Leiden Journal of International Law (2015), 28, pp. 303–322
 doi:10.1017/S0922156515000096

Enhancing Constitutional Justice by Using External References: The European Court of Human Rights' Reasoning on the Protection against Expulsion

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Abstract

This article argues that the European Court of Human Rights (ECtHR) uses external references as a tool to enhance 'constitutional justice'. This technique is illustrated by the Court's contribution to an important shift in migration law beginning in the late 1980s and resulting in an enhanced scheme for protection against expulsion in Europe. This shift reflects the changing role of the ECtHR from a court primarily concerned with providing 'individual justice' to a court aiming at enabling 'constitutional justice'. The aim of the article is to contextualize the aforementioned shift with a historical view and to understand it in methodological terms. It argues that the Court supports its dynamic interpretation of the right to privacy in Article 8 of the European Convention of Human Rights in crucial judgments by reference to often non-binding instruments issued by the Council of Europe and to other human rights treaties. In this regard, the case of protection against expulsion illustrates a particular feature of the Court's turn to 'constitutional justice', namely the increased application of the principle of systemic integration. This allowed the Court to develop a meaningful and comprehensive protection scheme in the first place. However, the article reveals that once the substantial standard developed by the ECtHR has been formally implemented in domestic law, domestic decisions are reviewed with significantly less scrutiny. This limitation may again be explained by the 'constitutional turn' which results in a pragmatic tendency to proceduralization in the jurisprudence of the ECtHR.

Key words

Constitutionalization; European Court of Human Rights; external references; human rights law; migration law

1. Introduction

The legal status of migrant workers has traditionally been perceived as a purely domestic issue on which international law does not exercise a significant influence.[1]

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1 See on this: R. Cholewinski, *Migrant Workers in International Human Rights Law* (1997), 40–7 (with a particular view to migrant workers); R. Plender, *International Migration Law* (1988), 1 et seq. (with regard to non-refugee migrants in general). The traditional view regarding non-refugee migrants has been expressed by: C. Hyde, *International Law* (1945), Vol. II, 871–1012; P. Jessup, *A Modern Law of Nations* (1964), 78–84; H. Kelsen,

In particular, the right to entry and the right to remain in a country are considered to be exclusive privileges of citizens, expressing the close legal bonds between the citizen and its nation-state.[2] With the exception of international refugee law, states are considered to exercise largely unrestrained discretion regarding the control of entry and exit of their territory.

In this article, I argue that this view holds no longer true regarding European countries. Throughout the last 30 years, the European Court of Human Rights (ECtHR or the Court) significantly contributed to this shift by using various international human rights standards for a dynamic interpretation of Article 8 of the European Convention on Human Rights (ECHR or the Convention) in the field of protection against expulsion. A crucial element of non-refugee migration law has thereby come under the scope of international law (section 2). The article claims that the development of the Court's jurisprudence on protection against expulsion reflects a more general turn of the Court from being mainly concerned with 'individual justice' to aiming at enabling 'constitutional justice' (section 3).[3] Moreover, protection against expulsion serves as a case study to illustrate the Court's technique of making use of external human rights instruments, a technique also applied in other fields.[4] While the turn to 'constitutional justice' allowed the Court to develop an influential protection scheme, it also has its downsides: 'constitutional justice' results in the tendency towards proceduralization of the Court's control of state parties' practice. Once the Court's standard is formally transformed into domestic law and generally respected by domestic institutions, the Court refuses to scrutinize individual cases more closely (section 4).

2. The breakthrough of universal human rights and the rights of migrant workers

Despite initial limitations on national sovereignty in migration matters in the aftermath of the Second World War, the breakthrough of migrants' human rights only took place in the 1980s as a result of the massive influx of so-called 'guest workers' to northern and western European countries since the 1950s (section 2.1.). This challenge motivated not only the Council of Europe but also global international

Principles of International Law (1966), 366; H. Lauterpacht (ed.), *Oppenheim's International Law* 1, (1955), para. 321 (acknowledging certain international restrictions due to equal protection before courts though). The traditional view can still be traced in modern analysis of international law regarding the protection of non-refugee migrants: J. Gogolin, K. Hailbronner, 'Aliens', § 14, § 21, in R. Wolfrum (ed.), *The Max Planck Encyclopaedia on Public International Law* (2008–), online edition <www.mpepil.com> (accessed on 15 April 2014).

2 L. B. Sohn and T. Buergenthal (eds.), *The Movement of Persons Across Borders* (1992), 39 et seq.; Plender, *supra* note 1, at 4; O. Dörr, 'Nationality', §§ 50–1, in Wolfrum (ed.), *supra* note 1.

3 On the debate about 'constitutional justice': S. Greer and L. Wildhaber, 'Revisting the Debate about "constitutionalising" the European Court of Human Rights', (2013) 12 *Human Rights Law Review* 655, 663–77; S. Hennette-Vauchez, 'Constitutional v. International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of the ECHR Law', in J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights Between Law and Politics* (2011), 144–63; J. Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?, in ibid., 181–203; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006), 165–74.

4 External references include references to all instruments other than the Convention itself.

https://doi.org/10.1017/S0922156515000096 Published online by Cambridge University Press

organizations (section 2.2.) to address the situation of migrant workers, and particularly their protection against expulsion. Given the relevance of expulsion law for the sovereignty of nation-states, this shift is particularly remarkable.

2.1. The illusion of return: How 'guest workers' became long-term residents and conquered human rights law

For centuries deciding on who was allowed to enter and remain on a country's territory was perceived as an essential feature of the modern nation-state.[5] Consequently, the matter of expulsion of foreign citizens formed an essential element of sovereignty which could not be regulated by international law. In light of the devastating consequences of the Second World War this view began to change.[6] The increased focus on refugees and stateless persons urged states to address the rights of migrants on a global level. The Geneva Convention Relating to the Status of Refugees (1951),[7] the Convention on the Reduction of Statelessness (1961),[8] and the Convention on the Elimination of all Forms of Racial Discrimination (1965)[9] reflect this goal. Moreover, the newly adopted universal instruments[10] no longer distinguished between the rights of citizens and the rights of aliens, but established a set of rights to be enjoyed by everyone, citizens and aliens alike.[11]

The most important change, however, came on the procedural level: The newly established human rights system not only codified human rights, but was also equipped with mechanisms for their enforcement.[12] For the first time, individuals were enabled to claim human rights violations against their own country or any other country by which they were negatively affected.[13] This was most prominently reflected by the newly established regional human rights courts. Given power to order the states to pay compensation for human rights violations, they proved to be particularly effective. However, it took more than two decades for both regional courts to gain relevance[14] and it was not until the 1970s that international human

5 W. Kälin, 'Aliens, Expulsion and Deportation', § 2, in Wolfrum (ed.), *supra* note 1. For the development of the modern nation-state and the relevance of migration and nationality law, see D. Gosewinkel, *Einbürgern und Ausschließen* (2001); J. Torpey, *The Invention of the Passport* (2000); A. Fahrmeir, *Citizens and Aliens – Foreigners and the Law in Britain and the German States, 1789–1870* (2000); A. Fahrmeir, *Citizenship – The Rise and Fall of a Modern Concept* (2008), 46 et seqq. Ibid., at 96. Ibid., at 217 et seqq.

6 T. Buergenthal, 'The Normative and Institutional Evolution of International Human Rights', (1997) 19 HRQ 702.

7 1951 Geneva Convention Relating to the Status of Refugees, 189 UNTS 137.

8 1961 Convention on the Reduction of Statelessness, 989 UNTS 175.

9 1965 Convention on the Elimination of all Forms of Racial Discrimination, 660 UNTS 195.

10 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR).

11 Article 25 of the ICCPR concerning the right to political participation is the exception in this regard.

12 On the enforcement of human rights within the UN system and in regional systems, see R. Bernhardt and J. A. Jolowicz (eds.), *International Enforcement of Human Rights* (1987); P. Alston, *The United Nations and Human Rights* (1992).

13 Traditionally international treaties almost exclusively entitled and obliged nation-states instead of individuals. See: S. Gorski, 'Individuals in International Law', §§ 1, 10–12, in Wolfrum (ed.), *supra* note 1; R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984), 8 et seqq.; M. St. Korowicz, 'The Problem of International Personality of Individuals', (1956) 50 AJIL 533, at 534 et seqq. On a more general trend of individualization in international law: A. Peters, *Jenseits der Menschenrechte* (2013) arguing for the existence subjective rights in international law (at 469–79).

14 Buergenthal, *supra* note 6, at 711. Ibid., at 716.

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rights became a prominent and effective paradigm in international law in general and for the protection of migrants in particular.[15] The role of the ECtHR as the crucial actor in Europe can be best explained from a historical perspective: The closure of most of the colonial wars of independence and the easing of relations in the Cold War pushed the relevance of human rights in Europe.[16] The increasing Europeanization and the dialogue between the Court of Justice of the European Union (CJEU) and the ECtHR arguably also contributed to the increased activism of the ECtHR.[17]

While the new human rights system was still in the making during the 1950s, western and northern European states started so-called guest worker programs, which brought many migrants from southern Europe or northern Africa to western and northern European countries. Twenty years later, it turned out that many of them not only stayed temporarily but in fact became long-term residents. Suddenly, a considerable number of non-citizens was working and living in many northern and western European countries and as migrant workers they were particularly vulnerable to discrimination when it came to wages, living conditions, or social security. Moreover, given the rather restrictive rules on how to get a permanent residence permit, the legal status of many migrant workers remained rather insecure. In addition, if a migrant worker were criminally convicted, he or she would face expulsion. In the following thirty years this would become a particular hardship for the growing number of second and third generation migrants who were mostly born in Europe and had (almost) never lived in their parents' country of origin. As the relevance and effectiveness of human rights protection increased, the vulnerability of migrant workers soon became an issue for human rights protection on the global as well as on the regional level. The principle of non-discrimination and the protection against expulsion were the most salient topics of this new discourse. The focus of the new international instruments – as well as of the early jurisprudence of the Court – was the protection of the individual in each particular case, which corresponded to the institutionalization of individual petition in the 1970s.[18]

2.2. 'At least five years': Enhanced protection against expulsion for long-term migrant workers in Europe

The conjuncture of a new interest in human rights protection and the concern for the protection of migrant workers led the Council of Europe to adopt a migrant workers convention[19] and to issue a number of non-binding recommendations over the following decades. Besides recommendations on non-discrimination, these

15 On human rights law in general: S. Moyn, *The Last Utopia* (2010), 120 et seqq. Ibid., at 155 (arguing that human rights did not effectively overcome the conception of human rights as rights of citizens in the first two decades after the Second World War), at 44 et seqq.

16 M. R. Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in J. Christoffersen and M. R. Madsen (eds.), *The European Court between Law and Politics* (2011), 43, at 54 et seqq.

17 Ibid., at 58.

18 Greer, *supra* note 3, at 38 et seqq.; Madsen, *supra* note 16, at 52.

19 1977 Convention on the Legal Status of Migrant Workers, CETS No. 93. The Convention has been only ratified by 11 member states. The Convention does not contain any provisions on the protection against expulsion, but requires 'appropriate measures to assist migrant workers and their families on the occasion of their final return to their State of origin' (Art. 30).

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recommendations concerned the rights of second-generation migrants,[20] the security of long-term migrants,[21] and the legal status of persons admitted for family regulation.[22] In relation to the protection against expulsion these instruments suggest that state parties should take the duration of residence and the existing social and family ties of a migrant into account. More specifically, Recommendation (84)9 suggests that

> expulsion orders against second-generation migrants who have lived for a considerable time in the host country are only issued on account of offences punished by law courts or in exceptional cases relating in particular to national security and public policy. ... consideration should be given to the occupational and family situation of the person concerned as well as his having been born in the host country and the fact that his family live and work there.[23]

Recommendation (2000) 15 suggests recognizing as a long-term migrant an alien who has resided 'lawfully and habitually' on its territory for at least five years or 'has been authorised to reside on its territory permanently or for a period of at least five years'.[24] This recommendation suggests that, with regard to expulsion decisions, state parties should take into account the migrant's personal behaviour, the duration of residence, the consequences for both the migrant and his or her family, and the existing links of the migrant and his or her family to his or her country of origin.[25] Additionally, the recommendation suggests that after five years of residence long-term migrants should only be expelled in cases of criminal conviction if sentenced to more than two years of imprisonment and after ten years of residence only in cases of criminal conviction if sentenced to more than five years of imprisonment.[26] After twenty years of residence, a long-term migrant should no longer be expellable.[27] Finally, the recommendation also suggests that 'long-term migrants born on the territory of the state party or admitted to the member state before the age of ten, who have been lawfully and habitually resident, should not be expellable'.[28]

The bottom line of these suggestions is that migrants should be granted enhanced protection against expulsion at least after five years of residence, and if they are second-generation migrants. While the Court did not make any reference to these instruments in its early jurisprudence on protection against expulsion between the late 1970s and the late 1990s, the discussions in the Council of Europe still reflect a 'climate change' in international migration law correlating with the ECtHR's first steps to increase protection against expulsion.

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20 Committee of Ministers, Rec. (84)9 on second-generation migrants (1984). All recommendations are available at: <www.coe.int>.
21 Committee of Ministers, Rec. (2000)15 concerning the security of long-term migrants (2000).
22 Committee of Ministers, Rec. (2002)4 on the legal status of persons admitted for family reunification (2002). See also: Parliamentary Assembly, Rec. 1504 (2001), at para. 7.
23 Rec. (84)9, *supra* note 20, at no. I.b.
24 Rec. (2000)15, *supra* note 21, no. 1.a.
25 Ibid., at no. 4.a.
26 Ibid., at no. 4.b.
27 Ibid.
28 Ibid., at no. 4.c.

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The adoption of these diverse instruments on the protection of the human rights of migrant workers in Europe suggests that between the 1970s and today the protection of migrant workers became an important human right issue. This finding is supported by the adoption of human rights conventions dealing with the protection of migrant workers in other international fora, such as the UN and the ILO. The ILO adopted the Migration for Employment Convention in 1949 which entered into force in 1952 and provides some protection against expulsion in its Article 8.[29] In 1990 the UN General Assembly adopted the UN migrant worker convention, Article 56 of which provides that for migrant workers lawfully residing in a host country, the 'duration of residence' needs to be taken into account in the decision about expulsion.[30] However, most of the international treaties on the protection of migrants do not receive much support.[31] Consequently, the 'climate change' expressed in the multitude of instruments does not correspond to a strong legal commitment. Against this background, the remainder of this article will examine whether Council of Europe instruments and international treaties have nonetheless had an impact on the ECtHR's later jurisprudence on expulsion matters.

3. The ECtHR as an agent of human rights transformation – human rights as standards and sources of argumentation

Given the low ratification rate of most migration-related conventions and the formally non-binding character of Council of Europe recommendations, the starting point for the following analysis is the question of whether the impact of these instruments on domestic law has been mediated by the ECtHR's jurisprudence. By way of dynamic treaty interpretation the Court established a right to protection against expulsion under Article 8 of the Convention (section 3.1.). This jurisprudence has been shaped by recommendations, conventions, and other legal instruments issued by the Council of Europe, the ILO, or the UN (section 3.2.). However, the Court only relies on external instruments in rare but important cases, a strategy that corresponds to the idea of providing 'constitutional justice' rather than 'systematic individual justice'. While external instruments are then mainly used as background information, their relevance for the Court's reasoning can be traced in dissenting opinions (section 3.3.). The Court's role as a body of the Council of Europe offers a key to understanding when the Court is willing to consider external instruments (section 3.4.).

29 Migration for Employment Convention, ILO Convention No. C097.

30 1990 Convention on the Rights of all Migrant Workers and their Family Members, 2220 UNTS 93. Given the reluctance of many countries the UN migrant worker convention did not enter into force until 1 July 2003.

31 Until today most countries of the global north which are the typical receiving people from countries of labour migration have not ratified the UN convention and only 15 member states of the Council of Europe have ratified the ILO Convention of 1949. For a list of signatory and ratifying states see: <http://treaties.un.org/andwww.ilo.org/normlex> (accessed 3 February 2015).

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3.1. The right to private life and the comprehensive protection against expulsion in the court's jurisprudence

Article 8 of the ECHR protects a person's right to respect for his or her private and family life. The Court acknowledges that Article 8 provides not only protection against expulsion for family members, but also protects the private life of migrants in general. The Court held that Article 8 'protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity'.[32] Migrants' protection against expulsion under Article 8 therefore encompasses every relationship with other human beings. However, in its early jurisprudence on expulsion matters the Court did not include any reference to external instruments.

Nonetheless, the Court step-by-step enhanced the protection against expulsion in a similar manner as envisaged by the Council of Europe instruments. The following analysis is based on the examination of 65 cases on protection against expulsion, which the Court decided after it found an expulsion to amount to a violation of Article 8 for the first time in *Berrehab*.[33] According to the Court's jurisprudence, the expulsion of a migrant always interferes with the respect for private or – if applicable – family life in Article 8 of the ECHR.[34] This applies particularly, but not exclusively, to those migrants who have been living in their host countries for a long duration. In *Berrehab* the Court held that Mr. Berrehab had lived in the Netherlands 'for several years' and 'had a home and a job [and] real family ties'.[35] In *Beldjoudi*, the Court stressed that Mr. Beldjoudi 'was born in France' and had lived there his 'whole life – over forty years'.[36] However, the Court refrained from specifying any particular period, and duration of residence remained only one aspect (among many) to determine family ties in the host country. This reflects a more general tendency regarding the role and self-perception of the Court at the time: The Court was primarily concerned with 'the systematic delivery of individual justice' aimed at ensuring 'that every genuine victim of a violation receives a judgment in their favour from the Court'.[37] Consequently, the Court was not so much concerned with answering structural problems and developing human rights guidelines for national institutions.[38]

Against this background it is not surprising that the Court's analysis usually centred on a rather unstructured balancing in assessing the justifications of interference with Article 8. Regarding justifications, the Court always underlined the principle that a state is 'entitled, as a matter of well-established international law and subject to their treaty obligations, to control the entry of aliens into its territory

32 *Üner v. The Netherlands*, Judgment of 18 October 2006, [2006] ECHR (Reports-XII), at para. 59; *Maslov v. Austria*, Judgment of 23 June 2008, [2008] ECHR (Reports), at para. 63.
33 *Berrehab et al. v. The Netherlands*, Judgment of 21 June 1988, [1988] ECHR (Ser. A).
34 *X. v. Germany*, Decision of 8 October 1974, [1974] ECommHR (D.R. 1), at 77; *X., Y., and Z. v. United Kingdom*, Decision of 6 July 1982, [1982] ECommHR (D.R. 29), at 205; *Berrehab*, *supra* note 33, at para. 23; *Beldjoudi v. France*, Judgment of 26 March 1992, [1992] ECHR (Ser. A), at para. 67.
35 *Berrehab*, *supra* note 33, at para. 29.
36 *Beldjoudi*, *supra* note 34, at para. 77.
37 Greer, *supra* note 3, at 166.
38 Ibid., at 171, L. Wildhaber, 'Constitutional Future for the European Court of Human Rights', (2002) 23 *Human Rights Law Journal* 161, at 163.

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and their residence there'.[39] Accordingly, the Court acknowledged discretion of the state parties concerning entry to and exit of their territory.[40]

Nonetheless, Article 8 § 2 of the Convention requires states to prove that the relevant expulsion is 'necessary in a democratic society, that is to say, justified by a pressing social need and, in particular proportionate to the legitimate aim pursued'.[41] Assessing this justification operates in a balancing of the state's interest with the individual's interest in staying on that territory.[42] The Court held 'that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued'.[43] This results in granting a considerable margin of appreciation to the states as regards justifying interferences.[44] Restrictions to this discretionary power are only drawn when the expulsion order is arbitrary or unreasonable.[45] In restricting its own control more or less to preventing arbitrary decisions the Court leaves the definition of a 'pressing social need' essentially to the state parties.

However, in cases where the applicant is a long-term resident and with regard to so-called second-generation migrants, the Court is prepared to more closely scrutinize the behaviour of the state authorities.[46] It is, nonetheless, obvious that what may be 'necessary in a democratic society' and what a 'pressing social need' entails, is hardly definable in an objective manner.[47] Therefore the assessment of the Court often results in an unstructured case-by-case balancing of the state's interest against the individual's interest.[48] In attempting to better structure this process, the Court developed in *Boultif* v. *Switzerland* (2001)[49] and *Üner* v. *The Netherlands* (2007) a series of criteria for assessing the proportionality of an expulsion order. In balancing the interests of the migrant against the interests of the expelling state, the family

39 *Abdulaziz et al v. The United Kingdom*, Judgment of 28 May 1985, [1985] ECHR (Ser. A), at para. 67; *Moustaquim v. Belgium*, Judgment of 18 February 1991, [1991] ECHR (Ser. A), at para. 43; *Boujlifa v. France*, Judgment of 21 October 1997, [1997] ECHR (Reports-VI), at para. 42; *Kaya v. Germany*, Judgment of 28 June 2007, No. 31753/02, [2007] ECHR, at para. 51; *Darren Omoregie et al v. Norway*, Judgment of 31 July 2008, No. 265/07, [2008] ECHR, at para. 54.

40 *Timocin v. Switzerland*, Decision of 28 June 1995, No. 27275/95, ECommHR, at 4; *Abdulaziz*, *supra* note 39, at para. 67; *Lamrabti v. The Netherlands*, Decision of 18 May 1995, No. 24968/94, ECommHR,.

41 *Berrehab*, *supra* note, 33, at para. 28; *Beldjoudi*, *supra* note 34, at para. 74; *Lamrabti*, *supra* note 40; *Mehemi v. France*, Judgment of 26 September 1997, [1997] ECHR (Reports-VI), at para. 34; *Baghli v. France*, Judgment of 30 November 1999, [1999] ECHR (Reports-VIII), at para. 45; *Boultif v. Switzerland*, Judgment of 2 August 2001, [2001] ECHR (Reports-IX), at para. 46; *Üner*, *supra* note 32, at para. 54; *Kaya*, *supra* note 39, at para. 51.

42 *Kaya*, *supra* note 39 and *Maslov*, *supra* note 32, at para. 76.

43 *Berrehab*, *supra*, note 33, at para. 28; *Slivenko v. Latvia*, Judgment of 9 October 2003, [2003] ECHR (Reports-X), at para. 113; *Maslov*, *supra* note 32, at para. 76.

44 *Timocin*, *supra* note 40; *Berrehab*, *supra*, note 33, at para. 28.

45 *Darren Omoregie*, *supra* note 39, at para. 68; *Timocin*, *supra* note 40.

46 See for a recent example, *Maslov*, *supra* note 32, at para. 75.

47 A. McHarg, 'Reconciling Human Rights and the Public Interest', (1999) 62 *Modern Law Review* 671, at 686 et seq.; S. Scottiaux and G. van der Schyff, 'Methods of International Human Rights Adjudication', (2008) 31 *Hastings International & Comparative Law Review* 115, at 135.

48 Scottiaux and van der Schyff, ibid., at 131 et seq.; S. Greer, 'Constitutionalizing Adjudication Under the European Convention on Human Rights', (2003) 23 *Oxford Journal of Legal Studies* 405, at 426.

49 *Boultif*, *supra* note 41; *Üner*, *supra* note 32.

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situation of the migrant should be taken into account, including the interests of children and spouses involved.[50] Moreover, the expelling state is required to consider the solidity of social, cultural, and family ties with the host country and with the country of destination, as well as the seriousness of the offence committed together with the time elapsed since the offence was committed, the age of children (if applicable), and whether the spouse knew about the offence committed when he or she entered into a family relationship.[51] The focus of the following considerations will be on social and family ties since this criterion has been crucial for building an enhanced protection scheme.

After more than 30 years of jurisprudence on expulsion matters, the cases of *Boultif* and *Üner* constituted a turning point in that the Court tried to develop a more general protection scheme with a fixed set of criteria that should provide guidance for national institutions. The Court now generally views expulsion as interfering with private and/or family life under Article 8 of the Convention.[52] This allows the Court to review a great many expulsion cases. At the same time, the Court is rather generous in granting states a broad margin of appreciation with regard to defining what may be 'necessary in a democratic society' and hence a legitimate justification of an expulsion.[53] This is due to the still important link between state sovereignty and migration law, particularly the decisions on expulsion.[54] However, this margin of appreciation narrows in cases of long-term or second-generation migrants. Here, the Court pays particular attention to the intensity of family life, the duration of residence and the social and cultural links to the host country and the country of destination. This scheme aspires to acknowledge the particular vulnerability of long-term and second-generation migrants as well as their families. At the same time, establishing this general scheme fits well into the observation that the Court started to change its role and self-perception at the beginning of the twenty-first century.[55] The Court tries to act more on enabling 'constitutional justice' in the sense that the Court itself tries to focus its jurisprudence on violations which are particularly serious for 'the applicant, the state or for Europe as a whole'.[56] Thus, apart from very severe individual violations the focus nowadays is on systematic failures, structural problems, and repetitive violations. Thereby, the Court focuses on the development of general guidelines for domestic institutions.

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50 *Boultif*, *supra* note 41; *Üner*, *supra* note 32.

51 The interest and well-being of children and social and cultural ties have been mentioned for the first time in *Üner*, *supra* note 32, at para. 58, and are part of the Court's jurisprudence on the protection against expulsion ever since.

52 See *supra* note 34.

53 For a critique of the role of the margin of appreciation doctrine in the justification of interferences with Art. 8 ECHR see A. Farahat, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants', (2009) 11 EJML 253–69, at 262 et seqq.

54 A. Nußberger, 'Menschenrechtsschutz im Ausländerrecht', (2013) *Neue Zeitschrift für Verwaltungsrecht* 1305, at 1310; See also *Timocin*, *supra* note 40; *Abdulaziz*, *supra* note 39, at § 67; *Lamrabti*, *supra* note 40 (all using the particularity of immigration law as an argument for a generally wide discretion of nation-states regarding the decisions on the entry and stay within their territory).

55 Greer, *supra* note 3, at 170.

56 Ibid., at 166.

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Much could be said about the shortcoming of the protection scheme developed by the Court under Article 8. Transnational migrants are systematically disadvantaged in the balancing scheme.[57] In addition, one can identify an inherent inconsistency in the ECtHR's jurisprudence on Article 8 of the Convention in cases of protection against expulsion as well as regarding family reunification.[58] Finally, one may with good cause criticize the ECtHR's jurisprudence for reproducing gender-related stereotypes.[59] My claim here is not that the ECtHR's jurisprudence on protection against expulsion is without any problems. There are many problematic aspects of the ECtHR's jurisprudence in doctrinal, procedural, and ideological terms.[60] However, the aim of this article is to understand how, under what conditions, and by which methodological approaches the ECtHR in fact changes its interpretation of norms and advances a dynamic interpretation. This might in turn be useful to address at least some of the aforementioned shortcomings. Therefore, the premise of my argument is that the Court has developed a meaningful new standard for the protection of long-term and second-generation migrants by establishing the aforementioned set of criteria. In doing so, the Court increasingly used external references to advance a particular interpretation of Article 8 of the Convention. This technique can be understood as an expression of the more 'constitutional' approach, as we shall see in the following.

3.2. Human rights instruments as an interpretative tool in the hands of the ECtHR

Before analysing a case, the Court usually summarizes the relevant law. In expulsion cases the Court for a long time only included domestic legislation. Since the Court first found an expulsion to violate Article 8 in *Berrehab*[61] in 1988, the Court has decided more than 60 cases on expulsion. In only eight of these cases did the Court not only refer to domestic law and practice but additionally mentioned relevant international instruments or European law.[62] However, the reference to external instruments in the jurisprudence of the ECtHR on protection against expulsion is still scarce.

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57 Farahat, *supra* note 53, at 260 et seqq.

58 T. Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion', (2009) 11 EJML 271, 276 et seqq.

59 B. de Hart, 'Love Thy Neighbor: Family Reunification and the Rights of Insiders', (2009) 11 EJML 235, at 251; B. de Hart, 'The Right to Domicile of Women with a Migrant Partner in European Immigration Law', in S. van Walsum and T. Spijkerboer (eds.), *Women and Immigration Law. New Variations on Classical Feminist Themes* (2007), 148–50; F. Staiano, 'Good Mothers, Bad Mothers: Transnational Mothering in the European Court of Human Rights' Case Law', (2013) 15 EJML 155, 161 et seqq., 167 et seqq.

60 Elsewhere, I have argued that the particular scheme of balancing and using the concept of margin of appreciation in this context reverses the burden of proof in a problematic way, Farahat, *supra* note 53, at 262 et seqq.

61 *Berrehab*, *supra* note 33.

62 *Sisojeva and Others v. Latvia*, Judgment of 16 June 2006, No. 60654/00, ECHR, at para. 53 (the case was later struck out of the list by the Grand Chamber); *Aristimuno Mendizabal v. France*, Judgment of 17 January 2006, No. 51431/99, ECHR; *Mayeka and Mitunga v. Belgium*, Judgment of 12 October 2006, No. 13178/03, ECHR, at paras. 39–40; *Üner*, *supra* note 32, at paras. 35–8; *Maslov*, *supra* note 32, at paras. 33–44; *Mutlag v. Allemagne*, Judgment of 25 March 2010, No. 40601/05, ECHR; *Tabrelsi v. Germany*, Judgment of 13 October 2011, No. 41548/06, ECHR; *Kurić and Others v. Slovenia*, Judgment of 26 June 2012, No. 26828/06, ECHR, at paras. 216–28.

Does external international law then matter at all for the protection against expulsion? A closer look at the facts and the reasoning of the eight cases sheds light on this question. A first group of cases concerns nationality conflicts after the collapse of the Soviet Union. In *Sisojeva* the Court had to decide whether Latvia was obliged under Article 8 of the Convention to grant formal residence status to persons who became stateless after the break-up of the Soviet Union and the restoration of Latvian independence in 1991. The Court found that under Article 8 of the Convention Latvia had a positive obligation to grant the applicants permanent residence status.[63] Here, external reference was made to a bilateral treaty between Latvia and Russia. Similarly, the *Kurić* case concerned the residence status of persons who became stateless after the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY). According to the Court, the applicants' right to private life under Article 8 of the Convention was violated by not granting them permanent residence status after their failure to obtain Slovenian citizenship.[64] In this case, the Court considered an opinion of the Arbitration Commission of the Conference on Yugoslavia[65] and several Council of Europe instruments: the European Convention on Nationality,[66] the Convention on the Avoidance of Statelessness in relation to State Succession,[67] the Framework Convention on the Protection of National Minorities,[68] a letter of the European Commissioner on human rights,[69] and a report by the European Commission against Racism and Intolerance.[70] Moreover, the Court mentioned the UN Draft Articles on Nationality of Natural Persons in Relation to the Succession of States[71] and observations of the UN Committee on the elimination of racial discrimination[72] as well as the UN Committee against torture.[73] Both cases are particular in that they concern the specific situation of state secession and the surrounding international law as well as specific bilateral treaties in that respect. However, they represent an important doctrinal improvement, namely that the Court established positive obligations resulting from Article 8 of the Convention. The Court did so for the first time in *Sisojeva*.

The Court reiterated this position in a different context in *Aristimuno Mendizabal* v. *France*, where it held that denying a European citizen a secure residence status despite his/her regular residence in France for fourteen years amounted to a violation of Article 8 of the Convention.[74] The Court not only mentioned European Union law,[75] but heavily relied on the regulation on European citizenship in its reasoning.[76]

63 *Sisojeva*, *supra* note 62, at 105.
64 *Kurić*, *supra* note 62, at 359.
65 Ibid., at 216–17.
66 Ibid., at 218.
67 Ibid., at 219.
68 Ibid., at 220–1.
69 Ibid., at 222–3.
70 Ibid., at 224.
71 Ibid., at 226.
72 Ibid., at 227.
73 Ibid., at 228.
74 See *Aristimuno Mendizabal*, *supra* note 62, at para. 79.
75 Ibid., at 29–35.
76 Ibid., at 75 et seqq.

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Therefore, the second group of cases in which the ECtHR makes reference to external instruments is the development of positive obligations in immigration matters under Article 8 of the Convention. The case of *Mayeka and Mitunga* also belongs in this group. In this case, the Court referred to the UN Convention on the Rights of the Child and the concluding observations of the Committee on the Rights of the Child in order to find an obligation of Belgium under Article 8 of the Convention to facilitate the reunion of a minor child from the Democratic Republic of Congo with her mother in Canada.[77]

Finally, the third group of cases under Article 8 of the Convention in which the ECtHR refers to external instruments is the protection of second-generation and long-term migrants. In *Üner* v. *The Netherlands* the Court mentioned the Council of Ministers' Recommendation (2000) 15[78] for enhanced protection against expulsion after a long duration of residence.[79] Moreover, the Court referred to similar provisions in the Council of Ministers' Recommendation (2002) 4[80] and the Parliamentary Assembly's Recommendation 1504 (2001).[81] However, despite including these materials, the Court did not find a violation of Article 8 of the Convention in *Üner*. Moreover, the Court refused to acknowledge an absolute prohibition on expulsion measures regarding certain long-term or second-generation migrants as the quoted recommendations would have suggested.[82] Precisely the fact that the Court referred to external instruments in spite of rejecting the claim of a violation of Article 8 of the Convention, illustrates the Court's concern to indeed develop a protection scheme which provides guidance for future cases on the domestic level. In *Maslov* v. *Austria* the Court referred to the same recommendations, to the UN Convention on the Rights of the Child and observations of the UN Committee on the Rights of the Child,[83] and to the EU long-term residents' directive, which was not yet binding for Austria by the time of the decision against Mr. Maslov,[84] and case-law of the CJEU.[85] Given the long duration of stay – the applicant entered Austria at the age of six – and the non-violent nature of the offences committed, the Court reached the conclusion that the expulsion of the applicant violated Article 8 of the Convention.[86] More generally, it held 'that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion'.[87] Like these two cases, the cases of *Mutlag* and *Tabrelsi*[88] equally concerned second-generation migrants. However,

77 See *Mayeka and Mitunga*, *supra* note 62, at paras. 80–7.
78 Ibid., note 21.
79 See *Üner*, *supra* note 32, at paras. 35–8.
80 Ibid., note 22.
81 Ibid., note 22.
82 Ibid., note 32, at para. 55.
83 See *Maslov*, *supra* note 32, at paras. 36–8.
84 Ibid., at paras. 39–43.
85 Ibid., at para. 44. Art. 4 of this directive (EC/2003/109, OJ L 16, 23 January 2004, at 44–53) defines as a long-term migrant every person who has lawfully resided in a member state for at least five years. Art. 12 of the directive provides enhanced protection against expulsion for long-term migrants and entails criteria similar to the criteria developed by the ECtHR.
86 Ibid., at para. 100.
87 Ibid., at para. 68.
88 See *supra*, note 62.

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the reference to several human rights instruments here seems to be only reiteration of the standard developed in *Maslov*.[89] Apart from the latter two cases, all cases of external reference by the Court concerned cases in which the Court engaged in a considerable improvement of the obligations under Article 8 of the Convention – be it the identification of positive obligations or the development of a scheme for the enhanced protection of second-generation migrants. Moreover, in all of these cases the Court tried to conceptualize a general line of reasoning for future cases.

With regard to Article 8 of the Convention it is striking that all of the cases in which the Court mentioned external instruments were decided after the year 2000. Here again the turn towards enabling 'constitutional justice' instead of 'systematic individual justice' offers a key to understanding this relatively late turn to external instruments. Interpreting an international treaty in the broader international and particular regional context is a good strategic tool for establishing and justifying a stable doctrinal scheme providing guidance for comparable cases on the domestic level in the future since it increases the persuasive authority of a judgment. Moreover, the accelerated European integration and the entanglement between the ECtHR and the EU may have contributed to a new openness toward external instruments and a more contextualized interpretation of the Convention.[90]

3.3. External reference in internal debates: Why dissenting opinions matter

A second observation resulting from a close examination of the aforementioned cases is that the Court often lists the relevant external instruments in the beginning, but only sometimes explicitly applies them in its reasoning of the particular case. Particularly in the four cases regarding second-generation migrants the Court does not explicitly include the mentioned external instruments in its reasoning. However, the fact that the Court includes the external instruments as relevant law at least signals its own awareness of the diverse human rights instruments.[91] That external instruments indeed play a crucial role for the Court's deliberations becomes evident by a closer inspection of the dissenting opinions. Some judges explicitly use external instruments, particularly recommendations of the Council of Europe directly in order to advocate for a particular interpretation of Article 8 of the Convention. Although only reflecting the view of a minority of the Court's judges, these dissents offer a valuable insight into the legal discourse among the judges. Dissenting opinions usually entail a broader and deeper argumentation and reveal legal aspects which have played a role in the Court's analysis. The direct reliance on external recommendations for the development of doctrinal arguments in dissenting opinions demonstrates that these instruments are taken seriously, although they may not be the only relevant considerations in defining the scope of Article 8 and the required standard of justification under this provision. In their dissent in *Üner*, judges Costa,

89 See *Multag*, *supra* note 62, at para. 37; *Tabrelsi*, *supra* note 62, at paras. 31–2.
90 See Greer, *supra* note 3, at 51 et seqq. With regard to an earlier period, see Madsen, *supra*, note 16, at 54 et seqq.
91 Not only does the Court only rarely cite case law produced by other international or domestic courts, but the Court also avoids basing its judgment on the instruments listed and acknowledged as 'relevant law'. On the Court's practice of citation, see E. Voeten, 'Borrowing and Non borrowing among International Courts', (2010) 39 *The Journal of Legal Studies* 547, at 557 et seqq.

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Zupancic, and Türmen explicitly used the wording of the aforementioned recommendations in order to substantiate their view.[92] They argued that Article 8 of the Convention should be construed in the light of these recommendations. In their view, the Court failed to do so in this case: 'In our view, the judgment does not quite do that, as it does not, we believe, draw the correct inferences from the international instruments which it cites'.[93] Although this approach does not lead to an absolute prohibition of the expulsion of long-term residents in the view of the dissenters, it would nonetheless increase the burden of proof on the governmental side and render an expulsion just based on criminal offences invalid.[94]

Similarly, judge Rozakis explicitly acknowledges the relevance of Council of Europe instruments in defining the scope of protection against and the justification of expulsion in Article 8 of the Convention in *Kaya* v. *Germany*.[95] Rozakis concludes that long-term migrants have a right not to be expelled, although this right is not an absolute one. Through the enhanced protection an expulsion becomes, however, the exception, rather than the rule and requires special justification.[96] Both dissents exemplify that judges seriously consider particularly Council of Europe instruments when defining the standard of justification of interferences, although the majority of the Court prefers not to base its judgments directly on these instruments.

The following conclusions can be drawn from the Court's jurisprudence on protection against expulsion: First, the Court is very selective regarding the consideration of instruments other than the Convention itself. If it does so, it primarily refers to Council of Europe instruments, specific bilateral treaties, and EU law. References to conventions of the ILO concerning the enhanced protection of long-term migrant workers do not occur at all, while recourse to UN treaties is made from time to time. Second, if the Court's majority decides to consider one of the aforementioned instruments, it regards them as background information rather than as the ground of a doctrinal development. Their importance as a source for arguments can mostly only be traced in dissenting opinions which better reflect the variety of arguments raised by the judges. In the following section of this article, I will try to explain the diverging reception of these instruments.

3.4. The Court as a promoter of *international* law or as a *European* Court?

As described above, the ECtHR mostly relies on non-binding instruments issued by the Council of Europe and on European law. What does this result tell us about the Court's role as a promoter of *international* law? I suggest that there are at least three features explaining the Court's use of European and international instruments respectively: First, the Court's role and position within the European legal framework; second, the communicative structures within the European legal order as opposed to the global legal order; third, the search for coherence and doctrinal consistency.

92 Dissenting Opinion of judges Costa, Zupancic, and Türmen in *Üner*, *supra* note 32, at para. 7.
93 Ibid., at para. 9.
94 Ibid., at paras. 17 and 18.
95 Concurring Opinion of judge Rozakis on *Kaya*, *supra* note 39, at para. 1.
96 Ibid., at para. 3.

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Perhaps the strongest explanation for the Court's focus on European law is provided by its function as a regional authority within the European legal order. Being a body of the Council of Europe it appears coherent that the Court primarily considers the instruments issued by other bodies of the Council of Europe. This institutional aspect also gains relevance on a doctrinal level: The jurisprudence on enhanced protection against expulsion by the ECtHR is a perfect example of dynamic treaty interpretation.[97] Such an interpretation 'in the light of present-day conditions'[98] has even been regarded as the *Leitmotiv* of the Court's jurisprudence.[99] Evolutionary treaty interpretation is usually justified by the Court on the basis of a consensus standard among the state parties.[100] If no such consensus in the law and practice of the state parties on a particular issue can be found, the Court usually leaves a wide margin of appreciation to the state parties regarding the justification of interferences.[101] A common trend among the state parties regarding the regulation of a particular issue is a strong argument for the Court to apply a stricter review.[102] Crucial support for such a discretionary approach is provided by the idea that the jurisprudence of the Court is subsidiary to the domestic systems.[103] However, in the area of protection against expulsion the Court could not find a common trend regarding the enhanced protection of long-term and second-generation migrants. Expulsion law in most European countries hardly recognized any social ties apart from family ties and was particularly restricting when it came to the expulsion of criminal offenders. Regarding EU member states, the Court later used EU law as a proxy for a common standard among those countries. However, EU law initially did not provide much support for the Court's dynamic interpretation. The field of protection against expulsion of third-country nationals – as opposed to EU citizens – has not gained much attention in EU migration law for a long time. Later EU legislation, such as the long-term residents' directive,[104] explicitly takes on the ECtHR's jurisprudence.[105]

In the absence of other indicators of a common standard, the Court started using non-binding recommendations of the Council of Europe as an equivalent for a common standard. Here, the Court exercised its 'institutionalized judicial powers' and acted as the 'guardian of a common institution', the Council of Europe.[106]

97 R. Bernhardt, 'Evolutive Treaty Interpretation', (2000) 41 *German Yearbook of International Law* 11, at 17 et seq.; E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 240, at 306 et seq.

98 *Marckx v. Belgium*, Judgment of 13 June 1979, [1979] ECHR (Ser. A), at para. 41.

99 P.-M. Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011), 123, at 135.

100 T. A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', (1982) 4 HRQ 474, at 480.

101 Ibid., at 484; H. C. Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence', (1987–1988) 3 *Conn. J. Int'l Law* 111, at 123 et seq. Ibid., at 134 et seq.

102 See Yourow, *supra* note 101, at 124; O'Donnell, *supra*, note 100; M. R. Hutchinson, 'The Margin of Appreciations Doctrine in the European Court of Human Rights', (1999) 48 ICLQ 638, at 640.

103 See Hutchinson, *supra*, note 102, at 640; see also *Handyside v. United Kingdom*, Judgment of 7 December 1976, [1976] ECHR (Ser. A), at para. 48.

104 Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents, OJ L 16, 2004, at 44–53.

105 Ibid., at Recital Nr. 3.

106 See Dupuy, *supra* note 99, at 125 et seq.

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Moreover, the Court could rely on its authority to initiate an autonomous interpretation of the Convention[107] paying particular attention to the object and purpose of the ECHR.[108] Having in mind, however, the criticism surrounding the common consensus approach,[109] it is quite bold to use 'soft law' as the basis for evolutive treaty interpretation. This may also explain why the Court shies away from actually basing its reasoning on the external references and rather uses them as an additional support wherever it can also find formally binding legal material. Moreover, in deploying formally non-binding human rights instruments for the evolution of new standards, the Court's activity in expulsion matters perfectly demonstrates that 'the space between the text and the law is of major significance'.[110] Building innovative treaty interpretation on the use of formally non-binding external references may nonetheless endanger the acceptance of the developed constitutional standard in domestic legal orders.[111]

Finally, the Court's recent focus on European law may not only result from an increased concern with protection against expulsion of third-country nationals in EU law, but also from the intense co-operation and communication among European courts. Although the ECtHR only rarely cites CJEU case law,[112] judges of both courts regularly meet for informal discussion and workshops.[113] Moreover, EU Treaty law explicitly acknowledges the rights enshrined in the ECHR as fundamental principles of the European Union (Article 6, § 3 EU-Treaty) and also acknowledges the relevance of the Court's case law in the preamble of the Charter of Fundamental Rights of the European Union.[114] In addition, both courts entertain an ongoing dialogue with domestic courts in Europe.[115] Hence, the legal discourse among the different actors in Europe is intense and enhances respect and acknowledgement for the respective legal instruments.[116]

While the use of non-binding recommendations of the Council of Europe may be explainable by the Court's institutional role, the rather cautious reference to other external international instruments may result from strategic decisions[117] of the Court as well as from their own legal qualification. Most ILO conventions on

107 See Yourow, *supra* note 101, at 159. On the practice of autonomous interpretation in the jurisprudence of the ECtHR more generally, see G. Letsas, 'The Truth in Autonomous Concepts', (2004) 15 EJIL 279, 281 et seqq.

108 'Object and purpose' serve as a general rule of interpretation according to Art. 31(1) of the VCLT, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

109 L. R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', (1993) 26 *Cornell Int'l L.J.* 133, at 154; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), 123 et seqq.; E. Benvinisti, 'Margin of Appreciation, Consensus, and Universal Standards', (1998–1999) 31 *N.Y.U. Journal of Int'l L. & Pol.* 843, at 851 et seq.;

110 I. Venzke, *How Interpretation Makes International Law – On Semantic Change and Normative Twists* (2012), 197.

111 On this aspect, see L. R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale LJ* 273, at 314, 316 et seqq. (stressing the need for incrementalism in order to ensure effectiveness).

112 See Voeten, *supra*, note 91, at 564.

113 F. G. Jacobs, 'Judicial Dialogue and Cross-Fertilization of Legal Systems: The European Court of Justice', (2003) 38 *TexIntlLJ* 547, at 553.

114 Charter of Fundamental Rights of the European Union, OJ C 364, 18 December 2000, at 8.

115 A.-M. Slaughter, 'A Typology of Transjudicial Communication', (1994) 29 *URichLRev* 99, at 100 et seq.

116 See Helfer and Slaughter, *supra* note 111, at 323 et seqq.

117 Strategic consideration as a motivation for citing external authorities is also identified by Voeten, *supra* note 91, at 556.

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the protection of migrant workers as well as the UN migrant worker convention have not been ratified by many European states and they cannot rely on the political consent reached within the institutions of the Council of Europe either.[118] However, the Court does not as a matter of principle refrain from considering non-European international instruments. When referring to international provisions, the Court responds to the need 'that every treaty provision must be read … in the wider context of general international law'.[119] A view on the Court's jurisprudence on other provisions of the Convention reveals that the Court indeed applies the principle of 'systemic integration' which is based on Article 31 (3)VCLT.[120] The Court actively and expressly used statements of ILO institutions on the right to strike when interpreting Article 11 of the Convention to include such a right.[121] *Demir and Baykara* is one of the rare cases in which the Court transparently explained its interpretative and doctrinal approach.[122] This may be caused by the fact that the Court abruptly and radically changed its view on the content of Article 11 of the Convention in only six years.[123] Hence, it needed particularly strong support for its new position in order to make up for the lack of doctrinal consistency.[124] Nevertheless, it is remarkable that the Court even ruled that relying on international law for a contextual interpretation does not require that the parties in question have ratified the international treaty in question.[125] The dynamic argument maybe more convincing, when binding international law is used: The more state parties are bound by the relevant international provision, the more convincing the doctrinal interpretation of this provision as an expression of a common standard is. However, the Court has unmistakeably clarified in *Demir and Baykara* that it indeed views the provisions of the Convention in a broader context of international law[126] – even if the international instruments are not formally binding for the state parties. This approach of systemic integration can also be identified in the Court's case law on the protection against expulsion. In short, external international legal instruments are used under two conditions: The relevant external instruments reflect a more general international trend and the content of the international provision justifies a departure from previous case law.

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118 See notes 29 and 30; for the ratification of ILO conventions see: <www.ilo.org/ilolex/>.

119 Sir I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), 139.

120 On this principle, see C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', (2005) 54 ICLQ 279, 294.

121 *Demir and Baykara v. Turkey*, Judgment of 12 November 2008, No. 34503/97, ECHR, at paras. 37–52, 147–54; *Enerji Yapi-Yol Sen v. Turkey*, Judgment of 31 April 2009, No. 68959/01, ECHR, at para. 16.

122 *Demir and Baykara*, *supra* note 121, at 65–8, 85–6.

123 F. C. Ebert and M. Oelz, 'Bridging the Gap between Labour Rights and Human Rights: The Role of the ILO in Regional Human Rights Courts', (2012) *International Institute for Labour Studies* <www.ilo.org>, at 10; R. Norheide, 'Demir and Baykara v. Turkey' (case note), (2009) 103 AJIL 567, at 571 et seq. The last decision denying a right to strike was *UNISON v. United Kingdom*, Decision of 10 January 2002, No. 53574/99, ECHR.

124 On the use of legal developments outside the Council of Europe in order to justify overruling by the Court, see A. Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law', (2009) 9 *Hum. Rts. L. Rev* 179, at 194 et seqq. On the role of precedent for justification an legitimation in international adjudication, see A. Von Bogdandy and I. Venzke, 'The Spell of Precedents', in C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014), 503.

125 See *Demir and Baykara*, *supra* note 121, at 85.

126 See Norheide, *supra* note 123, at 573.

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So far, this article has examined what motivates and explains the Court's use of European and international external references respectively. The last part of this article explains why external references are a feature of 'constitutional justice' and also reflects the shortcomings of this approach.

4. A CRITICIAL APPRAISAL: CONSTITUTIONALIZATION AND PROCEDURALIZATION IN THE COURT'S JURISPRUDENCE

A key element of the 'constitutional turn' in the Court's jurisprudence is the aim of developing more general human rights standards providing guidance for future domestic jurisprudence and legislation within the area of the Council of Europe.[127] Thereby the Court produces *erga omnes* effects of its judgments and enhances their effectiveness in domestic law.[128] This, in turn, increases the need for justification of a broadly applicable and often evolutive standard. In search for justification, the Court uses external references for strategic communication with domestic actors. As other international[129] and domestic courts[130] the ECtHR deploys external references to enhance the persuasiveness of its interpretation. In doing so, the Court places itself in a broader institutional context (the Council of Europe) and uses expressions of other institutional bodies to justify a common standard. Moreover, in an increasingly globalized world drawing the picture of a global trend seems to be a useful strategy to further the acceptability of a new human rights standard. However, this strategy is always delicate as it implies the risk of bypassing the authority and legitimating force of domestic legislation which is reflected by the idea of a common consensus.

The Court's turn to 'constitutional justice' may be pragmatically understood as a response to the docket crisis.[131] Moreover, the development of general standards has arguably increased the impact of the Court's jurisprudence on domestic law.[132] For the protection against expulsion this may be illustrated with a view to the case of Germany. The Constitutional Court (*Bundesverfassungsgericht*) held that the authorities and courts have to explicitly consider the criteria developed by the ECtHR in every single case of expulsion and that the automatism envisaged by the Residence Act cannot be applied.[133] Moreover, the Federal government issued

127 See Wildhaber, *supra* note 38, at 163.

128 S. Besson, 'European Human Rights, Supranational Judicial Review and Democracy', in P. Popelier, C. Van De Heyning, and P. Van Nuffel, *Human Rights Protection in The European Legal Order: The Interaction Between the European and the National Courts* (2011), 97, at 108 et seqq.

129 A. von Bogdandy and I. Venzke, 'In Whose Name? In Investigation of International Courts' Public Authority and its Democratic Justification', (2012) 23 EJIL 7, at 36 et seq. (arguing that systemic integration enhances democratic justification). For external references in the jurisprudence of the IACHR, see G. L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', (2008) 19 EJIL, 101, at 111 et seqq.

130 On the debate in US constitutional law see only J. Waldron, 'Foreign Law and the Modern Ius Gentium', (2005) 119 *Havard Law Review* 129 and the other comments on the Supreme Court Term 2004 in the same issue; on the use of foreign law by domestic courts see in general E. Benvinisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', (2008) 102 AJIL 241.

131 See Greer, *supra* note 3, at 169 et seqq.

132 See Besson, *supra* note 128.

133 BVerfG, 2 BvR 304/07, decision of 10 May 2007, at paras. 41 et seqq. German expulsion law links certain facts (such as particular criminal offences) to either an automatic mandatory expulsion.

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an administrative regulation explicitly acknowledging the criteria developed by the ECtHR and requiring administrative authorities as well as domestic courts to take these criteria into account.[134] The administrative regulation describes in detail which criteria may be considered in assessing the proportionality of an expulsion order.

However, 'constitutional justice' in the context of expulsion law is not a simple success story. As 'constitutional justice' requires the development of general protection schemes and guidelines, it also requires refraining from closely scrutinizing each and every case, in which violation might be possible. Instead, it requires the Court to leave the vast majority of comparable expulsion cases in the hands of domestic judges and to intervene only when it has the impression that the general guidelines of the protection scheme are not respected and applied. Hence, 'constitutional justice' demands a certain degree of proceduralization. This leads to a focus on formal implementation of and adherence to the Court's standard. As soon as formal recognition has taken place, the Court may reject complaints as 'ill-founded'[135] or 'manifestly ill-founded'.[136] However, such a reticent stance places an extra burden on the development of coherent doctrinal pattern instead of the vague and often sketchy balancing test that the Court has developed in its case law on expulsion.

The *Tabrelsi* case may illustrate the disadvantages of a proceduralization without providing a precise doctrinal pattern. In this case the Court held the expulsion of a Tunisian national who had been born and raised in Germany and admittedly had all his major private relations in Germany to be compatible with Article 8 of the Convention.[137] This assessment was not only based on the severity of his criminal offences, but in particular on the fact that he could not rebut the government's assertion that the claimant could reintegrate in Tunisia with the help of his relatives still living there.[138] This finding is even more surprising since the Court itself acknowledged that the claimant did not retain any ties to Tunisia of origin and did not speak Arabic.[139] This case illustrates that the Court is not willing to question the assessment of national authorities once they have explicitly endorsed the general protection scheme developed by the Court in expulsion cases. Moreover, the Court itself does not clarify in its jurisprudence the relative weight to be given to the diverging criteria in its balancing test. Hence, despite aspirations to develop a comprehensive balancing test, much remains vague and unclear.[140] The still sketchy balancing test should therefore give way to clearer guidance and a more principled interpretative approach in order to develop coherent and precise doctrinal patterns.

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134 *Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz* (General Administrative Regulation on the Residence Act), available at: <http://www.verwaltungsvorschriften-im-internet.de/pdf/BMI-MI3–20091026-SF-A001.pdf> (last visited 8 January 2014).

135 See *Kaya*, *supra* note 39; *Mutlag*, *supra* note 62; ECtHR, *Tabrelsi*, *supra* note 62.

136 *Savasci v. Germany*, Decision of 19 March 2013, No. 45971/08, ECHR.

137 See *Tabrelsi*, *supra* note 62, para. 62 et seq.

138 Ibid., para. 64.

139 Ibid., para. 63.

140 For a critique of the incoherence particularly resulting from the margin of appreciation doctrine, see R. St. MacDonald, 'The Margin of Appreciation', in R. St. J. Macdonald, F. Matscher, and H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), at 85.

https://doi.org/10.1017/S0922156515000096 Published online by Cambridge University Press

Finally, the inevitable tendency of proceduralization also stresses the importance of embeddedness as a structural principle of the European human right regime.[141] The focus on 'constitutional justice' alone obstructs the view on how effective implementation operates. The more the Court engages in the development of general standards and relies on domestic institutions to fully implement them, the more attention should be given to the institutional design of this regional system of shared responsibility.[142] Regarding protection against expulsion this requires the Court not only to develop a clear doctrinal pattern for the balancing procedure but also to take a stand regarding the means by which the required balancing test is to be implemented in national law.

141 On this principle, see L. R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008) 19 EJIL 125.
142 Ibid., at 141 et seqq.

https://doi.org/10.1017/S0922156515000096 Published online by Cambridge University Press