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**THE RULE OF LAW AND THE EUROPEAN HUMAN RIGHTS REGIME**

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**Preface (and Conclusion)**

Many of the chapters in this collection see “global governance” as a reference to the way the globe as a whole global system is governed -- in other words, as the way that so-called “international,” or inter-state systems are ordered the world over. This chapter, by contrast, fits into that group of the chapters (which includes those by Rosenau, Young, and O’Brien) that see “global governance” as about saying and seeing that governance takes place on the globe to an increasing degree (not only by state and interstate actors, but also) by suprastate, non-state, and substate actors. This chapter in particular examines the strengthening of one of these “disaggregated spheres of authority” (in the phrase of James Rosenau), one of the arenas where modes of regulating human behavior that were previously monopolized by state sovereigns has been taken over by a trans-state actor, the European Court of Human Rights.

We see the “structure” of global governance as in fact an absence of structure among these disaggregated spheres, and the process of global governance as varying from one to another sphere. Within traditional international organizations, governance is exercised with the range of traditional tools of international relations, although these tools are now often wielded by a number of non-traditional agents, such as NGOs. In addition, trans-state regimes of governance have moved recently into prominence: some, in the realm of political economy (e.g., those of the World Bank and the IMF); others, in the realm of trans-state law, enforced by trans-state courts.

This chapter zeroes in on one of the latter, in order to address a question posed in the chapter by Oran Young: What, in a trans-state regime, makes for regime effectiveness? Specifically, by what processes do trans-state legal regimes manage to take hold? (We do not address in this chapter the prior question why such trans-state judicial governance regimes get put into place at all; a large literature on this subject has already accumulated: Moravcsik 2000 and citations in Goldstein 2001, Ch.6).

The vantage point from which we examine the growth and entrenchment of this trans-state regime is that of public law. This chapter focuses on a single trans-state, rule-of-law regime, one implemented by a mix of trans-state actors of the Council of Europe and domestic political and legal institutions, all of whom are charged with making and enforcing law.

Our perspective on this particular piece of global governance, and others like it -- i.e., those regimes constructed and governed by transnational courts, the norms legitimating them and the norms they propound, and the actors and institutions that implement these norms -- changed in the course of researching and writing this chapter. We began persuaded by the thesis of various scholars in international relations (hereafter IR) that the areas where these trans-state judicial regimes most successfully manage to take hold and to alter the behavior of erstwhile sovereign states are those states where domestic culture already exhibits a well-entrenched commitment to the rule of law. In other words, we saw domestic culture at the society-wide level as decisive in shaping the receptivity of a given state to subordinating itself to governance by one of the trans-state judiciaries that have been proliferating and growing in strength around the turn of the twenty-first century.

The research in this chapter changed our viewpoint. We now believe that a multiplicity of causal variables shape the likelihood of regime effectiveness in these judicially dominated trans-state regimes: The degree of rule-of-law culture is important, but its impact can be trumped or blunted by such phenomena as strong political leadership (as it was in our study, on the part of judges on constitutional courts as well as in domestic executive branches and legislatures) or by

political forces exogenous to the judicial systems (such as, in our study, trans-state political mood, at least among elected member-state leaders during the mid- to late-1980s).

## **1. Introduction**

The European Court of Human Rights (hereafter ECtHR or the Court, or “Strasbourg,” its home) was founded in 1959 within the structure of the Council of Europe (COE), a group of European countries committed to the protection of human rights (originally, Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom). The ECtHR was to function as interpreter of the 1953 European Convention of Human Rights (hereafter ECHR or the Convention). The Convention regime began designedly gradually, with a cumbersome enforcement system, many opt-out possibilities on particular rights, and an enforcing court that met only temporarily. (In the states that chose to accept the right of individual petition, individuals could file complaints against the High Contracting Parties for alleged human rights violations. Inter-state complaints were also permitted against any member state. The complaints were first reviewed for admissibility by the Commission, a quasi-judicial body, and if no friendly settlement occurred, the Commission would issue a report stating the facts of the case and its opinion on the merits and send it to the Committee of Ministers. Then, the Commission and/or any contracting state concerned had the right to bring the case before the Court for final adjudication within three months following the transmission of the report to the Committee of Ministers. If the case were not referred to the ECtHR, the Committee of Ministers could decide whether there had been a violation of the human rights protected by the Convention. If the Committee found a violation, it would oblige the state to pay compensation to the victim of that violation. If the ECtHR did handle the case, its decision was final. The Committee had the responsibility of monitoring the execution of the ECtHR’s judgment. The Council of Europe dramatically strengthened this enforcement system in the 1990s, as explained below. As of 2003, the American Convention on Human Rights, for the Organization of American States, another trans-state regime, operates in much the same format as the early

ECHR.) Not until the early 1970s did the ECtHR begin to issue decisions with real teeth in them—i.e., decisions that produced prompt policy corrections by offending governments (e.g., De Wilde, Ooms and Versyp v. Belgium, judgment 18 June 1971—legal reform on 6 Aug. 1971; Ringeisen v. Austria, judgment 16 July 1971—prompt reversal by Constitutional Court; Golder v. the United Kingdom, judgment 21 Feb. 1975—reform on 22 June 1976).

By the end of 1998, however, the ECtHR became a permanent court and the right of individuals to petition the court for violations, which had not even existed until 1994, now became mandatory on all COE member countries. (The steps of change were as follows: Protocol 9, 1994, enabled individual applicants to bring their cases directly to the Court subject to agreement to this system by the respondent State and also to acceptance of the case by a Screening Panel. Protocol No. 11, effective in November 1998, replaced the Commission with what was now a permanent ECtHR. Now the obligation to permit individual citizens to take human rights complaints to this court became mandatory for all signatories to the Convention; no longer could states opt out. [www.echr.coe.int](http://www.echr.coe.int) ). Thus the ECtHR became an effective co-director of the ECHR legal regime, in unofficial partnership with the European Court of Justice (hereafter ECJ), the court of the European Union whose own doctrine obliges it to honor the ECHR whenever the Convention is relevant.

By applying a blend of IR approaches with public law analyses, as recommended in recent years by a number of influential IR and international law scholars of differing theoretical approaches (Abbot 1989; Koskenniemi 1990; Slaughter 1993; Finnemore 1996; Koh 1997; Rensmit 1997; Keohane 1997 and 2000; Slaughter et al. 1998; Byers 2000), this paper examines the extent to which rules derived from this Convention have become embedded in the domestic legal order of the member states. We view the set of rules and the organizational structure created around the Convention as a transnational legal regime, one grounded in post-Enlightenment European culture. Although that culture had obviously been scarred by World War II and the circumstances that led to it,<sup>1</sup> the Preamble of the Convention nonetheless

explicitly identified its own foundation as the “spiritual and moral values which are the common heritage of the European people and the true source of individual freedom, political liberty and the rule-of-law principles that form the basis of all genuine democracy” (Emphasis added. [www.coe.int](http://www.coe.int)).

Within the IR literature, a commonly cited definition of international regimes is that of Stephen Krasner: they are sets of issue-bounded “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge” (1983, 2). (E.g., One of the guiding principles of the ECHR regime as articulated by the ECtHR is the doctrine of a “national margin of appreciation”; it states that the preeminence of a given Convention norm must be weighed against national interests and restricted to the degree “necessary in a democratic society,” Lawless v. Ireland, ECtHR 1981. The analytic framework of an international regime reaches beyond the traditional international law studies of the ECtHR that confine their research focus to its legal doctrine (e.g. Delmas-Marty 1992; Clements et al. 1999; Yourow 1996). This paper views the Convention and the Court as part of the broader European human rights regime, which includes other organizations with which the Court cooperates closely (the Committee of Ministers) or loosely (the European Court of Justice, the European Commission?). This approach provides a more complete picture of the forces at work in creating a rule of law for Europe than would be available through merely doctrinal analysis.

We label the ECHR regime (i.e., the regime created around the Convention and the Court) transnational rather than international because its rules, norms and procedures are not confined to interstate interaction. For instance, the parties to the Convention commit to a variety of due process measures in Article 5, which list concludes with following:

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by

law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

(Emphasis added.)

Thus, these states pre-commit themselves to allow third party transnational institutions to hold their otherwise sovereign institutions liable for compensatory damages, to that degree abrogating sovereign prerogatives. Clearly, the hierarchical arrangement of the combined force of the Committee of Ministers and the ECtHR vis à vis the domestic courts that implement the ECtHR rulings differs qualitatively from the sheer intergovernmentalism that typifies purely international institutions. Instead the ECHR regime structures not simply state-to-state relations but multiple patterns of interaction—those between individuals and the state, between elements of civil society and state, between domestic courts and national political constituencies, between the EU and individual states, and between the ECtHR/Committee of Ministers and each of the aforementioned categories. The Convention is operationalized primarily through the medium of domestic law and courts (de Bruyn et al. 1997, 2-6), and few aspects of domestic policymaking pertaining to human rights evade the reach of the Convention and its protocols. Within the ECHR regime, states routinely act upon these limitations of their own sovereignty by consciously shaping their policies into patterns adapted to ECtHR jurisprudence.

Significantly, this is a rule-of-law regime in the sense that it gives life via the provisions of the Convention to the principle that the relationships of the individual with the state should be regulated by a framework of legal rules whose interpretation and application are in the hands of

independent judges and are to be applied even-handedly (Merrills 1993). This principle is implicated not only in the obvious cases of the provisions of Article 5 (right to liberty), Article 6 (right to a fair trial) and Article 7 (no retrospective criminal laws) but by all other provisions of the Convention and of its 11 additional protocols.

This transnational regime has enlarged its jurisdiction in two successive waves of integration. The first enlargement took place in the 1970s and moved southward. It included Spain (a dictatorship from 1936 to 1975) and Portugal (a dictatorship from 1933 to 1974)-- both initially excluded from the European Community due to their period of fascist rule—who signed the Convention on the day of their accession to the Council of Europe, on November 24, 1977 and September 22, 1976, respectively. The same wave included Greece, at the time, recently plagued by periods of instability and dictatorship. (Greece had signed onto the Convention in 1950, but did not ratify it and then withdrew in 1969, giving it practical effect only in 1974.)<sup>3</sup> (This expansion also included Malta, 1967, Cyprus, 1962, and Switzerland, 1974. We chose Greece, Spain and Portugal not only because they are bigger countries than Malta and Cyprus, but also because they represented interesting transitions from dictatorial to rule-of-law regimes.)

The second enlargement took place in the 1990s, when all former communist states, including Russia, were admitted to the Council of Europe. After fifty to seventy years of blatant disregard for the values professed by the Convention, particularly for the rule of law, these countries formally adopted an alternative political and legal paradigm for the protection of human rights. The number of Council of Europe members grew from 23 at the end of 1989 to 43 in 2001, and the total population of the member states grew from 451 to 772 million. The number of applications to the Court grew from 1,013 in 1988 to 10,486 (Report 2001, 4.) Since 2001, three new countries have signed on to the ECHR: Bosnia, Armenia, and Azerbaijan. These enlargements expanded the democratic Western European normative core to 800 million people living under legal regimes of remarkable heterogeneity.

Despite the variegated mosaic of democratic and legal traditions amassed under the aegis



of the Council of Europe, however, the ECHR regime by the late nineties was being acclaimed as a strikingly successful transnational framework for the protection of fundamental human rights and liberties (Gearty 1997, x-xv). Its very success raises intriguing questions: What holds it together? How do the common rule-of-law standards outlined by the European Court of Human Rights in fact apply to countries as different as England and Romania? Is this regime embedded uniformly or unevenly in the domestic order of the signatory members of the Convention? If it is indeed unevenly embedded, what explains the variations? The bulk of ECtHR studies either describe the Court's structure, processes and jurisprudence (Merrills 1993; Clements 1999; Yourow 1996; Ralph Beddard 1993); or offer a series of country by country non-analytic descriptive studies of the reception of ECtHR law (Gardner 1993; Barkhuysen 1999); or do both (Delmas-Marty 1992; Tavernier 1996; and Gearty 1997). We have found only two analytic accounts that attempt to explain patterns of cross-national variation within the ECHR regime (Drzemczewski 1983 and Lember 1999), and neither of these explores the variable of experience with a rule-of-law culture

To address these questions, we began with a hypothesis built on two foundations. First, a growing literature that began in the mid-90s both on general IR theory and specifically on EU integration points to the importance of rule-of-law-cultures (Seurin 1994, 625-636; Weiler 1994; Slaughter 1995; Moravcsik 1995; Shaw 1996; Alter 1996, 476; Helfer and Slaughter 1997; Goldstein 1996; 1997; and 2001, 158-60). If there is validity in the claims of the EU and IR literature postulating a connection between liberal, rights-respecting, rule-of-law cultures, on the one hand, and acceptance of integration into the ECJ and ECtHR legal regimes, on the other, then we should find longer seniority in the EU (because the latter is an association of liberal, rights-respecting countries) correlated with more complete embedding of the ECHR regime. (This hypothesis is not a mere tautology: A strong domestic rule of law culture does not necessarily imply a willingness to abrogate traditional elements of sovereignty to the degree necessary for acceptance of trans- or supra-national legal authorities. Indeed the French Supreme

Administrative Court, the *Conseil d'Etat*, for decades insisted that French law meant precisely that French sovereignty must be retained, and, on this ground, openly resisted claims of authority from the transnational ECJ (Goldstein 2001; Alter 2001, 158-59).) Secondly, the very fact of membership in the EEC/EC/EU has entailed involvement with political and legal processes that for half a century have been entrenching principles of legitimacy that transfer sovereign power to supranational institutions. One can plausibly assume that such involvement over time would strengthen a member state's transnational commitment to a European legal identity, one that includes protection for fundamental rights.

Both these observations support an expectation that the countries with longest tenure in the EEC->EU system would be the ones that more fully embedded the ECHR regime into their domestic legal system. If our hypothesis is borne out, we still will not know if rule-of-law culture per se is the primary causal variable, due to its co-variance with length of EU tenure. Still, we will have unearthed some initial support for the rule of law thesis.

In order to test this hypothesis, we divided our cases into three categories, as follows:

(1) Core EU member states-- France, Germany, and the Netherlands. These states have a long rule-of-law tradition, albeit one punctuated in the case of Germany (and its fellow core member Italy) by their Fascist/Nazi periods and a lengthy experience with supranational legal/political institutions. (2) States that became EU members in the 1980s--Portugal, Greece, and Spain. These states experienced decades-long discontinuities in the rule of law and missed the formative period of early European Community membership. (3) Members of the Council of Europe from outside Western Europe (i.e. states of the former Soviet bloc)--Romania. When they joined the Council of Europe in the early 1990s, these countries had endured fifty years of totalitarian political abuses and an abysmal record of rule-of-law performance. Romania joined the Council of Europe in 1993, ratified the Convention in June 1994, submitted its application for EU membership in June 1995, and began EU accession negotiations on February 15, 2000.

We initially had also included in our study an example of a former Soviet Republic (as

distinguished from Soviet bloc member), Moldova (Ban and Goldstein 2002). Its soviet-style institutions have been largely preserved since independence (1991), even though it joined the Council of Europe in 1995 and ratified the Convention in 1997. Further reflection caused us to eliminate all of the former Soviet republics from the scope of our study, although our hypothesis should apply to the other Soviet bloc (as distinguished from Soviet Union) countries that are in the Council of Europe and to the Baltic Republics. The reason we segregated the cases in this way is our perception that the ECtHR for a time was apparently applying a double standard with respect to former Soviet republics, most notoriously Russia: For a long time the Court accepted no cases that presented claims of violations of human rights in these countries, evidently attempting to give these fledgling rule-of-law regimes extra time to adapt to Western rule-of-law standards. Because the standard applied by the ECtHR to such countries is markedly easier to attain than the standard applied to the more Western member states, there is not yet a viable way to measure "integration" of the former into the ECtHR regime. In effect, the Court seems to have granted them some sort of de facto apprenticeship period. In 2000, for instance, the ECtHR registered 1,323 applications to hear cases (i.e., claims of human rights abuses) against Russia. It accepted none that year. By August 2002, in contrast, the ECtHR has issued two condemnations of Russia. For comparison purposes, the year 2000 figures for Romania are 31 out of 639 cases accepted; France, 80 out of 870 ([www.echr.coe.int](http://www.echr.coe.int)). If our inference from this data is correct, then it would seem that the ECtHR itself is operating, at least as to its treatment of Russia, on the very assumption we are testing in this paper (viz., that countries accustomed to the rule of law will more readily than others accept the transnational authority of the ECtHR.).

Having selected examples from each of these categories, we then compared both the rate and the thoroughness with which each of them accepted ECHR norms into their own legal systems as constraints on their own sovereignty. Our expectation was that the acceptance of the ECHR legal regime would be deepest and broadest in the core EU states, with more recent EU states and applicant states following in that order.

The structure of the argument to follow looks first, in Section 2, at the constitutionalization of the ECHR regime by examining (1) ECHR compatibility with texts of national constitutions and (2) the reception of the ECHR regime by specialized constitutional courts in those countries that have such courts. (In the majority of the countries we examined, a single court monopolizes this jurisdiction. Exceptions are noted below.) This section examines the primacy of the Convention over domestic law by surveying the degree of coherence between the treaty's treatment in constitutional text and in constitutional court doctrine. National constitutional law is our first measure of the embeddedness of the Convention.

Section 3 then examines implementation of ECtHR doctrine by the rest of judiciary (looking beyond the specifically constitutional courts) in each of the countries of our study. In section 4, we focus on the question of implementation of ECtHR decisions by the legislative and executive branches of the member states. Section 5 will present our conclusions.

## **2. Constitutional Status of the ECHR Regime**

As a preface to the analysis here, we point out two elements of European legal context. First, the ECtHR treats not only the text of the Convention but also its own doctrinal output as "the law of the Convention" (*Handyside v. UK*, ECtHR 1976; *Modinos v. Cyprus*, 22 April 1993; *Dudgeon v. United Kingdom*, 22 Oct. 1981; *Norris v. Ireland*, 26 Oct. 1988; Shapiro and Stone Sweet 2002, 2). This aspect of ECtHR doctrine merits attention because some national courts used to claim, and others still do (at considerable expense in treasure and credibility) that they were/are bound only by the text of the Convention and by those ECtHR decisions in which their country was a defendant. In support of this argument they cited the language of Article 53 of the 1950 Convention (renumbered in 1998 to become Art.46), which specifically mentions only an obligation of parties to the Convention to obey the ECtHR decision "in any case to which they are parties." Their behavior openly ignores the ECtHR's custom of prefacing its examination of the facts with a summary of the interpretation it gave to specific relevant cases in previous decisions; by 1993, the ECtHR was pointedly condemning defendant-states for neglect of prior

ECtHR cases. One must conclude that certainly by 1993 the ECtHR had explicitly rejected a narrow interpretation of Article 53, and expected its precedents to be honored.

Second, the Convention and ECtHR jurisprudence, on the one hand, and the ECJ jurisprudence on human rights, on the other hand, are tightly linked to each other. Early on, the ECJ referred to the Convention as a fundamental source of Community rights (Rutili v. Ministry of the Interior 1975). More recently, the (EU) Treaty of Amsterdam (Art.6) and the recently-adopted EU Charter of Fundamental Rights and Freedoms (Art.47), mandated deference to the Convention and to the Court. Thus, ECJ practice strengthens norms and rules of the ECHR regime, already termed by certain scholars, "a part of the cultural self-definition of European civilization" (Alston and Weiler 1999, 3; Harmsen 2000, 34).

## **A. The Core States**

### **I. France**

The French Constitution of 1958 does not privilege the Convention as compared to other international legal instruments. Under Article 55, treaties "prevail" over national laws (but not over the Constitution). The *Conseil Constitutionnel* (Constitutional Council) in a famous 1975 decision acknowledged this primacy, in principle (Decision 74-74 of 15 Jan. 1975), but refused there to review the compatibility of international treaties with national law, grounding its refusal on its claim that treaty law is "contingent," as Art. 55 puts it, "subject to its application by the other party," thereby declining to enforce the Convention (Steiner 1997; Coccozza 1996, 714-15). In a later case that same year the *Conseil Constitutionnel* refused specifically to review a French statute legalizing abortion for the compatibility with the Convention (Art.2) provision protecting the right to life of every human person. Here the *Conseil* said simply that its jurisdiction was limited to clashes between the Constitution and statutes, that treaty interpretation was not part of its purview, and the judges ruled the statute constitutional (*Cons. Const.*, 23 July 1975, Decis. 75-56; Troper 2003, 42).

What happened next is that France's supreme appellate court for ordinary law, the

*Cour de Cassation*, picked up the ball. In 1975, shortly after the abortion decision this court starting striking down French laws that conflicted with the treaty law of the European Community. From this action evolved the doctrine that all French courts have the duty to strike down a statute that conflicts with treaty law –“convention-based” judicial review (Troper *ibid.*). In 1981 France legislatively accepted the right of individual petition to the ECtHR, and in 1988 the Secretary-General of the *Conseil Constitutionnel*, Bruno Genevois, admitted that the Convention had constitutional value in France and therefore could not be considered as “contingent.” (Genevois 1988; Alter 2001, 158-59). The *Conseil Constitutionnel* in the late 1980s officially acknowledged its duty under Article 55 of the Constitution to enforce international law supremacy over ordinary domestic statutes, in general (Decis. 86-216, 3 Sept. 1986); Decis. 88-1082/1117, 21 Oct. 1988), and eventually enforced the Convention in particular (e.g., pursuant to *Funke, Crémieux and Mialhe (no. 1) v. France*, ECtHR Judgments of 25 Feb. 1993). These prominent shifts by the *Conseil Constitutionnel* evidently helped persuade the *Conseil d’Etat* (France’s supreme court for administrative law) by 1989 to abandon its earlier prominent hostility to enforcing international treaties (“*Nicolo*,” *Conseil d’Etat*, 5 July 1989 (EC Treaty above French Law)); *Conseil d’Etat*, 21 Dec. 1990, Decis. 283-286 (ECHR above French Law); Steiner 1997, 280).

Still, the willingness of these high French courts to conform to ECtHR rulings has been largely limited to cases in which France played a direct role as respondent state. In other words, these courts have not, as a general matter, treated ECtHR precedents from other countries as creating rules binding on France.

Despite this incompleteness of judicial implementation, it is fair to say that by the late 1980s formal constitutional doctrine in France gave the Convention priority over French statute law, if not over the French Constitution. This was no small change in a country with as strong a tradition of Parliamentary sovereignty as France had.

## **II. Germany**

In the text of the German Constitution (Art.59) the status of the Convention is lower, in that

treaties have the same rank as federal statutes. Only general principles of international law and the German Constitution itself are accorded higher status than domestic statutes. Nonetheless, in Germany, the ECHR did come to prevail over domestic statutes by way of intervention from the German Constitutional Court. In 1987, in accordance with the constitutional principle that the interpretation that conforms to international law must prevail, the powerful German Constitutional Court (*Bundesverfassungsgericht* or BVerfG) in effect brought the Convention regime into German law by deciding that the BVerfG's interpretation of those Convention rights that are listed in the German Constitution "must have regard to both the Convention and the case-law that ensues therefrom" (Decis. of 26 March 1987); Schlette 1996; BVerfG Decis. on Maastricht Treaty 12 Oct. 1993. Moreover, the BVerfG (officially appointed guarantor of human rights in Germany by the Constitution) ruled that ordinary German statutes must be interpreted (wherever possible) as conforming to the ECHR, no matter whether the legislation were prior or subsequent to the Convention (Voss 1997, 155-56). The BVerfG also created a special appeal founded on the principle of equal protection before the law, which was to operate whenever the ECHR was applicable and had been disregarded by ordinary courts (Frowein 1992, 122). This ruling encouraged the ordinary courts to take care to use the ECHR in order that their judgments would not be overturned on appeal. In sum, despite a constitutional text that accorded no special status to the Council of Europe treaty or to the Convention as such, the high constitutional court of Germany by 1987 elevated the ECHR and its related jurisprudence to supremacy over German statutes.

It bears attention that this judicial move was roughly contemporaneous both with the movement in the same direction by the French *Conseil Constitutionnel*, and with the adoption of the Single European Act of 1987 by the European Community (eliminating the veto power of each member state of the EC over EC policies). The political mood in Western Europe of the late 1980s (irrespective of differently worded constitutions) seems to have pushed both these transnational evolutions of legal doctrine.

### **III. The Netherlands**

Of our seven countries, the Constitution of the Netherlands, most clearly subordinates national law to the ECHR regime. Article 94 of the Dutch Constitution unequivocally provides that domestic regulations shall not be applied unless they are in conformity with provisions of treaties and “resolutions of international institutions” once the latter have been published, implicitly incorporating the ensemble of ECtHR case-law within this category of “resolutions.” As early as 1980 the *Hoge Raad* (Dutch Supreme Court) interpreted Article 94 as establishing (1) that both the text of the Convention and ECtHR interpretations of it are supreme over not only national laws, but even over the Dutch Constitution; and (2) that these ECHR rules take “direct effect” in Dutch law—i.e., no prior Dutch legislative or administrative implementation is required in order to give them the force of law (judgment of 23 Sept. 1980). The *Hoge Raad* also bolstered the status of the Convention by its leadership role: it produced three-fourths of all the Dutch judicial referrals to the ECtHR (Vervaele 1992, 211-14; Klerk and deJonge 1997).

This Dutch constitutional framework requires all Dutch judges to refuse to apply any domestic statutory provisions or provisions of the Constitution that conflict with the Convention (or other international treaty, even though they are not supposed to rule on conflicts between statutes and the Constitution). Unlike the other countries in our sample, the Dutch do not have a special constitutional court that monopolizes the power of constitution-based judicial review. Constitution-based judicial review (in contrast to international-law-based judicial review) is forbidden in the Dutch Constitution, Art.111 (Klerk and de Jonge 1997, 111-112).

#### **B. Newer EU States**

##### **I. Spain**

Spain is a paragon of the ECHR regime, the Convention being effectively supreme law on the basis of the widely presumed intent of the drafters of the 1978 Spanish Constitution to bind the national protection of human rights to international instruments (Cavagna and Monteiro 1992, 177). Interestingly, Article 10-2, the legal text supporting this interpretation, does not



mention specifically either the ECHR and or ECtHR jurisprudence; it reads, "The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain."

The Spanish Constitutional Court, however, beginning with its first case that posed the issue, in 1984, has construed Art.10-2 to require itself and all other Spanish courts to follow ECtHR caselaw; any individual under the jurisdiction of Spanish courts may take a claim to the Spanish Constitutional Court challenging a statute as unconstitutional on the grounds of conflict with ECtHR jurisprudence (Constitutional Court: Judgment 114/1984, 29 Nov. 1984; Judgment 25 Oct. 1993; Judgment 259/1994, 3 Oct. 1994; Lember 1999, 342, 354-55, 357).

Strasbourg case law thereby very quickly became an effective source of Spanish constitutional law. This occurred slightly in advance of, although roughly contemporaneously, with moves in the same direction by the constitutional courts of France and Germany.

## **II. Portugal**

By contrast, in Portugal, the reception of the Convention was until the early nineties much cooler. For one thing, the Portuguese Constitution specifies in its Article 16.2 only one international treaty in harmony with which domestic statutes and the Constitution must "be construed": the Universal Declaration of Human Rights. An attempted constitutional amendment to add the European Convention failed in 1982, on the purported grounds that it might have permitted derogation from the constitutional status of fundamental rights by introducing the "unforeseen restraints" of ECtHR jurisprudence (Cavagna and Monteiro 1992, 171-79).

In contrast to Spain, the Portuguese Constitutional Court for a long time did not actively promote the Convention as a normative framework for Portuguese domestic courts. Despite its sole constitutional authority to decide conflicts between domestic law and treaties, this court classified breaches of a treaty by a domestic statute as matters of "indirect constitutionality,"

which classification put them into the jurisdiction of ordinary Portuguese courts, who have constitution-interpreting (but not direct treaty-interpreting) authority (ibid., 180). Thus, this court abandoned the opportunity to direct lower court judges' interpretation of the Convention, even though the constitutional text constrained its powers no more than the German or Spanish constitutions restrained the Constitutional Court there.

Until the early nineties Portuguese legal scholars and judges were maintaining that their country's Constitution surpassed the Convention in terms of the protection of individual rights (Leandro 2000). The limitation of this viewpoint, as with that of their German counterparts on issues other than Article 6.1 of the Convention (see below), is that it construes the Convention as a (textually) fixed set of rules, when the reality is that of a continuous process of (judicial) interpretation and expansion of those rules. That is, even judges who heed the text of the Convention are ignoring rights under that Convention that have been developed by ECtHR jurisprudence. The clearest evidence of problems with their approach is the fact that both Germany and Portugal experience yearly condemnations in Strasbourg.

On the other hand, there are signs of change in Portugal, with respect to a recent turnabout by its Constitutional Court. In 2002 the Constitutional Court issued a lengthy report to a conference of constitutional courts in Brussels, in which it documented a decade of its own pro-active leadership in terms of revising Portuguese caselaw to bring it into conformity with the ECHR. Moreover, this court specifically noted that while the text of the Portuguese Constitution offers more detailed protection of human rights than does the language of the Convention, nonetheless the interpretive caselaw of the ECtHR ought to be used to flesh out the meaning of the correlative rights provisions in the Portuguese Constitution (Constitutional Court of Portugal 2002, 35).

### **III. Greece**

The 1975 republican Constitution of Greece granted to international law and all international conventions entered by Greece self-executing effect and primacy over "any

contrary provision of the law" (Article 28.1). While Greece lacks a specifically "constitutional" court, the Greek Supreme Administrative Court ruled that the expression "any contrary provision of the law" is to be construed as placing the ECHR above all domestic law except the Constitution, and this interpretation is accepted in the other Greek courts (Judgments 4590/1976 and 395/1978, cited in Perrakis 1996, 174).

Control over the validity of domestic laws has several unusual features, the most important being that under Greek law the ECHR is embedded in two systems of control. The first is the control for constitutionality: *all* Greek judges are obliged to assure that domestic laws conform to the Constitution; every judicial and administrative court is required by the Constitution (Art.87.2) to refuse to apply any law that violates the Constitution. The second is the control for conformity with international law. This control empowers all Greek courts to verify whether domestic laws comply with the ECHR and refuse to apply any domestic law that does not. This situation is distinct from that over constitutionality because judges are required to explore this question only if a party to the case raises the issue. The way this dual system plays out in practice is that, unless a party has raised a question of Convention violation, Greek courts do not refuse to apply laws that are contrary to the ECHR so long as the court finds them in other respects constitutional (Bechlivanou 1992; Perrakis 1996). This approach severely constrains the effectiveness of the Convention in Greece.

Apart from this limitation, a consensus for a long time prevailed among Greek courts and legal scholars that since the listing of human rights in the Greek Constitution matches that of the ECHR, their respect is assured by means of control over constitutionality, although one does find more recent scholarship now asserting the contrary (Bechlivanou 1992, 158; Perrakis 1996, 187). As in the case with Portugal, it becomes increasingly costly for Greek courts to ignore the law of ECtHR rulings: The right of individual petition to the ECtHR granted by Greece in 1985 is producing considerable pressure; in the year 2000, Greece figured high on the list (at no.6) of states condemned by the ECtHR for violations of the Convention.

### C. Non-EU Example – EU-applicant, Romania

In Romania the formal status of the ECHR benefits from generous treatment in its Constitution of 1991 (Art. 11; Art. 20.1): the protection of the human rights listed in the Constitution is to follow international human rights treaties; should a conflict arise between such treaty and domestic law (below the Constitution), the treaty prevails (Deleanu 2001). The Romanian Constitutional Court (hereafter CC) has a monopoly over questions of constitutionality, including all human rights issues. Ordinary courts are therefore required to refer the conflict and comply with whatever the CC decides.

Even before Strasbourg first decided a complaint from Romania in 1998, the CC ruled as early as 1994 (judgment of 14 Dec.) that the ECHR should guide the interpretation of the Constitution on human rights questions. This independent and active court managed to shape the practice of ordinary domestic courts, and its decisions, after uneven levels of compliance by ordinary courts in the early 1990's, are now treated as binding by all of them (e.g., *Curtea de Apel Bucuresti, s.pen.*, judgments 311/2000, 1235/2000, and 2768, 26 Nov. 1999).<sup>4</sup>

Still, the Court's interpretive stance is marked by a tension. On the one hand, the CC approaches gaps in the Romanian Constitution on due process as opportunities to enlarge the impact of the ECHR. Thus, in a 2000 landmark decision (CC judgment 146, 14 July 2000), the Constitutional Court rejected the interpretation of the executive branch that a rule of criminal procedure is constitutional so long as the human right invoked to challenge it (here, reasonable length of criminal proceedings) is not explicitly forbidden in the Constitution. The Court ruled that if a right is protected by the ECHR, since the Convention must be effective in Romanian law, any domestic norm infringing the right is unconstitutional.

On the other hand, in matters where no such gaps exist, the CC has been inconsistent in addressing the relevance of the text of the ECHR and of ECtHR jurisprudence in its decisions (Chirita 2003). Its application of the Convention varies: On many occasions it has declared unconstitutional a domestic norm on the grounds of violation of the ECHR (CC judgments 234, 20

Dec. 1999; 145, 14 July 2000; 112, 19 Apr. 2001; 148, 8 May 2001; 255, 20 Sept. 2001) and has even done so on its own initiative (CC, judgment 199, 23 Nov. 1999); but at other times it has (1) failed to offer any guidelines for applying concededly relevant ECtHR case law (CC, judgments 104, 11 Apr. 2001, and 234, 20 Dec. 1999), (2) failed to cite and apply obviously relevant ECtHR caselaw despite its obligation to do so (CC, Judgment 55, 22 Mar. 2000, neglecting a 1999 ECtHR case against Romania (*Brumarescu v. Romania*) despite a dissent criticizing the reasoning on this grounds (3) dismissed a complainant's reference to specific articles of the Convention as unduly detailed (CC judgment 82, 8 Mar. 2001) and (4) failed to address litigants' arguments based on the Convention and case law (CC judgments 11, 9 Feb. 1999; 211, 1 Nov. 2000; 171, 23 May 2001). These inconsistencies weakened the European human rights regime in Romania in that they exhibited patterns of reasoning that departed from those of the ECtHR and reflected the "old" understanding of sovereignty. Moreover, to the extent that the CC assumed the posture of the official promoter of the ECHR in Romanian law, its lack of consistency in upholding the ECHR regime has promoted a climate in which ordinary courts have not diligently been referring to it cases that pose a potential conflict between the Convention and Romanian law.

Aside from these caveats, one can conclude that this constitutional court has considerably strengthened the ECHR regime in Romania, primarily because it has reversed many longstanding practices that were out of line with ECtHR rulings. It also challenged a complacent attitude of the judiciary toward international legal norms.

#### **D. Conclusions to Section 2**

At least at the formal level, the findings in this section produce mixed results for our hypothesis. In Romania, not yet in the EU, its Constitutional Court has been markedly inconsistent in following the authority of the ECHR and of the caselaw of the ECtHR. So, at the extreme, our thesis in a sense holds. On the other hand, concerning the contrast we expected between the earlier, rule-of-law-entrenched EU members (Germany, the Netherlands, France) and the later ones -- the ones with recent lengthy histories of dictatorial rule (Spain, Portugal, and Greece) -- at

least at the level of formal constitutional law, we found noteworthy variation within each group, rather than the unidirectional contrast we expected. Specifically, France, with its decades of formal resistance by its high-level judiciary to the wording of its own Constitution, which should have indicated that the Convention and its caselaw took priority over domestic law, took much longer to accept the ECHR regime (and, in terms of treating caselaw as binding precedent, remains somewhat resistant) as compared to Spain, which ratified the Convention only in 1979. Germany, a stalwart of the EC system did not officially amend its Constitution to give priority to ECHR law any sooner than the French shift, but did move via interpretive change at the hands of its Constitutional Court just around the time that the French Court moved in the same direction. Strikingly, despite the difference in times of entering the Council of Europe, the Spanish, French, and German Constitutional Court moved roughly contemporaneously to give ECHR law priority over domestic law, and this judicial initiative occurred roughly at the time of the EC's Single European Act of 1987. The formal constitutional law of both Greece and Portugal does appear to have lagged behind the other EC members in our sample with respect to assimilating the ECHR regime.

### **3. The Regime Norms and Rules in "Sub-Constitutional" Courts**

In these seven countries (and in much of the world) the dominant pattern is that authority to engage in constitutional review of national statutes is reserved to a single special court. The three exceptions among our seven were the Netherlands, where constitution-based judicial review of acts of the national legislature is forbidden; Portugal, where all courts share the power (although treaty-interpreting power is, in principle, reserved to a single high court); and Greece, where all courts share the power (and are in principle obliged to exercise it) but which has a body, the Special Highest Court of Greece, that is, among other things, designated to resolve any disagreements on the meaning of the Constitution between any two of its three high appellate courts. These arise only rarely (Bechlivanou 1992, 169). This overall situation means that strong leadership, or lack thereof, by the Constitutional Court (where there is one) substantially

influences such questions as whether the ECHR is treated in fact as binding, and that is why we devoted a section to constitutional courts and their constitutions. The application of the Convention by ordinary (in the sense of the other than special constitutional) courts cannot be ignored either. To the degree that such practice prevails, the ECHR more fully attains the status of binding norm, which the formal constitutional systems of all seven countries in principle establish. In the nature of things, a single court for a whole country does not have time to hear more than a very tiny fraction of all cases that come along. Only if ordinary domestic courts routinely apply the ECHR, will these countries in fact attain the objective set forth by the ECtHR: to “safeguard the individual in real and practical ways, ” establishing “not rights that are theoretical or illusory, but rights that are practical and effective” (*Artico vs. Italy* ECtHR 1980; *Airey vs Ireland* ECtHR 1979).

Unlike the ECJ, which issues binding interpretations of Europe-level law in Preliminary Rulings to member state courts, the ECtHR has no mechanism allowing it to communicate directly with national courts and, as a consequence, faces more difficulty in constructing a legal regime. In the EU countries, however, the ECtHR presumably benefits from the creation by the ECJ of a “community of law” at both the domestic and transnational level. The conjecture that the same judges who have been socialized in the practice of referring domestic cases for interpretation by the ECJ and who are generally accustomed to make judgments bounded by (EU) transnational law norms would be more likely to take guidance from supranational ECHR law than the ones who have not, thus was one of the two foundations for our hypothesis that length of EU membership would be related to strength of the ECHR regime within a country.

## **A. Core EU Countries**

### **I. France**

The French Supreme Court for civil and criminal law, the *Cour de Cassation* has been at the forefront of acknowledging the force of ECHR law in France, having recognized its legal force in cases as early as 1975 (Respino, decis. 3 June 1975; Glaeser, decis. 30 June 1976; Judgment of 5

Dec. 1978, cited in Steiner 1997, 281 n. 58). These early forays into ECHR jurisprudence, however, were erratic and marked by ambivalence (Steiner 1997). Once the *Conseil Constitutionnel* changed its stance toward the ECHR, however, the *Cour de Cassation* followed along enthusiastically. Between 1987 and 1997 this court issued more than 700 decisions pertaining to the applicability of the Convention and ECtHR caselaw (Fabre and Gouron-Mazel 1998), and altering its own jurisprudence in case after case after France lost at the ECtHR (e.g., *Cour de Cassation* decis. 12 June 1996 pursuant to *Foucher v. France* ECtHR 18 March 1997).

Still, the record of the *Cour de Cassation* has been uneven. One can point to numerous cases, where this court has faithfully applied ECtHR standards to alter French law. For example, it declared Art. 546 of the French Code of Criminal Procedure incompatible with ECHR Art. 6 on the equality of the parties before the court (Judgment 21 May 1997). Also, this court issued a ruling to bring French practice into conformity with ECtHR decisions on the standards of interrogations for criminal proceedings (Judgment 26 March 1998). But in several cases which are sensitive to the creation of European rule-of-law standards such as the right to defense counsel and the right to file for appeal, the *Cour de Cassation* has mounted what Jean-Pierre Marguenaud (2001) termed a "rebellion" against the ECtHR, by refusing to consider explicit case law outlined by the ECtHR in judgments issued against the French state itself. In *Poitrimol v. France* (23 Nov. 1993), *Guerin v. France* (29 July 1998) and *Omar v. France* (29 July 1998) the ECtHR condemned the French judicial rule according to which a person resisting arrest may not file for appeal and be represented by a lawyer. The *Cour de Cassation* refused to overturn the rule (Judgments of 19 Jan. 1994; 15 Feb. 1994; 9 Jan. 1995; 14 Nov. 1996; 18 Nov. 1997; Gouttes n.d.). This court exhibited similar intransigence towards the ECtHR standards of *Bellet v. France*, (4 Dec. 1995) in its decisions of 6 Jan. 1997, *Affaire "Fondation saint Marc,"* (Gouttes n.d.). Subsequently the same criminal chamber of the same court yielded, only to reverse course two months later, with reference to the same Article 6.1, in the widely televised (former Nazi) *Papon* case, when the French judges again ignored the ECHR-relevant *Poitrimol* case-law.



French lower courts have tended since 1988 to use the Convention more extensively than before, even following the ECHR in preference to explicit French statute law, and copying ECtHR reasoning almost verbatim, although often without acknowledging its source (Margenau 2001, 5-7; Lember 1999, 345). Still, they seem to limit their preference for ECHR law to situations where French law (statutory and/or caselaw) either confirms or is silent about particular Convention provisions (Gouttes n.d.; Lember 1999, 349-50).

## **II. Germany**

In Germany, the practice of applying ECtHR jurisprudence as a direct source of law is relatively rare because of the widespread belief among German judges that the fundamental rights listed in their Federal Constitution are wider in scope than those found in the Convention (Burkhard 2000; Voss 1997, 158). But this is not the whole picture, because the detailed guarantees of Articles 5 and 6 of the ECHR do not appear in the German Constitution. Indeed, despite this general belief, in a number of instances German courts discontinued (well-entrenched) rules of pre-trial criminal proceedings that exceeded the standards of reasonable detention time (Art.6.1) set by the ECtHR (Frowein 1992, 126; BGH StV. 1992, 452-453; BGHR St. GB 46 Abs.2 *Verfahrenverzögerung* 3). Ordinary courts, on their own, are applying a number of other ECtHR standards (e.g., the Art.6.3 rule on legal assistance from *Pakelli vs. Germany*, ECtHR, 25 April 1983) to alter rights-restrictive domestic statutes, enforcement practices, or caselaw that have neither been amended yet by the legislative power nor invalidated by the BVerfG (Frowein 1992, 126).

## **III. The Netherlands**

If German ordinary courts are sophisticated at applying ECtHR case-law only with regard to Article 6.1, 6.2, and 6.3, their counterparts in the Netherlands (where all the courts are "ordinary courts" in our sense of the word) do so on a systematic basis with regard to both the ECHR and ECtHR caselaw. In this country the appeals court of Arnhem first applied the Convention in 1978-79; today, recourse to the ECHR and ECtHR jurisprudence is *de rigueur* for Dutch judges

(Corstens 2000). These courts have grown remarkably sophisticated in making judgments based on the Convention and have exercised interpretive skills that reproduce those of the ECtHR on such doctrines as the national margin of appreciation (see above) (e.g., case of 9 Jan. 1986, *Arrondissementrechtsbank, Zwolle*, No. 14740/1985, cited in Vervaele 1992, 223.)

In part, this sophistication with respect to ECHR law must be attributed to the Dutch constitutional provision (Art.94) that authorizes all courts to apply “provisions of treaties or decisions of international institutions.” Whenever the merits of the case bear on rights protected by the ECHR, the discussion of the ECHR article in point is standard procedure. On many occasions, Dutch low-level courts ordered a human rights protection very shortly after the ECtHR standards for it were laid out—whether the decision directly concerned the Netherlands as defendant (as in, e.g., *Hoge Raad* judgment 2 July 1990, pursuant to *Kostovski v. the Netherlands*, ECtHR 20 Nov. 1984) or involved a challenge to some other country's practices. For instance, the ECtHR ruling in *Abdulaziz, Cabales and Balkandali v. UK* (28 May 1985) was incorporated into Dutch jurisprudence within a year (Vervaele 1992: 224).

In Germany, the Netherlands, Spain and, to a lesser degree in France, ordinary courts now factor into their judgments standards from ECtHR caselaw and have become remarkably knowledgeable about the ECHR regime, capably applying complex patterns of ECtHR reasoning, including those which distinguish cases which, although arguably germane to the case in hand, differ in important nuances.

### **B. Newer EU countries: Spain, Portugal and Greece**

For the reasons explained in section 2, Spanish ordinary courts routinely use the ECtHR case law, whereas their Portuguese counterparts—at least as judged by analysts in the early 90s—were doing so only infrequently (Cavagna and Monteiro 1992, 179). The recently invigorated self-described leadership of the Portuguese *Tribunal Constitucional* noted above may well be triggering a change in the ordinary courts (although we have not yet found a second-party account of the lower courts' reaction).

Until Greece recognized the right to individual petition in 1985 and lost a long list of cases in Strasbourg, the Convention had little effect there (Bechlivanou 1992, 165-167; Perrakis 1996, 171). For years, many ordinary courts' decisions produced law later judged to be violations of the Convention, such as the interpretation of Art. 6 of the Greek Constitution as not protecting the individual against civil imprisonment (Salonika Court of Appeal, Judgment 7 Sept. 1990; Thessolani Administrative Court of First Instance, Judgment 1753/1983, cited by Bechlivanou 1992, 164). In some cases, ordinary Greek courts issued judgments that directly violated explicit standards from an ECtHR case in which Greece itself had been a plaintiff (e.g., two decisions contrary to *Kokkinakis v Greece*, 25 May 1993, are cited in Committee of Ministers Resolution DH 97, 576 of 15 Dec. 1997). Even today, ordinary Greek courts often refuse protection of a particular human right guaranteed by the Convention on the sheer grounds that the Convention allows for restrictions, without providing anything like the kind of justification for such restrictions that is demanded by ECtHR jurisprudence, such as the requisite explication of criteria of "legitimacy" and "democratic necessity" (e.g. Crete Court of Appeal (*Efetio*), Judgment 17 May 1987). Most recently, a Greek court (Misdemeanour Court of Lamia, Judgment 5 Jan. 2000) defied a series of repeated ECtHR judgments that the Greek practice in question violated the Convention (*Thlimmenos v. Greece*, ECtHR decis. no. 34369/1997, 6 Apr. 2000; *Kokkinakis v. Greece*, ECtHR 1993). In sum, the Greek judiciary does relatively little to uphold the ECHR regime.

As with our discussion in Section 2, Greece and Portugal are laggards in implementing the ECHR regime, Spain does at least as well as long-time EU members, Dutch courts were in the vanguard, and France resists the ECHR regime more than does Germany or even Spain—a less longstanding member of the EU.

### **C. Non-EU countries -- Romania**

Despite ECHR ratification in 1994, only after the first couple of ECtHR rulings against Romania, Vasilescu v. Romania 22 May 1998 and Petra v. Romania 23 Sept. 1998, did Romanian courts

start in noticeable numbers to address the ECHR. Then, from 1999 through 2002, the basic picture was that a minority of the judges increasingly honored the law of the ECHR, while most judges treated it as just another ineffectual international treaty. On the pro-ECHR side, for instance, the Supreme Court (Curtea Suprema) reversed in 2000 its prior jurisprudence on the use of legal venues for the retrieval of real estate confiscated by the communists after the ECtHR adjudged this line of precedent a violation of the Convention (Brumarescu v. Romania 28 October 1999). Also, at least one regional court of appeals crafted its plea of unconstitutionality at the Constitutional Court around ECtHR caselaw (e.g., *Curtea de Apel Brasov*, provisional judgment no. 515/p/2001). These examples, however, do not typify the entire judiciary.

The dominant pattern since 1999 has been that Romanian lawyers only sporadically deploy ECHR-based claims, due to their (accurate) perception of widespread unresponsiveness by low-level courts to such arguments. Indeed, despite several atypical examples one could cite, neither the Supreme nor the intermediate courts of appeals, as of the first half of 2003, had shown any intent to incorporate the body of ECHR law systematically into Romanian jurisprudence.

Mid-year 2003, however, seems to be ushering in a new, more ECHR-friendly era for the Romanian judiciary. The end of June brought two pivotal events. First, in response to a 3 June 2003 decision of the ECtHR (Pantea v. Romania) that declared the Romanian arrest warrant system inconsistent with the ECHR requirement of separation between the executive and judicial branches, the Romanian Supreme Court (on 27 June 2003) released a judge arrested on corruption charges. In doing so, it declared that Romanian prosecutors must cease issuing arrest warrants, despite their statutory authorization to do so, and despite the fact that a Parliamentary debate to amend this statute was in process at the time. In other words, for the first time, the Supreme Court (in effect) declared void a Romanian statute on the grounds of a conflict with the ECHR (even though the Constitution reserves constitution-based judicial review to the constitutional court). Several lower courts immediately followed the lead of the Supreme Court,

in ordering releases of persons held on (newly) improper warrants. Within a week of the Supreme Court action, the Parliament completed its ECHR-stimulated overhaul of the Code of Criminal Procedure. This whole process received enormous media coverage and provoked nationwide public discussion.

Secondly, in early July, the Ministry of Justice announced that it plans to send to Parliament a draft Law of the Magistracy that would require all judges and prosecutors to follow ECtHR jurisprudence in (respectively) their rulings and their pleadings. This move appears to be a direct expression of the strong desire of the Romanian political leadership for EU membership, pending in 2007 and contingent on, among other things, reform of the judiciary. As of fall 2003 the top Romanian law schools will begin to require coverage of ECtHR law in the curriculum.

#### **D. Conclusions to Section 3:**

As noted at the end of Section 3.B, the distinction we initially hypothesized between the core EU states and the newer EU members does not hold up across the board. While judges in the Netherlands and Germany, on the one hand, and Portugal and Greece, on the other hand, indeed form two distinctive groups along the pattern we expected, the cases of Spain and France do not fit this pattern. Spain, an EU member only since 1986 has much more fully embedded the ECHR regime into its law than has France, a founding member of the EU.

As for the three states where the ECHR regime is less well entrenched in judicial practice -- Portugal, Greece and Romania -- the Romanian judiciary has seemed most weakly committed to the ECHR regime, in the sense that many of its judges have been repeatedly ignoring clearly relevant ECtHR caselaw. In Greece, while there is frequent judicial resistance to or misapplication of ECtHR law, at least the ECtHR jurisprudence has become a part of the active vocabulary of the Greek judiciary. The Constitutional Court of Portugal, if one can trust its own report, has taken large strides since 1991 to entrench ECHR legal doctrine (2002). Still, this movement took on serious momentum only a decade ago, whereas ECHR law was by then an old story in countries like the Netherlands, Germany, and even, surprisingly, Spain.

#### **4. Legislative and Executive Branch Implementation of ECtHR decisions**

##### **A. Council of Europe Enforcement Regime**

After the ECtHR hands down a decision against a signatory member of the Convention, the only immediate concrete compulsion that the state confronts is its obligation to pay the “just satisfaction” awarded by the ECtHR to the applicant, an obligation states fulfill more or less on time, in light of the fact that each complainant functions as a highly motivated “monitor” until the payment is made. Having paid the compensatory penalty, however, the state is not then utterly free to preserve its domestic legal order intact and to persist in the same human rights violations.

The obligation to reform its statutes and legal practices, implicit in its signing on to the Convention, is enforced thereafter in a gentle and gradualist fashion by the Committee of Ministers of the Council of Europe. This Committee meets every few months and consists of all the foreign ministers of the (now forty-six) member countries. This Committee of Ministers receives a report of each ECtHR judgment and responds to each with a Resolution indicating the type of reform within the member country that is needed to satisfy the Court’s judgment (e.g., elimination of a particular penal statute, reform of a particular police practice, etc.). The state is held accountable at future meetings for reporting on what progress has been made to meet the standards set forth in these Resolutions. In effect, the Committee of Ministers acts as the administrative arm of the ECHR regime to implement, via public shaming, the rules implicit in the judgment of the ECtHR. Should the state drag its feet for an unreasonably long period of time, the Committee sanctions it by adopting interim resolutions that provide information about the lack of progress in improving implementation ([www.coe.int/intro/e-rules-46.htm](http://www.coe.int/intro/e-rules-46.htm)).

EU organizations, too, play a role in this compliance regime. First, EU states are indirectly pressured to behave, both by the ECJ, which regards the case law of the ECtHR as its own minimum human rights standard, and by political pressure from the “ever deepening Union.” Secondly, in the applicant countries the Commissioner for EU enlargement directly supervises

reform. Each applicant state is required to integrate huge swaths of the European legal order structured in 30 negotiation chapters, one of which is that on “justice and domestic affairs,” which has a rubric on human rights violations. The Commission annually reports on the state of the judiciary and of human rights and scolds the applicant state if it fails to make reasonable and timely changes. Thus, the EU integration and enlargement processes are highly intertwined. These institutional forces engulf the state in a network of transactions created the by complex interdependence of EU membership or associate status, which network furthers the entrenchment of the ECHR in national policy.

Finally, the ECtHR itself plays a role in speeding legislative reform by the way it words its decisions. In general, the Court refrains from directly stigmatizing a domestic norm as a per se violation and, therefore, from prescribing specific policy reforms (Merrills 1993, 104). Nonetheless, in certain landmark cases, the ECtHR took a more assertive stance and noticeably adopted the role of agenda-setter. In one instance, after having conceded, “The state has a choice of various means,” it added that a specific domestic norm violated the Convention (*Marcks vs. Belgium* 1979). The state correctly grasped that this amounted to a strong recommendation to change that law. The ECtHR announces such prescriptive decisions for the fulfillment of positive obligations when the domestic order lacks normative provisions meant to secure respect for the rights outlined in the Convention (*X & Y v. Netherlands* (1985)) or when the state has demonstrated neglect for the protection of individual rights (*Platform Artze fur das Leben v. Austria* 1992; Merrills 1993, 102-106).

### **B. Domestic level legislative and executive action**

If the impact of ECtHR rulings were limited to monetary damages to single individuals who brought suit, regime change would be very incremental indeed. In fact, the member states of the Council of Europe typically engage in extensive legislative and executive branch reform to implement ECtHR rulings. To redress and prevent future violations of the Convention, legislatures and executive organs adopt new laws or legislative amendments, undertake systematic

screening of draft legislation, and send circular letters to law enforcement agencies to bring their practices into compliance with the standards of ECtHR case-law. Additional executive action has included ordering inclusion of the Convention and of its case-law in the curricula of law schools, disseminating information concerning the Court to the public at large, implementing measures to ensure the independence and the professional prestige of the judiciary, and, finally, training in human rights for sectors responsible for law enforcement.

Within this evolving transnational regime, what, then, are the mechanisms pushing the so-called sovereign states to adopt legislative change and administrative reforms? First, the rationally calculating state, aware of the financial consequences looming in the potential that a stream of follow-up complaints ("repetitive applications") may be filed in Strasbourg, may decide that the costs of the "just reparation" payments to be made would outweigh both the material and the non-material benefits of preserving the successfully challenged legal domestic norm. Secondly, the state may abandon its resistance and reform the law after the painstaking and prolonged ordeal faced by its representatives, obliged to justify its resistance three or four times a year in legal language understood by the other members of the Committee of Ministers. These psychic and political costs are particularly high for EU applicant countries, but even member countries are aware that in the extreme situation, a non-complying country could get booted out of the Council of Europe.

Our empirical excursus (based largely on sources in [www.echr.coe.int](http://www.echr.coe.int)) found a mixed picture: All the surveyed states have taken some extremely prompt corrective action pursuant to ECtHR decisions in a number of crucial fields of domestic law, and all but one (Spain!) also exhibited instances of footdragging.

For example, the Netherlands, widely perceived as exemplary in the degree of its cooperation with the ECHR regime, in one case, in anticipation of a decision of the ECtHR, corrected a challenged statute two years before the Strasbourg Court ruled it a violation: The legislature reformed the rules on confinement of the criminally mentally ill two years before



Koendjiharie v. the Netherlands (ECtHR 1990). Yet even the Netherlands can take as long as five years after a negative ECtHR decision for the legislature to respond with appropriate reform: Five years elapsed (from 1986 to 1991) before the Dutch legislature changed its labor statutory regulations so that they conform to the ECHR standards announced in *Feldbrugge v. the Netherlands* (29 May 1986).

This mixed pattern of conduct appears to be replicated in Germany, France, Portugal, Greece, and even Romania. The Romanian Code of Civil Procedure was amended to allow individuals in the future to re-open their original case pursuant to ECtHR decisions that such individuals had been wronged, in order to assure full implementation of ECtHR decisions. Most recently, within weeks of the 3 June 2003 ECtHR decision on the arrest warrants system, both the legislative and executive branches reformed the Code of Criminal Procedure to replace prosecutors with judges as the issuers of warrants for arrests, searches, and wiretaps. Moreover, the Ministry of Justice is urging Parliament to adopt legislation that mandates adherence to ECtHR precedent by all prosecutors and judges.

Greece, like the Netherlands, has produced some legislative reforms in mere anticipation of a negative ECtHR decision: Law 2298/95 of 4 April 1995, reforming pretrial detention, anticipated by a few months *Kampanis v. Greece* of 13 July 1995. In other instances Greece implemented reforms within a year or two of the ECtHR holding; e.g., in response to *Holy Monasteries v. Greece*, judgment 9 Dec. 1994, the Greek Parliament adopted Law 2413/96 to protect the rights of monasteries.

Portugal diligently redesigned its entire judicial system pursuant to ECtHR decisions *Silvia Pontes v. Portugal*(1994), *Gama Cidrais v. Portugal* (1994) and *Lobo Machado v. Portugal* (1996) (COE Press Service 2000).

Spain actually overhauled statutory codes on three separate occasions in anticipation of an adverse ECtHR ruling on them. The Code of Criminal Procedure and the Criminal Code were amended (with respect to the actions of armed bands and terrorists) in May of 1988, in the early

stages of the *Case of Barbera, Messegue and Jabardo*, judgment 6 Dec. 1988. Similarly an act of 28 Dec. 1988 re-organized the judicial system, in anticipation of the ECtHR decision in *Union Alimentaria Sanders SA v. Spain*, judgment of 7 July 1989. Spain also adopted a law on 9 June 1988 reforming its Constitutional Court procedures in anticipation of the ECtHR's *Ruiz-Mateos v. Spain*, judgment 23 June 1993.

France reformed statutes in response to the ECtHR in as little as a year's time. The first Strasbourg decision against French law was *Kruslin and Huvig v. France* ECtHR 24 April 1990. The French legislature promptly complied by passing Act no. 91-646 of 10 July 1991 (effective 1 Oct. 1991) on telecommunications secrecy. On at least one occasion it amended legislation even before the Court handed down a decision: France altered its criminal procedure law in January 1993, to prevent breaches of the principle of the presumption of innocence and allow for rectifying measures, well in advance of *Alenet de Ribemont v. France*, ECtHR 10 Feb. 1995. The French Parliament, faced with the erratic behavior of its *Cour de Cassation* and in deference to the ECtHR, eventually intervened to abrogate article 588 of *Le Code de Procedure Penale* (regarding the pre-trial length of detention time), which had supplied a number of cases lost by France at the ECtHR (Steiner 1997, 293-94).

Germany amended the provisions of the Court Costs Act and of the Code of Criminal Procedure concerning interpretation costs in its Act of 18 Aug. 1980, in prompt response to the 28 Nov. 1978 ECtHR judgment in *Luedicke, Belkacem and Koç v. Germany*.

Similarly, one can also point to instances of footdragging in the all countries in our sample except Spain: (1) *Letellier v. France*, ECtHR 26 June 1991. Law reform: 30 Dec. 1996. (2) *Ozturk v. Germany*, ECtHR 21 Feb. 1984: Germany changed the law on payment of interpreter fees in administrative proceedings on 15 June 1989. (3) After *Vasilescu v. Romania* (ECtHR 22 May 1998) Romania still has not amended its Code of Criminal Procedure to allow for appeals against certain prosecutor's acts, as is required by the Committee of Ministers. Also, while the prosecuting arm of the executive branch in cooperation with a committee of Parliament

expeditiously produced drafts for amending the Criminal Code with reference to the standards for filing criminal libel in response to the ECtHR's *Dalban v. Romania*, Sept. 1999, the related legislation passed in differing versions in the two legislative chambers and has yet to be reconciled into a valid law. (4) It took the Netherlands five years (from 1986 to 1991) to change its labor statutory regulations so that they conform to the standards in *Feldbrugge v. the Netherlands* (ECtHR 29 May 1986). (5) As for Greece, three years elapsed before it changed the criminal military code (from 1992 to 1995) to conform to *Hadjianastassiou v. Greece* (ECtHR 16 Dec. 1992). Four years elapsed before it amended the Constitution (Art.93.3) with respect to criminal procedures that had been condemned in *Georgiadis Anastasios v. Greece*, ECtHR 29 May 1997. (6) After the adverse *Matos & Silva, & 2 others*, ECtHR 19 Sept. 1996, Portugal did not rectify the problem until the final judgment of the Plenary Assembly of the Supreme Administrative Court, on 21 Feb. 2001. (7) Spain has been taken to the ECtHR in seven instances, but in only three of them did the Committee of Ministers consider legislative reform necessary. In each of these cases the Spanish reform predated the ECtHR ruling.

In sum, the length of delay between ECtHR decision and reform at the national level has occasionally been as long as five years, but compliance in the sense of domestic reform within less than two years of the decision appears to be quite common.

### **C. Conclusions to Section Four**

The findings in this section lack the clear pattern of variation across the three categories that we initially predicted. In terms of the pace of responding to the ECtHR with cooperative legislative or executive branch alterations of the status quo ante, we have failed to confirm our hypothesis that states with a more lengthy prior commitment to the rule of law domestically will be significantly more receptive to the rule of law of the ECtHR regime. No such pattern appeared. All of the later joining countries to the EU and even applicant country Romania have repeatedly demonstrated a notable willingness to implement legislative and administrative reforms attentive to ECtHR decisions and to Committee of Ministers Resolutions implementing

them.

## 5. Conclusion

This paper tested the assumption that the European Convention on Human Rights would be more effective in legal systems that belong to the liberal core of Europe (as operationalized by length of membership in the EU), and did so for two reasons. The first was that these states have long-term commitments to legal systems respectful of individual rights, and a correlation between such commitment and acceptance of transnational regimes is prominently hypothesized in the IR literature. Secondly, it seemed common-sensical that long-term experience with one supranational legal regime (that of the EU) would be linked to more ready acceptance of related supranational legal regimes (specifically that of the ECHR). We examined seven Council of Europe member states, three with long rule-of-law traditions, and long-time members of the EEC/EC/EU; three with shaky recent histories with respect to the rule of law, and more recent membership in the EC/EU, and one, an applicant state to the EU, which has emerged from dictatorial rule only within the past fifteen years. We examined them with respect to formal constitutional provisions, legal doctrine from constitutional courts as to the meaning of the constitution, judicial practice in the other courts, and practice in the executive and legislative branches.

The paper found a considerable degree of variation in judicial reception of the Convention across legal systems with essentially the same constitutional text regarding the hierarchy of international vs. domestic norms (e.g., France and Spain). Moreover, a restrictive constitutional text vis-à-vis international treaties did not prevent Germany from granting constitutional value to the Convention by judicial interpretation. Also, we found that while seniority in the EU liberal core may be an important variable—certainly it predicted accurately that the Romanian judiciary would lag behind the others in our study -- the separation lines between the first and the second group seem to be blurred by the quality of reception of the Convention regime in Spain and France. By our prediction, ECtHR rules would have been better received in France,

but the reverse seemed to be our finding, certainly as to overall treatment of the corpus of ECHR law by the respective judiciaries. Also, despite quite different constitutional texts on the subject, and despite the much later entry of Spain into the EU and ECHR systems, the Constitutional Court of Spain, of France, and of Germany, all asserted the priority of ECHR law over domestic law within roughly the same time period, the period around the Single European Act of 1987.

Moreover, we also found surprising contrasts among branches within individual countries. Portugal, for instance, has a judiciary that for a long time was quite resistant to ECtHR rulings, but on a number of occasions reformed its executive and legislative practice even before the ECtHR reached the point of issuing a ruling against it; in other words, the mere fact of a registered application for a complaint to be heard at Strasbourg was enough to provoke reform in Portugal on the matter in dispute. Similarly, the French Parliament on occasion proved considerably more cooperative than the French judiciary toward ECHR-inspired reform.

These findings invite one to look beyond the simplistic division of the world into simply rights-respecting/rule-of-law states vs. the rest, thus calling into question the predictive utility of the hypothesis we culled from the IR literature. It turns out that a variety of other variables may be forceful enough to “trump” the impact of a rule-of-law tradition (or its absence). In our small study in particular, variables that seemed to be influential included (1) strong leadership by the personnel of constitutional courts in Spain and Germany, and by the legislature of Spain, which displayed the most prompt record of ECtHR compliance of any in our study; (2) political and judicial leadership in the decade of the 1990s in Portugal; (3) a political culture in France that elevates state sovereignty to almost iconic status, thereby slowing French willingness, especially within the judiciary, to subordinate the French state to transnational authority; (4) the impact of the general political mood in Western Europe, at least around the time of the Single European Act; and (5) for the case of Romania, pressure to “Europeanize” the training of the judiciary and professional bar from the European Commission, backed by the carrot of EU membership in 2007, which pressure has produced important reforms, as of mid-2003. Explorations of other

aspects of political culture besides commitment to the rule of law and liberal rights, and careful attention to such matters as political leadership, court leadership, the influence of particular NGOs (such as the national bar), and the overall mood of the electorate, cannot sensibly be neglected for the sake of monocausal explanations.

While the claims in the IR scholarship of the importance of a rule-of-law culture for easing transition in supranational legal regimes may have some validity not discernible in a study covering so few countries as this within a time span as short as fifty years, and countries with such a substantial cultural overlap, we could not demonstrate proof of its consistent impact among the Council of Europe countries we examined. In effect, it predicted correctly as to constitutional and judicial doctrine for some of the seven countries we examined, and erred as to some: the Dutch and the German do rank above those of Portugal and Greece on ECHR embeddedness, and Romania below the rest. But Spain ties with the Netherlands, instead of being below it (outdoing both Germany and France), and the French judiciary may approach that of Portugal—certainly it is below Spain. Moreover, the prediction is a flop as to legislative and executive branch reform in response to ECtHR decisions; all seven countries do reasonably well, and Spain does exceptionally well, with no obvious other differences discernible.

## NOTES

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1. Two of the participants to the drafting Conference, Italy and Germany (observer), could hardly claim to be members of this select club immediately after the war, given their former embrace of Fascism (Italy 1922-1944) and Nazism (Germany: 1933-1945). However, the delegations of these two countries were among the strongest supporters there for enforceability of the human rights system (Moravscik 2000).
  2. The European Commission, the executive branch of the EU (not of the Council of Europe), contributes to the implementation of the ECHR regime in two ways: First, it disburses significant amounts of money to EU applicant countries to enforce democracy and the rule of law, mainly by funding judicial reform. Second, the EU Commissioner for enlargement monitors the performance of the applicant states in securing the independence of the judiciary and fighting against corruption in courts. Essentially utilizing the technique of shaming, the Commission issues country reports annually on each applicant ([www.europa.eu.int](http://www.europa.eu.int)).
  3. Greece, despite its siding with the Allies, had a National Socialist (i.e. fascist) dictatorship from 1936 until 1945, a civil war from 1946-1949, then a constitutional monarchy with Parliamentary rule until 1967, at which time it underwent a military coup. The military junta

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exercised a dictatorship from 1967 until 1974. The Greek Third Republic reintroduced the Convention into Greece in 1974 (Law No.53).

4. Despite an appointment process geared to guaranteeing judicial independence, observers do still note that Romania faces difficulties in eliminating corruption from the ranks of its judges, as well as other public officials (Gall 2001). Nonetheless, it is not obvious to us that the corruption problem is substantially worse there than, for instance, in long-time EU member, Italy.

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