
Non-Universal Arguments under the European Convention on Human Rights

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Abstract

It is popular to view international human rights law as universal. In a normative sense, human rights universality refers to certain qualities of human rights norms. These qualities have long been under attack, most recently by what is called here human rights nationalism. The main point made in this article is that some of the criticism levelled against normative human rights universality can be accommodated through interpretation. To this end, non-universality of human rights is judicially created (argumentative non-universality). This article offers an analysis of argumentative non-universality in the context of the European Convention on Human Rights (ECHR). It shows that the European Court of Human Rights (ECtHR) operationalizes argumentative non-universality through a conception of asymmetric protection, by using context as a difference-making fact and by allowing, in certain cases, for a decentralized interpretation of rights under the ECHR. As argued here, resorting to argumentative non-universality sometimes makes sense because non-universality takes seriously the fact that individual freedom is, to some extent, socially and politically conditioned. Furthermore, non-universality allows for reasonable interpretive pluralism, and it contributes to the institutional legitimacy of the ECtHR. In conclusion, the ECtHR is, rightly so, an ‘interpreter of universality’ (as quoted by Judge Pinto de Albuquerque) as it is an interpreter of the non-universality of convention rights.

1 Introduction

International human rights lawyers and policy-makers like to believe that – if any – it is their field that deals with the universal part or, at least, with a ‘universalizing

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project’ of international law.¹ At the same time, the universality of human rights has turned, for some, into an ideology or myth at best.² For others, it has even assumed the status of a recognized ‘bad word’, a manifestation of new colonialism, ideological domination or what is troubling about the idea of the liberal subject.³ The debate between human rights universalists and anti-universalists (or, somewhat narrower, cultural relativists)⁴ often has a rather theoretical and uncompromising outlook.⁵ What is less frequently noticed is that the (non-)universality of human rights is also an issue of interpretive choice, constantly made by international human rights courts. In this vein, Judge Pinto de Albuquerque of the European Court of Human Rights (ECtHR) recently argued that the ECtHR is ‘the first interpreter’ of the principle of human rights universality.⁶ This quote reflects the central theme of the present article – namely, that the universality of international human rights law (IHRL) is not a legal ‘given’ but, rather, a social construction, employed for strategic purposes by the participants of the human rights discourse (in particular, by human rights adjudication). The socially constructed universality of IHRL will be called argumentative universality here, and its contestation argumentative non-universality.⁷ This article provides an

¹ See Universal Declaration of Human Rights (UDHR), GA Res. 217, 10 December 1948: ‘Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations’; UN General Assembly, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, para. 5: ‘The universal nature of these rights is beyond question’ (para. 1), ‘All human rights are universal, indivisible and interdependent and interrelated.’

² Goodale, ‘The Myth of Universality: The UNESCO “Philosopher” Committee and the Making of Human Rights’, 43 *Law and Social Inquiry* (2018) 596, at 599 (universality as a ‘cultural narrative that is meant to do important work in shaping the course of society in particular ways’).

³ Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’, 42 *Harvard International Law Journal* (2001) 201, at 206 (denouncing the ‘arrogant and biased rhetoric of the human rights movement’). See Žižek, ‘Against Human Rights’, 34 *New Left Review* (2005) 115, at 129 (‘universal human rights are effectively the rights of white, male property-owners to exchange freely on the market, exploit workers and women, and exert political domination’).

⁴ It should be noted that, here, ‘non-universality’ is understood as being distinct from ‘cultural relativism’ because they are not on the same conceptual level: ‘relativism’ is opposed to the theoretical concept of ‘universalism’, whereas ‘non-universality’ pertains to the practical aspects of the design or interpretation of legal norms: ‘non-universality’ arguments are even consistent with some variants of universalism.

⁵ On the one side, see Brlmayer and Huang, ‘The Illogic of Cultural Relativism in Global Human Rights Debate’, in G. Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence* (2015) 17, at 32 (arguing that ‘[i]n most cases cultural relativism is simply irrelevant, even based on its own logic’), and, on the other, see Žižek, *supra* note 3, at 130 (arguing that ‘the mode of appearance of universality, its entering into actual existence, is ... an extremely violent act of disrupting the preceding organic poise’).

⁶ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy*, Appl. nos. 1828/06 *et al.*, Judgment of 28 June 2018, para. 94, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque. All European Court of Human Rights (ECtHR) decisions are available at <http://hudoc.echr.coe.int/>.

⁷ Universality as an argumentative concept must be distinguished from its theoretical counterpart, universalism: for an overview, see Kress, ‘Universalismus’, in E. Hilgendorf and J.C. Joerden (eds), *Handbuch Rechtsphilosophie* (2017) 414. In general, universalism denotes a ‘system of public beliefs’ or ‘sets of attitudes, principles, ideas, arguments, normative theories and frameworks of values expressed by specific individuals, groups and movements’. Prince, ‘The Universal in the Social: Universalism, Universality, and Universalization in Canadian Political Culture and Public Policy’, 57 *Canadian Public Administration* (2014) 344, at 346.

account of argumentative non-universality by analysing when and how the ECtHR employs contestations of the universality of human rights. The main point made in this article is that argumentative non-universality allows the ECtHR to adjust some normative claims associated with human rights universality and, thereby, to accommodate some of the criticism raised against human rights universality.

The article proceeds as follows. Part 2 explores central concepts (universality, non-universality, universalism), dissects the main strands of criticism levelled against human rights universality and introduces the concept of argumentative non-universality. Part 3 analyses how the ECtHR constructs non-universality arguments. Part 4 explains why the ECtHR sometimes resorts to non-universality arguments. The article concludes that, given the limits of argumentative non-universality, we might eventually witness a larger 'turn to the local' under the European Convention on Human Rights (ECHR).

2 Human Rights Universality and Its Discontents

A Three Claims of Human Rights Universality

In itself, universality is a complex and contested concept.⁸ When used in the context of international law, at least three meanings of universality can be distinguished.⁹ First, and most commonly, universality is understood as referring to the geographical range of international law. It reflects the idea that international law 'is of worldwide validity and is binding on all States'.¹⁰ The idea of geographical universality accounts for important discussions on international law as evidenced by the debates on a universal *jus cogens*, on the idea of universal crimes or, of course, on universal human rights. However, Jan Klabbers is correct in stating that geographical universality is 'not generally considered to be particularly interesting'.¹¹ The reason is that geographical universality statements are either trivial (for example, the claim that the United Nations is by membership a universal organization) or persistently contestable (for example, the claim that human rights are universal). Second, universality in its substantive meaning refers to the pervasiveness of international law (for example, the breadth of international treaty law, the permeability of a specific international legal regime for human rights concerns).¹² However, pervasiveness statements run the risk of being viewed as mere exaggerations of the importance of international law as a discipline. Third, and

⁸ For a general conceptual overview, see Nollkaemper, 'Universality', in *Max Planck Encyclopedia of Public International Law* (2011).

⁹ Similarly, Klabbers, 'On Epistemic Universalism and the Melancholy of International Law', 29 *European Journal of International Law (EJIL)* (2018) 1057, at 1058–1059 (who adds a fourth understanding he calls 'epistemic universalism' referring to the multiple ways of treating international law as an academic).

¹⁰ Nollkaemper, *supra* note 8, para. 1.

¹¹ Klabbers, *supra* note 9, at 1058.

¹² On 'substantive universality', see *ibid.*, at 1059. Pervasiveness is operationalized, for example, by systemic interpretation according to Art. 31(3)(c) of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

importantly for the purpose of this article, universality, in a normative sense, refers to claims relating to particular qualities of international legal norms.¹³ These claims pertain to the quality (design and interpretation) of human rights norms. The normative universality of human rights is independent from both their geographical and substantive universality.¹⁴ Geographical and substantive universality statements concern holistic, descriptive observations on international law (as an international legal order or as fragmented legal regimes). In contrast, normative universality claims focus on individual international legal norms, assessing whether they meet certain qualities.

Normative universality refers to the following three qualities of individual human rights norms: abstractness, inclusiveness and rationality. Generically, these qualities can be derived from the preambles to international human rights instruments. Indeed, universality is explicitly envisaged by the major international human rights instruments.¹⁵ The first quality – abstractness – relates to the universal applicability of human rights: international human rights apply irrespective of the ethnic, national, socio-economic, political, cultural or religious context or belonging.¹⁶ The second quality – inclusiveness – concerns the rights holders: all humans as individuals enjoy an identical set of human rights.¹⁷ According to the third quality associated with the universality of human rights – rationality – a shared understanding of the practical implications of human rights is possible and, consequently, conflicting human rights interpretations can be solved by appeal to legal principles of higher status or authority.¹⁸

¹³ See Prince, *supra* note 7, at 349–352.

¹⁴ See Schmahl, 'Reflections on the Categorization of International Human Rights', in H.-G. Ziebertz and E.H. Ballin (eds), *Freedom of Religion in the 21st Century: A Human Rights Perspective on the Relation between Politics and Religion* (2016) 1, at 10.

¹⁵ See the preambles to the following instruments: UDHR, *supra* note 1, which sets out to protect the 'equal and inalienable rights of all members of the human family'; for an identical wording, see also the preamble of the International Covenant on Civil and Political Rights (ICCPR), 1966, 999 UNTS 171. The American Convention on Human Rights (ACHR) 1969, 1144 UNTS 123, speaks of 'the essential rights of man'.

¹⁶ UDHR, *supra* note 1, Art. 2: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.' ACHR, *supra* note 15, preamble (emphasis in the original): 'Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality.' African Charter on Human and Peoples' Rights (ACHPR) 1981, 1520 UNTS 217, preamble (emphasis in the original): 'Recognizing ... that fundamental human rights stem from the attributes of human beings.'

¹⁷ See, e.g., ICCPR, *supra* note 15, preamble, recognizing the 'equal and inalienable rights of all members of the human family'. See UDHR, *supra* note 1, Art. 1: 'All human beings are born free and equal in dignity and rights'; see also ACHPR, *supra* note 16, Art. 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter.'

¹⁸ A conception of interpretive universality is alluded to in preambles to regional human rights instruments: The preamble to the ECHR speaks of maintaining a 'common understanding ... of the human rights' laid out in the convention. See also the preamble to the UDHR, *supra* note 1, that stresses the

B Criticizing Normative Universality

All three claims of normative universality are heavily contested. The following discussion provides an overview of theoretical approaches criticizing one or more of these normative qualities.¹⁹ A first set of approaches taking issue with normative universality of human rights can be labelled, ideal-typically, ‘human rights nationalism’. Positions ascribing to human rights nationalism often employ a legal narrative that prioritizes the local over the universal. With striking similarities, such narratives have been used by several European states pushing back against the idea of the universality of human rights – for example, human rights nationalism draws on the ideas of ‘constitutional identity’,²⁰ ‘national identity’,²¹ ‘sovereignty’ (as the basis for a superior democratic legitimacy narrative),²² differences in the ‘socio-legal consciousness’²³ or differences in the (normative) ‘expectations of society’.²⁴ On the one end of the spectrum, human rights nationalism comprises strong versions, exemplified by the

importance of ‘a common understanding of these rights and freedoms’. The question of conflicts of human rights is, of course, far more complex. For recent treatment, see Smet, ‘On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights’, 17 *Human Rights Law Review* (2017) 499.

¹⁹ This overview is not exhaustive and it exclusively deals with approaches critical of the universality claims outlined above.

²⁰ The conflict of the ‘constitutional identity’ narrative with human rights universality is particularly visible in statements by members of the Russian Constitutional Court. See Antonov, ‘Philosophy behind Human Rights: Valery Zorkin vs. the West?’, in L. Mälksoo and W. Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (2017) 150, at 183 (stating that, according to the chief justice of the Russian Constitutional Court, ‘each country establishes its own “constitutional identity,” and national courts are better fitted for coining this identity than any supranational judicial organs, given the cultural particularities and institutional constraints in every country’).

²¹ On the ‘national identity’ rhetoric as a challenge to the ‘interpretative authority’ of the ECtHR, see *G.I.E.M. S.r.l. and Others v. Italy*, *supra* note 6, paras 87–90, Partly Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque.

²² For the superior democratic legitimacy narrative, see Jay, ‘Keeping Rights at Home: British Conceptions of Rights and Compliance with the European Court of Human Rights’, 19 *British Journal of Politics and International Relations* (2017) 842, at 846 (tracing the recent trend to human rights nationalism in the United Kingdom to the tradition of ‘political constitutionalism’ embodied in the idea of parliamentary sovereignty).

²³ The different ‘socio-legal consciousness’ narrative has been used to shield off human rights universality by Polish scholars, judges and politicians. See Kowalik-Banczk, ‘Poland: The Taming of the Shrew’, in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National Level and EU Level* (2016) 199, at 203, 233 (citing criticism that some judgments by the ECtHR do not ‘fully correspond to the Polish “legal” reality’); Polgári, ‘Hungary: “Gains and Losses”: Changing the Relationship with the European Court of Human Rights’, in Popelier, Lambrecht and Lemmens, *ibid.*, 295, at 307–308 (citing criticism that the ECtHR ‘failed to take into consideration the Hungarian reality’). Discussing the case ECtHR, *Markin v. Russia*, Appl. no. 30078/06, Judgment of 22 March 2012, Lauri Mälksoo states that ‘certain ultraprogressive opinions expressed in European human rights discourse ... do not correspond to sociological realities in European countries where postmodernity has not yet arrived in the form of that kind of thinking’. Mälksoo, ‘Markin v. Russia’, 106 *American Journal of International Law (AJIL)* (2012) 836, at 841–842.

²⁴ ECtHR, *Sõro v. Estonia*, Appl. no. 22588/08, Judgment of 3 September 2015, para. 8, Dissenting Opinion by Judges K. Hajiyev, J. Laffranque and D. Dedov (‘expectations of society and the legislature’s choices in different countries inevitably differ in such matters, depending on their unique historical experience’).

‘protecting human rights at home’ approach (endorsed by the Conservative Party in the United Kingdom) or the ‘self-rule initiative’ (brought by the Swiss Peoples’ Party),²⁵ both of which ultimately aim at establishing a supremacy of domestic human rights law over IHRL or even the withdrawal from IHRL mechanisms. On the other end of the spectrum, there are more moderate versions of human rights nationalism, calling for a greater control of national institutions (parliament, judiciary) over international human rights adjudication (for example, held by individual members of the Russian or Hungarian Constitutional Court).²⁶

There are obvious differences between human rights nationalism and the familiar discourse on ‘universality’ versus ‘cultural relativism’.²⁷ First, human rights nationalism does not primarily use a concept of ‘culture’ as a legitimizing ground for criticizing the universalist narrative. Grounding objections to universal human rights in a concept of ‘culture’ is not an option when states are evidently part of a common human rights culture. For example, Switzerland can hardly deny being part of the European human rights culture; the suggestion of a clash of human rights cultures would be considered a misguided line of argument. Second, some variants of human rights nationalism are not *per se* incompatible with (weak forms of) universality. Human rights nationalism may, for example, endorse a ‘programmatic’ vision of universal human rights (suggesting certain policy goals or means to the legislature) while demanding that national courts adjudicate legal disputes invoking human rights.²⁸ Not unlike cultural relativist approaches, however, human rights nationalism seeks to shield off the domestic legal order against universalizing interpretations of IHRL.

Human rights nationalism criticizes the universality of human rights from two different angles: In its stronger versions, human rights nationalism takes issue with the ‘abstractness’ claim of human rights universality – that is, the idea that human rights apply (and, consequently, that their meaning can and should be identified) irrespective of the national context. On this end of the spectrum, human rights nationalism marks

²⁵ On the UK approach, see Masterman, ‘The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?’, in P. Popelier, Lambrecht and Lemmens, *supra* note 23, 449, at 459–466. For Switzerland, see Altwicker, ‘Switzerland: The Substitute Constitution in Times of Popular Dissent’, in P. Popelier, Lambrecht and Lemmens, *supra* note 23, 385, at 398–401. In its earlier Party Programme (2011–2015), the Swiss Peoples’ Party discussed a withdrawal from the ECHR in case the popular initiatives adopted (on the construction of minarets and on deportation) were found incompatible with the Convention by the ECtHR. See Party Programme, available at www.svp.ch/partei/positionen/positionspapiere/2011-2/parteiprogramm-2011-2015-januar-2011/.

²⁶ For Russia, see Fura and Maruste, ‘Russia’s Impact on the Strasbourg System, as Seen by Two Former Judges of the European Court of Human Rights’, in Mälksoo and Benedek, *supra* note 20, 222, at 247; see also Constitutional Court of the Russian Federation, Judgment no. 12-П/2016, 19 April 2016, unofficial English translation available at www.ksrf.ru/en/Decision/Judgments/Pages/2016.aspx (claiming a ‘right to objection’ against a judgment by the ECtHR in respect of prisoners’ voting rights). For the case of Hungary, see Polgári, *supra* note 23, at 317–319.

²⁷ For a helpful overview, see Walker, ‘Universalism and Particularism in Human Rights’, in C. Holder (ed.), *Human Rights: The Hard Questions* (2013) 39.

²⁸ See Lord Hoffmann, ‘The Universality of Human Rights’, Judicial Studies Board Annual Lecture, 19 March 2009, available at www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf.

an epistemic stance: it is argued that the content of (some) human rights cannot be universalized beyond national borders. In its weaker forms, human rights nationalism makes an institutional claim by demanding the priority of domestic human rights interpretation over interpretations by an international adjudicatory body.²⁹ This variant of human rights nationalism is about the problem of who should exercise the ultimate interpretive power with respect to IHRL. The problem regarding the ultimate authority of the interpretation of IHRL does not target the 'abstractness' claim but, rather, relates to the 'rationality' claim. Human rights nationalism, in its weak form, claims that, in cases of conflicting interpretations of IHRL, the ultimate authority to decide rests with domestic organs.

A second line of argument against human rights universality extends from a group of (heterogeneous) critical legal approaches. These approaches typically identify structural biases in the law or practices of structural domination (enjoying the protection of the law), and they tend to advocate a selectivity in perspective and a pressure for change in favour of the disadvantaged as well as questioning the 'objectivity' of the legal discourse.³⁰ Approaches broadly associated with 'critical legal theory' include Marxism, critical legal studies, feminism and third world approaches.³¹ In recent times, new subdivisions have emerged – for example, 'third world feminism'³² – and new focal points of criticism have been identified – for example, 'monohumanism',³³ a notion of 'civility'³⁴ and global capitalism.³⁵ Critical legal approaches have come into conflict with human rights universality in several ways.³⁶ First, in some variants, the

²⁹ For a useful general overview, see Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 197.

³⁰ On the question of what makes an approach a 'critical' approach, see Altwicker and Diggelmann, 'What Should Remain of the Critical Approaches to International Law? International Legal Theory as Critique', 24 *Swiss Review of International and European Law* (2014) 69, at 71–73.

³¹ For an excellent overview on the international law debate, see A. Bianchi, *International Law Theories* (2016), at 72–90, 135–162; 183–204, 205–226.

³² For an overview, see B.S. Chimni, *International Law and World Order* (2017), at 386–392.

³³ King, 'Challenging MonoHumanism: An Argument for Changing the Way We Think about Inter-country Adoption', 30 *Michigan Journal of International Law* (2009) 413, at 414 (describing 'MonoHumanism' as 'the notion that the United States has substituted its own view of all non-American peoples or cultures for positive knowledge of them, facilitating the creation of the Western identity of self as the normative center').

³⁴ Evans, 'International Human Rights Law as Power/Knowledge', 27 *Human Rights Quarterly* (2005) 1046, at 1063 (arguing that the 'notion of "civility" emanating from global civil society and represented by the formal human rights regime narrows the political agenda and thus excludes some groups from full participation').

³⁵ Chimni, *supra* note 32, at 543–550.

³⁶ Critical legal approaches commonly attack not only the universality of human rights but also the idea of human rights universalism. For example, some critical legal approaches deny that the legitimacy conditions for an 'overlapping consensus' regarding human rights are fulfilled in practice. In particular, it is argued that the discourse on human rights merely reflects a 'deeper stage in Western universalization' (see Kennedy, 'International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* (2002) 101, at 114–116). On the argument that human rights express 'the ideology, ethics, aesthetic sensibility and political practice of a particular Western eighteenth- through twentieth-century liberalism' or that it is biased towards other interests, for example male interests, see Bianchi, *supra* note 31, at 190–191. Concerning human rights and capitalism, see Chimni, *supra* note 32, at 470 (on Pashukanis).

possibility of an objective and impartial standpoint towards the law in general, and to human rights law in particular, has been rejected.³⁷ According to this view, human rights, just as any other law, cannot be interpreted in an objective and impartial manner without regard to social influences (for example, the gender of the interpreter and the prevailing power structures).³⁸ To state it bluntly, it is posited that human rights interpretation is ‘power politics’, challenging the rationality claim made by human rights universality. Second, some approaches have criticized the claim of inclusiveness inherent in human rights universality by questioning whether the demands of difference can be accommodated under the universalist conception of human rights law (for example, demands of indigenous people, the lesbian, gay, bisexual and transgender community and refugees).³⁹

A third strand of criticism comes under the heading of normative legal pluralism. Normative legal pluralism generally relates to the fact and the endorsement of the coexistence of legal systems or orders within the same socio-political or territorial space.⁴⁰ Despite all of the differences in the details, what unites pluralist conceptions of law is their non-centric, non-hierarchical approach to law.⁴¹ Some accounts justify normative legal pluralism by reference to the idea of protecting the ‘public autonomy of citizens’,⁴² democratic concerns⁴³ or cultural differences.⁴⁴ Normative legal pluralism comes into conflict with human rights universality because it ultimately rests on the idea of a ‘right to one’s own law and one’s own interpretation of legal norms’.⁴⁵ From the perspective of the universality of human rights, the problem is that normative legal pluralism rejects the idea of interpretive rationality – that is, the claim that conflicting interpretations of human rights can be harmonized by appeal to higher

³⁷ For example, Catherine MacKinnon explicitly states that the viewpoint of feminism is not ‘universal’. See MacKinnon, ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’, 8 *Signs* (1983) 635, at 638.

³⁸ For a summary, see Altwickler and Diggelmann, *supra* note 30, at 82.

³⁹ See, seminally, A. Orford, *Reading Humanitarian Intervention* (2003), at 212 ([t]he figure of the victim of human rights abuses is a representative of the universal rights-holder. In this sense we recognise ourselves in this figure. ... [However,] the fetishised nature of the human rights victim also potentially invokes difference – here is a subject that is alien, external, foreign and threatening’); see also Davis, ‘Intersectionality and International Law: Recognizing Complex Identities on the Global Stage’, 28 *Harvard Human Rights Journal* (2015) 205, at 218 (arguing that ‘[u]niversality erases variation, reducing diverse groups to the lowest common denominator’).

⁴⁰ For a seminal account, see Griffiths, ‘What Is Legal Pluralism?’, 18 *Journal of Legal Pluralism and Unofficial Law* (1986) 1, at 1–8 (criticizing, in particular, the notions of ‘legal centralism’, the systematic and hierarchical ordering of law).

⁴¹ See Bianchi, *supra* note 31, at 234–238.

⁴² N. Krisch, *Beyond Constitutionalism* (2012), at 99–105.

⁴³ Besson, ‘Book Review: The Truth about Legal Pluralism (Review of Nico Krisch: Beyond Constitutionalism, The Pluralist Structure of Postnational Law)’, 8 *European Constitutional Law Review (ECLR)* (2012) 354, at 359–360.

⁴⁴ Brilmayer and Huang, *supra* note 5.

⁴⁵ Corradi, ‘Human Rights and Legal Pluralism: Four Research Agendas’, in G. Corradi, E. Brems and M. Goodale (eds), *Human Rights Encounter Legal Pluralism: Normative and Empirical Approaches* (2017) 1, at 5.

legal principles. Instead, normative legal pluralism affirms the persistence of a ‘plurality of human rights interpretations’, given the lack of a clear normative hierarchy between rights’ interpretations emanating from different legal orders.⁴⁶ In contrast to the idea of human rights universality, normative legal pluralism does not aim to solve situations involving a plurality of human rights interpretations by appeal to a higher norm or principle.

C *Argumentative Non-Universality*

Earlier in this article, it was shown that the (normative) universality of human rights is associated with three distinct claims and that these claims are contested by several theoretical approaches. However, the non-universality of IHRL is not merely a theoretical issue but also has practical application in the context of adjudication. The non-universality of human rights can be deliberately created through acts of interpretation. This is called ‘argumentative non-universality’. In other words, argumentative non-universality relates to the social construction of the scope and the content of rights by the relevant actors entrusted with the task of ensuring the observance of IHRL – particularly, international human rights courts and commissions. Argumentative non-universality is based on the premise that IHRL is, essentially, an argumentative practice: the meaning of rights – that is, what rights ‘are’ and the conduct they prescribe, prohibit or allow – is not a ‘given’ but, rather, is produced through the social interaction of the participants, most notably in human rights adjudication.⁴⁷ Approaching (non-)universality as a judicial practice takes seriously the insight that arguments of non-universality (just as their counterpart) ultimately serve certain goals envisaged by international judicial bodies. These goals must be contextualized both historically and institutionally (see, in detail, Part 4).⁴⁸

3 Instruments: How to Make Non-Universal Arguments under the ECHR

How does the ECtHR operationalize argumentative non-universality in order to address some of the criticism outlined earlier in this article? Instruments of argumentative

⁴⁶ Plurality of human rights interpretations here refers to the coexistence of different interpretations of human rights. See Besson, ‘European Human Rights Pluralism: Notion and Justification’, in M.P. Maduro (ed.), *Transnational Law: Rethinking European Law and Legal Thinking* (2015) 170, at 189–194 (also for criticism).

⁴⁷ For an excellent theoretical account on this point in general, see Aalberts and Venzke, ‘Moving beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice’, in A. Nollkaemper *et al.* (eds), *International Law as a Profession* (2017) 287, at 305–309.

⁴⁸ Similarly, Bhuta, ‘Rethinking the Universality of Human Rights: A Comparative Historical Proposal for the Idea of “Common Ground” with Other Moral Traditions’, in A.M. Emon, M.S. Ellis and Glahn Benjamin (eds), *Islamic law and International Human Rights Law: Searching for Common Ground?* (2012) 123, at 132. The analysis of how an international human rights court’s employment of these arguments varies over time – the economic cycle of (non-)universality arguments – must be left to further research.

non-universality used by the ECtHR include an asymmetric approach with regard to the subject of protection, using context as a difference-making fact and, finally, allowing the decentralized interpretation of IHRL. Using these instruments when interpreting rights under the ECHR allows the ECtHR to create a balance between the universal and the non-universal through human rights interpretation.

A *Asymmetric Protection*

'Asymmetric protection' is the first way of operationalizing argumentative non-universality. It focuses on the subjects of protection (who is protected) and constitutes an adaptation of the inclusiveness claim of universality. According to the universalist conception of human rights, all humans enjoy the same rights as individuals, not as members of groups.⁴⁹ In my view, the inclusiveness quality of human rights universality is based on a presumption of formal equality as the starting point, an idea that manifests itself in a 'right to principally equal rights'.⁵⁰ This is suggested by the foundational, highly abstract formulation in Article 1 of the Universal Declaration of Human Rights.⁵¹

The ECHR, like other international human rights instruments, endorses inclusiveness by requiring the contracting states to 'secure to everyone', within the jurisdiction of the state, the enjoyment of ECHR rights.⁵² Hence, inclusiveness basically means three things.⁵³ First, everyone is entitled to the same set of human rights. Second, everyone is entitled to the same level of protection by human rights. Third, human rights protect humans as individuals, not as members of groups. The ECtHR has modified the second and third elements of the universalist conception of inclusiveness by allowing for 'asymmetric protection' of ECHR rights in certain constellations. Rather than treating everyone equally, asymmetric protection means favourable treatment of certain individuals.⁵⁴ While symmetric protection is the norm, three constellations of accepted asymmetric protection under the ECHR can be distinguished.

The first situation of asymmetric protection is 'positive discrimination' or 'affirmative action' – that is, the idea of (temporary) preferential treatment of persons on the basis of their belonging to a historically disadvantaged group (for example, disabled

⁴⁹ See note 16 above.

⁵⁰ See, similarly, M.-L. Frick, *Human Rights and Relative Universalism* (2019), at 45.

⁵¹ Universal Declaration of Human Rights, GA Res. 217, 10 December 1948. See text in note 16 above.

⁵² See Arts 1 and 14 of the ECHR and the subsequent ECHR rights (speaking of 'everyone', 'no one' and so on).

⁵³ The universalist conception of inclusiveness as a legal principle is best reflected by the UDHR, *supra* note 1, Art. 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.' From this formulation, it is clear that inclusiveness of human rights does not simply mean 'equal rights' but also 'equal protection of the law' and 'non-discrimination'. See T. Altwicker, *Menschenrechtlicher Gleichheitsschutz* (2011), at 33–37 (referring to this as the 'principle of legal equality' that is foundational to equal protection and non-discrimination clauses). Furthermore, as Art. 7 of the UDHR and the substantive rights make clear: inclusiveness relates to all humans as individuals not as members of groups.

⁵⁴ On the concept of asymmetric protection, see T. Khaitan, *A Theory of Discrimination Law* (2015), at 61.

individuals, women).⁵⁵ Already in an early case, the *Belgian Linguistics Case* (1968), the ECtHR made a hint that it would, under certain conditions, accept ‘positive discrimination’.⁵⁶ In the case of *Stec and Others* (2006), a case concerning differential pensionable ages for men and women, the ECtHR coined the standard formula: ‘Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.’⁵⁷ Yet, despite its frequent referral to the *Stec* formula, the ECtHR has been reluctant to actually find a violation of the non-discrimination provisions (Article 14 of the ECHR and Article 1, Protocol 12, of the ECHR) on the basis of a failure to adopt positive measures to correct historical disadvantages (‘factual inequalities’) in society.⁵⁸ Rather than demanding positive measures, the ECtHR has limited itself to assessing whether positive discriminatory measures already taken by a contracting state were compatible with the ECHR.⁵⁹ In sum, ‘positive discrimination’ as an instance of argumentative non-universality is, in principle, at the conceptual disposal of the ECtHR; however, so far, the Court has not made much out of it.⁶⁰

A second constellation of asymmetric protection concerns positive obligations to adopt special protective measures in cases of ‘(particularly) vulnerable persons’.⁶¹ This is an instance of asymmetric protection because the individuals concerned benefit from a higher protection standard than the general public.⁶² A particular

⁵⁵ *Ibid.*, at 215.

⁵⁶ See ECtHR, *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium*, Appl. nos. 1474/62 *et al.*, Judgment of 23 July 1968, para. 10.

⁵⁷ ECtHR, *Stec and Others v. United Kingdom*, Appl. no. 65731/01, Judgment of 12 April 2006, para. 51; see also ECtHR, *Andrle v. Czech Republic*, Appl. no. 6268/08, Judgment of 17 February 2011, paras 48, 56. In this respect, the ECtHR deviates from the former commission’s case law. See ECtHR, *Magnago and Südtiroler Volkspartei v. Italy*, Appl. no. 25035/94, Decision of 15 April 1996 (stating that the ‘Convention does not compel the Contracting Parties to provide for positive discrimination in favour of minorities’). But see ECtHR, *Partei Die Friesen v. Germany*, Appl. no. 65480/10, Judgment of 28 January 2016, para. 42 (quoting from *Magnago and Südtiroler Volkspartei*).

⁵⁸ On the marginal role of ‘positive discrimination’ in the case law of the ECtHR, see Altwicker, *supra* note 53, at 388–389. Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000, ETS 177.

⁵⁹ For example, in ECtHR, *Wintersberger v. Austria*, Appl. no. 57448/00, Judgment of 27 May 2003, the ECtHR held that treating disabled and non-disabled persons differently with regard to requiring a prior authorization for a dismissal constituted legitimate ‘positive discrimination’.

⁶⁰ In his concurring opinion in the case ECtHR, *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, Appl. no. 47848/08, Judgment of 17 July 2014, Pinto de Albuquerque connects the Court’s conception of ‘vulnerable persons’ and ‘positive discrimination’, stating that the status as a vulnerable person warrants measures of positive discrimination.

⁶¹ ECtHR, *A.-M.V. v. Finland*, Appl. no. 53251/13, Judgment of 23 March 2017, para. 69 (‘particularly vulnerable persons’); ECtHR, *Khlaifia and Others v. Italy*, Appl. no. 16483/12, Judgment of 15 December 2016, para. 161 (‘vulnerable members of society’); ECtHR, *Tarariyeva v. Russia*, Appl. no. 4353/03, Judgment of 14 December 2006, para. 73. See Peroni and Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’, 11 *International Journal of Constitutional Law (IJCL)* (2013) 1056, at 1057, n. 7.

⁶² See ECtHR, *Lopes de Sousa Fernandes v. Portugal*, Appl. no. 56080/13, Judgment of 19 December 2017, para. 54, Separate Opinion of Judge Pinto de Albuquerque.

vulnerability status of a person may derive from age, mental capacity and/or circumstances.⁶³ Thus, the ECtHR has accepted that, in particular, victims of domestic violence,⁶⁴ prisoners⁶⁵ and children⁶⁶ can be vulnerable persons.⁶⁷ In contrast to positive discrimination, the particular vulnerability of a person does not originate from being historically disadvantaged. In respect of vulnerable persons, positive measures are not taken with a view to correct factual inequalities but, rather, with a view to provide relief from harm of some sort (unrelated to how a comparator group is treated). The particular vulnerability status of a person is not group based; that is, it does not derive from a person's belonging to a disadvantaged group but, rather, from the interaction between status and circumstances (for example, being a terminally ill prisoner, being a minor in a hospital for the mentally ill). Importantly, thus, not all prisoners or children are 'vulnerable persons'. For persons in a vulnerable position, the ECtHR requires states to provide a higher level of protection, for instance in regard to the prevention of a deprivation of liberty (Article 5 of the ECHR) or in order to prevent acts of torture/inhuman treatment (Article 3 of the ECHR).⁶⁸ Positive measures relate, for example, to safeguarding medical treatment (even in the absence of a ECHR right to health or socio-economic claim rights),⁶⁹ to consultation,⁷⁰ to special duties to carry out an examination⁷¹ or to measures of effective deterrence (for example, by the police or other authorities).⁷²

A third kind of asymmetric protection relates to 'vulnerable groups', a conception that relatively recently found its way into the case law of the ECtHR.⁷³ Thus far, the ECtHR has acknowledged four categories of vulnerable groups: the Roma minority, mentally disabled persons, asylum seekers and people living with HIV.⁷⁴ The

⁶³ See ECtHR, *Ibrahim and Others v. United Kingdom*, Appl. nos. 50541/08 *et al.*, Judgment of 13 September 2016, para. 24, Jointly Partly Dissenting Opinion of Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'Leary.

⁶⁴ ECtHR, *Talpis v. Italy*, Appl. no. 41237/14, Judgment of 2 March 2017, para. 126.

⁶⁵ ECtHR, *Salman v. Turkey*, Appl. no. 21986/93, Judgment of 27 June 2000, para. 99; ECtHR, *Khani Kabbara v. Cyprus*, Appl. no. 24459/12, Judgment of 5 June 2018, para. 127.

⁶⁶ ECtHR, *Z. and Others v. United Kingdom*, Appl. no. 29392/95, Judgment of 10 May 2001, para. 73. On migrant minors, see *Khlaifia and Others v. Italy*, *supra* note 61, para. 175 ('on account of his age and personal situation ... extremely vulnerable').

⁶⁷ Sometimes, the ECtHR speaks of 'vulnerable members of society', see *Khlaifia and Others v. Italy*, *supra* note 61, para. 161.

⁶⁸ ECtHR, *Storck v. Germany*, Appl. no. 61603/00, Judgment of 16 June 2005, para. 102.

⁶⁹ ECtHR, *Kudla v. Poland*, Appl. no. 30210/96, Judgment of 26 October 2000, para. 94 ('the State must ensure that ... given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance'); *Lopes de Sousa Fernandes v. Portugal*, *supra* note 62, para. 163.

⁷⁰ ECtHR, *N. v. Romania*, Appl. no. 59152/08, Judgment of 28 November 2017, para. 146.

⁷¹ *Talpis v. Italy*, *supra* note 64, para. 130.

⁷² ECtHR, *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009, para. 159.

⁷³ For a general overview, see I. Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (2017); Bossuyt, 'Categorical Rights and Vulnerable Groups: Moving Away from the Universal Human Being', 48 *George Washington International Law Review* (2016) 717. For the ECHR context, see Peroni and Timmer, *supra* note 61.

⁷⁴ See Bossuyt, *supra* note 73, at 726–729.

vulnerable group approach constitutes an instance of asymmetric protection because the ECtHR has established positive obligations for the contracting states in light of ‘special consideration to’ or ‘special protection of’ the group members’ ‘specificities’ and ‘needs’.⁷⁵ According to Maria Peroni and Alexandra Timmer, the vulnerable group approach has led the ECtHR to accept ‘special positive obligations’ (for example, under Article 3 of the ECHR), to acknowledge the ‘increased weight of harm in the scope and proportionality analysis’ (for example, under Article 8 of the ECHR) and to adopt a ‘narrowed margin of appreciation (under Article 14 of the ECHR).⁷⁶ It is not easy to distinguish the vulnerable group approach from positive discrimination. However, whereas the focus of positive discrimination lies in the correction of ‘factual inequalities’ stemming from a historical disadvantage (for example, of women in the workforce), the emphasis of the vulnerable group conception is on the correction of some sort of present ‘harm’ (for example, prejudice, stigma, social exclusion and marginalization).⁷⁷

In sum, one way in which non-universality is operationalized is by asymmetric protection, which interprets or rather modifies the universalist conception of human rights. This allows the ECtHR to address some of the concerns raised against human rights universality by critical legal approaches. In particular, the vulnerability approach can be interpreted as a shift away from the ‘abstract universal human subject’ to the ‘victim’ of human rights violations, indicating a new sensibility for the more diverse forms and circumstances of human suffering within the context of human rights.⁷⁸

B Context as Difference-Making Fact

A second way to construct non-universal arguments about rights is by using context as a difference-making fact.⁷⁹ It is undisputed that every interpretation of an international human rights norm must to some degree be context sensitive given that it is a concrete case that is decided. In contrast, when context is used as a difference-making fact, it serves as an argument legitimizing differential treatment of otherwise similar circumstances or, in other words, as a justification for making an exception.

⁷⁵ Quotes taken from Peroni and Timmer, *supra* note 61, at 1076 (with references to the ECtHR’s case law). In particular, as Peroni and Timmer argue, ‘[g]roup vulnerability has introduced an asymmetrical approach in the Court’s Article 3 ECHR scope analysis and Article 8 ECHR proportionality’ (at 1079).

⁷⁶ See *ibid.*, at 1076–1082.

⁷⁷ For a harm-based understanding of the vulnerable-group jurisprudence of the ECtHR, see *ibid.*, at 1064–1065.

⁷⁸ Similarly, Bossuyt, *supra* note 73, at 726 (claiming that the ECtHR ‘is moving away from protecting the universal human being and towards the protection of some specific categories of particularly vulnerable persons’).

⁷⁹ A difference-making fact provides a causal explanation of fact that simultaneously represents a normative cause for action. An example of a difference-making fact is ‘smoking causes health damage’: this is a fact that, at the same time, provides a normative reason for action (‘quit smoking’). Yun-chien Chang and Peng-Hsiang Wang, ‘The Empirical Foundation of Normative Arguments in Legal Reasoning’, Coase-Sandor Working Paper Series in Law and Economics Paper no. 745 (2016), at 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733781.

For example, the fact that a claimant is imprisoned (the social context) may justify differential treatment regarding access to medicine. Thereby, the Court adjusts the abstractness claim inherent in human rights universality. In practice, non-universality arguments based on context as a difference-making fact often appeal to ‘exceptional circumstances’, ‘a (cultural, political, religious) tradition’,⁸⁰ the ‘cultural and historical development’ or ‘cultural identity’.

Which contexts can potentially serve as difference-making facts legitimizing differential treatment? The nature of the social context as a potentially difference-making fact in ECHR interpretation is quite straightforward: The convention’s text itself makes frequent reference to various social associations and groups of which an individual may be part of (religious community, minority, family, marriage), to social contexts that an individual may find herself in (prison/detention, trial, home, education, war/public emergency) and to the social status of an individual (parent, alien, spouse). Four examples may suffice to illustrate how these social contexts can function as difference-making facts in the interpretation of rights. The fact that the social context of ‘prison’/‘detention’ matters for the determination of a right was already shown above: some convention rights are interpreted differently with respect to prisoners.⁸¹ Similarly, the ECtHR held that ‘marriage confers a special status on those who enter into it’.⁸² In its case law, the ECtHR stated in an *obiter dictum* that the social context of the German Democratic Republic may justify a difference in treatment of children born in wedlock.⁸³ Finally, socio-economic circumstances matter in the calculation of awards made by the ECtHR with respect to non-pecuniary damage – that is, the amount of money granted partially depends on where the human rights violation took place.⁸⁴ In these and other cases, the social or socio-economic context figures as a difference-making fact, allowing for interpretations of IHRL that are not generalizable beyond the relevant context.

Treating the political context as a difference-making fact is less obvious. The text of the ECHR is not particularly revealing in this respect. However, the ECtHR has acknowledged the relevance of the ‘(local) political context’ in the course of interpreting the right to free elections (Article 3 of Protocol no. 1 to the ECHR),⁸⁵ in relation to

⁸⁰ For example, ECtHR, *S.J.P. and E.S. v. Sweden*, Appl. no. 8610/11, Judgment of 28 August 2018, para. 89 (different traditions in the contracting states regarding the role of the family and the state intervention in family affairs).

⁸¹ See note 86 below.

⁸² ECtHR, *Burden v. United Kingdom*, Appl. no. 13378/05, Judgment of 29 April 2008, para. 63.

⁸³ ECtHR, *Brauer v. Germany*, Appl. no. 3545/04, Judgment of 28 May 2009, para. 44.

⁸⁴ Altwicker-Hamori, Altwicker and Peters, ‘Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights’, 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2016) 1, at 39.

⁸⁵ ECtHR, *Tănase v. Moldova*, Appl. no. 7/08, Judgment of 27 April 2010, para. 173 (calling for an assessment of a domestic election law due regard to the ‘special historico-political context’); ECtHR, *Paksas v. Lithuania*, Appl. no. 34932/04, Judgment of 6 January 2011, para. 104 (‘the Government contended that in assessing proportionality in the present case, regard should be had to the evolution of the local political context in which the principle of disqualification from elected office was applied. The Court does not disagree’). Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952, ETS 9.

tense security situations,⁸⁶ when interpreting the right to freedom of expression/press (Article 10 of the ECHR)⁸⁷ and when assessing the exhaustion of domestic remedies (Article 35 of the ECHR).⁸⁸ In these cases, too, the argumentation of the Court will usually not be generalizable beyond the specific political context.

Treating the cultural or historical context as a difference-making fact in human rights adjudication also seems quite rare. Few regional human rights instruments explicitly invoke the cultural and historical context.⁸⁹ Also, there are only a few direct references to the cultural context in the case law of the ECtHR. Aspects of culture as a difference-making fact have played a role, in particular, with respect to the interpretation of the scope of rights contained in Articles 8–11 of the ECHR and Article 2 of Protocol no. 1 to the ECHR as well as to their limitation clauses.⁹⁰

Cultural exceptionalism with regard to the scope of a right may be understood as referring to the interpretation that a right protects a (non-religious) culture-specific conduct (for example, a certain lifestyle). Such a ‘right to cultural practice’ has, until now, rarely been accepted by the ECtHR.⁹¹ In some judgments, however, the ECtHR has noted that there is ‘an emerging international consensus among the Member States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community’.⁹² So far the right to a different lifestyle is accepted only with respect to the Roma population and not to other minority groups.⁹³ Therefore, if living in caravans is part of the lifestyle of the Roma people (fact), this is considered to have repercussions on the interpretation of the domestic planning law (difference-making fact). Cultural exceptionalism plays a greater role regarding the interpretation of limitation clauses. For example, the cultural context mattered normatively in the case of *Lautsi and Others*, in which the Grand Chamber decided that the preservation of a cultural tradition – the presence of crucifixes in Italian state schools – fell into the margin

⁸⁶ ECtHR, *Cyprus v. Turkey*, Appl. no. 25781/94, Judgment of 10 May 2001, para. 346 (‘vulnerable political context’).

⁸⁷ ECtHR, *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Appl. no. 39394/98, Judgment of 13 November 2003, para. 38.

⁸⁸ ECtHR, *Estrih v. Latvia*, Appl. no. 73819/01, Judgment of 18 January 2007, para. 94 (The ‘Court must take realistic account of the general legal and political context in which the remedies operate’); ECtHR, *Kozak v. Poland*, Appl. no. 13102/02, Judgment of 2 March 2010, paras 72, 74.

⁸⁹ See the preamble to the Charter of Fundamental Rights of the European Union, OJ 2012 C 326/02: ‘[R]especting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.’

⁹⁰ The limitation clauses of Art. 8–11 of the ECHR are in their respective second paragraphs. Protocol no. 1, *supra* note 85, Art. 2 contains an implicit limitation clause.

⁹¹ For the concept, see Greer, ‘Universalism and Relativism in the Protection of Human Rights in Europe: Politics, Law and Culture’, in P. Agha (ed.), *Human Rights between Law and Politics: The Margin of Appreciation in Post-National Contexts* (2017) 17, at 32.

⁹² ECtHR, *Oršuš and Others v. Croatia*, Appl. no. 15766/03, Judgment of 16 March 2013, para. 148.

⁹³ ECtHR, *Chapman v. United Kingdom*, Appl. no. 27238/95, Judgment of 18 January 2001, para. 96 (‘there is ... a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life’).

of appreciation of the state.⁹⁴ In *S.A.S. v. France*, a case concerning the blanket ban on face-covering in public, the Court interpreted the limitation clause of the ‘protection of the rights and freedoms of others’ in light of the established tradition of social interaction and lifestyle in France.⁹⁵ It concluded that ‘the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society’.⁹⁶

To sum up, through the use of diversity language and the margin of appreciation, the Court is able to vary the degree of generalizability of its conclusions.⁹⁷ Using context as a difference-making fact allows the ECtHR to accommodate some criticism voiced by human rights nationalism and normative legal pluralism approaches: under certain circumstances, the Court is ready to accept context as a difference-making fact. The ECtHR, thereby, adjusts the abstractness condition under human rights universality.

C Decentralized Interpretation of Human Rights

A third path to non-universality arguments is by allowing for decentralized interpretations of IHRL. According to Article 19 of the ECHR, it is the ECtHR that, in cases of conflict or doubt, ultimately determines the scope, nature and content of the obligations undertaken by the contracting states. This general rule, however, does not preclude the ECtHR from redistributing interpretive power to state organs by way of deference. This aspect pertains to the rationality claim of human rights universality. As outlined above, the rationality condition holds that converging interpretations of human rights are possible and that conflicting interpretations of rights can be solved by reference to common, higher legal principles, leading to universalizing interpretations of IHRL.⁹⁸ Conversely, non-universality results through decentralized interpretations of human rights. Thus, by decentralizing the interpretation, the ECtHR is able to adjust the rationality claim inherent in human rights universality.

The ECtHR has allowed for decentralized interpretations by argumentatively deferring to the interpretive authority of a domestic court or by deferring to domestic legislative choice.⁹⁹ In relation to the legal order of the respondent states, arguments on the decentralization of the power of interpretation by the ECtHR mostly revolve around

⁹⁴ ECtHR, *Laursi and Others v. Italy*, Appl. no. 30814/06, Judgment of 18 March 2011, para. 76.

⁹⁵ ECtHR, *S.A.S. v. France*, Appl. no. 43835/11, Judgment of 1 July 2014, para. 122.

⁹⁶ *Ibid.*, para. 153.

⁹⁷ Universalization and generalization are two different concepts, see N. MacCormick, *Rhetoric and the Rule of Law* (2005), at 93 (in contrast to generalization, universalization allows for no exceptions); Hare, ‘The Presidential Address: Principles’, 73 *Proceedings of the Aristotelian Society* (1972–1973) 1. While I believe that the distinction is relevant to a philosophical account of judgments in an ideal world, I suspect that it is unhelpful for real-world determinations made by judges.

⁹⁸ See subpart 2.A.

⁹⁹ For an example for deference to domestic legislative choice, see ECtHR, *Correia de Matos v. Portugal*, Appl. no. 56402/12, Judgment of 4 April 2018, para. 117 (regarding the domestic requirement to be legally represented). See generally Çalı, ‘Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights’, 35 *Wisconsin International Law Journal* (2018) 237, at 256–263.

the ideas of the subsidiarity¹⁰⁰ and, conversely, the autonomy¹⁰¹ of the convention's human rights mechanism. In general, the more that the Court stresses the subsidiarity of the ECHR's mechanism, the less universal its interpretation is (conversely, the more the Court emphasizes the autonomy of the convention, the more universal it becomes). The fact that the interpretive power is indeed increasingly decentralized by the ECtHR can be shown empirically.

Figure 1 displays the relative frequency of references by the ECtHR (majority opinions only) to 'subsidiarity' in (the legal sections of) its judgments. There is an increase in references to 'subsidiarity' in judgments in English starting around 2010.¹⁰² This

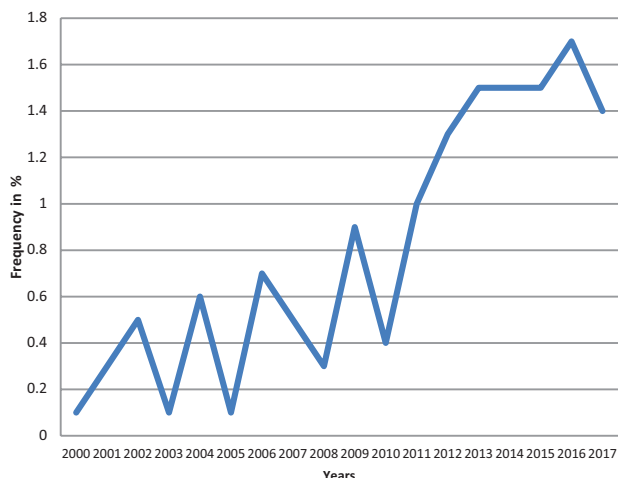


Figure 1: Relative frequency of the word 'subsidiarity' in 'The Law' sections of ECtHR judgments in English

Notes: Used advanced search on HUDOC database (<http://hudoc.echr.coe.int>) on 12 September 2018. All cases from 2000 to 2017 (N = 19,624) were considered. To get the yearly number of cases, the date range was selected from 01/01/yyyy to 31/12/yyyy, where yyyy is the respective year. The Language was restricted to 'English'. Under 'Search in Document Sections', the term 'margin of appreciation' was searched for in 'The Law'. For the 'Judgments' data, the 'Case Law' was restricted to 'Judgments' and the 'Conclusion' restricted to 'No violation', whereas for the 'Decisions' data, the 'Case Law' was restricted to 'Decisions' and the 'Conclusions' to 'Inadmissible'.

¹⁰⁰ Including the following: 'margin of appreciation', 'fourth instance' doctrine, 'primarily a matter for regulation under national law', 'non-formalist approach', quality of domestic legal process (*A.-M.V. v. Finland*, *supra* note 61, para. 82); no substitution by the Court of the assessment by the national authorities, 'respect for national constitutions' (ECtHR, *Király and Dömötör v. Hungary*, Appl. no. 10851/13, Judgment of 17 January 2017, para. 42, Dissenting Opinion by Judge Küris); 'domestic courts are better placed to examine and interpret facts' (ECtHR, *Lindstrand Partners Advokatbyrå AB v. Sweden*, Appl. no. 18700/09, Judgment of 20 December 2016, para. 85); 'falls first to the national authorities to redress any alleged violation of the Convention' (ECtHR, *Mikhno v. Ukraine*, Appl. no. 32514/12, Judgment of 1 September 2016, para. 116); 'supervisory role' of the Court (ECtHR, *A.K. v. Latvia*, Appl. no. 33011/08, Judgment of 24 June 2014, para. 86).

¹⁰¹ Including the following: 'autonomy of the Convention'. ECtHR, *Öztürk v. Germany*, Appl. no. 8544/79, Judgment of 21 February 1984, para. 2, Dissenting Opinion by Judge Bernhardt.

¹⁰² It should be noted that the more recent data is more reliable given the larger absolute number of judgments per year.

may be taken as an indicator that the ECtHR has gradually become more willing to decentralize the power of interpretation. Still, the mean reference to subsidiarity has, over the years, risen to only 1.4 per cent of all judgments in 2017, which does not seem particularly high.

Doctrinally, the ECtHR resorts to the margin-of-appreciation doctrine when it allows for a decentralized interpretation of ECHR rights.¹⁰³ Through the application of the margin of appreciation, the ECtHR is in control of when and how much non-universality comes into its case law.¹⁰⁴ It seems that decentralized interpretations are more acceptable with respect to certain convention rights and less acceptable with respect to others. For some rights – for example, the right to life (Article 2 of the ECHR) or the prohibition against torture, inhuman or degrading treatment or punishment (Article 3 of the ECHR) – the ECtHR has accepted little room for a national ‘*Sonderweg*’.¹⁰⁵ It can be argued that argumentative non-universality is less appropriate with regard to these rights due to the fundamental nature of the protected interest (as indicated by the non-derogability of the right) and/or the existence of a European consensus regarding the interpretation of the right.¹⁰⁶ There is empirical evidence for this proposition. As can be gathered from Figure 2, starting in 2000, reference to the margin of appreciation has sharply increased for the right to privacy (Article 8 of the ECHR) and, to a lesser degree, also for freedom of expression cases (Article 10 of the ECHR). For the right to freedom of assembly and association (Article 11 of the ECHR), no such trend is visible. As expected, the margin plays little role in cases of torture (Article 3 of the ECHR).

This finding is confirmed when looking at the cases in which the ECtHR relied on the margin of appreciation and, in addition, found no violation (judgments) or found the case to be inadmissible (decisions).

Figure 3 shows the relative frequency of a judgment or decision in English by the ECtHR that relies on the margin of appreciation to lead to a finding of ‘no violation’ or ‘inadmissible’ respectively. Since the year 2000, a relatively sharp decrease in inadmissibility decisions mentioning the margin of appreciation is to be noted. However, there has been a major increase (doubling) of judgments since 2009 in which the margin of appreciation was referred to and no violation was found. This can be read as additional empirical confirmation that the ECtHR has increasingly allowed for a

¹⁰³ For an overview, see Follesdal, ‘Exporting the Margin of Appreciation’, 15 *IJCL* (2017) 359, at 363–364 (margin of appreciation doctrine is needed for ‘applications to specific local circumstances’).

¹⁰⁴ See Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’, 54 *International and Comparative Law Quarterly* (2005) 459, at 461. For criticism, see Brems, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’, 18 *Human Rights Law Review* (2018) 495, at 501 (arguing that references to the margin of appreciation ‘are rather empty’).

¹⁰⁵ See Greer, *supra* note 91, at 31–32; for a more nuanced view, see Garlicki, ‘Cultural Values in Supranational Adjudication: Is There a “Cultural Margin of Appreciation” in Strasbourg?’, in M. Sachs and H. Siekmann (eds), *Der grundrechtsgeprägte Verfassungsstaat: Festschrift für Klaus Stern zum 80. Geburtstag* (2012) 727, at 738–741 (on the role of the margin of appreciation in cases relating to Art. 2 of the ECHR).

¹⁰⁶ Follesdal, *supra* note 103, at 364; Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’, 16 *ECLR* (2006) 907, at 927.

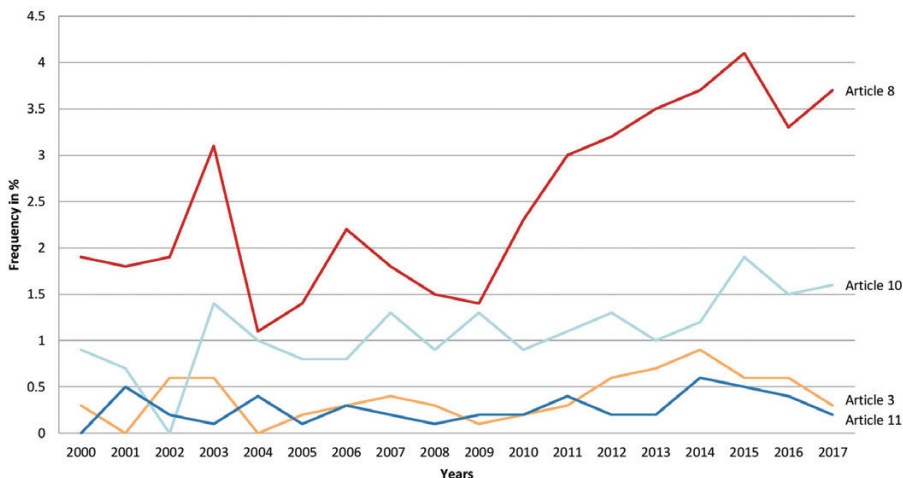


Figure 2: Relative frequency of the word ‘margin of appreciation’ in ‘The Law’ sections of ECtHR judgments in English in combination with selected convention articles

Notes: Used advanced search on HUDOC database (<http://hudoc.echr.coe.int>) on 12 September 2018. All cases from 2000 to 2017 (N = 19,624) were considered. To get the yearly number of cases, the date range was selected from 01/01/yyyy to 31/12/yyyy, where yyyy is the respective year. The language was restricted to ‘English’. Under ‘Search in Document Sections’, the term ‘margin of appreciation’ was searched for in ‘The Law’. The filter ‘Article’ was then used to get the number of cases per article.

decentralized interpretation of ECHR rights. In sum, by decentralizing the power of interpretation, the ECtHR has adjusted the rationality claim of universality. This will likely become even more important in the future given the recent surge in European human rights nationalism.

4 Reasons: Why Make Non-Universal Arguments in IHRL?

What are the reasons for the ECtHR to judicially construct non-universal arguments about IHRL?

A Social, Cultural and Political Condition of Individual Freedom

IHRL (as positive law) does not presuppose right bearers to exist ‘in isolated, existential loneliness’ but, rather, that individual freedom protected by IHRL is ‘relational’.¹⁰⁷ IHRL, in other words, is based on the assumption and the normative endorsement of the social, cultural and political condition of individual freedom.¹⁰⁸ Argumentative non-universality, in a way, takes the fact that individual freedom is itself socially,

¹⁰⁷ Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, 97 *AJIL* (2003) 38, at 46.

¹⁰⁸ See Tomuschat, ‘Individual and Collective Identity: Factual Givens and Their Legal Reflection in International Law’, 37 *Polish Yearbook of International Law* (2017) 11, at 34 (arguing that individuals

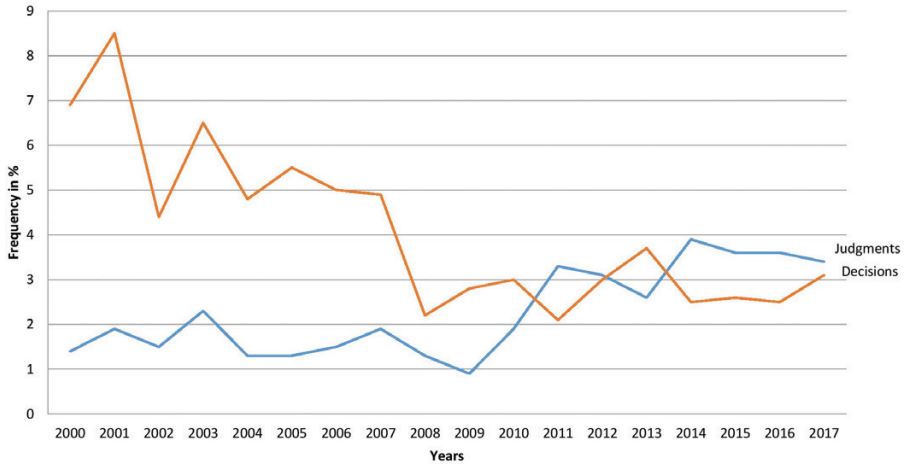


Figure 3: Relative frequency of the word ‘margin of appreciation’ in ‘The Law’ sections of ECtHR judgments and decisions in English in combination with conclusion of ‘no violation’ and ‘inadmissible’ respectively

Notes: Used advanced search on HUDOC database (<http://hudoc.echr.coe.int>) on 12 September 2018. All judgments from 2000 to 2017 (N = 19,624) and, in addition, all decisions from 2000 to 2017 (N = 18,302) were considered. To get the yearly number of cases, the date range was selected from 01/01/yyyy to 31/12/yyyy, where yyyy is the respective year. The ‘Language’ filter shows the number of English cases. Under ‘Search in Document Sections’ the term ‘subsidiarity’ was searched in ‘The Law’. This provided the number of references to subsidiarity in English judgments. This number divided by the total number of English cases per year is displayed.

culturally and politically conditioned seriously.¹⁰⁹ First, under the existing organization of social and political life, non-universality may be explained by reasons of practicality. For example, in its case law, the ECtHR regularly relies on the standard formula that ‘national authorities are in principle *better placed* than the international judge to appreciate what is in the public interest’.¹¹⁰ Deference to the domestic interpretive authority relies on the following arguments: national authorities are better placed because ‘of their direct and continuous contact with the vital forces of their countries’,¹¹¹ because ‘of their direct knowledge of their society and its needs’¹¹² and because they can carry out on-site visits and hear all parties.¹¹³ In these instances, non-universality is justified ultimately by practical reasons. The ECtHR as an international court does

‘find themselves enmeshed in crucial relationships of social dependency, notwithstanding the process of emancipation which they have experienced during the last century’).

¹⁰⁹ Eventually, this fact suggests a historicizing account of human rights universality. See Bhuta, *supra* note 48.

¹¹⁰ *Stec and Others*, *supra* note 57, para. 52 (emphasis added). For a useful overview on the ‘better placed’ case law by the ECtHR, see the summary in *Correia de Matos*, *supra* note 99, paras 4–9, Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Sajó.

¹¹¹ *Chapman v. United Kingdom*, *supra* note 93, para. 91.

¹¹² ECtHR, *Fábián v. Hungary*, Appl. no. 78117/13, Judgment of 5 September 2017, para. 115.

¹¹³ *Chapman v. United Kingdom*, *supra* note 93, para. 92.

not have the resources to engage in on-site fact-finding, thus it may lack vital information necessary for informed decision-making on certain issues.¹¹⁴

Second, when measures relating to national security are at stake, a different justification for deference to the domestic interpretive authority can be given. Here, the ECtHR refers to the role of each contracting state ‘as the guardian of its people’s safety’.¹¹⁵ This formula indicates an ultimate, comprehensive responsibility of the state in matters of national security with which the ECtHR does not meddle. In the national security case, non-universality can be explained by the political condition of individual freedom – that is, by the fact that it is the state that is ultimately responsible for protecting everyone within its jurisdiction.

Third, non-universality arguments pertaining to asymmetric protection can be explained by considerations of social justice: measures of asymmetric protection, the preferential treatment of certain individuals or the obligation to adopt special positive obligations to aim at correcting past injustices, factual inequalities or promoting social diversity – topics commonly advanced in conceptions of social justice.¹¹⁶ While a discussion of social justice through ECHR rights is beyond the scope of this article, what is important here is that the theorizing of social justice assumes a ‘bounded society with a determinate membership’.¹¹⁷ Thus, deference to domestic interpretive authority can be justified, in individual cases, by reference to the social condition of individual freedom.

B Reasonable Interpretive Pluralism

Argumentative non-universality of IHRL can furthermore be explained as an operationalization of the idea of reasonable interpretive pluralism.¹¹⁸ In the present context, reasonable interpretive pluralism would stipulate that there can be different, coexisting interpretations of human rights norms that are equally legitimate. For some, the idea of reasonable interpretive pluralism is already inherent in (certain) human rights themselves. For example, Paolo Carozza writes that ‘the idea of human rights ... necessarily entails an affirmation of a degree of pluralism and diversity in society’ and that some human rights norms ‘recognize and protect our capacity to pursue the good in question by a plurality of paths’.¹¹⁹ Reasonable interpretive pluralism can also be seen as deriving from the structure of certain international legal norms. For example, Yuval Shany argues that some norms are ‘open-ended or unsettled’, allowing for a margin of appreciation to be applied.¹²⁰ In these cases, according to Shany, ‘different national authorities, in distinct states, could conceivably reach different, yet lawful

¹¹⁴ Carozza, *supra* note 107, at 73.

¹¹⁵ ECtHR, *Zezev v. Russia*, Appl. no. 47781/10, Judgment of 12 June 2018, para. 37.

¹¹⁶ See S. Kershner, *Justice for the Past* (2004), at 33; Sweeney, ‘Introduction’, in M.J. Sweeney (ed.), *Justice through Diversity? A Philosophical and Theological Debate* (2016) ix.

¹¹⁷ See D. Miller, *Principles of Social Justice* (1999), at 4.

¹¹⁸ The concept draws on John Rawls’ notion of the ‘fact of reasonable pluralism’. Rawls argues that there can be an ‘overlapping consensus’ between otherwise ‘conflicting, reasonable comprehensive doctrines’. See J. Rawls, *Political Liberalism* (2005), at 36–38, 101.

¹¹⁹ Carozza, *supra* note 107, at 47.

¹²⁰ Shany, *supra* note 106, at 910.

decisions regarding the application of the same international norm'.¹²¹ Furthermore, the idea of reasonable interpretive pluralism resonates with the recent philosophical criticism of 'ideal theories' on justice: as Amartya Sen writes, '[t]here can be serious differences between competing principles of justice that survive critical scrutiny and can have claims to impartiality'.¹²² Applied to the context of the ECHR, there is a political expectation of reasonable interpretive pluralism, which is evident in the Copenhagen Declaration when it states that 'there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context'.¹²³ Given that the contracting states have incorporated the ECHR rights into their domestic legal systems (in their bills of rights), state organs are in a way ECHR interpreters 'of first resort'.¹²⁴ Finally, as Shai Dothan has argued, judicial deference to the national organs when interpreting human rights may ultimately ensure a European consensus will emerge.¹²⁵

In the ECHR context, non-universality arguments reflect the idea of reasonable interpretive pluralism, allowing contracting states to experiment with, and follow, different, but equally legitimate, approaches to certain human rights problems. In particular, the ECtHR's reliance on the margin of appreciation in the context of interpretive contextualization can be understood along these lines. The idea of reasonable interpretive pluralism is manifest in some formulations of the ECtHR – for example, when the Court refers to 'matters of general policy, on which opinions within a democratic society may reasonably differ widely',¹²⁶ when it mentions the absence of a (European) consensus,¹²⁷ when the ECtHR contemplates the contracting parties' 'primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto' and the Court's own mere 'subsidiary role'¹²⁸ or when the Court refers to 'legislative discretion'.¹²⁹ By employing these formulations, the Court indicates that there is room for divergent, equally legitimate solutions to a human rights problem.¹³⁰ Some non-universal arguments, thus, can be explained by interpretive legal pluralism.

¹²¹ *Ibid.*

¹²² A. Sen, *The Idea of Justice* (2010), at 10 (criticizing 'transcendental' approaches to justice).

¹²³ Copenhagen Declaration, adopted at the High Level Conference in Copenhagen, 12–13 April 2018, para. 28, available at www.coe.int/en/web/human-rights-rule-of-law/-/copenhagen-declaration-on-the-reform-of-the-european-convention-on-human-rights-system.

¹²⁴ I am grateful to one anonymous reviewer for pointing this out to me.

¹²⁵ Dothan, 'Judicial Deference Allows European Consensus to Emerge', 18 *Chicago Journal of International Law* (2018) 392.

¹²⁶ Long-standing case law: ECtHR, *Zelenchuk and Tsytsyura v. Ukraine*, Appl. nos. 846/16 *et al.*, Judgment of 22 May 2018, para. 111.

¹²⁷ For example, *Correia de Matos*, *supra* note 99, para. 137 (stating that 'while there may be a tendency amongst the Contracting Parties to the Convention to recognise the right of an accused to defend him or herself without the assistance of a registered lawyer, there is no consensus as such and even national legislations which provide for such a right vary considerably in when and how they do so').

¹²⁸ *Correia de Matos*, *supra* note 99, para. 116.

¹²⁹ ECtHR, *Bäck v. Finland*, Appl. no. 37598/97, Judgment of 20 July 2004, para. 54.

¹³⁰ From the perspective of the ECHR, the German Federal Constitutional Court thus rightfully claims the power to 'rethink' the human rights contents of the respective international treaty 'within the framework of an active (reception) process in the context of the receiving constitutional order'. BVerfG, Judgment of 12 June 2018, 2 BvR 1738/12 *et al.*, para. 131 (translated by the author).

C Institutional Legitimacy and the Division of Labour

Finally, argumentative non-universality fosters a division of labour and enhances the institutional legitimacy of the Court *vis-à-vis* the contracting states. ‘Legitimacy’, in a normative sense, means claiming ‘the right to rule’.¹³¹ The institutional legitimacy of the ECtHR largely depends on the quality of the reasoning adopted in its judgments and decisions, the judges (for example, selection process, independence), the design of the procedure (for example, transparency) and its interaction with domestic organs (for example, openness for judicial dialogue).¹³² Argumentative non-universality impacts the latter aspect of institutional legitimacy. Traditionally, the relationship between international courts and domestic organs used to be assessed under the perspective of ‘compliance’ and ‘implementation’.¹³³ More recently, the literature has started to emphasize a more cooperative relationship between international human rights courts and domestic organs. In the European context, some have stressed the aspect of a ‘division of labor’ between the ECtHR and domestic organs in the protection of ECHR rights.¹³⁴ Argumentative non-universality enhances this ‘division of labour’ by allowing and managing diversity in the judicial interpretation of the convention and, thus, by making the interpretation of its norms a more creative task, shared by the ECtHR and domestic organs. If one accepts the idea of a division of labour regarding the adjudication of convention rights, both domestic organs and the ECtHR assume responsibilities regarding that cooperation. Argumentative non-universality can then be viewed as one component by which the ECtHR discharges its responsibility for that division of labour. In this view, it is the duty of the ECtHR to find the proper balance between argumentative universality and non-universality in individual cases.¹³⁵ By adjusting the human rights universality claims – by conditionally granting interpretive power to the ‘local’ – the ECtHR maintains the division of labour and enhances its own institutional legitimacy.¹³⁶

In sum, argumentative non-universality contributes to the institutional legitimacy of the ECtHR by fostering a cooperative relationship of the ECtHR with domestic organs that could ultimately also be beneficial for the individual rights bearers (if

¹³¹ Buchanan and Keohane, ‘The Legitimacy of Global Governance Institutions’, 20 *Ethics and International Affairs* (2006) 405.

¹³² This list is adopted from Bogdandy and Venzke, ‘On the Democratic Legitimation of International Judicial Lawmaking’, in A. v. Bogdandy and I. Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (2012) 473, at 477–509.

¹³³ See *ibid.*, at 508–509 (‘domestic non-compliance triggers heavy argumentative burdens’).

¹³⁴ For example, Vila, ‘Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights’, 15 *IJCL* (2017) 393, at 402 (advocating a ‘balanced division of labor in rights protection’). Of course, the ‘division of labor’ argument could be recast also as a ‘division of power’ argument. For an earlier proposal, see Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, 19 *EJIL* (2008) 125, at 158.

¹³⁵ ECtHR, *Leyla Şahin v. Turkey*, Appl. no. 44774/98, Judgment of 10 November 2005, para. 2, Dissenting Opinion of Judge Tulkens (arguing that it is not the role of the Court ‘to impose uniform solutions’ and that it must ‘seek to reconcile universality and diversity’).

¹³⁶ Arnardóttir, ‘The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’, 15 *IJCL* (2017) 9, at 17.

the domestic organs abide by their obligations under IHRL and their obligation to cooperate).

5 Conclusion: A Turn to the Local?

This article has shown that argumentative non-universality allows the ECtHR to adjust the claims made by human rights universality. Importantly, by employing argumentative non-universality, the Court neither negates nor destroys human rights universality but adjusts its claims in individual cases. The abstractness and the rationality claims of human rights universality, currently, are the ones that are most heavily contested. As developed above, the ECtHR is able to adjust these claims by using context as a difference-making fact and through decentralizing the power of interpretation in a given case. However, it is presently unclear whether the critics of universality will be consoled by the judicial tools of argumentative non-universality (the use of which is optional to the ECtHR). Given the current political pressure in some European states towards pushing back the international protection of human rights, there are some indications that, eventually, we may witness a larger ‘turn to the local’ under the ECHR. This ‘turn to the local’ is sometimes associated with a preference of ‘home-grown’ solutions over ‘legally engineered’ solutions to human rights problems or with the acknowledgement that, in ‘a globalized world, global and local values compete for allegiance but that local authorities are bound to have more influence in shaping the ordinary virtues’.¹³⁷ In consequence, a ‘turn to the local’ was already diagnosed in the literature with regard to the USA and federal human rights protection systems in general.¹³⁸

There are also some indications for such a ‘turn to the local’ under the ECHR. First, instead of limiting the use of the ‘better placed’ formula to situations involving ‘better information’ by domestic authorities, the ECtHR has gradually broadened its application: domestic authorities may not only be ‘better placed’ due to their epistemic lead regarding the ‘needs of society’ or their direct contact with witnesses. Much more fundamentally, the ECtHR has started to justify its deference to national authorities by pointing out that ‘national authorities have direct democratic legitimation in so far as the protection of human rights is concerned’.¹³⁹ Since 2003 (and increasingly after 2014), the ECtHR has relied on the ‘direct democratic legitimation’ formula in order to justify a deferential approach.¹⁴⁰ Because of its overbreadth, however, the formula can

¹³⁷ Ignatieff, ‘Human Rights, Global Ethics, and the Ordinary Virtues’, 31 *Ethics and International Affairs* (2017) 3, at 9; see also Zwart, ‘Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach’, 34 *Human Rights Quarterly* (2012) 546, at 559–564.

¹³⁸ Kaufman and Ward, ‘The Local Turn in U.S. Human Rights’, 49 *Columbia Human Rights Law Review* (2017) 1; Kleinlein and Petkova, ‘Federalism, Rights, and Backlash in Europe and the United States’, 15 *IJCL* (2017) 1066, at 1068 (arguing that the ‘turn to the local should be understood as a weapon of resistance to a national [federal-level] or a European policy’).

¹³⁹ ECtHR, *Van der Heijden v. The Netherlands*, Appl. no. 42857/05, Judgment of 3 April 2012, para. 55.

¹⁴⁰ ECtHR, *Hatton and Others v. United Kingdom*, Appl. no. 36022/97, Judgment of 8 July 2003, para. 97. A HUDOC search reveals seven entries.

be the cause for concern: the text of the formula permits no situation in which domestic authorities would not be 'better placed' to protect human rights.¹⁴¹ The new awareness for the local, non-universal dimension of IHRL is exacerbated by the relatively recent procedural approach in human rights adjudication. As described in the literature, the ECtHR is increasingly willing to defer to domestic interpretive authority if the quality of the domestic democratic and judicial process meets the ECHR standard.¹⁴² This has been rightly identified as a shift by the ECtHR to a 'process-based review'.¹⁴³

Second, a new focus on the local would arguably be in line with the recent Protocol no. 15 to the ECHR (not yet in force) and its drafting history.¹⁴⁴ Protocol no. 15 to the ECHR will formally incorporate the principle of subsidiarity and the margin of appreciation doctrine into the preamble of the convention.¹⁴⁵ Additionally, the recent Copenhagen Declaration adopted by all 47 contracting states may be interpreted as underlining a 'turn to the local': it provides no less than an authoritative interpretation of the principle of subsidiarity.¹⁴⁶ Furthermore, the Copenhagen Declaration can be read as pushing the Court towards the development and stricter application of the principle of subsidiarity and, thus, towards strengthening the local, non-universal dimension of IHRL.¹⁴⁷ In sum, some recent developments are indicative of a new political awareness in the contracting states of the importance of the non-universal alongside the universal dimension of IHRL. Only the future case law will show whether this

¹⁴¹ Including the following: a case concerning a government policy on night flights (*Hatton and Others v. United Kingdom*, *supra* note 140); a new law barring the applicants from compensation claims regarding negligence in establishing a prenatal diagnosis (ECtHR, *Maurice v. France*, Appl. no. 11810/03, Judgment of 6 October 2005); matters of social-economic policy (ECtHR, *Valkov and Others v. Bulgaria*, Appl. nos. 2033/04 et al., Judgment of 25 October 2011, para. 92); the problem of compellability of witnesses (*Van der Heijden v. The Netherlands*, *supra* note 139); matters of housing reform in a post-socialist setting (ECtHR, *Berger-Krall and Others v. Slovenia*, Appl. no. 14717/04, Judgment of 12 June 2014); the relationship between state and religions (*S.A.S. v. France*, *supra* note 95, para. 122); a law prohibiting health professionals from attending home births (ECtHR, *Dubská and Krejzová v. Czech Republic*, Appl. nos. 28859/11 et al., Judgment of 15 November 2016); restrictions in choosing the place of residence (ECtHR, *Gar 'b v. Netherlands*, Appl. no. 43494/09, Judgment of 6 November 2017); refusal of leave to conduct one's own defence in domestic court proceedings (*Correia de Matos*, *supra* note 99).

¹⁴² See Kleinlein, 'Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control', 28 *EJIL* (2017) 871 (with references to the case law).

¹⁴³ Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law', 18 *Human Rights Law Review* (2018) 473, at 480–494.

¹⁴⁴ Available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213. On the drafting history (the Brighton Declaration), see Cram, 'Protocol 15 and Articles 10 and 11 ECHR: The Partial Triumph of Political Incumbency Post-Brighton?', 67 *ICLQ* (2018) 477, at 480–484.

¹⁴⁵ Protocol no. 15 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2013, ETS 213, Art. 1.

¹⁴⁶ Copenhagen Declaration, *supra* note 123, para. 28 (stressing, in particular, that the Court 'does not act as a court of fourth instance', that states enjoy a margin of appreciation, that domestic authorities are in principle 'better placed' to 'evaluate local needs and conditions', that there 'may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context' and that the Court will generally 'not substitute its own assessment for that of the domestic courts').

¹⁴⁷ See *ibid.*, para. 31 (welcoming the 'further development of the principle of subsidiarity and the doctrine of the margin of appreciation by the Court in its jurisprudence').

increased attention to the local indeed also manifests a systemic ‘turn to the local’ under the ECHR, which would go beyond argumentative non-universality.¹⁴⁸

¹⁴⁸ See also, with empirical evidence, Madsen, ‘Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?’, 9 *Journal of International Dispute Settlement* (2018) 199. A ‘turn to the local’ by the ECtHR would be in contrast to developments under the ACHR, *supra* note 15. Here, the Inter-American Court still ‘embraces a maximalist model of adjudication – one that leaves very little, if any, room for states to reach their own decisions’. Contesse, ‘Contestation and Deference in the Inter-American Human Rights System’, 79 *Law and Contemporary Problems* (2016) 123, at 124.