

Introduction

The research question that is addressed in this thesis is ‘How does the European Court of Human Rights (ECtHR) contend with facts, and how can principles of scientific method be used to critique the factual analyses by the ECtHR in its case-law?’

Facts play an important role in legal decision-making because without the occurrence of a (factual) event, there would be neither a need for legal analysis nor anything to base the legal analysis on. In international adjudication, as opposed to national jurisdictions, there are not many rules on how courts ought to contend with facts. Durward Sandifer famously wrote that ‘no rule of evidence [...] finds more frequent statement in the cases than the one that international tribunals are not bound to adhere to strict rules of evidence’.¹ This holds true for the European Court of Human Rights (ECtHR) as well.

Before any legal analysis can commence, the facts of a given case have to be disentangled and decisions have to be made as to which facts are considered relevant for the legal analysis that is to follow. The legal norms that are deemed applicable to the factual context will, in turn, bring into focus those facts that fulfil the legal bill. There is, thus, a back-and-forth between the factual and the normative; the factual gaze influences the legal, and the legal gaze influences the factual.² It is the element of fact-analysis, or fact-assessment, within this back-and forth that is of interest in this thesis.

Given that there is no clear framework and few rules are in place with regard to how the ECtHR ought to contend with facts, this thesis aims to shed light on the ECtHR’s fact-assessment procedures, and it suggests that principles of scientific method can be applied as a framework to analyse and critique the ECtHR’s practice in this regard. Nine judgments by the ECtHR will be analysed in depth using principles of scientific method. It will be shown that the ECtHR’s fact-assessment procedure does not follow a clear structure, and that this can result in problematic lines of reasoning in its judgments. A middle-ground pragmatist position, which acknowledges the specificities of the realm of legal decision-making but

1 Durward V Sandifer, *Evidence Before International Tribunals* (rev edn, University Press of Virginia 1975) 9.

2 Karl Engisch, *Logische Studien zur Gesetzesanwendung* (3rd edn., Winter 1963) 15.

allows for interdisciplinary approaches, will be outlined and defended as a theoretical framework that allows principles from the realm of science to enter legal thinking.

The contribution of this doctoral thesis is that it provides a framework for detecting flaws in the ECtHR's factual analyses. The added value of reading judgments of the ECtHR through the lens of principles of scientific method is that this provides a new perspective from which the ECtHR's jurisprudence can be analysed and critiqued. The principles provide an analytical and critical framework against which the at times chaotic fact-assessment of the Court can be scrutinised in a structured manner, making it easier for the reader of jurisprudence to detect problems.

This thesis aims at stressing the importance of paying more attention to the factual analysis in legal decision-making, and it outlines a framework for detecting flaws in the ECtHR's fact-assessment.

In Part I, the 'stage is set' by providing an overview of the particularities of the sphere of international adjudication. This will enable the reader to understand why there is no coherent framework regarding rules of evidence, fact-finding, and fact-assessment in international adjudication. The rules of evidence that are in place in different international adjudicative bodies are then discussed, with a focus on the ECtHR.

In Part II, the ways facts and law are intertwined are discussed, and the theoretical and philosophical underpinnings for the interdisciplinary approach to be applied in the case analysis in Part III are outlined.

In Part III, the principles of scientific method are introduced, and three of them are chosen for the case analysis. The principle of simplicity, the – closely related – principles of external validity and explanatory power, and the principle of falsifiability are then used to detect flaws in the fact-assessment by the ECtHR in its case-law. Nine cases decided by the ECtHR are scrutinised using these principles as a framework for analysis, and it will be shown what implications these new categories have for the way we can critique the ECtHR's jurisprudence.