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ARTICLE

Special Issue: Breaching the Boundaries of Law and Anthropology: New Pathways for Legal Research

Re-reading *Neulinger and Shuruk v. Switzerland*: Bringing the Religious Dimension into View

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Abstract

This Article offers an anthropologically informed rereading of the landmark case *Neulinger and Shuruk v. Switzerland*, decided by the European Court of Human Rights (ECtHR) in 2010. This rereading is undertaken by "going beyond judgments" temporally—i.e., reconstructing the case from its origins to present—and spatially—i.e., looking at different sources of data and putting them into conversation with one another. This approach draws on anthropology both conceptually and methodologically. Not only does it address "case law" and "litigation" as creations of a variety of social and legal agents, constantly and meaningfully interacting with one another, but it also adopts a "litigant's perspective" and creates space for acknowledging aspects of the lived experience of the applicants that have been marginalized in legal reasoning. By doing so, this Article shows that, from being strongly imbued with religious considerations, *Neulinger and Shuruk* came to assume a neutral framing when entering and progressing through the ECtHR. "Going beyond judgments" ultimately foregrounds the image of the Court as an institution addressing and doing different things to different audiences and stakeholders, and showcases some of the ways through which multi-perspectivity and efforts to "humanize the law" may be incorporated into case-law analyses.

Keywords: Litigation; applicant's perspective; extended case method; religion; secularism; international child abduction; parental disagreement; narrative

Introduction

This Article makes a case for "going beyond judgments" in order to dig deeper into a legal case and to reveal otherwise invisible dimensions and untold—or even silenced—stories underlying the case. This "going beyond" entails both a spatial and a temporal dimension, and is realized by combining law and anthropology at the conceptual and methodological levels. Conceptually, the analysis of a legal case is premised on a broad and plural understanding of what law is and who or what contributes to turning a disagreement into a legal dispute and, ultimately, into a

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legal verdict with individual and social outcomes. Methodologically, this exploration is undertaken by reading the text of the judgment against a comprehensive and in-depth reconstruction of the empirical case from which the dispute originated, drawing on the extended case method (ECM). By putting multiple sources of information and perspectives into conversation, "going beyond judgments" allows absences, gaps, said and unsaid assumptions underlying the development and outcomes of litigation to surface and present themselves for analysis. For the present purposes, the ways in which anthropology may contribute to the analysis of case law will be exemplified by focusing on a case heard by the European Court of Human Rights (ECtHR).

This Article is divided into four sections. Part A prepares the ground for illustrating what "going beyond judgments" entails by identifying three mottos that guide a doctrinal approach to the study of ECtHR case law. This section will also acknowledge an emerging academic interest in exploring the plural dimensions and understandings of the ECtHR case law and will introduce some relevant works that go beyond the doctrinal method. Parts B and C will delve into the conceptual and methodological contributions of anthropology to the study of case law—in this case, of the ECtHR. Part D provides a concrete illustration of this approach, applying some aspects of the "going beyond judgments" approach to the landmark case *Neulinger and Shuruk v. Switzerland*, which concerns international child abduction.[1] This part retraces the life of the case, from its origins to the present: In other words, *Neulinger and Shuruk* before, in, and after Strasbourg. By making the source of the dispute known, "going beyond judgments" brings the underexplored religious freedom dimension of *Neulinger and Shuruk* into view and observes its gradual recession once the case reached and progressed through the ECtHR system. Part D will also shed light on Isabelle Neulinger's perception of the way the Court handled her case, and on the effects that the Grand Chamber's decision and litigation have had on her life. To conclude, Part E highlights some take-aways that extend beyond the case of *Neulinger and Shuruk* and may be of inspiration for future case-law analyses.

A. Doctrinal Approaches and Beyond

Before turning to what "going beyond judgments" concretely entails and how it is facilitated by the integration of law and anthropology, it is worthwhile to first introduce some of the peculiarities and methodological predispositions of a doctrinal approach to the study of case law in legal scholarship. Borrowing stylistically from Dembour,[2] I express these peculiarities in the form of three "mottos":

I. *The Text of the Judgment is the Main Object of Study*

Conventional legal scholars typically adopt what is known as a "black-letter law" or doctrinal approach, according to which the law can be exhaustively studied through reading legal texts issued by the nation-state. It follows that, when the purpose is to analyze case law more specifically, a doctrinal approach leads to placing almost exclusive attention on the text of the judgment issued by the competent—state—court. The text of the judgment is considered the only, or, at least, the most legally relevant material to study in analyzing the court's approach to the legal question at stake. In the context of the ECtHR, this view and methodological predisposition leads to the assumption that, in cases where there is a verdict of violation, the judgment will have direct and beneficial effects on the legal and social realities it deals with. In other words, adopting a

[1] *Neulinger and Shuruk v. Switzerland*, App. No. 41615/07 (Jan. 8, 2009), https://hudoc.echr.coe.int/eng?i=003-2594667-2812114; *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07 (July 6, 2010), https://hudoc.echr.coe.int/FRE?i=001-99817.

[2] Marie-Bénédicte Dembour, *An Anthropological Approach to M.S.S. v. Belgium and Greece*, *in* Research Methods For International Human Rights Law—Beyond The Traditional Paradigm 227, 230–34 (Damian Gonzalez-Salzberg & Loveday Hodson eds., 2020).

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doctrinal approach risks missing the potential disconnect between the legal and the human/social outcomes of a case—namely, between a legal verdict and its real-life consequences on those involved in the litigation, particularly on the applicants.

II. *The Judgment is the Result of "Pure" Legal/Judicial Craft*

The focus on the text of the judgment as the main object of study also entails a narrow appreciation of the ways in which the judgment came into existence. Rather than acknowledging the "creative moves" which make judicial interpretation, the judgment is presented as "inevitable or obvious," as "expressions of indisputable fact."[3] The courtroom is conceived as a sterile environment, free of external interference. The court is depersonalized and viewed only as an institution rather than as a group of professionals and—even prior to that—human beings bringing to the bench a range of experiences and perspectives and, therefore, inevitably contributing subjectivity to decision-making. A doctrinal approach therefore tends to ignore or give only marginal attention to the socio-cultural processes through which the text of the judgment has been generated and to the variety of agents who have contributed to shaping litigation and its outcomes.

III. *The Applicants Are Viewed as Merely Giving a Name to The(ir) Case*

In doctrinal legal scholarship, scant attention is directed to the applicants. The name of the applicant appears in legal analyses only because it gives the case its name.[4] Individual experiences, expectations, motivations, and the impact of litigation on the individual applicant are generally not of legal interest. As eloquently explained by Zerilli and Dembour, "the socially stripped 'applicant' hardly matches the 'real person' who lives behind the legally constructed figure."[5] This mismatch, Zerilli and Dembour continue, produces a "distancing and objectifying effect" toward the applicant.[6]

These methodological predispositions continue to drive and shape most of the existing legal scholarship on the ECtHR and, more generally, research in the field of international human rights law, which is still predominantly doctrinal.[7] We are, however, witnessing an emerging academic interest in applying different research methods to the study of the Strasbourg case law, based on the growing conviction that doctrinal approaches alone may be insufficient to explore the causes, manifestations, and redress of injustice. Two sets of works, both of which are closely related to the approach taken in this chapter, deserve mention in this context.[8]

The first falls under the umbrella of oral history research, which is to be understood as "the interviewing of eye-witness participants in the events of the past for the purposes of historical reconstruction."[9] These works are characterized by a bottom-up, actor-centered approach and use oral history to gain insights into the experiences, motivations, and aspirations of a variety

[3]Anya Bernstein, *Before Interpretation*, 84 U. Chi. L. Rev. 567, 569 (2017).

[4]Filippo M. Zerilli & Marie-Bénédicte Dembour, *The House of Ghosts: Post-Socialist Property Restitution and the European Court of Human Rights in Brumărescu v. Romania*, *in* Paths To International Justice—Social And Legal Perspectives 189 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007).

[5]*Id.*

[6]*Id.*

[7]Damian A. Gonzalez-Salzberg & Loveday Hodson, *Introduction: Human Rights Research Beyond the Doctrinal Approach*, *in* Research Methods For International Human Rights Law—Beyond The Traditional Paradigm 1, 2 (Damian Gonzalez-Salzberg & Loveday Hodson eds., 2020).

[8]For a comprehensive account of research methods going beyond the doctrinal approach in the study of international human rights law, see Gonzalez-Salazar & Hodson, *supra* note 7. *See also* Alice Margaria, *Going Beyond Judgments: Exploring the Jurisprudence of the European Court of Human Rights*, *in* Pluralising International Legal Scholarship: The Promise And Perils Of Non-Doctrinal Research Methods 84 (Rossana Deplano ed., 2019).

[9]Ronald J. Grele, *Directions for Oral History in the United States*, *in* Oral History: An Interdisciplinary Anthology 62, 63 (David K. Dunaway & Willa K. Baum eds., 1996).

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of agents of litigation. A notable contribution of this kind is the book *A People's History of the European Court of Human Rights* by the journalist Michael D. Goldhaber.[10] As the author puts it, "this book is the story of how a few ordinary men and women have created the constitutional law for a continent."[11] In this work, therefore, the Strasbourg case law is told and studied through the personal tales of "heroic" applicants involved in a variety of landmark human rights disputes. Other more recent examples of oral history research on the Court include the article *"Strasbourg Was Something New, It Was an Adventure"* by Laurens Lavrysen[12] and the book *Going to Strasbourg* by the sociologist Paul Johnson.[13] The latter tells the story of how the ECHR has been used to challenge discrimination on the basis of sexual orientation in the UK from the "particular point of view" of fifteen individual applicants and four legal professionals and political campaigners who took part in litigation.[14] Lavrysen's work has a different and wider scope of inquiry: It examines the actors and factors that contributed to the discovery of the ECHR in Belgium by relying on the oral history accounts of, mostly, lawyers who played an active role in constructing the cases that reached Strasbourg in the 1960s, 1970s, and 1980s.[15]

The second set of relevant works are "anthropologically informed"[16] analyses of the ECtHR case law. In a recent chapter on methods, Marie-Bénédicte Dembour identifies four mottos that, in her opinion, are at the core of the anthropological method and define her approach to analyzing the ECtHR case law: (i) "aim at establishing how the small nitty-gritty stuff of social life connects with the big picture"; (ii) "pay attention to the gap between theory and practice"; (iii) "be aware of power relationships and their framing and silencing effects"; and (iv) "do not stop at surface level; always dig deeper."[17] By applying the anthropological method to the specific case of *M.S.S. v. Belgium and Greece*, Dembour casts new light on the Grand Chamber's judgment, where the conditions of detention and subsistence of the applicant asylum seeker—who had been expelled under the Dublin Regulation—were found to violate Article 3 (prohibition of torture, inhuman and degrading treatment or punishment) alone and in conjunction with Article 13 ECHR (right to an effective remedy).[18] Instead of representing a great victory for migrants' rights, she reads *M.S.S.* as "showing how absolutely terrible conditions must be met before the Court finds it within itself to intervene on issues related to migration."[19]

Analyses of ECtHR case law can be anthropologically informed in a variety of ways.[20] They do not need to be based on ethnography and might derive their anthropological quality from their "empirical character, attention to connections, context and the unsaid."[21] "Going beyond judgments" can be seen as one of the many ways of developing an anthropologically informed analysis of the ECtHR case law. As the following sections illustrate, it entails approaching the case law with

[10]Michael D. Goldhaber, A People's History of the European Court of Human Rights (2007).

[11]*Id.* at 9.

[12]Laurens Lavrysen, "*Strasbourg Was Something New, It Was an Adventure": A History of the Belgian Cases Before the European Court of Human Rights in the 1960s, 1970s and 1980s*, 86 Leg. Hist. Rev. 482 (2018).

[13]Paul Johnson, Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights (2016). For other examples of oral history research on the Court, *see* Wibo van Rossum, *The Roots of Dutch Strategic Human Rights Litigation, Comparing "Engel" to "SGP," in* Equality and Human Rights: Nothing But Trouble? 387 (Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt eds., 2015); Mikael Rask Madsen, La Genèse De L'europe Des Droits De L'homme (2010).

[14]Johnson, *supra* note 13, at 4.

[15]Lavrysen, *supra* note 12, at 489.

[16]Dembour, *supra* note 2, at 236.

[17]*Id.* at 230–234.

[18]*M.S.S. v. Belgium and Greece* [GC], App. No. 30696/09 (Jan. 21, 2011), https://hudoc.echr.coe.int/fre?i=001-103050.

[19]Dembour, *supra* note 2, at 243.

[20]In addition to Dembour's scholarship, see Jessica Greenberg, *Counterpedagogy, Sovereignty, and Migration at the European Court of Human Rights,* 46(2) L. Soc. Inq. 518 (2021); Moritz Baumgärtel, Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability (2019).

[21]Dembour, *supra* note 2, at 233.

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an open mind and building on empirical data as the starting point of the inquiry. By shedding light on the origins and reconstructing the context from which a legal case arises, "going beyond judgments" puts the researcher in a position to identify what was taken forward and what was left behind and, as such, what remains unsaid, unacknowledged, and undiscussed. In doing so, this approach shows that personal stories and narratives are part of judicial scrutiny—even if eventually marginalized in legal reasoning and scholarship—and, as a consequence, considers them as an object of study.

B. Anthropology's Conceptual Contributions

This section highlights two main conceptual contributions that anthropology brings to the study of ECtHR case law: (i) a broad and loose understanding of what (case)law is and, as a consequence, of who or what takes part in its creation; and (ii) a special emphasis on the insider's and, more specifically, on the applicant's perspective.

"Going beyond judgments" is premised on a dynamic and plural conception of "law." Law is understood as being constantly created and recreated by social and legal agents who shape it according to their interests, worldviews, and relative power within the legal field.[22] In the more specific context of litigation, legal provisions are never limited to a single, clear-cut interpretation and application, and judges are not machines; rather, they undertake their interpretive tasks under the influence of their personal and social circumstances. Moreover, as Dembour put it, "no judgment exists in a *social* vacuum."[23] Apart from legal arguments, judgments are made on the basis of all the "personal and social actions" that made it possible for the case to surface and, for the purposes of this Article, to reach Strasbourg. Case law is therefore made in a social field that goes far beyond the judiciary.[24]

A judgment—and more broadly a court's jurisprudence—is much more than an exercise in judicial craft; it is the outcome of socio-cultural-legal processes of production shaped by a vast array of human experiences with law. Lawyers, law clerks, and law enforcements officials, among other legal professionals, as well as lay people, *in primis* the applicants, contribute to defining the contours of (case) law by applying, interpreting, challenging, accepting, and invoking the ECHR in their professional and everyday lives. In Yngvesson's words, it is through the exchanges and interactions between professionals and lay citizens that "'cases' are constituted, as everyday acts and spaces are transformed into legal ones" and, at the same time, the court and the law are formed.[25] To be able to grasp the "richness of the human experience"[26] underlying litigation, therefore, the Strasbourg case law is to be approached as a complex "plural legal configuration,"[27] where a multiplicity of formal and informal norms, practices, and narratives overlap in time and space.

The second, and related, conceptual contribution of anthropology to the study of the ECtHR case law is the special attention that anthropology pays to the points of view of those directly concerned. An enduring feature of anthropological research is the effort to understand a society or a setting from the inside, from the perspective of its own members. This is typically pursued through ethnography, in which the researcher "immerses her or himself in a social field, setting, or arrangement in order to comprehend the actors' social relations, their practices, and their

[22]Daphna Hacker, Legalized Families In The Era Of Bordered Globalization 65 (2017).

[23]Marie-Bénédicte Dembour, *What It Takes to Have a Case: The Backstage Story of Muskhadzhiyeva v. Belgium (Illegality of Children's Immigration Detention)*, *in* Preventing and Sanctioning Hindrances To the Right of Individual Petition Before the European Court of Human Rights 75 (Elisabeth Lambert Abdelgawad ed., 2011)

[24]Hacker, *supra* note 22.

[25]Barbara Yngvesson, Virtous Citizens, Disruptive Subjects: Order And Complaint In A New England Court 11 (1993).

[26]Lavrysen, *supra* note 12, at 547.

[27]Keebet von Benda-Beckman & Bertram Turner, *Legal Pluralism, Social Theory, and the State*, 50(3) J. Leg. Plur. Unoff. L. 255 (2018).

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representations of themselves and the world."[28] This immersion entails giving voice to people, observing what they do, and interacting with them, and it is essential to accomplishing anthropology's "task of ascertaining facts about a real world," of addressing what "is."[29]

In the study of disputes, the anthropological emphasis on the insider's perspective has meant shifting the attention "away from the legal system itself towards the people who have to use it."[30] The focus is not on a formalized legal system, but rather on people's interactions and,[31] more specifically, on how rule-takers—as opposed to rule-makers—behave in the context of a dispute. More specifically, the "litigant's perspective," which anthropologists have pioneered, entails considering the applicant's wider goals pursued through litigation; what kind of support they sought and obtained; the reasons for bringing their case before a specific court; and the "tactics" they adopted before that court.[32]

This special attention to the litigant's experience and, more generally, to the various agents and steps that make the choreography of litigation also feeds into the plural understandings of what impact(s) a judgment may have. As argued by Greenberg, assessing the impact of case law entails "looking not only at judgments and at execution," but also at the more nuanced consequences that the aftermath may reveal.[33] If one roots the analysis in the applicant's perspective, what an "effectiveness approach"[34] – that compares the content of a judgment and the following state of legal affairs – can tell us about the impact of case law is of limited relevance because the basic question "what have been the consequences of litigation for the applicant's everyday life?" remains unaddressed.

Legal scholars have tended to focus on judicial behavior, thus obscuring this other important area of action in litigation, that is, the individual who is subject to the law as a litigant.[35] In the more specific domain of human rights, conventional scholarship has often treated applicants as "shadow images" and attributed the role of "real actors" to lawmakers, judges, politicians, bureaucrats, and organizations.[36] The real-life struggles that individual applicants have had and continue to face for the realization of their rights generally find little space in legal commentaries. With regard to the Strasbourg case law, the widespread absence of a "litigant's perspective" is particularly surprising. As argued by former Judge Lemmens, the establishment of the ECtHR triggered a "revolution in international law:" The individual came to take a central position in the international legal order.[37] The right of individual petition represents the core of the Convention system, the "Crown jewel of the Convention,"[38] the "motor of the enforcement machinery under the Convention."[39] It follows that, "it is, first and foremost, the experience of

[28]Jonas Bens & Larissa Vetters, *Ethnographic Legal Studies: Reconnecting Anthropological and Sociological Traditions*, 50(3) J. Leg. Plur. Unoff. L. 239, 240 (2018).

[29]James M. Donovan And H. Edwin Anderson III, Anthropology And Law 31 (2003).

[30]Simon Roberts, *Law and the Study of Social Control in Small-Scale Societies*, 39 Mod. L. Rev. 663, 679 (1976).

[31]Laura Nader & Barbara Yngvesson, *On Studying the Ethnography of Law and Its Consequences*, *in* Handbook Of Social And Cultural Anthropology (John Joseph Honigmann ed., 1973).

[32]Roberts, *supra* note 30, at 676.

[33]Greenberg, *supra* note 20, at 518.

[34]Keebet von Benda-Beckmann, *The Social Significance of Minangkabau State Court Decisions,* 23 J. Leg. Plur. Unoff. L. 1, 2 (1985).

[35]Roberts, *supra* note 30, at 678.

[36]Hans-Otto Sano & Hatla Thelle, *The Need for Evidence-based Human Rights Research*, *in* Methods of Human Rights Research 91 (Fons Coomans, Fred Grünfeld & Menno T. Kamminga eds., 2009).

[37]Paul Lemmens, *The ECHR and European Court of Human Rights: Ready for the Next 70 Years?*, Youtube, https://www.youtube.com/watch?v=MTfGUVRIaEU (at 8:20).

[38]Jonas Christoffersen, *Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?*, *in* The European Court of Human Rights Between Law and Politics 182 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

[39]Ed Bates, The Evolution of the European Convention on Human Rights—From Its Inception To the Creation of A Permanent Court of Human Rights 149 (2010).

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individual applicants that is the foundation of Strasbourg litigation."[40] Moreover, as the Court itself acknowledges, its "primary" duty consists in deciding each application on a case-by-case basis with the purpose of "provid(ing) individual relief" to those affected.[41] "Acting as a safeguard for individuals whose rights and freedoms are not secured at the national level" is therefore one—if not the main—role that the Court has been set up to fulfill, at least on paper.[42] Against this background, gaining knowledge about the applicant's experience as well as the impact that "going to Strasbourg" can have on their lives assumes a special relevance and value.

C. Anthropology's Methodological Contributions

The conceptual contributions of anthropology, as described in the preceding section, are also unavoidably reflected in the methodological approach that characterizes "going beyond judgments." Both its temporal and spatial components are indeed operationalized through the integration of anthropologically informed methods in the analysis of case law. While the temporal component entails reconstructing the development of a case from its origins to the present, spatially, "going beyond judgments" has to do with expanding data collection to include elements and sources generally overlooked in legal commentaries.

Legal scholars have mostly been prepared to consider only "the narrow 'slice'" represented by court proceedings[43] in their case-law analyses. However, if we adopt a broad and plural conception of law and understand litigation as process,[44] the scope of the inquiry has to be widened to include, *inter alia*, the genesis of the dispute and the state of affairs following the ruling. Traveling through litigation, in turn, can be realized by drawing on the extended case method (hereinafter, ECM). While it has changed and developed over time and is not an exclusively anthropological method, the ECM preserves a set of distinguishing features that make it particularly apt for anthropological research. First, as suggested by the name itself, this method deals with a series of events involving a specific set of agents over quite a long period of time.[45] The events described may start years before the researcher was in the field, continue while they are in the field, and will no doubt carry on after the researcher leaves.[46] The second characteristic of the ECM is, therefore, its "non-rapidity:" It is not "a 'hit and run' method of data collection or analysis."[47] It requires in-depth observation of human interactions, dynamics, choices, and events to understand a phenomenon through concrete cases. Third, and most importantly, the ECM pursues the aim of "extracting the general from the unique, to move from the 'micro' to the 'macro'."[48] In addition to enabling extensive documentation and reconstruction of a concrete case from its outset to the present, the ECM allows the researcher to think more holistically and establish how that particular case connects with the bigger picture.

In the context of the ECtHR case law, therefore, adopting the ECM has two interrelated benefits: First, it allows the researcher to dig deeper into a case to provide an image which may be different from the one generally projected by legal scholarship; second, it connects a single, specific case with the broader case law and approach of the Court in a given field or even more widely. In

[40]Johnson, *supra* note 13, at 175.

[41]*Konstantin Markin v. Russia* [GC], App No. 30078/06, ¶ 89 (Mar. 22, 2012), https://hudoc.echr.coe.int/ukr?i=001-109868.

[42]High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, ¶35(c), (Apr. 19–20, 2012), https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

[43]Roberts, *supra* note 30, at 676.

[44]*See supra* part B.

[45]James Clyde Mitchell, *Case and Situation Analysis*, 31(2) Sociol. Rev. 150, 192 (1983).

[46]*Id.*

[47]Data D. Barata, *Extended Case Method*, *in* Encyclopedia of Case Study Research 375 (Albert J. Mills, Gabrielle Durepos & Elden Wiebe eds., 2010).

[48]Michael Burawoy, *The Extended Case Method*, 16(1) Sociol. Theory 4, 5 (1998).

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other words, it invites comparison and allows the researcher to "reveal unexpected patterns, as well as discontinuities"[49] that could not be spotted if the focus was on "the narrow 'slice'" of court proceedings and on a single case in isolation.

This reconstruction is undertaken by using a variety of data sources that go well beyond the text of the judgment and putting them into conversation with one another. These sources may encompass any or all of the following: Other legal materials, such as legislation, court files, administrative guidelines, and legal scholarship; non-legal materials, including personal testimonies, media reports, and anthropological scholarship; and in-depth interviews conducted with agents involved in the litigation, such as applicants, legal representatives, judges and court personnel, NGO representatives, and third-party interveners. Interviews, in particular, provide unique insights into the context and circumstances out of which litigation emerges, as well as the motivations and aspirations of the agents who mobilized, applied, and interpreted the ECHR. Through interviews, the researcher therefore learns not only about events, but especially about the meanings given to events by the agents concerned. Reading across texts and perspectives deepens and broadens the understanding of a case and makes it possible to reconstruct litigation as a series of *experiences*—as opposed to abstracted facts—not always conducive to unitary and convergent narratives.

D. A Concrete Illustration: Rereading *Neulinger and Shuruk v. Switzerland*

As a concrete illustration of how "going beyond judgments" may be put into practice, this section focuses on the specific case of *Neulinger and Shuruk v. Switzerland*. Taking a self-reflective attitude, I will guide the reader along my intellectual path and choices, explaining and demonstrating what an anthropologically informed analysis of the case may involve and generate. Due to length constraints, certain aspects introduced in sections B and C will be given more attention than others. For the most part, the emphasis will be placed on the value of reading the text of the judgment against the context and life stories it comes from and treating personal testimonies as core data.

I. Neulinger and Shuruk v. Switzerland*: Setting the Scene*

In the case of *Neulinger and Shuruk v. Switzerland*, the first applicant, Isabelle Neulinger, was found to have abducted her child, Noam Shuruk, the second applicant, from Israel and taken him to Switzerland. The Court had to decide whether the child's return to Israel—pursuant to the Hague Convention on the Civil Aspects of International Child Abduction—would breach the right to respect for family life of the two applicants. While the Chamber ruled in favor of the Swiss government, the Grand Chamber found that enforcement of the return order would amount to a violation of Article 8 of the ECHR. This decision was received by most legal scholars as signaling a change of direction in the ECtHR case law on international child abduction and, more problematically, as undermining the aims and the functioning of the Hague Convention.[50] While in earlier case law, evidence of grave risk of

[49]Fernanda Pirie, *Sociology of Law and Legal Anthropology*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF LAW 51 (Jiri Pribán ed., 2020).

[50]Lara Walker, *The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of Neulinger*, 6 J. PRIV. INT. L. 649 (2010); Helen Keller & Corina Heri, *Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights*, 84 NORD. J. INT. L. 270 (2015); Linda Silberman, *The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – Abbott, Neulinger, Zarraga*, 63 OKLA. L. REV. 733, 742 (2011); Victoria Stephens & Nigel Lowe, *Children's Welfare and Human Rights Under the 1980 Hague Abduction Convention – The Ruling Re E*, 34(1) J. SOC. WELF. FAM. LAW 125, 133 (2012); *but see* Jean-Paul Costa, *The Best Interests of the Child in the Recent Case-law of the European Court of Human Rights*, *in* FRANCO-BRITISH-IRISH COLLOQUE ON FAMILY LAW (May 14, 2011), https://www.echr.coe.int/Documents/Speech_20110514_Costa_Dublin_FRA.pdf.

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harm (Article 13b of the Hague Convention) represented the yardstick to determine whether a child could be returned, the Grand Chamber's judgment in *Neulinger and Shuruk* placed states under the (extra) obligation to examine the merits of the case in depth before returning an abducted child.[51]

This judgment was therefore widely criticized by legal scholars for requiring national authorities to depart from the logic of the Hague Convention, which envisages the abducted child's prompt return to the country of habitual residence and a restrictive interpretation of the permitted exceptions (Article 13b), and to undertake a thorough assessment of the merits of the situation, to the detriment of the great procedural expedience required by the Hague Convention.[52] Related to this criticism, the Grand Chamber's decision in *Neulinger and Shuruk* is also well known for the detailed consideration given to the principle of the child's best interests, and—as former ECtHR judge Jean-Paul Costa put it—it remains, at least within the Court's practice, a "leading authority" on this point.[53] This is confirmed by the frequent citations this judgment consistently attracts in the ECtHR case law on Article 8 well beyond the context of international child abduction.

I became particularly intrigued by this case not immediately after it was decided, but in 2018, after reading a blog post entitled *Justice from the Perspective of the Applicant: Meeting Ms. Neulinger*.[54] In this blog post, Simona Florescu shares some aspects of the first applicant's experience at the Court, which she collected during a conversation with her. A point raised by Florescu that I found particularly interesting was the fact that, regardless of Isabelle's success in stopping the enforcement of the domestic judgments ordering the return of her son to Israel, "she is still an abductor who wrongfully removed her son" according to both Switzerland and Israel.[55] This specific point and, more broadly, the gap that this point seems to hint at between legal victory on paper and the concrete effects of the ECtHR judgment in the applicant's life, pushed me to dig deeper into the case. I did a bit of online research on the applicant and discovered that she had written an entire book about her story, entitled *Jamais vous n'aurez mon fils! Le combat d'une mère pour sauver son fils de l'emprise de religieux intégristes*.[56] I ordered and read the book all in one breath. I also contacted the ECHR archives to get hold of the whole case file, traced all correspondence between the Court and the parties, ordered the various submissions chronologically to reconstruct the flow of events, and carefully read all documents. I listened to the hearing of the Grand Chamber, available on the Court's website, and—only after extensive desk-based research, when I felt really familiar with the facts of the case—I reached out to some of the agents of litigation and spoke to the applicant, Isabelle Neulinger,[57] her legal representatives before the ECtHR (Alain and Patricia Lestourneaud) and in national proceedings (Marc-Etienne Favre), and two former ECtHR judges. In the early months of 2020, I had the pleasure of discussing—either in person or online—their involvement in the case *Neulinger and Shuruk*.[58] Another voice I had access to—albeit indirectly—is that of the father, Shai Shuruk, who was authorized to act as a third party in the ECtHR proceedings and was represented by Moshe Zingel.

This immersion led me to analyze the case from a different, previously underexplored angle in legal scholarship. In particular, it enabled me to see the religious dimension of *Neulinger and*

[51]Keller & Heri, *supra* note 50, at 281; Walker, *supra* note 50, at 649. The crucial passage of the Grand Chamber's judgment is ¶ 139.

[52]The Court itself addressed this line of criticism in subsequent case law regarding international child abduction. *See, e.g.*, *X. v. Latvia*, App. No. 27853/09 (Dec. 13, 2011).

[53]Costa, *supra* note 50, at 2.

[54]Simona Florescu, *Justice From the Perspective of the Applicant: Meeting Ms. Neulinger*, Strasbourg Observers (Nov. 12, 2018), https://strasbourgobservers.com/2018/11/12/justice-from-the-perspective-of-an-applicant-meeting-ms-neulinger/.

[55]*Id.*

[56]Isabelle Neulinger, Jamais Vous N'aurez Mon Fils! Le Combat D'une Mère Pour Sauver Son Fils De L'emprise De Religieux Intégristes (2011).

[57]I wish to thank Prof. Gian Paolo Romano (University of Geneva) for putting me in contact with her.

[58]Some excerpts from my interviews with Isabelle have been reproduced in the following reconstruction with her informed consent.

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Shuruk, which, despite being so factually and substantially central to the case, has been lost in the Strasbourg meanderings. Before exploring how the case evolved, some clarifications are needed. For the purposes of the current reconstruction, I draw mostly from the applicant's book and my exchanges with her. This means that much of the data collected through other interviews is not directly incorporated in the following account. The prominence of Isabelle's voice should not be understood as my taking sides in the dispute or supporting a specific agenda, but rather as the consequence of, first, a conscious methodological choice and, second, availability of sources. As explained in Parts B and C, one of the scholarly moves pursued by the "going beyond judgments" approach is to bring applicants back into the frame in light of their foundational role and the Court's primary duty to deliver individual justice. Moreover, as the main applicant, Isabelle's submissions constitute the largest part of the case file. Shai was authorized to act as a third party, but his submissions are significantly smaller in length as well as in number. Moreover, while I had direct access to Isabelle's personal testimony through her book as well as through interviewing her, the same exposure to Shai's perceptions and experiences has not yet been possible.

II. Neulinger and Shuruk v. Switzerland *Before Arriving in Strasbourg*

This section reconstructs the *status quo* preceding the legal dispute that ultimately reached the ECtHR. To this end, it includes a detailed account of some critical aspects of the applicants' lives, primarily taken from Isabelle's book *Jamais vous n'aurez mon fils!* and confirmed by her during our conversations.[59] The style of the following paragraphs is purposefully narrative. As explained above, one of the key methodological moves characterizing "going beyond judgments" is to give voice to the people involved, especially to the applicant. The narrative form is particularly suitable to operationalize this aspect, as it creates space for acknowledging the lived experience of the applicants and captures how Isabelle tells her own story. As Constable has compellingly argued, attending carefully to language is important for understanding law:[60] "Neither law nor justice is simply what lawyers and judges say nor even what officials and scholars more broadly claim they are."[61] Rather, justice today depends on how claims and counterclaims are said and unsaid, heard and unheard in the name of the law.[62] The power of narrative has also forcefully emerged from a wide range of feminist judging projects that emphasize how critical presenting the facts of a case *as a story* can be to the legal reasoning and outcome.[63] Judges exercise enormous power when constructing and relaying the facts of a case.[64] "By listening to narratives, contextualizing disputes, and utilizing knowledge acquired through life experiences,"[65] the individual applicants are placed at the center of legal analysis and the effects of the law on them become apparent. Narrative may therefore be used as a "method of subverting and disrupting the dominant legal discourse."[66] As such, telling silenced, untold, or overlooked stories "can and do[es] effectuate (gender) justice

[59]The book is written in French. All translations are mine and have been approved by Isabelle.

[60]Marianne Constable, Our Word Is Our Bond: How Legal Speech Acts 4 (2014).

[61]*Id.* at 15.

[62]*Id.* at 132.

[63]Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, *in* Feminist Judgments: Rewritten Opinions of the United States Supreme Court 15 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

[64]Rosemary Hunter, Māmaru Stephens, Elisabeth McDonald & Rhonda Powell, *Introducing the Feminist and Mana Wahine Judgments*, *in* Feminist Judgments Of Aotearoa New Zealand – Re Tino: A Two-Stranded Rope 35 (Elisabeth McDonald, Rgonda Powell, Māmari Stephens & Rosemary Hunter, eds. 2017).

[65]Berta Esperanza Hernández-Truyol, *Talking Back: From Feminist History and Theory to Feminist Legal Methods and Judgments*, *in* Feminist Judgments: Rewritten Opinions of the United States Supreme Court 46 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).

[66]Stanchi, Berger & Crawford, *supra* note 63, at 16.

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change by empowering people, changing perspectives, opening up new learning, and affecting future legal and nonlegal outcomes."[67]

Isabelle was born and raised in Belgium. Like many of her friends belonging to the Jewish communities of Brussels and Antwerp, she attended a secular school and grew up in a pluralist environment while remaining very attached to her Jewish identity.[68] She moved to Switzerland for work, and there she married a man who, unfortunately, died at a young age. After a short vacation in Eilat, Israel, with her cousin, Isabelle has what she calls "the revelation":[69] Israel is where she wants to continue her life.[70] To prepare for the move, she met the rabbi of the Israelite community of Lausanne, who supported Isabelle in her plan and provided her with a proof of "Jewish heritage" necessary to migrate to Israel.[71] After obtaining her visa from the Israeli consulate, she was finally able to move to Israel in October 1999.

A few months later, she met Shai who, after dating for a while, organized a surprise, intimate wedding on the day of *Lag Ba'Omer*, an annual Jewish festival.[72] Upon Isabelle's wish, they formalized their union before a rabbi.[73] Shai, who had been raised in a secular family and had never been to a synagogue before,[74] became more and more a practicing Jew and asked Isabelle to study and observe the laws of family purity.[75] After a miscarriage, Isabelle was pregnant again and, in 2003, Noam was born after a long labor and in the absence of his father.[76] When Shai arrived at the hospital, he avoided any physical contact with Isabelle; he considered her impure until the postpartum bleeding ended.[77] During a trip to visit her family in Europe, the reality of the situation smacked Isabelle in the face: Shai had changed. The funny, open, and secular professor of physical education who had seduced her now lived only by and for the *Halakha*—the Jewish religious law.[78] When Isabelle's maternity leave came to an end, Shai became a stay-at-home father—as they had agreed before Noam's birth.[79] It was around that time that Shai joins the ultra-Orthodox Jewish Lubavitch movement. He spent his days at a rabbi's, praying and studying the Torah, with Noam, while Isabelle went to work. He became more and more controlling and imposed a radical lifestyle on Noam and Isabelle, until she reached the point where she felt that she "must leave that man, at the cost of losing her identity."[80]

This is the point where Isabelle's and Noam's life experiences become relevant for the law. Fearing that Shai could take Noam to a Lubavitch community abroad, Isabelle applied to the Tel Aviv Family Court to forbid Noam's removal from the country. Only when she received the court's "Stop Exit Order" did she realize that it would last until Noam turned eighteen.[81] As an interim measure, she was given temporary custody of Noam, and Shai maintained visitation rights.[82] In point of fact, Shai, Isabelle, and Noam continued to live under the same roof as Shai refused to leave. In the meantime, Isabelle learned that she was pregnant again. She wanted to have an abortion, but Shai disapproved. Following a report by social services, the family court awarded

[67]Margaret E. Johnson, *Feminist Judgments & #MeToo*, 94 NOTRE DAME L. REV. 51 (2018). The brackets around "gender" are my own addition to convey the idea that the power of narrative applies well beyond the domain of gender justice.

[68]NEULINGER, *supra* note 56, at 19.

[69]*Id.* at 23.

[70]*Id.* at 25.

[71]*Id.* at 29.

[72]*Id.* at 77–81.

[73]*Id.* at 87–92.

[74]*Id.* at 94.

[75]*Id.* at 101.

[76]*Id.* at 120.

[77]*Id.* at 121.

[78]*Id.* at 124.

[79]*Id.* at 127.

[80]*Id.* at 138.

[81]*Id.* at 144.

[82]*Id.* at 145.

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Isabelle permanent custody and ordered Shai to pay child maintenance, which he never paid.[83] When Isabelle told social services about "the climate of terror that [she] experience[s] in [her] daily life, under threat and harassment,"[84] they officially recommended a separation and prohibited Shai from taking Noam with him for long hours at the synagogue or while he was proselytizing and collecting funds for the Lubavitch community on the streets.[85] When Shai received the letter from social services, he threatened to kill Isabelle. The family judge issued a restraining order, prohibiting Shai from entering or even approaching Noam's daycare center and the apartment where Isabelle and Noam continued to live. The next morning, Shai left the apartment and, a few months later, granted Isabelle a *get*. They were now officially divorced, yet, as Isabelle writes in her book, "the most complex things are still to come."[86]

As the above account suggests—and will be confirmed by Isabelle's submissions before the ECtHR—the source of what will then become *Neulinger and Shuruk v. Switzerland* is a parental disagreement over the child's religious upbringing. As Isabelle writes, she feared Shai would never leave them alone even after the divorce. She was sure she would not be able to raise Noam as a happy child in Israel, because they would never be able to get away from the fanaticism of his father.[87] If Shai was ready to take Noam proselytizing and fundraising when he was a baby, she asks herself:

> What would then happen when Noam is able to read and write? Where will Shai take him? Will he force him to join the Lubavitch? . . . Will Noam be forced to drop out from the state school system to pray and study the Torah? Shai had already made her aware that he would be intransigent about Noam's upbringing and that her life will be hell if she does not raise their son in complete respect of Jewish law and tradition.[88]

Parental choices affecting the daily life and the upbringing of Noam were therefore at the crux of the personal dispute and, as explained in the following section, religious freedom will also form part of Isabelle's legal claims.

It was almost spring, and Isabelle wanted to go visit her family in Switzerland. She sought the court's permission to leave the country with Noam, but her request was rejected. Isabelle is *de facto* hostage in Israel.[89] She had no choice—she must flee.[90] In the meantime, Shai made his first official request to the social services: He wanted Noam to attend a religious daycare center.[91] With the help of a smuggler, Isabelle and Noam crossed the Israeli border at Taba by car and arrived in Egypt, where they then boarded a flight from Sharm el Sheik to Geneva.

This is the moment where what Isabelle calls "the fight" starts.[92] In June 2006, Shai started proceedings for the return of his son to Israel in accordance with the Hague Convention. In August 2006, the Justice of the Peace of the district of Lausanne rejected Shai's request on the grounds that there was a grave risk that Noam's return to Israel would expose him "not only to physical but especially psychological harm and would place him in such an intolerable situation to compromise his development and the protection of his interests."[93] This decision was upheld in

[83]*Id.* at 148.
[84]*Id.* at 152.
[85]*Id.*
[86]*Id.* at 157.
[87]*Id.*
[88]*Id.* at 158.
[89]Email exchange between the author and Isabelle, June 21, 2022 (on file with the author).
[90]NEULINGER, *supra* note 56, at 159.
[91]*Id.* at 160.
[92]*Id.* at 178.
[93]Application of Ms. Neulinger to the ECtHR (Sept. 25, 2007), at 7 (all documents in the case file were made available by the Court through https://app.echr.coe.int/Contact/EchrContactForm/English/1). This excerpt from the Justice of the Peace's decision is also included in the text of the Chamber's judgment (¶ 28) as well as in the Grand Chamber's judgment (¶ 36).

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May 2007 by the Vaud Cantonal Court, which considered Noam's case an exception to the principle of prompt return in accordance with Article 13(b) of the Hague Convention. However, the Swiss Federal Court ruled that there was no obstacle to Isabelle's return to Israel and that Noam would not be exposed to any grave risk of harm if he returned with his mother. Isabelle was therefore to return Noam to Israel by the end of September (2007) that is, six weeks after the hearing before the Federal Court. The return order confronted Isabelle with "an impossible choice": The Swiss federal judges made her understand that if she is a good mother, she will accompany her child back to Israel. But returning to Israel means entering the lion's den and being prosecuted and jailed for likely many years.[94]

It was September fourth, and what Isabelle calls a "miracle" happened: She was introduced to Alain Lestourneaud, a French lawyer who suggested that she brings her case the ECtHR.[95] On September twenty-fifth, 2007, Isabelle lodged an application with the ECtHR also on behalf of Noam. Two days later, the Court indicated interim measures to the government in accordance with Rule 39 of its Rules of Court, and the enforcement of the Swiss judgment was therefore suspended pending the outcome of the proceedings before the ECtHR. Noam would remain in Switzerland, but the most difficult part was yet to come. As Alain Lestourneaud explained to Isabelle, they would have to persuade the Court to revise its strict jurisprudence on the issue of returning children illegally removed from their country of origin, and especially to take the best interests of the child—her child—into account.[96]

III. *Neulinger and Shuruk Arrives in Strasbourg*

The case arrives in Strasbourg with its original context still intact. The applicants open their *exposé des faits* by introducing Isabelle as Jewish.[97] Shai is described as also being Jewish and, since 2003, a member of the Jewish ultra-orthodox Lubavitch movement. The Lubavitch—so the applicants explain—is a "radical movement ... practicing an intense proselytism" and requiring women to cover their hair and boys to be sent to religious schools called *Heder* from the age of three.[98] As the first applicant made clear from the beginning, her reasons for fleeing Israel with Noam and, therefore, the source of the dispute have to do precisely with this: "It was the changed behavior of Shai, as well as his new and sudden radical religious demands imposed on Isabelle and Noam" that triggered the major tension between them and serious marital difficulties.[99] Apart from the source of the dispute, the applicants also introduce the religious freedom dimension of the case. They argue that the implementation of the return order would breach their right to respect for private and family life, Article 8 ECHR, taken separately and in conjunction with Articles 3 and 9 ECHR. In particular, they argue, enforcing Noam's departure without his mother would constitute inhumane treatment of both mother and child, in breach of Article 3, as well as a violation of Article 9 ECHR, freedom of religion, since "the father, as he had himself acknowledged, would then immediately and unilaterally subject his son to the precepts of the religious ultra-orthodox community Lubavitch, from which the applicant wishes to distance their child" at least until Noam is of age and able to decide for himself.[100]

The factual and substantial centrality of the religious freedom dimension can also be inferred from the text of the father's first submission as a third party. First, he condemns the applicant's description of the Lubavitch movement as "false," describing it more positively as promoting

[94]NEULINGER, *supra* note 56, at 210.
[95]*Id.* at 211.
[96]*Id.* at 217.
[97]Application of Ms. Neulinger, *supra* note 93, at 3. The text of the application and following submissions is in French. All translations are mine and approved by Isabelle.
[98]*Id.*
[99]*Id.* This claim was reiterated in Submission by Alain Lestourneaud on behalf of Ms. Neulinger (Mar. 3, 2008), at 4.
[100]Application of Ms. Neulinger, *supra* note 93, at 13.

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"learning, spirituality, giving and sharing, and doing good deeds."[101] Second, he considers Isabelle's reliance on Article 9 to be "not only misplaced, ... but also cynical and ironic" because—in his view—she "cannot represent ... her chosen lifestyle as superior to that of an observant Jew."[102] Third, as to the future education of Noam, Mr. Shuruk submits that Isabelle, being the residential parent, "can choose any education she prefers for the Minor, secular or otherwise."[103] However, during contact sessions, "he is, and should be, free to expose the Minor to his lifestyle and beliefs."[104]

Each parent's religious freedom and the religious upbringing of the child were, therefore, a central point of disagreement between them, and that is clearly reflected in their written submissions. Once within the ECtHR premises, however, this dimension gradually fades away and the case in general seems to lose most of the context it originated from. Through various steps—which will be explained in the following paragraphs—the case comes to assume an increasingly neutral framing. As the case progresses within the ECHR system—Chamber's assessment on admissibility; Chamber's ruling on Article 8; Grand Chamber's decision—the Court's attention shifts away from the source of the dispute as well as from the religious freedom dimension of the case. From being strongly imbued with religious considerations, *Neulinger and Shuruk* evolves into an "ordinary" case of international child abduction.[105]

This evolution occurs through various steps: First, the definition of the scope of the Court's review as limited to Article 8 ECHR; second, the Chamber's adoption of an abstract notion of the child's best interests; third, the passage of time and the Grand Chamber's majority selective scrutiny of Shai's ability to act as a "good father."

1. The Chamber's Detached Approach

Despite the applicants' attempt to bring in the religious freedom dimension by explicitly invoking Article 9, Section 1 of the ECHR, the Court considered only the complaint under Article 8 admissible. As concerns the other complaints, Articles 3 and 9, they were rejected on the grounds of non-exhaustion of national remedies because the applicants had failed to raise them—even in substance—before domestic courts.[106] This entailed only the *formal* exclusion of religious freedom from the scope of the Court's assessment.

The Court was nonetheless in the position of *substantially* addressing the religious freedom dimension of the case in the context of Article 8. This dimension is indeed present and prominent in the applicants' submissions, part of which are included by the Chamber in the text of the judgment. The applicants underlined the risk that Isabelle would be subject to a criminal sanction—most likely imprisonment—if she returned to Israel, and the major psychological trauma this would cause to Noam.[107] Due to the father's radical position, the applicants had also ruled out any possibility that Isabelle and Shai might agree on the religious upbringing of their child.[108] He had attempted to impose a radical lifestyle on his wife and child that would have included, for instance, requiring Isabelle to cover her hair and Noam to attend religious *Heder* schools starting at the age of three.[109] It was therefore her duty—so Isabelle argued—to remove her child from that "fanatical" environment.[110] According to the applicants, therefore, if returned to Israel, there was a

[101]Submission by Moshe Zingel on behalf of Mr. Shuruk (Feb. 7, 2008), at 4.
[102]*Id.* at 5.
[103]*Id* at 6.
[104]*Id.*
[105]"Ordinary" is to be intended as a case of child abduction where religious and cultural considerations are not at stake.
[106]*Neulinger and Shuruk v. Switzerland*, App. No. 41615/07 (Jan. 8, 2009), ¶ 101 https://hudoc.echr.coe.int/eng?i=003-2594667-2812114.
[107]*Id.* at ¶¶ 47–48.
[108]*Id.* at ¶ 52.
[109]*Id.*
[110]*Id.*

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great risk that Noam would be exposed to physical or psychological harm because of the following factors:

> [T]he father's conduct and death threats against the first applicant; the religious fanaticism that he publicly displayed; his desire to impose unilaterally on his infant son a lifestyle and an ultra-orthodox radical religious education with no regard for the child's interest or for the disagreement expressed by the mother; the arrest warrant issued against him in March 2005 for defaulting on maintenance payments; the restriction imposed on his right to visitation which had to be exercised under the supervision of social services as a result of his irresponsible behavior; and the ineffectiveness of the criminal complaint filed against him in Israel . . . , the proceedings having been discontinued.[111]

In its assessment, the Chamber started by holding that the child's removal to Switzerland had been wrongful: The father exercised—jointly with the mother—parental rights, which—according to Israeli law—also included the right to determine the child's residence.[112] Isabelle had therefore, according to the Hague Convention, committed an abduction and, as a consequence, the Swiss Federal Court's return order had a sufficient legal basis. Furthermore, the return order was considered to be in pursuit of a legitimate aim, namely the protection of the rights and freedoms of Noam and his father.[113] In addressing the allegations concerning death threats and religious fanaticism, the majority noted that several measures had been taken by the Israeli authorities to protect the applicants when they were still living in Israel: The prohibition against taking Noam out of Israel until the age of eighteen; the social services' order to live apart; the family court's order that Shai must stay away from Noam's daycare and their apartment, and could have only supervised contact with Noam.[114] Criminal proceedings against Shai were discontinued because of the applicant's departure, so the Chamber explains.[115] According to the Chamber, therefore, Israeli authorities had made the efforts to protect the applicants against "potentially fanatical and aggressive conduct on the part of the father."[116] Moreover, Noam, being almost six years old, was "still at a perfectly adaptable age."[117] The inconvenience that Isabelle and Noam would have faced if returned to Israel would have been—according to the Chamber—"largely the result of a decision taken unilaterally by the first applicant herself."[118] "There is no doubt", so the judges continued, "that it is in the best interests of every child to grow up in an environment that allows him or her to maintain regular contact with both parents."[119] It is therefore Isabelle's responsibility to reach an agreement with Shai about the child's religious upbringing, which is a matter for both parents.[120] There is no evidence—according to the Court—that Isabelle will not be able to influence Noam's religious education or that the Israeli authorities will be unable to prohibit the father from sending the child to a *Heder* school.[121] Hence, the Chamber found, by four votes to three, that implementing the return order would not breach Article 8.

[111] *Id.* ¶ 85.
[112] *Id.* at ¶ 80.
[113] *Id.* at ¶ 82.
[114] *Id.* at ¶ 86.
[115] *Id.*
[116] *Id.*
[117] *Id.* at ¶ 89.
[118] *Id.* at ¶ 91.
[119] *Id.*
[120] *Id.* at ¶¶ 91–92.
[121] *Id.* ¶ 92.

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As the above suggests, in spite of focusing on Article 8, the Chamber's reasoning accounted for the religious freedom dimension of the case, but in a rather detached and formalistic manner.[122] The Chamber—most likely unwittingly—seems to ignore or at least to significantly downsize many of the personal challenges Isabelle and Noam had to face, especially before fleeing. Much of their lived experience, as told in Isabelle's book and to some extent also in her submissions to the Court, is kept out of the judicial assessment. The Chamber's proportionality analysis appears driven by an abstract notion of the child's best interests as *a priori* growing up with contact to both parents, and its "mechanical" transposition in the specific case. Interestingly, therefore, the Chamber does, at the same time, address and sidestep the religious freedom dimension of the case. As a consequence of the Chamber's abstract notion of the child's best interests, *Neulinger and Shuruk* receives a further touch of neutrality and prepares itself for being adjudicated as an "ordinary" case of international child abduction.

2. The Grand Chamber's Decision: Further Shifting Away

The Chamber's decision, however, was not final. Upon the applicant's request, the case was referred to the Grand Chamber. Before the latter had heard and decided the case, both parties made further submissions, reiterating the central role of religion in their disagreement. In an attempt to counter the referral, the father praised the Chamber's decision for the "stability" it brings to the rule of law in Europe. Stability is, in his view, also a value at the core of the Chabad religious movement, which is a "legitimate movement," "accepted" and "famous all over the world."[123] In the summary of facts submitted on behalf of Isabelle, her legal representative found it important to emphasize once again that "the present case situates itself within a very particular religious context:" The father had joined the ultra-orthodox Lubavitch movement and tried to impose "radical" religious precepts on her and their child that are "incompatible with her secular beliefs and her status as a woman."[124] This aspect of the case, however, will remain unaddressed by the Grand Chamber.

In a vote of sixteen to one, the Grand Chamber found a violation of Article 8.[125] What proves decisive in overturning the previous ruling is the different weight attached to the best interests of the child, and specifically Noam's best interests, in the proportionality analysis. The Grand Chamber starts by explaining that the child's best interests comprise two aspects in particular: On the one hand, "it dictates that the child's ties with its family must be maintained" except in exceptional circumstances; on the other hand, it is also in the child's interest "to ensure its development in a sound environment."[126] The principle of the child's best interests is—so the Grand Chamber continues—also inherent in the Hague Convention and should be the primary consideration for competent authorities when examining whether, upon return, there would be a grave risk that the child would be exposed to physical or psychological harm.[127]

[122]The Chamber's non-contextual approach is a point raised also by Judge Steiner in her dissenting opinion, but in different terms. She writes that "the judgment addresses the central point of the case, namely its religious context, in a most summary manner." In her view, the Chamber's response displays "an excessive formalism and theoretical optimism" as it ignores the peculiarities of a legal system (the Israeli system) "whose principles in matters of family law, being inspired by traditional religious law . . . are sometimes significantly different from those with which we are familiar in Europe" and where disputes concerning family relationships are decided only before religious courts. For a critique of Judge Steiner's position as a manifestation of "cultural universalism," see Rhona Schuz, *The Relevance of Religious Law and Cultural Considerations in International Child Abduction Disputes*, 12 J. L. FAM. STUD. 453, 474 (2010).

[123]Letter from Shai Shuruk to the ECtHR (Aug. 6, 2009), at 2.

[124]Submission by Alain Lestourneaud on behalf of Ms. Neulinger (Aug. 12, 2009), at 4.

[125]*Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07 (July 6, 2010), ¶ 151 https://hudoc.echr.coe.int/FRE?i=001-99817.

[126]*Id.* at ¶ 135.

[127]*Id.* at ¶ 137.

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When applying these principles to the case of *Neulinger and Shuruk*, the Grand Chamber emphasizes the need to take into account new developments that had occurred in the case since the Swiss Federal Court's return order. In particular, they note that Noam, who has Swiss nationality, had arrived in Switzerland at the age of two and lived there ever since.[128] He had settled well into his new environment, attending a municipal secular daycare center and a state-approved private Jewish daycare center.[129] When the case was pending before the Grand Chamber, Noam was already in school and spoke French.[130] In light of these circumstances, even if—being seven years of age—he still had some ability for adaptation, "the fact of being uprooted again from his habitual environment" could not be considered beneficial.[131]

The Grand Chamber's concern was, therefore, to avoid disrupting solidified relationships and, more generally, a consolidated state of affairs. This is not novel. As argued by Uitz, it often happens that, by the time a case reaches an appeal court and even more so the ECtHR, the judicial decision becomes essentially concerned with "the emergence of a status quo and the costs (material and emotional) of altering it" as a result of the pending judgment.[132] The court's shifted attention, in turn, often means that "the religious liberty dimension quickly—and somewhat conveniently—fades away."[133] This applies to the case at hand, too, but with a caveat: The further into the ECHR machinery that the case progresses, the more the source of the dispute and the religious dimension of *Neulinger and Shuruk* is pushed to the peripheries of the judicial analysis. Yet, focusing more specifically on the Grand Chamber's reasoning, this shift was not only the product of Noam's development and integration becoming prevalent with the passage of time.

When imagining and reflecting on the long-term projections of the initial order to return Noam to Israel, the Grand Chamber expresses concerns about the ability of Shai to be a "good father" to Noam. Interestingly, however, the Court abstains from any consideration regarding the potential impact of the father's religiosity on Noam and rather focuses on his eventful marital life and his failure to financially provide for his children. In particular, it notes that Shai had remarried and, after a few months, left his new wife, who was pregnant.[134] He then married a third time.[135] His second wife had also initiated proceedings against him for failure to pay child maintenance.[136] The Grand Chamber doubts that "such circumstances . . . would be conducive to the child's well-being and development."[137] Furthermore, in the scenario where Isabelle would have to face imprisonment in Israel, the Grand Chamber has doubts as to the father's ability to take care of Noam, not only in light of "his past conduct and limited financial resources," but also considering that they had lost contact since Noam's departure.[138] In light of the above, the Court considers that Isabelle's and Noam's right to respect for private and family life would be breached if the return order were to be enforced.

As the above considerations indicate, it was not just the passage of time, but also Shai's noncompliance with certain features of "good fatherhood" that led the Grand Chamber to find a violation of Article 8. The central weight attached to this second element becomes even more evident when the judgment is read in light of the recording of the public hearing before the Grand

[128]*Id.* at ¶ 147.

[129]*Id.*

[130]*Id.*

[131]*Id.*

[132]Renata Uitz, *Rethinking Deschomets v. France: Reinforcing the Protection of Religious Liberty Through Personal Autonomy in Custody Dispute*, *in* Diversity and European Human Rights: Rewriting Judgments of the Echr 183 (Eva Brems ed., 2013).

[133]*Id.* at 184.

[134]*Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07 (July 6, 2010), ¶ 148 https://hudoc.echr.coe.int/FRE?i=001-99817.

[135]*Id.*

[136]*Id.*

[137]*Id.*

[138]*Id.* at ¶ 150.

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Chamber. After the pleadings of Isabelle's legal representatives and the government's agent, Mr. Schurmann, the judges were given the chance to ask questions to the parties. Some judges, in particular Judge Jočienė and Judge Malinverni, took this opportunity to dig deeper into some aspects of Shai's private life. Among other topics, Judge Jočienė inquired about the financial situation of Noam's father and whether he would be able to ensure his child's best interests.[139] Judge Malinverni required clarification regarding the remarriage(s) of Shai, which Patricia Lestourneaud had referred to in her pleading, and also asked whether, in the absence of Shai, there was a paternal figure in Noam's life. Judge Malinverni's concerns are then also reflected in the text of his concurring opinion, where he explicitly mentions "the discovery of the real personality of Noam's father," in combination with the passage of time, as the factors underlying his departure from the conclusion previously reached by the Chamber, where he had supported the conclusion that the Noam's return to Israel would not have violated the applicants' right to respect for family life.[140]

As Isabelle put it, while "the first judges (Chamber) never scratched the surface," the Grand Chamber's judges "went much deeper into the facts" and proved genuinely concerned with "the everyday aspects of the case."[141] Despite its willingness to do so, however, the Grand Chamber still preferred not to venture onto the uneasy terrain of religion. In other words, even when the father's profile was placed under scrutiny, his religiosity and the repercussions on the child's well-being and mother's rights did not occasion any explicit mention. The majority was able to make the argument that Shai was an unreliable and irresponsible father by focusing on the circumstances following the Chamber's ruling and staying on the safer terrain of divorce and child support. In other words, the Grand Chamber managed to focus its reasoning on the harm that returning to Israel would cause to Noam without referring to, and potentially discrediting, the father's religious beliefs and their potential impact on the child. After being sidestepped by the Chamber, therefore, the religious dimension of the case is—once and for all—excluded by the Grand Chamber.

IV. Neulinger and Shuruk after Strasbourg

The Strasbourg case law (and lack thereof) on religious freedom has attracted wide scholarly attention, and one recurring argument is that the Court has often tried to avoid directly addressing the "religious question."[142] For many decades, Article 9 ECHR appeared as if "it was going to be effectively a dead letter."[143] Up until 1989, the European Commission of Human Rights concluded "in almost all cases brought under Article 9 . . . that the facts at stake did not disclose any appearance of violation."[144] Applications were therefore held inadmissible and never reached the Court. Since the abolition of the Commission, all cases have gone directly to the Court. The Court has nonetheless shown "significant trepidation in deciding issues of religious freedom" and, for several

[139]Recording of the hearing before the Grand Chamber, available at https://echr.coe.int/Pages/home.aspx?p=hearings&w=4161507_07102009&language=lang.

[140]*Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07 (July 6, 2010), ¶ 4 https://hudoc.echr.coe.int/FRE?i=001-99817.

[141]Interview with Isabelle Neulinger, Lausanne Palace (Jan. 17, 2020).

[142]This argument has been made with respect to judges, more broadly. In the specific field of family law, see, for example, Merel Jonker, Mariëtte van der Hoven & Wendy Schrama, *Religion and Culture in Family & Law,* 12 (2) UTRECHT L. REV. 1, 5 (2016). *See also* Wibo van Rossum & Mariëtte van den Hoven, *Paucity and the Need for Value Sensitivity in Dealing with Youth Care: Why Legal and Youth Professionals Should Take Cultural and Religious Considerations Seriously*, 12(2) UTRECHT L. REV. 7 (2016).

[143]Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture*, 26 J. L. & RELIG. 321, 321 (2010).

[144]Julie Ringelheim, *Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 283 (Lorenzo Zucca & Camil Ungureanu eds., 2012).

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years, claims brought under Article 9 were consistently decided under other ECHR provisions.[145] Even if the case law under Article 9 has seen some progressive, active growth, especially over the last two decades,[146] the Court persists in its tendency to approach matters of religious freedom and diversity through the lens of other articles, certainly in the context of family life.

In the face of disputes arising from religious disagreements between the parents, the Court has manifested a strong preference for framing and settling the issue in terms of Article 8. In this context, Article 8 and the possibility of relying on a well-established body of jurisprudence pertaining to the less controversial area of child arrangements following separation/divorce represent, indeed, an easy way out. As a result of this approach, the religious freedom dimension of these cases has often been pushed to the margins of judicial analysis, not only formally but also substantially. In addition to not considering these cases under Article 9, the Court has also tended to approach them as "ordinary" parental disputes, denying religion any substantive influence in spite of its central factual relevance. As Uitz put it, by offering "a neutral frame of judicial analysis," the Court has often bypassed the kernel of the dispute."[147] This has resulted in, among other effects, giving—or reinforcing—the impression that a religious way of life is just "an accident or a *vis maior*," rather than "the result of conscious individual decisions about the good life" which are protected by the Convention.[148]

If read against this background, *Neulinger and Shuruk* comes across as a further manifestation of the abovementioned trend. As my reconstruction shows, the Court does indeed approach the case as a rather "ordinary" conflict within a family, leaving the deeper level—that is, the religious disagreement from which the conflict stemmed—off to the side or completely outside of the courtroom. In other words, the Court seems to strip religion from the story of Isabelle, Noam, and Shai to create an abstract and "ordinary" dispute, in line with the secularistic approach that characterizes the Court's broader case law. Nonetheless, if we are to consider the applicant's perspective on how the Court handled her case, the resulting image of the case is far more nuanced, and the contours more blurred, than the texts of the judgments would suggest.

Although she describes the religious dimension of the case as "crucial," Isabelle also acknowledged that, had the Court focused their reasoning on religious coercion, she would probably have felt "very uncomfortable toward her Judaism and Jews."[149] A judgment of this kind would have placed her in a difficult position. As she put it, "[t]he perception among Jews is that Israel and Judaism are being attacked as it is. We do not need more attacks."[150] She also understands why judges "did not want to put their foot in the boiling water of the religious aspect"[151] in similar terms. In her view, they simply wanted to avoid all that would have come if they had reached a judgment centered on Shai's religiosity, meaning "the attacks on Jews, the attacks from Israel, all sorts of attacks."[152]

Yet these attacks could not be avoided after all. Based on Israeli media reports, the Grand Chamber's judgment gave rise to claims of anti-Semitism and miscarriage of justice by both Israel's Office of the Prosecutor and Shai Shuruk.[153] According to them, the judges decided in favor of Isabelle because Shai is Israeli and ultra-Orthodox.[154] In the words of Moshe Zingel,

[145]Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 822 (2016).

[146]*Id.* at 823.

[147]Uitz, *supra* note 132, at 174.

[148]*Id.*

[149]Interview with Isabelle Neulinger, Lausanne Palace (Jan. 17, 2020).

[150]*Id.*

[151]*Id.*

[152]*Id.*

[153]Einat Fishbein, *Father Adopts Religion, but Loses Son*, YNETNEWS.COM (Jan. 8, 2010), https://www.ynetnews.com/articles/0,7340,L-3928168,00.html.

[154]*Id.*

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Shai Shuruk's legal representative, "anti-Semitism leaked out from every single word of their ruling. They didn't want to give us a right to speak, then they insisted we write only in French—they were hostile from the beginning."[155] At a personal level, Shai experienced the decision that Noam should remain in Switzerland as "heartbreaking."[156] He was sure the Court would rule in his favor and that he would be flying to Switzerland to bring Noam home after many years of delayed justice. Instead, "he lost his son" and, as a result, felt "broken inside."[157]

Reflecting upon her expectations of "going to Strasbourg," Isabelle felt that "she did not stand a chance" because previous ECtHR cases were consistently decided against the abducting parent and mechanically applied the Hague Convention's principle of prompt return.[158] Nevertheless, she followed Alain Lestourneaud's advice to appeal before the Grand Chamber because it meant "buying time" and "planning for another life somewhere else."[159] Her initial assessment of the chances of her application being successful explains, among other things, her post-trial perception of the judges as "courageous" for ruling in her favor and the broader sense of humanity that she experienced, especially during the public hearing before the Grand Chamber.[160] In Isabelle's words, "I have had the impression that someone, in the icy corridors of justice, cast their eyes and hearts on us."[161] In spite of all the complexities and technicalities that litigation—especially before an international court—entailed, she perceived the Court as "close to the people."[162]

This perception stands even though, as Isabelle also explained, the Grand Chamber found "only" a conditional violation of Article 8—that is, a violation only if the Swiss authorities were to enforce the Swiss Federal Court's return order for Noam.[163] After the Grand Chamber's ruling, Isabelle sought to reopen domestic proceedings to have the Swiss Federal Court reconsider and annul its original ruling. Her request was rejected precisely because of the conditional nature of the infringement found by the ECtHR. In other words, Swiss authorities considered themselves under no obligation to revise the substance of the domestic decisions as long as the return order was not enforced. It follows that, to date, after more than ten years, there is still a final domestic judgment ordering the return of Noam and, at least in principle, "if a zealous public servant takes this judgment into their hands, they might still require Noam to be sent back to Israel."[164]

In spite of this, the ruling brought a major change in Isabelle's life:

> What the ruling of the Grand Chamber changed in my daily life is that I could let my bags go, I could bring my child back to Switzerland, I could travel how I pleased except to and from Israel, but that did not really matter as, albeit very sad, it is the price to pay for being free . . . . I could stop acting like a fugitive, I could finally sit down and feel that I had the right to be where I was, that I did not have to be prepared to jump up and run at any moment.[165]

The ruling, therefore, had major liberating effects in Isabelle's daily life, and the mental and physical freedom of movement she regained significantly outweighed what could appear as "legal

[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Interview with Isabelle Neulinger, Lausanne Palace (Jan. 17, 2020).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] This point is also discussed by Florescu, *supra* note 54.
[164] Interview with Isabelle Neulinger, Lausanne Palace (Jan. 17, 2020).
[165] *Id.*

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technicalities." Whether the finding of a violation was conditional or not, whether the Court examined the case under Article 3, 8, or 9, was not important for her: "What mattered was that, after ten years of hardship, I could finally breathe."[166]

At the same time, Isabelle's account demonstrates that going to Strasbourg is no small undertaking and can also produce a range of long-term, negative effects on applicants' lives. Apart from having to bear enormous financial hardship, Isabelle experienced litigation as a "very traumatic process."[167] She could never get back to sleep normally. She could never get back to "normal," more generally. In her words, "There is always something . . . that prompts me to stay alert even if there is no more danger."[168] Following the Swiss Federal Court's judgment, there was a chance that the police would come and take Noam away from her. To cope with that risk, Isabelle unconsciously prepared Noam for a scenario in which he would have to be without his mother, for instance by exposing him to strangers. She taught him to survive without her and, in Isabelle's words, "that was a terrible experience": "[A] part of me closed because I could not stand the sufferings of being separated from him."[169] Perhaps what is most striking is that, despite all adversities, Isabelle still reflects on her litigation experience as "rewarding" and empowering: by going through all this, she realized that she actually had the strength to do it.[170]

E. Take-Aways

The case of *Neulinger and Shuruk v. Switzerland* has been widely discussed in legal scholarship. Regardless of the position taken by the commentators—whether critical or supportive of the decision—most analyses marginalize or ignore its religious dimension. One possible explanation underlying this disconnect is the doctrinal nature of the conceptual and methodological predispositions guiding these analyses, in particular, the tendency to focus on the narrow "slice" of court proceedings and to read the texts of the judgments in isolation. By adopting an anthropologically informed reading of the Court's judgments, this article offers not only a different image of *Neulinger and Shuruk v. Switzerland*, but also some take-aways that may be applicable to future legal research extending beyond this case.

First, an abstract balancing or proportionality exercise always involves real people in ways that will exceed what the Court can see, know, or say. Yet, to some extent, it is still possible to bring the "human" back into human rights by drawing information and perspectives from a range of sources that go well beyond judgments and are normally overlooked in legal commentaries. Second, contextualizing a dispute by telling the real-life stories of the applicants is critical to appreciating how these stories turned into legal disputes and, more specifically, what the Court did, did not do, or did differently. Third, the ECtHR has various audiences and stakeholders, and it does different things to different people. In the case at hand, for instance, while the Grand Chamber's finding of a violation was perceived as anti-Semitic by Shai, Noam's father, Isabelle praised the "neutral" tone of the Court's reasoning. Another example is the Court's hands-off approach in religious matters, which may be a source of concern for scholars, as indeed it has been for me in this Article, but may also be a source of appreciation and relief for the individuals who brought the case to Strasbourg and whose existence is at actually stake, as Isabelle's testimony shows. These disconnections are only able to come to the fore by putting different sources and perspectives into conversation with each other and, if scholars wish to engage in a critical reading of the case law, integrating this multiperspectivity—to some extent at least—into the analysis. Fourth, the Court's efforts to "humanize the law"—namely, the extent to which judicial reasoning focuses on the

[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*

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actual people involved and the harms done to them—constitute a significant factor determining the applicant's perception of the legitimacy of the institution and of its ability to render justice.[171] This should also trigger reflections among legal scholars as to the space that legal research and methods make for personal narratives, perceptions, and experiences. We, too, ultimately bear a considerable responsibility for "humanizing the law."[172]

[171]This point is in line with existing literature highlighting the benefits of procedural justice, more broadly. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006). In the context of the ECtHR case-law, see Saïla Ouald Chaib & Eva Brems, *Doing Minority Justice Through Procedural Justice: Face Veil Bans in Europe*, 2 J. MUSLIMS EUR. 1 (2013).

[172]Among recent contributions see, for example, Gian Paolo Romano, *Droit International Dit "Privé" et Droit International Dit "Public": Éléments d'une Théorie Unitaire et Humanisée du Droit International*, J. DROIT INT'L 3 (2022).

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