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

2018 *Rudolf Bernhardt* Lecture, Heidelberg

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In 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. *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 Europe-

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[1] *P. Leigh Fermor*, A Time of Gifts, 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.

an 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 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 Per-

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[2] Art. 32, Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, 213 UNTS 222.

[3] *Magyar Helsinki Bizottság v. Hungary* (GC), No. 18030/11, 8.11.2016, para. 123; *Al-Dulimi and Montana Management Inc. v. Switzerland* (GC), No. 5809/08, 21.6.2016, para. 134; *Al-Adsani v. the United Kingdom* (GC), No. 35763/97, ECHR 2001-XI, para. 55; *Bosphorus Hava Yollari Turizm v. Ticaret Anonim Şirketi v. Ireland* (GC), No. 45036/98, ECHR 2005-VI, para. 150; *Hassan v. the United Kingdom* (GC), No. 29750/09, paras. 77 and 102, ECHR 2014, paras. 77 and 102.

[4] *Case Concerning the Right of Passage over Indian Territory* (*Portugal v. India*), (Preliminary Objections), ICJ Reports 1957, 142; *Interpretation of the Agreement of 25.3.1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 76, para. 10; *Sir R. Jennings/Sir A. Watts*, Oppenheim's International Law, 9th ed. 1992, 1275.

[5] See *C. Tomuschat*, What Is General International Law?, in: Guerra y Paz, 1945-2009: Obra homenaje al Dr. Santiago Torres Bernárdez, 2010, 329.

[6] See on the questions to which this provision gives rise: *E. Bjorge*, The Convention as a Living Instrument: Rooted in the Past, Looking to the Future, HRLJ 36 (2016), 243 (248 et seq.).

manent 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 expectation. All three are usefully controversial: championed by some; chastised by others.

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]

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[7] *Factory at Chorzów* (1928) Series A, No. 17, 47; *C. Brown*, *Factory at Chorzów* (*Germany v. Poland*) (1927-28), in: E. Bjorge/C. Miles (eds.), Landmark Cases in Public International Law, 2017.

[8] *Papamichapoulous v. Greece* (*Article 50, just satisfaction*), No. 14556/89, 31.11.1995, para. 36; *E. Bjorge* (note 6), 249.

[9] See e.g. *Anglo-Norwegian Fisheries*, ICJ Reports 1951, 116, (131 et seq.).

[10] *Case Concerning the Right of Passage over Indian Territory* (note 4), 142; *Sir R. Jennings/Sir A. Watts* (note 4), 1275; *Dette publique ottoman*, 1925, 1 RIAA 529, 555, (Sole Arbitrator *Borel*). See e.g. *South West Africa-Voting Procedure*, Separate Opinion, Judge *Lauterpacht*, ICJ Reports 1955, 67 (99); *G. Fitzmaurice*, The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of International Law, BYIL 35 (1959), 183 (227 et seq.); *A. Pellet*, Recherche sur les principes généraux de droit en droit international, 1974, 420; *M. Kamto*, La volonté de l'état en droit international, RdC 310 (2004), 122 et seq.; *R. Kolb*, Interprétation et création du droit international, 2006, 468.

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]

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,

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

12 *Territorial Jurisdiction of the International Commission of the River Oder*, (1929), Series A, No. 23, 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 Reports 1971, 16.

14 *R. Bernhardt*, Homogenität, Kontinuität und Dissonanzen in der Rechtsprechung des Internationalen Gerichtshofs: Eine Fall-Studie zum Südwestafrika/Namibia-Komplex, ZaöRV 33 (1973), 1.

15 28.6.1919, 225 CTS 195.

16 "The stream cannot rise above its source": *J. Crawford*, Chance, Order, Change, RdC 365 (2013), 303.

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 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

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[17] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (note 13), 16, 47, para. 96.

[18] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (note 13), 47 et seq., paras. 97-98. Also: *Amoco International Finance Corporation v. Iran*, Iran (1987–II) 15 Iran-USCTR 189, 22, para. 112; ILR 83 (1987), 500 (541), para. 112.

[19] *Elettronica Sicula SpA (ELSI)*, ICJ Reports 1989, 15.

[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] 2.2.1948, 79 UNTS 171.

[22] *Elettronica Sicula SpA (ELSI)* (note 19), 15, 42, para. 50. See further *C. Rousseau*, L'Independence de l'État dans l'ordre international, RdC 73 (1948), 211 et seq.; *D. Alland*, L'interprétation du droit international public, RdC 362 (2013), 172; *R. O'Keefe*, Public International Law, BYIL 81 (2011), 339 (402).

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:

> "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 United Nations 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:

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[23] See e.g. *Lamotte*, Conseil d'État, 17.2.1950 (conclusions: Devolvé); translation in *L. Neville Brown/J. S. Bell*, French Administrative Law, 5th ed. 1998, 171.

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

[25] *Al-Jedda v. United Kingdom*, EHRR 53 (2011), 23, ILR 147 (2011), 107, para. 102. Also: *Nada v. Switzerland*, EHRR 56 (2012), 18, para. 171.

[26] *D. Alland* (note 22), 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* (note 25) and *Nada v. Switzerland* (note 25).

"[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 treatise *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 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*

[28] *R. Kolb*, L'article 103 de la Charte des Nations Unies, RdC 367 (2014), 11 (128 et seq.).
[29] *C. Santulli*, Droit du contentieux international, 2nd ed. 2015, 105.
[30] *American Bottle Company*, RIAA 4 (1929), 435 (437).
[31] *Companie des Chemins de Fer du Nord v. German State*, ILR 5 (1929-30), 498 et seq.

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 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 is 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

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[32] *J. Salmon* (ed.), Dictionnaire de droit international public, 2001, 320.

[33] *C. McLachlan*, Lis pendens in International Litigation, RdC 336 (2009), 454.

[34] *S. Rosenne*, The Perplexities of Modern International Law: General Course on Public International Law, RdC 291 (2001), 132; *S. Rosenne*, Essays on International Law and Practice, 2007, 77.

[35] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, ICJ Reports 2017, para. 132.

[36] *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No. 9, 30. See *C. Brown* (note 7), 61 (79 et seq.).

[37] *C. McLachlan* (note 33), 467.

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:

> "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 contained a compromissory 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 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]

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[38] Minutes of the Afternoon Sitting, 9.6.1950, Travaux préparatoires to the ECHR IV, 124.

[39] *W. A. Schabas*, The European Convention on Human Rights: A Commentary, 2014, 913. Also: *E. Decaux*, Article 62, in: L. E. Pettiti/E. Decaux/P. H. Imbert (eds.), La Convention européenne des droits de l'homme, 2nd ed. 1999, 912 et seq.

[40] Y.B. Eur. Conv. Hum. Rts. 3 (1960), 168 et seq.

[41] See *A. Fenet*, La fin du litige italo–autrichien sur le Haut-Adige-Tyrol du Sud, AFDI 39 (1993), 357.

[42] 21.12.1965, 660 UNTS 195.

[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*) (Preliminary Objections), ICJ Reports 2011 70.

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 European Convention on Human Rights (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 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]

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44 *Georgia v. Russia* (Decision), No. 38263/08, 13.12.2011.
45 *Georgia v. Russia* (note 44), para. 79.
46 *W. A. Schabas* (note 39), 914.
47 Which was the view taken in *Prosecutor v. Tadić* (Jurisdiction), ILR 105 (1995), 419 (458).
48 *Le Bridge Corporation LTD S.R.L. v. Moldova*, No. 48027/10, Decision, 19.4.2018, para. 25.
49 *OAO Neftyanaya Kompaniya Yukos v. Russia*, No. 14902/04, 20.9.2011.
50 See *Yukos Universal Limited* (*Isle of Man*) *v. Russian Federation*, PCA Case No. AA 227, Final Award, 18.7.2014.
51 *OAO Neftyanaya Kompaniya Yukos v. Russia* (note 49), para. 523.

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 Chief Executive Officer (CEO) of the company, had in that latter 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]

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

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52 *OAO Neftyanaya Kompaniya Yukos v. Russia* (note 49), para. 524.

53 *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8.4.2013.

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* (note 48), para. 31.

56 *Mr Franck Charles Arif v. Republic of Moldova* (note 53), para. 14.

57 *Mr Franck Charles Arif v. Republic of Moldova* (note 53), para. 14.

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 Expectation

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 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*

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[58] See also *Kemal Uzan & Others v. Turkey*, No. 18240/03, 29.3.2011.

[59] *R. Kolb*, General Principles of Procedural Law, in: A. Zimmermann/C. Tams (eds.), The Statue of the International Court of Justice, 3rd ed. 2019, 963, (1003); *R. Kolb*, La sécurité juridique en droit international, AYIL 10 (2002), 103; *R. Kolb*, Good Faith in International Law, 2017, 15; *C. C. Hyde*, International Law: Chiefly as Interpreted and Applied by the United States, Vol. I, 1922, 368 et seq.; *P. Lalive*, Le respect international des droits acquis, 1967, 49 et seq.; *J. P. Müller*, Vertrauensschutz im Völkerrecht, 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 ed. 2019, 196, fn. 8. A similar point is made by *A. Pellet/D. Müller*, Article 38, in: A. Zimmermann/C. Tams (note 59), 819 (949 et seq.).

Access to the Pacific Ocean, however, Bolivia had limited itself to arguing the point only on the basis of international investment law.

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]

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 gou-

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62 *H. Lauterpacht*, Implied Recognition, BYIL 21 (1944), 123, 150.

63 *Portendick* (*Great Britain v. France*), Recueil des arbitrages internationaux 1 (1843), 526, (Sole Arbitrator: *King Frederic William of Prussia*).

64 BFSP 30 (1835), 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 Portendick under blockade"; Letter from *Lord Granville* to *Viscount Palmerston*, 31.1.1835.

65 BFSP 30 (1835), 639 (641).

66 BFSP 30 (1835), 639.

verneur 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 *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,[70] 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.[71]

The source of this principle, too, is to be found in internal law.[72] 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.[73] 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.[74] This principle of legal certainty overlaps with important aspects of legitimate expectations.[75] 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".[76]

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67 *Portendick* (note 63), 530 et seq.

68 See *J. P. Müller* (note 59).

69 See *J. D. Sicault*, Du caractère obligatoire des engagements unilatéraux en droit international public, RGDIP 83 (1979), 633.

70 See e.g. *J. Crawford*, Brownlie's Principles of Public International Law, 9th ed. 2019, 601.

71 *Tecmed v. United Mexican States*, ICSID Reports 11 (2003), 361, para. 153, (*Grigera Naon*, President; *Fernandez Rozas*; *Bernal Verea*).

72 *C. McLachlan/L. Shore/M. Weiniger*, International Investment Arbitration, 2nd ed. 2017, 315.

73 *P. Craig*, Administrative Law, 8th ed. 2016, 670.

74 See e.g. Conseil d'État, 24.3.2006, *Société KPGM*; Conseil d'État, 27.10.2006, *Société Techna.*

75 *B. Stirn*, Towards a European Public Law (*E. Bjorge* transl., 2017), 121.

76 Decision No. 2013-682 of 19.12.2013; translation in *B. Stirn* (note 75), 121.

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 United Kingdom Supreme Court,[77] no stranger to international law and its relationship with the common law.[78] 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.[79] 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.[80] According to *Campbell McLachlan* QC, another reason is that in those instances the court is able to point to a specific 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:[81] as several arbitral tribunals have pointed out, "[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power"[82] 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.[83] Still today international society remains to a certain degree a society dominated by consensualism and the orthodoxy of bilateralism.[84] As *Crawford* has recently observed, "according to a

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[77] *Lord Lloyd-Jones*, General Principles of Law in International Law and Common Law, lecture given at the Conseil d'État, 16.2.2018, 8. Also: *S. Sedley*, Lions under the Throne: Essays on the History of English Public Law, 2015, 154 et seq.; *P. Craig* (note 73), 675 et seq.

[78] *Lord Lloyd-Jones* was, before going to the bench, an international law QC at Brick Court Chambers, London, and taught English law and international law at Downing College, Cambridge.

[79] *P. Craig* (note 73), 672.

[80] *P. Craig* (note 73).

[81] *C. McLachlan/L. Shore/M. Weiniger* (note 72), 7.162 et seq., 7.179.

[82] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No ARB/05/8, 11.9.2007, (*Lévy* President; *Lalonde*; *Lew*), para. 332.

[83] *Austro-German Customs Union Case*, (1931) PCIJ Reports Series A/B, No. 41, 57, (Judge *Anzilotti*); *J. Crawford*, Multilateral Rights and Obligations in International Law, RdC 319 (2006), 344.

[84] *P. Weil*, Cours général: le droit en quête de son identité, RdC 237 (1992), 151; *V. Gowland-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, 2015, 109 (144).

deeply ingrained view of international law and international society, the character of international rights and obligations is inherently bilateral".[85] 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.[86] As *Kolb* has pointed out, "[*l*]*a sécurité juridique en droit international est essentiellement une sécurité des rapports bilatéraux*".[87]

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.[88] 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".[89] 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 expectation is more than only something to which reference is made[90] in the case-law of investor-State tribu-

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85 *J. Crawford* (note 83), 344 et seq.

86 *P. Weil* (note 84), 157; *P. Couvreur*, Estoppel: synonyme pédant de la bonne foi, in: H. Ascensio/P. Bodeau-Livinec/M. Forteau/F. Latty/J. M. Sorel/M. Ubéda-Saillard (eds.), Dictionnaire des idées reçues en droit international: en clin d'œil amicale à Alain Pellet, 2017, 221.

87 *R. Kolb*, La sécurité juridique … (note 59), 142.

88 See e.g. *Aboliard (France v. Haïti)*, RGDIP 12 (1905), (Documents), 13 (15); *Jesse Lewis* (*United States*) *v. Great Britain* (*David J. Adams case*), RIAA 6 (1921), 85, (*Fromageot*, President; *Fitzpatrick*; *Anderson*) 92; *Shufeldt Claim* (*Guatemala v. United States*), RIAA 2 (1930), 1079, (Sole Arbitrator: *Sisnett*), 1094; *Situation in Manchuria: Report of the Lytton Commission of Enquiry*, League of Nations Publications, VII, Political, 1932 (1.10.1932), esp. 44; *ECE Projektmanagement International GmbH & Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010–5, paras. 4.762 and 4.767, (19.9.2013), (*Sir Frank Berman*, Chairman; *Bucher*; *Thomas*); *David Minnotte & Robert Lewis v. Poland*, ICSID Case No. ARB(AF)/10/1, (16.5.2014), paras. 193 et seq., (*Lowe*, President; *Mendelson*; *Silva Romero*).

89 *J. Crawford*, Treaty and Contract in Investment Arbitration, Arbitration International 24 (2008), 351 (373).

90 *Obligation to Negotiate Access to the Pacific Ocean* (note 60), para. 162.

nals. 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 expectation 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, in relation to which it can be argued that the individual has a legitimate expectation of obtaining effective enjoyment of a property right.[91]

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".[92] 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.[93]

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.[94] 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.[95]

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[91] *Kopecky v. Slovakia*, EHRR 41 (2005), 43; ECHR 2004–IX, para. 35; *J. A. Pye* (*Oxford*) *Ltd & J. A. 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, 19.1.2017, para. 39; *Werra Naturstein GMBH & Co KG v. Germany* (*Just Satisfaction-Striking Out*) (unreported), App. No. 32377/12, 19.4.2018, paras. 12-13.

[92] *Kopecky v. Slovakia* (note 91), para. 49.

[93] *Kopecky v. Slovakia* (note 91), para. 52; *Gratzinger & Gratzingerova v. Czech Republic*, App. No. 39794/98, 10.7.2002, para. 73.

[94] *W. A. Schabas* (note 39), 969; *Kopecky v. Slovakia* (note 91), para. 52.

[95] *Blusun v. Italy*, ICSID Case No. ARB/14/3, (27.12.2016), (*Crawford*, President; *Alexandrov*; *Dupuy*), para. 367. Also: *Philip Morris SARL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, (8.7.2016), para. 426; *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/1, (27.12.2010), para. 120, (*Sacerdoti*, President; *Alvarez*; *Herrera Marcano*); *C. Schreuer*, Fair and Equitable Treatment in Arbitral Practice, Journal of World Trade 6 (2005), 357 (374).

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 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.[96] 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.[97]

IV. Conclusion

The young traveler 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*"[98] of the Convention. As *Leigh Fermour's* interwar *Bildungsreise* has demonstrated to generations of readers, our old continent is, properly understood, shaped by outside 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

[96] *C. McLachlan/L. Shore/M. Weiniger* (note 72), 315*; A. de Nanteuil*, Droit international de l'investissement, 2nd ed. 2017, 353; *R. Kolb*, Good Faith … (note 59), 243 et seq.

[97] *Obligation to Negotiate Access to the Pacific Ocean* (note 60), para. 162.

[98] *Bankovic v. Belgium* (GC), No. 52207/99, ECHR 2001–XII, ILR 123 (2001), 94, para. 80; *Al-Skeini v. United Kingdom* (GC), No. 55721/07, ECHR 2011; ILR 147 (2011), 181, paras. 141-142.

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.