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Assessing the Impact of the ECHR on National Legal Systems

Helen Keller and Alec Stone Sweet

This book tracks and evaluates the impact of the ECHR on eighteen national legal orders. As the reports demonstrate, national systems are increasingly porous to the influence of the ECHR and the case law of its Court. European States no longer embody insular, autonomous, self-defined legal systems, if ever they did. At the constitutional level, the systems of every country surveyed in this volume have experienced significant structural change. To take two dramatic examples, judges once prohibited from engaging in judicial review of statute now do so routinely, with reference to European rights; and the dualist features of many legal systems have given way to a sophisticated monism, when it comes to the Convention. Further, how the different branches of Government interact with one another has been changed, radically in some States, to the extent that the regime's evolution has served to undermine traditional separation of powers dogmas. This volume also examines the impact of the Strasbourg Court's jurisprudence on legislators, executives, and judges. Thousands of discreet legal and policy outcomes have been altered as a result of the influence of Convention rights. It is also clear that legal education and scholarship are also changing in ways that will help to consolidate the regime's domestic presence and legitimacy.

The impact of the ECHR is organized by a complex social process that we call *reception*.[1] The reports identify a diverse range of *mechanisms* of reception: those stable procedures that national officials construct and use in order to adapt the national legal order to the ECHR, as it develops over time. The reports show that no State can fully insulate itself from the regime's reach and influence. The best States can do is to build and maintain their own system of strong national rights protection, and to develop effective mechanisms of reception. The reports also show that the intensity of the influence of the jurisprudence of the Strasbourg Court on domestic systems varies widely across States; and the Court's impact has increased over time, in some legal domains more than others, within each

[1] Reception is defined and discussed at length in chapter 1 of this book, Section B.1.

State. Although we will venture a number of general propositions about reception processes in this chapter, such statements should be carefully considered in light of the cross-national and temporal diversity documented and evaluated in the national reports.

A. Reception as Process

Viewed as a cross-national phenomenon, the reception of the ECHR into domestic law and practice can neither be easily summarized, nor neatly encapsulated in overarching generalizations. Indeed, it would seem to be all but impossible to model the Court's impact on States in any scientifically parsimonious way. The reasons are clear enough. First, although we can identify the most important factors that condition, or impinge upon, the reception process, not all of these factors are present or carry the same weight across all jurisdictions. When they are present, they typically combine in diverse ways to affect States differently. Second, the ECHR regime – considered sociologically as a continuous set of interactions between individual applicants, national political and legal systems, and the Strasbourg Court – does not possess a stable social structure. Convention rights, for example, have evolved in ways that have been virtually impossible to predict, not least by national officials, from any specific *ex ante* moment. States have been put under pressure to adapt national law to the Convention, but the manner in which they have done so has never been fixed or pre-determined. Instead, the relationship between the ECHR and domestic legal orders has been an open-ended product of interactive social processes. In this section, the most important factors that have impinged upon the reception process will be briefly analyzed.

1. Accession and Expansion

Most of the original Contracting States (including the UK, Ireland, Italy, Germany, Belgium, the Netherlands, Austria, Norway and Sweden in this volume) seriously underestimated the degree to which the ECHR would impact on their domestic legal systems. The *travaux préparatoires* provide scant evidence to the contrary. When the ECHR entered into force, none of these States (with the important exception of Ireland) possessed effective systems of rights protection in the contemporary sense. The fact that the Convention system developed during the same period that many national systems of rights protection emerged and matured no doubt facilitated the Court's efforts to build its own political legitimacy. During this formative period, the absence of sceptical States, such as France (which was hostile to supranational authority in general) was a benefit: the Court avoided the kinds of head-on collisions that had paralyzed the EC in the 60's and 70's. Both France and Switzerland (which was concerned with issues of neutrality) ratified relatively late, after several failed tries. For other late-ratifying States (Spain, Slovakia, Poland and the re-ratification of Greece after military rule),

the political legitimacy of the Convention and the Court was largely taken for granted. Each of these States were then in the throes of democratization, following long years under repressive, authoritarian rule. Democracy and rights protection were strongly equated. It is testimony to the remarkable success of the ECHR that, for these States, the Convention offered an established, "external", and therefore legitimate, normative standard for the transition to constitutional democracy. Accession would serve, in effect, to certify their membership in the circle of good European countries, otherwise dominated by Western Europe. These States ratified the Convention enthusiastically without lodging important reservations. Russia, Turkey, and Ukraine also took advantage of certification, if perhaps with less commitment to common values.

The use of declarations and reservations also varies across States and time. Some countries (France, Switzerland) once made extensive use of reservations and declarations; others have done so sparingly or not at all (Poland). Some States (Turkey) did not seriously examine the compatibility of national law with the ECHR at the time of ratification. Over time, the use of reservations and declarations has declined, and many States have allowed those they had lodged to elapse. One reason for this is that, as it has evolved, the Convention system has gained the trust and goodwill of its members; consider the ratification of Protocol no. 11, and the broad incorporation of the ECHR into national law. At the same time, most countries have made considerable progress in redressing incompatibilities between the domestic law and the Convention guarantees. Reservations made it possible for many States to join the regime, given quite specific concerns, but these concerns have been relaxed with changing circumstances and socialization into the regime. For its part, the ECtHR interprets reservations narrowly, to ensure that the Contracting Parties do not undermine the Convention's purposes.[2]

The Council of Europe, too, has played an important role in developing Convention rights. It is a well-established practice of international law for States to amend treaties to which they belong through supplementary instruments, like protocols. Since 1952, the Council of Europe has adopted fourteen Protocols to the ECHR. Most importantly, Protocol no. 11 reformed the institutional structure, and made obligatory State acceptance of the individual complaint procedure and of the Court's compulsory jurisdiction. Today, acceptance of Protocol no. 11 is a pre-condition for the ratification of the ECHR.[3] In hindsight, we observe that the ratification of Protocols nos 2, 3, 5 and 8 proved to be relatively unproblematic, and all Contracting States would eventually ratify them. It is important, therefore, to recognize that the Contracting States have themselves fully participated in expanding the Court's competences, as well as the ECHR's rights

[2] *Belilos v. Switzerland* (appl. no. 10328/83), Judgement (Plenary), 29 April 1988, Series A, Vol. 132. See *in extenso* Thurnherr, this volume, Section A.2.b.

[3] Protocol no. 9 has been repealed as from 1 November 1998, the date of entry into force of Protocol no. 11. Since then, Protocol no. 10 has lost its purpose.

catalogue, including rights to peaceful enjoyment of property, to education, and to free elections by secret ballot, and the abolition of the death penalty.

These reforms have fundamentally altered the ECHR, compared with the *status quo ex ante* of the 50's. When the ECHR was negotiated, States failed to agree on the inclusion of the right to property. In the end, Article 6(1) ECHR provided for procedural guarantees for "civil rights", which the Court interpreted broadly, but not so broadly as to include property rights *per se*. The right to property in Protocol no. 1,[4] which entered into force in 1954, proved to be tremendously important in the 90's, as statistics on the Court's activities demonstrate. In the post-Protocol no. 11 era, the Court has been flooded with applications claiming violations of the right to property, which have in turn revealed systemic failures (Greece, Italy, and Turkey's administration of Cyprus). Having received literally hundreds of clone applications from Poland, the Court began to experiment with pilot judgments to help States resolve such failures.[5]

On the other hand, Protocol no. 4 generated reluctance, with Greece, Turkey, Italy, Spain, Switzerland and the United Kingdom, among the States covered in this book, withholding ratification. That Protocol established human rights in a politically sensitive domain (*inter alia* prohibiting expulsion of nationals and collective expulsion of aliens); States that ratified it may now regret having done so.[6] In another once sensitive area – the death penalty – the Council of Europe has had more success, banning its use through Protocols no. 6 and no. 13. Russia alone has not ratified these Protocols. Russia is also the only country that blocks the entry into force of Protocol no. 14, which the Court, the Council of Europe, and we see as an essential reform, given the regime's present burdens.[7] Russia's general reluctance to enhance the discretionary authority of the Court should be understood in the context of the conflict-filled relationship it has with both the ECHR and the Council of Europe.[8]

Finally, the fate of Protocol no. 12 (non-discrimination) remains an open question. Among the States covered in our survey, only the Netherlands, Spain,[9] and Ukraine have ratified it. The others resist transitioning from the limited non-discrimination guarantee provided by the Convention (Article 14 ECHR) to a general, stand-alone right on various grounds. Failure to ratify Protocol no. 12 (only 16 of the 46 States have done so[10]) may well be a blessing in disguise for the

[4] Among the countries in our survey, Switzerland is now the only country that has not yet ratified. See, this volume, Thurnherr, Section A.2.a.

[5] *Broniowski v. Poland* (appl. no. 31443/96), Judgement (Grand Chamber), 22 June 2004, Reports 2004-V, 1. See Krzyżanowska-Mierzewska, this volume, Section H.1.a.

[6] For the situation in Spain, see Candela Soriano, this volume, Section III.A.1.a.

[7] See also *infra* Section E.3.

[8] See Nußberger, this volume, Section A.1.a.

[9] Spain ratified Protocol no. 12 on 13 February 2008, after this book went into production.

[10] Information on ratification presented by the Council of Europe on its website: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=3/2/2008&CL=ENG (Unless indicated otherwise, all websites were visited last at end of March 2008).

system. The Court is already overloaded; and non-discrimination claims would require it to intrude even more deeply into policy areas that are, by their very nature, politically controversial. It may be that some national Governments have reached a saturation point, feeling that the time is not ripe to develop new human rights standards, given the density of problems that have yet to be resolved.

2. European Integration and Reception

European integration – the evolution of the EU's legal system, in particular – has shaped reception in a number of crucial ways. First, the ECJ's commitment to the doctrines of the supremacy and direct effect of Community law provoked processes that, ultimately, transformed national law and practice. Supremacy required national courts to review the legality of statutes with respect to EC law, and to give primacy to EC norms in any conflict with national norms. For judges in many EU States, the reception of supremacy meant overcoming a host of constitutional orthodoxies, including the prohibition of judicial review of statute, the *lex posteriori derogat legi priori*, and separation of powers notions. These same structural issues arose anew under the Convention. Second, as the EU's legal system evolved, national judges were required to develop new remedies, including in the sensitive area of State liability for damages to individuals. Further, as the ECJ embraced the proportionality principle in one area after another (e.g., the four freedoms, sex discrimination, administrative and competition law), it pressured national courts to replace deference postures (under manifest error, reasonableness and *ultra vires* doctrines, for example) with much more intrusive forms of judicial review (requirements of necessity and proper balancing of rights against the public good). Although one can describe these innovations in formal doctrinal language, it is indisputable that these changes served to enhance judicial authority – across the Community – relative to political authority. Further, national courts also learned to interact closely, and to enter into a dialogue with a supranational court, giving to, as well as receiving from, the ECJ. The ECJ's move to embrace rights as general principles of EU law, citing the ECHR and the constitutional traditions of the Member States as sources, is a striking example. Thus, in a myriad ways, European legal integration under the Treaty of Rome helped to prepare national legal systems for the kinds of major challenges that were to come under the ECHR.

With the disintegration of the Soviet bloc, the EU worked to reinforce the authority of the ECHR in a more direct way. In the 90's, the EU (whose Members also belonged to the Council of Europe) made ratifying the ECHR a prerequisite for EU membership,[11] which entailed a great deal of preparatory work in the human rights field for candidate countries in Central Europe.[12] In two States covered in this volume, Poland and Slovakia, the EU demanded specific reforms

[11] Pinelli (2004).

[12] In Greece and Turkey, the implementation of EU law and the accession process has served as a

(countering anti-corruption, enhancing judicial independence and efficiency, re-organizing the penitentiary system, etc.) to safeguard the rule of law and the effective guarantee of Convention's rights.

3. Mechanisms of Reception and Coordination

The national reports make it possible to evaluate mechanisms of reception in terms of their relative capacity to enhance the ECHR's status in domestic law. The ECHR can be said to be effective, domestically, to the extent that national officials recognize, enforce, and give full effect to Convention rights and the interpretive authority of the Court, in their decisions. The most important mechanisms operate at the constitutional level and are associated with the monist-dualist distinction and how States incorporate the ECHR. They serve to coordinate the national legal order, as a whole, on an ongoing basis, with the Convention. Other mechanisms operate in discrete institutional settings, including those procedures that require legislative and judicial officials to take account of the ECHR in their decision-making. A third set of practices – related to knowledge and its production – also impinge on the reception process and, arguably, ought to be considered to be informal mechanisms of coordination, in their own right.

a. Doctrinal Factors

A formal, doctrinal understanding of the reception process is an indispensable first step in any attempt to explain the impact of the ECHR on national legal systems. The reports focus on four interrelated questions. First, does a given constitutional order adopt a monist or dualist posture with respect to international treaty law? Second, what rank does the legal system assign to the Convention in the national hierarchy of norms? Third, are the Convention's guarantees directly binding on public authority, can they be pleaded before national courts, and can judges directly enforce them against conflicting national norms, including statute? And, fourth, have the answers to these questions changed over time, and through what procedures? The national reports address these questions, and they trace the impact of these formal elements on the decision-making of national officials.

The domestification of the ECHR constitutes the most important, overarching narrative of this volume. Convention rights are domesticated through their incorporation into national legal orders. As Polakiewicz has emphasized,[13] the ECHR does not require any specific mode of incorporation and, for many decades, some States refused to incorporate it. Until the 80's, for example, the French position was that the Convention had virtually no legal status in the internal order. In that State's view, a High Contracting Party, faced with a violation of the Conven-

more direct catalyst for changes in the domestic law than the reception of the ECHR, see Kaboğlu and Koutnatzis, this volume, Section D.3.

[13] Polakiewicz (2001), 31–33.

tion, entirely discharged its responsibilities merely by compensating the affected applicant. It incurred no obligation to change its internal law even when the Court had ruled that law to be in breach of the Convention. Today, every State covered by this book has incorporated the Convention, albeit in different ways, and no States argue in favour of the former French position.

Other things being equal, the ECHR is most effective where Convention rights, *de jure* and *de facto*: (1) bind all national officials in the exercise of public authority; (2) possess at least supra-legislative status (they occupy a rank superior to that of statutory law in the hierarchy of legal norms), and (3) can be pleaded directly by individuals before judges who may directly enforce, while disapplying conflicting norms. In such States, the Convention is not subject to the principle of *lex posteriori derogat legi priori*, but takes precedence over all conflicting infra-constitutional norms. From the point of view of the international lawyer, the status of these systems toward the ECHR can be characterized as strongly monist. Among West European States covered in this book, Austria, Belgium, the Netherlands, Spain, and Switzerland have reached this position, through different routes. Of course, the fact that national officials, including judges, are well positioned to enforce the ECHR does not mean that they will always choose to do so.

b. Incorporation and the Hierarchy of Norms

One of our core comparative findings is that formal distinctions between systemic monism and systemic dualism *ex ante* do not, in and of themselves, determine the status of the ECHR in national law *ex post*. What ultimately matters is if and how the Convention is incorporated. France, for example, is a monist country, under Article 55 of its Constitution. However, for decades, Article 55 was simply overridden by the prohibition of judicial review of statutes (a corollary of separation of powers).[14] Belgium is formally dualist, but that State's courts – on their own and without constitutional authorization – embraced a sophisticated monism with respect to the ECHR (and EU law).[15] As the national reports show, over the past three decades, the ECHR has had far more impact in Belgium than in France, precisely because Belgian judges chose to confer supra-legislative status on Convention rights and to directly apply them, while French judges declined to do so. The French position began to change only in the late 80's; today, the Convention overrides conflicting law, including statutes adopted later in time. Consequently, complex reception processes are now underway in France, and the gap between the Convention's *de jure* and *de facto* status is bound to narrow.

The Spanish and Dutch Constitutions are both monist but, again, it is the position of the courts that makes the difference. The Spanish Constitutional Court has consistently worked to enforce the ECHR as a quasi-constitutional body of law. The Tribunal will strike down any statutes that violate the Convention as un-

[14] For the reasons, see Lambert-Abdelgawad and Weber, this volume, Section B.1.a.
[15] De Wet, this volume, Section B.2.a.

constitutional; it interprets Spanish constitutional rights in light of the ECHR; and it has ordered the ordinary courts to abide by the Strasbourg Court's case law, as a matter of constitutional obligation. If the judiciary ignores the dictates of the Convention, individuals can use the *amparo* procedure to appeal the issue directly to the Constitutional Tribunal. In Spain, then, the capacity of the legal system to guarantee the effectiveness of the ECHR is virtually perfect. Indeed, by every measure, Spain is one of the great success stories of post-authoritarian, rights-based democratization, and the ECHR is an important part of that story. The Netherlands, arguably, is the world's most monist State. The Dutch Constitution provides for the supremacy of treaty law over the Constitution itself, but it does not provide for the judicial review of Statutes. The Supreme Court, however, has chosen to directly enforce the ECHR, in effect, incorporating it as a *de facto* Bill of Rights. In her report, Erika de Wet notes that, generally, the Dutch Court has thus far used its judicial review powers cautiously.[16] However, she also stresses that the relationship between the courts and the legislature is changing as a result, and that the Court is developing some of the features of a constitutional jurisdiction with respect to rights enforcement.

Norway and Sweden are formally dualist States, but each has moved to monist positions with respect to the Convention, embracing the effectiveness criteria listed above, at least formally. Austria blends both dualist and monist features, but it too has moved to a strong monist posture. The Austrian Constitution provides for a Constitutional Court and review, but it contains only a short list of rights in comparison with the Convention. The Constitutional Court's initial position, which the administrative and civil courts followed, was that the ECHR neither possessed supra-legislative status nor was directly enforceable in the domestic legal order. In 1964, the political parties revised the Constitution, to confer upon the Convention constitutional status and direct effect. Today, conflicts between the Austrian Constitution and the ECHR are governed by the *lex posteriori derogat legi priori* rule, an apparently unique situation. Norway and Sweden also possessed, at the time of ratification, a short list of basic rights, and judicial review was known but virtually never used. In the 90's, four decades later, both countries adopted comprehensive Bills of Rights modeled on the Convention. In Norway, the charter is entrenched, requiring two successive votes of Parliament, the second after an intervening election. The Charter overrides conflicting statutes. The Swedish Charter has only the rank of a statute, and Sweden maintains certain dualist orthodoxies, including the application of the *lex posteriori* rule to resolve conflicts between norms of statutory rank. However, the Constitution states that all Swedish laws shall be interpreted and applied in light of international treaties.

A State may be formally monist but nonetheless treat the Convention as alien, foreign law, leaving it without much force in the domestic order. Such has

[16] De Wet, this volume, Section B.1.b.bb.

been the case, for different reasons, in pre-Protocol no. 11 France, and – today – in Russia, Slovakia, Turkey (at least until 2004), and the Ukraine. In these latter States, a surface, systemic monism is belied by a lack of commitment to the ECHR among political officials, and by massive structural problems in the functioning of judicial institutions. In Poland, a nominally monist State, the Constitutional Court has worked hard to enhance the status of the Convention before the courts.

Finally, most dualist systems have incorporated the Convention either through statute or the decisions of Constitutional or Supreme Courts, the details and consequences of which vary widely. In the UK, under the 2000 Human Rights Act (HRA) litigants may plead Convention rights against any public authority, and courts may enforce the ECHR against all but conflicting Parliamentary statutes, while certain appellate judges have the authority to declare such statutes incompatible with Convention rights (but not to annul them). As Besson's report emphasizes, the HRA is in the process of transforming the UK's legal system, not least, because it carves out important exceptions to doctrines of parliamentary sovereignty.[17] For the first time, UK judges have jurisdiction over what is, in effect, a Bill of Rights. In Ireland, which incorporated the ECHR in 2003, Convention rights function only as a supplement to its own highly effective domestic Charter and system of rights protection. Parties may not plead the Convention in Irish courts against judges or the legislature, and the *lex posteriori* rule holds sway, but this situation has yet to expose Ireland to the scrutiny and censure of the Strasbourg Court in any systematic way.

In Germany and Italy, both dualist States with complete systems of domestic rights protection, the incorporation has proceeded through rulings of the constitutional courts. In Germany, the ECHR was initially treated according to dualist orthodoxy: treaty law occupied the same rank as statute (*lex posteriori* taking primacy in case of conflict). Gradually, however, the Federal Constitutional Court began to treat the ECHR as *lex specialis* and, in 2004, it threw its weight behind the ECHR. It now requires the judiciary to enforce Convention rights even against statutes passed later in time, an activity that can be monitored through the individual constitutional complaint. In Italy, the courts' attitude towards the Convention has been marked by longstanding reluctance to recognize the Convention's primacy over statutes. In this context, a 2007 ruling of the Italian Constitutional Court declaring the unconstitutionality of a statute found to contravene Article 1 of Protocol no. 1, may well be a landmark change.[18] It remains to be seen whether this new approach will be followed consistently by the Italian Constitutional Court and other high courts.

In summary, there is no necessary causal linkage between *ex ante* monism or dualism, on the one hand, and the reception of the ECHR on the other.

[17] See Besson, this volume, Section III.B.1.b.
[18] See Candela Soriano, this volume, Section III.B.2.b.

Put differently, the manner in which the ECHR is incorporated is an outcome of the reception process which will, in turn, impinge on reception *ex post*. The assumption that dualistic States have, *a priori*, an unfriendly attitude towards international law, and will, therefore, generate a relatively poorer rights record, is untenable. That point accepted, some States – including Ireland, Norway, Italy, Sweden, and the UK – have found it difficult to confer supra-legislative rank on the Convention, precisely because of their dualist natures, though there is a great deal of variation even among this small group.[19] Other dualist States (notably Belgium) have done so relatively quickly and easily. Dualistic countries tend to incorporate through statute, whereas monist States tend to do so through judicial decisions. Clearly, a monistic constitutional structure can provide the judiciary with more leeway in the reception process, as in the Netherlands, helping courts overcome certain obstacles when they are motivated to do so. Finally, in dualistic countries where a powerful Constitutional or Supreme Court defends national human rights, we observe reticence among judges to base their rulings on the Convention as an independent source of rights. This is the case with Germany, Italy, and Ireland. Paradoxically, perhaps, a pre-existing human rights judicial tradition in a particular country can sometimes hamper reception of the Convention or, at least, the jurisprudence of the ECtHR.

c. The Convention as a Shadow Constitution

Today, in Belgium, France, the Netherlands, Switzerland, and the UK, we can say that the ECHR constitutes a kind of surrogate, or shadow, Constitution. These are States that, while not possessing their own judicially enforceable Bills of Rights have incorporated the Convention in ways that make Convention rights directly effective, supra-legislative norms in the domestic system. In the Scandinavian countries in our survey, new Bills of Rights have been modeled on the ECHR, but the latter text tends to be more important than the former. This type of reception is deeply structural and is, or will be, momentous in its significance. In States where Constitutions provide both an entrenched Bill of Rights and an effective system of constitutional justice, the ECHR tends to function as a supplement to the Constitution. We find this situation in Germany, Ireland, Spain and, arguably, in some Central European States.

d. Legislative Coordination Mechanisms

As the ECHR has evolved, national officials have developed procedures designed to provide legislative authorities with information and counsel on the relevance of the ECHR to their agenda. In many States (including Austria, Belgium, France, Italy, the Netherlands, Slovakia, Spain, and Switzerland), one of the tasks of the Government's legal advisor is to provide an opinion on the conformity of pro-

[19] With regard to the differences between the UK and Ireland, see Besson, this volume, Recapitulative comparative table.

posed Bills with the Convention, or on reforms that ought to be undertaken in order to bring the national legal order into conformity. The Government is free to disregard this advice. In most States (an important exception is Russia), one or more Parliamentary Committees also routinely examine the conventionality of Bills. In some (including France, Greece, Ireland, and Italy), lawmakers are now advised by independent Human Rights Committees. In Poland and Spain, an Ombudsman may advise executive and legislative bodies, and she or he possesses the power to challenge laws before the Constitutional Court. In Scandinavia, *ex ante* review of a legislative Bill is undertaken by judges, but these decisions (of the Swedish Law Council and the Norwegian Supreme Court) are non-binding. By contrast, in Ukraine, a 2006 reform made *ex ante* Ministerial review of the conventionality of proposed legislation obligatory. If a Bill is found to be contrary to the ECtHR, it will be declared void.

Although the national reports identify and discuss these mechanisms, much more research would be needed to evaluate their effects on policy outcomes. Their impact on the overall reception process, we suspect, depends heavily on the general commitment of political officials to improving rights protection and compliance with the ECHR. Many Russian national officials regularly expressed scorn for the Court's judgements. In Turkey, the Chairman of the Human Rights Advisory Board was prosecuted in 2004 for authoring a report criticising the Government's lack of commitment to rights, and the Board was then dissolved. Some States have no such mechanisms *per se*, but we know that German legislators take very seriously their responsibility to assess the conventionality of Bills before them, both in the Cabinet and the Bundestag, whereas Russian lawmakers do not.

e. Judicial and Other *Ex Post* Mechanisms of Coordination

Judges play a special role in the reception process. Due to the requirement that local remedies be exhausted, it is normally the courts that have the last word on the compatibility of national law with the ECHR, prior to an applicant going to Strasbourg. In addition, the Convention establishes standards that govern the operation of national systems of justice (notably through Articles 5, 6, and 13 ECHR). Of all national officials, judges are the most systematically exposed to the direct supervision of the ECtHR. It is hardly surprising that, in many States, the courts have taken the lead in incorporating the Convention, and in strengthening other quasi-constitutional mechanisms of reception. Today, all national high courts have a powerful interest in closely monitoring the ECtHR's activities, and in staying one step ahead of the latter when it comes to developing standards of rights protection. Such may be easier said than done, of course.

The national reports provide a rich trove of detail on specific interactions between the ECtHR and national courts. At the risk of some over-generalization, three overlapping points deserve emphasis. First, in most States, the incorporation of

the ECHR has enhanced the overall authority of the ordinary courts *vis-à-vis* all other non-judicial officials. As judges have consolidated their jurisdiction over the ECHR, they have increased their capacities to control policy outcomes; the move to proportionality review is a strong example.[20] In Europe today, judicial authority includes the competence to review the legal validity of all Government acts under the Convention. Second, the authority of national Constitutional Courts has been weakened: their final word (if not monopoly) on rights interpretation can no longer be presumed. It is to the credit of the constitutional courts on the continent (in Spain, Poland, Slovakia; and, more recently, in Germany and Italy) that they have chosen to require the judiciary – as a matter of constitutional duty – to enforce the ECHR and to follow the Strasbourg Court's jurisprudence. At the same time, all constitutional courts have taken pains to stress that it is the national Constitution that ultimately regulates the relationship between the domestic legal order and the Convention system. Third, rights protection in Europe is characterized by an important jurisdictional pluralism, an "open architecture"[21] whose tensions and contradictions will not be worked out easily, if at all. With the accession of the EU to the Convention, this architecture will become even more complex and its future development even less predictable.

The courts also manage the most important reception mechanisms following a finding of violation by the ECtHR, to the extent that they harmonize the substance of their jurisprudence to relevant judgments of the Court. Courts in most States do so routinely (though Russian, Ukrainian, and Turkish courts are exceptions). The national reports also identify a number of non-judicial *ex post* mechanisms of coordination. The fast-track procedure in the UK is a prominent example[22]; and it will be fascinating to monitor the Ukrainian experiment, just underway, to build a host of innovative mechanisms of reception, in order to improve its future record.[23] Some States have also adopted major legislative reforms in order to deal with failures of a systemic nature identified by the Court. Italian lawmakers, for instance, fashioned the *Azzolini* law with the hope of improving its capacity – notoriously infirm – to implement the Court's rulings.[24]

f. Informal Mechanisms: Knowledge and Practice

The state of knowledge about the ECHR and the Court's jurisprudence in national legal systems conditions the reception process in obvious ways. The more ignorant of the Convention are national officials, the less likely it is that they will be able to perform their duties properly. In all States, teaching and scholarly research about the ECHR and the Court's case law have steadily increased since the entry into force of Protocol no. 11 in 1998, but problems remain. Among

[20] See *infra* C.4
[21] Krisch (2008).
[22] See Besson, this volume, Section III.E.1.b.
[23] See Nußberger, this volume, Section E.2.a.
[24] See Candela Soriano, this volume, Section III.E.2.

lawyers and lower court judges in many States, knowledge of the Court's case law and access to translations of judgments involving applications from other States remains poor, a situation that weakens the judiciary's overall capacity to guarantee the ECHR's effectiveness.[25]

One negative finding concerning practice deserves comment. As the importance of the ECHR to domestic law increased, we expected networks of human rights litigators and Non Governmental Organizations (NGOs) to grow at both the national and transnational levels. We also expected that these networks would steadily develop capacity to influence the reception process. While human rights NGOs have at least some relevance in most States, none of the reports shows that they regularly exercise decisive influence on important outcomes.[26] Further, law firms seem to have little incentive to invest in the domain. Compared with litigating EU law in national courts, which typically has a heavy commercial content, the sums at stake in litigating the ECHR are relatively small. If a case does make it through the admissibility stage in Strasbourg, it will be subject to long delay and little hope of a large financial payout. Despite these initial findings, more systematic research on the organization and impact of human rights litigating in Europe is clearly needed.

B. The Court's Docket

In this section, we examine, from the point of view of the reception process, inputs into the ECHR legal system (applications) and the most important outputs (judgements of the Court and other decisions).

1. Applications to the ECtHR

The entry into force of Protocol no. 11 on November 1, 1998 removed any formal obstacle to access to the Court for individuals, beyond the requirement that petitioners exhaust available domestic remedies. In addition, the Court makes applying to it simple and virtually cost-free: the required forms and easy-to-follow instructions are posted online, and applicants do not need legal counsel, at least not initially. The data on Post-Protocol no. 11 applications are, therefore, a fairly direct measure of the social demand for rights protection under the Convention. Table 1 reports these data, broken down by State and per annum.

[25] See also the Committee of Ministers Recommendation Rec (2004)4 on the ECHR in universities and professional training, 12 May 2004.

[26] For a prominent exception concerning the Warsaw Helsinki Foundation of Human Rights, see Krzyżanowska-Mierzewska, this volume, Section J.1.g.

Table 1: Individual Applications to the ECtHR (November 1, 1998–December 31 2006)

	Received	Per Year	Per Cap.*	Admissible	Per Cap.**	Rank p/c*
Average per state	12,631	1,546	41.29	332.4 (4.7%)	1.64	
Spain	5,367	656.9	15.13	38 (1%)	0.108	2
Ireland	522	63.9	15.21	12 (2%)	0.357	4
Norway	603	73.8	16.04	17 (3%)	0.456	6
Germany	16,005	1,958	23.73	69 (0.4%)	0.101	1
Belgium	2,095	256.4	24.41	89 (4%)	1.038	11
UK	12.072	1,477.6	24.54	303 (3%)	0.616	9
Netherlands	3,641	445.6	27.33	57 (2%)	0.429	5
Greece	2,935	359.2	32.36	295 (10%)	3.252	17
Turkey	20,141	2,465.2	33.81	1,500 (7%)	2.518	15
Russia	48,791	5,972	41.93	353 (0.7%)	0.303	3
Switzerland	2,542	311.1	42.04	31 (1%)	0.513	8
France	23,582	2,886.4	47.39	590 (3%)	1.185	12
Sweden	3,590	439.4	48.82	37 (1%)	0.500	7
Ukraine	18,860	2,308.4	49.53	310 (2%)	0.813	10
Italy	24,141	2,954.8	50.42	1,617 (7%)	3.377	18
Austria	3,427	419.5	51.15	156 (5%)	2.329	14
Slovakia	3,823	467.9	86.64	133 (3%)	3.018	16
Poland	35,225	4,311.5	112.86	377 (1%)	1.206	13

* Calculated as the number of applications per State divided by population.

** Calculated as the number of admissible applications per State divided by population. Rank p/c refers to the ordinal ranking of States, from lowest to highest, on the basis of admissible applications generated, *per capita*.

The source for the raw data on applications is the annual *Survey of Activities*, the European Court of Human Rights, 1998–2006. The source for the population data is Eurostat (2006).

Applicants activate the ECHR's legal system in order to achieve outcomes – justice, a change in national law and practice, and so on – that have been denied to them in the domestic system. Although any given application may be unique in important respects, it is reasonable to assume that the aggregate data can tell us something of general significance about the relationship between the ECHR and national legal orders. Consider, for example, the following simple proposition, in effect, a "pathology hypothesis": the more a State violates the Convention rights of individuals, the more it will generate applications to Strasbourg. In this view of the regime, the ECHR functions to reveal problems in domestic orders which the Court helps States to resolve. The cross-national data will, therefore, chart the

relative extent to which rights are protected in national legal orders or, much the same thing, the degree to which States are in non-compliance with the Convention. This view has much to recommend it, but it does not provide a complete picture, as the case studies demonstrate.

A second view, which may partly overlap with the first, emphasizes a different function. The ECHR will be important to the extent that it fills important gaps in national legal orders. In those States that do not possess a comprehensive, entrenched Bill of Rights, for example, the ECHR may be used to perform that role, as a shadow Bill of Rights. If and how it does so depends heavily on how the Convention is incorporated into the national legal order. In addition, a State's constitutional rights provisions may not accord precisely with the Convention, or national judges may give a narrower reading to a right than the Strasbourg Court, situations that will attract applicants to Strasbourg. In this account, the data will reflect, at least in part, gaps between domestic rights protection and the ECHR, as the latter evolves.

In contrast to the "pathology hypothesis", we would not assume, under the "gap-filling hypothesis", that levels of petitions only measure the extent of pathology. The numbers may also chart a healthy social demand for perfecting rights protection in States whose basic commitment to protecting rights is already relatively robust. In many contexts, national law is likely to be more ossified and path dependent than the more malleable Convention. In so far as it is, Strasbourg will attract applicants.

A third logic rests on a still more complex view of how individual applicants, national officials, and the Strasbourg Court interact with one another. This view takes seriously the capacity of the Court's case law to "feedback" on petitioners and national officials. Applications from each country tend to be clustered in specific areas, due to pathology (including systemic failures), national gaps in protection, or for other reasons. Nonetheless, the extent to which applications in these domains increase over time will be partly a function of how the Court constructs its jurisprudence. If the Court responds positively to the demand for the expansion in the scope and application of a specific right, it will tend to attract more applications in that area. A feedback loop is thereby constituted. Theoretically, the inverse might be true. It is possible that applications will decline or stop altogether, in a given domain, if a State successfully adapts its law to the relevant case law. However, such instances may be rare in important areas of litigation in which relatively large or coherent classes of applicants are concerned. Petitions may actually increase even after a State adequately complies with a specific ruling, as individuals seek to extend the scope of a new interpretation of rights.

At the heart of this dynamic lies a tension (which inheres in rights adjudication more generally) between two functions of the Court. The Court constructs Convention rights as general norms, which it treats as having prospective legal consequences for States. At the same time, its powers are largely limited to the

rendering of individual (retrospective and particular) justice to victims of specific abuse. The Court may move to recognize a new right, or it may clarify the nature and scope of an existing right in an innovative way, while narrowly tailoring its ruling to the facts of the case. Indeed, this is a standard technique of judicial prudence in rights adjudication. Yet this type of ruling invites future applications, whose purpose will be to extend the coverage of the right even further, given remaining restrictions of national law. In this view, then, numbers of applications will also reflect the Court's own engagement in rights innovation, in the context of the social demand for such innovation (which varies cross-nationally).

Such propositions, and the data presented in Table 1, should be assessed in conjunction with the case studies presented in this volume. In the left-hand column, States are listed, lowest to highest, in terms of the average annual number of applications generated per one million inhabitants. States are ranked ordinally, in the right-hand column, with reference to the annual number of applications that are judged to be admissible by the Court, on a *per capita* basis. These numbers comprise a direct measure of the extent to which each State contributes to establishing the Court's agenda.

Not surprisingly, the States with the largest, most intractable, problems supply the Court with the bulk of its case load. The average number of applications judged admissible by the Court per year, among our 18 States, is 40.6. Only five States – Russia, Poland, France, Turkey, and Italy, in that order – exceed this average. States that have relatively high levels of admissible applications *per capita*[27] also include Greece and Slovakia which, like France, Italy, Russia and the Ukraine, have not succeeded in rectifying various structural failures, particularly as regards the functioning of the judiciary. In its 2006 Report,[28] the Court presented data on the 89,900 cases pending before it on 1 January 2007. Eight of the regime's forty-seven States generated 70% of all pending cases: Russia (21.5%), Romania (12.1%), Turkey (10%), Ukraine (7.6%), Poland (5.7%), France (4.8%), Germany (3.9%), and Italy (3.8%);[29] and applications from the first five comprise a majority of pending cases. For the foreseeable future, then, the Court will expend the bulk of its time and resources dealing with pathology: massive structural problems in sometimes intransigent States.

The countries that generate the least number of admissible petitions *per capita*[30] are Germany, Ireland, and Spain, States that possess the most effective domestic

[27] Austria (14th) is also ranked in the bottom third of admissible applications per year, *per capita*. In Austria, a small State with a legalistic culture, the ECHR possesses directly effective, constitutional status, but its courts remain hesitant to apply the Convention aggressively.

[28] European Court of Human Rights, Annual Report 2006, Registry of the European Court of Human Rights, Strasbourg, 2007.

[29] Ibid., p. 114.

[30] Third on that list is Russia (with by far the largest population). Arguably (see Nußberger's report, this volume, Section D.2.e.), Russia has the worst record of rights protection among ECHR Contracting States (even blocking the mailing of applications to the Court). Petitions from Russia are now flooding the Court.

systems of rights protection in Europe, as well as Norway, which possesses little experience with rights review. Although Belgium, Germany, Norway, Spain, and Switzerland, among other countries, interact with the ECHR less systematically or only sporadically than most of the States covered in this volume, the influence of the ECHR on their respective legal systems should not be underestimated. Considered on their own, each is experiencing significant legal change as a result of membership in the regime. As the respective national reports show, we find some of the dynamics of gap filling and feedback discussed above. The ECHR is an important structural backdrop, and the Court is a powerful agent, for steady progress in the direction of stronger rights protection.

2. Findings of Violations

Cross-national data on rulings of violation against States are relatively direct measures of the pressure that the ECHR regime places on national officials to adapt national legal orders to the Convention. Table 2 reports this information for the 18 States examined in this volume. States are listed, from lowest to highest, with respect to the number of violations declared annually by the Court, since 1 January 1998. States with the best records (under 6 violations found per year) include, in order, Ireland, Norway, Sweden, Spain, the Netherlands, Switzerland, Belgium, and Germany. At the bottom of the table, with more than 50 violations found per year, we find France, Turkey, and Italy. If we control for population – ranking countries with respect to the number of violations per annum and *per capita* – the order changes dramatically. Spain and Germany have far better records than all other States in our survey; whereas Slovakia, Italy, and Greece (in that order) have the worst records.

Table 2: Rulings on the Merits and Friendly Settlements: 1998-2006

	Judgements / Per Yr		Violations / Per Yr / Per Cap*			Non-Viol.	FS**
Average	260.7	29	246.3	27.4	0.926	14.9	40.2
Ireland	11	1.2	7	0.8	0.190 (6)	4	0
Norway	10	1.1	8	0.8	0.173 (4)	2	0
Sweden	21	2.3	14	1.6	0.177 (5)	7	13
Spain	34	3.8	26	2.9	0.066 (1)	8	1
Netherlands	52	5.8	39	4.3	0.263 (7)	13	8
Switzerland	60	6.7	41	4.6	0.621 (11)	29	2
Belgium	57	6.3	51	5.7	0.542 (9)	6	7
Germany	67	7.4	53	5.9	0.071 (2)	14	4
Slovakia	112	12.4	107	11.9	2.203 (16)	5	17
Austria	120	13.3	111	12.3	1.500 (14)	9	17

	Judgements / Per Yr		Violations / Per Yr / Per Cap*			Non-Viol.	FS**
UK	175	19.4	146	16.2	0.269 (8)	29	15
Russia	206	22.9	199	22.1	0.155 (3)	7	0
Ukraine	260	28.9	258	28.7	0.615 (10)	2	0
Greece	271	30.1	265	29.4	2.648 (18)	6	18
Poland	340	37.8	321	35.7	0.934 (13)	19	32
France	500	55.6	447	49.6	0.814 (12)	53	84
Turkey	1111	123.4	1080	120	1.646 (15)	31	182
Italy	1285	142.8	1260	140	2.389 (17)	25	324

* Ordinal rank in parentheses: Ireland is ranked sixth in terms of violations found per annum and per 1 million inhabitants; Spain is ranked first, and Greece last.

** Friendly settlements.

Source: Appendix, this volume.

Although our project was not designed to explain the cross-national variation depicted in Table 2, at least some of that variation is a product of the reception process. Those States with stable, robust systems of national rights protection (Germany, Ireland, Spain) are less vulnerable to censure from Strasbourg, all the more so once constitutional courts decided to require the judiciary to enforce both the Convention and the Court's case law directly and with fidelity, even against Parliamentary statutes. The majority of States in our survey, however, did not possess strong domestic systems of constitutional justice when they began to confront a more expansive ECHR and a more aggressive Court. These States can best reduce their exposure to censure in Strasbourg by developing effective reception mechanisms: stable rules and procedures that serve to coordinate the national legal order and the ECHR, on an ongoing basis. As the national reports demonstrate, developing such mechanisms is rarely an easy, simple, or smooth process, to the extent that it requires significant structural change. Such change will usually be slow and incremental, at least at first. New mechanisms are typically grafted onto older, institutionally embedded, ways of doing things, and some officials may seek to resist change. The evidence presented in this book, however, shows that national officials are being steadily socialized into a Europe whose Convention not only binds the State, as a matter of international law, but also binds domestic officials, as a matter of enforceable national law. Those States for which the Convention now functions as a *de facto* or shadow Constitution (Austria, Belgium, the Netherlands, Switzerland, the UK, and, increasingly, Norway, Sweden, and France) provide significant examples of these dynamics.

In some countries (including Italy, Poland), the commitment to protecting rights (of both Constitutional and Conventional origin) may be relatively high but insufficient, in itself, to counter certain structural deficiencies or specific

legal pathologies. In other countries (Austria, France), long-standing judicial resistance to the Court and its case law has undoubtedly exposed the national system to more applications and findings of violations than would have been the case had courts been more open to enforcing the ECHR. Finally, there are States whose commitment to rights has not always been strong, though gradually improving (Greece, Slovakia, and perhaps Ukraine); and there are States whose attitude toward the ECHR and its Court has been generally hostile (Russia, Turkey, and until recently Ukraine). In any event, as the data in Table 1 show,[31] it is applications from States with the poorest records that dominate the Court's docket.

C. The Court's Impact on National Legal Systems

The Court protects Convention rights in multiple, highly differentiated ways. While we recognize that the Court operates under unified jurisdictional rules and procedures, the role it performs, in fact, varies across Convention norms and State contexts. The Court functions (1) as a kind of High Cassation Court when it comes to procedure, (2) as an international watchdog when it comes to grave human rights violations and massive breakdowns in rule of law, and (3) as an oracle of constitutional rights interpretation when it comes to fine-tuning the qualified rights of Articles 8–11 and 14 ECHR.

1. Procedural Law

The Court has played its most prominent role in the field of civil and criminal procedure, for three main reasons. First, simplifying what is in fact a fiercely complex topic, Civil Law States on the continent base their procedural law on the so-called accusatorial model, rather than on the adversarial practices of the Anglo-Saxon Common Law. The Court, in its case law on Articles 5 and 6 ECHR, has pointedly criticized civil law systems (including Austria, Belgium, France, Germany, Italy, the Netherlands, and Switzerland) for their general lack of impartiality, insufficient transparency during the pre-merits phase, and the accumulation of functions by the same officials during different phases of the trial, which are values commonly associated with the adversarial system. As John Jackson has cogently argued, the Court is actively constructing a new "participatory model" that lies between the classic forms.[32] In any event, its case law on procedure has not been easy to digest by many States. Since implementation typically requires fundamental changes in judicial organization,[33] the Court's impact in this domain has transformative potential. Second, as the Convention itself does not protect the right to peaceful enjoyment of property, the Court adopted

[31] See Stone Sweet and Keller, this volume, Section A.2.b.
[32] Jackson (2005).
[33] In particular for France, see Lambert Abdelgawad and Weber, this volume, Section D.1.c.

a broad interpretation of the procedural guarantee in Article 6(1) ECHR, thereby filling the gap. This move, and others like it, gave an extremely wide scope to civil rights that in turn generated strong resistance in countries like Austria, Switzerland and Germany.[34] Third, the Court's emphasis on procedural guarantees for defendants has to be seen as part of a more general trend toward juridification in international law. After a first phase in which substantive human rights have been developed, the international community is now focused on procedural aspects, and on how domestic institutions enforce rights. Since the 70's, scholars and judges have worked to upgrade procedural rights. It is today a mega-trend of international human rights law, and with it comes an associated expansion of judicial authority. Among international courts, the ECtHR has been the most important progenitor of this trend.[35] In response, several countries have made important legislative efforts to reduce the length of proceedings (Austria, France, Germany, Italy, Poland, Slovakia).[36] Nonetheless, it remains an open question whether these reforms will, in fact, give results that meet the high requirements formulated by the Court.[37]

For every State in our survey, the majority of violations of the ECHR found by the Court concern Article 6 ECHR guarantees. Most alarming are broad failures across Europe to ensure trial within a reasonable time period. As the duration of court proceedings before the ECtHR has stretched to indefensible lengths,[38] the Court's demand for timely proceedings in the Contracting States may lose

[34] See Thurnherr, this volume, Section E.1.a.

[35] Aromaa and Viljanen (2006).

[36] For the famous *Pinto* law see Candela Soriano, this volume, Section III.D.2.a.bb.

[37] *Scordino v. Italy* (appl. no. 36813/97), Judgment (Grand Chamber), 29 March 2006, (not yet reported), para. 183.

[38] For the time period since the date of allocation for pending Committee and Chamber cases in 2006 (all data were provided by the Court), http://www.echr.coe.int/NR/rdonlyres/C8F656AA-94C4-4A3F-A69D-0E4C6D510CA8/0/Analysis_of_statistics_2007.pdf.

Time period	Chamber cases	Committee cases
one year or less	8817 or 32%	27107 or 55%
one to two years	5530 or 20%	15717 or 32%
two to three years	4844 or 17%	5029 or 10%
three to four years	4064 or 15%	999 or 2%
tour to five years	2537 or 9%	
more than five years	1917 or 7%	
Total of cases	27709	48852

It is difficult to say what the final average time period per case is. The large figure of 55% of Committee cases are mainly due to inadmissibility decisions on the grounds of Article 35 ECHR. For nearly one third (31%) of the Chamber cases, the average length of proceedings is between three and more than five years.

much of its persuasive and authoritative force.[39] Lord Woolf has formulated it poignantly: "If 'justice delayed is justice denied', then a large proportion of the ECtHR's applicants – even those who are the victims of serous violations – are effectively denied the justice they seek."[40] In view of the notorious human rights records of countries like Russia, Ukraine and Turkey, the assumption that the Court no longer has the necessary capacity to deal with grave human rights situations due to its own excessive caseload and delays cannot be easily dismissed.

2. Articles 2 and 3 ECHR

Violations of the right to life (Article 2 ECHR) and the right to be free from torture, and inhuman and degrading treatment (Article 3 ECHR) are justifiably understood to be the most serious types of violations of the Convention. For every State in our survey, the Court has ruled on at least one claim based on either Article 2 or 3 ECHR. Ireland, Norway, and Slovakia have never been found in violation of either provision. To date, the Court has found a single violation of at least one of these provisions by Austria, German, Italy, Spain, and Switzerland, and it has found only two violations by Belgium, Italy, Poland, and Sweden. Without downplaying the seriousness of any of these cases, it is clear that compliance with Articles 2 and 3 ECHR is not a systemic problem in any of these States. Indeed, one might argue that part of the Court's case law in these areas is a type of fine-tuning (conditions of prisons, food and body searches in detention, and so on). Other countries have had a more difficult time complying with these norms. Greece (5 violations), the Netherlands (8), France (10) make up an intermediate group, followed by Ukraine (16) the UK (21), and Russia (34). Turkey, with 230 findings of violation and 91 friendly settlements, constitutes an unfortunate class by itself.

In its jurisprudence on Article 3 ECHR, the Court has exposed deplorable conditions in detention centres and prisons across Europe, including in France, Greece, Italy, Turkey, Russia, and Ukraine, situations otherwise tolerated by national politicians and judges. In response, the Council of Europe has committed itself to observing these situations closely, and in articulating higher standards for the regime as a whole. Another area of serious concern is the conduct of police authorities. In several countries, including Greece and Italy in our survey, the disproportionate number of immigrants of Roma origin among victims of violations of Articles 2 and 3 ECHR is disquieting.[41] Across Europe, the trend towards an increasingly multicultural composition of society has taken its toll on

[39] In a similar vein, see Paraskeva, 189 et seq.

[40] The Right Honourable the Lord Woolf, Review of the Working Methods of the European Court of Human Rights, December 2005, http://www.echr.coe.int/Eng/Press/2005/Dec/LORDWOOLFSREVIEWONWORKINGMETHODS.pdf, 8.

[41] See Kaboğlu and Koutnatzis, this volume, Section C.1.e. The Council of Europe sees discrimination against the Roma population as a general human rights problem in Europe, see http://www.coe.int/t/dg3/romatravellers/.

standards of protection. In this area, too, the Convention (and Protocol no. 4) will continue to play a vital role, backed up by Council of Europe initiatives.

In countries in which the most serious human rights violations are observed, such as Russia and Turkey, the Court confronts delicate political conflicts (as it had before with respect to the UK's problems in Northern Ireland). Turkey faces long-standing problems with the Greek population on Cyprus, with organized Kurdish separatists in the southeast provinces, and the still fragile control of the military by civilian authorities. In Russia, national officials have justified State-sponsored assassination, torture, and measures resulting in massive dislocation and suffering as necessary responses to rebellion in Chechnya. Moreover, Russia, Turkey, and Ukraine have yet to establish firm foundations for the development of stable pluralist democracy and rule of law. Often enough to matter a great deal, officials in these States express hostility to human rights as alien (West European) norms and values that are imposed upon them. Clearly, the Court is not well equipped to deal with deep-rooted problems such as these; indeed, they test the limits of the supervisory system in dramatic fashion. Moreover, these States (today the biggest drain on the Court's resources) routinely choose not to comply with the Court's rulings, thus undermining the credibility of the system as a whole. On the other hand, these cases reflect the Court's strong commitment to closing gaps in domestic accountability where officials refuse to investigate or choose to ignore credible claims of serious human violations.[42]

3. Articles 5 and 6 ECHR: Anti-Terrorism

In Western European countries, anti-terrorism measures have generated serious complaints, most prominently against the UK[43] and Spain.[44] The Court's role in this area has been pivotal. Experience has shown that, in many cases, fundamental rights were not sufficiently guaranteed in the absence of supranational control. National courts, being close to the events, proved unable to accord sufficient weight to fundamental rights when balanced against security imperatives. The Court's caseload in relation to Articles 5 and 6 ECHR will undoubtedly become more politically sensitive in the coming years, as new anti-terrorist measures are implemented in these countries and in France and Italy.[45]

4. Article 8–11 and 14: Fine-Tuning and Proportionality

The Strasbourg Court plays an important role as an oracle of rights in Europe to the extent that it helps to define the scope and content of substantive rights, in particular, those provided by Articles 8–11 and 14 ECHR. Because these rights overlap with national rights provisions, or fill a constitutional gap in those States

[42] Helfer (2008), 144.
[43] See Besson, this volume, Section III.C.1.b.
[44] See Candela Soriano, this volume, Section III.C.1.b.aa.
[45] See also Wildhaber (2007), 534 et seq.

without Bills of Rights, the Court's jurisprudence tends to take on a transnational-constitutional character. Through this jurisprudence, the Convention commands the obedience of national legal systems in the way that national constitutional rights do, without being constitutional in any formal sense. Further, the Court has adopted proportionality as the framework for adjudicating qualified rights under the Convention. Proportionality analysis, it can be argued, is an inherently constitutional mode of adjudication.[46] It is also deeply intrusive in that it gives judges the final word on how non-judicial policy makers have already balanced conflicting interests and values. In the ECHR context, the move to proportionality means that it is often the Strasbourg Court that will have the final say on how all national officials, including judges, balance competing interests.

The Court adopted proportionality as a means of ensuring that States would take qualified rights seriously, notwithstanding the principles of subsidiarity and margin of appreciation. The necessity phase of the procedure – a least restrictive means test – narrows the scope of permissible derogations to Convention rights to those measures that are necessary to achieve some important public interest. The Court's move not only empowered ordinary judges across Convention States by making them *de facto* constitutional judges, it also gave life to Articles 8–11 and 14 ECHR.

Of these provisions, Article 8 ECHR has generated the greatest number of applications and findings of violation. Here we find a combination of the gap-filling and feedback effects discussed above.[47] The Court has used proportionality analysis to fashion an innovative and expansive jurisprudence on privacy and family life in ever-expanding zones of protection. The Court developed the right to family reunification as a core value of Article 8 ECHR, and that guarantee now plays a major role in national immigration law throughout Europe. The Court also invoked Article 8 ECHR to exercise control over telephone tapping, now extended to other forms of private communication. Since national legal regimes lagged behind the technological capacity of the State to eavesdrop on its citizens, a flood of complaints gave the Court the opportunity to define the basic standard of rights protection. Perhaps most spectacularly, the Court used Article 8 ECHR to recognize the rights of transsexuals and homosexuals, furthering *inter alia* the decriminalization of homosexuality in Europe and, in conjunction with Article 14 ECHR, the construction of a general right to non-discrimination on grounds of gender and sexual preference.

The Court's caseload concerning Article 10 ECHR (freedom of expression) is also striking, given that these are not new, or boutique, rights. The older States of the Council of Europe, Austria (28 violations), France (11), the UK (9), and Switzerland (7) have generated the highest number of rulings of violation, with

[46] Stone Sweet (2008).
[47] See *supra* Section B.1.

the exception of Turkey (120). In its balancing of freedom of the press and other media against other values, the Strasbourg Court has tended to downplay rights to personality, personal honor, and other values that national systems may accord more weight. The Court appears anxious to accord a vital role to the press in democratic society, as a watchdog of Government, and therefore interprets the scope of possible restrictions narrowly (through the necessity phase of proportionality). In some States, including Russia, Ukraine and Turkey, the Government openly seeks to control the press and visual media for its own, often illiberal, purposes.[48] Given the Court's conception of Article 10 ECHR, it will confront very serious challenges from these and other States in the years to come.

The Court's role in protecting Articles 8–11 and 14 ECHR deserves to be evaluated in light of its overloaded caseload and in light of the principle of subsidiarity. In post-Protocol no. 11 Europe, the Court can expect to receive a steady stream of applications asking it, in effect, to supervise how national officials have balanced, that is, how they have made and applied law with reference to qualified rights. When the Court reviews how national officials have balanced competing interests under this part of the Convention, it rarely if ever guarantees the core essence of a right; neither does it represent an external control on allegations that a State grossly violates the most basic human rights, such as those under Articles 2 and 3 ECHR. It is instead fine-tuning outcomes that would normally be subject to national decision-making. Proportionality is an instrument *par excellence* of judicial fine-tuning, and of helping policy makers achieve the right balance between competing interests and values. There is, however, no fixed limit to its reach: on the contrary, proportionality fixes the boundaries of the margin of appreciation.

This situation poses a delicate problem for the Court. From the standpoint of reception, the Court often ends up with the last word on how rights are to be defined and applied in general measures, and used in concrete situations. From the point of view of its caseload, the Court's position means that it attracts an ever-increasing number of demands for fine-tuning. It is obvious that the ECtHR cannot abandon proportionality as a general approach to the qualified rights; to do so at this point would undermine the Convention and the national judiciary's capacities to enforce it. The Court could, however, take a more permissive posture with respect to how national judges enforce the proportionality principle. The Court could, for example, reiterate that Article 13 ECHR requires national judges to employ proportionality analysis; and it could announce that it will ensure, as a matter of procedure, that judges in fact have done so. At the same time, it could choose to limit the scope of its substantive review on the merits to how national judges have used proportionality analysis in important or extreme cases.

[48] See Nußberger, this volume, Section D.3.c. For the infamous Article 301 of the Turkish Criminal Code, see also Kaboğlu and Koutnatzis, this volume, Section D.2.b.

Such a move would reduce the exposure of the Court, enable it to counter charges of usurping national autonomy and the margin of appreciation, and help to forge a better partnership with national judges. It would also give the Court a tool to manage its docket more flexibly. On the downside, some would accuse the Court of abandoning its true mission, which consists in providing justice in individual cases. Skeptics of proportionality,[49] those who consider the framework to be inherently unprincipled, will renew their attacks, though this cost is already being paid.

D. The ECHR and National Legal Systems

In this Section, we focus on how the evolution of certain structural features of the Convention has complicated the reception process at the domestic level.

1. Exhaustion of Local Remedies

The principle of subsidiarity is a cornerstone, a *ratio conventionis*, of the European system of human rights protection. It is a duty of national officials to protect human rights within their domestic legal systems and to ensure respect for the rights safeguarded by the Convention. For its part, the ECtHR may accept an application only after domestic remedies have been exhausted, and within a period of six months from the date on which the final decision was taken (Article 35 ECHR). At first glance, these elements would seem to comprise a framework under which there would be a simple and smooth transition from the national system to the ECHR. Yet as the reports on Switzerland, Poland, Russia, and Italy, among others, make apparent, determining when national remedies have been exhausted may be a difficult and time-consuming task, introducing a great deal of inter-systemic friction. The three factors that matter most – the organization of the national judiciary, the competences of constitutional and high courts, and the effectiveness of ordinary (and the availability of extraordinary) remedies – vary considerably across Europe. When the Court does not pay close attention to these differences, it produces incoherent case law.[50]

The Court also uses Article 35 ECHR strategically, for its own purposes: a restrictive interpretation of the exhaustion of local remedies rule will tend to close the door to applicants, whereas a broader construction will invite more applications. In practice, the Court seems to choose between progressive and narrow approaches, for different reasons. If an applicant can show that there would be no point in exhausting national remedies, and if the problem at hand seems important, the Court may simply ignore the requirement and dismiss the

[49] Bruach (2005) is a good example.

[50] *Sürmeli v. Germany* (appl. no. 75529/01), Judgement (Grand Chamber), 8 June 2006 (not yet reported); *Szott-Medyńska and Others v. Poland* (appl. no. 47414/99), Decision, 9 October 2003 (not reported).

Government's preliminary objections.[51] In doing so, the Court sends a powerful signal about the inadequacy of national rights protection and invites reform. The Court needs to be able to restrict access in order to cope with its overloaded docket, although the result will be denial of justice in some individual cases.

Thus, despite its *prima facie* intelligibility, applying the local remedies rule on the ground is fraught with both factual and political complexity. As this book shows, the Court's decisions on admissibility deserve to be evaluated more closely, both by scholars and States. States should consider translating and distributing such decisions: they are crucial to a proper understanding of the interaction between the national and European systems. In some countries, scholarly commentary on Article 35 ECHR is both abundant and highly technical whereas, in others, the topic is just being noticed. What is clear is that, at the interface of the national legal order and the ECHR, there exists considerable friction, with all the attendant inefficiencies (of time, money, and intellectual effort) that add to the system's burdens.

2. Convention Rights as Minimal Standards

As discussed in the introduction, the traditional view was that the Convention established European standards of rights protection in the form of a floor below which national legal protection may not fall.[52] In this sense, it has always been recognized that the Convention harmonizes rights protection, at least at this minimal level. Moreover, under Article 53 ECHR, the Contracting States may develop higher human rights standards than those entrenched in the Convention. As with Article 35 ECHR, however, this view misses what is arguably most important. The Court treats the Convention as a "living instrument", and understands its role to be an autonomous and authoritative defender of human rights. Further, it has expressly committed itself to raising human rights standards whenever possible, although it typically does so only after asserting that it has identified an emerging consensus among the Contracting States. What this means for laggard States – that is, those national legal systems that are not part of the identification of a new consensus – is that the Convention does not constitute the minimal, but rather the sole, obligatory, higher standard. Thus, one important meta-narrative of reception is that States are always playing catch-up to the Court, if some more than others.

[51] See, e.g., *Isayeva, Yusipova, Bazaeva v. Russia* (appl. no. 57947/00; 57948/00; 57949/00), Judgement (First Section), 24 February 2005 (not yet reported); *Isayeva v. Russia*, (appl. no. 57950/00), Judgement (First Section), 24 February 2005, (not yet reported); *Akdivar v. Turkey* (appl. no. 21893/93), Judgement (Grand Chamber), 16 September 1996, Reports 1996-IV (no. 15), 1192, para. 67; *Bosphorus Hava Yollari Turizm Ve Ticares AS v. Ireland* (appl. no. 45036/98), Decision (Fourth Section), 13 September 2001 (not reported); *Selçuk and Asker v. Turkey* (appl. nos 23184/94;23185/94), Judgement (Chamber), 24 April 1998, Reports 1998-II (no. 71), 891, paras 70–71; *McCann and Others v. United Kingdom* (appl. no. 18984/91), 27 September 1995, Series A, Vol. 324, para. 161.

[52] See Stone Sweet and Keller, this volume, Section A.1.

The national reports show clearly that these dynamics have influenced how national judges perform their tasks, and how they justify new, more active, roles in rights protection. Some national courts directly equate national human rights with European standards. Switzerland is a telling example,[53] but one finds variation on this theme wherever the Convention functions as a surrogate Bill of Rights. It is striking that most national courts have learned to follow the Court, and to widen the scope and standards of the rights that they enforce, with few difficulties. There are, arguably, a few notable exceptions. Irish judges, for example, consider the ECHR to state minimal standards in comparison to the higher standards offered under their own Constitution; and German and Italian judges sometimes state, or imply, as much as well. In the UK, where the courts cannot adopt an interpretation of the Convention that goes beyond benchmark standards set by the ECtHR, the Convention constitutes both a minimal and a maximal standard.[54]

This dynamic puts strains on the reception process in obvious ways, not least, since a State in compliance at one moment in time will be put out of compliance at a later point, every time the Court decides to raise levels of protection. In practice, Convention rights do not comprise minimal common-denominator standards, but rather obligatory, relatively free-standing standards above which national judges have an interest in developing, if they are to stay in compliance with the regime.

3. Beyond Individual Justice

To read the Convention literally (Articles 41 and 46 ECHR, for example), one might conclude that the regime's legal system is primarily geared to delivering individual justice. States bear a duty to give just satisfaction to any individual who has been a victim of a violation of the ECHR for which they are responsible. However, as this book emphasizes, the Court is increasingly engaged in delivering what the former President of the Court, Luzius Wildhaber, Stephen Greer, and others characterize as "constitutional justice".[55] Today, the Court often behaves more as a general and prospective lawmaker than as a judge whose reach is primarily particular and retrospective. In the post-Protocol no. 11 world, the Court functions as an authoritative oracle of rights jurisprudence for all of Europe; it supervises State compliance with the ECHR, whose standards are continuously rising; and it seeks general solutions to general problems with which it is confronted. This shift in emphasis has enormous consequences for the reception processes. States are routinely required to reform their internal law and practices in response to findings of violation by the Court, not simply to provide compensation to individual victims. Still more problematic, the Court finds itself in the

[53] See Thurnherr, this volume, Sections B.2.b. and B.2.c.
[54] See Besson, this volume, Section III.D.1.b.
[55] Wildhaber (2000); Greer (2006), 173.

role of a socio-political engineer when it seeks to solve systemic failures through pilot judgements and other types of rulings.

4. Reopening of Proceedings

It is now commonplace for States to allow the reopening of national criminal proceedings after a non-favourable judgement from Strasbourg (the only exceptions in our survey are Italy, Spain and Ukraine).[56] This quiet revolution in European procedural law is remarkable for several reasons. Formally, the States enjoy a degree of discretion as to the means by which to comply with a final ECtHR judgement in accordance with Article 46 ECHR, while the Court refers to the well-known principle of *restitutio in integrum* in international law. Thus, whenever the Court concludes that there has been a breach of the Convention, the respondent State is under a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore, as far as possible, the situation existing prior to the violation.[57] The idea that proceedings must be reopened after a negative judgement is not required.[58] On the contrary, the idea is clearly borrowed from a hierarchical system with a super-ordinate court structure.

This particular *acquis conventionnel* developed in a domain traditionally reserved to national law. The diversity and complexity of national legal systems concerning procedural requirements (juridical time limits and formal requirements) and jurisdictional competences (e.g., *ratione personae, rationae materiae* and *ratione temporis*) have thus far impeded international harmonization in this area (prominent exceptions like the Lugano Convention[59] and the Brussels Convention[60] only prove the rule). Although national procedural law remains a pretext for national parochialism, the ECHR has provoked a first important

[56] The coordination in civil law and administrative law has not substantially evolved. Only some countries provide –under certain conditions – for the reopening in civil or administrative proceedings (such as Germany, United Kingdom, Ireland, Norway, Russia, Sweden, Switzerland, Ukraine, Turkey).

[57] See, for instance, *Carbonara and Ventura v. Italy* (appl. no. 24638/1994), Judgement (Second Section), 30 May 2000, Reports 2000-VI, 91; *Scordino v. Italy* (No. 1) (appl. no. 36813/97), Judgement (First Section), 29 July 2004, (not reported).

[58] That said, the Committee of Ministers recognized the very importance of the possibility of reopening national proceedings for the reception of the ECHR and recommended the adoption of national remedies to the Member States. Recommendation Rec. (2000)2 of the Committee of Ministers to member States on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights, 19 January 2000.

[59] Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, 28 I.L.M. 620 (1989) (among EC and EFTA Member States).

[60] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 8 I.L.M. 229, reprinted as amended in 29 I.L.M. 1413 (1990), substantially replaced by the Council Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ 2011 L 12/1 (among EC Member States).

breakthrough in this sensitive area of national procedure. No other international treaty has triggered the same effect.

5. Inter-Judicial Cooperation and Conflict

The ECHR does not provide a blueprint for an integrated system of human rights protection for Europe, nor does it establish how the Court should interact with its national counterparts. Nonetheless, the Convention, once incorporated into domestic law, has had an enormous impact on the judiciary across Europe. As discussed above, incorporation has enhanced judicial authority *vis-à-vis* the legislative and executive branches in virtually every country in our survey. The book also documents the extent to which the ECtHR's case law has provoked changes in how national courts operate and, in countries such as France, Italy, and the UK, it has been a decisive factor in judicial reorganization.[61]

The absence of formal rules governing inter-judicial interaction in the regime has meant that national courts have had to choose how to define their relationship with Strasbourg, and these choices have evolved over time. Some national courts initially opted for a strong emphasis on national autonomy, leading to a competitive relationship, or even conflict, open or disguised. Examples include the German Constitutional Court, the Austrian Constitutional Court in its early case-law, the Italian Constitutional Court, the Irish and British courts, and the French high courts until the 90's, although judges on each of these courts have laboured to reduce tensions in recent years. Other courts have chosen to defer to the Convention and to its Court, for their own reasons, as the Spanish Constitutional Tribunal did in its early jurisprudence, and as the Dutch and Belgian judges do. One might identify a mid-point, between conflict and deference, wherein courts seek to forge a cooperative relationship with the Strasbourg Court through dialogue and comity. The Swiss Federal Supreme Court, the Polish Constitutional Court, and, more recently, the House of Lords and the French Supreme Court and Council of State are good examples; and this position may well become the norm. Finally, through negligence or ignorance, some courts have failed to negotiate much of a relationship at all (typical for the Greek courts until the 90's, for the Turkish courts at least until 2004 and for the Russian courts until today).

The reports address why national judges made the choices they did, with what consequences for reception, and why they may have changed their attitudes over time. Although more research on these issues needs to be undertaken, it is clear that no single factor, or simple combination of factors, can explain the choices judges have made. In some important cases (notably France and the UK), high courts became more open to the Strasbourg Court's jurisprudence in order to re-

[61] See this volume, Lambert Abdelgawad and Weber, Section B.1.c. and D.1.c.; Besson, Section III.D.1.b.; Candela Soriano, Section III.D.2.b.

duce their vulnerability to findings of violation. Non-legal factors also influence judicial attitudes to the ECHR regime. Independently of the formal structure and legal constraints (a system's monist or dualist nature, the formal rank of the Convention within the legal order, the existence and extent of judicial review of Government acts, etc.), those national judges who desired to enforce Convention rights directly, as supra-legislative norms, found ways to do so. The reports also show that judicial reception of the ECHR is conditioned by the judges' expertise, access to the Court's case law, trust in the ECtHR to perform its tasks in good faith, and self-understanding as regulators of Government action and rights protectors. The fact that judges interact with non-judicial national officials (who are often pursuing quite different goals) complicates matters. Indeed, the more national judges seek to increase the effectiveness of Convention rights in the domestic order, the more likely it is that they will face resistance on the part of other government actors.

The ECHR has thus evolved in ways that generate politics – between courts, and between courts and non-judicial officials – that will always be, in our view, significantly open-ended and difficult to model.

E. The Future of the Court

The Court faces two dramatic challenges: an exploding case load, and a steady stream of applications that raise very serious human rights abuses from a handful of problematic States. Fears that the Court has reached its extreme capacity are both widespread and justified. It is difficult to see how the individual complaint system can survive without fundamental changes in how the Court processes applications. The Court does not possess the necessary power and resources for it to oversee the kinds of deep structural domestic reform required for some countries to bring domestic rights standards up to bare minimal levels. In this Section, we briefly examine, from the perspective adopted in this book, how the ECHR regime might best meet its challenges in the future.[62]

1. Reception and Burden Sharing

One of the general claims of this volume is that the ECHR and domestic legal systems are significantly enmeshed in one another. If the protection of human rights in Europe is carried out at different levels and through various mechanisms, the question is how one can best distribute the overall charge of protecting human rights. In the Council of Europe system, other bodies such as the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Advisory Committee on the Framework Conven-

[62] We do not survey all of the reform proposals here, but see Helfer (2008). Helfer reviews the growing literature on ECHR reform, and develops an interesting approach that emphasizes "embeddedness" and burden sharing.

tion for the Protection of National Minorities and the European Committee on Social Rights, also have rights-based remits.[63] The Council of Europe also maintains Information Offices in some States (including Poland and Slovakia in our survey[64]), providing not only potential applicants with information on admissibility issues, but also giving counsel on existing domestic remedies. These offices save potential applicants from initiating proceedings unnecessarily or prematurely. The functions of such offices could be expanded and strengthened, in particular in Contracting States that have a strong share in the Court's docket.

As this volume shows, national officials have a crucial role to play in monitoring and enforcing Convention rights. Most important, they can incorporate the ECHR in ways that make it directly effective in the legal order, and they can develop and use mechanisms of reception. The book also demonstrates a strong correlation between relatively higher domestic human rights standards and relatively lower numbers of applications to Strasbourg. One obvious way to reduce the ECtHR's caseload is, therefore, to enhance rights protection domestically.

As the data show, a small handful of countries, with massive, systemic problems, generate a large proportion of total applications. Such problems include judicial dysfunction (underpaid judges, poor infrastructure, and lack of impartiality), the failure on the part of politicians to commit themselves to values associated with the rule of law, corruption, and deep-rooted political problems, including the oppression of minorities and secessionist movements. Among the countries covered in this volume, Russia, Turkey and Ukraine fit this description. In these contexts, a judgment of the Court may have little effect beyond the individual applicant. The Court, in pilot rulings, may seek to persuade or cajole such States to take comprehensive measures to correct problems at the root, but it can ill afford to allow dealing with the worst pathologies to preempt its other important roles. Since the advent of Protocol no. 11, the number of applications to the ECtHR has also steadily increased in Contracting States with fairly good human rights records (such as Austria, Ireland, Norway, Poland, Slovakia, Spain, Sweden, and Switzerland). We have to accept that in a Europe of Rights, "going to Strasbourg" will be attractive to those who wish to see new rights recognized, or to raise standards of protection for established rights. It is an important function of the Court to respond to these demands and to participate fully in the progressive development of rights in Europe, in meaningful partnership with national judges and other officials.

[63] In addition, it is important to mention the Commissioner for Human Rights established under the auspices of the Council of Europe. See Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999 at its 104th Session and Article 13 of Protocol no. 14 amending Article 36(3) ECHR.

[64] See Krzyżanowska-Mierzewska, this volume, Sections J.1.c. and J.2.c.

2. Remedies

Reform of the remedial requirements under the Convention could provide another means of burden-sharing between the Strasbourg and the national courts. The Court continuously emphasizes the States' obligation to vest the domestic courts with the necessary competencies and resources to enable them to give full effect to Convention rights.[65] National judges normally constitute the final phase of national remedial systems, and thus act as the gatekeepers between domestic legal orders and the Court. Although Article 13 ECHR was for many years a "dormant effective remedy clause",[66] the Court now stresses the importance of that Article,[67] not least in order to urge a more proactive stance on the part of the national courts. As this volume shows, States will not be able to manage the variegated demands of the ECHR regime without enabling strong judicial enforcement of rights.

Entrusting the determination of "reparation" and "just satisfaction" to the national courts (reform of Article 41 ECHR) has also been proposed,[68] not least since national authorities are normally better acquainted with the relevant criteria for assessing damages. Any delegation of tasks under the ECHR will run the risk of producing too much variation across the States, and the same would be true in the area of compensation. The ECHR makes awards in accordance with its own criteria, autonomously, rather than on the basis of national concepts. Conferring such authority on national courts would entail divergence, and such variation could, if too great, offend the very principles of fairness and justice that the ECHR is designed to protect. There would, therefore, need to be clear safeguards to protect individuals against States that might not live up to expectations, and this control function could only be performed by the Court.

[65] See *Kudła v. Poland* (appl. no. 30210/96), Judgement (Grand Chamber), 26 October 2000, Reports 2000-XI, 197, para. 152: "(...) Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the travaux préparatoires (...), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings."

[66] Malinverni (1998), 647–650.

[67] See, e.g., *Kudła v. Poland* (*supra* note 65), paras 146–160; *Sürmeli v. Germany* (appl. no. 75529/01), Judgement (Grand Chamber), 8 June 2006 (not yet reported), paras 97–117; *Aksoy v. Turkey* (appl. no. 21987/93), Judgement, 18 December 1996, Reports 1996-IV, 2260, paras. 51–57.

[68] Mahoney (2007).

3. Reforming the Regime

Over the past twenty years, the ECHR has been amended by a series of Protocols,[69] ultimately leading to the transformation of the legal system occasioned by Protocol no. 11. This strategy – of building the regime progressively through protocols – may have reached its limits. Most important, with the accession of the Eastern European States, the Council of Europe now comprises a much less homogeneous family of Contracting States. Because each additional Protocol requires ratification by all Contracting States (each State possesses a veto over proposed changes), it may be difficult or impossible to reform the regime through protocols in the future. If so, the ECHR regime may itself become mired in systemic problems for which no systemic solutions will be forthcoming. The Court might be allowed to propose changes to its jurisdiction to the Council of Europe, which would approve them by majority or a qualified majority of States. Yet such a reform would itself require unanimity, which may not be forthcoming.

Protocol no. 14 – which is strongly supported by the Court – illustrates the problem.[70] Protocol no. 14 aims at giving the Court the necessary procedural means and flexibility to process applications within a reasonable time, while enabling it to concentrate on those it finds most important. Under Protocol no. 14, the Court could declare a case inadmissible unless the applicant has not suffered a "significant disadvantage".[71] These and other provisions would reduce the time spent by the Court on manifestly inadmissible and repetitive cases. Although these reforms are no doubt necessary, it is already clear that they would not be sufficient to overcome the Court's overload.[72] Yet, alone among High Contracting Parties, Russia refuses to ratify Protocol no. 14, blocking its adoption.

One possible solution might be to allow the Court to undertake significant systemic reform on its own. The Council of Europe could authorize the Court to use Rule 103 (of the Rules of the Court) to amend its procedures as the Court sees fit, while reserving its own authority (under unanimity) to quash such changes. The Convention (Article 32 ECHR) also confers jurisdiction on the Court over all matters concerning the interpretation and application of the Convention and the Protocols. The Court might use these plenary powers to decide, in an appropriately explicit manner, to delegate some types of cases (of minor importance and without systemic implications) to national judges. As we argued above,[73] the Court could also choose to reduce its level of scrutiny when it comes to how national judges fine-tune the protection of qualified rights through pro-

[69] See *supra* Section A.1.

[70] For an overview of Protocol no. 14, see Caflisch and Keller; Greer (2005). For the ECtHR's view on Protocol No. 14 and other proposed reforms, see *Opinion of the Court on the Wise Persons' Report*, adopted by the Plenary Court, 2 April 2007.

[71] Article 12(3)(b) of Protocol no. 14 amending Article 35 ECHR.

[72] For a discussion of a range of reform proposals, see the *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203, 15 November 2006.

[73] See *supra* Section C.4.

portionality balancing. Such changes would enable the Court to concentrate on cases involving more serious human rights violations, and on defining the content and scope of rights, which national judges would then help to fine-tune.

F. A Europe of Rights

In post-Protocol no. 11 Europe, it makes little sense to conceptualize the ECHR as an international regime, external to the Contracting States. The Convention has a significant presence within national legal orders, even where this presence is resisted and opposed. Today, national officials routinely participate in a transnational judicial process whose reach into domestic law and politics is limited only by the ever-widening scope of the Convention itself, as determined by a transnational court. In virtually every State examined in this book, the Convention has provoked some measure of significant structural and procedural innovation, including the development of mechanisms for coordinating national law and the Convention, as the latter evolves. Reception processes have, in turn, provoked deep changes in European Government, through the accumulation of incremental, step-by-step adjustments to the demands of the Strasbourg Court. National officials are, gradually but inexorably, being socialized into a Europe of rights, a unique transnational legal space now seeking to develop its own logic of political and juridical legitimacy. The success of this endeavor will depend partly on the Council of Europe's ability to reform the ECHR legal system, and partly on the extent to which national officials sustain reception processes as means of further incorporating the Convention into national legal orders.

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