THE PRINCIPLE OF SYSTEMIC INTEGRATION IN HUMAN RIGHTS LAW

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Abstract International lawyers and courts consider the principle of systemic integration to be a potential answer to difficulties arising from the fragmentation of public international law. This article questions the application of this approach in the context of human rights treaties. It is argued, first, that in many instances, systemic integration raises serious interpretational and jurisdictional concerns and, second, that systemic integration may give rise to a less diverse international law.

Keywords: African Court of Human and Peoples' Rights, Article 31(3)(c) VCLT, European Court of Human Rights, human rights, Inter-American Court of Human Rights, interpretation, treaties, progressive development, systemic integration.

I. INTRODUCTION

The principle of systemic integration is being expounded as *the* answer to certain difficulties arising from the fragmentation of public international law. International lawyers and judges contemplate and discuss systemic integration without, however, explaining the application of this principle of interpretation to legal reasoning. This article makes two arguments: First, the *uncritical* application of systemic integration raises serious interpretational and jurisdictional concerns. Second, systemic integration does not necessarily yield the results hoped for, but may instead create unwarranted jurisdictional powers among international courts and give rise to a poorer and less diverse international law.

The article focuses on the application of systemic integration of treaties in the area of human rights. Although the function of systemic integration has been explored across different functional regimes (eg trade law and investment law),[1] not much has been written concerning its application in the context of

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[1] eg B Simma and T Kill, 'Harmonising Investment Protection and International Human Rights: First Steps towards A Methodology' in C Binder *et al.* (eds), *International Investment Law for the 21st Century* (OUP 2009) 678; B McGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EC-Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2008) 42 JWT 589; H van Asselt, F Sindico, MA Mehling, 'Global Climate Change and the Fragmentation of International Law' (2008) 30 Law & Policy 423.

[*ICLQ* vol 66, July 2017 pp 557–588] doi:10.1017/S0020589317000185

human rights. The article discusses the application of systemic integration in the case law of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court of Human and Peoples' Rights (ACtHPR) and draws lessons for the development of human rights law and international law more generally. International human rights courts are particularly inclined to apply this principle of interpretation. Although human rights treaties are not inherently different from other treaties, they are often drafted in a distinctive, open-textured manner which makes them particularly appropriate for further development through interpretation. Moreover, international courts of human rights engage with international law questions, including interpretive issues, on a regular basis and are therefore likely to reflect on and refine their approaches in a more systematic way than other international courts.[2] As a result, the case law of these courts should provide useful insights into the difficulties arising from the application of systemic integration and allow for generally applicable lessons to be learned. Finally, human rights regimes often take innovative approaches towards the articulation of interests in international law. Systemic integration is used as the interpretive means (and justification) by which international courts engage in this exercise. This article considers the rarely discussed implications of this for the progressive development of international law.

The question of the fragmentation of international law has attracted considerable attention over the last decade. The diversification and expansion of the scope of international law, and the proliferation of international bodies exercising judicial and quasi-judicial functions, have increased the likelihood of conflicting or diverging interpretations of similar or identical rules.[3] Careful interpretation is considered to be the main way of minimizing such difficulties.[4] A treaty is to be construed, as far as possible, consistently with other rules of public international law. Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT) is of interest in this regard, since it specifically requires that a treaty shall be interpreted by taking into account any relevant rules of international law applicable to the relations between the parties.[5]

[2] P Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 157.

[3] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission finalized by M Koskenniemi, 13 April 2006, UN Doc A/CN.4/L.682 (ILC Final Rep).

[4] ILC Final Rep (n 3) [34]–[37]; MT Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights on General International Law* (OUP 2009) 1–2.

[5] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Brill Nijhoff 2015); U Linderfalk, 'Who Are "the Parties"? Article 31 Paragraph 3(c) of the 1969 Vienna Convention, and the "Principle of Systemic Integration" Revisited' (2008) 55 NILR 343.

The fragmentation of international law, however, is not only about the risk of international courts taking divergent approaches to a particular problem. An equally important concern is that, due to jurisdictional constraints, international courts are unable to fully engage with, and thus respond holistically and effectively to, global legal problems. International courts decide the cases brought before them in a 'piecemeal' fashion by 'squeezing'[6] or reducing the dispute to fit the court's competence.[7] An international court is competent to decide a case only insofar as the subject matter of the dispute falls within the scope of the treaty which grants it jurisdiction.[8] Not all of the relevant legal aspects of a case will be heard by any one international court, since these courts are only able to decide disputes to the extent that they fall within its jurisdiction and only according to the applicable law.[9] The widening and enrichment of public international law, coupled with the proliferation of international bodies, has emphasized these disparities in public international law. Similar or even identical rights and obligations under different treaties retain their *separate existence*, notwithstanding the treaties' respective contexts, objects and purposes, or the subsequent practice of the parties.[10] It is an inherent feature of any international court's judicial function that it decides cases brought before it using the lens of the jurisdiction it possesses.

Against this background, systemic integration is being presented not only as a means of avoiding dissonant interpretations and/or judgments, but also as a remedy for the 'piecemeal' judicial functioning of international courts. The International Law Commission (ILC), in its work to remedy the fragmentation problem, is leading the way in asserting that systemic integration should be the process whereby international treaty obligations are interpreted by reference to their normative environment, so that, as a consequence, treaties function as parts of a coherent and meaningful whole. In this sense, systemic integration goes further than simply affirming the applicability of general international law to the interpretation of treaties. It specifically points to the need to interpret one treaty by reference to another treaty, *with the objective of* 'connect[ing] the separate treaty provisions … as aspects of an overall aggregate of the rights and obligations of the States'.[11] This is arguably the most obscure aspect of the push for systemic integration. Whereas, in general, taking other treaties into account when interpreting a treaty is part of the international lawyer's mindset and enhances consistency in

[6] Sir F Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 YaleJIntlL 315.

[7] Sir R Jennings, 'Reflections on the Term "Dispute"' in R StJ Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers 1994) 403.

[8] L Caflisch, 'The Law – Substantive and Procedural Questions' (2008) 7 The Law and Practice of International Courts and Tribunals 294.

[9] Webb (n 2) 158, 162.

[10] International Tribunal for the Law of the Sea, *Mox Plant (Ireland v UK)* Provisional Measures, 3 December 2001 (2002) 41 ILM 405 [51] (emphases added).

[11] ILC Final Rep (n 3) [467], [413]–[415].

international law,[12] it is unclear what it means to set the *objective* of systemically integrating one treaty into another in order to achieve 'a sense of coherence and meaningfulness'.[13] Many scholars have endorsed the ILC's approach, however, suggesting that Article 31(3)(c) VCLT may be taken to express the principle of systemic integration.[14]

This article's starting point is that the principle of systemic integration should not be equated to the language of Article 31(3)(c) VCLT. It argues that the principle of systemic integration[15]—either *allegedly* derived from Article 31(3)(c) VCLT or as a stand-alone principle—cannot remedy the international courts' fragmented lens.[16] The purpose of interpretation is not to integrate treaties into a coherent whole, but to introduce into the process of interpreting a treaty any relevant rules and to offer interpretive guidance (Article 31(3)(c) VCLT being one tool for accomplishing this).[17] Part II of the article demonstrates that the application of systemic integration in many cases finds its place outside the realm of interpretation and that the principle raises serious jurisdictional concerns regarding the mandate of international courts. The crucial questions in legal reasoning with regard to pursuing systemic integration concern the degree to which other treaties will be relevant and the weight that will be attached to them in informing the interpretation of a given treaty.[18]

Part III explores the reasons why systemic integration of treaties falls short of the expectations of international lawyers. It submits that the principle is still shaped by—and may reinforce—existing institutional preferences and biases, and that it cannot serve as a tool for prioritizing important concerns.

[12] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Panel Report, WT/DS291R, WT/DS292R/WT/DS293 (29 September 2006) [7.70].

[13] ILC Final Rep (n 3) [419].

[14] ibid [410]–[460]; McLachlan (n 5); J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in A Nollkaemper and OK Fauchald (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Hart Publishing 2012) 141. Also M Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010) 13; R Nordeide, 'The ECHR and its Normative Environment: Difficulties Arising from a Regional Human Rights Court's Approach to Systemic Integration' in Nollkaemper and Fauchald ibid 131; Merkouris (n 5).

[15] The ILC Final Rep (n 3) [473]–[474]; McLachlan (n 5) 280; and Merkouris (n 5) equate the principle of systemic integration to art 31(3)(c) VCLT. cf Simma and Kill (n 1); R Higgins, 'A Babel of Judicial Voices? Ruminations From the Bench' (2006) 55 ICLQ 791; D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281; Webb (n 2); I van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009); M Samson, 'High Hopes, Scant Resources: A Word of Skepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2011) 24 LJIL 701; VP Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) 31 MichJIntlL 621.

[16] McLachlan (n 5) 288.

[17] Samson (n 15) 710–13; Simma and Kill (n 1) 692–4; Webb (n 2) 5; van Damme (n 15) 365. R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 327.

[18] ILC Final Rep (n 3) [419], [435]–[438], [473]–[474]; McLachlan (n 5) 310; Gardiner (n 17) 327.

Furthermore, systemic integration in human rights law does not necessarily always benefit the inherent diversity that characterizes international law; on the contrary, it may hinder its progressive development. In an effort to create coherence, there is a risk of reducing the existing or potential reach of international law to the restricted vocabulary and structure of the human rights paradigm. Systemic integration fuels the phenomenon of international judicial bodies exercising undue interpretive authority over treaties other than those under their jurisdiction, as well as raising the possibility of the emergence of new, perhaps unwarranted, informal jurisdictional powers in international courts. The analysis concludes that, despite the appealing nature of the principle of systemic integration, international courts and bodies should exercise caution in applying it.

II. INTERPRETATIONAL AND JURISDICTIONAL CONCERNS

This part of the article highlights the limitations of applying the principle of systemic integration when interpreting a given treaty. Three principal issues arise when the interpreter loses sight of the appropriate weight that should be attached to other treaties in the construction of the treaty being analysed. First, systemic integration of treaties may lead the interpreter to disregard the textual limits of the treaty under interpretation. Second, it can aggravate the risk of downplaying the different contextual nuances of different treaties. Third, uncritically employing systemic integration may result in the indirect application of and supervision over other treaties under the guise of interpretation, thereby raising serious implications for a court's mandate and legitimacy.

A. Disregarding the Textual Limits of the Treaty under Interpretation

As is the case with any interpretive principle, application of the principle of systemic integration is limited by the explicit language of the treaty under interpretation.[19] The weight accorded to provisions from other treaties in the construction of the treaty at issue cannot lead to an interpretation that goes beyond the plain meaning of the treaty's text. There have been cases, however, in which reliance upon other treaties has driven an interpretation that distorts the language of a human rights treaty.

In the *Zolotukhin* case, the applicant alleged a violation of Article Four of Additional Protocol Seven (Article 4 of AP 7) to the European Convention on Human Rights (ECHR),[20] complaining that he had been prosecuted twice for the same offence.[21] Article 4 of AP 7 reads:

[19] *Pretty v United Kingdom* (29 April 2002) [39].
[20] (Concluded 4 November 1950; entered into force 3 September 1953) ETS 5.
[21] *Sergey Zolotukhin v Russia* (10 February 2009) (Grand Chamber).

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State.

The Grand Chamber of the ECtHR held that the term 'offence' should be understood by reference to the legal classifications under national law. Hence, if an act was classified as constituting two distinct criminal offences under national law, the prohibitions of Article 4 of AP 7 would not apply. The Grand Chamber analysed the definition of the term 'offence' by referring to similar provisions in other treaties containing formulations of the *ne bis in idem* principle. Reference was made to the pertinent provisions of the International Covenant on Civil and Political Rights (ICCPR);[22] the Statute of the International Criminal Court (ICC Statute);[23] the Charter of Fundamental Rights of the European Union (EU Charter);[24] the Convention Implementing the Schengen Agreement;[25] and the Inter-American Convention on Human Rights (IACHR).[26] Article 14(7) ICCPR and Article 50 EU Charter contain the term 'offence', Article 8(4) IACHR refers to 'cause', Article 54 of the Schengen Agreement mentions 'acts' and Article 20 (1) ICC Statute refers to 'conduct'. The Court emphasized that the jurisprudence of the Court of Justice of the European Union (CJEU) and the IACtHR followed the most favourable approach to the applicant and that, for this reason, it could not 'justify adhering to a more restrictive approach'.[27] The Grand Chamber unanimously overruled its previous case law and dramatically altered the scope of applicability of Article 4 AP 7.

The driving force behind the Court's reasoning was its construction of the ECHR in light of other treaties and the Court's decision to base its ruling on the jurisprudence of other international courts. The Court's reliance on the jurisprudence of the CJEU and the IACtHR in order to reach the most favourable interpretation for the applicant is ill-founded. This is because the rulings of these two international courts were interpreting the Schengen Agreement and the IACHR, respectively, which frame the *ne bis in idem* prohibition in broader terms than the ECHR does.[28] The ECtHR thus relied upon an interpretation of the Schengen Agreement and the IACHR to arrive at a broad definition of the specific, restricted term 'offence' contained in Article 4 of AP 7. The Grand Chamber afforded such great weight to these

[22] (Adopted 16 December 1966; entered into force 23 March 1976) 999 UNTS 171.
[23] (Concluded 17 July 1998; entered into force 1 July 2002) 2187 UNTS 90.
[24] Official Journal of the European Communities (18 December 2000) C 364/1.
[25] Convention Implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (concluded 14 June 1985; entered into force 19 June 1990).
[26] (Concluded 21 November 1969; entered into force 18 July 1978) OAS Treaty Series No 36.
[27] *Zolotukhin* [80].
[28] ibid [36]–[38], [40].

https://doi.org/10.1017/S0020589317000185 Published online by Cambridge University Press

treaties and their interpretation by other courts that it effectively disregarded the textual limits of the ECHR. It is doubtful whether, as has been argued, the judgment in *Zolotukhin* is a positive example of constructive dialogue among international courts.[29] In the *Mamatkulov and Askarov* and *Scoppola* cases, the Grand Chamber overruled its previous jurisprudence in a similar fashion by disregarding the limitations of the language in the ECHR.[30]

Likewise, the IACtHR in *Artavia Murillo et al.*—a case concerning *in vitro* fertilization and the question of whether Article 4 IACHR protects the right to life of an embryo—construed the IACHR in a manner contrary to its letter. Even though Article 4(1) provides that '[the right to life] shall be protected by law and, *in general, from the moment of conception*', the Court ruled that an embryo cannot be understood to be a person for the purposes of Article 4.[31] In reaching this conclusion, the Court emphasized that trends in international law do not support the position that an embryo should be treated as a person, or that it has a right to life.[32] The Court conducted its interpretation of the IACHR by referring to other treaties and instruments, as well as the views of human rights bodies,[33] including the Universal Declaration on Human Rights;[34] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[35] and the views of the CEDAW Committee; the Convention on the Rights of the Child (CRC);[36] the ICCPR and the views of the Human Rights Committee (HRC) which monitors the implementation of the ICCPR; the African Charter on Human and People's Rights (ACHPR);[37] and, finally, the ECHR and the case law of the ECtHR. This was, however, an inappropriate application of systemic integration, not only because many of these treaties do not bind the member States to the IACHR,[38] but also, most importantly, because none of these treaties explicitly protects unborn life. Article 4 IACHR is a unique formulation of the right to life in

[29] cf Forowicz (n 14) 360–1; T Treves, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law?' in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty-Making* (Springer 2005) 614–15.

[30] *Mamatkulov and Askarov v Turkey* (4 February 2005) (Grand Chamber) [109]–[113], [123]–[125]. *Scoppola v Italy (No 2)* (17 September 2009) (Grand Chamber) [96]–[110]; cf Partly Dissenting Opinion of Judge Nicolaou joined by Judges Bratza, Lorenzen, Jočiené, Villiger and Sajó in *Scoppola*, 44–47.

[31] *Artavia Murillo et al. (In vitro fertilization) v Costa Rica*, IACtHR Series C 257 (2012) [264] (emphases added).

[32] ibid [253].

[33] ibid [224]–[244].

[34] United Nations General Assembly (UNGA) Res 217 A (III) (10 December 1948).

[35] Convention on the Elimination of All Forms of Discrimination against Women (concluded 18 December 1979; entered into force 3 September 1981) 1249 UNTS 13.

[36] Convention on the Rights of the Child (adopted by UNGA Res 44/25 (20 November 1989) UN Doc A/RES/44/25; entered into force 2 September 1990) 1577 UNTS 3.

[37] (Adopted 27 June 1981; entered into force 21 October 2001) 1520 UNTS 217.

[38] Dissenting Opinion of Judge Eduardo Vio Grossi in *Artavia Murillo et al.* 113, 128; LM De Jesús, 'A Pro-choice Reading of a Pro-life Treaty: The Inter-American Court on Human Rights' Distorted Interpretation of the American Convention on Human Rights in Artavia v. Costa Rica' (2014) 32 WisIntlLJ 223, 250–2.

international human rights law and, hence, it is questionable how far other more general treaties and instruments shed light on its interpretation. The problems in the Court's reasoning can be illustrated by its reference to the *Vo. v France* case, in which the ECtHR stated that:

> [*U*]*nlike Article 4 of the American Convention on Human Rights*, which provides that the right to life must be protected 'in general, from the moment of conception', Article 2 of the Convention [ECHR] is silent as to the temporal limitations of the right to life […].[39]

Most international human rights treaties are able to accommodate change over time because of their vaguely drafted text, which affords considerable leeway to the interpreter. Yet, the interpreter cannot properly pursue a construction of a treaty that amounts to a revision of its text.[40] In the cases discussed above, the ECtHR and the IACtHR seem to have crossed that line.

B. Duly Appreciating the Contextual Nuances between Different Treaties?

International courts and other international bodies have developed an extensive case law establishing synergies and links between the treaty under their jurisdiction and other treaties. These synergies and links are welcome, and are attuned to the goal of pursuing coherence in international law. Nonetheless, taking account of norms in other treaties that are similar or identical to those in the treaty under interpretation should be subject to pertinent contextual nuances pertaining to the purpose, function and aims of the other treaty provisions.[41] In order for the interpreter to ascertain and give due regard to such nuances, he or she needs not only to identify the core of similarity among equivalent[42] treaty provisions but also to appreciate the differences between them. The question is, therefore, whether international courts meaningfully engage with other treaties so as to value the different contexts from which provisions in these treaties originate. It is important that the international judge examines and explains how the other treaty is relevant and, accordingly, how it informs the proper construction of the treaty being interpreted. This section argues that such nuances are easily disregarded.

The *Van der Mussele* and *Siliadin* cases exemplify how the ECtHR should give consideration to other treaties while still preserving the particular

[39] *Vo. v France* (8 July 2004) (Grand Chamber) [75] (emphases added). See Dissenting Opinion of Judge Eduardo Vio Grossi in *Artavia Murillo et al.* 113.

[40] Human Rights Committee, *Atasoy and Sarkut v Turkey*, Comm Nos 1853/2008 and 1854/2008, UN Doc CCPR/C/104/D/1854-1854/2008 (29 March 2012) [7.13].

[41] *Mox Plant* (n 10); Permanent Court of Arbitration, *Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)*, Final Award (2 July 2003) 42 ILM 1118 [142].

[42] Broude and Shany use the term 'equivalent' to denote norms that are identical or similar in their normative context and have been established through different instruments, or are applicable in different substantive areas of law, in T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011) 5, 9.

language and purpose of the ECHR.[43] In *Van der Mussele*, the applicant alleged a violation of the prohibition on 'forced or compulsory labour' under Article 4 (2) ECHR. In its analysis, the Plenary Court referred to both the 1932 International Labour Organization (ILO) Convention Concerning Forced or Compulsory Labour (ILO Convention No 29)[44] and the 1959 ILO Convention on the Abolition of Forced Labour.[45] The definition of 'forced or compulsory labour' contained in ILO Convention No 29 and the standards adopted by the ILO Committee of Experts[46] informed the Court's construction of Article 4 ECHR. The Court stressed that the ILO Convention would provide the '*starting point* for the interpretation of Article 4',[47] but that 'sight should not be lost of [the European] Convention's special features'.[48] The question whether the applicant *unwillingly* offered his services was not assessed against the ILO approach to the meaning of consent,[49] but rather against the structure and aims of Article 4 ECHR. Hence, the ECtHR neither unqualifiedly relied on, nor did it integrate, ILO Convention No 29. Likewise, in the *Siliadin* case, the ECtHR recognized the definition in ILO Convention No 29 of 'forced or compulsory labour', according to which the work or service must be extracted from an individual under the *menace of penalty*. Although the applicant in the circumstances of the case had not been threatened by a penalty, the Court found that she was in an equivalent situation due to her vulnerable position.[50] In this way, the Court, in light of the specific facts, equated the ILO standard of *being threatened* by a menace of penalty to *perceiving to be threatened* by a penalty.

In contrast, in other instances the ECtHR has drawn interpretive guidance from other treaties while ignoring contextual differences, uncritically transposing the detailed standards of other treaties into the provisions of the ECHR. In the *National Union of Rail, Maritime and Transport Workers* case, the Court held that the Convention protects sympathy strikes. It referred to a series of international treaties and views of international bodies in its legal reasoning, but it failed to examine exactly how the norms of these treaties were relevant or how they aided in the interpretation of Article 11 ECHR.[51] The Court stressed that the ILO Committee of Experts and the ILO Committee on Freedom of Association had supported the position that a general prohibition on sympathy strikes violates the right to strike, even though these bodies simply mentioned that a general ban *could* lead to abuse

[43] *Van der Mussele v Belgium* (23 November 1983) (Plenary).

[44] Convention concerning Forced or Compulsory Labour, C29 (concluded 28 June 1930; entered into force 1 May 1932) 39 UNTS 55 (ILO Convention No 29).

[45] Convention concerning the Abolition of Forced Labour, C105 (concluded 25 June 1957; entered into force 17 January 1959) 320 UNTS 291 (ILO Convention No 105).

[46] 'Abolition of Forced Labour': General Survey by the Committee of Experts on Application of Conventions and Recommendations, 1979.

[47] *Van der Mussele* [32] (emphases added).

[48] ibid.

[49] ibid [37].

[50] *Siliadin v France* (26 July 2005) [118].

[51] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (8 April 2014) [26]–[37], [76], [84]–[104]; cf Concurring Opinion of Judge Wojtyczek, 47–9.

https://doi.org/10.1017/S0020589317000185 Published online by Cambridge University Press

in light of the specific circumstances.[52] Further, the restrictions on the right to strike in the EU Charter were not sufficiently addressed. Finally, the Court relied heavily upon Article 6 of the European Social Charter (ESC),[53] without acknowledging that most of Article 6's undertakings are optional and that ten European States have chosen not to guarantee the right to strike under the ESC.

The expansive interpretation of the ECHR given in the *National Union of Rail, Maritime and Transport Workers* case follows the Court's approach in the area of socio-economic rights. In *Demir and Baykara*, the Grand Chamber accepted that the right of public officials to form and join a trade union and to bargain collectively has become one of the essential elements of Article 11 ECHR.[54] This judgment also paved the way for recognizing the right to strike and the right to collective action under Article 11.[55] The legal reasoning in both *National Union of Rail, Maritime and Transport Workers* and *Demir and Baykara* was grounded in the consideration of ILO Conventions and the ESC and their progressive development by their respective monitoring bodies. The judgments share the same methodology: namely, discerning an alleged analytical common denominator by reference to a great variety of treaties. One could argue that this so-called integrated approach to the interpretation of the ECHR seeks to integrate socio-economic rights into individual and political rights, and that it is founded upon the ideas of cross-fertilization between and convergence among different treaties.[56] Yet cross-fertilization and convergence of treaty norms cannot justify transplanting detailed provisions of other treaties into the scope of the ECHR without considering the relevant context of the other treaties.

Another example demonstrating how the ECtHR pursues systemic integration by ignoring crucial contextual differences is the *Opuz* case. Because, under certain Turkish legislation, perpetrators of domestic violence could not be prosecuted if the victim withdrew her complaint, the applicant claimed a breach of Article 2 ECHR due to the legislation's lack of a deterrent effect. Despite the clear absence of consensus among Member States on this matter, the Court ruled that States have a positive obligation under the ECHR to establish and effectively apply a system punishing all forms of domestic violence, and to provide sufficient safeguards for

[52] V Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 HRLRev 80.

[53] European Social Charter (revised) (concluded 3 May 1996; entered into force 1 July 1999) CETS No 163.

[54] *Demir and Baykara* (12 November 2008) (Grand Chamber) [65]–[86], [153]–[154].

[55] *Enerji Yapi-Yol Sen v Turkey* (21 April 2009) [16], [24], [31]; *Danilenkov and Others v Russia* (30 July 2009) [102]–[108], [123].

[56] V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRLRev 538; cf H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 HRLRev 72.

victims.[57] This conclusion was reached by invoking the standard of due diligence as a yardstick for assessing State responsibility in the context of violence against women.[58] In the process of finding an analytical common denominator between the ECHR and a series of other treaties, the ECtHR made the mistake of detaching the *different variants* of the due diligence standard from the contexts of these other treaties. More specifically, the Court drew upon General Recommendation 19 issued by the CEDAW Committee and the Committee's views as expressed in individual communications, including its views as stated in the *A.T. v Hungary* case.[59] A careful reading of *A.T.* reveals, however, that the CEDAW Committee did not explicitly mention a failure to exercise due diligence.[60] The ECtHR in *Opuz* devoted special attention to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem Convention), which was the only treaty in force (at the time) addressing violence against women,[61] and the related practice of the Inter-American Commission on Human Rights (IACmHR). In the *Maria Da Penha v Brazil* case, the IACmHR held that States must exercise due diligence by deterring and investigating domestic violence incidents.[62] The ECtHR, however, did not acknowledge that the IACmHR employed the due diligence standard in *Maria Da Penha v Brazil* by asserting jurisdiction over and applying the specialized Belem Convention (and not the IACHR).[63]

In *Lohe Issa Konate v Burkina Faso*, the question before the ACtHPR was whether the harsh criminal penalties levied by Burkina Faso against the applicant for defamation represented a disproportionate interference with his right to freedom of expression under the ACHPR.[64] A specific feature of the right to freedom of expression under ACHPR and other rights contained in the ACHPR, is that they are subject to so-called clawback clauses.[65] For example, Article 9(2) provides: 'Every individual shall have the right to express and disseminate his opinions *within the law*' (emphasis added). The idea behind subjecting the right of freedom of expression to the limits of domestic law is to preserve the rights of Member States. The Court, however, held that the phrase 'within the law' must be interpreted with reference to

[57] *Opuz v Turkey* (9 June 2009) [87]–[90], [138], [145].

[58] UNGA Res 48/104, 'Declaration on the Elimination of Violence against Women' (20 December 1993) UN Doc A/RES/48/104.

[59] *A.T. v Hungary*, CEDAW Committee, Comm No 2/2003 (26 January 2005); *Fatma Yildirim v Austria*, CEDAW Committee, Comm No 6/2005 (6 August 2007).

[60] Report of the UN Special Rapporteur on Violence against Women, Its Causes and Consequences (20 January 2006) UN Doc E/CN.4/2006/61 [23].

[61] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (concluded 9 June 1994; entered into force 5 March 1995) (1994) 33 ILM 1534.

[62] *Maria Da Penha v Brazil*, Rep No 54/01 [55], [56].

[63] ibid [60].

[64] *Lohe Issa Konate v Burkina Faso*, ACtHPR App No 004/2013 (2014) [164], [176].

[65] CA Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in MD Evans and R Murray (eds), *The African Charter on Human and Peoples' Rights* (CUP 2002) 195.

international standards.[66] It based its reasoning on its consideration of Article 19 ICCPR, the views of the HRC and the practice of the African Commission on Human and Peoples' Rights (ACmHPR).[67] Although this is, in principle, a welcome development in the context of a growing convergence among international courts when interpreting limitation and clawback clauses,[68] it is not entirely clear to what extent other treaties may be used in this process of interpretation. The ICCPR, the IACHR and the ECHR do not contain similar clauses and, therefore, one might question whether they can be used to 'neutralize' these clauses in the ACHPR. In fact, the only other human rights treaty which includes clawback clauses applicable to many of the rights specified in the ACHPR is the Revised Arab Charter,[69] but the ACtHPR made no mention of it. The vice president of the Court, in a separate opinion issued in another case, pointed out this problematic issue, but concluded, with no further explanation, that the ACHPR should be interpreted in the same spirit as the ICCPR.[70]

Typically, the IACtHR does not discuss contextual differences between treaties. The ECtHR is more mindful of these, although many pertinent issues are still not sufficiently addressed. To summarize, the principle of systemic integration should not be relied on as the legal tool for an unwarranted alignment of a treaty's meaning with the content of other treaties. After all, it is the task of human rights treaties to establish minimum standards for creating a selected catalogue of rights. In many instances, the ECtHR unfortunately follows an ambitious integrative and harmonizing interpretation of the ECHR with regard to other treaties to such an extent that it raises questions about the boundary between interpreting and rewriting the ECHR. The goal of lessening fragmentation does not justify an excessive striving for uniformity. International courts can and should articulate different approaches and interpretations among treaties, if such articulations are dictated by different treaty contexts.[71] The ECtHR's great receptiveness to other treaties is, however, not always accompanied by a rigorous examination of how these treaties are relevant to the ECHR.

Other international bodies pursue a more robust analysis of whether a rule of international law is relevant to the treaty under interpretation. The Appellate Body of the WTO, in the *Measures Affecting Trade in Large Civil Aircraft* dispute, scrutinized in detail the extent to which other international treaties

[66] *Lohe Issa Konate* [125]–[131].
[67] ibid [128]–[129].
[68] D Shelton, 'International Decisions' (2015) 109 AJIL 635.
[69] League of Arab States, Revised Arab Charter on Human Rights (adopted 22 May 2004; entered into force 15 March 2008) reprinted in 12 (2005) IHRR 893.
[70] Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, ACtHPR App Nos 009 & 011/2011 (2013) [29]–[31].
[71] Higgins (n 15) 799; Webb (n 2) 5.

were related to the issues under dispute.[72] It found that the provisions of the 1992 Agreement between the EU and the USA concerning the application of the 1979 GATT Agreement on Trade in Civil Aircraft were not relevant to determining the meaning of 'benefit' under Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures.[73] The International Court of Justice (ICJ), in the *Questions of Mutual Assistance* case, accepted that the 1977 Treaty of Friendship and Co-operation Between France and Djibouti had '*some* bearing'[74] on the proper interpretation of the 1986 Convention on Mutual Assistance in Criminal Matters, although it did not elaborate further. The discussions in these cases show that there is room for improvement, which should be the goal of international human rights courts.

C. Indirectly Applying and Supervising Other Treaties

A concern when applying the principle of systemic integration (or Article 31(3)(c) VCLT with the objective of systemic integration) is the risk of conflating the use of a treaty for the purpose of interpretation and the de facto application of that treaty.[75] Systemic integration may lead not only to transposing the detailed standards of one treaty into the scope of a human rights treaty, but also to indirectly applying and supervising these standards under the pretext of interpretation. This, in turn, stretches—if not contravenes—the limited *ratione materiae* jurisdiction of an international human rights court.[76] As will be discussed, both the IACtHR and the ECtHR tend to discern a common denominator in the various potentially relevant treaties by reading them together and subsequently integrating this denominator into the scope of the IACHR and the ECHR, respectively. The ECtHR articulates this practice mostly in terms of a European consensus; the IACHR explains it in terms of the international *corpus juris*, positing that a comprehensive and integrative reading of the IACHR alongside other treaties is justified on multiple grounds, including the *pro homine* principle, Article 29(b) IACHR and Article 31(3)(c) VCLT.[77]

[72] Report of the Appellate Body, WTO, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (18 May 2011) [845].

[73] ibid [846]–[855]. Also *United States Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (2 October 1998) [130].

[74] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Merits, Judgment (4 June 2008) [2008] ICJ Rep 177 [114] (emphasis added).

[75] Gardiner (n 17) 313.

[76] Separate Opinion of Judge Vendross in *Golder v United Kingdom* (21 February 1975) (Plenary). See discussion in Part IIIC regarding the exceptional nature of the ACtHPR's jurisdiction.

[77] G Neuman, 'Import, Export and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101; H Tigroudja, 'La Cour Interaméricaine des Droits de l' Homme au Service de l' "Humanisation du Droit International Public" – Propos Autour des Récents Arrêts et Avis' (2006) 52 AFDI 620–1; A Rachovitsa, 'Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties'

The *Taşkin* and *Tătar* judgments marked a discernible shift in the ECtHR's interpretation of the ECHR with respect to its willingness to look to potentially relevant environmental protection treaties.[78] This consideration of environment-related norms took the form of fully integrating detailed obligations under the Aarhus Convention relating to access to information, public participation in decision-making and access to justice into the positive obligations of Article 8 ECHR. In effect, the Court provided for indirect environment-related procedural rights and assessed Member States' acts and omissions against these standards.[79] In a different series of cases concerning children's rights, the principle of systemic integration, Article 31(3) VCLT and the international *corpus juris* for the protection of children served as the bases for the IACtHR to determine that the content of Article 19 IACHR by incorporating provisions of the CRC.[80] Although the Court stated that the CRC merely sheds light on Article 19 IACHR, the judgment does in fact integrate detailed requirements of the CRC.[81]

Even more striking is the ECtHR's practice with respect to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention).[82] Systemic integration provided the means for the Court to transplant technical provisions of the Hague Convention into Article 8 ECHR. In addition to this, the Court held that any weakening of the Hague Convention's guarantees reduces protections under the ECHR.[83] The failure of national authorities to meet the six-week requirement to reach a decision on the expeditious return of an abducted child (Article 11 of the Hague Convention), or to diligently enforce this decision, *automatically* gives rise to a violation of Article 8 ECHR.[84] In this way, the Court effectively supervised the

(2016) 16 HRLRev 77; C Medina, *The American Convention on Human Rights* (Intersentia 2016) 51–5.

[78] Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton and others v United Kingdom* (8 July 2003) (Grand Chamber). T Stephens, *International Courts and Environmental Protection* (CUP 2009) 320.

[79] M Fitzmaurice, 'Environmental Degradation' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (OUP 2013) 640.

[80] *'Street Children' (Villagran-Morales et al.) v Guatemala*, IACtHR Series C 63 (1999) [192], [194]; *'Juvenile Reeducation Institute' v Paraguay*, IACtHR Series C 112 (2004) [148].

[81] *'Street Children'* [195], [196]; *Gomez-Paquiyauri Brothers v Peru*, IACtHR Series C 110 (2004) [164]–[173]; *'Juvenile Reeducation Institute'* [161]–[163], [172], [230]. J Butler, 'The Rights of the Child on the Case Law of the Inter-American Court of Human Rights: Recent Cases' (2005) 5 HRLRev 159, 161, 166–7.

[82] Convention on the Civil Aspects of International Child Abduction (concluded 25 October 1980; entered into force 1 December 1983) 1343 UNTS 89. *Neulinger and Shuruk v Switzerland* (6 July 2010) (Grand Chamber) [131]–[132].

[83] *Monory v Romania and Hungary* (5 April 2005) [81]. Also *Bianchi v Switzerland* (22 June 2006) [92]; *Carlson v Switzerland* (6 November 2008) [73].

[84] *Carlson* [76]; *Monory* [81], [79], [85]; *H.N. v Poland* (13 September 2005) [79]; *Karadžić v Croatia* (15 December 2005) [59]; *Bianchi* [94]; *P.P. v Poland* (8 January 2008) [89]. On enforcement issues, see eg *H.N.* [80]; *Karadžić* [60]–[61]; *Maire v Portugal* (26 June 2003) [75]; *Bianchi* [98]; *Lafargue v Romania* (13 July 2006) [103]. PB Beaumont, 'The Jurisprudence of the

implementation of the Hague Convention under the guise of interpreting the ECHR.[85]

International courts have gone so far as to pronounce on Member States' failures to honour and implement other treaties. In *Carlson*, Switzerland's actions were 'not in accordance with Article 11 of the Hague Convention'.[86] In *Fornerón and Daughter*, the IACtHR found that the fact that Argentina did not specifically criminalize the sale of a child in its domestic law 'does not satisfy the provisions of Article 35 [CRC]'[87] and is contrary to its obligations under the Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prosecution and Child Pornography.[88] In *Rantsev*, the ECtHR found a procedural violation of the right to life because Cyprus had failed to make use of the procedures provided for in a Mutual Legal Assistance Convention.[89] The IACtHR decided that the States' failure to enact relevant extradition treaties was in violation of their obligations under the right to a fair trial and the right to judicial protection to prosecute and punish those responsible for serious human rights violations.[90] In other words, according to the Court, the IACHR specifically requires Member States to conclude extradition agreements.

Turning to another area of law, in *Gonzales Lluy* the IACtHR addressed the right to health.[91] Notwithstanding the fact that the IACHR does not provide for the right to health and Article 26 IACHR contains only a commitment to progressive development of access to rights rather than a recognition of socio-economic rights,[92] the Court decided to uphold the right to health by linking it to the right to personal integrity and the right to life. In particular, the Court read into the scope of the right to personal integrity the State's obligation to regulate, monitor and supervise the services provided by private healthcare centres.[93] This link was articulated in light of the interdependence and indivisibility of civil and political rights on the one hand and economic, social and cultural rights on the other—and by taking into consideration a series of international treaties and documents, including the Additional

European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction' (2008) 335 RdC 19.

[85] J Arato, 'Constitutional Transformation in the ECTHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37 BrookJIntlL 353.

[86] *Carlson* [76].

[87] *Fornerón and Daughter v Argentina*, IACtHR Series C 242 (2012) [141].

[88] ibid [142].

[89] *Rantsev v Cyprus and Russia* (7 January 2010) [241]–[242].

[90] *Goiburú et al. v Paraguay*, IACtHR Series C 153 (2006) [130]–[132]; *Cantuta v Peru*, IACtHR Series C 162 (2006) [227].

[91] *Gonzales Lluy et al. v Ecuador*, IACtHR Series C 298 (2015). See also *Suárez Peralta v Ecuador*, IACtHR Series C 261 (2013).

[92] Art 26 (Progressive Development) reads: 'The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires'.

[93] *Gonzales Lluy et al.* [167].

Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,[94] the CRC and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[95] The ICESCR Committee's General Comments articulating a detailed framework for the requirements of availability, accessibility, acceptability and quality of all health services, goods and facilities served as the Court's standard for assessing Ecuador's obligations under the IACHR.[96] The Court was divided, with the point of disagreement among the judges being the scope and nature of Article 26 IACHR and, accordingly, the question of whether the right to health should become justiciable under Article 26 or under the rights to life and personal integrity.[97] The president of the Court submitted an insightful concurring opinion, arguing that, if one were to define the entire content and scope of a right by means of other treaties, this would result in a modification of the IACHR and a delegitimization of the Court.[98] What was not addressed, however, was the question of why these concerns are not equally applicable when detailed soft-law and hard-law standards pertaining to the right to health are fully incorporated into an analysis of the right to personal integrity.

From the cases discussed, it follows that, although both the ECtHR and the IACtHR argue that other treaties and instruments may be used as interpretive references in their reasoning, in practice they have sometimes transplanted external standards into the scope of their constitutive instruments. Specific application of systemic integration has resulted, in many instances, in the indirect application of other treaties under the pretext of interpretation. States may provide different levels of protection for the same rights in different international treaties, or even strategically create divergences or conflicts among treaties.[99] This does not mean that international judges have the competence to resolve such divergences or conflicts, or to align the content of one treaty with another. In some other cases, courts have effectively supervised other treaties.[100] This practice stretches their mandate too far and circumvents the consent of States that have not ratified these treaties by imposing on them obligations that they have not assumed. Even when some or all Member States have ratified these treaties, they have not consented to court supervision of their implementation. Establishing the content and

[94] (Adopted 17 November 1988; entered into force 16 November 1999) OAS Treaty Series No 69.

[95] (Adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 3. *Gonzales Lluy et al.* [172]–[174], [193], [196].

[96] ibid [176], [192]–[193].

[97] cf Concurring Opinion of Judge Humberto Antonio Sierra Porto and Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot (Judges Roberto F Caldas and Manuel E Ventura Robles adhered to this Opinion).

[98] Concurring Opinion of Judge Humberto Antonio Sierra Porto in *Gonzales Lluy et al.* [1], [4], [7], [31], [32].

[99] In general, S Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014).

[100] Neuman (n 77); Tigroudja (n 77) 622–3; Butler (n 81).

meaning of the rights provided for under the ECHR and the IACHR by reading into them not only detailed external obligations, but also arguably new rights, crosses the line between interpreting and modifying human rights treaties.[101]

III. SYSTEMIC INTEGRATION: FALLING SHORT OF EXPECTATIONS

Having discussed certain doctrinal (interpretational and jurisdictional) issues that arise when systemic integration is applied, this part of the article explores the broader implications of applying systemic integration within the human rights arena. Systemic integration falls short of the expectations of international lawyers for reasons which are rarely addressed. The first section highlights the fact that application of the principle of systemic integration is subject to the institutional and policy preferences of international courts and, hence, there are inherent limitations to pursuing a uniform or consistent interpretation of human rights law. The second section discusses the argument that systemic integration has the potential to establish priorities among important concerns, rather than simply resolving treaty conflicts. The case law of the ECtHR reveals that when this takes place, it may upset the aims and structure of the treaty under interpretation. The third section questions the well-established presumption that the more receptive an international court is to other treaties, and the more systemically it integrates them in its reasoning, the more effectively it ameliorates fragmentation.[102] The analysis discusses the risk that international courts may exercise undue interpretive authority over other treaties, thereby leading to the emergence of new informal jurisdictional powers residing in international courts. The final section argues that systemic integration in the human rights regime may hinder the progressive development of other interests and concerns in international law and cause our imaginative space to become stagnant, preventing us from looking beyond the present human rights regime(s).

A. Systemic Integration Is Shaped by Institutional Preferences

Application of the principle of systemic integration does not escape the functional biases and preferences of international courts. This application is affected by the legal and institutional aspects of fragmentation that it purports to overcome in the first place. Interpretation is, therefore, an invaluable yet limited tool for international lawyers and judges.

The debates in the literature usually revolve around the question of whether the introduction of relevant treaties in the process of interpretation could

[101] O Ruiz Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties. Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2011) 31 NQHR 172.

[102] Forowicz (n 14) 21; cf S McInerney-Lankford, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32 OJLS 623.

promote, for example, an investment arbitration tribunal or a WTO Panel being receptive to human rights law and, hence, form the basis of a holistic construction over different areas of law.[103] An interesting exercise that demonstrates the intrinsic difficulties involved is to adopt a narrower frame of reference and explore how international courts in the same area of law are restricted not only by the mandate defined by their subject areas (eg human rights, trade) but also by their own judicial policies and preferences. Systemic integration as a policy goal and/or interpretive tool does not necessarily avoid these preferences and biases, nor does it bring coherence to specific areas of public international law—let alone to international law as a whole.

As an example, the IACtHR and the ECtHR are not equally willing to take into account the rights of indigenous peoples when interpreting the IACHR and the ECHR, respectively. The IACtHR has enlarged the scope of Article 21 IACHR by reading into it a collective understanding of the right to property (in accordance with Article 13 of ILO Convention No 169) in the context of the duty of State parties to respect the special relationship that indigenous peoples develop with the lands they occupy or use.[104] According to this Court, a comprehensive and integrative reading of the IACHR alongside other treaties is required in order to promote the uniform interpretation of international human rights law.[105] This 'effort of normative integration'[106] serves the aim of incorporating the indigenous world view into human rights.[107] However, the ECtHR does not share the same degree of sympathy for indigenous peoples' rights. In the *Handölsdalen Sami Village* case, the Court did not address how the rights of indigenous peoples and treaties relevant to those rights might inform interpretation of the ECHR.[108] This point demonstrates not only the different approaches taken by the courts, but also the selectiveness underlying the application of systemic integration. The IACtHR uses systemic integration and the *pro homine* principle to construe the *corpus juris* of international human rights law in favour of serving specific judicial policy goals in the Latin American region.[109] Consequently,

[103] eg E de Wet and J Vidmar, 'Conflicts Between International Paradigms: Hierarchy versus Systemic Integration' (2013) 23 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269703>.

[104] *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C 125 (2005) [124]–[129], [136]–[137], [149]–[151]; *Sawhoyamaxa Indigenous Community v Paraguay*, IACtHR Series C 146 (2006) [117]–[121], [134]–[141].

[105] eg *Yakye Axa Indigenous Community* [151]; Separate Opinion of Judge Cançado-Trindade in *Caesar v Trinidad and Tobago*, IACtHR Series C 123 (2005) [62]–[63].

[106] Concurring Opinion of Judge Poisot in *Liakat Ali Alibux v Suriname*, IACtHR Series C 276 (2014) [74].

[107] Joint Separate Opinion of Judges Cançado-Trindade, Pacheco Gomez and Abreu Burelli in *Mayanga (Sumo) Awas Tingi Community v Nicaragua*, IACtHR Series C 79 (2001) [13].

[108] *Handölsdalen Sami Village and Others v Sweden* (30 March 2010). This is despite the strong objections raised by Judge Ziemele in her separate opinion.

[109] Neuman (n 77); A Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in HP Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP 2016) 153.

any claim for a uniform interpretation of human rights or use of integration is subject to (and even reinforces) existing biases and judicial policies. In addition, institutional preferences and structural biases permeate human rights expertise from within, since human rights lawyers may regard themselves as experts in very specific areas (for example, children's or anti-discrimination lawyers) and, therefore, may adopt opposing perspectives and priorities.[110] These preferences and biases existing at the level of institutions, judicial policy and expertise are entrenched in the practice of human rights law, and, at the very least, one should be aware of them.

B. Prioritizing Concerns beyond Treaty Conflicts?

The principle of systemic integration holds a prominent position in discussions of treaty (or norm) conflicts. Although many scholars have acknowledged that Article 31(3)(c) VCLT is not equipped to resolve true treaty conflicts,[111] the ILC assigns such a role to this provision in its alleged capacity as an expression of the principle of systemic integration. It has additionally been argued that the principle of systemic integration offers the prospect of balancing different values and interests without necessarily predicating or establishing the prevalence of one norm over another.[112] The interpreter has a role in 'prioritiz[ing] concerns that are more important at the cost of less important objectives'.[113] These claims have not been elaborated on at length, but a few points need to be underlined in light of ongoing judicial practice. First, the task of balancing values or interests is different to prioritizing them; prioritizing is but one option. Second, as will be discussed below, it is doubtful whether the balancing of different interests and values against treaty provisions can be addressed while engaging in interpretation.[114] Third, it is unclear how one can decide which concerns are most important and prioritize them accordingly; this is an exercise that is dependent on the interpreter's standpoint.

For its part, the IACtHR does not seem inclined to consider, let alone prioritize, interests and values reflected by other treaties unless those interests are perfectly aligned with the aims of the IACHR. To take an example, the Court was firm in its position that a bilateral investment treaty between Paraguay and Germany had no legal bearing on its assessment of whether a series of rights, including the right to property, of the Sawhoyamaxa community had been violated under the IACHR.[115] In a similar vein, in the *Wong Ho Wing v Peru* case, the bilateral extradition treaty between Peru and China was largely treated

[110] M Payandeh, 'Fragmentation within International Human Rights Law' in M Andenas and E Bjorge (eds), *A Farewell to Fragmentation* (CUP 2015) 297.
[111] McLachlan (n 5) 318–19; Tzevelekos (n 15) 665–70, 686. M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 DukeJComp&IntlL. 69.
[112] McLachlan (n 5) 318–19. [113] ILC Rep (n 3) [419]. [114] Gardiner (n 17) 281.
[115] *Sawhoyamaxa Indigenous Community* [140].

https://doi.org/10.1017/S0020589317000185 Published online by Cambridge University Press

as a fact under domestic law, rather than as an international treaty to be considered in the process of interpreting and applying the right to life under the IACHR.[116] In other words, the general interest in international cooperation in the specific area of extradition did not have any bearing on the Court's analysis. Finally, in assessing the compatibility of El Salvador's amnesty law with the IACHR, the Court stated that it would take the 1992 Peace Accord and Additional Protocol II to the 1949 Geneva Conventions (AP II) into account.[117] In this instance, there seemed to be a discrepancy between, on the one hand, the requirement of the AP II to grant the broadest possible amnesties and the need to maintain the negotiated peace,[118] and, on the other, the Court's inflexible approach in declaring all amnesty laws to be incompatible with the IACHR.[119] The Court did not enter into this discussion, but simply reiterated its general position—declaring El Salvador's amnesty law to be inconsistent with the guarantees of the IACHR.[120]

On the other side of the spectrum, the ECtHR is willing not only to balance external concerns and interests with the guarantees of the ECHR, but even to prioritize the former over the latter. In many instances, the ECtHR has taken other treaties (or the absence of other treaties) into account without proceeding to resolve (or avoid) a conflict of norms. It has on occasion arguably prioritized the admittedly weighty interests expressed in these treaties under international law over the applicability of the ECHR. This has had a significantly restrictive impact on the protective scope of the rights in question. In *Carson*, the Grand Chamber accepted that the *absence* of bilateral reciprocal treaties in the social security sphere is a sufficient reason to limit the applicability of Article 14 ECHR; otherwise, Article 14 would effectively undermine the right of States to enter into reciprocal agreements.[121] In *Waite and Kennedy*, the Plenary Court held that the right to access a court should be substantially restricted so as not to undermine the proper functioning of international organizations and international cooperation.[122] In *Bosphorus*, the Court established the presumption of equivalent or comparable protection between EU law and the ECHR by relying upon the principle of *pacta sunt servanda* and the need for the proper

[116] *Wong Ho Wing v Peru*, IACtHR Series C 297 (2015) [126], [138], [239]; cf *Soering v United Kingdom* (7 July 1989) (Plenary) [83]–[90].
[117] *Massacres of El Mozote and Nearby Places v El Salvador*, IACtHR Series C 252 (2012) [284]–[287].
[118] Concurring Opinion by the President of the Court, Judge García-Sayán in *Massacres of El Mozote*.
[119] JM Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP, 2014) 218–19, 322–3; Neuman (n 77) 108–9.
[120] For criticism to the Court's practice see L Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 ICLQ 660–1.
[121] *Carson and others v United Kingdom* (16 March 2010) (Grand Chamber) [89].
[122] *Waite and Kennedy v Germany* (18 February 1999) (Grand Chamber) [63].

functioning of international organizations (relating to Ireland's EU membership).[123]

A cluster of cases concerning the Hague Convention on the Civil Aspects of International Child Abduction also illustrates that prioritizing the purposes and goals of other treaties may interfere with the aims, structure and effectiveness of the ECHR. The applicants before the ECtHR claimed that returning the child pursuant to the Hague Convention would be in violation of the best interests of the child and the right to family life under Article 8 ECHR. The Court refused to rigorously review whether the return of the child was in breach of the guarantees of Article 8 ECHR unless there had been an arbitrary decision by national authorities.[124] The crux of these cases involved the fact that Article 13(b) of the Hague Convention provides for an exception to the State parties' obligation to return a child if there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. The Court's previous case law, which applied the Hague Convention's provisions de facto via the ECHR,[125] and the importance attached to preserving the *main aim* of the Hague Convention (the expeditious return of the child) created the uncomfortable situation in which the Court was obliged to review the requirements of the Hague Convention in light of the ECHR.[126] On the one hand, Article 13(b) of the Hague Convention contains an exceptional 'escape clause' pertaining to the return of a child which must be narrowly interpreted, whereas on the other hand, the protection of the best interests and rights of the child serve as primary considerations under Article 8 ECHR (which, in turn, may be subject to restrictions). The ECtHR was hesitant to review the application of the Hague Convention against the guarantees of Article 8 ECHR in light of the risk of undermining the effective implementation of the Hague Convention.[127] The Grand Chamber, in *Neulinger and Shuruk*, restored this imbalance, ruling that the conditions for the enforcement of the return of the child need to be in strict conformity with Article 8 ECHR.[128]

[123] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland* (30 June 2005) (Grand Chamber) [150].

[124] *Maumousseau and Washington v France* (6 December 2007) [71]; cf Dissenting Opinion of Judge Zupančič joined by Judge Gyulumyan, 39–40. *Eskinazi and Chelouche v Turkey* (6 December 2005) 21–2. E Sthoeger, 'International Child Abduction and Children's Rights: Two Means to the Same End' (2011) 32 MichJIntlL 521–2.

[125] cf discussion in Pt II.C.

[126] *Maumousseau and Washington* [73]; cf Dissenting Opinion of Judge Spielmann in *Neulinger and Shuruk* (8 January 2009) 41; Dissenting Opinion of Judge Dedov in *Adžić v Croatia* (12 March 2015) 27–9.

[127] *Neulinger and Shuruk* [134], [137], [145]. Also Concurring Opinion of Judge Lorenzen joined by Judge Kalaydjieva, 54; Concurring Opinion of Judge Cabral Barreto, 56; Concurring Opinion of Judge Malinverni, 57; Joint Separate Opinion of Judges Jočienė, Sajó and Tsotsoria, 61–2.

[128] *Neulinger and Shuruk* [132]–[133], [138]–[141]; *X. v Latvia* (26 November 2013) (Grand Chamber) [94], [106].

In summary, the IACtHR and the ECtHR have different approaches to other treaties. The IACtHR appears to be fixed in giving little weight to the values and interests of other treaties unless these converge with the aims and implementation of the IACHR. Some scholars have argued that this practice can be rigid and one-sided on certain occasions, especially in the context of amnesty laws. The ECtHR employs the legal methodology of systemic integration in order to justify prioritizing significant interests over the guarantees of the ECHR. The foregoing cases demonstrate that the argument that systemic integration is a means of balancing or even prioritizing among important interests raised by other treaties can lead to significant restrictions on human rights.

C. *Exercising Undue Interpretive Authority over Other Treaties*

An international court's receptiveness to relevant public international law rules can be a reliable indicator of a reduced risk of diverging interpretations and/or judgments, as well as bolstering cross-fertilization.[129] At the same time, however, an international court's systematic engagement with, and integration of, other treaties raises questions regarding its authority to shape the construction of these treaties. When an international court takes a treaty provision into account for interpretation purposes, it inevitably engages in an articulation of its ordinary meaning.[130] While international courts have the inherent power to construe general international law, they do not have the competence to *authoritatively* ascertain the ordinary meaning of treaties other than the instruments subject to their jurisdiction.

An exception to this is the jurisdiction that the African Court of Human and Peoples' Rights enjoys. Article 3(1) of the Protocol establishing the ACtHPR provides that:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol *and any other relevant Human Rights instrument ratified by the States concerned*.[131]

Pursuant to this broad jurisdiction, the Court has interpreted, applied and, accordingly, found violations of, for example, the ICCPR[132] and the Economic Community of West African States (ECOWAS) Revised

[129] Forowicz (n 14).

[130] T Broude, 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law* (Hart Publishing 2008) 112; Samson (n 15) 708–9.

[131] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 11 July 2003; entered into force 24 January 2014) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (emphases added); F Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012) 435–9.

[132] eg *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR App No 007/2013 (2016) [145].

Treaty.[133] Yet, even in light of the exceptional scope of the ACtHPR's competence, concerns regarding the potential for undue interpretive authority over other treaties are not alleviated. Such concerns relate, obviously, to the risk of divergent interpretations of a treaty which is already supervised by another body. The vice president of the ACtHPR underlined this risk in his separate opinion in the case of *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*.[134] However, these concerns are also manifested (and merit equal consideration) in situations in which a treaty is not subject to supervision by an international body or where the interpretation of one of its provisions is contested or unclear.[135] The WTO Appellate Body[136] and international investment tribunals tend to engage only very reluctantly in the interpretation of other treaties.[137] Human rights courts, however, show no signs of hesitance in this regard.

In the *X and others* case,[138] the Grand Chamber was divided over the ordinary meaning of the European Convention on the Adoption of Children.[139] Seven dissenting judges strongly opined that the majority's interpretation adhered neither to the letter nor to the object and purpose of Article 7 of this Convention.[140] Moreover, the ECtHR regularly defines the ordinary meaning of debated provisions of the Hague Convention on the Civil Aspects of International Child Abduction and corrects the (alleged) shortcomings of national court decisions when applying this Convention.[141] Judge Pinto De Albuquerque argued that, in the absence of an oversight body for the Hague Convention, the ECtHR should ensure the uniformity of interpretation and implementation of States' obligations under this Convention.[142] The IACtHR, in *Artavia Murillo*, extensively analysed many human rights treaties, and it is arguable that in the process of doing so adopted an inappropriate interpretation of the CRC and the ICCPR.[143] The Court read and adopted a specific interpretation of the right to life under these treaties that does not necessarily reflect their ordinary meaning or the current views

[133] Economic Community of West African States (ECOWAS) Revised Treaty (adopted 24 July 1993; entered into force 23 August 1995) 2373 UNTS 233. eg *Lohe Issa Konate* [164], [176].

[134] Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R.* [16].

[135] *Enerji Yapi-Yol Sen* and *Danilenkov and Others* cases; Velyvyte (n 52) 80.

[136] L Bartels, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It?' in Broude and Shany (n 42) 140–1.

[137] M Hirsch, 'The Interaction Between International Investment Law and Human Rights Treaties: A Sociological Perspective?' in Broude and Shany (n 42) 216–17.

[138] Samson (n 15) 708–9.

[139] 2008 European Convention on the Adoption of Children (Revised), CETS No 202.

[140] Joint Partly Dissenting Opinion of Judges Casadevalli, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos in *X and others v Austria* (19 February 2013) (Grand Chamber) [19].

[141] *Monory* [81]; *Bianchi* [92].

[142] cf Concurring Opinion of Judge Pinto De Albuquerque in *X v Latvia* 44.

[143] Jesús (n 38) 258–62.

of their supervisory bodies.[144] Such instances may be somewhat exceptional (thus far) but they may be indicative of future trends.[145] The questions that come to the surface, but are rarely discussed in literature and judicial practice, are the following: Are international courts entitled to have a say in the interpretation of other treaties? If so, what are the implications for the development of international law, and what is the role that these courts assume?

In general, all international courts are equal participants in the development of international law, including general international law (international customary law and general principles of law) and treaties.[146] As far as treaties are concerned, international courts frequently refer to and use them as interpretive aids. When doing so, they make sure to approach the authoritative meaning of a treaty provision by relying on how its interpretation has been developed by the treaty's supervisory body. If a treaty lacks a supervisory body, it is the State parties to this treaty that prescribe authoritative interpretations. Yet, it would be unreasonable to question altogether the authority of international courts and bodies to interpret other treaties, should an issue arise when deciding a case that necessitates it. Their interpretations may not be authoritative, but they do enjoy a *certain* authority.[147]

The weight of this authority is determined by how an international court ascertains the ordinary meaning of a treaty provision. In the Hague Abduction cases discussed above, the only source that the ECtHR employed as an interpretive aid to support its findings was the 1980 Explanatory Report on the Hague Convention.[148] It was only after the Court's use of the Hague Convention was contested that it employed additional and more recent resources to interpret the Convention.[149] Although the practice of national authorities (primarily courts) of Member States to the Hague Convention is critical in the sense that it is genuinely authoritative, the ECtHR is not rigorous in identifying and analysing such practice.[150] The ECtHR in *Monory* invoked the practice of *European* States, although the treaty has been widely ratified on a global level by 94 States,[151] and the Court essentially cited the practice of one European State! In *Neulinger and Shuruk*, the ECtHR looked selectively into the practice of certain European and Australian domestic courts.[152] Conversely, the weight of the authority of an interpretation by the

[144] ibid 254–5.

[145] L Silberman, 'Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence', Institute of International Law and Justice (New York University, School of Law), Working Paper 2005/5, 32 <www.iilj.org>.

[146] eg AAC Trindade, 'The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights' (2004) 25 HRLJ 158.

[147] Gardiner (n 17).

[148] *Maumousseau and Washington* [43]; *Neulinger and Shuruk* [58]; *X. v Latvia* [45]; *Adžić* [63].

[149] *Neulinger and Shuruk* [67]; *X. v Latvia* [36]; *Adžić* [64]–[65].

[150] cf the detailed analysis of the US Supreme Court in similar cases discussed in A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 86.

[151] *Monory* [76].

[152] *Neulinger and Shuruk* [60]–[74].

ECtHR will subsequently be tested against the practice of Member States with respect to the other treaty. This means that, for instance, ECHR Member States can, in theory, disregard the ECtHR's findings as to the interpretation of the Hague Convention; this, however, would put them in a difficult position since they are required to conform to the Court's judgments.

The increasing receptiveness of an international court to relevant treaties, if accompanied by an integrative interpretation, raises questions not only on the level of interpretation but also regarding the role that the court assumes in asserting authority over other treaties.[153] There is the risk of establishing novel, informal hierarchies among international courts on the basis of which exercises the most influential persuasive, interpretive and normative power when construing certain treaties. One cannot fail to note that the discussion over the fragmentation of international law has unfolded as a critique of or in favour of sustaining formal or informal hierarchies among international courts. The perception that the multiplicity of international courts poses a danger to the unity of international law partly reflects the hegemonic conflicts stemming from the 'loss of hierarchical position by institutions of the *ancien régime*'[154] (referring mostly to the role of the ICJ). In this context, other international courts are not exempt from the same note of caution. Neither the ECtHR nor the IACtHR are immune from the temptation to establish new forms of informal hierarchies.[155] It is important to be mindful that shared ownership over international law goes hand in hand with the burden of shared responsibility for its development and for managing international dispute settlement.[156] Shared responsibility is not restricted to drafting treaty clauses that regulate overlapping jurisdictions, apply procedural principles or implement judicial comity.[157] In the everyday operation of international courts, international lawyers and judges need to be aware of the systemic implications of their judgments in order to avoid exercising undue authority over other treaties. Creativity does not preclude prudence. International courts should conduct more rigorous research on a comparative and international level, and they should enhance the quality of judicial reasoning and methodology, especially when interpreting a treaty that does not fall within their jurisdiction.[158]

[153] Broude (n 130) 112.

[154] M Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (Harvard, 5 March 2005) <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d%5B1%5D.pdf> 6; cf. T Treves, 'Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals' (2000) 4 MaxPlanckYbkUNL 221.

[155] Cullen (n 56) 93.

[156] B Simma, 'Universality from the Perspective of a Practitioner' (2009) 20 EJIL 266.

[157] K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 MaxPlanckYbkUNL 88–90.

[158] In the case of the ACtHPR, this is the case even when a relevant human rights treaty falls under its jurisdiction!

Finally, an argument that is often raised is that certain international courts may present the only viable opportunity to meaningfully develop the reach of a given international treaty which lacks an implementation mechanism. The IACtHR used this reasoning as a basis not only for taking other treaties into account, but also for exercising jurisdiction over the Inter-American Convention to Prevent and Punish Torture,[159] despite the fact that it is unclear whether this Convention assigns this task to the Court.[160] Although such an argument is somewhat understandable given the shortcomings of the international judicial system, it is tenuous for two reasons.[161] First, it disregards the pivotal role that domestic courts can play in the interpretation and development of international law and treaties. National courts serve the role of providing accessible justice on a daily basis.[162] There is evidence to indicate that domestic courts increasingly engage with questions of international law, employ complex interpretive principles (including systemic integration) and come up with creative decisions.[163] This is not to say that innovative approaches in international litigation are not needed; rather, the point is that we should not wait for domestic remedies to be exhausted in order to pursue international justice.[164] We should treat the national judge as an agent of international justice as well. This is all the more pertinent since the national judge is in a unique position to apply the principle of systemic integration without being confined by the limited jurisdiction of an international court.[165]

The second reason that the systematic and integrative approach of international courts towards other treaties is problematic is its repercussions for their legitimacy and for the overall effectiveness of human rights regime.[166] There are growing concerns among Member States to the ECHR regarding the ECtHR's practice of uncritically applying the principle of systemic integration. The lack of transparent legal reasoning and foreseeability in the case law, as well as the States' unwillingness to transform, de facto, the ECtHR into a supervisory mechanism for their obligations of other treaties, have led to a series of incongruous preliminary objections *ratione materiae*. Moldova, in *Tănase*, strongly argued that the

[159] (Concluded 9 December 1985; entered into force 28 February 1987) OAS Treaty Series No 67.

[160] *'Street Children'* [248]. According to Art 8 '[a]fter all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State'.

[161] A third reason is obviously the jurisdictional confines of an international court. See discussion in Pt II.

[162] A Roberts *et al.*, 'Comparative International Law: Framing the Field' (2015) 109 AJIL 472–4.

[163] eg A Nollkaemper, *National Courts and International Rule of Law* (OUP 2012) 264–76; Rodiles (n 109) 161–8; HP Aust, A Rodiles and P Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 LJIL 92–100.

[164] cf D Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6 JHRE 141.

[165] Rachovitsa (n 77) 96–100.

[166] Rodiles (n 109) 163.

https://doi.org/10.1017/S0020589317000185 Published online by Cambridge University Press

Court should not have used the European Convention on Nationality[167] as a tool for construing the ECHR, and that the weight attached to this Convention was inappropriate.[168] Turkey, in *Demir and Baykara*, objected to the integration of ILO conventions into the scope of Article 11 ECHR.[169] Similarly, the United Kingdom, in *National Union of Rail, Maritime and Transport Workers*, opposed the interpretive relevance of the legal assessments of the European Committee on Social Rights and the ILO Committee of Experts to the interpretation of Article 11 ECHR.[170] From the other side of the Atlantic, Member States to the IACHR have also started to show signs of unease. Paraguay, in the *Juvenile Reeducation Institute* case, contested the idea that socio-economic rights can be read into the scope of Article 26 IACHR.[171] In *Acevedo Buendía*, Peru raised a preliminary objection arguing that an alleged violation of the right to social security falls outside the Court's competence.[172] Against this background, the current president of the IACtHR and various scholars caution that the IACtHR's practice of strongly pursuing a *pro homine* interpretation of the IACHR by applying systemic integration will delegitimize the Court and undermine the progress it has achieved.[173]

D. Does the Application of Systemic Integration in the Human Rights Regime Limit the Potential of International Law?

The role that international courts assume in the task of interpretation and their perception of that task are significant to the development of international law. Georges Abi-Saab's metaphor of international law as a parasitic plant that grows erratically by seizing on all opportunities and latching onto anything that offers the possibility of moving towards the light[174] makes one quick to ascribe only weaknesses to the development of international law and to disregard the qualities of diversity and richness encapsulated precisely in the absence of a centralized legislative and judicial authority. International law, despite its sophistication, and its broadening and thickening in recent years, holds more firmly than ever to its old tendency to grow erratically. In their

[167] European Convention on Nationality (concluded 6 November 1997; entered into force 1 March 2000) ETS No 166.

[168] *Tănase v Moldova*, 27 April 2010 (Grand Chamber) [36]–[39], [124], [135]–[8], [176].

[169] *Demir and Baykara* [137].

[170] *National Union of Rail, Maritime and Transport Workers* [69], [94]–[98].

[171] *'Juvenile Reeducation Institute'* [254].

[172] *Acevedo Buendía et al. ('Discharged and Retired Employees of the Comptroller') v Peru*, IACtHR Series C 198 (2009) [12]–[19]. See also *Velásquez Paiz et al. v Guatemala*, IACtHR Series C 307 (2015) (only in Spanish) [16]–[19]; *Espinoza Gonzáles v Peru*, IACtHR Series C 295 (2015) (only in Spanish) [18]–[19].

[173] Concurring Opinion of Judge Humberto Antonio Sierra Porto in *Gonzales Lluy et al.* [23]–[32]; Rodiles (n 109) 161–2; Neuman (n 77); C Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' 12 (2011) GLJ 1208, 1227–8.

[174] G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' 31 (1999) NYUJ IntlL&Pol 930–1.

effort to look at international law in an orderly way—with a vision and a goal of bringing together and integrating all the disparate elements of the system into a single coherent story—international courts should be mindful of unintended implications. The *uncritical* application of the principle of systemic integration, especially in the context of international human rights law, may narrow the existing and potential reach of international law by *reducing* various concerns and interests to the human rights paradigm.

An exemplary case concerns the integration of environmental norms into the scope of the ECHR, bringing about the long-awaited integration of environmental concerns into human rights discourse.[175] This is, in principle, a positive development. Few note, however, the now-prevailing individualistic perspective with regard to environmental protection, and fewer still recognize that the concept of the environment as a public good, indispensable for the life and welfare of society as a whole, is being reduced to a restricted set of individual rights of a procedural character.[176] Neither the European nor the Inter-American Courts of Human Rights address an ecological approach to the environment, nor do they appreciate environmental integrity and degradation as issues affecting the community per se.[177] This narrow approach has important legal consequences: environmental damage can only be translated into the violation of a human right;[178] the victim requirement before international courts is not informed by the collective dimension of environmental integrity; and environmental regulations introduced by States can be assessed only as potential limitations to human rights.[179] It could be argued that other regimes and approaches mitigate the shortcomings entrenched in human rights discourse and practice. Yet such an argument disregards the fact that the practice of international human rights courts and bodies is disproportionately influential and, hence, it is highly likely that the 'narrowest but strongest argument for a human right to the environment'[180] will survive and become mainstreamed into the future development of international law, hindering its potential evolution in other directions.[181]

Similar considerations apply to other areas and concerns under international law. It is unclear to what extent human rights treaties—even in light of the integrative and groundbreaking jurisprudence of the IACtHR—are structurally equipped to include and articulate indigenous understandings of

[175] eg A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 52; Stephens (n 78) 320.

[176] F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 EJIL 41.

[177] ibid 50; Shelton (n 164) 145, 154.

[178] D Shelton, 'Developing Substantive Environmental Rights' (2010) 1 JHRE 90.

[179] R Desgagne, 'Integrating Environmental Values into the European Convention on Human Rights' (1995) 89 AJIL 264, 280–5.

[180] Boyle (n 175) 59–60.

[181] A Grear, 'Editorial – Where Discourses Meet' (2010) 1 JHRE 1; C Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1 JHRE 7. For similar thoughts, albeit in a different context, see Webb (n 2) 149, 209.

ownership.[182] It is clear that the IACtHR has not acknowledged indigenous people as a collective group, as rights-holders under the IACHR, but rather as individual members of the community.[183] Neither does the systemic integration approach of the IACtHR give due regard to the potential of the UN Declaration on the Rights of Indigenous Peoples.[184] The IACtHR made a choice—one that was never acknowledged—between the ILO Conventions and the UN Declaration, the latter of which sets more demanding standards, more difficult to reconcile with the IACHR.[185] Equally concerning is the integration of socio-economic rights into the discourse of civil and political human rights, insofar as we might question whether it is reasonable to expect that the imbalance of power in labour relations and in the complex area of social rights can and should be mediated through the ECHR or the IACHR. In the same vein, the language of human rights is (to some extent) ill-suited to describe how corruption causes harm to socio-economic rights,[186] or to acknowledge the effects of systemic discrimination and stigmatization.[187] In addition, despite the significant contribution of human rights courts and bodies to recognizing domestic violence as a human rights issue, there are limitations on how far human rights law can go to protect individuals from violations occurring in the private sphere.[188] Another topical question is whether international human rights law is capable of articulating and remedying the contemporary refugee crisis.[189] And then there is the issue of protecting human rights online. International human rights law is currently attempting to grasp in legal form the concerns pertinent to the digital environment.[190] To what extent, however, will the human rights paradigm recognize the complex and distinctive interrelationship between network/national/individual security and online privacy? In the online environment, privacy and aspects of security

[182] M Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 AJIL 357–9.

[183] Medina (n 77) 5.

[184] UNGA Res 61/295 (2 October 2007) UN Doc A/RES/61/295.

[185] C Charters, 'Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples' Rights under International Law' in Broude and Shany (n 42) 315.

[186] C Rose, 'The Limitations of a Human Rights Approach to Corruption' (2016) 65 ICLQ 405.

[187] *Garib v The Netherlands* (23 February 2016); cf Joint Dissenting Opinion of Judges López Guerra and Keller. See L Lavrysen, 'Strasbourg Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty' (10 March 2016) <http://strasbourgobservers.com/2016/03/10/strasbourg-court-fails-to-acknowledge-discrimination-and-stigmatization-of-persons-living-in-poverty/>.

[188] RJA McQuigg, 'Domestic Violence as a Human Rights Issue: Rumor v. Italy' (2015) 26 EJIL 1024.

[189] The Chamber of the Strasbourg Court upheld its strong record of protecting refugees and asylum seekers from collective expulsions; see *Khlaifia and Others v Italy* (1 September 2015). However, it is alarming that, upon referral of the case to the Grand Chamber, the Chamber's judgment as to the violation of the prohibition of collective expulsion of aliens was overturned. The Grand Chamber does not seem to grasp either the legal or the pragmatic challenges of the refugee crisis; *Khlaifia and Others v Italy* (15 December 2016) (Grand Chamber).

[190] UNGA Res 68/167, 'The Right to Privacy in the Digital Age' (21 January 2014) UN Doc A/RES/68/167 (adopted without a vote); UN HRC Res 32/13, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (18 July 2016) UN Doc A/HRC/RES/32/13 (adopted without a vote as orally revised).

can be in both a symbiotic and an antithetical relationship,[191] and privacy can be an important prerequisite for exercising freedom of expression. Nonetheless, according to the structure of human rights law, it is challenging to protect privacy and freedom of expression at the same time; instead, one can only be assessed as a legitimate restriction on the other. How will this dynamic relationship be incorporated into, and inform, legal reasoning and the proportionality test?[192]

The foregoing points are not intended to understate the relevance and significance of the human rights approach to other interests and concerns. Pursuing systemic integration within the human rights arena may lead to progressive developments in international law and enrich the human rights discourse while adding value to, and highlighting, new areas of interest. However, one should question whether we should settle for the strongest arguments, which in practice seem to be the easiest arguments to make. Human rights are simultaneously part of the solution and the problem; its well-established and powerful doctrinal and rhetorical vocabulary dominates the imaginative scope of international law and overshadows other possible articulations.[193] In this context, the principle of systemic integration arguably tends to accelerate and intensify this process: the human rights paradigm not only overshadows but also subsumes other emerging areas by 'squeezing' them into its own vocabulary, aims, structure and scope. Aspects of these new areas and interests in the law that are not readily reducible to human rights may remain embryonic or fall between the cracks.[194] In this sense, international law's store of available words and possible future meanings is being constrained and impoverished.[195] Progress and stagnation stand on opposite sides of a very fine line:[196] mitigating fragmentation and ensuring consistency should not impede the progressive development of international law in pursuit of more radical and imaginative changes, even if this means that the available narratives become less coherent.

It needs to be underscored that this is a process familiar in many quarters of international law and practice: other areas and regimes may raise similar questions when engaging with other treaties and concerns. It is also true that, in general, human rights law shapes and, in turn, is shaped by other fields

[191] Report of the Special Rapporteur on the Right to Privacy, JA Cannataci, UN Doc A/HRC/31/64, 8 March 2016 [24]–[25].

[192] See pending case before the ECtHR *Bureau of Investigative Journalism and Alice Ross v United Kingdom* (case communicated on 5 January 2015), App No 62322/14.

[193] D Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in R Dickinson *et al.* (eds), *Examining Critical Perspective on Human Rights* (CUP 2014) 19.

[194] JH Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/22/43, 24 December 2012 [51], [53].

[195] P Allott, *Eunomia – New Order for a New World* (OUP 2004) 6–8.

[196] Francioni (n 176) 54.

and norms in a dynamic, non-linear fashion.[197] The present discussion, however, shifts the debate from the conventional focus on interactions among well-known regimes (or the interactions of regimes vis-à-vis general international law) to how the human rights paradigm may develop and/or inhibit the legal articulation of numerous other interests under international law. Applying systemic integration arguably has a unique net effect in the human rights area for a number of reasons: in contrast to other international institutions, human rights courts and bodies are increasingly receptive to the technique of systemic integration;[198] as discussed above, human rights possesses a persuasive and appealing discourse that can monopolize our attention; and, finally, judgments by prominent human rights courts are particularly influential and contain the promise of enforcement, especially vis-à-vis norms and treaties that lack monitoring mechanisms.[199]

To conclude, the consideration and possible incorporation of other interests under international law into human rights and the use of systemic integration in the instances discussed in this article must not become our comfort zone. On the one hand, human rights bodies should acknowledge, engage with and integrate other concerns into their interpretations. On the other, and to the extent that the human rights structure and its conceptual tools fail to accommodate other concerns, we should continue exploring what is legally possible and acceptable for the international legal community.[200] This could involve forging different norm interactions and synergies or looking into creating different international fora. One way forward could be to move in the direction of setting up more monitoring mechanisms and/or international judicialization. In this way, various interests in international society could be evenly represented and more diverse approaches could be on the table. Yet, even if it is to be assumed that States would give their consent to establishing these mechanisms, international supervision (of a judicial nature or otherwise) in itself does not necessarily guarantee that we will respond effectively to emerging and complex questions. Human rights and international law expertise needs to be both creative in construing the law *and* mindful of their own limitations.

IV. CONCLUSIONS

This article has argued that systemic integration is neither the ultimate answer to difficulties arising from the fragmentation of international law nor a problem-free interpretive technique. Legal interpretation alleviates certain difficulties

[197] eg Kamminga (n 4); AN Pronto, '"Human-Rightism" and the Development of General International Law' (2007) 20 LJIL 753.

[198] Gardiner (n 17) 310. See also the discussion in Simma and Kill (n 1); Van Damme (n 15).

[199] Francioni (n 176) insists on expanding the human rights structure; cf L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 JEL 391.

[200] Aust, Rodiles and Staubach (n 163) 78–9 and references therein.

presented by fragmentation, but it cannot resolve the need for international courts to reject their fragmented lens and 'piecemeal' decision-making. One might also assume that applying systemic integration within one functional regime—the human rights regime—would present fewer challenges than applying systemic integration across different regimes. The analysis in this article has provided evidence demonstrating that this is not the case. In fact, it is perhaps a greater challenge to identify subtle contextual differences between treaties originating in the human rights regime or to preserve the aims and specificity of the ECHR, the IACHR or the ACHPR vis-à-vis other human rights and human rights-related treaties.

The application of systemic integration (or Article 31(3)(c) with the goal of systemic integration in mind) should not be understood as the legal basis upon which to align the contents of a treaty with the contents of other treaties. Ensuring consistency and cross-fertilization requires due appreciation of the contextual nuances in different treaties. In the current practice of the ECtHR and the IACtHR, we encounter cases in which these Courts indirectly apply and supervise other treaties under the guise of systemic integration. Such instances stretch the boundaries of these Courts' jurisdictional limitations and mandates, if indeed they do not exceed them. The critical analysis in this article should not be seen as a call for textualism or an abandonment of attempts at creativity—it is rather a call to be creative while at the same time striving for a more rigorous methodology and more transparency in legal reasoning and judgments. Legal reasoning is not merely a matter of applying rigid legal technique but rather requires the knowledge, when employing other treaties to interpret a treaty, of where the limits to this exercise of interpretation lie.

Most importantly, this article has stressed that we should be aware of the (unintentional) ramifications of pursuing systemic integration or systemic integration-like interpretive exercises in the human rights area. A court's systematic engagement with other treaties, especially when those treaties lack a monitoring mechanism, may lead to the exercise of undue interpretive authority over treaty provisions that are contested or unclear. Moreover, systemic integration does not always benefit the diversity of international law or the development of other bodies of law. Providing the opportunity for other areas of international law to reach their potential, addressing pressing global issues via different avenues or even acknowledging that human rights law cannot ameliorate the prevalent policy incoherence in international law-making are important values which should remind courts to avoid reducing some of the concerns of international law to the standards and language of the human rights regime. These concerns are not frequently raised, notwithstanding the fact that international human rights courts have made important contributions to progressively developing both their own treaty regimes *and* some other interests under international law. There remains a real risk that human rights practice and discourse will overshadow and subsume some important concerns.