

# THE CHALLENGING AUTHORITY OF THE EUROPEAN COURT OF HUMAN RIGHTS:

## FROM COLD WAR LEGAL DIPLOMACY TO THE BRIGHTON DECLARATION AND BACKLASH

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### I

#### INTRODUCTION

History is a key context for understanding the authority of the European Court of Human Rights (ECtHR or Court).<sup>1</sup> This half-century old international court (IC) has operated in contexts as different as the Cold War and decolonization, the emergence of the political and economic process of European integration, the post-Cold War period and, most recently, the geopolitical power shift that has prompted new transnational projects and alliances beyond Europe. The ECtHR's long period of operation and the different socioeconomic and geopolitical conditions under which it has evolved are also reflected in the institutional evolution of the Court from a traditional, nonpermanent IC that met occasionally in smaller premises to a permanent court proudly perched on the River Ill in Strasbourg, France. Moreover, the ECtHR has changed from being the product of a Cold War political compromise to a high-profile and influential IC with de facto supreme jurisdiction over European human rights.<sup>2</sup>

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1. See generally ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* (2010); A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2004); MIKAEL RASK MADSEN, *LA GENÈSE DE L'EUROPE DES DROITS DE L'HOMME: ENJEUX JURIDIQUES ET STRATÉGIES D'ÉTAT (FRANCE, GRANDE-BRETAGNE ET PAYS SCANDINAVES, 1945-1970)* (2010).

2. See generally Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*,

The Court's transformation has contributed to an explosive growth in its caseload, most notably since 2000. In its first decade of operation, 1959 to 1969, the Court delivered ten judgments; in 2008, the ECtHR delivered its tenth-thousandth judgment.<sup>3</sup> Its current docket includes some 70,000 pending applications and it delivered 891 judgments in 2014 alone.<sup>4</sup> Thus, when examined solely at the level of institutional and legal development, the ECtHR has undergone a wholesale metamorphosis—a development that its advocates and architects could hardly have anticipated.

This article uses the theoretical framework laid out by Alter, Helfer, and Madsen to analyze the transformation of the authority of the ECtHR since its genesis.<sup>5</sup> Their framework lays out a set of different types of authority in fact: from narrow, to intermediate, to extensive authority.<sup>6</sup> The extent to which a court's constituencies recognize IC decisions as binding and take consequential steps to implement those decisions reflects the type of authority an IC wields.<sup>7</sup> Narrow authority concerns the immediate parties of a given case.<sup>8</sup> Intermediate authority concerns the larger group of actors similarly situated to the parties of a given case, such as potential litigants and government officials charged with implementing IC decisions.<sup>9</sup> Extensive authority concerns the broadest range of actors that engage with the IC—including NGOs, legal professionals, academics, and business actors.<sup>10</sup> An IC with extensive authority will typically be a key institution in developing law and politics within its area of legal authority. There is no teleology implied in this theory and different types of authority can coexist. Also, the authority of the Court can vary across member states.

From its inception until the mid-to-late 1970s, the ECtHR struggled to maintain narrow legal authority. The Court's judgments influenced the litigants involved in these disputes but did not cast a broader normative shadow beyond the target state and the specific case.<sup>11</sup> The ECtHR's limited influence was an artifact of its very small caseload during its first fifteen years of operation and the reality that key member states of the European Convention on Human Rights (the Convention or ECHR)—notably France and the United

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32 LAW & SOC. INQUIRY 137 (2007) (discussing the process that shifted the Court to its current position as the supreme European human rights court).

3. EUROPEAN COURT OF HUMAN RIGHTS OVERVIEW 1959–2014, 4 (2015), [http://www.echr.coe.int/Documents/Overview\\_19592014\\_ENG.pdf](http://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf).

4. This number is current as of December 31, 2014. See EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 6 (2014), [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf).

5. See generally Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 9–12.

6. In their framework, they also include two additional types of authority: no authority and popular authority. These two types are not considered in this analysis. *Id.* at 9, 11–12.

7. *Id.* at 10.

8. *Id.*

9. *Id.*

10. *Id.* at 10–11.

11. *Id.* at 16, tbl. 1.

Kingdom—were unwilling to accept the Court’s jurisdiction out of fear that it would meddle in the decolonization struggles of the period.<sup>12</sup> The Court responded by deploying a relatively restrictive and often state-friendly interpretation of the Convention to facilitate states’ acceptance of the system. This diplomatic approach to the Convention had, however, the negative consequence that civil society groups, typically litigation-oriented NGOs, found the Court to be of little use.<sup>13</sup>

Both the Court’s caseload and civil society engagement with the Court changed throughout the late 1980s and the 1990s when the ECtHR gained intermediate and extensive authority.<sup>14</sup> During this period, the Court, with a steady and growing docket, became the *de facto* Supreme Court of human rights in Europe.<sup>15</sup> Even though there were negative reactions to the Court’s expanding jurisprudence and power—first in the United Kingdom, and then in France<sup>16</sup>—member states generally accepted ECtHR judgments, although compliance was sometimes partial or delayed.<sup>17</sup> Moreover, human rights emerged not only as a distinct area of European law but also as a broader legal-political field marked by contests over the meaning and interpretation of human rights as an increasingly important social and legal issue in Europe.<sup>18</sup>

The enlargement of Europe in the late 1990s—which expanded the Convention’s membership to forty-seven and its geographical reach from western Europe to the easternmost boundaries of Russia—had a major impact on the Court and its authority. Most notably, in 1998, the ECtHR was reconstituted as a permanent IC, and the European Commission on Human Rights, previously responsible for filtering applications to the Court, was disbanded. At first, these significant changes did not alter the Court’s approach to adjudicating human rights cases. The supreme interpreter of the Convention, the ECtHR, initially continued to pursue the jurisprudential path developed since the late 1980s for the new eastern European member states. Yet the combined effects of the institutional transformation and the structural and systematic human rights problems in several new member states led the Court’s

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12. Mikael Rask Madsen, *France, the UK and “Boomerang” of the Internationalization of Human Rights (1945–2000)*, in HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 57, 63 (Simon Halliday & Patrick Schmidt eds., 2004).

13. See MADSEN, *supra* note 1, at 178–79.

14. Alter, Helfer & Madsen, *supra* note 5.

15. See Madsen, *supra* note 2, at 155 (providing an overall analysis of the construction of the new and permanent Court in 1998).

16. For further discussion, see Madsen, *supra* note 12, at 77, 82.

17. Insiders to the ECtHR system at this time generally claim that there was nearly total compliance. See SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 218 n.9 (2014) (“[M]ost of the sources that dealt with this issue claim compliance rates are very high.”).

18. For definition of the field, see PIERRE BOURDIEU & LOÏC WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 97 (1992). See also Mikael Rask Madsen, *Reflexivity and the Construction of the International Object: The Case of Human Rights*, 259 INT’L POL. SOCIOLOGY 263–64 (2011).

caseload to skyrocket.<sup>19</sup> The ECtHR could not diffuse its interpretation of human rights to lower courts in the same way a constitutional or national supreme court might; instead, the ECtHR was forced to serve as the final court of appeal for the protection of the individual human rights of more than 800 million Europeans.<sup>20</sup>

With the Court increasingly overburdened and backlogged—yet still progressively expanding the scope of the Convention—a number of member states launched, for the first time since the Court’s creation in 1959, a systematic critique of both the Court’s power over national law and politics and the quality of the Court’s judges and their judgments.<sup>21</sup> This discontent climaxed with the 2012 Brighton Declaration, adopted by all forty-seven member states, which began an institutionalized process that aimed to limit the ECtHR’s power.<sup>22</sup> The process before and after the Brighton Declaration raises the fundamental question of whether the overall authority of the Court has changed. Although more exacerbated in the case of the ECtHR, the situation somewhat resembles that of the Court of Justice of the EU—another European IC created in an entirely different historical context that, like the ECtHR, also faces a problem in terms of eliciting respect for its rulings in a number of Eastern European countries. In both cases these implementation problems have in turn spurred criticism also in the original member states.<sup>23</sup>

This article analyzes the transformations of the Court’s authority by emphasizing on one hand the broader historical context of its development—notably changes at the geopolitical level—and, on the other hand, the institutional and constituent-specific contexts influencing the Court’s authority. Because of the size of this empirical object, the analysis cannot be exhaustive and is instead based on a combination of structural analysis of the broader geopolitical context, that is, the overriding global frameworks of power, and the ideas that influence and enable actions in both ICs and in regional and national settings; more pointed case studies of important member states; and analysis of significant changes in the institutional design of the ECtHR. The focal point of

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19. See *infra* Part III.

20. This spurred a debate among scholars and judges on the precise role of the ECtHR in terms of providing constitutional justice or individual justice. For an overview, see Steven Greer & Luzius Wildhaber, *Revisiting the Debate about ‘Constitutionalising’ the European Court of Human Rights*, 12 HUMAN RIGHTS L. REV. 665 (2012).

21. JONAS CHRISTOFFERSEN & MIKAEL R. MADSEN, *Postscript: Understanding the Past, Present and Future of the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 230, 239 (Jonas Christoffersen & Mikael R. Madsen eds., 2013).

22. BRIGHTON DECLARATION, APR. 20, 2012, [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf). However, the Brighton Declaration is ambiguous. See CHRISTOFFERSEN & MADSEN, *supra* note 21, at 230 (arguing that the Brighton Declaration both limits and extends the power of the Court); Laurence R. Helfer, *The Burdens and Benefits of Brighton*, 1 ESIL REFLECTIONS 1 (2012) (also arguing that the Brighton Declaration points affects the power of the Court in contrasting ways).

23. See R. Daniel Kelemen, *The Court of Justice of the European Union in the Twenty-First Century*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 127–39 (demonstrating that a number of European countries are only partly in compliance with the rulings of the Court of Justice of the EU).

the analysis is the changing authority of the ECtHR as a result of both broader structural changes and country-specific interfaces with the Court. Geopolitics set the parameters for the action and reforms of the ECtHR, but the Court's specific authority—and particularly the unevenness of the Court's authority across member states—is for the most part a product of the more local politics.

Addressing the ECtHR's ever-evolving authority, part II analyzes the long Cold War period from 1950 through 1989 during which the ECtHR transitioned into a powerful international court. Part III then turns to the post-Cold War period from 1989 to the present, first analyzing the increasing number of judgments handed down by the Court, and then examining the possible new directions of the Court against the background of its recent criticism.

## II

### THE ECtHR DURING THE COLD WAR (1950–1989)

Scholars have argued that European governments embraced the Convention and the ECtHR, in part, to “lock in” liberal democratic ideals into the Western European form of government.<sup>24</sup> But although defending Free Europe was a key driver in the drafting of the Convention,<sup>25</sup> states generally assumed that the cost of ratifying the treaty was low.<sup>26</sup> Indeed, the original Convention provided a flimsy padlock that was easily broken: ratification did not require accepting the ECtHR's jurisdiction or the right of individual petitions, through which individuals could submit claims to European Commission of Human Rights.<sup>27</sup> Instead, both features, which later became trademarks of the European human rights regime, were optional at the time. The judicialization of the Convention depended, therefore, on each state's acceptance of these optional provisions. The optional nature of important parts of the agreement—introduced as a necessary compromise during negotiation of the European human rights system—deeply influenced the authority and practices of the ECtHR until the mid-1970s.<sup>28</sup> Only after all major member states had accepted these optional review provisions did the Court begin to acquire broader authority, analyzed below.

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24. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 228 (2000) (arguing that the Court was created to “lock in” democratic governance against future opponents”).

25. See Marco Duranti, *Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politics*, 3 HUMANITY: AN INT'L J. OF HUM. RTS., HUMANITARIANISM, AND DEV. 361, 362 (2012) (“[T]hose founding the European human rights regime were exclusively concerned with the dangers of communism and fascism.”).

26. See Madsen, *supra* note 2, at 140.

27. Convention for the Protection of Human Rights and Fundamental Freedoms art. 25, Nov. 4, 1950, 213 U.N.T.S. 222, [https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention\\_ENG.pdf](https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf) [hereinafter Convention].

28. See Mikael Rask Madsen, *Legal Diplomacy—Law, Politics and the Genesis of Postwar European Human Rights*, in HUMAN RIGHTS IN THE TWENTIETH CENTURY: A CRITICAL HISTORY 62, 75–79 (Stefan Ludwig Hoffmann ed. 2011) (showing how this forced the institutions to develop a very cautious approach to the Convention).

As originally designed, European states could choose to only accept the jurisdiction of a quasi-judicial institution, the European Commission of Human Rights.<sup>29</sup> Under the Commission's jurisdiction, the right of individual petition was optional, and ratifying the Convention only resulted in the Commission's compulsory jurisdiction over interstate complaints.<sup>30</sup> Further weakening the legal dimension of the system, the recommendations of the Commission were not legally binding unless the Committee of Ministers accepted them.<sup>31</sup> Thus, recommendations were principally controlled by an interstate political body rather than an independent legal body.<sup>32</sup> The Commission, however, had the power to bring a case before the Court if the state in question had accepted the Court's jurisdiction and the case could not be settled by conciliation.<sup>33</sup> Individuals had no such option, whereas states could choose to refer a case to the Court if they had accepted its jurisdiction.<sup>34</sup> As a result of this institutional design, the Commission rather than the Court initially became the key institution in the European human rights system. By filtering applications and deciding which cases to review on the merits or refer to the ECtHR, the Commission became the central Strasbourg institution and therefore a critical player in building the system's authority.<sup>35</sup> In what follows, this article first analyzes the period of narrow authority (1953–1974) that resulted from both institutional design and the structural limitations imposed by the Cold War and decolonization. It then addresses the subsequent period (1975–1989) in which the Court broadened its authority by laying the foundations of European human rights law and establishing itself as the region's *de facto* supreme court of human rights.

#### A. The Fragile Human Rights System in Search of Authority (1950–1974)

Ratified by ten member states, the Convention became legally binding in 1953.<sup>36</sup> In 1955, a number of smaller countries—Sweden, Ireland, Denmark, Iceland, and Belgium, along with the Federal Republic of Germany—accepted the provision on individual petition.<sup>37</sup> By 1958, the necessary eight optional acceptances of the Court's jurisdiction had been submitted, once again by a group of smaller countries: Ireland, Denmark, the Netherlands, Belgium, Luxembourg, Austria, and Iceland, together with the Federal Republic of

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29. Convention, *supra* note 27, art. 46.

30. *Id.* art. 25.

31. *Id.* art. 31.

32. The Committee of Ministers also oversaw respondent states' implementation of decisions by the Court and Commission. *See id.* art. 32.

33. *Id.* art. 48.

34. *Id.*

35. *See* notes 56–61 and accompanying text.

36. The original ten member states of the European Convention were: The United Kingdom, Denmark, Germany, Greece, Iceland, Ireland, Luxembourg, Norway, the Saar, and Sweden.

37. *See* CHRISTOFFERSEN & MADSEN, *supra* note 21.

Germany.<sup>38</sup> It was the support of smaller European countries that ensured the initial establishment of the Convention's oversight system. Conversely, the two major European imperial powers, France and Britain, which together with Italy had the greatest influence on the drafting of the Convention,<sup>39</sup> both initially abstained from accepting the right of individual petition and the jurisdiction of the Court. Moreover, the fact that states assenting to these optional clauses typically did so only for three or five years at a time combined with the reluctance of key member states to commit to a European-level review of their human rights practices, put the entire system in a fragile situation.<sup>40</sup> Consequently, both the Commission and the nascent Court needed to prove themselves to reticent governments in order to secure the institutions' continuous operation.

For a new, fragile human rights system in search of authority, the first cases to reach Strasbourg were hardly ideal. Filed in 1955, the Commission's first case, *Greece v. United Kingdom*,<sup>41</sup> was an interstate dispute between two North Atlantic Treaty Organization (NATO) allies, Greece and the United Kingdom, at the height of both the Cold War and decolonization. The issue involved the rights of Greek insurgents in Cyprus. Britain had extended the reach of the Convention to cover some of its colonial possessions, including Cyprus, yet by not accepting individual petition or the Court's jurisdiction, it was assumed by the Foreign Office that this extension was a merely symbolic gesture.<sup>42</sup> Greece's interstate complaint effectively bypassed this careful British evasion of the Convention system. Coming to terms with being sued by a NATO ally, the U.K. Foreign Office eventually defended its actions as a necessary response to the emergency situation on the island. The Commission resultantly investigated both the alleged violations and the emergency situation.<sup>43</sup>

The ambiguity in what role European human rights should play, and the recognition—or lack thereof—by member states, is strikingly clear from *Greece v. United Kingdom*. In response to the imminent investigation by the Commission, the British Foreign Office analyzed every member of the Commission delegation. Although this assessment was only for internal use, it clearly revealed the British officials' disdain for the nascent system. Although Waldock of the United Kingdom and Professor Sørensen of Denmark both received favorable reviews as “the only members of real caliber,” practically every other Commission member was regarded with scorn.<sup>44</sup> For example, the

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38. *Id.*

39. See generally SIMPSON, *supra* note 1.

40. A. H. Robertson, *The European Court of Human Rights*, 9 AM. J. COMP. LAW 1, 18 n.49 (1960).

41. See generally *Greece v. United Kingdom*, App. No. 176/56, 2 Y.B. Eur. Conv. on H.R. 174 (1959) (Eur. Comm'n on H.R.).

42. See SIMPSON, *supra* note 1, at 838–41 (discussing the relationship between extending the Convention yet limiting access to use the Convention).

43. Convention, *supra* note 27, art.15.

44. See SIMPSON, *supra* note 1, at 941.

Italian Dominedo was described as “garrulous and rather ridiculous individual,” and the French Pernot as “quite capable of supporting the British case in the morning, the Greek in the afternoon, and a compromise of his own making in the evening.”<sup>45</sup>

And then there was the question of decolonization and Cold War politics. Icelander Jonasson in particular was singled out as not only “NATO’s enemy [number one]” but also as “impetuous, obstinate, and ambitious. He is, like all Icelanders, an anti-colonialist and very idealistic about anything which does not concern him or Iceland. We fear he will vote for Human Rights.”<sup>46</sup> In practice, the Foreign Office used its intelligence to sabotage the Commission’s visit to Cyprus, on numerous occasions allowing only Sørensen and a few others access to files and facilities.<sup>47</sup> But when British efforts seemingly failed to avoid an embarrassing showdown in Strasbourg with this cast of apparently unfriendly European jurists, the United Kingdom eventually solved the case by diplomacy.<sup>48</sup> In 1959, Britain gave up its colony, and no further action was called for in Strasbourg—a result viewed with some relief by all parties.<sup>49</sup>

Also in 1959, the ECtHR was finally ready to receive cases. Mirroring the Commission’s experience, the Court’s became embroiled in high politics in its first dispute. The 1959 *Lawless*<sup>50</sup> case concerned the practice of detention without trial in Ireland during an IRA insurgency, a matter also of British interest.<sup>51</sup> The European Commission and the Court both found that the practice violated Article 5 of the ECHR.<sup>52</sup> Yet the Court also found that the Irish Government was acting in conformity with the Convention because, under the treaty’s derogation clause, the “life of the nation” was threatened.<sup>53</sup> Although the outcome of the case once again pleased governments, the Court nevertheless asserted the power to decide precisely when such situations of emergency existed—a small but important step for the Court.

The Irish and Greek cases are illustrative of the legal–diplomatic nature of the Convention system at this point in time. The Court and Commission had to strike a fine balance between developing the Convention and simultaneously persuading reluctant governments of the institutions’ sensitivities to complex domestic sociopolitical contexts.<sup>54</sup> Both the Commission and the Court found

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45. *Id.*

46. *Id.*

47. *Id.* at 991.

48. *Id.* at 1049–52.

49. G.A. Res. 59/32 (Dec. 1, 2004).

50. *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Ct. H.R. (ser. B) at 3 (1960) (“[I]n his Application that there has been a violation of the Convention in his case, by the authorities of Ireland, inasmuch as he was detained without trial.”).

51. *See, e.g.*, Madsen, *supra* note 2.

52. *Lawless*, 1 Eur. Ct. H.R. (ser. B).

53. Convention, *supra* note 27, art. 15.

54. *See generally* The Greek Case, App. No. 3321/67, 3322/67, 3323/67 and 3344/67, 1969 Eur. Conv. on H.R. 1 (1970); *see also* Madsen, *supra* note 28, at 78–79.



violations in very few cases and gained the image of being minimalistic and even state-friendly in their operations.<sup>55</sup> Statistically, the Commission played a significant gatekeeping role; it decided whether or not to refer an individual complaint to the Court.<sup>56</sup> Through this structure, the Commission in part controlled the development of the Court's jurisprudence.<sup>57</sup> Equally important was the Commission's power to screen applications. Of the 713 individual complaints received by the Commission from July of 1955 to March of 1960, 710 were rejected.<sup>58</sup> During the next decade only fifty-four cases were declared admissible out of some 3,600 applications.<sup>59</sup> And of this small number of admitted cases, the Commission found violations of the Convention in only a handful.<sup>60</sup> Consequently, among potential litigants, the Commission gained a reputation for dismissing cases.<sup>61</sup>

The situation at the Court was even more striking. During its first decade of operation, 1959 through 1969, the Court was involved only in ten cases.<sup>62</sup> In fact, after the *Lawless* and *De Becker*<sup>63</sup> cases, the Court was practically without work during the mid-1960s, which led some to question whether it should be shut down due to inactivity.<sup>64</sup> Only toward the end of the decade did the Court slowly start gaining renewed public and political prominence. When the governments of Denmark, Norway, Sweden, and the Netherlands simultaneously filed interstate complaints for very serious violations of the Convention against the Greek colonels who had seized power in Greece,<sup>65</sup> the system's role as the guardian of freedom was symbolically reinstated.<sup>66</sup> The case received significant press coverage and ended with the withdrawal of Greece from the Council of Europe.<sup>67</sup> It also showed, however, that the balance

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55. Madsen, *supra* note 28, at 76.

56. Convention, *supra* note 27, art. 48.

57. Member states that had accepted the jurisdiction of the Court could equally appeal to the Court. *See id.*

58. Gordon L. Weil, *Decisions on Inadmissible Applications by the European Commission of Human Rights*, 54 THE AM. J. OF INT'L LAW 874, 880 (1960).

59. MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS 25 (2000).

60. *Id.*

61. *Id.*

62. *See* Madsen, *supra* note 28, at 74.

63. *De Becker v. Belgium*, App. No. 214/56, 59 Y.B. Eur. Conv. on H.R. 214 (1962).

64. *See, e.g.*, Henri Rolin, *Has the European Court of Human Rights a Future*, 11 HOWARD L.J. 442 (1965). This led to discussions of new competences of the Court. For example, Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 44, Sept. 21, 1970, conferred upon the ECtHR the power to give advisory opinions.

65. *See generally* The Greek Case, App. No. 3321/67, 3322/67, 3323/67 and 3344/67, 1969 Eur. Conv. on H.R. 1 (1970).

66. MIKAEL RASK MADSEN, *The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 43, 53 (Mikael Rask Madsen & Jonas Christoffersen eds., 2011).

67. As Shai Dothan has argued, it is hard to imagine a similar scenario to the earlier case of *Lawless*, when the Court was much weaker, and the opposition and member states were much stronger. *See* DOTHAN, *supra* note 17.

between internationally legalized human rights and Cold War political objectives created divisions within the system. Although a number of smaller countries with strong democratic records used the Greek case to advocate for an idealist approach to human rights, the larger member states—notably the United Kingdom, France, and Germany—were reluctant because they feared that isolating Greece would jeopardize the Greek commitment to NATO.<sup>68</sup>

Jurisprudential developments also surfaced behind this cloud of Cold War politics. The 1968 *Belgian Linguistics*<sup>69</sup> case was the first case in which the ECtHR found a violation of the Convention, although by a highly divided eight-to-seven vote. It nevertheless signaled that a majority of the judges were ready to give Convention rights and freedoms an *effet utile*.<sup>70</sup>

Considering both the number of applications as well as the diversity of applicants from states to individuals during this early period, there is little doubt that relevant legal constituencies were aware of both the Court and the Commission. Yet the European human rights system was not highly esteemed in all camps. Because of system's reluctance to admit cases or to find violations, lawyers and activists generally saw little use in going to Strasbourg.<sup>71</sup> The obvious spokesmen for the Convention—the part-time judges and commissioners in Strasbourg—were only haphazard advocates for the system when fulfilling their national roles.<sup>72</sup> Finally, the judgments of the ECtHR were so fragmented and specific that most member states and lawyers did not consider them as having an effect beyond the litigating parties—the definition of narrow authority in the model of Alter, Helfer, and Madsen's framework.<sup>73</sup>

The system also suffered from a number of external structural limitations. First, the broader geopolitical contexts in which it operated—the Cold War and decolonization—were not conducive to establishing authority because they put key member states, notably the United Kingdom and France, in highly complex political situations. Second, the very notion of human rights law was ambiguous and was more often associated with politics than law, partly as a consequence of the linkage between international human rights and the Cold War,<sup>74</sup> and partly

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68. In fact, the Greek junta benefited more generally from Western support, including U.S. support, as, out of a pure Cold War logic, the colonels were seen as a guarantee that the country would not move toward a neutral or pro-Soviet position. See, e.g., ALEXANDROS NAFPIOTIS, *BRITAIN AND THE GREEK COLONELS: ACCOMMODATING THE JUNTA IN THE COLD WAR* (2012).

69. See generally Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (1968).

70. *Id.* “Effet Utile” is the method of understanding international treaties.

71. For details, see Madsen, *supra* note 1.

72. The civil servants of the ECHR institutions and a group of judges and commissioners were the main promoters of the system in its initial years of operation. See Stéphanie Hennette-Vauchez, *The ECHR and the Birth of (European) Human Rights Law as an Academic Discipline*, in *LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD* 117, 120–21 (Bruno de Witte & Antoine Vauchez eds., 2013).

73. Alter, Helfer & Madsen, *supra* note 5.

74. See generally Mikael Rask Madsen, *Human Rights and the Hegemony of Ideology: European Lawyers and the Cold War Battle over International Human Rights*, in *LAWYERS AND THE*

because many European legal systems did not have a developed human rights jurisprudence. These structural limitations resulted in a Court that attracted complaints but had only narrow authority as it failed to cast a legal shadow beyond particular case-by-case interventions.

#### B. The Emergence of the ECtHR as a Powerful International Court (1975–1989)

The Court's limited role and authority changed over the following fifteen years, rapidly metamorphosing the Court from a paper tiger to a court with real teeth and both intermediate and extensive authority. In this process, the initial minimalistic approach of the Strasbourg system paradoxically constituted an advantage. Major European powers' failure to fully accept the jurisdiction of the Court and the right of individual petition had turned the institutionalization of the ECtHR into a "game of cat and mouse" in which the Court was being dragged around by the member states.<sup>75</sup> Although the immediate consequence of this limited external recognition of the ECtHR was its fragility as institution and limited legal shadow, the Court's minimalistic approach to the Convention also had a positive side effect: more and more governments accepted the Court and the individual petition because they simply did not fear the Court's influence.<sup>76</sup> The United Kingdom did so for three years starting in 1966 based on precisely such an assessment.<sup>77</sup> This assessment was not unique to Britain—in 1973, both Italy and Switzerland followed suit. The next year, in the aftermath of President Pompidou's sudden death and with the fading memory of the war in Algeria, France finally ratified the Convention and accepted the Court's jurisdiction, although individual petition was accepted only much later, in 1981.<sup>78</sup> The democratization of Greece, Portugal, and Spain also brought these countries into the ECtHR protection system in 1974, 1978, and 1979, respectively.<sup>79</sup>

Three further exogenous factors influenced this expansion of the Court's authority. First, the originally limited space for developing the Strasbourg system was mainly due to geopolitical constraints deriving from Cold War politics as argued below. That made lawsuits between NATO allies—and corresponding denunciations of NATO countries as violators of human rights—very damaging to the collective interest of Western Europe. By the early 1970s,

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CONSTRUCTION OF TRANSNATIONAL JUSTICE 258 (Yves Dezalay & Bryant Garth eds., 2012) (demonstrating the close link between early human rights practices and Cold War politics); *see also* HOWARD TOLLEY, THE INTERNATIONAL COMMISSION OF JURISTS: GLOBAL ADVOCATES OF HUMAN RIGHTS 29, 34 (1994).

75. Anthony Lester, *The European Court of Human Rights after 50 Years*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 98, 100 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

76. MADSEN, *supra* note 66, at 51–52.

77. *Id.*

78. *Id.*

79. The only countries that had accepted neither the individual petition nor the Court were Turkey, Greece, Malta, and Cyprus.

however, the Cold War seemed to be in retreat; détente politics became the name of the game. Second, decolonization was virtually over by the early 1970s, at least for the larger colonial possessions, which made the international positions of France and the United Kingdom much less at risk.<sup>80</sup> A structural change in human rights discourse also occurred around this time, with the focus of the discourse moving from the practices of European imperial powers to other perpetrators such as military dictatorships in Latin America, the apartheid regime in South Africa, and Eastern Europe's Helsinki Process.<sup>81</sup> A third factor that influenced the ECtHR during this period was European integration. Whereas the initial Strasbourg jurisprudence was very case specific, after 1975, the idea of a Europe of common standards made its entrance as an additional justification for more progressive human rights developments.<sup>82</sup> The standards in question were, however, not the common-market ideas of the European Community but values derived from sociopolitical developments of the more permissive and less patriarchal society that was taking form in many European countries.<sup>83</sup> In other words, changes in geopolitics opened up a new space for developing a jurisprudence that sought to couple European human rights with intra-European societal developments.

The ECtHR's burgeoning power during this period is immediately apparent from its legal practices. The jurisprudence of the last half of the 1970s set a new tone—a dynamic championing of European human rights—that was very different from the self-constrained legal diplomacy of the previous period. In a series of landmark decisions, the Court fundamentally transformed European human rights from a project mainly linked to Cold War objectives to both an independent mission of setting common standards across Europe and a quest for a real protection of human rights under the ECHR.<sup>84</sup>

In the late 1970s, the framework for this distinctively European protection of human rights was hammered out in three key cases: *Ireland v. the United Kingdom*,<sup>85</sup> *Tyrer v. the United Kingdom*,<sup>86</sup> and *Airey v. Ireland*.<sup>87</sup> The *Irish* case

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80. See generally DIETMAR ROTHERMUND, *THE ROUTLEDGE COMPANION TO DECOLONIZATION* (2006); MARTIN SHIPWAY, *DECOLONIZATION AND ITS IMPACT: A COMPARATIVE APPROACH TO THE END OF THE COLONIAL EMPIRES* (2007).

81. See generally Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 *LAW & SOC. INQUIRY* 137 (2007); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

82. See *infra* notes 100–01 and accompanying text.

83. The literature is large on this subject but with regard to its impact on the development of rights, see particularly STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2004).

84. The Court began this new wave of jurisprudence in *Golder v. United Kingdom*, App. No. 4451/70, 18 Eur.Ct. H.R. (ser.A) (1975); *National Union of Belgian Police v. Belgium* App. No. 4464/70 (1975); *Handyside v. United Kingdom* App. No. 5493/72, 19 Eur. Ct. H.R. (ser. A) (1976); *Kjeldsen, Busk Madsen and Pedersen v. Denmark* App. No. 5095/71; 5920/72; 5926/72, 23 Eur. Ct. H.R. (ser. A) (1976).

85. *Ireland v. the United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) (1978).

86. *Tyrer v. the United Kingdom*, App. No. 5856/72, 26 Eur. Ct. H.R. 26 (ser. A) at 12 (1978).

offered ECtHR judges a chance to revisit the tricky question of national emergencies, an issue for which the Court had previously shown great deference to the member states in the *Lawless* case.<sup>88</sup> The case was a controversial interstate complaint against the United Kingdom concerning five interrogation techniques used by British security forces in Northern Ireland.<sup>89</sup> The Court held that these practices could not be justified by merely citing to a national emergency.<sup>90</sup> The Court found that the interrogation techniques in question violated the nonderogable Article 3 of the ECHR, which prohibits inhuman and degrading treatment—a provision that must be respected even in situations of political unrest and violence.<sup>91</sup>

In the same year as *Irish*, the ECtHR decided *Tyrer v. the United Kingdom*, a case concerning corporal punishment of an underage pupil.<sup>92</sup> The Court famously stated that the Convention was “a living instrument . . . [to] be interpreted in the light of present-day conditions . . . and commonly accepted standards in the . . . member states.”<sup>93</sup> This set the stage for the Court’s later use of a highly controversial, dynamic interpretation of the ECtHR.

The following year, in *Airey v. United Kingdom*, the Court further extended its reach by noting that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>94</sup> Somewhat similar to the jurisprudence of the European Court of Justice in its formative period,<sup>95</sup> the ECtHR managed to devise a tripartite framework that consisted of nonderogable rights,<sup>96</sup> dynamic interpretation,<sup>97</sup> and the requirement of an effective and practical protection of rights by the member states.<sup>98</sup> The decisions were not all unanimous or easily swallowed by the respondent countries, but they made a strong claim for the Court being the authoritative interpreter of the Convention.

In 1976, a pattern of growth began in the number of cases under the Court’s review. Figure 1<sup>99</sup> shows the total number of judgments delivered each year

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87. *Airey v. Ireland* App. No. 6289/73, 32 Eur. Ct. H.R. (ser. A) at 9 (1979); *see also* *Marckx v. Belgium*, App. No. 6833/74, 31 Eur. Ct. H.R. (ser. A) (1979) (ruling out distinction between legitimate and illegitimate children and imposing a positive obligation on member states).

88. *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Ct. H.R. (ser. B) (1960).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Tyrer v. the United Kingdom*, App. No. 5856/72, 26 Eur. Ct. H.R. 26 (ser. A) (1978).

93. *Id.*

94. *Airey v. Ireland* App. No. 6289/73, 32 Eur. Ct. H.R. (ser. A) (1979).

95. *See* J. H. H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991) (arguing that in the foundationa period of European law, from 1958 through mid 1970s, the European Court of Justice created constitutional framework of consisting of direct effect, supremacy, implied powers, and human rights).

96. *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Ct. H.R. (ser. B) (1960).

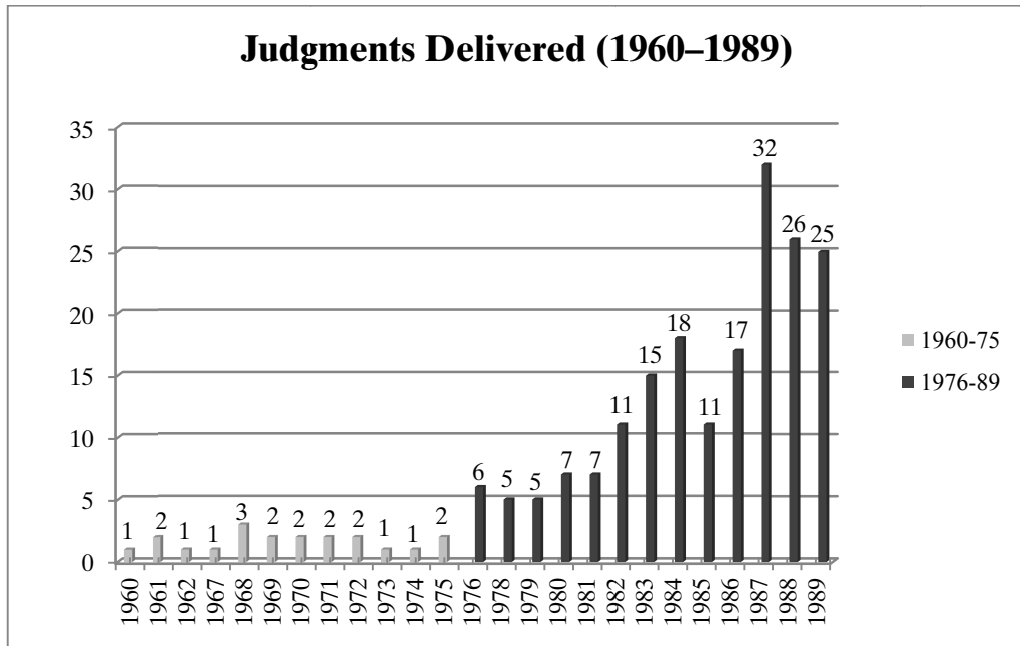
97. *Tyrer*, 26 Eur. Ct. H.R. 26 (ser. A).

98. *Airey*, 32 Eur. Ct. H.R. (ser. A).

99. All data reflected in the tables included in this article have been generated by using the database at iCourts.

from 1960 to 1989.

Figure 1



The jurisprudence that developed throughout the 1980s is further indicative of the expansion of European human rights. Particularly important is the decrease in the relative frequency of high political interstate complaints and the corresponding increase of the Court's involvement in other social issues of a less political nature.<sup>100</sup> As a consequence, the institution was less tied up with highly political cases and could continue to develop its jurisprudence incrementally under the auspices of these less controversial cases.<sup>101</sup> The development of the Court's authority is well illustrated in cases such as *Sunday Times v. United Kingdom*, which held that freedom of the press is "necessary in a democratic society,"<sup>102</sup> a fast-growing number of liberty<sup>103</sup> and due-process<sup>104</sup>

100. During this period, in addition to the *Irish* case, there were three other interstate complaints: *Austria v. Italy*, App. No. 788/60, 4 Y.B. Eur. Conv. on H.R. 116 (1961), *Cyprus v. Turkey I-III*, App. Nos. 6780/74 and 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125 (1975); App. No. 8007/77, 13 Eur. Comm'n H.R. Dec. & Rep. 85 (1983), and *Denmark, France, Norway, Sweden, and the Netherlands v. Turkey*, App. No. 9940–9944/82, 35 Eur. Comm'n H.R. Dec. & Rep. 143 (1983).

101. Reviewing the entire dataset of caselaw until the late 1980s, structural problems of human rights were not yet part of the Court's caseload, with the exception of the *Irish* case, which highlighted the broader situation of law in Northern Ireland.

102. *Sunday Times v. The United Kingdom*, App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) at 22 (1979).

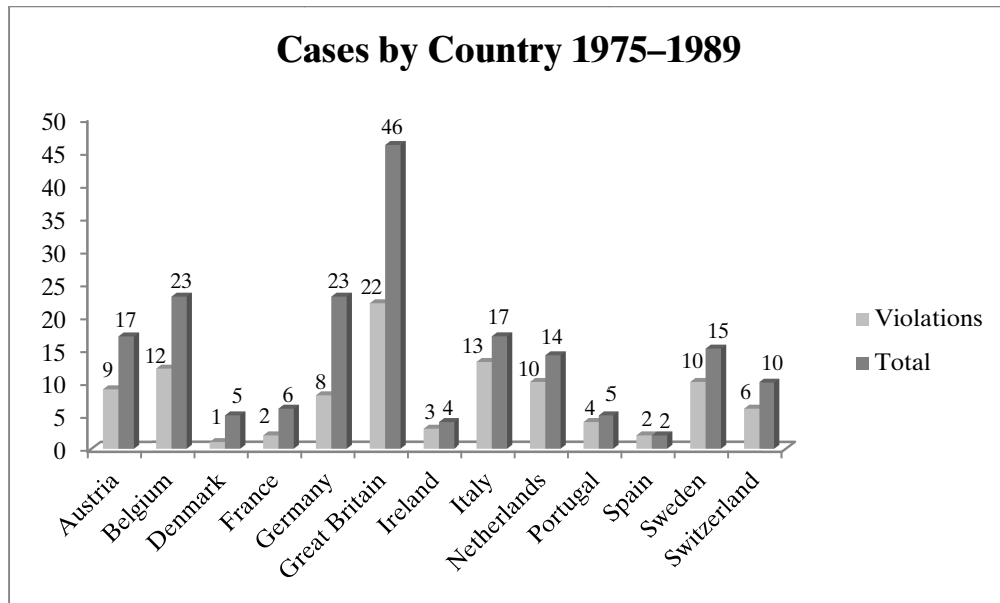
103. Convention, *supra* note 27, art. 5.

104. *Id.* art. 3.

cases; and, emblematically, *Soering v. the United Kingdom*, in which the Court aligned itself with popular European sentiments against capital punishment to hold that extradition to the United States would violate Article 3 of the ECHR if the applicant would face the death row phenomenon, that is, the emotional distress felt by prisoners on death row for an extended period of time.<sup>105</sup>

Although *Soering* suggests a broadening of the Court's authority, the result of this new jurisprudence was uneven among the different member states. Differentiating the number of cases according to respondent state during the period from 1975 to 1989 reveals that relatively few countries had numerous cases—such as the United Kingdom, with forty-six cases—and a number of other countries had few or no cases. Figure 2 provides data on all states with cases before the ECtHR during this period:<sup>106</sup> cases against each member state and the number of cases finding violations in this period.

Figure 2



As a result of this uneven distribution of cases across member states, the Court and Convention played significant roles in some states and very limited roles in others. Illustratively, Denmark, for example, did not experience a single violation in Strasbourg for thirty-six years: from 1953 to 1988,<sup>107</sup> European

105. Case of *Soering v. The United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) at 24 (1989).

106. This figure excludes Commission cases and countries without cases before the ECtHR during this period, most notably Norway, Cyprus, Malta, Greece, and Iceland.

107. Denmark was finally found in breach of the Convention in 1989 in *Hauschildt v. Denmark*, App. No. 10486/83, 158 Eur. Ct. H.R. (ser. A) (1989) (concerning impartiality of single-judge provincial

human rights law played practically no role in domestic Danish law and politics.<sup>108</sup> Cases brought against Denmark were summarily dismissed, with only limited exceptions, for which no violations were found. Equally important, the Danish government concluded that very few legislative revisions were required to conform Danish and European human rights standards—with the exception of securing a minimum level of protection of the (negative) freedom of association within respect to “closed-shop” unions due to the Court’s ruling in *Young, James and Webster v. United Kingdom*. Not until 1989, in the *Hauschildt* case<sup>109</sup> concerning impartiality of single-judge provincial courts in criminal proceedings, was Denmark found to be in breach of the Convention. The ECHR was long viewed mainly as a tool for the country’s international engagement. Illuminatingly, Denmark once again joined forces in 1982 with the other Scandinavian states, the Netherlands, and France in another interstate complaint, this time against Turkey.<sup>110</sup> And this perception of the ECHR was not unique to Denmark. Other states party to the Convention continued to regard the Strasbourg system as a positive but distant institution, essentially international and therefore of little domestic importance.<sup>111</sup>

In stark contrast to Denmark, the United Kingdom became “the most regular customer in Strasbourg” throughout the 1980s.<sup>112</sup> Although there had been some warnings in the two interstate cases involving *Cyprus*<sup>113</sup> and *Ireland*,<sup>114</sup> as well as the individual petition cases of *Golder*,<sup>115</sup> *Tyrer*,<sup>116</sup> and *Airey*,<sup>117</sup> it was still assumed in the Foreign Office that the United Kingdom’s relationship to international human rights was that of exporting legal norms rather than importing them.<sup>118</sup> Yet as a consequence of the ECtHR’s multiple findings of U.K. violations of the Convention—twenty-two from 1975 to 1989—the continuous acceptance of “the right to individual petition came up as a real question” at the highest political level.<sup>119</sup> Emblematic of the situation at the

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courts in criminal proceedings).

107. See generally Jonas Christoffersen & Mikael Rask Madsen, *The End of Virtue? Denmark and the Internationalisation of Human Rights*, 80 NORDIC J. INT’L L. 257 (2011).

108. *Id.* (arguing that European human rights was practically dealt with as matter of foreign policy).

109. *Hauschildt*, 158 Eur. Ct. H.R. (ser. A).

110. Denmark, France, Norway, Sweden, and the Netherlands v. Turkey, App. No. 9940–9944/82, 35 Eur. Comm’n H.R. Dec. & Rep. 143 (1983).

111. See, e.g., Malcolm Langford & Johan Karlsson Schaffer, *The Nordic Human Rights Paradox*, (Univ. of Oslo Faculty of Law Research Paper, No. 2013-35, 2014).

112. Interview with Senior Legal Advisor in the British Foreign Office, conducted on May 8 2001 by author.

113. *Cyprus v. Turkey I-III*, App. Nos. 6780/74 and 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125; App. No. 8007/77 (1975).

114. *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Ct. H.R. (ser. B) (1960).

115. *Golder v. United Kingdom*, App. No. 4451/70, 18 Eur.Ct. H.R. (ser.A) (1975).

116. *Tyrer v. the United Kingdom*, App. No. 5856/72, 26 Eur. Ct. H.R. 26 (ser. A) (1978).

117. *Airey v. Ireland* App. No. 6289/73, 32 Eur. Ct. H.R. (ser. A) (1979).

118. See generally Madsen, *supra* note 12, at 80–82.

119. Interview with Senior Legal Advisor in the British Foreign Office, conducted on May 8, 2001 by author. The 1966 U.K. decision to accept the jurisdiction of both the European Court and



time—and in sharp contrast to the current conservative British government—the Thatcher government’s response was that “the U.K. was not to pull out, but the Court to pull back.”<sup>120</sup> But behind the critical public rhetoric, the United Kingdom generally took consequential steps to implement lost cases in Strasbourg as well as take proactive steps to more generally comply with European human rights norms.<sup>121</sup> The one exception was *Brogan and Others v. United Kingdom*,<sup>122</sup> in which the ECtHR found that the long detention period permitted by the British Prevention of Terrorism Act violated Article 5(3). After expressing anger and sympathy for the victims of terrorism in the House of Commons, Thatcher announced that Britain would refuse to accept the judgment and would derogate from certain provisions of the Convention.<sup>123</sup>

In more institutional terms, the British government’s frequent interaction with Strasbourg had significant consequences. First, it resulted in human rights being “domesticated” and the British Home Office increasingly took over from its Foreign Office.<sup>124</sup> Another important consequence was that the U.K.–Strasbourg interaction triggered the development of specialized human rights lawyers in the United Kingdom, a unique situation in Europe at the time.<sup>125</sup> Much of this legal activism was directly linked either to the conflict in Northern Ireland or to the increasing rift between the British left and the Thatcher government regarding the protection of civil and political rights, such as the rights to strike, assemble, or protest.<sup>126</sup> In other words, whereas geopolitics had enabled the ECtHR to pursue a different interpretive strategy since the mid-1970s, it was domestic feuds that fueled the making of a distinct British human rights environment in the 1980s—an environment that would have influence beyond the British Isles.<sup>127</sup>

The legal establishment, however, was initially averse to using the ECHR. As one prolific human rights barrister recalled, “It was distinctively seen as

Commission only ran for a specified renewable period until the incorporation into British law of the Convention by the 1998 Human Rights Act. See *supra* text accompanying note 40; see also Human Rights Act of 1998 (U.K.), <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

120. Interview with Senior Legal Advisor in the British Foreign Office, conducted on May 8, 2001 by author.

121. Madsen, *supra* note 12, at 81.

122. *Brogan and Others v. The United Kingdom*, App. No. 11209/84; 11266/84; 11386/85, 11 Eur. H.R. Rep. 117 (1988).

123. K.D. EWING & CONOR A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 224–25 (1990).

124. Madsen, *supra* note 12, at 81.

125. To use the case of Denmark again, only one Danish lawyer specialized in the field, and his practice covered all of Scandinavian human rights. See Mikael Rask Madsen, *L’Emergence d’un champ des droits de l’homme dans les pays européens: enjeux professionnels et stratégies d’Etat au carrefour du droit et de la politique (France, Grande-Bretagne et pays scandinaves, 1945–2000)* (2005) (unpublished Ph.D. Dissertation, l’École des hautes études en sciences sociales) (on file with author).

126. See generally EWING & GEARTY, *supra* note 123.

127. Some NGOs—for example, the National Council of Civil Liberties and JUSTICE—date back much longer, but they only started investing in the ECtHR in the 1980s. See Madsen, *supra* note 12, at 82.

unfashionable to use the ECHR . . . even treacherous . . . one was seen as being in the last ditch or in a hopeless case if you referred to it . . . I was perceived as a maverick that had an obsession that was un-British . . .”<sup>128</sup> But with the entrepreneurial efforts of a handful of key barristers, the situation was quickly reversed and these human rights lawyers went on to repeatedly secure victories against their home state in Strasbourg.<sup>129</sup> Unsurprisingly, roughly half of the cases against the United Kingdom during the period in focus involved specialized human rights NGOs.<sup>130</sup>

Due to these and other developments, Britain became the frontier in which the ECtHR acquired intermediate and extensive authority. That is, the United Kingdom was the first member state in which the Court had a real, immediate, and continuous domestic importance as well as a broader audience. Although the strengthened respect for, and pursuit of, human rights in the United Kingdom had no real counterpart in other member states, it had some presence in academia on the continent, where law schools had started to integrate European human rights into the curriculum.<sup>131</sup> Human rights centers, most often established on the fringes of legal academia, were an additional innovation of the 1980s. In Britain, the pioneers were at Essex University, which hosted key professors and litigators of European human rights.<sup>132</sup> In other countries, notably in Scandinavia, well-funded human rights centers were also set up, but, in line with the general view of human rights as an “export good,” they took a broader global perspective.<sup>133</sup> Internally focused human rights centers required more time to take root.<sup>134</sup>

The state of human rights and ECtHR authority during this period is best labeled, due to the varied state of human rights across member states, as narrow and intermediate authority, with flashes of expansive authority.<sup>135</sup> There is little doubt, however, that the late 1980s ushered in a new era of broader authority for the ECtHR. This expanded authority was evident in the Court’s increasingly packed docket, general impact on human rights, and ability to spur broader interest in the field.<sup>136</sup> Although a situation similar to the United Kingdom’s increasingly intense interface with the ECtHR did not develop in other Convention member states until the 1990s,<sup>137</sup> it was throughout this period that the ECtHR slowly came to be regarded as the central European human rights

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128. Interview with leading London barrister specializing in human rights (Feb. 26, 2001).

129. For details, see Madsen, *supra* note 12, at 81.

130. CAROL HARLOW & RICHARD RAWLINGS, *PRESSURE THROUGH LAW* 254–68 (1992).

131. For details, see Madsen, *supra* note 125.

132. The Essex Human Rights Center would eventually develop into, de facto, the largest human rights law office in Europe, later being the spearheading into what later was known as the Kurdish cases. *Id.* at 554–55.

133. *Id.* at 358–64

134. *Id.*

135. Alter, Helfer & Madsen, *supra* note 5.

136. *See supra* fig. 1.

137. *See generally* Madsen, *supra* note 2.

institution.<sup>138</sup>

### III

#### HUMAN RIGHTS IN AN EVER-LARGER EUROPE (1990–2014)

After the end of the Cold War, the ECtHR started generally to deliver a significantly higher number of judgments per year. Further change occurred between the periods 1990 through 1999 and 2000 through 2014 as both the rate of applications to the Court and the Court's output expanded substantially *after* 2000.<sup>139</sup> The Court continued its trend of the 1980s until about 1999 with a steady increase in the number of judgments, from around thirty in 1991 to 177 in 1999.<sup>140</sup> Between 2000 and 2014, this trend accelerated. The Court issued 695 judgments in 2000 and 1,624 in 2009.<sup>141</sup> The number dropped to 891 rulings in 2014.<sup>142</sup> The drop in the annual number of judgments beginning in 2011, however, is a relative one as it is a product of change in policy at Strasbourg to join cases such that more applications are listed in a single judgment.<sup>143</sup> In 2013 and 2014, for example, the Court judged 3,661 and 2,388 applications but delivered only 916 and 891 judgments, respectively.<sup>144</sup> The year 2013 had the highest figure ever in terms of number of applications judged. Figure 3 provides the number of judgments delivered each year during the period from 1990 to 2014. The two periods (1990–1999; 2000–2014) are indicated with different shading.

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138. *Id.* at 154–55.

139. *See infra* fig. 3. The period after 2000 is marked with darker coloring.

140. *Id.*

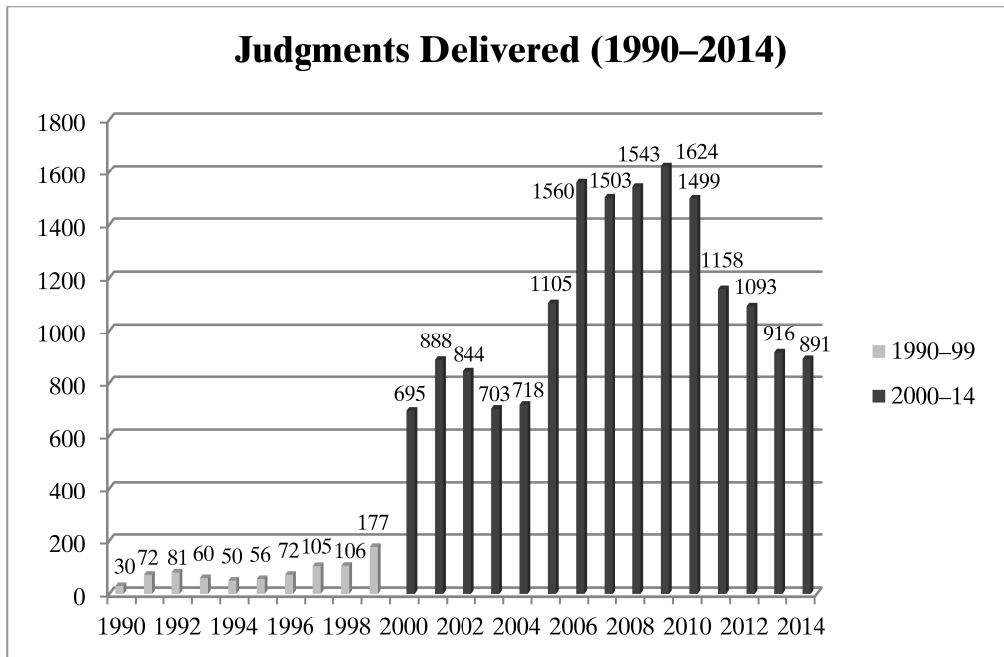
141. *Id.*

142. *Id.*

143. The use of so-called pilot judgments on test cases, general measures, and a 2009 priority policy has also influenced output. *See* EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2011 4–5, [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf).

144. *See* EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2013 4 (2014) [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf); EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2014 5 (2015) [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf).

Figure 3



The transformation of Europe after the fall of the Iron Curtain is the obvious geopolitical context for explaining this change in the quantity of judgments at a structural sociopolitical level. The Council of Europe (CoE) was very much an engine of the immediate post-Cold War politics of democratization and human rights. Fueled by a widespread sense of the inevitability of spreading human rights to all of Europe, the CoE quickly integrated into the organization the Central and Eastern European countries.<sup>145</sup> Hungary was the first to join the CoE in 1990; Poland and Czechoslovakia following in 1991; Bulgaria in 1992; Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, and Romania in 1993; Latvia in 1995; and Croatia in 1996. A second batch of new member states from the former Soviet Union entered soon thereafter: Ukraine in 1995, Russia in 1996, Georgia in 1999, and Armenia and Azerbaijan in 2001. Then the new republics of the former Yugoslavia joined: Bosnia and Herzegovina in 2002, Serbia in 2003, and Montenegro in 2007. This massive intake of new member states with recently refurbished yet incomplete legal and political systems had a profound impact on the Court. The prevalence of countries with structural human rights problems, most notably Russia, created an almost insurmountable backlog of complaints that reached an all-time high in 2011 of approximately 160,000 pending cases.<sup>146</sup> Enlargement

145. See, e.g., JAMES A. SWEENEY, *THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST-COLD WAR ERA: UNIVERSALITY IN TRANSITION* (2013).

146. For details, see *infra* app. 1.

thus created a fundamental challenge not only to the high standards set in the 1980s and 1990s but also to the Court's strategy of spinning an expansive and tighter normative web of European human rights.<sup>147</sup>

Closely related to the challenges the massive member state intake precipitated, a major overhaul of the system's institutional design provides additional context to explain the increase in the Court's activity described in Figure 3. With Protocol No. 11's entry into force in 1998, the ECtHR was transformed into a permanent IC with compulsory jurisdiction and compulsory right to individual petition.<sup>148</sup> As part of the institutional overhaul, the Commission was closed down and the supranational protection of human rights in Europe was fully judicialized.<sup>149</sup> Importantly, Protocol No. 11 was not simply the result of the transformation of post-Cold War Europe.<sup>150</sup> In fact, the negotiation was initiated in 1983 when it became apparent that the Commission had difficulties dealing with what was identified as a serious backlog of cases.<sup>151</sup> Most of the design choices of Protocol No. 11 were therefore prompted by the operational contexts of the 1980s and early 1990s. This had the consequence that the CoE had to draft additional new protocols to adapt the new, single, permanent court to the operational contexts of the larger Europe which in the meantime had come under the ECtHR's jurisdiction. To analyze these continuous changes in the Court's authority, in what follows, this article first traces the authority of the Court from 1990 to approximately 2000 to show the gradual transition from the original pre-Protocol No. 11 Court into the permanent Court. It then examines the growing discontent with the permanent Court and its rapidly growing backlog of cases and how this criticism culminated around the Brighton Declaration of 2012.

#### A. Judicializing and Embedding Human Rights in Western Europe (1990–2000)

As indicated by Figure 3 above, the evolution of cases before the ECtHR in the 1990s follows a steady but limited growth pattern that began in the early 1980s. Although Britain was the main violator of European human rights and the frontier of the development of the human rights field in the 1980s, other countries led the charge during the 1990s.<sup>152</sup> The United Kingdom saw an overall decline in relative number of cases in Strasbourg whereas Italy, France,

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147. There is a large literature on the interpretive approaches of the Court. *See, e.g.*, Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. OF INT'L L. 125 (2008).

148. *See* Convention, *supra* note 27, art. 19.

149. *See* Convention, Protocol 11 pmbl., *supra* note 27 (restructuring the control machinery established thereby, 1 November 1998).

150. SWEENEY, *supra* note 145.

151. Robert Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 119, 119 (Jonas Christoffersen & Mikael R. Madsen eds., 2011).

152. *See supra* fig. 3.

and Turkey became the most frequent respondent states.<sup>153</sup> Figure 4 lists the percentage of total output of judgments for a representative number of Western European member states. Figure 4 suggests that France, Italy, and Turkey are key countries for understanding the ECtHR's changing authority during the 1990s. Italy and Turkey, although quantitatively the most significant countries in terms of the number of judgments against them, are actually outliers. The case of France is more representative of the general transformation of the Court.

*Figure 4*

Country \ Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
<b>Austria</b>	10.00%	6.94%	6.17%	15.00%	6.00%	17.86%	6.94%	8.57%	1.89%	1.69%
<b>Belgium</b>	0.00%	6.94%	6.17%	1.67%	4.00%	1.79%	2.78%	2.86%	1.89%	1.13%
<b>Denmark</b>	0.00%	0.00%	0.00%	0.00%	2.00%	0.00%	1.39%	0.00%	0.00%	0.00%
<b>France</b>	13.33%	8.33%	14.81%	21.67%	14.00%	23.21%	19.44%	14.29%	25.47%	12.99%
<b>Germany</b>	0.00%	1.39%	4.94%	1.67%	4.00%	1.79%	2.78%	2.86%	0.00%	1.69%
<b>Italy</b>	0.00%	52.78%	54.32%	23.33%	10.00%	8.93%	11.11%	19.05%	6.60%	40.11%
<b>Netherlands</b>	16.67%	2.78%	1.23%	5.00%	10.00%	8.93%	6.94%	3.81%	4.72%	1.13%
<b>Switzerland</b>	13.33%	2.78%	1.23%	6.67%	6.00%	1.79%	4.17%	5.71%	4.72%	0.00%
<b>Turkey</b>	0.00%	0.00%	0.00%	0.00%	0.00%	5.36%	6.94%	7.62%	16.98%	10.73%
<b>United Kingdom</b>	20.00%	5.56%	3.70%	10.00%	14.00%	14.29%	16.67%	9.52%	9.43%	7.91%
<b>Other</b>	26.67%	12.50%	7.41%	15.00%	30.00%	16.07%	20.83%	25.71%	28.30%	22.60%

Italy was an outlier due to the inability of its legal and political system to respond adequately to the requirements of Article 6, which generated a huge caseload.<sup>154</sup> By the early 2000s, judgments against Italy—due in large part to the excessive length of Italian trials—accounted for an average of forty-five percent of the total number of judgments delivered by the Court.<sup>155</sup> These cases against Italy are important as it is the first time the Court had to deal with structural human rights problems.<sup>156</sup> Although the Italian government generally paid the damages awarded by the ECtHR, the root of the problem—the archaic legal proceedings—was not sufficiently reformed.<sup>157</sup>

153. *Id.*

154. This was mainly due to the lack of reforms of the judicial system and a reserved attitude towards the ECtHR by the highest courts. Mercedes Candela Soriano, *The Reception Process in Spain and Italy*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 393, 405 (Helen Keller & Alec Stone Sweet eds., 2008).

155. It subsequently dropped to below ten percent in 2014. For details, see *infra* app. 1.

156. The question of structural human rights problems arises again below when analyzing the integration of the new Eastern European member states.

157. See generally Candela Soriano, *supra* note 154.

The situation of Italy presented a new challenge for the Court, one the Court would face continuously during the following decade: that compliance was increasingly partial and judgments on particular issues seemed to lead to more, rather than fewer, cases challenging the same structural problems. Thereby the ECtHR judgments arguably generated more cases than it resolved, as the underlying structural problems were not fixed. In terms of the Court's authority, this created a paradoxical situation of increased mobilization by litigants paired with relevant state agencies' insufficient efforts to give effect to the ECtHR's rulings. As a result, the Court's intermediate and extensive authority increased while its narrow authority decreased.

The plight of democratizing countries presented another new challenge to the Court as it had to not only monitor but also promote human rights. Turkey provides an apt illustration of the ECtHR's authority in this complex context, a situation that also would become well known to the Court throughout the 2000s. Turkey had accepted individual petition and the Court only in 1987 and 1990 respectively, and cases from Turkey did not appear before the Court until the mid-1990s.<sup>158</sup> The pattern of cases generally reflects Turkey's distinctive social, political, and legal problems at that time. These problems included the contested status of the Kurds, which caused recurrent cases in Strasbourg, and a set of issues related to the modern Turkish state's guarantee of basic civil liberties and political freedoms.<sup>159</sup>

In terms of the authority of the ECtHR, the cases from Southeast Turkey stood out. For the first time, in *Aksoy v Turkey*, the Court found a respondent state in violation of the prohibition on torture.<sup>160</sup> Violations of Article 3 were also found in a number of other cases involving the Turkish–Kurdish conflict.<sup>161</sup> Due to these and a steady stream of other human rights cases, the total number of judgments directly linked to southeast Turkey from 1996 to 2008 was approximately 175 cases, with another 1,500 pending in 2010.<sup>162</sup> This was the first time the Court was faced with the challenge of gross and systemic human rights violations.<sup>163</sup>

Turkey's problematic assimilation into the ECHR system reveals two things

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158. In addition, there were interstate cases against Turkey in 1974, 1975 and 1977. See *supra* note 100. In 1983, Denmark, France, Norway, Sweden, and the Netherlands v. Turkey, App. No. 9940–9944/82, 35 Eur. Comm'n H.R. Dec. & Rep. 143 (1983). And again in 1997, Denmark v. Turkey, App. No. 34382/97, Eur. Ct. H.R. (2000).

159. See generally Aisling Reidy, Françoise Hampson & Kevin Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETH. Q. HUM. RTS. 161 (1997).

160. Case of *Aksoy v. Turkey*, App. No. 21987/93, Eur. Ct. H.R. 1996-VI 18 (1996).

161. Rachel Chichowski, *Civil Society and the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 77, 89–95 (Jonas Christoffersen & Mikael R. Madsen eds., 2011).

162. Başak Çalı, *The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006*, 35 LAW & SOC. INQUIRY (2010).

163. See generally Reidy, Hampson & Boyle, *supra* note 159.

about the changing authority of the ECtHR. First, most of the Kurdish cases would most likely never have been filed were it not for systematic lawyering facilitated in part by veteran British human rights lawyers.<sup>164</sup> This suggests a linkage between the pioneering human rights constituents in Britain and the broadening of the ECtHR's authority.<sup>165</sup> Second, comparing the situations in Turkey and Italy foregrounds the sociopolitical reality that the Court serves very different functions in these two countries, ranging from the more technical modernization of the Italian judiciary to the democratization of Turkey. The ECtHR's authority with respect to Turkey is also distinctive because the relevant government agencies have shown little recognition of the Court's rulings in terms of implementing them. Of the approximately 2,400 cases decided against Turkey between 1987 and 2001, of which eighty-seven percent found at least one violation, around 1,700 judgments were not fully implemented as of 2012.<sup>166</sup> This strongly indicates the Court's limited narrow and intermediate authority in Turkey. Yet the fact that so many cases are directed to Strasbourg suggests conversely the emergence of a legal field in which the European Convention and the ECtHR are increasingly accepted among many audiences as a tool for legal and social change even though some government agents continue to resist it.

In the bigger picture of the evolution of the ECtHR, however, Turkey and Italy are both outliers; France is a far more representative case of how the ECtHR generally developed extensive authority in many European countries throughout the 1990s. France fully entered the ECHR only in 1981, and the first judgments against France were not delivered until the mid-1980s.<sup>167</sup> One of the key agents, *la Cour de Cassation*, the highest French court on civil and criminal matters, originally sought to integrate the ECtHR into its practices.<sup>168</sup> An estimated 700 French decisions explicitly referring to the ECHR were issued between 1987 and 1997, and *la Cour de Cassation* was initially quick to incorporate the outcomes of cases against France before the ECtHR into its practices.<sup>169</sup> In light of this collaborative mood, the French highest courts were surprised—if not offended—when the ECtHR began to criticize not only certain police and administrative practices in France but also the functioning of

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164. See *supra* note 132 and accompanying text.

165. See Chichowski, *supra* note 161, at 89–94 (providing descriptive statistics on this linkage). See generally LOVEDAY HODSON, *NGOS AND THE STRUGGLE FOR RIGHTS IN EUROPE* (2011).

166. Başak Çalı, *Turkey's Relationship with the European Court of Human Rights Shows that Human Rights Courts Play a Vital Role, but One that Can Often Be Vastly Improved*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Mar. 14, 2012), <http://blogs.lse.ac.uk/europpblog/2012/03/14/turkey-echr/>.

167. Elisabeth Lambert Abdelgawad & Anne Weber, *The Reception Process in France and Germany*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 107, 109 (Helen Keller & Alec Stone Sweet eds., 2008).

168. See generally Leslie Goldstein & Cornel Ban, *The Rule of Law and the European Human Rights Regime*, Center for the Study of Law and Society Jurisprudence and Social Policy Program (Working Paper No. 13, 2003).

169. *Id.* at 23.



French courts.<sup>170</sup> Counterattacking, the *Cour de Cassation* launched a rebellion against the Court in response to the rulings of the ECtHR on the impartiality of the general advocates of the *Cour de Cassation*—a similar situation would occur with regard to the *Commissaires du gouvernement* of the *Conseil d'État*—and a number of cases on more technical issues related to, for example, standards of interrogation.<sup>171</sup> It was a real rebellion in the sense that the French court deliberately ignored the relevant ECtHR case law and, in some instances, ignored the ECtHR cases that had found France to be in violation of the ECHR.<sup>172</sup>

Yet the use of the ECtHR to attack high courts in France simultaneously spurred an interest among lawyers in challenging the particularities of the French justice system as incompatible with the Convention.<sup>173</sup> The ECtHR virtually became an appeals court to the supreme French courts; the number of cases grew steadily and France eventually became one of the three most frequent litigators in Strasbourg.<sup>174</sup> The response from French judges was that the ECtHR simply failed to grasp the complexity of French justice in the Court's pursuit of a superficial and formalist attempt to set uniform European standards.<sup>175</sup> Regardless of rhetoric, there was little doubt that the ECtHR was becoming both a part of domestic legal reality and a force to be reckoned with in the French legal field at large.

The French court system was not alone in coming under fire. The politico-administrative elites also needed to respond to the criticism from Strasbourg, particularly after the 1999 case *Selmouni v France*,<sup>176</sup> in which France was found guilty of torture. France was only the second member state that had been found guilty of violating this nonderogable right.<sup>177</sup> This judgment cast a shadow beyond the legal field and its technical concerns. *Selmouni* became front-page news and confirmed that being the cradle of human rights did not automatically also mean being in the avant-garde of human rights.<sup>178</sup> For French administrative and political elites, this controversial judgment, combined with the persistent need for technical reform due to other ECtHR judgments, was a serious challenge.<sup>179</sup> In fact, it required rethinking the French *raison d'état*

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170. Madsen, *supra* note 12, at 78.

171. J. P. Marguenaud, *l'Effectivité des arrêts de la Cour européenne des droits de l'Homme en France*, 24 J. DES DROITS DE L'HOMME 1, 1–12 (2001).

172. Lambert Abdelgawad & Weber, *supra* note 167, at 129.

173. *Id.*

174. *See supra* fig. 3.

175. Madsen, *supra* note 12, at 78.

176. *See Selmouni v. France*, App. No. 25803/94, 29 Eur. H.R. Rep. 32, 32 (1999). For the first time, the Court found a respondent state to be guilty of torture. *See Case of Aksoy v. Turkey*, App. No. 21987/93, Eur. Ct. H.R. 1996-VI 18 (1996).

177. Based on search in HUDOC Database of the European Court of Human Rights (<http://hudoc.echr.coe.int/>).

178. Madsen, *supra* note 12, at 78.

179. *Id.*

through the prism of the ECtHR.<sup>180</sup> The bottom line was that the ECtHR could not be regarded simply as an external phenomenon when it was invoked continuously and successfully against French law and legal practice.

Ultimately at stake in France, as well as in many other European countries during the 1990s, was whether to accept a new, much deeper national implementation of the Convention. The impact of the ECtHR was no longer limited to singular cases in Strasbourg; the Court began to transform more broadly the interface of law and politics through an ever-close transnational normative web.<sup>181</sup> Due to the principle of monism of French constitutional law, which automatically incorporates the country's international obligations into domestic legal law, the Convention had in principle been applicable domestically from the state's ratification of the Convention in 1974—although this had little practical importance as individual petition was only accepted in 1981.<sup>182</sup> In most other member states, this domestication of the Convention required a specific legislative act.<sup>183</sup> Throughout the 1990s, a growing number of countries incorporated the Convention by legislative acts.<sup>184</sup> The main reason for this remarkable shift was arguably the general geopolitical zeitgeist, which favored human rights and neoconstitutionalism both nationally and regionally.

With the incorporation of the ECHR into national law, the Convention became embedded<sup>185</sup> in a substantially different way, which implied that national courts could apply the Convention. That domestic courts could apply the Convention almost immediately produced a significant growth in domestic suits that invoked Convention rights and freedoms, which in turn prompted more petitions to be filed with the Court.<sup>186</sup> The package implemented by national institutions was not only the Convention and national cases that were lost in Strasbourg but also the developing *acquis Strasbourgensis*, that is, the entire case law of the ECtHR to date. Countries with few or hardly any cases through the late 1980s started having a more steady flow of cases to the Court.<sup>187</sup> But above all, there was massive growth in references to the Convention by national lawyers and, to a lesser extent, judges.<sup>188</sup> Institutionally, the ECtHR became a de facto constitutional court for most member states because the Convention—although in most dualist countries only having the status of

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180. See MIREILLE DELMAS-MARTY, *RAISONNER LA RAISON D'ÉTAT : VERS UNE EUROPE DES DROITS DE L'HOMME* 18 (1989) (arguing that there is a fundamental clash between the objectives of the ECHR and the craving of national sovereignty and difference in the member states).

181. See *supra* fig. 3.

182. See, e.g., Lambert Abdelgawad & Weber, *supra* note 167, at 115–16 (explaining the limited effect of the Convention because of French courts' refusal to review the compatibility of French domestic law with regard to the ECHR).

183. For an overview, see HELEN KELLER & ALEC STONE SWEET, *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (1998).

184. *Id.*

185. See Helfer, *supra* note 147.

186. *Id.*

187. See *infra* apps. 1 & 2.

188. See generally Madsen, *supra* note 125.

statutory law—effectively governed human rights at a transnational constitutional level.<sup>189</sup>

Viewed cumulatively, these trends transformed the undertaking of European human rights, making the Strasbourg system more akin to EU law: directly applicable and with supreme status.<sup>190</sup> This striking development also changed how different constituencies engaged with the Court. The combined effects of the institutionalization of European human rights law in state bureaucracies, academic programs, and the portfolio of lawyers made European human rights an integral part of public and constitutional law across Europe.<sup>191</sup> Consequently, the ECtHR gained extensive authority in the vast majority of European countries and became part of the deep constitutional structure of national legal orders. The only real exceptions to this trend were Turkey and perhaps Italy, which were harbingers of the trouble the ECtHR would face in the following decade.

#### B. From Protocol No. 11 to Backlash (2000–2014): New Directions for European Human Rights?

As the new democracies of Eastern Europe were gradually accepted into the Council of Europe during the 1990s and early 2000s, the ECtHR was on a course of increased activity and potential case overload in its role as a *de facto* constitutional court of European human rights. The effect of new member states on the Court's output in terms of the number of judgments was not registered until approximately 2005.<sup>192</sup> However, the rapidly growing number of applications from new member states, which put the system under stress, was detectable before that.<sup>193</sup> In light of the original Cold War objectives of the Convention, the accession of Russia to the Convention in 1998 was highly symbolic and was seen by many as a strong indication of the system's success despite skepticism among some founding members.<sup>194</sup>

Initially, Russia's entrance had no significant impact. Most of the first applications—approximately 2,000 applications until 2001—were rejected as inadmissible, often on technical grounds.<sup>195</sup> Only after 2004 did the Court deliver a number of high-profile judgments against Russia.<sup>196</sup> Almost immediately thereafter, problems with Russian compliance and political

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189. Compare this to the Huneeus argument that neoconstitutionalism was central to human rights in Latin America. See generally Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varied Authority*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 179.

190. See Helfer, *supra* note 147.

191. See, e.g., STEPHANIE HENNETTE-VAUCHEC & JEAN-MARC SOREL, *LES DROITS DE L'HOMME ONT-ILS CONSTITUTIONNALISE LE MONDE?* (2011); NEIL WALKER, JO SHAW & STEPHEN TIERNEY, *EUROPE'S CONSTITUTIONAL MOSAIC* (2011).

192. See *supra* fig. 3.

193. See *infra* app. 2.

194. *Id.*

195. Pamela A Jordan, *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*, 25 HUM. RTS. Q. 660, 681 (2003).

196. *Id.*

discontent arose.<sup>197</sup> Figure 5 indicates in each column the percentage of overall judgments with Russia as respondent and other respondent states that frequently appeared before the Court. It only includes the most regular litigators from Eastern and Western Europe. The percentage of Russian judgments grew steadily over the period, ending at about fifteen percent of the total amount of judgments.<sup>198</sup> Several other new member states, for example Ukraine, also count for a significant percentage of total number of judgments.<sup>199</sup>

Figure 5

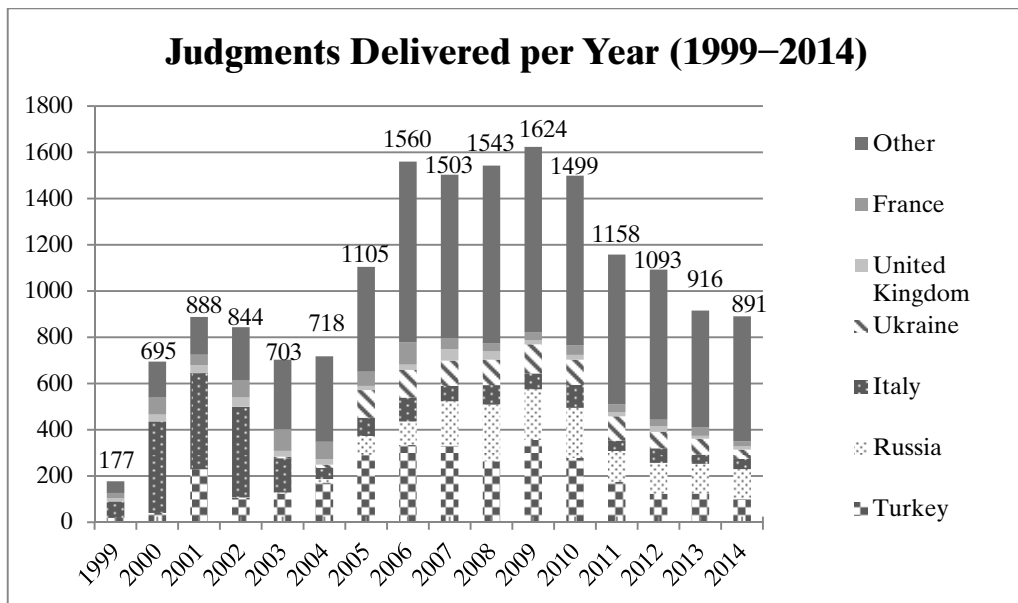


Figure 5 further reveals that the vast growth in decided cases cannot be explained simply by the entrance to the ECtHR of new member states with structural human rights problems. In other words, it is wrong to allocate the transformation in the level of output to only the geopolitical transformation and corresponding additions of member states such as Russia; existing members with structural problems—notably Italy and Turkey—also count for substantial percentages of ECtHR judgments.<sup>200</sup> Yet a dramatic change is visible in the growing total number of judgments delivered.<sup>201</sup> This change is arguably due to both the institutional changes introduced by Protocol No. 11 and the doubling of the number of member states. Moreover, the change is arguably in part the

197. *Id.* at 682.

198. For details, see *infra* app. 2, where the precise calculations are found.

199. *Id.*

200. See fig. 5.

201. See also fig. 3 *supra* and explanations of the relative decline after 2009 through 2010 as a result of joining applications as single judgments.

product of the growth model implicit in the expansive interpretive approach of the ECtHR developed in the context of a limited caseload discussed above, but now applied in a context of a rapidly expanding caseload in Strasbourg.

Protocol No. 11 was an attempt at rationalizing the operation of the Court in light of a growing backlog of cases. The reform fit well with the pattern of previous overhauls of the system: in every reform of the ECHR system since 1950—including all the additional Protocols No. 1 through 14bis from 1952 through 2009<sup>202</sup>—the member states have chosen either to expand the Court's jurisdiction or to introduce various technical changes to enhance its capability and capacity to carry out its function.<sup>203</sup> There were, however, signs that technical rationalization was inadequate to resolve the new problems faced by the Court. For example, Russia had broken rank in initially refusing to join Protocol No. 14 in 2004, which was drafted to reduce the backlog by giving single judges and three-member panels the power to quickly dispose of meritless complaints.<sup>204</sup> Russia's relations with the Court steadily deteriorated from 2004 on; the Duma continuously refused ratification of Protocol No. 14 until 2010.<sup>205</sup>

Though the functioning of the Court had long been considered a matter of technical rationalization, the British offensive with the leaked Draft Declaration before the 2012 Brighton Summit further underscored that the power of the ECtHR was no longer beyond political debate.<sup>206</sup> The subsequent Brighton Declaration stands out in comparison with earlier reforms for two reasons: It identified measures for further rationalization of the ECtHR, and it openly raised the political question of the future role of the Court with a series of negative comments on the quality of the judges and their judgments.<sup>207</sup> Subsequent Protocols Numbers 15 and 16 were explicitly designed to rebalance the system in favor of national levels of law and politics,<sup>208</sup> although the actual contents of these Protocols also indicate the Court's empowerment.<sup>209</sup>

Although these reforms emphasized reducing the backlog of cases, the reforms also marked the beginning of what could appear as an odd, informal

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202. See CHRISTOFFERSEN & MADSEN, *supra* note 21, at 239; see also Harmsen, *supra* note 151, at 120.

203. See CHRISTOFFERSEN & MADSEN, *supra* note 21, at 237.

204. Harmsen, *supra* note 151, at 126–32.

205. With regard to the Court, it was notably the victories of Chechen applicants in, for example, *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, Eur. Ct. H.R. (2005) and then *Ilaşcu and Others v. Moldova and Russia* App. No. 48787/99, Eur. Ct. H.R. (2004), about Russia's role in the breakaway region of Transdnistria, that caused frictions with Moscow. The war between Russia and Georgia, the first ever between two CoE member states, only added to the deteriorating of relations. See LAURI MÄLKSOO, *RUSSIA AND EUROPEAN HUMAN-RIGHTS LAW: THE RISE OF THE CIVILIZATIONAL ARGUMENT* (2014).

206. See, e.g., Helfer, *supra* note 22.

207. BRIGHTON DECLARATION, *supra* note 22, ¶¶ 23, 25c.

208. See CHRISTOFFERSEN & MADSEN, *supra* note 21, at 241.

209. See *id.*; Helfer, *supra* note 22 (arguing that the Brighton Declaration points toward more possible futures of the Court).

alliance between the United Kingdom and Russia. These two countries had in common that they were the most outspoken critics of the Court. This “alliance” was illustrative of growing discontent with the ECtHR that united critiques from governments and civil society facing Eastern and Western Europe’s starkly different human rights situations.

The United Kingdom’s *volte face* with regard to the Court is striking. Throughout the 1990s, human rights were embedded into the fabric of British society through New Labour’s attempt at making human rights culture the ethos of multicultural Britain.<sup>210</sup> The Human Rights Act of 1998 was thus a crowning moment that transformed the domestic legal status of human rights and started constitutionalizing British human rights law.<sup>211</sup> The British turnaround to become critical of the ECtHR occurred in the aftermath on the War on Terror, when the Court—to Britain’s outrage—stopped deportation of some radical Islamists and terrorists.<sup>212</sup> Other more technical cases caused additional political uproar, including *Vinters and Others v. United Kingdom*,<sup>213</sup> on the possibility of appeals of life sentences, and *Hirst (No. II) v. United Kingdom*,<sup>214</sup> finding that a blanket ban on voting by British prisoners violated the Convention.

Although Britain had been found to have violated the Convention in numerous comparably technical cases in years past, the political outrage in *Vinters* and *Hirst* stemmed from the ECtHR’s foray into a deeply polarized political arena. The ECtHR’s involvement in the cases was under intense media coverage that portrayed the Court as effectively overruling legitimate democratic British political decisions and the doctrine of Parliamentary Supremacy.<sup>215</sup>

The *Hirst* case has generated an ongoing tug-of-war between judges in Strasbourg and British officials and politicians. Currently, there is open noncompliance with the *Hirst* decision and Britain has another twenty-six cases pending before the Committee of Ministers, the CoE body monitoring compliance with judgments.<sup>216</sup> And although Margaret Thatcher previously told the Court to pull back, Prime Minister David Cameron is now threatening more dramatic action: to pull Britain from the Convention altogether.

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210. See Madsen, *supra* note 12, at 82–84 (demonstrating how human rights became part of mainstream politics and culture).

211. Christopher McCrudden, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. L. STUD. 499, 503–05 (2000).

212. See, e.g., Conor Gearty, *11 September 2001, Counter-terrorism, and the Human Rights Act*, 32 J. L. & SOC. 18, 29 (2005).

213. See generally *Case of Vinter and Others v. The United Kingdom*, App. No. 66069/09; 130/10; 3896/10 (2013).

214. *Hirst v. The United Kingdom (No. 2)*, App. No. 74025/01, Eur. Ct. H.R. (2005).

215. See, e.g., David Davis, *Britain Must Defy the European Court of Human Rights on Prisoner Voting as Strasbourg is Exceeding Its Authority*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH* 65 (Spyridon Flogaitis et al. eds., 2013).

216. *SEE COUNCIL OF EUROPE COMMITTEE OF MINISTERS, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, 7 ANN. REP.1, 100 (2013).

The ECtHR has responded to Britain's pushback with some hesitation in its subsequent jurisprudence. For example, in *Scoppola v. Italy*,<sup>217</sup> the Court allowed for depriving prisoners of voting rights if there is a legitimate aim and deprivation is not automatic. But this hesitation is not driving all of the Court's decisions. In *McHugh and Others v. the United Kingdom*,<sup>218</sup> the Court reasserted that a blanket ban on prisoners' voting rights constituted a violation. The Court's vacillation regarding *Hirst* is readily apparent: while the ECtHR is seemingly seeking to retreat in *Scoppola* from an overreach in *Hirst*, Britain has not budged on *Hirst*, and it intervened very strongly in *Scoppola* against *Hirst*.

This British pushback in the courtroom, the media, and at the political level may be paying off as the ECtHR is now, seemingly, granting the United Kingdom a wider margin of appreciation—that is, it gives more deference to national decisions.<sup>219</sup> As suggested by one ECtHR judge, the new conciliatory approach moves emphasis from substantial individual justice to more abstract procedural justice.<sup>220</sup> If the member state can document that it has conducted a transparent review of the problem and the relevant ECtHR case law, and has involved the relevant actors, the ECtHR will be less likely to overrule the state's decision.<sup>221</sup> Although the Court's retreat has been described as “qualitative, democracy-enhancing” in the member states,<sup>222</sup> in light of the present analysis it would seem more appropriate to assert that the retreat's main purpose is most likely to find a means that is authority-enhancing for the Court in the context of its tense interface with the United Kingdom. Consequently, the rights-oriented jurisprudence that became the Court's trademark in the late 1970s is being supplemented, or replaced, by new forms of strategic judging reminiscent of the legal diplomacy of the early ECtHR.

Compared to the United Kingdom, the situation in Russia is completely different. On one hand, Russia exemplifies the problem of structural human rights violations that are also visible in a number of other new member states. There are endemic and unsolved problems with due process, police brutality, prison conditions, and freedom of the press, as well as other rights.<sup>223</sup> As of 2014, Russia has been the subject of 1,604 cases, and the Court found a violation in all

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217. See generally *Scoppola v. Italy* (No. 3), App. No. 126/05, Eur. Ct. H.R. (2012).

218. See generally *McHugh and Others v. the United Kingdom*, App. No. 51987/08 and 1,014 others, Eur. Ct. H.R. (2015).

219. See, e.g., *MGN Ltd. v. United Kingdom*, App. No. 39401/04, 2011 Eur. Ct. H.R. 66 (2011); see also ODDNÝ MJÖLL ARNARDÓTTIR, *RETHINKING THE TWO MARGINS OF APPRECIATION* (2014) (demonstrating how such a change in approach is arguably taking place).

220. See Robert Spano, *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487, 499 (2014).

221. See, e.g., *RMT v. United Kingdom*, App. No. 31045/10, 366 Eur. Ct. H.R. (2014), *Animal Defenders v. United Kingdom*, App. No. 48876/08, 57 Eur. H.R. Rep. 21 (2013), and *A, B and C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010).

222. Spano, *supra* note 220.

223. See *Violations by Article and by State 1959-2014*, EUR. CT. OF HUM. RTS. (2015), [http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2014_ENG.pdf).

but seventy-four.<sup>224</sup> Comparatively, in the same period, Ukraine appeared in 1,002 cases and only in ten were violations not found. Poland appeared in 1,070 cases and nonviolation was found in 107 of them.<sup>225</sup> Resembling the situation of Italy and Turkey, the rulings of the ECtHR with regard to a number of new member states seem not to solve the human rights problems at hand but instead highlight them and spur mobilization toward the Court, which engenders further backlog and political tensions.

Yet Russia is an exceptional case. The fact that the country has been involved in numerous violent military disputes over territory has raised unprecedented issues relating to interstate conflict—earlier interstate complaints in the Cyprus, Greece, Northern Ireland, and Turkey cases never involved interstate war among member states.<sup>226</sup> The Russo–Georgian War in 2008 prompted not only an interstate complaint but also many individual applications.<sup>227</sup> Likewise, the Chechen–Russian conflict produced numerous individual applications.<sup>228</sup> Most recently, the Russo–Ukrainian warfare has triggered an interstate complaint.<sup>229</sup> The Strasbourg system was never set up with such situations in mind.<sup>230</sup> Though the Court overcame significant challenges as an instrument of democratization—witnessed in numerous cases from Eastern Europe and earlier, in Spain, Portugal, and Greece,<sup>231</sup> it has been an ineffective tool for promoting democracy in warlike conditions.<sup>232</sup> As a result of Russia’s contentious relationship with the Court, it is the odd man out. For example, although Russia has an accredited delegation in Strasbourg, its right to vote and to be represented in the Parliamentary Assembly’s main bodies has been suspended.<sup>233</sup> Further, Russia has both been threatened with expulsion and has threatened to leave the CoE multiple times since 2000.<sup>234</sup>

These examples of pushback from the United Kingdom and Russia are not the only signs of increasing challenges to the ECtHR’s authority. As recent reports from the Committee of Ministers have shown, compliance rates are declining, and most countries are now subject to compliance monitoring.<sup>235</sup> The authority of the ECtHR, as argued by Alter, Helfer, and Madsen, is in part a

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224. *Id.*

225. *Id.*

226. *See supra* note 100 and accompanying text for a discussion of these cases.

227. *See, e.g.,* Georgia v. Russia (No. 1), App. No. 13255/07, Eur. Ct. H.R. (2009); Georgia v. Russia (No. 2), Appl. No. 38263/08, Eur. Ct. H.R. (2011); and Georgia v. Russia (No. 3) Appl. No. 61186/09, Eur. Ct. H.R. (2010).

228. DOTHAN, *supra* note 17, at 255.

229. Ukraine v. Russia, App. No. 20958/1, 4 Eur. Ct. H.R. (2014).

230. The original idea was precisely to intervene before such situations occurred. *See generally* Bates, *supra* note 1.

231. SWEENEY, *supra* note 145.

232. *See generally* Réne Provost, *Teetering on the Edge of Legal Nihilism: Russia and the Evolving European Human Rights Regime*, 37 HUM. RTS. Q. 289 (2015).

233. *Id.*

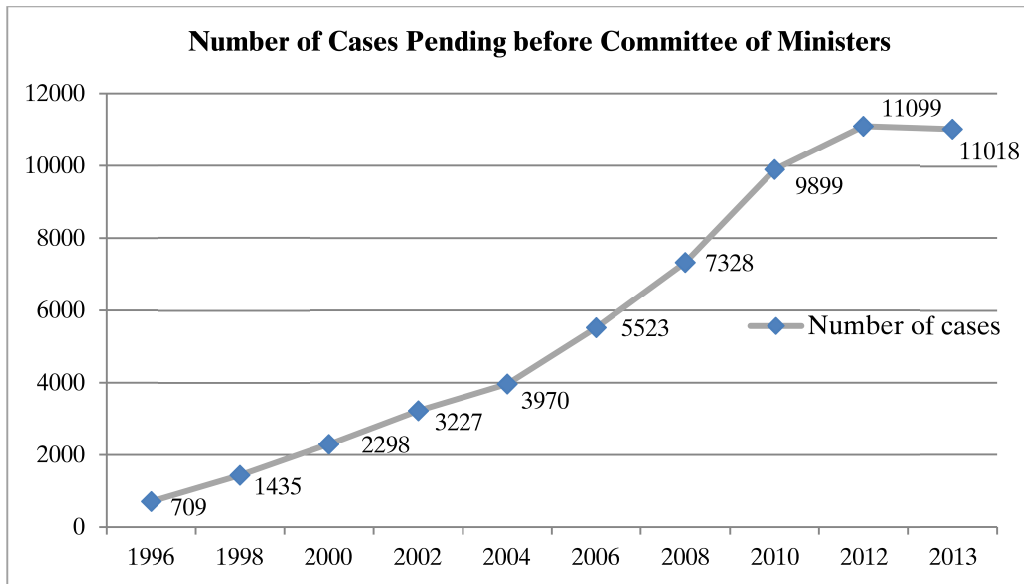
234. *Id.*

235. For details, see *infra* fig. 6.



product of the relevant agents giving effect to IC judgments.<sup>236</sup> While there are great variations between member states in this regard, partial compliance appears increasingly to have become the norm in both Western and Eastern Europe.<sup>237</sup> Figure 6 shows the development of pending cases before the Committee of Ministers since 1996.<sup>238</sup>

Figure 6



Although the data clearly demonstrates a growth in problems with compliance, it does not prove a direct correlation between partial compliance and the backlash against the Court. Moreover, considering the quantitative output from the ECtHR and the complexities of many judgments, for example, by a change in remedial practices after 2000,<sup>239</sup> an increase in the number of open compliance cases before the Committee of Ministers should be expected.<sup>240</sup> In terms of the ECtHR's authority, compliance is nevertheless a reliable contextual indicator, but it requires an additional qualitative analysis of the

236. Alter, Helfer & Madsen, *supra* note 5.

237. See *8th Annual Report of the Committee of Ministers 2014*, 27 COUNCIL OF EUROPE (2014), [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2014\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf).

238. See *id.*

239. Since the 2000s, the ECtHR has changed its remedial practices to include more specific obligations on respondent states than paying damages. In the same period, the Court has developed the practice of "pilot judgments." See HELFER, *supra* note 86, at 147 ("[T]he ECtHR has included specific remedial obligations in several high-profile judgments.").

240. Darren Hawkins & Wade Jacoby, *Partial compliance: a Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L & INT'L REL. 35, 38 (2010) (arguing that there is increased scope for partial compliance in European human rights law).

kind of compliance. Where the state response is typically limited to paying damages without further implementation of judgments—in Russia, for instance—this challenges narrow authority.<sup>241</sup> Where the states are seeking a dialogue and have demonstrated willingness to reform—Poland, for example—this is not necessarily detrimental to narrow authority.<sup>242</sup> It is clear that the Court's narrow authority varies even among member states with structural problems. Although the Court has little narrow authority in Russia, the reverse situation exists for the Court in Poland and many other new member states engaging with the Court and Committee of Ministers to find solutions to structural problems.

In addition to member states' consequential steps toward giving full effect to the Court's rulings, the other closely related criteria for assessing the ECtHR's authority suggested by Alter, Helfer, and Madsen is recognition by constituencies.<sup>243</sup> Member states' rhetoric, increasingly critical of the Court, is salient in this regard. Although this discourse of discontent is rooted in very different legal and political circumstances from one country to another, these differences seem lost on many commentators. In fact, one can observe a diffusion of critical discourse: critics from countries with comparatively few cases in Strasbourg—such as Denmark and Finland—adopt the very same discursive means as states facing more serious challenges from Strasbourg.<sup>244</sup> In the legal field, highly critical voices speak out in every single European state. Even presidents of national supreme courts are openly voicing their opposition to the ECtHR—most recently, the Supreme Court Presidents from the United Kingdom, Belgium, and Finland.<sup>245</sup> Although bashing the ECtHR is not new, the generalization of the discourse across Europe and its application to very different human rights situations is quite novel. The United Kingdom's current government does stand out, however, even from previous U.K. governments with its threat of leaving the ECHR; Russia is in part already ousted from the CoE. Most other member states, however, are not seeking such radical breaks with Strasbourg.

Compared to the discourse of discontent, the Brighton Declaration, adopted by consensus, provides a different but more robust empirical indicator of the

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241. See DOTHAN, *supra* note 17, at 255.

242. *Id.* at 237–38.

243. Alter, Helfer & Madsen, *supra* note 5.

244. These statements are typically made at unrecorded seminars and less so in written material. See however, the statements by English Law Lords in Owen Bowcott, *European Court is not Superior to UK Supreme Court, says Lord Judge*, THE GUARDIAN, (Dec. 4, 2013), <http://www.theguardian.com/law/2013/dec/04/european-court-uk-supreme-lord-judge>, and Owen Bowcott, *Senior Judge: European Court of Human Rights Undermining Democratic Process*, THE GUARDIAN, (Nov. 28, 2013), <http://www.theguardian.com/law/2013/nov/28/european-court-of-human-rights>.

245. See Bowcott, *supra* note 244 for English judges; for Belgium see MARC J. BOSSUYT, STRASBOURG ET LEASE DEMANDEUS D'ASILE: DES JUGES SUR UN TERRAIN GLISSANT (2010); for Finland see Pauline Koskelo, *Domare, lagstiftare och professorer*, SVJT 619, 620–41 (2014). See generally SPYRIDON FLOGAITIS, TOM ZWART & JULIE FRASER, THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH (2013).

general recognition of the ECtHR by key constituencies—the member states’ governments.<sup>246</sup> Importantly, at no point does the Declaration suggest reducing Convention rights or the *acquis* of Strasbourg.<sup>247</sup> Although the Brighton Declaration is not limiting the Court’s subject-matter authority, it is nevertheless seeking to limit its future role in defining that authority by giving more power to national institutions.<sup>248</sup> Nothing is fixed at the moment, and much probably depends on the Court’s ability to reduce the backlog of cases and implement reforms.<sup>249</sup> The Declaration mainly seeks a different balance between the Court and the member states. But this unsolved balance between national and European human rights law creates a new uncertainty in the system where the Court seems to be seeking the approval of the constituencies. This rebalancing of the system—between law and politics and between the international and the national—might best be understood as an indicator of new fragility in the system.<sup>250</sup> This fragility is apparent in the described efforts by the United Kingdom and Russia to reduce the ECtHR’s power over domestic matters. The very recent case law giving more leeway to member states is probably the first empirical indication of this decline of power of the ECtHR. But as suggested by Alter, Helfer and Madsen, power and authority are to be treated as two distinct phenomena. Following Alter, Helfer and Madsen’s framework, the Court’s power is currently challenged, but its overall authority is generally sustained, at least for the time being.

#### IV

#### CONCLUSION

Not long ago, the ECtHR was heralded as “one of the most remarkable phenomena in the history of international law, perhaps in the history of all law.”<sup>251</sup> Since the Brighton Declaration, Europeans have become accustomed to a different kind of discourse where both the judgments and the judges are scolded by fuming heads of states, members of the press, and senior members of the legal profession. As suggested, however, this new critical discourse is not necessarily a sign of shrinking ECtHR authority. Underneath this discourse lies an uneven human rights landscape with some member states facing very different challenges—qualitatively and quantitatively—in giving effect to the European Convention.<sup>252</sup> Although this article does not exhaustively analyze all

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246. See BRIGHTON DECLARATION, *supra* note 22.

247. CHRISTOFFERSEN & MADSEN, *supra* note 21 (arguing that the Brighton Declaration only suggests rebalancing the relationship between national and European law and politics).

248. *Id.*

249. *Id.* at 248.

250. *But see* Gregory C. Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 267.

251. Michael O Boyle, *On Reforming the Operation of the European Court of Human Rights*, 1 EUR. HUM. RTS L. REV. 1 (2008).

252. *But see* FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE. CHALLENGES AND TRANSFORMATIONS IN COMPARATIVE PERSPECTIVE (2014) (arguing that some member states are

forty-seven member states, it is clear from the case studies examined here that the most serious challenges to the Court's authority are concentrated in some member states, notably the United Kingdom and Russia.

The United Kingdom and Russia, although having fueled broader public discontent with the Court, might be outliers in the bigger picture, however. Despite these member states' fundamentally different human rights situations, they both move away from European consensus on human rights and the European integration project more generally. The United Kingdom's projects, on one hand, have recently included threats of leaving the Convention and even the EU. And Russia, on the other hand, is pursuing the rise of the BRICs as an alternative way of restoring its power and threatening its flight from the CoE.

These broader changes in the behavior of two important member states cannot be explained simply as a response to the quality of the rulings or the judges of the ECtHR. Instead, the change in behavior is a reflection of the transformation in the broader geopolitical contexts in which both the member states and the Court operates. The post-Cold War period catalyzed the Court's rapid growth and an ideological demand for its services to democratize Eastern Europe. The current geopolitical situation has different demands. Although the "post-post Cold War" era has competing origins—the rise of China, 9/11 and the fight against terrorism, the financial crisis and resulting crisis in the European project and economy, et cetera—the era has resulted in new cleavages in Europe, including in the area of human rights. Specifically, there are indications, notably regarding to the ongoing conflict between Russia and Ukraine, that the boundary of Europe is being redrawn both geographically and symbolically. At the same time the United Kingdom is championing a different balance between national and European law and politics of human rights. There is nothing new in the fact that geopolitics prompts change in the delineation of liberal Europe and its commitment to human rights. On the contrary, as suggested by this analysis of the long-term evolution of the ECtHR, geopolitical transformations have consistently impacted the operation of the Court: Cold War, decolonization, *détente*, and the post-Cold War. The current geopolitical transformation will also—if it has not already—impact the authority of the ECtHR. What is uncertain, however, is the precise direction of that change. What we can observe right now is form of boundary politics of the space regulated by the ECHR both with regard to its geographical reach and its impact on the national level of law and politics. The question remains what impact that will have on the authority of the Court in the long run.

*Appendix 1: Select Member States' Percentage of Total Output of Judgments*

<b>Year</b>																
<b>Country</b>	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
<b>Austria</b>	1.69 %	3.02 %	2.03 %	2.37 %	2.70 %	2.37 %	1.99 %	1.35 %	1.53 %	0.91 %	0.92 %	1.27 %	1.04 %	2.10 %	1.64 %	0.79 %
<b>Belgium</b>	1.13 %	0.29 %	0.56 %	1.66 %	1.14 %	2.09 %	1.27 %	0.45 %	1.00 %	0.91 %	0.68 %	0.27 %	0.78 %	0.55 %	0.98 %	2.13 %
<b>Bulgaria</b>	0.56 %	0.43 %	0.34 %	0.36 %	1.56 %	3.76 %	2.08 %	2.88 %	3.53 %	3.82 %	3.88 %	5.40 %	5.35 %	5.86 %	2.84 %	2.02 %
<b>Croatia</b>	0.00 %	0.00 %	0.56 %	1.07 %	0.85 %	4.60 %	2.35 %	1.41 %	2.06 %	1.23 %	1.17 %	1.40 %	2.16 %	2.10 %	2.62 %	3.03 %
<b>Denmark</b>	0.00 %	0.86 %	0.23 %	0.24 %	0.28 %	0.42 %	0.27 %	0.13 %	0.13 %	0.13 %	0.18 %	0.00 %	0.52 %	0.09 %	0.00 %	0.22 %
<b>France</b>	12.99 %	10.50 %	5.07 %	8.89 %	13.37 %	10.45 %	5.52 %	6.15 %	3.19 %	2.20 %	2.03 %	2.80 %	2.85 %	2.65 %	3.93 %	2.47 %
<b>Germany</b>	1.69 %	0.43 %	2.03 %	1.07 %	1.71 %	0.84 %	1.45 %	0.64 %	0.80 %	0.65 %	1.29 %	2.40 %	3.54 %	2.10 %	0.66 %	1.46 %
<b>Greece</b>	3.39 %	3.02 %	2.36 %	2.96 %	3.98 %	5.85 %	9.50 %	3.53 %	4.32 %	4.80 %	4.62 %	3.74 %	6.30 %	5.12 %	4.15 %	6.06 %
<b>Hungary</b>	0.56 %	0.14 %	0.34 %	0.36 %	2.28 %	2.79 %	1.54 %	2.05 %	1.60 %	2.85 %	1.85 %	1.40 %	2.94 %	2.38 %	4.59 %	5.61 %
<b>Italy</b>	40.11 %	56.98 %	46.85 %	46.45 %	21.05 %	6.69 %	7.15 %	6.60 %	4.46 %	5.44 %	4.25 %	6.60 %	3.89 %	5.76 %	4.26 %	4.94 %
<b>Moldova</b>	0.00 %	0.00 %	0.11 %	0.00 %	0.00 %	1.39 %	1.27 %	1.28 %	3.99 %	2.14 %	1.85 %	1.87 %	2.68 %	2.47 %	2.07 %	2.69 %
<b>Netherlands</b>	1.13 %	0.86 %	0.79 %	1.30 %	1.00 %	1.39 %	0.90 %	0.45 %	0.67 %	0.06 %	0.25 %	0.27 %	0.52 %	0.64 %	0.11 %	0.34 %
<b>Poland</b>	1.69 %	2.73 %	2.25 %	3.08 %	9.53 %	11.00 %	4.43 %	7.37 %	7.39 %	9.14 %	8.19 %	7.14 %	6.13 %	6.77 %	2.51 %	3.14 %
<b>Romania</b>	1.13 %	0.43 %	0.11 %	3.20 %	3.98 %	2.65 %	2.99 %	4.68 %	6.19 %	12.90 %	10.34 %	9.54 %	5.87 %	7.23 %	9.61 %	9.76 %
<b>Russia</b>	0.00 %	0.00 %	0.00 %	0.24 %	0.71 %	2.09 %	7.51 %	6.54 %	12.77 %	15.88 %	13.49 %	14.48 %	11.49 %	12.26 %	14.08 %	14.48 %
<b>Slovakia</b>	1.13 %	0.86 %	0.90 %	0.83 %	3.84 %	1.95 %	2.62 %	2.24 %	1.53 %	0.97 %	2.40 %	2.67 %	1.81 %	2.10 %	1.75 %	1.57 %
<b>Slovenia</b>	0.00 %	0.29 %	0.11 %	0.12 %	0.00 %	0.00 %	0.09 %	12.18 %	1.00 %	0.58 %	0.49 %	0.40 %	1.04 %	2.01 %	2.73 %	3.48 %
<b>Switzerland</b>	0.00 %	1.01 %	0.90 %	0.59 %	0.14 %	0.00 %	0.45 %	0.58 %	0.47 %	0.26 %	0.43 %	0.73 %	0.95 %	0.73 %	1.42 %	2.02 %
<b>Turkey</b>	10.73 %	5.76 %	25.79 %	12.44 %	17.64 %	23.96 %	26.24 %	21.41 %	22.02 %	17.11 %	21.92 %	18.55 %	15.11 %	11.25 %	13.54 %	11.34 %
<b>Ukraine</b>	0.00 %	0.00 %	0.11 %	0.12 %	1.00 %	1.95 %	10.86 %	7.69 %	7.25 %	7.13 %	7.76 %	7.27 %	9.07 %	6.50 %	7.53 %	4.49 %
<b>United Kingdom</b>	7.91 %	4.32 %	3.83 %	4.74 %	3.56 %	3.34 %	1.63 %	1.47 %	3.33 %	2.33 %	1.11 %	1.40 %	1.64 %	2.20 %	1.42 %	1.57 %
<b>Other</b>	14.12 %	8.06 %	4.73 %	7.94 %	9.67 %	10.45 %	7.87 %	8.91 %	10.78 %	8.55 %	10.90 %	10.41 %	14.34 %	17.11 %	17.58 %	16.39 %

*Appendix 2: Number of Applications Allocated to a Judicial Formation per Year*

