

A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe

A L E C S T O N E S W E E T

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Abstract: The European Convention on Human Rights is rapidly evolving into a cosmopolitan legal order: a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction. The emergence of the system depended on certain deep, structural transformations of law and politics in Europe, including the consolidation of a zone of peace and economic interdependence, of constitutional pluralism at the national level, and of rights cosmopolitanism at the transnational level. Framed by Kantian ideas, the paper develops a theoretical account of a cosmopolitan legal system, provides an overview of how the ECHR system operates, and establishes criteria for its normative assessment.

Keywords: ECHR; human rights; Kant; cosmopolitanism; judicial review

A cosmopolitan legal order [CLO] is a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship. In Europe, a CLO has emerged with the incorporation of the European Convention on Human Rights [ECHR] into national law. The system is governed by a decentralized sovereign: a community of courts whose activities are coordinated through the rulings of the European Court of Human Rights. While imperfect and still maturing, the regime meets significant criteria of effectiveness. It routinely succeeds in raising national standards of rights protection; it has been crucial to the success of transitions to constitutional democracy in post-authoritarian states; and it has steadily developed capacity to render justice to all people that come under its jurisdiction, even those who live, and whose rights are violated, outside the territory of the Convention. Today, the Court is the single most active and important rights-protecting body in the world. The purpose of this paper is to explicate and defend these claims.

The paper builds on three strains of scholarship. First, I argue that the CLO ought to be conceptualized in Kantian terms, in effect, as a formalization of

cosmopolitan Right. Moral and political philosophy has recently experienced a broad revival of interest in Kant's notions of cosmopolitanism (Brown 2009; Brown and Held 2010; Flikschuh 2000), including a sustained effort to build a broader, rights-based cosmopolitanism, in part by extending Kant's ideas (Anderson-Gold 2001; Benhabib 2004; Held 2010). While sharing some of these orientations, I provide an account of a cosmopolitan legal system and how it operates. In the field of international relations, following from Doyle's (1986) seminal paper, political scientists have subjected Kant's blueprint for 'perpetual peace' to rigorous testing, with impressive results (Brown, Lynn-Jones, and Miller 1996; O'Neal and Russett 1999). This paper builds on this agenda, though its aim is to explain the emergence and operation of a CLO, not the absence of war between liberal states.

Second, the paper responds to a tenacious controversy concerning the nature and scope of human rights (Beitz 2001; Sajo 2004). Simplifying, the debate has focused on the tension between (1) the universalistic claims of rights, and (2) the diversity of culture and moral views in the world. This tension is typically resolved in one of two ways. Either one derives the content of rights from those elements that are common to moral systems, or conceptions of justice, across cultural divides; or one concludes that practices that fail to meet predetermined standards established by human rights are indefensible and lack legitimacy.¹ The debate has produced a dominant view that rights can (or should) have only minimalist content (Ferrara 2003; Ignatieff 2001; Rawls 1999; Walzer 1994). The view has its detractors (Benhabib 2009; Pogge 2000), who worry that minimalism drains rights of their intrinsic moral and legal force. Cohen (2004: 192), a reluctant proponent of minimalism, puts it this way: 'we can be tolerant of fundamentally different outlooks on life, or we can be ambitious in our understanding of what human rights demand, but we cannot – contrary to the aims of ... activists – be both tolerant and ambitious.' One strong empirical claim of the paper is that the European Court has transcended rights minimalism while maintaining a meaningful commitment to principles of national diversity and regime subsidiarity.

Third, the paper follows in a line of research on how new forms of judicial authority emerge and evolve, with what political consequences (Stone Sweet 1999). Courts famously govern not through the sword or the purse, but through reason-based justification and the propagation of argumentation frameworks (doctrine), to the extent that they draw non-judicial actors

¹ The absolutist may also seek to derive the content of rights from normative arguments that one would be required to accept regardless of one's moral views or cultural standpoint (Finnis 1980; Nickel 2006).

into dynamic, ‘jurisgenerative’ fields of action (Benhabib 2009; Shapiro and Stone Sweet 2002). The ECHR is both a source and product of jurisgenerative processes, and an expansive politics of rights protection has been the result. The CLO is also a novel legal system, constituted on the basis of a structural characteristic that the paper refers to as ‘constitutional pluralism.’ International law scholarship now squarely confronts the question of how to understand both the ‘constitutional’ and ‘pluralist’ features of global governance arrangements (Dunoff and Trachtman 2009; Klabbers, Peters, and Ulfstein 2009; Krisch 2010). Europe possesses an overarching ‘constitutional’ structure, comprised of fundamental rights and the shared authority of judges to adjudicate individual claims. No single organ possesses the ‘final word’ when it comes to a conflict between conflicting interpretations of rights; instead, the system develops through inter-court dialogue, both cooperative and competitive.

The paper proceeds as follows. The first part frames an account of the CLO in Kantian terms, and defines the key concepts to be deployed: *cosmopolitan legal order*; *cosmopolitanism justice*; *constitutional pluralism*; and *decentralized sovereignty*. The second part discusses how the evolution of European law enhanced constitutional pluralism within national legal orders, while fatally undermining legislative sovereignty and its corollary: the prohibition of judicial review of statute. In the third part, I provide an overview of how the CLO operates, focusing on the organ charged with managing the system: the European Court of Human Rights. The second and third parts give empirical content to the notion of a CLO, explain its emergence, and establish criteria for normative evaluation. Central to the account is the claim that two processes – the evolution of constitutional pluralism at the national level; and the development of rights cosmopolitanism at the transnational level – are causally connected to one another. The first process destroys traditional models of the national legal systems in which the notions of constitutional unity and centralized sovereignty overlap and reinforce one another. The second process generates a new, transnational legal system in which the judicial authority to develop and enforce fundamental rights is decentralized.

I. Kantian analogs

In *Perpetual Peace among States*, Kant (2006 [1795]) held that in a ‘state of nature’ nations would find themselves recurrently beset by conflict and war, and thus incapable of establishing international Public Right. Kant insisted that states, like individuals, could achieve peace and freedom only by subjecting themselves to ‘universally valid public laws’ which he associated with a ‘constitution’ codified or not. Existing constructions of sovereignty and international law, by contrast, supported the evils to be eradicated.

In his essay, Kant outlined a blueprint for achieving peace and Right. Six ‘preliminary articles’ ban treacherous dealings among states, including preparation for war. States subscribing to these laws would form a security community in which the threat of armed conflict would be eradicated. Three ‘definitive articles’ establish factors deemed necessary for a cosmopolitan system to sustain itself over time. Partly for this reason, social scientists have treated these elements as variables, and Kant’s arguments as testable hypotheses.

The first factor (definitive article) concerns the political organization of the state, which must be ‘republican.’ By republican, Kant meant a form of government in which executive and legislative powers are separated, ‘equality among citizens’ secured, and tyranny avoided. Contemporary Kantians typically script the variable in terms of standard conceptions of ‘liberal democracy.’ A nation that has established a competitive electoral system, independent courts and the rule of law, and basic market freedoms would be included.

The second factor is international organization, what Kant (2006: 78–81) characterized as the building of a ‘federalism of free states.’ Some states, weary with war, would choose to form a ‘league’ an association designed for the ‘maintenance and security’ of its members. Kant stressed that the federation would constrain but not extinguish ‘the power of the state.’ The league would not exercise coercive powers within any national order, and every state would be free to quit it at any time.² Nonetheless, to escape the state of nature, states must enter into federation with one another:

As concerns relations among states, according to reason there can be no other way for them to emerge from the lawless condition, which contains only war, than for them to relinquish, just as do individual human beings, their wild (lawless) freedom, to accustom themselves to public binding laws, and to thereby form a state of peoples (*civitas gentium*), which continually expanding, would ultimately comprise all the peoples of the world (Kant 2006: 81).

Social scientists typically operationalize the variable with reference to state membership in international organizations, and in the type of organizations to which states belong.

² Among Kantian scholars, there exists a lively debate as to whether, in *Perpetual Peace among States*, Kant rejects his earlier advocacy of a global state (Brown 2009; Kleingeld 2011; Pogge 2009). In his essay, Kant clearly advocates establishing a ‘federation of free states’ that would contain within it the possibility of gradually developing into a stronger state-like entity whose purpose is to achieve international Public Right.

The third factor concerns the duty, born by all republican states in the league, to provide ‘hospitality’ to non-citizens. Kant (2006: 82) defined the definitive article narrowly: ‘Hospitality means the right of a stranger not to be treated in a hostile manner by another upon arrival on the other’s territory.’ Strangers are to be welcomed, but they do not possess an entitlement to permanent settlement or citizenship; and, in contrast to citizens, a state may expel foreigners who do not abide by its laws. Kant (2006: 92) stressed that hospitality would both express and facilitate ‘a spirit of trade, which cannot coexist with war.’ Social scientists script hospitality in terms of economic interdependence, as measured by cross-border trade and investment flows.

In other writings, Kant implied that a wider range of rights are implicated in the notion of hospitality and cosmopolitan Right (Brown 2006). These include the freedom of an individual: ‘to establish a community with all’;³ to engage in trade and commercial transactions;⁴ and ‘to make public use of one’s reason.’⁵ To be fully enjoyed, these freedoms would seem to require the provision of civil rights more generally. Thus, some cosmopolitans (Anderson-Gold 1988; Benhabib 2009) extend the concept of hospitality to cover the norms and discursive politics of the international bill of rights.⁶ I treat ‘hospitality’ as a basis for recognizing fundamental rights, in this more expansive interpretation of Kant. As Benhabib (2011) puts it, rights cosmopolitanism flows from ‘the recognition that human beings are moral persons equally entitled to legal protection in virtue of rights that accrue to them not as nationals, or members of an ethnic group, but as human beings as such.’

The democratic peace and the cosmopolitan constitution

Over the past 25 years, political scientists have generated a massive research project designed to test Kant’s model. Although scholars continue to refine methods and debate findings, the ‘democratic peace’ has been shown to be remarkably robust, and the independent causal influence of the three variables (liberal democracy, international organization, and economic interdependence) on the outcome (the absence of war between liberal states) has been impressively demonstrated (O’Neal, Russett, and Berbaum 2003).

³ *The Metaphysics of Morals* (Kant 1996 [1797]: 121).

⁴ *The Metaphysics of Morals* (Kant 1996: 121).

⁵ *What is Enlightenment?* (Kant 1994 [1784]: 55).

⁶ Including (see Appendix to Benhabib 2009: 702): the United Nations Declaration of Human Rights (1948); the International Covenant on Economic, Social, and Political Rights (1966, entry into force in 1976); and the International Covenant on Civil and Political Rights (1966, entry into force in 1976).

Peace among nations was not Kant's only priority. Without a stable peace, achieving cosmopolitan Right – a rights-based, 'international rule of law' (Huntley 1996: 49) – would not be possible. Kant defined Right as 'the sum of the conditions under which the choice of one can be united with the choice of the other in accordance with a universal law of freedom.'⁷ These conditions are 'constitutional' in that they ground the legitimacy of all political arrangements, including treaty-based organizations, in a rights-based conception of the rule of law:⁸

The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is *public right*. Public Right is ... a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under ... a *constitution* ... so that they may enjoy what is laid down as Right [emphases in original].⁹

The cosmopolitan constitution is a set of 'normative and juridical principles of ... cosmopolitan Right' (Brown 2006: 674). We can understand these principles, once codified as positive law, as a code for universal justice that states voluntarily establish to realize Right.

Kant did not outline in any detail how a system of international public Right would operate, and he had little to say about courts, judicial review, or even of rights in the contemporary sense. We can nonetheless derive from Kant certain core features of a cosmopolitan legal system that are relevant to the ECHR. Most important for present purposes, Kant emphasized that, because individuals must live together in a limited space with finite resources, freedom of choice will inevitably lead to social conflict; while conflict can be debilitating, it also provides opportunities for generating stable, legitimate governance.¹⁰ Kant conceived of the domain of justice, and of the rightful exercise of public authority more generally, as those arrangements whose purpose is to determine the acceptable reasons for using state power to restrict an individual's freedom in order to guarantee the freedom of all.¹¹

⁷ *The Metaphysics of Morals* (Kant 1996: 24).

⁸ 'A constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all the other[s], is at all events a necessary idea which must be made the basis not only of the first outline of a political constitution but of all laws as well' *The Metaphysics of Morals* (Kant 1996: 89).

⁹ *The Metaphysics of Morals* (Kant 1996: 89).

¹⁰ *The Metaphysics of Morals* (Kant 1996: 121–2).

¹¹ '[I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindrance of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right ... an authorization to coerce someone who infringes upon it. ... Right and authorization to use coercion ... mean one and the same thing.' *The Metaphysics of Morals* (Kant 1996: 25–2).

It follows that, with few exceptions (for example, the prohibition of slavery; the right of access to justice) rights are not absolute. Rather, most rights will be subject to limitation when necessary to achieve significant public purposes.

The CLO's primary mission is to render justice in this sense. Most of the rights that comprise the international bill of rights, the ECHR, and the charters of most national constitutions are, in fact, 'qualified' by limitation clauses; indeed, the qualification comprises part of the norm itself. The task of the European Court is to evaluate the reasons proffered by states to justify infringements of an individual's Convention rights. The techniques which the Court has developed to do so have been crucial to the regime's viability (third part below).

Transformation

Europe has experienced a deep, structural transformation since the end of World War II. The steady expansion of a zone of 'liberal peace' enabled the CLO to materialize. In this variation of Kant's model, fulfilling the three definitive articles constitutes a precondition for the building of arrangements to achieve cosmopolitan Right.

The institutionalization of this transformation broadly conforms to the dictates of Kant's model. Under NATO, Western Europe became a security community, in alliance with the U.S. and Canada. NATO membership expanded from 10 members in 1949, to 28 states today; 22 more European states are 'partner countries.' Six states established the European Coal and Steel Community (1952) and then the European Community (1958), organizations which grounded the construction of market federalism, a supranational regulatory system, and a corpus of fundamental rights. Today, the European Union [EU] (1993) trades more with the rest of the world than does any other member of the World Trade Organization; and each of its 27 member states exports more to markets within the EU than to all global markets combined. The Council of Europe, founded by ten states in 1949, completed negotiations of the ECHR in 1950, and the Convention entered into force in 1953. With Protocol No. 11 (entry into force on November 1, 1998), all of the High Contracting Parties accepted the right of individuals to petition the Strasbourg Court, as well as the compulsory jurisdiction of the Court to adjudicate these claims. The Convention system is truly pan-European, covering 47 states with a population exceeding 800 million people.

At the national level, the change that matters most concerns the status of fundamental rights. Prior to World War II, only a handful of high courts in the world had any experience with constitutional judicial review: the

authority to invalidate statutes and other acts of public authority that conflict with constitutional norms. After World War II, Western Europe became the epicenter of a ‘new constitutionalism’ (Stone Sweet 2010a) which, with successive waves of democratization, spread across the Continent. The basic formula – an entrenched, written constitution; a charter of rights; and a mode of constitutional judicial review (typically a specialized constitutional court) to protect those rights – was replicated in every new European constitution adopted since 1949.¹²

Kant’s model is dynamic: important outcomes – including peace, economic interdependence, and arrangements for rendering cosmopolitan justice – can be reached only through learning and adaptation (Cederman 2001). The momentous changes just discussed interact with one another in complex ways, one result of which is an increasingly structured interface between national and international politics. As rights-based constitutionalism migrated to states in Southern Europe, and then across Central and Eastern Europe, membership in NATO, the EU, and the ECHR expanded. As the ECHR evolved into a CLO, the impact of the Convention, too, was registered on multiple levels at once, including the activities of individuals, the decision making of governmental organs, and the content and dispositions of national and international law.

Concepts

While framed in Kantian terms, my account of the CLO in Europe is meant to stand on its own, that is, it does not depend upon its derivability from, or fidelity to, Kant. Most important, I argue that constitutional pluralism and rights cosmopolitanism have been co-constitutive of one another in ways that can be charted and assessed. Before turning to the empirics, further elaboration of concepts is in order.

By *rights cosmopolitanism*, I mean the recognition of a legal duty to provide justice under the cosmopolitan constitution. A CLO is a legal system in which all public officials bear an obligation to respect the fundamental rights of every person within their jurisdiction. For courts, this obligation entails rendering justice in the Kantian sense just discussed. The ECHR occupies a central strategic position in the CLO, given that individuals have an unfettered right to petition the Court once national remedies have been exhausted.

Constitutional pluralism is a structural characteristic of a legal system. Within the domestic constitutional order, the term refers to a situation in

¹² The exception is the Constitution of the French Fifth Republic (1958) which did not contain a charter of rights. In 1971, the Constitutional Council began incorporating rights into the constitution, and this process was completed by the end of the 1970s (Stone 1992).

which two or more sources of judicially-enforceable rights co-exist. In many national legal systems, three such sources – national constitutional rights, EU rights, and the ECHR – overlap. Individuals have a choice of which source to plead, and judges have a choice of which right to enforce. These choices have consequences, as when national judges prefer to apply European rights, rather than their own constitution law, as a means of raising standards of protection.

The term, *constitutional pluralism*, also refers to systemic features of the CLO. The fact that ECHR maps onto rights found in national systems undergirds the notion of a multi-level constitutionalism (Kumm 2009: 303–10; Petersmann 2006): no act taken by any public authority, at any level of governance, can be considered lawful if it violates a fundamental right. This notion of multi-level constitutionalism, too, can be tied to Kant.¹³ The structure of authority within this presupposed constitution is pluralistic, in that the system is comprised of discrete hierarchies, national and Treaty-based, each of which has a claim to autonomy and legitimacy. In Europe today, judges intensively interact with one another across jurisdictional boundaries with reference to questions of rights adjudication that they collectively confront.

This paper examines the construction of a pluralistic, constitutional system, a momentous outcome given legacies of the past. In Europe, traditional models of the juridical state are grounded not in notions of legal pluralism, but *sovereignty*.¹⁴ These models depict the legal system as hierarchically organized, with one organ positioned to defend the integrity of the hierarchy of norms that constitutes it. This organ is considered to

¹³ As Flikschuh (2000: 170) emphasizes: ‘Kant does not share the widespread view that we can turn our attention to the issue of cosmopolitan Right only *after* we have settled the matter of domestic justice. The grounds of cosmopolitan justice are identical with those of domestic justice: both follow from the claim to external freedom of each other under conditions of unavoidable empirical constraints. Instead of distinguishing between different theories of justice for the domestic and international contexts, Kant refers to different *levels* of institutionalizing his cosmopolitan conception of Right.’

¹⁴ I define *sovereignty* in narrow, juridical terms, as the formal capacity to make and enforce legal norms. In the international system, states are sovereign in that they are entered into binding agreements with other states and incur duties under international law. Domestically, sovereignty refers to the authority to make and enforce legal norms within the jurisdictional boundaries of the state. The constitutions of liberal states distribute sovereignty among governmental organs, specify procedures for making and enforcing law, and stipulate restrictions on the exercise of public authority through rights. Treaties of the kind discussed in this paper ‘pool’ state sovereignty in order to achieve common purposes. In the EU and the Council of Europe, states have endowed supranational organizations, including the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) with compulsory jurisdiction over state acts that come within the purview of rights found in EU law and the Convention respectively.

be the repository of *centralized sovereignty*, to the extent that it possesses a monopoly on the authority to resolve certain legal questions. In the archetypal cases, a constitutional court (under rights-based constitutionalism) or a parliament (under a regime of legislative sovereignty) are considered to possess the ultimate authority to resolve issues involving the validity of, or conflict among, legal norms within the system.

A CLO is a legal system in which fundamental rights are enforced by a ‘decentralized sovereign’ a concept that I adapt from Smith (2008). The regime is not hierarchically constructed with one jurisdiction positioned to render a ‘final word’ on questions of legal validity at each level of governance. From an internal perspective given by the Convention, the European Court is the authoritative interpreter of Convention rights. The Court, however, does not possess the authority to invalidate national measures that conflict with the Convention. If and how the Court’s rulings are ‘implemented’ in the national legal order depends entirely on the decision making of national officials under national rules. What makes the system ‘constitutional’ is an overarching normative structure: the code of rights that officials are under a legal duty to enforce; and a set of shared techniques that judges, in particular, have developed to adjudicate rights. In the decentralized model, as Smith (2008: 43) puts it, ‘there is no single hierarchy that encompasses the entire political order, but instead a series of related hierarchies.’ In Europe, states have pooled and then distributed sovereignty in such a way as to create a layered set of ‘nodes’ of judicial authority to protect rights. Each of these nodes is autonomous; yet the cosmopolitan order exists only in so far as national judges credit their roles in a common project.

A system of decentralized sovereignty¹⁵ suffers from two generic coordination problems that centralized sovereignty was meant to resolve (Smith 2008: 427–9). The first problem concerns the source of systemic order, which is resolved by the pre-supposed constitution (Gardbaum 2008): the overarching framework of fundamental rights that underpins cosmopolitan constitutionalism. The second problem is one of overlapping competences: each high court is under a duty to resolve disputes within the same domain, that of the cosmopolitan constitution. In the CLO, overlapping competences count as a good in so far as individuals (a) have multiple points of access to the decentralized sovereign, and (b) healthy competition among nodes of authority serves to upgrade, rather than reduce, a collective commitment to rights protection.

¹⁵ From the point of view of centralized sovereignty, the notion of ‘decentralized sovereignty’ may seem nonsense, an oxymoron. At the very least, how the regime has evolved, post-Protocol No. 11 and incorporation, requires us to reconsider the concept of sovereignty, perhaps rejecting it altogether.

II. Constitutional pluralism and national legal systems

The CLO in Europe is comprised of three interlocking elements. First, individuals are able to plead fundamental rights, including the Convention, before national judges. Although the ECHR does not require incorporation into the domestic order, all 47 states have now done so, in ways that make it binding on all public authorities and enforceable by national judges (Appendix 1). Second, national systems of rights protection are formally linked to a realm of rights adjudication beyond the state: every individual, regardless of citizenship, possesses an unfettered right to petition the European Court, once national remedies have been exhausted. Third, the ECHR comprises an autonomous source of rights doctrine. The Court treats the Convention as a ‘living’ instrument, which is interpreted and applied in order to secure the effectiveness of rights, as society evolves.¹⁶ States have no means of blocking applications or the Court’s rulings, which are final (there is no appeal).¹⁷

In this section, I describe the development of constitutional pluralism within the *domestic* order, a process that removed obstacles to the emergence of the CLO. Most important, it destroyed the constitutional dogmas associated with legislative sovereignty, crucially, the prohibition of judicial review of statutes.

The supremacy of EU law and judicial review

Constitutional pluralism first emerged in Europe with the consolidation of the doctrines of the *direct effect* and *supremacy* of EU law, announced by the European Court of Justice (ECJ) in the 1960s. As a massive literature has demonstrated (Stone Sweet 2010b), acceptance of these doctrines by national courts integrated the EU and national systems in complex ways, ‘constitutionalizing’ the regime. The EC Treaty originally contained no supremacy clause, and the member states did not provide for the direct effect of Treaty provisions or directives. The doctrine of direct effect entitles individuals to plead entitlements found in the treaties and in directives (EU statutes that member states are obliged to ‘transpose’ into national law) before national courts. The doctrine of supremacy requires that national judges resolve any conflict between domestic law and EU law with reference, and deference, to the latter. The ECJ justified these moves

¹⁶ *Loizidou v. Turkey* (Preliminary Objections), Application no. 15318/89, ECHR Judgment of March 23, 1995.

¹⁷ States, within three months following a Chamber judgment, may request referral of the case to a 17-member Grand Chamber. Such requests may be accepted by a five-judge committee, but only on an ‘exceptional’ basis, see the *Rules of Court*, Rule 73.

on the grounds that the Treaty constituted an ‘autonomous’ legal order conferring rights onto individuals (Stein 1981).

Supremacy challenged the prohibition of judicial review in that it required judges to refuse to apply any norm, including statutory provisions, found to be in conflict with EU law. By 1989, every high court in the EU had accepted supremacy, and the courts of new member states quickly joined them. The result: all judges acquired the power of judicial review of statute, albeit only in areas governed by EU law, authority otherwise denied to most courts under national constitutional law. In systems in which a constitutional court defends the primacy of the constitution and rights, the ECJ’s case law fatally undermined the presumed monopoly of the constitutional judge to determine the conditions under which the ordinary (non-constitutional) could refuse to apply relevant statute.¹⁸

The politics of supremacy involved significant inter-judicial conflict (Alter 2001; Slaughter, Stone Sweet, and Weiler 1998). The ECJ had placed no limits on the doctrine’s scope: the most banal provision of an EU directive trumps every conflicting statute, as well as the most sacred provisions of the constitution. Under a regime of supremacy, each extension of EU law would potentially create a gap in national rights protection. In 1974, the German Federal Constitutional Court (GFCC) reacted, declaring that it would review the implementation of directly effective EU law, upon referrals from the ordinary courts and individuals, ‘so long as the integration process has not progressed so far that Community law also possesses a catalogue of rights ... of settled validity, which is adequate in comparison with a catalogue of fundamental rights contained in the [German] constitution.’¹⁹ In response, the ECJ actively developed such a catalogue, in the guise of (unwritten, judge-made) general principles inspired by the ECHR and ‘the constitutional traditions common to the member states.’ In 1986, the GFCC withdrew its objections ‘so long as the [EU], and in particular the ECJ, generally ensures an effective protection of fundamental rights.’²⁰ These ‘dialogues’ and others that followed, did not destroy supremacy; rather, they served to upgrade standards of protection and the authority of courts at both the national and EU levels of governance.

While it may be argued that the supremacy doctrine constituted a sovereignty claim on the part of the ECJ, no national constitutional court has accepted supremacy as the ECJ understands it. The ECJ, in effect, holds that all national judges are agents of the EU legal order, not the national

¹⁸ Following from *Simmenthal II*, ECJ 106/77 [1978] ECR 629.

¹⁹ *Solange I*, BVerfGE 34, 269 (1974).

²⁰ *Solange II*, BVerfGE 73, 339 (1987).

order, whenever they act in domains that fall within the scope of EU law. The ECJ further asserts that it alone possesses the ultimate authority to determine the compatibility of EU law with fundamental rights.²¹ National constitutional courts assert that EU law – including the doctrine of supremacy – enters into national law through their own constitution, and does not deprive them of their own ‘final word’ on the constitutionality of EU acts. This ‘jurisprudence of constitutional conflict’ (Kumm 2005) is a manifestation, probably permanent, of the pluralistic structure of EU law.

On the ground, most ordinary courts, including supreme courts, routinely behave as faithful agents of the EU order when they adjudicate EU law.²² Some go further, overtly leveraging the ECJ in order to expand their own authority and to subvert that of the domestic constitutional order. In the area of workplace discrimination, for example, the German labor courts successfully engaged the ECJ in a joint effort to raise national standards of rights protection. The GFCC, which had chosen not to aggressively confront discrimination based on sex and age, lost these skirmishes and was forced to adapt, along with every other court in the EU (Stone Sweet and Stranz 2012). Today, across Europe, EU fundamental rights are a more important source of non-discrimination law than are national constitutions.

Although elected officials have at times sought to constrain the courts, these efforts failed. In the end, governments too adapted. With the Maastricht Treaty on European Union (1993), the member states revised the Treaty of Rome, echoing the Court’s seminal case law: ‘the Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights ... and as they result from the constitutional traditions common to the member states as general principles of Community law.’ In 2009, the member states promulgated a Charter of Rights and accepted for the first time the basics of the supremacy doctrine.²³ As part of this reform, the EU began formal negotiations to accede to the ECHR in 2011. Accession will further strengthen the ECHR and its Court, adding another layer of pluralism to EU law, and formally integrating the EU’s multi-level structure into the CLO.

The domestication of the Convention

In 1950, when the ECHR was signed, Ireland was the only member of the Council of Europe with any meaningful experience with rights review. The

²¹ *Foto Frost*, ECJ 314/85 [1987] ECR 4199.

²² With the enormous expansion of EU law over the past 40 years, national legal autonomy has been all but extinguished in many important policy domains (Kelemen 2010).

²³ While the ECJ’s fundamental rights jurisprudence remains in place, rights-oriented litigation is likely to increase substantially under the Charter.

constitutions of Belgium, France, Luxembourg, The Netherlands, and the UK did not include a charter of rights and/or prohibited the judicial review of statutes. Norway's constitution (1814) contained a handful of rights and permitted judicial review, but few if any important laws had ever been found to have violated these rights. The German and the Italian constitutional courts were still being designed. Not surprisingly, a majority of states rejected proposals to grant individuals a right of petition, and to accept the compulsory jurisdiction of the European Court (which began operation only in 1959). With Protocol No. 11 (1998), states embraced a robust legal regime. Two factors were crucial. First, the development of EU law gave national officials, including judges, a chance to adjust to new forms of judicial power under constitutional pluralism. By the end of the 1980s, every high court in the EU had accepted supremacy, and judicial review of statute under the supremacy doctrine had become routine. Second, the Soviet bloc collapsed. In the 1990s, with constitutional reconstruction in full swing, the EU and the Council of Europe offered admission to post-Communist states on the basis of certain conditions, including a commitment to rights protection. Locking them into the ECHR, and placing them under the supervision of its Court, was an obvious means of securing that commitment.

Protocol No. 11 confers upon the Court compulsory jurisdiction over individual petitions that claim a violation of Convention rights, after exhausting national remedies. If the Court finds a violation, it may award monetary damages. Unlike a national constitutional court, the Court has no authority to invalidate a national norm that conflicts with the Convention. In the 1970s, the regime received only 163 individual petitions, rising to 455 in the 1980s. Under Protocol No. 11, the number of petitions exploded. In 1999, the Registry of the Court received 8,400 complaints, a figure that has increased every year thereafter. In 2010, the Court registered 61,300 applications. Although some 96% of all petitions will be ruled inadmissible for one reason or another, the Court is overloaded. The annual rate of judgments on the merits shows a similar trend. Through 1982, the Court had issued, in its history, only 61 full rulings pursuant to applications by individuals. In 1999, it rendered 250 judgments; 1,200 in 2005; and 2,607 in 2010.²⁴ Under Protocol No. 11, the Strasbourg Court is the most active rights-protecting court in the world.

The CLO is a product of Protocol No. 11 and the incorporation of the ECHR into domestic legal orders. As Appendix 1 documents, domestication of the Convention proceeded via different routes: express constitutional provision (Austria, many post-Communist states); judicial interpretation

²⁴ Statistics reported on the Court's website: <http://www.echr.coe.int/echr/>.

of constitutional provisions related to treaty law generally (most states in Western Europe); or special statutes (UK, Ireland, and Scandinavian states). With incorporation, all national courts in the system are capable of enforcing the Convention: individuals can plead the ECHR at national bar against any act of public authority; judges are under a duty to identify statutes that conflict with Convention rights, and to interpret statutes in lights of the ECHR to avoid conflicts whenever possible; and virtually all courts may refuse to apply statutes that conflict with Convention rights, with the notable exception of those in the UK and Ireland.

Incorporation is an inherently constitutional process: it subverted centralized sovereignty at the national level, while provoking dynamics of systemic construction at the transnational level. The Convention quickly developed into a ‘shadow’ or ‘surrogate’ constitution (Keller and Stone Sweet 2008) in every state that did not possess its own judicially-enforceable charter of rights (including original signatories, Belgium, France, The Netherlands, Switzerland, and the UK). In the 1990s, Finland, Norway, and Sweden enacted new Bills of Rights, closely modeled on (and invoking) the ECHR, in order to fill gaps in their own constitutions.

In those states that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection. We find this situation in Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-Communist states. The Spanish Constitutional Tribunal, for example, enforces the ECHR as quasi-constitutional norms (Candela Soriano 2008). The Tribunal will strike down statutes that violate the Convention as *per se* unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court’s jurisprudence as a matter of *constitutional* obligation, including case law generated by litigation not involving Spain. If the judiciary ignores the Court’s jurisprudence, individuals can appeal directly to the Tribunal for redress. Nonetheless, the Tribunal insists that in the event of an irreconcilable conflict between the ECHR and the Spanish Constitution, the latter will prevail – a common position among constitutional courts.²⁵ In many post-Communist states, as well, constitutional judges invoke the Strasbourg Court’s jurisprudence as authority, in order to enhance the status of fundamental rights – and hence their own positions – in the domestic context (Hammer and Emmert 2011).

Strikingly, some states give the Convention constitutional rank (e.g., Albania, Austria, Slovenia); and, in The Netherlands, the ECHR enjoys

²⁵ In systems in which such doctrines hold sway, a model of centralized sovereignty (section I.C) can usually be constructed from the internal perspective of the national constitutional court.

supra-constitutional status. In Belgium, the Constitutional Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, while the Supreme Court holds that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy vis-à-vis the Constitutional Court.

One could continue in this vein, but the basic point has been made. The incorporation of the ECHR generated constitutional pluralism and inter-judicial competition within the national order;²⁶ it destroyed doctrines that underpinned centralized sovereignty (e.g., legislative supremacy, the monopoly of constitutional courts over the domain of rights protection); and it enhanced judicial power with respect to legislative and executive power.

Transformation

Constitutional pluralism expands the discretionary authority of courts. Many judges will now refuse to apply law that conflicts with the Convention; at the same time, they are rapidly abandoning traditional methods of statutory interpretation. Instead of seeking to discern legislative intent, judges increasingly favor the purposive construction of statutes in light of fundamental rights jurisprudence. In systems in which multiple, functionally-differentiated, high courts co-exist (the majority of states), pluralism means that the supreme courts of ordinary jurisdiction may assume the mantle of *de facto* constitutional courts whenever they review the *Conventionality* of statutes. France, which for two centuries famously embraced and propagated the dogmas of the General Will (legislative sovereignty and the prohibition of judicial review), is now a robust example of pluralism.²⁷ From the point of view of the rights claimant, the Supreme Civil Court (*Cour de Cassation*) and the Council of State (the supreme administrative court) function as the ‘real’ constitutional courts; and litigants and judges treat the Convention as the ‘real’ charter of rights. The outcome is dictated

²⁶ The most obvious cases of internal constitutional pluralism are systems in which one finds both (1) a constitutional court which considers, as a matter of national constitutional law, that it alone possesses the authority to invalidate statutes that conflict with constitutional rights, and (2) one or several supreme courts which may refuse to apply statutes in conflict with rights found in EU law or the Convention. Today, classic distinctions between the constitutional and ordinary courts, themselves derived from traditional models of legislative sovereignty, are on the verge of extinction (see Garlicki 2007).

²⁷ Article 55 of the Constitution of the Fifth Republic provides for the primacy of international treaty law over conflicting statutes, but separation of powers doctrines – the prohibition of judicial review of statute – rendered Article 55 without effect in the courts. Beginning in the 1970s, the courts gradually overthrew the prohibition.

by the fact that individuals have no direct access to the Constitutional Council;²⁸ and it is the European Court, not the Constitutional Council, that supervises the rights-protecting activities of the civil and administrative courts. Today, three autonomous high courts protect fundamental rights on an ongoing basis; and there is no formal means of coordinating rights doctrine, or of resolving conflicts, among these courts. Without revising the constitution or exiting the ECHR, French officials are now locked into a pluralist system of rights protection.

Some of the most powerful states in Western Europe have had the greatest difficulty incorporating the ECHR to permit judges to enforce it against statute. In legal terms, the structural problem concerns the fact that in so-called ‘dualist’ systems – including original signatories, Germany, Ireland, Italy, Sweden, Norway, and the UK – constitutions confer upon treaty law the same rank as statute. In such systems, conflicts between statutes and treaty provisions are expected to be resolved according to the rule, *lex posterior derogat legi priori*. The rule is anathema to a CLO, since legislation adopted after the transposition of the ECHR into national law would normally be immune from review under the Convention. What is critical for the emergence of the CLO is that, in these states, the rule has been relaxed or overridden altogether.

In Italy, at least until the late 1960s, ‘Italian courts refused to apply the Convention considering its provisions to be merely programmatic’ (Candela Soriano 2008: 405). In the past decade, courts incorporated the Convention, destroying the *lex posterior* rule and producing a pluralist order. In 2004, the Supreme Court (*Cassazione*) began treating the Convention as directly applicable, while in 2007, the Italian Constitutional Court (ICC) struck down a statute (concerning expropriation) as unconstitutional on the grounds that it violated property rights under the Convention (Candela Soriano 2008: 405–6). In its decision, the ICC held that Italian judges are required to interpret national law in light of the ECHR and, where a conflict is unavoidable, to refer the matter to the ICC. Some judges have chosen to ignore this jurisprudence. In 2008, for example, a court of appeal decided on its own authority to refuse to apply a controlling statute on grounds that it was incompatible with the Convention (reported in Andenæs and Bjørge 2011: 37–8). The situation has given rise to a fierce debate: does the ECHR enjoy supra-legislative but infra-constitutional rank (the ICC’s position) or constitutional status (the position of some

²⁸ In 2008, the French Constitution was revised to permit the Supreme Court and the Council of State to refer laws to the Constitutional Council for review, in the context of ongoing litigation.

civil courts and scholars)? This is yet another example of constitutional pluralism in action.

In Germany, overcoming the *lex posterior* rule has been tortuous (Lambert Abdelgawad and Weber 2008). Not until 1987 did the GFCC directly confront the problem, holding that German statutes, regardless of their date of adoption, must be ‘interpreted and applied in harmony’ with the Convention.²⁹ In its *Görgülü* decision (2005),³⁰ the GFCC repudiated the ‘traditional theory’ according to which the Strasbourg’s Court’s judgments did not bind the domestic organs of government, including the courts (Hoffmeister 2006: 728–9). The ruling establishes a strong presumption that judges are to apply the Court’s jurisprudence when it is on point, except in ‘exceptional’ circumstances, namely, when ‘it is the only way to avoid a violation of the fundamental principles contained in the Constitution.’³¹ As important, the GFCC’s ruling expanded the constitutional complaint procedure: individuals can now challenge (as a violation of their constitutional rights) judicial rulings that ignore or fail to properly take into account the European Court’s case law. While *Görgülü* significantly bolstered the status of the ECHR within the domestic order, the GFCC also noted that it would settle any conflict between the Basic Law and the ECHR in terms of the former.

In 2011, the GFCC declared that the ECHR and the European Court’s case law comprise interpretive ‘aids for the determination of the contents and scope of the fundamental rights and of rule-of-law principles enshrined in the Basic Law.’ Like *Görgülü*, the GFCC’s *Preventive Detention* ruling³² ended a convoluted saga involving a direct conflict between the German courts and the European Court. In 2009, in *M v. Germany*, the Strasbourg Court had held that German law allowing the further detention of convicted criminals after they had served their prison sentences violated the ECHR. The GFCC had upheld the constitutionality of the relevant statute in 2004, in so far as such detention was deemed necessary to protect public security. When the GFCC appeared reluctant to change its position following the *M* judgment, the European Court issued a series of rulings finding the same violation. In *Prevention Detention*, the GFCC overturned its 2004 ruling, on the grounds that the Strasbourg’s court’s case law had constituted a significant ‘change in the legal situation.’ The Court then went on to ground the Basic Law’s ‘openness’ to the Convention in Article 1.2 of the Basic Law (which recognizes human rights as foundational principles).

²⁹ BVerfGE 74, 358 (370).

³⁰ BVerfGE 111, 307.

³¹ BVerfGE 111, 307 (para 35).

³² *Preventive Detention*, No. 2 BvR 2365/09 (May 4, 2011).

As a result, all organs of the state are under a duty ‘not only to take into account’ the ECHR in their decisions, but ‘to avoid conflict’ between it and national law. ‘The openness of the Basic Law’ the GFCC stated, ‘expresses an understanding of sovereignty that not only does not oppose international and supranational integration, it presupposes and expects [integration].’

By formally recognizing the overlapping nature of fundamental rights in Europe, the GFCC has taken a cosmopolitan position. In *Görgülü*, the GFCC had already declared that its own rights protecting role is exercised ‘indirectly in the service’ of the Convention, an engagement that both protects Germany from findings of violations and ‘contributes to promoting a joint European development of fundamental rights.’³³ In *Preventive Detention*, the GFCC acknowledged a dialogic relationship with the Strasbourg Court, without abandoning its position on the primacy of the Basic Law: ‘The fact that the German constitution has the final word is not incompatible with an international and European dialogue between courts, rather it [comprises the dialogue’s] normative foundation.’³⁴ In June 2011, two months after *Preventive Detention*, the European Court responded favorably, finding no violation in a related case, *Mork v. Germany* (2011). The Court noted: ‘In its judgment, the GFCC stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to ... dialogue between the courts’ and that ‘in its reasoning, [the GFCC] relied on the interpretation ... of the Convention made by this Court in its judgment in the case of *M. v. Germany*.’³⁵ The outcome illustrates one basic mechanism – dialogue among autonomous courts – through which decentralized sovereignty can increase the effectiveness of the ECHR.

In two states – Ireland and the UK – the *lex posterior* rule has also been relaxed, although no judge is authorized to set aside legislation conflicting with the Convention (Besson 2008). Pursuant to the ECHR Act (2003), Irish officials are under a duty to respect and enforce the Convention, and individuals can plead it against all acts of public authority, except those of Parliament and the courts. Under the UK Human Rights Act (2000),

³³ *Preventive Detention* (para 61).

³⁴ *Preventive Detention* (para 89).

³⁵ *Mork v. Germany*, Applications nos. 31047/04 and 43386/08, Judgment of June 9, 2011 (para 31). In *Schmitz v. Germany*, App. No. 30493/04, Judgment of June 9, 2011 (para 41), the Court noted that the GFCC had reversed its earlier case law and declared that the Court ‘welcomes the [GFCC’s] approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court’s case-law, which demonstrates that court’s continuing commitment to the protection of fundamental rights not only on national, but also on European level.’

individuals may challenge all acts, including Parliamentary legislation; if a Parliamentary statute is found to be incompatible with the ECHR, the high courts are obligated to issue a ruling of incompatibility – but they may not set aside the offending legislative provisions. Declarations of incompatibility are addressed to the Parliament, which must indicate what remedial legislation, if any, will be proposed. In Ireland, the high courts may also issue rulings of incompatibility, although Parliament is not obliged to respond to them.³⁶ In Norway and Sweden, which incorporated the ECHR through human rights statutes in the 1990s, the courts must give primacy to the Convention when in a conflict with legislation (Wiklund 2008). In the past decade, Norwegian courts in particular have positioned themselves to become active participants in the development of Convention rights (Andenæs and Bjørge 2011: 15–17).

While the dynamics of incorporation are heavily mediated by constitutional provisions and doctrine, important strategic interests have been catalysts. In the 1990s, incorporation constituted a formal means for post-Communist states to signal their commitment to the massive institutional reforms being demanded by Western states. As a growing scholarly literature has shown, the ECHR has played a crucial role in democratic transitions after 1989 (Buyse and Hamilton 2011; Hammert and Emmer 2011). New bills of rights were modeled on the ECHR, with an eye towards future membership in the EU and the Council of Europe; and some states even signed the ECHR prior to ratifying new constitutions (including Albania, Armenia, Azerbaijan, Georgia, Poland, Slovakia, and Ukraine). For the core states of Western Europe, folding the post-Communist states into the ECHR also fulfilled important strategic interests. Protocol No. 11 reconstructed the regime, making it an extraordinarily efficient mechanism for monitoring the functioning of post-Communist states. For Western states, the cost of Protocol No. 11 is enhanced supervision of their own rights-regarding activities, a cost they have thus far been willing to pay.

III. The ECHR as a cosmopolitan legal order

The European Court performs three governance functions. It (1) renders justice to individual applicants, beyond the state (a justice function); (2) it supervises the respect for fundamental rights on the part of state officials

³⁶ Although a surface commitment to Parliamentary sovereignty survives, constitutional pluralism has nonetheless emerged. The courts may apply EU law, including EU fundamental rights and the Charter, against conflicting legislation; the Parliament, however, may choose not to harmonize legislation with the Convention in the face of a declaration of incompatibility.

(a monitoring function), and (3) it determines the scope and content of Convention rights, in light of state practice within the Cosmopolitan commons (an oracular, or lawmaking, function). The CLO is a pluralistic: sources of rights and jurisdiction overlap. The Court regards the ECHR as a type of transnational constitution,³⁷ but it does not exercise sovereignty within national orders. The Court's case law gains influence domestically through the complicity of national officials.

In this section, I argue that the regime and its Court meet significant criteria of effectiveness, despite being overloaded. The Court has transcended 'rights minimalism' grounded an expansive jurisgenerativity within national legal orders, and helped to consolidate a rights-based constitutionalism in new, post-authoritarian democracies. Further, the Court has proved capable of rendering justice without regard to the nationality of the petitioner or the territory on which rights violations occur; and it admits to no gaps in protection under the guise of a 'political questions' doctrine, even with respect to the conduct of war and international politics.

Beyond minimalism

The Court routinely generates new rights and expands the scope of existing ones, placing even powerful states out of compliance with the Convention. This outcome has not influenced the philosophical discourse on rights, which remains dominated by minimalist precepts, and there are good reasons for wonderment. Most of the original signatories of the Convention assumed that the treaty enshrined minimalism, thereby affording substantial latitude in how states would balance public interests and rights (Nichol 2005). One might also suppose that a transnational court would have weaker political legitimacy in comparison with national courts. After all, the typical national judge is embedded in a liberal democratic order, and s/he is a native of the legal system in which the rights conflict has taken place. The transnational judge's gaze, in contrast, is an alien presence. Why has this situation not led to a jurisprudence of rights minimalism?

The answer lies in how decentralized sovereignty operates. Three factors deserve emphasis. First, the Court expends great resources to convince its audience that it fully understands the richness and particularity of the dispute, as well as variation in the relevant national law across the regime. In its rulings, the Court carefully traces the process through which individuals exhausted remedies, and it dwells on the arguments briefed by the defendant state and others filing as *amici*. Findings of violation may not convince

³⁷ The Court has itself called the ECHR 'a constitutional document' of European public law, *Loizidou v. Turkey*, op cit.

states, but it is not plausible to argue that the Court has ignored domestic law and context. The practice also helps the Court provide guidance on how violating states should change their laws, which it now does routinely when the source of a violation is a general legal norm or practice (Sadurski 2009).

Second, the Court has developed a doctrinal framework – proportionality analysis (PA) – to adjudicate virtually all Convention rights, and it insists that all national courts use it as well. PA is tailor-made for the adjudication of qualified rights in a pluralist setting, and it is the crucial mechanism of coordination in the cosmopolitan order (Kumm 2004; Stone Sweet and Mathews 2008). In the standard sequence, once a judge determines that a right is in play, s/he then verifies (a) that the measure was properly designed to achieve a state purpose (means are rationally related to legitimate ends), and (b) that the measure does not infringe more on the right than is *necessary* to achieve objectives (a test for least-restrictive alternatives). Even a law that passes the first two prongs of the test may nonetheless fail a third phase of PA: balancing in the strict sense. In the balancing phase, the judge weighs the cost to the right claimant against the benefits of the measure in light of the facts. The European Court typically balances within necessity analysis, collapsing the second and third stages. Thus, how any qualified right is actually enforced will always be contingent upon local law and context, while the state that would infringe a right bears the burden of justifying the necessity of the means chosen. What is common across the national systems that comprise the CLO is not a list of norms defined in a lowest-common denominator manner, but a mode of argumentation, and justification: the proportionality framework.

The Court uses PA, in part, to determine how much discretion – the ‘margin of appreciation’ in the jargon – states should have in infringing a right for public purposes. In practice, the Court combines PA with a simple comparative method for determining when the scope of a Convention right has expanded. Typically, the Court will raise the standard of protection in a given domain of law when a sufficient number of states have withdrawn public interest justifications for restricting the right. The margin of appreciation thus shrinks as consensus on higher standards of rights protection emerges within the regime, shifting the balance in favor of future applicants. The move will always put some states out of compliance. Nonetheless, the Court can claim that there is an external, ‘objective’ means of determining the weights to be given to the values in conflict, and the Court’s supporters can usually assert that the Court’s bias is majoritarian, transnational, and pro-rights. A state that chooses not to comply is left to defend a lower standard of rights protection, on idiosyncratic or nationalistic grounds. Although states may balk when it

comes to implementing controversial judgments, they eventually comply in the vast majority of cases.

The saga of *Smith and Grady v. UK* (1999)³⁸ illustrates these dynamics. The case involved a lesbian air force nurse and a gay naval officer who were dismissed pursuant to policy prohibiting homosexuals from serving in the armed forces. Each had been highly recommended for promotion prior to being 'outed' by anonymous sources. Smith and Grady sued, pleading Article 8 ECHR (privacy). Although their claims were rejected, presiding judges indicated that the plaintiffs would have prevailed but for the fact that UK judges were bound by the 'Wednesbury (Un)Reasonableness' test. A deference doctrine derived from the prohibition of judicial review, the test restricts courts from reviewing the merits of a public policy decision unless plaintiffs can show that no rational person would have taken it. (In its ruling, the Strasbourg Court characterized the test as the rights-claimant's burden 'to show that the policy-maker had 'taken leave of his senses.'). Clearly uncomfortable with the outcome, the Court of Appeal urged the claimants to go to Strasbourg.

The Court found that the dismissals violated the applicants' privacy rights, and ordered the UK to pay them £59,000 and £78,000 respectively (the justice function). The Court also took the opportunity to declare the reasonableness test unlawful under the Convention, holding that failure of the courts to use PA had violated the applicants' right to an effective judicial remedy (Art. 13 ECHR). In this and subsequent cases, the Court required national judges to abandon such deference doctrines. PA is an analytic procedure that requires judges to evaluate the merits of public policy decisions that infringe upon fundamental rights; judges that adopt it are thus fully positioned to render justice in the Kantian sense (the monitoring function). Finally, the Court expanded the scope of the right to privacy (the oracular function): homosexuals may not be excluded from military service. It did so by methodically rejecting each of the UK's arguments in support of its policy. At the same time, the Court stressed that those 'European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority.' Although protests were heard, the UK lifted the ban in 2000.³⁹ After adoption, UK commissions charged with reviewing the reform found no significant negative effects of integrating homosexuals into the armed forces.

³⁸ *Smith and Grady v. United Kingdom*, Applications nos. 33985/96 and 33986/96, ECHR Judgment of September 27, 1999.

³⁹ The UK had defended the ban as necessary to preserve 'unit cohesion' 'morale' and 'operational effectiveness' to ensure retention of homophobic soldiers, and to protect gays and lesbians from harassment.

Smith and Grady is just one of hundreds of important cases in which the Court has explicitly rejected a strategy of rights minimalism. It has steadily raised standards of protection with regard to every Convention right, thereby requiring ongoing adjustment on the part of laggard states.⁴⁰ Its approach to qualified rights is infused with cosmopolitan elements. In determining the size of a state's margin of appreciation, the Court makes it clear that no state is ever alone in its rights-regarding activities; rather, the Court will evaluate justifications for limiting a Convention right in the light of state practice within the Council of Europe and beyond. It is not uncommon for the Court to discuss rulings of the Canadian Supreme Court and the South African Constitutional Court, for example.

Third, the incentives facing national judges push them toward implementing the Court's progressive rulings, as well as raising standards on their own. Simplifying a complex topic, there are several basic logics at work. The first is an 'avoidance of punishment' rationale: enforcing Convention rights will make the state – in practice, the judiciary – less vulnerable to censure in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second dynamic is embedded in domestic politics. Individuals and NGOs may seek to leverage the ECHR to alter law and policy, and national judges may work to entrench Convention rights in order to enhance their own authority with respect to legislators and executives. Third, as the CLO gains in effectiveness, the interest high courts have in using the Convention, and seeking to influence the evolution of the ECHR, increases (see Bjørge 2011). Even for a court that is relatively jealous of its own autonomy, constructive engagement is more likely to constrain the Court than the more costly alternatives: defection and open conflict. With regard to domestic arrangements, exercising power within the CLO may well be more attractive than submitting to the authority of the legislature or constitutional court. Friction among national authorities, and between national courts and the European Court, has been an important catalyst for the regime's progressive development.

Beyond individual justice

Protocol No. 11 fully exposes states to the supervisory machinery of the ECHR, but the reform did not transfer sovereignty to the Court. The

⁴⁰ In cases in which one right comes into conflict with a second right, enhancing the protection of the first may well involve reducing the scope of the second. In such cases, the Court has steadily upgraded the standard of justification that defendant states must meet when they determine how two rights are to be balanced.

Court's formal powers remain tailored to its primary mission: rendering justice to individual claimants. Nonetheless, the European Court performs many of the same functions that powerful national constitutional courts do, using similar techniques, with broadly similar effects (Sadurski 2009; Stone Sweet 2009). The Court confronts cases that would be classified, in the context of domestic law, as inherently 'constitutional.' The Court has consistently held that its interpretative precedents bind all judges in the system (Besson 2012);⁴¹ it resolves alleged conflicts between rights and state interests through balancing, using PA; and it routinely indicates how a state must reform its law in order to avoid future violations. Further, the Court's most important rulings place national policymakers 'in the shadow' of future litigation, provoking a politics of adaptation akin to the rights-based jurisgenerativity one finds in national systems of constitutional justice.⁴² It would therefore be a serious mistake to read the Convention literally to conclude that the Court's major role is to render individual justice.

Appendix 2 provides basic data on applications and rulings for each member of the ECHR since the entry into force of Protocol No. 11 through 2010. The huge number of applications to the Court comprises a fairly direct measure of the enormous social demand for rights protection under the Convention.⁴³ Pursuant to more than 400,000 petitions, the Court rendered some 10,577 findings of violation, and 588 rulings of no violation; the Court allowed a further 995 cases to be settled by states with the accord of the applicant. Thus, while competition for the Court's attention is fierce, petitioners prevail in more than 95% of cases ruled admissible. Given the flood of applications, the Court has little choice but to use individual cases to shed light on general problems, and then work to help national authorities resolve them. In recent years, structural deficiencies in a handful of states have generated the majority of applications.⁴⁴

⁴¹ As Besson (2012) reports, many states, including Belgium, Croatia, the EU, Ireland, The Netherlands, Spain, the UK, and Ukraine, have also accepted the *erga omnes* effects of the Court's precedents.

⁴² Systematic research on the impact of the Court on national law and policy has recently taken off, including Andenæs and Børge (2011), Buyse and Hamilton 2011; Hammert and Emmer 2011; Helfer and Voeten (2011), Keller and Stone Sweet (2008), and Von Staden (2009).

⁴³ Petitioning the Court is simple and virtually cost-free: the required forms and easy-to-follow instructions are posted online, and applicants do not initially need legal counsel.

⁴⁴ As of the end of 2010, there were 139,630 cases pending before the Court, more than two-thirds of which were generated by just six States: Russia (40,295); Turkey (15,206); Romania (11,950); Ukraine (10,434); Italy (10,208); and Poland (6,452). Data reported by the ECHR in its *Annual Report* (Strasbourg, 2010).

Where multitudes of ‘clone’ petitions are produced by the same national laws or practices, the Court may issue a ‘pilot’ judgment, a ruling that ‘requires’ a state to change its law so as to avoid chronically reproducing the same violation.⁴⁵

The types of cases the Court confronts vary widely.⁴⁶ It monitors states that are incapable of maintaining minimal standards of rights protection while routinely generating serious violations (right to life, access to justice, prohibition of torture). Following World War II (Greece and Turkey), and then again after the collapse of the Soviet bloc (including Georgia, Romania, Russia, Serbia, and the Ukraine), the Council of Europe chose to admit important states that could not be expected, in the near term, to meet the criteria normally expected for membership. These decisions placed a huge burden on the Court. Today, it regularly confronts cases concerning the organization of elections, high-level malfeasance, and military operations both at home and abroad, without reliance on a ‘political questions’ doctrine, or other deference doctrines that would be anathema to the very notion of a CLO.

What the data do not show are the myriad ways in which ECHR membership bolsters weak domestic systems. Even the worst ‘problem’ states, such as Russia and the Ukraine (Nußberger 2008), Turkey and Greece (Kaboğlu and Koutnatzis 2008), and many other post-Communist states (Emmert and Hammer 2011), have undergone massive legal reforms, major progress that would not have been made without ECHR membership and incorporation. The Court is the agent of the CLO within national orders. As Buyse and Hamilton (2011: 300) put it: ‘Through its jurisprudence and its ripple effects, the Court fosters the values of democracy, plurality, openness and the rule of law. In doing so, it maps the transitional goals to be pursued and helps [post-Communist] societies, through the interplay with national institutions and civil society actors, [to address] current and future threats to democracy and human rights.’

⁴⁵ As Sadurski (2009) has demonstrated, the Court’s competence to issue ‘pilot rulings’ makes the Court’s ‘constitutional’ functions starkly visible. The European Council expressly authorized the pilot ruling procedure in 2004. In February 2011, the Court (which writes its own procedures) ‘inserted’ a new Rule 61 to the Rules of the Court. Paragraph 3 of Rule 61 states: ‘The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting State concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.’

⁴⁶ The majority of all cases processed by the ECHR concern the functioning of the judiciary (Arts 5 and 6 ECHR). Many States, including Western States like France and Italy, are unable to provide final judicial decisions in a reasonable time period, and thus fall afoul of Article 6.

States boasting robust systems of domestic rights protection (e.g., Germany, Ireland, and Spain) generate important cases in areas in which the protection offered lags behind that of other important systems. The perception of a differential in relative standards across jurisdictions not only attracts applications; it also animates the Court's majoritarian activism and the dynamic of inter-judicial competition that enables the CLO to transcend rights minimalism. Perhaps counter-intuitively, the Court's oracular, law-making function is most prominently exercised when it deals with high-standard states. Participation in the CLO helps them 'fine-tune' rights-protection. The CLO fills gaps in national protection and demands continuous adjustment on the part of all of its members.

Beyond borders

For cosmopolitans, the Court's capacity to render justice to foreigners and to people who are marginalized by, and within, national systems is a factor of special importance to the argument that a CLO has emerged in Europe. Securing the rights of marginalized groups has become one of the central objectives of the ECHR regime (Anagnostou and Psychogiopoulou 2010). The Council of Europe manages dedicated programs designed to ameliorate the plight of Roma and Travelers, for example; and the Court has become deeply engaged in supervising national treatment of Roma after findings of violation.⁴⁷ More generally, treatment of foreign nationals, oppressed minorities, and asylum seekers are major sources of applications and jurisprudence. While no one would claim that the Court, on its own, can eliminate such discrimination, the jurisgenerative effects of the CLO on rights politics within states deserve to be taken seriously. Lawyers and NGOs operating at the national level now routinely leverage the ECHR and the Court's jurisprudence in efforts to change policy and improve the lives of individuals and groups, and sometimes these efforts succeed. State officials may seek to limit the scope of the Court's rulings. But they remain under the supervision of the Council of Europe and the courts, under an expanding cosmopolitan jurisprudence that shines a bright light on discriminatory practices.

To conclude, I will focus on two strands of cosmopolitan jurisprudence that concern citizens of states that are not members of the ECHR. In the first, the Court has held that Article 3 ECHR, which prohibits torture

⁴⁷ See the saga of *Moldovan and Others v. Romania* (no. 2), Applications nos. 41138/98 and 64320/01, Judgment July 12, 2005.

and inhumane and degrading treatment, barred states from extraditing individuals to a non-ECHR country when ‘substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.’⁴⁸ In *Saadi* (2008), the Court, exercising authority to order interim measures under its Rules of Procedure,⁴⁹ requested Italy to stay a decision to deport a Tunisian national to Tunisia, pending a ruling on the merits. Italy complied. The Court ruled that deportation of Mr. Saadi would violate Article 3, citing reports by Human Rights Watch, Amnesty International, and the U.S. State Department to the effect that torture and other forms of ill-treatment were routine in Tunisian prisons. The Court pointedly rejected arguments made by the UK, as *amicus*, suggesting that states did not bear the same obligations under the Convention if the ill-treatment was ‘inflicted by the authorities of another State’ and that ‘this latter form of ill-treatment should be weighed against the [security] interests’ of the community. Unlike most of the Convention, the Court ruled, Article 3 is not qualified by permitted derogations, and thus excludes balancing. The Court’s lack of deference contrasts sharply with the refusal of U.S. courts to adjudicate cases involving official torture pursuant to ‘extraordinary rendition.’⁵⁰

A second strand flows from a series of rulings that extended coverage of the Convention to state acts that harm people living outside of the territory of the Council of Europe (Gondek 2009). The most dramatic of these require the courts to review the conduct of armed forces acting abroad in wartime situations. In 2011, the Court rendered two major rulings, virtually unanimously on the important points of law. *Al-Skeini*⁵¹ concerned the deaths of six Iraqi civilians killed by UK patrols during the UK’s participation in the Coalition Provisional Authority (which governed Iraq in 2003–04). The UK Government had denied requests, brought by relatives of five of these victims, for an inquiry and for

⁴⁸ *Saadi v. Italy*, Application no. 37201/06, ECHR Judgment of February 28, 2008.

⁴⁹ In a July 2011 ‘Practice Direction’ the Court clarified its authority under Rule 39 of the Rules of Court, stating that it would rely on interim measures ‘only ...in exceptional cases when, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied.’ In such situations, the Court attempts to intervene directly within the national legal order in order to stop a violation from occurring in the first place.

⁵⁰ Indeed, the Court has declared admissible an application brought by a petitioner whose case was dismissed by U.S. courts, despite the direct involvement of U.S. government officials (*El-Masri v. Moldova*, Application no. 39630/09).

⁵¹ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, ECHR Judgment of July 7, 2011.

consideration of liability and compensation. The UK courts dismissed the application for judicial review of the Government's position on two grounds: that the killings fell outside their jurisdiction, and that the Convention did not cover the relatives of victims. The European Court, echoing prior rulings, held that when a state, 'as a consequence of military occupation ... exercises all or some of the public powers normally to be exercised by that Government' then its responsibilities under the Convention are engaged. Further, 'whenever the State through its agents exercises control and authority over an individual ... the State is under an obligation to secure to that individual the rights and freedoms ... that are relevant to the situation of that individual.' For its failure to undertake a formal investigation of the deaths, the relatives of five victims were awarded 40,000 Euros in costs (jointly) and 25,000 Euros each in compensation.

In *Al-Jedda*,⁵² the Court censured the UK for having imprisoned the petitioner in Iraq for more than three years without bringing charges, contrary to Article 5 ECHR. In its defense, the UK claimed that Mr. Al-Jeddah had 'conspired' to commit acts of terrorism, that his incarceration was necessary for 'imperative reasons of security' and that it was acting lawfully, as an agent of the United Nations under a series of Resolutions of the UN Security Council.⁵³ The House of Lords dismissed the case, holding that state obligations under UN Security Council Resolutions overrode those of the ECHR. The European Court found for the petitioner and, in a move of great potential importance, positioned itself as a check on the Security Council:

In interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity ... the Court must choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

⁵² *Al-Jedda v. the United Kingdom*, Application no. 27021/08, ECHR Judgment of July 7, 2011.

⁵³ *UNSC Resolution 1546* (June 8, 2004), for example, confers authority on the multi-national force to take measures to prevent terrorism.

Al-Jeddah thus extends the reach of cosmopolitan constitutionalism into a realm beyond the ECHR.

In a CLO, every public authority, including the UN, bears a duty to justify acts that would have the effect of violating the fundamental rights of individuals.⁵⁴

Conclusion

I have argued that a legal system that broadly conforms to Kantian notions of cosmopolitan Right and justice has emerged in Europe. The system was instantiated by Protocol No. 11 to the ECHR and the incorporation of the Convention into national legal orders. At the regime level, states have steadily strengthened the supervisory capacities of the European Court, an organ that, arguably, now functions as a transnational ‘constitutional’ court. Within national systems, elected officials and judges have gradually abandoned centralized sovereignty while institutionalizing complex forms of rights pluralism. In today’s CLO, virtually no act of public authority is immune from fundamental rights review. While other forms of cosmopolitan order are possible, the ECHR has established significant, general criteria for evaluating a CLO normatively. The regime has played a major role in helping post-authoritarian states achieve stable constitutional democracy, thereby expanding the ‘zone of liberalism’ in Europe. And the Court has progressively developed the content and scope Convention rights, while raising the standards of justification that states must meet when they have limited enjoyment of a right, including for people who are non-citizens of the regime.

The CLO imperfectly protects rights. The European Court – overloaded and often overwhelmed – is activated, after all, by the inadequacies of national protection. It is obvious that judges, other officials, and the Court itself⁵⁵ routinely fail to meet obligations to fulfill the fundamental rights of all persons that come under their jurisdiction. What is important is that they are now positioned to do so. As Kant recognized, the process of achieving Right can only be a gradual one. Constructing a cosmopolitan commons – those norms, procedures, and dispositions that enable a

⁵⁴ The ruling departs from the approach adopted in the Court’s ruling in *Behrami v. France, Saramati v. France, Germany & Norway*, Application Nos. 71412 & 78166/01, Judgment on Admissibility, May 2, 2007.

⁵⁵ Given its enormous caseload, for example, the Court routinely fails to meet the standards of Article 6 ECHR (‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’).

decentralized sovereign to fulfill the rights of persons – is a necessary first stage. Achieving an ever-more effective CLO is likely to be arduous, non-linear, and full of setbacks. Further, the evolution of cosmopolitan arrangements is not predetermined (Kleingeld 2011: 67–8). As Brown (2006: 683) suggests:

Kantian cosmopolitanism has no particular predictive institutional complexion, only the requirement that the process must be the result of a free consensus in line with *a priori* principles of universal public right. ... How complex this cooperative system will ultimately become will be solely determined by the *wills* of various federated states and their shared belief in broadening a condition of cosmopolitan public right.

While I have focused on the European case, the theoretical materials developed in the paper have general relevance to global constitutionalism, in particular, to cosmopolitan variants. I sought to define a CLO and related concepts to make them useful for thinking about how new judicial orders might emerge and evolve under conditions of rights-based, constitutional pluralism. At present, while there are recurrent outbreaks of cosmopolitan justice in every region of the globe, only Europe provides an example of a CLO. In my view, a stable cosmopolitan legal system is only likely to emerge within a zone of liberalism, that is, within an interstate territory where the conditions for ‘perpetual peace’ have been met. In addition, national legal systems must be (re)configured so as to permit judges to render cosmopolitan justice. In principle, judges and other state officials could forge a cosmopolitan legal system on the basis of shared legal norms, practices, and understandings (Kumm 2009), once mutual trust has been established, and interactions among them sustained. The successful construction of a cosmopolitan commons, however, is far more likely where there is a treaty, a court, and a steady caseload. Imagine, for a moment, the probable trajectory of the ECHR without its Court, or without the right of individual petition. There would have been little pressure for incorporation. A CLO may eventually have appeared, but not as quickly or with as much effectiveness.

Last, I have not addressed legitimacy concerns, beyond the implicit assertion that the CLO is both a product and a source of rights-based constitutionalism and jurisgenerativity. If the protection of fundamental rights is a core value of pan-European constitutionalism, then the CLO is good for Europeans. Of course, the principles associated with parliamentary democracy are also core values. The evolution of rights pluralism, however, has undermined the models that officials and

scholars have long used to describe, and normatively circumscribe, how state organs, including parliament and the courts, function. Traditional notions of sovereignty, separation of powers, the hierarchy of norms, the monist/dualist dichotomy, representation, and so on, are no longer up to the task. It may be that such notions are in the process of being adapted to cosmopolitan precepts and realities. But it also may be that the discursive battles between the values of rights cosmopolitanism and those of classic statist conceptions of the legal system have barely begun.

Acknowledgements

I received helpful comments on earlier versions of this paper from participants in workshops and seminars at the European University Institute, Florence (March 2011), the NYU Law School, New York (September 2011), the Wissenschaftskollege, Berlin (October 2011), and the LUISS Government Department, Rome (October 2011). Special thanks are due to Mads Andenæs, Antoine Buyse, Paul Kahn, Mattias Kumm, Matt Noah Smith, and Kathleen Stranz for detailed responses to earlier drafts. I am particularly grateful to Seyla Benhabib, Michael Doyle, Garrett Brown, Pauline Kleingeld, and Thomas Pogge for generously sharing their wisdom on matters Kantian.

Appendix 1. The Incorporation of the ECHR into National Legal Orders

State	Mode of Incorporation	Rank	Direct Effect
Albania	Constitution	2	Yes
Andorra	Constitution	3	Yes
Armenia	Constitution	3	Yes
Austria	Constitution	2	Yes
Azerbaijan	Constitution	3	Yes
Belgium	Judicial	1, 2	Yes
Bosnia-Herzegovina	Mixed (C/L)	2	Yes
Bulgaria	Constitution	3	Yes
Croatia	Constitution	3	Yes
Cyprus	Legislative	3	Yes
Czech Republic	Constitution	3	Yes
Denmark	Legislative	3	Yes
Estonia	Constitution	3	Yes
Finland	Mixed (C/L)	3	Yes
France	Mixed (C/J)	3	Yes

(continued)

Appendix 1. (*Continued*)

State	Mode of Incorporation	Rank	Direct Effect
Georgia	Constitution	3	Yes
Germany	Judicial	*	Yes
Greece	Constitution	3	Yes
Hungary	Judicial	3	Yes
Iceland	Mixed (C/L)	3	Yes
Ireland	Legislative	4	Yes
Italy	Judicial	3	Yes
Latvia	Mixed (C/L)	3	Yes
Liechtenstein	Constitution	3	Yes
Lithuania	Judicial	3	Yes
Luxembourg	Judicial	3	Yes
Macedonia	Constitution	2	Yes
Malta	Legislative	3	Yes
Moldova	Mixed (C/J)	3	Yes
Montenegro	Constitution	3	Yes
Netherlands	Judicial	1	Yes
Norway	Legislative	3	Yes
Poland	Judicial	3	Yes
Portugal	Judicial	3	Yes
Romania	Constitution	3	Yes
Russia	Mixed (C/J)	3	Yes
Serbia	Constitution	3	Yes
Slovakia	Constitution	3	Yes
Slovenia	Constitution	2	Yes
Spain	Judicial	3	Yes
Sweden	Constitution	3	Yes
Switzerland	Judicial	3	Yes
Turkey	Constitution	3	Yes
UK	Legislative	4	Yes
Ukraine	Legislative	3	Yes

Note: The table does not capture the full complexity of incorporation in any state. Incorporation can occur through a specific constitutional provision, legislation, and/or judicial rulings (typically interpreting the constitutional law as enabling direct applicability of the Convention). Key:

Rank: Denotes the effective rank, within domestic law, of the ECHR. Key: 1 Supra-Constitutional; 2 Equivalent to the Constitution; 3 Supra-Legislative (takes primacy over statutes in conflict); 4 Infra-Legislative (judges may not set aside conflicting statutes adopted later in time than the ECHR, but are obligated to interpret statutes in light of the Convention, and to issue declarations of incompatibility when statutes conflict with the ECHR or the Court's case law).

Direct effect: 'Yes' indicates that the ECHR is directly applicable within the national legal order, that is, Convention rights (and the Court's case law) can be pleaded by individuals at bar, and judges can enforce them (applying them to resolve the case).

* In Germany, the ECHR is considered to be equivalent to an 'ordinary statute' but it is in fact treated as an extraordinary statute to render it effective (see text).

Appendix 2. The European Court and National Legal Orders under Protocol No. 11 (November 1, 1998 – December 31, 2010)

State Party	Applications	Admissible	Judgments*	Friendly Settlements	Finding of Violation	Finding of No Violation
Albania	476	26	24	1	23	0
Andorra	41	3	3	1	2	0
Armenia	1420	26	22	0	21	1
Austria	3849	212	203	17	169	17
Azerbaijan	2523	58	38	0	36	2
Belgium	1846	121	110	12	87	11
Bosnia-Herzegovina	3606	34	13	0	13	0
Bulgaria	8447	429	356	5	332	19
Croatia	6447	189	188	26	154	8
Cyprus	613	52	51	3	46	2
Czech Republic	9353	158	139	8	127	4
Denmark	837	32	22	11	5	6
Estonia	1665	25	23	1	14	2
Finland	2990	143	139	9	111	19
France	19048	736	672	51	537	84
Georgia	4749	40	39	6	32	1
Germany	14924	148	151	9	109	30
Greece	4045	570	533	19	503	11
Hungary	4382	216	206	6	196	4
Iceland	92	9	9	2	7	0
Ireland	468	14	14	1	9	4
Italy	19207	2431	1875	332	1508	35
Latvia	2350	47	45	3	37	5
Liechtenstein	63	5	5	0	5	0
Lithuania	3222	79	58	6	45	7
Luxembourg	303	35	35	3	28	4
Macedonia	2658	78	74	3	68	3
Malta	124	24	26	0	24	2
Moldova	6381	242	170	2	167	1
Monaco	44	1	1	0	1	0
Montenegro	878	3	3	0	3	0
Netherlands	4329	67	74	15	43	16
Norway	717	27	23	0	16	7
Poland	43106	849	829	40	730	59
Portugal	1819	331	183	54	125	4
Romania	34875	808	710	23	667	20
Russia	84775	1717	1007	13	958	36
San Marino	32	8	10	2	8	0
Serbia	6922	119	44	0	43	1
Slovakia	4857	262	238	20	213	5

(continued)

Appendix 2. (Continued)

State Party	Applications	Admissible	Judgments*	Friendly Settlements	Finding of Violation	Finding of No Violation
Slovenia	6627	237	233	3	220	10
Spain	5901	85	68	1	45	22
Sweden	4406	52	51	19	23	9
Switzerland	2958	57	62	2	49	11
Turkey	35152	3113	2429	203	2174	52
Ukraine	30738	982	682	2	676	4
United Kingdom	11881	393	324	61	213	50

* The figure excludes rulings concerning other issues, such as State objections involving further jurisdictional issues and remedies.

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