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Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts

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Preface

Much of the debate on the responses to the global crisis which started in 2008 has focused on the role of economic and labour market policies. And yet, the global crisis represents a major challenge for worker rights. Indeed there is concern that, as the crisis continues, countries may be tempted to erode worker rights on the grounds that this would improve competitiveness and reassure financial markets. On the other hand, protecting ensuring worker rights is of paramount importance for enhancing social support for the recovery strategy and mitigating perceptions that the burden of the crisis is shared unfairly.

These tensions reinforce the importance of international labour standards as embedded in ILO instruments, notably ILO Conventions. The United Nations and regional organizations have also elaborated a range of instruments which aim at protecting human rights in general, including as regards social issues. This raises the issue of how the various instruments reinforce each other and whether there exist tools to address matters of interpretation of the different provisions.

This paper points to recent developments in the jurisprudence on human rights in different regional courts and bodies. It shows that ILO standards are increasingly taken into consideration by these courts and bodies. The result is a move to greater coherence in the international legal system. The paper represents a major step in documenting these trends, while also highlighting upcoming challenges.

Raymond Torres

Director

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I. Introduction

The emergence of international norms aiming at the protection of the individual is one of the most significant developments of modern international law. Two key dimensions in this regard are international labour law on the one hand and international human rights law on the other. A number of intersections can be discerned between these two dimensions: Numerous labour rights form part of the body of human rights enshrined by the relevant international human rights instruments. At the same time, many general human rights are relevant for labour rights issues since they constitute the necessary precondition for the exercise of labour rights, including freedom of expression, the right to life, the right to personal integrity and liberty, and the freedom from torture. Also, despite certain structural differences (Kolben, 2010:468 et seq.), the relationship between the labour rights and human rights discourse is close, with often overlapping regulatory objectives (e.g. Valticos, 1998:136).

However, despite normative linkages between international labour and human rights law, the intersections and synergies between the human rights and labour rights movements have generally lagged behind expectations. Many scholars have described the human rights and labour rights movement as largely similar yet isolated movements. Famously, Virginia Leary has described the two movements as “running on tracks that [...] rarely meet” (Leary, 1996:22).¹ Leary’s comments overall still seem to stand true today, although an increased emphasis on economic and social human rights, including workers’ rights, in international human rights fora² and related advocacy by some high-profile human rights NGOs can be observed.³ Yet, despite this and the fact that labour rights groups and scholars have made some headway in using human rights discourses,⁴ considerable gaps remain (Mundlak, 2011:1). It is hence not surprising that many international and regional human rights mechanisms have so far been rather underexplored from the labour rights perspective.⁵

At the legal stage, the relative isolation of the labour rights and human rights discourse is reinforced by the fragmentation of public international law, which for its part reflects the fragmented nature of global society and global policy making (Fischer-Lescano and Teubner, 2004:1004). The evolution of the international legal order has been accurately described as a development from a normative pyramid to a normative web (Simma and Pullowski, 2006:529) where a number of legal sub-systems (human rights, economic, labour, environment etc.) stand beside each other in a rather isolated manner.⁶

¹ Leary also criticized that labour rights have for a long time been excluded from the general human rights discourse, which goes along with a limited interest of human rights NGOs in ILO meetings and conferences (Leary, 1996:24, 42).

² At the UN level, the General Assembly adopted a Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 establishing a complaints mechanism, where the Committee on Economic, Social and Cultural Rights has issued general comments on the right to work (2005) and the right of social security (2008) under the Covenant.

³ For an early and prominent example, see Compa (2000). Human Rights Watch has been actively engaged in the context of the International Labour Conference’s Committee preparing the new ILO instruments on domestic work, and recent reports by this organization to address worker’s rights issues, relying on ILO and UN instruments. See, e.g., Human Rights Watch, *Domestic Plight: How Jordanian Laws, Officials, Employers, and Recruiters Fail Abused Migrant Domestic Workers*, 27 September 2011.

⁴ Some international trade union associations have been reported to begin “to conceive of themselves as part of the international human rights movement” (Kolben, 2010:457 et seq.).

⁵ This is argued by Joseph (2010:331) for the UN human rights system. Novitz (2010:410) makes a similar point regarding regional human rights mechanisms while recognizing that the jurisprudence of regional courts has gradually, albeit slowly, opened up to labour rights issues.

⁶ Some consider the fragmented nature of public international law as obstacles for achieving social progress, also because it may hamper the effective addressing of complex policy issues, involving, for example, both economic and social concerns, see e.g. Chimni (2007:11).

In the area of international human rights and labour law the fragmentation concerns not only different law-makers and supervisory mechanisms at the international level but also a division into international and regional legal systems. In parallel to the elaboration of human rights treaties under the auspices of the United Nations, systems of human rights protection have been adopted for the European, Inter-American, and African regions.⁷ Particularly regional human rights systems, which are supervised by courts, open opportunities for protecting workers' rights, which can complement and reinforce the protective effects of ILO conventions. At the same time, a multitude of different regimes relevant to labour rights may result in confusion or even inconsistencies if not properly coordinated (Valticos, 1979:695) that may in the long run weaken both the labour rights and the human rights regimes. There is hence a need to ensure coherence of the human rights courts' case law touching on labour issues with the relevant ILO standards. This could, among other things, be achieved by integrating the relevant ILO instruments and the reports of the ILO's supervisory machinery (henceforth: "ILO jurisprudence") into the court's reasoning and analysis. Such reference by human rights courts to ILO standards can also increase the quality, legitimacy and, hence, the authority of the courts' arguments when dealing with labour rights questions.⁸ Yet, while both the relations between the different regional human rights systems and their relations with other fields of international law have been subject to academic scrutiny,⁹ the interactions between the body of international labour law and the regional human rights systems have been rather unexplored.¹⁰

This discussion paper hence seeks to contribute to the debate on the relation between labour rights and human rights¹¹ by examining how the regional human rights courts have, in practice, considered ILO instruments and jurisprudence when interpreting and applying the regional human rights treaties. The focus is on the regional human rights courts, more specifically the Inter-American Court of Human Rights and the European Court of Human Rights,¹² rather than on the quasi-judicial regional bodies, such as the European Committee of Social Rights, mainly for two reasons. First, unlike other human rights bodies as well as the ILO supervisory mechanisms, regional human rights courts engage in legally binding adjudication available to individuals under the jurisdiction of any State Party to the

⁷ The relevant regional organizations are the Council of Europe, the Organization of American States and the Organization for African Unity, which has recently been replaced by the African Union, which have negotiated the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights, respectively. The European Social Charter is the most detailed regional instrument on economic and social rights, including workers' rights, with a significant normative overlap with the corresponding UN and ILO instruments. In Africa, economic and social, including workers' rights are included in the African Charter, while in the Americas such rights are covered in an additional protocol to the American Convention ("Protocol of San Salvador").

⁸ See, along similar lines, Mantouvalou (2010:445) and *mutatis mutandis* Neuman (2008:112).

⁹ See, for instance, Neuman (2008); Forowicz (2010).

¹⁰ See, however, the study by Novitz (2010) on labour rights in the African, Inter-American, and European regional human rights systems, which also touches on their relation with ILO law. Also Novitz's seminal study on the right to strike contains reflection on overlapping systems protecting workers' rights, which focuses, however, on the inter-action between ILO and regional standards in Europe (Novitz, 2003), leaving out the Inter-American system of human rights protection. Although the UN's International Law Commission has studied a number of approaches to deal with fragmentation, including "systemic integration" through interpretation of treaty provisions in the light of other rules of international law, it has not examined the integration between international human rights norms and international labour standards. See, 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 Martti Koskeniemi, UN doc. A/CN.4/L.682, 13 April 2006.

¹¹ See in this regard, for example, Alston (2005), Kolben (2010), Fenwick and Novitz (2010).

¹² The African Court on Human and Peoples' Rights, which has jurisdiction of the African Charter on Human and Peoples' Rights, will not form part of this analysis given the scarcity of available case law. The Court has so far only issued one judgment and one order for provisional measures, which are available at the Court's website at: <http://www.african-court.org/en/cases/latest-judgments/> (accessed on 10 July 2011).

convention concerned, including the award of compulsory reparation.¹³ Second, regional human rights treaties monitored by courts are often accorded special importance by the domestic judiciary, which tends to use these mechanisms as their primary international law reference on human rights issues.¹⁴

The remainder of the paper is structured as follows. In the two main sections, different stages of development in the courts' approaches to ILO instruments will be expounded to shed light on the ways in which ILO standards have influenced decision-making by these courts. Hereby, the focus will be on workers' freedom of association and forced labour. It will be demonstrated that references to ILO instruments and jurisprudence by the two regional courts are not only becoming more and more frequent but are also increasingly sophisticated. This way, ILO instruments have influenced the scope and content of the Conventions' rights, contributing, in some cases, to sweeping reversals of courts' case law in favour of workers' interests. This has also led to an increased alignment of the substance of the Courts' case law with that of ILO instruments and jurisprudence and thus to an increased coherence of labour rights at the global and regional level. The final section underscores the significance of this development for legal advocacy of workers' rights before regional human rights courts as well as for the relation between labour rights as well as the human rights discourses more largely and points to its implications for current legal problems at the EU level.

II. The Inter-American Court of Human Rights

1. ILO law as a source of legitimacy and factual evidence

In terms of supervision, the American Convention on Human Rights (ACHR) provides for a two-tier system. Individuals can petition, as a first step, the Inter-American Human Rights Commission alleging violations of the Convention by any of the States Parties. If the Commission finds a violation, it may refer the case to the Inter-American Court of Human Rights (IACtHR), which, under its contentious jurisdiction, can issue legally-binding judgments.¹⁵

Workers' rights have, alongside with social rights, so far not played a prominent role in the jurisprudence that the Court has been developing since its creation in 1978 (see also Cavallaro and Schaffer, 2004; López-Patrón 2008, p. 198 et seq.).¹⁶ That being said, in a number of rather recent cases the Court found violations of the right to life or to legal protection of trade union members and leaders,¹⁷ and more recently also decided cases regarding workers' freedom of association (Article 16)

¹³ See further Shelton (2006:268 et seq). By contrast, quasi-judicial committees operate based on periodical reporting and in some cases quasi-judicial complaint mechanisms. For a more comprehensive overview of the enforcement machinery of the respective human rights systems see, out of many, Pasqualucci (2003) and Leach (2005). In the case of the Inter-American Court of Human Rights, reparation may also mean measures such as memorials for the victims of the human rights violations at issue or specific government policies to protect or restore the victims' integrity (Pasqualucci, 1996; Báez Rojas, 2007).

¹⁴ See further Martinico and Pollicino (2010) on the European system and Oñate Laborde, Alfonso et al. (2006) on the Inter-American system. Examining the jurisprudence of regional human rights courts with regard to workers' rights is also worth studying against the background that no tribunal open to individual or collective complaints has been established within the ILO system.

¹⁵ However, submission to the Court's contentious jurisdiction is not automatic but applies only if a State Party makes a declaration to this effect. Currently 23 States Parties are subject to contentious jurisdiction.

¹⁶ In addition to contentious jurisdiction, the Court may issue advisory opinions on the obligations under the Convention or other human rights treaties, upon request by any member States of the OAS.

¹⁷ Relevant for work-place issues, while not limited to workers, are, in particular, the right to life (Article 4), the right to humane treatment (Article 5), and the right to a fair trial and to judicial protection (Articles 8 and 25).

and forced labour (Article 6).¹⁸ In a number of cases, the Court has made reference to ILO instruments and jurisprudence, which have had varied and gradually expanding functions.¹⁹

In the initial stage of this evolution, the Court's references to the ILO's instruments and supervisory bodies have mainly served a two-fold purpose: First, to increase legitimacy of the Court's normative assessment by invoking ILO instruments containing similar normative content. Second, to establish the accuracy of the alleged facts of the case by referring to the factual assessments of the ILO Committee of Freedom of Association.

The main example in this regard is *Baena-Ricardo et al. v. Panama* of 2001 which concerned the dismissal of 270 government employees who participated in a demonstration for labour rights and who were accused of complicity in perpetrating a military coup.²⁰ In order to arrive at the conclusion that dismissal of the workers concerned violated the workers' freedom of association,²¹ the Court clarified that freedom of association in labour matters means the "ability to constitute labour union organizations" and to put in place their internal structures, activities and action programme, without intervention from the public authorities. This echoed ILO Convention No. 87, which the Court mentioned in this context, along with the ILO Constitution and Convention No. 98.²² Secondly, the Court referred to the ILO Committee of Experts, which had called on the Government to abrogate the relevant legislation, leaving, however, open its relevance for the Court's legal analysis.²³ Third, the Court gave particular weight to the findings and recommendations of the ILO Committee on Freedom of Association in its report on Case No. 1569, which dealt with the same facts as the case before the

¹⁸ Additional labour rights, alongside with a number of economic, social and cultural rights, are laid down in the Protocol of San Salvador, including the right to "just, equitable, and satisfactory conditions of work" (Article 7 of the Protocol), the right of workers to organize trade unions and to join the union of their choice (Article 8(a) of the Protocol), and the right to strike (Article 8(b) of the Protocol). Of these only the latter is covered by the jurisdiction of the Commission and the Court as regards complaints (Article 19(6) of the Protocol of San Salvador). The Convention remains thus the Court's most important reference for workers' rights issues and has dominated the Court's legal analysis in this regard.

¹⁹ In some cases, sporadic reference was made to ILO instruments. For instance, the ILO Declaration on Fundamental Principles and Rights at Work of 1998 was cited alongside with a number of ILO Conventions in *Xákmok Kásek Indigenous Community. v. Paraguay* to provide normative support to the principle of equal treatment and non-discrimination, see IACtHR, *Xákmok Kásek Indigenous Community. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, para. 269. It should also be noted that the IACtHR regularly refers to the ILO Indigenous and Tribal Peoples Convention, 1969 (No. 169). These cases are not examined here as they have related mainly to issues regarding consultation of indigenous peoples and land rights rather than worker's rights in the area of freedom of association or forced labour.

²⁰ IACtHR, *Baena-Ricardo et al. v. Panama*. Merits, Reparations and Costs, judgment of February 2, 2001, Series C No. 72, para. 171. Within days following the dismissals, legislation ("Law No. 25") had been enacted retroactively provided for a basis of such dismissals and suspended normally applicable dismissal protection for trade union leaders. Subsequently, the trade unions' premises were blocked and the bank accounts interfered with. The Inter-American Commission argued before the Court that Law No. 25 penalized employees of the State for exercising freedom of association and that the demonstration and planned work-stoppage were legitimate activities inherent to this right. The Commission corroborated its argument by stating that the ILO Committee on Freedom of Association had held that the impugned legislation impeded freedom of association, *ibid*, para. 151.

²¹ However, the Court refrained from examining whether the convocation to a work stoppage was a legitimate strike action inherent to the exercise of the freedom of association and was therefore illegally prohibited by the authorities. In this regard, it can be noted that at the time of the events in this case, Panama had only signed but not yet ratified the Protocol of San Salvador which explicitly provides for the right to strike (Article 8(b)). The Court therefore decided not to apply the Protocol to the present case. The question whether the exclusion of the right to strike set out in Article 8(b) of the Protocol from the Court's jurisdiction, as mentioned above, would prevent it from establishing such a right under article 16 of the American Convention, remains therefore open.

²² *Ibid*, para. 157.

²³ *Ibid*, para. 163.

Court and was submitted to the Court as evidence.²⁴ In particular, the Court used the report of the Committee of Freedom of Association as one of three key sources to establish the facts of the case relevant to the alleged violation.²⁵ However, at this stage, the role of the reports of the ILO supervisory bodies as guidance for the Court's interpretations remained largely unexplored.

2. Going further: Using ILO law to shape legal obligations

In later judgments, the Court further sophisticated its approach vis-à-vis ILO instruments by using references to reports of the ILO supervisory bodies not only as factual evidence but also in order to determine the scope of the rights guaranteed by the Convention.

Some embryonic evidence for such an approach can be found the case of *Huilca-Tecse v. Peru* of 2005 where the Court recognized that the extrajudicial execution of a person in his capacity as a trade union leader did not only violate the right to life, but also constituted a violation of the right to freedom of association.²⁶ In support of its reasoning, the Court cited the ILO Committee on Freedom of Association's doctrine that the exercise of freedom of association requires fundamental human rights, particularly those related to the life and safety of the individual, are fully guaranteed and respected.²⁷ Similarly, in the case of *Cantoral-Huamaní and García-Santa Cruz v. Peru* of 2007, the Court used ILO jurisprudence in support of its interpretation that the State's obligation to investigate the killings of trade union members was "accentuated in contexts of violence against the trade union sector".²⁸

The key case regarding the Court's use of ILO instruments to shape the scope of the rights under the Convention is, however, *Ituango Massacres v. Colombia* of 2006, dealing with forced labour, among other matters. In this case, a paramilitary group captured 17 peasants and obliged them to herd livestock which they had taken from local communities during a military incursion. The Court considered these facts a violation of Article 6(2) of the American Convention,²⁹ which establishes that "[no]ne shall be required to perform forced or compulsory labour". The absence of any definition of this term allowed the Court to elaborate on its methods of interpretation. It highlighted Article 29 of the American Convention³⁰ which stipulates that no provisions of the Convention "shall be interpreted as [...] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party". It further stated that the interpretation of a treaty must not only take into account the agreements and

²⁴ *Ibid*, para. 162. In three separate paragraphs the Court cited the Committee's findings on the various elements which led to breaches of the trade union's freedom of association as guaranteed by ILO Convention No. 87. *Ibid*, paras. 162, 164, and 165.

²⁵ *Ibid*, para. 162. The Court, inter alia, took into account that the Committee on Freedom of Association found that sanctioning the strike actions with dismissals seriously impaired the possibilities for action of the public sector unions, in violation of ILO Convention No. 98.

²⁶ IACtHR, *Huilca-Tecse v. Peru*. Merits, Reparations and Costs. Judgment of March 3, 2005. Series C No. 121, paras. 67 and 69. In this regard, the Court emphasized the impact of such a crime on the collective right to organize without fear and the State's obligation to create an environment in which this right can be exercised.

²⁷ *Ibid*, para. 75. In this respect, the Court also referred to the case law of the European Court of Human Rights, *ibid*, para. 76.

²⁸ IACtHR, *Cantoral-Huamaní and García-Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 146. More specifically, the Court had referred to the report of the Committee of Freedom of Association, which specifically dealt with the facts of the case before the Court. The Court observed the Committee's statements, in this and other cases, that a climate of violence and a failure to guarantee fundamental human rights constituted a serious impediment for the effective exercise of freedom of association. In this case, the Court referred also to jurisprudence of the Committee on Freedom of Association, regarding the State's obligation to tackle impunity as a corollary of workers' freedom of association. *Ibid*, para. 145.

²⁹ IACtHR, *Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 168.

³⁰ *Ibid*, para. 155.

instruments related to the treaty (paragraph 2 of Article 31 of the Vienna Convention), but also the system of which it is part (paragraph 3 of Article 31 of that Convention).³¹

Applying these principles to the present case, the Court found it “useful and appropriate” to “use other international treaties, such as ILO Convention No. 29”,³² arguing that the ILO Convention’s definition could “throw light on the content and scope of Article 6(2) of the American Convention.”³³ The Court also noted that Colombia had ratified ILO Convention No. 29.

Taking it from there, the Court utilized the ILO instruments and jurisprudence in two ways. First, the Court based its conception of forced labour on the two constitutive elements of forced and compulsory labour – “menace of penalty” and “involuntariness” – as set out in Article 2(1) of ILO Convention No. 29.³⁴ The Court thus used the legal criteria of ILO Convention No. 29 to interpret a more general provision of the American Convention and fill a legal indeterminacy contained therein. By linking the content of a Convention’s provision to the legal content of ILO Convention also was accorded a substantial influence on the further development of the Court’s case law. Next, when exploring the scope of the term “menace of penalty” the Court drew on the meaning given to them by the ILO supervisory bodies, as reflected in the 2005 ILO Global Report on forced labour under the follow-up to the 1998 Declaration on Fundamental Principles and Rights at Work.³⁵ The Court applied this definition to the case at hand, thereby aligning its interpretation of the legal sub-criteria as well as its use to the principles developed by the ILO supervisory bodies.

3. Implications for the coherence between Inter-American human rights law and ILO law

The above cases illustrate that the IACtHR has been increasingly open to draw on ILO instruments and the reports of findings of ILO supervisory bodies. At least three different approaches vis-à-vis references to ILO law and jurisprudence can be detected, although no strict classification is possible due to the fact that the Court is hardly elaborating on its methods in this regard. First, ILO instruments and jurisprudence have been invoked, underlining the importance and/or universality of a certain provision of the American Convention, thereby increasing the Court’s legitimacy and authority to sanction labour-related human rights violations. Second, ILO jurisprudence, more specifically the reports of the Committee of Freedom of Association, has been utilized to establish the accuracy of the facts alleged in the case. Third and finally, ILO instruments as well as ILO jurisprudence was used to interpret and define the legal concepts contained in the provisions of the American Convention.

This can be seen in connection with the Court’s broader practice to interpret and apply the Convention as a part of the general body of international human rights law of which it is a part. Article 29 of the American Convention and Article 31(3)(c) of the Vienna Convention have been activated by the Court to arrive at interpretations of the American Convention consistent with the obligations under other international treaties ratified by the State concerned. By considering that ILO standards and the American Convention are part of the same “system” of international law, the Court is increasingly contributing to the development of a coherent body of international law protecting workers’ rights.

³¹ *Ibid*, para. 156.

³² *Ibid*, para. 157.

³³ *Ibid*, para. 158.

³⁴ *Ibid*, para. 160. The Court only added as a third criterion imputability of the acts to the State, “either due to their direct participation or to their acquiescence to the facts” (para. 160), which is implicitly contained in ILO Convention No. 29, *ibid*.

³⁵ *Ibid*, para. 161.

III. The European Court of Human Rights

1. ILO law as a source of legitimacy and interpretative guidance

Since its creation in 1959, the European Court of Human Rights (ECtHR) has decided a number of cases which deal with rights at the workplace (Heringa and van Hoof, 2006; Caflisch, 2010), in particular dealing with forced labour and freedom of association issues (Articles 4 and 11 of the European Convention on Human Rights (ECHR)). Hereby, the ECtHR has referred to ILO instruments and jurisprudence in various ways.³⁶ Given the longer life and the larger quantitative output in terms of cases, it does not come as a surprise that the ECHR's relevant case law is more comprehensive than that of its Inter-American counterpart. Similar to the approach of the IACtHR, three basic functions of the Court's references to ILO instruments and jurisprudence can be identified.

First of all, references to ILO instruments and jurisprudence were made to provide additional argumentative support and legitimacy to the ECtHR's interpretations and findings. For example, the ECtHR has referred to ILO Convention No. 87 to support its view regarding the trade unions' right to exclude certain persons from membership.³⁷ Similarly, the Court has drawn on the ILO Committee of Experts' reports to support its finding that a bribe paid by an employer to his workers with a view to motivating them to cede their trade union rights, violates workers' freedom of association under the European Convention.³⁸ The Court has also based itself on ILO Conventions to justify restrictions of employer's rights in favour of worker rights³⁹ and certain issues of employers' freedom of association.⁴⁰

³⁶ See, most recently, ECtHR, *Kiyutin v. Russia* (Application no. 2700/10), judgment of 10 March 2011. In this decision, the Court referred to the ILO Recommendation No. 200 concerning HIV and AIDS and the World of Work, 2010, among other international and European instruments, to argue that travel bans against HIV infected people are an inappropriate means to prevent HIV, see *ibid*, para. 67.

³⁷ Here, the Court backed its interpretations with Articles 3 and 5 of ILO Convention No. 87. ECtHR, *Associated Society of Locomotive Engineers & Firemen (ASLEF)* (Application no. 11002/05), judgment of 27 February 2007, para. 38. Reference was also made to Article 5 of the ESC. In this context, the Court also mentioned the Conclusions of the ESC-Committee where the latter had repeatedly found that the UK Government was in breach of Article 5 of the ESC in this respect, ECtHR, *ASLEF*, paras. 23, 24, and 39. See, along similar lines, already European Commission of Human Rights, *Cheall v. United Kingdom* (Application no. 10550/83), decision of 13 May 1985 and European Commission of Human Rights, *Appl. 4125/69, X v. Ireland*, Yearbook XIV (1971), p. 198 at 222, the latter of which concerned protection against employers' acts aiming at dissuading workers from joining trade unions.

³⁸ ECtHR, *Wilson, National Union of Journalists and Others* (Application nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002, para. 48. In this case, which concerned the United Kingdom, the Court referred to the observations by the ILO Committee of Experts who had repeatedly criticized the British Government for this practice. Reference was also made to the reports of the European Committee of Social Rights, which had made similar statements as the ILO Committee of Experts.

³⁹ In the case *Gustafsson v. Sweden* of 1996, it was held that the employer's freedom of association did, *in casu*, not preclude strike actions against non-organised employers (para. 54) In this case, the Court referred to the ESC, the International Covenant on Economic, Social and Cultural Rights, and ILO Conventions Nos. 87 and 98 in order to corroborate "the legitimate nature" of collective bargaining (*ibid*, para. 53). ECtHR, *Gustafsson v. Sweden* (Application no. 15573/89), judgment of 25 April 1996 (Chamber) and *Gustafsson v. Sweden* (Application no. 15573/89), judgment of 30 June 1998 (Grand Chamber).

⁴⁰ Here, the Court also referred to the jurisprudence of the ILO Committee of Freedom of Association when arguing that employers' freedom of association precluded that non-members of an association were required to contribute to the funds of the organization. See ECtHR, *Vörður Ólafsson v. Iceland* (Application no. 20161/06), judgment of 27 April 2010, para. 53 in conjunction with paras. 22 to 24. Interestingly, as part of its argumentation the government of the Defendant State tried to show that the case at issue did not contravene the principles established by the Committee of Freedom of Association, *ibid*, para.69. This suggests that the State parties to the Convention increasingly became aware of the important of ILO instruments and jurisprudence for the interpretations of the ECtHR.

While the Court in most cases aligns its reasoning with ILO standards where it refers to them, there are exceptions. Most prominently, when the Court dealt with the lawfulness of closed-shop agreements, the Court made reference to the case-law of various ILO bodies, which neither prohibits nor protects closed-shop agreements,⁴¹ but considered such agreements to contravene workers' negative freedom of association, i.e. the right *not* to associate.⁴²

Secondly, the ECtHR has, albeit scarcely, used reports of the ILO supervisory bodies to ascertain the facts of a case. In *Danilenkov v. Russia* of 2009 the Court, when examining allegations of anti-union discrimination, referred to a report of the ILO Committee of Freedom of Association dealing with the same facts as evidence for the fact that the Government was aware of the discriminatory acts at stake. This was instrumental to find a violation of the State's positive obligation to protect the victim's freedom of association.⁴³

Third, and perhaps most importantly, ILO instruments and jurisprudence have been used as guidance when interpreting certain articles of the European Convention. One important example relates to the prohibition of forced or compulsory labour.⁴⁴ The leading case in this regard is *van der Musselle v. Belgium* of 1983, which dealt with obligatory professional duties of legal trainees ("avocats stagiaires") in Belgium. Noting the striking similarities between the relevant provisions of the European Convention and the ILO Convention No. 29 on Forced Labour, the Court stated that the definition of forced labour provided by the ILO Convention "can provide a starting-point for interpretation".⁴⁵ In this regard, the Court, first, used the definition provided by ILO Convention No. 29 to construe the term "forced labour".⁴⁶ Second, the Court referred to the ILO Committee of Experts and adopted its definition of the term "penalty".⁴⁷ Similar to the IACtHR, the ECtHR has thus considerably aligned its concept with that of the relevant ILO instruments. However, unlike its Inter-American counterpart, the ECtHR established additionally a minimum threshold of gravity that must be fulfilled in order for the forced labour prohibition to apply, which, in a way, constitutes a deviation from the ILO definition.⁴⁸

2. Going further: ILO law as an argument to reverse earlier case law

The most important development regarding the ECtHR's approach to ILO standards concern freedom of association, in particular the right to collective bargaining and the right to strike. In order to understand the recent developments in this area, a brief review of the Court's earlier case law is useful, which has, for a long time, been characterized by a rather restrictive approach (Brems and Haeck,

⁴¹ See further on this ILO (2006), paras. 364-365.

⁴² ECtHR, *Sörensen and Rasmussen v. Denmark*, (Application nos. 52562/99 and 52620/99), judgment of 11 January 2006, paras. 38, 75-77. In this regard, the Court also used references to the observations of the ESC-Committee, which had held the Danish legislation on closed-shop agreements to be incompatible with the ESC, see *Sörensen and Rasmussen*, para. 72. See also the Court's earlier judgment in the case *Young, James and Webster v. the United Kingdom*, (Application nos. 7601/76; 7806/77), judgment of 13 August 1981, para. 65, which does, however, not refer to any international instrument.

⁴³ ECtHR, *Danilenkov and Others v. Russia* (Application no. 67336/01), judgment of 30 July 2009, para. 130 in conjunction with para. 108.

⁴⁴ See further Meyer-Ladewig (2006:76 et seq.); Harris, Boyle and Warbrick (2009:114 et seq.).

⁴⁵ ECtHR, *Van der Musselle v. Belgium* (Application no. 8919/80), judgment of 23 November 1983, para. 32. The relevant provisions are Article 3 of the European Convention and Article 2 of ILO Convention No. 29.

⁴⁶ *Ibid*, para. 33.

⁴⁷ *Ibid*, para. 35. This approach was reproduced and refined in the Court's landmark case *Siliadin v. France* of 2005, concerning forced labour exacted from a migrant domestic worker. In this case, the Court employed references to ILO Convention No. 29, among other international instruments, also to define the positive obligations of States regarding the prevention of the use of forced labour through private actors. ECtHR, *Siliadin v. France* (Application no. 73316/01), judgment of 26 July 2005, paras. 85-89.

⁴⁸ This additional criterion for the existence of forced labour, the Court required that "the obligation to carry it out must be "unjust" or "oppressive" or its performance must constitute "an avoidable hardship", in other words be "needlessly distressing" or "somewhat harassing". *Ibid*, para. 37.

2004, p. 26). While recognizing that trade unions have the “freedom to protect the occupational interests of trade union members by trade union action”, the Court held that the States had “a free choice of the means to be used towards this end”.⁴⁹ As a consequence, the Court found in two early cases of 1976 that neither the right to collective bargaining nor the right to strike were protected by the European Convention.⁵⁰ In none of these cases, the Court considered ILO Conventions No 87 and 98 nor did the Court examine the relevant reports of the ILO supervisory bodies.⁵¹

This approach was substantially reversed in the landmark cases *Demir and Baykara*⁵² and *Enerji Yapı-Yol Sen*⁵³, both against Turkey, which were handed down by the end of 2008 and in spring 2009, respectively. These judgments are not only remarkable due to the shift in the Court’s case law and the substantial increase in workers’ rights protection but also because the Court justified this shift to a large extent with references to other international legal instruments, in particular with the relevant ILO Conventions. This aspect, whose importance for the protection of workers’ rights under the ECHR has been underscored by a number of scholars (Dorssemont, 2009a; 2009b; Lörcher, 2009; Nordreide, 2009), shall be discussed in detail further below.

The *Demir and Baykara* case concerned the legal status and collective bargaining rights of a civil servants union.⁵⁴ When the trade union brought legal action to enforce the collective agreement concluded with the local municipal council, the Turkish judiciary refused to recognize both the union’s legal personality and its right to collective bargaining.⁵⁵ The case was subsequently taken to the ECtHR whose Chamber⁵⁶ and, further to the appeal of the Turkish government, Grand Chamber found a violation of Article 11 of the ECHR regarding the refusal to recognize the validity of the collective agreement and the trade union’s legal personality.⁵⁷

The Court’s Grand Chamber placed the international instruments related to freedom of association and collective bargaining in the centre of its analysis. For this purpose, it reflected, first, on its approach to international law more generally. More specifically, it stated that the analysis of the “evolving norms of national international law” is an essential feature of interpreting the ECHR as a “living instrument”.⁵⁸ Drawing on Article 31 (3) (c) of the Vienna Convention,⁵⁹ the Court concluded that it “can and must” consider other international law instruments. It also stated that those instruments could “constitute a relevant consideration for the Court”.⁶⁰ In this regard, the Court did not consider it necessary that the international instrument referred to had been ratified by the country in question as long as there was a sufficient continuity in the general application of the treaty.⁶¹

⁴⁹ ECtHR, *Schmidt and Dahlström v. Sweden* (Application no. 5589/72), judgment of 6 February 1976, para. 36; ECtHR, *Swedish Engine Drivers’ Union v. Sweden* (Application no. 5614/72), judgment of 6 February 1976, para. 40.

⁵⁰ *Ibid.*

⁵¹ In this context, reference was made to the ESC which enshrines the right to collective action in its Article 6(4). However, the Court did not consider this as a valid argument because this ESC provision was subject to regulation and the general restriction clause.

⁵² ECtHR, *Demir and Baykara v. Turkey* (Application no. 34503/97), judgment of 12 November 2008 (Grand Chamber).

⁵³ ECtHR, *Enerji Yapı-Yol Sen v. Turkey* (Application no. 68959/01), judgment of 21 April 2009.

⁵⁴ ECtHR, *Demir and Baykara v. Turkey* (Grand Chamber), paras. 15 and 16.

⁵⁵ *Ibid.*, paras. 17 and 19.

⁵⁶ ECtHR, *Demir and Baykara v. Turkey* (Application no. 34503/97), judgment of 21 November 2006 (Chamber).

⁵⁷ *Demir and Baykara v. Turkey* (Grand Chamber), para. 8.

⁵⁸ *Ibid.*, para. 68.

⁵⁹ This provision stipulates that when interpreting international treaties, “any relevant rules of international law applicable in the relations between the parties” are to “be taken into account, together with the context”.

⁶⁰ *Ibid.*, para. 85

⁶¹ *Ibid.*, para. 86.

Subsequently, the Court applied this reasoning to its analysis of the trade union's rights under the European Convention. Most importantly, the Court relied on international instruments when examining whether the right to collective bargaining was actually covered by the European Convention. In this regard, the Court pointed out that it had, to that date, not recognized the right to collective bargaining as an essential element of Article 11 of the ECHR.⁶² The Court stated, however, that the list of essential elements was not definitive. Rather, it was related to "particular developments in labour relations". In the Court's view, these essential elements also had to be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights.⁶³

The Court then turned to analysing the relevant international law framework. Here, it focused on ILO Convention No. 98 and the more recent ILO Convention No. 151 on Labour Relations in the Public Service.⁶⁴ Whilst noting that, in accordance with Article 6 of ILO Convention No. 98, public servants were not covered by that instrument, it pointed to the ILO Committee of Experts' settled position that this exception only applied to members of the administration of the state.⁶⁵ Based on this reasoning, in combination with the analysis of the relevant European legal instruments and state practice,⁶⁶ the Court came to the conclusion that the right to collective action – even regarding members of the public service – had become an essential element of Article 11 (1) of the ECHR.⁶⁷ The Court explicitly noted that this constituted a departure from the approach taken in its earlier case law. However, it found this shift appropriate "to take account of the perceptible evolution in such matters, in both international law and domestic legal systems".⁶⁸

In addition to this, the Court also used ILO instruments when analysing the content of this right, referring to ILO Convention No. 98 and the reports of the ILO Committee of Experts in order to show that no exceptions from this right were applicable in this case.⁶⁹

Only a few months later, this new approach was confirmed in the case *Enerji Yapi-Yol Sen* which concerned the right to strike of a public service trade union. In this judgment, the Court drew on the fundamental considerations developed in *Demir and Baykara*, albeit in a more succinct form. Unlike in its earlier case law, the Court considered in this case that collective actions was an essential element of freedom of association whose infringement in principle led to a breach of Article 11 of the ECHR. In this regard, the Court relied on the interpretations of ILO Convention No. 87 by the ILO supervisory bodies, according to which the right to strike is an intrinsic corollary of workers' freedom of association.⁷⁰ After having briefly mentioned the relevant provisions of the European Social Charter (ESC), the Court concluded that the right to collective action was protected by Article 11 of the ECHR and that this right had been restricted in the case at hand.⁷¹ The two judgments, hence, do away with the Court's earlier restrictive approach on the right to collective bargaining and collective action.

⁶² *Ibid*, para. 145.

⁶³ *Ibid*, para. 146.

⁶⁴ The latter instrument entered into force in 1981, i.e. after the ECtHR's precedents on this matter. The Court noted that both instruments had been ratified by Turkey by the time the case was filed.

⁶⁵ *Ibid*, para. 147. The Court also noted that ILO Convention No. 151 only contained exceptions from the right to participate in the determination of working conditions for armed forces and the police.

⁶⁶ *Ibid*, paras. 149-152. The Court referred both to the European Social Charter and the EU Charter of Fundamental Rights.

⁶⁷ *Ibid*, para. 154.

⁶⁸ *Ibid*, para. 153.

⁶⁹ This concerned in particular the "public service" exception of ILO Convention No. 98. *Ibid*, para. 166. The Court also used the interpretations of the ILO Committee of Experts and the ILO Committee of Freedom of Association when dealing with the scope of the right of public servants to join trade unions, *ibid*, para. 101.

⁷⁰ *Enerji Yapi-Yol Sen v. Turkey*, para. 24.

⁷¹ While this is not explicitly stated in the judgment, this is clear from the fact that the Court proceeds afterwards to examine whether the restriction of the right to collective action can be justified.

3. Implications for the coherence between European human rights law and ILO law

While the Court has referred to ILO Conventions for a long time, it has accorded them a more important role in its most recent case law. In its earlier case law on forced labour, the Court had drawn on ILO conventions and reports in order to define certain terms contained in the ECHR. Also, the Court had taken these instruments into account when dealing with aspects of the legal scope of workers' freedom of association and when examining whether this right had been infringed in a concrete case. However, these references were usually of a rather ornamental character, used to illustrate or back up certain principles or interpretations established earlier, and with limited influence on the actual outcome of the case.

The ECtHR significantly enhanced this approach in its recent *Demir* and *Enerij* decisions, using "developments in international law" as one of the main arguments to reconsider its case law (Nordreide, 2009).⁷² Interestingly, in both cases the Court submitted the international treaty law to a more detailed analysis than the respective State practice and it is tempting to draw a conclusion from this as to the importance the Court assigns to the different sources. Also, the Court pays more attention to the ILO Conventions than to the European Social Charter or other European norms as far as the number and depth of the references are concerned. This can be seen as an indicator that the Court tries to ensure increased normative coherence not only at the regional but also – and particularly – at the global level.⁷³

The Court thereby accords these international instruments a key role in the development of its case law. While Ovey and White (2006, p. 344) had noted earlier that the Court did not seem to be confident when dealing with the workers' rights contained in the Convention due to its lack of expertise in this area, the Court seems to have deliberately filled this supposed lack of expertise by extensive reference to international bodies specialising in this field. This development also impacts the consistency of the Court's case law with the interpretations of other international supervisory bodies. Contrasting with the Court's earlier case law, which had been criticized for deviating from the approaches taken by the relevant ILO Conventions and the ESC (Dorsemont, 2006), the Court's most recent case law is coherent with the relevant principles developed by the ILO supervisory bodies (Harris, O'Boyle and Warbrick, 2009, p. 544; Novitz, 2010:430). The *Demir* and *Enerij* cases have, hence, led to a new dynamic regarding the Court's approach, towards a more pro-active interpretation of the workers' rights by opening its case law at the same time for the influence of international labour law instruments.

⁷² However, as Judge Zagrebelsky notes in his separate opinion, one may critically ask where exactly the "developments in labour law, both international and national" lie to which the Court refers, see *Demir and Baykara v. Turkey* (Grand Chamber), para. 154. Indeed, the Court had addressed this issue the last time in the seventies. Both ILO Convention No. 98 and the ESC had been adopted at that time and had also been ratified by a large number of the Contracting States of the ECHR. The only new event in this regard was the entry into force of ILO Convention No. 151 and the adoption of the EU Charter of Fundamental Rights in 2000. Judge Zagrebelsky argues therefore that the approach of the Court is rather correcting its earlier case law than adapting it to real international developments. See *Demir and Baykara v. Turkey* (Grand Chamber), Separate Opinion of Judge Zagrebelsky, para. 2.

⁷³ This is also evident from a recent line of employment-related case regarding the right of access to court under Article 6 ECHR, namely *Fogarty v. the United Kingdom* (Application no. 37112/97), judgment of 21 November 2001, *Cudak v. Lithuania* (Application no. 15869/02), judgment of 23 March 2010, and most recently *Sabeh El Leil v. France* (Application no. 34869/05), judgment of 29 June 2011. In these cases, all decided by its Grand Chamber, the Court held that jurisdictional barriers as a result of the grant of diplomatic immunity in employment disputes between locally recruited staff and diplomatic missions are disproportional and hence violating the ECHR if granted in discord with the generally recognized principles of international law regarding State immunity. The ECtHR considers these principles as codified in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2004, preferring a global instrument over European Convention on State Immunity, 1972.

IV. Concluding remarks

The analysis presented here, dealing with forced labour and freedom of association, shows that the regional human rights courts increasingly take the ILO instruments on labour standards into account when dealing with workers' rights. While the specific ways to integrate ILO standards into their jurisprudence vary, a number of specific patterns can be identified. Both the ECtHR and the IACtHR engage in "systemic interpretation" (McLachlan, 2005) relying on Article 31(3)(c) of the Vienna Convention on the Law of the Treaties as a means to include ILO standards in their analysis and interpretation. This supports the view that the sub-systems of international law are not entirely decoupled from each other but subject to certain basic rules of general public international law.

Importantly, these Courts do not only consider the provisions of ILO Conventions but also the interpretations of the ILO supervisory bodies. Although the IACtHR first referred to ILO reports when examining the facts of a case, it has subsequently also drawn on ILO instruments and jurisprudence as guidance for its interpretations of the American Convention. While adopting a similar approach, the ECtHR has gone further by using ILO Conventions and jurisprudence as a key argument to reverse its earlier case law and extend the European Convention's protection as regards the right to collective bargaining and the right to strike. Importantly, the regional human rights courts show no hesitation as to the authoritative character of the views of the ILO supervisory bodies despite the current absence of an ILO tribunal.⁷⁴

While the quest of bridging the gap between the labour rights and human rights discourses depends on a number of factors, the two regional human rights courts examined have made an important contribution to facilitating inter-action and synergies of the two discourses at the legal level. This also has implications for those filing cases involving labour rights issues with the Courts. The Courts' increased references to ILO standards can be read as a signal that human rights courts are increasingly willing to open their analyses to considerations of the labour rights legal discourse of the ILO. In addition, coherent jurisprudence across the different protection systems tends to increase the protective effect of international law norms on worker's rights as a whole as it favours the application of the most favourable standard. This raises the potential of human rights courts as an instrument for the enforcement of labour rights which is yet to be fully exploited by trade unions and labour rights organizations. In this regard, the chances of success of a complaint filed with a human rights court are likely to increase where plaintiffs make references to ILO instruments and jurisprudence in their submissions and argue in favour of an interpretation of the regional human rights conventions in light of the relevant international labour law instruments. However, as Novitz (2010:438) notes, a continued progressive evolution of the regional courts' approach to workers' rights, in particular the social and economic rights dimension thereof, will be necessary in order to maximise their potential for the protection of workers' rights.

At the global governance level, it seems safe to say that the ILO's legal instruments and jurisprudence have gradually acquired a leading role regarding the shaping of regional human rights law in relation to labour matters. While by no means being able to remove the risk of international law's fragmentation in this area entirely, this helps to enhance coherence of these different but related parts of international law protecting workers' rights.⁷⁵ That being said, it should be noted that the process of creating coherence with ILO standards is itself a decentralized and largely unilateral process. Given that it is the regional Courts who decide what instruments and jurisprudence to refer to, the ILO's possibilities to guide or influence the way the regional Courts take into account ILO law is limited. That being said, it does not appear that the Courts' approach to integrating ILO instruments and jurisprudence into their case law has compromised the integrity or consistency of the body of ILO

⁷⁴ Article 37(2) of the ILO Constitution provides for a mechanism to set up a tribunal which has not been used. The possibility to seek rulings from the ICJ on interpretation questions envisaged in article 37(1) of the constitution has only been used on a few occasions in the ILO's early years.

⁷⁵ On the weak prospects to unify the different sub-systems of public international law at this point in time see Fischer-Lescano/Teubner (2004:1045).

standards in any way. Rather, the Courts have so far been anxious to accurately refer to and draw on the ILO's legal *aquis*. The increasing references to ILO standards thus appears to result in a win-win situation for both the regional Courts and the ILO itself. While the Courts obtain additional legitimacy as well as expertise in dealing with specific and often highly complex legal problems, the ILO itself benefits from a proliferation of their standards and their mainstreaming into other legal systems potentially leading to a broader application and wider awareness of the ILO body of law. On the other hand, coherence is also in the interest of States who may otherwise be confronted with contradictory guidance under the different instruments.

The experiences regarding coherence between regional human rights systems and international labour law can also provide avenues for solving labour-related fragmentation problems of other international legal sub-systems. This applies in particular to the EU's Court of Justice whose decisions in the cases *Laval* and *Viking* have been criticized for unduly prioritizing market freedoms over trade union rights⁷⁶ and have given rise to concerns regarding their coherence both with the ILO's labour standards and the European Convention of Human Rights (see e.g. Laulom, 2010). Here, a more comprehensive and consistent approach in terms of taking into account the ILO instruments and jurisprudence could help avoid conflicts between the EU legal system on the one hand and the ILO law as well as the jurisprudence of the ECtHR who increasingly draws on ILO conventions on the other. In the medium term, the expected accession of the EU to the European Convention on Human Rights, as envisaged under the Lisbon Treaty, has the potential of further enhancing the role of the European Court of Human Rights in ensuring coherence in the regional protection of workers' rights.⁷⁷

In light of the increasing awareness among individuals, organizations, and enterprises of the benefits of regional litigation, it seems likely that opportunities for litigating labour rights cases in human rights forums will continue to arise. It remains to be seen whether other regional courts, such as the European Court of Justice or the recently created African Court on Human and Peoples' Rights, will draw on the experiences made by their human rights counterparts with a view to further increasing coherence between regional and international law in relation to labour concerns.

⁷⁶ See further on this Hinarejos (2008); Syrpis and Novitz (2008).

⁷⁷ On the implications of the EU's accession to the ECHR see Lock (2010).

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