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BUTTERFLY EFFECT ON LEASH

The Calculated Use of ICTY's Rationales as a Persuasive Authority in Strengthening the Criminal Dimension of the Positive Obligations under the ECHR

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Erlina Tafa,
24.05. 2018,
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SUMMARY

Originally from chaos theory, "the butterfly effect" as a concept indicates the verisimilitude of how the most insignificant thing can have a significant ripple effect in a certain process. By analogy, courts are not immune to the "butterfly effect". Due to the rapid proliferation of legal regimes and bodies, courts are confronted with unorthodox situations requiring that they interface one-another, thus as a response they have developed "a sixth sense" in being cognizant of each-others decision to help them manage this effect. This concept premised against the backdrop of transjudicial communication inspired my research question. However, the choice of focusing on the effects that ICTY's jurisprudence as an international criminal law body has upon the ECtHR- a human rights body, was driven by the fact that this discussion is at an embryonic stage, as opposed to the other side of the interaction that has been analysed more extensively. An additional propeller was the fact that the ending of ICTY's mandate struck as an optimal time to explore the reach of its legacy within the ambit of human rights law in Europe.

The work conducted in this thesis aims to discern the collateral effects resulting from this communication and its inter-play with the procedural obligation of States to investigate and prosecute human rights abuses under Article 2, 3 and 7 of the ECHR. Using foreign rationales is a phenomenon that goes beyond the deliberation of a particular case. It reinforces certain patterns and reveals features of ECtHR's *modus operandi.*

ABBREVIATIONS

App.	Application
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber of the European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICTY	International Criminal Tribunal for the former Yugoslavia
IHRL	International Human Rights Law
ILC	International Law Commission
ITM	Charter of the International Military Tribunal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United National Treaty Series
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

'A strange thing about the International Criminal Tribunal for the Former Yugoslavia (ICTY) is that for most of its life, it has thought about its death.' [1]

Marko Milanović

The wreaking war havocs taking place in the territory of ex-Yugoslavian countries in the early 90s alarmed the consciousness of the international community and in response induced its intervention in order to halt these reprehensible acts. The United Nations Security Council expressed the seriousness of its condemnation by adopting a Resolution[2] based on which the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established to punish those responsible for the serious violations that occurred throughout a multitude of wars. By the year 2017 the life-span of the ICTY came to an end. It was decided that the Tribunal would not pursue the prosecution of additional new cases and the retrials and appellate proceedings of already tried cases would be finalised by the so-called Residual Mechanism for International Criminal Tribunals.[3]

Given that endings impel the reflection of legacies, this concentration served as an impetus for choosing the focus of my contribution- *to explore a dimension of ICTY's legacy*. That said, I do not intend to provide a full-fledged overview of ICTY's merits and all the aspects that appease its jurisprudence as a landmark contribution or one worthy of criticism. I intend to appraise a dimension of its legacy against the backdrop of the phenomenon known as "transjudicial communication", which in the current contribution takes place between the European Court of Human Rights[4] and the ICTY[5]. Bearing in mind that such an interaction is a "two-way street", it is important to clarify from the beginning that my focus will rest on certain aspects of the way the ECtHR utilises the rationales and principles of the Tribunal. Long story short, it is a process of transplantation. The term "cross-fertilisation" will be employed throughout the course of this contribution to depict ECtHR's "borrowing of" or "resort on" external sources

[1] Marko Milanović, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem' (2016) *American Journal of International Law* 233.
[2] UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993).
[3] UN Security Council, *Security Council resolution 1966 (2010) [ICTY]*, 22 December 2010, S/Res/1966(2010).
[4] Throughout this thesis, 'European Court of Human Rights' is used interchangeably with 'ECtHR', 'the Court' and 'the Strasbourg Court.
[5] Throughout this thesis, 'International Criminal Tribunal for the Former Yugoslavia' is used interchangeably with 'ICTY' or 'the Tribunal'.

(those of the ICTY) during its judicial interpretation[6] to deliberate whether rights of individuals have been breached. The use of this term becomes clear given that this practice takes place between judicial institutions belonging to two separate legal regimes, namely International Human Rights Law (IHRL) and International Criminal Law (ICL), and the outcome of the transplant is a hybrid product that has characteristics of both regimes. This phenomenon reflects a judicial dialogue that transcends geographical or substantive legal commitments and approaches.

The proliferation of international courts has played a prominent role in inducing the process of judicial exchange and it shows that courts are cognizant of 'themselves as members of a transnational community of law'.[7] However, international courts are bound to have overlapping jurisdictions/subject-matters and it has been asserted that this exacerbates the risk of a 'conflicting jurisprudence as the same rule of law might be given different interpretations in different cases'. Thus, concerns have been raised about the fragmentation of international law given the fact that 'international law has always lacked a clear normative and institutional hierarchy'.[8] This happens because specialised courts are 'inclined to favour their own disciplines'.[9] On this note Koskenniemi and Leino's statement that 'Each institution speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody'[10] rings true.

1.2 Research Question, Limitations and Backdrop Considerations

Premised against the backdrop of transjudicial communication with the intention of exploring an aspect of the Tribunal's legacy, the cardinal issue that this thesis strives to uncover is:

> ***For what purpose does the ECtHR employ ICTY's judicial rationales and principles and what is the role of such cross-fertilisation in strengthening the positive obligations of States to investigate and prosecute human rights abuses***

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[6] S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law' (2001) 83 *International Review of the Red Cross*, 652.
[7] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) *29 U. Rich. L. Rev.* 99, 133.
[8] Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2005*) 15 Leiden Journal of International Law* 553, 553.
[9]Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000. The speeches of the Presidents of the ICJ since 1993 can be found on the Court's website http://www.icj-cij.org/icjwww/ipresscom/iprstats/htm.
[10] Koskenniemi, 'International Tribunals Fragmentation of International Law? Postmodern Anxieties' (n8), 578.

under the European Convention on Human Rights (ECHR)?

This is a two-fold research question. *The first part* that deals with unfolding the purpose of the cross-fertilisation in question helps to elucidate the authority that the Tribunal enjoys in front of the ECtHR. It will be discerned based on whether the external source is utilised as a tool that either helps the ECtHR in construing the content of a certain right or concept, i.e. establishes a new finding, or it merely justifies its line of interpretation in terms of a finding that was developed through other avenues, i.e. supports a finding. *The second part* links the cross-fertilisation with a concept that has mainly been developed by the ECtHR's case law- that of positive obligations of states. In terms of this some clarifications are warranted. This research question will be unfolded by using selected ECtHR cases that fall within the ambit of the Right to life (Article 2), Prohibition of torture (Article 3) and No Punishment without Law (Article 7) of the ECHR.[11] The procedural obligations to investigate and prosecute will be of a main concern. This serves as an important caveat together with the disclaimer that I do not intend to pinpoint an overall pattern of the transjudicial communication between the ECtHR and ICTY. On the contrary, at the heart of this thesis lies the deconstruction of four cases deliberated by the ECtHR namely, *Jorigć v. Germany, M.C. v. Bulgaria, Jelić v. Croatia and B. and Others v. Croatia*. Thus, these cases confine my research.

The full-delineation of this research question requires the uncovering of certain backdrop considerations. The utilisation of the case law under Article 2 and 3 makes sense considering that the ECtHR has mainly developed the concept of positive obligations through the case law falling within the ambit of these articles. However, one is bound to ask how is the case law under Article 7 on the same wavelength since the Court does not speak of positive obligations when dealing with a breach under said article? I make the connection in the following way, since Article 7 embodies the requirement for a clear definition of crimes, the importance of having a defined proscribed conduct in relation to the procedural obligations of States centres on the fact that if a criminal offence has not been criminalised in the primary legislations or has not been well-defined it disables domestic authorities from investigating and prosecuting it; hence, the fulfilment of the procedural obligations is impeded. Thus, diverging from the concept of procedural obligations the analysis will also tackle the substantive obligation to criminalise conduct. More specifically, it will focus on the way ICTY's jurisprudence is used to construe both the definition of core crimes and/or ordinary crimes with the abovementioned procedural obligations being the common denominator. The decision to incorporate Article 7 was driven by the fact that it is paramount to scrutinize the interplay between

[11] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocols Nos. 11 and 14*, 4 November 1950.

criminalisation and the principle of legality in order to discern its effects on the positive obligation to investigate and prosecute.

Regarding the issue of the fragmentation of international law, attentiveness will also be given to situations where the ECtHR shows a broader proclivity and departs from ICTY's standpoint- always considered with a ruminative lens regarding its effect on the procedural obligation to investigate and prosecute.

Finally, all the above considerations will be contemplated against the backdrop of one grand question: *Does the utilisation of ICTY's jurisprudence encourage the idea of using criminal law as the most suitable avenue to discharge these positive obligations?* Additionally, in-depth considerations shall be conferred to the analysis on whether the utilisation of ICTY's jurisprudence results in relegating or enhancing the position of the accused and/or victim.

1.3 Disposition

Considering that the ECtHR and ICTY are judicial institutions belonging to two separate regimes, i.e. International Human Rights and International Criminal Law respectively, one is inclined to wonder what the dynamic of this cross-fertilisation is and the value it attains. Given the paradoxical nature of these two regimes, and by extension these institution, the question whether such an interaction triggers or neutralises the use of the criminal law as a prerequisite for States to fulfil their positive obligations, has a prerogative of consideration. A general overview of this dichotomy i.e. the *trigger v. neutralisation* of the criminal law resulting from ECtHR's practice will be given in **Chapter 1**. This will be used as an analytical tool when unfolding the issues within the bounds of my research question.

The existence of this form of transjudicial communication necessitates an inquiry on what is the legal basis that justifies ECtHR's judicial resort on "external sources". By default, issues of interpretative methods arise. **Chapter 2** provides an elaboration of this inquiry. Although 'external citations are the predominant form of anecdotal evidence used by scholars of transjudicial communication' Voeten is right to point out that 'transnational citations should not be equated with transnational influence' and that 'citations are not necessarily decisive in judgments'.[12] This premise was one of my points of departure when analysing the selected case law. The underlying question in this regard posits as followed: *Did the Court use the rationales of the Tribunal as a decisive authority when reasoning a certain case or as a merely persuasive authority that supplemented its already predetermined line of interpretation?*

[12] Erik Voeten, 'Borrowing and Non-Borrowing among International Courts' (2010) *39 The Journal of Legal Studies* 547, 549-550.

Chapter 3 consists of two parts. The first one is concerned with shedding some light on the different commitments that the ECtHR and ICTY have since they belong to two separate regimes. Clarifying their divergencies makes it easier to understand the dynamic of this communication and why in certain cases the ECtHR's interpretation based on ICTY's rationales comes across as unorthodox from an international criminal law point of view. The second part captivates the points of convergence between these two regimes. I argue that one of the convergence scenarios results due to the structural design of the ICTY and ECtHR. Some cases are a testament of this, i.e. due to ICTY inability or unwillingness to proceed with a case, the national state is bequeathed with the task of investigating and prosecuting. Such a task derives from its adherence to the ECHR and its duty to comply with its positive obligations. The scope and content of such duties will be the object of elaboration in **Chapter 4**. Finally, **Chapter 5** deals exclusively with the selected case law and encapsulates all the considerations posed throughout the thesis.

1.4 Methodology

The main method used to elaborate this thesis is the one known as traditional legal doctrine, i.e. 'studying law as a normative system, limiting its empirical data to legal texts and court decisions'.[13] As already mentioned the bread and butter of this analysis are four selected cases. Logically, the Court's constitutive instrument- the European Convention on Human Rights (ECHR) serves as a primary source. Consequently, the ECHR and ECtHR's case law are the main study object. However, the Convention as a legal text would have little purpose in terms of case law analysis if one is not acquainted with ECtHR's methods of interpretation.

The present study is embedded in this hermeneutic tradition and its focus is two-fold. First, it focuses on how the ECtHR justifies the utilisation of external sources through the process of interpretation. Second, by discerning ECtHR's standard methods of interpretation, these methods become an analytical tool used in the selected case law to extract the effects that the utilisation of the external sources has on the procedural obligation to investigate and prosecute. On this note, the rules on treaty interpretation of the Vienna Convention on the Law of Treaties[14] are to be considered. Additionally, an overview of some ICTY rationales and case law are used to grasp a better understanding of the reason why they are utilised by the ECtHR in the selected case law and on what authoritative capacity, i.e. for what purpose. Finally, an ample number of publications by renowned legal scholars are used to shape the content of the thesis.

[13] Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed.), *Methodology of legal research* (Oxford, Hart Publishing 2011), 2.
[14] United Nations, *Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155.

1.5 The Dichotomy of Defensive and Offensive Role of Human Rights

Given that my focus is placed on how the ECtHR relies on ICTY's jurisprudence, namely on the interaction between an international human rights mechanism with an altruistic impetus of maximizing protection for the individual and a criminal law mechanism whose goal is to evade the impunity of perpetrators- hence repressive by nature, I have decided to structure my thesis along the dichotomy of the Defensive/Offensive Role of human rights when applying criminal law as introduced by Françoise Tulkens, a judge of the ECtHR.[15] She claims that human rights law in the context of the ECHR and ECtHR's case law *can both neutralize and trigger the use of criminal law*. The defensive role refers to those cases when human rights are used to humanise and avoid the application of the criminal law, thus contributing in diluting its power. Consequently, human rights are utilised to keep close tabs on the domestic authorities when they enforce criminal law provisions and procedures, because in certain situations their enforcement results in the breaching of the rights and freedoms under the Convention.[16] The offensive role paints a picture of a reverse scenario, that is how the case law of the Court encourages the effective application of criminal law because it is proven to be the most appropriate remedy for safeguarding some rights under the Convention, i.e. criminal law is 'called into play to protect human rights.'[17]

The necessity of using criminal law in terms of the offensive role, although not in the context of ECHR, has been acknowledged by Christine Van den Wyngaert a current judge at the International Criminal Court (ICC). She designates these two branches by imputing on them shield/sword attributes, i.e. human rights being the shield of protection and international criminal law as a necessary 'sword' that furthers this protection. According to Wyngaert:

> [h]uman rights is the shield that protects people against the state. But just standing up for human rights is not enough; you also have to make sure the perpetrators are prosecuted. […] To my mind, that's a change that's taken place: from human rights as a shield, to international criminal law as a sword. It's an evolution I've watched happen and I've also managed to participate in.[18]

[15] For a more concise elaboration of this dual function see Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights', (2011) 9 *Journal of International Criminal Justice* 577.
[16] Tulkens (n15), 577-582.
[17] Tulkens (n15), 582.
[18] Annelotte Huiskes, 'Human Rights is the Shield, International Criminal Law the Sword' (*Webmagazine Maastricht University*, 20 May 2013) <http://webmagazine.maastrichtuniversity.nl> accessed 19 May 2018.

The idea of human rights law drawing from the postulates of criminal law can strike as counter-intuitive when we think about the general repressive nature of criminal law and how it can influence the application of human rights at the detriment of the accused. However, the other side of the scenario conveys a story of providing victim protection, meaning that when criminal law becomes "the sword" that human rights law uses, this is done in order to prevent and deter crimes and safeguard general values of the society.[19] The analysis of the case law I have selected will highlight this stance of the Court where the protection from crimes, with an emphasis on international core crimes, and the need to end the impunity of perpetrators are factored in. Thus, it is important to distinguish whether the Court uses the ICTY's jurisprudence to pave a defensive or offensive role pattern when it deals with cases where the procedural obligation to investigate and prosecute crimes is at stake. In such cases, the question posed is whether the Court is constraining the use of criminal law or giving rise to it?

Tulken's analysis on how the case law of the ECtHR neutralizes or triggers the use of criminal law when applying and interpreting the rights and freedoms under the Convention is not article-specific and does not focus on the effects that these roles have upon the victim and the accused. This is an important difference that serves as a caveat for my thesis because my case law analysis is article-specific, i.e. limited to Articles 2, 3 and 7 of the ECHR. Not only I will point out whether the role of the Court is defensive or offensive, but I will also reflect whether this role expands or restricts the protection of the victim and/or accused. However, for the purpose of providing a general idea of what this dichotomy stands for I will use Tulkens' methodology and first touch upon these roles on a more general basis.

1.5.1 The Defensive Role of Human Rights in Using Criminal Law

It is not difficult to imagine how the use and abuse of criminal law reflects upon the protection of rights and freedoms of the individual. As Herbert Packer claimed:

> [t]he criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is threatener. The tensions that inhere in the criminal sanction can never be wholly resolved in favor of guaranty and against threat.[20]

The manner in which the Convention limits the application of criminal law in terms of criminal offences, procedures and sentences is visible, first because of the many safeguards placed by it and second due to the Court's approach of relegating

[19] Tulkens (n15), 590.
[20] Tulkens (n15), 578 citing H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 366.

criminal law as a subsidiary mean of achieving protection when there are other avenues that prove to be more adequate.[21] This is the Convention's way of impeding the 'excessive and arbitrary use of state power in criminal justice.' Conversely, it has been claimed that ECHR's drive is directed mainly in constraining criminal procedure rather than substantive criminal law. In this regard it is important to point out Andrew Ashworth's scholarship on 'the constrains imposed by the ECHR' and what is their effect in limiting the forms of criminal procedures, criminal offences and sentences. [22] He contends that when it comes to the normative coverage of criminal law the Convention leaves large gaps because:

> [t]he constraints imposed by the European Convention on Human Rights are significant in relation to criminal procedure, slightly less significant in matters of sentencing and not extensive at all in the criminal law itself.[23]

Safeguards as Constraints of Criminal Law

A relevant consideration is the need to ensure that the domestic authorities exercise their power to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice. The guarantees contained in Articles 5 are a prominent example. An impediment of state power in criminal justice is conveyed through said article that postulates the importance of liberty and the circumstances prescribed by law under which it can be restricted.[24] These due process guarantees constrain the scope of police actions to properly investigate crime and bring offenders to justice.[25] An example of this is to be found in Article 5(1)(c) that allows 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence […].' Thus, the discretion of state authorities in arresting/detaining someone (criminal justice context) must be justified by the "reasonable suspicion" parameter and be conducted with the goal of bringing someone before a legal authority, which prevents the arrest from being arbitrary. Ashworth says that this safeguard limits the forms of criminal procedure.[26]

The meticulous formulation of the liberty restrictions under Article 5, which prevent unlawful detention, and its role on limiting state power in the criminal

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[21] Tulkens, (n15), 579, 581.
[22]Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 87, 92.
[23]Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n22), 93.
[24] ECHR (n11), Article 5 imposes an ample number of preceding requirements that need to be respected for a deprivation of liberty to be considered lawful.
[25] *Osman v. The United Kingdom* [GC] App. No. 23452/94 (ECtHR 28 October 1998), para.116.
[26] Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n22), 92

justice context is best conveyed through the case of *Stafford v. United Kingdom.* In this case the Court had to determine whether a continued detention under mandatory life sentence after the expiration of a fixed-term sentence complied with the requirements of Article 5(1)(a) of the Convention, i.e. 'the lawful detention of a person after conviction by a competent court'. The applicant was convicted of murder and released on license, however this license was revoked due to the commission of cheque fraud and consequently he was convicted to six years of imprisonment. At the time 'when he would have normally been released from fraud sentence', a release on life license was recommended by the Parole Board but rejected by the Secretary of State. The decision to continue detention under a mandatory life sentence was challenged unsuccessfully by the applicant because it was concluded that the discretion of the Secretary of State could not be constrained in such cases.[27] The Court held that the continued detention by the Secretary of State was not based on the applicant's punishment for the original murder since he was previously released on license for that offence. Rather the Secretary of State's decision 'relied on the risk of non-violent offending by the applicant.'[28] Hence, the Court held that there was:

> no sufficient causal connection, as required by the notion of lawfulness in Article 5 § 1 (a) of the Convention […] between the possible commission of other non-violent offences and the original sentence for murder[...].[29]

It was also concluded that there was 'no power under domestic law to impose indefinite detention on him to prevent future nonviolent offending' and that:

> [t]he Court cannot accept that a decision-making power by the executive to detain the applicant on the basis of perceived fears of future non-violent criminal conduct unrelated to his original murder conviction accords with the spirit of the Convention, with its emphasis on the rule of law and protection from arbitrariness.[30]

This is an example of how the Court keeps an eye on state authorities so that they will not impose arbitrary and unlawful measures of detention, but with a caveat that different standards apply based on whether the criminal conduct was of a non-violent or violent nature and whether it was related to the original conviction. As pointed out by Judge Rozakis in his Concurring Opinion:

> [t]he question which has been left unanswered in the present case […] is whether a causal link only exists when a person commits or presents

[27] *Stafford v. The United Kingdom* App. No. 46295/99 (ECtHR 28 May 2002), para. 32; paras.10-27.
[28] *Stafford v. The United Kingdom (n27)* para. 81
[29] *Stafford v. The United Kingdom (n27)* para 81.
[30] *Stafford v. The United Kingdom (n27)* para 82.

> a threat of committing a crime identical to the original one (in this case murder), or whether the requirement of the causal connection is satisfied with the commission (also, hence, the threat of future commission) of other offences bearing a resemblance with the original offence (in this case, for example, armed robbery, rape, etc.). I think that the answer to this question is that serious violent offences, other than murder, can satisfy the requirement of a causal connection, and hence, allow the Secretary of State to detain the person concerned.[31]

Next, the provision that proscribes torture under Article 3 prohibits the subjugation of a person to 'torture, inhumane and degrading punishment.' This means that human rights law scrutinizes among others also the behaviour of private actors and imposes complicity on their part to respect the rights of those who have been subjected to detention or prison because of breaching criminal law provisions.[32] Such scrutiny places human rights law as a "watchdog" of the retributive nature of criminal law so that it does not strip off said persons of this fundamental right.

Constrains in terms of criminal offences under the Convention are scarce and conditioned by the stringent requirements of being necessary and proportional, otherwise they infringe certain rights and freedoms under the Convention. As claimed by Ashworth:

> [w]hen it comes to the criminal law itself, European human rights law imposes few constraints. The content of criminal laws must not interfere unjustifiably with a person's Convention rights—for example, the right to respect for private life (Art 8), the right to freedom of thought and religion (Art 9), the right to freedom of expression (Art 10) and the right to freedom of association (Art 11). […] Beyond that, however, there is little in the Convention to constrain the form and scope of criminal offences.[33]

Another important safeguard in confining the power of states on how and when they are using criminal law is Article 7 of the Convention that protects a person from retroactive criminal offence and punishment. Although not a constraint of criminal offences per se, the principle of legality is of a primal importance on giving security to people because it dictates that criminal law has to define the offences and sanctions by law (*nullum crimen sine lege, nulla poena sine lege*). Its first paragraph reads:

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[31] *Stafford v. The United Kingdom (n27),* Concurring Opinion Judge Rozakis.
[32] See for example: *Tali v. Estonia* App. No. 66393/10 (ECtHR 13 February 2014); *Milić and Nikezić v. Montenegro* App. Nos.54999/10 and 10609/11 (ECtHR 28 April 2015); *Cirino and Renne v. Italy* App. Nos. 2539/13 and 4705/13 (ECtHR 26 October 2017).
[33] Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n22), 92-93.

> [n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

In its case law the Court has shown offensive tendencies due to the evolving nature of criminal law. These tendencies are supported by the developments in international criminal law. The Court has acknowledged that Article 7 cannot be invoked by the accused just because the rules on criminal liability have not been clarified at the time when the specific crime was allegedly perpetrated. In *Streletz, Kessler and Krenz v. Germany* the Grand Chamber acknowledged this evolutive process of clarification as long as the offence is reasonably foreseen:

> [T]he progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[34]

In terms of sentencing, Ashworth sees the relevance of this article as followed:

> [s]o far as sentencing is concerned, there are some definite constraints. Article 7 prohibits the imposition of a heavier penalty than was applicable at the time the offence was committed. [35]

Considering the above, in my thesis I will tackle how the evolving nature of international criminal law has influenced the case law of ECtHR under Article 7 and how this influence interplays with the procedural obligations of states to investigate and prosecute crimes.

Criminal Law as a Subsidiary Avenue

Now turning to the second point- subsidiarity of criminal law, the case law of the ECtHR is replete with explicit and implicit indications to limit recourse to criminal law. It has been claimed that avenues other than recourse to criminal law provisions can protect the rights of individuals.[36] An example where the Court pronounced to be satisfied because criminal sanctions were not used was in *Vona v. Hungary*. The core issue of this case was whether the dissemination of anti-Roma and anti-Semitic

[34] *Streletz, Kessler and Krenz v. Germany* App. Nos. 34044/96, 35532/97 and 44801/98 (ECtHR 22 March 2001), para 50.
[35] Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n22), 93.
[36] *Du Roy and Malaurie v. France* App. No. 34000/96 (ECtHR 3 October 2000), para. 36.

slurs warranted the dissolution of an Association, created by some members of a Hungarian political party, as a necessary and proportionate reaction under Article 11 the ECHR. The said Association which had an aim of '*inter alia*, preserving Hungarian traditions and culture', created the Movement whose objective was to defend a 'physically, spiritually and intellectually defenceless Hungary'[37], thus performing intimidating quasi-military rallies and demonstration, calling for 'the defence of "ethnic Hungarians" against so-called "Gypsy criminality".'[38] Consequently the Court found that the dissolution of the Association, which was overstepping on the boundaries of peaceful demonstrations due to its paramilitary format and singling out Roma people on an ethnical basis, was necessary and proportionate in order to preserve the coexistence of the 'members of society free from racial segregation, without which a democratic society is inconceivable.'[39] In this case, the Court showed proclivity towards its resistance against the extensive usage of criminal law because the dissolution of the Association as opposed to bringing criminal charges against its member was claimed to be less invasive. Accordingly, it held that:

> [t]he Court is aware that the disbanding of the Movement and the Association represented quite a drastic measure. However, it is satisfied that the authorities nevertheless chose the least intrusive – indeed, the only reasonable – course of action to deal with the issue.[40]

In his separate opinion, Judge Pinto De Albuquerque disagreed with this approach to a certain extent and pinpointed that the international obligation to criminalise the dissemination of racism cannot stay recluse from the effective implementation of criminal provisions. Otherwise these acts of racial discrimination would be only "punishable on paper". In such cases, criminal law should be used as a tool to rectify the violation and prevent reoffending of such crimes and:

> [h]ence, States Parties to the Convention have the duty to criminalise speech or any other form of dissemination of racism, xenophobia or ethnic intolerance […]. States have the obligation not only to bring to justice the alleged offenders and empower the victims of racism with an active role in the criminal proceedings, but also to prevent private actors from committing or reiterating the offence.[41]

In another case *Cumpana and Mazare v. Romania,* the use of criminal sanctions for press offences was downgraded to "exceptional circumstances". This case dealt with the freedom of expression of two journalists who were sentenced to prison for

[37] *Vona v Hungary* App. No.35943/10 (ECtHR 9 July 2013), paras.7-8.
[38] *Vona v Hungar* (n37), para 10.
[39] *Vona v Hungar* (n37), paras. 66,57.
[40] *Vona v Hungar* (n37), para 71; paras. 9-11.
[41] *Vona v Hungar* (n37), Separate opinion Judge Pinto De Albuquerque, p.34-35 (emphasis added).

defamation and insult due to an article they published where it was implied the existence of a corruptive scheme in the Romanian Government.[42] The Court found unanimously a violation of Article 10, because such punishment was not proportionate and furthermore the fear of criminal sanctions impairs journalistic freedom of expression or, as the Court described, it has a 'chilling effect' on it.[43] The Court concurred:

> [a]lthough sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.[44]

However, based on this one can deduce that the Court indicates the extent to which criminal law is to be used as a subsidiary avenue, by designating escalated cases of hate speech or incitement to violence, among others those that take the form for example of genocidal incitement, as exceptional cases requiring the usage of criminal sanctions.

1.5.2 The Offensive Role of Human Rights in Using Criminal Law

The reverse scenario represents a situation where the case law of the Court embraces the use of criminal law to 'reinforce and safeguard more effectively the rights' under the Convention. On this note, justification should be given when the State fails to use the "criminal option" rather than when it resorts to it.[45] For the purpose of this thesis, "the criminal option" refers to both criminal law provisions that criminalise acts/define sanctions as well as criminal procedures (investigation/prosecution).

The Court has emphasised that in some situations criminal law is the most adequate avenue to afford protection to the victim as well as to discourage some practices. *X and Y v. the Netherlands* illustrates this. The case concerned a complaint under Article 8 of ECHR and a situation where due to a gap in the Dutch law, the applicant was deprived from initiating criminal proceedings against the person who raped his daughter with learning disability.[46] The applicant argued that in this case 'the requisite degree of protection' could be afforded only through recourse to criminal

[42] *Cumpana ana Mazare v. Romania* App. No. 33348/96 (ECtHR 17 December 2004), paras. 19,37.
[43] *Cumpana ana Mazare v. Romania* (n42), para.114, 120.
[44] *Cumpana ana Mazare v. Romania* (n42), para.115.
[45] Tulkens (n15), 584.
[46] *X and Y v. the Netherlands* App. No. 8978/80, (ECtHR 26 March 1985), paras. 7-13.

law. The Court held that even though such recourse 'is not necessarily the only answer',[47] in the current case civil law protection was insufficient and found that:

> [e]ffective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.[48]

While generally, criminal provisions are intended to preserve public order and protect the State, criminal law enforcement also serves to protect individual freedoms.[49] Tulkens claims that the use of "the criminal option" by the Court is done for multiple reasons that serve for the protection of individual freedoms as well as the maintenance of public order. One reason is that "the criminal option" proves to be the most adequate mean designed to 'protect/highlight the fundamental values of the society' in cases of extreme situations, such as disappearances, extrajudicial executions, rape and so on. Another viable reason is that the prevention and deterrence of crimes can only be achieved by putting in place effective criminal-law provisions,[50] so that it protects individual rights that would have been jeopardized by the commission of the crime as well as preserve public order. Consequently, in order for goals such as protection of value or prevention of crimes to be achieved, as Tulkens observes, the Court has shown an inclination of using "the criminal option" in connection with the positive obligations of states (both substantive and procedural) under Article 2 and 3 of the Convention.[51] The concept of positive obligations under the said articles and the way they reflect an offensive role dimension shall be discussed in detail in Chapter 4.

To bring to completion, the reason why I opted for this dichotomy is because there has been a shift in the practice of the Court in terms of when states are obliged to neutralize or trigger the use of criminal law to protect the rights of the individuals. The classical point of view of human rights has been that originally many provisions under the Convention serve to constrain the domestic authorities from excessive use of criminal law measures. However, today there has been a noticeable trend in the practice of the Court as it encourages and obliges States to show a more rigorous criminal arm in certain situations. Regarding the utilization of this dichotomy I have two disclaimers. *Firstly,* I do not dive into the discussion whether this is a positive or negative phenomenon, my main focus rests upon unfolding which role does the utilisation of ICTY's jurisprudence encourage in the selected case law. *Secondly,* I do not merely describe Tulkens' dichotomy, my personal input consists on the fact that contrary to Tulkens' general analysis, mine is article-specific, case law specific

[47] *X and Y v. the Netherlands* (n46), para.24
[48] *X and Y v. the Netherlands* (n46), para.27.
[49] Tulkens (n15), 583 citing JJ. Rivero, 'La protection des droits de l'homme dans les rapports entre personnes privées', in Amicorum Discipulorumque Liber. Mélanges René Cassin. Protection des droits de l'homme entre personnes privées,Vol. 3 (Paris: Peédone, 1971) 311, 317.
[50] *Kilić v Turkey* App. No. 22492/93 (ECtHR 28 March 2000), para.62. See also Tulkens (n15), 591.
[51] Tulkens (n15),584-587.

and aside from pinpointing which role is encouraged it also reflects whether the same role expands or restricts the protection of the victim and/or accused in the selected case law.

2 Transjudicial Communication

2.1 General Considerations on the Conveyance of ICTY's Jurisprudence

As already stressed, the specific issues raised in this thesis consider the way in which the European Court of Human Rights uses the sources and case law of the International Criminal Tribunal for the Former Yugoslavia and how this affects positive procedural obligations of State Parties to the ECHR. The thesis will focus on the obligation to investigate and prosecute under the Right to life (Article 2) and Prohibition of torture (Article 3). Article 7 (No punishment without law) and its correlation with said obligations will also be considered. Prior to the process of analysing the selected cases under said articles, it is necessary, to unfold some general concepts and understand the dynamics of the cross-fertilisation[52] between these two institutions (ECtHR and ICTY**).** The term "cross-fertilisation" for the purpose of this thesis refers to the scenario where the ECtHR, throughout the interpretative process of the Convention, resorts to legal provisions and jurisprudence of the ICL, specifically that of ICTY, in order to reach a decision whether the said Convention has been breached. On this note, it is important to emphasise that it is not my intention to discern into details the "how" and "why" the Court cites or uses the rationales of the Tribunal. Nor it is to provide a full-fledged taxonomy of the interaction between these two institutions belonging to separate, yet contiguous, legal realms[53] (the ECtHR operates in the international human rights law, while the ICTY in the international criminal law). However, it is important as a premise, to touch upon the inclination that courts have of deliberately referencing other courts as well as to discern the points of convergence between the ECtHR and ICTY and their respective regimes with the purpose of shedding some clarification upon their interaction. Therefore, this chapter will deal mainly with understanding the legal basis of the cross-fertilisation in question because its acknowledgment is crucial as it gives validity to the whole process of deliberation. The issue of convergence shall be tackled in Chapter 3.

The increasing phenomenon of courts "conversing" with one-another has drawn the attention of many legal scholars. Anne-Marie Slaughter commences her article 'A Typology of Transjudicial Communication'[54] with the apprehensive observation that 'Courts are talking to one another all over the world.'[55] She then highlights the many occasions where courts of different statuses (whether national or

[52] For a more detailed understanding on the meaning and the conditions on "cross-fertilisation" see Ulf Linderfalk, 'Cross-fertilisation in International Law' (2015) *Nordic Journal of International Law* 428.
[53] The terms "legal realms" and "regimes" are used interchangeably.
[54] Slaughter, 'A Typology of Transjudicial Communication' (n7).
[55] Slaughter, 'A Typology of Transjudicial Communication' (n7), 99.

supranational) cite each-other[56], and does so in the quest of answering the question whether these occasions 'form part of a single phenomenon' to which Slaughter's answer is that 'they are all forms of transjudicial communication.'[57] She conveyed the idea of a "global community of courts" which comes to life through the cooperation of judges, whether as representatives of national or international courts, due to the common problems they face. Accordingly:

> [t]he result is that participating judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavour that transcends national borders. They face common substantive and institutional problems; they learn from one another's experience and reasoning; and they cooperate directly to resolve specific disputes. Increasingly, they conceive of themselves as capable of independent action in both international and domestic realms. Over time, whether they sit on a national supreme or constitutional court or on an international court or tribunal, they are increasingly coming to recognize each other as participants in a common judicial enterprise.[58]

Regarding the transjudicial communication between the ECtHR and ICTY, it is important to establish their status and whether their communication derives from a formal obligation explicitly indicated by their constitutive treaties or it emerges outside this context. The Strasbourg Court is an international human rights court, more specifically regional,[59] whose *ratione materiae* jurisdiction is attached to the ECHR, i.e. it is delegated with the task of interpreting the Convention and its function is to ensure that State Parties comply with their obligations under it.[60] Thus, its function rests upon deciding whether any human rights violations were committed based on the said Convention.[61] The ICTY, on the other hand, is an ad-hoc international tribunal established by a Security Council Resolution in order to prosecute those responsible for serious violations of international humanitarian law

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[56] Slaughter, 'A Typology of Transjudicial Communication' (n7), 99-101.
[57] Slaughter 'A Typology of Transjudicial Communication' (n7), 101.
[58] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 193.
[59] The Council of Europe has currently 47 European member states of which 28 are also members of the European Union.
[60] ECHR (n11), Article 19.
[61] Solomon T. Ebobrah*, 'Part II Orders and Families of International Adjudicative Bodies, International Human Rights Courts'* in P.R. Romano, Karen Alter, Yuval Shany (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press, 19 February 2014). Ebobrah asserts: What is an "international human rights court"? In its strictest meaning, an international human rights court is an international court whose *ratione materiae* jurisdiction is attached to a binding international human rights instrument. Generally, dedicated IHRCs are created specifically to supervise the implementation of their respective human rights treaties. As such, those courts function solely to decide on human rights violations on the basis of specific human rights treaties. Currently, there are three such courts (in order of appearance): the African Court on Human and Peoples' Rights (ACtHPR), the Inter-American Court of Human Rights (IACtHR), and the European Court of Human Rights (ECtHR).

conducted in the territory of the former Yugoslavia.[62] The Tribunal's categorization into the national/regional/global paradigm is less clear-cut than the ECtHR, because in terms of jurisdiction, it has a regional character, but its global nature is portrayed 'on account of having been set up by the United Nations and possessing universal law-generative and discursive relevance'.[63]

The mutual reliance between the ECtHR and ICTY is undeniable,[64] however an "asymmetry of influence" [65] has been detected because the influence that the human rights court have had upon the international criminal tribunal (ICTs) has resulted to be the more dominant side of the coin.[66] One explanation for this asymmetry derives from the fact that the reliance of international criminal tribunals on the interpretation provided by human rights supervisory bodies is viewed 'as an aspect of good judging', therefore encouraged. This means that a range of issues of due process that have been elucidated by the case law of the ECtHR, such as 'the consistency of judicial development of substantive law with *nullum crimen sine lege* to fair trial requirements and other rights' are of a great value to the ICTs.[67] In terms of the other side of the interaction, it has been claimed that the case law of the Tribunal which clarifies the rights and duties in the 'specific context of international criminal adjudication is of marginal relevance' for the Court which supervises the obligations borne by State Parties to the ECHR in a different legal context.[68]

In terms of status, this "asymmetry of influence" does not indicate a hierarchical cluster between these two judicial bodies. Furthermore, there is nothing in their constitutive instruments (the ECHR and ICTY Statute) that explicitly obliges either court to rely on the sources or case law of one-another, indicating that this transjudicial communication happens outside of any formal relationship, i.e. their constitutive instruments do not oblige them to consider each-others' rationales. From the lens of Slaughter's classification, this interaction would fall under the category of horizontal communication which:

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[62] UNSC Resolution 827 (n2).
[63] Sergei Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross Fertilization' (2015) *84 No.3 Nordic Journal of International Law* 1, 7.
[64] See among others Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Leiden: Martinus Nijhoff, 2003); Erik Møse, 'Impact of Human Rights Conventions on the Two Ad Hoc Tribunals', in *ibid.*, 185-204; William A. Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention of Human Rights', (2011) 9 *Journal of International Criminal Justice* 609.
[65] Vasiliev (n63), 4.
[66]See Schabas 'Synergy or Fragmentation? ...' (n64); Vasiliev (n63).
[67] Vasiliev (n63), 3, 6.
[68]Vasiliev (n63), 6.

> [T]akes place between courts of the same status, whether national or supranational, across national or regional borders. These courts are not bound to follow or even take account of one another's jurisprudence by any formal relationship."[69]

Although my analysis adheres to the less-influential side of the interaction, it is not within the ambit of my thesis to explore the reasons why the impact that the jurisprudence of the ICTY has upon the ECtHR is less visible than the reverse interaction. My aim is to deduce the characteristics of the effect that such an impact has in terms of the positive obligation to investigate and prosecute under specific articles of the Convention. However, this analysis would be simplistic if I do not provide a general understanding of what is the legal foundation that enable such a cross-fertilisation, as well as how and when can this international criminal jurisprudence be of use to the ECtHR. The latter issue on jurisprudential utilisation will be elaborated in Chapter 3.

2.2 Legal Basis for Cross-Fertilisation: referral from or out of treaty context?

The Strasbourg Court is endowed with monitoring the compliance of State Parties with the rights and freedoms set forth in the ECHR[70], meaning that the said Convention is the instrument based on which the Court finds violations and develops its case law. The current analysis regarding the situations where the ECtHR uses ICTY's rationales, begs a twofold question. Firstly, it is important to determine whether the Convention explicitly makes a referral to the sources and case law of the ICTY or the ICL regime in general, as "external rules". Secondly, on a more generic plane, the question stands on whether the Convention empowers the Court to use, and if yes to what extent, provisions of international criminal law (ICL). The first question refers to an explicit referral based on a treaty obligation, while the second one denotes a situation where the reliance on "external rules" of a specific regime is justified outside of treaty context. On a separate note, it is worthy to point out that it is not uncommon for the constitutive instruments of ICTs to designate human rights instruments, either generally or specifically, as applicable law on the basis of which they adjudicate. An illustration of a general referral is Article 21(3) of the Rome Statute[71] that stipulates that the application and interpretation of its law should be consistent with human rights law. An example of a specific referral to the ECHR can be found in the Law on the Specialist Chambers

[69] Slaughter, A Typology of Transjudicial Communication' (n7), 103.
[70] ECHR (n11), Article 19).
[71] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

and Specialist Prosecutor's Office in Kosovo,[72] where the adjudicative body is conditioned to take into consideration inter alia the criminal justice standards that comply with the ECHR.[73] However, the situation is different when it comes to the reverse situation, i.e. ECHR's referral to the ICL regime.

To answer the first question, there are no provisions in the ECHR that make an explicit referral neither to the ICTY's sources or case law, which is self-evident since the Convention precedes the Statute. Nor any provisions render referral to ICL pointedly. The lack of such referral is reasonable especially when one considers that the ECtHR is an international human rights court with a specific subject matter-expertise in a regime different from that of ICL and whose international adjudication is consequential from the agreement of its State Parties. A referral to another regime might result to the Court expanding unduly its competence *ratione materiae* (subject matter) without the consent of the States. [74] Nonetheless these considerations, as its case law proves, the Court has made plenty referrals to ICL provisions,[75] specifically to the ICTY's case law and sources. This brings us to the second question of how, why and to what extent is the Court empowered to rely on ICL provisions?

2.2.1 Referral to International Law as a Basis

An explanation of such referrals derives from the fact that there are provisions in the ECHR which make referrals to international law, and these are technically a renvois[76] to ICL as a body of international law.[77] ECtHR's resort to ICL has been distinguishable especially in judgments regarding violations of the principle of legality enshrined in Article 7 of the Convention[78] according to which:

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[72] The purpose of this Chambers is explained on the official website as follows: The Kosovo Specialist Chambers and Specialist Prosecutor's Office are part of the judicial system of Kosovo. and attached to each level of the Kosovo court system. They were established by a Constitutional Amendment and a Law adopted by the Kosovo Assembly to conduct trials for allegations stemming from the 2011 Council of Europe report, which alleges serious violations of international law. They are of temporary nature with a specific mandate and jurisdiction, namely over certain crimes against humanity, war crimes and other crimes under Kosovo law which allegedly occurred between 1 January 1998 and 31 December 2000. < https://www.scp-ks.org/en> accessed 19 May 2018.

[73] Assembly of Republic of Kosovo *Law No.05/L-053* ON SPECIALIST CHAMBERS AND SPECIALIST PROSECUTOR'S OFFICE, (3 August 2015), Article 3(2)(e) states: The Specialist Chambers shall adjudicate and function in accordance with (…):
e). international human rights law which sets criminal justice standards including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.

[74] Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of *Kononov v. Latvia*' (2008) *6 Journal of International Criminal Justice* 1043, 1044.

[75] Pinzauti (n74), 1044. Ibid

[76] The term "Renvois" as used by Pinzauti (n74) will be used interchangeably with the term "referral" and "resort" in this thesis.

[77] Pinzauti (n74), 1046.

[78] As an example, see *Kononov. v. Latvia* App. No. 36376/04 (ECtHR 24 July 2008).

> [n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Although Article 7 has not acutely incorporated the phrase "international criminal law", nonetheless by design the phrase "criminal offence under international law" makes it self-evident that the conclusion of whether an act constitutes an offence under international law, logically depends upon the rules of ICL. According to Pinzauti the provisions of ICL are called into question inevitably in terms of Article 7. The phrase "under international law" although not an explicit authorization for the Court to apply substantive and procedural provisions of ICL as external rules, it conditions the application of this Article upon the way in which provisions of ICL 'regulate a given matter brought to the court'.[79] In other words, she recognizes that the ECtHR has to deal with *two sets of questions* in order to reach its ruling. The *primary question* always concerns whether a certain article of the Convention has been breached. In order to get an answer for the primary question, the Court needs to deal with *preliminary questions* whose solution requires to consider international treaty or customary rules on international crimes. In terms of Article 7 she explains:

> [t]he Court's ruling on the alleged violation of the legality principle laid down in Article 7 (principal or primary question), is conditional upon the solution of another question, which is preliminary in nature (question prejudicielle): did the offence of which the applicant was convicted constitute a crime under either national or international law at the time of its commission? To solve that preliminary question the Court obviously has to take into consideration the relevant criminal provisions of the respondent state or, if need be, any international treaty or customary rules on international crimes, depending on the specific substance of the petitum.[80]

The other two articles which are also within the ambit of this thesis, do not contain an explicit referral to international law like Article 7 does. For example, the Right to life under Article 2 stipulates that 'Everyone's right to life shall be protected by law' but does not discern whether the law in question is domestic or international. This means that Article 2 incorporates scenarios where an unlawful death results as a disregard of either domestic or international instruments. This certainly opens the possibility for the ECtHR to refer to the rationales developed by the ICTs when, for example an unlawful death has occurred as a result of disregarding international humanitarian law (IHL) rules and constitutes an international core crime. The ICTs are designated bodies which have developed an ample case law regarding the definition of international core crimes as well as the criminal responsibility of the

[79] Pinzauti (n74), 1046.
[80] Pinzauti (n74), 1047.

perpetrators. In applying Pinzauti's approach, the preliminary question of whether the unlawful death disregarded international treaty or customary rules on international core crimes requires the Court to refer to ICTs sources and case law as a necessary step to reach a conclusion of whether a violation of Article 2 (primary question) under the ECHR has occurred. On a side-track note it is important to mention that the Court's practice shows that it has not limited itself into using ICTs' rationales only when dealing with matters related to international core crimes.

On the other hand, Article 3 (Prohibition of torture) makes no explicit nor implicit referral to neither domestic nor international law. It simply states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[81] However, there have been cases where the Court has resorted to ICL in order to rule a violation under Article 3.[82] From what has been said so far, it can be deduced that neither of the abovementioned articles explicitly acknowledge a referral to ICL and by extension to the sources and case law of the ICTY. On this note, how can one explain the discretion of the Court to apply external rules not provided expressively in the ECHR, i.e. outside of treaty context?

Discerning the subject-matter jurisdiction of the ECtHR helps unfolding this issue. It is stipulated under Article 32(1) of the Convention, representing 'the inclusion of a more elaborate provision governing applicable law'[83] and it reads 'the *jurisdiction* of the Court *shall extend to all matters concerning the interpretation and application of the Convention* and the Protocols thereto […]'.

One can deduce that this provision does not enumerate the sources that form part of the applicable law, i.e. on which the Court can resort to when dealing with a case. Rather, the Court has the discretion to extend its jurisdiction to any matter as long as it is relevant for the interpretation and application of the rights under the Convention. Another token of such an extension is portrayed through the Court's case law where it has actively proclaimed that its powers of interpretation are not limited to the text of the Convention or Protocols.[84] As established in the *De Wilde, Ooms, and Versyp v. Belgium* case:

> [T]he Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case.[85]

[81] ECHR (n11) Article 3 stipulates: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[82] *M.C. v. Bulgaria* App. No. 39272/98, (ECtHR 4 December 2003).
[83] William A. Schabas, *The European Convention on Human Rights: A Commentary* (1st edition, Oxford University Press 2015), 720.
[84] *Shamayev and Others v. Georgia and Russia* App. No. 36378/02 (ECtHR 12 April 2005), para.57.
[85] *De Wilde, Ooms, and Versyp v. Belgium*, Application no. 2832/66; 2835/66; 2899/66 (ECtHR 18 June 1971), para. 49.

Those who support the inherent power doctrine provide an explanation that justifies the Court's reliance to rules outside the ECHR.[86] International courts and tribunals have the discretion to exercise powers that have not been expressly envisaged in their constitutive instruments in order to fulfil the function for which they have been established. Thus, such powers are perceived to be 'logically inherent in their judicial role'.[87] One of the proponents of the inherent powers doctrine- Paola Gaeta, claims that such a doctrine is an appropriate legal construct to fill any gaps that constitutive instruments of international courts or tribunals might have, as they cannot be as explicit as national codes and regulate all possible situations linked to their jurisdiction. Accordingly:

> [i]t would be inconceivable for international judicial bodies to fulfil their mandate by exercising only the rather limited powers expressly conferred upon them by their constitutive instruments. Furthermore, such instruments are perhaps unsuitable for the task of providing an international court with the means and powers which would enable it to face effectively all possible situations arising from the conduct of judicial proceedings and which might even jeopardize their judicial character. These instruments being of conventional origin cannot be as detailed and specific as national codes which regulate all possible procedural problems. The doctrine of inherent powers thus constitutes an appropriate legal construct for enabling international judicial bodies to fill the lacunae of their constitutive instruments.[88]

2.2.2 The Legal Basis as Justified by the ECtHR

Since the Court uses the sources and case law of the ICTY, i.e. designated as foreign sources/external rules for the ECtHR, outside of an explicit treaty context it is important to touch upon some methodological issues of interpretation. The method through which the ECtHR uses foreign or international materials in order to clarify the meaning of a provision under the Convention is known as comparative interpretation. Such materials can be used to either support a certain line of interpretation or be the decisive component of establishing a certain interpretation.[89] This means that the method is invoked to either justify or support a certain line of reasoning. What is characteristic about the comparative method of interpretation is the fact that it deals with situations where it is not the text or the purpose of the provision that requires interpretation per se, but the outcome of a comparative study

[86] Paola Gaeta, 'Inherent powers of international courts and tribunals' in: Vohrah, Lal Chand (Ed.). *Man's inhumanity to man: Essays on international law in honour of Antonio Cassese* (Kluwer Law International 2003), 353-372.
[87] Gaeta(n86), 353, 363.
[88] Gaeta (n86), 366-367.
[89] Hanneka Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System- An analysis of the ECTHR and the Court of Justice of the EU* (Cambridge 2011), 66-67.

'supports a certain choice of interpretation'.[90] To clarify, the external sources are used to elucidate why the Court determines that a certain provision of the Convention applies to a given situation.

In this respect, throughout the analysis of the case law chosen for this thesis I have noticed two different patterns of the way ICTY jurisprudence is used as an external source. The meagre pattern is that when the Court relies exclusively on the ICTY jurisprudence in order to fulfil its task. The most recurring pattern is that where the Court uses said jurisprudence together with other external sources and in this respect, it is important to distinguish whether the ICTY's jurisprudence plays a crucial or an auxiliary role in the Court's finding. For instance, in the *Al-Adsani v. the United Kingdom* judgment, the Court uses the ICTY's *Furundzija case* among an ample number of external sources such as the UDHR, ICCPR and CAT Convention to foreground the jus cogens status of the prohibition of torture in international law.[91] This means that the ICTY's jurisprudence was used in an auxiliary capacity to enhance the Court's stance on the peremptory nature of the prohibition of torture. On this note, it is important to unfold the legal basis provided by the ECtHR in order to justify its reliance on foreign/international materials that are outside of the framework of the Convention.

Demir and Baykara v Turkey represents an important case where the Court explained the legal basis of using international material for the interpretation of the ECHR and it referred to it as 'the practice of interpreting Convention provisions in the light of other international texts and instruments'. Since the ECHR represents a multilateral treaty, the Court has reiterated numerous times that the rules of interpretation provided for in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT) are to be used in order to determine the meaning of the terms and phrases used in it.[92] Apart from the obvious starting point of interpretation, which is the text of the Convention itself i.e. ascertaining the ordinary meaning of the words in the light of the object and purpose of the provision from which they are drawn,[93] the Court endorses the idea that rules and principles of international law must be taken into account. Thus, the Court has held that it:

> [H]as 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.[94]

[90] Senden (n89), 112
[91] *Al-Adsani v The United Kingdom* App. No. 35763/97 (ECtHR, 21 November 2001), paras. 59-61.
[92] See for example *Demir and Baykara v. Turkey* [GC] App. No. 34503/97 (ECtHR 12 November 2008), para.65; *Golder v. the United Kingdom* App. No 4451/70 (ECtHR 21 February 1975), para.29; *Witold Litwa v. Poland* App. No. 26629/95 (ECtHR 4 April 2000), paras.57-59.
[93] *Demir and Baykara v Turkey* [GC] (n92), para.65.
[94] *Al-Adsani v. the United Kingdom* (n91) 55; *Demir and Baykara v Turkey* [GC] (n92), para.67.

The rationale behind the concept of considering the rules and principles of international law throughout the interpretation process emerges from the rapid development of international law. The proliferation of international treaties has diversified and expanded international law and consequently induced the 'emergence of specialized and relatively autonomous spheres' of legal operations often referred to as specialized legal regimes containing their own principles and institutions.[95] Both IHRL and ICL fall under the category of specialized regimes as they pay intricate attention to the particularities of their subject matter and 'regulate it more effectively than general law.' Additionally, they accommodate their own form of expertise and ethos, namely the former protects the rights of the individual and the latter 'gives legal expression' to the "fight against impunity".[96]

Despite of their particularities, specialized regimes are not isolated from general international law. The International Law Commission in its Report called '*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'* stated:

> [T]he term "self-contained regime" is a misnomer. No legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*. In previous debates within the Commission over "self-contained regimes", "regimes" and "subsystems", there never was any assumption that they would be hermetically isolated from the general law.[97]

This Report discussed also the issue of these specialized regimes transgressing their borders by relying on other regimes for the purpose of interpretation, despite the fact that their constitutive treaties limit their jurisdiction. The ILC concluded that a limited jurisdiction does not limit the scope of law applicable in the interpretation and application of such treaties[98] and consequently, treaties must be interpreted and applied accordingly with their normative environment, i.e. "other" international law. Thus:

> [i]t is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument […]. But, if […] all international law exists in systemic relationship with other law, no

[95] International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (A/CN.4/L.682, 2006), paras. 7-8.
[96] ILC(n95) para.15 p.14; para.191.
[97] ILC (n95), para. 193.
[98] ILC (n95), para. 48.

> such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment - that is to say "other" international law.[99]

The dynamic of interpretation against the backdrop of international law is called systematic interpretation and it comes to life through Article 31 paragraph 3 lit c of the VCLT. It has been described as the "master key of the house of international law" because when 'no other interpretative means provides a resolution, then recourse may always be had to that article in order to proceed in a reasoned way'.[100] This article endorses reliance on other international treaties and such reliance is an expression of the principle of "systematic integration".[101] This means that throughout the process of interpretation, attention should be given to the normative environment for the purpose of the integration and coherence between different regimes. Additionally, when dealing with a situation where a court resorts to foreign materials, justification for this choice is needed and 'the question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole'.[102]

The rationale behind the premise of regimes of law relying on international law generally, and by extension on one-another, can be deduced from Article 42 of the VCLT which 'regulates everything that happens in the world of regime-building and regime-administration.'[103] It stipulates that general law gives validity to special regimes:

> [t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

In terms of this, the ILC has stated that:

> [a]ll treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others.[104]

[99] ILC (n95), para 423.
[100] ILC (n95) para. 420.
[101] ILC (n95) para 419.
[102] ILC (n95) para.414.
[103] ILC (n95) para.194.
[104] ILC (n95) para 414.

Article 31(3)(c) of the VCLT

Paragraph 3 of Article 31 of the VCLT imposes, in addition to the context, three matters that 'should be taken into account in treaty interpretation' as a mandatory part of the interpretation process.[105] Correspondingly, the one under lit (c) is the provision that indicates the usage of relevant rules of international law. It foregrounds a general rule that when interpreting a treaty, together with its context, one should consider extrinsic material to the treaty or: 'Any relevant rules of international law applicable in the relations between the parties.'

The phrase "any relevant rules of international law" indicates that a wide spectrum of all recognized sources of international law (deduced from the word "any") can be of assistance for the purpose of interpretation[106] as long as these sources are germane (deduced from "relevant") i.e. 'relate to the same subject matter as the treaty provision under interpretation.'[107] This means that Article 31(3)(c) envisages a situation where the terms of one treaty are interpreted in the light of another one (so called external rules). The second treaty represents a normative environment for the first treaty that needs to be interpreted, as long as they are dealing with similar objects or same legal situations.[108] There is an abundant number of cases where the ECtHR has relied on other international human rights treaties and the interpretation of these instruments by competent organs in order to interpret provisions under the Convention.[109] However, the designated case law for the purpose of this thesis will show that the ECtHR relies also on treaties pertaining to the ICL regimes such as the constitutive treaties of various ICTs (the ICTY Statute or the Rome Statute, among others). Although relying on instruments of the same regime (the human rights regime) is self-explanatory since they deal with similar objects, relying on instruments of the ICL regime among others occurs when questions regarding the definition of individual criminal responsibility or definition of international core crimes emerge. Pinzauti explains this in the following way:

> [i]nternational human rights law, as any other legal order, is not a monad, independent of and separated from its other counterparts. The various sectors of international law are closely intertwined and often

[105] ILC(n95) para.425.
[106] Oliver Dörr, Kirsten Schmalenbach (eds), *The Vienna Convention on the Law of Treaties: A Commentary.* (Berlin, Heidelberg: Springer 2012), 561.
[107]Dörr (n106), 565 Where the meaning of "relevant" was deduced from the WTO Appellate Body, WT/DS316/AB/R 18 May 2011, EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT, para.846: 'A rule is "relevant" if it concerns the subject matter of the provision at issue'.
[108] Dörr (n106), 562.
[109]*Al-Adsani v United Kingdom* [GC] (n91), para.60; *Siliadin v France* App.No. 73316/01 (ECtHR26 July 2005), paras.85–87; *Sørensen and Rasmussen v Denmark* [GC] App. Nos. 52562/99 and 52620/99 (ECtHR 11 January 2006), para 72; *Demir and Baykara* [GC] (n92) paras.69–73.

> the application of rules of one sector is contingent on the coming into play of rules pertaining to another sector.[110]

Additionally, the rules used for the purpose of interpretation have to be "applicable in the relations between the parties". To understand the extent of what kind of rules are envisaged by this article, i.e. binding or non-binding for the parties, one has to discern the word "applicable". It indicates that the parties are legally bound by the "external rules" because either they consented to them as treaty rules or they constitute customary rules or general principles.[111] Although most claim that the word "rules" refer to legally binding instruments only, the ECtHR has blazed a less restrictive practice in this regard, as it turns to non-binding instruments as well.[112] The Court has clearly expressed its practice of using intrinsically non-binding instruments for interpreting the Convention. To name a few, amid the abundance of non-binding instruments, the Court has referred to those of Council of Europe organs[113], the UDHR[114] or Guidelines from the United Nation High Commissioner for Refugees (UNHCR).[115]

Turning over to the ICTY, the Tribunal's Statute as its constitutive instrument was adopted by a Security Council Resolution acting under Chapter VII of the Charter of the United Nations[116] and as such is binding.[117] The ECtHR's referral to the ICTY's Statute does not represent a sporadic case where the Court has used a Security Council Resolution to interpret specific provisions under the Convention. For example, in *Louizidou v Turkey*, the Court referred to a UNSC Resolutions concerning the situation in Northern Cyprus with regard to property possession.[118] The ECtHR stance on the importance of complying with a UNSC Resolution is discussed in Chapter 3 under the second point of convergence.

In addition, Article 31(3)(c) states that the external rules that form part of one treaty and are being used to interpret another treaty (in this case the ECHR) have to be applicable between "the parties". The term "party" has been elaborated in the VCLT as 'a State which has consented to be bound by the treaty and for which the treaty is in force'.[119] However, no distinct clarification has been made whether in order to apply these external rules, said rules have to bind all the state parties to the instrument (in this case State Parties to the ECHR) or only those states that have an

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[110] Pinzauti (n74), 1046
[111] Dörr (n106), 567.
[112] Dörr (n106), 564.
[113] *Demir and Baykara v. Turkey* [GC] (n92), paras.74-75
[114] *Al-Adsani v. the United Kingdom* [GC] (n91), para 60.
[115] *Saadi v. Italy* App. no. 37201/06 (ECtHR 28 February 2008), para 65.
[116] UNSC Resolution 827 (1993*)* (n2).
[117] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI- UNSC, Article 25:"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".
[118]*Loizidou v. Turkey* App. No. 40/1993/435/514 (ECtHR 23 March 1995) paras.42-47.
[119] VCLT (n14) Article 2(1)(g).

'immediate interest in the interpretation' (in this case the State(s) against which a case has been brought in front of the ECtHR).[120] The ECtHR case law does not provide for a uniform answer in this regard. It shows a practice of the Court relying on external rules that do not bind all the parties to the treaty, as well as situations where international instruments were used despite not being binding on the specific state party to the dispute. *Glass v. the United Kingdom* is an example of the former where the Court, for the sake of interpreting Article 8, used the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, which had not been ratified by all the State Parties to the ECHR.[121] On the other hand, *Marckx v. Belgium* depicts an example of the latter where the Court used two international conventions[122] that at the time Belgium had signed but not ratified. Recourse happened in order to establish the maternal affiliation of an "illegitimate" child, i.e. the legal status of children born out of wedlock[123] for the purpose of interpreting whether inter alia Article 8 of the ECHR was violated. Furthermore, in *Demir and Baykara v. Turkey* the Court admitted itself that:

> [I]n searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.[124]

Article 31(3)(c) is a testament of the fact that international treaties, regardless of their subject matter,' are a creation of the international legal system and their operation is based upon that fact'.[125] The International Court of Justice (ICJ) in the Namibia opinion has also accosted the interconnection of international treaties throughout the process of judicial interpretation. Among other issues, it was emphasised that the interpretation of the ICCPR cannot be conducted without considering both the evolutionary developments of law and the international legal framework as a whole. Thus, a proper interpretation of the abovementioned instrument requires that:

> [T]he Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and

[120] Dörr (n106), 566.
[121] *Glass v. the United Kingdom* App. No. 61827/00 (ECtHR 9 March 2004), para.75.
[122] *Marckx v. Belgium* App. No. 6833/74 (ECtHR 13 June 1979). On the said case, the ECtHR referred to the Brussels Convention of 2 September 1962 on the Establishment of Maternal Affiliation of Natural Children and the Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock.
[123] *Marckx v.Belgium* (n122), paras. 20, 14 and 41.
[124] *Demir and Bayakara v Turkey* [GC] (n92), para 78.
[125] Dörr (n106), p.560.

> applied within the framework of the entire legal system prevailing at the time of the interpretation.[126]

Moreover, the ECtHR has stressed out that the interpretation of the Convention should be conducted in compliance with other rules of international law since it forms part of it. Thus:

> [a]ccount must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.[127]

2.3 The Link between Evolutive Interpretation and the Comparative Method

It has been claimed that resorting to foreign/international material, both domestic and international, finds its basis on the link between evolutive interpretation and the comparative method of interpretation.[128] Evolutive interpretation is a tool of interpretation that has emerged from ECtHR's case law to ensure that the rights guaranteed by the Convention comply with the present day social conditions. Such an approach has been deemed fundamental for the realization of rights under the Convention. As the former President of the ECtHR Luzius Wildhaber stated:

> [o]n the question of evolutive interpretation, it is precisely the genius of the Convention that it is indeed a dynamic and a living instrument. It has shown a capacity to evolve in the light of social and technological developments that its drafters, however farsighted, could never have imagined. The Convention has shown that it is capable of growing with society; and in this respect its formulations have proved their worth over five decades. It has remained a live and modern instrument. "The living instrument" doctrine is one of the best known principles of Strasbourg case-law. It expresses the principle that the Convention is interpreted in the light of present day conditions", that it evolves through the interpretation of the Court.[129]

For example, in the *Rantsev case* the ECtHR laid ground for a comparative interpretation by referring explicitly to Article 31(3)(c). The Court defined Trafficking of Human Being under the Convention according to the definition stipulated in the Protocol to Prevent, Suppress and Punish Trafficking in Persons,

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[126] International Court of Justice (ICJ), *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 21 June 1971, p.53.
[127] *Al-Adsani* (n91) para.55; *Demir and Baykara* [GC] (n92) para.67; *Saadi* (n115) para.62.
[128] Senden (n89), 244.
[129] Luzius Wildhaber, 'The European Court of Human Rights in action' (2004) *Ritsumeikan Law Review* 83, 84.

especially Women and Children (the Palermo Protocol), that subsequently was adopted by the Council of Europe Convention on Action against Trafficking in Human Beings (Anti-Trafficking Convention).[130] By relying vicariously on the definition provided by these international instruments, the Court reached the conclusion that Trafficking of Human Beings falls within the scope of Article 4 ECHR (Prohibition of slavery and forced labour).[131] The comparative interpretation of the Court made an "honourable mention" to a bundle of foreign materials, or as designated by the Court 'international treaties and other material', including the jurisprudence of the ICTY.[132] However, the Court's assessment of whether trafficking falls within the ambit of Article 4 was based on a narrower scope of foreign materials and apart from the two abovementioned instruments, it also referred to the ICTY's *Kunarac case*.[133] This case, which dealt with the definition of enslavement as a crime against humanity for sexual exploitation[134] was used to depict the evolution of the traditional concept of slavery and indicate relevant factors to assess whether a situation amounted to a contemporary form of slavery.[135] This evolutive approach of the ICTY coincides with ECtHR's pronunciation of the Convention as a "living instrument", meaning that its interpretation has to be conducted 'in the light of present day conditions' and the Court has to take 'account of the evolving norms of national and international law'.[136] This case is an example of what Senden refers to as providing a "novel interpretation" of provisions due to the evolution of international law:

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[130] Vladislava Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) *Cambridge Journal of International and Comparative Law* 407, 411.

[131] *Rantsev v Cyprus and Russia* App No 25965/04 (ECtHR 7 January 2010), paras.273–282.

[132] *Rantsev* (n131) paras.137-174.

[133] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

[134] In the *Kunarac case*, the ICTY Trial Chambers observed that: "...the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery' has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree ..."

and it concluded that: "the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement [including] the 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea ..." (paras. 117,119).

[135] *Prosecutor v. Kunarac(Trial Chamber)* (n133), paras.117,119; *Rantsev* (n131) paras. 142,280.

[136] *Demir Baykara v Turkey* [GC] (n92) para.68, *Soering v. the United Kingdom* App. No. 14038/88 (ECtHR 7 July 1989), para. 102; *Vo v. France* [GC], App.no. 53924/00 (ECtHR 8 July 2004) para. 82; and *Mamatkulov and Askarov v. Turkey* [GC], App. Nos. 46827/99 and 46951/99 (ECtHR 4 February 2005), para. 121.

> [a] continuous evolution in the norms and principles applied in international law provides a sufficient basis for the Court to give a novel interpretation to one of the terms contained in the Convention.[137]

Thus, the ECtHR gave a novel approach to Article 4 by relying on the practice of a foreign institution (the ICTY) which asserted the continuous evolution of slavery in contemporary forms. On one side the jurisprudence of the ICTY was used to substantiate arguments based on evolutive interpretation, while on the other side evolutive interpretation was 'invoked to justify the use of comparative arguments'.[138]

2.4 The Extent to which External Rules are to be Used

Since the ECtHR's task is to 'the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'[139] and such engagement comprises of the obligation to secure the rights and freedoms under the Convention[140], logically any external rules cannot be used beyond the fulfilment of the task of interpreting and applying the Convention.[141]

Pinzauti stresses that the Court resorts to external sources due to the relevance that these sources have in applying the Convention and it ultimately serves the purpose of maintaining the coherence of the international legal order. Thus:

> [t]he provisions of the various branches of international law must therefore be interpreted and applied respecting the unity and internal coherence of the international legal order. The purpose of renvois in the ECHR is precisely to link the treaty to rules of other bodies of international law or to some elements of domestic law that are relevant to its application. [142]

Accordingly, she distinguished the Court's principal and incidental jurisdiction in order to determine the extent to which the ECtHR can apply rules belonging to external sources. The principal jurisdiction refers to the provisions of the Convention that the Court is empowered to apply directly. The incidental jurisdiction covers the external sources that the Court uses in order to 'settle a preliminary question whose resolution is necessary to decide on the principal question brought to the court'. However, when ruling the Court bases its final

[137] Senden (n89), 225.
[138] Senden (n89), 244.
[139] ECHR (n11) Article 19.
[140] ECHR (n11) Article 1.
[141] ECHR (n11) Article 32(1) stipulates that: "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto […]".
[142] Pinzauti (n74), 1046-47.

decision on the provisions of the Convention.[143] This means that the extent of ECtHR's incidental jurisdiction of using the sources and case law of the ICTY, is limited by their relevance in clarifying the preliminary questions and is always correlated with a specific provision of the Convention, i.e. the principal jurisdiction. On this note, when analysing the case law I have chosen for the purposes of this thesis, I will use Pinzauti's formula on how this incidental jurisdiction is used to answer the preliminary questions and the way it resolves the primary question that falls under the domain of the Court's principal jurisdiction. Special attention will be given to whether the Court takes these external sources for granted, i.e. accepts them as they have been developed in the external regime or scrutinizes them to an examination. For example, it has been asserted that the ECtHR when it resorts to criminal provisions under Article 7, engages in a hermeneutic activity of the external rules because it examines their degree of accessibility and foreseeability. Hence, external rules are prone to scrutiny.[144]

2.5 Conclusion

The primary purpose of this chapter was to unfold the transjudicial communication and the legal basis that enables the cross-fertilisation process, which results from ECtHR's reliance on ICTY's sources and case law. One of the question posed, was whether this type of communication derives from a formal relationship between these two institutions, more specifically whether the ECHR obliges explicitly the Court to take into account the ICTY sources and case law or provisions of ICL. The answer was that this type of communication happens outside of a formal context. However, the formulation of the abovementioned articles either references international law to be considered or use the term "law" without any further specification and thus paving the road for the usage of international law. This empowers the Court to rely on the provisions of ICL (a body of international law), as a necessary step for the Court to fulfil the function for which it was established.

Then I move on to inquire the justification that the Court provides when it relies on external sources even though it has no legal obligation to do so and I discern three grounds as a basis:

1. First, article 32 of the Convention grants the Court with the discretion to consider all matters which concern the interpretation and application of the Convention.
2. Second, a justification is given based on the VCLT rules on interpretation- and Article 31(3)(c) allows a referral to international law for the purpose of interpretation.

[143] Pinzauti (n74), 1049.
[144] Pinzauti (n74), 1049.

3. And lastly, such reliance is justified through the evolutive method of interpretation that has emerged from ECtHR case law and requires the provisions to be interpreted in the light of the present day social conditions.

On this note, I discerned Pinzauti's approach of primary/preliminary questions that will be used throughout my case analysis for grasping a better understanding of why the Court resorted to the ICL regime to reach a conclusion whether the ECHR was breached. Next, I focused on the methodological approach that the ECtHR uses when it includes provisions of international law, and by extension ICL as a body of international law, for interpreting and applying ECHR. Article 31(3)(c) of VCLT proves to be the bread and butter of the Court's comparative method, i.e. using rules of international law (external sources) for interpretation and this process is inextricably linked to the evolutive interpretation of the Convention. Understanding the legal basis that enables the judicial dialogue is a prerequisite to justify such an interaction. However, to fully grasp the dynamics of their cross-fertilisation it is necessary to understand characteristics of the IHRL and ICL regime and the situations when they inevitably "cross paths".

3 Divergence and Convergence of Regimes

3.1 Considerations Regarding the Divergences of the Regimes

The starting point when assessing the transjudicial communication between the ECtHR and ICTY is to acknowledge the distinctive features between their regimes, IHRL and ICL respectively, as they 'have different purposes and consequences and thus entail different philosophical commitments.'[145] IHRL deals with situations by focusing on systems and allocating ways of improving the practices of States in order to maximize the protection that they should grant to the individuals.[146] Since the human rights regime is more akin to addressing broad social phenomenon,[147] it is not expected to be accustomed with 'the special moral restraints' imposed by ICL when determining issues.[148] Such an approach serves as a caveat for the purpose of this thesis.

Thus, the absorption of any ICL assumptions and case law by IHRL will be conducted with the purposive goal to reflect the classical battle of state sovereignty in terms of 'freedom of action retained by state' and human rights obligations[149] that limit the State's discretion on acting as it pleases. Also, a trend of broad, progressive and liberal interpretative approach of human rights instruments has burgeoned and this is closely related to the fact that the beneficiaries of these instruments are individuals and not States, underlying that they deal with 'human dignity rather than reciprocal obligations undertaken by states.'[150] The ECHR emulates such progressive features and as the Strasbourg Court has vocalized early on, its interpretation is not be framed by reference to a State Party's understanding. Additionally, the ECtHR has disfavoured to a certain point the sovereignty of states in order to protect rights effectively, thus tipping the scale towards the benefit of the individual because:

[145] Darryl Robinson, 'The Identity Crises of International Criminal Law' (2008) 21 *Leiden JIL* 925, 946.
[146] Robinson (n145), 947; 928-929.
[147] A. M. Danner and J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 86-89.
[148] Robinson (n145), 928-929.
[149] Robinson (n145), 956.
[150] Robinson (n145), footnote 32, 934 referring to *Keith Cox v. Canada*, Communication No. 539/1993, Views 31 October 1994, A/50/40, Vol. II, Annex X, sect. M, at 105–29 ((1994) *Human Rights Law Journal* 410); CCPR/C/57/1, 117–47.

> [A] restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention of Human Rights would be contrary to the object and purpose of this treaty.[151]

Within the interest of my thesis, such a trend begs the question of whether the ECtHR tends to use a broad approach by relying on ICL, more specifically the sources and case law of the ICTY, i.e. evade a restrictive interpretation and limit the discretion of States when determining their procedural obligation to investigate and prosecute crimes? In addition, how does its approach affect the position of victims and that of the accused?

3.2 Inception of IHRL and ICL as Regimes

The interaction between ICL and IHRL has evolved to a point where it is clear why they draw from one another despite their paradoxical design. The horrendous nature of the events that took place during the World War II boosted both regimes from a latent state and instigated a more assertive approach in order to make sure that humanity would not have to witness such kinds of depredations again. If one wishes to trace back how the ICL and IHRL (as we know them today) came into prominence, one would have to refer to the year 1945 that marked the ending of World War II. ICL gained momentum with its institutionalization when the Allied Forces respectively established the International Military Tribunals in Nuremberg and Tokyo in 1945 and 1946. The Nuremberg Tribunals were bequeathed with the task of providing a 'just and prompt trial and punishment' of the major war criminals who acted in the interest of the European axis countries,[152] while the Tokyo Tribunal was tasked with the punishment of war criminals in the Far East.[153] Apart from war crimes, the Charters of the International Military Tribunals laid down an innovative class of criminality: crimes against humanity and crimes against peace (aggression).[154]

At the same time, the horrors of this war proved to be an incentive for the creation of today's human rights regime. The UN Charter vested human rights with attributes of international concern by referring to the promotion of human rights and fundamental freedoms as an explicit purpose of the organization;[155] however,

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[151] Report of the Commission, ECHR Series B, No. 16, at 9; *East African Asians v. the United Kingdom*, [1973] ECHR 2 (14 December 1973), paras. 192–193.
[152] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"),* 8 August 1945 (ITM Charter) Article 1.
[153] United Nations, *Charter of the International Military Tribunal for the Far East*, 19 January 1946 (ITMEF Charter) Article 1,
[154] ITM Charter (n152) Article 6.
[155] UN Charter (n117) Article 1(3): "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and

the Charter does not frame any concrete human rights.[156] On the topic of state obligations, the Universal Declaration of Human Rights (UDHR) in its Preamble stipulates that 'human rights should be protected by the rule of law'. Although formally a non-binding instrument,[157] the UDHR asserted the obligation of states to provide legal protection of human rights, which was furthered by the legally binding instruments the International Covenant for Civil and Political Rights (ICCPR) and International Covenant for Economic, Social and Cultural Rights (ICESCR). These two treaties helped to expand and clarify human rights and entrenched the obligation upon State Parties to ensure them.[158]

The UDHR inspired the Convention for the Protection of Human Rights and Fundamental Freedoms[159], broadly known as the European Convention on Human Rights (ECHR), which arguably today has become one of the most prominent instruments and represents a pillar of example to be followed in the human rights field. This instrument, a by-product induced as a response against the horrors of WWII and also against new forms of totalitarianism that emerged in Europe right afterwards,[160] assists the Council of Europe in achieving its aim, namely *'a greater unity between its members for the purpose of safeguarding and realising the (common) ideals and principles.'*[161] The 'maintenance and further realisation of human rights and fundamental freedoms'[162] is proclaimed to be a crucial component of such an aim.

Nonetheless, the parallel of how these two regimes developed is not their only point of commonality and their interaction goes beyond their characterization as a "post-second world war vintage" response. [163] My next step will consist on conveying the points of convergence between these two regimes (ICL and IHRL), by drawing examples from the ICTY- ECtHR dimension. The reason for my initiative to discern

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encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; "

[156] Bartram S. Brown (ed), *Research handbook on International Criminal Law* (Edward Elgar Pub 2011), 8.

[157] According to the UN Charter the General Assembly can make recommendations. See Articles 10-12.

[158] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (ICCPR) Article 2; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (ICESCR) Article 2.

[159] The ECHR was established in 1949 by the Council of Europe entered into force in 1953. Its Preamble stipulates the impact that the UDHR had on its establishment: "Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared […]"

[160] Claire Ovey, Robin White and Jacob F. Geoffrey, *Jacobs & White the European Convention on Human Rights* (3rd edition, Oxford University Press 2002), 2.

[161] *Statute of the Council of Europe* (Statute of CoE), 87 U.N.T.S. 103, E.T.S. 1 (1949), Article 1(a).

[162] Statute of CoE (n161) Article 1(b).

[163] Robert Cryer, 'International Criminal Law' in Daniel Moeckli *International Human Rights Law* (3rd edition, Oxford University Press 2018), 521.

these points of convergence is to clarify the dynamic of their interaction which will provide a better understanding of the situations when ECtHR relies on ICTY's jurisprudence or acknowledges its authority. However, before dwelling into the points of convergence, it is important to discern some distinguishing patterns of these two regimes. Understanding their points of divergence is a prerequisite of fully grasping the dynamic of any cross-fertilisation that follows as a result of their convergence.

3.3 Deconstruction of Distinctive Regime Characteristics

In order to deconstruct the IHRL-ICL relationship from the accost of the latter on the former, the concept of State-proximity plays a decisive role in the abovementioned interaction. Both constitute branches of Public International Law (PIL), which indicates the central importance of state sovereignty, however, at their equinoctial point lies the individual- albeit for different reasons. ICL's embodiment of PIL is deduced from the fact that its rules emerge from sources of international law such as treaty or customary international law[164] and as such are conditioned by the sovereignty of states. Nonetheless, ICL's deviation from state-centrism and the localization of the individual at the heart of its platform is evident as it proscribes certain conduct, which instigates individual criminal responsibility in those cases when individuals decide not to comply with the said prohibition.[165] This divergent approach is emphasised by the fact that ICL is not preoccupied with the responsibility of States, but rather with those individuals who are the culprits of specific human rights and IHL violations, regardless whether they act in the capacity of state agent or not.[166] As Piotr Hofmański, a judge of the International Criminal Court (ICC), acknowledged:

> [o]ur *focus is primarily on the criminal responsibility of individuals* […], rather than on the responsibility of States, even where such conduct is aimed at implementing State policy.[167]

While ICL centres the individual and detaches itself from the state's responsibility by steering clear from the notion of the obligations of States, IHRL is posited on a different context. The human rights regime also favours the individual in terms of conceptualizing the rights the individual is entitled to, but with the caveat that this entitlement is often asserted vis-à-vis the state and generated by restricting the authority of states over the said individual,[168] therefore entailing certain obligations

[164] Antonio Cassese, *International Criminal Law* (3rd edition, Oxford University Press 2013), 3.
[165] Cassese *International Criminal Law* (n164), 3.
[166] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2009), 36.
[167] Piotr Hofmański, 'International and national courts confronting large-scale violation of human rights: Genocide, crimes against humanity and war crimes' (Dialogue between judges, European Court of Human Rights, Council of Europe 2016) (emphasis added).
[168] Cassese *International Criminal Law* (n164), 6

from the State. This makes human rights law's vicinity closer to the concept of state-centrism, as States can be held accountable for failing to deliver their obligations in protecting and providing these rights to the individual. A cardinal example for the purpose of this thesis can be conveyed through the ECHR, which posits the task of states to enforce certain rights as defined by the Convention itself within their jurisdiction.[169]

3.4 The ECHR, State Obligations and Protection of the Individual

As emphasised in Chapter 2, the Convention as it is a multilateral treaty is not exempted from the general rules of interpretation of treaties, i.e. it is prone to the rules of interpretation dictated by Article 31 and 33 of the Vienna Convention on the Law of Treaties (VCLT). The guiding role of these articles were recognized in the *Golder case* where the Court acknowledged the symbiotic relationship between the Convention and any relevant rules discerned by the Council of Europe, as the ECHR is an instrument 'adopted within' this international organization.[170] Accordingly, to fully grasp the essence of the ECHR, one has to denote its object and purpose.[171] This is deduced from Article 1 of the Convention that is consequential to the obligation imposed by the Statute of CoE according to which members 'must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms', otherwise their membership is jeopardized with suspension or termination.[172]

Article 1 reads: *'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*'.[173] The phrase "shall secure" enunciates an obligation of State Parties to secure directly the

[169] ECHR (n11) Preamble; In terms of State Party Obligations Article 1 stipulates: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention; See also Kälin (n166), 31.

[170]*Golder v United Kingdom* (n92), para 29; VCLT (n14) Article 5 stipulates that: The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization

[171]VCLT (n14) Article 31(1): "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" (emphasis added).

[172] Statute of CoE (n161) Article 3 stipulates:
"Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."
Article 8
"Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."

[173] ECHR (n11) Article 1 (emphasis added).

rights and freedoms embodied in the Convention. The Court clarified in *Ireland v. The United Kingdom* that 'in order to secure the enjoyment of those rights and freedom' this obligation goes beyond a mandatory respect and extends to the obligation of States to 'prevent or remedy any breach at subordinate levels.'[174] Next, "within their jurisdiction" connotes the change that the human rights regime has undertaken in placing primacy upon the protection of the individual, a protection that goes beyond labels of nationality or status. The word "everyone" indicates that this protection is not restricted to the State's own nationals but brings all precarious categories of individuals, even beyond of nationals of CoE members, within the ambit of protection. In the *Pfunders* case the Court pointed out that:

> [A] State undertakes; vis à vis the other High Contracting Parties, to secure the rights and freedoms defined in Section 1 to every person within its jurisdiction, regardless of his or her nationality or status; whereas, in short, it undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the Convention and to stateless persons.[175]

The operational phrase that determines how far the scope of the obligation of states goes is "within their jurisdiction" because it shows that obligations are triggered as long as the violation happened within a State Party's jurisdiction. This is an explicit example of an instrument that favours the individual and where State behaviour is scrutinized in order to maximize the protection of said individual. Opting for a jurisdictional premise rather than a territorial scope of protection, the Convention conditions states to have a "proper human rights behaviour" inside as well as outside of their frontiers.[176] In this regard, it represents a multilateral treaty with a futuristic out-of-the-box approach. It strayed away from the traditional conception that international law ought to interfere only on those occasions when human rights infringements of a person by a State affected the interests of another State of which the individual was a national.[177] Thus, the object and purpose of the Convention inter alia concern the protection of rights and freedoms of individuals and as the Court has indicated, such an ultimate goal requires an interpretation and application which will render these 'safeguards practical and effective.'[178] Deduced from this, there can be little doubt of the special character of the ECHR that was emphasised by the Court in the *Lizidou* case 'as an instrument of European public order (ordre public) for the protection of individual human beings'.[179] The Convention is to be

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[174] *Ireland v the UK* App. No. 5310/71 (ECtHR 18 January 1987), para.239.
[175] *Austria v. Italy* (Pfunders case) App. No. 788/60 (ECHR11 January 1961), p.19.
[176] In *Loizidou v Turkey* (n118) para 87 the Court held: "The Court first recalls that in accordance with the concept of "jurisdiction" in Article 1 of the Convention, State responsibility may arise in respect of acts and events outside State frontiers".
[177] Ovey (n160), 3.
[178] *Soering v The United Kingdom* (n136), para.87.
[179] *Loizidou v Turkey (n118)*, para 93.

used in an objective way that facilitates the realization of the collective enforcement of rights and freedoms and not as an avenue that restricts 'to the greatest possible degree the obligations undertaken by the Parties.'[180] This is a further indicator of an instrument with a structure that 'goes beyond the merely setting out the rights and obligations of the contracting states'[181] and where the benefit of the individual, i.e. the protection of his/her human rights, overrides the discretion of States in the human rights regime.

3.5 Disparate Jurisdictions and the Road towards Convergence

Although from the perspective of ICL there is an irrelevance of whether the perpetrator of crimes falling under the jurisdiction of ICTs acts in the capacity of a State agent or not, this might be relevant for human rights courts as they can hold the State accountable for the human violations committed by persons acting on its behalf.[182] As history has showed, many international crimes have been state-sponsored.[183] However, such crimes need not be committed by someone in an official capacity in order for the State to be held accountable for a breach under the Convention. The Court has come to accept that the 'acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention'.[184] This means that a State can be held responsible before the Court because it 'was unable to legally or materially prevent the violation of the right' by acts of private individuals or unable to conduct its procedural obligation to investigate and prosecute the perpetrators.[185]

Nonetheless, there is no conflict between the two regimes as their jurisdictions are disparate. The idea is that the operation of both can be instigated by the same conduct, however, they have different objectives. The ICTs (including the ICTY) are interested in punishing the perpetrator and this is achieved if criminal liability is established. However, the ECtHR would view the same conduct as a violation of human rights and focus on the protection of victims from the State's activity or lack thereof. A testament of this is the derogation clause of ECHR in time of emergency as it inter alia provides that: '*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, […] be made under this provision'*.[186] It

[180] *Wemhoff v. Germany* App. No. 2122/64 (ECtHR 27 June 1968), para 8.
[181] David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (3rd edition, Oxford University Press 2014), 29.
[182] Hofmański (n167), para.3.
[183] This is exemplified by the fact that many state figures were tried by the ITM due to the horrendous state-sponsored Nazi policies during WWII. Another example is the prosecution of the late president of ex-Yugoslavia Mr. Slobodan Milosevic due to the multitude of wars that took place in its territory.
[184] *Cyprus v. Turkey* App. No. 25781/94 (ECtHR 10 May 2001), para 81.
[185] Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights- A guide to the implementation of the European Convention on Human Rights* (Human rights handbooks No.7, Council of Europe 2007), 14.
[186] ECHR (n11) Article 15 (2).

underscores the fact that individuals can make claims for example regarding violations of the right to life that do not comply with IHL principles and said violations at the same time can be qualified as international crimes that fall under the jurisdiction of ICTs. It exhibits the 'twofold role of international justice'.[187]

3.5.1 The Structural Design of ECtHR and ICTY as a Point of Convergence

The substantive side of international criminal law[188] indicates the conditions under which States are authorized or obliged to prosecute the perpetrators of the international crimes.[189] A novelty induced by ICL is premised on the idea of 'holding perpetrators directly accountable under International Law' i.e. imposing direct obligations upon the individual without the need to rely on domestic authorities.[190] The severe nature of international crimes and the inability of the domestic law to exercise proper enforcement over the perpetrators has been proven an incentive for the creation of internationalized tribunals with the intention of halting the impunities of such havocs. The atrocities committed in the former Yugoslav countries as well as the abhorrent crimes devastating Rwanda in the 90s were perceived as reaching an alarming level that thwarted international peace. This prompted the Security Council to establish ad-hoc tribunals under the auspices of Chapter VII of the UN Charter in order to 'prosecute persons responsible for serious violations of international humanitarian law',[191] i.e. war crimes, crimes against humanity and genocide. However, as reality indicates ICL cannot act as a self-contained regime, thus the cooperation with national states represents a necessity. This is best conveyed through the International Criminal Court's (ICC) principle of complementarity according to which this institution's jurisdiction will be conditioned by that of national courts. It means that national courts are given primacy and only their inability or unwillingness to deal with a certain case justifies ICC's interference.[192] This principle seems to strike a balance between the need for international justice on the one hand and the protection of state sovereignty of the

[187] Hofmański (n167), para. 3.
[188] The substantive side of international criminal law deals with definition of crime and general conditions of criminal responsibility. Contrasted by procedural law- it deals with procedure and enforcement of substantive law.
[189] Cassese *International Criminal Law* (n164), 3.
[190] Kälin (n166), 36-37.
[191] UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia* (ICTY Statute) (as amended on 17 May 2002), 25 May 1993 Article 1, reads: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." ICTR Statute Article 1 reads: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute."
[192] ICC Statute (n71) Article 1, Article 17.

'states which could claim a sovereign right to exercise jurisdiction' over such crimes on the other.[193]

Another exemplification of the inevitability of this interaction is found in the ICTY Statute. Article 9(2) establishes the primacy of ICTY over national courts because ICTY can 'formally request national courts to defer to the competence of the ICTY' at any stage of the procedure'. However, paragraph 1 of the said article underlines that 'ICTY and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.'[194] This means that the Statute acknowledges the importance of ICTY sharing the task of ending the impunity of perpetrators of international core crimes with national courts, which sometimes is inevitable due to material resources and mandate restrictions.[195] Since the ICTY could not prosecute every alleged perpetrator of international crimes and the ICC is a 'courts of a last resort'[196], this entails that in many situations it is the national courts that are primarily entrusted with the task of prosecuting such atrocities. Therefore, they must be encouraged to carry out effective investigations and end the impunity of the perpetrators of international crimes.[197] But what happens when national courts of State Parties to the Convention fail to succeed in this task and by doing so this consequently violates the rights safeguarded by it?

Here we come across the first point of convergence where the two regimes intersect, i.e. under the auspices of the subsidiary role of the Strasbourg Court. Subsidiarity as a concept has been entrenched extensively in the jurisprudence of the ECtHR and it encapsulates the phenomenon where national authorities are given primacy in attending possible violations of the Convention and the Court provides an opportunity for victims to avail redress only if violations have not been remedied in the national level. As pointed out in the Explanatory Report on Protocol No. 14:

> [u]nder Article 1 of the Convention, it is with the High Contracting Parties that the obligation lies 'to secure to everyone within their jurisdiction the rights and freedoms' guaranteed by the Convention, whereas the role of the Court, under Article 19, is 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention'. In other words, securing rights and

[193] Sarah M.H. Nouwen, 'Fine-tuning Complementarity' in Brown (n156), 206.
[194] ICTY Statute (n191) Article 9(1),(2).
[195] Statement by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the investigation and Prosecution of crimes committed in Kosovo, (2 September 1999), available at: <http://www.icty.org/en/press/statement-carla-del-ponte-prosecutor-international-criminal-tribunal-former-yugoslavia> accessed 19 May 2018.
[196] Hofmański (n167), para.2.
[197] Hofmański (n167), para.2.

> freedoms is primarily the responsibility of the Parties; the Court's role is subsidiary.[198]

The absence of an explicit reference to the principle of subsidiarity in the ECHR was amended with the introduction of Protocol no. 15. According to the Protocol, as soon as it enters into force,[199] a new recital will be added at the end of the Convention's Preamble to stipulate subsidiarity as an explicit principle of the Convention. Accordingly, Protocol no.15 entails that:

> [T]he High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[200]

This change vocalizes the Court's auxiliary role in safeguarding the rights and freedoms dictated by the Convention, thus deferring their protection principally to the State Parties with ECtHR acting out as a supervisory mechanism in case the first one proves to be unsatisfactory.[201] However, the Court has deduced the implicit recognition of the principle of subsidiarity over the years from a logical connection between various articles of the Convention.[202] For example in *Kudla v. Poland* the Grand Chamber concluded that subsidiarity is substantiated when the obligation of States to secure the rights under the Convention- Article 1 is read in conjunction with Articles 13 and 35(1).[203] Article 13 entails that national authorities are the primary avenue to redress violations of rights and freedoms as proclaimed by the Convention, while Article 35(1) provides for the admissibility criteria of when the Court is allowed to take a case into its hands and inter alia allows for a case to be admissible only when all domestic remedies have been exhausted. Consequently,

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[198] Council of Europe, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention Strasbourg* (2004) 194, para.12.

[199] Council of Europe, *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms* (2013) 213 Article 7 reads: "This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol […]".

[200] Protocol 15 (n199) Article 1.

[201] Brighton Declaration, 'High Level Conference on the Future of the European Court of Human Rights' (2012) Article 1 reads: "The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level."

[202] Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 313, 320.

[203] *Kudla v Poland* App. No. 30210/96 (ECtHR 26 October 2000), para. 152.

this indicates that States are given the opportunity to provide remedies of violations first through their own legal systems before being scrutinized to answer in front of the ECtHR.[204] This corroborates that 'the machinery of complaint to the Court is [...] subsidiary to national systems safeguarding human rights.'[205] According to Von Staden the requirement to exhaust remedies at the domestic level before redress is sought at an international level:

> [G]ives expression not only to the duty of domestic institutions to try to remedy alleged human rights violations, but also to their right to do so in line with their domestic arrangements for resolving such disputes.[206]

In *Austin and Other v. the United Kingdom* subsidiarity was proclaimed to be 'the very basis of the Convention' protecting the inherent function of the Court and guiding it not to overstep on the functions of domestic authorities by 'taking on the role of a first-instance tribunal of fact'. This conclusion was based on the joint reading of Article 1 and Article 19[207], which concerns the establishment of the Court and declares that its task would be *'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.'*

In order for the Court to preserve its subsidiary role in relation to national authorities, courts included, it is important to ascertain the limits of its discretion when deciding a case. The contours of the Court's review when handling an allegation of breach were foregrounded in the *Belgian Linguistic Case*. This case proclaimed that since domestic authorities have the discretion to choose the measures that they consider appropriate to rectify the alleged infringements of the Convention, the review will 'concerns only the conformity of these measures with the requirements of the Convention'[208], i.e. the compatibility of measures or domestic laws with the standards emanating from the Convention. As Schabas rightly points out, subsidiarity 'defines the relationship between the law of the Convention and internal law, in the sense that it is primarily the duty of internal law to ensure that rights are respected' and it 'defines the relationship between the

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[204] *Akdivar v Turkey* App. No. 21893/93 (ECtHR 16 September 1996), para.65.
[205] *Handyside v. the United Kingdom* App. No. 5493/72 (ECtHR 7 December 1976) p. 22, para. 48, *Kudla v. Poland* (n203), para 152.
[206] Andreas Von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *International Journal of Constitutional Law* 1023, p.1036.
[207] *Austin and Others v. The United Kingdom* App. No. 39692/09, 40713/09 and 41008/09 (ECtHR 15 March 2012), para 61
[208] '*Relating To Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium* App. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR 23 July 168), *para.10.*

system of enforcement established by the Convention, and in particular the European Court of Human Rights, and the mechanisms of internal law.'[209]

Bringing to completion, I argue that this point of convergence happens due to the structural designs of both the ICTY and ECtHR. On the one side, the structural design of the ICTY conveys an inevitability of scenarios where the Tribunal is unable or unwilling to engage with a case, thus the duty of investigation and prosecution is conferred upon the national state. On the other side, such a duty of the State is imposed by the structural design of the ECtHR because the principle of subsidiarity dictates that should the national state, a Party to the ECHR, fail in its procedural obligation to investigate and prosecute, the role of the ECtHR comes into play. A multitude of such cases shall be discussed in Chapter 5.

3.5.2 The State-ICTY Cooperation as a Point of Convergence

The possibility of the ECtHR dealing with the aftermath of the Yugoslav post-war international criminal proceedings has arisen due to the presence of the ICTY in the Netherlands, a State Party to the ECHR, as well as the cooperation of other parties to the Convention with this Tribunal.[210] Generally, ICTs have strived to uphold a human rights approach and this has been evident in many cases.[211] However, there is no possibility for individuals to complain at the ECtHR against ICTs in relation to the proceedings conducted by these tribunals, since only States can become parties to the Convention. However, there have been cases where States have found themselves as the object of a complaint due to the allegation that their cooperation with the ICTY might lead to breaches of rights protected under the Convention.[212] The possibility of such implications had already been acknowledged by the Court:

> [W]here States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights.[213]

[209]Schabas, *The European Convention on Human Rights: A Commentary* (n83), 76.
[210] Schabas, 'Synergy or Fragmentation? …' (n64), 610.
[211] Cases where referral to the ECtHR has been made: *Prosecutor v. Milutinović et al.*,(Appeals Chamber Judgment) IT-99-37-AR72, AC, International Criminal Tribunal for the former Yugoslavia (ICTY), 21 May 2003, , paras 38-39. ; *Prosecutor v. Vasiljević*, (Trial Chamber Judgment) IT-98-32-T, TC, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 November 2002, paras 193 and 196.
[212] Salvatore Zappala, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003), 7-14.
[213]*Galić v the Nethelands* App. No. 22617/07 (ECtHR 9 June 2009), para 43; *Waite and Kennedy v. Germany* [GC] App. No. 26083/94 (ECtHR 18 February 1999), para. 67.

Blagojević v. the Netherlands- Protecting ICTY's Mission

In *Blagojević v. the Netherlands* the Court stated that it lacked 'jurisdiction *ratione personae* to examine complaints directed against the ICTY itself'. The applicant complained that the ICTY had violated his right under Article 6 of the Convention while claiming that the responsibility of the Netherlands, since it was where the ICTY was located, was engaged as well.[214] Consequently, the Court had to tackle two main issues before diving into the merits of the case. First, it needed to determine whether complaints against the ICTY were eligible and second whether the matter engaged the responsibility of the Netherlands, regardless of what the determination regarding the first issue was.

In terms of the first issue, the Court noted that the ICTY is a "subsidiary organ" of the Security Council therefore the 'acts and omissions imputable to the ICTY are likewise attributable in principle to the United Nations' and since 'the United Nations is an intergovernmental international organisation with a legal personality separate from that of its member states and is not itself a Contracting Party', complaints against the ICTY reach an impasse.[215] In terms of the second issue, the Court held that the mere fact that the ICTY had its seat in the Netherlands, was not 'sufficient ground to attribute the matters complained' to it.[216] This conclusion, among others, was supported by practices in other domains such as that of the NATO Status of Forces Agreement where under international public law criminal trials do not 'necessarily engage the responsibility of the state on whose territory it is held'.[217]

The matter accented the most was the fact that the ICTY was established by a Security Council Resolution under the auspices of the UN Charter. On this note, the Court reiterated its stance towards said Resolutions whose mission is to 'secure international peace and security' that cannot be effective without the support of the UN member states. Therefore, it held that the interpretation of the ECHR cannot scrutinize the acts of States that are dictated by such Resolutions. On the contrary, such scrutiny would 'interfere with the fulfilment of the United Nations' key mission in this field'[218] and according to the Court ICTY's mission is directly linked to the restoration and maintenance of peace' and its creation 'is to be seen as an 'operation "fundamental to the mission of the UN"'.[219] The Court held that:

[214] *Blagojević v. the Netherlands* App. No. 49032/07 (ECtHR 9 June 2009), para. 36,29.
[215] *Blagojevic v the Netherlands* (n214), paras.35-36.
[216] *Blagojević v the Netherlands* (n214), para.46.
[217] *Blagojević v the Netherlands* (n214), para 44.
[218] *Behrami and Behrami and Saramati* App. Nos. 71412/01 and 78166/01 (ECtHR 2 May 2007), para 149; *Blagojević v the Netherlands* (n214), para 37.
[219] *Blagojević v the Netherlands* (n214), para 39.

> [T]he present case involves an international tribunal established by the Security Council of the United Nations, an international organisation founded on the principle of respect for fundamental human rights and that moreover the basic legal provisions governing that tribunal's organisation and procedure are purposely designed to provide those indicted before it with all appropriate guarantees.[220]

This means that since the UN is an organization that has the utmost respect for human rights, ICTY's procedures by extension are to provide all appropriate guarantees. Additionally, under the section of "Relevant International Law" in the judgment, the Court inter alia incorporated Article 2 of the ICTY Statute that stipulates the rights of the accused as a guarantee premise of fair trial.[221]

Naletilić v. Croatia- ECHR Obligation Trumped by that of ICTY

In cases such as *Blagojević v. the Netherlands* or *Galić v. the Netherlands*, where the exact same line of reasoning was followed as in the former, the applicants tried to prove the responsibility of a country simply because the alleged violations were conducted by a Tribunal set on its territory. However, the Strasbourg Court is a forum where applicants have also complained about alleged breaches of the Convention consequential of the cooperation of State Parties with the ICTY, albeit on a different paradigm. The case of *Naletilić v. Croatia* is a good example of this. The applicant was transferred to the ICTY by Croatia even though criminal proceedings for kidnapping, murder and participation in a group that committed a crime, were pending against him before the domestic courts. Thus, he lodged a three-ground complaint with the ECtHR.

First, he argued that his extradition for the purpose of his prosecution in front of the ICTY suspended the criminal proceedings pending against him in Croatia. This arguably meant that his right to be tried within a reasonable time in Croatia (Article 6(1)) had been breached. Second, he complained that the ICTY was not an impartial and independent tribunal established by law. Finally, he argued that the fact that the ICTY could impose harsher punishment than the Croatian authorities jeopardized his rights under Article 7 of the ECHR.[222] In response, the ECtHR found his first argument ill-founded because:

> [T]he applicant does not complain about the length of the proceedings that have been instituted against him in Croatia prior to the decision to hand him over to the ICTY. He complains as to the fact that - because of his extradition to the ICTY - the present criminal proceedings pending against him in Croatia would in future necessarily exceed a

[220] *Blagojević v the Netherlands* (n214), para 46.
[221] *Blagojević v the Netherlands* (n214), para.22.
[222] *Naletilić v. Croatia* App. No. 51891/99 (ECtHR 4 May 2000), p.2.

> reasonable time within the meaning of Article 6 § 1 of the Convention. In this respect the Court notes that even the possibility of such future proceedings is doubtful, because they might be continued only in the event the applicant is acquitted by the Hague Tribunal or if the proceedings before the ICTY are stayed for some reason.[223]

In terms of the second issue the Court held that complaints under Article 6(1) may be raised exceptionally 'where the applicant risks suffering a flagrant denial of a fair trial'. This ground of complaint was discarded on the basis that the situation did not involve an act of extradition, rather a surrender to an international court that inter alia offers all needed guarantees of impartiality and independence.[224] However, the Court did not dwell on explaining the intricacies of such an "impartiality" and "independence" which was the basis of the applicant's second ground. Instead, it merely said that they were provided in the ICTY's Rules of Procedure and Evidence and shifted the focus on the extradition/surrender paradigm. This indicates that the Court acknowledges that it will not tackle any issues that may come across as an assessment of the ICTY, because as already indicated in the *Blagojević case,* it cannot act as a supervisory mechanism for the ICTY.

Lastly, the Court emphasised that receiving a harsher punishment by the ICTY would not contradict Article 7 because of paragraph 2 of the said article clarifies that the principle of legality: *"[...] shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations"*.[225] Here we can see how the Court, when it comes to international core crimes, tips the scale towards the offensive role of human rights by encouraging the usage of criminal law.

The reason I decided to focus on this case is not because I want to convey whether the ECtHR has become an effective forum where applicants can raise issues claiming that State Parties have infringed their human rights in connection with ICTY's proceedings.[226] This case is a clear example that the Court does not deal with issues such as questioning the legitimacy of the ICTY and furthermore shows inclinations of finding the ICTY more trust-worthy to end the impunity of alleged perpetrators of international crimes than domestic courts. The Court implicitly recognised the primacy of another international obligation over the obligation that derives from the ECHR. Naletilić's concern that his right to be tried within a reasonable time by the Croatian authorities would be jeopardized, obviously referred to the time-period that would pass because the ICTY's proceedings were

[223] *Naletilić v. Croatia (n222),* p.3.
[224] *Naletilić v. Croatia (n222),* p.4.
[225] *Naletilić v. Croatia (n222),* p.4.
[226] See more Zappala (n212).

given primacy. By claiming that the future of domestic proceeding is "doubtful", the ECtHR bypassed an existing reality- the existence of the domestic criminal proceedings and it refused to elaborate whether the national authority have a duty to comply with Article 6 in such cases.

In this case, Croatia was confronted with two sets of overlapping obligations. The first one was the obligation under Article 6 of the ECHR to proceed with the domestic proceedings against Naletilić and the second one under Article 1 of the ICTY Statute to surrender him upon the Tribunal's request, an obligation that prevailed. Here the Court passed on the opportunity to give primacy to the obligation under the Convention. Instead, it implicitly recognized the domination of the obligation that Croatia had under Article 1 of the ICTY Statute, but without explaining the reasons why the obligation under the ICTY Statute relegates the obligation under the ECHR. Of course, from an international law point Croatia's obligation to surrender derives from the UN Charter, bearing in mind that the obligation is stipulated by a UNSC Resolution[227] of a binding character. Based on Article 103 of the said Charter, this obligation prevails any obligations under other international agreements, including those from the ECHR. Nevertheless, the Court did not resort to such a comparison of obligations.

Milosević v. The Netherlands

Another case of interest when talking about the unlikeliness of the Court becoming an avenue for redress in relation to proceedings before the ICTY, is the case of *Milosević v. The Netherlands*. At the time, Slobodan Milosević (the former president of SFY) was detained at the United Nations Detention Center in the Hague because he was prosecuted by the ICTY. Milosevic brought a civil proceeding against the Netherlands before the Regional Court of the Hague challenging the lawfulness of his detention as well as the impartiality of the ICTY, which according to him was "the handmaiden of NATO" and had no basis in international law. Among others, he sought for his unconditional release, claimed that 'his transfer to the ICTY was illegal as a matter of the domestic law of the FRY' so consequently the Netherlands 'was acting unlawfully by allowing him to be detained and remain in detention on its territory'.[228] The President of the Regional Court declared that the court was not competent to consider the request for release since the Netherlands had lawfully transferred its jurisdiction over the ICTY, furthermore the ICTY had a legal basis according to both national and international law and provided for

[227] UNSC Resolution 827 (n2) para.4 stipulates among others that : "[…] all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber[…]".
[228] *Milosević v. the Netherlands* App.No.77631/01 (ECtHR 19 March 2002), p.3.

sufficient procedural guarantees as indicated in *Naletilić v. Croatia*.[229] Subsequently Milosevic brought a claim before the ECtHR, however the Court did not pronounce on the merits because it concluded that the applicant had not exhausted all the possible domestic remedies.[230]

3.5.3 Defining International Crimes as a Point of Convergence

An additional convergence point occurs when the Court is confronted with the situation of defining international crimes. This situation is two-fold. There have been cases where the Court has chosen to resort to the jurisprudence of the ICTs to reach a conclusion whether a certain concept is encompassed by a provision of the ECHR and consequently whether a violation had occurred. A different scenario is that where the ECtHR is bequeathed with the task of exploring the concepts of international core crimes, i.e. genocide[231], crimes against humanity[232] and war crimes[233] as preliminary questions in order to reach a conclusion on the primary question, that is, whether a breach to the Convention has occurred. Regarding this contact point, Schabas claims:

> [d]efinitions of international crimes are another area where there is a relationship between the European Court and international criminal law. In terms of defining the violations, whether in the human rights or the international criminal law context, there has been some cross-fertilization.[234]

The first situation can be illustrated through *Rantsev v. Cyprus and Russia*, where the Court sought guidance from the ICTY's *Kunarac case* 'on the scope of the concept of slavery in the context of human trafficking'.[235] The abridged version is that the Court was able to place human trafficking within the ambit of Article 4 of the ECHR, i.e. the provision that prohibits slavery and forced labour by relying, among others, on the conclusion deduced by the ICTY in the *Kunarac case* that the concept of slavery had evolved 'to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership'.[236]

In terms of the second situation where the Court is confronted with the concept of international core crimes, the case of *Koberly v Hungary* depicts a good example. The applicant had been convicted of multiple homicide constituting crimes against humanity in 1956 and he complained that his prosecution was based on an act that

[229] *Milosević v. the Netherlands* (n228), p.4.
[230] *Milosević v. the Netherlands* (n228), p.7.
[231] *Jorgić v. Germany* App. No. 74613/01 (ECtHR 12 July 2007).
[232] *Korbely v. Hungary* [GC] App. No. 9174/02 (ECtHR 19 September 2008).
[233] *Kononov v. Latvia* (n78)3; *Kononov v. Latvia* [GC] App. No. 36376/04 (ECtHR 17 May 2010).
[234] Schabas,' Synergy or Fragmentation? …' (n64), 623.
[235] Schabas,' Synergy or Fragmentation? …' (n64), 624. Ibid
[236] *Rantsev v. Cyprus and Russia* (n131), para. 280.

did not constitute any crime at the time of its commission, therefore alleging that the Hungarian authorities breached the principle of legality.[237] This means that the Court was entrusted with the task of figuring out whether Article 7 of the Convention was violated and if we follow Pinzauti's approach, that constitutes the primary question. To answer this question, the Court needed to discern the preliminary question of whether among others, 'this act was capable of amounting to "a crime against humanity"' as that concept was understood in 1956'.[238] The Court held that:

> [i]n order to verify whether Article 7 was complied with in the present case, the Court must determine whether it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity.[239]

It also clarified that its intention did not revolve around establishing the meaning of "crimes against humanity", rather it was to determine whether according to the international law at the time there was a sufficient clear basis for convicting the applicant, i.e. whether the crime was accessible and foreseeable. In this respect the Court held:

> [i]t follows that the Court must satisfy itself that the act in respect of which the applicant was convicted was capable of constituting, at the time when it was committed, a crime against humanity under international law. The Court is aware that it is not its role to seek to establish authoritatively the meaning of the concept of "crime against humanity" as it stood in 1956. It must nevertheless examine whether there was a sufficiently clear basis, having regard to the state of international law as regards this question at the relevant time, for the applicant's conviction on the basis of this offence.[240]

Conversely, the mere fact that the Court deals with the definitions of international core crimes, does not mean that it will have a harmonious approach with that of ICTs. As Schabas rightly point out:

> [t]he relationship between international criminal law and the European Court of Human Rights may well be synergistic. However, that does not necessarily mean that the principal institutions that apply these bodies of law, the international criminal tribunals and the European

[237] *Korbely v Hungary* [GC] (n232), paras.76, 54.
[238] *Korbely v Hungary* [GC] (n232), para 77.
[239] *Korbely v Hungary* [GC] (n232), para 76.
[240] *Korbely v Hungary* [GC] (n232), para 78.

> Court of Human Rights, are committed to complementary approaches. In that sense, the spectre of fragmentation is considered.[241]

The case of *Jorgić v Germany* that will be discussed at length in Chapter 5 is an example of such a situation where the Court took a broader approach on the definition of genocide than that provided by the ICTY.

3.6 Conclusion

To unfold the main research question that is premised on the judicial interaction between two institutions belonging to separate regimes, first I considered the divergent characteristics in terms of objects and purposes of both fields of law, i.e. the human right and international criminal law. Pointing out the divergence between these two regimes that have different purposes and legal commitment helps us to understand any outcome of the cross-fertilisation that happens between their institutions. This means that if we are aware of the characteristics of the IHRL, and by the same token the inclinations of ECtHR, we are able to understand why it uses or dismisses an ICTY rationale in a way that might seem unorthodox from an ICL perspective. Although the development of IHRL and ICL as witnessed today was triggered by the horrendous acts of WWII, they serve different purposes. On the one hand, the regime of human rights is pugnacious in improving 'the practices of states in order to advance the protection of individuals'.[242] International criminal law on the other hand is concerned with individual criminal responsibility and punishment of the perpetrators.

However, despite their divergencies and since they are not self-contained regimes I argue that they are bound to intersect. Conveying the points of convergence is done with the purpose of providing a better understanding of why the ECtHR relies on ICTY's jurisprudence or acknowledges its authority. In terms of this, I highlight three possible points of convergence:

1. One happens because of the cooperation of State Parties to the Convention with the ICTY. Many cases have been brought against either the Netherlands where the ICTY was located or the domestic state with the claim that they had breached their rights under the Convention as a result of cooperating with an impartial court. The most important thing I discerned from these cases was when an obligation under the ICTY Statute was competing with an ECHR obligation, the Court favoured the first one. It does so with the acknowledgement that it cannot interfere with the Tribunal's mission since its authority is perceived as an extension of the Security Council in preserving the maintenance of peace. However, one has

[241] Schabas, '' Synergy or Fragmentation? …' (n64), 623.
[242] Vladislava Stoyanova, *Human Trafficking and Slaver Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2017), 335.

to keep in mind that this is a separate issue from it actually validating its authority as a judicial institution by "borrowing" or "relying" on the Tribunal's jurisprudence.

2. Another point of convergence emerges because the ECtHR is confronted with situations where it has to deal with the definition of international core crimes and modes of responsibility, which as concepts have mainly been developed by the ICT- the ICTY included. Thus, they turn to be the most credible source of reliance.
3. Lastly, the most important point of convergence from the lens of this thesis happens due to the structural designs of ECtHR and ICTY. On the one side, the structural design of the ICTY conveys an inevitability of scenarios where the Tribunal is unable or unwilling to engage with a case, thus the duty of investigation and prosecution is conferred upon the national state. Here is where I make the connection, as the structural design of the ECtHR based on the principle of subsidiarity dictates that the primary obligation to investigate and prosecute rests on the national state and should it fail, the role of the Court comes into play. Considering that the research question is linked to the procedural obligation to investigate and prosecute, this point of convergence proves to be the most relevant because it is a scenario where the State's procedural obligation under the Convention is instigated due to ICTY's inability or unwillingness to proceed.

4 Positive Obligations in a Criminal Law Setting

4.1 Negative v. Positive Obligations

The effective application of the rights and freedoms encompassed in human rights treaties is heavily dependent on the obligations that State Parties must ensure in the first place. From an international law perspective, by becoming a party to an international human rights treaty States undertake the obligation to respect, protect and fulfil the rights included comprehensively in them. The obligation to "respect" imposes a duty on States not to interfere with the enjoyment of rights; "protect" entails a duty to shield 'individuals and groups against human rights abuses' whilst "fulfil" enforces the need for States to 'take positive action to facilitate the enjoyment of basic human rights.'[243]

Since the obligations of States play a pivotal role on the outcome of how human rights are safeguarded under the ECHR, this explains why the Court renders, as claimed by Akandji-Kombe, 'particular attention to their identification, delimitation and scope'. The Court has opted for a two-pronged approach that divides the obligations of States into negative and positive, as opposed to the aforementioned respect/protect/fulfil paradigm.[244] On this note, it has acknowledged that '[…] the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition'[245], i.e. this division is not clear-cut. The negative obligations 'essentially require states not to interfere in the exercise of rights',[246] while the positive obligations' 'key characteristic is the duty to undertake specific affirmative tasks'.[247] In a Dissenting Opinion of ECtHR's judgment *Gul v. Switzerland*, Judge Martens discerned these obligations in the following way:

> [t]he Court's case-law distinguishes between positive and negative obligations. Negative obligations require member States to refrain from action, positive to take action.[248]

[243]United Nations Human Rights Office of the High Commissioner (OHCHR) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> accessed 19 May 2018.
[244] Akandji-Kombe (n185), 5.
[245] *Keegan v. Ireland* App. No. 16969/90 (ECtHR 26 May 1994), para. 49.
[246] Akandji-Kombe (n185), 7
[247]Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004), 2.
[248] *Gul v. Switzerland* App. No.23218/94 (ECtHR 19 February 2006) Dissenting Opinion of Judge Martens, para.7.

Throughout its case law, the Court has additionally clarified that a positive duty on the State channels the necessity 'to take reasonable and appropriate measures to secure' the rights of the individual under the Convention.[249] Consequently, in terms of positive obligations the Convention would be breached in those cases where the national authorities remain passive despite their obligation to act, while in cases of negative obligations a violation of the Convention would result due to their action which constitutes an interference with the individual's exercise of the right.[250] In connection with positive obligations, the Court has reiterated many times that the substance of an applicant's complaint 'is not that the State has acted but that it has failed to act.'[251]

The exponents of positive human rights obligations agree that the Convention is mainly concerned with negative obligations. For example, Merrills asserts that 'the Convention is mainly concerned not with what a State must do, but with what it must not do'.[252] Akandji-Kombe claims that negative obligations:

> [H]ave always been regarded as inherent in the European Convention, the same is not true of the positive obligations. A number of these – in fact very few – are of course laid down from the outset, in the text itself.[253]

He then highlights the level of creativity that the Court has in expanding the concept of positive obligations to the point where 'virtually all the standard-setting provisions of the Convention now have a dual aspect in terms of their requirements, one negative and the other positive'.[254]

4.2 Positive Obligations as a Judicial Creation

Since the objectives pursued in this thesis are linked to the positive human rights obligations under the ECHR, it is important to underscore their genesis as a basis of a better understanding. Attention must be drawn to whether said obligations are, as Mowbray puts it, 'express textual requirements of the Convention or implied judicial creations'. Consequently, if they result to be judicial creations of the ECtHR a clarification needs to be made on how the Court justifies their recognition.[255]

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[249] *Ostra Lopez v. Spain* App. No.16798/90 (ECtHR 9 December 1994), para 51; Akandji-Kombe (n185), p.7
[250] Akandji-Kombe (n185), 11.
[251] *Airey v Ireland* App. No. 6289/73 (ECtHR 9 October 1979), para 31; *Gaskin v. the United Kingdom* App. No. 10454/83 (ECtHR 23 June 1989), para.41.
[252]Mowbray, *The Development of Positive Obligations....* (n247), 3 citing JG Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester, MUP, 1993), 103.
[253] Akandji-Kombe (n185), 7.
[254] Akandji-Kombe (n185), 7.
[255] Mowbray, *The Development of Positive Obligations....* (n247), 2.

The concept of positive obligations has been developed mainly through the Court's case law. Its substantiation has been conducive by relying on Article 1 that imposes an obligation of States to secure the rights in the ECHR.[256] Another inter-related principle that justifies the development of the positive obligations is that of effectiveness, i.e. interpreting the Convention as a 'living instrument'.[257] This principle has been utilised by the Court in order to proclaim the duty of State Parties to act in a certain way, even if a particular provision does not 'expressly create a positive obligation'.[258] Thus, the Court has acknowledged:

> [i]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.[259]

4.2.1 The Horizontal Effect and the Limitations of Positive Obligations

One of the most relevant dimensions of positive obligations is the fact that it encapsulates the relationship between private individuals whereas the State acts as an intermediary. As already mentioned in Chapter 3, although traditionally the focus of human rights law has been on proscribing violations committed by the State, the Court has also addressed the phenomenon of private individuals acting as human rights abusers through positive obligations.[260] Tulkens claims that 'this trend is itself the result of the development and extension of the theory of positive obligations'.[261] Akandji-Kombe asserts that the phenomenon of positive obligations is underpinning 'the very marked trend towards extending the scope of the Convention to private relationships between individuals which is called the "horizontal effect"'.[262] It is worth pointing out that this "horizontal effect" where the harm is perpetrated by private actors makes it conducive for individuals who have suffered such harm to 'successfully bring a human rights claim only if a contracting state can be linked to the abuses'.[263]Along these lines the Court has held that:

> [T]he acquiescence or connivance of the authorities of a contracting state in the acts of private individuals which violate the Convention

[256] *Medova v Russia* App. No.25385/04 (ECtHR 15 January 2009), para.103; Stoyanova (n book),320; Akandji-Kombe (n185),8.
[257] Stoyanova *Human Trafficking and Slaver Reconsidered:…*(n242),320.
[258] Mowbray *The Development of Positive Obligations....* (n247) citing Merrill , 103.
[259] *Christine Goodwin v The United Kingdom* App. No. 28957/95 (ECtHR 11 July 2002), para 74.
[260] Stoyanova, *Human Trafficking and Slaver Reconsidered:…*(n242), 320.
[261] Tulkens (n15), 583.
[262] Akandji-Kombe (n185), 14.
[263] Stoyanova, *Human Trafficking and Slaver Reconsidered:…*(n242), 320.

> rights of other individuals within its jurisdiction may engage that state's responsibility under the Convention.[264]

Although the act is not directly attributable to the State, [265] the link is created in those cases where the State 'has been unable legally or materially to prevent the violation of the right by individuals, and otherwise because it has not made it possible for the perpetrators to be punished'.[266] In other words, the State makes the violation resulting from the conduct of private individuals 'possible or probable either through simple negligence or through benign tolerance'[267] due to a multitude of scenarios such as a failure in the legal order, an absence of a legal intervention, inadequate intervention and so on.[268]

Conversely, the concept of positive obligations is not to be understood as an imposition on States to be neither 'almighty nor omniscient' by having knowledge and control of every individual's action under their jurisdiction.[269] Accordingly the Court has refused to acknowledge the imposition of an "excessive" or "impossible or disproportionate burden on the domestic authorities" regarding the positive obligation to protect under both Article 2[270] and 3[271] 'bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources'.[272] However, when it comes to an ill-treatment of which domestic authorities had or should have had knowledge upon, the situation differs and does not qualify as an excessive burden due to the "knowledge of the harm" component. Thus, the Court

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[264] *Cyprus v. Turkey* [GC] (n184), para 81.
[265] In *Beganovi/ v. Croatia* App. No. 46423/06 (ECtHR 25 June 2009) the Court held: 69. "The Court observes in the first place that no direct responsibility can attach to Croatia under the Convention for the acts of the private individuals in question."
[266] Akandji-Kombe, (n185) 14.
[267] Tulkens (n15), 583.
[268] Akandji-Kombe (n185),15.
[269] Stoyanova *Human Trafficking and Slaver Reconsidered:…*(n242),324.
[270] In *Osman v. the United Kingdom* [GC] (n25), para.116 the Court held: "For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."
[271] In O'Keefe v. Ireland [GC] App. No. 35810/09 (ECtHR 28 January 2014), para.144 the Court held: "The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. *This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities*, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources." (emphasis added)
[272] *Osman v the United Kingdom* [GC] (n25), para 116.

has held that the measures applied by the State to provide protection against acts of violence:

> [S]hould be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity. [273]

Consequently, to conclude whether a State has breached its positive obligations one has to determine whether the harm that an individual suffers can be linked to the State (test of proximity), if the State had or ought to have had knowledge of the harm (text of knowledge) and whether the burden placed on the authorities is excessive (test of reasonableness).[274] These tests delimit the scope of positive obligations, or rather set up the boundaries that the Court needs to follow when assessing if a breach of such obligations has taken place. On this note, an important delimitation is conveyed also through the margin of appreciation- a concept created by the Court indicating the power granted to States to discharge their positive obligations according to their own discretion.[275] However, the margin of appreciation is not immutable, rather there are some factors that restrict it and thus expand the level of scrutiny applied by the Court. For example, as stated in Chapter 2 this concept can be diminished through the "European Consensus"[276] or in situations concerning ' a particularly intimate aspects of a person's private life'.[277]

4.2.2 Substantive v. Procedural Obligations

A division of a primary concern in terms of positive obligations for the purpose of this thesis is that of substantive and procedural obligations, with the latter category being emphasised to a greater extent. If one opts for a traditional division between the aforementioned categories, Black's Law Dictionary offers some clarification in this regard. It defines the substantive dimension as 'the part of the law *that creates, defines, and regulates* the rights, duties, and powers of parties', whereas the procedural one consists of 'the rules that *prescribe the steps for having a right or duty judicially enforced*, as opposed to the law that defines the specific rights or duties themselves'.[278]

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[273] *Soderman v Sweden* [GC] App. No. 5786/08 (ECtHR 12 November 2013), para.81.
[274]Stoyanova *Human Trafficking and Slaver Reconsidered:…*(n242), 324-325.
[275]Laurens Lavrysen, *Human Rights in a Positive State; Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Phd Dissertation, Ghent University 2015), 185.
[276] *Dickson v. the United Kingdom* App. No. 44362/04 (ECtHR 4 December 2007), para.78; *M.C. v. Bulgaria* (n82).
[277] *Hatton and Others v the United Kingdom* App. No.36022/97 (ECtHR 8 July 2003), para.103.
[278] Bryan A. Garner, *Black's Law Dictionary* (9th edition, West 2010), 1323; 1567 (emphasis added).

Even though the ECtHR has not established the intricacies of a particular division,[279] it has nevertheless explicitly referred to the distinction as the substantive/procedural aspect.[280] Such recourse is highly prominent in terms of cases under Articles 2 and 3.[281] Akandji-Kombe claims that the distinction between substantive and procedural is conditioned by the 'substance of the action expected of the state'. He asserts that substantive obligations are 'the basic measures needed for full enjoyment of the rights guaranteed' which is achieved by 'laying down proper rules' that for example, govern the intervention of domestic authorities, lay down prohibitions or give legal recognition.[282] Concerning the procedural obligations, he claims that they make sure that those rules laid down as part of the substantive obligations of States are practical and effective. He explains that:

> [T]hey (procedural obligations) are those that call for the organisation of domestic procedures to ensure better protection of persons, those that ultimately require the provision of sufficient remedies for violations of rights. This provides the background against which the right of individuals (alleging violation of their rights) to an effective investigation and, in the wider context, the duty of the state to enact criminal legislation which is both dissuasive and effective, must be seen. [283]

The Court has pointed out that the aim of positive obligations is to "prevent" or "remedy" infringements of the Convention.[284] Such an aim was emphasised in *Assanidzé v. Georgia*:

> the Convention does not merely oblige the higher authorities of the Contracting States themselves to respect the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, *those authorities must prevent or remedy any breach at subordinate levels* […].[285]

In relation to the protect/remedy aim of positive obligations, it is important to note that many scholars have asserted that it should not be used as a key criterion to grasp this distinction. This means that they should not be compartmentalized in such a way that substantive obligations are given a preventive purpose or procedural obligations a remedial one.[286] Throughout the analysis of the case law I have

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[279] Lavrysen (n275), 47.
[280] *Öneryıldız v. Turkey* [GC] App. No. 48939/99 (ECtHR 30 November 2004), paras.97, 111.
[281] See as an example *Tagayeva and Others. V. Russia* App. No.26562/07 (ECtHR 13 April 2007) where the Court treated both aspects in terms of Article 2.
[282] Akandji-Kombe (n185), 16.
[283] Akandji-Kombe (n185), 16 (emphasis added).
[284] Akandji-Kombe (n185), footnote 49, 16.
[285] *Assanidzé v. Georgia* App. No.71503/01 (ECtHR 8 April 2004), para. 146 (emphasis added).
[286] Akandji-Kombe (n185),16, footnote 49: "Even though the Court does emphasise quite specifically that the positive obligation aims to "prevent" or "remedy" violations of the Convention

chosen, focus shall be placed on whether the positive procedural obligations established in said cases enshrine a preventive or remedial purpose.

4.2.3 Systematization of Positive Obligations

The ECtHR in its ample case law has elaborated many requirements that States need to fulfil to comply with their positive obligations under certain articles of the Convention. Nonetheless, the Court has not opted for a definitive enumeration of positive obligations. Many legal scholars have elaborated their own form of systematization based on the Court's case law. For example, by looking into each article from the ECHR separately Mowbray tends to identify different forms of action which are required by States within the ambit of positive obligations.[287] Starmer has identified five categories of duties resulting from positive obligations, namely: a basic duty to create a national legal framework which provides effective protection for Convention rights, a duty to prevent breaches of Convention rights, a duty to provide information and advice relevant to the breach of Convention rights, duty to respond to breaches of Convention rights (*e.g.* by conducting an investigation) and duty to provide resources to individuals to prevent breaches of their Convention rights.[288] Stoyanova's chosen method of systematization is 'based on identifying the nature of actions the state is required to take' and accordingly she identifies: the obligation to criminalize, the obligation to adopt substantive criminal law of a certain quality, the obligation to investigate and potentially apply relevant criminal law framework by prosecuting and punishing; the obligation to put in place effective regulatory frameworks; the obligation to take protective operational measures; the obligation to provide an effective remedy.[289] Tulkens on the other hand asserts that the Court puts forth essential duties for the States 'which may be noted at each stage of the criminal law process', ergo the use of criminal law comes into prominence in connection with both substantive and procedural obligations. [290] Such duties include a wide-range of issues from the criminalisation in primary legislation [291] to investigation[292] and prosecution[293] and finally up to sentencing[294]

(Assanidzé v. Georgia, para.146), this distinction – based essentially on the aim pursued – cannot be seen as the key to understanding the distinction between substantial and procedural obligations. The former do not necessarily in all cases have a preventive purpose, and the latter are not confined to remedial measures"; Lavrysen (n275), 51.

[287] Mowbray, *The Development of Positive Obligations…* (n247).

[288] K. Starmer, 'Positive obligations under the Convention' in J. Lowell and J. Cooper (eds), *Understanding human rights principles* (Portland, Hart Publishing, 2001), 146.

[289] Stoyanova, *Human Trafficking and Slaver Reconsidered:…* (n242), 329.

[290] Tulkens (n15), 586; 584.

[291] See for example *Siliadin v. France* (n109).

[292] See, for example, *K.U. v. Finland* App. No. 2872/02 (ECtHR 2 December 2008).

[293] For forms of prosecution see *Sandra Jankovic v. Croatia* App. No. 38478/05 (ECtHR 5 March 2009), para.50; for prosecution policy *Wiktorko v. Poland* App. No. 14612/02 (ECtHR 31 March 2009) para.60.

[294] *Öneryıldız v. Turkey* [GC] (n280), para.116.

and the execution of the sentence[295]. Mavronicola identifies four types of positive obligations stemming from Article 2 and claims that 'equivalent obligations emanate from Article 3 of the ECHR'[296]:

(i) Framework obligations which 'require states to establish domestic legal provisions, mechanisms and processes' to protect the life of individuals
(ii) Operational duties which oblige the State to take measures to protect individuals from a particular risk 'which is in the actual or imputed knowledge of the authorities'
(iii) Investigative obligations which demand 'an investigation of any suspicious death which may involve either direct or indirect State responsibility'
(iv) Duties of redress which 'emerge as an aim of the investigative duty' to identify and punish those responsible[297]

From the way on how these different scholars have systemized the positive obligations based on the Court's case law, it can be noted that all of them have discerned, among others, the obligation to criminalise, investigate and prosecute within the span of positive obligations. A waiver must be made here. It is not within the ambit of my thesis, and as such by extension I do not aim, to provide an elaborative span of what positive obligations under the ECHR are nor touch upon their proper application. Concerning positive obligations, my focus is chiefly place on unearthing how the jurisprudence of the ICTY has impacted the development of the procedural obligation to investigate and prosecute, or what Mavronicola designates as "investigative obligations" and "duties of redress". I will also touch upon the substantive obligation to criminalise (framework obligations) as prerequisite in order to grasp the ripple effect it has on the obligation to investigate and prosecute.

4.3 Adequate legal and administrative framework

The requirement to put in place a legal and administrative framework has become a benchmark for States to discharge their positive obligations in certain situations. Such an obligation is of a central importance since its effectiveness or lack of thereof can implicate the State's human rights obligations.[298] In terms of the ECHR, some provisions such as the one that safeguards the Right to Life (Article 2) 'contain an explicit requirement for the adoption of regulatory frameworks'.[299]

[295] *Branko Tomasić and Others v. Croatia* App. No. 46598/06 (ECtHR 15 January 2009), para. 57. See also *Maiorano and Others v. Italy* App. No. 28634/06 (ECtHR 15 December 2009).
[296]Natasa Mavronicola, 'Taking Life and Liberty Seriously: Reconsidering criminal liability under Article 2 of the ECHR'(2017) *Modern Law Review* 1026, 1031 footnote 34.
[297]Mavronicola (n296), 1031-1033.
[298] Stoyanova, *Human Trafficking and Slaver Reconsidered:…* (n242), 370.
[299] Stoyanova, *Human Trafficking and Slaver Reconsidered:…* (n242), footnote 229, 370.

It is important to note that the mere action of putting in place a legal and administrative framework does not let States "off the hook" regarding their positive obligations. The Court's case law has introduced a standard according to which a legal framework has to be "adequate" in the sense that domestic laws should offer 'an acceptable level of protection' to the individuals.[300] In addition, there have been cases where, although States have put in place a legal framework designated to safeguard the rights of the individuals, significant flaws in the said legal framework have resulted in shortcomings regarding the procedural obligation to investigate and prosecute. Subsequently, individuals end up by being deprived from the protection they are entitled to.[301] Stoyanova points out that when the deficiencies of the national regulatory framework result in human rights abuses, the claims of individuals 'relate to a general failure by the state, which once identified should lead to changes in the national legislation such as to achieve a satisfactory level of general prevention so that future abuses are averted'.[302] In terms of regulatory spheres that come under scrutiny, she claims that the State's failures can be reduced to four categories:

(i) total absence of regulatory framework when there should be one;
(ii) inadequacies of the rules in the existing legal framework, which means that the rules do not comply with certain qualitative standards;
(iii) practical ineffectiveness of the legal framework and
(iv) enactment of flawed legislation.[303]

The rationale behind the obligation to put in place an adequate legal and administrative framework is that 'the effective protection of human rights often requires more than mere ad hoc responses to human rights claims, as human rights protection then risks depending solely on wide discretionary powers of particular State authorities'.[304] Put in simple terms, the adoption of relevant legal rules effectuates the protection of the rights and freedoms enshrined in the ECHR in the relation between the individuals and the State as well as amongst private actors themselves.[305] The obligation comes into prominence even more in relation to the latter interaction (private actors themselves) as they 'are not bound by an international legal obligation to refrain from infringing human rights, the State must put in place binding domestic law to deter them from doing so'. For example, the criminalisation of the unlawful taking of life (murder) is a positive obligation of the State which regulates and affects directly the behaviour of individuals. Thus, in certain situations the preventive measure of regulating the behaviour of private

[300] *Soderman v. Sweden* (n273), para 91.
[301] *M.C. v Bulgaria* (n82).
[302] Stoyanova *Human Trafficking and Slaver Reconsidered:…* (n242), 370.
[303] Stoyanova *Human Trafficking and Slaver Reconsidered:…* (n242),371.
[304] Lavrysen (n275), 119.
[305] Stoyanova *Human Trafficking and Slaver Reconsidered:…* (n242),370.

actors in advance constitutes a *conditio sine qua non* in enabling the effective protection of human rights. [306]

On the topic of the co-dependency between these two types of positive obligations (substantive and procedural), it must be stressed that there have been cases where the Court has found that a defect in the substantive action to put in place a regulatory framework can play a part in the assessment of violations of procedural aspect, as well as the other way around. A defect in procedural actions, i.e. steps taken to implement the regulatory framework can impair its effectiveness, thus resulting in the State's failure to comply with its substantive obligations.[307]

4.3.1 Criminal Law v. Non-Criminal Law Context

The realm of national criminal-law provisions constitutes an important chunk of any domestic regulatory frameworks that discharge the positive obligations of states. Given the context of this thesis an important caveat is that considerations regarding any positive obligations will be mainly linked with the application of the criminal law. Nonetheless, it is important to emphasise that the legal protection of individuals is not confined within criminal law provisions, on the contrary the Court has reiterated the necessity of relying on the criminal law as 'a last resort' that 'calls for a certain degree of "restraint"' when using it.[308]

Mowbray asserts criminalisation as a suitable avenue of safeguarding the rights and freedoms of individuals from the infringing actions of other individuals:

> [o]ne of the most prevalent types of positive obligation is the duty upon states to take reasonable measures to protect individuals from infringement of their Convention rights by other private persons. At its most basic level this positive obligation may be satisfied by the respondent state having adequate domestic legal provisions criminalizing the conduct which threatens another's Convention rights.[309]

Judging from the ECtHR's case law, what determines recourse to the criminal law as the most suitable avenue of protecting the rights under the Convention is the nature of the threat to human rights. Along these lines, in asserting the offensive role of human rights Tulkens claims that:

> [i]n certain situations, the very purpose of the criminal law is emphasized. Where the ECtHR is confronted with extreme situations (disappearances, extrajudicial executions, terrorism, rape, etc.), the

[306] Lavrysen (n275), 119.
[307] *Tanis and Others v. Turkey* App. No. 65899/01 (ECtHR 2 August 2005); Akandji-Kombe (n185),17; Lavrysen (n275),116.
[308] *M.C. v. Bulgaria* (n82) Concurring opinion of Judge Tulkens; Stoyanova (n242),370.
[309] Mowbray, *The Development of Positive Obligations* (n247), 225.

> criminal option is felt to be the best way of satisfying the need to protect/highlight the fundamental values of society.[310]

The Court's case law requires recourse to criminal law for offences against the right to life, physical integrity or sexual integrity as long as the infringement happened intentionally.[311] Au contraire, in cases where such killings were not caused intentionally the Court has held that 'the positive obligation to set up an "effective judicial system" does not necessarily require criminal proceedings to be brought in every case and may be satisfied if civil, administrative or even disciplinary remedies were available to the victims'.[312] Similarly in terms of Article 3, the Court has found that as long as the violence inflicted attains the minimum level of severity as required by said article, it is clear that the implementation of adequate criminal law mechanisms is required.[313] It would appear that the non-criminal context emerges, i.e. criminal law protection is not necessary in cases of unintentional breaches of the right to life under Article 2 or outside the sphere of violence under Article 3.[314]

However, recourse to criminal law goes beyond the State's obligation to put in place adequate criminal law provisions, it rather extends to the procedural obligation of conducting an effective official investigation which secures the adequacy of such frameworks.[315] In terms of this, Tulkens claims that 'criminal proceedings would appear to constitute par excellence the most appropriate remedy for satisfying the procedural requirements of Article 2 ECHR in particular'.[316] A recourse to criminal law is even more enhanced in certain cases where criminal proceedings are proclaimed to lead to the identification and punishment of perpetrators. In *Khashiyev and Akayeva v. Russia* the Court established that in cases of fatal assaults, the obligation of States under Article 2 'might be rendered illusionary' if individuals are only afforded civil actions. Accordingly, the Court found that 'a civil action is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings as to the perpetrators of fatal assaults, and still less to establish their responsibility'.[317]

It appears that the positive obligations under Article 2 and 3 of the Convention have contributed in enhancing the offensive role of human rights when using criminal law, placing various requirement on States to criminalise, investigate and prosecute intentional harmful acts. By doing so they have indoctrinated 'a shift from a

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[310] Tulkens (n15), 589.
[311] Tulkens (n15) ,589.
[312] *Öneryıldız v. Turkey* [GC] (n280), para.92
[313] *Beganovć v Croatia* (n265), para 69.
[314] Lavrysen (n275), 123.
[315] *Paul and Audrey Edwards v. the United Kingdom* App. No. 46477/99 (ECtHR 14 March 2002), para.69.
[316] Tulkens (n15), 591.
[317] *Khashiyev and Akayeva v. Russia* App. No. 57942/00 and 57945/00 (ECtHR 24 February 2005), para.121.

conception of rights as a limitation on state action to one which views rights as a demand for such action'.[318]

4.3.2 Criminalisation

The right to life as enshrined under Article 2(1) ECHR acknowledges that 'Everyone's right to life *shall be protected by law'*. The phrase "shall be protected by law" provides a distinctive feature to this article as it 'expressly places a substantive positive obligation'[319] on the State 'not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.[320] The endowed case law of the Court has elaborated various actions that ought to be taken in order for this right to be protected. However, the duty to put in place effective criminal law provisions is of a paramount concern. According to the Court's settled case law:

> [t]he Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[321]

Consequently, the obligation of State to ensure the enactment of criminal law as well as its enforcement in order to protect the individual's right to life from deprivation, entails the State's duty to provide security to said individual by censuring 'those who attack or endanger those rights'.[322] As Ashworth explains, 'such laws (criminal laws) are justifiable both as censuring those who commit such egregious wrongs and as a form of deterrence to minimise the occurrence of those wrongs'.[323] Thus, such a duty illustrates an offensive role of human rights in using criminal law as an instrument of deterrence as it signals to potential future perpetrators that if they do not comply with specific criminal law provisions, they shall be punished. On the correlation between this positive substantive obligation and deterrence, it has been pointed out that criminalisation is not concerned with specific deterrence since often the abuse has already taken place and the victim

[318] Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Lucia Zedner and Julian V Roberts (eds) *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press 2012), 136.
[319] Akandi-Kombe (n185), 21.
[320] *Osman v. the United Kingdom* [GC] (n25), para. 115.
[321] *Kilić v. Turkey* (n50), para.62; *Mahmut Kaya v. Turkey* App. No. 22535/93 (ECtHR 28 March 2000), para.85.
[322] Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing Limited 2003), 212.
[323] Ashworth, *Positive Obligations in Criminal Law* (n322), 213 (emphasis added).

cannot be shielded from it. [324] Conversely, this obligation entails traits of general deterrence since the victim claims to be 'a representative victim of the state's failure to achieve a satisfactory level [of general deterrence] against the offence in question'.[325]

Article 3 on the other hand, is construed in a prohibitive manner and the substantive obligation and the assertion of a substantive positive duty to set in place effective criminal law provisions is 'mainly judge-made'.[326] In order to establish the jurisprudential foundation of the positive obligations of States to safeguard individuals from a serious ill-treatment caused by both state agents and private individuals, [327] the Court has made use of the combination of Article 3 with Article 1. For example, in the case of *A. v. the United Kingdom* the Court approached the question of whether the State was under a positive obligation in the following manner:

> [t]he Court considers that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.[328]

On this note the facts of the case *A. v. the United Kingdom* may be recited briefly. The stepfather of a nine-year-old boy was prosecuted for assault constituting bodily harm due to hitting the boy with a garden cane as a form of disciplinary punishment. However, he was acquitted by the jury as his actions were qualified as 'lawful chastisement'- a common law tradition where the parent is entitled to use force for disciplinary purposes so long they are perceived as reasonable.[329] The Court held that the State's failure to 'ensure effective criminal punishment for the ill-treatment of a child by his stepfather'[330] derived from a law that was used as a defence against such charges under the excuse of "reasonable chastisement".[331] Thus, the Court concluded that the abovementioned law 'did not provide adequate protection to the

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[324] Stoyanova, *Human Trafficking and Slaver Reconsidered:…* (n242), 332.
[325] J Rogers 'Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings'(2003) *Criminal Law Review* 690,695 (emphasis added).
[326]Akandji-Kombe (n185), 21.
[327]Mowbray, *The Development of Positive Obligations…* (n247), 44.
[328] *A. v the United Kingdom* App. No. 100/1997/884/1096 (ECtHR 23 September 1998), para 22.
[329] *A. v the United Kingdom* (n328), para.14.
[330] Tulkens (n15), 585
[331] *A. v the United Kingdom* (n328), para 23.

applicant against treatment or punishment contrary to Article 3'.[332] Furthermore, no discussion took place in the judgment on 'whether the protection of criminal law was required' and the Court assumed that "effective deterrence" could be provided only by adequate criminal-law provisions.[333] Therefore, it seems that this case exemplifies a scenario where the Court decided that the State's criminal arm was not strong enough to prevent and punish breaches of this fundamental right. As Mowbray explains:

> [I]n this case it appears that the Court envisaged the need for more extensive criminal law prohibitions on the use of corporal punishment by parents in respect of their children. Hence the enactment and enforcement of adequate criminal law offences safeguarding the physical (and psychological) well-being of individuals may be one form of action required by this Convention duty.[334]

4.3.3 The Correlation of Criminalisation with the Principle of Legality

From what has been entailed so far it is safe to say that it is a well-established premise that the Court has foregrounded an array of positive obligations under Articles 2 and 3 of the Convention. However, when determining cases under Article 7 (principle of legality) that epitomizes the requirement to define crimes clearly, the Court does not speak of positive obligations. Consequently, the question remains- why have I opted to incorporate case law within the ambit of this article and how does it interplay with the positive obligations to investigate and prosecute? Put in simple terms, providing clear margins of crime definitions assist the State to discharge properly its procedural obligations to investigate and prosecute.

The maxim *"nullum crimen sine lege, nulla poena sine lege"* constitutes the backbone of criminal law as it embodies the imperative that all criminal offences and sanctions must be stipulated by law, otherwise the conviction of the individual will be considered unlawful and arbitrary. Since my thesis compartmentalizes the dynamics between two institutions of separate legal realms, I believe it to be important to pinpoint their conceptualisation of this principle. The proponents of the 'Identity Crisis Theory of International Criminal Law' proclaim the oxymoron attitude of ICL regarding its assertion and commitment in applying the law strictly on the one hand and expanding it on the other. Robinson points out an 'overt contradiction' in ICTY's claim of its inclination to comply with those rules that are 'beyond any doubt customary law' and at the same time expand the boundaries of ICL.[335] The ICTY Statute does not provide for an exclusive codification of clear-cut definitions of crimes and thus leaves room for the expansion of definitions of crimes through judicial interpretation. For example, the phrase "shall include, but

[332] *A. v the United Kingdom* (n328), para 24.
[333] Ashworth, *Positive Obligations in Criminal Law* (n322), 201.
[334] Mowbray, *The Development of Positive Obligations* (n247), 44.
[335] Robinson (n145), 946.

not limited to" provided by Article 3 concerning violations of the laws and customs of war indicates expansion. However, in the *Delalić Judgment* the Trial Chamber (ICTY) clarified that since the tribunal was created by a non-legislative body (Security Council) it 'cannot create offences' and its task concerns of applying existing law. Accordingly, the Security Council:

> [V]ests in the Tribunal the exercise of jurisdiction in respect of offences already recognised in international humanitarian law. *The Statute does not create substantive law*, but provides a forum and framework for the enforcement of existing international humanitarian law.[336]

Consequently, the process of expansion means that the judicial interpretation is refrained within the contours of positivism because it is performed by "drawing out" from the latent part of the rule which is "uncovered" through adjudication.[337] The ICTY has recognized this process to be of paramount importance in terms of the principle of legality 'so that the problem of adherence of […] States to specific conventions does not arise*'.*[338] It can be deduced that the ICTY has implicitly recognized the need of a stringent compliance with the principle of legality in order to avoid its cases ending up in the hands of mechanisms such as the ECtHR.

It appears that from the criminal law side of the spectrum, the principle of legality is rock solid and does not celebrate any expansive interpretation of norms.[339] On the other hand, the ECtHR has shown a determined inclination on respecting the principle of legality as a precondition to protect the rights of the accused. It has held that the requirement of clear definition of offences in the law is satisfied where:

> [T]he individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable.[340]

Even though it has held that 'criminal law must not be extensively construed to an accused's detriment',[341] the Court has shown inclination of expansive tendencies of interpretation regarding this principle. Since many laws are couched in vague terms, in order 'to avoid excessive rigidity and to keep pace with changing circumstances'[342] judicial interpretation is proclaimed to be inevitable. Therefore,

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[336] *Prosecutor v. Delacić* (Trial Chamber Judgment) IT-96-21-T, International Criminal Tribunal for the former Yugoslavia, 16 November 1998, paras. 415-417 (emphasis added).
[337] H.L.A Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 *Harvard Law Review*, 612.
[338] *Prosecutor v. Delacić (n 336)*, para.415.
[339] Stoyanova, *Human Trafficking and Slaver Reconsidered…* (n242), 336.
[340] *Korbely v. Hungary* (n232), para 70.
[341] *Korbely v. Hungary* (n232), para 70.
[342] *Kokkinakis v. Greece* App. No. 14307/88 (ECtHR 25 May 1993), Para. 40.

the Court has embraced the fact that judicial interpretation is indispensable for the clarification of the elements of crimes and criminal liability and consequently the principle of legality cannot outlaw the 'progressive development of the criminal law'.[343]

A clarification is in order here. When talking about expansive interpretations of the principle of legality, this is not to mean that the approach of international criminal tribunals does not leave room for novel interpretations of crimes or culpability that put in question their compliance with legality[344], or that the approach of the ECtHR is liberal to the point that it infringes the principle legality. It means that international criminal tribunals on the one side and the ECtHR on the other, function in two different regimes with separate purposes and objects, therefore they are inclined to have different perceptions.[345] This naturally factors their divergent approaches and becomes especially evident when the ECtHR opts for a broader interpretation regarding the elements of crime than the ICTY, which as a specialized criminal court is better suited to make such determinations.

4.4 The Obligation to Investigate

Within the framework of this thesis, the most protuberant point of connection between the two regimes is the positive obligations of States that require the investigation and prosecution of crimes. The bypass-technique of ICL which enables international tribunals to investigate without recourse to domestic authorities entails a protective mechanism when States cannot or do not want to illuminate these cases procedurally. However, the ECtHR scrutinizes State Parties to the ECHR to abide by these positive obligations as an extended form of human rights protection.

The case law of the ECtHR has been very dedicated in creating 'an expanding range of implied duties of effective investigation by domestic authorities'[346] that are triggered under certain conditions due to the allegations 'that individuals have been subjected to criminal forms of abuses'.[347] This obligation has been extensively elaborated in terms of both the Right to life (Article 2) and the Prohibition of torture (Article 3). The ECtHR has recognized that the procedural obligation to investigate

[343] *Korbely v. Hungary* (n232), para 71.
[344] There have been cases where international criminal tribunals have encompassed certain actions of perpetrators as a criminal offence through judicial interpretation, but with an important caveat that said interpretation is confined within the principle of legality. See, Situation in the Democratic Republic of the Congo in the Case of the *Prosecutor v. Bosco* "Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" No. ICC-01/04-02/06 OA, ICC 15 June 2017.
[345] Stoyanova *Human Trafficking and Slaver Reconsidered…* (n242), 336.
[346] Alastair Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 *International and Comparative Law Quarterly* 437, 447.
[347] Stoyanova, *Human Trafficking and Slaver Reconsidered:…* (n242), 351.

in terms of Article 2 and 3[348] constitutes a separate and autonomous duty under the Convention[349] and that the public interest in obtaining prosecution and convictions of perpetrators is even more accented in the context of war crimes and crimes against humanity.[350]

In the context of Article 2 this obligation was implied first in the *McCann v United Kingdom,* [351] where it was held that an effective investigation should take place when the use of force by agents of the State has resulted in the unlawful death of the individual.[352] Additionally, the duty to investigate became prone to an extensive array of requirements through the Court's case law, extending this obligation to various situations. For example, the State is also under an obligation to investigate even if the killing is caused by private individuals[353] as well as in those situations where a person who was last seen in the custody of the State [354], has disappeared (enforced disappearances context) and 'it has not been conclusively established that (a person) has been unlawfully killed'.[355] The Court has held that once authorities become aware that a person has been killed or a disappeared under life-threatening circumstances, their obligation to investigate such deaths and disappearances are triggered:

> [T]he mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.[356]

Consequently, the State's responsibility is engaged if it does not undertake the necessary investigative steps, or in the absence of a plausible explanation why such steps were not taken after the alleged criminal abuses have come to its attention.[357]

4.4.1 The Correlation of the Obligation to Investigate with the Principle of Legality

In the abovementioned judgment *McCann* the Court stated that 'a general prohibition of arbitrary killings […] would be ineffective, in practice, if there

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[348] *Silih V. Slovenia* [GC] App. No.71463/01 (ECtHR 9 April 2009), para 153: *B. v. the United Kingdom* App. No. 16580/90 (ECtHR 8 July 1987), para. 63, Series A no. 121; *M.C. v. Bulgaria*, (n82), paras. 148-153; and *Cyprus v. Turkey* [GC] (n184), para. 147.
[349] *Silih v Slovenia* [GC] (n348), para.159, para 153.; *Assenov and Others v. Bulgaria* App. No. 24760/94 (ECtHR 28 October 1998) para. 102.
[350] *Brecknell v the United Kingdom* App. No. 32457/04 (ECtHR 12 December 2007), para 69.
[351] *McCann and Others v. the United Kingdom* [GC] App. No.18984/91 (ECtHR 27 September 2005).
[352] *McCann and Others v. the United Kingdom* [GC] (n351), para.161.
[353] *Ergi v Turkey* App. No. 23818/94 (ECtHR 28 July 1998), para 82.
[354] *Cyprus v. Turkey* (n184), para 132.
[355] Mowbray, *The Development of Positive Obligations…* (n247), 28.
[356] *Ergi v Turkey* (n353), para 82.
[357] *Velikova v. Bulgaria* App. No. 41488/89 (ECtHR 18 May 2000), para 82.

existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities'.[358] This means that the purpose behind the duty to conduct an effective investigation 'forms part of a broader obligation',[359] and seeks to secure 'the effective implementation of the domestic laws'[360] in order to reinforce the substantive rights of the Convention'.[361] Additionally, the Court has pronounced holding perpetrators accountable for unlawful deaths as another purpose that necessitates domestic inquires.[362] This evidently heightens the offensive role of human rights in using the criminal law.

Since the investigative requirement plays a central role within the realm of positive obligations, this highlights the importance of the substantive obligation of States to incorporate provisions that proscribe both ordinary crimes and international crimes into their national system so that they can investigate all actions that derive thereof and constitute violations of human rights as dictated by the ECHR.[363] Due to their horrendous nature there is an overwhelming trend of proscribing international crimes in domestic systems, therefore the substantive obligation to have effective and discerned criminal law provisions in place plays a role in determining the effectiveness of procedural obligations under the ECHR. In the context of my research its role is twofold. First, it enables the State to conduct a proper and effective investigation therefore it provides the victim with access to justice (truth). Second, succinct legal provisions strengthen the principle of legality thus nurturing the rights of the accused on the long run. Under the auspices of the principle of legality (Article 7) lies the need to set up 'an appropriate legal basis for individual criminal responsibility for international crimes at national level'.[364].

4.4.2 Requirements for an Effective Investigation

The Court has asserted that there are no uniform standards to pinpoint by default an effective investigation because 'it is not possible to reduce the variety of situations which might occur to a bare check list of acts of investigation or other simplified criteria'.[365] Nonetheless, it has discerned certain institutional and procedural requirements that are beacons of an effective investigation. An effective investigation is independent, prompt and 'capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances […] and to the identification and punishment of those responsible'.[366]
In the context of Article 3 the Court has also elaborated the procedural obligation to investigate in those situations 'where an individual raises an arguable claim that

[358] *McCann and Others v. the United Kingdom* [GC] (n351), para 161.
[359] Akandji-Kombe (n185), 32.
[360] *Brecknell v. the United Kingdom* (n350), para 65.
[361] *Silih v Slovenia* [GC] (n348), para 159.
[362] *Kelly and Others v The United Kingdom* App. No. 30054/96 (ECtHR 4 May 2001), para.46.
[363] Hofmański (n167), para 4.
[364] Hofmański (n167), point 4.
[365] *Velikova v Bulgaria* (n357), para 80.
[366] *Kelly and Others v. the United Kingdom* (n362), paras.95-97.

he has been seriously ill-treated'.[367] The question whether States have complied with such a procedural obligation is raised after the Court decides if a certain treatment falls within the scope of Article 3. Furthermore, the requirement to investigate is imposed when allegations of ill-treatment are "arguable" and "raise reasonable suspicion" regardless if the treatment has been caused by state agents or private individuals. [368]

Congruently as with the investigative requirement under the Right to life, also in terms of Article 3 it has been established that the investigation should be utilised to identify and punish the perpetrator, otherwise this provision proves to be ineffective:

> [t]his obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance […] would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[369]

4.5 The Indistinct Obligation to Prosecute

Unlike the explicit obligation to conduct an effective investigation, the duty to prosecute has not been clearly stated as an obligation.[370] The Court has clarified that there is no right to have someone prosecuted or sentenced for a criminal offence, nor 'for all prosecutions to result in conviction.'[371] However, it has been implied in between the lines that the failure to prosecute can lead to a violation of the Convention:

> [t]he fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative.[372]

By asserting that 'the national court should not under any circumstances be prepared to allow life endangering offences and grave attacks on physical and moral integrity to go unpunished',[373] the Court openly shows its inclination on not tolerating impunity for certain criminal abuses. However, the Court avoids asking

[367] *Assenov and Others v Bulgaria* (n349), para 102.
[368] *Beganovi/ v. Croatia* (n265), para 66.
[369] *Assenov and Others v Bulgaria* (n348), para 102.
[370] Stoyanova, *Human Trafficking and Slaver Reconsidered…* (n242), 368.
[371] *Öneryıldız v. Turkey* [GC] (n280), para.96.
[372] *Öneryıldız v. Turkey* [GC] (n280) , para.93.
[373] *Ali and Ayse Duran v. Turkey* App. No. 42942/02 (ECtHR 8 April 2008), para.61.

the question of whether those responsible for criminal abuses are prosecuted by the respondent state and shifts the focus to whether the domestic authorities were determined to prosecute.[374] The issue of such determination 'might involve review of whether there had been in fact prosecutions and sanctions'.[375]

4.6 Conclusion

This chapter discussed how the Court defines the content and scope of positive obligations. Relevant principles and tests were touched upon to understand the justification of these obligations that come in the form of impositions on state sovereignty. The exertion of providing an overview on the concept of positive obligations was done with the intention to shed some clarity regarding the Court's practice in developing these obligations, however with the caveat of when it mainly focuses on the criminal context. I consider such an overview to be relevant for a comprehensive understanding regarding the next chapter that concerns some chosen cases where the ECtHR makes use of ICTY's rationales and the impact it has on the procedural obligation to investigate and prosecute.

[374] *Öneryıldız v. Turkey* [GC] (n280), para.68.
[375] Stoyanova, *Human Trafficking and Slaver Reconsidered…* (n242), 367-368.

5 Selected Case Law Analysis

5.1 Patterns of Judicial Referral

In the last few decades a phenomenon which has become very prominent is that of international criminal tribunals burgeoning and enriching the field of ICL. Some of the reasons which have induced the inevitability of the interface between the IHRL and ICL regimes, and by extension that between their judicial mechanisms, have already been elaborated in Chapters 3 and 4. As already emphasised, the Strasbourg Court's reliance on the jurisprudence of the ICTs pales in comparison if one considers the abundance of cases where the ICTs have used ECtHR's jurisprudence. A crucial reason among the many other that might explain this, and of which I do not intend to give a full elaboration, is the fact that most ICTs came into existence long after the ECtHR had already developed its standards.[376] Nonetheless, the Court has resorted occasionally to the sources and case law of ICTs and despite their variety, the reliance on the jurisprudence of ICTY is the most notable among the others.

Before dwelling into the case law analysis, it is important to accentuate that ECtHR's reliance is not always uniform. As one of its very own judges Erik Møse underlines 'some judgments contain international criminal-law references in the factual or comparative parts but not in the reasoning'.[377] On this note, from the Court's case law one can infer two patterns of referral- one is in the factual/comparative and the other in the reasoning. To give an example of the former category, in the facts of the *Palić v. Bosnia and Herzegovina*[378] case the Court explained the practice of the third category of joint criminal enterprise as set out in the ICTY's *Tadić* case, however, it did not consider it necessary to mention it in the reasoning.[379] Thus, in cases where ICTY's jurisprudence has no input on the reasoning of ECtHR's case law, one cannot speak of a proper judicial influence.

The cases that I have chosen for this thesis fall into the latter category, i.e. where the referral to the ICTY's jurisprudence is embedded in ECtHR's reasoning. In such occurrences the judicial influence becomes eminent because ICTY's jurisprudence as an external source is used by the ECtHR as a part of the decision reaching process of whether the Convention has been breached. Consequently, one can distinguish between situations where a referral is made mainly to the Statute of the ICTY, its

[376] Erik Møse, 'Comments on Judicial Dialogues between Courts Confronting International Crimes' (Dialogue between judges, European Court of Human Rights, Council of Europe 2016), 2,5.
[377] Møse (n376), 2.
[378] *Palić v. Bosnia and Herzegovina* App. No. 4704/04 (ECtHR 15 February 2011).
[379] *Palić v. Bosnia and Herzegovina (n378), pa*ra 30; Møse (n376), 2.

case law or both. Reliance on the Statute is explained by judge Møse in the following way:

> [I]t is not surprising that the first references to international criminal courts mainly consisted in mentioning their statutes. Of necessity, it took some time for those courts to develop case-law which could be of relevance in the Strasbourg context.[380]

Even though in all such scenarios one can notice ICTY's imprint, and by extension that of ICL, the Court's reliance on ICTY's case law embodies an even stronger influence as cases are heavily dictated by ICTY's own judicial interpretation. However, a difference must be made in terms of utilisation, i.e. between the utilisation of this external source to make a finding as opposed to supporting a finding.

5.2 Competing Standards on Crime Definition: The Case of *Jorgić v. Germany*

The case of *Jorgić v. Germany* is emblematic because the ECtHR had to deal with the definition of the crime of genocide whose precise denotation of elements have spurred a debate among international criminal tribunals and scholars as well. On one side, the claim stands that the crime of genocide occurs only if the acts of the perpetrators intend to destroy a group in a physical-biological context. On the other side, the proponents of a broader definition claim that the sole social destruction of the group is enough. It should be borne in mind that I do not intend to dwell on or settle these controversies. However, since the physical-biological v. social paradigm plays a crucial role in this case, it is important to swiftly touch upon it.

The Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention) was the first international instrument marking the definition of this crime. Conduct is punishable as genocide if there is special intent to destroy in whole or in part national, ethnical, racial or religious groups through certain proscribed acts.[381] This definition forms part of customary international law and is considered jus cogens,[382] and as such has been incorporated in the Statutes of international criminal tribunals, including the ICTY.[383] The protected interest that the prohibition of genocide strives to elucidate is the 'groups' right to exist'.[384] The similes used by the UN General Assembly Resolution 96(1) rings true on this note - 'genocide is a denial of the right of existence of entire

[380] Møse (n376), 5.
[381] UN General Assembly, *Prevention and punishment of the crime of genocide*, 9 December 1948, A/RES/260 Article II (Genocide Convention).
[382] International Court of Justice, *Armed Activities on the Territory of Kongo (Democratic Republic of Congo v Rwanda)*, 3 February 2006. para 64.
[383] ICTY Statute (n191) Article 4(2).
[384]Gerhard Wehler and Florean Jessberger, *Principles of International Criminal Law* (3rd edition Oxford University Press2014), 294.

human groups, as homicide is the denial of the right to live of individual human beings'.[385]

The debate regarding what constitutes the destruction of a group has proven to be a convoluted issue amongst ICTs themselves as well as scholars. The stance that the definition of genocide encompasses protection against the annihilation of the physical-biological existence of the group is uncontroversial.[386] However, tribunals and scholars have been divided on the point of whether this definition incorporates the protection of the group as merely a social unit i.e. whether acts of 'expulsion or dispersion of the group through systematic destruction of their awareness of belonging together, or through elimination of the group's intellectual or political leadership'[387] constitute as genocide. On this note, the ICTY in the *Krstić* judgment rejected the concept of social destruction solely being sufficient to constitute genocide. Moreover, social destruction can be used as 'evidence of an intent to physically destroy the group'. Its standpoint has been emphatic:

> [c]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[388]

5.2.1 Facts of the Case, the Decision and Case Relevance

The German Courts convicted Nikola Jorgić of, inter alia, murder and genocide and the ill-treatment of Bosnian Muslims in 1992 because he 'had set up a paramilitary group, with whom he had participated in the ethnic cleansing ordered by the Bosnian Serb political leaders and the Serb military'.[389] The conviction was based on the national court's interpretation of the crime of genocide, according to which the genocidaire special intent to "destroy a group" covered the 'destruction of the

[385] UN General Assembly, *United Nations General Assembly Resolution on the Crime of Genocide* 96(1), 1946, 188.
[386] Wehler (n384), .294.
[387] Wehler (n384) footnote 36, 294.
[388] *Prosecutor v. Krstić* (Trial Chamber Judgment) IT-98-83-A, International Criminal Tribunal for the former Yugoslavia, 1 August 2001, para.580
[389] *Jorgić v. Germany* (n231), paras. 15-16.

group *as a social unit* in its distinctiveness and particularity and its feeling of belonging together' therefore 'a biological-physical destruction was not necessary' for a person to be convicted.[390]

The complaint of the applicant was two-fold. He first claimed that the German courts were debarred from exercising jurisdiction, i.e. lacked jurisdiction because the principle of universal jurisdiction 'was not recognised internationally in the case of genocide'[391] and this meant that his rights under Article 6 and 5 ECHR were breached. Then, he claimed the way the crime of genocide as construed in German law as well as public international law did not coincide with the wide interpretation adopted by the German Courts, therefore he was arbitrarily convicted, and this constituted a violation of Article 7 of the Convention.[392] Explained more intrinsically, he asserted that according to the national law the "intent to destroy" requirement could not be satisfied by 'a mere attack on the living conditions or the basis of subsistence of a group' since the "ethnic cleansing" of Bosnian Muslims was carried out with the intention to expel the group from the region, not destroy them.[393] Additionally a conviction based on actions that aimed to destroy the group as a social unit did not comply with the internationally accepted doctrine according to which genocide encompassed only the destruction in a biological-physical sense. For reasons stated above the applicant was unable to foresee that his acts 'would qualify as genocide under German or public international law'.[394] The Court ultimately found that the German authorities 'had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide'.[395] Furthermore, the interpretation of genocide as provided by them was consistent with the essence of the offence as entailed by international law and could be foreseen by Jorgić.[396]

The relevance of this case in terms of my thesis is two dimensional. First, in reaching both conclusions the Court used a comparative method of interpretation, utilising inter alia the jurisprudence of ICTY. Albeit, if we talk about a non-divergent reliance, it only relied on said jurisprudence regarding the first ground (universal jurisdiction). The second reason is inferred from one of the focal points of this case, i.e. how was Article 7 impacted by the German Court's interpretation on the definition of the crime of genocide. Here we come across a point of interaction between IHRL and ICL that is proven by the fact that throughout its reasoning, the ECtHR used various ICL sources to reach its decision. Looking at this case in light of my research question, the second part of the complaint proves to be relevant as it is linked to an alleged breach of the principle of legality.

[390] *Jorgić v. Germany* (n231), para 18 (emphasis added).
[391] *Jorgić v. Germany* (n231), para 58.
[392] *Jorgić v. Germany* (n231), para.89.
[393] *Jorgić v. Germany* (n231), para.92.
[394] *Jorgić v. Germany* (n231), para.93.
[395] *Jorgić v. Germany* (n231), para.70.
[396] *Jorgić v. Germany* (n231), para. 114.

Nonetheless, I will touch upon the first ground of complaint as well because it entails judicial influence by the ICTY and exemplifies ECtHR's assertion on using criminal law as the most optimal avenue to safeguard rights. (the offensive role of human rights)

5.2.2 The Input of the ICTY in establishing Jurisdiction

To settle the first part of the applicant's complaint, the Court had to answer the question of whether Articles 5 and 6 of the Convention were breached. In the context of the primary/preliminary question technique as discussed previously in Chapter 2, this would constitute the primary question because its answer coincides with ECtHR's ultimate task of concluding a breach under the Convention. Consequently, it required the quest of unfolding whether the national courts had jurisdiction to try Mr. Jorgić, i.e. answering the preliminary question without which the fulfilment of the ultimate task could not be conducive. Unfolding this preliminary question consisted of two separate steps. First, the ECtHR needed to conclude whether the domestic law of Germany gave discretion to its courts to try alleged perpetrators for the crime of genocide that was not committed in the territory of Germany, regardless of the perpetrator's and victim's nationality. Second, even if the national law permitted such a thing it needed to be ascertained whether the decision that courts had jurisdiction complied with the relevant rules of public international law applicable in the country.[397] This resulted from the claim of the national courts that 'their competence under the principle of universal jurisdiction was not excluded by the wording of Article VI of the Genocide Convention'.[398]

In terms of the first issue, by relying on the domestic criminal provisions the ECtHR established that the national law provided for such discretion. To unfold the second issue, an examination of how the German Courts' interpreted Article VI of the Genocide Convention took place, thus the Court had to refer to the rules of international law as external sources. Said article dictates that those charged with genocide 'shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.[399] The Court concluded that the German's Courts assertion of universal jurisdiction based on the Genocide Convention was a 'reasonable and unequivocal interpretation' of Article VI. This conclusion was inferred from Article I of the Genocide Convention that stipulates the '*erga omnes* obligation to prevent and punish genocide':

[397] *Jorgić v. Germany* (n231), paras.64-65.
[398] *Jorgić v. Germany* (n231), para. 67.
[399] Genocide Convention (n381) Article VI.

> [P]ursuant to Article I of the Genocide Convention, the Contracting Parties were under an erga omnes obligation to prevent and punish genocide, the prohibition of which forms part of the jus cogens. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).[400]

Although the second issue, i.e. whether the decision of having jurisdiction complied with relevant rules of international law, was concluded by merely using the Genocide Convention, the ECtHR opted for a comparative method of interpretation by enumerating other external sources, amongst which the Statute and two cases from the ICTY were used. It observed that:

> [T]he German courts' interpretation of Article VI of the Genocide Convention in the light of Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide is widely confirmed by […] the Statute and case-law of the ICTY. […] Article 9 § 1 of the ICTY Statute confirms the German courts' view, providing for concurrent jurisdiction of the ICTY and national courts, without any restriction to domestic courts of particular countries. Indeed, the principle of universal jurisdiction for genocide has been expressly acknowledged by the ICTY […].[401]

The Court relied on ICTY's practice of acknowledging the principle of universal jurisdiction for genocide to strengthen its own line of reasoning. Thus, in this case ICTY's jurisprudence proves to be of an auxiliary nature. ICTY's acknowledgment of universal jurisdiction was deduced from Article 9 of the its Statute, which opens the possibility of concurrent jurisdiction between the Tribunal and domestic courts, as well as from two of its cases *Prosecutor v. Tadić and Prosecutor v. Furundžija.* In the *Tadić* case the universal jurisdiction of international crimes was acknowledged, while in *Furundžija* it was asserted that every State has the right to prosecute and punish perpetrators of genocide by the token that international crimes are universally condemned regardless where they are committed. [402] It is important to point out that the ECtHR conducted no scrutiny upon ICTY's jurisprudence on which it relied as an external source and it "transplanted" its conclusions without any reserves. The interpretation of the Genocide Convention by the ECtHR that States, other than that where the crime of genocide was committed, have jurisdiction to try alleged perpetrators based on the principle of universal

[400] *Jorgić v. Germany* (n231), para.68.
[401] *Jorgić v. Germany* (n231), para.69.
[402] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 62 (Oct. 2, 1995); *Jorgić v. Germany* (n231), paras. 50-51.

jurisdiction, exemplifies ECtHR's stance on ending the impunity of perpetrators. Although, no positive obligation was substantiated in this regard, the mere fact that ECtHR acknowledged the principle of universal jurisdiction can be perceived as an encouragement for States to halt the impunity for the crime of genocide by prosecuting perpetrators.

5.2.3 The Interpretation of the Crime of Genocide: a divergent approach

The applicant complained that the interpretation of the crime of genocide by the German authorities was wide to the effect that it did not comply with international law, therefore arguably breaching his right under Article 7 which embodies the requirement of providing clear definitions of crimes. It is evident that the primary question that needed to be answered was whether Article 7 was infringed. To determine a case of violation/no violation of the Convention the Court needed elucidate the preliminary question that was two-fold. First, a determination needed to be made of whether the interpretation provided by the national courts regarding the genocidal "intent to destroy" was consistent with the offence of genocide as entailed by international law. Bluntly put, the Court had to scrutinize the interpretation that construed the social destruction of the group as an element of the crime of genocide. Next, even if such an interpretation was consistent with international law, a further determination had to be made of whether it had been foreseen by the applicant.[403] To solve this piece of the puzzle, the ECtHR decided to rely on external sources, amongst which the jurisprudence of the ICTY as well.

First, the basis of the domestic court's interpretation needs to be pointed out. It stemmed from Article II of the Genocide Convention that defines the crime of genocide by underlining five different criminal conducts as follows:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

The German Courts decided to incorporate as an element of the crime the destruction of a group as a social unit even if no physical-biological destruction took place, based on the fact that two of the underlying conducts, i.e. imposing measures intended to prevent births within the group and forcibly transferring

[403] *Jorgić v. Germany* (n231), para.103.

children of the group to another group did not require the physical destruction of the group.[404] The ECtHR pointed out that this interpretation of the offence was not narrow,[405] however it concluded to be reasonable based on the fact that the wording of the national provision was construed in light of Article II of the Genocide Convention.[406] To reinforce this decision it also referenced the wide interpretation of the General Assembly Resolution that labelled "ethnic cleansing" as a form of genocide. [407]

What is interesting about ECtHR's endorsement of this interpretation is the fact that it contradicts ICTY's interpretation on what constitutes destruction of a group. In the case of *Prosecutor v. Krstić* [408] the Tribunal eschewed a broad definition and expressly diverged from this wide interpretation of the notion of "intent to destroy". There it was claimed that for an interpretation of the crime of genocide to comply with the principle of legality, it would be only limited to encompassing the physical and biological destruction of a group, thus attacks aiming to destroy the group as a social unit fell outside of its scope. Accordingly:

> [t]he Trial Chamber is aware that it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.[409]

It should be noted that *Krstić*'s deliberation on the definition of Genocide has been influential to the effect that the International Court of Justice (ICJ) relied on it in

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[404] *Jorgić v. Germany* (n231), para.96.
[405] *Jorgić v. Germany* (n231), para.104.
[406] *Jorgić v. Germany* (n231), paras.105-106.
[407] United Nations, General Assembly Resolution 47/121 (no. A/RES/47/121) 1992 alerted: "Gravely concerned about the deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing", which is a form of genocide, ...
[408] *Prosecutor v. Krstić* (n388).
[409] *Prosecutor v. Krstić* (n388), para.580.

the case of *Bosnia and Herzegovina v. Serbia and Montenegro* ("Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide") in order to deliver the message that ethnic cleansing is not a form of genocide.[410]Despite the conclusion that the wide interpretation by the domestic courts was reasonable, in order to conclude on a violation of Article 7 of the Convention, the Court needed to determine whether the offence of genocide was foreseeable by the applicant.[411] Accordingly the Court stated:

> [i]n the present case, which concerns the interpretation by national courts of a provision stemming from public international law, the Court finds it necessary, in order to ensure that the protection guaranteed by Article 7 § 1 of the Convention remains effective, to examine whether there were special circumstances warranting the conclusion that the applicant, if necessary after having obtained legal advice, could rely on a narrower interpretation of the scope of the crime of genocide by the domestic courts, having regard, notably, to the interpretation of the offence of genocide by other authorities.[412]

It was in this part of the puzzle, where among other sources the ICTY jurisprudence was used as well to determine the foreseeability of the offence. ICTY's jurisprudence played a crucial role in determining that Mr. Jorgić 'could have foreseen the domestic courts' interpretation of the crime of genocide'[413], i.e. that his acts could fall within the scope of genocide. The ECtHR concluded that it was inconceivable for the applicant to expect that the German Courts could rely on ICTY's interpretation that only the physical-biological destruction of a group constitutes genocide given the fact that the aforementioned ICTY case law were delivered after he committed the crime.[414] The ECtHR concluded that:

> [T]he national courts' interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time. These requirements being met, it was for the German courts to decide which interpretation of the crime of genocide under domestic law they wished to adopt. Accordingly, the applicant's conviction for genocide was not in breach of Article 7 § 1 of the Convention.[415]

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[410] In *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, International Court of Justice (ICJ), 11 July 1996, para *190 the ICJ held: "*As the ICTY has observed, while 'there are obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"' (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.' ..."

[411] *Jorgić v. Germany* (n231), para. 109.

[412] *Jorgić v. Germany* (n231), para. 110.

[413] *Jorgić v. Germany* (n231), para.109.

[414] *Jorgić v. Germany* (n231), para.112.

[415] *Jorgić v. Germany* (n231), para.114.

The affirmation that domestic courts have the discretion to choose what is the interpretation of the crime of genocide they wish to adopt, is a portrayal of ECtHR's proclivity to not step on the boundaries of the sovereignty of States. It has clearly asserted that 'it is primarily for the national authorities, notably the courts, to interpret and apply domestic law' and that scrutiny of errors of facts and laws is done only if rights under the Convention are infringed.[416] However, the discretion of States is limited by the requirement of national definitions of genocide being consistent with relevant rules of international law as well as that of foreseeability. Opting for the wide approach on the crime of genocide even though the ICTY, a specialized court in international criminal law, as well as most legal scholars have opted for a narrower definition, shows that in the Strasbourg arena there is no tolerance for horrendous acts. As a result, one is inclined to question whether this broad approach relegated the position of the accused. To answer this question, an extensive analysis should be conducted on what the take of most international criminal tribunals on the definition of genocide is, i.e. does it encompass the destruction of the group as a social unit. Looking at it from the ICTY-ECtHR paradigm, the answer would be that this approach relegated Mr. Jorgić's position because if he were to be hypothetically tried by the ICTY, chances are that his actions would have not been qualified as genocide. However, it must be borne in mind that the foreseeability of the crime was established because ICTY deliberated on the case of *Krstić* after Mr.Jorgić had already committed the crime. Could this mean that ICTY's case law can be used as an excuse by applicants to negate the foreseeability for those crimes that have happened *post- Krstić?*

To bring to completion, *Jorgić* exemplifies a case where the ICTY rationales were both accepted and dismissed depending on ECtHR's agenda with the sovereignty of States being the main algorithm. The reliance on this external source served the purpose of supporting the finding that States have a prerogative of trying alleged authors of genocide based on the principle of universal jurisdiction. This means that although States do not have an obligation to prosecute perpetrators for genocide that did not affect them (did not happen in its territory, by its citizens or against its citizens), still there is an entitlement fiercely supported by the ECtHR to pursue such prosecution that consequently enforces the criminal dimension. In dismissing ICTY's rationale the concept of State sovereignty played a crucial role and did not diminish the Tribunal's credibility. Conflicted between two competing definitions of genocide i.e. one provided by the national authorities and the other one by ICTs, the Court evaded the ICTY's definition on genocide, as siding with it would convey that the national courts had made an error in law and in making such a conclusion the Court would overstep its function.

[416] *Jorgić v. Germany* (n231), para.102.

5.3 Consent as an Element of Rape and its Ripple Effect on Law Interpretation: The Case of *M.C. v. Bulgaria*

The congruity of the judgment of *M.C. v. Bulgaria* in terms of this thesis stems from two reasons. The first reason is that apart from being a case concerning the positive obligations of States under Article 3 (considered together with Article 8), it also exemplifies the intertwined dynamic resulting from the substantive v. procedural obligations paradigm and the cascade effect they can have on each-other. A decision was reached that Bulgaria had violated said obligations because:

> [T]he investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.[417]

This brings me to the second reason that pinpoints the relevance of the case. It stems exactly from the fact that the Court's conclusion regarding the State's failure to fulfil its positive obligations was heavily influenced by the "relevant modern standards in comparative and international law"- the ICTY case law being one of the components utilised to establish such standards. Precisely, the account of the comparative and international law trend made by the Court will be my point of departure when analysing this case. My intention is not to give a full account of the case, however in order to get a comprehensible grasp on how and why ICTY's jurisprudence was used and what was its effect, a basic overview of the facts and structure of reasoning is in order.

5.3.1 Facts of the Case and the Cascade Effect of Positive Obligations

The case originated because a fourteen-year-old girl who alleged to have been a victim of rape complained that the domestic law and the practice of the Bulgarian investigative and prosecutorial authorities did not comply with the positive obligations under Articles 3 and 8 'to provide effective legal protection against rape and sexual abuse'.[418] Her allegations of rape were followed by the initiation of a domestic investigation that was subsequently halted by the District Prosecutor on the basis that, inter alia:

> [t]here can be no criminal act under Article 152 §§ 1 (2) and 3 of the Criminal Code, however, unless the applicant was coerced into having sexual intercourse by means of physical force or threats. This

[417] *M.C. v. Bulgaria* (n82), para.185.
[418] *M.C. v. Bulgaria* (n82), para.3.

> presupposes resistance, but there is no evidence of resistance in this particular case.[419]

Consequently, the prosecutorial take on this instance was that without evidence of resistance from the victim, a substantiation could not be made that she was coerced into having sexual intercourse. This means that the prosecutorial stance in cases of rape was that lack of such evidence equated with consensual intercourse. Accordingly, the prosecutor's decision on closing the investigation stated:

> [w]hat is decisive in the present case is that it has not been established beyond reasonable doubt that physical or psychological force was used against the applicant and that sexual intercourse took place against her will and despite her resistance. There are no traces of physical force such as bruises, torn clothing, etc.[420]

An abridged clarification needs to be made here. The problem tackled in this case did not derive from the way the national definition of the crime of rape was framed, but rather how the Bulgarian investigative and prosecutorial authorities interpreted the national law. More specifically the complaint rested on the claim that since the aforementioned authorities interpreted the law in a way that perceived resistance 'as evidence of lack of consent', it was elevated to the status of constituting an element of the crime of rape and consequently certain acts of rape were left unpunished. This meant that rape allegations where resistance could not be corroborated were halted by the prosecution and were disabled from reaching the courts.[421]

The complaints under Article 3 and 8, both of which encompass positive obligations as dictated by the Court's case law, were considered under a common heading. Reiterating principles from its previous case law the Court drew the conclusion that these positive obligations in terms of both articles extend to the substantive obligation of establishing efficient criminal-law provisions, in order to provide 'effective deterrence against grave acts such as rape', as well as to the procedural obligation of conducting an effective official investigation even when the perpetration of crime was conducted by private individuals.[422] Accordingly:

> [o]n that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.[423]

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[419] *M.C. v. Bulgaria* (n82), para.64.
[420] *M.C. v. Bulgaria* (n82), para.65.
[421] *M.C. v. Bulgaria* (n82), para.113.
[422] *M.C. v Bulgaria* (n82), paras.149-152.
[423] *M.C. v Bulgaria* (n82), para.153.

The first building block of the reasoning conveys the preventive aim of positive obligations through the Court's trust in the effectiveness of criminal law as the only deterrent when it comes to the crime of rape.[424] This initial step certainly sets the tone for the rest of the reasoning- it transmits a quality of the offensive role of using criminal law to safeguard human rights. The Court delivered this unequivocal message by considering criminal law as the only suitable remedy in such cases and strayed away from the conviction that the criminal law 'is to be regarded as a last-resort remedy and not as a substitute for other possible solutions'.[425] This concern was highlighted by Judge Tulkens in her Concurring Opinion serving as a reminder of the subsidiary role of the criminal law and the fact that even in the context of positive obligations it should not be overused:

> [a]dmittedly, recourse to the criminal law may be understandable where offences of this kind are concerned. However, it is also important to emphasize *on a more general level*, […], that "[r]ecourse to the criminal law is not necessarily the only answer". I consider that criminal proceedings should remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of "restraint".[426]

5.3.2 International and European Trend on the Definition of Rape

After asserting the importance of establishing and applying an effective criminal law framework, consequently the logical step was to ascertain if the national definition of the crime of rape lived up to the standards required by Articles 3 and 8 to discharge the positive obligations dictated thereof. In a classical manoeuvre to not overstep its function and show respect towards State sovereignty, the Court stated that 'in respect of the means to ensure adequate protection against rape, States undoubtedly enjoy a wide margin of appreciation'.[427] In other words, States have the discretion to choose the way, the means and avenue on how they will fulfil their positive obligations, a doctrine developed by the ECtHR because respective societies have different cultural traditions as well as moral compasses, thus 'perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account'.[428]

However, the platitude established by the Court regarding the domestic margin of appreciation is that it does not grant States with 'unlimited power of appreciation' and 'goes hand in hand with a European supervision'.[429] This means that ECtHR's

[424]Cesare Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria'(2005) 3 *Journal of International Criminal Justice* 447, 456.
[425] Pitea (n424), 456.
[426] *M.C. v Bulgaria* (n82), Concurring Opinion of judge Tulkens, para.2 p.40.
[427] *M.C. v. Bulgaria* (n82), para.154.
[428] *M.C. v. Bulgaria* (n82), para.154.
[429] *Handyside v. the United Kingdom* (n205), para.49.

duty is to ensure that this discretion is reconcilable with the limits of the Convention.[430] An important factor in ascertaining whether the standards stemming from positive obligations are met is by taking into account 'the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved'.[431] The formula is well-known, an evolutive-dynamic approach of interpreting the Convention affords rights that are effective and practical, not theoretical and illusory. This certainly limits State discretion.

The Court's task on ascertaining the evolving convergence regarding the crime of rape is of central importance for my analysis. This constitutes the preliminary question that the Court needed to answer in order to conclude the primary question of whether Articles 3 and 8 of the ECHR were breached. To clarify further, the preliminary issue that needed to be resolved was whether the national definition of the crime of rape complied with how rape is construed according to both the European and international consensus. In order to settle this question, the Court needed to make explicit reference to the external sources that compile said consensus- ICTY's jurisprudence being one among the others. The importance of the consensus lies on the fact that it is used as a tool to prove a prevalent phenomenon in the society despite their differences. On this note, it is a well-entrenched principle in terms of the "margin of appreciation" doctrine that it 'decreases proportionately as a common European standard in a particular area develops'.[432]

In order to establish the prevalent contemporary standard in terms of the penalization of rape, the Court resorted to a multitude of external sources such as the laws of European countries, a recommendation of the Committee of Ministers of the Council of Europe on the protection of women against violence and it resorted as well as on the case law of the ICTY.[433] The standard deduced from the comparative international sources was that there is a 'clear and steady trend in Europe' to abandon the requirement that the victim should resist physically/actively in rape cases. Otherwise, a contrary requirement would constitute a very formalistic and narrow definition. Instead the trend showed that the definition of the crime of rape was consent-oriented. This was the case even in countries where the definition of rape contained references 'to the use of violence or threats of violence by the perpetrator'[434] since focus on non-consent was placed through broad interpretation of 'relevant statutory terms […] and through a context-sensitive assessment of the evidence'.[435]

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[430] Beate Rudolf and Andrea Eriksson, 'Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence' (2007) 5 *International Journal of Constitutional Law* 507, 509.
[431] *M.C. v. Bulgaria* (n82), para.155.
[432] *Christine Goodwin v. The United Kingdom* [GC] (n259), para. 74; Beate (n430), 509.
[433] *M.C. v, Bulgaria* (n82), paras.154-163.
[434] *M.C. v. Bulgaria* (n82), para.159.
[435] *M.C. v. Bulgaria* (n82), paras.156-161.

It would appear that the Court established the standard, hence answered the preliminary question, by relying on the trend deriving from the way European laws defined rape. Accordingly, the question arises of what was the purpose behind the exercise of cross-fertilisation with ICTY's case law?

5.3.3 The Relevance of ICTY's jurisprudence: The Utilisation of Furundžija and Kunarac

The "Relevant Comparative and International Law Practice" part of the judgment contains extracts from two well-known ICTY cases- *Furundžija* and *Kunarac.* The facts of these cases may be recited briefly. In *Furundžija*, the rape and sexual assault against one woman constituting war crimes were the sole charges. The issue rested on the allegation that being present in the premises where the unlawful act of rape committed by his subordinates had taken place and doing nothing to prevent them was enough to accrue the criminal liability of the accused *Furundžija*.[436]. Plainly he 'had encouraged the assault without participating physically'.[437] In an effort to define the crime of rape the Tribunal first established that rape was prohibited by IHL treaty law[438] and its prohibition had evolved into customary international law.[439] It also considered the prohibition of rape from the human rights lens concluding that it was proscribed by 'the provisions safeguarding physical integrity' or torture.[440] The Trial Chamber concluded that 'no definition of rape can be found in international law',[441] and in order 'to arrive at an accurate definition of rape' it resorted to an examination of how national criminal laws from both major systems (common law and civil law) defined rape.[442] Its ultimate conclusion on the prohibition of rape focused on force or threat of force:

> [T]he prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.[443]

The case of *Kunarac* concerned rape as crimes against humanity[444] and its deliberation on the definition of rape had as a starting point the articulation of rape

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[436] *Prosecutor v. Anto Furundzija* (Trial Chamber Judgment) IT-95-17/1-T International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, paras. 39-42.
[437] Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* ((Martinus Nijhoff Publishers 2011), 378; *Prosecutor v. Anto Furundzija* (n436) , para.42.
[438] *Prosecutor v. Anto Furundzija* (n436), paras.165-166.
[439] *Prosecutor v. Anto Furundzija* (n436), para.168.
[440] *Prosecutor v. Anto Furundzija* (n436), paras.170-171.
[441] *Prosecutor v. Anto Furundzija* (n436), para.175.
[442] *Prosecutor v. Anto Furundzija* (n436), paras. 177-186.
[443] *Prosecutor v. Anto Furundzija* (n436), para.186.
[444] *Prosecutor v. Kunarac* (Trial Chamber Judgment) (n 133), para.4.

in *Furundžija*. According to the Trial Chamber the focus on force or threat of force rendered the definition in *Furundžija* too narrow. It noted:

> [i]n stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which, […] is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[445]

In shifting the focus from force to consent, an observation was made that although not included in the final definition, the *Furundžija* case had pointed out based on the survey of the legal systems that 'the basic underlying principle common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim'.[446] Although the focus of both cases when deliberating the definition of rape at first sight seem to differ, their reasoning shared the same basis.

The Relevance of the Furundžija and Kunarac case

In view of the ECtHR, the *Furundžija* case was relevant since it dealt with 'the question whether or not forced oral sexual penetration may be characterised as rape under international law'. [447] Although the Trial Chamber had concluded that 'rape is a forcible act' it also noted that 'force is given a broad interpretation and includes rendering the victim helpless.'[448] The conclusion in *Furundžija* was that rape is defined as 'sexual penetration ... by coercion or force or threat of force against the victim or a third person'.[449] The paragraphs extracted from the *Kunarac* case served to clarify that one of the main assertion in *Furundžija* was not to interpret terms such as "coercion", "force" or "threat of force" narrowly, rather the broad interpretation required that context and delicacy of the situation be accounted. To prove this, the ECtHR resorted to the *following example*- the case of a Muslim Girl who herself initiated sexual contact with Mr. Kunarac- a commanding officer because she was threatened previously by some soldiers. The argument of Mr. Kunarac's defence that 'he was not aware of the fact that the victim had only initiated sexual intercourse with him because she feared for her life' were rejected 'given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls in the region'.[450]

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[445] *Prosecutor v. Kunarac* (Trial Chamber Judgment) (n133), para.138.
[446] *Prosecutor v. Kunarac* (Trial Chamber Judgment) (n133), para.440.
[447] *M.C. v. Bulgaria* (n82), para.102.
[448] *Prosecutor v. Anto Furundzija* (n436), para.174.
[449] *M.C. v. Bulgaria* (n82), para.103.
[450] *M.C. v. Bulgaria* (n82), para.105.

The most relevant conclusion reached by the ICTY was deduced from the examination of the relationship between force and consent in terms of the crime of rape. It clarified that consent is an element of the crime of rape, not the use of force or threats. The element was extracted by the following logic that both the conduct and the intention or knowledge in committing rape were intertwined with the lack of consent- i.e. the 'actus reus of the crime of rape in international law is constituted by ... sexual penetration ... where [it] occurs without the consent of the victim', while 'the *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim'.[451] On this note, the ICTY refused to accredit the argument of the defence, inter alia, that there was no rape without the victim's genuine and active resistance:

> [t]he Appellants' bold assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.[452]

Another crucial observation by the ICTY was that of underlying the necessity of avoiding a narrow interpretation of the notion of force because there are 'factors [other than force] which would render an act of sexual penetration *non-consensual* or *non-voluntary* on the part of the victim'.[453] Additionally, the criminal responsibility of perpetrators for non-consensual sexual intercourse could be evaded, by 'taking advantage of coercive circumstances without relying on physical force'. [454]

On this note, it is important to not bypass the fact that this cross-fertilisation tackled an interpretation of the crime of rape in two different contexts- as a war crime and ordinary crime. The ECtHR explained its justified the relevance of this reliance in the following way:

> [w]hile the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also *reflects a universal trend towards regarding lack of consent* as the essential element of rape and sexual abuse.[455]

Based on all these considerations the ECtHR ultimately concluded that:

> [A]ny rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks

[451] *Prosecutor v. Kunarac* (Trial Chamber Judgment) (n133), para.460.
[452] *Prosecutor v. Kunarac* (Appeals Chamber Judgment) IT-96-23& IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY),12 June 2002, para.128
[453] *Prosecutor v. Kunarac* (Trial Chamber Judgment) (n133), para.438.
[454] *Prosecutor v. Kunarac* (Appeals Chamber Judgment) (n452), para.129.
[455] *M.C. v. Bulgaria* (n82), para.163 (emphasis added).

> leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.[456]

5.3.4 ICTY Jurisprudence as a Basis for Validation

All considerations deriving from the ICTY jurisprudence as an external source were used when the Court assessed whether a breach of the Convention had occurred. As a matter of priority, it clarified that the Court cannot act as an instance of appeal by 'being concerned with allegations of errors or isolated omissions in the investigation'.[457] Namely, its task was:

> [T]o examine whether or not the impugned legislation and practice and their application in the case at hand, combined with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention.[458]

Through this predetermination the objective becomes clear. By assessing the dynamic between substantive and procedural obligations and the cascade effect they have on each other, the Court conveyed a message that it did not intend to treat this case as an isolated one. Rather it would use this case to identify if any shortcomings in the practice of its investigation (procedural obligations) happened as a result of a deficiency or the inability to establish and apply an effective criminal framework (substantive obligation). Such an approach reflects an initiative from the Court to identify and rectify the core of the problem, rather than providing a temporary fix.

After applying scrutiny on the national criminal framework, it was concluded that the problem lied not with the wording of how the crime of rape was defined in the Bulgarian Criminal Code, rather with its interpretation by the domestic authorities.[459] Although the national criminal definition did not differ from most European homologue legislations, the Court noted that 'what is decisive, however, is the meaning given to words such as "force" or "threats" or other terms used in legal definitions'.[460] The conclusion was reached that the interpretation of Bulgarian investigative and prosecutorial authorities was such that it 'put undue

[456] *M.C. v. Bulgaria* (n82), para.166.
[457] *M.C. v. Bulgaria* (n82), para.168.
[458] *M.C. v. Bulgaria* (n82), para.167.
[459] *M.C. v. Bulgaria* (n82), para.170.
[460] *M.C. v. Bulgaria* (n82), para.171.

emphasis on "direct" proof of rape' that basically meant that the requirement of "resistance" was elevated 'to the status of defining element of the offence'.[461]

The conclusion was reached based on the finding that the investigation 'failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made.'[462] Here we can notice the ECtHR mirroring ICTY's remark from *Kunarac* that consent should be 'assessed in the context of the surrounding circumstance'.[463] The reason of the aforementioned failure resulted from:

> [T]he investigator's and the prosecutors' opinion that, since what was alleged to have occurred was a "date rape", in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances.[464]

This reason was concluded to be 'highly significant' because it proved that the ineffectiveness of the domestic investigating authorities activity 'was ab initio tainted by a presumption of consent by the victim, deriving from lack of evidence of her physical resistance'.[465] Additionally, the domestic authorities had bypassed the opportunity to conclude whether the victim had consented by focusing on the question if 'the perpetrators had understood that the applicant had not consented'. Since the practice treated "resistance by the victim" as an element of the crime of rape, due to its absence the authorities could not find an answer to that question.[466] Therefore, a decision was made to halt the investigation.

The ECtHR noted that the core problem was that the investigation and its conclusions were not centred on the issue of non-consent.[467] Consequently, this case depicts the importance of compartmentalizing the elements of crimes, since a misinterpretation of the criminal law can result into a long-standing practice that leaves perpetrators unpunished and victims with breached rights under the Convention. The centrality of the issue on consent seems to have been the incentive for the Court to consider the violation under both articles together. As Judge Tulkens emphasises in her Concurring Opinion, this move was 'important and significant' because:

> [r]ape infringes not only the right to personal integrity (both physical and psychological) as guaranteed by Article 3, but also the right to

[461] *M.C. v. Bulgaria* (n82), para. 182.
[462] *M.C. v. Bulgaria* (n82), para.178.
[463] *Prosecutor v. Kunarac* (Trial Chamber Judgment) (n133), para.460.
[464] *M.C. v. Bulgaria* (n82), para.179.
[465] Pitea (n424), 454.
[466] *M.C. v. Bulgaria* (n82), para.180.
[467] *M.C. v. Bulgaria* (n82), para.181.

> autonomy as a component of the right to respect for private life as guaranteed by Article 8.[468]

From the judgment it can be deduced that sexual intercourse can be a violation of personal integrity under Article 3 if it is non-consensual and this is a violation of sexual autonomy under Article 8.[469] In this regard, the reliance on ICTY's *Furundžija* and *Kunarac* proves to be important as it was stipulated that rape requires the penalisation of violations of sexual autonomy that occur when a person does not consent to the sexual act.

By using ICTY's rationales the Court elucidated the elements of the crime of rape, clarifying that although the use of force and threats are signs of non-consent, criminal legislations should not perceive them as elements of the crime. Rather lack of consent is what defines the crime of rape. On this note, its utilisation by the ECtHR makes sense due to ICTY's status as an international criminal tribunal, meaning the it was already vested with the credibility of discerning and acknowledging such elements. However, its utilisation was supplementary because these cases were used to provide an emphatic effect to points already made based on other external sources. On the one hand, it should be borne in mind that the method used in *Furundžija* and *Kunarac* to construe the definition of rape consisted of examining the practices of the national criminal laws because it was concluded that a definition based on international law could not be deduced. On the other hand, the European consensus as deduced by the ECtHR followed the same method-scrutiny of the crime rape through an analysis of national criminal laws. It seems that by emphasising the centrality of consent as a reflection of sexual autonomy, these cases reaffirmed the Court's stance deriving from the European consensus trend, i.e. it should not be required from the victim to actively resist, but rather not giving consent is enough for an act to constitute rape. Without a doubt such an approach enhances the position of victims.

5.4 Commander v. Direct Perpetrator Responsibility and the Procedural Limb of Article 2: The Case of Jelić v. Croatia and *B and Others v. Croatia*

In *Jelić v. Croatia* and *B and Others v. Croatia* the ICTY Statute was utilised by the ECtHR to highlight that punishing both the superior who gave orders or was negligent, i.e. didn't commit the war crime physically, as well as the person who did, is well-established under international criminal law. I have chosen them as focus-cases under Article 2, as they exemplify the impact that general modes of criminal responsibility have in causing shortcomings on the procedural obligations to investigate if the State fails to punish both categories.

[468] *M.C. v. Bulgaria* (n82), Concurring Opinion of judge Tulkens, para.1.
[469] Pitea (n424), 458.

5.4.1 Facts of the case in *Jelić v. Croatia*

In *Jelić v. Croatia* the applicant argued that the State had failed in complying with its substantive and procedural obligations under the Right to life (Article 2) because during the war in Croatia her husband Vaso Jelić, who was of a Serbian ethnicity, had been abducted and killed and the investigation into his death had 'yielded little results'.[470] Although one person had been consequently convicted for this war crime in his Commander capacity since 'he had allowed the killings of persons of Serbian origin and had failed to undertake adequate measures to prevent such killings',[471] according to the applicant's perusal the main failure of the State's procedural obligation to investigate and prosecute consisted on the fact that none of the direct perpetrators had been indicted despite the fact that there had been some witnesses who had identified them.[472] The Government of Croatia did not share the applicant's view and argued that this procedural obligation had been fulfilled with the indictment and sentencing of those who had given orders for the killings. Additionally, it relied on the complexity of conducting an investigation for war crimes due to lack of material evidence as well as the prosecution's dependence on witness evidence that in most cases are reluctant to come forwards because of fear of reprisal.[473] Since the unlawful killing had taken place prior to Croatia's accession to the ECHR, the Court concluded that it could not assess the complaint under the substantive aspect.[474] However, in terms of the procedural limb the Court declared the application admissible.[475]

5.4.2 The Importance of the Commander v. Direct Perpetrators Paradigm

Ultimately, the Court was faced with the task of unfolding if Croatia had fulfilled its procedural obligation to conduct an effective official investigation under Article 2. In order to unravel this primary question, it had to settle the preliminary question of whether in the event of war crime murders failing to punish the direct perpetrators, or rather the sole punishment of those of a Commander status was enough to satisfy this obligation. Consequently, the issue of individual criminal responsibility with a focus on the superior v. direct perpetrator criminal responsibility paradigm became crucial in reaching a conclusion on this case. This is the reason why the Court makes a specific reference to Article 7 of the ICTY Statute that, inter alia, establishes the individual responsibility of both direct perpetrators and commanders, i.e. it accentuates the obligation to prosecute and punish both. In terms of the criminal responsibility of direct perpetrators it stipulates that they are not exempted solely because they have acted pursuant to a superior's

[470] *Jelić v. Croatia* App. No. 57856/11 (ECtHR 12 June 2014), para.71.
[471] *Jelić v. Croatia* (n470), para.87.
[472] *Jelić v. Croatia* (n470), para.71.
[473] *Jelić v. Croatia* (n470), para.69.
[474] *Jelić v. Croatia* (n470), para.48.
[475] *Jelić v. Croatia* (n470), para.68.

order.[476] The conclusion reached was that Croatia had failed its obligation to 'carry out an adequate and effective investigation into the circumstances surrounding the killing' and accordingly had violated the procedural obligation of Article 2.[477] The shortcomings of the investigation were two-fold.

Firstly, the domestic authorities had not complied with the requirement of a prompt investigation as it had taken them a long time to initialise the investigation. Even though the Court acknowledged that war and post-war circumstances might inflict objective difficulties in conducting this obligation, it asserted that inactivity for long subsequent periods could not be justified as it negatively impacted the prospect of establishing the truth.[478] It means that although certain delays may be justified, States cannot use the "complexity of post-war situation" justification in evading their procedural obligations in terms of international core crimes. This reflects the Court's determination for not tolerating the impunity for said acts.

Secondly, the failure to investigate and punish direct perpetrators was the most crucial shortcoming. By relying on a myriad of already firmly-established principles related to the procedural limb of Article 2, the Court reiterated that the obligation to take investigative measure arises in situations where:

> there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing […].[479]

In the present case the authorities, despite the fact that they disposed 'some information which could possibly lead to the identification of direct perpetrators',[480] did not strive to identify and prosecute the direct perpetrators. Therefore, they breached their obligation under the Convention.

It would appear that the obligation to prosecute the direct perpetrators of unlawful killings had already been established by the ECtHR in its previous case law. This induces the question of what was the purpose of resorting to ICTY's Statute if such a determination had already been made? Since the unlawful killing was a war crime it was to be distinguished from ordinary murders happening outside of the war context. Hence, resorting on the ICTY Statute served the purpose of conveying the specific differentiation between command responsibility and that of direct authors of the crime. It is important to emphasise that although the Court made an explicit reference to the ICTY Statute, it also mentioned that the Statutes of other ICTs, such as the ICC and ICTR, encompass the notion of individual criminal

[476] ICTY Statute (n191) Article 7(4).
[477] *Jelić v Croatia* (n470), para.95.
[478] *Jelić v Croatia* (n470), paras.92-93.
[479] *Brecknell v the United Kingdom* (n350), para.71; *Jelić v Croatia* (n470), para.85.
[480] *Jelić v Croatia* (n470), para.85.

responsibility. The purpose behind it seems to be an acknowledgment by the ECtHR of a trend in international criminal law regarding these two general modes of responsibility. This trend is reflected considering that these institutions are specialized in dealing with war crimes, discern these two general modes of responsibility and furthermore stipulate the obligation to criminalise both categories, i.e. commander and direct perpetrator. Resorting to this external source prompted the ECtHR to conclude that:

> [A]part from the responsibility of the superior officers, in the case at issue there is a deficiency which undermines the effectiveness of the investigation and which could not be remedied by convicting only those in command. In the context of war crimes the superior (command) responsibility is to be distinguished from the responsibility of their subordinates. The punishment of superiors for the failure to take necessary and reasonable measures to prevent or punish war crimes committed by their subordinates cannot exonerate the latter from their own criminal responsibility.[481]

It seems that the ECtHR relied fully on the concept as established by the ICTY and the other ICTs and no further scrutiny of the concept was needed. Additionally, it held that failing to punish both categories impedes the retributive aim of criminal law and by extension undermines the justice for the victims as well as the general deterrence of future violations:

> [i]n this connection the Court notes that among the main purposes of imposing criminal sanctions are retribution as a form of justice for victims and general deterrence aimed at prevention of new violations and upholding the rule of law. However, neither of these aims can be obtained without alleged perpetrators being brought to justice. Failure by the authorities to pursue the prosecution of the most probable direct perpetrators undermines the effectiveness of the criminal-law mechanism aimed at prevention, suppression and punishment of unlawful killings.[482]

Interestingly, the Court interjected the victims' need for justice as an important factor that justifies the need to punish direct perpetrators. It is precisely the consideration of the victims' right to 'know what had happened' that should give an impetus to the domestic authorities to conduct an effective investigation. Here the Court vests the procedural obligation with remedial characteristics. Additionally, bringing direct perpetrators to justice has a preventive aim to deter future violations

[481] *Jelić v Croatia* (n470), para.88.
[482] *Jelić v Croatia* (n470), para.90.

and prevent the display of any tendencies of extending impunity for such acts[483] - the avoidance of which is important in order to preserve the public confidence.[484]

Placing emphasis on the command/direct perpetrator responsibility asserts that the obligation to punish direct perpetrators is accentuated firmly in the international criminal law context. This is not to say that the Court created instructions for the State Parties to incorporate these modes as such in their national legislations per se. The criminalisation and prosecution in the national legislation of those who commit murder (direct perpetrators) seems to suffice. For example, the provisions extracted by the Court under the "Relevant Domestic Law" part of the judgment, were the ones from the national Criminal Code that stipulated the criminalisation and punishment of perpetrators who commit ordinary murder, i.e. not in the context of war crimes.[485] There was no scrutiny by the ECtHR on the domestic criminal law in terms of envisaging both modes of responsibility for war crimes. Moreover, the investigation of those who commit murders as stipulated by the national criminal law by the domestic authorities, was contemplated as enough for the State to discharge its procedural positive obligations:

> [T]he relevant authorities should have taken steps to ensure effective implementation of the domestic criminal-law provisions, which would have satisfied the requirements of the State's positive obligations under the Convention.[486]

5.4.3 The Suitability of Criminal Option over a Civil one: mirroring offensive role features

The use of the criminal option i.e. the offensive role of human rights when using the criminal law was promulgated by the Court in this case as a prevalent foundation to satisfy the positive obligations. For example, the Court dismissed the Government's contention, that the applicant did not make use the civil law option of seeking damages from the State, as unsuitable avenue of discharging the positive obligations under Article 2:

> [t]he Court confirms that an action for damages, either to provide redress for the death or for the breach of official duty during the investigation, is not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators and still less of establishing their responsibility. Furthermore, a Contracting State's obligation under Article 2 of the Convention to conduct an investigation capable of leading to the

[483] *Jelić v Croatia* (n470), para.94.
[484] *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC] App. No. 3963/09 (ECtHR 13 December 2012), para.192; *Jelić v Croatia* (n470), para.76.
[485] *Jelić v Croatia* (n470), paras.38-41.
[486] *Jelić v Croatia* (n470), para.63.

> identification and punishment of those responsible in cases of fatal assault might be rendered illusory if, in respect of complaints under that Article, an applicant would be required to exhaust an action leading only to an award of damages.[1]

5.4.4 Exigency Tendencies on the Obligation to Investigate

The fact that the complaint under the procedural aspect under Article 2 was declared admissible and the way the Court reasoned this decision is significant and promulgates the idea of a stronger criminal approach by States. The Court reiterated that this obligation constitutes a separate and autonomous duty and explained that it can bind the States even if a claim under the substantive limb is excluded due to the lack of temporal jurisdiction, as long as the "genuine connection test" is satisfied.[487] This test requires the gratification of two criteria: the elapsing of a reasonably short period between the occurrence of the triggering event (unlawful death) and the Convention's entry into force for the respective State as well as a considerable part of the investigation 'must have been carried out, or ought to have been carried out' after the State had adhered to the Convention'.[488] Since a "genuine connection" had been substantiated,[489] the Court was enabled to assess if a violation under the procedural limb had occurred.

On a related note, it is important to note that the Court made sure to promulgate the exigency of investigating crimes such as genocide, crimes against humanity and war crimes. It claimed that under exceptional circumstances a procedural obligation would exist even if the "genuine test" was not satisfied when the triggering event, i.e. the unlawful death happened as a result of an international core crime. Bypassing this test is justified due to the necessity of providing an effective and real protection of the underlying values of the Convention.[490] Accordingly, the Court considered:

> [T]he reference to the underlying values of the Convention mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.[491]

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[487] *Jelić v Croatia* (n470), para.52.
[488] *Jelić v Croatia* (n470), para.148.
[489] *Jelić v Croatia* (n470), para.48..
[490] *Jelić v Croatia* (n470), para.149.
[491] *Jelić v Croatia* (n470), para.150.

The Court's power to compel a State in fulfilling its procedural obligations even if the violation happened before the State was bound by the Convention, conveys its standpoint on the importance of investigating crimes in general. Similarly, making exceptions from the "genuine connection" test in cases of international core crimes highlights the imperative need of pursuing their elucidation. Conversely, the Court made sure to clarify that the same connection based on the "Convention values" does not instigate this procedural obligation for those international core crimes that predated the Convention.[492] Thus, the Court delimited its power of compelling by stating that it cannot be overstretched prior to the Convention's existence. Accordingly, this is where the difference lies between the obligation to prosecute and the possibility to do so.[493]

5.4.5 An Implied Obligation to Prosecute

Although the whole case was reasoned through the lens of the obligation to investigate and ultimately the violation was proclaimed due to the shortcomings of the investigative process, the Court emphasised that the case in question is not merely an isolated event of the killing of one person, rather it concerned '*the investigation and prosecution of those responsible* for the killing of a number of other individuals' in the same area where the war crime in question took place.[494] The exigency to prosecute the perpetrators of international core crimes was also reiterated through the assertion that 'the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity'.[495] It also noted that the requirements under Article 2 extend beyond the official investigation including the trial- when the investigative results lead to prosecution. Furthermore, even though there is no obligation for the prosecutions to result into sentencing, special precaution must be given not to fail in punishing violent deaths.[496]

5.5 A Pre-Determined Decision and Unconsidered Differences: the case of B. and others v. Croatia

B. and Others v. Croatia also concerned a case where the direct perpetrators were not brought to justice, rather the State contented that it had discharged its procedural obligation under Article 2 because they had punished the Commander of the area where the war crimes were committed. Due to a remarkable similarity in terms of the facts and the Court's reasoning with *Jelić v. Croatia,* I will not provide an intricate analysis, as it would merely be a repetition of what it has been said in *Jelić.*

[492] *Jelić v Croatia* (n470), para.151.
[493] *Jelić v Croatia* (n470), para.151.
[494] *Jelić v Croatia* (n470), para.94.
[495] *Jelić v Croatia* (n470), para.52.
[496] *Jelić v Croatia* (n470), para.77.

The Court concluded that a violation of the procedural obligation to conduct an effective investigation[497] had occurred based on the fact that, inter alia, the punishment of the superior does not exonerate the subordinates from their individual criminal responsibility.[498] The violation stemmed from the need to bring the direct perpetrators to justice through their identification and punishment. According to the Court, this was a plausible scenario due to the large number of people who had witnessed the unlawful death, however the domestic authorities had not done their utmost to identify the direct perpetrators. One of the shortcomings of the investigation resulted from the fact that the examination of the case was conducted at the level of a police inquiry, despite that the national Code of Criminal procedure presented the option 'for an urgent investigation against unknown perpetrators'.[499] The Court explained the relevance of differentiating between these two procedures:

> [t]he difference between a police enquiry and an investigation is that in the former, statements given to the police amount only to informal statements and cannot be used as evidence in criminal proceedings. An investigation, however, is conducted by an investigating judge and statements given before him or her amount to valid evidence. An investigating judge may, moreover, punish a witness who refuses to give his or her statement or refuses to tell all he or she knows about the relevant facts.[500]

Raising a concern regarding how investigative measures can affect possible criminal proceedings, indicates the Court's assertion that when it comes to war crimes States should make use of their most rigorous criminal avenues in order to achieve the goal to punish the direct perpetrators. Evidence that can lead to their identification, and subsequent punishment, are too valuable, therefore opting for "more relaxed" procedure that makes them unusable in the criminal procedures certainly jeopardizes the goal of punishing such perpetrators. Additionally, one of the reasons for endorsing the investigation option over the police enquiry is because in the former procedure witnesses can be obliged to give their statements, otherwise punishment could follow for their uncooperativeness. Endorsing such a coercive action, reflects the need for States to accede to the demand of maintaining a strong criminal arm when the unfolding of war crime allegations is at stake.

5.5.1 Evidence Credibility as an Unconsidered Dissimilarity from Jelić

The Court favouring a rigorous investigation when it comes to war crimes is also conveyed by the fact that it embraced the same principles laid down in the *Jelić* case, despite some obvious differences between the two cases as explained in the

[497] *B. and Others v Croatia* App. No.60642/08 (ECtHR 18 June June), para 74.
[498] *B. and Others v Croatia* (n497), para.66.
[499] *B. and Others v Croatia* (n497), para.71.
[500] *B. and Others v Croatia* (n497), para.71.

Separate Opinion of Judge Mose and Turković. They claimed that the case in question diverges from *Jelić* on the fact that the evidence pointing towards the identity of the direct perpetrator in *Jelić* had been more credible than in the current case. Thus, they did not agree with the finding that a violation of the procedural aspect of Article 2 had occurred. According to their point of view, from various witness statements it could be concluded that in this case three people could have been implicated in triggering the unlawful death in question. Two of the potential suspects had died, and the evidence implicating the remaining one was questionable since it was based on the statement of a witness that had no direct knowledge of the event.[501] Bearing in mind the abundance of police action to illuminate the case, since the evidence in question was not firm they asserted the following:

> [t]his leads us to conclude that the present case is not comparable to Jelić, but rather to the whole line of cases emphasizing that Article 2 cannot be interpreted such as to impose a requirement on the authorities to initiate a prosecution irrespective of the evidence which is available. Bearing in mind the presumption of innocence, a prosecution on such a serious charge as involvement in war crimes should never be embarked upon lightly and irrespective of the standard of evidence required. The impact on a defendant who thus comes under the weight of the criminal justice system is considerable, as he or she is held up to public obloquy, with all the attendant repercussions on his or her reputation and private, family and professional life.[502]

5.5.2 The Meagre Consideration for National Post-War Strategies

An interesting consideration in terms of both cases (*Jelić v. Croatia* and *B. and Others v. Croatia*) is that, although the Court emphasised that the investigation of war crimes cases can encounter various impediments due to their sensitivity, lack of action to punish the direct perpetrators cannot be justified if the authorities possess the tools that lead to their identification. The obligation is compelling to the effect that the Court did not place any weight on the national strategies that Croatia might have had in order to punish war crime allegations, i.e. by prioritizing the punishment of commanders or considering the seriousness of the offence, number of victims and the degree of sensitivity of the crime.

In their Separate Opinion, Judge Mose and Turković stated that such strategies are strong indicators of a 'systematic approach to solving the problem of the large number of pending war-crime cases'[503] and as such a demonstration that the domestic authorities are doing what is reasonably expected from them to fulfil their procedural obligation.[504] Conversely, the Court did not consider this to be enough.

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[501] *B. and Others v Croatia* (497), Dissenting Opinion of Judge Mose and Turković, paras. 6-8.
[502] *B. and Others v Croatia*, Dissenting Opinion (n497), para.8.
[503] *B. and Others v Croatia* Dissenting Opinion (n497), para.11.
[504] *B. and Others v Croatia* Dissenting Opinion (n497), para.9.

The State's failure to fulfil its procedural obligation in one case cannot be justified merely because the State is overwhelmed with workload or based on the "success rate" of discharging said obligations in other cases of a similar nature. Also, by not validating the practice of a pattern of prioritization, meaning which war crime allegations should take priority in terms of investigation, it conveyed a message that equal importance is placed on investigating all war crime allegations.

5.6 Conclusion

The purpose of this chapter was to analyse the case law following the questions imposed throughout the course of this thesis. The case of *Jorgić* depicts an example of how divergent approaches of adjudicating bodies can cause the fragmentation of international law because of the different inclinations they have towards the principle of legality. It showed a double layout of how the Court can utilise and disregard the rationales of the Tribunal based on their compliance with the Court's reasoning. An ICTY rationale was used to enforce the concept of universal jurisdiction for the crime of genocide, however in the same judgment ICTY's definition on genocide was accompanied by dismissal. This means that in terms of determining breaches of the principle of legality, the Court operates according to its own standards. *M.C. v Bulgaria* on the other hand reflects a case where the Court showed more faith in the Tribunal and accepted fully its rationale regarding the elements of the crime of rape in order to give more credibility to its own finding that the lack of consent, rather than force constitutes an element of the crime. Finally, in *Jelić v. Croatia* and *B. and Others v. Croatia* the ICTY rationale that command responsibility should be distinguished from that of the direct perpetrator and consequently the punishment of both is required was embraced without any reserves by the ECtHR to underline the positive obligation that States must punish the direct culprit of the crime. Although such an obligation had been already reiterated in previous case-law, ICTY's rationale was used to support the finding of this obligation or vest it with more credibility. Its reliability stemmed first from the fact that the rationale fit the context of the case- it was dealing with war crimes not ordinary murders and second because the command responsibility v. direct perpetrator responsibility paradigm, by being incorporated in various ICTs Statutes, reflects a well-established trend under ICL.

6 General Conclusions

The objective of this thesis was two-fold: on the one side to address the purpose behind ECtHR's motives in employing the rationales of the ICTY and discern the role that this cross-fertilisation has played in enhancing the positive obligation of States to investigate and prosecute human rights abuses, and on the other side to draw a conclusion whether this cross-fertilisation enhances the use of criminal law and subverts its subsidiarity in human rights law.

A conclusion was drawn that there is no explicit obligation compelling ECtHR's reliance on the jurisprudence of the ICTY, hence the communication in question happens outside of any formal treaty context. Nonetheless, the use of ICTY's rationales is evident in the Court's case. Generally, the utilisation of foreign rationales has found justification mainly through interpretation and has been premised on the need to maintain coherence in international law and to keep up the pace with the changing social conditions. In all four cases that I analysed, reliance on the evolutive method of interpretation was invoked and played a double effect. First, in order to satisfy the requirement of the present day social conditions, the Court sought to conclude if an international law trend exists in a given matter and to do so it relied on ICTY's jurisprudence. This certainly acknowledges ICTY's persuasive authority by being perceived as worthy representative of the ICL regime. Second, the existence or non-existence international trend was used to justify any line of interpretation that the Court undertook.

Deferring to foreign rationales outside of an explicit obligation, reflects that the institution whose foreign rationales are used enjoys some authority or credibility on part of the institution that uses said rationales. The Court's validation of ICTY's authority by acknowledging that it cannot interfere with its mission since the Tribunal's authority is perceived as an extension of that of the Security Council in preserving the maintenance of peace, is a separate issue from it actually validating the Tribunal's authority as a judicial institution by "borrowing" or "relying" on its jurisprudence. Given that there are "no strings attached" on the part of the ECtHR for such reliance, this reflects the persuasiveness of ICTY's authority within the ambit of ECtHR's reasoning process.

However, the relevance of ICTY's rationales is not absolute as they can be dismissed by the Court as it sees fit. The case of *Jorgić* case is a fitting example. Nonetheless, this dismissal does not diminish the credibility of the Tribunal and it mostly depicts a situation where the Court refuses to overstep its function by disrespecting the sovereignty of States.

Conversely, embracing said rationales does not make ICTY's input indispensable. On this note, *this thesis distinguishes between a utilisation that results in making a*

finding v. supporting a finding and my main deduction, in terms of the selected case law, is that ICTY's jurisprudence is not used exclusively, rather it serves as an auxiliary authority that supports ECtHR's findings or predetermined lines of interpretation.

Another underlying deduction is that the cross-fertilisation in question undoubtedly *amplifies the idea of criminal law* being the most suitable avenue for States to fulfil their procedural requirement to investigate and prosecute abuses on the right to life or sexual integrity. In *M.C. v Bulgaria* the definition promulgated by the ICTY regarding the elements of rape served to tackle a problem bigger than investigative deficiencies- moreover the entire criminal system in terms the crime of rape was put on the loop. A misconception by the domestic authorities of the elements of rape was the butterfly effect that had caused an incorrect interpretation of the law, therefore causing perpetual breach of the procedural obligation to investigate. Although, this obligation in terms of rape had been previously entrenched by the Court, the ICTY's rationale played an important role in dissecting the problem and raised awareness that only through a clear delineation of the elements of a crime a criminal law system is effective.

When it comes to international core crimes such as genocide, war crimes and crimes against humanity, using the Tribunal's rationales heightens the role of criminal law. As illustrated in *Jelić v. Croatia*, the rationale according to which *the commander's punishment does not exempt the responsibility of the direct perpetrator* (i.e. the need to punish both the commander and the direct perpetrator of the crime) was used to underline the unwavering obligation that States have to identify and punish perpetrators as long as they have some information regarding their identification. In *B. and Others v. Croatia* the information regarding the identification of the direct perpetrators was less clear than in *Jelić,* however the same rationale was used to justify placing an even heavier burden on States in terms of their positive obligation to investigate, by requiring the utilisation of more rigorous criminal procedure to evade the impunity of perpetrators at all cost. The importance of not eluding culprits of these crimes was implicitly underlines in *Jorgić* v. Germany. ICTY's stance on the universal condemnation of the crime of genocide and the prerogative of universal jurisdiction that States have, was used by the ECtHR, although not to oblige but rather give them the green light to prosecute genocide that is not tangible to their territory nor citizens whatsoever.

Bringing to completion, aside from influencing the setting of international criminal law by inducing novelties, the Tribunal's influence has not gone unnoticed also in the Strasbourg arena. Although the symmetry of the cross-fertilisation between these two institutions has not been abided by a *quid quo pro* equation, meaning that the Court's reliance on the Tribunal's rationales is evidently less prominent than the other way around, its ripple effects should not be taken for granted.

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