation was in accordance with the UNCAT.[106]

5.4 *Context*

The context and risk of torture in a receiving country when the applicant faces extradition is of relevance. Here, EIs can function as providing the Court with detailed information and reports, e.g., about prison conditions and if torture is frequent. In the case of *Othman* (*Abu Qatada*) v. *the United Kingdom* the Court used EIs such as the CAT for a description of the situation in Jordan prisons, in the case of extradition. The CAT stated that torture is "widespread and routine".[107] The Court concluded that it was "beyond any reasonable doubt that torture is perpetrated systematically by the General Intelligence

104 *See for example,* IACtHR *19 Merchants v. Colombia,* 5 July, 2004; IACtHR *Cantoral-Benavides v. Peru*, 18 August 2000.

105 Ulfstein, *supra* note 52, p. 919.

106 ECtHR *Babar Ahmad and others* v. *the United Kingdom*, 10 April 2012, para. 175.

107 ECtHR *Othman* (*Abu Qatada*) v. *the United Kingdom*, 17 January 2012, para. 107.

Directorate…".[108] At the same time, the ECtHR stated that the assurance given from the Jordanian government, that the applicant would not be subject to ill-treatment, was compelling and therefore the Court found no violation of Article 3 ECHR.[109]

The Court used EIS in *W.D* v. *Belgium* to dissect the conditions at a psychiatric care facility, looking at monitoring reports. It cited the CAT, but also other EIS outside the scope of this investigation such as the CPT and the l'Obervatoire international des prisons who had indicated their concern with the situation of the applicant.[110]

5.5 *Evolutive Interpretation*

By using EIS to support an evolutive interpretation, legal solutions from EIS are transferred into the ECHR system, updating the content of the Convention. This ensures a flexibility when safeguarding human rights, avoiding an expiration date of the ECHR by not having the law divorced from present-day conditions.[111] However, it seems to be a rather uncommon practice, and occurred only in two of the sample judgments, in *Mamatkulov and Askarov* v. *Turkey* and *Mocanu and others* v. *Romania*. Both rulings include separate opinions criticising the majority conclusion stating that the Court had overstepped its mandate given by the Member States.

In the case of *Mamatkulov and Askarov* v. *Turkey*, the two applicants were part of an opposition party in Uzbekistan. They were arrested in Turkey facing extradition. The applicants complained to the ECtHR stating that they would be subjected to torture if they were to be handed over to Uzbekistan. Using Rule 39 of the Rules of Court, the ECtHR decided to use interim measures while the case was to be resolved at the Strasbourg Court. However, the Turkish government went through with the extradition before the ECtHR had decided the case.

In 'the law' section, the Court did not consider a substantial risk of torture, inhuman or degrading treatment to exist and found no violation of Article 3 ECHR.[112] However, it continued to examine Turkey's decision to extradite and failure to respect the interim measures decided by the Court under Article 34 ECHR.

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108 *Ibid*, para. 191.

109 *Ibid*, paras. 191, 194, 198, 205.

110 ECtHR *W.D. v. Belgium,* 6 September 2016, para. 107.

111 *See* A. Hallo de Wolf, D H. Wallace, 'The Overseas Exchange of Human Rights Jurisprudence: The U.S. Supreme Court in the European Court of Human Rights', 19:3 *International Criminal Justice Review,* 2009, p. 290.

112 ECtHR (GC) *Mamatkulov and Askarov* v. *Turkey*, 4 February 2005, para. 77.

The Court noted that its previous case law had found no support for interpreting interim measures to be binding. However, it now turned to "general principles of international law and the view expressed on this subject by other international human rights bodies since Cruz Varas and Others".[113] Article 31.3 (c) VCLT was relied upon by the ECtHR when it stated that "the Convention must be interpreted so far as possible consistently with other principles of international law of which it forms a part…".[114] The Court went on stating that the current jurisprudence of international human rights regimes stressed the importance of interim measures and that compliance is central to ensure their effectiveness highlighting the different legal reasoning of these bodies. The Court stated that it is of outmost importance that the interpretation is conducted in a way that makes rights effective. The ECtHR concluded marking that "[a] failure by a Contracting State to comply with interim measures is to be regarded as preventing the court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34".[115]

Judges Caflisch, Türmen and Kovler criticised the finding and concluded that Article 34 ECHR could not be interpreted at all to contain binding interim measures. They stated that "what the Court's Grand Chamber has done… is to exercise a *legislative function*, for the Convention as it stands nowhere prescribes that the States Parties to it must recognise the binding force of interim measures indicated by this Court".[116] They continued highlighting that the living instrument doctrine was central in the majority's legal reasoning. However, "binding interim measures were as desirable then [in *Cruz Varas and Others* v. *Sweden*] as they are today, yet they cannot be justified without an enabling provision in the Convention".[117]

The case of *Mocanu and others* v. *Romania* concerned statutes of limitations for acts such as torture, inhuman or degrading treatment taking place during the movement for democracy in Romania in 1990.[118] The applicants proclaimed that Romania had breached the procedural parts of Article 3 ECHR. The

113 *Ibid,* para. 110.

114 *Ibid*, para. 111.

115 *Ibid*, para. 128.

116 Joint Partly Dissenting Opinion of Judges Caflisch, *Türmen* and Kovler to the case of *Mamatkulov and Askarov* v. *Turkey*, *supra* note 111, para. 151.

117 *Ibid*, para. 154. It should be noted that in the case of ECtHR (plenary) *Cruz Varas and others* v. *Sweden,* 20 Mars 1991 there was a joint dissenting opinion with nine judges advocating for the now current position taken by the majority in *Mamatkulov and Askarov* v. *Turkey*.

118 A different interesting aspect of this case is the exemptions from the rule of non-retroactivity of the ECHR.

government objected, stating that the complaint was done outside the statutes of limitation. The applicants were part of anti-totalitarian protests taking place in Bucharest. During the demonstration, one of the applicants, Mr. Stoica, was captured and assaulted by the police, and during detention threatened with weapons. Miners were also sent to the capital for a counter-protest, cheered upon by the government to restore order, which led to very violent encounters. It was later established that the police, military and the miners had used excessive force and committed acts of "extreme cruelty".[119] The High Court of Cassation and Justice concluded in its judgment in 2011 that the applicants had been subjected to, among other crimes, torture and ill-treatment. However, it continued stating that the criminal acts had become time-barred, and that torture was not a crime under Romanian law at the time of the offences.

The ECtHR listed sources from CAT, IACtHR and the IAC under the heading of Relevant Domestic and International Law and Practice. CAT takes the view against statutes of limitations for victims of torture because it interferes with the right to redress.

The Court emphasised that the provision must be interpreted and applied in a way making it practical and effective. The prohibition against torture, inhuman or degrading treatment would be ineffective if there were no procedures in place to investigate claims of ill-treatment conducted by the government.[120] Article 3 ECHR thus includes a provision for "effective official investigation" in such events.[121] The Court highlighted that it has considered ill-treatment carried out by authorities before and that "criminal proceedings ought not to be discontinued on account of a limitation period…".[122] The ECtHR added that there needs to be a degree of flexibility regarding statutes of limitation. It stated that the investigation was ended because of the limitation period and that the procedural obligation under Article 3 ECHR "can hardly be considered to have been met where an investigation is terminated… through statutory limitation of criminal liability resulting from the authorities' inactivity".[123] The Court concluded that the procedural part of Article 3 ECHR had been violated.[124]

119 ECtHR (GC) *Mocanu and Others* v. *Romania*, 17 September 2014, paras. 63, 154.
120 *Ibid*, para. 316.
121 *Ibid*, para. 317.
122 *Ibid*, para. 326.
123 *Ibid*, para. 346.
124 *Ibid*, paras. 352, 353.

Judge Wojtyczek[125] partly dissented and raised concerns about the reasoning and conclusion of the majority. He stated that the judgment raises questions of the legitimacy of the ECtHR, making it open to criticism such as judicial activism. He also marked that the ECtHR did not have jurisdiction *ratione temporis* because the offence had taken place before Romania had ratified the ECHR. Moreover, he viewed the majority's ruling concerning limitations to be "too rigid". He stated that the term "ill-treatment" includes a variety of offences and some limitations may be necessary "at least for acts of lesser seriousness". Judge Wojtyczek claimed that the majorities' conclusion is partly inconsistent with earlier judgments of the ECtHR. In the context of war crimes, he highlighted that the Court had "accepted the idea that the passage of time could extinguish the obligation to investigate and prosecute". He concluded, stating that the omissions in the Convention "are to be regretted, but we must accept them. It is for the High Contracting Parties to correct them by means of new treaties".[126]

5.5 *Other*

There are additional ways regarding how the EIS are employed in the application of Article 3 ECHR,[127] such as when developing procedural requirement to actively prevent against gender-based violence.[128] The Court held in the judgment of *Opuz* v. *Turkey* that the State had breached its obligation under Article 3 by failing to address and protect the victim against domestic violence. When resolving the case, the Court held that it "will also [apart from principles formulated in the ECtHR's jurisprudence] look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention …" when

125 Judge Wojtyczek has been classified to be the "most restrained judge" at the ECtHR. Ø. Stiansen, E. Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', 64:4 *International Studies Quarterly* (2020), p. 777.

126 Partly Dissenting Opinion of Judge Wojtyczek to the case of ECtHR (GC) *Mocanu and Others* v. *Romania*, *supra* note 118, para. 12.

127 The judgment of ECtHR (GC) *Varnava and Others v. Turkey*, 18 September 2009 concerns the issue of enforced disappearance. The ECtHR has utilised EIS towards its reasoning on positive obligations under Article 3. Note here that "[t]he State's procedural obligation was first developed within international human rights law by the Inter-American Court of Human Rights in cases dealing with enforced disappearance". Schabas, *supra* note 100, p. 193.

128 *See* Schabas, *supra* note 100, p. 192.

"interpreting the provisions of the Convention and the scope of the State's obligation in specific cases …".[129] This statement neatly reflects the Courts approach toward the usage of EIs.

6 Analysing the Findings

The ECtHR has occasionally cited EIs in its jurisprudence since the first cases. The sources are diverse both considering the content and origin, but also the legal status as hard law or soft law. Yet, the Court seems to have a preference for primarily CoE materials, but also sources from the UN. Still, how these EIs are used witness of a conservatism in the ECtHR's borrowing practice, although the two cases of evolutive interpretation shows an expansionist side of the coin. The EIs are however used in tandem with the Courts own case law and interpretation doctrine, and not as the sole argumentative force. This finding is in line with earlier research conducted by Forowicz concluding that the ECtHR "has been reluctant to grant too much weight to international sources".[130] Still, it is clear that the Court takes EIs seriously and considers that the ECHR is not a watertight system.[131]

6.1 *Undermining State Sovereignty as Criticism*

The criticism that can be directed against the judicial borrowing practice posits that the Court makes away with the consensual basis of the ECHR as an international treaty when incorporating EIs from other parts of the world including soft law. Legal standards not otherwise applicable to the ECHR Member States may become binding indirectly by the reliance of the ECtHR on EIs.[132] A classical position on the role of treaties, with States as the main actors, is that "states are only bound by the treaties' provisions to the extent in which they have consented to be bound".[133]

129 ECtHR *Opuz v. Turkey,* 9 July 2009, para. 164.

130 Forowicz, *supra* note 18, p. 385. *See* also Christensen, *supra* note 5, p. 184: "Finally the story of the European Court of Human Rights shows restraint, with scarce reference to external decisions, which rarely make waves in the development of the European jurisprudence."

131 *Cf.,* Rozakis, *supra* note 54, p. 268.

132 *See* Glas, *supra* note 18, p. 98.

133 M. De Pauw, 'The Inter-American Court of Human Rights and the Interpretive Method of External Referencing: Regional Consensus v. Universality', in Y. Haeck, O. Ruiz-Chiriboga, C. Burbano Herrera (eds.), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia, 2015), p. 15.

Moreover, there have been objections that using EIs, especially connected to the evolutive interpretation, undermines State sovereignty because it is said that the Member States lose control over the content and development of the ECHR.[134] The argument follows that if the State Parties prefer new standards, they can legislate and add new protocols to the ECHR. It then adds to the criticism when the evolutive interpretation is partly based on EIs. The critique is not unexpected because it implies "an impact of [EIs] on the establishment of 'new' or 'enlarged' standards under the Convention".[135] It may be concluded that "[o]n the whole, the more substantive and influential the references are, the more controversial they may become, especially when grounded in non-binding instruments".[136]

References to sources from the CoE are the most common and although the ECtHR is embedded within the same institutional context and the Court has pointed out that it needs to especially take into account EIs from the CoE, the position is not entirely unproblematic. Although all contracting States to the ECHR are also parties to the CoE, "some instruments of the CoE are not ratified by all Member States, some contain 'soft law', some cover sustentative issues other than human rights law, etc".[137] Also, one of the main pillars of the ECHR is to lay down a minimum level of protection that Member States can exceed but not reduce. EIs from CoE expert bodies and Convention's might imply higher standards.

Moving beyond the CoE framework, other EIs are more distant from the realities and context of Europe,[138] and although the Member States to the ECHR have also ratified UN conventions such as the UNCAT, it stretches further than the European context. It is not evident that the UNCAT should have normative force on the ECtHR. Other UN conventions have not been ratified as a conscious choice by States party to the ECHR. Furthermore, several of the EIs lack the connection to State consent, especially for soft law instruments. When obligations from the outside arrive through the backdoor of the ECtHR, it may be viewed as concerning for affected Member States.

This inquiry has identified a myriad of different EIs cited and a range of different ways that these penetrates the ECHR. The way that the Court relies on these to develop the Convention is not especially foreseeable. Staes highlights that "[t] his lack of clarity might be interpreted as an indication of the Court

134 Staes, *supra* note 8, p. 25.
135 Staes, *supra* note 8, pp. 25–26.
136 Staes, *supra* note 8, p. 455.
137 Staes, *supra* note 8, p. 43.
138 *See* O'Boyle, *supra* note 38, p. 591.

not being entirely comfortable about the inclusion of external references or at least, not being entirely comfortable as to how to explain this practice in a convincing manner".[139]

6.2 *Universal Human Rights as Justification*

The reference practice of the Court can be viewed as a way to acknowledge the strive for universality in human rights law.[140] It can also have practical reasons for its inclusion such as the need to fill gaps in the Convention when existing case law is lacking.

"All human beings are born free and equal in dignity and rights."[141] In addition to being universal, human rights are inalienable and self-evident.[142] The universality of human rights is the central argument for the legitimacy of human rights law.[143] The ECHR was created in 1950, and is based on the UDHR.[144] Many of the issues coming before the ECtHR, such as the prohibition of torture, has already been decided in similar cases at the CAT and in a different regional context of the IACtHR. "There no longer exists, de facto, regional frameworks as such, but an increasingly salient universal one."[145] There exists shared understandings of the content of human rights in the world; otherwise using EIS would be meaningless.[146] Using EIS therefore "reaffirms the theoretical universality of their reach".[147] It is also important to emphasize that the main ideas of interpretation of the ECtHR rejects a limited and sovereigntist approach,[148] for the ECtHR holds the task of safeguarding human rights that "by their nature are inherently indivisible and global".[149]

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139 Staes, *supra* note 8, p. 34.

140 Christensen, *supra* note 5, p. 2. "This cross-fertilization connects the regional human rights courts to each other and has potential universalizing effects on the regional human rights law."

141 Article 1 UDHR.

142 J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 3 ed., 2013), p. 10.

143 Heyns, Killander, *supra* note 75, p. 670; UN General Assembly, *Universality, cultural diversity and cultural rights A/73/227*, 2018, pp. 4,7.

144 *See* M. Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws', 32:2 *Nordic Journal of Human Rights* (2014), pp. 87–98.

145 L. Burgorgue-Larsen, '"Decompartmentalization": The key technique for interpreting regional human rights treaties', 16:1 *International Journal of Constitutional Law* (2018), p. 213.

146 *See* Ajevski, *supra* note 143, pp. 132–133.

147 Staes, *supra* note 8, p. 408. *See also* Christensen, *supra* note 5, p. 183.

148 Pinto de Albuquerque, *supra* note 10.

149 Rozakis, *supra* note 54, p. 279.

When the ECtHR cites the CAT and IACtHR for the purposes of integrated definition, external validation or evolutive interpretation, it ameliorates the shared interpretations of universal human rights such as the prohibition against torture.[150] It has, for example, resulted in that the Court, through its evolutive interpretation, has aligned the use of binding interim measures and statutes of limitations with the UNCAT and the ACHR. Also soft law is a fruitful source for marking an international consensus emerging. This strengthens individual human rights. Therefore, interpreting the Convention, taking into consideration the core principle of universalism regarding human rights, fosters international coherency,[151] and it "can be said to further the universal set of values that are expressed in the UDHR…".[152] Especially regarding the prohibition against torture as a *jus cogens* norm, harmonisation of interpretation is important for the realisation of universal human rights.

Still, the Court is aware of the specifics of the regional context in the interpretation of the Convention. Christensen underlines that "they can borrow from one another, in the understanding that the external must be adapted to the new context, thus attaining a degree of universality".[153] Context is important because there is a risk of walking back human rights if relying on standards that offer less protection than the ECHR. For example, harmonisation with the UNCAT might risk lowering the human right standard within the ECHR in some cases.[154] According to Forowicz, "the prohibition against cruel, inhuman or degrading treatment is more far-reaching" under the ECHR.[155] Citing EIS to lower the protection of human rights goes against the nature of universal human rights,[156] and this has not been identified in the case-study.

The criticism of undermining State sovereignty should also be toned down with the conclusion that the ECtHR has been rather modest in the reliance on the EIS, especially compared to the IACtHR. Also the main sources cited from the CoE and the UN are not that 'external' taking into account that

150 *Cf.,* Sandholtz, *supra* note 18, p. 24.

151 *Cf.,* Burgorgue-Larsen, *supra* note 144, p. 204.

152 V. Blaker Strand, 'Interpreting the ECHR in its normative environment: interaction between the ECHR, the UN convention on the elimination of all forms of discrimination against women and the UN convention on the rights of the child', 27:7 *The International Journal of Human Rights* (2019), p. 988.

153 Christensen, *supra* note 5, p. 203.

154 *Cf.,* C. McCrudden, 'Pluralism of Human Rights Adjudication', in L. Lazarus, C. McCrudden N. Bowles (eds.), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014).

155 *See* Forowicz, *supra* note 18, p. 216.

156 Staes, *supra* note 8, pp. 254–255.

the Convention States are part of these two organizations. Furthermore, it is possible to locate traces from the ECHR in certain UN conventions. The universal is thus in some instances stemming from the ECHR with the UN drawing upon the European Commission of Human Rights case law when creating the UN Declaration against Torture and then the UNCAT.[157]

An opposite form of criticism from sovereignty could instead be that the Court is too restrictive relying on EIs. In support of that statement, the discrepancy between the ECtHR and the citation practice of its sister-courts in the Americas and Africa should be stressed,[158] but also separate opinions criticise the Court for its conservatism, arguing for the normative force of EIs on the ECHR.[159] From this perspective, the Court has shown protectionist tendencies favouring its established jurisprudence at the potential loss of harmonisation with other international bodies and increased protection of human rights.

7 Conclusions

Definitions usually comes in the introduction of an article, but this research has concentrated on what the EIs are that the ECtHR cites and how they are used. Thus, it is the practice of the Court that dictates the definition. The EIs cited seems to be everything that is not the ECHR nor Convention States'

157 *The Greek Case*, *supra* note 76. *See also* M. Farrell, 'Just How Ill-treated Were You? An Investigation of Cross-fertilisation in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law', 84:3 *Nordic Journal of International Law* (2015), p. 507; Forowicz, *supra* note 18.

158 *Cf.* A. Stone Sweet, W. Sandholtz, M. Andenas, 'The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018, *The Law & Practice of International Courts and Tribunals* (2022), p. 244:
"The Inter-American Court of Human Rights and the various African regional courts virtually never issue an important judgment without consulting the relevant rulings of the European Court."

159 *See for example* the Dissenting Opinion of Judge Pinto de Albuquerque to the case of ECtHR (GC) *Khamtokhu and Aksenchik* v. *Russia*, 24 January 2017: "I have specifically pointed out above that there is an international trend towards abolishing this type of treatment and that, furthermore, the Court is not bound to wait for that trend to mature to take note of it. On the contrary, it can, and must, accompany and encourage it in the light of an evolutive and *pro persona* interpretation of the Convention." *See also* the Partly Dissenting Opinion of Judge Pinto de Albuquerque to the case of *Muršić, supra* note 55.

domestic law because that is referenced separately.[160] I identified 438 distinct sources. Yet, the most popular EIs are largely derived from the CoE and the UN.

The ECtHR has occasionally used EIs in its high importance judgments when defining Article 3 ECHR, highlighting how EIs have solved similar cases without explicitly applying them, validating its interpretation, in its evolutive interpretation and when investigating the specific context of a case. The Article 3 case-study shows how the EIs are used, but since it is limited to one Convention article, the categorization of functions is not exhaustive, and the sample should not be extrapolated to represent the whole case law. It is important to keep in mind that Article 3 is the provision that is the most likely to include citations, meaning that it is probable that the EIs are referenced even less frequently under the other Convention Articles.

Justification for this practice can be found in the universality of human rights. On the other hand, critics argue that it undermines State sovereignty. In the end, what matters is the protection of individual human rights. The reference to the UN system and OAS has arguably benefited the protection of right-holders, especially in the two judgments of evolutive interpretation. Still, the expansionist interpretations need to be carefully balanced, otherwise risking Member States not implementing judgments or even exiting the Convention to the detriment of individuals human rights safeguards. Baroness Hales highlights that, while being a supporter of the ECHR, "my plea to them is to accept that there are some natural limits to the growth and development of the living tree. Otherwise I have a fear that their judgments, and those of the national courts which follow them, will increasingly be defied by our governments and Parliaments."[161] On the other hand, the Court should be careful not to lower the protection of the rights in the Convention "in order to keep their 'customers'".[162]

The findings of this study should encourage applicants to bring materials from EIs before the Court to support their arguments.[163] This can especially

160 This is clear for the respondent State, but a bit messy for the other Member States domestic laws. *See supra* note 30.

161 Baroness B. Hale, 'Beanstalk or living instrument how tall can the European Convention on Human Rights grow?', *The Gray's Inn Reading* (2011).

162 *See* R. Uitz, A. Sajó, 'The Sovereign Strikes Back A Judicial Perspective on Multi-Layered Constitutionalism in Europe, *European Journal of Law Reform* (2018), p. 115. *See* also E. Voeten, L. Helfer, 'Walking Back Human Rights in Europe?', *European Journal of International Law* (2020); Stone Sweet, Sandholtz, Andenas, *supra* note 158.

163 Staes, *supra* note 8, pp. 56–57; C. M. Buckley, A. Donald, P. Leach, (eds.), *Towards Convergence in International Human Rights Law* (Brill, 2016), p. 30.

be the case to bring higher levels of protection,[164] arguing for an evolutive interpretation of the ECHR by highlighting an international consensus emerging.

If anything, this article highlights the need for more research partly because of limitations to study design and only investigating the explicit use. It would also be fruitful to expand the analysis of the 'how' questions to include the full population of EIs, but also to other Convention Articles. At a general level, the question of how EIs have horizontally and vertically developed through borrowing within the global flora of human rights law remain a topic partly unexplored.

The ECtHR is an important safeguard of universal human rights. Using EIs is one way to recognize the role in this larger international framework. The ECtHR is no Ivory Tower as Judge Rozakis has put it,[165] but remain open to a wide range of sources from outside, although seemingly being somewhat reluctant compared to the other regional human rights courts in the cross-fertilization of international human rights law.

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164 *Cf.* Hennebel, Tigroudja, *supra* note 11, p. 644.

165 *See* Rozakis, *supra* note 54, p. 278.