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Treaty Clauses and Fragmentation of International Law: Applying the More Favourable protection Clause in Human Rights Treaties

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Abstract:
The Article argues that, despite the growing interest in the so-called fragmentation of international law, little, if any, attention has been paid to the role of the more favourable protection clause in addressing certain aspects of the interactions between treaties on human rights. It shows that both the Inter-American and European Courts of Human Rights do not employ the clause, found in their respective constitutive instruments, to fulfill its initial aim and design. The Article compares the practices of the two Courts and explores the underlying reasons for not using or misapplying the more favourable protection clause. Moreover, the analysis finds that, even though the clauses in the ECHR and IACHR are identical, the two Courts have adopted completely different understandings of how the clause should be applied, thereby strengthening the fragmentation narrative. The Article proceeds to suggest a novel way in which the more favourable protection clause may be used. It contends that the clause is a provision subject to violation by the member States by way of offering an alternative manner in which international courts can engage with the proliferation of human rights treaties.

Introduction
The Article discusses the function and application of the more favourable protection clause envisaged in human rights treaties.¹ By including this clause in a

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treaty any pre-existing or subsequent treaties, which prescribe a higher level of protection to the individual, prevail over the first treaty.\(^2\) This clause can be found in a variety of international treaties,\(^3\) such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,\(^4\) the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively Injurious or to have Indiscriminate Effects.\(^5\) It is, however, mostly proliferous as a provision inserted in international treaties concerning the protection of human rights.\(^6\)

Despite the growing interest in the difficulties arising from the diversification of international law and the proliferation of international Courts – the so-called fragmentation of international law - no attention has been paid to the role that this clause may serve. This is surprising given that the drafters of human rights treaties specifically equipped them with the more favourable protection clause in order to regulate certain aspects of treaties’ interaction. Despite the fact that there is a vast of literature focusing on how international human rights Courts must engage with other rules of international law, including other treaties on human rights,\(^7\) the potential role of the more favourable protection clause in regulating the level of protection that should be accorded to the individual has been ignored. The Article suggests that this


\(^4\) Article 7 (1) provides that ‘[t]he provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon’, in Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959, 330 UNTS 38.

\(^5\) Article 2 (Relations with other international agreements) reads: ‘Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict’, in Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 2 December 1983, 19 ILM 1823.

\(^6\) According to the typical wording of the clauses, the more favourable protection accorded to the individual may be granted either by a national law provision or by another international treaty. Instances where the more favourable treatment is accorded under municipal law are not addressed herein, unless they are deemed necessary for the analysis.

interpretation principle is a valuable tool at the international lawyer’s disposal and, therefore, its role should be revisited.\(^8\)

The Article argues that the clause remains relevant in addressing interactions between different human rights treaties. It explores the potential (and the limitations) of the clause by discussing whether (and if so, how) the Inter-American Court of Human Rights (hereinafter IACtHR) and the European Court of Human Rights (hereinafter ECtHR) apply the more favourable protection clause under the Inter-American Convention on Human Rights\(^9\) and the European Convention on Human Rights\(^10\) respectively. The analysis argues that two Courts do not employ the clause to fulfill its initial aim and design. The ECtHR rarely uses the clause, whereas the IACtHR employs the clause in a manner inconsistent with the purpose and the text of the provision. Furthermore, the analysis demonstrates that, even though the clauses in the ECHR and IACHR are identical, the two Courts have adopted completely different understandings of how the clause should be applied. These different understandings adopted by the IACtHR and ECtHR undermine the common understanding of rules on treaty interpretation and strengthen the fragmentation narrative.\(^11\) Having highlighted the shortcomings in the international judicial practice, the Article proceeds to suggest a novel way in which the more favourable protection clause may be used. It contends that international human rights Courts must examine whether the clause is subject to violation by the member States. This suggestion is not only an arguable use of the clause but also offers an alternative way in which international Courts may engage with the proliferation of human rights treaties by


\(^10\) European Convention on Human Rights, 3 September 1953, ETS No 5 (hereinafter ECHR).

way of deferring to national courts. In principle, overlapping human rights obligations are issues that should be considered and resolved by the national judge. Such an approach is consistent with the primary responsibility of national authorities to decide on the relationship between international treaties in light of the circumstances of a case. At the same time, this primary role of the domestic courts does not absolve them from their obligation - under the more favourable protection clause - to accord an individual with the highest level of protection. The international Courts on human rights should review the States’ compliance with the clause.

The discussion is divided into three Parts. Part I addresses the purpose of designing the more favoured protection clause. Part II examines how the IACtHR and the ECtHR use the more favourable protection clause in their jurisprudence and critically discusses their practices. Part III explains how the clause can be applied in a manner that would alleviate some of the difficulties arising from the fragmentation of international law and re-examines the allocation of responsibilities between the international and national judges.

1. The More Favourable Protection Clause in Theory

This Part discusses how the more favourable clause has been designed to function. It shows that, although its original purpose appears to be easily comprehensible, the application of the clause may pose certain difficulties. The Article suggests drawing a distinction between the different addressees of the clause in order to identify their precise, respective obligations. This distinction will be useful in critically examining the case law of the European and Inter-American Courts of human rights in Part II.

A. The Aim of Drafting the Clause

The more favourable protection clause is a provision typically inserted in international treaties concerning the protection of human rights. It is designed to regulate the level of protection of rights and freedoms that must be granted to an individual. Examples of such provisions envisaged under international treaties on human rights include: Article 29 (b) of the Inter-American Convention on Human Rights.

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Rights; Article 5 (2) of the International Covenant on Civil and Political Rights; Article 5 (2) of the International Covenant on Economic, Social and Cultural Rights, and Article 41 of the Convention on the Rights of the Child. It has been argued that, in the area of human rights, the more favourable protection provision constitutes a general principle, regardless of the inclusion of the clause in a given treaty. However, such an argument is not plausible. The more favourable protection is to be applied by virtue of the clause and because the contracting parties to said treaty agreed to include such a rule therein. To adduce an example, Article 5 (former Article 60) ECHR reads that

[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

The clause regulates the level of protection by prescribing two obligations. The first obligation ensures that an individual is afforded the highest level of protection of his rights. If a State is party to both human rights treaties A and B and treaty B accords greater protection to a given right protected under both treaties, then the State is obliged to apply the more favourable provision for the protection of the individual, namely the provision of treaty B. The second duty imposed by the clause is that any

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13 'No provision of this Convention shall be interpreted as: [...] (b) restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State Party or by virtue of another convention to which one of the said parties is a party’.
14 'There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent’, in International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS 17 (hereinafter ICCPR).
15 'No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent’, in International Covenant on Economic, Social and Cultural Rights, 3 January 1976, 993 UNTS 3 (hereinafter ICESCR).
16 'Nothing in the present Convention shall affect any provision which are more conductive to the realization of the rights of the child and which may be contained in: (a) the law of a State Party; or (b) international law in force for that State’, in Convention on the Rights of the Child, 2 September 1990, 1577 UNTS 3 (hereinafter CRC).
18 Marcelo Kohen, Comment to Heymann, supra n 17 at 241, 243.
19 Nowak, supra n 1.
restrictions to, or derogations from, a right - as provided in treaty A - cannot be invoked or used by the State with respect to rights guaranteed under treaty B.  

B. The Function of the Clause

Although the aim served with including the more favourable protection clause in human rights treaties appears straightforward, the practical application of said clause entails uncertainty and even creates certain difficulties. This is also reflected in the differing views in literature regarding their application. Whereas many authors qualify this clause as a rule of interpretation, others treat it as a conflict resolution rule or as a principle when applying successive treaties.

In particular, Cançado-Trindade and Nowak contend that Articles 29 (b) IACHR and 5 (2) ICCPR qualify as rules on treaty interpretation. Other commentators, such as Decaux, view the clause from the standpoint of the application of treaties. Decaux discusses Article 53 ECHR in light of the Vienna Convention on the Law of Treaties and, in particular, Article 30 concerning the application of successive treaties relating to the same subject matter. He notes that Article 30 VCLT deals with applying successive treaties in a static manner, whereas Article 53 ECHR opts out for a more dynamic approach promoting the progressive development of human rights. Similarly, Alkema and Heymann treat Article 53 ECHR as a ‘principle of precedence’. According to a third perspective, the treaty clause is a conflict resolution rule. Wolfram, when discussing treaty conflicts, underlines that the VCLT merely provides a general framework that leaves room for solutions envisaged in treaty clauses (lex specialis). Taking up the example of human rights treaties, he posits that conflicts are to be solved on the basis of the ‘primacy of the most-

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24 Alkema, supra n 1 at 41; Heymann, supra n 17 at 234.
favourable provision’. Klabbers refutes this claim. He, in turn, considers it ill defined to classify the more favourable protection clause as a treaty conflict rule. In his opinion, this type of clause deals with differing rather than with divergent standards as provided in different treaties protecting human rights and, thus, there is no conflict to begin with.\(^{26}\)

The preparatory work and the text of the clauses do not offer conclusive evidence as far as their precise nature and function are concerned.\(^{27}\) The provisions of the IACHR and the ECHR appear to adopt a particular terminology, which relates mainly to the interpretation task,\(^{28}\) whereas the wording of the ICCPR, ICESCR and the CRC leans towards the application task.\(^{29}\) It can be argued that this discussion relates to a theoretical debate since, although, in theory, the interpretation, application and conflict resolution between international rules are distinct intellectual enterprises, in practice, the boundaries are quite blurred. Yet, this seemingly theoretical debate is significant to the application of the clause. The disagreements among scholars, arguably, reflect the fact that the clause has a dual function with respect to its addressees. The clause is addressed to both the member States to a treaty and (when existing) to the supervisory body of the said treaty. Consequently, the application of the more favourable protection clause entails different obligations for each addressee.\(^{30}\)

More specifically, national authorities - notably domestic courts - have the following twofold obligation pursuant to the more favourable protection clause contained in a human rights treaty \(A\): first, they must identify and apply the more favourable for the individual provision which may be found under another treaty \(B\). Secondly, the court is obliged not to apply restrictions to, or derogations from, any


\(^{26}\) Klabbers, Treaty Conflict and the European Union (Cambridge: Cambridge University Press, 2009) at 34.


\(^{28}\) Article 53 ECHR mentions that ‘nothing in this convention shall be construed as…’; Article 29 (b) IACHR envisages that ‘no provision of this Convention shall be interpreted as…’ (emphases added).

\(^{29}\) Article 5 (2) ICCPR states that ‘there shall be no restriction to or derogation from […] on the pretext…’; Article 5 (2) ICESCR that ‘there shall be no restriction to or derogation from […] admitted on the pretext…’; and Article 41 CRC that ‘nothing in the present convention shall affect…’ (emphases added).

rights and freedoms envisaged under treaty B with respect to the application of treaty A. The clause ensures that, in this way, the national authorities do not apply lex posterior but instead the more favourable for the individual protection applicable to the case at hand.\(^{31}\) Hence, this clause guarantees that subsequent (to the treaty containing said clause) introduction of national legislation or ratification of an international treaty by the State cannot be used as a pretext to accord a lower level of protection to the individual. In other words, from the standpoint of the national judge, the more favourable protection clause resembles a rule of precedence, which indicates that he/she must apply the more favourable to the individual protection.

On the other hand, the \textit{supervisory body} of a treaty must \textit{construe} the rights protected under its constitutive instrument in such a way that it would not undermine the more favourable protection accorded to the individual under another treaty. The supervisory body \textit{cannot apply} the more favourable provision found under another international treaty.\(^{32}\) This is due to the limited \textit{ratione materiae} jurisdiction of treaty supervisory bodies, which are confined to interpreting and applying their own constitutive instruments.\(^{33}\) Therefore, the supervisory body has the \textit{negative duty}\(^{34}\) to ensure that their respective constitutive treaties are not being used as a pretext for weakening the more favourable protection accorded to the individual under another applicable treaty. In this sense, the more favourable protection clause - from the standpoint of the international body supervising the treaty - appears as a principle of interpretation (and not a rule of precedence).

Despite the differences in the roles and obligations of the international and national courts, they are united by the imperative that the more favourable protection must always be preserved. Subsequent or more specialised treaties on human rights are not in place to diminish the existing level of protection and, conversely, prior or less specialised treaties will not be used as a pretext to justify a reduced level of protection accorded to the individual. It is in this sense that the clause offers a

\(^{31}\) Nowak, supra n 1 at 118.

\(^{32}\) Decaux, supra n 23 at 901; Sohn, Summary of Discussion Following the Report by Capotorti, supra n 30 at 94.

\(^{33}\) According to Article 62 (3) IACHR ‘the jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it’. Article 32 (1) ECHR envisages that ‘the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47’.

\(^{34}\) Decaux, supra n 23 at 901 discussing the identical more favourable protection clause under the ECHR.
dynamic approach to the development of human rights and, therefore, is a valuable interpretation principle in order to address the proliferation of human rights treaties.

2. The More Favourable Protection Clause in Practice

Having discussed the aim and the function of the more favourable protection clause in theory, this Part examines its application by the Inter-American and European Courts of Human Rights. Interestingly, even though the clauses envisaged under the ECHR and the IACHR are identical, the Courts follow different approaches regarding the interpretation of and the purpose served by the provisions. The analysis shows that, first, neither Courts use the clause in order to properly regulate the level of protection afforded to the individual and that, second, that the divergent practices deepen the difficulties related to the fragmentation of international law. Three subsections follow reflecting the different ways that the Courts have suggested using the clause.

A. The More Favourable Protection Clause as an Interpretative Principle for Preserving the Higher Level of Protection Accorded under Other International Treaties

It is a fact that the ECtHR rarely refers to Article 53 ECHR (former Article 60). The relevant case law is scarce and relates mostly to cases where the greater protection to the individual was afforded under a national provision of the respondent State - and not under another international treaty. In the same vein, general textbooks on the ECHR lack any analysis of the more favourable protection clause, thereby making Article 53 practically invisible. Although municipal law issues do not fall

35 Article 53 of the ECHR has the title ‘Safeguards for existing human rights’ and it provides that ‘nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party’.

within the scope of the present discussion, some evidence may be deduced as to how the Court interprets the more favourable protection clause.

The Court has stressed that, pursuant to Article 53 ECHR, the ECHR ‘reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level, but never limits it’.\textsuperscript{37} Likewise, many judges, in their Separate or Dissenting opinions, have underlined that - by virtue of Article 53 ECHR - the Court has the obligation to \textit{save} and \textit{keep intact} the more favourable protection provided under national law.\textsuperscript{38} Therefore, the ECtHR perceives its duty under Article 53 as a \textit{negative duty} in the sense that the interpretation of a right under the ECHR should not endanger the greater level of protection of the same right afforded under the domestic law of the respondent State.

One of the few instances in which the Court discussed Article 53 ECHR, as far as international treaties are concerned, is the \textit{N.A. v United Kingdom} case\textsuperscript{39}. The applicant complained under Articles 2 and 3 ECHR that, if returned to Sri Lanka, he would be put at a real risk of ill treatment. He claimed that, in accordance with the European Union (EU) law, he was entitled to a subsidiary protection status and argued that, pursuant to Article 53 ECHR, ‘the level of protection offered by the [European] Convention had to be equal or higher to that in the [European Union] Directive’.\textsuperscript{40} The Court rejected the applicant’s argument as follows:

\begin{quote}
It is not the Court’s task to apply directly the level of protection offered in other international instruments and therefore considers that the applicant’s
\end{quote}

\textsuperscript{37} \textit{Shamayev and others v Georgia and Russia}, Application No 36378/02, 12 April 2005, Merits and Just Satisfaction, at para 500; \textit{Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in Bosphorus Hava Yollari Turizm Ticaret Anonim Şirketi v Ireland}, Application No 45036/98, Merits, 20 June 2005 (Grand Chamber), at para 53.
\textsuperscript{39} \textit{N.A. v United Kingdom}, Application No 25904/07, Merits and Just Satisfaction, 17 July 2008 (hereinafter \textit{N.A.} case).
\textsuperscript{40} \textit{Ibid.} at para 100.
submissions on the basis of Directive 2004/83/EC are outside the scope of its examination of the present application.\footnote{Ibid. at para 107.} The Court was unequivocal in its stance that it does not fall within its competence to apply the same level of protection ensured under other treaties.\footnote{Alkema, supra n 1 at 44. The Court did not refer to the fact that, in any event, the conditions for the applicability of Article 53 were not fulfilled. Article 53 refers specifically to an (international) ‘agreement’, whereas the subsidiary status protection as envisaged in the EU Directive does not attain the status of treaty law.} Therefore, Article 53 ECHR neither gives rise to a claim for the violation of a right protected under another treaty\footnote{Liisberg, ‘Does the European Union Charter of Fundamental Rights Threaten the Supremacy of Community Law?’ (2001) 38 Common Market Law Review 1171 at 1184.} nor serves as a legal basis for equating the level of protection under the ECHR to other international treaties.\footnote{Alkema, supra n 1 at 44; Decaux, supra n 23 at 902-903; de Meyer, ‘Brèves Réflexions à Propos de l’ Article 60 de la Convention des Droits de l’ Homme’, in Matscher and Petzold (eds), Protecting Human Rights: The European Dimension. Studies in Honour of Gerard J. Wiarda (Kohn: Carl Heymanns-Verlag KG, 1988) at 125, 126, 128; Martens, ‘Perplexity of the National Judge Faced with the Vagaries of European Consensus’, in Dialogue Between Judges – The European Court of Human Rights (Strasbourg: Council of Europe, 2007) 23 at 27; Eissen, ‘The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence’ (1972-1973) 22 Buffalo Law Review 181 at 210-211.} Given the number of the judgments issued by the Court on an annual basis, it is strikingly unusual that there are so few references to Article 53, insofar international treaties. After all, it is undisputable that hardly a week goes by without the Court discussing issues related to international law, including other international human rights treaties.\footnote{Costa, ‘Intervention Introductive: Conférence devant le Conseil d’ Etat’, Paris, 19 April 2010, at 5, available at: http://www.echr.coe.int [last accessed 27 October 2014].} Therefore, if the rights under the ECHR frequently interact with other human rights treaties three scenarios may arise.

The approach of the ECtHR seems to be consistent with the wording and aim of Article 53 ECHR. Nonetheless, what needs to be asked at this point is whether this provision truly serves its purpose within the Court’s case law. In other words, does the Court properly use the clause in practice? Why is it that Jean-Paul Costa, the former President of the European Court, stated that the more favourable protection clause is not the most well-known (‘le plus connu’)?\footnote{Myjer, ‘Hardly a Week Goes by without… Observations on the Increasing Number of General Problems of International Law in the Case Law of the European Court of Human Rights’, in Boerefijn and Goldschmidt (eds), Changing Perceptions of Sovereignty and Human Rights. Essays in Honour of Flinterman (Antwerp: Intersentia, 2008) 327 at 327-328; Caflisch, ‘International Law and the European Court of Human Rights’, in Dialogue Between Judges, supra n 44, 23 at 27. See also Speech of Dame Rosalyn Higgins, ‘The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights’, Ceremony Marking the 50th Anniversary of the European Court of Human Rights, 30 January 2009, available at: http://www.echr.coe.int/NR/donlyres/38D1E6A5-DE24-42BD-BC3D-45CCCC8A7F8A/0/30012009PresidentHigginsHearing_eng.pdf [last accessed 20 October 2014].} Given the number of the judgments issued by the Court on an annual basis, it is strikingly unusual that there are so few references to Article 53, insofar international treaties. After all, it is undisputable that hardly a week goes by without the Court discussing issues related to international law, including other international human rights treaties.\footnote{Myjer, ‘Hardly a Week Goes by without… Observations on the Increasing Number of General Problems of International Law in the Case Law of the European Court of Human Rights’, in Boerefijn and Goldschmidt (eds), Changing Perceptions of Sovereignty and Human Rights. Essays in Honour of Flinterman (Antwerp: Intersentia, 2008) 327 at 327-328; Caflisch, ‘International Law and the European Court of Human Rights’, in Dialogue Between Judges, supra n 44, 23 at 27. See also Speech of Dame Rosalyn Higgins, ‘The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights’, Ceremony Marking the 50th Anniversary of the European Court of Human Rights, 30 January 2009, available at: http://www.echr.coe.int/NR/donlyres/38D1E6A5-DE24-42BD-BC3D-45CCCC8A7F8A/0/30012009PresidentHigginsHearing_eng.pdf [last accessed 20 October 2014].} Therefore, if the rights under the ECHR frequently interact with other human rights treaties three scenarios may arise.
The first scenario is that the ECHR, via its dynamic interpretation by the ECtHR, always provides for the highest level of protection and, hence, there is no need for Article 53 to be employed. According to the second scenario, national courts are very diligent in their obligations and always ensure that the individual is accorded the more favourable protection and, in this way, no pertinent applications find their way before the ECtHR. Without a doubt both of the foregoing considerations contribute to substantially reducing the number of cases in which Article 53 could be of use, but it is highly unlikely that they eliminate almost all relevant instances for its application.

The third scenario that is, in fact, the main reason for the scarce use of Article 53 is due to the Court’s choice to adopt an alternative approach in order to address the different level of protection of rights under the ECHR and other treaties. In particular, the ECHR’s well-documented practice of interpreting the ECHR by taking other rules of international law into account includes many instances in which the Court has expanded the scope and content of the rights under the ECHR by reference to more detailed provisions from other treaties.47 In this sense, it is argued that the Court pursues an interpretative approach, which – to a great extent – surpasses the obligation to construe the ECHR in a way that would not endanger the higher level of protection under another treaty. It appears that the judicial policy and practice of the Court does not follow the specific path initially laid out by the drafters of the ECHR. When the drafters foresaw the difficulties stemming from the proliferation of human rights treaties (including the possibility of different levels of protection of the same rights under different treaties), the solution that they prescribed was that the Court should have a negative duty not to jeopardize the level of protection provided under any another treaty. In contrast, the ECtHR follows the policy of enlarging the scope of the ECHR to accommodate, in many instances, the higher level of protection accorded under other international human rights treaties.48


48 For example, Rantsev v Cyprus and Russia Application No 25965/04, Merits and Just Satisfaction, 7 January 2010, at paras 146, 272-277, 280, 285, 290-293 (enlarging the scope of the prohibition of slavery to include trafficking in humans by taking cognisance of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Crime (29 September 2003, 40 ILM 335 (2001) and the
B. The More Favourable Protection Clause as a Conflict Resolution Rule?

A second way that the more favourable protection clause has been invoked before the European Court is as a principle to resolve conflicts of rights. In such instances, the right of the applicant under the ECHR seems to be in tension, or in conflict, either with the rights of other individuals or with duties incumbent on the State. The more favourable protection clause seems to come into play because a higher level of protection could be applicable to individuals (other than the applicant) as far as their rights are concerned. Respondent States and dissenting judges have argued that the Court has the obligation to construe the applicant’s right in a way that does not limit other private parties’ rights or interfere with the States’ duties to protect certain interests.

The *Nilsen and Johnsen* case illustrates this scenario. The applicants, who were police officers, complained before the ECtHR of a violation of their freedom of expression following their indictment by national courts in defamation proceedings. An academic researcher, who alleged the existence of widespread police brutality, brought the proceedings against them. Whereas the majority of the Court found a violation of Article 10, four dissenting Judges opined that Article 53 ECHR should be applied. They highlighted that the respondent State had undertaken, by virtue of the

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Council of Europe Convention on Action against Trafficking (1 February 2008, CETS No 197); *Neulinger and Shuruk v Switzerland* Application No 41615/07, Merits and Just Satisfaction, 6 July 2010 (Grand Chamber), at paras 131-132; *Carlson v Switzerland* Application No 49492/06, Merits and Just Satisfaction, 6 November 2008, at para 76; *Bianchi v Switzerland* Application No 7548/04, Merits and Just Satisfaction, 22 June 2006, at paras 92, 94 (reading into the scope of the ECHR the Convention on the Civil Aspects of the International Child Abduction (1 December 1980, 1343 UNTS 89)); *Taşkin and others v Turkey* Application No 46117/99, Merits and Just Satisfaction, 10 November 2004, at para 119; *Tătar v Romania* Application No 67021/01, Merits and Just Satisfaction, 27 January 2009, at paras 88, 101, 118 (reading detailed aspects of the right to access to environmental information into the ECHR by taking account of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (2161 UNTS 447) and the Rio Declaration on Environment and Development (31 ILM 874 (1992)).

40 In the *Open Door* case, at paras 64, 78 the applicants complained of a violation of their right to communicate information to pregnant women so as to assist them to have abortion in England. One of Ireland’s arguments was that Article 10 ECHR should be construed in a way that does not conflict with the protection of the rights of the unborn which enjoyed special protection in domestic law (the Irish Constitution). Although the majority did not engage with this argument, many Judges in their Dissenting and Separate opinions thought that the fact that the right of the unborn to be born in the Irish legislation qualified as more favourable protection to the right to life guaranteed under the ECHR and, therefore, Article 53 should preclude the interpretation of the right to freedom of expression in a way that would lead to endangering the higher level of protection of the right of the unborn. See Dissenting Opinion of Judges Pettiti, Russo and Lopes Rocha approved by Judge Bigi, at 36; Separate Opinion of Judge de Meyer, at para 4; Dissenting Opinion of Judge Blayney, at 47-48.

41 *Nilsen and Johnsen v Norway* Application No 23118/93, Merits and Just Satisfaction, 25 November 1999 (Grand Chamber) (hereinafter *Nilsen and Johnsen* case).

42 Dissenting Opinion of Judges Kūris, Türmen, Strážnická and Greve in *Nilsen and Johnsen* case, at 35.
Convention Against Torture, the obligation to proceed to a prompt and impartial investigation and to ensure that an alleged victim of torture has his/her case examined. They invoked Article 53 ECHR, arguing that Article 10 ECHR should not have been construed in a way that disregarded the protection afforded under CAT to the individuals who had originally brought the defamation proceedings before the national courts.

Two points need to be underlined in this respect. First, the fact that the respondent State undertook certain obligations under CAT does not necessarily mean that a private party is entitled to specific rights or, all the more, to a higher level of protection pursuant to CAT (or domestic law). In fact, the wording of the duties of Norway under Articles 12, 13, 16 (1) CAT, subject to the terms of their incorporation and implementation in domestic law, does not indicate the provision of clear and justifiable rights to individuals. If this is the case, the application of Article 53 ECHR is not under discussion, since the provision does not come into play unless an individual has a justifiable right. However, even if it is assumed that a higher level of protection was afforded to other private parties, other than the applicant before the ECtHR, the more favourable protection clause is ill fitted to resolve this type of tension. Tensions or conflicts of rights between private individuals cannot be addressed by applying Article 53 ECHR. The clause was not designed for this purpose; it can only offer solutions in the case of one individual and the respective more favourable treatment that should be accorded to him/her when two or more treaties come into play. In cases where more than one individuals claim a more favourable protection of their respective rights under different treaties the application of the clause ‘entails a logical impossibility’, since the protection accorded to one

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52 Convention against Torture and other Cruel, Inhuman or Degrading Treatment, 26 June 1987, 1465 UNTS 85 (hereinafter CAT).
53 According to Article 12 ‘[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction’. Article 13 reads that ‘[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given’. Article 16 (1) provides that ‘[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment’.
54 Sadat-Akhavi, supra n 17 at 218; Alkema, supra n 1 at 48, 51.
right inevitably results in the reduced protection of the other right. In such scenarios the Court neither has the duty to, nor should, apply Article 53 ECHR. The case should rather be decided by balancing the relevant rights and interests and by applying the proportionality test.

C. The More Favourable Protection Clause as a Legal Basis for Interpreting a Treaty by Reference to Other Treaties of International Law

Although the more favourable protection clauses under the ECHR and IACHR share identical wording, the IACtHR, in contrast to its counterpart, has established a completely different understanding of Article 29 (b) IACHR. The IACtHR posits that Article 29 (b) IACHR is an interpretative principle according to which the guarantees under the IACHR must be construed in light of other international instruments. International lawyers have highlighted weaknesses and shortcomings in the Court’s methodology when it applies Article 29 (b) in this manner, but their discussion either takes place on a case-by-case basis or focuses on specific strands of the case law, (e.g. children’s right, women’s rights, rights of the indigenous peoples) thereby lacking a comprehensible analysis. This section throws light on the use of Article 29 (b) by examining how its application underpins the Court’s reasoning through the case law.

57 Article 29 is placed under the fourth Chapter of the IACHR, which contains general provisions with regard to the suspension of guarantees, interpretation and application of the Convention. Its second paragraph reads that ‘[n]o provision of this Convention shall be interpreted as [...] restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State or by virtue of another convention to which one of the said states is a party’.
The Mapiripán Massacre and Ituango Massacres cases aptly demonstrate the Court’s practice.\(^5^9\) Both cases concerned the alleged forced displacements of members of the local population in the context of a non-international armed conflict in Colombia. The applicants complained \textit{inter alia} of a violation of Article 22 IACHR concerning their freedom of movement. The Court decided to address forced displacement in light of International Humanitarian Law (IHL).\(^6^0\) It noted that Article 29 (b) IACHR ‘forbids a restrictive interpretation of the rights [under the Convention]’\(^6^1\) and that the rights protected under the IACHR and IHL ‘complement each other or become \textit{integrated} to specify their scope or their content’.\(^6^2\) On this basis, it proceeded to interpret Article 22 IACHR by taking Article 17 of the Additional Protocol II to the Geneva Conventions into account.\(^6^3\) The interpretative weight attached to Article 17 of AP II to GC was instrumental to the Court’s analysis. First, the state of vulnerability and defenselessness of the displaced population were substantiated by reference to the criteria under Article 17 (the satisfactory conditions of shelter, hygiene, health, safety and nutrition). Second, Article 22 IACHR was construed to include the State’s positive obligation to reverse the effects of the state of vulnerability.\(^6^4\) This positive obligation reflects - to the letter - the duty under Article 17 of AP II to GC to take all possible measures to secure satisfactory conditions for the population.\(^6^5\) Hence, the Court employs the more favourable protection clause as the legal basis for taking IHL treaties into account when interpreting the IACHR.\(^6^6\)

In a similar vein, the Court has developed its well-known jurisprudence on the rights of the indigenous peoples mainly by employing Article 29 (b) and interpreting

\(^{59}\) Mapiripán Massacre \textit{v} Colombia, Series C No 134, 15 September 2005 (hereinafter \textit{Mapiripán Massacre} case); Ituango Massacres \textit{v} Colombia, Series C No 148, 1 July 2006 (hereinafter \textit{Ituango Massacre} case).

\(^{60}\) Ituango Massacres case, at para 208; Mapiripán Massacre case, at paras 171-172.

\(^{61}\) Mapiripán Massacre case, at paras 115, 188; Ituango Massacres case, at para 207.

\(^{62}\) Mapiripán Massacre case, at para 115 (emphasis added).

\(^{63}\) Article 17 on the prohibition of the forced movement of civilians reads: ‘1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict’, in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 7 December 1978, 1125 UNTS 609 (hereinafter AP II to GC).

\(^{64}\) Mapiripán Massacre case, at paras 171-172; Ituango Massacres case, at para 209.


\(^{66}\) Also the Separate Opinion of Judge A. A. Cançado-Trindade in Las Palmeras \textit{v} Colombia, Series C No 67, 4 February 2000, (hereinafter \textit{Las Palmeras} case) at para 4 where he underlined that ‘the interpretive interaction between distinct international instruments […] is warranted by Article 29 (b) of the Convention’.
Article 21 IACHR in light of the International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. In the Yakye Axa Indigenous Community and Sawhoyamaxa Indigenous Community cases, the IACtHR enlarged the scope of Article 21 by reading a collective understanding of the right to property in accordance with Article 13 ILO Convention No. 169 regarding the duty of State parties to respect the special relationship that indigenous peoples develop with the lands that they occupy or use. Moreover, a conflict between the right to private property and the right to the communal property of indigenous communities has to be resolved by reference to the criteria under Article 16 ILO Convention No. 169 (e.g. the overall consideration of the specific needs of the indigenous peoples, the compensation awarded to them and the possibility of the land being returned to them in the future).

Article 29 (b) qualifies as a regular reference in the case law in order for the Court to justify an interpretation of the IACHR in accordance with other international treaties and to provide scope and content to the rights therein. The Court has read the right not to be forcibly displaced within a State party into the freedom of movement under the IACHR and has brought the Convention on the Rights of the Child under the protective scope of Article 19 IACHR. In particular, Article 19

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68 Yakye Axa Indigenous Community v Paraguay, Series C No 125, 17 June 2005 (hereinafter Yakye Axa Indigenous Community case).
70 Yakye Axa Indigenous Community case, at paras 136-137; Sawhoyamaxa Indigenous Community case, at para 119.
71 Article 16(4) reads ‘when such return is not possible […] these people shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the people concerned express a preference for compensation in money or in kind, there shall be so compensated under appropriate guarantees’.
72 Yakye Axa Indigenous Community case, at paras 149-151; Sawhoyamaxa Indigenous Community case, at paras 119, 134-141.
74 Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia, Series C No 270, 20 November 2013, at paras 220-224 (hereinafter Afro-Descendant Communities case) by referring to Article 17 AP II.
75 García and Family Members v Guatemala, Series C No 258, 29 November 2012, at para 184 (hereinafter García and Family Members case); Fornerón and Daughter v Argentina, Series C No 242, 7 April 2012, at paras 44, 137 (hereinafter Fornerón case).
IACHR has been interpreted to include the children’s freedom of association\textsuperscript{76} and the obligation of States to criminalise the sale of children in their domestic legislation.\textsuperscript{77}

Despite the fact that the Court has a well-established case law with regard to the use of the more favourable protection clause, Article 29 (b) IACHR does not provide a convincing basis for interpreting the IACHR in light of other international treaties.\textsuperscript{78} The more favourable protection principle has not been designed to justify the interpretation of the IACHR by reference to other treaty provisions. As it was discussed in Part I, the Court’s task - by virtue of Article 29 (b) - is to construe the Inter-American Convention so as not to undermine the greater level of protection of a right accorded under another treaty. In other words, Article 29 (b) dictates that the IACtHR cannot be used as a pretext for not allowing a treaty to provide for a higher level of protection. This argument is also aligned with the position of the ECtHR, as it was analysed earlier.

Some concur with the Court that Article 29 (b) ‘has essentially the same effect to Article 31(3)(c) VCLT’.\textsuperscript{79} However, such an argument is not plausible since Article 31 (3)(c) VCLT and Article 29 (b) IACHR serve different purposes.\textsuperscript{80} On the one hand, Article 31 (3)(c) VCLT is a principle for the interpretation of international treaties and envisages that - for certain rules to be taken into account - they have to be relevant and applicable in the relations between the parties. On the other hand, Article 29 (b) is an interpretation principle dictating that the IACtHR has the negative duty not to endanger the more favourable protection provided for an individual under another international treaty. Therefore, the tasks assigned to the IACtHR under Articles 31 (3)(c) VCLT and 29 (b) IACHR differ substantially.

Having said this, the inappropriateness of Article 29 (b) for interpreting the IACHR in light of international law does not imply that the Court does not have the authority to interpret the provisions of the IACHR in light of other rules of international law. It is a common exercise of international Courts to construe a given

\textsuperscript{76} García and Family Members case, at para 184 by way of taking account of Article 35 CRC.
\textsuperscript{77} Fornerón case, at paras 138-144.
\textsuperscript{78} Doswald-Beck, supra n 58 at 111-112; Neuman, supra n 58 at 112; Davidson, supra n 58 at 134; Zegveld, supra n 58 at 509; Butler, supra n 58 at 159, 161, 166-167.
\textsuperscript{80} Article 31 (3)(c) VCLT reads: ‘there shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties’.
treaty against the background of general international law or in light of other treaties. If this is the case, the question that must be asked is why the Court insists on applying the ill-fitted Article 29 (b) IACHR instead of other possible bases and - in particular - Article 31(3)(c) VCLT in order to justify its interpretative practice to read the IACHR with reference to other treaties.

There are, arguably, two reasons that the IACtHR does not apply Article 31 (3)(c) VCLT and instead invokes Article 29 (b) IACHR in its legal reasoning. The first reason is the different conditions for the applicability of the two provisions. Article 29 (b) IACHR comes into play when the respondent State is a party to the convention under discussion, whereas Article 31 (3)(c) VCLT requires that the relevant treaty must be applicable in the relations between the parties. Although it is contested whether the ‘parties’ under Article 31 (3)(c) are only the parties to a given dispute or all contacting parties to the treaty under interpretation, it is possible that

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81 For example, the ICSID Annulment Committee held that the ICSID arbitral tribunal in the CMS case should have examined in detail the relationship between the treaty clause in the Argentina-US Bilateral Investment Treaty regarding the state of necessity and pertinent customary international law. See in CMS Gas Transmission Co. v Argentina Republic, 25 September 2007, ICSID Case No ARB/01/8, Annulment Proceeding, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 [last accessed 1 November 2014]. The International Court of Justice noted the dynamic interaction between treaties and customary law in the area of diplomatic protection in the Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Judgment, Preliminary Objections, 24 May 2007, ICJ Reports 2007, p. 582, at para 88. The Permanent Court of Arbitration in the Iron Rhine case read the 1839 Treaty of Separation between Belgium and the Netherlands in light of the duty to sustainable development under general international law in Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway (The Kingdom of Belgium and the Kingdom of Netherlands), Award, 24 May 2005, at para 60, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1155 [last accessed 5 November 2014].


83 Interpreting the IACHR by reference to other treaties could be also justified on the basis of good faith for identifying the common use of a term by States in public international law under Article 31 (1) VCLT. See Gardiner, supra n 82 at 282-284; Berman, ‘Treaty “Interpretation” in a Judicial Context’ (2004) 29 Yale Journal of International Law 315 at 318; Linderfalk, ‘Who Are “the Parties”? Article 31, paragraph 3(c) of the 1969 Vienna Convention and the “Principle of Systemic Integration” Revisited’ (2008) LV Netherlands International Law Review 343 at 364; Pauwelyn, supra n 2 at 256.

84 Gardiner, supra n 82 at 269-275; Pauwelyn, supra n 2 at 257-263; ILC Report, supra n 11 at paras 470-472; cf. Linderfalk, supra n 83 at 364.
the Inter-American Court conveniently evades the question of whether the external treaty is binding on the all or certain of the parties to the IACHR.\(^{85}\) It should be noted that, in any event, the Court does not hesitate to refer to and use treaties that have not been ratified by the respondent State as well as non-binding instruments.\(^{86}\) Article 29 (b) is frequently employed as the legal basis to ground this ‘incontrollable’ interpretative practice, even though the provision explicitly refers only to conventions.\(^{87}\) The Court’s increased confidence in using an interpretative clause contained in its own constitutive instrument (the IACHR) in this particular way rather than a general rule of interpretation under the VCLT cannot be ruled out.

The second reason that the IACtHR invokes Article 29 (b) IACHR instead of Article 31 (3)(c) VCLT is due to the fact that the Court’s specific misapplication of Article 29 (b) serves the objective not only of taking other treaties into account to interpret the IACHR but de facto incorporating them under the IACHR. The fashion in which the IACtHR puts Article 29 (b) into practice is significant for construing the Court’s \textit{corpus juris} theory. The \textit{corpus juris} of international human rights law is comprised of a set of international instruments of varied content and juridical effects\(^{89}\) and is decisive in dynamically interpreting the IACHR.\(^{90}\) The Court regularly refers to either the Inter-American \textit{corpus juris} on the regional level, which comprises of regional treaties on human rights and the legislation and practice of member States to

\(^{85}\) For example, Mapiripán Massacre case, at para 115; Ituango Massacres case, at para 179; Yakye Axa Indigenous Community case, at para 130; Sawhoyamaxa Indigenous Community case, at para 117.

\(^{86}\) For example, Ituango Massacres case, at para 157; Saramaka People v Suriname, Series C No 172, 28 November 2007, at para 93; Gonzalez et al. v Mexico, Series C No 205, 16 November 2009, at para 225 (hereinafter Gonzalez case); Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in the Case of Liakat Ali Alibux v Suriname, Series C No 276, 30 January 2014, at paras 81, 82 (hereinafter Concurring Opinion of Judge Poisot in the Liakat case); Vanneste, supra n 47 at 299-300.


\(^{88}\) The position that the text of Article 29 (b) does not accommodate non-treaty instruments is further strengthened by comparing Article 29 (b) IACHR to the more favourable protection clause as envisaged in Article 1 (2) CAT. In contrast to the usual wording of the clause in human rights treaties, CAT provides that ‘[the definition of torture under] this Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’ (emphasis added). Whereas other clauses refer to the terms ‘agreement’ or ‘convention’, CAT’s text refers to any international instrument, thereby encompassing non-binding declarations, principles and other ‘soft law’ documents. See Nowak and McArthur, \textit{The United Nations Convention Against Torture – A Commentary} (New York: Oxford University Press, 2008) at 85.

\(^{89}\) For the meaning of the principle of \textit{corpus juris} protection of human rights in the jurisprudence of the IACtHR see Neuman, supra n 58; Vanneste, supra n 47 at 294-312.

\(^{90}\) Vanneste, supra n 47 at 312.
the IACHR,\textsuperscript{91} or the international \textit{corpus juris}, which is construed of international instruments.\textsuperscript{92} Article 29 (b) IACHR is the bedrock of the \textit{corpus juris}: the Court has employed the \textit{pro persona} (or \textit{pro homine}) principle encapsulated in Article 29 (b) to establish and support the \textit{corpus juris} exercise when it interprets the IACHR.\textsuperscript{93} Although the Court posits, in theory, that other treaties (and instruments) are used as interpretative references in its reasoning, in practice, it transplants external standards under the protective scope of the IACHR because they are allegedly part of the international \textit{corpus juris}. The justification that it provides in this respect is that Article 29 (b) not only prohibits a restrictive interpretation of the IACHR, but also requires a comprehensible and integrative reading of the IACHR with other treaties.\textsuperscript{94} According to the IACtHR, Article 29 (b) gives the Court the authority to \textit{integrate} the more favourable protection of the individual under another international treaty into the scope of the IACHR. It is interesting that many judges of the Inter-American Court in their Concurring Opinions openly acknowledge that, by way of applying the more favourable protection clause, the IACtHR has to integrate into the IACHR the same level of protection accorded to the individual under other international instruments.\textsuperscript{95} They also note that Article 29 (b) IACHR dictates the primacy of the more favourable norm and, hence, promotes the uniform interpretation of international human rights law.\textsuperscript{96}

Nonetheless, it is difficult to ground such an understanding of Article 29 (b) in either its text or its function. It is not the Court’s task, on the basis of Article 29 (b), to accord equivalent or comparable standards to those guaranteed under other

conventions under the IACHR; all the more, it certainly is not its obligation to do so. It is only domestic authorities, notably domestic courts, which are entitled and have the duty to apply the more favourable provision. Part I showed that the duty of the body supervising a given treaty by virtue of the more favourable protection clause is to construe that treaty in a way that will not endanger a better protection under another treaty. This position, regarding the aim and function of the clause, is supported by the practice of the ECtHR and the scholars’ views. In the name of the effective protection and dynamic interpretation of human rights, and under the pretext of the corpus juris theory, the IACtHR has created a system different to which the member States consented. This is because the IACtHR seems to indirectly apply other treaties and not respect the restrictions of its jurisdiction under the IACHR to interpret and apply only the IACHR. The relevant complications faced by the States in complying with their international obligations, if the duties under the IACHR were contradictory or different with other international norms, is irrelevant. Whether or not the respondent State, or even all the State parties to the IACHR, have ratified a given treaty is also immaterial. The IACtHR does not have the authority to entertain the task of harmonizing the member States’ international obligations nor it can effectively supervise provisions of other international treaties under the guise of the IACHR. Not only is the more favourable protection clause not the legal basis for achieving such goals, but further these goals do not fall within the remit of interpretation at large.

It would be an omission not to appreciate that this particular application of Article 29 (b) (strictly linked to the corpus juris theory) has been developed in the

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97 Vanneste, supra n 47 at 302-303; Nowak, supra n 1 at 118; Buergenthal, supra n 20 at 90 with regard to the identical clause in the ICCPR and infra n 43 and 44 with regard to the ECHR’s clause.
98 Tigroudja, supra n 87 at 622-623.
100 Concurring Opinion of Judge Poisot in the Liakat case, at para 80.
101 García and Family Members case, at para 184 discussing the CRC.
context of the Inter-American system of human rights. It cannot go unnoticed that the *corpus juris* theory is an ‘effort of normative integration’\(^{104}\) and that it reflects a particular vision of international human rights law as a new *jus gentium*.\(^{105}\) The IACtHR attempts to consolidate the protection of human rights in the region and be responsive to delivering justice in cases of massive, grave and systematic violations of human rights within the context of civil wars and dictatorships.\(^{106}\) For instance, the integration of the ILO Convention No 169 serves the aim of incorporating the indigenous cosmovision into human rights;\(^{107}\) the progressive case law on the protection of the rights of children is a small contribution to fighting the ‘microsm of the brutality prevailing in the day-to-day scenario of the streets of Latin America’.\(^{108}\) Yet, judicial creativity is not limitless.\(^{109}\) The IACtHR, preoccupied with the policy implications of its judgments, leaves its legal reasoning and methodology weak, misguided and vulnerable. Article 29 (b) cannot serve the role of supporting the integration of other standards into the IACHR or harmonizing international human rights obligations at large. The Court is obliged to give reasons for its judgments and to employ a sound, convincing and transparent legal reasoning.\(^{110}\) Legal reasoning is not merely a matter of technique or rigid methodology, but also reflects and enhances the Court’s legitimacy.\(^{111}\) Therefore, a more credible and refined approach with regard to the use of Article 29 (b) would be welcome.\(^{112}\)

In sum, neither the ECtHR nor the IACtHR have – in practice – used the more favourable protection clause to serve its original purpose. The ECtHR is aware of the

\(^{104}\) Ibid. at para 74.
\(^{109}\) Terris et al., *The International Judge – An Introduction to the Men and Women Who Decided the World’s Cases* (Hanover and London: University Press of New England, 2007) at 97 where Judge Thomas Buergenthal compares the discretion of judicial creativity in the ICJ and the IACtHR.
\(^{110}\) Article 66 (1) IACHR.
proper function of the clause but the case law reveals an ‘apparent unwillingness to apply the clause’, especially as far as international treaties are concerned. It was also discussed that the clause cannot be used to resolve conflicts of rights. Further, the clause cannot serve the role of an interpretation principle in order to equate the level of protection under the IACHR with the higher level envisaged under other human rights treaties. In this respect, the IACtHR employs Article 29 (b) IACHR inconsistently with the text and aim of the provision as well as the confines of its jurisdiction since, on many occasions, it indirectly applies other treaties via the IACHR. This implies that the IACtHR also interferes with the role of domestic courts, which are the only courts that are entitled to apply the more favourable provision. The rationale underlying the clause is to address the interactions between different human rights treaties by way of preserving the progressive development of human rights and, at the same time, to maintain a balance between the different roles of the domestic and international judge. Furthermore, the divergent interpretations of the more favourable protection clause by the two Courts prejudice a common understanding of rules on treaty interpretation. This is, all the more, important because this rule of interpretation was specifically designed for human rights treaties. Despite the great discrepancies in the practice of the IACHR and the ECtHR, Part III argues that the clause remains relevant in dealing with different levels of protection of the same rights under different treaties and suggests a novel way to apply the clause concordant to its rationale.

3. A New Way to Apply the Clause: Is the More Favourable Protection Clause Subject to Violation?

The Article has established that the IACtHR and ECtHR are entitled and obliged to construe their treaties in such a way so as to preserve the more favourable protection accorded to the individual under another treaty. There is, however, a closely related issue that is largely unexplored both in the case law and the literature: is the more favourable protection clause subject to violation? If the answer is in the positive, then does the supervisory body have the jurisdiction to entertain such a claim? To give an example, if a State party to the ECHR does not accord to an

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113 Alkema, supra n 1 at 47.
individual the more favourable treatment afforded under another international treaty, is it in breach of Article 53 and hence, in violation of the ECHR? If this is the case, may an individual bring a complaint before the Court arguing for a violation of the more favourable protection clause? This Part argues that such a claim should be admissible before the Court and that a State may be indeed found in breach of its international obligation under the more favourable protection clause.

Two objections against this argument may be raised at the outset. The first objection may be summarised in that the Court cannot review the member State’s compliance to the clause because that would imply that it incorporates the external more favourable standard into its own system of protection.\textsuperscript{114} However, if the Court is to hear a similar complaint and accordingly find a violation of the clause, it merely finds that the applicant \textit{in casu} should have been accorded a higher level of protection by virtue of a more favourable international provision binding on the respondent State. This does not entail that the more favourable protection will be integrated within the Convention’s protection or in the interpretation of a given provision of the Convention.

The second objection could be that the clause is not justifiable because the Court does not have the jurisdiction to review the proper application of an international treaty by the State.\textsuperscript{115} It is true that the Court is not competent to review, in principle, how a member State interprets and applies its international obligations. Yet pursuant to the more favourable protection clause the State assumes the international obligation to afford the more favourable protection to the individual. Hence, the Court can and should, in fact, review whether or not the State complied with this obligation.

The foregoing concerns stem from the \textit{sui generis} nature of the more favourable protection clause. The clause falls within the category of the procedural provisions of a treaty, namely the provisions, which do not envisage a substantive right or freedom. Despite this, the competence of the Courts encompasses the interpretation and application of all provisions of their constituent instruments, regardless of whether they are substantive or not. Therefore, there is nothing, in principle, to preclude the possibility of a procedural provision to be subject to violation. Both the ECHR and the IACHR prescribe the jurisdiction of the respective

\textsuperscript{114} Meyer, supra n 44 at 125-126.
\textsuperscript{115} Eissen, supra n 44 at 211; Lixinski, supra n 79 at 587; \textit{cf}. Zegveld, supra n 58 at 509.
Courts without drawing any relevant distinction between substantive and non-substantive provisions contained therein. In fact, the practice of both Courts provides convincing evidence to support this argument. The ECtHR acknowledges that Article 18 ECHR, for example (concerning the limitations on the use of restrictions of rights) is subject to a violation. Similarly, the IACtHR has explicitly dismissed Brazil’s contention that provisions found in the IACHR, that do not provide for substantive guarantees - but rather rules for the interpretation and application of the IACHR - are not subject to the Court’s jurisdiction. The IACtHR has reaffirmed in different instances that it has the competence to examine the alleged violation of any provision of the IACHR regardless of whether it is a general obligation, a right, or a norm of interpretation. A State, therefore, may be found in breach of procedural provisions and interpretation principles found in both the ECHR and the IACHR. It must be underlined, however, that a violation of a procedural provision is only possible if the provision is taken together with a substantive right under the treaty. This is because procedural provisions do not have an independent character since they indicate specific guidelines and interpretive principles for the construction of the human rights. Yet a violation of a procedural provision read together with a human right can be found, even if there is no violation of that right taken alone – a stance confirmed by both Courts. The IACtHR in the Apitz Barbera case, for example, was careful to underline that ‘the interpretation principles contained in Article 29 (c) can only result in a violation of a right unduly construed in accordance with those principles’.

The two Courts have not been engaged in detail with such a claim regarding the violation of the more favourable protection clause. There are only a few instances in which Article 53 was brought before the ECtHR and the former European

116 Article 62 (3) IACHR and Article 32 (1) ECHR. For the wording of the provisions infra n 33.
117 Article 18 provides that ‘the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed’.
118 See Gusinskiy v Russia Application No 70276/01, Merits and Just Satisfaction, 19 May 2004, at para 73 (hereinafter Gusinskiy case); van Dijk, supra n 36 at 1093-1100 and 1083-1092 for similar analysis regarding Article 17 ECHR.
119 Garibaldi v Brazil, Series C No 203, 23 September 2009, at paras 31, 40 (hereinafter Garibaldi case).
120 Ibid. at paras 31, 40, 145; Escher et al v Brazil, Series C No 200, 6 July 2009, at para 218; Apitz Barbera case, at para 221. See also Blake v Guatemala, Series C No 27, 2 July 1996, at para 45 where the Court found the claim of an alleged violation of Article 29 (d) as pertinent to be examined in the merits; Salvador Chiriboga v Ecuador, Series C No 179, 6 May 2008, at paras 130-133.
121 For the ECtHR see White & Ovey, supra n 36 at 124-128; Leach, supra n 36 at 168-169; Dijk, supra n 36 at 1084.
122 Apitz Barbera case, at para 221. Also Gusinskiy case, at para 73.
Commission on Human Rights. In these cases, however, the applicants did not complain of an alleged violation of Article 53, but instead framed their arguments as an alleged violation of the external more favourable treaty provision that should have been applied by national authorities pursuant to Article 53. In the *M. K. v Greece* and *Markopoulou v Greece* cases the applicants argued for a violation of the European Social Charter and the ICSECR because Greece did not apply the more favourable provisions found under these treaties. The European Commission dismissed their complaints as incompatible *ratione materiae* since it did not have the competence to declare a violation of another treaty. Similar arguments on the basis of Article 29 (b) IACHR were presented before the IACtHR concerning the violation of other human rights treaties and the Court dismissed them because it lacked jurisdiction.

There is only one instance before the ECtHR, the *Leempoel v. Belgium* case, in which the applicant argued for a violation of the right to freedom of expression under Article 10 ECHR taken together with Article 53 ECHR. The applicant alleged that Belgium did not apply the relevant provision of the freedom of expression under its Constitution, which provided for a higher level of protection to Article 10 ECHR. Even though the complaint concerns a more favourable provision under domestic law, the case aptly demonstrates how a pertinent complaint for a violation of Article 53 ECHR may come into play. It is of particular interest that - unanimously - the Court did not dismiss the argument as manifestly ill-founded or incompatible *ratione materiae*. The ECtHR found that it did not deem a separate examination of this claim necessary, since it had already found a violation of Article 10 ECHR. Therefore, it is highly likely that, if the Court had not found a violation of Article 10 ECHR, it would have considered that it has the competence to hear the complain and entertain the allegation of a violation of Article 10 ECHR in conjunction with Article 53. In other words, even if the State did not breach Article 10 ECHR, it may have violated

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123 Council of Europe, European Social Charter (Revised), 1 July 1999, ETS 163.
126 *Leempoel & S. A. ED. Cine Revue v Belgium* Application No 64772/01, Merits, 9 November 2006, at para 3 (hereinafter *Leempoel case*).
127 *Leempoel case*, at paras 86-87.
128 Cf. *Gusinskiy* case, at paras 70-78 in which case the ECtHR found both a violation of Article 5 ECHR and a violation of Article 5 taken together with Article 18 ECHR.
Article 10 taken together with Article 53 because it did not apply the more favourable provision in the circumstances at hand.

Overall, a complaint with regard to the violation of the more favourable protection clause can justifiable and admissible, if it is taken in conjunction with a substantive right under the treaty, even if there is no violation of that right taken alone. The ECtHR, in the *Leempoel v Belgium* case, appeared willing to examine a similar claim as long as the more favourable protection pursuant to Article 53 ECHR was not applied to the applicant’s circumstances. When the Court entertains such a complaint, the external more favourable provision will not be incorporated into its system of protection - it will only ascertain whether State authorities honoured their obligation under Article 53 ECHR.\(^\text{129}\) Moreover, substantiating such a claim should not involve an excessive burden of proof on the applicants. Two conditions have to be met for proving their case.\(^\text{130}\) First, it must be shown that a more favourable provision under an international treaty is binding on the respondent State. Second, it must be demonstrated that the competent national authorities did not apply the more favourable provision. In this event, it is argued, the Court is entitled and, in fact, obliged to declare a violation of the more favourable protection clause in conjunction with a given right under the ECHR.

The foregoing suggestion does not only fully explore the potential of applying the more favourable protection clause but also offers an alternative way for international human rights Courts to engage with the difficulties arising from the proliferation of human rights treaties. It needs to be stressed that the rationale of the more favourable protection clause is not exhausted in its provision of interpretative guidelines to the national courts and the international court supervising the said treaty. There is also an implicit - but strong - presumption relating to how the jurisdictional functions are allocated between the national and international courts. Overlapping human rights obligations, or different levels of protection of a given right under different treaties, are issues that should be resolved by their natural judge - that is national - judge. Such an approach is consistent with the primary responsibility of national authorities to decide on the applicability and application of more than one relevant international treaties to the circumstances of a case. Therefore, the

\(^{129}\) Zegveld, supra n 58 at 509.

\(^{130}\) For the difficulties to substantiate and prove an alleged violation of Article 18 ECHR read together with another provision see Leach, supra n 36 at 168-170; Dijk et al., supra n 36 at 1096-1097.
international human rights Courts should defer these issues, unless there is an alleged violation of the more favourable protection clause. In light of such a claim by an applicant, the IACtHR and the ECtHR are entitled to review the judgments by the national courts and examine whether the more favourable protection was accorded to the individual. It should be noted that the more favourable protection clause is not the only provision that attributes the right to the supervisory organ of a human rights treaty to review whether a member State is in compliance with another treaty. The derogation clause found in many human rights treaties attributes similar, and even broader, jurisdictional functions to these bodies regarding the interpretation of other rules of international law.\footnote{Brannigan and McBride v United Kingdom Application Nos 14553/89, 14554/89, Merits and Just Satisfaction, 25 May 1993 (Plenary), at paras 67-73 and the Human Rights Committee, General Comment No 29, ‘States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, at para 10. See also Harris et al., supra n 36 at 637; Dijk et al, supra n 36 at 1067; Merrills, supra n 111 at 208-210; Allain, ‘Derogation from the European Convention of Human Rights in light of “other obligations under international law”’ [2005] European Human Rights Law Review 480 at 491; Macdonald, ‘Derogations under Article 15 of the European Convention on Human Rights’, in Charney et al. (eds), Politics, Values and Functioning International Law in the 21st Century. Essays in Honour of Professor Louis Henkin (The Hague: Kluwer Law International, 1997), 209 at 227.}

**Conclusion**

The more favourable protection clause is largely unexplored in the judicial practice of international human rights Courts. The ECtHR appears unwilling to apply the clause in its case law, whereas the IACtHR misinterprets the provision in order to justify its *corpus juris* theory and, accordingly, the expansion of the scope of rights under the IACHR. However, the clause remains a pertinent and valuable interpretation principle for addressing certain aspects of the fragmentation of international law as far as the interaction of human rights treaties are concerned. The Article also demonstrated that the practice of both the ECtHR and the IACtHR in not properly applying the more favourable protection clause reflects the fact that both Courts prefer to decide on the interrelation of international human rights conventions, even if this is, first and foremost, the responsibility of national courts. It is submitted that the international Courts should re-evaluate the role that the clause may play in their jurisprudence and should explore the application of the clause in reviewing the member States’ compliance with it.