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An Analysis of the Contribution of the ILO's
International Labour Standards System to the European
Court of Human Rights's Jurisprudence in the Field of
Non-Discrimination

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EUI Working Paper **RSCAS** 2018/50

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ISSN 1028-3625

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Printed in Italy, November 2018

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I – 50014 San Domenico di Fiesole (FI)

Italy

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Abstract

This paper examines the role played by International Labour Standards (ILS) of the International Labour Organisation (ILO) and the pronouncements of the ILO supervisory bodies in the development of the European Court of Human Rights (ECtHR)'s jurisprudence by focussing on the ECtHR's case law on discrimination. This analysis is conducted against the background of the role that the ECtHR has been playing in making the European Convention of Human Rights (ECHR) an instrument that protects not only civil and political rights but also social and economic rights, and its consideration of the ECHR as a 'living' document. This study concludes with a reflection on the benefits of the ECtHR's use of ILS and the work of the ILO supervisory bodies, and challenges ahead.

Keywords

International Labour Organization (ILO), International Labour Law, International Labour Standards (ILS), ILO Supervisory Bodies, European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR), Discrimination

Introduction*

The European Court of Human Rights (hereinafter the ECtHR or the Court) has been increasingly integrating labour rights in its interpretation of the European Convention on Human Rights (hereinafter the ECHR or the Convention) and, particularly since the early 2000¹ it has been progressively relying on international labour standards (ILS) adopted by the International Labour Organisation (ILO) and the pronouncements of the ILO bodies supervising their application in judging relevant cases.²

In light of these developments, the aim of this paper is to examine the role played by the ILS system, which include both ILS and the work of the ILO supervisory bodies, in the development of the ECtHR's jurisprudence by using as a case study the ECtHR's judgments in the field of discrimination. The choice to focus on this area is due to the fact that the Court's decisions on discrimination have attracted less scholarly attention than other judgements where the Court has delivered decisions using ILO legal sources, in particular concerning freedom of association.³ This analysis is conducted against the background of the role that the ECtHR has been playing in making the ECHR an instrument that protects not only civil and political rights but also social and economic rights, and its consideration of the Convention as a 'living' document. This study concludes with a reflection on the benefits of the ECtHR's reliance on the ILS system and challenges ahead.

1. The ECtHR's 'integrated' and 'dynamic' approach to interpretation

The ECHR was adopted by the Council of Europe (CoE) in 1950 in a context dominated by a binary idea of rights. The Convention was thus conceived as aimed at protecting civil and political rights, while the European Social Charter (ESC) adopted in 1961 and revised in 1996 was adopted to safeguard economic and social rights. The only labour rights expressly mentioned in the Convention were the right to form and join a trade union (Article 11) and the prohibition of slavery, servitude, forced and compulsory labour (Article 4). However, as Caflisch has noted, 'quite a number of Convention provisions (...) cover labour relations'.⁴ On the basis of the existing case law, it can be said that besides Articles 4 and 11, this is the case of Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 14 (prohibition of discrimination).

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¹ This method has occurred since the *Wilson, National Union of Journalists and Others v. UK*, nos. 30668/96, 30671/96 and 30678/96, 2 July 2002.

² For a review of these cases, see Susana Sanz Caballero, 'La invocación del acervo de la Organización Internacional del Trabajo en la jurisprudencia social del Tribunal Europeo de Derechos Humanos' (2014) 32 *Revista General de Derecho Europeo* 1.

³ See for e.g. Keith D. Ewing and John Hendy QC, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *Industrial Law Journal* 2-51; Claire Kilpatrick, 'Has Polycentric Strike Law Arrived in the UK? After Laval, After Viking, After Demir?' (2014) *The International Journal of Comparative Labour Law and Industrial* 293-318; Tonia Novitz, 'Protection of Workers under Regional Human Rights Systems: An Assessment of Evolving and Divergent Practices', in Tonia Novitz and Colin Fenwick (eds.), *Human Rights at Work* (OUP, 2010) 409, 426-430; Virginia Mantouvalou, 'Is there a Labour Right Not to Be a Union Member? Labour Rights under the European Convention on Human Rights', in Tonia Novitz and Colin Fenwick (eds.), *Human Rights at Work* (OUP, 2010) 439.

⁴ Lucius Caflisch, 'Labour Relations before the Strasbourg Court', in Holger Paul Hestermeyer, Doris König, Nele Matz-Lück; Volker Röben, Anja Seibert-Fohr, Peter-Tobias Stoll, Silja Vöneky, (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers, 2011) 343, 365.

In fact, despite the original binary human rights conception, the ECtHR has progressively, even though with some degree of uncertainty, interpreted the rights contained in the Convention going beyond such dichotomy and incorporating socio-economic rights, including labour rights. Such interpretation mirrors a development that has also occurred at the level of international human rights law where the dominant dualistic view of such divide has been replaced by the idea that '[a]ll human rights are universal, indivisible and interdependent and interrelated' as proclaimed by the United Nations' Vienna Declaration of 1993.⁵

Thus, the Court has gradually moved away from an 'exclusive approach',⁶ according to which it considered that the rights not explicitly mentioned in the ECHR and which found protection in the ESC or ILS were not to be considered as covered by the ECHR, and has embraced an 'integrated approach' to interpretation.⁷ This approach enabled the Court to affirm in 1979 in the case *Airey v. Ireland* that 'there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention'.⁸ While this statement was not immediately followed by a consistent protection of social and economic rights, it opened up the Court's jurisprudence to these rights.

The 'integrated' approach to interpretation is coupled by a complementary interpretative method of interpretation that the Court has defined as 'dynamic' or 'evolutive'. This method is linked to the Court's vision of the Convention since the 1970s as a 'living document', which means that 'it must be interpreted in the light of present-day conditions'.⁹ Mowbray has noted that the 'major forces'¹⁰ underpinning this 'dynamic' interpretation of the Convention are 'rising human rights standards', the evolution of technology, and developments in the forms of personal and social relationships. The sources from which the Court assesses these diverse changes have evolved over time. Initially the Court derived such contemporary conditions from 'the developments of commonly accepted standards (...) of the member States of the Council of Europe'.¹¹ Later, it widened its perspective going beyond Europe and considered the broader 'signs of evolution of attitudes amongst modern societies'.¹² According to Judge Rozakis '[t]his interpretative latitude (...) has over the years been disciplined by the emergence of "internal" principles through the ECHR's case law (...)'.¹³ These 'internal principles' include the use of 'foreign law' as 'sources of inspiration'. With the term 'foreign law' Rozakis means domestic law of the Contracting States of the Convention, judicial decisions of other international courts or 'influential domestic courts ranking high in the conscience of the legal world', and 'international conventions (or even acts of international bodies carrying weight at the level of international or European relations)'.¹⁴

⁵ See United Nations, *Vienna Declaration and Programme of Action*, 25 June 1993, paras 5 and 8 in Part I, UN doc. A/CONF.15/23.

⁶ See Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *Human Rights Law Review* 529.

⁷ For the concept of integrated approach see Martin Scheinin, 'Economic and Social Rights as Legal Rights', in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds.), *Economic, Social and Cultural Rights* (Martinus Nijhoff, 2001) 259. See also Mantouvalou [6].

⁸ *Airey v. Ireland*, no. 6289/73, 9 October 1979 (ECtHR), para 26.

⁹ See *Tyrer v. United Kingdom*, no. 5856/72, 25 April 1978 (ECtHR), paras 33-34.

¹⁰ Alastair Mowbray, 'Between the Will of the Contracting Parties and the Needs of Today', in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 17, 20.

¹¹ *Tyrer v. United Kingdom* [9], paras 15-16. See also Maris Burbergs, 'How the Right to Respect for Private and Family Life, Home and Correspondence became the Nursery in Which New Rights are Born', in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 313, 319.

¹² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007) 77.

¹³ Christos L. Rozakis, 'The European Judge as Comparatist' 80 *Tulane Law Review* 257 (2005) 257, 261.

¹⁴ *ibid.*

Among the legal sources, the ECtHR has been referring especially to EU, CoE, UN and ILO instruments and documents as well as comparative law (often in combination) both upon parties' allegation and *ex officio*. When relying on international instruments (such as UN or ILO ones), the Court has not refrained from using them also when not ratified by the respondent State, and it has also relied on instruments not subject to ratification (as in the case of ILO recommendations) and the work of the bodies monitoring their application. Finally, it has also interpreted the ECHR in light of public international law, even though not in a consistent way.¹⁵ However, the presence of a *de jure* or *de facto* European consensus on the detected developments is a *condition sine qua non* for a dynamic interpretation of the Convention. If, according to the Court, this is lacking it abstains from an expansive interpretation of the rights and freedoms protected by the Convention.¹⁶

The Court has justified the 'evolutive' method of interpretation of the Convention also as an application of the principle of teleological interpretation established by Article 31(1) of the Vienna Convention on the Law of Treaties.¹⁷ The 'dynamic' interpretation is, thus, directed at realizing the object and purpose of the ECHR, which consists in the 'protection of individual human rights' and the realization of 'the ideals and values of a democratic society'.¹⁸

2. The *Demir and Baykara* case and the systematisation of the ECtHR's approach to international (labour) law

While the Court has referred to international law sources and related materials (including from the ILO) before 2008, it is only then that it has explained its approach to international (labour) law. This happened with the landmark judgement relating to the *Demir and Baykara* case¹⁹ delivered unanimously by the Grand Chamber on 12 November 2008. Reversing its previous jurisprudence, with this decision the Court established that the right to collective bargaining is 'an essential element' of the right to freedom of association covered by Article 11 of the ECHR. To reach this decision, the Court relied on various legal sources, the most significant of which have been ILS on freedom of association²⁰ and the pronouncements of two ILO supervisory bodies, namely the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA). The interpretative methodology developed in this decision has been defined by Lörcher as an 'internationally oriented interpretation methodology with binding ('must') character'.²¹ The Court indeed stated that in 'in defining the meaning of the terms and notions of the Convention', it '*must and can take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.*'²² (italics added). Thus, international law and the corpus of pronouncements of international supervisory

¹⁵ Magdalena M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010) 4-5.

¹⁶ See Mowbray [10] 36

¹⁷ Article 31.1 reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

¹⁸ David Harris, Michael O'Boyle, Edward Bates, 'The European Convention on Human Rights in Context', in David Harris, Michael O'Boyle, Edward Bates, *Law of the European Convention on Human Rights* (Oxford University Press, 2009) 1, 5-8.

¹⁹ *Demir and Baykara v. Turkey*, no 34503/97, 12 November 2008 (ECtHR).

²⁰ ILO Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87); ILO Convention No. 98 on the Right to Organise and Collective Bargaining, 1949; ILO Convention on Labour Relations (Public Service), 1978 (No. 151).

²¹ Klaus Lörcher, 'The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The *Demir and Baykara* Judgement, its Methodology and Follow-up', in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann, in *The European Convention on Human Rights and the Employment Relation* (Hart Publishing, 2013) 3, 5.

²² *Demir and Baykara v. Turkey* [19], para 85.

bodies are considered as sources that reveal the existence of an international consensus that should be used to interpret the ECHR. This approach is consistent with the ‘evolutive’ interpretation of the Convention and its nature of a ‘living document’. This is witnessed by the following paragraph of the judgement: ‘The Court further observes that it has always referred to the ‘living’ nature of the Convention, which must be interpreted in the light of present day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions’.²³ The fact that what the Court is interested in is to identify the existing or emerging consensus on how a certain right is conceived explains why it considers a wide array of binding and non-binding instruments together with ‘the interpretation of such instruments by competent organs’.²⁴ As the Court has clarified, the ratification of all applicable international instruments by the respondent State, is not necessary as long as ‘the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is *common ground in modern societies*’.²⁵ (italics added).

In the *Demir and Baykara* case the ECtHR also explained that its interpretative methodology is inspired by the rules of interpretation included in Articles 30-33 of the Vienna Convention of the Law of Treaties. In particular, it referred to the systemic interpretation set out in Article 31(3)(c)²⁶ to explain that it ‘has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties’.²⁷

The following section will examine to what extent and how this approach has been followed in the Court’s jurisprudence relating to the right to non-discrimination and how it has shaped it.

3. The ECtHR’s jurisprudence on the right to non-discrimination: The role of the ILS system

3.1. The ECtHR’s case law on discrimination relying on ILS: Main features

The ECtHR case law on discrimination is quantitatively less significant than in regard to other Convention rights. However, in the last ten years,²⁸ the Court has delivered important judgements some of which have relied on ILS. In this field the ILO has a lot to offer given the prominent importance it has given to the right to non-discrimination since its foundation. The ILO has been a pioneer and a model for the development of both international human rights law and national human rights and labour law in this field. The ILO Constitution has been the first international legal instrument to enshrine the principle of equal pay for work of equal value. The subsequent Declaration concerning the Aims and Purposes of the ILO of 1944 (known as the Declaration of Philadelphia), which was incorporated in the Constitution in 1946, can be considered as the first international declaration of rights with universal vocation.²⁹ In providing a definition of social justice, i.e. the ILO’s constitutional goal, it also established

²³ *ibid.*, para 68.

²⁴ *ibid.*, para 85.

²⁵ *ibid.*, para 86.

²⁶ Article 31(3)(c): ‘There shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties.’

²⁷ *Demir and Baykara* [19], para 67.

²⁸ Samantha Besson, ‘Evolutions in non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’ (2012) 60 *American Journal of Comparative Law* 147, 147.

²⁹ Alain Supiot, *L’esprit de Philadelphie* (Seuil, 2010) 9.

a human right to non-discrimination with the following words: 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.³⁰ Since then, the ILO has adopted several conventions and recommendations relevant to the elimination of discrimination and the realisation of the right to equality at work. Among them two conventions are considered as 'fundamental' by the Organization.³¹ These are the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which all Contracting Parties to the ECHR have ratified. The right to non-discrimination is also covered by the 1998 Declaration on Fundamental Principles and Rights at Work, which has stated the obligation of all ILO Member States to respect, promote and realize four categories of rights and principles defined as fundamental even if they have not ratified the relevant conventions. Besides these two conventions and the accompanying recommendations,³² the ILO has been providing protection against new or newly recognised forms of discrimination, discrimination expressed against specific groups or manifested in specific phases or in regard to specific aspects of the employment relationship. It has done so by adopting further anti-discrimination ILS or ILS on other subject matters, which include anti-discrimination provisions and provisions promoting equality. In addition, the ILO supervisory bodies have contributed to a dynamic understanding of the meaning and scope of the provisions included in these instruments. The CEACR has been playing a key role in this regard, for example clarifying that Convention No. 111 covers both direct and indirect discrimination or that discrimination based on sex includes sexual harassment.

Until September 2018 the ECtHR has handed down five judgements on discrimination relying on the ILS system. Two judgements relate to discrimination on the grounds of political opinion, two concern discrimination on the grounds of HIV status and one regard a case of discrimination on the grounds of sex. All these decisions applied Article 14 in conjunction with Article 8. The joint application of these two provisions is linked firstly to the formulation of Article 14 as protecting from discrimination only in respect to the the enjoyment of rights guaranteed by the Convention, which the Court has interpreted extensively as also covering facts that fall within the 'ambit' of other Convention' articles.³³ Secondly, Article 8 has been dynamically and expansively interpreted so that new rights and interests have been progressively brought within its 'ambit'. As will be shown in the following section, such expansive interpretation of Article 8 has enabled work-related situations to fall within its scope. In other circumstances, it is Article 14 which has helped the Court give a social dimension to Article 8 and

³⁰ ILO, Declaration of Philadelphia, II(a).

³¹ The ILO Governing Body has classified eight Conventions as fundamental (also labelled as 'core'), which concern fundamental principles and rights at work. The fundamental Conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29) accompanied by the 2017 Protocol; the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 1951 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

³² Equal Remuneration Recommendation, 1951 (No. 90) and Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).

³³ See Oddný Mjöll Arnardóttir, 'Discrimination as a Magnifying Lens', in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 330, 334.

determine that a violation of a worker right has occurred.³⁴ Protocol 12 to the ECHR³⁵ could further extend the application of the right to non-discrimination to social and labour rights since it contains a general prohibition of discrimination by any public authority.³⁶

In the existing case law, the Court has relied on both ILO conventions and recommendations together with pronouncements of the CEACR. The works of the CEACR used include General Surveys³⁷ and comments relating to Member States' application of ratified conventions. The CEACR's comments (notably observations)³⁸ referred to by the Court concerned States that were not parties to the case. This can be explained in light of the approach elucidated by the Court in the *Demir and Baykara* case examined in the section above. What the Court seeks are legal instruments and relevant documents and practices that can help it assess the today's prevailing consensus on the claimed rights.

What also emerges from the examination of the ECtHR's case law on discrimination is that ILS and related documents, together with other international and comparative sources, serve not only the general purpose to inspire and support the interpretation of the Convention but also more specific aims. These include addressing contentious political issues,³⁹ justifying the reversal of preceding jurisprudence⁴⁰ or addressing situations that the drafters of the Convention had not envisaged⁴¹ consistent with the conception of the Convention as a 'living' document.

The following section will examine the five judgements which have been delivered by the ECtHR in the field of discrimination with the 'assistance' of the ILS system, according to the grounds of discrimination identified by the Court.

3.2. Cases related to discrimination on the grounds of political opinion

The ECtHR relied on sources and documents belonging to the ILS system in two judgements that concerned discrimination on the grounds of political opinion. These were *Sidabras and Džiautas v.*

³⁴ Arnardóttir has talked of a 'magnifying' role of Article 14 in these terms: "In the final analysis, therefore, Article 14 is not quite the 'parasite' sometimes alleged. It does not derive nourishment from the other article without benefiting it, but functions instead as a lens magnifying the interests protected by it'. It does it by 'detecting additional violations or aggravating elements' of Conventions rights; 'detecting legitimate interests that are closely linked to Convention rights'; 'supporting domestic developments that exceed the minimum standards required for Convention rights'; *ibid* 347.

³⁵ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedom has been ratified by twenty States as of 28 August 2018.

³⁶ Art. 1 reads: '1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1. For a critical view on the potential application of Protocol 12 in the socio-economic sphere see Arnardóttir [31] 344-347.

³⁷ General Surveys are examinations of the law and practice in a given subject matter covered by ILS in ILO Member States having or not having ratified relevant Conventions. There the CEACR also clarifies the scope and content of the ILS covered.

³⁸ The CEACR adopts two types of comments, i.e. direct requests and observations. The former are only addressed to the relevant State while the latter are also published in the CEACR's Annual Report, which is presented and discussed at the International Labour Conference.

³⁹ See below cases *Sidabras and Džiautas v. Lithuania* and *Rainys and Gasparavicius v. Lithuania*.

⁴⁰ See below case *Konstantin Markin v. Russia*.

⁴¹ See below cases *Kiyutin v Russia and I.B. v. Greece*.

Lithuania of 27 July 2004,⁴² and *Rainys and Gasparavicius v. Lithuania* of 7 April 2005.⁴³ Earlier, in the case *Vogt v. Germany* of 26 September 1995 the Court had delivered a decision relating to a situation similar to these two cases and took into consideration the report of an ILO Commission of Inquiry but did not consider the case under Article 14 of the Convention.⁴⁴

The *Sidabras* case concerned two Lithuanian nationals who lost their jobs as a consequence of the enactment in 1998 by Lithuania of the Law on the Evaluation of the USSR State Security Committee (SSC) and the Present Activities of Former Permanent Employees of the Organisation (the 'KGB' Act). This law provided that for a period of ten years from the date of its entry into force former employees of the Lithuanian branch of the KGB were banned from working in the public sector and in certain private sectors jobs. A detailed list of positions within the KGB was adopted with the aim of identifying the persons to whom the Act would apply. The two applicants were dismissed since they were found to fall under the scope of this list and be KGB officers. The applicants alleged that the ban, which prevented them from seeking employment in various private sector jobs until 2009, was in breach of the ECHR.

Citing its previous judgement *Niemietz v. Germany*,⁴⁵ the Court highlighted how '[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings', which also include 'activities of a professional or business nature'.⁴⁶ Moreover, it considered that 'a far-reaching ban on taking up private sector employment does affect 'private life'. In evaluating whether this right had been affected in a discriminatory way, the Court expressly recognized that, besides the ESC and the European Committee on Social Rights (ECSR), it 'attached particular weight (...) to the texts adopted by the ILO'.⁴⁷ As for the ILO, the Court referred not only to Convention No. 111,⁴⁸ which covers discrimination based on political opinion, but also to the work of the CEACR. What makes this judgement particularly interesting is the nature of the CEACR's pronouncements used. The Court considered the CEACR's observations addressed to States other than Lithuania relevant given the similarity of the legislation adopted. All of them were post-communist countries that enacted legal restrictions to access to or retain employment of former security agents or active collaborators in the

⁴² *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 27 July 2004 (ECtHR). For a comment on this judgement see Virginia Mantouvalou, 'Work and Private Life: Sidabras and Dziautas v. Lithuania' (2005) 30 *European Law Review* 573-585.

⁴³ *Rainys and Gasparavicius v. Lithuania*, no. 70665/01 and 74345/01, 7 April 2005 (ECtHR).

⁴⁴ This case concerned the suspension of Ms. Vogt, a German permanent civil servant, from her teaching position because of her past membership in the German Communist Party and consequently for 'allegedly having failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of the Basic Law.' (*Vogt v. Germany*, no. 17851/91, 26 September 1995 (ECtHR), para 49). The practice that concerned Ms. Vogt was also examined by an ILO Commission of Inquiry established on the basis of Article 26 of the ILO Constitution to assess whether this was in breach of ILO Convention No. 111. The Commission concluded that 'the measures taken in application of the duty of faithfulness to the free democratic basic order have in various respects not remained within the limits of the restrictions authorised by Article 1, paragraph 2' of Convention No. 111' (see ILO, *Report of The Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, 1987*, cited in *Vogt v. Germany*, para 36). The Commission of Inquiry recommended that these measures should be re-examined with a view to maintaining only those restrictions that correspond to the inherent requirements of particular jobs within the meaning of Article 1(2) of Convention No. 111 or can be justified under Article 4 of the same convention. The ECtHR judged the case of Ms. Vogt in light of Articles 10 and 11 of the ECHR. It did not consider the possible violation of Article 14 because this was not claimed by the applicant. However, it took into account the report of the ILO Commission of Inquiry and reached a decision similar to the Commission's conclusions. Notably, among other arguments, it held that the post of Ms. Vogt, who was a teacher of German and French in a secondary school, was 'a post which did not intrinsically involve any security risks.' (*Vogt v. Germany*, para 60) Moreover, it considered that the dismissal was disproportionate to the legitimate aim pursued (*ibid*, paras 61 and 68).

⁴⁵ *Niemietz v. Germany*, no. 13710/88, 16 December 1992 (ECtHR).

⁴⁶ *Sidabras and Džiautas v. Lithuania* [42] para 44.

⁴⁷ *ibid*, para 47.

⁴⁸ Germany ratified Convention No. 111 in 1961.

former regime. Notably the Court cited the 1996 CEACR's Special Survey regarding Equality in Employment⁴⁹ where its observations regarding Germany, Bulgaria and former Czechoslovakia were recalled. The Court paid an even greater attention to the case of Latvia where a legislation very similar to that of Lithuania had been adopted. The Court cited two entire paragraphs of an observation addressed to Latvia in which the CEACR had expressed its dissatisfaction vis-à-vis the State Civil Service Act of 2000 and the Police Act of 1999 and explained how this legislation was in contravention of Convention No. 111. More specifically, the CEACR found that the Latvian legislation excluding people having worked with or for the KGB from any civil service position and the police was not justifiable under art. 1(2) of Convention No. 111 under which requirements of political nature can be established only if 'inherent' to a 'particular' job, function and post and be 'limited to the characteristics of a particular post and be in proportion to its labour requirements'. The CEACR also held that these provisions could not be considered as non-discriminatory under Article 4 of ILO Convention No. 111. This permits measures affecting an individual due to activities he or she is justifiably suspected or proved to be engaged which are prejudicial to the security of the State but 'does not exclude from the definition of discrimination measures taken by reason of membership of a particular group or community'.⁵⁰

Against this background, the Court found that restrictions can be imposed to pursue the legitimate aims of the protection of national security, public order, the economic well-being of the country and the rights and freedoms of others but the measures taken must be proportional to the aims pursued. In the case of the Lithuanian law '[a] reasonable link' was missing since the 'KGB' Act does not contain any definitions of the 'specific jobs, functions or tasks which the applicants are barred from holding'⁵¹ and therefore the measure taken was disproportionate. In concluding that such Act lacked 'the necessary safeguards for avoiding discrimination and for guaranteeing adequate and appropriate judicial supervision of the imposition of such restrictions',⁵² the Court specifically referred to the 'conclusions pertaining to access to public service reached in regard to similar legislation in Latvia by the ILO CEACR'.⁵³

The second case (*Rainys and Gasparavicius v. Lithuania*) was initiated by two Lithuanian nationals who lost their jobs because of the above-mentioned 'KGB' Act. They alleged that this law restricted their prospects to find employment in the private sector and their dismissals constituted a breach of the Convention. Also in this case the Court concluded that Article 14 read in conjunction with Article 8 was breached. However, the legal reasoning was more succinct than the one in the *Sidabras* case because it expressly built on it, including as for the references to ILO sources.

3.3. Cases related to discrimination on the grounds of HIV status

The ECtHR judged two cases relating to discrimination on the grounds of HIV by interpreting the Convention in light of an ILO Recommendation (together with other international legal sources and materials).

The first case is *Kiyutin v. Russia* of 10 March 2011.⁵⁴ The applicant was an Uzbeki national who had applied for a residence permit in Russia where his wife resided and his child was born. On the basis of Russian legislation he was subjected to an HIV test. Since this resulted positive, he was refused the

⁴⁹ ILO, *Equality in Employment and Occupation*. Special Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 83rd session, Report III (Part 4B), ILO, 1996.

⁵⁰ Observation (CEACR) - adopted 2001, published 90th ILC session (2002), Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Latvia, para 6.

⁵¹ *Sidabras and Džiautas v. Lithuania* [42] para 59.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *Kiyutin v. Russia*, no. 2700/10, 10 March 2011 (ECtHR).

permit and was ordered to leave the country. He alleged before the ECtHR that he was victim of discrimination on the grounds of his health status in breach of Articles 8 and 14 of the Convention. The third party intervener, that is Interights, cited numerous international instrument in support of his allegation.

In this case the Court referred to the *Demir and Baykara* decision to expound the international materials used, the aim pursued through their use and the method applied. Notably, it recalled that it takes into account not only 'relevant international instruments' but also 'reports'. Moreover, it indicated that it uses them 'to interpret the guarantees of the Convention', and it does so with the aim 'to establish whether there is a common standard in the field concerned'.

Adopting this methodologic approach to interpretation, in the present case, the Court drew the existence of an existing 'consensus among experts and international organisations active in the field of public health' that travel restrictions on people who are HIV positive cannot be justified 'by reference to public health concerns' from various international materials. Among them, it cited the only international legal instruments specifically adopted on HIV and AIDS, that is the ILO Recommendation concerning HIV and AIDS in the World of Work, 2010 (No. 200).⁵⁵ It is interesting to remark that the Court referred to this instrument even though neither the applicant nor Interights made any reference to it.

The Court also considered that the particular vulnerability of the group (i.e. people living with HIV) to which the applicant belonged and the significant discrimination, prejudice and stigma suffered by this group narrows the States' margin of appreciation in determining when differential treatment is justified.⁵⁶ Therefore, the Court concluded that although 'the protection of public health' that the Russian legislation purportedly pursued, is a 'legitimate aim', the Government was unable to show that the refusal of the residence permit had 'a reasonable and objective justification'. Moreover, the 'contested legislative provisions did not make room for an individualised evaluation' based on actual facts.⁵⁷ Thus, the Court concluded that the applicant had been victim of discrimination on the grounds of his health status⁵⁸ taken in conjunction with Article 8 of the Convention, which includes 'the relationships that arise from a lawful and genuine marriage'.⁵⁹

The second judgement *I.B. v. Greece*⁶⁰ of 3 October 2013 concerned a Greek national who was dismissed as a consequence of the spread of the information, within the company where he was employed, that he had contracted HIV. This was followed by the request of many of his colleagues addressed to the company's owner to dismiss him in order to preserve their health and a harmonious atmosphere in the workplace. He alleged that his dismissal amounted to a breach of Articles 14 and 8 of the ECHR. In his allegation, he referred to ILO Recommendation No. 200 underlining how this 'defined

⁵⁵ Paragraph 27 of ILO Recommendation No. 200 provides: 'Workers, including migrant workers, jobseekers and job applicants, should not be required by countries of origin, of transit or of destination to disclose HIV related information about themselves or others. Access to such information should be governed by rules of confidentiality consistent with the ILO code of practice on the protection of workers' personal data, 1997, and other relevant international data protection standards.' Further, Paragraph 28 states: 'Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status'.

⁵⁶ On the Court's 'vulnerable group' approach, see Arnardóttir [31], 345-346.

⁵⁷ *Kiyutin v. Russia* [54] para 74.

⁵⁸ Art. 14 of the Convention does not explicit covers health status, but the Court held that this should be considered as encompassed by the term 'other status' contained in the text. It applied the same position in the case *I.B. v. Greece* examined below.

⁵⁹ *Kiyutin v. Russia* [54] para 55.

⁶⁰ *I.B. v. Greece*, no. 552/10, October 2013 (ECtHR).

stigmatisation in the world of work and called for the protection of persons infected with the virus against any form of discrimination'.⁶¹

In taking note of relevant international instruments, the Court gave ample room to the study of ILO Recommendation No. 200, which it defined as 'the first human rights instrument on HIV and AIDS in the world of work'.⁶² Further, while in the previous judgement the Court made a general reference to the Recommendation, in this decision it cited all the Recommendation's paragraphs⁶³ prohibiting discrimination and stigmatization on the grounds of real or perceived HIV status, including dismissal, and recommending the adoption of measures to prevent discrimination on such grounds.⁶⁴

The Court found that the dismissal of the applicant resulted in his stigmatisation and had an impact on his 'personality rights, the respect owed to him, and ultimately, his private life'⁶⁵ protected by Article 8 of the Convention. Moreover, building on the position taken in the *Kiyutin* case, it reiterated that States have a narrower margin of appreciation in deciding on differential treatment when dealing with vulnerable groups in society. Finally, it observed that, while not all CoE's Member States have adopted legislation in favour of persons living with HIV there is not only a 'clear general tendency towards protecting such persons from any discrimination in the workplace by means of more general statutory provisions applied by the courts (...)'⁶⁶ but also 'a growing number of specific international instruments', which prohibit discrimination in employment 'such as ILO Recommendation no. 200'.⁶⁷

Thus, the Court rejected the argument according to which the dismissal was needed to preserve harmonious work relations and decided that the applicant had been discriminated against on the basis of his health in breach of Article 14 taken in conjunction with Article 8 of the ECHR.

3.4. Cases related to discrimination on the grounds of sex

In the case *Konstantin Markin v. Russia* of 22 March 2012⁶⁸ a Russian national serving in the military had been refused a three year parental leave, which he had requested as a father and only carer of three children, because only female military personnel were entitled to a leave of such duration. Mr. Markin alleged before the ECtHR that the refusal to grant him parental leave constituted a breach of Article 14 of the Convention and amounted to discrimination based on sex taken in conjunction with Article 8. The third party intervening, the Human Rights Centre of the University of Ghent, relied on the Convention on the Elimination of all Forms of Discrimination Against Women and the Concluding Observations addressed to the Russian Federation by the Committee on the Elimination of Discrimination against Women but did not make any reference to ILO instruments.

However, the Court took into account provisions included in three ILS, notably Article 1(1)-(2) of ILO Convention No. 111;⁶⁹ Article 3(1) of the ILO Workers with Family Responsibilities Convention, 1981 (No. 156),⁷⁰ and Paragraph 22 of the accompanying Recommendation No. 165. Article 1 of Convention No. 111 defines discrimination and requires the elimination of any discrimination on the basis of seven prohibited grounds including sex. The other two instruments specifically deal with women

⁶¹ *ibid*, para 59.

⁶² *I.B. v. Greece* [60] para 32.

⁶³ See paragraphs 3, 9, 10, 11 and 12 of the Recommendation.

⁶⁴ *I.B. v. Greece* [60] para 32.

⁶⁵ *ibid*, para 72.

⁶⁶ *ibid*, para 83.

⁶⁷ *ibid*, para 84.

⁶⁸ *Markin v. Russia*, no. 3007/06, 22 March 2012 (ECtHR).

⁶⁹ The Russian Federation ratified Convention No. 111 in 1961.

⁷⁰ The Russian Federation ratified Convention No. 156 in 1998.

and men workers with family responsibilities. Article 3(1) of Convention No. 156 requires that workers with family responsibilities are not discriminated against and are enabled to engage in employment without conflict between their employment and family responsibilities.⁷¹ Paragraph 22 of Recommendation 165 provides that either parent should have the possibility to obtain parental leave.⁷²

The Court relied on these sources, together with other international and European instruments, to overrule its previous decision in the case *Petrovic v Austria* of 1998⁷³ where it had found that a distinction based on sex with respect to parental leave allowances was not in breach of Article 14 of the Convention. In the *Markin* case the Court decided that the denial of parental leave to men constituted a form of intersectional discrimination based on military status and sex. Regarding discrimination on the basis of sex, it explained that it could reach this conclusion and overrule the *Petrovic* judgement because since 1998 'the legal situation as regards parental leave entitlements in the Contracting States had evolved'⁷⁴ as the majority of European States' legislation now grant also fathers parental leave. The Court also made a sociological observation that these legal developments 'showed that society had moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role had gained recognition.'⁷⁵ The Court drew such 'significant' societal evolution also from 'the relevant international and comparative-law material'⁷⁶ and on their basis it concluded that 'the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. (...) gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.'⁷⁷

The Court did not rely on ILS only to determine the changed legal and social context regarding the distribution of family responsibility but also to address the issue on whether the exclusion from the entitlement to parental leave could be considered as based on the inherent requirements of the military service. In this regard, the Court took into consideration Article 1(1)-2 of the ILO Convention No. 111. Article 1(1) defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, and other grounds provided for by Member States, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Article 1(2) provides that '[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.' Based on these provisions, the Court concluded that the exclusion of Mr. Markin from the entitlement of parental leave cannot be justified as an inherent job requirement since such exclusion applied only to men and regardless of whether parental leave constitutes a disruption of the normal functioning of the military. Therefore, it concluded that '[s]uch a general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any

⁷¹ Art. 3(1) of Convention No. 156 reads: 'With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.'

⁷² Para 22 of Recommendation No. 165 states: '(1) Either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded. (2) The length of the period following maternity leave and the duration and conditions of the leave of absence referred to in subparagraph (1) of this Paragraph should be determined in each country by one of the means referred to in Paragraph 3 of this Recommendation. (3) The leave of absence referred to in subparagraph (1) of this Paragraph may be introduced gradually.'

⁷³ *Petrovic v. Austria*, no. 20458/92, 27 March 1998 (ECtHR).

⁷⁴ *Markin v. Russia* [68] para 99.

⁷⁵ *ibid*, para 99.

⁷⁶ *ibid*, para 140.

⁷⁷ *ibid*, para 143.

acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 14.⁷⁸

Concerning the applicability of Article 8, the Court observed that this ‘does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances’. However, ‘by enabling one of the parents to stay at home to look after the children (...) it promotes family life and necessarily affect the way in which it is organised’, thus falling within the scope of Article 8 of the Convention.⁷⁹ The Court has also considered that States can place limitations on certain rights and freedoms of the members of the military but they had a narrower margin of appreciation in the area of family and private life covered by Article 8. In this case, restrictions should be required by ‘a real threat to the armed forces’ operational effectiveness’⁸⁰ and supported by specific evidence, which was lacking in this case. Therefore, it concluded that the refusal to grant parental leave to the applicant amounted to a breach of Articles 14 taken in conjunction with Article 8.

4. The integration of ILS and ILO supervisory bodies’ work in the ECtHR’s interpretation of the ECHR: Benefits and challenges

The methodology described in the *Demir and Baykara* case and applied in the above-examined judgements, which request the Court to take systematically into account all pertinent international instruments and the work of the relevant supervisory bodies in interpreting the Convention has reinforced the dimension of the ECHR as a holistic human rights instrument. As such, this protects human rights in their civil, political, social and labour dimensions.

This approach has several advantages. Firstly, both the ECHR and the ILS systems obtain benefits.⁸¹ The reliance on ILS and the work of the relevant supervisory bodies in the interpretation of the ECHR allows the ECtHR to address petitions relating to labour rights with reinforced authority. This derives from the specific ILO’s expertise regarding the world of work and the distinctive legitimacy of ILO’s norms and supervisory bodies. The distinctive legitimacy of ILS lies in their tripartite adoption, consisting in the involvement of not only governments but also the most representative workers’ and employers’ organisations of ILO Member States. The legitimacy of the ILO supervisory bodies lies in the independent and impartial nature of their members or its tripartite nature. In particular the legitimacy of the CEACR, which is the most cited supervisory body in the Court’s anti-discrimination jurisprudence, rests in its being composed of renowned law professors and judges appointed by the ILO Governing Body on the basis of their independence, impartiality and competence. Their provenance from all world regions guarantees a knowledge by the Committee of different legal systems and socio-economic and cultural realities. Their method of work implies a constant dialogue with governments and social partners, who nurture its work respectively with reports and observations on the application of ILS.

Moreover, the use of ILS supports the Court’s integrated approach to interpretation, which enables it to understand the multidimensional nature of the Convention rights breached. The *Sidabras* and *Rainys* cases are a good illustration of how the Court could see the labour dimension of the violation of the Convention based on this method when, otherwise, it would have seen it through the lens of civil and political rights only. The use of the sources and documents belonging to the ILS system serves also to operationalise the Court’s view that the ECHR is a ‘living’ document. The *Markin* case on parental leave is a case in point. It reveals how the Court could reverse its previous jurisprudence thanks, *inter alia*, to

⁷⁸ *ibid*, para 148.

⁷⁹ *ibid*, para 130.

⁸⁰ *ibid*, para 100.

⁸¹ See also Franz Christian Ebert and Martin Oelz, *Bridging the Gap Between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts*, ILS Discussion Article Series 212/2012 (ILO, 2012) 14.

ILS on discrimination and on workers with family responsibility. The *Kiyutin* and *I.B v. Greece* cases relating to discrimination on the grounds of HIV are a particularly significant illustration of how ILS can assist the Court to decide cases regarding situations that the drafters of the Convention could not even contemplate.

As for the ILO, the use of ILS by the ECtHR enhances their application. The impact of the Court's jurisprudence on the implementation of ILS is demonstrated by the reference that the CEACR makes to ECtHR's judgements in the comments relating to the application of ratified conventions.⁸² The interpretative use and, thus indirect application, made by the ECtHR of ILO conventions ratified by the respondent States contributes to ILO Member States' compliance with the obligations taken with the ratification of such conventions. The interpretative use of ILO's recommendations strengthens the role of these non-binding instruments typically considered as addressed to governments. The use made by the ECtHR of ILS has counter-balanced the weakness frequently attributed to the ILS system and labour lawyers have started seeing the ECtHR as a *forum* that can give them effective strength.⁸³

Ultimately and crucially, the synergy between the ECHR system and the ILS system realised by the ECtHR provides workers with an additional (human rights) framework where they can obtain protection of rights that are enshrined in international labour law but are not protected by domestic law. The *Kiyutin* case shows that ILS can also support the protection of human rights outside the sphere of the world of work.

Furthermore, the Court's approach to international (labour) law as resulting from the above-examined case law seems to provide an adequate response to the challenges posed by the pluralism of legal systems, that is a world characterised by a multiplicity of legal orders producing legal norms to be applied on the same territories and endowed with their own adjudication or monitoring bodies. What makes such pluralism complex is that while the State has rules determining a hierarchical order between its law and international law sources, there are no rules of this type applicable to the relationship between different sources of international law. The above-examined case law is the expression of a view which seems to correspond to what de Búrca has defined a 'soft constitutionalist approach' to international law. This is based on the assumption of the existence of an international community, which shares norms or principles of communication to avoid conflict, and of the 'universalizability' of the norms adopted by such community.⁸⁴ In the ECHR system the communication with other sub-systems of international law and the search for universal sources of validity is carried out through the method of interpretation developed by the ECtHR. This approach limits the risks of conflicts of laws, foster harmony among legal systems and promotes legal certainty. In the field of labour rights this is particularly useful since all Contracting Parties to the ECHR are also members of the ILO⁸⁵ and are thus bound by both the ECHR and ratified ILO conventions. Moreover, domestic courts are, on the one hand, increasingly directly

⁸² A Survey made on the ILO database NORMLEX reveals that since 1990 the CEACR has adopted 34 comments (direct requests or observations) referring to pending or decided cases of the ECtHR.

⁸³ Commenting on the *Demir and Baykara* judgement where ILS have played a central role in shaping the decision, see Ewin and Hendy [3] 8 and Kilpatrick [3] 298.

⁸⁴ Grainne de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51 *Harvard International Law Journal* 1, 39.

⁸⁵ On the desirability of the adoption of this approach also by the Court of Justice of the European Union (CJEU) and the role that the ECtHR can exert in making the work of the CJEU more open to international labour law, see Tzehainesh Teklè, 'Labour Rights and the Case Law of the European Court of Justice: What Role for International Labour Standards?' (2018) *European Labour Law Journal*, DOI: 10.1177/2031952518791831

applying the ECHR⁸⁶ and, on the other, many of them can also directly apply ratified ILO Conventions.⁸⁷ All of them can interpret domestic law in light of ILS.⁸⁸

In sum, the dialogue among legal systems and supervisory and adjudicative bodies is useful to guarantee workers legal certainty on a common minimum level of protection of their human and labour rights across legal orders. This is also indispensable to uphold the idea of the universality and interdependence of human rights beyond rhetoric and ensure the effectiveness of labour law as a means of worker's protection in a time where this original role is being eroded at both practical and theoretical level.⁸⁹

Despite the benefits of the integration of the different components of the ILS system in the reasoning of the ECtHR, this method faces a number of challenges. Its application is not systematically utilised although the opportunities exist.⁹⁰ However, the fact that the Court has a research division entrusted with the task of conducting studies on comparative law and international law relating to the cases pending before the Grand Chamber and 'occasionally' also Chambers⁹¹ shows that there is the potential to increase the consideration of international (labour) law. Therefore, it seems that this challenge can be tackled by reinforcing the role of this division in relation to cases to be judged not only by the Grand Chamber but also the Chambers, and by ensuring that its members are trained in international law,⁹² including international labour law. There is also a greater role to be played by the ILO to make its standard-setting and supervisory work better known and its relevance vis-à-vis cases framed in terms of human rights better appreciated.

An additional challenge is the limited reference to ILO sources by applicants or third parties intervening before the Court. The case law examined above shows that even when they refer to international law sources they may disregard ILS. A notable exception is the *I.B. v. Greece*. This suggests the importance that lawyers as well as human rights organisations and research centres, which may intervene as third parties, become more aware of the relevance of the ILS system not only with regard to pure labour rights cases but even in human rights cases not directly regarding the workplace as *Kiyutin v. Russia* shows. In regard to this and the above challenge, there is a greater role to be played by the ILO to make its standard-setting and supervisory work better known and its relevance vis-à-vis cases framed in terms of human rights better appreciated.

⁸⁶ The influence of the convention and the Court on domestic judicial proceedings will be reinforced by Protocol No. 16 entered into force on 1 August 2018 which provides that highest courts and tribunals may request the Court advisory opinions on questions of principle relating to the interpretation or application of rights and freedoms defined in the Convention or the protocols.

⁸⁷ Among the Contracting parties of the ECHR, most of the EU countries are monist and in some of them ratified treaties have a supra-legal value; see *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts* adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014); Monica Claes, 'The Primacy of EU Law in European and National Law', in Anthony Arnall and Damien Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015) 178, 194.

⁸⁸ For concrete examples of the different modalities of use of ILS by domestic court see the online database <http://compendium.itcilo.org>. See also Tzehainesh Teklè, 'Utiliser les normes de l'OIT par les juridictions nationales: comment et pourquoi?' (2018) 840 *Le Droit Ouvrier* 414; Xavier Beaudonnet and Tzehainesh Teklè (eds), *International Labour Law and Domestic Law. A Training Manual for Judges, Lawyers and Legal Educators* (ITCILO, 2016); Constance Thomas; Martin Oelz; Xavier Beaudonnet, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications', in Jean-Claude Javillier, and Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (ILO, 2004) 249.

⁸⁹ Keith D. Ewing, 'Foreword', in Tonia Novitz and Colin Fenwick (eds.), *Human Rights at Work* (OUP, 2010), vii, vii.

⁹⁰ Lörcher [21] 21-45.

⁹¹ Harris et al. [18] 10.

⁹² See Forowicz [15] 401.

A final open issue is whether the Court will regularly take into account ILS and seek an interpretation of the Convention in harmony with them. It has already happened that the Court has decided a case in a manner that is not in line with ILS and the views expressed by ILO supervisory bodies after having considered ILS⁹³ or completely disregarded them. In the field of discrimination, this latter situation has occurred with the case *Leyla Şahin v. Turkey* of 29 June 2004.⁹⁴ In this case, the ECtHR reached a decision which not only did not take into account either international human rights law or ILS and the position of relevant supervisory bodies but was also not in agreement with them. The case concerned regulations imposing a ban on the wearing of Islamic headscarves in universities. The Court held that these represented an interference with the applicant's right to manifest her religion protected by Article 9 of the Convention and with the right to education guaranteed by Protocol 1. Nevertheless, it concluded that there was no violation of these rights because, in the Turkish context, these restrictions were necessary in a democratic society to protect the rights and freedoms of others and public order. The Court also held that there was no violation of Article 14.⁹⁵ No consideration was made to the concern expressed by the CEACR. With an observation addressed to Turkey and relating to the application of Convention No. 111, while not expressing a straightforward view that these regulations amounted to a violation of the convention, the CEACR manifested the opinion that 'restrictions on the wearing of head coverings may have the effect of nullifying or impairing the access to university education of women who feel obliged to or wish to wear, a headscarf out of religious obligation or conviction'⁹⁶ and asked the government to monitor and report on such possible discriminatory impact based on sex and religion.

Concerning the issue raised by the *Şahin* case, it is useful to recall that in the *Kiyutin* judgement, the Court underlined that it is for it 'to decide which international instruments and reports it considers relevant and how much weight to attribute to them'.⁹⁷ However, this position could be mitigated by the argument that when the respondent State has ratified an ILO Convention relevant to the case, the ECHR cannot be applied in a way that would lead to a lower level of protection.⁹⁸ This argument can be constructed on the basis of Article 53 of the ECHR which states that '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.' On the other hand, nothing precludes the Court to give a more protective interpretation as also envisaged by Article 19(8) of the ILO constitution, according to which '[i]n no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.' Moreover, this argument can also be built on the Court's recognition of the rights enshrined in ILS as human rights and its adherence to the principle of the indivisibility of human rights. In this regard, from a human rights perspective, scholars like Scheinin have advocated an 'interdependent' approach to interpretation. This means that 'every human rights provision should be

⁹³ In the area of freedom of association this has happened in the case *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, 8 April 2014, no. 31045/10 (ECtHR).

⁹⁴ *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004 (ECtHR).

⁹⁵ The only dissenting opinion was expressed by Judge Tulkens who, among other arguments, held that the regulations constituted an infringement of the right to education and raised the question whether 'ultimately' the applicant's exclusion from university amounted to 'an implicit acceptance of discrimination against the applicant on grounds of religion', see *Leyla Şahin v. Turkey, Dissenting Opinion of Judge Tulkens*, para 18. She also found the exclusion of Ms. Şahin on the grounds of her choice to wear a headscarf at odds with the principle of secularism and gender equality in the name of which this exclusion was decided, *ibid* para 19.

⁹⁶ See Observation (CEACR) - adopted 2005, published 95th ILC session (2006) Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Turkey, para 5.

⁹⁷ *Kiyutin v. Russia* [54], para 67.

⁹⁸ See also Luke Clements and Allen Simmons, 'European Court of Human Rights. Sympathetic Unease', in Malcom Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (CUP, 2008) 409, 412.

interpreted as being compatible with all other human rights⁹⁹ not only within the same instrument but also ‘within the broader family of all human rights’.¹⁰⁰ While respecting the specificities of each human rights system, the objective should be avoiding incompatible interpretations that can end up undermining a minimum common ground of protection across legal systems.

Conclusions

The ECtHR has been making an increasing, albeit not regular, use of ILS and the pronouncements of ILO supervisory bodies to interpret the ECHR’s provisions. By using its case law on discrimination, this paper has argued that this is consistent and instrumental to its ‘integrated’ and ‘dynamic’ methods of interpretation. It also seems to reveal a trend towards a conception of the legal system of the Convention as interrelated with other legal systems. This approach is well summarised by Judge Rozakis who has written: ‘The legal system of the Convention is not a watertight, self-sufficient system. It is in constant dialogue with other legal systems’.¹⁰¹

This paper has sustained that the specific dialogue between the ECHR system and the ILS system has several benefits. The ECtHR benefits from the specialisation, a century-long experience of the ILO and the distinctive legitimacy of its standards and supervisory bodies. In particular, its anti-discrimination case law has disclosed how the ILS system can assist the Court to respond to changing conceptions of equality and new forms of discrimination. This synergy also fosters the effectiveness of the ILS system because the ECtHR’s interpretative use of ILS helps their application.

An interpretation of Convention provisions in harmony with ILS also guarantees legal certainty and ensures workers a universal minimum level of protection of their rights. They can thus count on an additional form of protection of their rights as human rights.

What remains to be seen is on the one hand, whether workers will make a greater use of the ECHR and of ILS in their allegations before the court than they have done so far¹⁰² and, on the other, to what extent the Court’s case law will not only consistently take into account relevant ILS and the ILO supervisory bodies’ work but also interpret the Convention in harmony with them.

⁹⁹ Martin Scheinin, ‘European Human Rights as Universal Human Rights,’ in Eva Brems and Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2013) 259, 261.

¹⁰⁰ *ibid.*, 261.

¹⁰¹ Rozakis [13] 268

¹⁰² For a reflection on the potential of framing workers’ rights in terms of human rights to achieve their protection see Philip Alston (ed.), *Labour Rights as Human Rights* (OUP, 2005) and, more recently, Colin Fenwick and Tonia Novitz (eds.), *Human Rights at Work* (OUP, 2010).

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