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The Contribution of the European Court of Human Rights to General International Law

2018 Rudolf Bernhardt Lecture, Heidelberg

In the the classic travelogue *A Time of Gifts*, eighteen-year-old Patrick Leigh Fermor, travelling in 1933 on foot from the Hook of Holland to Constantinople, describes his arrival in Heidelberg, as the old capital of the Electors Palatine rose before him:

> 'On the far side of the bridge I abandoned the Rhine for its tributary and after a few miles alongside the Neckar the steep lights of Heidelberg assembled. It was dark by the time I climbed the main street and soon softly-lit panes of coloured glass, under the hanging sign of a Red Ox, were beckoning me indoors. A jungle of impedimenta encrusted the interior—mugs and bottles and glasses and antlers—the innocent accumulation of years, not stage props of forced conviviality—and the whole place glowed with a universal patina.'[1]

In common with the self-proclaimed scholar-gypsy Patrick Leigh Fermor, I stand here today, all 'the lights of Heidelberg assembled' before me, unencumbered by the wisdom of age, to celebrate someone whose long career in international law glows with a 'universal patina' similar to that of this city.

[1] P Leigh Fermor, *A Time of Gifts* (John Murray 1977) 72. It did not take long, however, after the young Englishman's arrival in Heidelberg, until he first heard the *Horst Wessel Lied* and would find that not everything shone with a universal patina in the Germany of 1933.

Rudolf Bernhardt is the real thing, and I am delighted to be here, in what I believe is the dedicatee's ninety-fourth year, to give the second Rudolf Bernhardt Lecture.

The theme of this article is the contribution of the European Court of Human Rights to general international law. The jurisdiction of the European Court of Human Rights extends to all matters concerning the interpretation and application of the European Convention on Human Rights and its Protocols.[2] The European Court takes, in its interpretation and application of the Convention, into account other relevant rules of international law.[3] In common with other treaties and instruments of international law, the Convention should so far as possible be interpreted in harmony with the context of international law of which it forms part.[4] This means that the Court adverts to rules of general international law—customary international law and general principles of law.[5]

Sometimes it does so explicitly; at other times, implicitly. And, equally, sometimes it is clear that the rule or principle of general international law at issue is of a customary law nature, or is a general principle of law: at other times, the rule or principle at issue may be more difficult to categorize as one or the other.

The reference, for example, in Article 1 of Protocol 1 which stipulates that '[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions

[2] Art 32, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.
[3] *Magyar Helsinki Bizottság v Hungary* [GC], no. 18030/11, 8 November 2016, para. 123; *Al-Dulimi and Montana Management Inc v Switzerland* [GC], no. 5809/08, 21 June 2016, para. 134; *Al-Adsani v the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, para. 55; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* [GC], no. 45036/98, ECHR 2005-VI, para. 150; *Hassan v the United Kingdom* [GC], no. 29750/09, §§ 77 and 102, ECHR 2014, paras. 77 & 102.
[4] *Case Concerning the Right of Passage over Indian Territory (Portugal v India)*, (Preliminary Objections) ICJ Reports 1957 p. 142; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p. 76, para. 10; Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* (9th edn, Longmans 1992) 1275.
[5] See Tomuschat, 'What is General International Law?' in *Guerra y Paz: Obra homenaje al Dr. Santiago Torres Bernárdez* (2010) 329.

provided for by law and by the general principles of international law', is that a reference to the general principles of law or instead to principles of customary international law?[6]

Or when a Chamber of the Court, presided over by President Bernhardt, referred in *Papamichalopoulos v Greece*, to the principle set out by the Permanent Court of International Justice in *Factory at Chorzów*,[7] according to which 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed', was it then referring to a general principle of law or a principle of customary international law?[8] For the present purposes it matters little.

This article explores the considerable contribution which the European Court has come to make to that body of law, rules and principles of general international law, what we used to call '*le droit international commun*',[9] both as regards rules of a substantive nature and a procedural nature. My thesis is that the contribution of the European Court in this regard is greater than we tend to think, and that it stretches to areas which are often overlooked, but equally that that contribution is not beyond reproach.

I give three examples. These are what I shall call the principle of legality, the principle of what I shall call the freedom of choice of international judicial forum, and the principle of protection of legitimate expectations. All three are usefully controversial: championed by some; chastised by others.

[6] See on the questions to which this provisions gives rise: E Bjorge, 'The Convention as a Living Instrument: Rooted in the Past, Looking to the Future' (2018) 36 Human Rights Law Journal 24, 248–51.
[7] *Factory at Chorzów* (1928) Series A, No. 17, p. 47; C. Brown, 'The *Factory at Chorzów* Case' in E Bjorge & C Miles (eds), *Landmark Cases in Public International Law* (Hart 2010).
[8] *Papamichapoulous v Greece (Article 50, just satisfaction)*, no. 14556/89, 31 November 1995, para. 36; E Bjorge, 'The Convention as a Living Instrument: Rooted in the Past, Looking to the Future' (2016) 36 HRLJ 243, 249.
[9] See e.g. *Anglo–Norwegian Fisheries* ICJ Reports 1951, p. 116, 131–33.

I. The principle of legality

What is the principle of legality? It is shorthand for the proposition that, in international law, a text emanating from a State must, in principle, be interpreted as producing and as intending to produce effects in accordance with existing international law and not in violation of it.[10]

The sobriquet 'the principle of legality', used with this particular meaning, is taken from the common law, where the principle is also known as the *Ex parte Simms* principle, as Lord Hoffmann in that case cast the principle in a particularly attractive form, observing that, in the absence of 'express language or necessary implication to the contrary', the courts will presume that even the most general words were intended to be subject to the fundamental principles of the English constitution, including especially those operating to protect the rights of the individual.[11]

In international law, the principle surfaced in rudimentary form already in the jurisprudence of the Permanent Court of International Justice,[12] and then more prominently in the Advisory Opinion of the International Court in *Namibia*,[13] a decision that was authoritatively glossed by Rudolf Bernhardt in 1973.[14]

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[10] *Right of Passage* ICJ Rep 1957, p 142; R Jennings & A Watts (eds), *Oppenheim's International Law* (9th ed, Longman 1992) 1275ø *Dette publique ottoman* (1925) 1 529, 555 (Sole Arbitrator Borel). See eg *South West Africa—Voting Procedure*, Separate Opinion, Judge Lauterpacht, ICJ Rep 1955, p 67, 99; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of International Law' (1959) 35 BYIL 183, 227–8; A Pellet, *Recherche sur les principes généraux de droit en droit international* (Université de Paris 1974) 420; M Kamto, 'La volonté de l'état en droit international' (2004) 310 Hague *Recueil* 122–3; R Kolb, *Interprétation et création du droit international* (Bruylant 2006) 468.

[11] *Ex parte Simms* [2000] 2 AC 115, 131. Also: *R (on the application of Evans)* [2015] UKSC 21; [2015] AC 1787, [56]–[58], [90] (Lord Neuberger); *R (Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, [2019] 2 WLR 1219, [100] (Lord Carnwath).

[12] *Territorial Jurisdiction of the International Commission of the River Oder*, (1929), Series A, No. 23, p. 20 ('it would hardly be justifiable to deduce from a somewhat ill-chosen expression [contained in a treaty] an intention to derogate from a rule of international law so important as that relating to the ratification of conventions'.)

[13] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, p 16.

[14] R Bernhardt, 'Homogenität, Kontinuität und Dissonanzen in der Rechtsprechung des Internationalen Gerichtshofs: Eine Fall-Studie zum Südwestafrika/Namibia-Komplex' (1973) 33 Zeitschrift für ausländisches Recht und Völkerrecht 1.

In that advisory proceeding it had been contended (by South Africa) that the Covenant of the League of Nations[15] did not confer on the Council of the League the power to terminate a mandate for misconduct of the mandatory, and that no such power to terminate a mandate for misconduct could therefore be exercised by the United Nations, as it could not derive from the League greater powers than had inured to the League itself.[16] The International Court observed that, for this objection to prevail, it would be necessary to show that the original mandates system, 'excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character'.[17] That aside reference to 'provisions relating to the protection of the human person' is interesting but cannot detain us in the present context. The Court added, on the relationship between the treaty and the principle of general international law applicable in the case, that:

> 'The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law'.[18]

A Chamber of the International Court was even more explicit in *Elettronica Sicula*.[19] The United States had argued that the rule of the exhaustion of local remedies did not apply to a

[15] 28 June 1919, 225 CTS 195.
[16] 'The stream cannot rise above its source': J Crawford, 'Chance, Order, Change' (2013) 365 Hague *Recueil* 303.
[17] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 1971, p 16, 47, para 96.
[18] ibid. Also: ibid p 47–8, para 97–8. Also: *Amoco International Finance Corporation v Iran* (1987–II) 15 Iran–USCTR 189, 22, para 112; (1987) 83 ILR 500, 541, para 112.
[19] *Elettronica Sicula SpA* (*ELSI*) ICJ Rep 1989, p 15.

case brought under Article XXVI[20] of the 1948 Treaty of Friendship, Commerce, and Navigation between Italy and the United States.[21] The Chamber concluded that it found itself:

> unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.[22]

There is a rule generally accepted by municipal legal systems according to which an affirmative statute does not detract from the general law, or as it was traditionally expressed by way of Latin brocard: *statutum affirmativum non derogat communi legi*. I touched above on the common law; exactly the same principle can be found in the jurisprudence of the French courts.[23] They make up a principle of legality operating at the international level, according to which treaties will, in the absence of express or even crystal clear language, be presumed to have been intended to be subject to fundamental principles of general international law, including perhaps principles which protect the rights of the individual, what the Permanent Court already in 1935 termed the 'fundamental rights' of the human person.[24]

The Grand Chamber of the European Court of Human Rights relied on such a reading of the principle when in *Al Jedda v United Kingdom*, concerning the interpretation of Security Council resolutions, it determined that:

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[20] 'Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.'

[21] 2 February 1948, 79 UNTS 171.

[22] *Elettronica Sicula SpA* (*ELSI*) ICJ Rep 1989, p 15, 42, para 50. See further C Rousseau, 'L'Independence de l'État dans l'ordre international' (1948) 73 Hague *Recueil* 211–12; D Alland, 'L'interprétation du droit international public' (2013) 362 Hague *Recueil* 172; R O'Keefe, 'Public International Law' (2011) 81 BYIL 339, 402.

[23] See e.g. *Lamotte* Conseil d'État 17 February 1950 (conclusions: Devolvé); translation in L Neville Brown & JS Bell, *French Administrative Law* (5th ed, OUP 1998) 171.

[24] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (1935) PCIJ Series A/B No 65, 54.

> in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.[25]

As Alland has observed, explicitly using the language of legality, '*l'interprétation du particulier se fait par référence au général comme si était postulée une légalité générale opposable à tout Etat*'.[26] Interpreting UN Security Council resolutions in cases such as *Al Jedda*, the Grand Chamber of the European Court of Human Rights resorted to the principle of legality, a principle of general international law, in order to safeguard fundamental human rights in the face of a generally worded instrument.[27] The judgment has been subject to mild criticism by Kolb, who has observed that:

[25] *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, 147 ILR 107, para 102. Also: *Nada v Switzerland* (2012) 56 EHRR 18, para 171.
[26] D Alland, 'L'interprétation du droit international public' (2013) 362 Hague *Recueil* p 172 (our translation: "We understand particular [rules] with reference to general [rules], on the basis of a general principle of legality opposable to all States.").
[27] *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, 147 ILR 107 & *Nada v Switzerland* (2012) 56 EHRR 18.

> '[*l*]*'enchaînement de l'argumentation de la Cour est un exemple impressionnant d'un jugement reposant entièrement sur la présomption d'harmonie et de conformité. Le Conseil de sécurité est prévenue : tout silence sera interprété « contre lui »*'.[28]

What the European Court has added to the principle as applied by the International Court is a strict application of it and the insistence on the fundamental rights of the individual, the legal protection of those rights being held out as the general by reference to which the particular needs to be understood.

II. The principle of freedom of choice of international judicial forum

As Santulli has observed in his magisterial treaties *Droit du contentieux international*,

> '*la possibilité de recours parallèles et de décisions discordantes est admise en droit international. … Plusieurs juridictions internationales peuvent donc être saisies, et aucune objection fondée sur la litispendance … ne pourra être utilement opposé à la multiplication des procédures*.'[29]

That, plainly, is the position of general international law. According to the Tribunal in *American Bottle Company*, there is thus 'no rule in international law' that precludes an applicant from presenting a claim to one tribunal 'because of [the claim] having been

[28] R Kolb, 'L'article 103 de la Charte des Nations Unies' (2014) 367 Hague *Recueil* 11, 128–9.
[29] C Santulli, *Droit du contentieux international* (2nd edn, LGDJ 2015) 105.

previously filed by Memorial' to another.[30] Similarly, the Arbitral Tribunal in *Companie des Chemins de Fer du Nord v German State* held that:

> 'The fact that the claimant instituted proceedings before both the Reparation Commission and the Mixed Arbitral Tribunal could not result in rendering the Mixed Arbitral Tribunal incompetent. If the duplication of proceedings would suffice to bring about the incompetence of the Mixed Arbitral Tribunal, it would equally suffice to cause the incompetence of the other jurisdiction invoked by the Company. This would result in a denial of justice.'[31]

International courts and tribunals have been astute to emphasize this point about the dangers of a denial of justice, what Salmon's *Dictionnaire de droit international* defines as a '[*f*]*ait d'un organe juridictionnel refusant d'exercer sa fonction à égard d'un justiciable*'.[32] Despite the proliferation of international tribunals it cannot be said that the resulting system achieves perfect coverage; experience has shown that the possibility remains of a denial of justice by reason of decisions by tribunals to decline jurisdiction.[33] The court or tribunal first seized of the dispute will have jurisdiction, unless it finds itself confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.[34] This insistence on avoiding the dangers of a denial of justice in connection with the possible seisin of more than one court or tribunal was cast in the following terms by the Permanent Court in *Factory at Chorzów*, and later repeated by the

[30] *American Bottle Company* (1929) 4 RIAA 435, 437
[31] *Companie des Chemins de Fer du Nord v German State* (1929–30) 5 ILR 498–99.
[32] J Salmon (ed), *Dictionnaire de droit international public* (Bruylant 2001) 320.
[33] C McLachlan, 'Lis pendens in international litigation' (2009) 336 Hague *Recueil* p. 454.
[34] S Rosenne, 'The perplexities of modern international law: general course on public international law' (2001) 291 Hague *Recueil* p. 132; C Rosenne, *Essays on International Law and Practice* (Nijhoff 2007) 77.

International Court in *Maritime Delimitation in the Indian Ocean*:[35] in defining its jurisdiction in relation to that of another tribunal, which might or might not at a later point in time consider itself to have jurisdiction over the same matter, the first tribunal 'cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice'.[36] The concern is to obviate a denial of justice by rendering the claimant's suit incapable of adjudication before any tribunal.[37]

What of the approach of the European Court of Human Rights in this regard and its contribution to the principle here at issue? The Court seems to have adopted a double standard, depending on whether or not the application is an inter-State one, or an ordinary application involving an individual applicant on the one hand and a State on the other.

On the one hand there is Article 35 of the Convention, which concerns individual applications:

> '[t]he Court shall not deal with any application submitted under Article 34 that … is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information'.

On the other hand there is Article 55 of the Convention which, concerns inter-State applications, and is in the following terms:

[35] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*, Preliminary Objections, ICJ Rep 2017, para 132.
[36] *Factory at Chorzow*, Jurisdiction, Judgment No 8, 1927, PCIJ, Series A, No 9, p 30. See C Brown, '*Factory at Chorzow (Germany v Poland)* (1927–28)' in E Bjorge & C Miles (eds), *Landmark Cases in Public International Law* (Hart 2018) 61, 79–80.
[37] C McLachlan, 'Lis pendens in international litigation' (2009) 336 Hague *Recueil* p. 467.

> The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Let us begin with Article 55. As was explained by Sir Samuel Hoare during the drafting of that provision, a consideration that weighed with the drafters was the 'proliferation of organs with tremendous difficulties for the definition of their respective jurisdiction'.[38] As observed by William Schabas, however, 'Article 55 does not entirely exclude the possibility that human rights issues as well as related matters are addressed in other fora',[39] and the Strasbourg organs, including the Court, have taken a broad-minded approach to the question. Two examples seem to show this.

First, regarding the matter of Süd Tirol/Alto Adige, Italy and Austria, having initially submitted an inter-State application to the Commission,[40] subsequently reached an agreement, which agreement contained a compromissary clause in which the parties agreed to submit disputes not to the Strasbourg Court but to the International Court of Justice. No Strasbourg organ registered any misgivings.[41]

Secondly, in the dispute between Georgia and Russia, Georgia relied upon the compromissory clause in the International Convention on the Elimination of All Forms of Racial Discrimination[42] in order to bring a case before the International Court of Justice. In

[38] Minutes of the afternoon sitting, 9 June 1950, *Travaux préparatoires to the ECHR IV*, 124.
[39] W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2014) 913. Also: E Decaux, 'Article 62' in LE Pettiti and others (eds), *La Convention européenne des droits de l'homme* (2nd edn, Economica 1999) 912–13.
[40] (1960) 3 Yearbook of the European Convention on Human Rights 168–71.
[41] See A Fenet, 'La fin du litige italo–autrichien sur le Haut-Adige-Tyrol du Sud' (1993) 39 AFDI 357.
[42] 21 December 1965, 660 UNTS 195.

2011 the International Court granted a preliminary objection filed by Russia, finding that Georgia had failed to exhaust the route of negotiation before seising the Court.[43]

During the pendency of the proceeding before the International Court, however, Georgia had filed a case before the European Court of Human Rights.[44] The rule against similar proceedings set out in Article 35 ECHR does not apply to inter-State proceedings. As the case before the International Court had been rejected, no problem of *lis pendens* arose: but what of Article 55? The Court did not explicitly touch on Article 55.[45] Schabas has observed that:

> 'Georgia may well have breached article 55 of the Convention, although it is hard to see what consequence this could have in judicial proceedings. Jurisdiction before either the International Court of Justice or the European Court of Human Rights could not be defeated merely because one of the States had failed to respect Article 55 of the Convention.'[46]

As a matter of principle, that view must be correct. It is not that 'every tribunal is a self-contained system'.[47] Rather, the question of breach by a party of a treaty not at issue before the '*tribunal de céans*' is, on the whole, an extraneous matter to the interpretation and application of the treaty of which the tribunal is in fact seised.

This seems to contrast with the European Court's strict interpretation of Article 35(b) of the Convention, relating to individual applications. The purpose of the provision is, in the

[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections), ICJ Rep 2011 p 70.
[44] *Georgia v Russia* (dec.), no. 38263/08, 13 December 2011.
[45] ibid para 79.
[46] W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2014) 914.
[47] Which was the view taken in *Prosecutor v Tadic* (Jurisdiction) (1995) 105 ILR 419, 458.

Court's own words, 'to avoid a plurality of international proceedings relating to the same cases'.[48]

The Court in 2011 took jurisdiction over the claim in *Yukos v Russia*,[49] which claim was also being heard by an arbitral tribunal set up under the auspices of the Permanent Court of Arbitration in The Hague.[50] The European Court saw no reason to spend much time on the respondent's arguments as to Article 35: 'the Court finds that there is no need for it to examine whether the proceedings in the Hague brought by the company's majority shareholders … may be seen as "another procedure of international investigation [or] settlement" as it is clear that the cases are not "substantially the same"'.[51] The impugned events and domestic proceedings complained of were, said the Court, the same. But the claimants in the arbitral proceedings were the company's shareholders acting as investors, and not the company itself, which was the applicant in the proceedings before the European Court.[52]

In the more recent *Le Bridge v Moldova*, however, the European Court declared inadmissible an application by the company *Le Bridge* because a similar claim had been brought by its single shareholder, Mr Franck Charles Arif,[53] before an arbitral tribunal set up under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).[54] Mr Arif, who was also the CEO of the company, had in that latte capacity signed the application form when introducing the case before the Court, and the Court referred to statements by Mr Arif himself according to which the company and he were indissociable.[55]

[48] *Le Bridge Corporation LTD S.R.L. v Moldova*, no. 48027/10, decision, 19 April 2018, para. 25.
[49] *OAO Neftyanaya Kompaniya Yukos v Russia*, no. 14902/04, 20 September 2011.
[50] See *Yukos Universal Limited (Isle of Man) v Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014.
[51] *OAO Neftyanaya Kompaniya Yukos v Russia*, no. 14902/04, 20 September 2011, para. 523.
[52] ibid para. 524.
[53] *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.
[54] Convention on the Settlement of investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.
[55] *Le Bridge Corporation LTD S.R.L. v Moldova*, no. 48027/10, decision, 19 April 2018, para. 31.

The ICSID Tribunal had been invited by the Respondent in the arbitral proceedings to postpone or extend the time-limit for the filing of one of the Respondent's written pleadings 'on the basis of parallel proceedings before the European Court of Human Rights, the resolution of which might affect' the arbitral proceeding.[56] The Tribunal, taking a rather more latitudinarian approach than the European Court would come to take, held in that regard that 'it was not persuaded that the proceedings before the European Court of Human Rights were substantially similar to the ICSID proceeding, given that they relate to different claimants, different scope of claims and different relief'.[57] The European Court, for its part, chose in its judgment not to make any reference whatever to the ICSID Tribunal's finding in this regard.

Here, therefore, it seems that the insistence of other courts and tribunals, including the International Court and its predecessor, on the freedom of claimants to elect the judicial or arbitral forum or forums that suit them, and the attendant insistence on the avoidance of a denial of justice, is much less strongly felt by the European Court of Human Rights than other courts and tribunals. This is no doubt to be understood in the context of a docket that is bursting at the seams with applications, which perhaps make statements like that of the International Court in *Maritime Delimitation in the Indian Ocean* or the approach of the ICSID Tribunal in *Arif v Moldova* seem like a luxury the European Court can ill afford.[58]

III. The principle of legitimate expectations

When a subject of international law makes assurances to another in a way that leads the other legitimately to place trust and confidence in them, then the expectations created are protected

[56] *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 14.
[57] para. 14.
[58] See also *Kemal Uzan & Others v Turkey*, no. 18240/03, 29 March 2011.

by international law.[59] The International Court of Justice recently observed, in *Obligation to Negotiate Access to the Pacific Ocean*, that:

> 'references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.'[60]

Thirlway has observed in connection with this finding that the fact that the International Court declined to conclude from rulings in arbitral awards in the specialized field of international investment law that a principle parallel to that applied there exists also in general international law 'might appear to suggest that those rulings were based on a non-general source; but in fact they were based on the application of treaty-clauses'.[61]

That is plainly correct. If such a principle does exist in general international law, as I believe it does, then it owes its existence to rather more than references to it by investor–State tribunals interpreting the fair and equitable treatment clause in bilateral investment treaties. In *Obligation to Negotiate Access to the Pacific Ocean*, however, Bolivia has limited itself to arguing the point only on the basis of international investment law.

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[59] R Kolb, 'General Principles of Procedural Law' in A Zimmermann & C Tams (eds), *The Statue of the International Court of Justice* (3rd edn, OUP 2019) 963, 1003; R Kolb, 'La sécurité juridique en droit international' (2002) 10 Afr Ybk Intl L 103; R Kolb, *Good Faith in International Law* (Hart 2017) 15; C C Hyde, *International Law: Chiefly as Interpreted and Applied by the United States Vol I* (Little, Brown & Co 1922) 368–69; P Lalive, *Le respect international des droits acquis* (Association des Études Internationales 1967) 49–50; J P Müller, *Vertrauensschutz im Völkerrecht* (Carl Heymanns Verlag 1971).

[60] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, ICJ Reports 2018, para. 162.

[61] H Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 196 fn 8. A similar point is made by A Pellet & D Müller, 'Article 38' in A Zimmermann & C Tams (eds), *The Statue of the International Court of Justice* (3rd edn, OUP 2019) 819, 949–50.

It is, as Lauterpacht observed more than seventy years ago, 'a sound precept of law', operating to make it impossible under international law for a State 'to cause confusion and to disappoint legitimate expectations by blowing hot and cold'.[62]

In fact, the reliance by international courts and tribunals on a principle of legitimate expectations, or '*confiance légitime*', goes well beyond the case-law of arbitral tribunals interpreting fair and equitable treatment clauses in investment treaties. This was the case in *Portendick (Great Britain v France)*.[63] The French Minister of Marine, Admiral de Rigny, had assured Lord Granville, British Ambassador at Paris, that France had no intention of closing the port of Portendick in French Senegal.[64] When, owing to security concerns, France later abruptly closed the port, with British ships suffering damage as a result, Great Britain remonstrated, deploring the fact that it had received no prior warning of the closure, which in light of the representations ten months earlier might have been called for. In the view of Great Britain there 'is not (precisely speaking) an engagement in this case, but there is a confidential communication, which communication, in all good faith, is to be believed, until otherwise explained or contradicted.'[65] The principle of protection of legitimate expectations was at the heart of the British argument, which was presented in the following terms:

> 'where a Minister of the French Government has made an official communication, relative to his own department, the Government of Great Britain is justified by all the rules and constant usages subsisting in the intercourse between civilized nations, to give trust and confidence to such declaration'.[66]

[62] H Lauterpacht, 'Implied Recognition' (1944) 21 BYIL 123, 150.
[63] *Portendick (Great Britain v France)* (1843) 1 Recueil des arbitrages internationaux 526 (Sole Arbitrator: King Frederic William of Prussia).
[64] (1835) 30 BFSP 639, 640. 'I have been assured by Admiral de Rigny, Minister of Marine, that no intention exists, on the part of the French Government, to place the port or roadstead of Portendic under blockade': letter from Lord Granville to Viscount Palmerston (31 January 1835).
[65] ibid 641.
[66] ibid.

The Tribunal agreed with Great Britain, determining that: '*la France devra indemniser les réclamants des dommages et préjudices auxquels ils n'auraient pas été exposés si ledit Gouvernement en envoyant au gouverneur du Sénégal l'ordre d'établir le blocus, avait simultanément notifié cette mesure au Gouvernement anglais*.'[67] Thus, according to the 1843 award, the French representation vis-à-vis Great Britain had given rise to a legitimate expectation opposable under international law to France. It had done so not on the basis of a treaty, or an 'engagement', but on the basis of a representation by France in which Great Britain had reposed its faith and confidence—in short, its '*Vertrauen*'[68] or its '*confiance*'.[69] The representation was a bilateral one, made by France vis-à-vis only Great Britain: and it was specific and clear.

The key here, at times neglected by common lawyers (and it seems neglected by Bolivia in its pleadings in protected by international law.[70] The International Court of Justice recently observed, in *Obligation to Negotiate Access to the Pacific Ocean*), is the underlying principle of good faith. As the arbitral tribunal held in *Tecmed*, a decision that has been criticized,[71] but not on this particular score, the fair and equitable treatment standard itself codifies a principle of general international law that is based on good faith.[72]

[67] *Portendick*, 530–1.
[68] See J P Müller, *Vertrauensschutz im Völkerrecht* (Carl Heymanns Verlag 1971).
[69] See J D Sicault, 'Du caractère obligatoire des engagements unilatéraux en droit international public' (1979) 83 RGDIP 633.
[70] R Kolb, 'General Principles of Procedural Law' in A Zimmermann & C Tams (eds), *The Statue of the International Court of Justice* (3rd edn, OUP 2019) 963, 1003; R Kolb, 'La sécurité juridique en droit international' (2002) 10 Afr Ybk Intl L 103; R Kolb, *Good Faith in International Law* (Hart 2017) 15; C C Hyde, *International Law: Chiefly as Interpreted and Applied by the United States Vol I* (Little, Brown & Co 1922) 368–69; P Lalive, *Le respect international des droits acquis* (Association des Études Internationales 1967) 49–50; J P Müller, *Vertrauensschutz im Völkerrecht* (Carl Heymanns Verlag 1971).
[71] See e.g. J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 601.
[72] *Tecmed v United Mexican States* (2003) 11 ICSID Rep 361, para 153 (Grigera Naon, President; Fernandez Rozas; Bernal Verea).

The source of this principle, too, is to be found in internal law.[73] The concepts of legal certainty and legitimate expectations are connected and, although their precise content may vary, can be found in the public law of many legal systems.[74] In the civil law, exemplified by French law, the premium has been on legal certainty (or security), '*sécurité juridique*', the protection of which has been recognized as a general principle of law by the French courts.[75] This principle of legal certainty overlaps with important aspects of legitimate expectations.[76] Thus the Conseil constitutionnel has held that as a matter of French law citizens are protected against violations of their 'legally acquired positions' and changes that might 'compromise the effects which may legitimately be expected in connection with such positions'.[77]

As regards the common law, the doctrine of legitimate expectations has firmly established itself as a fundamental general principle of English law, as recently observed by Lord Lloyd-Jones of the UK Supreme Court,[78] no stranger to international law and its relationship with the common law.[79] In the common law, the cases normally treated as the strongest cases of legitimate expectations are those where there has been an individualized representation in which the individual has put faith and reliance.[80] The reason these cases have been treated as the strongest is that such a representation has been considered to carry a particular moral force, and because holding the public body to such a bilateral representation would have less far reaching consequences for the administration.[81] According to Campbell McLachlan QC, another reason is that in those instances the court is able to point to a specific

[73] C McLachlan, L Shore & M Weiniger, *International Investment Arbitration* (2nd ed, OUP 2017) 315.
[74] P Craig, *Administrative Law* (8th ed, Sweet & Maxwell 2016) 670.
[75] See e.g. Conseil d'État, 24 March 2006, *Société KPGM*; Conseil d'État, 27 October 2006, *Société Techna.*
[76] B Stirn, *Towards a European Public Law* (E Bjorge tr, OUP 2017) 121.
[77] Decision No 2013–682 of 19 December 2013; translation in B Stirn, *Towards a European Public Law* (E Bjorge tr, OUP 2017) 121.
[78] Lord Lloyd-Jones, 'General Principles of Law in International Law and Common Law', lecture given at the Conseil d'État, 16 February 2018, p 8. Also: S Sedley, *Lions under the Throne: Essays on the History of English Public Law* (CUP 2015) 154–7; P Craig, *Administrative Law* (8th ed, Sweet & Maxwell 2016) 675–8.
[79] Lord Lloyd-Jones was, before going to the bench, an international law QC at Brick Court Chambers, London, and taught English and international law at Downing College, Cambridge.
[80] P Craig, *Administrative Law* (8th ed, Sweet & Maxwell 2016) 672.
[81] ibid.

act on the part of the executive vis-à-vis the individual which is amenable to review in a manner that does not engage the legislative function:[82] as several arbitral tribunals have pointed out, '[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power'[83] by changing its laws.

For the principle of legitimate expectations to be able to operate on the international level, however, the principle needs to conform to the fundamental exigencies of the international order. In spite of the growing similarities between public international law and municipal public law, a defining feature of this international legal system remains the absence of a central organ with legislative authority.[84] Still today international society remains to a certain large degree a society dominated by consensualism and the orthodoxy of bilateralism.[85] As Crawford has recently observed, 'according to a deeply ingrained view of international law and international society, the character of international rights and obligations is inherently bilateral'.[86] In order for the principle of legitimate expectations to operate in international law, therefore, it needs to be made to conform to the inherently bilateral character of rights and obligations in international law. The protection of legal security is in international law therefore a bilateral matter.[87] As Kolb has pointed out, '[*l*]*a sécurité juridique en droit international est essentiellement une sécurité des rapports bilatéraux*'.[88]

[82] C McLachlan, L Shore & M Weiniger, *International Investment Arbitration* (2nd ed, OUP 2017) 7.162–5 & 7.179.
[83] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, 11 September 2007 (Lévy P; Lalonde; Lew) para 332.
[84] *Austro–German Customs Union Case* (1931) PCIJ Rep. Series A/B, No. 41, p 57 (Judge Anzilotti); J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 Hague *Recueil* 344.
[85] P Weil, 'Cours général: le droit en quête de son identité' (1992) 237 Hague *Recueil* 151; V Gowlland-Debbas, 'The ICJ and the Challenges of Human Rights Law', in M Andenas & E Bjorge (eds), *A Farewell to Fragmentation: Convergence and Reassertion in International Law* (CUP 2015) 109, 144.
[86] Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 Hague *Recueil* 344, 345.
[87] P Weil, 'Le droit international en quête de son identité' (1992) 237 Hague *Recueil* 157; P Couvreur, 'Estoppel: synonyme pédant de la bonne foi', in H Ascensio, P Bodeau-Livinec, M Forteau, F Latty, JM Sorel and M Ubéda-Saillard (eds), *Dictionnaire des idées reçues en droit international: en clin d'œil amicale à Alain Pellet* (Pedone 2017) 221.
[88] R Kolb, 'La sécurité juridique en droit international' (2002) 10 Afr Ybk Intl L 103, 142.

A legitimate expectation therefore cannot in international law be based on general commitments or assurances (such as the publication of documents setting out government policy, or an invitation to potential investors launching a tendering process, or a statute addressed to the general public) which are not directed to any particular recipient. This is why international courts and tribunals have been slow to hold that legitimate expectations can exist outside of bilateral relationships.[89] The general principle of law protecting legitimate expectations, thus conceived, is in line with the consensualist and still essentially bilateral nature of international law. That might go some way towards obviating the misgivings of those who have deprecated the principle as being 'a general and vague standard'.[90] Within carefully defined bounds, the principle of protection of legitimate expectations is a part of general international law.

It is clear from the jurisprudence of the European Court of Human Rights that the principle of legitimate expectations is more than only something to which reference is made,[91] in the case-law of investor–State tribunals. Nevertheless, there does not seem to be a requirement of synallagmaticity or bilateralism in the case-law of the European Court.

Recourse to the principle of legitimate expectations within the jurisprudence of the European Court of Human Rights is of a somewhat different nature. According to the case-law of that court, an individual may have a 'possession' for the purpose of Article 1 of Additional Protocol 1 of the European Convention if the individual has an 'asset', in the shape of a claim,

[89] See e.g. *Aboliard (France/Haïti)* (1905) 12 RGDIP (Documents) 13, 15; *Jesse Lewis (United States) v Great Britain (David J Adams case)* (1921) 6 RIAA 85 (Fromageot, President; Fitzpatrick; Anderson) 92; *Shufeldt Claim (Guatemala v United States)* (1930) 2 RIAA 1079 (Sole Arbitrator: Sisnett) 1094; *Situation in Manchuria: Report of the Lytton Commission of Enquiry*, League of Nations Publications, VII, Political, 1932 (1 October 1932), esp 44; *ECE Projektmanagement International GmbH & Kommanditgesellschaft Panta Acthundsechzigste Grundstückgesellschaft mbH & Co v The Czech Republic*, PCA Case No. 2010–5, paras 4.762 & 4.767 (19 September 2013) (Sir Frank Berman, Chairman; Bucher; Thomas); *David Minnotte & Robert Lewis v Poland*, ICSID Case No ARB(AF)/10/1 (16 May 2014), paras 193–4 (Lowe, President; Mendelson; Silva Romero).
[90] J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arb Int 351, 373.
[91] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, ICJ Reports 2018, para. 162.

in relation to which it can be argued that the individual has a legitimate expectation of obtaining effective enjoyment of a property right.[92]

In that regard the Grand Chamber of the European Court in *Kopecky v Slovakia* stressed that there was a difference between a mere hope, however understandable that hope might be, and a legitimate expectation, which 'must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act'.[93] Where the proprietary interest is in the shape of a claim, it may be regarded as an asset for the purposes of Article 1 of Protocol 1 only where it has a sufficient basis in a legal provision which has a bearing on the property interest in question.[94]

Two aspects stand out in that regard. On the one hand, the bar is a high one: it is not enough, for example, to have an 'arguable claim' to obtaining effective enjoyment of the property right.[95] On the other hand, by placing such a premium on legislative acts, the European Court takes a different approach from other international courts and tribunals, since, on the basis of the requirement of synallagmaticity, the majority of those international courts and tribunals have, in the words of the Tribunal in *Blusun v Italy*, 'declined to sanctify laws as promises' on which an individual can legitimately found expectations.[96]

But the jurisprudence of the European Court also makes another contribution in this regard. As with arbitral tribunals interpreting fair and equitable treatment provisions, where the

[92] *Kopecky v Slovakia* (2005) 41 EHRR 43; ECHR 2004–IX, para 35; *JA Pye (Oxford) Ltd & JA Pye (Oxford) Land Ltd v United Kingdom*, ECHR 2007–III, para 61; *Prince Hans-Adam II of Liechtenstein v Germany*, ECHR 2001–VIII, para 83; *Werra Naturstein GMBH & Co KG v Germany (Merits)* (unreported) App No 32377/12, 19 January 2017, para 39; *Werra Naturstein GMBH & Co KG v Germany (Just Satisfaction—Striking Out)* (unreported) App No 32377/12, 19 April 2018, paras 12–13.
[93] *Kopecky v Slovakia* (2005) 41 EHRR 43; ECHR 2004–IX, para 49.
[94] ibid para 52; *Gratzinger & Gratzingerova v Czech Republic*, App No 39794/98, 10 July 2002, para 73.
[95] W A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 969; *Kopecky v Slovakia* (2005) 41 EHRR 43; ECHR 2004–IX, para 52.
[96] *Blusun v Italy*, ICSID Case No ARB/14/3 (27 December 2016) (Crawford, President; Alexandrov; Dupuy) para 367. Also: *Philips Morris SARL v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), para 426; *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1 (27 December 2010), para 120 (Sacerdoti, President; Alvarez; Herrera Marcano); C Schreuer, *Fair and Equitable Treatment in Arbitral Practice* (2005) 6 Journal of World Trade 357, 374.

principle of legitimate expectations is also connected to a conventional standard, the principle of legitimate expectations on which the European Court has relied is not as such rooted in this treaty standard.[97] Because the ECHR does not mention legitimate expectations or in any way make reference to the principle: it is a reference to something found in general international law.

Perhaps, therefore, the most important contribution to general international law of the jurisprudence of the European Court on legitimate expectations is the fact that it exists in the first place.

The jurisprudence of the European Court on legitimate expectations combines with traditional inter-State case-law to show that 'references to legitimate expectations may be found', to use the words of the International Court, not only in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment.[98]

Conclusion

The young traveller with whose description of Heidelberg I began this article, Patrick Leigh Fermor, who came through the Palatine Forest in the winter of 1933–34, had set out from England and would travel all the way to Constantinople, arriving there in February of 1935. That progress from West to East thus mapped the entire width of the area covered today by the jurisdiction of the European Court of Human Rights and which makes up the so-called '*espace juridique*'[99] of the Convention. As Leigh Fermour's interwar *Bildungsreise* has demonstrated to generations of readers, our old continent is, properly understood, shaped by outside

[97] McLachlan, Shore, and Weiniger, *International Investment Arbitration*, 315; A de Nanteuil, *Droit international de l'investissement* (2nd ed, Pedone 2017) 353; Kolb, *Good Faith in International Law*, 243–6.
[98] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*, ICJ Reports 2018, para. 162.
[99] *Bankovic v Belgium* [GC], no. 52207/99, ECHR 2001–XII, (2001) 123 ILR 94, para. 80; *Al-Skeini v Untied Kingdom* [GC], no. 55721/07, ECHR 2011; (2011) 147 ILR 181, paras. 141–142.

influences as much as it itself has shaped the outside world (the traces, for example, of Eastern influences, whether in the shape of gurgling *nargilehs* or engaging loan-words, were everywhere to be found along the author's progress). So, too, it is with the case-law of the European Court of Human Rights and its relationship with general international law. The influences evidently go both ways, the road is littered at times with difficulties that may hinder smooth communications, and sometimes the one does not make the impact on the other that one might have hoped for. But it remains that the two—Europe and the outside world, the European Convention and general international law—are intimately linked, to the mutual betterment of both.