Customary International Law as an Object of Scrutiny and an Interpretative Aid

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Customary International Law as an Object of Scrutiny and an Interpretative Aid

(obs. ECtHR, 9 July 2019, *Volodina v Russia*, N° 41261/17 and ECtHR, GC, 29 January 2019, *Güzelyurtlu and Others v Cyprus and Turkey*, N° 36925/07)

Marina Fortuna

ABSTRACT

This article examines two recent cases from the European Court of Human Rights — *Volodina* and *Güzelyurtlu* — in which the Court has used customary international law both as an object of its scrutiny and as an interpretative aid. The two cases serve as a springboard for an analysis in broad brushstrokes of the regular approach of the ECtHR in the ascertainment and interpretation of rules of customary international law, on the one hand, and in the interpretation of rights contained within the ECHR and the Protocols thereto in light of customary international law, on the other. Analysed against the background of the Court's older cases, *Volodina* and *Güzelyurtlu* fit, to a large extent, within the orthodox approach of the Court, yet simultaneously depict the challenges it faces when dealing with customary international law in its practice.

RESUME

Cet article examine deux arrêts récents de la Cour européenne des droits de l'homme - *Volodina* et *Güzelyurtlu* – qui montrent que la Cour s'en sert du droit international coutumier à la fois comme d'un cadre d'action et comme d'un outil interprétatif. Les deux affaires s'inscrivent dans la continuité de sa jurisprudence classique qui consiste à utiliser les règles du droit international coutumier non seulement pour développer le contenu des droits et libertés inscrits dans la ConvEDH et ses Protocoles, mais aussi pour inscrire les règles du droit international coutumier dans le système européen de protection des droits de l'homme. L'analyse de ces deux arrêts montre sans aucun doute les défis pratiques auxquels elle est confrontée dans le cadre de l'exercice de son office.

KEYWORDS : customary international law - identification of customary international law - interpretation of customary international law - article 31(3)(c) VCLT - *Volodina v Russia*, *Güzelyurtlu and Others v Cyprus and Turkey*

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Marina Fortuna*

1. INTRODUCTION

In 2019 the European Court of Human Rights ('ECtHR' or 'the Court') delivered its judgments in the cases of *Volodina v Russia*[1] and *Güzelyurtlu and Others v Cyprus and Turkey.* [2] Both cases, while concerning different rights contained in the European Convention on Human Rights ('ECHR' or 'the Convention'), are the most recent addition to the Court's thread of cases touching upon customary international law. Although international custom is only incidental to the Court's jurisdiction, the ECtHR has frequently used customary rules as either an object of its scrutiny (upon identification of the existence or interpretation of the content of customary rules) or as an interpretative aid for the purposes of construing the rights found in the Convention and the Protocols thereto.

Volodina and *Güzelyurtlu* bring to the fore, once again, the intricacies that the Court is faced with when dealing with customary international law. When the ECtHR uses customary international law as an object of its scrutiny — which usually happens preliminary to the Court using international custom in order to interpret the Convention itself — it rarely conducts its own assessment into State practice and *opinio juris.* More often than not, the Court outsources this determination to other authorities — an approach for which it has been criticized by legal scholars, but which it still maintained in both *Volodina* and *Güzelyurtlu.* When customary international law is used as an interpretative aid, the ECtHR, relying on the provisions of Article 31(3)(c) of the Vienna Convention on the Law of Treaties ('VCLT'), seeks to harmonize the interpretation of the Convention rights with general international law. *Güzelyurtlu* stands out from the case law where the Court relied on Article 31(3)(c). Instead, the ECtHR used its own interpretation of a customary rule established in a previous case to construe the content of the procedural obligation contained in Article 2 of the ECHR.

Both cases are a valuable contribution by the ECtHR to the thread of cases dealing with the (sometimes complex) relationship between ECHR law and customary international law.

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[1] *Volodina v Russia* Application No 41261/17, Merits and Just Satisfaction, 9 July 2019 [Third Section].

[2] *Güzelyurtlu and Others v Cyprus and Turkey* Application No 36925/07*,* Merits, 29 January 2019 [Grand Chamber].

Likewise, both cases advance our understanding of the interplay between the two facets of customary international law in the practice of the ECtHR, which is why they were selected for the present analysis.[3] The inquiry starts off with a brief presentation of the factual background of the two cases and the claims made by the Parties **(Section 2)** and proceeds to the substantive analysis of the use of customary international law as an object of the ECtHR's scrutiny and as an interpretative aid **(Section 3)**.

2. THE CASES IN SHORT

A. *Volodina v Russia*

In 2017 Ms Volodina lodged an application before the ECtHR against the Russian Federation for failing to prevent, investigate and prosecute acts of domestic violence committed against her by her former partner and for failing to establish a normative framework to prevent and punish gender-based violence.[4]

Between 2016 and 2017 the applicant was abducted, assaulted and threatened by her former partner multiple times.[5] She repeatedly addressed emergency calls and criminal complaints to the police, but the authorities refused to open a criminal investigation into the incidents.[6] Further, in March 2018 the applicant's former partner published her private photographs on a social network without her consent, which the applicant again complained of to the

[3] To date the research on the general approach of the ECtHR towards customary international law is rather scarce, compared to the research conducted on other international courts and tribunals. Most legal publications focus on specific areas of customary international law and their interaction with one or more of the rights contained in the Convention. For general discussions on the ECtHR and customary international law see indicatively: Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights — The Method' (2013) 12 *The Law and Practice of International Courts and Tribunals* 243-252; Francioni, 'Customary International Law and the European Convention on Human Rights' (1999) 9 *Italian Yearbook of International Law* 11-25; Caflisch, 'L'application du droit international général par la Cour européenne des droits de l'homme' in Buffard, Crawford, Pellet, Wittich (eds) *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (2008) 627-648.
For an analysis concerning the interaction of customary international law and specific rights contained in the ECHR see indicatively: Pavoni, 'The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?' in van Aaken, Motoc (eds) *The European Convention on Human Rights and General International Law* (2018); Motoc, Vasel, 'The ECHR and Responsibility of the State: Moving Towards Judicial Integration' in van Aaken, Motoc (eds) *The European Convention on Human Rights and General International Law* (2018); Rodgers, 'State immunity and employment relationships before the European Court of Human Rights' (2019) 19 *ERA Forum* 537-550; Forowicz, *The Reception of International Law in the European Court of Human Rights* (2010); Kloth, *Immunities and the right of access to court under Article 6 of the European Convention on Human Rights* (2010); Vanneste, *General International Law Before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law* (2010); Voyiakis, 'Access to Court v State Immunity' (2003) 52 *International & Comparative Law Quarterly* 297-332; Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards during Armed Conflicts' (2002) 45 *German Yearbook of International Law* 60-77; Tigroudja, 'La Cour Europeenne des Droits de l'Homme et les Immunites Juridictionnelles d'Etats' (2001) 34 *Rev BD*I 526.
[4] *Volodina v Russia,* supra n 1, at paras 1-3.
[5] Ibid. at paras 10-29.
[6] Ibid.

State police.[7] The Russian authorities initiated a criminal investigation, as the conduct was potentially falling under the ambit of an invasion of personal privacy, but by the time of the applicant's final submissions to the court, the criminal investigation had produced no results.[8]

After the police refused to start a criminal investigation when the applicant was again assaulted on the street and had her belongings stolen by her former partner, she applied for State protection.[9] This, however, did not result in any formal decision on her case, which is why she made a complaint to the domestic court. The courts, in turn, found that the refusal of the police to issue a decision on her case was unlawful, but, at the same time, refused to rule on the issue of state protection, as this was a matter to be decided by the police.[10]

According to the applicant the conduct of the Russian authorities violated the provisions of Article 3 (prohibition of torture), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the ECHR.[11]

B. *Güzelyurtlu and Others v Cyprus and Turkey*

The application was lodged in 2007 by the relatives of Elmas, Zerrin and Eylül Güzelyurtlu. On 15 January 2005 the victims, all of Cypriot nationality and Turkish Cypriot origin, were murdered in the area of Cyprus controlled by the Cypriot Government.[12] Both Cyprus and Turkey initiated criminal investigations into the murders. The investigation conducted by the Cypriot authorities led to the identification of eight suspects.[13] Since the suspects were found on the territory of the Turkish Republic of Northern Cyprus ('TRNC'), the Cypriot authorities requested their extradition from Turkey. The latter, however, did not respond to the Cypriot request for extradition.[14]

Parallel to the investigation conducted by Cyprus, the TRNC initiated its own criminal investigation and, as a result, managed to arrest the suspects.[15] The authorities of the TRNC requested that the Cypriot authorities hand over the evidence collected at the crime scene, but the latter refused, relying in front of the ECtHR on the customary obligation of non-recognition. This obligation prohibits any State to recognize as lawful a situation created by a serious breach of an obligation arising from a peremptory norm of international law.[16] As a result, due to a lack of evidence connecting them to the crime, the suspects were

[7] Ibid. at para 30.
[8] Ibid.
[9] Ibid. at paras 31-37.
[10] Ibid. at para 38.
[11] Ibid. at para 67 and 103.
[12] *Güzelyurtlu and Others v Cyprus and Turkey,* supra n 2, at paras 14-15.
[13] Ibid. at paras 31, 41.
[14] Ibid. at paras 59-60.
[15] Ibid. at paras 66-90.
[16] Ibid. at para 208.

subsequently released.[17] This led to the proceedings in both Cyprus and the TRNC to remain unresolved.

The applicants alleged that both Cyprus and Turkey violated their obligations under Article 2 (right to life) because of their failure to cooperate in investigating the murder of their family members and in failing to bring the suspects to justice[18] and Article 13 (right to an effective remedy) of the ECHR.[19]

3. CUSTOMARY INTERNATIONAL LAW AS AN OBJECT OF SCRUTINY AND AN INTERPRETATIVE AID

Both *Volodina* and *Güzelyurtlu* concerned serious violations of the rights enshrined in the Convention and are by themselves a valuable contribution to the Court's jurisprudence. At the same time, they inform our understanding of the ways in which the ECtHR deals with customary international law.

A. Customary International Law as an Object of Scrutiny

Both *Volodina* and *Güzelyurtlu* are two cases where customary international law was an object of scrutiny by the ECtHR and the Parties to the case, in the sense of being either identified or interpreted.[20] Though the ECtHR cannot rule, strictly speaking, on whether a State had violated a norm of customary international law, according to Article 32 of the ECHR its jurisdiction is wide enough to encompass rules of customary international law whenever they regard the interpretation and application of the Convention and the Protocols thereto. Some rights enshrined in the Convention either implicitly or explicitly mandate the Court to apply rules of customary international law, such as Article 7 of the ECHR.[21] In the case of other rights, rules of customary international law may only be used for interpretative purposes and, thus, are incidental to the Court's jurisdiction. In either case, preliminary to either the application of or the interpretation in accordance with international custom the ECtHR is to determine whether an individual customary rule exists. To this end, the ECtHR has throughout its practice, more often than not, relied on pronouncements made by other authorities — an approach of outsourcing the ascertainment of customary international law, which the Court has maintained in both *Volodina* and *Güzelyurtlu.*

In *Volodina*, ruling on whether the Russian authorities violated Article 14 of the ECHR, the Court not only made reference to the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), which prohibits gender-based violence,[22] but

[17] Ibid. at para 91.
[18] Ibid. at para 169.
[19] Ibid. at paras 169, 269.
[20] Merkouris, 'Interpreting the Customary Rules of Interpretation' (2017) 19 *International Community Law Review* 127-155, 133 *et seq*.
[21] See Francioni, supra n 3, 13-16.
[22] *Volodina v Russia,* supra n 1*,* at paras 55,110.

also felt the need to emphasize that 'the prohibition of gender-based violence against women as a form of discrimination against women has evolved into a principle of customary international law'.[23] To give this legal qualification (thus, to identify the customary rule) the ECtHR relied on the CEDAW Committee's General Recommendation No. 35 that made this pronouncement.[24] In *Güzelyurtlu*, on the other hand, the Court relied, in its regular fashion, on the International Law Commission ('ILC') Articles on State Responsibility and the commentaries thereto[25] which contain the obligation of non-recognition.

In the Court's practice, the approach of outsourcing customary international law to other authorities has been frequently resorted to in cases involving State immunity and State responsibility.[26] In *Radunović and Others v Montenegro*[27] and *Naku v Lithuania and Sweden,*[28] and earlier in *Cudak v Lithuania,*[29] *Sabeh El Leil v France,*[30] *Wallishauser v Austria,*[31] *Oleynikov v Russia,*[32] *Jones and Others v the United Kingdom*[33] the ECtHR relied on the 1991 ILC Draft Articles on Jurisdictional Immunities of States and their Property[34] (together with the UN Convention on Jurisdictional Immunities of States and their Property)[35] — an approach which it was subsequently criticized for in legal scholarship.[36]

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[23] Ibid. at para 110.
[24] Ibid. at para 55.
[25] *Güzelyurtlu and Others v Cyprus and Turkey,* supra n 2, at paras 157-158.
[26] Indicatively: *Ilgar Mammadov v Azerbaijan* Application No 15172/13, Proceedings under Article 46 § 4, 29 May 2019 [Grand Chamber], at paras 81-87; *Abu Zubaydah v Lithuania* Application No 46454/11, Merits and Just Satisfaction, 31 May 2018 [First Section], at para 232; *Al-Dulimi and Montana Management Inc. v Switzerland* Application No 5809/08, Merits and Just Satisfaction, 21 June 2016 [Grand Chamber], at para 57; *Liseytseva and Maslov v Russia* Application Nos 39483/05 and 40527/10, Merits and Just Satisfaction, 9 October 2014, [First Section], at paras 128-130; *Anchugov and Gladkov v Russia* Application Nos 11157/04 and 15162/05, Merits and Just Satisfaction, 4 July 2013 [First Section], at para 37.
[27] *Radunović and Others v Montenegro* Application Nos 45197/13, 53000/13 and 73404/13, Merits and Just Satisfaction, 25 October 2016 [Second Section].
[28] *Naku v Lithuania and Sweden* Application No 26126/07, Merits and Just Satisfaction, 8 November 2016 [Fourth Section].
[29] *Cudak v Lithuania* Application No 15869/02, Merits and Just Satisfaction, 23 March 2010 [Grand Chamber].
[30] *Sabeh El Leil v France* Application No 34869/05, Merits and Just Satisfaction, 29 June 2011 [Grand Chamber].
[31] *Wallishauser v Austria* Application No 156/04, Merits and Just Satisfaction, 17 July 2012 [First Section].
[32] *Oleynikov v Russia* Application No 36703/04, Merits and Just Satisfaction, 14 March 2013 [First Section].
[33] *Jones and Others v the United Kingdom* Applications Nos 34356/06 and 40528/06, Merits, 14 January 2014 [Fourth Section]. For older case law see also *Al-Adsani v the United Kingdom* Application No 35763/97, Merits, 21 November 2001 [Grand Chamber]; *Fogarty v the United Kingdom* Application No 37112/97, Merits and Just Satisfaction, 21 November 2001 [Grand Chamber]; *McElhinney v Ireland* Application No 31253/96, Merits, 21 November 2001 [Grand Chamber].
[34] International Law Commission, *Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries*, ILC Rep A/46/10 in Yearbook of the International Law Commission, 1991, vol. II, Part two, 13.
[35] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, A/RES/59/38.
[36] Pavoni, supra n 3, at 266. While exceeding the scope of the present inquiry, the examination by the ECtHR of the facts of the case in terms of state immunity may raises issues concerning the fact that the ECtHR acts as a court of fourth instance. See van Alebeek, '*Oleynikov* Judgment on State Immunity', ECHR Blog, 22 March 2013 [last accessed 13 June 2020].

The concerns of scholars regarding the Court's methodology of ascertaining customary rules, especially in State immunity cases, were endorsed by one of the judges of the Court, who in her Concurring Opinion to *Naku v Lithuania* noted that :

> The Court subsequently jumped forward from the 1991 draft Articles to the United Nations Convention of 2004, and from "the new trends implemented by a growing number of States" to well-established State practices, largely and representatively accompanied by the *opinio juris*.[37]

and

> if the ECtHR had decided to take account of the international norms, it would also have been useful to examine the origin, quality and reliability of the customary norms in question[38]

The outsourcing of the ascertainment of customary rules to the ILC, in addition to the ECtHR's reliance on the determinations of customary international law made by the International Court of Justice ('ICJ'), has been perceived by some judges of the Court to be a misstep.[39] According to Judge Dedov in the Court's recent *Naït-Liman v Switzerland* case :

> the Court quoted the opinion of the International Court of Justice in the landmark (and very recent) case of *Jurisdictional Immunities of the State* [..] but the two cases are different : the ICJ case is more of a historical nature and does not concern such a grave crime against humanity as torture, which is specially and exclusively protected at the level of an international convention. In contrast, the present case is directed towards the future. It concerns the development of effective international measures to protect fundamental rights and freedoms within the framework of multilateral international treaties, not of bilateral relations.[40]

This raises the question of the extent to which the approach of the ECtHR to outsource the ascertainment of customary rules, maintained in both *Volodina* and *Güzelyurtlu,* is justified. It is safe to say that the ECtHR is hardly singular in its approach of outsourcing customary international law to other authorities — it is an accepted practice across most international

[37] *Naku v Lithuania*, supra n 15, Concurring Opinion of Judge Motoc, at 42.
[38] Ibid. at 43.
[39] For instance, in *Jones and Others v the UK*, the European Court noted: it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the ICJ in *Germany v. Italy* [..] – *which must be considered by this Court as authoritative as regards the content of customary international law* – clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. See *Jones and others v the United Kingdom*, supra n 33, at para 198, emphasis added.
[40] *Naït-Liman v Switzerland* Application No 51357/07, Merits and Just Satisfaction, 15 March 2018 [Grand Chamber], Dissenting Opinion Judge Dedov, at 71.

courts and tribunals.[41] Outsourcing has, firstly, the advantage of saving time and increasing efficiency, especially in cases where the existence of a customary rule is well-established and it is unnecessary to re-examine and re-expose the existing State practice on the subject. Secondly, it contributes to an increase in the uniform application of customary international law within international courts and tribunals, especially in light of the fact that the ECtHR does not have an obligation to take into account the pronouncements made by international courts with general jurisdiction. If different courts emitted different opinions on matters of whether a specific rule is custom or not, then there would be a higher likelihood of judicial chaos to ensue. Thus, the reference to the determinations made by other international courts and tribunals or the collective reference of international courts and tribunals to the work of the ILC encourages and promotes uniformity and cohesion.

Moreover, the ILC's draft conclusions on the identification of customary international law,[42] as the authoritative guide on the ascertainment of customary rules, explicitly mentions that decisions of the ICJ (and other decisions of international courts) may be consulted as evidence of customary international law[43] and thus encourages 'transjudicial communication'.[44]

The same reasoning is valid with respect to interpretation of customary international law, which, as opposed to the identification of custom, deals with the determination of the content of a customary rule after its existence and initial content has already been acknowledged.[45] While the ECtHR has itself engaged in interpretation of customary international law, and used, to this end, methods similar to those used in treaty

[41] For instance, investment tribunals have in many cases used the ILC Articles on State Responsibility as a statement of customary international law. See indicatively: *Patrick Mitchell v The Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application of the Annulment of the Award 1 November 2006, at para 57; *Noble Ventures Inc. v Romania*, ICSID Case No ARB/01/11, Award of 12 October 2005, at para 69; *Mondev International Ltd. v United States of America*, ICSID Case No ARB(AF)/99/2, Award 11 October 2002, at para 68. For a doctrinal analysis see Bordin, 'Reflections of Customary International Law. The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 *International and Comparative Law Quarterly* 535-568.

[42] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, ILC Rep A/73/10 in *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, 123.

[43] Ibid. at 149.

[44] The term 'transjudicial communication' was coined by Anne-Marie Slaughter. See Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99.
Nonetheless, from the standpoint of the ILC, 'the term "subsidiary means" denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law', which means that an authoritative statement of the ICJ on custom does not discharge the international court from the duty to evaluate a court's pronouncement against state practice and *opinio juris*. Another important caveat is that that 'judicial pronouncements on customary international law do not freeze the law; rules of customary international law may have evolved since the date of a particular decision'. The proximity of the statement made by the ICJ to the date of the case should then be taken into account as a relevant circumstance for the determination of custom. Lastly, the value given to a decision of an international court will depend, according to the ILC, on factors such as: the quality of reasoning, the reception of the decisions by States and in subsequent case law, the nature of the court or tribunal, the size of the majority by which the decision was adopted, the rules and procedures applied by the court or tribunal. See ILC Draft conclusions on the identification of customary international law, supra n 42, at 149.

[45] See Merkouris, supra n 20.

interpretation, [46] such as the resort to a consequentialist argument, [47] teleological interpretation, [48] *exceptio est strictissimae applicationis,* [49] it has also relied on interpretations given by other international courts and tribunals (which may also be considered to be a form of outsourcing). Again, however, the judges of the ECtHR disagree among themselves on the value to be given to the interpretations of customary international law belonging to other international courts and tribunals. For instance, according to Judge Gyulumyan in the recent *Chiragov and Others v Armenia* case :[50]

> the uniformity of interpretation and application of general international law by different courts and other institutions stands as a prerequisite of international

[46] Unlike the ICJ, international criminal courts and tribunals or investment tribunals, the ECtHR's case law does not abound in examples of interpretation of customary international law. At the same time, the few instances where customary international law was interpreted share similarities with other international courts and tribunals. See Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (2015), at 255-263; Fortuna, 'Different Strings of the Same Harp. Interpretation of Customary International Law *versus* Identification of Custom and Treaty Interpretation', TRICI-Law Research Paper Series No. 001/2020, University of Groningen. Faculty of Law.

[47] In *Al-Adsani v the United Kingdom* two judges of the Court used two different interpretative methods concerning a legal question of state immunity in proceedings arising from the *jus cogens* prohibition of torture. Judge Pellonpää argued that 'although the consequences should not alone determine the interpretation of a given rule, one should never totally lose sight of the consequences of a particular interpretation one is about to adopt'. See *Al-Adsani v the United Kingdom,* supra n 33, Concurring Opinion of Judge Pellonpää joined by Judge Sir Nicholas Bratza, at 27. For this type of interpretation see McCormick, *Legal Reasoning and Legal Theory* (1994) at 149-150.

[48] Also in *Al-Adsani* Judge Loucaides stated that the legal issue in question had to be resolved by taking into account the rationale (teleology) of the rules on accountability for those who commit acts of torture. Broadly speaking, this approach is similar to interpretation of treaties in light of their object and purpose, which has also been used at the ICJ with respect to customary international law. See *Al-Adsani v the United Kingdom*, supra n 33, Dissenting Opinion of Judge Loucaides, at 34.

In a similar vein in *Güzelyurtlu* the Cypriot Government used the language of treaty interpretation with respect to the customary rule of non-recognition, when it argued that 'the aim of the rules on non-recognition was not less important that the aims of the Convention. The function of non-recognition both in customary law and under the ILC Articles was to punish the violation of peremptory norms against State aggression, occupation and acquisition of territory by force, and therefore to prevent the death and destruction that these brought.' See *Güzelyurtlu and Others v Cyprus and Turkey,* supra n 2, at para 208.

[49] In *Sabeh El Leil v France* the Court dealt with the interpretation and application of the employment exception in state immunity as part of customary international law. For the purposes of interpretation, the Court declared that 'exceptions must be strictly interpreted'. Although the ECtHR made this statement when referring to Article 11 of the UN Convention on State Immunity, it should be noted that, since the convention was (and still is) not in force, it was applying the rule as customary international law. Restrictive interpretation is a common form of interpretation in the law of treaties, which means that 'any doubt when interpreting will be resolved in favour of the general provision and against the exception'. While it is far easier to imagine restrictive interpretation in the the case of treaties, customary international law can be equally restrictively interpreted, especially in the case of a regional customary rule by reference to general principles of international law, where the regional customary rule will be the exception. See *Sabeh El Leil v France,* supra n 30, at para 66; Solomou, 'Exceptions to a Rule Must Be Narrowly Construed' in Klingler et. al (eds) *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (2019) 359-385; Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 2nd ed (2015) 170; Waibel, 'Demistifying the Art of Interpretation' (2011) 22 *European Journal of International Law* 571-588; Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness' (1949) 26 *British Yearbook of International Law* 48-87; Lauterpacht, *The Development of International Law by the International Court* (1958) at 382.

[50] *Chiragov and Others v Armenia* Application No. 13216/05, Merits, 16 June 2015 [Grand Chamber].

> justice and legal order. Thus, bearing this consideration in mind, regard must also be had to the practice of other international institutions.[51]

This position is shared by those to whom the ECtHR is expected to deliver justice.[52] *Per a contrario*, for other judges the consistency of the ECtHR with its previous case law stands as a primary consideration,[53] which creates the expectation that if the Court had to decide among the two strategies, judges supporting this position would firmly advise in favour of the Court being faithful to its earlier pronouncements. Similar to the identification of customary international law, relying on the interpretations given by other international courts and tribunals may be advantageous from the standpoint of promoting uniformity in the interpretation and application of the law. Nonetheless, it is reasonable to expect that as opposed to the identification of custom, where the uniformity of the conclusions of international courts and tribunals on the existence of custom is mandated by the principle of legal certainty,[54] international judges have more discretion in the case of interpretation.

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[51] Ibid. Dissenting Opinion of Judge Gyulumyan, para 85.

[52] For instance in *Mozer v the Republic of Moldova and Russia* Application No 11138/10, Merits and Just Satisfaction, 23 February 2016 [Grand Chamber], at para 93 Russia argued that the Court should take into account the interpretations given by other international courts to the concept of effective control.
The concept of effective control is part of the rules on attribution in State responsibility, as reflected in the ILC Articles on State Responsibility, acknowledged to be largely a codification of customary international law. The ECtHR, however, uses this standard to determine whether under Article 1 of the ECHR the Respondent State had, at the time the alleged violation occurred, jurisdiction over a specific territory. Effective control was established as the standard approach of the Court for the purposes of spatial jurisdiction in *Loizidou v Turkey.* Since then it had raised valid questions concerning the relationship between effective control in attribution (where it is part of the customary rule on attribution) and effective control as part of jurisdiction (where it falls under the notion of jurisdiction in Article 1).
In the case law of the ECtHR the notion of 'effective control' was interpreted to refer to the strength of the State's military presence in a certain area and is evaluated along a spectrum which ranges 'from the more entrenched and visibile exercise of de facto government, administration, or public powers, to the more borderline cases of less permanent or overt state control' (Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011) at 141). According to Milanovic, the effective control test from the ECtHR is conceptually distinct from the ICJ one, since 'the former refers to state control over *territory* for the purpose of establishing whether the state has jurisdiction over the territory, the latter to state control over *actors* and their specific acts for the purpose of attributing these acts to the state'. This however does not undermine the fact that when it interprets effective control, the ECtHR contributes, at least to some extent, to the meaning of the effective control test in customary international law, due to, firstly, the identity of the test in both attribution and jurisdiction and secondly, the close connection between jurisdiction and attribution. Since the standard is the same, it can be expected, as a minimum, that there is some similarity in meaning, even if, strictly speaking, the ECtHR does not apply effective control as part of customary international law.
On the relationship between attribution and jurisdiction in the practice of the ECtHR see Rooney, 'The Relationship Between Jurisdiction and Attribution after *Jaloud v. the Netherlands*' (2015) 62 *Netherlands International Law Review* 407-428; Milanovic, 'Jurisdiction, Attribution and Responsibility in Jaloud' *EJUL:Talk!*, 11 December 2014 [last accessed 30 June 2020]; Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011).

[53] *Chiragov and Others v Armenia,* supra n 50, Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, at para 10.

[54] It is not unprecedented for international courts and tribunals to reach different conclusions on the existence of a rule of customary international law, even in international criminal law, where the respect for *lex certa* is of utmost importance. For instance in international criminal courts the question of whether 'extended' joint criminal enterprise ('JCE III') was part of customary international law was raised in front of the International Criminal Tribunal for the Former Yugoslavia in *Tadić* and in front of the Extraordinary Chambers of Cambodia in *Ieng Sary*. In *Tadić*, after a case law analysis the Appeals Court reached the conclusion that JCE III was established in customary international

While uniform conclusions on the existence of the law are necessary, the uniformity in interpretation is only desirable, provided that the Court remains within the bounds of legal interpretation. This means that the ECtHR remains but one universe within a 'multiverse' of international courts, whose freedom to interpret, including that of customary international law, is difficult, if not impossible, to limit.

But while *Volodina* and *Güzelyurtlu* are part of the chain of cases in which the Court has outsourced the determination of international custom to other authorities, they stand in stark contrast with the approach of the Court in the 2018 *Naït-Liman v Switzerland* case.[55] As opposed to *Güzelyurtlu,* which concerned an unchallenged obligation established by the authoritative body of the ILC as early as 2001, and to *Volodina,* where the qualification of gender-based violence as a form of discrimination is widely supported by States (at least in their verbal commitments), *Naït-Liman* concerned the controversial question as to whether States are under an obligation to recognize universal civil jurisdiction for acts of torture.[56] In contrast to *Volodina* and *Güzelyurtlu,* in *Naït-Liman* the ECtHR comprehensively scrutinized the legislation and case law of both European and non-European States to make a statement on customary international law.[57] This difference in approach could be interpreted to mean different things. Nonetheless, rather than viewing it as a misstep on behalf of the ECtHR or a chance occurrence, the most plausible explanation is that the Court calibrates its approach depending on the rule involved.

This calibration should, however, not only be done at the level of 'to outsource or not to outsource ?' in a particular case, but also upon deciding the authority to whom the Court may outsource the ascertainment of customary rules. The approach of the ECtHR in *Volodina*, while acceptable in this case where customary international law played only a(n) (arguably) minor role in interpretation, may raise issues if replicated in cases where customary international law has a key role in the solution to be given in the case (such as State immunity cases). In the realm of customary international law *Volodina* raises the issue of whether reliance on the CEDAW Committee's (and similar Committees'/institutions') pronouncements meet the standard of objectivity established by the ILC.[58] While the CEDAW Committee's pronouncements are an invaluable source for the promotion of human rights, since the mandate of the CEDAW Committee is to monitor the progress in the protection of human rights and encourage it, it may be regarded as an interested party and challenge the strict requirements of objectivity necessary in the ascertainment of

law. In *Ieng Sary*, the ECCC reached the opposite conclusion. See *Prosecutor v. Tadić*, ICTY, Case no. IT-94-1-A Appeals Chamber Judgment of 15 July 1999, at para 220 and *Prosecutor v. Ieng Sary*, ECCC, Case no. 002/19-09-2007-ECCC/OCIJ(PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) of 20 May 2010, at paras 85-86.

[55] *Naït-Liman v Switzerland,* supra n 40.

[56] Ibid. at para 182.

[57] Ibid. at paras 68-83 and 183-187.

[58] ILC Draft conclusions on the identification of customary international law, supra n 42,at 151.

customary rules.[59] Whether or not the Court considers this a relevant consideration in its decisions on outsourcing customary international law remains to be seen in its future case law.[60]

B. Customary International Law as an Interpretative Aid

Alternative to the first stance, where customary international law was examined as the object of the ECtHR's scrutiny, either as part of an exercise in identification or interpretation, this section examines it as an interpretative aid in the construction of the rights provided for in the Convention and its Protocols.

The ECHR system's striving towards an integrative approach that would include general international law in the Court's assessment on the violations of the ECHR is visible, firstly, in the provisions of the Convention itself.[61] For instance, Article 35 of the ECHR provides that the applicants must have exhausted all domestic remedies, according to generally recognized rules of international law, which may, according to Francioni, include customary international law.[62] Another example is Article 7 which stipulates that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.'[63] The incorporation of general international law within these provisions, by definition, requires the ECtHR to take into account these rules when deciding on a case. On the other hand, Francioni also discusses how the ECtHR is bound to apply norms of international law by virtue of what he terms as 'implied references', which include rules on state responsibility, state immunity etc., which are of concern to the ECtHR simply by virtue of it being a court operating in international law.[64]

Throughout its case law the ECtHR has consistently held that the Convention cannot be interpreted in a vacuum, but should take into account relevant rules of international law in accordance with Article 31(3)(c) of the VCLT.[65] An interpretation in harmony with other

[59] The Court had previously conducted its own examination of state practice on the same legal question in the *Opuz v Turkey* case, which might justify the omission of the Court to rule on this question for a second time. See *Opuz v Turkey* Application No 33401/02, Merits, 9 June 2009 [Third Section] at para 87 *et seq.* Yet the question as to whom to outsource remains important for future cases.

[60] The Court appears to have endorsed this approach in the judgment of *M.K. and Others v Poland* issued at the time of writing. The Court refers to the Note on International Protection of 13 September 2001 of the Office of the United Nations High Commissioner for Refugees which indicated that the principle of *non-refoulement* is a rule of customary international law. See *M.K. and Others v Poland* Applications Nos 40503/17, 42902/17 and 43643/17, Merits and Just Satisfaction, 23 July 2020 [First Section], at para 93.

[61] Francioni, supra n 3, at 13-16.

[62] Ibid.

[63] Emphasis added.

[64] Francioni, supra n 3, at 16-20.

[65] Indicatively: *Loizidou v Turkey* Application No 15318/89,Merits, 18 December 1996 [Grand Chamber], at para 43; *Fogarty v the United Kingdom*, supra n 20, at para 35; *McElhinney v Ireland*, supra n 33, at para 36; *Al-Adsani v the United Kingdom,* supra n 33, at para 55; *Banković and Others v Belgium* Application No 52207/99, Decision on Admissibility, 12 December 2001, at para 57; *Cudak v Lithuania,* supra n 29, at para 56; *Sabeh El Leil v France*, supra

relevant rules[66] means not only taking cognizance of rules of general international law, but also that there is 'no *a priori* assumption that the rules of the Convention would override those of general law'.[67] At the same time, it should be pointed out that in some cases the ECtHR has qualified this approach by stating that some provisions of the Convention should 'be interpreted in so far as possible in light of general principles of international law',[68] which could be regarded as an implicit recognition of the primacy of the Convention in the case of a normative conflict.

If from the standpoint of using customary international law as an object of scrutiny *Volodina* and *Güzelyurtlu* are similar to the majority of the Court's previous case law, the latter case stands out in terms of the Court's use of customary international law as an interpretative aid.

Güzelyurtlu posed interesting legal questions due to the atypical territorial situation, since the murders were committed on the territory of Cyprus, whereas the suspects were found and investigated on the territory of the TRNC. This factual conundrum raised the question whether both Cyprus and Turkey could have been held responsible for not fulfilling their obligations concerning an effective investigation into the death of the applicants' relatives. According to the Cypriot Government, the Court, in its evaluation of the scope of its obligation to cooperate under Article 2 the ECHR, had to take cognizance of the relevant applicable rules of international law — the customary international law obligation of non-recognition.[69] In addition, Cyprus contended that regardless of the fact that the suspects were found on the territory of the TRNC, if it would have been held by an obligation to supply all of its case evidence to the TRNC, it would mean a renouncement of its own criminal jurisdiction in favour of the TRNC's. This would, in turn, lead to the strengthening of the TRCN's claim and control over the territory, contrary to the customary law obligation of non-recognition.[70] In other words, renouncing criminal jurisdiction in favour of the TRNC would have amounted to an implied recognition of the TRNC. Relying on the customary rule's teleology — to punish States for their violation of *jus cogens* norms that

n 30, at para 48; *Oleynikov v Russia,* supra n 32, at para 56; *Hassan v the United Kingdom* Application No 29750/09, Merits, 16 September 2014 [Grand Chamber] at para 102; *Radunović and Others v Montenegro,* supra n 27, at para 63; *Rinau v Lithuania* Application No 10926/09, Merits, 14 January 2020 [Second Section] at para 185.

[66] An interpretation in harmony with other rules was a method used by the ECtHR in a way that not only considers other rules of international law, but also rules of the Convention itself. An example in this sense is the statement of Judge Serghides in his Concurring Opinion in *Dyagilev v Russia* (Application No 49972/16, Merits and Just Satisfaction, 10 March 2020 [Third Section] at para 7), where, quoting two older decisions of the ECtHR, he stated that 'according to the well-established case-law of the Court, the Convention should be interpreted as a whole, thus, its provisions should be interpreted in an internal harmony and in a coherent manner'.

[67] International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions (A/CN. 4/L. 702) (18 July 2006) at para 162.

[68] For instance, *Varnava and Others v Turkey Application Nos* 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, Merits and Just Satisfaction, 18 September 2009 [Grand Chamber], at para 185; *Georgia v Russia (II)* Application No 38263/08, 13 December 2011 [Former Fifth Section] at para 72.

[69] *Güzelyurtlu and Others v Cyprus and Turkey,* supra n 2, at para 207.

[70] Ibid. at para 207.

prohibit State aggression, occupation and acquisition of territory — the Government posited that the aims of the Convention cannot be taken as being more important than the purposes of the rule of non-recognition.[71]

From the standpoint of the applicants, the ECtHR had previously in its case law established that engaging with the *de facto* administration of the TRNC did not qualify as either express or implied recognition.[72] Moreover, the ECtHR had previously established in *Cyprus v Turkey* that human rights override the duty of non-recognition.[73] At the same time, Turkey argued that both State practice and the previous case law of the Court demonstrated that such a cooperation did not imply recognition.[74]

In its assessment of the case, the ECtHR acknowledged that according to Article 31(3)(c) of the VCLT it had to take into account other relevant rules of international law.[75] However, it referenced this provision solely for the purpose of determining whether the States had used 'all the legal possibilities available to [them] on cooperation in criminal matters'.[76] Concerning the obligation of non-recognition, the ECtHR firstly noted that it did not deem it necessary to elaborate a general theory on the lawfulness of cooperation in criminal matters with *de facto* entities under international law.[77] Instead, the Court relied on its pronouncement made in *Ilaşcu and Others*[78] where it stated that

> unofficial relations in judicial and security matters in the interests of crime prevention between a Contracting State and a separatist regime set up within its territory could not be regarded as support for that entity, given their nature and limited character.[79]

The Court subsequently considered the obligation to cooperate contained in Article 2 of the ECHR. It established that supplying the file to the TRNC in the circumstances of the case would go beyond mere cooperation and would amount to a waiver of the criminal jurisdiction of Cyprus.[80] This led the ECtHR to conclude that neither the refusal by Cyprus to submit the evidence to the TRNC or the Turkish authorities, nor its decision to refuse the transfer of the proceedings could be considered as a breach of the procedural duty contained within Article 2 of the ECHR.[81]

[71] Ibid. at para 208.
[72] Ibid. at para 202.
[73] Ibid. at para 203.
[74] Ibid. at para 214.
[75] Ibid. at para 235.
[76] Ibid. at para 236.
[77] Ibid. at para 250.
[78] *Ilaşcu v Others* Application No 48787/99, Merits and Just Satisfaction, 8 July 2004 [Grand Chamber].
[79] *Güzelyurtlu and Others v Cyprus and Turkey,* supra n 2, at para 251.
[80] Ibid. at para 253.
[81] Ibid. at para 255.

Judge Serghides appended a Concurring Opinion where he disagreed with the way in which the Court dealt with the customary obligation of non-recognition.[82] According to him, the principle of non-recognition played a pivotal role in both the interpretation and the application of Article 1 and Article 2 of the Convention by virtue of Article 31(3)(c) of the VCLT[83] and 'the Court should have emphasized [..] that the Convention cannot require any State to do anything that would require it to breach a rule of customary international law'.[84]

The relationship between the obligation to cooperate and the customary duty of non-recognition can be construed as a potential norm conflict. From a bird's-eye view, issues of potential norm conflict and the ECtHR's avoidance in making an explicit statement on the relationship between two (at least potentially) contradictory laws is not a novel occurrence (yet, at the same time, not a frequent one). The Court had previously done so in cases of norm conflict between human rights provided for in the Convention and norms of international humanitarian law.[85] *Güzelyurtlu* is not an exception from this string of cases. Nonetheless, it is different in terms of approach from the cases where the Court used Article 31(3)(c) of the VCLT as a legal basis for using customary international law as an interpretative aid.

Strictly speaking, in *Güzelyurtlu* the ECtHR did not use a customary *rule* relevant to the case, nor did it apply (for the purposes of interpretation) a rule applicable between the 'parties' in the sense of Article 31(3)(c) of the VCLT. To be more precise, the Court applied its own interpretation of the customary rule of non-recognition established in *Ilaşcu and Others*. According to this interpretation, criminal cooperation between a State and a *de facto* regime did not fall within the scope of express or implied recognition of the regime as lawful. At the same time, since the TRNC is not a State and is not a party to the ECHR, it did not qualify as party within the range of possible meanings of Article 31(3)(c). Therefore, *Güzelyurtlu* firstly demonstrates that customary international law can be used as an interpretative aid in a way that bypasses Article 31(3)(c) of the VCLT. This is not a problem *per se* as there is no consensus on the exhaustive character of the provisions of Articles 31-33 of the VCLT as binding rules of treaty interpretation.

Secondly, this case demonstrates that the use of customary international law as an interpretative aid may involve some degree of interpretation of the customary rule itself. Due to their inherent plasticity, norms of international custom can be molded in many ways.[86] *Güzelyurtlu* is an example where the Court used a customary rule that it previously shaped in a way that fulfills the purposes of the Convention — that of ensuring that the rights of those who are under the States' jurisdictions remain practical and effective, not

[82] Ibid. Concurring Opinion of Judge Serghides, at para 21.
[83] Ibid. at paras 15 and 20.
[84] Ibid. at para 24 and 19.
[85] Wallace, *The Application of the European Convention on Human Rights to Military Operations* (2019) at 157.
[86] Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 *European Journal of International Law* 235-267, 247.

illusory[87]— in order to reconcile it with the customary obligation of non-cooperation. As the Court itself noted,

> 'the key consideration was to avoid a vacuum which would operate to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements to their rights'.[88]

Thus, in cases of potential normative conflict the ECtHR does not always consider rules of customary international law only as far as possible. *Güzelyurtlu* shows that, if need be, the Court is ready to (actively) shape the rules of customary international law in a way that reconciles them with the rights provided for in the Convention and with its overall purpose. While the achieved harmony between the relevant norms allows to further the goals of the ECHR system, there is one concern that the Court should take into consideration — a concern raised by this case. In its reliance on its own interpretations of customary international law as an interpretative aid (as well as in its interpretation of customary international law as an object of its scrutiny), the ECtHR needs to ensure that the act of interpretation does not transcend the boundary that separates interpretation from law creation — a boundary which in the case of customary rules is hazier than in treaty interpretation. This is especially the case for peremptory norms of international law, where the demarcation line between interpretation and the creation of an exception from the general rule is difficult, but imperative to draw. Ultimately, how far the Court is ready to go in order to ensure the harmonization of the rights contained in the ECHR with customary international law remains to be seen in the future cases on the Court's docket.

4. CONCLUSION

As the recent addition to the Court's case law dealing with customary international law, *Volodina* and *Güzelyurtlu* maintain the ECtHR's orthodox approach of outsourcing the identification of customary international law to other authorities. Although in stark contrast to *Naït-Liman,* the approach of the Court in *Volodina* and *Güzelyurtlu* is not a misstep or a chance occurrence, but depicts the Court's calibrated position towards outsourcing customary international law when it is an object of its scrutiny.

In contrast, *Güzelyurtlu* differs from the main thread of cases where the Court used customary international law as an interpretative aid relying on Article 31(3)(c) of the VCLT. In *Güzelyurtlu* the Court relied on a previous interpretation of a customary rule in a way that accommodated the content of the procedural rights contained in Article 2 of the ECHR to the ECHR's system overall purpose, thus, showing that the harmonization of the Convention with general international law may be done in various ways.

[87] *Soering v the United Kingdom* Application No 14038/88, Merits and Just Satisfaction, 7 July 1989 [Court Plenary] at para 87.
[88] *Güzelyurtlu and Others v Cyprus and Turkey,* supra n 2, at para 250.

Both the use of customary international law as an object of scrutiny and as an interpretative aid should, however, be done with caution and in a way that ensures that the boundaries between identification/interpretation and law creation are respected.