Human Rights Courts as Norm-Brokers

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ABSTRACT

This article develops an understanding of human rights courts as 'norm-brokers'. 'Norm-brokering' requires that courts approach the accommodation or rejection of alternative normative standpoints with methodological rigour. It is ultimately concerned with reason-giving and the quality of justification, and thus entails robust engagement with – rather than the mere cataloguing of – competing norms raised in the course of argument. The value of this exegetic judicial process lies in its contribution to 'public reason'. This in turn yields corresponding benefits in terms of institutional legitimacy and helps confound legitimacy-based critiques of human rights courts. The argument is supported by an analysis of ten-years' worth of European Court of Human Rights judgments, focusing on the ways in which external norms from the Inter-American human rights system are relied upon (or not) by the Strasbourg Court.

KEYWORDS: norm-brokering, interpretative methodology, human rights courts, public reason, legitimacy, *Marguš v Croatia*

1. INTRODUCTION

Discussion of the role played by courts in the development of legal norms, indeterminate human rights norms in particular,[1] is often closely followed by a critique of judicial 'innovation and adventurism'.[2] The classic argument – fundamentally sceptical about the legitimacy of strong judicial review of legislative action – holds that primary responsibility for the development of legal norms should lie squarely with democratically elected legislatures.[3]

This article responds to such arguments by developing the concept of 'norm-brokering' to describe the deliberative role that human rights courts can and ought to perform when opportunities for norm development arise. At its core, norm-brokering entails that human rights courts pay greater methodological attention to *how* they consider alternative interpretations of human rights standards, drawing on normative developments from other human rights bodies. A judicial openness to such external norms can, we suggest, evince a commitment to 'public reason'. In turn, paying careful consideration to the methods of engagement can reinforce the standing of human rights courts and help redress the legitimacy deficits often highlighted by their detractors. We argue that through an exegetic process of norm-brokering, human rights courts can better weather the controversies that follow from being cast as the guardians of human rights (and thereby provide a more resilient foundation for their protection).

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[1] See, for example, Sandholtz, 'Expanding Rights: Norm Innovation in the European and Inter-American Courts of Human Rights' in Brysk and Stohl (eds), *Expanding Human Rights: 21st Century Norms and Governance* (Edward Elgar, 2017) at 156-76.

[2] Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67 at 71. See further, de Londras and Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 523.

[3] Waldron, 'The Core of the Case against Judicial Review' (2005-06) 115 *Yale Law Journal* 1346.

We use the term 'human rights courts' as shorthand to describe any court or quasi-judicial human rights institution entrusted to resolve disputes about the scope and application of human rights. Our own particular case study draws upon the jurisprudence of the European Court of Human Rights. At one level, this selection may appear ill-suited to ground a broader argument about judicial review and interpretive methodology. As Jeremy Waldron notes, the Strasbourg Court is rarely directly involved in the review of legislative action.[4] Nonetheless, we suggest that the European Court of Human Rights provides a case *par excellence* in terms of the legitimacy struggles encountered by human rights courts more widely – in short, the calumnious suggestion that such courts habitually stretch the meaning of basic rights beyond democratically acceptable limits.[5] The fact that the Strasbourg Court is a supra-national court only further exacerbates the legitimacy challenges it faces.[6] As such, our contention is that norm-brokering can enhance the legitimacy of regional and international human rights courts, and that this argument also holds true for domestic human rights courts.[7]

In the face of foundational attacks, scholars have emphasized the urgency of making 'a serious case for the legitimacy of existing human rights law'.[8] While these attacks may not at first blush concern the nuances of juridical method, any serious counter must at least address the sometimes opaque reasoning of human rights judgments, particularly where this relates to the accommodation of external normative influences.[9] The way in which human rights courts assimilate or discount alternative normative standpoints is of critical importance to their perceived legitimacy. At one level, external norms present an interpretative dilemma for individual judges – how should these external norms be identified in the first instance, especially if they are themselves emerging, ambivalent or contested? In what circumstances should they be deemed relevant? What weight should be afforded to them, especially if they derive from differently worded treaty provisions? At another level, however, engagement with alternative normative positions provides a measure of the logical mettle and argumentative fortitude of the normative resolutions proposed. Thus, what may initially seem to be a narrow

[4] Ibid. at 1353, n 20. Instead, Waldron argues, 'much of what is done by the European Court of Human Rights is judicial review of executive action. Some of it is judicial review of legislative action, and some of it is actually judicial review of judicial action.'

[5] Pinto-Duschinsky, 'Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK' (Policy Exchange, 2011) at 30, citing Raab, *The Assault on Liberty* (Fourth Estate, 2009) describing this as 'rights contagion'. Available at: https://www.policyexchange.org.uk/wp-content/uploads/2016/09/bringing-rights-back-home-feb-11.pdf [last accessed 10 October 2017].

[6] George Letsas similarly focuses on the European Court of Human Rights 'given lively debates in legal theory about the nature and legitimacy of judicial review' and the importance of locating 'where the European Court stands in these debates.' See Letsas, 'Strasbourg's interpretive ethic: lessons for the international lawyer' (2010) *European Journal of International Law* 509 at 511.

[7] Colm O'Cinneide, for example, argues that similar 'lines of attack are also beginning to be directed against domestic courts charged with enforcing compliance with national rights standards.' See O'Cinneide, 'Rights under Pressure' (2017) *European Human Rights Law Review* 43 at 45. For discussion of transnational judicial dialogue about human rights in the context of domestic courts, see, in particular, McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) *Oxford Journal of Legal Studies* 499-532.

[8] O'Cinneide, ibid. at 43.

[9] Of-course, legitimacy demands more than just methodological rigour, and other factors will also undoubtedly determine whether (borrowing from de Londras's and Dzehtsiarou's definition of 'legitimacy') the public have 'confidence that the Court will decide cases consistently, in a manner that respects the nature of both the Convention (as a human rights instrument) and its jurisdiction (as subsidiary and limited)'. See de Londras and Dzehtsiarou, supra n 2 at 526. See also Sadurski, 'Supranational Public Reason: Part One – A Theory' (2015) *Sydney Law School, Legal Studies Research Paper No. 15/02* at 16, n 64. Sadurski clarifies that he is 'not making a claim that the use of public reason is the only, or even necessarily the most important factor in legitimating supranational authorities.' See further below at section 4A.

question of interpretative methodology is inextricably bound up with more fundamental questions concerning the legitimacy of human rights courts.[10]

The focus of our argument also resonates more widely with familiar tropes of fragmentation and harmonisation in international law. We argue that the legitimacy of human rights courts is not enhanced by the pursuit of normative uniformity for its own sake, but is better served by rigorous, transparent and reflective consideration of relevant normative developments. In other words, human rights courts should at a minimum consider the case for and against harmonisation. The article develops the concept of 'norm-brokering' to describe this process, arguing that a robust engagement with external norms can make a net contribution to 'public reason' and thereby strengthen the normative baseline protection of human rights. Much has already been written on the subject of judicial dialogue.[11] It is well recognized that courts function as an 'interpretative community'[12] in which the range of possible interpretations is constrained. Neither purely 'objective' (textual) nor purely 'subjective' (in the eyes of the judge) readings are possible, and the process of norm development demands close attention to questions of epistemic justification.[13] In this regard, law is a fundamentally discursive process, and international law 'an intersubjective enterprise'.[14] The term 'cross-judging' has been coined to capture the dialogic interaction between different levels of courts – both domestic and international (vertical) and different regional/international courts (horizontal).[15] Our argument builds upon these studies examining the interaction of transnational legal norms – what Dana Burchardt refers to as 'substantive complementarity': the dynamic development of hybrid norms whereby 'the normative content of legal norms of one legal space is influenced, complemented and ultimately modified by the normative content of the norms stemming from another legal space.'[16] The article thus seeks to contribute to the burgeoning scholarship about the role and methods of human rights courts in settling normative disputes, and about the corresponding determinants of judicial legitimacy.

As noted, we focus, for illustrative purposes, on the European Court of Human Rights. Indeed, we began writing this piece in response to the specific normative question raised by the European Court of Human Rights' Chamber judgment in *Marguš v Croatia*,[17] a case centring on the purported impermissibility (in international law) of amnesties for grave violations of human rights. Given the uncertain scope of this norm, *Marguš* brought into sharp focus the underlying interpretative dilemmas at play (see further below at section 3C). It became clear that time and time again the Strasbourg Court is confronted with the question of whether, and if so how, to engage with external legal norms. Individual judges too have tried

[10] This is supported by a quantitative analysis of the Court's case-law by political scientist Erik Voeten. Voeten argues that the more scrutiny an international court faces, the more reticent it may be to borrow. His research showed that this was indeed the case for the European Court of Human Rights. See Voeten, 'Borrowing and Non-Borrowing Among International Courts' (2010) 39 *Journal of Legal Studies* 547.

[11] See, for example, Slaughter, 'Judicial Globalization' (1999-2000) 40 *Virginia Journal of International Law* 1103.

[12] Johnstone, 'The Power of Interpretative Communities' in Barnett and Duvall (eds) *Power in Global Governance* (Cambridge University Press, 2005) 185 at 189-90.

[13] Of particular note in this regard is William Talbott's highly persuasive 'equilibrium model of epistemic justification.' See, Talbott, *Which Rights Should be Universal?* (Oxford University Press, 2005) at 29-30.

[14] Johnstone, supra n 12 at 192. See also McGuinness, '*Medellín*, Norm Portals, and the Horizontal Integration of International Human Rights' (2006-7) 82 *Notre Dame Law Review* 755.

[15] Teitel and Howse, 'Cross-judging: Tribunalization in a Fragmented but Interconnected Global Order' (2008-9) 41 *New York University Journal of International Law and Politics* 959; Teitel and Howse, 'Cross-judging Revisited' (2013-14) 46 *New York University Journal of International Law and Politics* 867.

[16] Dana Burchardt, 'Intertwinement of legal spaces in the transnational sphere' (2017) *Leiden Journal of International Law* 305 at 324.

[17] *Marguš v Croatia* Application No 4455/10, Merits and Just Satisfaction, 13 November 2012. See also *Marguš v Croatia* Application No 4455/10, Merits and Just Satisfaction, Grand Chamber, 27 May 2014.

to highlight the importance of addressing precisely this methodological dilemma. In *Hrvatski liječnički sindikat v Croatia*,[18] for example – a case concerning the right to strike in international law – Judge Pinto de Albuquerque wrote a Concurring Opinion in which he examined the express guarantees of a right to strike in international and regional instruments. He referred to a 'methodology of legal reasoning and interpretation … which aims at the cross-fertilization of international human rights and other fields of international law.'[19] While this may be the ideal, as our study demonstrates (and as others have also recognized) despite there being '… a considerable degree of borrowing of concepts and jurisprudence from and between each of the regional bodies', in practice this 'is not always consistently applied and it is not always clear why the jurisprudence and practice of the other bodies are not acknowledged.'[20]

Before illustrating these inconsistencies in approach and more fully expounding our central concept of 'norm-brokering' (section 3), it is important first to present and explain our methodology (section 2). We then consider the implications of this norm-brokering function for the roles that human rights courts play with particular reference to the concept of 'public reason' (section 4) and in conclusion, offer some thoughts on juridical methodology (section 5).

2. SAMPLING STRASBOURG CASE LAW: MEASURING THE TRACTION OF EXTERNAL NORMS

The argument presented here is underpinned by systematic analysis of 70 European Court of Human Rights (ECtHR) cases[21] – those which, over a 10-year period from 1 January 2007 to 31 December 2016, contain some reference to the Inter-American Commission or Court of Human Rights.[22] Of course, focusing exclusively on references to the Inter-American system provides only a snapshot of the Strasbourg Court's reliance on external norms – the actual number of cases in which external norms obtain some level of traction is much higher. A HUDOC text search for 'Human Rights Committee' over the same period, for example, generates 165 results (43 of which also appear within our sample of 70 cases).[23] Clearly, therefore, a focus on other such external sources could generate a further study – perhaps most usefully, one that attempts to *compare* the Court's receptivity to norms emanating from different sources.[24] The same could be said of the temporal parameters of our sample – we have

[18] *Hrvatski liječnički sindikat v Croatia* Application No 36701/09, Merits and Just Satisfaction, 27 November 2014.

[19] Ibid. Concurring Opinion of Judge Pinto de Albuquerque at n 2.

[20] Leach, Murray and Sandoval, 'The Duty to Investigate Right to Life Violations across Three Regional Systems: Harmonisation or Fragmentation of International Human Rights Law?' in Buckley, Donald and Leach (eds) *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill Nijhoff, 2016) 33 at 66-7.

[21] For the sake of readability, the cases we cite here are merely illustrative.

[22] The sample of cases relied upon was generated by a simple HUDOC text search (for 'Inter-American') of English-language judgments between 1 January 2007 and 31 December 2016. This raised a dataset of 70 cases.

[23] In other words, a HUDOC search for references to the 'Human Rights Committee' yields 122 additional cases, not included within our sample of judgments referencing the 'Inter-American' system. In parallel, our sample of 70 cases citing the Inter-American system includes 27 additional judgments that do not appear in the 'Human Rights Committee' results list.

[24] For key groundwork in that respect, see for example: Vanneste, *General International Law Before Human Rights Courts – Assessing the Specialty Claims of Human Rights Law* (Intersentia, 2009); Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010); Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28(4) *Leiden Journal of International Law* 863.

not examined the further 26 cases containing some reference to the Inter-American system between 1975 and 2006 (though with none in the years 1976-90) since our focus here is on assessing the Court's current practice rather than providing a historical account. Nevertheless, analysing references to the Inter-American system serves as a useful case study through which to explore the issue of normative transplantation and adaptation – and the circumstances in which the Court's norm-brokering role can serve to enhance public reason.

In order to assess the value of judicial engagement with external norms, our study traced the impact of external Inter-American norms on the development of Strasbourg jurisprudence. However, the figures that we cite represent best approximations. This is, in large part, because of the difficulty of perfectly classifying each case. It is also because some of the categories that we sought to tabulate (such as whether an Inter-American norm could be said to have emboldened the European Court's approach) are themselves ultimately contestable and difficult to definitively measure.[25] Furthermore, in attempting to gauge the normative impact of external sources on Convention jurisprudence, a HUDOC text search is a rather blunt instrument – capturing *all* cases which contain some reference, no matter how minor, to the Inter-American system. The Court's way of engaging with the external Inter-American norms varies greatly – norms are stated with differing levels of precision and are sometimes cited only in passing.[26] Indeed, in a small proportion of the 70 cases, the reference to the Inter-American system is of no normative significance whatsoever.[27] We have tried to reflect this more granular understanding in our qualitative evaluation.

It can also be difficult to distinguish between judgments decided primarily on factual rather than normative grounds (though it should also be recognized that the convincing resolution of factual disagreements can be just as significant in terms of enhancing 'public reason').[28] Moreover, in some cases, the Inter-American norm is largely peripheral to the precise question before the Strasbourg Court. There are also several cases in which the external norm is not peripheral, but which the Court nonetheless decides exclusively on the basis of its own past jurisprudence, Council of Europe instruments and/or comparative analysis of practice within Council of Europe member states. In these cases, relevant external norms might be raised only in the separate concurring[29] or dissenting[30] opinions of individual judges. Indeed, it is notable that of the 70 cases in the sample, references to the Inter-American system were raised in 20 Concurring or Partly Concurring Opinions, and in 10 Dissenting or Partly Dissenting Opinions.

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[25] We have, however, counted cases where such an argument could at least plausibly have been made on the basis of an alignment or confluence of factors within the judgment.

[26] See, for example, the 'the principle of customary international law' raised by the applicants in *Janowiec and Others v Russia* Application Nos 55508/07 and 29520/09, Merits and Just Satisfaction, 16 April 2012, at para 96, that 'no internal rule, even of constitutional rank, can be invoked as an excuse for non-observance of international law', citing the invocation of this principle by, *inter alia*, the Inter-American Court of Human Rights.

[27] For example, in *Volk v Slovenia* Application No 62120/09, Merits and Just Satisfaction, 13 December 2012, the reference to the Inter-American system is merely in a footnoted book title in a Concurring Opinion.

[28] See Shadd, 'Why the Facts Matter to Public Justification' (2015) 27(2) *Critical Review* 198 – albeit focusing on justifications for State action through legislation (rather than justification in judicial reasoning). See also section 4A below for discussion of the concept of 'public reason'.

[29] For example, in *Lagutin and Others v Russia* Application Nos 6228/09, 19678/07, 52340/08, 7451/09 and 19123/09, Merits and Just Satisfaction, 24 April 2014, the Court (at paras 68-9) refers exclusively to Council of Europe instruments and comparative analysis among Council of Europe member states, whereas only the Concurring Opinion of Judge Pinto de Albuquerque joined by Judge Dedov raises Article 5 of the Inter-American Drug Abuse Control Commission (CICAD) Model Regulations.

[30] For example, in *Perinçek v Switzerland* Application No 27510/08, Merits and Just Satisfaction, 17 December 2013, two Inter-American cases are cited very briefly by the Partly Dissenting opinion of Judges Vučinić and Pinto de Albuquerque in relation to the inadmissibility of statutory limitations to the prosecution of genocide and crimes against humanity.

Many of these might be classed as 'missed opportunity' cases in which the Court *could* usefully have engaged with the external norms highlighted in the separate opinion. [31]

Further dissecting our sample of 70 cases gives rise to four preliminary observations. First, what is perhaps most striking is that there are 38 cases more in 2012-16 (54 cases in total) than in 2007-11 (16 cases in total) in which Inter-American norms are referred to – an exponential increase of 237%. This happened at a time when the overall number of judgments was actually lower than in the preceding five years.[32] The most plausible explanation for this increase lies in the interpretative approach of individual judges. In particular, the opinions of Judge Pinto de Albuquerque, appointed to the Court in 2011, account for 16 Concurring and six Dissenting Opinions (22 of the 38 cases in 2012-16). In another 13 judgments,[33] a norm deriving from the Inter-American system was raised principally by third party interveners.[34]

Second, 35 of the 70 judgments were decided by a Grand Chamber of the Court. It might of course have been expected that cases raising difficult normative questions and thus leading the Court to look beyond its own jurisprudence would be more likely to be heard by a Grand Chamber. However, the fact that Chamber judgments just as frequently reference external norms underscores the importance of ensuring methodological consistency in the Court's proceedings.

Third, in approximately 20 cases, the external norm relied upon related to purely procedural matters – such as the *locus-standi* of NGOs,[35] time-barred proceedings,[36] the punitive nature of just satisfaction,[37] interim measures,[38] or the question of 'continuing violations' and *ratione temporis* jurisdiction in disappearance cases.[39] That said, it is not always straightforward to

[31] The wider category of 'missed opportunity' cases – in which no attempt at all is made to draw upon potentially relevant extra-regional norms in *either* the judgment *or* separate opinions – is an obvious blind spot of the HUDOC search, one which we make no attempt to quantify.

[32] 'The European Court of Human Rights in Facts & Figures 2016' (March 2017) at 6, available at: www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf [last accessed 11 June 2017].

[33] *Opuz v Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009; *Gäfgen v Germany* Application No 22978/05, Merits and Just Satisfaction, Grand Chamber, 1 June 2010; *A v Netherlands* Application No 4900/06, Merits and Just Satisfaction, 20 July 2010; *Bayatyan v Armenia* Application No 23459/03, Merits and Just Satisfaction, Grand Chamber, 7 July 2011; *El Haski v Belgium* Application No 649/08, Merits and Just Satisfaction, 25 September 2012; *P. and S. v Poland* Application No 57375/08, Merits and Just Satisfaction, 30 October 2012; *El-Masri v The Former Yugoslav Republic of Macedonia* Application No 39630/09, Merits and Just Satisfaction, Grand Chamber, 13 December 2012; *X and Others v Austria* Application No 19010/07, Merits and Just Satisfaction, Grand Chamber, 19 February 2013; *Janowiec and Others v Russia*, Application Nos 55508/07 and 29520/09, Merits and Just Satisfaction, Grand Chamber, 21 October 2013; *Marguš v Croatia* (2014) supra n 17; *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* Application No 47848/08, Merits and Just Satisfaction, Grand Chamber, 17 September 2014; *Bouyid v Belgium* Application No 23380/09, Merits and Just Satisfaction, Grand Chamber, 28 September 2015; *Khlaifia and Others v Italy* Application No 16483/12, Merits and Just Satisfaction, Grand Chamber, 15 December 2016.

[34] It is notable that the Court's own updated research paper on 'References to the Inter-American Court of Human Rights' omits judgments where the reference to the Inter-American system is raised only in submissions to the Court by third party interveners. See, Council of Europe/European Court of Human Rights, References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights (updated 1 November 2016), available at: www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf [last accessed 27 May 2017]. It would be interesting to learn whether the number of third party interventions that reference external norms is in fact higher than the Court's (in-judgment) summary of these interventions indicates.

[35] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, supra n 33.

[36] *Mocanu and Others v Romania* Application Nos 10865/09, 45886/07 and 32431/08, Merits and Just Satisfaction, Grand Chamber, 17 September 2014 (though this case also raises a substantive interpretive question).

[37] *Cyprus v Turkey* Application No 25781/94, Just Satisfaction, Grand Chamber, 12 May 2014.

[38] *Savriddin Dzurayev v Russia* Application No 71386/10, Merits and Just Satisfaction, 25 April 2013.

[39] *Varnava and Others v Turkey* Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Merits and Just Satisfaction, Grand Chamber, 18 September 2009.

categorize a case as being *either* substantive *or* procedural[40] – a case may focus on a substantive point yet reference Inter-American jurisprudence in relation to a question of procedure. Indeed, sometimes the invocation of Inter-American jurisprudence does not touch upon either a substantive or procedural *right*, but rather concerns a method of treaty interpretation.[41]

Finally, a fourth notable aspect is that of the 70 cases, 11 could be categorized as involving domestic constitutional issues[42] – raising questions about either the membership or powers of state institutions,[43] the relationship between such institutions,[44] access to State-held information[45] or fundamental political rights pertaining to citizenship, voting and language.[46] A further 13 cases could be regarded as belonging to the 'transitional jurisprudence' of the Court.[47] Highlighting these cases, in which questions of state sovereignty may be especially acute, emphasizes that the way in which external norms are handled often touches the central nerve of subsidiarity. As we noted at the outset, in this context the Court may face accusations of improper judicial activism and overreach.[48] Such considerations speak directly to underlying questions about the Court's role – in particular, to what degree its judgments are declaratory and prescriptive, whether the interpretation of the Convention should be driven teleologically

[40] The 'procedural' category does not include cases concerning the interpretation of the procedural limb of a substantive right. So, for example, the normative obligation under Article 3 ECHR to afford *access* to comprehensive health-care services and information to victims of sexual violence is counted as a substantive rather than a procedural norm (*P. and S. v Poland*, supra n 33 at para 72 and para 160). Similarly, while Article 13 cases focus on aspects of domestic procedure (the nature and effectiveness of domestic remedies), Article 13 is counted as a substantive right whose scope the Court must determine.

[41] For example, *Tautkus v Lithuania* Application No. 29474/09, Merits and Just Satisfaction, 27 November 2012, Dissenting Opinion of Judge Pinto de Albuquerque.

[42] A narrower definition – embracing only, for example, what David Feldman describes as the 'core function' of a constitution (namely, the establishment of 'institutions of the state, defining their roles and authority, and regulating their relationships with each other') – yields a count of just five cases. See Feldman, 'The Nature and Significance of 'Constitutional' Legislation' (2013) 129 *Law Quarterly Review* 343 at 357.

[43] For example, *Oleksandr Volkov v Ukraine* Application No 21722/11, Merits, 9 January 2013 and *Baka v Hungary* Application No 20261/12, Merits and Just Satisfaction, Grand Chamber, 23 June 2016 (and Merits, 27 May 2014) (removability of judges without procedural safeguards); *Lagutin and Others v Russia*, supra n 29 (limits of police powers regarding special investigation techniques); *Szabó and Vissy v Hungary* Application No 37138/14, Merits and Just Satisfaction, 12 January 2016 (national security, secret intelligence gathering and sweeping prerogative powers).

[44] For example, *Lexa v Slovakia* Application No 54334/00, Merits and Just Satisfaction, 23 August 2008 (revocability of amnesties granted by the executive branch).

[45] For example, *Magyar Helsinki Bizottság v Hungary*, Application No 18030/11, Merits and Just Satisfaction, Grand Chamber, 8 November 2016 and *Stoll v Switzerland* Application No 69698/01, Merits, Grand Chamber, 10 December 2007 (access to state-held information).

[46] For example, *Ramadan v Malta* Application No 76136/12, Merits and Just Satisfaction, 21 June 2016 (right to citizenship) and *Petropavlovskis v Latvia* Application No 44230/06, Merits, 13 January 2015 (right to nationality); *Catan and Others v Republic of Moldova and Russia* Application Nos 43379/04, 18454/06 and 8252/05, Merits and Just Satisfaction, Grand Chamber, 19 October 2012 (language rights); *Sitaropoulos and Giakoumopoulos v Greece* Application No 42202/07, Merits, Grand Chamber, 15 March 2012 (right to vote from abroad).

[47] For example, *Aslakhanova and Others v Russia* Application Nos 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, Merits and Just Satisfaction, 18 December 2012; *Varnava and Others v Turkey*, supra n 39. On 'transitional jurisprudence' more generally, see Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) *Yale Law Journal* 106; Buyse and Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice Politics and Rights* (Cambridge University Press, 2010).

[48] See, for example, the Russian Government's assertion that '[t]he Court should be guided by its own case-law rather than the approach of the Inter-American Court', in *Catan and Others v Republic of Moldova and Russia*, supra n 46 at para 164 (a case concerning educational policy and the use of Cyrillic rather than Latin script in schools within the separatist Transdniestrian region of Moldova). The Russian government's particular sensitivity to external norms might also partly be explained by the fact that Russia featured as the most prominent Respondent State in our sample (14 cases out of 70). Croatia followed next (with 8 cases), followed then by Hungary, Switzerland and Turkey (each with 4).

or whether instead it should seek only to establish a minimal (perhaps consensus-driven) baseline.

Clearly, the choice between these different approaches will reflect differences in opinion about the role of human rights courts, and we revisit these questions in section 4. Before doing so, we will first further explore the interpretative constraints that influence the methods of engagement by the European Court of Human Rights with conflicting normative positions – whether these come from within the Council of Europe space or beyond it (as in our case sample, from the Inter-American system).

3. NORM-BROKERING: CONSTRAINTS AND OPPORTUNITIES

Norm development can occur in several different ways.[49] These include broadening the ambit of an existing right,[50] modifying the threshold test for finding a violation,[51] supplementing the positive obligations attached to a right[52] or extending the range of available remedies.[53] The factors that influence how human rights courts approach this process of norm development – especially when confronted with normative dissensus – is the focus of this section. Drawing on our case study of the European Court of Human Rights, we will deal first with the triggers for norm-brokering, followed by the interpretative constraints that derive from the Court's own established principles of interpretation. We then turn to examine the Court's approach in cases where tensions have arisen between the Council of Europe's standards and *external* normative developments beyond Europe. It is in this latter domain that the norm-brokering role of the Court becomes most evident.

A. Triggers for Norm-Brokering

Several triggers for norm development emerge from the jurisprudence and separate opinions of the European Court of Human Rights. These include: if the facts of a case present the Court with an opportunity to elucidate a clear normative position,[54] perhaps because of a pattern of

[49] Sandholtz, for example, identifies four different types of judicial norm development – according higher norm status, application to additional subjects, application to additional categories of behaviour, and creating new positive duties. Supra n 1, at 158.

[50] See further Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR' (2006) 69(5) *The Modern Law Review* 714.

[51] For example, *Fáber v Hungary* Application No 40721/08, Merits and Just Satisfaction, 24 July 2012 (drawing on the judgment of the US Supreme Court in *Virginia v Black* 538 US 343 (2003) to establish a higher threshold for finding a violation of the rights to freedom of expression and assembly under Articles 10 and 11 ECHR); Also, *Selmouni v France*, Application No 25803/94, Merits and Just Satisfaction, 28 July 1999 (which, as Nigel Rodley argues, 'manifestly adjusted downward the line between torture and inhuman treatment'). See Rodley, 'The Prohibition of Torture: Absolute Means Absolute,' (2006) 34(1) *Denver Journal of International Law and Policy* 145 at 155.

[52] For example, *McCann and Others v The United Kingdom* Application No 18984/91, Merits and Just Satisfaction, 27 September 1995 (regarding operational planning under Article 2); *Osman v The United Kingdom* Application No. 23452/94, Merits and Just Satisfaction, 28 October 1998 (regarding preventive obligations in relation to acts of third parties). See also Teitel, 'Transitional Justice and Judicial Activism – A Right to Accountability?' (2015) 48 *Cornell International Law Journal* 385 at 396.

[53] In the realm of transitional justice for example, both the 'right to reparations' and the 'right to truth' derive from the well-established rights to life and the right to an effective remedy. See, for example, Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 (1) *Heidelberg Journal of International Law* 129.

[54] For example, in *Gäfgen v Germany*, supra n 33, the Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens Zimele, Bianku and Power (at para 2) argues that the case '… presented the Grand Chamber with an opportunity to rule upon the precise scope of the exclusionary rule in respect of any evidence obtained by a breach of Article 3.'

persistent violations;[55] if there is no directly analogous prior Convention case law,[56] or indeed, if there had been significant criticism of previous judgments;[57] 'uncertainty'[58] or 'apparent conflict'[59] in the Court's own jurisprudence thus requiring 'further clarification', perhaps following from an earlier failure by the Court to provide a clear and defined standard for national authorities to comply with;[60] a broader concern to bring coherence to 'the Court's messy case-law';[61] the need to promote internal consistency and harmony between the Convention's various provisions[62] (noting that 'the Convention and its Protocols must be read as a whole'); and more generally, providing 'legal certainty in international law'.[63]

The Court has also sometimes been guided by teleological principles such as 'the principle of effectiveness',[64] of the most protective interpretation[65] or the requirements of the rule of law.[66] Yet even where these triggers are present, the Court is constrained by its own established rules of interpretation.

B. Principles of Interpretation

Citing Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the Strasbourg Court has held that '[t]he Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part'.[67] This includes '"any relevant rules of international law applicable in the relations

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[55] *Lagutin and Others v Russia*, supra n 29. Here, Judge Pinto de Albuquerque argued that '[i]n view of the systemic failure of the Russian legal order … the time was ripe for the Court to establish the requirements of Convention-compliant legislation on special investigation techniques.'

[56] In *Palomo Sánchez and Others v Spain* Application Nos 28955/06, 28957/06, 28959/06 and 28964/06, Merits and Just Satisfaction, Grand Chamber, 12 September 2011, the dissenting judges (at para 7) note that 'there has not yet been any specific Convention case-law associating trade-union freedom … with freedom of expression'. See also, *Bayatyan v Armenia*, supra n 33 at para 99 (concerning the applicability of Article 9 to conscientious objectors).

[57] For example, in *Öcalan v Turkey (No. 2)* Application Nos 24069/03, 197/04, 6201/06 and 10464/07, Merits and Just Satisfaction, 18 March 2014, Judge Pinto de Albuquerque (at para 1 of his Partly Dissenting Opinion) argued that '[i]n view of the reaction to *Vinter*, the Court could and should have taken the opportunity to clarify the meaning of its standard in this matter.' See also the argument raised by the International Federation for Human Rights (FIDH) intervening in the Armenian Genocide denial case of *Perinçek v Switzerland*, supra n 30 at para 189.

[58] *Janowiec and Others v Russia*, supra n 33 at para 140.

[59] *Šilih v Slovenia* Application No 71463/01, Merits and Just Satisfaction, Grand Chamber, 9 April 2009, Joint Dissenting Opinion of Judges Bratza and Türmen.

[60] *El-Masri v The Former Yugoslav Republic of Macedonia*, supra n 33, Concurring Opinion of Judge Pinto de Albuquerque.

[61] *Abdullahi Elmi and Aweys Abubakar v Malta* Application Nos 25794/13 and 28151/13, Merits and Just Satisfaction, Grand Chamber, 22 November 2016, Concurring Opinion of Judge Pinto de Albuquerque at para 33, arguing for the need to align the Court's position 'with international human-rights and refugee law' (in relation to the interpretation of Article 5(1)(f) ECHR).

[62] *Marguš v Croatia* (2014), supra n 17 at para 128.

[63] *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, supra n 45 at para 150 (access to state-held information). Judge Pinto de Albuquerque, joined by Judge Vučinić, makes a similar point in his Concurring Opinion in *Maktouf and Damjanović v Bosnia and Herzegovina* Application Nos 2312/08 34179/08, Merits and Just Satisfaction, Grand Chamber, 18 July 2013 (emergence of domestic violence as an autonomous human rights violation).

[64] *Milenković v Serbia*, supra n 69.

[65] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, supra n 33, Concurring Opinion of Judge Pinto de Albuquerque at para 8.

[66] *Baka v Hungary*, supra n 43 at paras 117 and 121.

[67] *Marguš v Croatia* (2014), supra n 17 at para 129. See also *Loizidou v Turkey* Application No 15318/89, Merits and Just Satisfaction, Grand Chamber, 18 December 1996, at para 43. Burchardt argues that Article 31(3)(c) 'stipulates an obligation of inter-systemic interpretation.' See Burchardt, supra n 16 at 316.

between the parties", and in particular the rules concerning the international protection of human rights …'[68]

While the Court has noted that the Convention, like other international treaties, 'must be construed in the light of their object and purpose',[69] it has adopted a number of interpretative principles enabling the Protean development of human rights norms. The Court has frequently emphasized that it should not depart, without good reason, from precedents laid down in previous cases.[70] On the other hand, it has emphasized the imperative of 'evolutive interpretation'.[71] This means that the Convention is to be viewed as a 'living instrument' to be 'interpreted in the light of present-day conditions'.[72] The Strasbourg Court has thus held that it must 'have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any *emerging consensus* as to the standards to be achieved.'[73] From our sample, evolutive development of a Strasbourg norm was expressly acknowledged in six cases (though it is debatable whether or not these cases perfectly exemplify evolutive interpretation),[74] and an evolutive approach was explicitly rejected due to a lack of consensus in four cases (concerning the pension entitlements of surviving unmarried partners,[75] the use of human embryos for scientific research,[76] same-sex adoption[77] and voting from abroad).[78]

These modes of interpretation delimit the menu for the Court in performing its norm-brokering role. However, notwithstanding the articulation of these interpretative principles, the Court has sometimes struggled – in methodological terms – to resolve acute normative dilemmas. Indeed, the methodology used to ascertain whether a European consensus exists is not elaborated upon in the Rules of Court,[79] and has sometimes caused significant internal

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[68] *Marguš*, ibid.

[69] See, for example, *Milenković v Serbia* Application No 50124/13, Merits and Just Satisfaction, 1 March 2016, at para 80, citing *Mamatkulov and Askaraov v Turkey* Application Nos 46827/99 and 46951/99, Merits and Just Satisfaction, 4 February 2005, Grand Chamber, at para 123.

[70] For example, *Magyar Helsinki Bizottság v Hungary*, supra 45 at para 150.

[71] It is noteworthy, given the focus of this article on emerging norms, that the concept of 'evolutive interpretation' first appeared in Strasbourg jurisprudence in dissenting opinions: see *Albert and Le Compte v Belgium*, Application Nos 7299/75 and 7496/76, Merits and Just Satisfaction, 10 February 1983, Partly Dissenting Opinion of Judge Matscher; *Öztürk v Germany* Application No 8544/79, Merits and Just Satisfaction, 21 February 1984, Dissenting Opinion of Judge Bernhardt.

[72] *Tyrer v The United Kingdom* Application No 5856/72, Merits, 25 April 1978, at para 31; Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19(1) *European Journal of International Law* 101 at 106.

[73] For example, *Scoppola v Italy (No.2)* Application No 10249/03, Merits and Just Satisfaction, Grand Chamber, 17 September 2009, at para 104 (emphasis added).

[74] *Khlaifia and Others v Italy*, supra n 33 (collective expulsion of Aliens, Article 4 of Protocol 4 ECHR); *Magyar Helsinki Bizottság v Hungary*, supra n 45 (access to state-held information, Article 10); *Konstantin Markin v Russia* Application No 30078/06, Merits and Just Satisfaction, Grand Chamber, 22 March 2012 (parental leave for fathers, Article 14 in conjunction with Article 8 ECHR); *Bayatyan v Armenia*, supra n 33 (conscientious objection, decoupling Article 9 from Article 4(3)(b) ECHR); *Scoppola v Italy (No.2)*, ibid. (Article 7 ECHR to include *lex mitior* principle as well as non-retrospectivity – but note the partly dissenting Opinion of Judge Nicolaou, joined by Judges Bratza, Lorenzen, Jočienė, Villiger and Sajó); *Šilih v Slovenia*, supra n 59 (evolution of the procedural obligation under Article 2 ECHR into a separate and autonomous duty).

[75] *Aldeguer Tomás v Spain* Application No 35214/09, Merits and Just Satisfaction, 14 June 2016, at para 82.

[76] *Parrillo v Italy* Application No 46470/11, Merits and Just Satisfaction, Grand Chamber, 27 August 2015, at para 69.

[77] *X and Others v Austria*, supra n 33 at para 149; cf. Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos.

[78] *Sitaropoulos and Giakoumopoulos v Greece*, supra n 46 at para 74.

[79] Registry of the Court, 'Rules of Court', 14 November 2016. Available at: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [last accessed 3 July 2017].

disagreement within the Court.[80] Thus, even the Court's own principles of interpretation do not always convincingly explain or resolve normative tensions within the Council of Europe space – and the methodology employed by the Court when considering the question of 'consensus' is far from failsafe.

It is precisely for this reason – the inability of bare interpretative principles to formulaically yield persuasive normative outcomes – that we propose the concept of 'norm-brokering' as an appeal to 'public reason' (explained further in Sections 3D and 4A below). As Fred Frohock notes, 'the verbal firepower of good arguments' is one of 'the dominant modes of public reasoning when consensus is not effective'.[81] Indeed, the limits of a consensus driven approach – and thus the need to find an alternative basis for grounding strong rights protections – are heightened, as Sandholtz suggests, 'when the majority of states are rights laggards.'[82] Norm-brokering compels the Court to expressly confront and methodically address normative challenges as they arise. As has been noted, these challenges may arise *within* the Council of Europe space (whereupon the Court must mediate between different national and regional normative standpoints), but it is the *external* dimension of the norm-brokering role that is especially significant (since recourse to external norms more obviously raises questions of jurisdictional overreach and hence, also of legitimacy).

C. Accommodating External Norms

Letsas argues that 'the "openness" of regional instruments to other parts of international law is not a choice, a process, or a recent development. It is a necessary consequence of the fact that the adjudicative task of international courts and other bodies is one of moral evaluation, not one of textual interpretation.'[83] Whether or not one accepts Letsas's thesis in its entirety, we are interested here in *how* human rights courts explain or do not explain their reliance on these other parts of international law.

The findings of our own study demonstrate that the manner in which the Strasbourg Court engages with the Inter-American norms varies significantly. In 13 judgments,[84] the Inter-American system was referenced by the Court *only* in its listing of relevant international norms but was not referred to in the 'Court's assessment' of the case before it. In just 18 of the 70 cases, the Court's assessment does engage with the external Inter-American norm (sometimes even just minimally so).[85] In judgments where the Inter-American norms do inform a more robust evaluation of the merits, on at least two occasions the external norm was expressly rejected[86] and in up to five judgments, simply not followed. For example, the Court's judgment

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[80] In *X and Others v Austria*, supra n 33, for example, a case concerning the extension of second-parent adoption rights to same-sex couples (under Article 14 in conjunction with Article 8 ECHR), there was disagreement regarding the 'sample' of member States to be taken into account – see paras 78 and 149 and the Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos at paras 13 and 15. In *Sitaropoulos and Giakoumopoulos v Greece*, supra n 46, there was disagreement about the interpretation of the results of a comparative study of 33 Council of Europe Member States (namely, whether or not a European consensus on allowing nationals to vote from abroad could be said to exist, under Article 3 of Protocol 1 ECHR) – see paras 49 and 74.

[81] Frohock, *Public Reason: Mediated Authority in the Liberal State* (Cornell University Press, 1999) at 223.

[82] Sandholtz, supra n 1 at 160.

[83] Letsas, supra n 6 at 541. Letsas further argues (at 540) that 'the purpose of human rights courts … is to discover, over time and through persuasive moral argument, the moral truth about these fundamental rights', and indeed (at 538) that the Strasbourg Court has adopted an 'interpretative ethic' which rejects originalism and instead 'prioritizes the moral reading of the Convention rights'.

[84] For example, *Lexa v Slovakia*, supra n 44.

[85] For example, the reference to the Inter-American Court's interpretation of the right to freedom of expression as including the right to seek information in *Magyar Helsinki Bizottság v Hungary*, supra n 45 at para 146.

[86] For example, in *Janowiec and Others v Russia*, supra n 33 the Grand Chamber rejected the argument advanced by the 3rd party intervenors (Amnesty International, Open Society Justice Initiative, Memorial, the European

in *Aldeguer Tomás v Spain*[87] (concerning the pension rights of surviving, unmarried, same-sex partners) does not follow the less deferential approach of the Inter-American Court of Human Rights in relation to a matter of discrimination on the basis of sexual orientation. Instead, the Strasbourg Court afforded a wide margin of appreciation to Spain in relation to the delayed introduction of legislative changes in this area – an area that the Court emphasized was concerned with 'evolving rights with no established consensus' (and also 'general economic or social measures' in relation to which a wide margin is usually allowed).[88]

In 14 of the 70 cases, it is at least arguable that the Inter-American norm somehow emboldens the European Court of Human Rights to adopt or affirm a more expansive interpretation of a Convention right.[89] For example, in relation to enforced disappearances, the willingness of the Inter-American Court to find violations of, amongst other provisions, Article 8 ACHR (fair trial) could be said to have emboldened the Strasbourg Court in affirming autonomous procedural obligations in the absence of a proven substantive breach.[90] However, even within a single case, the same external norm can be relied upon in different ways by different judges – the salience of the external norm is entirely contingent on how the case is framed (with the same norm being central to some lines of argument and largely peripheral to others). This underscores the importance of the Court clarifying how precisely the external norm is being relied upon. In *Marguš v Croatia*,[91] for example, the Inter-American norm (relating to the impermissibility of amnesties, and itself contested) was invoked by different judges to address a mixture of different factual and normative questions. These questions centred on the applicability and/or application of the *non bis in idem* rule under Article 4 of the Seventh Protocol to the Convention.[92] Likewise, the admissibility *ratione materiae* of the Article 6 complaint in *Baka v Hungary*[93] – specifically, the applicability of the civil head of Article 6 to a dispute concerning a person exercising a public function – illustrates the challenge of teasing apart what is normative and what is factual.[94] The Concurring Opinion of Judge Sicilianos in *Baka* pays close attention to the external materials referred to at different junctures

Human Rights Advocacy Centre and the Transitional Justice Network) who relied on Inter-American cases to assert that the investigative obligations under Article 2 persisted 'for as long as it was practically feasible' and that it was 'existing practice of national and international courts to assert jurisdiction over past violations'.

[87] *Aldeguer Tomás*, supra n 75.

[88] Ibid. at paras 90 and 82.

[89] In approximately 25 of the 70 cases, it could be argued that the Council of Europe norm was already congruent with the particular Inter-American norm raised. For example, *P. and S. v Poland* Application No 57375/08, Merits and Just Satisfaction, 30 October 2012 (concerning the question of whether a lack of access to healthcare was germane to the Article 3 ECHR threshold). Here, the Court relied (at para 160) only on its own prior case law, without referring back to the arguments raised by Amnesty International (at para 72).

[90] See, *Varnava and Others v Turkey*, supra n 39 and subsequently *Aslakhanova and Others v Russia*, supra n 47. Indeed, by also finding a violation of the right to life under Article 2 ECHR, the Strasbourg Court could be said to have gone further than the Inter-American jurisprudence (which did not find of a violation of the right to life under Article 4 ACHR). Another example is provided by *Opuz v Turkey*, supra n 33 at paras 190-1, in which Inter-American case-law was referred to in order to establish the meaning of discrimination in the context of domestic violence, thereby helping ground a finding of a violation of Article 14 in conjunction with Articles 2 and 3 ECHR.

[91] *Marguš v Croatia* (2014), supra n 17.

[92] These *different* questions related to the applicability of Protocol 7-4 to the facts of the case; the applicability of Protocol 7-4 to amnesties per se; the application of Protocol 7-4 to different types of amnesty; the interpretation of Protocol 7-4 in light of the investigative obligations under Articles 2 and 3; and the application of Protocol 7-4 retrospectively given the evolution of international standards relating to amnesties. For Judges Ziemele, Berro-Lefèvre and Karakaş and for Judge Vučinić, the Inter-American norm was relevant (albeit for slightly different reasons), whereas it was peripheral to the arguments advanced by Judges Spielmann, Power-Forde and Nussberger and by Judges Šikuta, Wojtyczek and Vehabović.

[93] *Baka v Hungary*, supra n 43. In this case, a Chamber judgment (unanimously) and Grand Chamber judgment (by a 15-2 majority) held that the dismissal of the President of the Hungarian Supreme Court, without due process guarantees, engaged and violated both Article 6 and Article 10 ECHR.

[94] See also Shadd, supra n 28.

in the majority opinion, and expressly poses the *normative* question: 'Towards a subjective right to judicial independence, protected by the Convention?' In contrast, the majority drew upon both Council of Europe and external sources to answer a *factual* question about the existence of an express right for court executives of access to a court in Hungarian law, concluding that 'judicial protection *was* available under domestic law for cases of dismissal' in line with these standards and the principle of the rule of law.[95]

Three different issues relating to the accommodation of external norms emerge from the cases in our sample. The primary question concerns the weight properly to be attached to external norms, and whether harmonization of international law should necessarily be pursued. The second relates to how to navigate differences arising from differently worded treaty provisions (when the very rights protected by the European Convention and other treaties are differently framed). The third is the difficulty of establishing what exactly international law, beyond the Council of Europe, has to say on a particular normative point. We will deal here with each of these three issues in turn – but it is significant to observe again[96] that Rule 74 of the Rules of Court (on the 'Contents of the Judgment') is entirely silent on how international materials ought to be drawn upon or reflected in the Court's reasoning.[97] Instead, this is apparently left entirely to judicial discretion – and too often the Court merely lists relevant international norms without making any further attempt to articulate their significance or explain how, if at all, they have been taken into account.

Let us turn to the first question. Where an external norm is deemed relevant to a particular case, the question of what weight ought to be attached to it may be thought to depend on the provenance of the norm concerned – perhaps because of salient contextual similarities or its standing within orthodox scholarship. The approach to external norms is certainly not uniform, even considering only the cases in which the Court expressly acknowledged the evolutive development of Convention rights. For example, in *Šilih v Slovenia*,[98] while the Grand Chamber found that the procedural obligation to carry out an investigation into deaths under Article 2 had evolved *in its own case-law* into a separate and autonomous duty, it then noted that: '[t]his approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, in particular, of the Inter-American Court of Human Rights …'[99] In *Bayatyan v Armenia*,[100] however, while external norms may have had some role in catalysing the normative shift in the Strasbourg Court's jurisprudence relating to conscientious objection (the decoupling of Art 9 and Art 4(3)(b)), it was certainly not the jurisprudence of the Inter-American Commission or Court that galvanized the European Court's approach. After all, the Inter-American jurisprudence itself expressly drew upon and reflected the *earlier* position of the European Commission on Human Rights, confirming that 'conscientious objection was protected under the American Convention *only in countries where it was recognized*'.[101] In *Bayatyan*, the norm was revised because of a combination of developments within both the EU

[95] Supra n 43 (Grand Chamber) at paras 114 (emphasis added) and 117. This factual assertion prompted Judges Pinto de Albuquerque and Dedov to enter a concurring opinion, suggesting overreach (at para 1) on the part of the majority: 'The Court found this right of access to be a given by reading into the domestic law the international standards on judicial independence, which are – for the most part – soft law.'
[96] See above at section 3B.
[97] Registry of the Court, supra n 79.
[98] *Šilih v Slovenia*, supra n 59.
[99] Ibid. at para 160.
[100] *Bayatyan v Armenia*, supra n 33.
[101] Ibid. at para 68 (emphasis added).

and Council of Europe[102] and the UN Human Rights Committee's interpretation of Articles 8 and 18 ICCPR.[103]

The weight to be attached to external norms also depends on whether the desired goal is one of harmonization and achieving uniformity in international law. In one case from our sample, *Zolotukhin v Russia*,[104] the Court adopted a novel approach in its assessment of the merits of the case. The Court undertook a structured, two-step process organised under the following subheadings: 'Summary of the existing approaches'[105] and 'Harmonisation of the approach to be taken'.[106] Only in two other cases does the Strasbourg Court expressly follow a similar approach – but both of these are concerned with the harmonization of internal, rather than external, norms.[107] Significantly, *Zolotukhin* is a Grand Chamber judgment which ultimately provided the normative clarification that differently constituted Chambers were subsequently able to follow.[108] Our thesis is that addressing the *question* of harmonization (rather than having harmonization as a goal) is a methodological approach that human rights courts could adopt when considering the weight to be attached to external norms. The goal will certainly not always be uniformity or harmonization as in *Zolotukhin*, but rather as others have suggested 'textured harmony'[109] or reasoned and 'thoughtful convergence'.[110]

Second, and relatedly, the issue of what normative import can properly be drawn from Inter-American jurisprudence deriving from differently worded treaty provisions *has* led the European Court to afford more in-depth – or at least, more explicit – consideration of external norms than it might otherwise do in cases involving entirely congruent treaty provisions. This may be because, as Jamie Mayerfeld notes, '[d]ifferences in the way particular treaties and constitutions define human rights force us to evaluate and compare. Why is this human right defined differently here than there? Which definition is better and why?'[111] In *Petropavlovskis v Latvia*,[112] for example, the applicant's attempt to rely on Inter-American jurisprudence in relation to the naturalization of Stateless persons was rejected by the Court as inadmissible. The Court explained that:

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[102] Specifically, Article 10, EU Charter of Fundamental Rights, Recommendations of the Parliamentary Assembly and of the Committee of Ministers.

[103] *Bayatyan v Armenia*, supra n 33 at paras 54-5 and 105-8.

[104] *Sergey Zolotukhin v Russia* Application No 14939/03, Merits and Just Satisfaction, Grand Chamber, 10 February 2009.

[105] Ibid. at paras 70-7.

[106] Ibid. at paras 78-84 (followed then by 'Application of this approach to the present case').

[107] See, *Roman Zakharov v Russia*, Application No 47143/06, Merits and Just Satisfaction, Grand Chamber, 4 December 2015 (concerning *actio popularis* and the question of determining victim status in surveillance cases), at para 170; and *Idalov v Russia*, Application No 5826/03, Merits and Just Satisfaction, Grand Chamber, 22 May 2012, at para 127 (reconciling two different approaches to the application of the six-month rule in assessing the reasonableness of the duration of pre-trial detention 'so that a uniform and foreseeable approach may be adopted in all cases, thus better serving the requirements of justice').

[108] *Maresti v Croatia* Application No 33401/02 and 55759/07, Merits and Just Satisfaction, 25 June 2009 (first section); *Tomasovic v Croatia* Application No 53785/09, Merits and Just Satisfaction, 18 October 2011 (first section); and *Milenković v Serbia*, supra n 69 (third section).

[109] Evans, 'Co-existence and Confidentiality: The Experience of the Optional Protocol to the Convention against Torture; Harmony and Human Rights: The Music of the Spheres' in Buckley, Donald and Leach (eds), supra n 20, 516 at 542. See generally, Cheeseman, 'Harmonising the Jurisprudence of Regional and International Human Rights Bodies: A Literature Review', Appendix in Buckley, Donald and Leach (eds), supra n 20.

[110] Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) *Yale Law Journal* 273 at 374.

[111] Mayerfeld, *The Promise of Human Rights: Constitutional Government, Democratic Legitimacy, and International Law* (University of Pennsylvania Press, 2016) at 209.

[112] *Petropavlovskis v Latvia*, supra n 46.

> … a "right to nationality" similar to that in Article 15 of the Universal Declaration of Human Rights, or a right to acquire or retain a particular nationality, is not guaranteed by the Convention or its Protocols … The applicant's reference to the case-law of the Inter-American Court of Human Rights is … misguided, since the American Convention on Human Rights, which is a regional instrument, explicitly provides for a right to nationality in its Article 20.

Of-course, the Strasbourg Court need not reject such normative arguments absolutely, and may decide to distinguish its own jurisprudence in other ways. In *El Haski v Belgium*,[113] for example, the relevant Inter-American treaty provision was Article 10 of the Inter-American Convention to Prevent and Punish Torture. This provision excludes evidence obtained by torture 'in a legal proceeding', but the Strasbourg Court in *El Haski*, relying on its own prior case law (*Gäfgen*), adopted a more nuanced approach that further holds: (a) admission of evidence obtained in breach of Article 3, however classified, will render any *criminal* trial unfair in breach of Art 6; and (b) admission of evidence obtained as a result of inhuman treatment that falls short of torture will render non-criminal cases unfair in breach of Article 6 if the breach of Article 3 is shown to have a bearing on the outcome of the case.

All the cases discussed in this section so far – *Zolotukhin*, *Petropavlovskis* and *El Haski* – demonstrate that the European Court *has* on occasion been willing to enter into a deliberative process with a view to carefully explaining how external norms might or might not be appropriately weighted and applied. However, the Court does not always engage so admirably.

A third element of tension concerning the Court's recognition of external norms illustrates the point. In the case of *Marguš v Croatia*,[114] the external norm was itself a matter of contestation, and the Court was evidently less willing to enter into a process of norm-brokering. The gap between the Court's approach in this case and in the cases discussed above underscores the need for more reasoned judicial engagement with relevant external norms and greater methodological consistency in doing so.

Fred Marguš, a decorated commander in the Croatian Army, was prosecuted in December 1991 for the murder of two Serbian civilians. He later benefitted from an amnesty enacted by the Croatian government in 1996.[115] However, when he was retried in 2007, he claimed that he had been tried twice for the same crime, in contravention of Article 4 of Protocol 7 ECHR – the double jeopardy, *ne bis in idem* principle.[116] In both the domestic proceedings and later before the European Court, the government argued that the Amnesty Act had been applied contrary to its purpose, and thus contrary to Croatia's obligations under the Articles 2 and 3 of the Convention. Both the Chamber and Grand Chamber broadly agreed, merely concluding that since the Croatian authorities were acting in compliance with their investigative obligations under Articles 2 and 3 of the Convention, Article 4 of Protocol 7 was not applicable. However, setting aside the Grand Chamber's rather perfunctory conclusion, it is the Court's lengthy documenting of external norms concerning the status of amnesties under international law that is particularly relevant here in terms of norm-brokering. The Chamber of the Court had stated that:

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[113] *El Haski v Belgium*, supra n 33. The case also provides a good example of a dialogic approach in light of arguments advanced in the case law of national courts (including the UK House of Lords judgment in *A and Others v Secretary of State for the Home Department (no. 2)* [2005] UKHL 71, and the German and Canadian case-law cited by UK government).

[114] *Marguš v Croatia* (2014), supra n 17.

[115] Ibid. at para 16.

[116] The applicant also argued that his fair trial rights under Article 6 ECHR had been violated, but neither the Chamber nor Grand Chamber found Article 6 to have been violated.

> Granting amnesty in respect of "international crimes" – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. The understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by governments.[117]

However, as many scholars have observed, the issue of amnesties is one where the international norm remains deeply contested.[118] Pensky, for example, notes that anti-amnesty arguments 'have seriously overestimated what current international law has to say about the status of domestic amnesties for international crimes'.[119] Mallinder has similarly noted that 'it is too early to say that an absolute prohibition on amnesties for crimes under customary international law exists: it is *lex ferenda*'.[120] It was on this basis that a third-party intervention from a number of academics argued that 'strong policy reasons supported acknowledging the possibility of the granting of amnesties where they represented the only way out of violent dictatorships and interminable conflicts.'[121] The interveners pleaded against a total ban on amnesties and for a more nuanced approach in addressing the issue of granting amnesties.

Only Judges Šikuta, Wojtyczek, and Vehabović in their Joint Concurring Opinion expressly recognized the key epistemological difficulty: namely, the challenge of establishing what rules of international law were applicable 'in the past at a particular juncture or over a specific period'. The challenge presented was twofold: it involved first identifying the relevant international law norm, and second, assessing its 'fit' with the evolutive jurisprudence of the Strasbourg Court. But the Court does not follow such a structured approach. Instead, much of the Grand Chamber ruling in *Marguš* is taken up by documenting the judgments of other (non-European) regional and international courts and tribunals. In fact, of the 58 pages of the judgment (not counting the five separate opinions),[122] 24 pages are devoted to 'Relevant

[117] *Marguš v Croatia* (2012), supra n 17 at para 74. See also *Marguš v Croatia* (2014), supra n 17 at para 130.

[118] Indeed, as recently as 2012, the European Court of Human Rights itself held that: 'even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting any amnesty laws it might consider necessary'. See *Tarbuk v Croatia* Application No 31360/10, Merits and Just Satisfaction, 11 December 2012, at para 50 (citing an earlier admissibility decision of the Commission in *Dujardin and Others v France* Application No 16734/90, Commission Decision, 2 September 1991 at 243).

[119] Pensky, 'Jus Post Bellum and Amnesties' in May and Edenberg (eds) *Jus Post Bellum and Transitional Justice* (Cambridge University Press, 2013) 152 at 161.

[120] In other words, 'future law'. See Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart, 2008) at 9.

[121] See, 'Legal Status of Amnesty: Third party intervention in the case of *Marguš v Croatia*, Application no. 4455/10'. The authors are grateful to Professor William Schabas and Dr Josepha Close for sharing with us the full text of this intervention (as summarized in *Marguš v Croatia* (2014), supra n 17 at paras 108-113).

[122] There are four separate concurring or joint concurring, and one partly dissenting, opinions. The joint concurring opinion of Judges Spielmann, Power-Forde and Nussberger relied on a textual analysis of Article 4 of Protocol 7, arguing that this provision was simply not applicable since the amnesty did not constitute a 'final acquittal' (because there had been no assessment by a court of the circumstances of the case, and the guilt or innocence of the defendant had never been established). Another joint concurring opinion (of Judges Ziemele, Berro-Lefevre and Karakaş) argued instead – contrary to the third-party intervention to which they do not refer – that 'given the importance of combating any perception of impunity for grave breaches of human rights or for war crimes, we would have preferred to say that the *ne bis in idem* principle … should not operate as a barrier to bringing individuals to justice where those individual have been granted amnesty shielding them from responsibility …' In this way, they argued, the Court would have contributed to a better understanding of the scope of Article 4 of Protocol 7.

International Law Materials'.[123] While these references to external norms of international law might have assisted the Court in divining the 'Conventional' approach to amnesties for serious violations of human rights, they play a relatively minor role in the Court's reasoning.

The Grand Chamber simply 'notes' *inter alia* and without further comment: (a) the possibility that treaty obligations may circumscribe the possibility of amnesties being granted in respect of grave breaches of human rights;[124] (b) that '[v]arious international bodies have issued resolutions, recommendations and comments … generally agreeing that amnesties should not be granted' in such circumstances;[125] (c) 'the interveners' argument that there is no agreement among States at the international level when it comes to a ban on granting amnesties without exception for grave breaches of fundamental human rights, including those covered by Articles 2 and 3 of the Convention';[126] and (d) the relevant jurisprudence of the Inter-American Court of Human Rights.[127] The Grand Chamber's conclusion recognizes 'a growing tendency in international law to see such amnesties as unacceptable', but does not decide whether the international norm is, or ought to be, firmly settled so as to permit amnesty for grave violations of human rights in certain circumstances (such as in the context of 'a reconciliation process and/or a form of compensation to the victims') since there were no such circumstances in the present case.[128] This is essentially a consensus-driven approach, albeit here on a global extra-Conventional scale.

Indeed, only the Joint Concurring Opinion of Judges Šikuta, Wojtyczek, and Vehabović makes some attempt to consider the 'meaning' of these various treaty-based and external judicial pronouncements. Referring to the leading judgments under the Inter-American system, the Concurring Opinion notes that 'the solutions adopted under that system are not necessarily transposable to other regional human rights protections systems' since it 'has a number of distinctive features.'[129] In an argument that resonates with Evans's call for 'textured harmony' rather than uniformity, whilst noting the rapid evolution of international law, the Joint Concurring Opinion concludes that:

> [W]orld history teaches us the need to observe the utmost caution and humility in this sphere. Different countries have devised widely varying approaches enabling them to put grave human rights violations behind them and restore democracy and the rule of law'.[130]

The joint concurring opinion thus places ECHR norms in a broader global context, while at the same time arguing that differentiation may sometimes be called for. This kind of argumentation is an explicit example of norm-brokering.

D. Norm-Brokering

[123] This in itself might point to the Court's normative ambition since, as noted previously, the facts of the case did not require the Strasbourg Court to pronounce on the legality, or otherwise, of amnesties. The domestic failing was less the recourse to amnesty, and more the miscategorisation of Fred Marguš's crimes by the domestic courts.
[124] *Marguš v Croatia* (2014), supra n 17 at para 132.
[125] Ibid. at para 134.
[126] Ibid. at para 137.
[127] Ibid. at para 138.
[128] Ibid. at para 139: '*Even if it were to be accepted* that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances' (emphasis added).
[129] Ibid. Joint Concurring Opinion of Judges Šikuta, Wojtyczek, and Vehabović at para 7.
[130] As such, they could not 'rule out the possibility that ... an amnesty [for grave human rights violations] might in some instances serve as a tool enabling an armed conflict or a political regime that violates human rights to be brought to an end more swiftly, thereby preventing further violations in the future.' Ibid. at para 9.

The way in which human rights courts attempt to resolve issues of treaty interpretation, in the face of normative divergence both within and beyond their jurisdictional boundaries, illuminates the role of human rights courts in mediating between competing internal and external norms. Our thesis is that the concept of 'norm-brokering' helpfully captures the role that human rights courts ought to undertake. As a concept, however, 'norm-brokering' has received relatively little scholarly analysis.

The concept of 'norm-brokering' has been used by Ramesh Thakur and Thomas G Weiss to describe the role of the International Commission on Intervention and State Sovereignty in reconciling the tension between sovereignty and humanitarian intervention through the 'Responsibility to Protect' norm.[131] Philipp Pattberg uses it to describe the role of the Forest Stewardship Council (FSC) in mediating norms between multiple stakeholders, such as experts and practitioners. This is a role which he distinguishes from the FSC's standard-setting function, describing it in terms of the production and dissemination of knowledge ('including knowledge from other sources such as international organisations' and 'providing an arena for learning').[132] Otherwise, however, there has been no attempt to carve out or interrogate what a judicial norm-brokering role might entail.[133]

We argue that norm-brokering, as a method of human rights interpretation, implies active engagement with contextual factors both beyond and within the particular region concerned. It is a granular and exegetic process, one that demands close engagement with legal texts and their respective origins. 'Brokerage' is much more than the inert or indifferent supply and reception of norms. Just as peace agreements are 'brokered', the concept of 'norm-brokering' entails an active and exhaustive process of delicate judicial deliberation. As such, regional human rights courts are not merely a conduit between global and domestic norms. They should be neither a passive receptacle by merely scanning and cataloguing potentially relevant external standards nor a pedlar of their own hermetically determined standards. Norm-brokering entails 'a dynamic act of congruence-building'.[134] Arguably, the goal of norm-brokering is to articulate a compelling and finely-judged case for the extension of human rights norms,[135] perhaps aiming for maximal congruency and comity where possible, but not settling for straightforward transposition or a bare process of translation between regional and global actors. Norm-brokering should function like a 'thick' 'consolidation machine'[136] by which, as Fred Frohock argues, '[i]ndividual entries are to be interpreted and judged, eventually rank ordered, and sometimes flatly denied as they pass from the entrances to the exits of the machine.'[137]

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[131] See, Thakur and Weiss, 'R2P: From Idea to Norm – and Action' (2009) 1 *Global Responsibility to Protect* 22 at 33-5.

[132] Pattberg, 'Private Rule Making in Global Environmental Governance' (2005) 5 *International Environmental Agreements* 175 at 182-3.

[133] The etymology of 'broker' in Middle English conjures rather pejorative notions of 'peddlers and pimps' or individuals who 'buy and sell public office'. However, there are other more charitable usages – 'wine dealer' (from the Old French, 'brochier', meaning to broach or pierce a keg) and thus 'retailer' or 'middleman'. See, for example, Hoad (ed.), 'The Concise Oxford Dictionary of English Etymology' (OUP online: 2003) http://www.oxfordreference.com/view/10.1093/acref/9780192830982.001.0001/acref-9780192830982-e-1873?rskey=P0fgHZ&result=1871 [last accessed 3 July 2017]. In mid-14th century Anglo-French, 'brocour' meant 'small trader', and the Portuguese 'alborcar' meant 'barter' – see: http://www.etymonline.com/?term=broker [last accessed 3 July 2017].

[134] Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239 at 269.

[135] Suggested in Beeson, 'Living with Giants: ASEAN and the Evolution of Asian Regionalism' (2013) 1(2) *TRaNS: Trans-Regional and National Studies of Southeast Asia* 303 at 316 (attributing the term to Katsumata, *ASEAN's Cooperative Security Enterprise: Norms and Interests in the ASEAN Regional Forum* (Palgrave, 2009).

[136] Frohock, supra n 81 at 220.

[137] Ibid. at 221.

Our argument broadly is that human rights courts too often simply amass and catalogue in an aggregative manner different external norms, without also expressly assessing the transferability of those norms (given the contexts within which they emerged). As such, they fail to adequately perform the brokering role that we suggest. There is a fine line between appropriate judicial humility[138] and excessive judicial caution.[139] As we have noted, there are also clear sensitivities pertaining to overstepping the Court's subsidiary position. However, we suggest that the mere referencing of external norms, without explaining why they ought or ought not to obtain purchase, will only further exacerbate a human rights court's legitimacy challenges in the view of states and applicants, rather than strengthening the basis of the judgment.

The development and diffusion of norms across regions has become more pronounced 'as rich and sophisticated bodies of jurisprudence have emerged from the European and Inter-American systems.'[140] To put it differently, the more the global normative environment has filled out, the more these Courts can borrow from this rich library. The global multiplication of norm-generating bodies undoubtedly offers opportunities for interpretative burden-sharing. But it also 'increases the possibility of clashes … increases uncertainty, ambiguity, inconsistencies, gaps and instability'.[141] This makes it all the more incumbent on human rights courts to engage closely with the normative arguments raised. This means not only drawing on external norms where international law is clear, not simply citing external norms to 'fortify adverse decisions against state resistance',[142] not simply transplanting norms from one regional system to another, but engaging in norm-brokering principally because this process is an exercise of 'public reason', focused on improving the intelligibility of judgments and their public reception.[143] This thesis has further implications for the way in which the role of human rights courts – and especially supra-national human rights courts – is conceived.

4. HUMAN RIGHTS COURTS AS NORM-BROKERS

Writing six years ago in this journal, Steven Greer and Luzius Wildhaber conceived of two alternative conceptual poles: on the one hand, 'the systematic delivery of individual justice' ('the attempt by the Convention system to ensure that every genuine victim of a Convention violation receives a judgment in their favour')[144] and on the other, a model premised on the

[138] See the Joint Concurring Opinion of Judges Šikuta, Wojtyczek, and Vehabović in *Marguš v Croatia* (2014), supra n 17 at para 132.

[139] See, for example, the accusation of timidity in the Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller in *El-Masri v The Former Yugoslav Republic of Macedonia*, supra n 33, Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller at para 10: 'In these circumstances, we consider that the judgment's somewhat timid allusion to the right to the truth in the context of Article 3 and the lack of an explicit acknowledgment of this right in relation to Article 13 of the Convention give the impression of a certain over-cautiousness.'

[140] Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38 at 60.

[141] Sadurski, supra n 9 at 2. See also Bjorge, 'National supreme courts and the development of ECHR rights' (2011) 9(1) *International Journal of Constitutional Law* 5 at 16, arguing that, for States, the Court's commitment to evolutive interpretation means that the normative content and scope of the Convention is a moving target.

[142] Neuman, supra n 72 at 112.

[143] See further, Sadurski, supra n 9141. See also, Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 *Philosophical Quarterly* 127 at 134 and 149, discussing the liberal ideal that any attempt at social ordering should be 'capable of explaining itself at the tribunal of each person's understanding.'

[144] Greer and Wildhaber, 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights,' (2012) 12(4) *Human Rights Law Review* 655 at 664. In its most rigid incarnation, this model affords equal attention to each and every complaint '…however slight the violation, whatever the bureaucratic cost, whether or not the applicant receives compensation or any other tangible remedy, and whatever the likely impact on the state conduct

delivery of 'constitutional justice', laying emphasis on the 'constitutional role' of the European Court of Human Rights. With regards the latter, the Court has itself declared the Convention to be a 'constitutional instrument of European public order in the field of human rights.'[145] For our purposes, perhaps the most useful understanding of this 'constitutional' role is to see the Court, through its oversight of High Contracting Parties, as the guardian of the Convention and of the institutional framework of the Council of Europe.[146] As was stated in the 'Opinion of the Court on the Wise Persons' Report', adopted by the Plenary Court on April 2, 2007:

> Although [the Court's] judgments do not, strictly speaking, have *erga omnes* effect all States should take due notice of judgments against other States, especially judgments of principle, thereby pre-empting potential findings of violations against themselves.

Not only does the distinction between these two models have salience for our proposed norm-brokering function (which, on the surface at least, tends towards the 'constitutional' end of the spectrum),[147] but the norm-brokering role also highlights the significant interdependence of individual and constitutional justice.

The Strasbourg Court sometimes sidesteps thorny normative disputes because their resolution is not strictly necessary for it to reach judgment on the particular facts before it, suggesting a prioritization of individual justice over the Court's constitutional role. The result, however, is that in failing to perform the constitutional role and provide normative direction, or in giving a normative steer that is equivocal and ambiguous, the Court also compromises the subsequent delivery of individual justice.[148] We have already seen an example of this normative irresolution in the Grand Chamber judgment in *Marguš v Croatia* which does not sufficiently engage with the external materials brought to the Court's attention so as to clarify the European

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or practice in question.' This corresponds with what Bogdandy and Venzke describe as a 'settling disputes' role for international courts. See Bogdandy and Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49.

[145] See, for example, *Chrysostomos, Papachrysostomou and Loizidou v Turkey* Application Nos 15299/89, 15300/89 and 15318/89, Commission Decision, 4 March 1991, at para 22; *Loizidou v Turkey* Application No 15318/89, Preliminary Objections, 23 March 1995, at para 75. See also de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611. By way of contrast, the Secretary General of the Council of Europe has expressly cautioned against viewing the ECHR as a 'European Constitution' noting that 'it is difficult to see how the Court could become like any existing national constitutional court.' See, Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, 18 December 2009, at para 28, available at http://www.astrid-online.it/static/upload/protected/Secr/Secretary-General---18-December.pdf [last accessed 3 July 2017].

[146] As Article 19 ECHR provides, the Court is designed to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.'

[147] See similarly, Farahat, 'Enhancing Constitutional Justice by Using External References: The European Court of Human Rights' Reasoning on the Protection against Expulsion' (2015) 28 *Leiden Journal of International Law* 303-322; See also, de Londras and Dzehtsiarou, supra n 2 at 526.

[148] In *De Souza Ribeiro v France* Application No 22689/07, Merits and Just Satisfaction, Grand Chamber, 13 December 2012, for example, while the applicant had been able to apply to an Administrative Court, the Administrative Court's role was held not to constitute a 'genuine intervention' given the 'excessively short time' (less than one hour) between his application to the court and his deportation in execution of the removal order (at paras 94-5). Notably, the Grand Chamber in *De Souza* found that the remedy was in violation of Article 13 '*without prejudice to the issue of its suspensive nature*' (at para 93). The fact that this caveat appears in the 'Application of these principles to the present case' indicates that the Court fully intended to leave its earlier normative conclusion (at paras 82-3) firmly intact (so here, the issue is not one of sidestepping the normative question but rather the ambiguity of the normative position adopted).

Court's position on amnesties for the benefit of future litigation.[149] The case of *De Souza Ribeiro v France* – a case concerning procedural guarantees for undocumented migrants – also illustrates the point. The Court stated that 'it is *not* imperative, in order for a remedy to be effective, that it should have automatic suspensive effect'.[150] By framing the Court's normative position here in negative rather than positive terms, the Court failed to clarify the circumstances in which a remedy with automatic suspensive effect would be required – a question that, some four years later, was ultimately given decisive clarification in *Khlaifia and Others v Italy*.[151] Similarly, in *Valiulienė v Lithuania*,[152] Judge Pinto de Albuquerque's Concurring Opinion argues that 'the majority missed the opportunity to set out a principled reasoning to impute a violation of Article 3, and not of Article 8, to the respondent State, preferring once again to remain attached to the particular specificities of the case.'[153]

In this light, it is tempting to side with the argument advanced by Judge Pinto de Albuquerque:

> … it is through principled reasoning that judicial statements are normative, and it is only by being normative that they can be fully intelligible and implemented. In their substance, the Court's judgments and decisions are acts of *auctoritas*, which must avoid a fallacious over-simplification of the factual and legal problems raised by the case and resist the easy temptation of convenient omissions. Such *auctoritas* can be exercised only when the judge shies away from a one-sided selection of the domestic and international case-law and does not turn a blind eye to fundamental scholarly work pertinent to the discussion of the case under adjudication.[154]

However, despite the intuitive appeal of Judge Pinto de Albuquerque's vision, the Court is undoubtedly subject to significant time and resource constraints and does not have the luxury of engaging in comprehensive surveys of normative developments or scholarly research. The goal is certainly not for judgments to become an encyclopaedic repository, chronicling every possible comparable normative position. Nor is it necessary for the Court's secretariat to routinely survey the jurisprudence of international courts – though there may be merit in ever more regular dialogue between regional human rights courts, exchanging summaries of key normative developments and identifying precisely any points of normative divergence. Our thesis is simply that to take norm-brokering seriously implies the need for careful reflection on how best to ensure rigour and consistency in meeting these normative challenges. As Armin von Bogdandy has argued, international courts should be thought of as 'multifunctional actors' – not merely 'settling disputes', but also involved in 'the stabilization of normative expectations.'[155] In this light, where relevant internal or external norms are raised in the course

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[149] See above at section 3B. In *Marguš v Croatia* (2014), supra n 17, for example, it was not necessary for the Strasbourg Court to resolve the normative question concerning the impermissibility of amnesties in international law. However, the Chamber judgment's seemingly definitive (over)statement of the normative position resulted in a highly critical third-party intervention, ultimately leading the Grand Chamber to make a somewhat evasive normative concession (at para 139, cited above at n 128).

[150] *De Souza Ribeiro v France*, supra n 148 at para 83.

[151] *Khlaifia and Others v Italy*, supra n 33. By way of contrast, see text accompanying note 108 above, discussing how the Court's clarity in *Zolotukhin v Russia*, supra n 104 laid the normative foundation for three future Chamber judgments.

[152] *Valiulienė v Lithuania* Application No 33234/07, Merits and Just Satisfaction, 26 March 2013.

[153] Ibid. Concurring Opinion of Judge Pinto De Albuquerque at n 18.

[154] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*, supra n 33, Concurring Opinion of Judge Pinto de Albuquerque at para 14 (internal references omitted).

[155] Bogdandy and Venzke, supra n 144.

of proceedings, human rights courts should at least engage with (rather than merely list) such norms by explaining how and why its own position aligns or diverges. Doing so, we suggest, will stand to significantly enhance the intelligibility and persuasiveness of judgments, addressing to some degree the critique (here, of the European Court of Human Rights) that its judgments are 'somewhat turgid and lengthy with rather a lot of "boiler-plate paragraphs", and … tend to be rather unengaging …'[156]

A. Norm-brokering as a contribution to Public Reason

We began this article by noting Jeremy Waldron's scepticism of strong judicial review. There is, however, much in Waldron's sceptical account with which we broadly agree: where there is a purported violation of rights, 'we must set up a decision-procedure whose operation will settle, not reignite, the controversies whose existence called for a decision-procedure in the first place.'[157] Moreover, Waldron argues that '[j]udicialization tends to shift the focus of public discussion from the open and comprehensive consideration of reasons to a highly formalized and technical processing of texts and interpretive ideas'. It is this inescapable legalism of court proceedings and their inherent remove from the deliberative *ideal* that leads Waldron to reject Rawl's claim that courts are 'the exemplar of public reason'.[158] We accept many of the realist critiques that highlight the constraints operating on judges,[159] and so we accept that human rights courts will inevitably fall short of an abstract ideal of pure deliberation – and that their judgments may sometimes involve '"rationalizations" rather than the giving of reasons.'[160]

Where we depart from Waldron, however, is in his rejection of the capacity of courts to contribute to 'public reason'. Waldron argues that courts – because they exclude consideration of [some] normatively significant reasons – should not be regarded as 'reasoning or reason-giving institutions'[161] involved in the 'unalloyed practice of justification'.[162] To the contrary, we argue that all the qualities that Waldron ascribes to the Rawlsian ideal of deliberative 'public reason' – a 'requirement of openness',[163] 'real engagement',[164] grappling 'openly and conscientiously'[165] with alternative formulations, not 'holding back in the search for reasons that might possibly pertain to the merits of the decision under scrutiny',[166] 'offering something for others to grasp, consider, and engage with'[167] – are precisely what human rights courts ought diligently to strive for. As such, this article is not making an argument in favour of strong judicial review. Ultimately, our claim is a much more modest one focusing on *how* human

[156] Lord Neuberger, President of the UK Supreme Court, 'Some thoughts on judicial reasoning across jurisdictions', 2016 Mitchell Lecture, Edinburgh, 11 November 2016 at para 27. Available at: https://www.supremecourt.uk/docs/speech-161111.pdf [last accessed 3 July 2017].
[157] Ibid. at 1371.
[158] Rawls, John, *Political Liberalism* (Columbia University Press, 1993), 224-25. Note that our argument is not premised on fidelity to the Rawlsian account. Sadurski also distinguishes his 'vertical' (between supranational authorities and state entities) concept of supranational public reason from the 'horizontal' (between sovereign states) account of Rawls. See Sadurski, supra n 9 at 19-20.
[159] Waldron, 'Public Reason and "Justification" in the Courtroom' (2007) 1(1) *Journal of Law, Philosophy and Culture* 107-134 at 129 and 132.
[160] Ibid. at 125, citing Frank, *Law and the Modern Mind* (Tudor Publishing Company, 1936) at 102-3.
[161] Ibid. at 129. See also, Waldron, supra n 3 at 1382-1386.
[162] Waldron, supra n 159 at 122.
[163] Ibid. at 121.
[164] Ibid. at 134.
[165] Ibid.
[166] Ibid. at 122.
[167] Ibid. at 112.

rights courts can best enhance the protection that they afford to fundamental rights and simultaneously – without contradiction[168] – deepen their claim to legitimacy.

In defending the human rights project, some scholars have sought primarily to rebut arguments that supranational authorities lack democratic legitimacy,[169] for example, by making the argument that human rights courts are merely tasked with clarifying the scope and substance of abstract provisions in what are 'democratically approved' human rights texts.[170] However, since this 'tethering' of evolutive interpretation to original (democratic) consent is 'sometimes tenuous',[171] 'public reason' provides a more sure foundation upon which to build the case for the legitimacy of human rights.[172]

As we have argued, norm-brokering can contribute to what Wojciech Sadurski has called the essential 'public reason' aspect of legitimacy.[173] In Sadurski's view, the legitimacy of (especially supra-national) legal institutions is directly supported by the degree to which they explain their adopted reasoning since 'publicly admissible reasons confer legitimacy upon decisions.'[174] As such, a key rationale for the norm-brokering role proposed here is that it enhances the legitimacy of regional human rights courts, remembering that these courts occupy a 'front-line' position[175] yet also face significant pushback from national governments in light of their subsidiary status.

5. CONCLUSION: NORM-BROKERING AND JURIDICAL METHODOLOGY

Our argument, in summary, is that the concept of 'norm-brokering' usefully captures what ought to be regarded as a core role of human rights courts. Our case study of the references to the Inter-American system in the jurisprudence of the European Court of Human Rights and the adopted argumentation or lack thereof has sought to illustrate this. The 70 Strasbourg judgments between 2007-16 that contained some reference to the Inter-American human rights system revealed that a range of acutely difficult normative challenges confront such courts. The issues range from 'missed opportunity cases' (where further normative reasoning could have been adduced) to the acute methodological problems of both demonstrating normative 'consensus' amongst Council of Europe Member States and appropriately reflecting external normative developments (especially where these too lack certainty).

We noted that the Rules of Court are silent in relation to both methodological questions. In this light, it could be argued that the Rules should be amended so as to specifically address such questions of juridical methodology. However, we prefer the view that revision of the Rules is unlikely in itself to be a panacea. The Court has already shown that it can undertake a norm-brokering role – in instances, for example, where other international treaties contain similar but differently worded provisions or where the Court expressly addresses the desirability of harmonization. Since these approaches to norm-brokering were not driven by

[168] *Cf.* Waldron's suggestion, supra n 3 at 1383-4, that reason-giving to enhance the protection of rights and reason-giving (instrumentally) to enhance court legitimacy are often at cross-purposes.
[169] See, for example, Mayerfeld, supra n 111 at 186-216.
[170] O'Cinneide, supra n 7 at 46.
[171] De Londras and Dzehtsiarou, supra n 2 at 544.
[172] Indeed, Sadurski argues that legitimacy should be uncoupled from democracy-based arguments altogether, supra n 9 at 15
[173] Ibid.
[174] Ibid. at 12.
[175] Harmsen, 'The European Convention of Human Rights after Enlargement' (2001) 5(4) *International Journal of Human Rights* 18 at 29.

adherence to rules, we suggest that what is critical is the ethos underlying the Court's approach.[176]

Ultimately, this ethos should not be one of 'relaxed promiscuity'[177] in relation to the accommodation of external norms (in the sense that Waldron notes: 'Sure, fine, bring them all on'). Rather, there is a need to bring greater methodological rigour to the norm-brokering role. Norm-brokering demands that human rights courts should, at a minimum, expressly address and carefully reflect upon the *question* of harmonization. This can be done without automatically striving for harmonization as a goal. Norm-brokering entails explicit engagement with, rather than mere reference to, external norms. This engagement ought to include a number of elements. For the Strasbourg Court, the first is a purely internal question: Is there a clear and established line of Strasbourg authority? In cases of conflicting Strasbourg authorities, an external norm may assist in their reconciliation. A second question then is whether internal and external norms are entirely congruent, so that reference to the external norm would be merely iterative, i.e. solely for the purpose of noting the existence of an international consensus. Arguably, the legitimacy gains of cataloguing congruent norms are relatively slight when contrasted with cases where the external and internal norms are widely divergent. Such divergence points to a dissensus which must be explained and grappled with. Thus, if internal and external norms diverge, it could thirdly be asked what level of reconciliation is desirable. In that latter context, it matters whether there are relevant contextual differences. In a parallel exercise of internal norm-brokering, the existence or lack of a European consensus may also raise subsidiarity-related considerations in the shape of a wider margin of appreciation (but here again, there are important methodological issues for the Strasbourg Court to consider in terms of both triggering and interpreting studies which examine levels of consensus).

Addressing these different questions should not turn the norm-developing role into one of academic inquiry. However, even if external norms are not critically decisive for the case at hand, explaining why this is so can help strengthen the normative basis of a judgment, thereby contributing to 'public reason' and increasing a court's legitimacy in the eyes of both States and applicants. In terms of the Strasbourg Court specifically, taking this implicit norm-brokering role more seriously will, as we have argued, enhance both its constitutional standing and the delivery of individual justice.

[176] McCrudden makes a similar point in relation to domestic courts, supra n 7 at 515.
[177] Waldron, supra n 159 at 117.