The Constitutionalisation of International Law and the Evolving Nature of the European Court of Human Rights (ECtHR): Towards a European Constitutional Court for Human Rights?

by

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Abstract

The undertaking of this thesis coincided with the 70th anniversary of the signing of the European Convention on Human Rights (ECHR), and the European Court of Human Rights' (ECtHR) 60th year of operation, having first been established in 1959. Reaching this milestone is probably the biggest achievement in the history and development of the ECHR system so far. Also, 2019 marked the completion of the Interlaken reform process – the latest stage in the ECtHR's long history of reform. In highlighting the positive results of the Interlaken process, Council of Europe (CoE) bodies and its member States concluded that the ECtHR is not only functioning well now, but the achievements of the past years have set the foundations to secure the future and long-term effectiveness of the Court.

Contrary to this position, the thesis identifies that a number of underlying challenges hindering the effective functioning of the Court, thus jeopardising its very viability, still remain unresolved and in some cases have even worsened. The thesis thus problematises the past and current dominant approaches to the reform of the ECtHR and argues that the challenges facing the Court have been misframed as primarily institutional, rather than constitutionalist, in nature. As a result, I argue, the decades-long reform process has been incapable of revealing, let alone resolving, the underlying problems of deeper constitutional importance, which form the root cause of any further institutional shortcomings that the Court is faced with. While much of the focus of the reform process has been on containing the ECtHR's ever-increasing backlog of pending cases through institutional restructuring and other managerial/technical practices, other, normative considerations of greater constitutional importance remain sidelined to a significant extent. Most crucially, though, little consideration has been given to wider, underlying systemic issues concerning, for example, the role and purpose that the 'new' (post-1998) Court should serve in an enlarged, diverse Europe and its relationship with national political and legal actors.

In critically analysing recently adopted reform measures, the thesis demonstrates that any attempts to address the above systemic or constitutionalist issues so far have been merely part of a wider plan envisaged by ECHR States to attribute a more focused, albeit diminished, role to the ECtHR so that it would hear fewer cases and consequently pass fewer judgments. Following this reform direction, as my analysis shows, entails serious risks for the future of the Court and the protection of Convention rights in Europe more broadly, many of which are already looming.

As a forward-looking contribution to the reform debate, I argue that the (further) constitutionalisation of the ECtHR, ie its evolution into a European Constitutional Court for human rights, could be an appropriate and viable response to its ongoing fundamental challenges. In this respect, I present a series of reform proposals aiming at creating a sustainable ECtHR and a wider human rights protection system at the international level that will continue to be effective in the future.

To my parents

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Abbreviations

Brighton Declaration	High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration (20 April 2012)
Brussels Declaration	High-level Conference on the "Implementation of the European Convention on Human Rights, our Shared Responsibility" – Brussels Declaration (27 March 2015)
Budapest Colloquy 1993	Eighth International Colloquy on the European Convention on Human Rights (Budapest 1993)
CDDH	Council of Europe Steering Committee for Human Rights
CEE	Central and Eastern European (States)
CoE	Council of Europe
CoM	Council of Europe Committee of Ministers
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICTY	International Criminal Tribunal for the former Yugoslavia
INGO Conference	International Non-Governmental Organisations Conference
Interlaken Declaration	High Level Conference on the Future of the European Court of Human Rights – Interlaken Declaration (19 February 2010)
Izmir Declaration	High Level Conference on the Future of the European Court of Human Rights –Izmir Declaration (27 April 2011)
Lord Woolf Report	The Right Honourable The Lord Woolf, Review of the Working Methods of the European Court of Human Rights (2005)
Neuchâtel Colloquy 1987	'Merger of the European Commission and European Court of Human Rights' (Neuchâtel colloquy proceedings, 14-15 March 1986) (1987) 8 *Human Rights Law Journal*
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution

PACE	Parliamentary Assembly of the Council of Europe
Potsdam Colloquy 1997	*The European Court of Human Rights – Organisation and procedure: Questions concerning the implementation of Protocol No. 11 to the European Convention on Human Rights* (Proceedings of the Colloquy organised by the Human Rights Centre of the University of Potsdam, 19-20 September 1997)
Rome Proceedings 1975	*Proceedings of the Fourth International Colloquy about the European Convention on Human Rights, Rome* (Strasbourg: Council of Europe, 1975)
Venice Commission	European Commission for Democracy through Law
Wise Persons' Report	Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203 (2006)

Chapter 1

Introduction – Thesis Overview

'The second challenge [facing the Court nowadays, apart from its excessive workload] is of a different nature. It is essentially a political one. The challenge is to the very idea of the Convention system. It questions the authority, and even the legitimacy of the European Court of Human Rights. […] If this is less visible now, it is only because other, bigger targets are being pursued, meaning the whole European project'.[1]

1.1 Research Background

As the European, and wider international, community celebrated the 70th anniversary of the signing of the European Convention on Human Rights (ECHR),[2] it is evident that the European mechanism for the protection of human rights remains extremely fragile.[3] Similarly, the goal to secure the future viability and long-term effectiveness of the European Court of Human Rights (ECtHR)[4] is still more uncertain than ever.[5] This thesis locates itself within the ever-growing field of European human rights law and the studies seeking to critically analyse the Strasbourg Court's reform process. It thus aims to make a practical and impactful contribution not only to the existing literature on the topic, but also to the wider ongoing debate on the reform and future of the ECtHR. In this thesis, I problematise the dominant reform approaches, which, as will be argued, have misframed the nature of the

[1] Guido Raimondi (former ECtHR President), *Speech at the Conferral of the Treaties of Nijmegen Medal* (18 November 2016) 4 <https://www.echr.coe.int/Documents/Speech_20161118_Raimondi_Nijmegen_ENG.pdf> accessed 20 April 2021.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950 (hereinafter and for the remaining of the thesis, 'ECHR' or 'the Convention').

[3] On the 70th anniversary of the signing of the ECHR, see, Linos-Alexandre Sicilianos, *The European Convention on Human Rights at 70: The dynamic of a unique international instrument* (5 May 2020) <https://www.echr.coe.int/Documents/Speech_20200505_Sicilianos_70th_anniversary_Convention_ENG.pdf> accessed 5 May 2021; Robert Spano, *Opening Remarks – The European Convention on Human Rights at 70: Milestones and Major Achievements* (Strasbourg, 18 September 2020) <https://echr.coe.int/Documents/Speech_20200918_Spano_Opening_Conference_70_years_Convention_ENG.pdf> accessed 5 May 2021.

[4] Hereinafter and for the remaining of the thesis, 'ECtHR', 'the Court' or 'the Strasbourg Court'.

[5] On the 60th anniversary of the ECtHR, see, Linos-Alexandre Sicilianos, *The European Court of Human Rights marks 60 years of work for peace, democracy, and tolerance* (30 September 2019) <https://www.echr.coe.int/Documents/Speech_20190930_Sicilianos_60_years_ECHR_ENG.pdf> accessed 5 May 2021; Angelika Nussberger, 'The European Court of Human Rights at Sixty – Challenges and Perspectives' (2020) 1(1) *European Convention on Human Rights Law Review* 11.

challenges facing the Court. Arguably, such misframing has resulted in measures that not only have proven inadequate to meet the objectives of the reform, but also further exacerbated the underlying challenges that the Court is faced with. The thesis, therefore, seeks viable answers to these underlying challenges that could eventually enable the ECtHR to reach its full potential and ensure that its future and long-term effectiveness are guaranteed. The ECtHR has been in a constant process of reform since its inception in 1959 and this is set to continue at least for the foreseeable future. The analyses, findings and proposals made in this research project are thus believed to be both academically meaningful and timely, and are expected to remain so for the coming years.

The fundamental changes in the Convention control system that the establishment of the 'new' Court under Protocol No 11 brought, in conjunction with the Council of Europe's (CoE) rapid geographical expansion eastwards, resulted in a dramatic increase in the numbers of admissible applications and judgments delivered by the ECtHR during subsequent years. At that stage of the Court's life, a fundamental tension had arisen between the size of the population who would have access to the Court by virtue of the right of individual petition, on the one hand, and the ECtHR's responsibility as the final arbiter in Convention matters for so many and diverse States, on the other.

The excessively growing backlog in the late 2000s threatened 'to clog the Court to the point of asphyxiation',[6] leaving it unable to fulfil its crucial, and primary, mission of providing individual legal protection of human rights across Europe. Two key observations then became evident: firstly, that the credibility of the Convention system, and the Court in particular, as the guarantor of fundamental rights already started to decline and, secondly, that in the absence of drastic reform measures the ECtHR would continue to malfunction while its institutional deficiencies would seriously impede the Court's performance and place its viability and future at risk.[7]

Admittedly, significant progress has been achieved with regard to the Court's functioning, especially since Protocol No 14's entry into force. A series of structural and procedural arrangements and working methods of the Convention control system has sought to tackle the various institutional challenges facing the ECtHR, including, first and foremost, the increasing backlog.[8] Indeed, by the end of the Interlaken process in 2019, the overall number of pending applications stood at nearly 60,000, noting an impressive overall decrease of over

[6] Helen Keller, Andreas Fischer and Daniela Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2010) 21(4) European Journal of International Law 1025, 1025.

[7] See eg, Andrew Drzemczewski, 'Human Rights in Europe: an Insider's Views' (2017) 2 *European Human Rights Law Review* 134; Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21(1) *Penn State International Law Review* 101; 'A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol No. 11' in *Collected Courses of the Academy of European Law*, Vol 6, book 2 (Martinus Nijhoff 1997) 121-244; Alastair Mowbray, 'Reform of the Control System of the European Convention on Human Rights' (1993) *Public Law* 419.

[8] For an overview and critique of these measures, see Chapter 4 of the thesis.

60% since this figure reached a record-high of about 160,000 in September 2011.[9] Despite the constant efforts and reform processes over the past decades, the caseload crisis continues to pose a serious threat to the effectiveness of the entire ECHR system and it has been repeatedly recognised as the biggest challenge in the history of the Court.[10]

Apart from the unsustainable caseload, the ECtHR has been faced with another challenge which, in recent years, has become even more compelling: a persistent phenomenon of delayed/partial/non-execution of ECtHR judgments. Reform measures have generated some positive results regarding the execution of ECtHR judgments too as there were about 5,230 ECtHR judgments pending execution at the domestic level by States Parties at the end of 2019, compared to the record figure of around 11,000 unenforced cases in 2012. Despite this positive development, non-compliance with the Court's judgments remains a major problem for the Court and the ECHR system in general. Notably, the proportion of pending cases classified as leading cases - ie cases identified by the Court as new cases revealing the necessity for the respondent State to take more general measures in order to address structural or systemic problems and prevent similar violations in the future –[11] has remained high, while slowly increasing from 13% to 15% over recent years. As Chapter 3 further explains, the persistent failure of certain States to effectively execute ECtHR judgments in a full and timely manner creates a domino effect on the Court's backlog as this generates new, repetitive claims before it. Consequently, the Court is distracted from what this thesis will argue is the ECtHR's essential constitutionalist function, ie bringing non-compliant States in line with their Convention obligations by shaping their domestic laws and policies, thus jeopardising its credibility and authority as a regional human rights court.

Despite the efforts made so far, the reform process still remains slow. Several underlying issues of deeper constitutional importance, ie challenges to the authority of the ECtHR, which the thesis regards as *the* fundamental problem/challenge and seeks to draw the attention to, are yet to be resolved. In the analysis below, I will show that much of the recent reform of the ECtHR has been institutional, primarily aiming at tackling the practical challenges faced by the ECtHR, such as the case overload, and improving its institutional effectiveness. While acknowledging that these reform measures have been vital for the 'survival of the ECtHR',[12] in particular, and the entire ECHR system, in general, these positive

[9] For a comprehensive analysis of the ECtHR's statistical image, see Chapter 3 of the thesis.
[10] ibid.
[11] See eg, *13th Annual Report of the Committee of Ministers 2019* (Council of Europe 2020) 19 <https://rm.coe.int/annual-report-2019/16809ec315> accessed 20 April 2021.
[12] See eg, Thorbjørn Jagland, *Speech at the Conference on the Future of the European Court of Human Rights* (Interlaken, 18 February 2010), stating: 'I do not think that I am overly dramatic when I say that what is at stake is not only the effectiveness but the survival of the European Court of Human Rights' <https://www.coe.int/en/web/secretary-general/speeches-2010-thorbjorn-jagland/-/asset_publisher/u1PnOaJ3sk0h/content/conference-on-the-future-of-the-european-court-of-human-rights?inheritRedirect=false> accessed 5 May 2021; Dean Spielmann, *Speech at the Opening of the Judicial Year of the European Court of Human Rights* (Strasbourg, 30 January 2015), noting that the overwhelming backlog of the ECtHR in the late 2000s and early 2010s 'gave cause for concern about the very survival of the system'

developments presented in the Court's statistics could be characterised as misleading, in the sense that they only correspond to a narrow understanding of the Court's effectiveness while overlooking other important aspects of its functioning. Arguably, the structural and procedural reform measures have been successful in offering the ECtHR a new lease of life by merely mitigating its institutional shortcomings and providing temporary solutions for the short and medium-term. However, the extent to which these improvements on the institutional/technical level have contributed to securing the long-term effectiveness of the ECtHR is still questionable. Most importantly, though, despite years of continuous reform, certain questions of deeper constitutional importance relating to the Court's role and future within the ECHR system have not been adequately addressed or fully grappled with yet.

The ECtHR's case overload reveals another problematic aspect which is also explored in the thesis. Notably, a significant portion of applications currently pending before the ECtHR is overwhelmingly from a relatively small number of certain States, most of which joined the Convention system as part of the CoE's 1990s enlargement process. As current statistics confirm, more than half (56%) of the applications currently pending for examination before the Court are directed at just three States (ie Russia, Turkey and Ukraine), while the three-quarters (about 75%) of the pending cases concern only five States (adding Romania and Italy to the above list).[13] This reality, therefore, attests to the underlying systemic and structural deficiencies of the national legal order of certain ECHR States, where, in most cases, national authorities are clearly incapable or unwilling to respect the CoE's founding principles and embed the Convention standards into their legal orders in a sufficient/satisfactory manner.

It has now become a kind of mantra that the ECtHR is 'a victim of its own success',[14] resulting in a consistently high number of incoming applications and a permanently overwhelming backlog.[15] It has been claimed – mistakenly, as I will seek to demonstrate - that this "weakness" is due to the ECtHR's institutional incapacity to keep pace with the examination of an increasingly high number of individual applications, especially in the CoE post-1990 enlargement era.[16] Moreover, scholars, ECHR Contracting Parties and the ECtHR alike, have largely attributed the Court's high popularity – again, deceptively, as I argue - to

<https://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf> accessed 20 April 2021. See also, Michael O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' (2008) 1 *European Human Rights Law Review* 1, 5, noting that 'the tools contained in Protocol No. 14 … were meant to enable the Court to "survive" … pending the outcome of the longer term reform process'.

[13] Data as of January 2021. For a comprehensive analysis of ECtHR statistics, see Chapter 3 of the thesis.

[14] L Turnbull, 'A Victim of its Own Success: The Reform of the European Court of Human Rights' (1995) 1(2) *European Public Law* 215.

[15] See eg, Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 229; Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) *EJIL* 125, 126.

[16] See Chapters 2, 3 and 4 below.

its perceived success in protecting human rights at the international level, arguably making the ECtHR the most effective mechanism for the protection of human rights in the world.[17]

Against the above background, the thesis argues that the ECtHR, in the way it currently functions, is not effective to the extent it should or could be. The thesis, therefore, seeks possible answers to the underlying constitutional challenges that potentially could respond to the institutional issues as well, enabling the ECtHR to reach its full potential. The various institutional problems facing the ECtHR, I argue, essentially translate into an underlying challenge of effective authority, corresponding to the Court's inability to yield its authority over (non-compliant, law-defying) ECHR States. Going beyond this, while compliance of respondent States with the ECtHR judgments is already a major challenge for the Court, given its (quasi)constitutional function, I claim that *the* real challenge for the Court to be considered effective is to have the power to assert its authority, as this is expressed in its jurisprudence, vis-à-vis non-respondent States. Altering the behaviour of States beyond a particular human rights dispute and driving them to shape their domestic laws and policies in conformity with the applicable Convention standards may well constitute the benchmark for establishing an outright effective Court embracing its constitutionalist function.[18] In order to achieve the ECtHR's long-term effectiveness, the primary focus should thus be on further embedding the Convention principles into the national jurisdictions of the ECHR Contracting Parties.[19] As I attempt to demonstrate in my analysis below, cutting corners to improve costs, speed and productivity has proved to be inadequate in the long run and this, alone, cannot be the answer to the ECtHR's ongoing fundamental problem of effectiveness, as understood and explained in the thesis.[20] Without an appropriate change in the course of action with regard to the reform and future of the ECtHR, I argue, it is evident that the Court may well continue to underperform and remain hostage to its own institutional limitations while conducting its endless, but often ineffective, Sisyphean task of adjudicating an unsustainable docket.

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[17] ibid.

[18] See, *inter alia*, Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) *European Journal of International Law* 126; Janneke Gerards, 'The Paradox of the European Convention on Human Rights and the European Court of Human Rights' Transformative Power' (2017) 4(2) *Kutafin Law Review* 315.

[19] For a recent reaffirmation of this position, see statements made by various actors within the ECHR system, including the President of the PACE, the Commissioner for Human Rights of the Council of Europe, at the High-level Conference in Copenhagen. See, *Continued Reform of the European Human Rights Convention System – Better Balance, Improved Protection: High-level Conference Proceedings* (11-13 April 2018), 20, 28 <https://rm.coe.int/high-level-conference-on-continued-reform-of-the-european-human-rights/16808d560f> accessed 26 May 2021. See also, Steering Committee for Human Rights (CDDH), *Report on the Longer-term Future of the System of the European Convention on Human Rights* (2015) 29 <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 5 May 2021; Copenhagen Declaration (13 April 2018), paras 8, 12, 14.

[20] See, Section 1.3 below and analysis in Chapter 2.

1.2 Research Question

The central research question that the thesis intends to explore is whether the current, dominant reform agendas (ie reform proposals and measures adopted thus far) adequately address the fundamental problem of effectiveness facing the ECtHR. My proposition is that these dominant reform agendas have not adequately addressed the underlying problem facing the Court and, therefore, alternative means of how this fundamental problem might be addressed will be examined. In the thesis, I argue that the main reason the fundamental challenge that the ECtHR is faced with has not been adequately addressed in the various reform processes so far, essentially, lies with the fact that the current nature of the problem has been misframed, and thus misapprehended, as primarily institutional, rather than constitutional, in nature.

By critically analysing key ECHR stakeholders' official reports, speeches, declarations and other archival sources, I then argue that the framing of the challenges facing the ECtHR as primarily institutional in nature is fundamentally flawed and, as a result, the Court's ongoing reform process has been misguided by this misapprehension. As such, the decades-long reform process has been incapable of revealing the underlying problems of deeper constitutional importance, which arguably form the root cause of any further institutional shortcomings that the Court is faced with. Consequently, any reform proposals developed within this inadequate frame are unlikely to be effective in the long term. Responding to this misconception, the thesis argues that the challenges the ECtHR is faced with are, instead, primarily constitutional(ist) in nature and touch on the very "fabric", ie object and purpose, of the Court and the Convention system more broadly. Any institutional reforms proposed or implemented so far, however vital for the technical rationalisation and modernisation of the ECtHR, must be complemented by constitutional measures in order to secure a viable and effective long-term future for the Court.

In this regard, the thesis intends to re-shape the debate on the reform and future of the ECtHR in its constitutional dimension and provide a robust and viable response to its ongoing challenges following a comprehensive analysis of the underlying causes of its institutional shortcomings. In doing so, the thesis seeks answers as to why, for instance, it is still necessary nowadays for a European Court of Human Rights to co-exist along with the established and, in many cases, improved rights protection mechanisms at the national level. Similarly, it asks what role and purpose the 'new' Strasbourg Court, following the entry into force of Protocol No 11, should serve in an enlarged, diverse Europe, and what relationship it should have with national political and legal actors. These are fundamental questions of deeper constitutional importance which the various reform processes of the last decades failed to yield any conclusive or clear answers to. Admittedly, though, such questions should

form the contours of any debate on the reform and future of the ECtHR and, as a result, they will form the basis of any argument put forward in the thesis.[21]

In exploring the central research question, as described above, the thesis also identifies and addresses a series of questions that arguably have been left largely unanswered but remain fundamental for the Court's reform and future. Such overarching questions pertain to whether the primary role of the Convention system, and thus the ECtHR, is to provide individual or constitutional justice and whether these two concepts are inherently contradictory or whether they can co-exist. Furthermore, in light of the CoE enlargement and today's increasingly challenging political environment, it is essential to ask whether, and, most importantly, how the ECtHR can maintain consistent standards of rights protection in its jurisprudence while continuing playing its role to 'achieve a greater unity' between European States for the 'further realisation of human rights and fundamental freedoms',[22] or whether the evidently growing emergence of a multi-speed Europe in this regard is inevitable.

1.3 Thesis Argument and Narrative

Securing the long-term effectiveness of the ECtHR has been the ultimate objective underpinning the Court's various reform stages and notably the latest decade-long Interlaken process.[23] Despite the numerous reform proposals for achieving this aim, there has been no clear explanation of what it means for the ECtHR to be effective in the long run or how this attribute of the Court should be determined and measured. The first substantive chapter of the thesis (Chapter 2), therefore, focuses on the concept of effectiveness. Building on existing legal literature on assessing the effectiveness of international judicial institutions[24] as well as research from management and social sciences studies on the concept of organisational effectiveness,[25] Chapter 2 seeks to develop a structured

[21] See eg, Paul Mahoney, 'An Insider's View of the Reform Debate' (2004) 29 *NJCM Bulletin*, 171, 175.
[22] Council of Europe Statute 1949, Preamble and Article 1.
[23] See eg, *Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference* (3 July 2009) <https://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf> accessed 20 April 2021; *High Level Conference on the Future of the European Court of Human Rights – Interlaken Declaration* (19 February 2010) <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 April 2021; Steering Committee for Human Rights (CDDH), *The Longer-term Future of the System of the European Convention on Human Rights* (11 December 2015).
[24] See especially, Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013); Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014); Theresa Squatrito, Oran R. Young, Andreas Follesdal and Geir Ulfstein (eds), *The Performance of International Courts and Tribunals* (CUP 2018).
[25] See eg, Cheri Ostroff and Neal Schmitt, 'Configurations of Organizational Effectiveness and Efficiency' (1993) 36(6) *Academy of Management Journal* 1345; Peter Davis and Timothy Pett, 'Measuring Organizational Efficiency and Effectiveness' (2002) 2(2) *Journal of Management Research* 87; Ilona Bartuševičienė and Evelina

methodology providing a practical and workable framework with the necessary tools that allows us to determine, evaluate and improve the overall effectiveness of the ECtHR, as a supranational human rights court and in light of its multi-functionality. In doing so, the chapter discusses the evolving nature of the Court, noting its remarkable shift from an international court primarily concerned with reviewing the correctness of the application of Convention rights by national courts in individual rights disputes to a policy-shaping actor striving to establish uniform rights protection standards across Europe.

In light of this multi-functionality, and by applying a goal-based approach for assessing the effectiveness of the ECtHR, Chapter 2 argues that the Court's effectiveness cannot be merely assessed based on its case-processing capacity. Instead, the ability of the Court to assert its authority over ECHR States when requesting general measures or legal and regulatory changes in States' domestic orders needs also to form part of the equation. As mentioned in Section 1.1 above, Chapter 2 further argues that emphasising the Court's (quasi)constitutional function reveals that the real challenge for the Court's effectiveness has now shifted from being solely a problem of efficiency to being, first and foremost, a problem of effective authority. In this regard, I claim that the power to assert its authority vis-à-vis non-respondent States and its ability to influence State behaviour by increasingly engaging in 'structural reform litigation',[26] thus getting more actively involved in addressing and resolving systemic problems at the national level is *the* underlying challenge for the ECtHR to be considered effective. Seen from this perspective, further embedding the Convention principles into the national jurisdictions of ECHR States, including through the prompt and effective execution of the Court's judgments, is a fundamental element for strengthening the national rights protection mechanisms and, in turn, enhancing the overall effectiveness of the ECtHR. Chapter 2 thus concludes that reform measures aimed at enhancing the institutional efficiency and cost-effectiveness of the Court, albeit vital for the survival and continued legitimacy of the institution, are alone insufficient to fully address and resolve the underlying problems hindering its overall, normative effectiveness.

Based on the conceptual framework of effectiveness established in Chapter 2, the following chapter in the thesis (Chapter 3) examines the ECtHR's performance from a statistical perspective. The purpose of this statistical analysis is to assess whether the apparent progress achieved so far in the ECtHR's reform process has secured, or has the potential to secure, the Strasbourg Court's long-term effectiveness. In evaluating the completion of the Interlaken process, the key message that CoE bodies seek to convey is that the overall picture regarding the functioning of the ECtHR and the wider ECHR system looks rather positive. Indeed, former ECtHR President Sicilianos, commenting on the Court's situation,

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Šakalytė,'Organizational Assessment: Effectiveness vs Efficiency' (2013) 1 *Social Transformations in Contemporary Society* 45.

[26] Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 1, 6-8, 16-17.

noted that the latest findings of the Steering Committee for Human Rights (CDDH) at the end of 2019 showed it 'in a very positive light'.[27] A sense of success and optimism is also well evident in the official annual statistics published by the ECtHR and the Committee of Ministers (CoM) throughout the past reform decade (2010-2019). As the statistical analysis in Chapter 3 shows, however, any improvement achieved is largely attributed to the sharp reduction of clearly inadmissible or ill-founded applications following the establishment of the Single-judge formation in 2010 – a type of applications that was clogging up Strasbourg's entire judicial system for many years even before the launch of the Interlaken process.[28] Consequently, I claim that much of the focus of the Interlaken reform process was on containing the Court's ever-increasing backlog and reducing its overwhelming volume of pending caseload, thus improving its input-output ratio.[29]

The "success story" of the Interlaken process that the CoE annual reports seek to present forms only a part of the bigger picture. Despite the achievements noted, Chapter 3 shows that a number of underlying challenges remain unresolved, while others are, in many regards, even being exacerbated. Consequently, many of the achievements of the Interlaken process hailed in the ECtHR and CoM's annual reports are in fact deceptive and do not reflect the daunting reality of human rights protection on the ground. Indeed, the Court 'continues to receive a very high number of applications; [f]ar too many for an international court', most of which are repetitive in nature, and, as such, it 'continues to struggle to keep the backlog to the manageable level'.[30] Most importantly, though, national implementation of the Convention still remains one of the Court's major underlying challenges to date. This ongoing, and even worsening, problem is also well reflected in the statistics concerning the execution of ECtHR judgments domestically, which show that the phenomenon of delayed, partial or non-execution of ECtHR judgments has worryingly gained traction during the Interlaken process, both in relation to 'new' as well as 'old' Contracting Parties to the Convention.[31] It is thus evident that drawing conclusions on the success of the Interlaken process in improving the effective implementation of the Convention at the domestic level solely based on the reduction of the Court's backlog of pending cases can therefore be misguided. Although some technical elements regarding the functioning of the Court have significantly improved, efforts to eliminate the root causes of the ever-increasing number of

[27] Linos-Alexandre Sicilianos, Foreword, *Annual Report 2019 of the ECtHR* (Council of Europe 2020) 8 <https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf> accessed 20 April 2021.
[28] See eg, Lord Woolf, *Review of the Working Methods of the European Court of Human Rights* (2005), 19, 23-28; *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203 (2006), paras 26-28, 35.
[29] See analysis in Chapter 3.
[30] Christos Giakoumopoulos, Speech at *European Convention on Human Rights at 70: Current Challenges* (MGIMO University, 19 October 2020) <https://www.coe.int/en/web/human-rights-rule-of-law/speech-by-christos-giakoumopoulos-19-october-2020> accessed 5 May 2021.
[31] See eg, *9th Annual Report of the Committee of Ministers 2015* (Council of Europe 2016) 10 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d> accessed 20 April 2021; *14th Annual Report of the Committee of Ministers 2020* (Council of Europe 2021) 37-39 <https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8> accessed 20 April 2021. See also, Chapter 3 of the thesis.

applications reaching Strasbourg have not been equally successful. In other words, as I will seek to show in Chapter 3, the Interlaken reform process has disproportionately placed the burden of guaranteeing the long-term future and effectiveness of the ECtHR on its own (and the Registry's) ability to reduce the backlog of cases, mainly through technical rationalisation, whereas little has been achieved in strengthening the normative relationships between the Court and ECHR States and the place of the Convention in domestic orders. Consequently, analysing the statistical image of the Court proves that the viability of any progress achieved during the last decade remains fragile and highly susceptible to future overturn while the objective of securing the Court's long-term effectiveness is still far from fulfilled.

Following from Chapter 3's key observations, Chapter 4 explores in depth the main research question examined by the thesis. Drawing from frame theory,[32] Chapter 4 seeks to identify the reasons the dominant reform approaches have failed to achieve the end-goal of the reform process, ie to guarantee the future and long-term effectiveness of the ECtHR. The framing analysis in this chapter shows that discussions on how to ensure the survival and viability of the ECtHR since the 1980s have been primarily framed in technical or managerial terms and focused on how modifying the Court's institutional structures and improving its working methods and procedures can enhance its ability to manage more efficiently and cost-effectively its growing backlog of cases. Evidently, this reform frame has been incapable of revealing and addressing the underlying challenges of normative effectiveness facing the Court, which, I argue, are of constitutionalist nature instead. This misapprehension of the real nature of the identified problems began to change during the Interlaken process, when an attempt to identify and address the root causes of the Court's backlog challenge was first made. The position that the ECtHR is not a lone actor in the ECHR system and, thus, its overall effectiveness directly depends on the proper functioning of other key players as well, notably at the national level, started to gain ground. I refer to this as a 'systemic turn' in the Court's reform debate, implying a greater emphasis on the constitutionalist nature of its ongoing challenges.[33]

As Chapter 4 shows, the debate on the reform of the ECtHR during the last few decades has been taking place on two distinct levels: first, on the institutional/technical level concerning questions regarding the mechanics of the functioning of the Court with a view of enhancing its institutional efficiency and cost-effectiveness; and, second, on the constitutional level concerning questions underpinning the very object and purpose of the ECtHR within the wider ECHR system while (re)considering its relationship with national political and judicial actors. As I argue, however, approaches to reform seem to respond much more to the former level. Much of the reform process since the mid-1980s has focused on enhancing the

[32] See Section 1.4 below for an explanation of how and why frame theory is deployed in the thesis.
[33] See further below in this section and Chapter 5 more specifically for a critical analysis as to why this 'systemic turn' still proved insufficient in achieving the aims of the reform process.

institutional case-processing capacity and working methods of the Court, while substantive questions of deeper constitutional importance have been left largely undetermined or even wholly unchallenged. Although measures adopted on the first level 'may be sweeping in the sense that the functioning is profoundly changed, [they] are not revolutionary because they leave unchallenged the overarching object and purpose of [the] system and its general principles'.[34] Consequently, such institutional reforms need to be seen in their wider context and ultimately be conceived in relation to the deeper purpose the ECtHR is to serve. Questions underpinning the very role and function of the ECtHR thus need to be repositioned at the heart of the reform debate.

The above need to re-frame the challenges facing the ECtHR has caused the Court to reconsider its relationship with national authorities (political as well as judicial decision-makers) and become more deferential in the process.[35] In this respect, subsidiarity has arguably 'become the *leitmotif*' in the Court's latest reform process.[36] Chapter 5 thus critically examines these changes in the legal and political landscape, as reflected in the Brighton Declaration and at subsequent high-level conferences as well as through the introduction of 'constitutionalist' measures, notably the Amending Protocol No 15. By assessing the extent to which the shift to greater deference to national authorities has in fact materialised, as illustrated, for example, in the Court's 'age of subsidiarity' jurisprudence, the chapter seeks to determine whether the underlying challenge of effective authority and, thus, normative effectiveness facing the ECtHR has been adequately addressed and/or resolved. As former President Spielmann argued, the turn to an enhanced subsidiarity 'is the only sustainable way to alleviate the huge [backlog] pressure on the European mechanism'.[37] Throughout the thesis, and in light of Spielmann's statement, I approach subsidiarity and effectiveness as two sides of the same coin; as two concepts enjoying a symbiotic relationship.[38] I thus consider the national political and judicial authorities primarily responsible for securing the Convention rights. As further explained in Chapter 5, based on the subsidiary character of the Convention system, national authorities remain under the ultimate supervisory jurisdiction of the ECtHR, which, in turn, should address any identified shortcomings regarding their obligations under the ECHR. Essentially,

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[34] Lize Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 55-56.

[35] See eg, Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (Speech at Max Planck Institute for Comparative Public Law and International Law, 13 December 2013) 8 <https://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf> accessed 26 May 2021; Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *Human Rights Law Review* 487.

[36] Guido Raimondi, *Speech at the Conferral of the Treaties of Nijmegen Medal* (n 1) 5.

[37] Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (n 35) 8.

[38] This is also reflected in the Preamble of the ECHR which declares, for example, that the aim of the ECHR system is to ensure the 'maintenance and further realisation' of human rights and fundamental freedoms enshrined in the Convention.

what subsidiarity, as understood and explained in the thesis, makes evident is that the concepts of 'shared responsibility' and 'collective enforcement' - which have gained prominent place in the ongoing reform debate - do not apply only among the Contracting Parties but they also define the relationship between the ECtHR and the States. As such, rather than defining a clear-cut division of exclusive or even competing competences, subsidiarity highlights the supplementary and auxiliary nature of the ECtHR's external, supervisory role in reviewing the compatibility of national laws and practices with the Convention. I therefore argue in Chapter 5 that it is this additional layer of rights protection offered by the ECtHR at the international/regional level that ensures that the safeguard of Convention rights is made effective at the national level.

Besides this acknowledgment, however, Chapter 5 argues that, apart from some caseload-related benefits, these latest 'constitutionalist' measures have not, in reality, resolved the effectiveness and authority problem facing the ECtHR. Instead, these have exacerbated the fundamental problem as they have simply limited the scope of intervention of the Court into certain Convention matters even further. Additionally, and contrary to the belief that 'the signs so far are that [the subsidiarity-driven measures adopted post-Brighton] will not be regarded as modifying the basis of the Court's review',[39] Chapter 5's analysis shows that the Court's increased deference to national decision-makers marked a shift from a substantive to procedural review of Convention rights disputes, which, in turn, has resulted in a reduced standard of rights protection.

Having established that the nature of the challenges facing the ECtHR has been misframed as institutional, rather than constitutional, in nature and that recent attempts in the Interlaken reform process to grapple with issues of deeper constitutional importance have, in fact, exacerbated the underlying challenges facing the Court, there remains the question of how the overarching aim of securing the long-term future and effectiveness of the ECtHR can still be achieved. As a forward-looking contribution to the reform debate, Chapter 6 engages with this very question and argues that an alternative or revised approach to enhance the authority and normative effectiveness of the ECtHR is needed. In Chapter 6, I examine whether the further constitutionalisation of the ECtHR, ie the evolution of the ECtHR into a European Constitutional Court for human rights, might be an appropriate and viable solution to its ongoing fundamental challenges and, thus, capable of ensuring the long-term future stability and integrity of the entire European human rights project.

Chapter 6 begins by acknowledging the constitutionalist character of the ECtHR, as reflected in its duty to oversee the domestic application of the ECHR, which is already recognised as a 'constitutional instrument of European public order' in the field of human rights.[40] This

[39] Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (n 35).
[40] See eg, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (30 June 2005), para 156.

becomes more evident when one considers that the impact of the ECtHR's jurisprudence nowadays extends beyond the confined boundaries of the application of Convention rights in a concrete individual application and, instead, elucidates how the Convention standards can be applied in areas of wider public policy in the general interest of States and individuals.[41] This is particularly timely given the worryingly increasing autocratic tendencies in many ECHR States and the ECtHR's firm duty to uphold the common European values upon which the CoE was founded.[42] Consequently, I argue that the role of the ECtHR nowadays goes far beyond rendering individual justice and many of its decisions concern how the national legal systems must be reformed structurally, and such reforms are often constitutionally significant. The fact that the ECtHR often reviews the conventionality (ie compatibility with the Convention) of domestic laws and policies in areas that traditionally fell within the State's *domaine réservé*[43] and were thus categorically excluded from any judicial, let alone international, scrutiny reinforces its constitutionalist character.[44]

Taking the above into account, my analysis in Chapter 6 goes beyond a traditional understanding of constitutionalisation that sees it 'as an analytical tool that can distinguish between trivial adjudicatory decisions and more serious constitutionalist judgments'.[45] Instead, I develop the idea of hybrid constitutionalism as a normative manifestation to encapsulate the ECtHR's targeted and dynamic jurisprudential approach to influencing the ECHR States' national decision-making in favour of compliance with the applicable Convention standards. I thus argue that the ECtHR has now been transformed into a hybrid constitutional court for human rights, which decides to discharge its constitutionalist function depending on the gravity and scope of a Convention rights violation as well as the willingness or ability of the States' national authorities to cooperate in addressing and rectifying the identified systemic deficiencies domestically.

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[41] See, *Ireland v United Kingdom* App no 5310/71 (18 January 1978), para 154; *Konstantin Markin v Russia* App no 30078/06 (22 March 2012), para 89.

[42] See eg, Başak Çalı, 'Autocratic Strategies and the European Court of Human Rights' (2021) 2(1) *European Convention on Human Rights Law Review* 11. See also, European Commissioner for Human Rights, 'Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions' CommDH(2019)10 (29 March 2019) <https://rm.coe.int/hr-defenders-in-the-coe-area-current-challenges-and-possible-solutions/168093aabf> accessed 14 June 2021.

[43] See eg, Katja Ziegler, 'Domaine Réservé' in *Max Planck Encyclopedia of Public International Law* (OUP 2013), defining *domaine réservé* as 'the areas of State activity that are internal or domestic affairs of a State and are therefore within its domestic jurisdiction or competence' and noting that '*domaine réservé* describes areas where States are free from international obligations'.

[44] ibid. See also, Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 243; Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 *European Journal of International Law* 25, 27-28; Thomas Kleinlein, 'Constitutionalization in International Law' (2012) 231 *Contributions to Max Planck Institute for Comparative Public Law and International Law* 703, 706 <https://www.mpil.de/files/pdf2/beitr231.pdf> accessed 29 May 2021.

[45] Kanstantsin Dzehtsiarou and Alan Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' (2013) *Public Law* 710, 713. See also, Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael R Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 226.

A series of reform proposals are then made to further enhance the Court's (hybrid) constitutionalist role and function. In brief, the proposed measures include (i) the establishment of ECtHR "Regional Branches" in certain "designated geographic areas" in Europe, (ii) the strengthening of European consensus as an interpretive tool for assessing the scope of Convention rights in the Court's judicial reasoning, (iii) the introduction of "judgments of principle" as a jurisprudential measure to strengthen the *erga omnes* effect of the ECtHR judgments, and (iv) the introduction of an additional procedural admissibility criterion, whereby, under certain clearly pre-determined and codified requirements, national authorities could enjoy greater deference from the Strasbourg institutions. Each of the proposed measures is extensively discussed in Chapter 6, where I argue that these reforms, when considered together, can constitute practical and workable solutions that can guarantee the long-term future and effective functioning of the ECtHR.

1.4 Methodology

Beginning with Chapter 2, I develop a multidimensional model for defining, measuring and assessing the effectiveness of the ECtHR. By establishing a conceptual framework of effectiveness, I attempt to reconcile the focus on the institutional efficiency and cost-effectiveness of the Court with its normative effectiveness, as reflected through the impact of its jurisprudence on the domestic order of ECHR States. To achieve this, I employ a goal-based approach to effectiveness to illustrate the multi-functionality of the Court, that is the various functions it performs as a regional human rights court, and explain how this multi-functionality should be taken into account when evaluating the Court's overall effectiveness.[46] As such, a goal-based approach to effectiveness ensures that the correct balance between the institutional efficiency and normative effectiveness of the ECtHR is struck. Furthermore, the above method of analysis proves in a more structured manner that in order to achieve the ECtHR's long-term viability an examination of the Court's efficiency and cost-effectiveness should be complemented by a consideration of other aspects of its function that bear more normative or constitutionalist attributes.

The conceptual framework developed in Chapter 2 is adapted on and tested against the ECtHR's specific characteristics. Its straightforward and measurable benchmarks, however, could also serve as a potential model that could be applied to determine and assess the effectiveness of other international courts operating in different treaty-based systems. In

[46] See eg, Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225. See also, P Davis and T Pett, 'Measuring Organizational Efficiency and Effectiveness' (n 25); Jessica Sowa, Sally Coleman Selden and Jodi Sandfort, 'No Longer Unmeasurable: A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness' (2004) 33 *Nonprofit & Voluntary Sector Quarterly* 711.

this regard, the present research could also make a contribution to the growing body of studies investigating the work and functioning of international courts and tribunals.[47]

In Chapter 3, I conduct a statistical analysis of the present reality of the ECtHR by using quantitative research methods against the above effectiveness framework. In order to demonstrate how the main challenges currently facing the ECtHR are manifested, empirical (quantitative) data are collected from the official ECtHR Annual Reports and Analyses of ECtHR Statistics as well as the Annual Reports on the Supervision of the Execution process of ECtHR judgments published by the CoM. The timeframe of this statistical analysis is primarily focused on the Interlaken reform decade (2010-2019), although in certain cases references are made to the years preceding the launch of the Interlaken process for comparison purposes. Similarly, references are also made to the most recent Annual Reports of the ECtHR and CoM, published in the first quarter of 2021, to confirm certain trends already identified in the above analysis. While official CoE reports seek to deliver a rather positive message regarding the functioning of the ECtHR, a different picture emerges when a more critical assessment of the Court's statistics is conducted. By choosing a quantitative research method, Chapter 3's intention is to closely examine the statistical image of the Court from a more critical perspective in order to expose any misleading statements presented by various CoE bodies in relation to the Court's current, or future, performance. Most importantly, the purpose of the quantitative assessment is to demonstrate - statistically too, through identifiable trends and patterns - that, contrary to the dominant narrative in the Court's reform debate, the present reality as well as future prospect of the functioning of the ECtHR remains problematic and a cause of concern.

Empirical research is also conducted in Chapter 4, where a qualitative analysis is employed to explore, test and confirm the proposition in the central research question that the thesis examines. In Chapter 4, a chronological examination of archival sources concerning the Court's reform, including reports, speeches, resolutions and opinions of various CoE bodies and other ECHR stakeholders, is conducted. The timeframe of this analysis ranges from the mid-1980s to date. Essentially, I divide this timeframe into the three main stages in the Court's reform process: the first stage, which I call 'major reform' stage, ranges roughly between the mid-1980s when preparations for the first substantial reform of the ECHR control system started to take place, followed by the introduction of Protocol No 11[48] and the creation of the single, permanent Court in 1998; the second stage, namely the 'reform of the reform', locates itself in the first decade of the 2000s, thus concerning the period following the establishment of the 'new' Court until the adoption and entry into force of

[47] For relevant studies, see eg, Laurence Helfer, 'The Effectiveness of International Adjudicators' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013); Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014).

[48] *Explanatory Report to Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby* (11 May 1994) <https://rm.coe.int/16800cb5e9> accessed 14 June 2021.

Protocol No 14[49] in 2006 and 2010, respectively; and, finally, the latest stage in the Court's reform, which became known as the Interlaken reform decade,[50] lasting between 2010 and 2019, marking the adoption and entry into force of Protocols Nos 15[51] and 16.[52]

As noted in Section 1.3 above, Chapter 4 explores the proposition that the current, dominant reform agendas have misframed the challenges facing the ECtHR as primarily institutional, rather than constitutional, in nature. The deployment of frame theory as the methodological choice in this chapter is thus of particular importance. It allows us to interpret a given problem, identify its root causes and then evaluate the proposed solutions based on the way these issues were framed by certain actors. As relevant literature suggests, framing has been used as a social and political tool to influence a targeted audience's attitudes towards a particular topic.[53] Arguably, the framing of a problem or a situation in a given context influences the relevant audience's perception of the issues at stake and the subsequent decision-making on the matter.[54] As a result, framing is used in this chapter as a useful methodological heuristic that enables us to better understand the dynamics of the ECtHR reform debate amongst relevant actors and illustrate how these dynamics may affect the Court's future and long-term effectiveness.

Particularly important for exploring the thesis' research question is Tversky and Kahneman's empirical analysis, suggesting that frames intentionally select and focus on specific aspects of the reality described in order to call attention to particular aspects of the topic under study and, at the same time, direct attention away from some other.[55] Tversky and Kahneman describe this as 'framing effect', referring to a cognitive bias where people make

[49] *Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control systemof the Convention* (13 May 2004) <https://rm.coe.int/16800d380f> accessed 14 June 2021.
[50] See eg, *Memorandum of the President of the European Court of Human Rights to the States with a view to Preparing the Interlaken Conference* (n 23).
[51] *Explanatory Report to Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms* <https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 14 June 2021. It is noted, however, that Protocol No 15 enters into force in August 2021, after the Interlaken process has completed. See, 'Italy ratified the Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms' (Strasbourg, 21 April 2021) <https://www.coe.int/en/web/human-rights-rule-of-law/-/italie-ratified-the-protocol-no-15-amending-the-convention-for-the-protection-of-human-rights-and-fundamental-freedoms> 18 June 2021.
[52] *Explanatory Report to Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms* <https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf> accessed 14 June 2021. For further information on the Additional and Amending Protocols to the ECHR, including their full text, opening for signature and entry into force dates, see, *Complete List of the Council of Europe's Treaties* <https://www.coe.int/en/web/conventions/full-list> accessed 14 June 2021.
[53] See eg, Erving Goffman, *Frame analysis: An essay on the organization of experience* (Harvard University Press 1974); Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453; Robert Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (1993) 43(4) *Journal of Communication* 51.
[54] Amos Tversky and Daniel Kahneman, 'Rational Choice and the Framing of Decisions' (1986) 59(4) *The Journal of Business* 251-278.
[55] ibid.

decisions based on whether the available options are presented to them as positive or negative.[56] In Entman's words, 'to frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, casual interpretation, moral evaluation, and/or treatment recommendation for the item described'.[57] Accordingly, frames serve a series of certain functions: after defining or explaining a certain issue, frames then define problems (determine what a causal agent is doing and with what costs and benefits), diagnose causes (identifying the roots of the problem), make moral judgments (evaluate causal agents and their effects), and, finally, suggest remedies (offer possible treatments to the problem and predict their likely effects).[58]

Based on the above, framing is selected as the analytical mode in Chapter 4 in order to demonstrate that the predominantly technical or institutional frame of the ECtHR reform process over the past decades does not adequately capture the true nature and scope of the underlying challenges facing the ECtHR. I thus use framing to build on the thesis' overarching objective to re-shape and re-locate the debate on the reform and future of the ECtHR in its real, constitutional dimension and provide a robust and viable response to its ongoing challenges following a comprehensive analysis of the underlying causes of its institutional shortcomings. Although framing is the key analytical method in Chapter 4, its use also underpins other parts of the thesis, notably where I seek to problematise the narrow or distorted, at times, understanding of what it means for the ECtHR to be effective (Chapter 2), of the apparent "success story" of the Interlaken process (Chapter 3) as well as of the role that some States want the Court to have within the ECHR system (Chapter 5).

In conducting the above analysis, Chapter 4 further attempts to identify, select and categorise the relevant stakeholders within the ECHR system and, subsequently, examine how, and to what extent, these stakeholders have influenced, driven and contributed to the ECtHR's reform process since the 1980s to date. This is done based on the definitional descriptions of 'stakeholders' found in relevant literature, presenting them as 'those groups without whose support the organization would cease to exist',[59] entities 'on which the organization is dependent for its continued survival',[60] those who 'have an interest in the actions of an organization and…the ability to influence it',[61] and 'any group or individual who

[56] Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (n 53) 456-458.
[57] Robert Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (n 53) 52.
[58] ibid.
[59] Stanford Research Institute memo cited in E Freeman and D Reed, 'Stockholders and Stakeholders: A New Perspective on Corporate Governance' (1983) 25 *California Management Review* 88, 89.
[60] E Freeman and D Reed, 'Stockholders and Stakeholders: A New Perspective on Corporate Governance' (n 59) 91.
[61] Grant Savage, Timothy Nix, Carlton Whitehead and John Blair, 'Strategies for Assessing and Managing Organizational Stakeholders' (1991) 5(2) *Academy of Management Executive* 61, 61.

can affect or is affected by the achievement of the organisation's objectives'.[62] In the ECHR context, therefore, and for the purposes of the thesis, the relevant ECHR stakeholders include the traditional constituent bodies of the Council of Europe (CoE), namely the Committee of Ministers (CoM) and expert groups, such as the Steering Committee for Human Rights (CDDH), the ECtHR, its Registry and the Parliamentary Assembly of the Council of Europe (PACE). In order to achieve as comprehensive an analysis of the framing of ECtHR challenges as possible, the term 'stakeholders' extends to other CoE bodies, such as the Commissioner for Human Rights and the CoE Secretary-General. The importance of the individual and civil society as key stakeholders in the Court's reform process is also highlighted in the chapter. Arguably, the above broad perception of 'stakeholders' could extend further beyond the institutional boundaries 'at Strasbourg' so as to include actors at the national level, notably political and judicial authorities of the CoE Member States, which undoubtedly play a key role in the development of the Convention standards, the Court's reform process and the functioning of the Convention system in general. As explained in the following section, however, due to research limitations, a detailed analysis of the positions adopted by such actors falls beyond the scope of the present thesis.

Lastly, Chapter 5 seeks to investigate any potential shift in the Court's judicial practices and approaches following the adoption of the Brighton Declaration in April 2012[63] and, subsequently, Protocol No 15 in 2013. The analysis conducted in Chapter 5 is based on the review of relevant literature and serves to examine the extent to which States' post-Brighton demands for increased deference in favour of their domestic legal and political authorities have had any material or procedural impact on the Court's decision-making. Based on this literature review, an observation is made suggesting that the Court is now showing more deference in its decision-making. Some of the ECtHR's post-Brighton case law – which I identify as the Court's 'age of subsidiarity'[64] jurisprudence – is also used to offer some examples of the above observation. The selection of judgments discussed in Chapter 5 was made on the basis of certain factors, including their time relevance,[65] the novelty and

[62] Edward Freeman, Jeffrey Harrison, Andrew Wicks, Bidham Parmar, Simone de Colle (eds), *Stekeholder Theory: The State of the Art* (CUP 2010) 209. For relevant literature on how the concept of 'stakeholder' is used in organisational studies, see eg, Edward Freeman, 'The Politics of Stakeholder Theory: Some Future Directions' (1994) 4(4) *Business Ethics Quarterly* 409, 411-412; John Hasnas, 'Whither Stakeholder Theory? A Guide for the Perplexed Revisited' (2013) 112(1) *Journal of Business Ethics* 47, 52-55; David Caron, 'A Political Theory of International Courts and Tribunals' (2014) 24 *Berkeley Journal of International Law* 401, 402-03.

[63] *High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration* (20 April 2012) <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 20 April 2021.

[64] See eg, Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *HRLR* 487.

[65] See eg, *Austin and Others v UK* App nos 39692/09 *et al* (15 March 2012), which was delivered right before the Brighton Conference took place. It is worth noting that before the delivery of this judgment, the ECtHR had already published its position on the upcoming Brighton Conference. See, *Preliminary Opinion of the Court in Preparation for the Brighton Conference* (adopted by the Plenary Court, 20 February 2012) <https://www.echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf> accessed 20 April 2021. See also,

complexity of issues at stake,[66] the strong reaction they caused among the ECtHR bench[67] and the name of the respondent State.[68]

1.5 Challenges and Limitations

In conducting the present research, I acknowledge the fact that the ECtHR does not operate in vacuum. Rather, it forms part of a highly complex and increasingly inter-dependent geopolitical context within the wider CoE structure. As the centre of gravity of human rights protection in Europe is increasingly shifting closer to the national level, the notions of *shared responsibility* and *collective enforcement* gain greater importance. Yet, in the CoE context, in which major decisions are largely made by exercising diplomatic pressure, States are too often unwilling to sanction their non-compliant counterparts. Therefore, the success of any reform proposals made or indeed any measures adopted with a view to securing the future and long-term effectiveness of the Court will primarily depend on the political will of ECHR Contracting Parties to honour their international legal obligations under the Convention and remain faithful to the European human rights project.

Without disregarding the differences in domestic political systems across the CoE membership, for present purposes, I approach States as unitary entities on the international stage and, thus, in the CoE context.[69] For this reason, the changing political dynamics, different political agendas and party politics within each individual ECHR State are not examined in the following analyses. I thus consider each State as a single actor, which manages its foreign affairs, at least at CoE level, and speaks with "one voice", as reflected by the national governments' official position on Convention-related matters. Moreover, although it may be interesting to investigate in greater detail the individual political dynamics in every ECHR State and their subjective motives for adopting a particular position in the debate on the reform and future of the Court (or indeed examine how this position

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Scoppola v Italy (No. 3) App no 126/05 (22 May 2012), which was delivered in the aftermath of the Brighton Conference. See further, Chapter 5 of the thesis.

[66] Almost all of the judgments discussed in Chapter 5 were delivered by the ECtHR's Grand Chamber.

[67] See eg, *Correia de Matos v Portugal* App no 56402/12 (4 April 2018) and *Animal Defenders International v. UK*, app no. 48876/08 (22 April 2013), both of which were decided by a narrow majority of nine to eight votes. See also the dissenting opinions in these judgments, especially of Judge Pinto de Albuquerque in *Correia de Matos v Portugal* and the Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano in *Animal Defenders International v. UK*. For an analysis of these dissenting opinions and their implications, see eg, Laurence Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(2) *European Journal of International Law* 797, 799, referring to them as 'walking back dissents'.

[68] Many of these judgments were delivered against the UK, which during the Interlaken reform decade has expressed strong criticism against the ECtHR and demanded greater deference to its national decision-makers. See analysis in Chapter 5.

[69] See eg, Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6(3) *European Journal of International Law* 503, 506-507; Eric A Posner, 'International Law and the Disaggregated State' (2005) 32 *Florida State University Law Review* 797, 798-799. Cf, Uwe Kischel, 'The State as a Non-unitary Actor: The Role of the Judicial Branch in International Negotiations' (2001) 39(3) *Archiv des Völkerrechts* 268.

may have changed across different reform stages), this clearly falls beyond the scope of the thesis. That being said, Chapter 2 does recognise domestic legal and political factors as one of the parameters affecting the effective functioning of the ECtHR,[70] without, however, examining further any responses to, reasons or political expediencies behind such contextual factors.[71] Similarly, the thesis distinguishes between the position of individual States in the reform debate and the position of CoM, where collective decisions are made on the basis of political compromise and consensus at a CoE-47 level.[72]

Furthermore, the thesis does not provide an empirical investigation to assess the effectiveness of the ECtHR on the basis of the impact that the implementation of the Convention has had in specific Contracting Parties' domestic orders. This task has already been performed by a number of scholars[73] and undertaking a similar exercise would not justify the alternative approach that this present research seeks to adopt with regard to understanding the ECtHR's evolving role as a constitutional court (see Chapter 2). Additionally, in analysing the impact of the 'constitutionalist' measures adopted post-Brighton, as reflected in the Court's 'age of subsidiarity' jurisprudence, Chapter 5 does not look at how domestic political developments influence the nomination and selection of ECtHR judges or any implication this may have on the Court's decision-making.[74] Similarly, judicial politics within the ECtHR, ie the judicial behaviour of individual ECtHR judges and their policy preferences, are not taken into consideration in Chapter 5's analysis either.[75]

[70] See Chapter 2, Section 2.4.

[71] Also, Chapter 4 does make specific references to initiatives undertaken by certain ECHR States that had particular influence at various stages of the reform debate, such as the High-level Conferences on the future of the ECtHR, organised with the initiative of the State holding the chairmanship of the CoM during the Interlaken process. Again, domestic politics that may have shaped individual States' approaches to the Court's reform are not examined in this analysis.

[72] Unless otherwise specified, the thesis considers and analyses the collective position of ECHR States, as reflected in the CoM setting. See, for example, Chapter 4, Section 4.5, where a distinction is drawn between the draft Copenhagen Declaration produced solely by the Danish government and the final Copenhagen Declaration approved by all CoE 47 member States.

[73] See eg, Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008); Leonard Hammer and Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (Eleven International 2012); Dia Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press 2013); Janneke Gerards and Joseph Fleuren, *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law: A Comparative Analysis* (Intersentia 2014); Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (CUP 2016).

[74] For studies analysing these aspects, see, Jutta Limbach, Pedro Cruz Villalón, Roger Errera, Lord Lester, Tamara Morschtschakowa, Lord Justice Sedley and Andrzej Zoll, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (INTERIGHTS 2003); Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61(4) *International Organization* 669; Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) *American Political Science Review* 417; Erik Voeten, 'The Politics of International Judicial Appointments' (2009) 9(2) *Chicago Journal of International Law* 387.

[75] Empirical studies have already analysed the voting patterns and the degree of deference ECtHR judges are eager to grant national authorities as well as any shift in such judicial behaviour over time. See in particular, Erik Voeten, 'Politics, Judicial Behaviour, and Institutional Design' in Jonas Christoffersen and Mikael Rask

Furthermore, although Chapter 5 examines the impact of the 'systemic' or 'constitutionalist' reform measures, as exaplined above, the analysis is limited to the (potential) impact of Protocol No 15 and measures encouraging the ECtHR to exercise greater deference towards national authorities. As a result, the potential impact of Protocol No 16 on strengthening the authority, thus normative effectiveness, of the ECtHR is not explored in the thesis. I acknowledge that a closer examination of the debates on the drafting and subsequent adoption of Protocol No 16 could offer some further nuance to the analysis of the ECtHR's reform process, not least because this Protocol was specifically introduced in order to 'enhance the Court's "constitutional" role'.[76] Nevertheless, due to the lack of empirical evidence regarding how Protocol No 16 has operated to date, I chose not to engage with this aspect of the Court's reform in my thesis.[77] This is certainly a novel area in the study of the ECHR system and invites further research on the matter, especially as the body of advisory opinions delivered under the new protocol gradually grows.[78]

Lastly, the thesis does not attempt to challenge the good faith of Contracting Parties in engaging in a reform process with a view to securing the future and long-term effectiveness of the ECtHR. Nor does it question States' frequently repeated 'deep and abiding commitment'[79] to the protection of Convention rights. Although there might be strong reasons to do so, given the counter-productive, at times, stance of certain States towards this objective,[80] this aspect *per se* does not form part of the present research question. It is

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Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011); European Centre for Law & Justice (ECLJ), *NGOs and the Judges of the ECHR 2009-2019* (ECLJ 2020).

[76] Explanatory Report to Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para 1.

[77] See section 7.2 in Chapter 7 of the thesis where I present a series of questions that could form the basis for further research in relation to Protocol No 16 once a more considerable body of relevant empirical evidence becomes available.

[78] For some preliminary thoughts on how Protocol No 16 could influence the implementation of the Convention in States' domestic orders and the impact it may have on the relationships between national highest courts and the ECtHR, see *inter alia*, Kanstantsin Dzehtsiarou and Noreen O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34(3) *Legal Studies*, 444; Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention on Human Rights: A Comparative and Critical Appraisal' (2014) 21(4) *Maastricht Journal of European and Comparative Law*, 630; Björg Thorarensen, 'The Advisory Jurisdiction of the ECtHR under Protocol No.16: Enhancing Domestic Implementation of Human Rights or a Symbolic Step?' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection – Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016); Síofra O'Leary and Tim Eicke, 'Some reflections on Protocol No 16' (2018) 3 *European Human Rights Law Review* 220; Koen Lemmens, 'Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?' (2019) 15(4) *European Constitutional Law Review* 691.

[79] See eg, *High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration* (n 63), para 1; *Copenhagen Declaration* (13 April 2018), para 1 <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf> accessed 20 April 2021.

[80] For instance, the UK has been engaging in the Court's Interlaken reform process since 2010 while openly maintaining, at least domestically, its pledge to withdraw from the ECHR and replace the Human Rights Act 1998, ie the national legislation incorporating the ECHR in the UK domestic order, with a so-called British Bill of Rights. See eg, *Conservative Manifesto 2010*, 79-80 <https://general-election-2010.co.uk/2010-general-

nevertheless acknowledged that in times of heightened tension and a growing backlash against the ECtHR, ECHR States have sought to curtail the authority and independence of the Court by delimiting its jurisdiction and, thus, its role in reviewing and delivering judgments on certain Convention-related matters.[81] As former ECtHR President Raimondi stated, 'the challenge to Strasbourg remains. It takes aim at what is said to be a judicial activism at the European level, over-reaching by a judicial European institution, over-riding national democracy and over-turning national decisions'.[82] This challenge, former President Raimondi adds, 'is continuous, and those tasked with upholding rights must be ever vigilant'.[83]

Taking the above into account, the thesis will seek to problematise the dominant approaches to the reform of the ECtHR, as primarily expressed by States' national governments, and explain the reasons these approaches have so far proved inadequate to secure the Strasbourg Court's future and long-term effectiveness. I will then attempt to identify alternative means of how the Court should and could best be reformed in order to achieve the above objective. In recognising that no reform measure can constitute a magic bullet to realising this goal, the present thesis is expected to be read at least as an alternative, guiding framework, indicating the future direction that following reform processes should consider.

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election-manifestos/Conservative-Party-Manifesto-2010.pdf> accessed 22 June 2021; Helen Fenwick and Roger Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality? (2017) 80(6) *Modern Law Review* 1111. Other notable examples include Russian Constitutional Court's decision that ECtHR judgments may not be executable at the domestic level if they contradict the Constitution of the Russian Federation, certain States' (eg Turkey, Azrbaijan) poor record of execution of ECtHR judgments and some other States' attempts to weaken the jurisdiction and, thus, influence that the ECtHR has in their domestic legal orders. See eg, Azar Aliyev, 'Decision of the Russian Constitutional Court on Enforcement of the Yukos Judgment: The Chasm Becoming Deeper' (2018) 6 *European Human Rights Law Review* 578; Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66(2) *International and Comparative Law Quarterly* 467; Sarah Lambrecht, 'Undue Political Pressure is not Dialogue: The Draft Copenhagen Declaration and its Potential Repercussions on the Court's Independence' (*Strasbourg Observers*, 2 March 2018) <https://strasbourgobservers.com/2018/03/02/undue-political-pressure-is-not-dialogue-the-draft-copenhagen-declaration-and-its-potential-repercussions-on-the-courts-independence/> accessed 26 May 2021; Ramute Remezaite, 'Challenging the Unconditional: Partial Compliance with ECtHR Judgments in the South Caucasus States' (2019) 52(2) *Israel Law Review* 169.

[81] See eg, Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18(2) *Perspectives on Politics* 407; Mikael Rask Madsen, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights' (2020) 22(4) *British Journal of Politics and International Relations* 728; Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 *International Studies Quarterly* 770.

[82] Guido Raimondi (former ECtHR President), *Speech at the Conferral of the Treaties of Nijmegen Medal* (n 1) 4

[83] ibid.

Chapter 2
Governing Regional Justice: Assessing the Effectiveness of the ECtHR

'Although the best-performing organizations are both effective and efficient, there may be trade-offs between the two. Progression along one performance dimension could entail regression along another'.[1]

2.1 Introduction

Guaranteeing the long-term effectiveness of the ECtHR has occupied a central place in the ongoing debate on the reform and future of the Strasbourg Court during the past few decades. In fact, the enhancement of the effectiveness of the ECHR system, in general, and the ECtHR, in particular, has been considered essential in ensuring the effective protection of Convention rights across Europe[2] and one of the key objectives of the Interlaken process for preserving the viability of the Court.[3] Despite the fact that several CoE reports and studies have proposed measures in this respect, no clear or in-depth explanation has been provided so far as to what it means for the ECtHR to be considered effective or how its effectiveness can be measured. The present chapter, therefore, focuses on the notion of effectiveness and aims to develop a conceptual framework for defining, understanding and assessing the ECtHR's (under)performance in light of its multi-functionality.

The ECtHR, States Parties to the Convention and an array of domestic actors have an interest in observing, measuring and enhancing the effectiveness of the Court in order to justify its continuous relevance and importance in today's context. In applying a goal-based

[1] Cheri Ostroff and Neal Schmitt, 'Configurations of Organizational Effectiveness and Efficiency' (1993) 36(6) *Academy of Management Journal* 1345, 1345.

[2] See eg, Steering Committee for Human Rights (CDDH), *Guaranteeing the Long-term Effectiveness of the European Court of Human Rights – Final Report containing proposals of the CDDH*, CM(2003)55 (8 April 2003); Committee on Legal Affairs and Human Rights (PACE), *Guaranteeing the Authority and Effectiveness of the European Convention on Human Rights (Report)*, Doc 12811 (3 January 2012); Committee on Legal Affairs and Human Rights (PACE), *The Effectiveness of the European Convention on Human Rights: The Brighton Declaration and beyond (Report)*, Doc 13719 (2 March 2015); Steering Committee for Human Rights (CDDH), *The Longer-term Future of the System of the European Convention on Human Rights* (11 December 2015).

[3] See eg, *Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference* (3 July 2009) <https://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf> accessed 20 April 2021; *High Level Conference on the Future of the European Court of Human Rights – Interlaken Declaration* (19 February 2010) <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 April 2021.

approach for assessing the effectiveness of the ECtHR, the chapter emphasises the multi-functionality of the Court to explain that its effectiveness cannot be merely assessed based on the number of cases examined or its compliance rate. Instead, the ability of the Court to assert its authority over ECHR States when requesting general measures or legal and regulatory changes in States' domestic orders needs also to form part of the equation. By addressing this 'functional myopia',[4] Chapter 2 argues that, in order to achieve the long-term effectiveness of the Convention system, and the ECtHR in particular, the primary focus should be on further embedding the Convention principles into the national jurisdictions of the ECHR Contracting Parties. The chapter further acknowledges that while respondent States' compliance with ECtHR judgments is already a major challenge for the Court, appreciation of the Court's (quasi)constitutional function reveals that the real challenge for the Court's effectiveness is whether it has power to assert its authority, as this is expressed through its jurisprudence, to non-respondent States. Therefore, in further recognising the ECtHR's meta-effective authority, I argue that altering the behaviour of States beyond a particular human rights dispute may well constitute the benchmark for establishing an outright effective Court embracing its constitutionalist function. I further elaborate on the ECtHR's meta-effective authority, and how this can be achieved, in Section 2.4 below.

The chapter further seeks to problematise the restrictive understanding of effectiveness that is increasingly employed in the reform processes of international courts, which emphasises efficiency and cost-effectiveness, often to the neglect of normative effectiveness. As the statistical analysis conducted in the next chapter (Chapter 3) will further demonstrate, reform of the Court has so far reflected a managerial approach to effectiveness. Such an approach has been crucial in constructing a progress narrative that enables the Court and other CoE actors to showcase the evolution of the ECtHR from inefficient bureaucracy to an efficient, well-managed and well-functioning judicial institution. Although managerial reform measures may delay the effects caused by the ECtHR's underperformance, such measures alone are insufficient to fully address and resolve the underlying problems hindering the overall effectiveness of the Court. Instead, as I argue in the present chapter, what is often needed for an international judicial institution to become and/or remain effective in the long run is a more drastic structural redesign that touches its very 'fabric', that is the object and purpose it serves within the international legal regime in which it is embedded.[5]

[4] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49, 51, using the term in a similar context.

[5] See eg, Yuval Shany, 'Plurality as a Form of (Mis)management of International Dispute Settlement: Afterward to Laurence Boisson de Chazournes' Foreword' (2018) 28(4) *EJIL* 1241, 1249.

2.2 Understanding Effectiveness

Defining and assessing the effectiveness of a given organisation, and especially of a regional court entrusted with the promotion and protection of human rights, like the ECtHR, is not a straightforward task. Indeed, conceptually, the effectiveness of organisations remains an enigma as it can have multiple dimensions and multiple definitions. In the human rights context, as the International Council on Human Rights Policy noted, 'effectiveness' will, to some extent, depend on the observer's subjective point of view.[6] While, for example, for individuals, effectiveness is likely to mean the prompt resolution of their complaints to their satisfaction, this factor may only be one of the relevant criteria for a judicial institution in determining and assessing its own effectiveness. Despite the abstract, and often subjective, definition and conceptualisation of effectiveness, social sciences studies have developed several tools, such as outcome measurement, benchmarking, and quality systems to assess and build organisational capacity and achieve greater effectiveness of institutions.[7] Yet, limited progress has been made on reaching a consensus on a particular model or approach for evaluating the concept.

The thesis adopts a goal-based approach to understanding and assessing the effectiveness of the ECtHR. The rationale of the goal-based approach to effectiveness argues that organisations are designed to achieve certain goals, both formally specified and implicit.[8] According to this approach, an actor 'is effective if it accomplishes its specific objective aim',[9] and it has been identified as the dominant and most suitable method for evaluating international courts' effectiveness.[10] Goals under this approach act as a key, overarching criterion and, therefore, the extent to which an organisation reaches its goals determines its effectiveness. As a result, the first and most important step in measuring the effectiveness of an organisation under the goal-based approach is to identify those aims or goals, ie the desired outcomes the court in question ought to generate.[11] The definitional elements of effectiveness identified below in this section will then be applied against the specific goals of

[6] International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (ICHRP, 2000) 105.
[7] See eg, KN Jun and Ellen Shiau, 'How Are We Doing? A Multiple Constituency Approach to Civic Association Effectiveness' (2011) 41(4) *Nonprofit and Voluntary Sector Quarterly* 632; CW Letts, WP Ryan and A Grossman, *High Performance Nonprofit Organizations: Managing Upstream for Greater Impact* (Wiley, 1999); Cheri Ostroff and Neal Schmitt, 'Configurations of Organizational Effectiveness and Efficiency' (n 1); P Rich, 'The Organizational Taxonomy: Definition and Design' (1992) 17 *Academy of Management Review* 758; James L Price, 'The Study of Organizational Effectiveness' (1972) 13 *Sociological Quarterly* 3.
[8] Jessica Sowa, Sally Coleman Selden and Jodi Sandfort, 'No Longer Unmeasurable: A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness' (2004) 33 *Nonprofit & Voluntary Sector Quarterly* 711, 713.
[9] Chester Bernard, *The Function of the Executive* (HUP 1968) 20.
[10] Yuval Shany, 'A Goal-Based Approach to Effectiveness Analysis' in *Assessing the Effectiveness of International Courts* (OUP 2014) 13-14.
[11] ibid, 13-15.

the ECtHR, in light of its multi-functionality, in order to determine its own levels of effectiveness.[12]

In doing so, it is understood that particular challenges may be encountered. A primary conceptual challenge related to the application of the goal-based approach involves the issue of implementation of the commonly accepted, but still very broad, definition of effectiveness. Different stakeholders within an organisation may have different goals or prioritise goals differently. As a result, they may perceive effectiveness in a completely different manner. A goal-based approach to judicial effectiveness will thus require us to develop different effectiveness benchmarks for courts pursuing different goals. Factors that render one international court effective may or may not apply to a different international court.[13] Another important factor that may affect the assessment of effectiveness of a given organisation is the phenomenon of goal shifting.[14] It is essential to note that organisational goals are not necessarily static but can evolve over time. As will be further explained below, effectiveness depends also on the 'context' variable, reffering, *inter alia,* to the ability of the organisation to adapt itself in the changing needs and circumstances of its surrounding environment. Indeed, the viability of an organisation is closely related to its adaptability, which, when taken together, form two of the most important indicators of the organisation's effectiveness.[15] This observation finds application in the case of the ECtHR too, which operates within a constantly changing and evolving social, political and legal landscape.[16] As the chapter demonstrates further below, the goal shifting phenomenon is particularly evident in the ECtHR context, whereby the Court's multi-functionality has been shaped over the years.[17]

2.2.1 Benchmarks of Effectiveness

As already noted, the concept of effectiveness covers a very broad research field. A review of relevant studies in sociology, organisational management and international (judicial) institutions reveals a wide range of definitions of effectiveness and a variety of models and methods for measuring and assessing it. Although an agreement on the exact characteristics of effectiveness can be sparse across these studies, a synthesis of relevant findings suggests

[12] See Sections 2.3 and 2.4 below.
[13] For conceptual or methodological challenges in applying the goal-based approach to determine effectiveness, see, SE Seashore, 'A Framework for an Integrated Model of Organzational Effectiveness' in KS Cameron and DA Whetten (eds), *Organizational Effectiveness: A Comparison of Multiple Models* (Academic Press, 1983), 59.
[14] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225, 235.
[15] ibid, 235.
[16] Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 23-25.
[17] Karen Alter, 'The Multiple Roles of International Courts and Tribunals' in Jeffrey Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013) 350.

that certain generally accepted elements that formulate the foundations of the concept can be identified.[18] Based on these studies, the chapter presents certain factors and characteristics, in the form of benchmarks, by which the effectiveness of the ECtHR could be understood, determined and assessed. These can be divided into four distinct, but closely interrelated, dimensions: *capacity*, *performance*, *authority* and *context*. This proposed multidimensional model for evaluating the effectiveness of the ECtHR could then be deconstructed further into various subcomponents, as explained in turn below. The rationale behind this combination of parameters suggests that effectiveness is a multifaceted concept that facilitates capability building and underpins the ability of a given institution to maintain and improve balance between credibility, speed and quality in its area of practice – in the ECtHR case, the promotion and protection of human rights across European States.

Although a more comprehensive analysis of these dimensions is provided later in this chapter, it is first worth outlining briefly some of their key characteristics which I will use to further develop the arguments below. Beginning with *capacity*, the specific benchmarks related to this dimension of effectiveness may involve a clear legal foundation or framework for the Court to operate, a clearly defined and compulsory jurisdiction as well as a legally binding status of its rulings. These characteristics are provided for by the Convention text, which establishes the ECtHR as a permanent court with a specific mandate (Article 19 ECHR) and clarifies the Court's compulsory jurisdiction and the unconditional obligation of ECHR respondent States to comply with its final and legally binding judgments (Article 46 ECHR). Additionally, *capacity* may also refer to a coherent organisational management and structure, operational efficiency and the necessary (human, material and financial) resources that need to be made available for the institution to carry out its duties, as these are defined by its constituent instrument. With regard to *performance*, the list of factors may contain adequate powers and mechanisms for the Court to perform its functions, including for example the various filtering and jurisprudential tools, such as the pilot-judgment procedure and the body well-established case law (WECL), that enable the Court to engage in speedier, more consistent and accurate review of the applications pending before it. Furthermore, the quality of its jurisprudence and the direct or indirect impact of its jurisprudence may also fall under this dimension.

[18] For sociological understandings of effectiveness, see nn 7-8 above. For relevant studies in international courts that inspired the identification of benchmarks of effectiveness proposed in this chapter, see eg, Lawrence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273; S Livingstone and R Murray, 'The Effectiveness of National Human Rights Institutions', in S Halliday and P Schmidt, *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart, 2004) 141-143; Laurence Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899, 906; Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (n 14) 238-239; Yuval Shany, 'A Goal-Based Approach to Effectiveness Analysis' in *Assessing the Effectiveness of International Courts* (n 10).

Authority, in turn, may refer to the perceived independence of the institution, the accessibility and transparency of its proceedings, the reputation and support it enjoys from its various stakeholders, and the extent to which the interpretation and application of the Convention is made 'practical and effective' so that they reflect the constantly changing societal realities within and across ECHR States.[19] *Authority* also refers to State compliance with the Court's final judgments and, most importantly, the Court's ability to influence State behaviour at different levels (transformative effect of its jurisprudence).[20] As I discuss further below in the chapter, the ECtHR has strengthened its authoritative position within the European human rights architecture by gradually moving away from its original 'declaratory model of human rights litigation' to a more 'structural reform litigation', thus getting more actively involved in addressing and resolving systemic problems at the national level.[21] In addition, following Guzman's proposition that determining the effectiveness of an international legal institution requires far more than the observation that States often comply with its judgments, the chapter argues that determining whether and when the ECtHR changes the behaviour of States Parties is also a necessary pillar for assessing its overall effectiveness.[22] Similarly, in recognising this 'causal effect' of an international court, Martin suggests that effectiveness should be assessed against the extent to which an international treaty or the judicial body established to monitor its implementation at national level solve the problem that led to their formulation in the first place.[23] In the ECHR context, the ECtHR in its case law identified the Convention as 'a treaty for the effective protection of individual human rights',[24] but also as a treaty 'designed to maintain and promote the ideals and values of a democratic society'.[25] As such, one may consider the 'problem' 'solved' and, thus, the ECtHR effective when ECHR States consistently adhere to the Convention standards, as established under the Court's jurisprudence over time, and implement the necessary restorative as well as preventive measures to avoid similar rights violations in the future.

[19] See eg, *Goodwin v United Kingdom* App no 28957/95 (11 July 2002), para 74. See also, Luzius Wildhaber, 'European Court of Human Rights' (2002) 40 *Canadian Yearbook of International Law* 310, emphasising that evolutive interpretation is fundamental to the effectiveness of the ECHR system and the Court's authority. The term 'effective' is indeed found in various places in the Convention, including the Preamble and Articles 13, 34 and 52 ECHR.

[20] See eg, Janneke Gerards, 'The Paradox of the European Convention on Human Rights and the European Court of Human Rights' Transformative Power' (2017) 4(2) *Kutafin Law Review* 315.

[21] Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 1, 6-8, 16-17.

[22] Andrew Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 22.

[23] Lisa Martin, 'Against Compliance', in Jeffrey Dunoff and Mark Pollack (eds), Interdisciplinary Perspectives on International Law and International Relations (CUP 2013) 600-601.

[24] *Saadi v UK* App no 13229/03 (29 January 2008), para 62.

[25] *United Communist Party of Turkey and Others v Turkey* App no 133/1996/752/951 (30 January 1998), para 45.

Under the conceptual framework of effectiveness developed in this chapter, *authority* may also refer to the perceived legitimacy that the ECtHR enjoys among ECHR stakeholders.[26] Indeed, I consider legitimacy an integral component of the effective authority, thus normative effectiveness of the ECtHR. As noted in the literature, 'an international tribunal without legitimacy cannot be effective', therefore, 'the effectiveness of the Strasbourg system depends on its legitimacy'.[27] Consequently, legitimacy forms a key precondition to the overall effectiveness of the ECtHR since, arguably, 'human rights tribunals cannot function effectively if they are perceived to be illegitimate'.[28]

Although the ECtHR 'has earned respect and recognition at both national and international levels',[29] its legitimacy cannot be taken for granted. Indeed, neither the moral superiority of human rights enshrined in the Convention[30] nor the fact that the Contracting Parties have voluntarily accepted the compulsory jurisdiction of the Court and certain other legal obligations by signing and ratifying the ECHR constitute sufficient factors that can guarantee the continuous legitimacy of the Court.[31] Knowing that maintaining high levels of legitimacy is an important factor contributing to its long-term effectiveness, the ECtHR often strives to deliver judgments that will be accepted by the various compliance constituencies across the ECHR system. Commentators thus tend to conflate the idea of legitimacy with compliance.[32] While compliance is important, however, it alone cannot determine the legitimacy of an international court.[33] As I further explain below, this ongoing quest for legitimacy risks

[26] For the various understandings of legitimacy developed over time, including the conept's social as well as normative dimensions, see, Başak Çalı, Anne Koch and Nicola Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35(3) *Human Rights Querterly* 955, 960, determining legitimacy, for instance, by 'capturing what normative expectations actors have of an institution and how actors assess whether such expectations are met'. See also, David Beetham, *The Legitimation of Power* (Palgrave Macmillan 2013, 2nd edn) 38, adopting a 'legitimacy-in-context' approach to suggest that multiple and often contradictory understandings of legitimacy may be adopted about the same institution.

[27] Kanstantsin Dzehtsiarou and Donal Coffey, 'Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights' (2014) 37(2) Hastings International and Comparative Law Review 269, 269, 271.

[28] Kanstantsin Dzehtsiarou, 'Legitimacy of the Court and Legitimacy of its Judgments' in *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 143.

[29] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009) 125.

[30] ibid, 3, arguing that moral values of human rights legitimise ECtHR judgments.

[31] See, Kanstantsin Dzehtsiarou, 'Legitimacy of the Court and Legitimacy of its Judgments' (n 28) 153-154.

[32] See eg, C J Carrubba and M J Gabel, 'Courts, Compliance, and the Quest for Legitimacy in International Law' (2013) 14(1) *Theoretical Inquires in Law* 505, 509 and 533, arguing that compliance is an important aspect affecting a court's legitimacy and the two notions have an inter-dependent relationship: 'legitimacy enhances compliance and compliance enhances legitimacy'; Nico Krisch, Beyond *Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 144-145, arguing that the ECtHR maintains its legitimacy by keeping the cost of compliance with its judgments relatively low. See also, James L Gibson and Gregory A Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support and the European Court of Justice' (1995) 39(2) *American Journal of Political Science* 459, 460, arguing that from a methodological perspective, 'the operational indicator of legitimacy is compliance'.

[33] See eg, Kanstantsin Dzehtsiarou, 'Legitimacy of the Court and Legitimacy of its Judgments' (n 28) 154-155; Yuva Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (n 14) 244-247.

rendering the ECtHR a regressive, rather than progressive, court for the protection of Convention rights.[34] Securing the normative effectiveness of the ECtHR in the longer term, therefore, needs to be pursued by enhancing its legitimacy not on the basis of increased compliance rates, but, rather, based on the extent to which the Court maintains its role as an effective decision-maker in human rights adjudication and a progressive, uniform standard-setter across the ECHR system. This account thus reflects the understanding of normative effectiveness that I deploy in this chapter, emphasising the ability of the ECtHR, as a subsidiary human rights court, to influence rather than determine what happens at the national level. Lastly, as shown by *context* as a crucial variable in determining the effectiveness of the ECtHR, in a pluralistic, complex and inter-dependent system such as the ECHR, the ECtHR's legitimacy and, in turn, normative effectiveness can only be achieved through 'the interplay between international human rights institutions, the domestic institutions of States, and individuals and groups'.[35]

Arguably, some of these identified benchmarks could fall under more than one category or even be listed under a different one. Similarly, this taxonomy is by no means an exhaustive or comprehensive list, but, rather, an indication of some of the key factors that could constitute an effective international or regional human rights court such as the ECtHR. In this regard, these benchmarks are to be seen as set of commonly accepted criteria which define effectiveness in the ECtHR context and provide the necessary framework that can facilitate the assessment as well as the enhancement of the Court's effectiveness.[36] Admittedly, though, the determination of the effectiveness of the ECtHR, as a regional human rights court, derives largely from the continuous interaction between the factors identified above and no variable, or cluster of variables, should be taken in isolation in such an assessment. As such, for the ECtHR to be considered effective and remain so in the longer term, it is expected that a comprehensive set of interdependent reform measures tackling the fundamental challenge(s) facing the Court, as defined in the thesis, from different angles should be in place. As will be further explored in this chapter, such measures seeking to ensure and optimise the Court's effectiveness extend to the ECHR States (aiming at preventing violations at national level through better and more effective implementation of the Convention standards domestically), as well as to other Council of Europe organs, such as the Committee of Ministers (aiming at improving and accelerating the execution of the ECtHR judgments).[37]

Attempts to define the effectiveness of an organisation by equating it with its organisational efficiency are common, yet inadequate, so it is deemed appropriate at this point to draw a

[34] See discussion in section 2.4 below.
[35] Johan Karlsson Schaffer, Andreas Føllesdal and Geir Ulfstein, 'International Human Rights and the Challenge of Legitimacy' in Føllesdal, Schaffer and Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 11.
[36] For relevant literature, see n 18 and n 38.
[37] See eg, Explanatory Report to Protocol No. 14 ECHR, para 14.

distinction between the two concepts.[38] *Efficiency*, on the one hand, measures the relationship between an organisation's inputs and outputs and determines how successfully the inputs have been transformed into outputs on a cost-effective basis, ie the fewer resources an organisation uses to generate its outputs, the greater its efficiency.[39] On the other hand, *effectiveness* determines the policy objectives of the organisation and measures the degree to which an organisation achieves its own end goals or the way the outputs it produces interact with or influence the wider (economic, social, political, legal) environment it operates in, thus assessing the organisation's progress towards the fulfilment of its mission.[40]

In the ECtHR context, as a result of the continuing and accelerating growth of the ECtHR backlog, the Convention control system, and particularly the Court, needed to adjust itself to these new circumstances. Several stakeholders have repeatedly called for an 'increased efficiency' and an 'enhanced effectiveness'.[41] Very often, these two terms - *efficiency* and *effectiveness* - are used interchangeably as synonyms with regard to responding to the ECtHR's increasing backlog.[42] While efficiency denotes a relationship between the number of applications examined by the Court and the time in which the proceedings are concluded, effectiveness extends even further and covers the ability of the ECtHR pronouncements to have an effect at the national level, both in relation to the individual applicants and the States, as well as on the international level. In other words, *efficiency*, it may be argued, refers to the institutional or organisational effectiveness and operationability of the ECtHR, meaning its capability to process a certain amount of applications and deliver a number of judgments and decisions in certain time. The term may also refer to the so-called resource

[38] See eg, Charles Ridley and Danielle Mendoza, 'Putting Organizational Effectiveness into Practice: The Preeminent Consultation Task' (1993)72 *Journal of Consulting and Development* 168, 169; Peter Davis and Timothy Pett, 'Measuring Organizational Efficiency and Effectiveness' (2002) 2(2) *Journal of Management Research* 87, 87-9; Ilona Bartuševičienė and Evelina Šakalytė,'Organizational Assessment: Effectiveness vs Efficiency' (2013) 1 *Social Transformations in Contemporary Society* 45, 48; Cheri Ostroff and Neal Schmitt, 'Configurations of Organizational Effectiveness and Efficiency' (n 1) 1345-6, 1357-8.

[39] ibid.

[40] ibid.

[41] See among various sources where both or either term appeared, Steering Committee for Human Rights (CDDH), *The Longer-Term Future of the System of the European Convention on Human Rights (CDDH Report)* (Council of Europe, 2015) <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 5 May 2021; *The Effectiveness of the European Convention on Human Rights: the Brighton Declaration and Beyond,* PACE Doc 13719 (2015) <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMTU2NSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIxNTY1> accessed 26 May 2021; *Explanatory Report to Protocol No.14* (2004) <https://rm.coe.int/16800d380f> accessed 14 June 2021; *Report of the Group of Wise Persons to the Committee of Ministers (Wise Persons Report)* CM(2006)203 (2006) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893> accessed 5 May 2021; *Review of the Working Methods of the European Court of Human Rights (the Lord Woolf Report)* (Council of Europe, 2005) <https://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf> accessed 5 May 2021.

[42] ibid.

economy of the organisation, ie the good management of the Court's resources, whether financial, material or human. In social sciences and management studies, for instance, this has been referred to the management effectiveness dimension of organisational effectiveness.[43] *Effectiveness*, on the other hand, includes not only the elements of efficiency, as described above, but also the ability of the ECtHR to impact a wide range of actors, including individual applicants, ECHR States Parties, International Organisations and institutions as well as the civil society, through its jurisprudence.

Although sociologists have argued that the best-performing organisations share both the efficiency and effectiveness attributes, it has been also accepted that trade-offs between the two are often required in order to maintain their overall effectiveness.[44] As shown in Section 2.4 below, this observation finds application in the ECHR context too, notably when the ECtHR engages in strategic judicial decision-making whereby it issues rulings it expects the respondent State to comply with.[45] The Court does so, for example, by tailoring its judgments to the political realities in the respondent State and counter-balancing the burdensome nature of the remedy awarded with the prospects of compliance, thus aiming at maintaining its perceived effectiveness by demonstrating high case-resolution or judgment-compliance rates.[46] Such a judicial approach, however, risks lessening the ECtHR's authority for reasons I further explain in Section 2.4 below.

Efficiency, as described above, admittedly forms the underlying objective of a managerial approach[47] that has been increasingly pursued towards the greater effectiveness of international courts and legal systems by optimising their institutional performance.[48] As

[43] Jessica Sowa, et al, 'No Longer Unmeasurable: A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness' (n 8) 715-716.
[44] Cheri Ostroff and Neal Schmitt, 'Configurations of Organizational Effectiveness and Efficiency' (n 1) 1345.
[45] Andrew Guzman, 'International Tribunals: A Rational Choice Analysis' (2008) 157 *University of Pennsylvania Law Review* 171, 184.
[46] ibid. See also, Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 268.
[47] Daniel Wren, *The History of Management Thought* (5th edn, Wiley 2005) 3, defining the managerial approach to the internal organisation of an institution as 'an activity that performs certain functions to obtain the effective acquisition, allocation, and utilization of human efforts and physical resources to accomplish some goal'.
[48] Technical reports, studies and opinions on assessing the effectiveness of international courts and judicial systems beyond the ECHR context feature a range of common elements, similar to those presented above, with a particular emphasis on effective resource management, case and workload management and cost-effectiveness of judicial proceedings. See eg, Douglas Guilfoyle, 'Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the adults in the room?' (*EJIL:Talk!*, 8 May 2019) <https://www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/> accessed 8 February 2021; Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Cristian Wenaweser and Tina Intelman, 'The International Criminal Court Needs Fixing' (Atlantic Council, 24 April 2019) <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/> accessed 8 February 2021; European Commission for the Efficiency of Justice, 'CEPEJ Tools on Evaluation of Judicial Systems' <https://www.coe.int/en/web/cepej/eval-tools> accessed 8 February 2021; *Reform of the Judicial Framework of the Court of Justice of the European Union*, Regulation 2015/2422 of the European Parliament and of the Council (16 December 2015); Antonio Cassese, *Report on the Special Court for*

managerialists suggest, this approach aims at ensuring more value-for-money institutions compared to existing national mechanisms, thus, influencing their reform processes towards this end by focusing on how to achieve maximum output with minimum input of time, effort and resources.[49] Deploying technical and managerial tools for enhancing the effectiveness of an institution allows for tractable and measurable results during the reform process and enables relevant stakeholders involved in the reform to assume responsibility for the (non)implementation of any reforms measures adopted more easily. Based on the idea that progress is achieved through the measurement and optimisation of organisational performance, it is only logical that stakeholders would focus on identifying those aspects related to the institution's performance that can be more easily monitored, measured and improved.[50]

As shown above, efficiency is an integral element of the effective functioning of every organisation. It alone, however, does not exhaust all necessary qualities of effectiveness and, thus, cannot always guarantee improved levels of overall effectiveness. Indeed, improving the organisational effectiveness of the ECtHR may lead to its better functioning as it provides the foundation for its sustainability and growth in its performance as a judicial institution, ie its ability to review more applications more quickly. For the ECtHR, like any other organisation, to be seen as effective, it needs first and foremost to operate effectively at the internal management level, meaning to have functional structures and processes for the deliberation of its judicial services.[51] From an economic perspective, a resource-efficient organisation is also a healthier and more effective organisation. Undoubtedly, the ability of the ECtHR to exploit its scarce and valued resources is vital for it to sustain its continuous and proper functioning. Nevertheless, efficiency alone does not and cannot ensure effectiveness. Other characteristics, including the legal status of served remedies, the authority of the Court's final decisions and the impact its jurisprudence has on the States' national legal order, are also important aspects of the Court's effectiveness and, thus, should supplement the analysis of the concept. To guarantee the long-term future and viability of the Convention control system, the institutional efficiency and cost-effectiveness of the Court must be increased but, at the same time, supplementary measures need to be taken so that the Court's overall effectiveness beyond the structural or managerial context can be enhanced as well.

Instrumentalising technical language and having recourse to the notions related to efficiency and cost-effectiveness when problematising the Court's performance allows for shifting the

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Sierra Leone (12 December 2006) <http://www.rscsl.org/Documents/Cassese%20Report.pdf> accessed 8 February 2021.

[49] Richard Clements, 'From *bureaucracy* to *management*: The International Criminal Court's internal progress narrative' (2019) 32 *Leiden Journal of International Law* 149, 152-154.

[50] ibid, 152-153.

[51] Jessica Sowa et al, 'No Longer Unmeasurable: A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness' (n 8) 715. See also, CW Letts, WP Ryan and A Grossman, *High Performance Nonprofit Organizations: Managing Upstream for Greater Impact* (Wiley 1999).

emphasis away from other less successful aspects of its work. As Chapter 3 will next demonstrate in more detail, when confronted with more complex, underlying challenges such as the lack of State co-operation regarding the execution of judgments and the consistent pattern of repetitive applications from certain States, the Court and its stakeholders can often cite its seemingly successful battle against institutional inefficiency and bureaucracy to present a more positive image about its overall performance.[52] Maintaining the focus on a managerial approach to the effectiveness of an institution, therefore, performs a range of rhetorical functions that are capable of reframing multifaceted, complex challenges as technical or organisational ones, distracting or redirecting attention away from other problematic aspects and, ultimately, reframing the understanding of the institution's success and effectiveness.[53]

2.3 The multi-functionality of the ECtHR: The shift from a 'fine-tuner' to a 'policy-shaping actor'

As discussed in Section 2.2 above, apart from the specific indicators or benchmarks that could be applied towards assessing the effectiveness of international courts, in general, and the ECtHR more particularly, such an assessment is also informed by the goal-based approach. Consequently, in order to define and measure the effectiveness of the ECtHR according to the goal-based approach, the Court's aims or goals need to be identified and an assessment needs to be conducted of whether all or some of these goals have been (or could be) met.[54] Importantly, as Shany explains, under the goal-based approach, the desirability of the goals themselves is not challenged, but rather, the focus of this analysis is whether, and to what extent, the identified goals can be and are attained.[55]

Guzman problematised the absence of a 'well-developed and tractable analysis of what international tribunals can or should achieve […], or even what it means for a tribunal to be effective'.[56] Despite this acknowledgment, studies on international tribunals have proceeded very slowly in grappling with and providing answers to these questions. This point refers to the purpose that the regional judicial system of human rights protection established under the ECHR is expected to serve. Any reform proposals or changes introduced must be capable of rendering the ECHR system better equipped to achieve its aims. As Paul Mahoney, former

[52] See conclusions in Chapter 3 of the thesis. See also, Grietje Baars, 'Making ICL history: On the need to move beyond pre-fab critiques of ICL' in C Schwobel (ed), *Critical Approaches to International Criminal Law* (2014) 204, using the term 'pre-fab critique' to acknowledge a similar phenomenon in the International Criminal Law context.
[53] Richard Clements, 'From *bureaucracy* to *management*: The International Criminal Court's internal progress narrative' (2019) 32 *Leiden Journal of International Law* 149, 151-2. On how the challenges facing the ECtHR have been framed over time, see Chapter 4 of the thesis.
[54] Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 13-14.
[55] ibid, 14.
[56] Andrew Guzman, 'International Tribunals: A Rational Choice Analysis' (n 45) 174.

Registrar and Judge of the ECtHR, pointed out, 'the mission of the Court, the service that it is expected to render European citizens and European societies, should dictate the contours of any reform'.[57] A clear determination of the role and function of the Court is thus needed before any discussion on its reform and future takes place. In the absence of such determination, reform measures which do not correspond to the role of the Court, as a regional, subsidiary and (quasi)constitutional court of human rights, are likely to be ineffective or insufficient in improving its overall functioning. Indeed, as later discussed in Chapter 4, while the ECtHR has been under considerable pressure to increase its levels of efficiency and productivity, and a great deal of energy was spent on debating and exploring possible institutional reforms to achieve this, the discussion on this vital issue – the role and function of the Court – has been significantly overlooked during the reform debate.

Originally established in a closed community of (otherwise)[58] like-minded Western European liberal democracies, the ECtHR was traditionally perceived as a judicial institution whose role and reach, through its judgments, carried a purely individualised character and effect.[59] As Mahoney explains, this perception that developed through to the 1990s confirmed that the Convention and the Court's mission was 'indissoluble from the right of individual petition […] [and] individual justice'.[60] In the first forty years of its existence, the ECtHR thus operated 'very much at the margins of the human rights *problématique'*, without really engaging with important policy or legal choices adopted by ECHR States within their national systems.[61] The ECtHR itself was largely perceived as a tribunal of last resort, in the form of a 'super-appellate judicial institution', whose role was limited to the examination of specific individual applications raising Convention rights violations after the exhaustion of all domestic remedies.[62] The individual justice function that the ECtHR was deemed to perform according to this view meant that the Court was prevented from assessing the compatibility of the domestic laws *per se* with the Convention.[63] As Sadurski argues, the Court's policing

[57] Paul Mahoney, 'An Insider's View of the Reform Debate' (2004) 29 *NJCM Bulletin*, 171, 175.

[58] See eg, *Ireland v United Kingdom* App no 5310/71 (18 January 1978); *Greece v United Kingdom*, 2 (1958-1959) *Yearbook of the European Convention on Human Rights* 182 and *Greece v United Kingdom*, 2 (1958-1959) *Yearbook of the European Convention on Human Rights* 186.

[59] See eg, Separate Opinions of Judge Sir Gerald Fitzmaurice in *Ireland v United Kingdom* App no 5310/71 (18 January 1978), para 6 and in *Golder v United Kingdom* App no 4451/70 (21 February 1975), paras 33, 38, 46, accusing the Court of acting as a judicial legislator and exceeding its 'normal judicial function' and noting that any changes in States' national legal order should be decided by domestic authorities themselves, rather than being indicated by the ECtHR. See also, Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 128-129, 131, 146-149.

[60] Paul Mahoney, 'Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order', in L Caflisch *et al* (eds), *Liber Amicorum Luzius Wildhaber: Human Rights, Strasbourg Views* (Engel 2007) 267.

[61] Wojciech Sadurksi, *Constitutionalism and the Enlargement of Europe* (OUP 2012) 3.

[62] ibid, 25. See also, Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9(3) *HRLRev* 397, 412.

[63] It is worth noting, however, that this purely individual justice approach was not entirely unquestioned. See eg, the rationale in *Ireland v United Kingdom* App no 5310/71 (18 January 1978), para 154, suggesting that the function of the ECtHR is 'not only to decide those cases brought before [it] but, more generally, to elucidate,

role was, therefore, 'strictly restricted' to the consideration of the application of Convention rights by the domestic court in a specific case 'rather than to the laws allegedly underlying the latter'.[64] This adjudicatory function of the ECtHR and its focus on offering individual justice to every meritorious application, however, has been criticised for preventing the Court from fulfilling its broader 'constitutional mission'.[65]

Despite this perceived 'individual justice' approach, the finding of a Convention rights violation has led many States at various times to amend their own national legislation and harmonise it with the required level of protection under the ECHR 'in explicit or implicit response to the Strasbourg Court's judgments'.[66] More importantly, as will be further explained in the following section, the 'transformative power'[67] of the ECtHR can be seen by the fact that such structural changes in national law may also occur in non-respondent States in response to ECtHR judgments delivered against other Contracting Parties.[68] It gradually became evident that individual applications could also inspire substantial law reform at the domestic level and, most importantly, that full and effective execution of ECtHR judgments may require not only individual, but also restorative and preventive

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safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19)'. See also, *Marckx v Belgium* App no 6833/74 (13 June 1979), Dissenting Opinion of Judge Sir Gerald Fitzmaurice, para 28, recognising that the Court's function could also entail ruling, *in abstracto*, that a national law, *per se*, is incompatible with the Convention: 'Basically, the Court's judgment constitutes a denunciation of a particular part of Belgian law as such, and in abstracto, because that law fails to provide a natural child with the civil status of being the child of its mother as from the moment and by the mere fact of birth, without the necessity of any concrete step on the part of the mother or guardian to bring that about. Although, speaking generally, it is not part of the Court's legitimate function to incriminate the laws of member States merely because they are difficult to reconcile with the Convention, or may lead to breaches of it - (so that in the normal case it will only be the specific step taken under, or by reason of, the law, leading to a breach, rather than the law itself, that can properly be impugned) - yet I accept that where it is the law itself, acting directly, that produces, ex opere operato, the breach (if there is one), it (the law) may be impugned even though there has been no specific act or neglect on the part of the authorities, or step taken under the law: it will be the law itself that, by its very existence, constitutes the act or neglect concerned'.

[64] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 62) 412.

[65] Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 *Human Rights Law Review* 655, 676.

[66] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 62) 413. See also, Parliamentary Assembly of the Council of Europe (PACE), *Impact of the European Convention on Human Rights in States Parties: selected examples*, AS/Jur/Inf (2016) 04 (8 January 2016) <http://www.assembly.coe.int/LifeRay/JUR/Pdf/DocsAndDecs/2016/AS-JUR-INF-2016-04-EN.pdf> accessed 26 May 2021.

[67] Janneke Gerards, 'The Paradox of the European Convention on Human Rights and the European Court of Human Rights' Transformative Power' (n 20) 319-321.

[68] See eg, Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law – A Comparative Analysis* (Intersentia 2014); Karen J Alter, Laurence R Helfer and Mikael R Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79(1) *Law and Contemporary Problems* 1, 10-11 and 16.

general measures by States.[69] More recent research has also shown that ECtHR judgments may have systemic influence across ECHR States and promote legal and policy changes even in cases where the respondent State to a particular dispute does not comply with the ruling.[70] Arguably, this shows that the scope of the ECtHR's decisions gradually started to go 'well beyond' the mere condemnation of an individual domestic judicial decision and, indeed, began to engage into a compatibility assessment of the national law with the ECHR.[71] In turn, the Convention is now seen as a living and evolving instrument and as an aspirational set of pan-European minimum standards which all ECHR States should attain.[72] Evidently, the ECtHR has steadily moved away from its pure adjudicatory role and it is no longer seen as a 'mere' remedial mechanism hearing personalised human rights cases and dispensing individualised human rights justice. Rather, its focus has shifted towards dispensing a more generalised justice with the view that a respondent State is required to reform its laws and practices in response to the finding of an ECHR violation by the Court.[73]

As the jurisprudence of the ECtHR continued to evolve, this assumption of the Court's 'new' function started to become clearer. In examining an individual application before it, the ECtHR no longer limits itself to identifying the defect of the law in question and its potentially erroneous application by the national court, but also indicates how, through domestic legislative amendments, this 'un-conventionality' (ie inconsistency with the ECHR) should be rectified by bringing, in essence, the national law fully in line with the required Convention standards.[74] The Court has thus started identifying and addressing the real, underlying source of such violations by scrutinising the States' structure and *modus operandi* of their institutions. As such, the reach of the ECtHR judgments gradually extended, with their implications going beyond the individual litigant.[75]

In numerous cases, the ECtHR clarified that such a root cause of a Convention violation found in a particular case was the 'systemic problem connected with the malfunctioning of

[69] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (n 59) 149-153.
[70] See eg, Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (n 21) 6-8, 16-17; Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) *International Organization* 77, 81-84.
[71] W Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 62) 413.
[72] ibid.
[73] Max Sørensen, 'Do the Rights and Freedoms Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?', in *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights, Rome* (Strasbourg: Council of Europe 1975) 86; Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 153-158; Fiona de Londras, 'Dual functionality and the Persistent Frailty of the European Court of Human Rights' (2013) *EHRLR* 38.
[74] Lech Garlicki, 'Broniowski and After: On the Dual Nature of 'Pilot Judgments' in Caflisch et al. (eds) *Human Rights – Strasbourg Views; Droits de l'homme – Regards de Strasbourg*' (2007) 177, 182-183.
[75] Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (n 21) 13.

domestic legislation'.[76] The Court's message, therefore, regarding what really is at stake and needs to be remedied becomes clear and compelling. Such 'malfunctioning' is the direct result of an inherent defect of a particular piece of national legislation which renders it incompatible with the Convention, rather than its bad application or interpretation by the national court. In this way, the ECtHR has placed itself at the centre of European constitutional politics by increasingly reviewing national legislation while encouraging or ordering legal and policy changes where necessary.

Through the development of its pilot-judgment case law, in particular, the ECtHR has further reinforced the clear, authoritative and imperative stance it developed with regard to identifying and addressing underlying systemic deficiencies in the national order resulting in repetitive and continuous Convention violations. As highlighted in one such instance, 'in order to put an end to the systemic violation identified … the respondent State *must* (emphasis added), through appropriate legal and/or other measures, secure in its domestic legal order a mechanism' ensuring that the standards of Convention rights protection are met.[77] As evidenced through its increasing 'structural reform litigation', as Huneeus describes it,[78] it is this policy-shaping role that arguably has now become the Court's *raison d'être*. Apart from its normative importance, however, this self-enhanced constitutionalist function that the Court assumed, most notably following the introduction of pilot judgments, constitutes also a 'simple and pragmatic' development with regard to the effective functioning, and indeed survival, of the entire ECHR system.[79] It is therefore important to recognise that such a mechanism was established to offer 'practical and pragmatic decisions … that avert an increase in the quantity of cases' reaching the Court.[80] Similar arguments based on the 'realism' premise have also been put forward by other key figures of the Court who maintained that the ECtHR cannot bear a disproportionate and unattainable burden in enforcing the Convention; this has to be shared with domestic authorities.[81]

The ECtHR, as Judge Zupančič controversially argues, may not have 'an interest in meddling in what national legislation should or should not do' since 'this is the role rightly reserved for national constitutional courts'.[82] What Judge Zupančič - and indeed everyone who shares the above view – fails to acknowledge, however, is that the Strasbourg Court has a responsibility, as a subsidiary organ for the protection of human rights, to intervene, in an

[76] *Hutten-Czapska v Poland* App no 35014/97 (16 September 2006), Partly Concurring, Partly Dissenting Opinion of Judge Zupančič.
[77] *Hutten-Czapska v Poland* App no 35014/97 (16 September 2006), Operative Part 4.
[78] Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (n 21) 15-17.
[79] *Hutten-Czapska v Poland,* Partly Concurring, Partly Dissenting Opinion of Judge Zupančič (n 76).
[80] ibid.
[81] See eg, Paul Mahoney, 'An Insider's View of the Reform Debate' (n 57) 175, warning against transforming the Court into a 'small claims court'; Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *HRLJ* 161, 164.
[82] *Hutten-Czapska v Poland,* Partly Concurring, Partly Dissenting Opinion of Judge Zupančič (n 76).

imperative and decisive manner, and provide an additional layer of protection when national authorities fail to meet the required level of rights protection under the Convention. Indeed, this responsibility to protect the rights enshrined in the Convention is *shared* between the national authorities of States Parties *and* the ECtHR.[83] Such shared responsibility for the 'collective enforcement' of the ECHR guarantees is also apparent in the jurisprudence of the Court.[84]

The ECtHR has thus demonstrated that, when national authorities, including national constitutional courts, are unable or unwilling to bring national legislation or national constitutions fully in line with the Convention standards – which regrettably is too often the case –, it should, and indeed has the obligation to, step in and address this domestic malfunctioning.[85] While the ECtHR is well cautious of its jurisdictional boundaries, it has occasionally shown that it is inclined to take up this 'invitation'[86] from States Parties and self-enhance its own constitutionalist role in order to remedy the shortcomings of national authorities in assuming their *primary* responsibility to uphold the Convention standards and, in turn, the CoE fundamental values. From this perspective, the ECtHR acts as a 'trustee' court (instead of a mere 'agent' of the States) and exercises its 'fiduciary' responsibilities vis-à-vis the States and with respect to the Convention.[87] In this regard, the ECtHR, as a trustee court of the values underpinning the Convention, discharges various 'fiduciary' duties for the purpose of achieving the overarching objectives of the ECHR system.

The multi-functionality of the ECtHR, apart from normative and theoretical interest, has also practical significance. The original, one-dimensional understanding of the ECtHR, as an international court engaging in individualised human rights adjudication, eclipses other important functions that it actually performs and, thus, underrates or does not adequately address its underlying effectiveness problem. This 'functional myopia', as von Bogdandy and

[83] Janneke Gerards 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"' in J Gerards and J Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (n 68) 21; LR Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 157. See also, Copenhagen Declaration (2018) paras 6-11.

[84] *Ireland v. United Kingdom* App no 5310/71 (18 January 1978), para 239; *Loizidou v Turkey* App no 15318/89 (Preliminary Objections) (18 December 1996), para 70.

[85] See eg, *Vučković and Others v Serbia* App no 17153/11 *et al* (25 March 2014), paras 69-70, 88 and *Kudła v Poland* App no 30210/96 (26 October 2000), paras 148, 155-156. See also, Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61(1) *American Journal of Jurisprudence* 69, 75, 77-79 and 93.

[86] See eg, Committee of Ministers Resolution Res(2004)3 (12 May 2004), para 1, where the CoM 'invite[d] the Court' 'to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments', thus introducing the pilot-judgment procedure.

[87] See, Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organisation' (2013) 1 *Journal of Law and Courts* 61, 64-69 ; Alec Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 *West European Politics* 77, 88-90.

Venzke call it, obstructs any comprehensive analysis and assessment of the effectiveness, including components such as the authority and legitimacy, of any international judicial institution.[88] Confirming the observations in Section 2.2 above, when it comes to the assessment of ECtHR's effectiveness, the emphasis on the traditional understanding of its functions gives more prominence to the institutional efficiency and operationability/organisational functioning challenges of the Court. At the same time, however, it stands in the way of adequately addressing other, underlying issues of deeper constitutional importance and, thus, realising the Court's full potential.

As will be further shown in the next chapter, for a long period in the reform process, the focus of ECHR stakeholders' attention has been solely on increasing the efficiency of the ECtHR and optimising its capacity to examine more applications within a shorter period of time. This focus, therefore, was directed primarily to the first dimension of 'effectiveness', as presented above, while paying little to no attention to the enhancement of the rest of the identified factors for ensuring an outright effective ECtHR. As already argued, measures aimed at institutional effectiveness alone are highly unlikely to prove sufficient in achieving the overall, long-term effectiveness of the Court. While urgent, institutional measures are crucial to prevent the sinking of the ECtHR in the growing influx of applications, these can only produce urgent remedial effects and, thus, need to be accompanied by additional, more structural reforms which address the underlying problems facing the Court (ie the effective implementation of Convention standards in the national order of ECHR States Parties).

2.4 Assessing the Effectiveness of the ECtHR in light of its multi-functionality

Scholars investigating the work and functioning of the ECtHR have suggested that its judgments are 'as effective as those of any domestic court' in the sense that they enjoy high compliance rates.[89] Similarly, it has been said that the ECHR system is 'the most effective human rights regime in the world'[90] and that '[i]t is no exaggeration to state that the Convention and its growing and diverse body of case law have transformed Europe's legal and political landscape, qualifying the ECtHR as the world's most effective international human rights tribunal'.[91] Although the above conclusions seem to have been reached by evaluating the ECtHR's effectiveness comparatively against the performance of other international or regional human rights courts, this section seeks to (re)determine and

[88] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (n 4) 51.
[89] Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 18) 296.
[90] Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 3.
[91] Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) *EJIL* 126.

(re)assess the effectiveness of the Strasbourg Court against its own specific characteristics and performance, in light of its multi-functionality as presented above.

In light of the Court's ongoing reform process, increasing the efficiency and enhancing the effectiveness of the ECtHR became vital components of the debate on its future.[92] As Chapter 4 will later show, however, the focus of ECHR stakeholders' attention has been disproportionately on increasing the efficiency of the ECtHR from an organisational or structural perspective. Recalling from earlier discussion in this chapter, efficiency refers to the operationability of an organisation and its capacity to increase its input-output ratio while using the least possible resources and time. Measures seeking to achieve increased efficiency normally look at improving the internal structure and processes of an organisation, while at the same time overlooking the rest of the dimensions of overall effectiveness outlined in Section 2.2.1. Illustratively, the first major reform measures brought by Protocol No 11 offer a clear indication of the frame of mind of the ECHR States that would underpin the reform and restructuring of the ECHR system for the years to come. The States Parties at the time aimed at 'improving efficiency and shortening the time taken for individual applications, at minimum cost'.[93] A clear message was then sent: that the reform of the Convention control system is necessary, but it must be kept 'on the cheap'.[94] Equally, Protocol No 14's entry into force in 2010 brought a series of organisational arrangements within the ECtHR aiming at improving its functioning and optimising its efficiency by providing the Court with the necessary procedural means and flexibility to process its fast-growing backlog in a timely manner.[95]

The precise effect this combination of an 'effective mechanism for the filtering of applications' with a 'minimum cost' logic has had on the Court's reform process will be discussed more extensively in Chapter 4. For present purposes, it suffices to acknowledge that providing an international court, such as the ECtHR, with greater resources will certainly equip it to engage in independent fact finding (where necessary), to structure more cost-effective procedural rules and increase efficiency in case examination by supporting the judges' work with a capable secretariat.[96] Undoubtedly, these are all factors that can

[92] See eg, Steering Committee for Human Rights (CDDH), *The Longer-Term Future of the System of the European Convention on Human Rights (CDDH Report)* (Council of Europe, 2015); *The Effectiveness of the European Convention on Human Rights: the Brighton Declaration and Beyond,* PACE Doc 13719 (2015); CDDH, *Reforming the European Convention on Human Rights: A Work in Progress* (Council of Europe, 2009) <https://www.echr.coe.int/librarydocs/dg2/isbn/coe-2009-en-9789287166043.pdf> accessed 26 May 2021; *Explanatory Report to Protocol No.14* (2004); *Report of the Group of Wise Persons to the Committee of Ministers (Wise Persons Report)* CM(2006)203 (2006); *Review of the Working Methods of the European Court of Human Rights (the Lord Woolf Report)* (Council of Europe, 2005).

[93] Explanatory Report to Protocol No. 11 (1994), para 4.

[94] Michele de Salvia, 'The Effectiveness of Low-cost Justice: The Great Illusion of Protocol No. 11?' in *Ten Years of the "New" European Court of Human Rights 1998-2008: Situation and Outlook* (Council of Europe, 2009) 71.

[95] Explanatory Report to Protocol No.14, para 35.

[96] L Helfer and AM Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 18) 301-4. See also, Explanatory Report to Protocol No.14, para 23, 59, stating that the Committee of Ministers agreed to increase

contribute to the quality of the Court's decision-making and, thus, its overall effectiveness.[97] Indeed, as the statistical analysis in Chapter 3 will next show, some positive results regarding the functioning of the Court were noted soon after the implementation of these reforms. The efficiency of the ECtHR has thus increased significantly as the Court has made noticeable progress in reducing its immense backlog, mainly that of manifestly inadmissible applications.[98] Reform efforts at management level aimed at enhancing the Court's working methods and expediting judicial proceedings have the efficacy of case examination as their end goal. This pursuit of institutional efficiency is undoubtedly important as it ensures that the ECtHR, as a regional human rights court, can engage in consistent, prompt and authoritative dispute settlement and successfully fulfill its adjudicatory role.[99]

Reform measures aimed at enhancing the efficiency and cost-effectiveness of the Court's procedures have already enabled the adjudication of a greater number of cases in a more timely and cost-effective manner. Analysing the statistical image of the Court (Chapter 3), however, shows that certain underlying challenges remain, including, for instance, the increasing numbers of repetitive applications lodged against a handful of States and the growing phenomenon of delayed, partial or even non-execution of (mainly leading) judgments. Attempts to improve the Court's efficiency, therefore, appear to have failed in addressing and resolving these underlying challenges, which remain 'a serious threat to the effectiveness of the system of the Convention'.[100] Clearly, cutting corners to improve costs, speed and productivity is not the answer to the effectiveness problem of the ECtHR. Instead, to move beyond institutional effectiveness and achieve overall effectiveness of the ECtHR, additional measures are necessary which are not directed only to the Court itself but extend to ECHR States Parties as well. Consequently, the remaining underlying challenges indicate that the problem of effectiveness facing the ECtHR has now shifted from being solely a problem of efficiency to being, first and foremost, a problem of effective authority. In other words, the underlying challenge currently facing the ECtHR is its inability to effectively assert its authority vis-á-vis (non-compliant, law-defying) States.

Section 2.2 has already identified *authority* as one of the four distinct, but closely inter-related, dimensions under the proposed model for determining and assessing the effectiveness of the ECtHR. For present purposes, authority is understood as the ability of the ECtHR not only to compel respondent States to comply with its judgments but also to

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the budget of the Court and allow it to recruit a 'significant number of extra lawyers', as well as administrative and supporting staff to increase the work capacity of its Registry.

[97] L Helfer and AM Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 96). See also, Andrew Guzman, 'International Tribunals: A Rational Choice Analysis' (n 45) 207.

[98] See statistical analysis in Chapter 3.

[99] Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach' (2017) 28(1) *EJIL* 13.

[100] Decisions of the Committee of Ministers – 1136th meeting (6-8 March 2012), CM/Del/Dec(2012)1136/14, paras 1-2 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805caf0a> accessed 20 April 2021.

alter or influence the behaviour of non-respondent ECHR States Parties through its authoritative jurisprudence and interpretation of the Convention. This understanding of authority reflects the multi-functionality of the Court and its role in shaping States' national orders based on the *common European values* it serves, thus, exemplifying the transformative effect of its jurisprudence on States Parties.[101] Therefore, based on the conceptual framework of effectiveness I develop in this chapter, authority corresponds to whether the ECtHR is effective at a normative, rather than institutional, level. This can be determined by the extent to which the impact of the Court's judgments expands beyond the immediate litigants in a particular dispute so that it consistently produces normative change, that is to shape domestic law and policies, across the States Parties subject to the ECtHR's jurisdiction.[102] In other words, this translates into the ability of the ECtHR to move national governments and other actors with States in the direction indicated by its rulings. The relationship between authority and normative effectiveness can be further explained by disaggregating the former into various sub-components in light of the ECtHR's multi-functionality, as follows.

The first part of authority, as described above, reflects the ECtHR's role as an adjudicatory, dispute-settlement body whose effectiveness can be determined in terms of its 'ability to compel compliance with its judgments by convincing domestic government institutions directly […] to use power on its behalf'.[103] This understanding of effectiveness expressly equates the concepts of compliance and what Helfer calls 'case-specific effectiveness', referring to the extent to which respondent States comply with a final judgment delivered against them and provide the remedy ordered by the Court.[104] While some scholars have accepted a similar relationship between compliance and effectiveness,[105] others have sought

[101] Ed Bates, 'Consensus in the Legitimacy-Building Era of the European Court of Human Rights' in Panos Kapotas and Vassilis P. Tsevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP 2019) 50. See also, Janneke Gerards, 'The Paradox of the European Convention on Human Rights and the European Court of Human Rights' Transformative Power' (n 20).

[102] Some scholars have developed a similar understanding of normative effectiveness in the context of international courts, in general, and the ECtHR, in particular. See eg, Laurence Helfer, Karen Alter and Florencia Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103 *American Journal of International Law* 1; Karen Alter, Laurence Helfer and Mikael Madsen, 'How Context Shapes the Authority of International Courts' (n 68); Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79(1) *Law and Contemporary Problems* 141, 167-175.

[103] L Helfer and AM Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 18) 290.

[104] Laurence Helfer, 'The Effectiveness of International Adjudicators' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 464.

[105] For instances where compliance has been linked to authority and, thus, effectiveness of international courts, see, D Hawkins and W Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 Journal of International Law and International Relations 35, 39-40, claiming that when a State changes its behaviour regarding a particular issue following a judgment against it, it is reasonable to assume that the judgment materially influenced that behavioural change 'even if other factors may also have been important'; Eric Posner and John Yoo, 'Judicial Independence in International Tribunals' (2005) 93(1) *California Law Review* 1, 6-7, presenting compliance as a yardstick of effectiveness.

to draw a distinction between the two concepts.[106] The position I take in this chapter sides with the latter view and suggests that, although compliance could potentially be considered as a subcomponent of authority and, thus, effectiveness of the ECtHR, the authoritative effect of the Court's judgments - by virtue of their legally binding nature - alone is not sufficient to achieve compliance. Arguably, an international court can achieve high levels of compliance 'for reasons entirely exogenous to the legal process'[107] or 'even if other factors may also have been important' besides the legally binding nature of the judgment.[108] At the same time, international courts 'can be effective even if compliance with them is low' and their judgments 'may still correlate with observable, desired changes in behavior' even in cases of apparent non-compliance.[109] High rates of compliance with the ECtHR, therefore, do not necessarily imply that the Court is effective in promoting its underlying aims as a regional human rights tribunal. As such, the question of effectiveness is inevitably based on a relative, rather than absolute, measure and, as a result, the compliance rate the ECtHR enjoys cannot, alone, determine its level of effectiveness.[110]

In this respect, scholars have argued that the ECtHR, in an attempt to maintain or even enhance its perceived effectiveness, does engage in strategic decision-making.[111] It does so by taking the likelihood of compliance with its judgments into account when awarding a specific remedy and by issuing a judgment that the respondent State is more likely to comply with, thus avoiding too severe a deviation from the preferences of the respondent State.[112] This observation is also confirmed by recent empirical research investigating the award of non-pecuniary damages by the Court.[113] These findings have led scholars to suggest that international courts that enjoy high rates of compliance may indeed be entirely ineffective, whereas those with lower compliance rates may be in fact be more effective in terms of engendering some modification of State behaviour.[114] Consequently, the ECtHR's effectiveness increases only when there is an increase in the cost borne by the respondent

[106] For studies that reject the claim that compliance can be a useful measurement of an international court's effectiveness, see eg, Lisa Martin, 'Against Compliance' (n 23) 591-2, arguing in favour of 'dropping compliance as a central concept in the study of institutional effects'; Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' 2000 32(3) *Case Western Reserve Journal of International Law* 387; Robert Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54(3) *International Organization* 457.

[107] Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (n 105) 393.

[108] D Hawkins and W Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (n 94) 40.

[109] K Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (n 106) 394.

[110] L Helfer and AM Slaughter, 'Why States Create International Tribunals' (n 18) 918.

[111] Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 268; Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12(1) *Chicago Journal of International Law* 115; Andrew Guzman, 'International Tribunals: A Rational Choice Analysis' (n 45) 184.

[112] ibid.

[113] Veronika Fikfak, 'Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim; it's all about the State' (2020) 33 *Leiden Journal of International Law* 335*,* 355, 360.

[114] L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 467.

State when complying with its judgments. If a respondent State's payoff as a result of an adverse judgment is merely limited to a material cost, ie monetary payment of individual compensation in the form of just satisfaction, the ECtHR's effectiveness decreases, even in the case of compliance.[115] As Shany put it, '[a] low-aiming court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world'.[116] This is because the Court's ruling may appear more favourable to the respondent State but in reality it would have a negligible impact in resolving the underlying violation domestically and preventing similar violations in the future, thus undermining the Court's role as a policy-shaping actor, as discussed above.

Consequently, the appropriate yardstick for the effectiveness of a regional human rights court like the ECtHR should not be solely whether a national government obeys and complies with specific judgments. '[T]he real effectiveness test', Alter argues, 'is not compliance but the counterfactual of what the outcome would have been absent the [international court]'.[117] In assessing the effectiveness of the ECtHR, one should look beyond the compliance rates it generates and contemplate whether the Court 'contributed to moving a State in a more law-complying direction'.[118] While compliance may be the primary indicator to judge the respondent State's respect to wider international law and the value they ascribe to their membership in the European and international community more broadly, other considerations appear more important to assess the authority and, thus, effectiveness of the ECtHR.[119] The applicable benchmark should, therefore, be whether the Court succeeds, through its authoritative decisions, in positioning Convention standards and upholding the common European values it serves in the legislative and institutional procedures at the national level. The transformative effect of the jurisprudence of the ECtHR can therefore constitute a meaningful benchmark for assessing its effectiveness as a regional, (quasi)constitutional court for the protection of human rights. Considering States' compliance rate with ECtHR judgments as the only or primary factor evaluating the authority of the ECtHR does not only disregard the 'context' variable of effectiveness (discussed further below), but also risks discouraging the Court from addressing the most serious human rights violations and systemic and structural deficiencies in certain States in a

[115] Andrew Guzman, 'International Tribunals: A Rational Choice Analysis' (n 45) 204-7.
[116] Yuva Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (n 14) 227.
[117] Karen Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *European Journal of International Relations* 33, 52.
[118] ibid.
[119] Oona A Hathaway, 'Do Human Rights Make a Difference?' (2002) 111 *Yale Law Journal*, 1935, 2002; Karen J Alter, 'Do International Courts Enhance Compliance with International Law?' (2003) 25 Review of Asian and Pacific Studies 51, 51; Andrew Guzman, *How International Law Works* (n 22) 35.

potential attempt to improve both the compliance records of a given State as well as its own levels of trust and support it receives from that State.[120]

Arguably, the ECtHR, as an international judicial institution, is nowadays well-positioned to exercise greater influence over national actors, through its ever-growing jurisprudence, in order to facilitate the further protection and promotion of the Convention in their national legal orders. The law-making function of the ECtHR may have a 'dynamic', transformative effect domestically as its pronouncements may urge improvements or changes to national laws, policies and practices in order for State authorities to ensure compliance with the Convention.[121] The above position is further reinforced by the fact that the Court exercises a compulsory and final jurisdiction over disputes concerning the interpretation and application of the Convention and that it can monitor and rule on the compliance of ECHR States with the Convention while determining the scope of its own jurisdiction under Article 32(2) ECHR.

Looking beyond the ECtHR's role as a purely adjudicatory body entrusted with the resolution of human rights disputes in contentious cases, Helfer recognises that to be considered effective, the Court needs also to develop '*erga omnes* effectiveness'.[122] In this regard, '*erga omnes* effectiveness' evaluates whether an international court's ruling has 'systemic precedential effects' that influence the behaviour of all States subject to its jurisdiction, even when they are not parties to a particular dispute.[123] In fact, since the beginning of the Interlaken reform process, enhancing the normative effect of the ECtHR's judgments was seen as a necessary means for strengthening its effectiveness in the long term.[124]

Despite the ECtHR's compulsory jurisdiction, which compels ECHR Contracting Parties 'to abide by the final judgment of the Court in any case to which they are parties',[125] former President Spielmann acknowledged that 'the authority of the Court's judgments has its limits because they only constitute *res judicata* and lack *erga omnes* effect'.[126] Theoretically, States

[120] Armin von Bogdandy, 'In the Name of the European Club of Liberal Democracies: How to Evaluate the Strasbourg Jurisprudence' (*EJIL:Talk!,* 20 December 2018) <https://www.ejiltalk.org/in-the-name-of-the-european-club-of-liberal-democracies-how-to-evaluate-the-strasbourg-jurisprudence/> accessed 5 May 2021.
[121] Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28(3) *EJIL* 763, 770; Janneke Gerards, 'The Paradox of the European Convention on Human Rights and the European Court of Human Rights' Transformative Power' (n 20).
[122] L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 470.
[123] ibid.
[124] See eg, Contribution of the Secretary-General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference (14 January 2010), para 17, noting that '[s]ubsidiarity thus requires that the authority of the Court's case law should also be reinforced' and Interlaken Declaration (2010), Action Plan, para B.4(c), where Contracting Parties committed to 'taking into account the Court's developing case-law, also with a view to considering the conclusions drawn from a judgment finding a violation of the Convention by another State, where the same problem exists within their own legal system'.
[125] Article 46(1) ECHR.
[126] Dean Spielmann, Opening Remarks at the International Conference 'Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges' (Baku, 24-25 October 2014) 2 <https://www.echr.coe.int/Documents/Speech_20141024_OV_Spielmann_ENG.pdf> accessed 5 May 2021.

which are not directly concerned by a Court judgment are not legally obliged to comply with it. In practice, however, national courts increasingly take into account the ECtHR's growing corpus of jurisprudence and require domestic authorities to align their national legislation or administrative practices with the principles developed in the Strasbourg Court's judgments, even when delivered against other ECHR States.[127] It is also now accepted that the ECtHR judgments have gradually become a significant source of non-consensual international law-making as the interpretation of the Convention rights in the Court's case law is of a general nature and can be regarded as determining the meaning of the broader standards and principles underpinning the ECHR.[128] A constitutional reading of the jurisprudential authority of the ECtHR's judgments, as frequently evidenced in its case law, justifies the Court's expectation that all States Parties conform to its interpretations of the Convention rights.[129] In this sense, 'the process of application of the Convention has been, to a considerable extent, transformed into the process of application of the case law of the Strasbourg Court'.[130] The ECtHR's increasing recourse to its 'well-established case law' (WECL) when dealing with questions of interpretation and application of Convention rights which have already been covered in its previous judgments,[131] in a *de facto* precedential manner, is another indication of the importance attributed to the normative function of the Court's jurisprudence beyond its binding effect for the resolution of a case-specific dispute.[132]

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[127] See eg, Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (n 90) 13-15; Samantha Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights - What's in a Name?' in Samantha Besson (ed), The European Court of Human Rights After Protocol 14 (Schulthess 2011) 125; J Gerards, 'The European Court of Human Rights and the national courts: Giving Shape to the Notion of "Shared Responsibility"' (n 83) 21-23; Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change' (n 70) 77; Iulia Motoc, Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (CUP 2016). See also, PACE Committee on Legal Affairs and Human Rights, 'Strengthening Subsidiarity – Integrating the Court's Case-Law into National Law and Judicial Practice' (October 2010).

[128] See eg, Janneke Gerards, 'The European Court of Human Rights and the national courts: Giving Shape to the Notion of "Shared Responsibility"' (n 83) 22; Laurence Helfer, 'Redesigning the European Court of Human Rights' (n 91).

[129] See eg, *Opuz v Turkey* App no 33401/02 (09 September 2009), para 163, stating that '[i]n carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States' (emphasis added).

[130] Lech Garlicki, 'Some Observations on Relations between the European Court of Human Rights and the Domestic Jurisdictions' in J Iliopoulos-Strangas (ed), *Cours suprémes nationales et cours européennes: concurrence ou collaboration?* (Bruylant, 2007) 305, 306. See also, Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012) 5, arguing that the ECtHR has 'equat[ed] the application of the Convention with that of its case law'.

[131] Article 28(1)(b) ECHR, empowering a ECtHR's three-judge Committee to declare an application admissible and deliver a judgment on its merits, 'if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court'.

[132] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (OUP 2018) 127. See also, Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (n 90) 3, stating that, in addition to

The scope of the WECL procedure has also been subsequently extended so as to be applied in cases where WECL concerning a different State exists and the underlying facts of the case are comparable.[133] In certain circumstances the Court did not hesitate to (indirectly) sanction a respondent State for not complying with its previous judgments pertaining to other States.[134] This is particularly the case where ECtHR judgments determine what the public policy should be in a specific area for the common interest, thereby extending the influence and, thus, effectiveness of its jurisprudence to all ECHR States.[135] The Court thus increasingly recognises not only the importance of its jurisprudence as a persuasive and authoritative interpretation of the Convention but also its nature as having *de facto erga omnes* effect across all ECHR Contracting Parties.[136] Suggesting otherwise would undermine the ECtHR's role of establishing a uniform, minimum level of protection throughout the European continent. By enhancing the interpretive or jurisprudential authority of its judgments, therefore, certain features of the Court's normative effectiveness are strengthened too.

Yet, the '*erga omnes* effectiveness' of the ECtHR can only be realised if domestic actors actively show their preparedness to adopt the Court's interpretations of the Convention. As Keller and Stone Sweet acknowledge, 'Convention rights will only have impact beyond any individual case to the extent that national officials take into account the Court's jurisprudence in their own decision making'.[137] Helfer and Voeten's empirical investigation supports this position, arguing that the effect of the ECtHR jurisprudence is even greater when domestic legal institutions are more receptive to the influence of international law when reviewing national policy, even if the overall domestic political support for policy change is low.[138] Admittedly, the *erga omnes* effect of the ECtHR jurisprudence has been increasingly endorsed by the Court over the past decades and States Parties have repeatedly

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providing justice in individual cases, the ECtHR 'works to identify and to consolidate universal standards of right protection' and 14, acknowledging the ECtHR's precedent-based case law.

[133] D Harris *et al*, *Law of the European Convention on Human Rights* (n 132) 127.

[134] See eg, *Modinos v Cyprus* App no 15070/89 (22 April 1993), para 20, noting that '[t]he Court first observes that the prohibition of male homosexual conduct in private between adults still remains on the statute book […]. Moreover, the Supreme Court of Cyprus […] considered that the relevant provisions of the Criminal Code violated neither the Convention nor the Constitution notwithstanding the European Court's Dudgeon v the United Kingdom judgment […]'.

[135] See eg, *Karner v Austria* App no 40016/98 (24 October 2003) para 26, noting that '[the ECtHR's] mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States'.

[136] See also, *Hermann v Germany* App no 9300/07 (26 June 2012), Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, summarising the legal effect of the ECtHR's jurisprudence in future cases and on non-respondent States and *Ireland v United Kingdom* App no 5310/71 (18 January 1978) para 154, stating that '[t]he Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.

[137] H Keller and A Stone Sweet (eds), *A Europe of Rights* (n 90) 14. See also, J Gerards, 'The European Court of Human Rights and the national courts: Giving Shape to the Notion of "Shared Responsibility"' (n 83) 23.

[138] Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change' (n 70) 83, 89.

expressed their commitment to give greater recognition to *erga omnes* effect of ECtHR judgments.[139] Having said that, the *erga omnes* concept is still not universally regarded as a legal requirement stemming from the Convention across the CoE membership.[140] As Helfer and Voeten's study further shows, non-respondent States do not always (or immediately) adopt reforms following an ECtHR judgment finding a violation for a specific legal issue, with some non-respondent States spending over a decade before remedying policy or legislative issues already identified as incompatible with the Convention in their CoE counterparts.[141]

The inherent limitation on the authority of the ECtHR judgments may often result in repetitive applications lodged with the Court in which the only material difference is the identity of the respondent State involved in the proceedings. Indeed, the very high numbers of repetitive applications reaching Strasbourg, as will be next shown in Chapter 3, reaffirms that compliance with the ECtHR judgments by respondent – let alone non-respondent – States remains a significant challenge for the Court. The national governments of States generating a high number of repetitive applications may even show a preference for knowingly maintaining their Convention-incompatible practices and continuing to pay 'low cost' reputational or financial burdens of violating the ECHR instead of proactively complying with jurisprudential developments of the Convention standards and transporting the Court's case law in their domestic order.[142] In fact, aware of this limitation, the ECtHR has, paradoxically, gradually adapted the setting of damages awarded in individual cases against States that are considered frequent violators, and, thus, generating large numbers of repetitive cases, so that they pay lower compensation to the victim.[143] The Court does so in the hope of preventing further or more prolonged non-compliance in future cases by the same States.[144] Consequently, developing a consistent and coherent body of jurisprudence is a necessary condition for the ECtHR to facilitate this transposition and exert greater influence on ECHR States' national legal orders, thus making it normatively more effective. Greater jurisprudential consistency, therefore, would enable the Court's interpretation to become an integral part of the authority of the Convention right itself and, in turn, could

[139] S Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights - What's in a Name?' (n 127) 141; L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 471-472.
[140] ibid.
[141] L Helfer and E Voeten, 'International Courts as Agents of Legal Change' (n 70) 95-6. It is worth noting, however, that the passage of time should not always be considered problematic. In many cases, it may well suggest that domestic authorities take the implementation of the judgment seriously or that certain domestic constitutional or procedural challenges may arise when adjusting national law in response to a ECtHR judgment. See eg, Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25(1) *European Journal of International Law* 205; Øyvind Stiansen, 'Delayed but not Derailed: Legislative compliance with European Court of Human Rights Judgments' (2019) 23(8) *International Journal of Human Rights* 1221.
[142] Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 274-5.
[143] Veronika Fikfak, Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim; It's all about the State (2020) 33 *Leiden Journal of International Law* 335, 359.
[144] ibid. Cf, Louis Vischer, 'Economic Analysis of Punitive Damages' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 25, arguing that to be effective, damages awarded in court judgments should be high and individualised.

arguably increase the political salience of a Convention-incompatible issue identified by the Strasbourg Court domestically even in cases where national governments appear as ideologically opposed to required reforms.[145]

Arguably, the *erga omnes* effect of the ECtHR judgments can be further enhanced when the constituting treaty, ie the ECHR, is deeply embedded in the national legal systems of ECHR States, that is to be incorporated into the domestic legal order, either automatically or through the adoption of implementing legislation.[146] Helfer thus recognises an additional element of an international court's normative effectiveness, namely 'embeddedness effectiveness'.[147] 'Embeddedness effectiveness', in its turn, assesses the extent to which an international court succeeds in embedding Convention standards, notably by incorporating its judgments, in the domestic legal order of the States subject to its jurisdiction.[148] In doing so, it enables national actors to proactively remedy potential treaty violations domestically, thus avoiding the need for further, international litigation.[149] The minimally robust, yet increasingly recognised, conception of judicial precedent in the ECtHR jurisprudence, as described above, is undoubtedly essential for gradually strengthening the Court's effectiveness through further entrenchment of the Convention standards in national legal orders.[150] For the ECtHR to maintain and even strengthen its effectiveness in the longer-term, national actors, political and judicial alike, must strive to give effect to the Convention standards, as developed in the Court's jurisprudence over time, domestically in a prospective manner.[151] This become all the more compelling considering the absence of an enforcement mechanism similar to that in national orders and the ECtHR's lack of authority to invalidate national laws judged to be incompatible with the Convention.[152] Otherwise, the role of the ECtHR will be merely limited to rendering retrospective justice in individual cases with restricted normative effect, thus perpetuating one of its biggest challenges to date, that is its struggle to adjudicate an ever-increasing backlog, which would be highly inefficient.

At the moment, however, it is evident that not all Contracting Parties have equally embraced the growing normative influence of the ECtHR's jurisprudence as the Court's impact domestically still 'varies widely across States' and 'has increased over time, in some domains

[145] L Helfer and E Voeten, 'International Courts as Agents of Legal Change' (n 70) 106.
[146] L Helfer, 'Redesigning the European Court of Human Rights' (n 91).
[147] ibid; L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 474-6. See also, R Keohane *et al*., 'Legalized Dispute Resolution: Interstate and Transnational' (n 106) 457-8.
[148] ibid.
[149] ibid.
[150] A Stone Sweet and H Keller, 'The Reception of the ECHR in National Legal Orders' (n 90) 8.
[151] See eg, Karen Alter, Laurence Helfer and Mikael R Madsen, 'How Context Shapes the Authority of International Law' (n 68) 23, emphasising the need for an international court's jurisprudence to be 'internalized by domestic legal constituencies – including national judges' in order to be effective.
[152] On the role of national judges in facilitating the further embeddedness of the ECHR, see eg, K Alter, 'The Multiple Roles of International Courts and Tribunals' (n 17) 353-354.

more than other, within each State'.[153] As Chapter 3 will show, violations of the right to an effective remedy (Article 13 ECHR) are consistently among the most frequent violations of the Convention found by the ECtHR, attesting to the fact that many States Parties are yet to effectively embed the Convention standards domestically so that rights violations are identified and remedied 'at home'.[154] Similarly, and contrary to its subsidiary role, the ECtHR occasionally needs to assume a function of either a first or fourth-instance court due to the unstable political environment of certain ECHR States, where the notions of the rule of law and democratic governance are particularly weak and the independence of the judiciary contested, thus preventing it from performing a more effective functioning.[155] Undoubtedly, the Court has made at least some progress towards achieving its original or intermediate goal of improving primary norm-compliance through the peaceful settlement of human rights disputes. Yet, whether the ECtHR has been effective in realising its ultimate/longer-term objectives of harmonising standards for rights protection across the ECHR States and 'unifying' the CoE membership, thereby encouraging States' political and economic integration,[156] cannot be determined with the same degree of certainty.[157]

The focus on the ECtHR's case adjudication function as the primary task of the Court meant that for a long time the usefulness and importance of its 'embeddedness effectiveness' in promoting and protecting Convention rights received insufficient attention. The issue became more salient as the jurisdictional competence of the ECtHR to rule on matters concerning public policy gained more recognition.[158] The ever-growing backlog of the Court has been another critical factor encouraging actors within the ECHR system to seek mechanisms to incentivise national decision-makers - judges, legislators and administrators -

[153] Alec Stone Sweet and Helen Keller (eds), *A Europe of Rights* (n 90) 677. See also, Lize Glas, *Bridging the Gap in the Implementation of European Court of Human Rights' Judgments: Introduction to the Implementation System and Proposal for a Civil Society Strategy* (Netherlands Helsinki Committee 2011), arguing that there remains a significant 'implementation gap' which maintains diverse levels of rights protection across the Council of Europe.

[154] See eg, *Annual Report of the ECtHR 2019* (Council of Europe 2020) 131 <https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf> accessed 20 April 2021.

[155] L Helfer, 'Redesigning the European Court of Human Rights' (n 91) 142-144. See also, Jernej Letnar Černič, 'Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe' (2018) *Hague Journal on the Rule of Law* 111. For an analysis of this observation from a statistical perspective, see Chapter 3 below.

[156] CoE Statute, Preamble.

[157] Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 275-276.

[158] See eg, Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161, 168, arguing that individual relief should not be the primary concern for the Court and that its practice should, instead, reinforce the 'public policy' nature of the ECHR, by 'determining issues on public policy grounds in the general interest'. See also, *Karner v Austria* App no 40016/98 (34 July 2003), para 26. For the effect of ECtHR judgments in domestic policy, see, *inter alia*, Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) 71 *Yale Law School Faculty Scholarship Series* 1, 8, arguing that 'the Strasbourg Court, through its jurisprudence, is capable of changing how national politico-legal systems operate, in a wide range of policy settings, at the most fundamental levels'; Dia Anagnostou, 'Untangling the Domestic Implementation of the European Court of Human Rights' Judgments' in Dia Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (CUP 2013) 6-9.

to 'resume their position as the Convention's "first-line defenders"' by promoting rule compliance and providing remedies for any violations occurred domestically.[159] The ECtHR's increased emphasis on the principle of subsidiarity seems likely to further facilitate the settlement of rights disputes domestically 'in the "shadow" of the Court' by enabling ECHR States to develop a well-functioning, autonomous Convention rights protection system in their own national legal order.[160] Indeed, subsidiarity is increasingly deployed as a justifying ground for the enhancement of both the Court judgments' *erga omnes* as well as embedded effectiveness. Securing the Court's normative effectiveness by attributing greater jurisprudential authority to its case law could equally enhance the role of States Parties' national political and judicial actors in the implementation of the Convention and, thus, the overall effectiveness of the domestic rights protection mechanisms.[161] Finally, the ECtHR's extended advisory jurisdiction under the recently introduced Protocol No 16, which aims to 'foster dialogue between courts and enhance the Court's "constitutional" role', is expected to play its role in securing the long-term effectiveness of the ECHR control mechanism.[162] Arguably, such mechanisms can enable international courts to 'forge direct links to their national counterparts' so that national judges are no longer seen as 'passive intermediaries' between international judges and domestic administrators,[163] thus further facilitating the embeddedness process.[164] The precise extent to which this new advisory opinion mechanism can achieve these aims is yet to be seen.[165]

The last definitional element of effectiveness identified in this chapter that needs to be taken into account when assessing the overall effectiveness of the ECtHR concerns the *context* variable. Given that the Court operates in an environment of diverse constituencies, it often needs to communicate with different audiences and, thus, tailor its message, as

[159] L Helfer, 'Redesigning the European Court of Human Rights' (n 91) 144-146, 149, 152-155; L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 474. See also, Christos Pourgourides, 'National Parliaments: Guarantors of Human Rights in Europe' (PACE Committee on Legal Affairs and Human Rights Report, 06 June 2011) <https://pace.coe.int/en/files/12866/html> accessed 20 April 2021.

[160] Yuval Shany, *Assessing the Effectiveness of International Courts* (n 10) 275.

[161] S Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights - What's in a Name?' (n 127) 157-158.

[162] Explanatory Report to Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, para 1.

[163] L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 474-475.

[164] Laurence Helfer and Karen Alter, 'The Andean Tribunal of Justice and its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community' (2009) 41 *New York University Journal of International Law & Politics* 871, 912-20.

[165] On the potential impact of Protocol No 16 in this regard, see, Björg Thorarensen, 'The Advisory Jurisdiction of the ECtHR under Protocol No. 16: Enhancing Domestic Implementation of Human Rights or a Symbolic Step?' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection – Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016); Maria Dicosola, Cristina Fasone and Irene Spigno, 'The Prospective Role of Constitutional Courts in the Advisory Mechanism before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System' (2015) 16(6) *German Law Journal* 1387; Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol o. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal' (2014) 21(4) *Maastricht Journal of European and Comparative Law* 630.

reflected in its jurisprudence, accordingly. Reform aspects from a managerial perspective, including measures for a more efficient use of resources, speedy examination of pending cases, streamlined procedures and improved working methods, usually appear to be easier to reach a consensus on than aspects of a different nature. Such managerial approach promotes the idea of effectiveness as an objective, commonly accepted goal, which is then universally perceived as necessary and desirable. The distracting power of this narrative suggests that the ECtHR can better showcase its efforts for an efficient internal machinery and retain and further enhance its widespread support from the various actors within the CoE system.

As the earlier discussion on the ECtHR's 'case-specific effectiveness' showed, the ability of an international court to persuade a State to comply with an adverse or unfavourable judgment against it may be only one component of the multifaceted and complex political context within which the Court operates. Scholars have also recognised other factors contributing to State compliance with international court rulings. These may refer to political dynamics at the national and regional level, including, for example, a change in national government with different foreign or domestic policy agendas and an increased domestic mobilisation through civil society campaigns, the support of political and other influential elites and an active domestic judiciary.[166] Additionally, very often States arguably choose to comply with particular laws only when and if this action is in accordance with their own national interests.[167] Although these contextual factors are largely beyond the immediate control of international judges sitting at Strasbourg, they still, nevertheless, influence the levels of effectiveness enjoyed by the ECtHR.[168] Consequently, *authority*, thus normative effectiveness, needs to be examined against *context* since 'different international laws have different "authority structures"', and the level of authority they enjoy over domestic systems depends on the *context* of that particular international law and the way it is *practically applied* or *enforced* within a particular domestic system.[169]

The increasingly challenging political context in which the ECtHR currently operates risks restricting the Court's role and preventing it from continuing the progressive expansion of

[166] See eg, L Helfer, 'The Effectiveness of International Adjudicators' (n 104) 470-471; D Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 121, 128-34; Dia Anagnostou, 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-related Policies' (2010) 14(5) *International Journal of Human Rights* 721, 735-738.

[167] Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015) 12; A Guzman, *How International Law Works* (n 22) 9, elaborating the theory on the 'Three Rs of compliance' with international law, namely, reputation, reciprocity, and retaliation); Harold Koh, 'Why Do Nations Obey International Law?' (1995) 106 *The Yale Law Journal,* 2599.

[168] Karen Alter, Laurence Helfer and Mikael R Madsen, 'How Context Shapes the Authority of International Law' (n 68) 2, 17, 22-25.

[169] Başak Çalı, *The Authority of International Law* (n 167) 11-12.

Convention rights that has previously characterised its jurisprudence.[170] Some scholars have argued that established international courts, like the ECtHR, are often well-insulated from external political pressures and can use their large body of jurisprudence as guidance to further advance the norms in the treaties under their supervision.[171] Conversely, others have found that international judicial bodies, including the ECtHR, enjoy a form of constrained independence and, therefore, cannot remain unaffected by the wider political context they operate in, which, as shown already, influences their decision-making in a number of ways.[172] As will be further discussed in later chapters,[173] the ECtHR remains vulnerable to changes in current political environment and such developments may have serious consequences for the future of the wider European human rights system.

2.5 Conclusion

The first substantive chapter of this thesis sought to develop the conceptual framework through which the effectiveness of the ECtHR can be determined and evaluated in light of its multi-functionality. The multidimensional model for assessing the effectiveness of the ECtHR seeks to reconcile the focus on the internal structure and functioning of the ECtHR with the rational goal-based approach to effectiveness and the Court's long-term viability. It is for this reason that an examination of the ECtHR's efficiency and cost-effectiveness should be complemented by a goal-based effectiveness study to ensure that the correct balance between institutional effectiveness and overall, normative effectiveness is struck. Measures taken with a view to finding solutions to the workload, or efficiency, problem at Strasbourg, including any further structural reform of the Court, would be fundamentally flawed if they are seen as substitute for solutions within the legal systems of the Contracting States. Not only would such an approach be harmful regarding the operational capacity and resources of the ECtHR, but it would also, in the longer term, be detrimental to the ultimate objective of the Court, as a subsidiary regional organ for the protection of human rights. Any attempt to guarantee the long-term effectiveness of the ECtHR, thus, requires an examination not only of the functioning of the Court itself but also of the functioning of the wider ECHR system, including that of States Parties in relation to the protection of Convention rights

[170] See eg, Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights - Shifting the Dynamics of the Convention System: Counter-Dynamics at the National and EU level* (Intersentia 2016); Mikael R Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2017) 9(2) *Journal of International Dispute Settlement* 199.

[171] See eg, Karen Alter, 'Agents or Trustees? International Courts in their Political Context' (n 117) 33.

[172] Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61(4) *International Organization* 669; Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) *American Political Science Review* 417; Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64(4) *International Studies Quarterly* 770.

[173] See especially Chapter 5.

domestically. In other words, it would be incorrect (or even misleading) to determine the effectiveness of the ECtHR based on its own institutional performance only as the ECHR system is not made up solely of the Court.

In the absence, however, of a clear determination of the role of the ECtHR and its goals, unsurprisingly, the focus of the reform of the Court will be on enhancing its efficiency (ie organisational/institutional effectiveness), while other aspects that can determine its overall effectiveness will continue to be overlooked. Furthermore, unless there is a fundamental change in how the ECtHR's underlying problem is framed,[174] most of the reform proposals will problematise the Court and its structural deficiencies while seeking to implement measures to enhance its functioning at a technical level with little or no results as to the ultimate goal. Moreover, the chapter has argued that, in order to achieve the long-term effectiveness of the ECtHR, the primary focus should be on further embedding the Convention principles into the national jurisdictions of the ECHR Contracting Parties. Evidently, the efficiency of the procedures before the ECtHR alone cannot reach to the root causes of the effectiveness problem. At the same time, emphasis should also be given on the prompt and effective execution of the Court's judgments by States in co-operation with the Court and the Committee of Ministers.

As a former Secretary General of the Council of Europe aptly stated, 'human rights protection begins and ends at home'.[175] The inter-dependent character of the ECHR system of human rights protection, therefore, needs to be borne in mind: the effectiveness of the Convention system relies substantially on the effectiveness of national systems and structures to prevent or remedy human rights violations domestically.[176] Equally, when the ECtHR is inevitably seized and a final judgment is delivered, the emphasis shifts back to the national arena where national authorities are under a legal obligation to execute the judgment in a full and timely manner. Failure to do so will result in further individual applications reaching the ECtHR, thus placing additional, but nevertheless preventable, burden on the Strasbourg Court. One can then speak of an outright effective ECtHR when the need for individuals to have recourse to Strasbourg for Convention-related disputes is eliminated due to the strengthening of human rights protection at national level and the possibility of individuals to effectively vindicate their Convention rights before the national courts, without engaging the complex and lengthy international process offered by the ECtHR.

[174] See Chapter 4 on framing the ECtHR's challenges.
[175] Walter Schwimmer's speech in *Proceedings: European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th anniversary of the Convention* (Council of Europe, 2002) 20.
[176] See eg, Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights' (2007) 3(1) *Human Rights Law Commentary*.

As recognised above, seen from a comparative perspective, the Strasbourg Court 'can certainly be considered cost-effective when compared to other international tribunals'.[177] The uncertainty, nevertheless, of whether the ECtHR has been effective in achieving its own end goals remains a vital question. The Court's perceived general effectiveness, therefore, should not be overstated. As this chapter indicated, several issues underpinning its normative effectiveness, notably its *erga omnes* and embeddedness effectiveness, are still in development phase and by no means can be considered complete. As the following chapter will demonstrate from a statistical perspective, besides the notable progress achieved in establishing a harmonised level of rights protection across the CoE membership, apparent discrepancies in the implementation of Convention standards across the ECHR States and the permanently high numbers of repetitive applications resulting in an extensive backlog suggest that the ECtHR still has a long way to go before it can be named a truly effective international court. Testing this effectiveness framework developed above, Chapter 3 will further show that the Court's institutional underperformance is also linked to the failure of other (national) mechanisms of rights protection to function effectively. Consequently, the framework for assessing the Court's effectiveness elaborated in this chapter indicates anew that its continued authority cannot be taken for granted as certain underlying challenges concerning its functioning, both at institutional but mainly at normative level, need to be further addressed and resolved.

[177] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (n 14) 276.

Chapter 3
The European Court of Human Rights from a Statistical Perspective: Demystifying the Interlaken process success story

'The package of reform measures implemented over the following decade has enabled this unique international system of human rights protection to remain truly effective'.[1]

'The Interlaken reform process […] has led to significant advances, which also bode well for the system's capacity to meet new challenges […]. The necessity of a new major revision of the system is therefore not apparent. […] the CDDH sees no reason to depart from its assessment made in 2015 that the current challenges the Convention system is facing can be met within the existing framework. What appears important is rather to allow the Convention system as it has emerged from the Interlaken process and Protocol No. 14 … to demonstrate fully its potential'.[2]

3.1 Introduction

Having reached the end of the decade-long Interlaken process in December 2019, the key message that official annual statistics published by Council of Europe (CoE) bodies seek to convey is that the overall picture regarding the functioning of the ECtHR and the wider ECHR system looks rather positive. The number of applications pending for examination before the ECtHR has eventually stopped its upward trend and has, indeed, dropped significantly during the past few years (notably since 2014) to just below 60,000 by the end of 2019 – a remarkable decrease of over 60% since the figure reached a record high of about 160,000 in September 2011.[3] More specifically, there has been an impressive reduction of clearly inadmissible or manifestly ill-founded applications pending before the Court's single-judge formation from 88,400 at the end of the first year of the introduction of the ECtHR's new structure under Protocol No 14 in 2010 (representing the 63% of the overall number of pending applications at the time) to 'merely' 5,150 applications (8% of the overall backlog)

[1] Marija Pejčinović Burić (Council of Europe Secretary-General), Preface in *The Interlaken Process* (Council of Europe 2020) <https://rm.coe.int/processus-interlaken-eng/1680a059c7> accessed 6 May 2021.
[2] 'Contribution of the Steering Committee for Human Rights (CDDH) to the Evaluation provided for by the Interlaken Declaration' (hereinafter, CDDH Contribution) in *The Interlaken Process* (n 1) 103-104.
[3] *ECtHR - Analysis of Statistics 2019* (Council of Europe, 2020) 7 <https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf> accessed 20 April 2021.

by the end of 2019.[4] At the same time, the average number of repetitive applications (or 'clone' cases) decreased in recent years and has now ceased to be the greatest challenge facing the Court in terms of caseload.[5] Such applications, which result from already identified structural and systemic domestic deficiencies, were largely responsible for the ECtHR's excessive backlog during the previous decade and, consequently, their declining number can be seen with optimism. Similarly positive data have also been communicated with regard to the execution of ECtHR judgments. The number of judgments pending execution domestically has been reducing considerably since the all-time high figure of 11,099 reported at the end of 2012, dropping by 53% by 2019.[6] Delving deeper into these statistics, however, one realises that, despite the significant progress achieved, the underlying challenges facing the ECtHR not only remain unresolved after years of constant reforms, but are also much more widespread than it may first appear.

Between 1998 and 2010, the Court delivered 12,860 judgments – an average of about 990 per year, as opposed to 65 judgments per year delivered in the preceding decade.[7] The ECtHR's 'output' in the last decade (2011-2019) saw an average of about 982 judgments per year, projecting a noticeable, consistent downward trend until 2014. Indeed, each year between 2011 and 2019 noted a decrease in the number of judgments delivered compared to the preceding year, with 2016 and 2017 being the only exceptions during this time period.[8] Similarly, during the same period (2011-2019), the number of applications in respect of which judgments were delivered shows a downward trend too.[9] Yet, although the numbers of cases judicially examined, and of judgments delivered, by the ECtHR have been generally decreasing, the overall number of pending applications during the last decade, paradoxical as it may appear, has decreased considerably as well (even though the high annual rate of new incoming applications remained unchanged in this same period).[10] The official ECtHR Reports present this finding as a great achievement and attribute it to institutional reasons, ie the Court's improved working methods, overall functioning and

[4] See, *ECtHR –Analysis of Statistics 2010* (Council of Europe, 2011) 6 <https://www.echr.coe.int/Documents/Stats_analysis_2010_ENG.pdf> accessed 20 April 2021; *ECtHR – Analysis of Statistics 2019* (n 3) 6.

[5] See Section 3.2 below.

[6] *13th Annual Report of the Committee of Ministers 2019* (Council of Europe 2020) 51 <https://rm.coe.int/annual-report-2019/16809ec315> accessed 20 April 2021.

[7] *Annual Report 2011 of the ECtHR* (Council of Europe 2012) 155.

[8] Also, the number of judgments delivered between 2009 and 2019 reduced by almost 50%. Based on data from *ECtHR - Analysis of Statistics 2011* to *2019* <https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22sort%22:[%22createdAsDate%20Descending%22],%22Title%22:[%22\%22analysis%20of%20statistics\%22%22],%22contentlanguage%22:[%22ENG%22]}> accessed 20 April 2021.

[9] In 2019 alone, a drop of 20% from the previous year was noted. See, *ECtHR – Analysis of Statistics 2019* (n 3), 61.

[10] During the last decade, the number of incoming applications allocated to a judicial formation each year has ranged from 40,500 (in 2015) to 65,800 (in 2013). See, *ECtHR - Analysis of Statistics 2011* to *2019* (n 8).

efficiency.[11] Although the institutional tweaking undoubtedly played its role,[12] a deeper analysis, nevertheless, shows that this trend is fully aligned with the underlying objectives of ECHR States – as reflected in the Brighton Conference - to '[re]evaluate the fundamental role and nature' of the ECtHR and create a 'more focused' and increasingly deferential Court that would 'need to remedy fewer violations itself and consequently deliver fewer judgments'.[13]

The "success story" of the Interlaken process that the CoE annual reports seek to present forms only a part of the bigger picture.[14] The statistical analysis conducted in this chapter seeks to demonstrate that most of the 'exceptionally positive trend[s]'[15] and 'impressive achievements'[16] noted since 2010, as former ECtHR President Spielmann put it, are largely attributed to the technical rationalisation of the ECtHR, which, alone, has proven inadequate to address and/or resolve the underlying challenges facing the Court. In this chapter, I argue that the reform process of the last decade has disproportionately placed the burden of guaranteeing the long-term future of the ECtHR on its own (and the Registry's) ability to reduce the backlog of cases, mainly through technical/institutional restructuring and on the basis of its growing well-established case law. At the same time, little has been achieved in strengthening the normative relationships between the Court and ECHR States.[17] As the ECtHR itself highlighted, 'there are limits to what can be achieved in relation to managing

[11] See eg, Guido Raimondi, *Speech at the Opening of the Judicial Year 2019* in *Annual Report 2019 of the ECtHR* (Council of Europe 2020) 14. See also, Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' (2013) 12 *HRLR* 655, 657-8, presenting this as a 'hugely welcome achievement' without, however, disregarding the fact that the ECtHR remains in crisis due to its permanently unsustainable backlog.

[12] See eg, Philip Leach, *Taking a Case to the European Court of Human Rights* (OUP 2011) 7-9.

[13] *High Level Conference on the Future of the European Court of Human Rights - Brighton Declaration* (2012) paras 31, 33 (emphasis added) <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 5 May 2021. For a critical analysis, see, Mikael R Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 *Journal of International Dispute Settlement* 199. For further discussion on the impact of the Brighton Conference on the future of the ECtHR, see Chapter 5 of the thesis.

[14] 'Success' is often deployed in official ECtHR Annual Reports to characterise the achievements or progress noted during the Interlaken reform process. See eg, Guido Raimondi, *Speech at the Opening of the Judicial Year 2018* in *Annual Report 2018 of the ECtHR* (Council of Europe 2019) 13 <https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf> accessed 20 April 2021. See also, Marija Pejčinović Burić, Speech at the *Commemorative Ceremony on the Occasion of the 70th Anniversary of the European Convention for Human Rights* (Athens, 4 November 2020) suggesting that the 'decisions [adopted by the Committee of Ministers on the evaluation of the Interlaken process] confirm the success of the reforms' <https://www.coe.int/en/web/secretary-general/-/commemorative-ceremony-on-the-occasion-of-the-70th-anniversary-of-the-european-convention-for-human-rights> accessed 5 May 2021.

[15] Dean Spielmann, *Speech at the Opening of the Judicial Year 2015* in *Annual Report 2015 of the ECtHR* (Council of Europe 2016) 31 <https://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf> accessed 5 May 2021.

[16] ibid.

[17] As shown further below, this is evidenced, for example, by the steadily increasing incoming applications and the relative unchanged number of leading cases pending execution over the past decade. See Sections 3.2 and 3.3 below for further analysis.

the high case load through the Court's efforts to continually improve working methods'.[18] Ultimately, the chapter serves to demonstrate that while the considerable achievements at this stage of the Court's reform need to be acknowledged (but not overly praised), the viability of this progress, and thus the efforts to secure the long-term future of the ECtHR, remain fragile and highly susceptible to future overturn.

3.2 Case overload crisis

By the end of the Interlaken process in December 2019, the number of applications pending for examination before a judicial formation stood at nearly 60,000, a rise of 6% from the previous year.[19] The overall number of pending applications, nevertheless, has been generally decreasing during the last decade and, indeed, dropped significantly from the 'astronomical', record-high figure of about 160,000 in September 2011 (an 'impressive' overall decrease of over 60% by 2019).[20] This is arguably a significant achievement and was praised widely by the ECtHR and other CoE bodies over the last few years.[21] Yet, this achievement is largely attributed to the sharp reduction of clearly inadmissible or ill-founded applications following the establishment of the Single-judge formation in 2010 (applications pending before Single Judges fell from 88,400 in 2010 to 5,150 in 2019).[22] Admittedly, this type of applications was clogging up Strasbourg's entire judicial system for many years and its almost elimination should be seen as a positive development.[23] This apparent statistical

[18] ECtHR, 'Comment from the European Court of Human Rights on the CDDH Contribution to the Evaluation of the Interlaken Reform Process' in *The Interlaken Process* (n 1) 118.

[19] *ECtHR - Analysis of Statistics 2019* (n 3) 6-7. As of January 2021, this figure remains relatively unchanged (ie 62,000 pending applications). See, *ECtHR - Analysis of Statistics 2020* (Council of Europe, 2021) 6 <https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf> accessed 14 June 2021.

[20] ibid; Dean Spielmann (n 15), characterising the backlog's figure at the time as 'astronomical'. See also *Figure 1*, below.

[21] See eg, Guido Raimondi (n 14) characterised this 'undeniably a success', while Dean Spielmann (n 15) spoke of an 'impressive achievement'. See also, CDDH Contribution to the Evaluation provided for by the Interlaken Declaration (n 2), paras 69-71; Thorbjørn Jagland, Speech at the Seminar on the Occasion of the 20th Anniversary of the Single European Court of Human Rights (Strasbourg, 26 November 2018) <https://www.coe.int/en/web/secretary-general/speeches-thorbjorn-jagland/-/asset_publisher/gFMvl0SKOUrv/content/seminar-on-the-occasion-of-the-20th-anniversary-of-the-single-european-court-of-human-rights?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fsecretary-general%2Fspeeches-thorbjorn-jagland%3Fp_p_id%3D101_INSTANCE_gFMvl0SKOUrv%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1> accessed 14 June 2021.

[22] *ECtHR – Analysis of Statistics 2010* and *2019* (n 8).

[23] Lord Woolf, *Review of the Working Methods of the European Court of Human Rights* (2005), 19, 23-28; *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203 (2006), paras 26-28, 35. For a critical analysis of the classification of applications as clearly inadmissible by the ECtHR, in particular in relation to the 'significant disadvantage' criterion, see eg, Nikos Vogiatzis, 'The Admissibility Criterion under Article 35(3)(b) ECHR: A "Significant Disadvantage" to Human Rights Protection?' (2016) 65(1) *International & Comparative Law Quarterly* 185. See also relevant discussions later in this section as well as in Chapter 4, Section 4.4 and Chapter 6, Section 6.3.4 of the thesis.

improvement, however, should be treated more as a *sine qua non* for the survival of the Court, rather than a success of the Interlaken process. The fact that still to date only a tiny fraction (1%) of the ECtHR's current workload comprises admissible applications proves that the drastic decrease noted above has been of no avail as the underlying problem of ineffective implementation of the Convention domestically, including the (in)existence of effective domestic remedies in all ECHR States, remains unresolved.[24] As such, although the institutional reforms brought by Protocol No 14 have proved to be a catalyst for containing the Court's excessive backlog, the Interlaken process has not adequately grappled with the root causes of this phenomenon, which still need to be further analysed and addressed.

A closer look into these statistics shows that the decrease in the overall number of pending applications over the past decade may not be the result of a stable and consistent downward trend in the ECtHR's backlog. For instance, in 2017 there was a considerable decrease of pending applications before the Court by about 30% compared with 2016 (from almost 80,000 to 56,250 applications).[25] Although this can be considered 'undeniably a success', according to former ECtHR President Raimondi,[26] there is still a long way from reaching a satisfactory situation in terms of the Court's backlog and this constitutes one of the biggest challenges for the Court and its Registry to date. Indeed, although some of the recent figures published by the Court are quite promising regarding the current or even future functioning of the Court, these statistics are rather deceptive and, therefore, it should not be inferred that the human rights situation in Europe has improved.[27]

More specifically, in that same year (2017), more than 12,000 applications were struck out of the Court's list of cases with the delivery of a single judgment in the light of an ongoing pilot judgment execution process, albeit initially declared admissible.[28] Having dealt with a constant influx of identical cases unsuccessfully for almost two decades,[29] the ECtHR decided that 'nothing is to be gained, nor will justice be best served' by repeating its previous findings in future comparable cases.[30] Instead, taking a more pragmatic approach, through a strike-out decision, would better serve the 'general interest'.[31] As the Court admitted,

[24] Similarly, around 85% of the applications examined by the Court in 2019 were declared inadmissible. See, *ECtHR – Analysis of Statistics 2019* (n 3) 11.
[25] *ECtHR – Analysis of Statistics 2019* (n 3) 7.
[26] Guido Raimondi, *Speech at the Opening of the Judicial Year 2019* (n 11).
[27] President Guido Raimondi, Opening Speech, Solemn Hearing of the European Court of Human Rights (26 January 2018) <http://www.echr.coe.int/Documents/Speech_20180126_Raimondi_JY_ENG.pdf> accessed 5 May 2021.
[28] *Burmych and Others v Ukraine* App no 46852/13 *et al* (12 October 2017). At the time, applications deriving from the *Burmych* case accounted to almost one third of all the repetitive applications pending before the Court.
[29] The underlying issue in *Burmych*, namely the mass non-enforcement by Ukraine of its national court judgments, was first revealed in *Kaysin and Others v Ukraine* App no 46144/99 (27 January 2000) and was later identified as a systemic problem in the 2009 pilot judgment of *Yuriy Nikolayevich Ivanov v Ukraine* App no 40450/04 (15 January 2010), whose execution is still pending to date.
[30] *Burmych and Others v Ukraine* (n 28), paras 173-174.
[31] ibid, para 173.

continuing to examine those applications would 'affect [its] ability to fulfil its mission under Article 19 [ECHR] in relation to other meritorious applications' and 'would place a significant burden on its own resources, with a consequent impact on its considerable caseload'.[32] As a matter of judicial policy, therefore, the Court clearly chose to prioritise procedural and institutional efficiency at the expense of victims' right to seek international redress.[33] Although strike-out decisions such as the above may look good for superficial statistical considerations, the example of *Burmych* serves to demonstrate that the ongoing caseload crisis experienced by the Court may prevent it from further examining and ruling on a substantial number of meritorious cases. What is more, such strike-out practice risks 'transferring [the responsibility for] the determination of human rights claims from a judicial authority […] to a political body, […] namely the Committee of Ministers',[34] which, in the case of *Burmych* at least, had already proven unable to ensure the execution of previous judgments on the same legal issues.[35]

As I further explain below, the ineffectiveness of the strike-out practice in ending and remedying a continuous rights violation becomes all the more relevant given the precedent set by the first-ever infringement-proceedings judgment delivered by the Court in 2019 as a result of the prolonged non-execution of a previous ECtHR judgment.[36] Essentially, strike-out decisions in conjunction with infringement proceedings can end up transforming the execution of ECtHR judgments into a ping-pong game between the Court and the CoM without in reality resolving the underlying issue in a definite manner, ie by rectifying the systemic problem at stake through a prompt and effective implementation of the ECtHR judgment domestically.[37] While the Court recognised that it cannot 'be converted into a body supervising execution of judgments', by handling a long-standing unresolved issue in such a way, it risks rendering the supervision of the execution process by the CoM an alternative to its own function (and duty under a broader interpretation of Article 19 ECHR) of judicial review of admissible cases.[38]

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[32] ibid, paras 150, 174.

[33] Eline Kindt, 'Non-execution of a pilot-judgment: ECtHR passes the buck to the Committee of Ministers in *Burmych and Others v. Ukraine*' (*Strasbourg Observers*, 26 October 2017) <https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/> accessed 17 June 2021.

[34] *Burmych and Others v Ukraine* (n 28), Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaç, De Gaetano, Laffranque and Motoc, paras 13 and 27. On the Court's strike-out of decisions policy, see further below in this section.

[35] See eg, Başak Çalı and Anne Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14(2) *Human Rights Law Review* 301.

[36] *Ilgar Mammadov v. Azerbaijan* (infringement proceedings under Art 46 § 4) App no 15172/13 (29 May 2019).

[37] See eg, Antoine Buyse, 'First Infringement Proceedings Judgment of the European Court: Ilgar Mammadov v Azerbaijan' (*ECHR Blog*, 31 May 2019) <http://echrblog.blogspot.com/2019/05/first-infringement-proceedings-judgment.html> accessed 17 June 2021.

[38] *Burmych and Others v Ukraine* (n 28), para 193. See generally, Andrew Clapham, 'Overseeing Human Rights Compliance' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012). See also, Eline Kindt, 'Non-execution of a pilot-judgment: ECtHR passes the buck to the Committee of Ministers in

Beyond that, important normative questions may also arise from such strike-out judicial practice, not least concerning the principle of access to justice and the right of individual petition, as already mentioned earlier.[39] This is particularly problematic from the perspective of procedural access to justice as the type of applications struck off in *Burmych* were clearly admissibile and, based on the established case law, it is very likely that had the ECtHR considered them on the merits, it would have found a violation of the Convention.[40] Yet, the strike-out practice of *Burmych*-type applications is equally problematic from a substantive perspective too. Seen from this angle, the effective protection of human rights forms the primary objective of the Convention system and, thus, the Court. [41] However, it remains questionable how a decision to strike off a group of meritorious applications due to the prolonged non-execution of a previous pilot judgment on the same matter serves the above objective; the affected individuals are left without formal recognition of the rights violation they incurred, let alone a legal remedy.[42]

Burmych and Others v. Ukraine' (n 33), suggesting that the Court's mass strike-out decision 'has thoroughly shifted the institutional balance in the Council of Europe between the Court and the Committee of Ministers'.

[39] A similar reform proposal suggesting the automatic strike-out of admissible applications was previously rejected by the ECtHR precisely on these grounds, but left the door open for 'introducing new limits on the numbers of cases to be examined'. See, *Preliminary Opinion of the Court in preparation for the Brighton Conference* (February 2012), paras 33-34 <https://echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf> accessed 20 April 2021.

[40] See eg, Janneke Gerards and Lize Glas, 'Access to Justice in the European Convention on Human Rights system' (2017) 35(1) *Netherlands Quarterly of Human Rights* 11, 25-26.

[41] ibid.

[42] Eline Kindt, 'Giving Up on Individual Justice? The Effect of State non-execution of a Pilot Judgment on Victims' (2018) 36(3) *Netherlands Quarterly of Human Rights* 173. On the ECtHR's strike-out practice in general, see, Elisabeth Lambert Abdelgawad, 'The Practice of the European Court of Human Rights when Striking Out Applications' (2018) 36(1) *Netherlands Quarterly of Human Rights* 7.

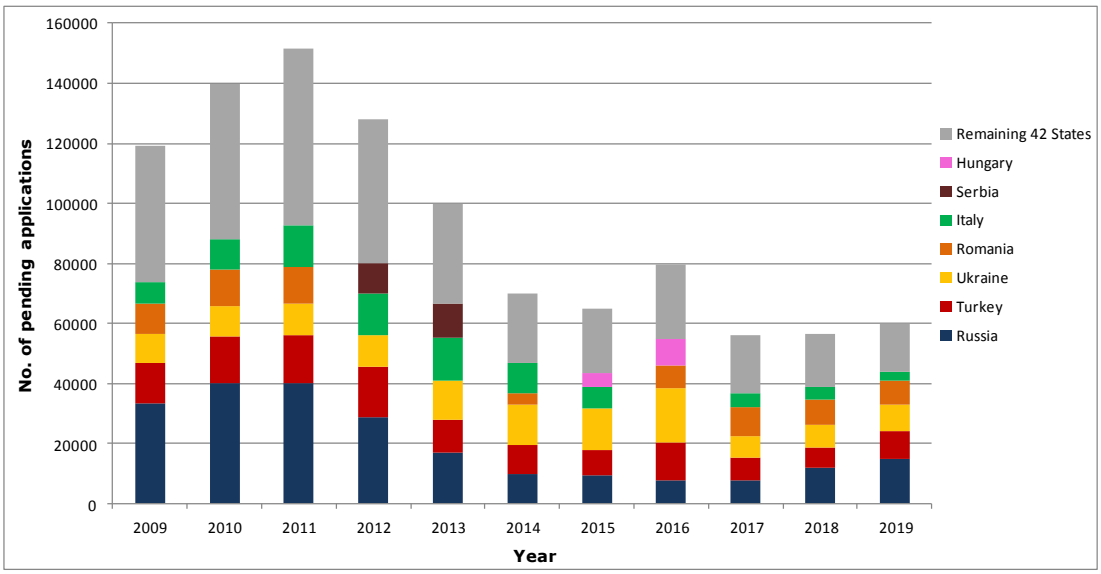

Figure 1- Pending applications before the ECtHR between 2009-2019 (main respondent States).

Returning to the analysis of the Court's statistics, I will seek to demonstrate that the otherwise decreased figures concerning the Court's overall caseload form only a part of the wider backlog problem. Analysing further the currently pending applications, one can clearly observe that the caseload crisis that the ECtHR was facing at the beginning of the Interlaken process is far from resolved. On the contrary, after a decade of reforms, the caseload crisis that was jeopardising the very survival of the Court has now further deteriorated in a number of respects. Firstly, the number of repetitive, or 'clone', applications dealt with by Committees climbed ten times during the last decade, from around 4,000 applications in 2010 to nearly 35,000 in 2020, currently representing more than the half of the total number of pending applications.[43] Although the examination of such cases should be relatively straightforward and can be conducted on the basis of the Court's well-established jurisprudence, the persistently growing number of repetitive applications throughout the Interlaken period is particularly worrying. The fact that a large amount of them (almost 20,000 applications, or almost two thirds of all repetitive application, in 2019) are classified as 'high priority', thus requiring urgent examination,[44] places additional challenges to the ECtHR and contributes to an excessive length of its judicial proceedings.[45]

A similar challenge exists in relation to the number of Chamber cases (about 22,000 pending applications in 2020), which now make up more than a third of the Court's overall caseload,

[43] *ECtHR - Analysis of Statistics 2019* (n 3) 6 and *ECtHR Monthly Statistics October 2020* <https://www.echr.coe.int/Documents/Stats_month_2020_ENG.PDF> accessed 20 April 2021. See also, *Figure 2*, below.
[44] For the categorisation of applications by the ECtHR, see, *The Court's Priority Policy* <https://www.echr.coe.int/documents/priority_policy_eng.pdf> accessed 5 May 2021.
[45] See eg, Guido Raimondi, *Speech at the Opening of the Judicial Year 2019* in *Annual Report 2019 of the ECtHR* (n 11) 12-13.

despite having been reduced by half in actual terms since 2010.[46] Chamber cases in principle involve well-founded non-repetitive applications deriving from novel structural or systemic problems in States' domestic orders. They also raise new questions regarding the interpretation and application of the Convention and are very likely to result in a judgment. Due to the importance and gravity of the issues raised therein, prompt examination of such cases is essential for both the attribution of justice in pressing human rights issues across the continent and the normative development of ECHR law.[47] CoE official reports suggest that the reform measures implemented during the Interlaken process have now enabled the Court to 'bring the situation under control' and deal with new incoming clearly inadmissible (Single-Judge) applications on a 'one in/one out basis'.[48] However, the pressing challenge of reducing the backlog of non-repetitive Chamber cases remains.[49] Indeed, the novelty and complexity of applications pending before Chambers means that they will take much longer to be examined. Additionally, the fact that an increasingly large amount (currently about one third) of these applications is categorised as 'priority cases' results in even lengthier proceedings before the Court (currently taking over 5 years for Chamber cases to be examined – about the same as in 2005), with further consequential effects on the ECtHR's overall functioning and effectiveness.[50] Indicatively, by the late 2010s, Chambers delivered an average of 400 judgments and decisions in respect of about 600 applications each year.[51] It is evident that at this rate Chambers will need dozens of years to clear their persistent backlog, even in the hypothetical scenario that no new non-repetitive cases are allocated for examination.[52]

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[46] See *Figure 2*, below.

[47] See, ECtHR, 'Comment from the European Court of Human Rights on the CDDH Contribution to the evaluation of the Interlaken Reform Process' in *The Interlaken Process* (n 1) 119.

[48] See, *The Interlaken Process and the Court* (2015) (DD(2015)1045E), 3 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804caeb5> accessed 5 May 2021; CDDH, 'Contribution to the Evaluation Provided for by the Interlaken Declaration' in *The Interlaken Process* (n 2) 53-54.

[49] See eg, CDDH, 'Contribution to the Evaluation Provided for by the Interlaken Declaration' in *The Interlaken Process* (n 2) 57.

[50] ibid. See also, France's Contribution in CDDH, *Follow-up Work to the Copenhagen Declaration – Compilation of the Contributions Received from the Member States* CDDH(2019)12 (25 April 2019), arguing that the biggest challenge for the Court is not so much the processing of repetitive applications raising issues already dealt with in a pilot/leading judgment ("well-established case law cases"), but rather that of non-repetitive and priority cases, which raise issues with regard to 'core rights' under Articles 2, 3, 4 or 5(1) ECHR (ie Category IV and III cases under the Court's Priority Policy, respectively, which are normally dealt with by Chambers), due to their high number as well as complexity and urgency <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680943434> accessed 26 May 2021. See further, Başak Çalı and Esra Demir-Gürsel, '"A Court that matters" to whom and for what? Academic freedom as a (non-)impact case' (*Strasbourg Observers*, 11 June 2021), acknowledging that it 'will take a *minimum* of five to six years' for about 17,000 Category IV cases currently pending for examination to be adjudicated <https://strasbourgobservers.com/2021/06/11/a-court-that-matters-to-whom-and-for-what-academic-freedom-as-a-non-impact-case/> accessed 24 June 2021.

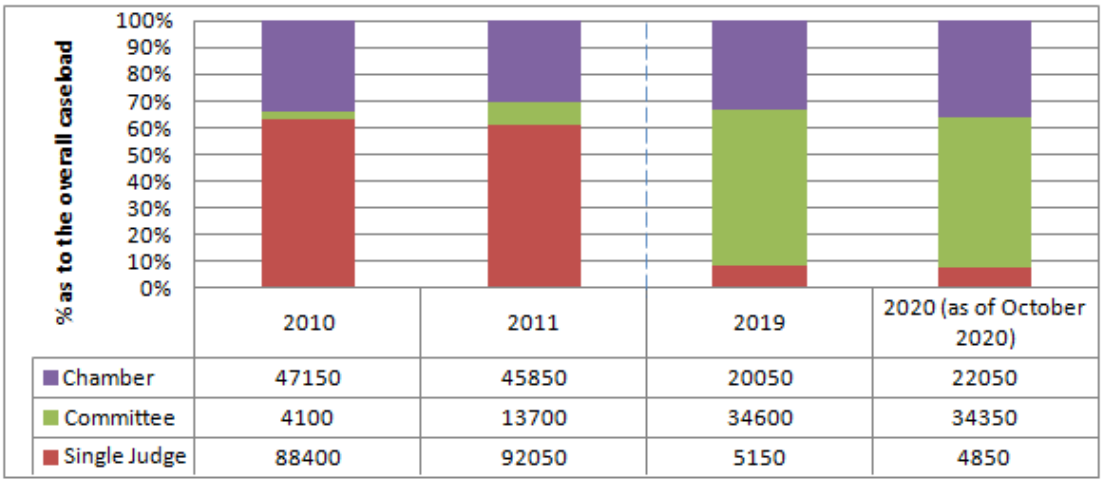
[51] *ECtHR – Analysis of Statistics 2017* to *2019* (n 8).

[52] For a further analysis of the ECtHR's overall input-output performance, see below in this section.

The above findings have been acknowledged by the ECtHR in its annual stocktaking activities in the last few years, albeit in a vague and truistic manner, often by shifting the attention to the 'achievement' of overall decrease in numbers over the last decade. For instance, in his speech at the opening of the Judicial Year 2018, the ECtHR President at the time, Guido Raimondi, pointed out that the biggest challenge that the Court is currently facing is not the excessively high number of clearly inadmissible or ill-founded applications (as it used to be in the late 2000s and early 2010s), but, rather, the considerable volume of applications currently being processed by one of the ECtHR's Chambers.[53] The same observation was repeated anew in his 2019 speech, when he referred to this situation as 'undoubtedly' 'the biggest challenge for the Court'.[54] More recently, the Court reaffirmed that 'given its current resources it has great difficulty in dealing adequately with the backlog of non-repetitive cases'.[55]

Despite the great importance attributed to this growing challenge by the President, no CoE official report or study has so far made an exhaustive analysis of the root causes of this phenomenon or proposed long-term measures to resolve it.[56] Instead, the *Analysis of Statistics* for 2019 draws attention to the Court and Registry's ability to 'continue to test and implement new working methods and procedures … to streamline processing of this part of [the Court's] caseload' as a means to tackle the overburdening of Chambers – something which has already proven inadequate after a decade of continuous reform in this direction.[57] Following a similar tone and confirming its previous findings, the Steering Committee for Human Rights' (CDDH) final contribution to the evaluation of the Interlaken process published at the end of 2019 suggests that 'the challenges the system is faced with are best addressed within its current framework' and no departure from this position is necessary.[58]

[53] Guido Raimondi, Opening Speech, Solemn Hearing of the European Court of Human Rights (26 January 2018) <http://www.echr.coe.int/Documents/Speech_20180126_Raimondi_JY_ENG.pdf> accessed 5 May 2021.
[54] Guido Raimondi, *Speech at the Opening of the Judicial Year 2019* in *Annual Report 2019 of the ECtHR* (n 11) 12-13.
[55] 'Comment from the European Court of Human Rights on the CDDH Contribution' in *The Interlaken Process* (n 1) 119.
[56] It is noted, however, that the Committee of Ministers invited the CDDH in 2018 to conduct 'a comprehensive analysis of the Court's backlog' to identify and examine 'the causes of the influx of cases from the States Parties so that the most appropriate solutions may be found at the level of the Court and the States Parties'. As this study was completed after the end of the Interlaken process, its real impact remains to be seen. See, Copenhagen Declaration (2018), para 54 a) <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed 5 May 2021.
[57] *ECtHR - Analysis of Statistics 2019* (n 3) 5.
[58] CDDH, 'Contribution to the Evaluation Provided for by the Interlaken Declaration' in *The Interlaken Process* (n 2) 22.



	2010	2011	2019	2020 (as of October 2020)
Chamber	47150	45850	20050	22050
Committee	4100	13700	34600	34350
Single Judge	88400	92050	5150	4850

Figure 2 – Pending applications per judicial formation and as a percentage (%) to the Court's overall caseload at the beginning and end of the Interlaken process (2010-2011, 2019-2020). Data extracted from Annual Reports of the ECtHR <https://www.echr.coe.int/Pages/home.aspx?p=court/annualreports&c>.

Looking further into the ECtHR statistics, one can note that the total number of new applications allocated to a judicial formation in 2017 rose to 63,350 applications, an overall increase of nearly 20% compared with 2016 (53,400 applications), making this the highest number of newly allocated cases since 2013.[59] This spike in new applications can be explained by a considerable increase in the number of applications lodged against Turkey as a result of a series of State actions, notably the declaration of a state of emergency, following the attempted *coup d'état* in July 2016.[60] Similar examples can be found with regard to other ECHR States, such as Hungary, which saw the number of new applications lodged against it surging by almost 1180% in just six years (2010-2016).[61] Domestic constitutional and other legal reforms put forward by certain States' respective governments during the above period sought to dispense with domestic checks and balances and placed the independence, and thus overall functioning, of national judiciaries at stake. This situation incapacitated domestic courts *de facto* and prevented them from dealing effectively with cases raising important human rights issues.[62] For instance, the constitutional amendments adopted in the aftermath of the attempted *coup* of 2016 in Turkey raised serious concerns in relation to the principles of democracy and the rule of law.[63] In its 2017 report, the CoE

[59] *ECtHR – Analysis of Statistics 2017* (n 8) 6-7.
[60] ibid, 4. According to the Court's Registry, the events in Turkey in July 2016 were responsible for the 6% of the total pending applications by 2018. See, CDDH Contribution in *The Interlaken Process* (n 2) 58.
[61] The number of new cases directed at Hungary almost doubled between 2015 and 2016. See, *ECtHR – Analysis of Statistics 2010* to *2019* (n 8).
[62] See eg, Başak Çalı, 'Autocratic Strategies and the European Court of Human Rights' (2021) 2(1) *European Convention on Human Rights Law Review* 11.
[63] See eg, PACE, *Report on the Functioning of Democratic Institutions in Turkey*, Doc 14282 (5 April 2017).

Venice Commission concluded that the 'Turkish-styled' presidential system, as described by the Turkish authorities, that was sought to be established through the latest constitutional reforms 'are not based on the logic of separation of powers' and they carry 'an intrinsic danger of degenerating [Turkey's political system] into an authoritarian rule'.[64] Serious concerns have been also raised regarding the constitutional reforms in Hungary and Poland over the last decade and the consequential implications of these new measures on the independence of domestic judiciary as well as the freedom of expression and association of national judges.[65]

Inevitably, and contrary to its subsidiary role, such domestic developments rendered the ECtHR virtually an appeals court to national supreme and constitutional courts.[66] They further contributed to raising the average number of incoming applications steadily over the years as well as to establishing certain ECHR States among the most frequent litigators in Strasbourg.[67] This also leads to an increase in the number of inadmissible applications for

[64] Venice Commission, *Turkey Opinion on the Amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017* (Opinion no 875/2017, 13 March 2017) 28. See also, Venice Commission, *Opinion on the restructuring of the Court of Cassation and Council of State and on constitutional aspects of the appointments of the members of high judicial bodies of Turkey* (Opinion no 857/2016, 11 July 2016). For relevant ECtHR case law, see eg, *Alparsian Altan v Turkey* App no 12778/17 (16 April 2019); *Kavala v Turkey* App no 28749/18 (10 December 2019) and *Selahattin Demirtaş v Turkey* (no 2) App no 14305/17 (22 December 2020). For commentary on the matter, see, *inter alia*, Lucia Picarella, 'Democratic Deviations and Constitutional Changes: The Case of Turkey' (2018) 2(7) *Academic Journal of Interdisciplinary Studies* 9; Ali Yildiz, 'Does the Turkish Constitutional Court Provide Effective Remedies for Human Rights Violations?' (IACL-AIDC Blog, 19 November 2019) <https://blog-iacl-aidc.org/2019-posts/2019/11/19/does-the-turkish-constitutional-court-provide-effective-remedies-for-human-rights-violations> accessed 16 June 2021; Steven Blockmans and Sinem Yilmaz, *Turkey and the Codification of Autocracy* (CEPS Policy Insights no 2017/10 March 2017) <http://aei.pitt.edu/85021/1/PI2017-10_SB%2BSY_Turkey_final_0.pdf> accessed 16 June 2021.

[65] Regarding the constitutional reforms in Hungary and their rule of law implications, see eg, Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary* (Opinion no 683/2012, 15 October 2012), para 84, concluding that 'the reform undertaken introduced a unique system of judicial administration, which existed in no other European country and which threatened the independence of the judiciary'. With regard to Poland, see eg, Venice Commission, *Poland – Opinion on the Act on the Constitutional Tribunal* (Opinion no 860/2016, 14 October 2016), para 128, concluding that through the proposed constitutional reforms 'the Parliament and Government continue to challenge the [Constitutional] Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves' and that these proposed laws 'will create new obstacles to the effective functioning of the [Constitutional] Tribunal'. See also, Venice Commission, *Poland – Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other Laws* (Opnion no 977/2019, 16 January 2020).

[66] See eg, *Burmych and Others v Ukraine* (n 28), para 155, where the ECtHR observed 'that it runs the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities in directing "appropriate and sufficient redress"'. See also, Fiona de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) *EHRLR* 38, 42, arguing that given the increasing number of individual (mainly repetitve) applications received by the ECtHR, the Court 'is asked to play a *de facto* appellate function'.

[67] ibid. See also, *Figure 1* above. For a commentary, see, Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 13.

failure to exhaust domestic remedies, risking leaving individual applicants in a legal vacuum with no effective domestic judicial system and without the possibility to have their cases heard by the ECtHR.[68]

Moreover, the fact that a number of ECHR States have been involved in various military cross-border disputes with each other during the last two decades has produced not only an increased number in inter-State complaints,[69] but also a large amount of new individual applications.[70] Consequently, the ECtHR is often required to perform an onerous task, much different to the one originally entrusted with. While the ECtHR and the wider Convention protection system were initially established in order to prevent conflicts between ECHR States before they happen,[71] an unrealistic burden is now increasingly being placed on the ECtHR, requiring it to perform an unattainable task, that is to respond to or even resolve such conflicts.[72] Commenting on the most recent developments concerning the armed

[68] In the aftermath of the attempted *coup* in Turkey, in 2017 alone, almost 30,000 applications lodged in this context were declared inadmissible for failure to exhaust domestic remedies. See, Guido Raimondi, *Speech at the Opening of the Judicial Year* in *Annual Report 2017 of the ECtHR* (Council of Europe 2018) 8 <https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf> accessed 5 May 2021.

[69] See eg, *Georgia v Russia (II)* App no 38263/08 (21 January 2021); *Georgia v Russia (I)* App no 13255/07 (31 January 2019); *Ukraine v Russia* (Interim measures) App no 20958/14 (11 September 2019); Armenia v Turkey App no 43517/20 (submitted; 9 May 2021) and *Armenia v Azerbaijan* App no 42521/20 (submitted; 27 September 2020). For a full list of past and currently pending inter-State cases, see, ECtHR, *Inter-State Applications* (23 July 2021) <https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf> accessed 26 July 2021. See also, Philip Leach, 'On Inter-State Litigation and Armed Conflict Cases in Strasbourg' (2021) 2(1) *European Convention on Human Rights Law Review* 27.

[70] According to the Court's Registry, 17% of the ECtHR's current caseload results from cross-border conflicts between ECHR States that took place during the last decade (2009-2019). See, ECtHR Registry, 'The Development of the Court's case-load over ten years – Statistical Data for the CDDH', (CDDH(2019)08, 27/02/2019) 7 <https://rm.coe.int/steering-committee-for-human-rights-cddh-the-development-of-the-court-/1680945c35> accessed 26 May 2021. Also, over 7,000 individual applications currently pending before the Court concern the events in Crimea and Eastern Ukraine. See, *European Court joins three inter-State cases concerning Eastern Ukraine* (ECtHR Press Release, 04 December 2020) <http://hudoc.echr.coe.int/eng-press?i=003-6875827-9221606> accessed 26 May 2021.

[71] See eg, Statute of the Council of Europe 1949, Preamble, suggesting that such conflicts could be prevented by 'creat[ing] an organisation which will bring European States into closer association', and, in the same vein, Article 1(a), noting that '[t]he aim of the Council of Europe is to achieve a greater unity between its members'. In this vein, considering that the drafting of the ECHR was largely inspired by the UN Charter, the Charter's Preamble may also provide some guidance as to the Convention system's purpose: 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'. In the literature, see eg, Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012) 3, noting that 'the very setting up of the ECHR system was motivated by the desire to prevent the recurrence of extreme state violence and blatant disregard for the most basic individual human rights'. See also, Angelika Nußberger, *Promoting Peace and Integration among States – Speech at Conference 70th anniversary of the European Convention on Human Rights* (Strasbourg, 18 September 2020) <https://echr.coe.int/Documents/Speech_20200918_Nussberger_Conference_70_years_Convention_ENG.pdf> accessed 19 June 2021.

[72] See eg, Kanstantsin Dzehtsiarou, 'The Effectiveness of the European Court of Human Rights in Cases of War' (*ECHR Blog*, 24 March 2014) <https://www.echrblog.com/2014/03/ukraine-russia-inter-state-application.html> accessed 26 May 2021; Isabella Risini, 'Armenia v Azerbaijan before the European Court of Human Rights'(*EJIL:Talk!*, 1 October 2020) <https://www.ejiltalk.org/armenia-v-azerbaijan-before-the-european-court-of-human-rights/> accessed 26 May 2021. See also, Georgia v Russia (II) App no 38263/08 (21 January 2021),

conflict in Nagorno-Karabakh between Armenia and Azerbaijan in late 2020, Dzehtsiarou noted, for instance, that interim measures granted by the ECtHR in this (or a similar) context clearly lack effectiveness as 'their impact almost entirely depends on the political reality on the ground'.[73] Consequently, the fact that the States involved in this kind of disputes are more likely to disobey to such measures poses serious challenges to the authority and reputation of the ECtHR.[74]

As the above shows, the European human rights protection system and the ECtHR, in particular, remain directly exposed to the constantly changing legal and political developments at the national and inter-State level. This sentiment is also reflected in President Raimondi's speech at the Opening of the Judicial Year 2020, where he acknowledged that the ECtHR has 'no control over the volume of incoming cases'.[75] This clearly suggests that, despite years of continuous reform, no appropriate and/or adequate mechanisms that would safeguard the Court from such exposure or would allow it to respond to it more swiftly have been developed yet.[76]

Having preoccupied the initial Strasbourg jurisprudence during the 'formative phase' of the Convention system,[77] the numbers of inter-State applications saw a noticeable decrease in subsequent years.[78] Recent developments, however, show that an identified pattern of growth has begun in the number of cases brought between ECHR States under the Court's review.[79] Particularly important is the increasing frequency with which inter-State

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Concurring Opinion of Judge Keller, paras 8-13, where she notes the distinctive role of the ECtHR when examining inter-State cases as opposed to individual applications.

[73] Kanstantsin Dzehtsiarou, 'Catch 22: The Interim Measures of the European Court of Human Rights in the Conflict between Armenia and Azerbaijan' (*Strasbourg Observers*, 9 October 2020) <https://strasbourgobservers.com/2020/10/09/catch-22-the-interim-measures-of-the-european-court-of-human-rights-in-the-conflict-between-armenia-and-azerbaijan/> accessed 26 May 2021.

[74] ibid. See also, Kanstantsin Dzehtsiarou, 'Can the European Court of Human Rights Prevent War? Interim Measures in Inter-State Cases' (2016) *Public Law* 254, 263-271.

[75] Guido Raimondi, *Speech at the Opening of the Judicial Year 2019* in *Annual Report of the ECtHR 2019* (n 11) 14.

[76] Previously proposed measures, including, *inter alia*, the establishment of an additional filtering body or enabling the ECtHR to choose which applications to examine, addressed this issue but they were subsequently rejected. For a critical analysis of these proposals and the reasons leading to their rejection, see Chapter 4 of the thesis.

[77] 'Formative phase' refers to the first two decades of the establishment of the Convention system for the protection of human rights, ie from the 1950s to the early 1970s. See, Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 23-24.

[78] For a commentary on the most important inter-State cases of that period ('formative phase'), see, Ed Bates, *The Evolution of the European Convention on Human Rights* (n 77) 264-276. See also, ECtHR, *Inter-State applications (by date of introduction of the applications)* (n 69).

[79] Elif Erken and Claire Loven, 'The Recent Rise in ECtHR Inter-State Cases in Perspective' (ECHR Blog, 22 January 2021) <https://www.echrblog.com/2021/01/guest-post-recent-rise-in-ecthr-inter.html> accessed 26 May 2021; Geir Ulfstein and Isabella Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (*EJIL:Talk*!, 24 January 2020) <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/> accessed 26 May 2021; Isabella Risini, 'Armenia v Azerbaijan before the European Court of Human Rights' (n 72).

complaints have recently reached Strasbourg, a situation which is now evolving into a 'major challenge for the Court'.[80] More worryingly, though, legal scholars have warned that this trend is only set to continue its upward trajectory over the coming years.[81] This suggests that deep-rooted political differences between CoE member States resulting in widespread, cross-border human rights violations not only remain unresolved but are even worsening.[82] The effective functioning of the ECtHR at an institutional level is directly impacted by this development as inter-State applications are dealt with by the already overwhelmed Chambers, as shown further above. Unlike individual applications, inter-State cases, precisely due to their complex and politically sensitive nature, require the ECtHR, as an independent and impartial international adjudicatory body, to thoroughly investigate the complaints brought before it by undertaking, inter alia, costly and time-consuming fact-finding missions on the ground.[83]

Long-standing resource constraints, nevertheless, impose additional hurdles to the ECtHR and often prevent it from delivering well-reasoned and authoritative judgments in a timely manner.[84] Lastly, the fact that the very same ECHR States which are directly or indirectly responsible for the outburst of these conflicts and, consequently, for the growing number of applications lodged with the Court have already withdrawn or threatened to withdraw their annual financial contributions to the CoE creates additional challenges and diminishes the authority of the Convention system as a whole.[85]

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[80] 'Comment from the European Court of Human Rights on the CDDH Contribution to the Evaluation of the Interlaken Reform process' in *The Interlaken Process* (n 1) 121. See also, n 72 above.

[81] Geir Ulfstein and Isabella Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (n 72); Isabella Risini, 'Armenia v Azerbaijan before the European Court of Human Rights' (n 72).

[82] See, *14th Annual Report of the Committee of Ministers 2020* (Council of Europe 2021), 13-14 <https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8> accessed 20 April 2021.

[83] See eg, Philip Leach, Costas Paraskevas and Gordana Uzelac (eds), *International Human Rights & Fact-Finding: An Analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights* (London Metropolitan University, 2009) 5-6. See also, Robert Spano, *Speech at the Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)* (Strasbourg, 25 March 2021), acknowledging the various challenges the examination of inter-State cases poses on the Court, while noting, *inter alia*, that in such cases, 'the Court must, by sheer necessity, act as a court of first instance' <https://www.echr.coe.int/Documents/Speech_20210325_Spano_Meeting_CAHDI_ENG.pdf> accessed 26 May 2021; Copenhagen Declaration (n 56) para 54(c).

[84] This institutional limitation is regularly raised by the ECtHR and other CoE bodies. See eg, Guido Reimondi, *Speech at the Opening of the Judicial Year 2019* in *Annual Report 2019 of the ECtHR* (n 11) 14, noting that 'the serious and unprecedented crisis in the Council of Europe […] is both political and budgetary'; Linos-Alexandre Sicilianos, *Speech at the Openig of the Judicial Year* in *Annual Report 2020 of the ECtHR* (Council of Europe 2021) 15 <https://www.echr.coe.int/Documents/Annual_report_2020_ENG.pdf> accessed 15 May 2021; *CDDH Contribution to the Evaluation provided for by the Interlaken Declaration* (n 2), paras 128-131. See also, Copenhagen Declaration (n 56) paras 50 and 52, noting the importance of adequate human and budgetary resources for the ECtHR 'to solve present and future challenges'.

[85] See, *inter alia*, Christos Giakoumopoulos, Speech at *European Convention on Human Rights at 70: Current Challenges* (MGIMO University, 19 October 2020) <https://www.coe.int/en/web/human-rights-rule-of-law/speech-by-christos-giakoumopoulos-19-october-2020> accessed 15 May 2021. Illustratively, the recent decision of the ECtHR to join some of the inter-State cases currently pending against the same respondent

As already mentioned, the steep rise in the Court's caseload in the 2000s compelled the ECHR States to seek ways to manage its excessive backlog. The launch of the Interlaken reform process emphasised the need to streamline the Court's procedures, improve its working methods and increase its productivity. The subsequent high-level conference at Brighton in 2012, however, sought to introduce a 'new agenda' as to the fundamental role and function the Court was to assume in the coming years by establishing a 'more focused and targeted' Court that would hear fewer cases and consequently deliver fewer judgments.[86] In this sense, a greater emphasis on subsidiarity that would allow national authorities, legal and political alike, to play a more substantial role in the interpretation and development of the Convention, while, at the same time, enhancing the ECtHR's capacity to address the most serious ECHR violations more effectively, could be seen as 'part of a larger rescue plan' to relieve the overburdened Court.[87] Empirical evidence from subsequent years suggests that these objectives were substantially achieved. A clear, overall drop in the number of applications pending examination before a judicial formation has been noted since 2011, as well as a decrease in the number of judgments delivered by the ECtHR during 2013-2019 compared to the early years of the decade (2009-2012).[88] More specifically, unlike the impressive surge of the Court's output in the 2000s, the number of judgments delivered by the Court in the following decade saw a continued, steady downfall, decreasing almost by half by the mid-2010s, while a similar trend continued until 2019. Although there has been a slight overall increase since 2015, the past three years (2017-2019) have seen a downward trend anew and, in any case, the number of judgments delivered nowadays remains considerably lower than the figures reported at the beginning of the 2009-2019 decade (884 judgments were delivered in 2019 as opposed to 1,625 in 2009).[89] Similarly, in 2019, almost 70% of the overall number of applications allocated to a judicial formation were identified as Single-judge cases likely to be disposed of judicially by failing the admissibility hurdle.[90]

State was made 'in the interests of the efficient administration of justice'. See, *European Court joins three inter-State cases concerning Eastern Ukraine* (ECtHR Press Release, 04 December 2020) <http://hudoc.echr.coe.int/eng-press?i=003-6875827-9221606> accessed 26 May 2021; *Ukraine and the Netherlands v. Russia* App nos 8019/16, 43800/14 and 28525/20.

[86] Brighton Declaration (n 13), paras 31-33. For a critical analysis of the impact of Brighton Conference on the reform and future of the Court, see, Mikael Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 13). For a further discussion on this point and its implications, see also, Chapter 5 of the thesis.

[87] Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 13), 200-207.

[88] *ECtHR - Analysis of Statistics 2019* (n 3) 10.

[89] ibid. Also, In the last three years (2017-2019), there was a decrease of 17% in the number of judgments delivered by the ECtHR. See, *ECtHR- Analysis of Statistics 2019* (n 3) 10. These findings are in direct contrast to the respective statistics of the previous decades, when the ECtHR saw its output expanding substantially as it started to deliver a significantly higher number of judgments each year during the 1990s and, in particular, 2000s.

[90] *ECtHR- Analysis of Statistics 2019* (n 3) 4.

By assessing the output (number of applications judged, together with dismissed and struck-off-the-list cases) against the number of pending applications per year, it can be shown that the *case throughput* of the Court (the ratio of these two figures) has increased post-Brighton. This observation, therefore, further supports the above finding that the Court now processes a greater amount of its pending applications in one of the above methods (by judgment, dismissal or strike-out decision). However, as *Figuer 3* below shows, although the case throughput rate increased sharply in the aftermath of Brighton, it did not follow a consistent trend in the following years as it dropped anew to pre-Brighton low levels, notably in 2016 and 2019.[91] 2017 is to be seen as the only exception in this regard, as the Court's case throughput rate in that year reached a decade high of over 150%. As explained earlier in this section, however, this figure is rather deceptive as it is largely attributed to a single strike-out decision of the Court.[92] Indeed, no fundamental improvement in the European or national human rights protection mechanisms took place in order for this high ECtHR case throughput rate to be sustained; inevitably, the figure was reduced by half in the following years.[93]

Consequently, the case throughput now seems too low for the Court to effectively assume the 'more focused and targeted role'[94] envisaged at Brighton and, most importantly, the projected achievements of the Interlaken process may not be as viable as some ECHR stakeholders may want to believe. As Madsen explains, if the Court was to both reduce its overwhelming backlog and assume a new, more focused role, case throughput should be at least 100% as this rate would reduce total cases by the same number as they enter the system.[95] However, due to the already high number of pre-existing pending applications, this rate should be raised to about 115% in order to create a balanced system in the next 5 years.[96] According to the calculations presented above, the Court only reached this threshold twice since Brighton. As a result, based on current and recent case throughput rates, the Court's overall backlog of cases will inevitably continue to increase over the years. The reform measures adopted throughout the Interlaken process, therefore, have been inadequate to successfully tackle the Court's unsustainable caseload. Beyond the feasibility

[91] Based on data extracted from *ECtHR Annual Reports 2014* to *2020* <https://echr.coe.int/Pages/home.aspx?p=court/annualreports&c=>; *ECtHR - Analysis of Statistics 2009* to *2019* <https://www.echr.coe.int/sites/search_eng/pages/search.aspx#{%22sort%22:[%22createdAsDate%20Descending%22],%22Title%22:[%22\%22analysis%20of%20statistics\%22%22],%22contentlanguage%22:[%22ENG%22]}> accessed 5 May 2021. The ECtHR's case throughput from the Brighton Conference to the end of the Interlaken process (2013-2019) is calculated as 93%, 123%, 70%, 48%, 153%, 76% and 68%, per year, respectively. See *Figure 3*, below, for a relevant graphic illustration.

[92] See nn 28-35 above and accompanying text.

[93] See n 91 above.

[94] Brighton Declaration (n 13), paras 31.

[95] Mikael Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 13), 208-9.

[96] ibid. '[O]btaining a balanced case-load' was set as one of the objectives of States in the Copenhagen Declaration (n 56), para 54.

of the Interlaken goals, though, what is even more significant is the viability of the ECtHR itself. The above findings thus reinforce the overarching argument I put forward in the thesis, suggesting that in the absence of supplementary or alternative reform measures, the effectiveness and long-term future of the ECtHR remains at stake.

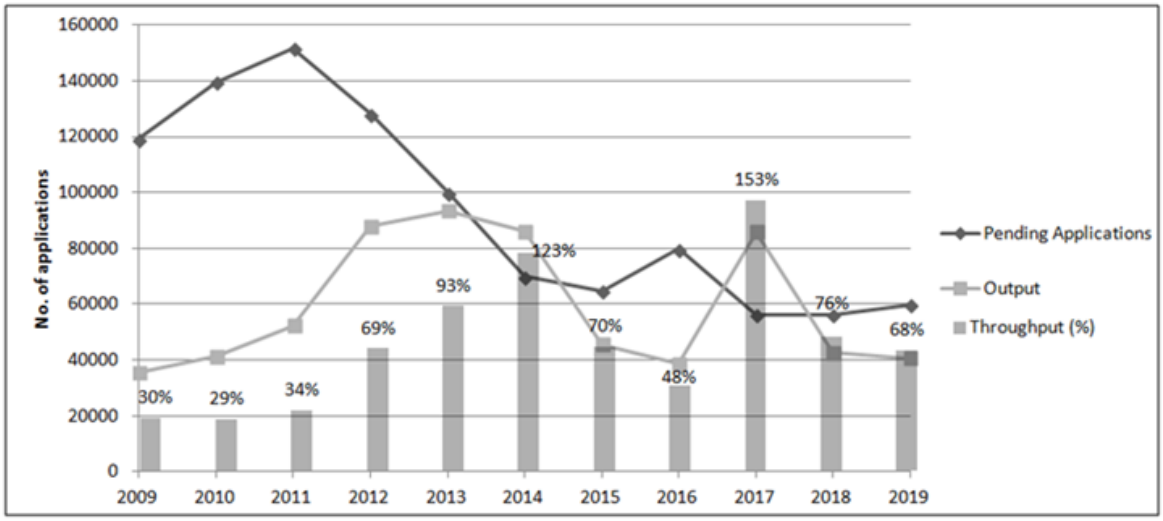

Figure 3 – The ECtHR's output and throughput in relation to its pending applications (2009-2019).

Another important aspect of the Court statistics is the number of inadmissibility and strike-out decisions, whose yearly average rate in relation to the total applications decided remained steadily high at 95% throughout the Interlaken reform process.[97] The notable example of the Burmych case in 2017, by means of which the Grand Chamber struck out 12,148 applications in a single judgment, has already been discussed above.[98] Beyond the importance of this case, at least from a statistical perspective, and its impact on significantly reducing the existing backlog, the Court's admissibility and strike-out policy of the last decade deserves a closer examination.

When analysing the relevant statistics, one notes that a growing proportion of cases is struck out of the Court's list as a result of a 'friendly settlement' reached between the individual applicant and the respondent government.[99] Indeed, the ECtHR is placing increasing emphasis on its friendly settlement procedure, particularly as a means of resolving repetitive or 'clone' applications arising from the same root cause more efficiently.[100] In 2019, for

[97] *ECtHR – Analysis of Statistics 2010* to *2019* (n 8).
[98] *Burmych and Others v. Ukraine* (n 28). See also nn 28-38, above, and accompanying text.
[99] See eg, Registrar of the Court, 'ECHR is to test a new practice involving a dedicated non-contentious phase' (Press Release, 18 December 2018) <http://hudoc.echr.coe.int/eng-press?i=003-6283390-8191707> accessed 5 May 2021; *Annual Report 2019 of the ECtHR* (n 11) 125.
[100] See eg, Heller Keller, Magdalena Forowicz and Lorenz Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (OUP 2010) 110-11; Philip Leach, *Taking a Case to the European Court of*

instance, although friendly settlements saw a decrease of 23% compared to 2018, the overall number of applications struck out of the list of cases following a non-contentious resolution increased by 5% in relation to the previous year.[101] According to the ECtHR, the increased recourse to non-contentious means for human rights dispute resolution 'is intended to provide faster and more effective redress to applicants thereby enabling the Court to concentrate resources on applications which it considers a priority'.[102]

Friendly settlements within the ECHR system have been, at times, the subject of strong criticism as they can be portrayed as 'a great diplomatic victory' and a 'stamp of approval' from Strasbourg for the State against which the original application was brought.[103] By settling a human rights dispute through the friendly settlement procedure and providing individual relief to the applicant(s), the respondent State often escapes judicial accountability at the international level. Also, the respondent State's obligation to undertake the necessary restorative and preventive reforms in its domestic order in order to put an end to the continuation of widespread and systematic violations and prevent similar ones from happening in the future is often overlooked.[104] As a result, the structural or systemic deficiencies identified by the ECtHR can remain unresolved while the respondent State hides behind the provision of some individual remedy to the applicant(s) who brought the case against it.

In fact, the ECtHR's decision to strike out applications allegedly resolved by 'friendly settlements' without examining them further, apart from reducing its own backlog, does little, if anything, to address the real scale of the problem at the domestic level. In addition, such practice by the ECtHR risks encouraging the State in question to continue to commit the same gross and/or repeat human rights violations with impunity.[105] It is worth noting that under the ECtHR's newly introduced friendly settlement pilot scheme, a proposal for such a resolution between the parties would be made by the Court's Registry directly to the respondent government (based on the Court's established jurisprudence) and the execution of the settlement would remain under the supervision of the CoM (either independently or as part of the execution of judgments already delivered by the Court raising the same

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Human Rights (OUP 2011) 63-74; Nino Jomarjidze and Philip Leach, 'What future for settlements and undertakings in international human rights resolution?' (*Strasbourg Observers*, 15 April 2019) <https://strasbourgobservers.com/2019/04/15/what-future-for-settlements-and-undertakings-in-international-human-rights-resolution/> accessed 5 May 2021.

[101] *ECtHR - Analysis of Statistics 2019* (n 3) 4.

[102] ECtHR, 'Comment from the European Court of Human Rights on the CDDH Contribution to the Evaluation of the Interlaken Reform Process' in *The Interlaken Process* (n 1) 119.

[103] Menno Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' (1994) 12 *Netherlands Quarterly of Human Rights* 153, 158-159, criticising the former European Commission for Human Rights' approval of a friendly settlement in an inter-State case against Turkey following the 1980 *coup.*

[104] Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16(4) *HRLR* 731, 753.

[105] ibid.

issue).[106] Despite these safeguards, nevertheless, it has been shown that the monitoring of compliance of States' undertakings under friendly settlements can be loose and ineffective, while restoration of cases struck out through this procedure can hardly be achieved, even in situations where the agreed measures are not carried out promptly and/or effectively.[107]

3.3 A consistent pattern of repetitive human rights violations by certain States

As already mentioned above, one of the major challenges facing the ECtHR during the last decade has been the large number of repetitive applications, which, in principle, are well-founded cases which reflect a structural problem already diagnosed by the ECtHR and found to be incompatible with the Convention.[108] According to statistics of the past decade (2010-2020), the vast majority of repetitive cases results from long-standing deficiencies in domestic orders, such as the length of civil proceedings in Italy, the delayed issuing or non-enforcement of domestic decisions in Ukraine, the lawfulness and conditions of detention in Russia, Turkey and Hungary.[109] Pending applications arising from the above issues, most of which are categorised as repetitive, currently make up the majority of the Court's backlog (54%), compared with 45% in 2009.[110]

The serious failings of certain States, such as Ukraine, Russia and Turkey, in implementing core Convention rights, including those protected under Articles 2 and 3 ECHR has also been evident in previous empirical studies.[111] This finding was largely attributed to the fact that pluralist democracy and the rule of law in the aforementioned States still remain relatively weak and unpopular, 'with the ECHR and Court publicly castigated as "Western"

[106] See, Registrar of the Court, 'ECHR is to test a new practice involving a dedicated non-contentious phase' (n 99).
[107] Nino Jomarjidze and Philip Leach, 'What future for settlements and undertakings in international human rights resolution?' (n 100). In a similar vein, see also, Lize Glas, 'Unilateral Declarations and the European Court of Human Rights: Between efficiency and the interests of the applicant' (2018) 25(5) *Maastricht Journal of European and Comparative Law* 607.
[108] *High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility" – Brussels Declaration* (27 March 2015) <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf> accessed 5 May 2021; *Annual Report 2016 of the ECtHR* (Council of Europe 2017) 16, 193 <https://echr.coe.int/Documents/Annual_report_2016_ENG.pdf> accessed 5 May 2021.
[109] See eg, *ECtHR - Analysis of Statistics 2019* (n 3) 5; ECtHR - *Analysis of Statistics 2018* (n 8) 5. See also, Pierre-Yves Le Borgn, 'The Implementation of Judgments of the European Court of Human Rights' (*PACE Report*, 2017) 15.
[110] ECtHR Registry, 'The Development of the Court's case-load over ten years – Statistical Data for the CDDH' (CDDH(2019)08, 27/02/2019) 5 <https://rm.coe.int/steering-committee-for-human-rights-cddh-the-development-of-the-court-/1680945c35> accessed 5 May 2021.
[111] Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (n 67), 697-700.

imposition'.[112] Equally, similar patterns of violations can be identified in the 'old' ECHR States, where the Court's jurisprudence regarding qualified rights under Articles 8-11 as well as civil and criminal procedure under Article 6 may be particularly salient in this respect.[113] As an empirical assessment shows, those Articles generate the greatest number of decided breaches within 'Western' States, in which cases the Court often employs its fine-tuning role when conducting its proportionality-based review.[114]

As evidenced from the above, repetitive applications should be dealt with promptly, based on the Court's well-established jurisprudence, and their root cause, ie the failure to execute existing judgments in a timely and effective manner, should be categorically addressed.[115] Similarly, factors contributing to said failure, including, for example, unjustifiable delays in domestic decision-making processes that may hinder the creation of effective domestic redresses as per the Court's pronouncements, should also be addressed in clear and unequivocal terms by the ECtHR and other CoE bodies. Jurisprudential and procedural tools developed by the Court, notably the pilot-judgment and the 'well-established case law' procedures, have significantly contributed to tackling this challenge. Admittedly, however, the Court cannot resolve the problem of the remaining backlog of repetitive cases alone.[116] In fact, States Parties must play their own part in this process and 'address the underlying structural issues which result in the applications being brought'.[117]

The latest reform period during the 2010s drew particular attention to improving national implementation of the Convention and ensuring that effective domestic remedies are available to provide adequate redress at the national level without the need for applicants to take their cases before the ECtHR. The continuously high numbers of repetitive applications against a handful of certain States over the last decade, however, indicate that these objectives have not been met uniformly across the Convention system. The reduction of pending applications as a result of strike-out decisions, such as in *Burmych,* has certainly been beneficial to the Court. At the same time, however, this sense of achievement can be illusory as it does not necessarily reflect an improvement in the human rights situation on the ground. It should not thus be overlooked that the result of these strike-outs, and consequently the reduction of pending application, came as a result of the ineffective execution of a pilot judgment - a responsibility that lies with the respondent State in question. As a result, it is evident that in spite of such strike-out decisions there are still ongoing repetitive human rights violations at the respondent States' domestic level. The monitoring of the execution of such judgments has been transferred to the Committee of

[112] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 272.
[113] ibid, 273-274.
[114] ibid. See also, *ECHR Overview of Statistics 1959-2020* (European Court of Human Rights 2021), 8-9 <https://echr.coe.int/Documents/Overview_19592020_ENG.pdf> accessed 5 May 2021.
[115] See eg, Copenhagen Declaration (n 56) para 51; Brussels Declaration (n 108), Preamble.
[116] ECtHR, 'Comment from the European Court of Human Rights on the CDDH Contribution to the Evaluation of the Interlaken Reform Process' in *The Interlaken Process* (n 1) 119.
[117] ibid.

Ministers and a large amount of continuous, repetitive human rights violations are thus far from resolved.[118]

The figures regarding the Court's current caseload continue to vary considerably from State to State, and not necessarily in proportion to their respective populations. As shown in *Figure 1* above, in 2019, about one quarter of all pending applications concerned Russia alone, confirming the State's status as one of the most frequent respondent States before the ECtHR since at least 2009.[119] Following the consistent pattern of previous years, more than half (55.5%) of the pending applications at the end of 2019 were derived from just three States, while four States Parties only accounted for almost 70% of the Court's overall caseload.[120] In this regard, the fact that a very small group of States is responsible for the bulk of the Court's current backlog is particularly problematic. The situation becomes even more worrying if one considers that the list of high case-count States has remained almost unchanged during the last decade, with certain States (namely Russia, Turkey and Ukraine) featuring consistently in the top of that list since 2009.[121]

As also noted in the previous section, the above figures reaffirm that the ECtHR's workload is made even more burdensome by long-term endemic shortcomings identified in the national orders of specific CoE member States. Such domestic deficiencies clearly have a knock-on effect on the institutional performance of the Court due to the considerable volume of applications they generate each year.[122] Moreover, the list indicating the distribution of pending applications per State suggests that the Court's backlog during the last decade has been disproportionately shared among the ECHR Contracting Parties. In conjunction with the number of judgments delivered against States, it becomes evident that there is lack of effective implementation of the Convention in certain geographical parts of the continent and that deep-rooted structural and systemic human rights deficiencies in specific States remain unresolved for a prolonged period of time.[123] As a combined reading of *Figure 1* (above) and *Figure 4* (below) shows, there is a clear correlation between the most frequent respondent States (ie States with the most pending applications against them) with those representing the most frequent violators of the Convention. Once again, taking these figures together, it is evident that a small number of certain States systematically fail to comply with the applicable Convention standards over prolonged periods of time causing considerable impact on the Court due to the ever-high number of applications lodged against them for identical issues.

[118] *ECtHR - Analysis of Statistics 2017* (n 8) 4-5.
[119] *ECtHR - Analysis of Statistics 2019* (n 3) 8.
[120] Ibid. The high-count States include Russia (25.2%), Turkey (15.5%), Ukraine (14.8%) and Romania (13.2%).
[121] See eg, *ECtHR - Analysis of Statistics 2015* (n 8) 8; *ECtHR - Analysis of Statistics 2018* (n 8) 8 and *ECtHR - Analysis of Statistics 2019* (n 3) 8. See also, *Figure 1*, above.
[122] Guido Raimondi, *Speech at the Opening of the Judicial Year* in *Annual Report 2019* (n 11) 12.
[123] See eg, ibid, noting that 'the weight of the case-load emanating from a given country is an indicator of the effectiveness of Convention implementation in that country'.

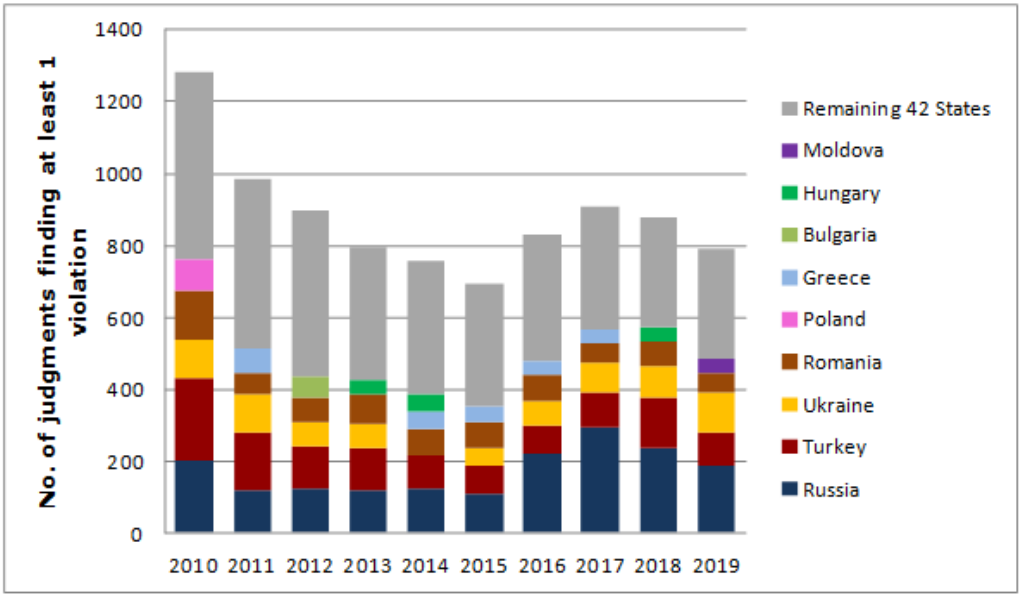

Figure 4 – Judgments delivered per year (top 5 respondent States), 2010-2019.

Consequently, fundamental changes, mainly at the national level, will need to be carried out in order for the Court to obtain a more balanced caseload, as per the objectives of the Copenhagen Declaration.[124] It is now thus evident that the only viable way to tackle the phenomenon of increasing repetitive applications reaching the Court is for ECHR States to proceed with more transformative and systematic reforms, notably with regard to structural problems identified in their domestic order.[125] At the same time, effective domestic remedies must be put in place to enable individuals to seek and obtain adequate redress at the national level.[126]

3.4 Delayed/partial/non-execution of ECtHR judgments

Over the last few years, as with the number of pending applications discussed above, the CoE has advanced a consistent narrative about the state of implementation of ECtHR judgments. This narrative suggests that implementation is going very well indeed.[127] This

[124] Copenhagen Declaration (n 56), para 54 a).
[125] CDDH Contribution in *The Interlaken Process* (n 2) 22.
[126] ibid.
[127] See eg, *12th Annual Report of the Committee of Ministers 2018* (Council of Europe 2019) 5, opening the Report by noting that '[t]he system for the supervision of the execution of the European Court of Human Rights' judgments, strengthened by the reforms undertaken since the Interlaken Conference in 2010, has seen another encouraging year'. It further noted that '[t]he results of these improvements are clearly evidenced by the statistics' and that '[t]hese achievements, and the effectiveness of the system for pan-European democratic

general "good news story" is told to those whose role is to monitor the effectiveness of the ECHR system. The same narrative about the falling number of judgments pending implementation is circulated across the various CoE bodies, including the ECtHR itself.[128] This pervasive narrative, which is often maintained by CoE official sources, thus gives the impression that the system for the implementation of judgments is getting more and more effective and that it has improved significantly during the latest Interlaken reform stage.

A statistical analysis of the data concerning the execution progress of the ECtHR judgments illustrates that the decade-long Interlaken reform process has indeed had a rather positive impact. According to the latest statistics reported by the Committee of Ministers (CoM), the overall number of judgments pending execution at the domestic level has considerably dropped (by 40%) during the past ten years (2009-2019), while an even bigger decrease (of 52%) is noted in the last five years (2014-2019).[129] According to the same data, a total of 5,231 judgments were pending for execution at the end of the Interlaken process in 2019, down by 53% since the figure peaked (11,099 pending judgments) in 2012.[130] 2018 was particularly noteworthy as record numbers of cases were closed concerning the three States with the highest volume of judgments pending before the CoM.[131] The most recent Annual Report published by the CoM in the first quarter of 2021 did not document any substantial change regarding the above statistics, as the overall number of judgments pending execution at the end of 2020 remained almost identical (5,233 judgments) to that of the previous year, albeit still among the lowest counts since 2006.[132]

Notwithstanding the clear signs of the improved execution process, a number of persistent challenges remain in place, notably with regard to the capacity or willingness of certain domestic actors in facilitating a prompt and effective execution of pending judgments.[133] As the Director General of the Directorate General of Human Rights and Rule of Law stressed on the occasion of the 70th anniversary of the ECHR, 'this is not a time for complacency' as '[s]erious challenges continue to be raised in the context of the execution of many cases'.[134] The situation regarding the execution of ECtHR judgments, therefore, begins to appear more problematic once a deeper analysis of the relevant statistics is made. Positive results

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security and good state governance cannot be taken for granted' <https://rm.coe.int/annual-report-2018/168093f3da> accessed 5 May 2021. See also, *13th Annual Report of the Committee of Ministers 2019* (Council of Europe 2020) 11, stating that '[t]he report provides … statistics illustrating the positive impact of the Interlaken process on the execution of the judgments of the Court' <https://rm.coe.int/annual-report-2019/16809ec315> accessed 5 May 2021.

[128] *Annual Report 2019 of the ECtHR* (n 11) 99-101; *Annual Report 2020 of the ECtHR* (n 84) 15-16.

[129] *13th Annual Report of the Committee of Ministers 2019* (n 6) 51.

[130] ibid.

[131] 385 cases against Russia, 318 cases against Ukraine and 372 cases against Turkey were closed. *12th Annual Report of the Committee of Ministers 2018* (n 127) 16-17.

[132] *14th Annual Report of the Committee of Ministers 2020* (Council of Europe 2021) 12 and 37 <https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8> accessed 26 May 2021.

[133] See summary conclusions in *13th Annual Report of the Committee of Ministers 2019* (n 6) 11.

[134] *14th Annual Report of the Committee of Ministers 2020* (n 132) 12.

regarding the overall reduction of judgments pending execution may sometimes be deceptive and may not always reflect the true state of affairs.[135] As shown below in more detail, the unconditional obligation of ECHR States under Article 46 ECHR to abide by the final judgments of the Strasbourg Court has been increasingly compromised by what can be characterised as an *à la carte* approach of States to the execution of ECtHR judgments.[136] Such a selective approach inevitably results in dilatory, partial, lengthy, contested or even non-compliance with ECtHR judgments with serious consequential effects on the overall functioning of the ECtHR and the wider ECHR system.[137]

Despite the notable reduction in the overall number of judgments pending execution since 2009, the number of pending leading cases under the monitoring of the CoM has remained relatively unaltered during this period. More specifically, although there was a decrease of 18% of the total number of leading cases pending execution in the last five years (2014-2019), the figure is up by 4% since the beginning of the decade (2009-2019).[138] The latest annual reports by the CoM suggest that the fact that the total number of leading cases closed in the period 2010-2019 was greater than the number of new such cases is a great improvement.[139] Indeed, in 2018, the number of leading cases pending went for the first time back at pre-2010 figures.[140] The growing concerns over the 'implementation crisis' in Europe, as expressed, among various commentators, by the CoE Commissioner for Human Rights in 2016,[141] seem to have been overshadowed by the alleged success of the Interlaken process.[142] However, as I show below, the large number of remaining unexecuted leading

[135] For instance, out of the 3,691 closed cases in 2017, some 2,000 concerned Italy alone, the majority of them relating to excessive length of proceedings and thus resolving long-lasting structural deficiencies following the closure of at least two important leading cases. See, *Belvedere Alberghiera SRL and Others* App no 31524/96 (30 May 2000) and *Mostacciuolo Giuseppe and Others (No 1)* App no 64705/01 (29 March 2006), leading to the closure of more than 100 repetitive cases each. See also, *11th Annual Report of the Committee of Ministers 2017* (Council of Europe 2018) 70 <https://rm.coe.int/annual-report-2017/16807af92b> accessed 5 May 2021.

[136] See, in this regard, Thorbjørn Jagland, *The Convention is our Compass*, Communication on the occasion of the first part of the 2016 Parliamentary Assembly Session (Strasbourg, 26 January 2016), stating that '[t]here have always been those who challenge the authority of international institutions, but these forces have slipped into the mainstream – and they are gaining traction. When we join the dots, the danger to our Convention system begins to feel very real indeed'.

[137] See eg, Ramute Remezaite, 'Challenging the Unconditional: Partial Compliance with ECtHR Judgments in the South Caucasus States' (2019) 52(2) *Israel Law Review* 169.

[138] 1,194, 1,513 and 1,245 leading cases were pending execution in 2009, 2014 and 2019, respectively. See *Figure 5* below. See also, *13th Annual Report of the Committee of Ministers 2019* (n 6) 51.

[139] *13th Annual Report of the Committee of Ministers 2019* (n 6) 18.

[140] ibid. See also, *14th Annual Report of the Committee of Ministers 2020* (n 132) 37.

[141] Nils Muižnieks, 'Non-implementation of the Court's Judgments: Our Shared Responsibility' (the Commissioner's Human Rights comment, 23 August 2016) <https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/non-implementation-of-the-court-s-judgments-our-shared-responsibility?_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB> accessed 5 May 2021.

[142] See also, Lucy Moxham, 'Implementation of ECHR Judgments – Have we reached a crisis point?' (*UK Human Rights Blog*, 7 July 2017) <https://ukhumanrightsblog.com/2017/07/07/implementation-of-echr-judgments-have-we-reached-a-crisis-point-lucy-moxham/> accessed 26 May 2021; Amnesty International *et al*, *Joint Statement on Non-implementation of ECHR Judgments against Azerbaijan* (2020)

cases warrants a closer examination if we were to fully understand and tackle the outstanding underlying issue facing the Court.

Focusing on the consistently high number of leading cases which remain unexecuted over the years is particularly important for the overall functioning of the ECtHR. This is because leading cases reveal newly identified structural or systemic deficiencies in the respondent State's domestic order, often requiring the adoption of general measures to resolve the deep-rooted problems identified.[143] The identification and analysis of leading cases, therefore, does not simply concern the 'quantity' of cases dealt with by the CoM, but also their 'quality', complexity and importance, which also allows for some qualitative insight into the impact of the ECtHR's judgments on domestic law. As such, the longer leading cases remain unimplemented, the larger the number of future repetitive applications arising from the same root cause will be accumulated in the Court's docket.[144] In other words, a failure to effectively execute a previous judgment – let alone a leading one - contributes to the ever growing number of pending repetitive cases, which, then, has a consequential effect on the Court's caseload and the overall functioning of the Convention system. It is precisely for this reason that the Court in its opinion on the Draft Copenhagen Declaration insisted that a stronger wording is needed in relation to the effective execution of judgments.[145] The 'critical importance of effective execution', according to the Court's Opinion, should be addressed by placing more emphasis on the shared responsibility of States Parties to deal with the structural deficiencies in their domestic legal systems already identified through previous cases and by explicitly reiterating the States' strong commitment to the effective and prompt execution of the Court's judgments.[146]

<https://humanrightshouse.org/articles/joint-statement-on-non-implementation-of-echr-judgments-against-azerbaijan/> accessed 26 May 2021.

[143] See eg, *13th Annual Report of the Committee of Ministers 2019* (n 6) 18-20; *14th Annual Report of the Committee of Ministers 2020* (n 132) 17.

[144] See eg, Copenhagen Declaration (n 56), paras 19-20. See also, Report of the Steering Committee for Human Rights (CDDH), *The Longer-term future of the system of the European Convention on Human Rights* (CoE, 2015), 73-74.

[145] Opinion on the Draft Copenhagen Declaration (European Court of Human Rights, 19 February 2018), paras 32-34 <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf> accessed 20 April 2021.

[146] ibid.

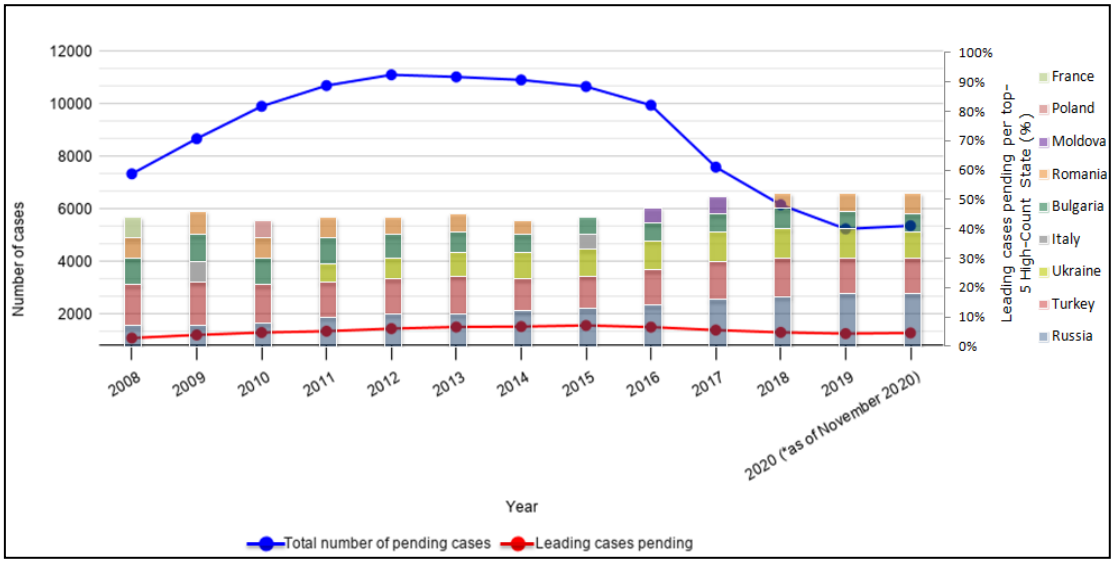

Figure 5 - Total and leading cases pending execution per year, showing the top 5 non-compliant States (2008-2020).

From a more critical perspective, the overall decrease in judgments pending execution over the last decade could arguably be attributed to a recent change in the CoM's approach in monitoring the execution of judgments.[147] As a result of this new approach, repetitive cases are now closed as soon as the individual measures have been implemented, regardless of whether the general restorative measures to prevent similar future violations had been adopted or not.[148] In many instances, therefore, cases may be deemed as 'closed' even though the underlying issue at the national level identified by the ECtHR as the root cause for the rights violation remains unresolved. As a result, the general measures remain pending under a single leading case, while the bulk of repetitive cases is removed from the CoM's watchlist. Inevitably, this new policy created an opportunity for States to close rapidly, but often in a superficial and formalistic manner, a significant number of cases by simply paying the monetary compensation due. Critics of this new policy argued that, despite being able to reduce the overall number of pending cases, the policy itself is fundamentally flawed as it also reduces the pressure on the respondent States to undertake the necessary reforms and alleviate the underlying problem at the domestic level.[149] On the other hand, the practical necessity of the new measure was also admitted as it had been already acknowledged that the increasing number of repetitive cases pending for execution

[147] *11th Annual Report of the Committee of Ministers 2017* (n 135) 12-14.
[148] George Stafford, 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 1: Grade Inflation' (EJIL:Talk!, 7 October 2019) <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-1-grade-inflation/> accessed 26 May 2021. See also, Ramute Remezaite, 'Challenging the Unconditional: Partial Compliance with ECtHR Judgments in the South Caucasus States' (n 137) 170.
[149] George Stafford, 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 1: Grade Inflation' (n 148).

was clogging up the entire Convention system. The new case closure policy was accompanied by a significant reduction in the overall number of ECtHR judgments pending implementation domestically. In fact, in the absence of this new policy, the overall number of pending cases would not change substantially during the last few years and, therefore, would remain in the vicinity of the landmark 10,000 number noted in 2017.

The closures, nevertheless, are generally presented as resulting from States getting better at implementation, rather than a change in the way in which implementation is measured and assessed. Consequently, the newly adopted policy facilitated a doubling of the number of cases closed in 2017.[150] Although a deeper analysis of the statistics published by the CoM could reaffirm this observation, no direct or clear mention about it was made in any of the relevant reports.[151] In contrast, the seemingly improved rate of closed cases was presented as resulting from a better functioning and more effective Convention system and improved State behaviour. More recent reports on the implementation of ECtHR judgments, however, appear to be more nuanced in this regard. The CoM's Annual Report 2018, for instance, made clearer references to the change in policy and provided more detailed information on the number of pending leading cases, rather than just the overall number of unexecuted cases.[152] Nevertheless, a similar narrative was maintained aiming at linking the decrease in the overall number of pending cases to improved State behaviour and a well-functioning implementation system, both at European and national level.[153] Consequently, relevant CoE reports presenting the latest statistics on the implementation of cases often communicate a false, even misleading, message: that the implementation of judgments has been rather successful in recent years, largely based on the fall of the overall number of pending judgments. What they fail to demonstrate, however, is any reliable evidence of the much-acclaimed progress on the implementation of the ECtHR's judgments domestically. As shown above, the fall in the overall number of cases pending execution seems to have mostly resulted from a more lenient closures policy, rather than a more effective State performance or improved domestic procedures regarding implementation. In this regard, the way CoM Annual Reports are drafted could also contribute to deepening the misconception that the widely-recognised problem about the delayed, partial or non-execution of judgments is already being solved.

Drilling further into the statistics, a breakdown of this figure per State reveals that a small group of certain ECHR Contracting Parties continues to object, disregard or resist the implementation of ECtHR judgments persistently over the years (especially those classified

[150] *11th Annual Report of the Committee of Ministers 2017* (n 135) 12-14.
[151] George Stafford, 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 1: Grade Inflation' (n 148).
[152] *Annual Report of the Committee of Ministers 2018.*
[153] George Stafford, 'The Implementation of Judgments of the European Court of Human Rights: Worse than you think – Part 2: The Hole in the Roof' (*EJIL:Talk!,* 8 October 2019) <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ accessed 26 May 2021.

as leading cases). In fact, despite the remarkable overall decrease of the number of judgments pending execution at CoE-47 level, as mentioned above, no effective measures have been taken at the domestic level to rectify the negative record of certain States to date. Particularly, an impressive 93% of the leading judgments delivered against Azerbaijan in the last ten years (2010-2020) are still currently pending execution, closely followed by Russia which is yet to implement 90% of the leading cases delivered against it since 2010.[154] The respective figure for Ukraine and Turkey for the same time period is at, or close to, 65%.[155] Moreover, the CoM has already acknowledged that deep-rooted problems related to Europe's 'grey zones' or 'unresolved conflict zones' pose additional challenges to the execution process and that further cases arising from these pending judgments are to be expected.[156] Going even further, in each year since 2015, an average of 50% of the total number of leading cases has been pending for more than five years.[157] Similarly, out of 1,245 leading cases pending before the CoM by the end of 2019, 635 (or 51%) had been outstanding for more than five years.[158] Despite the progress noted in recent years in this regard, what is striking is that at the beginning of the Interlaken year in 2010 the percentage of leading cases pending execution for more than five years was only 7%.[159] Country-specific data, however, show that the current execution problem is even more compelling: the latest 5-year (2015-2020) average rate of unimplemented leading cases pending execution for more than five years in Turkey is currently about 60% and almost 70% in Russia and Ukraine.[160] Instances of increasing contested, delayed or non-execution of ECtHR judgments – referred to as 'situations of resistance' by the CoM[161] – are thus now becoming the norm rather than the exception in the ECHR system, at least with regard to certain States.

While there are noticeable discrepancies between ECHR States when it comes to the execution of ECtHR judgments, partial compliance too appears increasingly to have become

[154] Data extracted from HUDOC-Exec database (as of October 2020). See also, data analysis presented by the European Implementation Network <https://www.einnetwork.org/countries-overview> accessed 5 May 2021.
[155] ibid.
[156] Remarks by the Director General of the Directorate General of Human Rights and Rule of Law, *12th Annual Report of the Committee of Ministers 2018,* 8, 14.
[157] *13th Annual Report of the Committee of Ministers 2019* (n 6) 72-74.
[158] ibid.
[159] *4th Annual Report of the Committee of Ministers 2010* (Council of Europe 2011) 57 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592ac6> accessed 5 May 2021.
[160] Indeed, execution of some leading cases against Turkey has been pending as far as since the early 1990s, while certain judgments against Russia and Ukraine remain unimplemented since the early 2000s – only a few years after they joined the Convention system. See eg, *Loizidou v Turkey* App no 15318/89 (26 August 1993); *Kalashnikov v Russia* App no 47095/99 (15 July 2002) and *Kuznetsov v Ukraine* App no 3904/97 (29 April 2003). Additionally, the average time leading cases have been pending in Russia, Turkey and Ukraine is calculated at about 7.5 years for the first two and almost 8 years for the last, while similar figures can be found with regard to other States too, such as Hungary (6 years) and Azerbaijan (8 years). Data (as of 25 October 2020) were extracted from the HUDOC-EXEC database and *13th Annual Report of the Committee of Ministers 2019* (n 6) 73.
[161] *11th Annual Report of the Committee of Ministers 2017* (n 135) 10, 13.

the norm, in both Western and Eastern European States alike.[162] The growing phenomenon of partial compliance was already noted by scholars in the beginning of the previous decade and current statistics indicate that the problem has not only remained unresolved but it has, instead, been exacerbated over the years.[163] In this regard, equally noteworthy is the fact that in the overwhelming majority of the cases whose execution process is still ongoing individual redress (most commonly, monetary payment in the form of just satisfaction) has been provided within the given deadline. Such cases, however, cannot normally be yet classified as closed because the required general measures indicated by the ECtHR remain unimplemented.[164] Delays in the adoption of general measures indicated in leading cases, as already stated, have serious repercussions for the functioning of the Court as they give rise to additional repetitive applications, thus unnecessarily overburdening the Court as well as its Registry. Notably, some of the leading cases currently pending for execution are responsible for hundreds of repetitive cases whose execution process is also ongoing. Prompt and effective execution of leading cases is therefore paramount for reducing the ECtHR's excessive caseload and maintaining a functional judicial system.[165] These findings thus reaffirm both the impact and practical necessity of the CoM's new case closure policy, as described above, as well as the risk it carries in creating a distorted image regarding the execution process of many cases.

Responding to the growing phenomenon of delayed, partial or non-execution of ECtHR judgments, the Court delivered its very first infringement proceedings judgment, under Article 46 (4) ECHR, in 2019.[166] The mechanism was established with the adoption of Protocol No 14 with a view to making the implementation of the Court's judgments more effective by exerting added political pressure through proceedings for noncompliance against a respondent State, which has persistently shown its unwillingness to fully uphold Convention standards, before the ECtHR.[167] Although the Court was equipped with an

[162] Philip Leach and Alice Donald, 'Russia Defies Strasbourg: Is Contagion Spreading?' (EJIL:Talk!, 19 December 2015) <https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/> accessed 26 May 2021. See also, Ramute Remezaite, 'Challenging the Unconditional: Partial Compliance with ECtHR Judgments in the South Caucasus States' (n 137) 170.

[163] Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6(1) *Journal of International Law and International Relations* 35, 38. Conclusion drawn based on the stage of execution process and latest monitoring report of pending cases on HUDOC-Exec database.

[164] On the contrary, the percentage of cases in which payments were made outside the deadline has tripled during the last decade (ie from about 10% in 2009 to about 30% in 2019). Cf, *4th Annual Report of the Committee of Ministers 2010* (n 155) 49 and *13th Annual Report of the Committee of Ministers 2019* (n 6) 79.

[165] An indicative example is the recent execution of *Ceteroni v Italy* App no 22461/93 (15 November 1996), which finally closed in 2017 and, at the same time, facilitated the implementation of another 500 repetitive cases arising from the same structural problem, thus considerably dropping the overall number of judgments pending execution at that point. For currently pending leading cases causing similar backlog problems, see eg, *Bragadireanu v Romania* App no 22088/04 (6 March 2008), which continues to result in almost 100 repetitive cases even twelve years after it became final, and *Klyakhin v Russia* App no 46082/99 (6 June 2005) still giving rise to about 190 unimplemented repetitive cases to date.

[166] *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) App no 15172/13 (29 May 2019).

[167] See, *Explanatory Report to Protocol No 14*, para 99.

additional jurisprudential tool to ensure that ECHR States abide by its rulings, the effectiveness of the mechanism has been heavily criticised.[168] Apart from the (delayed as well as partial) individual measures taken as a result of this infringement-proceedings judgment, the mechanism proved insufficient to ensure that the respondent State implements the required general measures to rectify the structural deficiency in its domestic order and, therefore, fell short of the high expectations placed on it before its first-ever deployment.[169] Yet, the exact impact of the mechanism, including whether, and to what extent, the ECtHR will now seek a more active role in facilitating the execution of its own judgments, remains to be seen.

Apart from the institutional implications of partial compliance, it can be also argued that where a State's response to a judgment is limited to paying monetary compensation without pursuing further implementation and thus actively seeking solutions to the underlying structural problems, the authority of the ECtHR is seriously jeopardised.[170] It is important to note that having an independent court, whose authority is uncompromised by domestic expediencies and whose decisions are accepted as final and legally binding, is at the heart of the Convention system. A number of scholars, such as Helen Keller and Alec Stone Sweet, have argued that nowadays, seventy years since the establishment of the Convention system and after twenty years of the existence of the ECtHR in its current form, the Court enjoys a remarkable reputation as an 'important, autonomous source of authority on the nature and content of fundamental rights' in the European continent and forms part of 'the most effective human rights regime in the world'.[171] Some other scholars, including Nico Krisch, have attempted to link the Court's arguable success and effectiveness to the States Parties' performance in executing its judgments by stating that the ECtHR's judgments enjoy high rates of compliance.[172]

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[168] See eg, Kanstantsin Dzehtsiarou, 'How many judgments does one need to enforce a judgment? The first ever infringement proceedings at the European Court of Human Rights' (*Strasbourg Observers*, 4 June 2019) <https://strasbourgobservers.com/2019/06/04/how-many-judgments-does-one-need-to-enforce-a-judgment-the-first-ever-infringement-proceedings-at-the-european-court-of-human-rights/> accessed 12 June 2021; Jessica Gavron and Ramute Remezaite, 'Has the ECtHR in Mammadov 46(4) opened the door to findings of 'bad faith' in trials?' (*Ejil:Talk!,* 4 July 2019) <https://www.ejiltalk.org/has-the-ecthr-in-mammadov-464-opened-the-door-to-findings-of-bad-faith-in-trials/> accessed 12 June 2021.

[169] ibid.

[170] See eg, Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (CUP 2014) 255; Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79(1) *Law and Contemporary Problems* 141, 173-174.

[171] Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights* (n 67) 3. See also, A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) *International Organization* 217, 218, noting that the ECHR system has been characterised as the 'most advanced and effective' international regime for the enforcement of human rights in the world.

[172] Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71(2) Modern Law Review 183, 184. See also, A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) *International Organization* 217, 218.

However, this last statement could today be questioned, especially given the consistently high number of pending leading cases, as described above, and the fact that all but three States are currently subject to compliance monitoring.[173] In any case, though, a note of caution needs to be made when seeking to link compliance rates in respect of a judicial institution, such as the ECtHR, and the authority it wields. If the compliance rate was used as a towering yardstick for the performance or functioning of the Court, its authority would be very easily surrendered to the whims of certain deviant governments. Instead, compliance remains the primary yardstick to judge the respondent State, rather than the Court itself.[174] Suggesting otherwise could risk discouraging the ECtHR from addressing and deciding on the most pressing challenges facing European societies. As Madsen acknowledges, however, a striking paradox arises from this phenomenon regarding the Court's authority at the domestic level. Despite the inadequate efforts by State authorities to give full effect to the Court's rulings - as evidenced by the CoM statistics on the execution of judgments -, there has been an increased mobilisation, instead of discouragement, by litigants (ie individual applicants and their representatives) resulting in an ever-growing number of incoming applications over the years.[175] In this sense, the ECtHR judgments have arguably generated more cases than they have actually resolved as the underlying structural problems identified in many occasions have not been effectively rectified.[176] Seen from a different perspective, however, although the ECtHR often faces open and persistent resistance when certain States fail to fully and promptly execute its judgments, the fact that a consistently high number of applications continue to reach Strasbourg from those States clearly indicates the emergence of a ground whereby the ECtHR is increasingly conceived of as a tool for legal and social change by various other stakeholders beyond State governments.

3.5 Conclusion

With the completion of the Interlaken process in December 2019, the overall assessment conducted by the Steering Committee for Human Rights (CDDH) shows the ECtHR 'in a very positive light'.[177] Official reports of the ECtHR, the Committee of Ministers (CoM) and other Council of Europe (CoE) bodies during the 2010-2019 decade sought to convey an overly optimistic message suggesting not only that the Court has now significantly improved its

[173] Excluding Andorra, Monaco and San Marino (as of October 2020). See also, *13th Annual Report of the Committee of Ministers 2019* (n 6) 60-62.
[174] Copenhagen Declaration (n 56), para 19.
[175] Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights' (n 170) 163. See also, Guido Raimondi, *Speech at the Opening of the Judicial Year* in *Annual Report 2019 of the ECtHR* (n 11) 12, noting that the significant volume of new applications received by the Court each year reflects 'the degree of trust shown by [individuals] in the European mechanism for the protection of human rights and the importance it represents for them'.
[176] Mikael Madsen, 'The Challenging Authority of the European Court of Human Rights' (n 170) 163.
[177] Linos-Alexandre Sicilianos, Foreword, *Annual Report 2019 of the ECtHR* (n 11) 8.

functioning, but also that the Interlaken reform process has set the correct foundations enabling the Court to continue performing its tasks effectively in the future. The latest reform stage, in conjunction with the measures adopted under Protocol No 14 which entered into force at the same time the Interlaken process was launched, has been crucial for ensuring a better functioning and, indeed, the survival of the Convention system. Nevertheless, as the above statistical analysis demonstrates, this overly optimistic view cannot be justified as it does not reflect the current, or even future, situation of the Court. The reality, instead, indicates that, despite some improvements, a number of underlying challenges remain unresolved and, in many regards, are even being exacerbated. As a result, even after the completion of a decade-long reform process, the Court continues to underperform and its long-term future is far from guaranteed, thus putting into question the success and adequacy of the Interlaken process.

As shown in the analysis above, much of the focus of the Interlaken reform process was on containing the Court's ever-increasing backlog and reducing its overwhelming volume of pending caseload. Indeed, by the end of the reform decade, there was an impressive drop of about 50% in the total number of pending applications compared with the late 2000s. The fact that the overall decrease in the number of cases pending either before the Court or the Committee of Ministers preoccupies a central place in the CoE bodies' official statistical overview each year is illustrative of the importance attributed to this objective. This was also widely reflected and praised in the CoE institutions' annual stock-taking regarding the Court's functioning and state of play.

Seen in isolation, this achievement can be deceptive and does not reflect the reality of human rights protection on the ground. The volume of the ECtHR's current caseload remains considerably high and results in a permanently excessive length of proceedings before it. Indeed, the Court 'continues to receive a very high number of applications; [f]ar too many for an international court' and, as such, it 'continues to struggle to keep the backlog to the manageable level'.[178] Therefore, drawing conclusions on the success of the Interlaken process in improving the effective implementation of the Convention at the domestic level solely based on the reduction of the Court's caseload can be misguided.

In reality, as the analysis of statistics presented above shows, the most apparent institutional improvement with regard to the Court's workload during the Interlaken decade concerns the near-elimination of clearly inadmissible and manifestly ill-founded applications. Remarkably improved productivity and working methods are all factors which contributed to this outcome. Arguably, however, the success of halting the increase in caseload in the last decade is to be attributed mainly to the Court's changing attitude, encouraging it to dispense an ever greater number of pending applications, through inadmissibility or strike-out

[178] Christos Giakoumopoulos, Speech at *European Convention on Human Rights at 70: Current Challenges* (MGIMO University, 19 October 2020) <https://www.coe.int/en/web/human-rights-rule-of-law/speech-by-christos-giakoumopoulos-19-october-2020> accessed 26 May 2021.

decisions or even through non-contentious means, as evidenced also by the decreasing number of judgments delivered each year.[179] This shift in the Court's approach should be read in light of States' post-Brighton mandate to develop a 'more focused' and increasingly deferential Court that would 'need to remedy fewer violations itself and consequently deliver fewer judgments'.[180] This serves to show that the significant reduction of the Court's caseload and its apparent improvement in effectiveness are nothing more than the result of the new role States envisaged for the ECtHR in light of a renewed emphasis on the subsidiarity principle. The actual means, therefore, by which the Interlaken process has sought to ensure the Court's long-term effectiveness should be carefully examined, not least because of the implications these may have on the future (role) of the Court.

Furthermore, the chapter made apparent that the Court's current situation resembles the one recorded in the late 2000s, both in terms of overall numbers of pending applications and of judgments pending execution. Conversely, some other aspects concerning its functioning, such as the number of repetitive cases or the proportion of Chamber cases in relation to the total backlog, reveal a worsening trend over the last decade. Regarding repetitive applications in particular, the Interlaken process has evidently failed to achieve its objectives as well as the expectations of the CDDH, which, in its mid-term assessment of the reform process in 2015, had foreseen that the backlog of such cases would be cleared by 2018. Instead, despite the measures adopted by the Court to tackle this phenomenon, notably the pilot-judgment procedure, as Section 3.2 above showed, the number of repetitive applications has steadily grown since 2010, reaching a point whereby it now represents more than 50% of the Court's current caseload. Consequently, one may only question how the very same situation, and in many respects much aggravated than the one which urgently prompted the CoE stakeholders to initiate a reform process in the late 2000s can nowadays be celebrated as improved or satisfactory. Arguably then, the otherwise obvious achievements of the Interlaken decade were used to cover up or detract from the persistent, and often exacerbated, underlying challenges still facing the ECtHR.

Among the key findings of this chapter is that national implementation of the Convention still remains one of the Court's major underlying challenges to date. Prompt and effective execution of ECtHR judgments evidently plays a vital role within the Convention system, not only in terms of their direct impact at the national level but also in decreasing the number of future applications by eliminating the root causes of violations. What the present chapter sought to demonstrate, therefore, is that the root causes of the most pressing challenges facing the ECtHR may not be located, in the end, 'at Strasbourg', but, rather, externally with direct consequences for the functioning of the Court, its Registry and the wider ECHR system.

[179] See also, ECtHR Registry, 'The Development of the Court's case-load over ten years – Statistical Data for the CDDH' (CDDH(2019)08, 27/02/2019) 4 <https://rm.coe.int/steering-committee-for-human-rights-cddh-the-development-of-the-court-/1680945c35> accessed 26 May 2021.
[180] Brighton Declaration (n 13), paras 31-33.

Chapter 4
Framing the ECtHR challenges: Institutional vs Constitutional

'However responsive and efficient the Court may be, ultimately it will only be able to operate effectively if domestic courts play to the full their part in securing the protection of fundamental rights'.[1]

'[T]he mission of the Court, the service that it is expected to render European citizens and European societies, should dictate the contours of any reform'.[2]

4.1 Introduction

The present chapter explores in detail the central research question put forward by the thesis. More specifically, it examines the extent to which the current, dominant reform agendas (ie proposals and measures adopted thus far in the ECtHR reform debate) adequately address the fundamental problem of normative effectiveness facing the ECtHR, as identified and analysed in the previous chapters. The main argument I seek to develop here is that these dominant reform agendas have not adequately addressed, let alone resolve, the underlying problem of the Court. As I will argue below, the explanation of why the fundamental challenge of the ECtHR has not been adequately addressed thus far lies with the fact that the current character of the problem is misframed, and thus misapprehended, as primarily institutional, rather than constitutional in nature. This misapprehension of the character of the problem distracts the reform process from grappling with the real, underlying challenge of normative effectiveness facing the ECtHR. As a result, alternative means of addressing this fundamental problem should be examined.

A chronological examination of past and recent reform proposals made by relevant stakeholders within the ECHR system is conducted in order to test and potentially confirm the above position. I then argue that the framing of the underlying challenges facing the ECtHR as primarily institutional in nature, as presented through State and ECtHR official reports, speeches, declarations and other archival sources, is misapprehended. As a result, the ongoing reform process of the Court has been misguided, thus incapable of revealing and addressing the underlying problems of deeper constitutional importance. Consequently, any reform proposals developed within this frame are unlikely to secure the Court's effectiveness in the long term. Responding to the above misapprehension, the thesis argues

[1] *Interview with Judge Luzius Wildhaber, President of the New European Court of Human Rights* (1999) 37(5) *Russian Politics and Law* 55, 56.
[2] Paul Mahoney, 'An Insider's View of the Reform Debate' (2004) 29 *NJCM Bulletin*, 171, 175.

that the challenges faced by the ECtHR are, instead, primarily constitutional(ist) in nature and, therefore, any institutional reforms proposed or implemented so far must be complemented by constitutional measures in order to secure a viable and effective long-term future for the Court. Following the analysis in the previous chapters, I further seek to demonstrate that the predominantly technical or institutional frame of the ECtHR reform process over the past decades does not adequately capture the true nature and scope of the underlying challenges facing the ECtHR. In this regard, this chapter builds on the thesis' overarching objective to re-shape and re-locate the debate on the reform and future of the ECtHR in its real, constitutional dimension and provide a robust and viable response to its ongoing challenges following a comprehensive analysis of the underlying causes of its institutional shortcomings.

4.2 Identifying Stakeholders and Why Frames matter

4.2.1 Stakeholders in the ECHR context

This part of the thesis identifies who the relevant stakeholders in the ECHR context are in order to examine how these actors have framed the challenges facing the ECtHR since the early stages of its reform in the 1980s.[3] It will further analyse how, and to what extent, such framing of the Court's challenges has influenced its functioning so far and shaped the ongoing debate on its reform and long-term future.

I conduct the below framing analysis based on the distinction between stakeholders whom I deem 'internal' or 'external' to the ECHR system. Particular attention is given to the way the challenges facing the ECtHR have been framed by the 'internal' stakeholders within the CoE, which shall include the traditional CoE constituent bodies, namely the ECtHR, its Registry, the Parliamentary Assembly (PACE), expert groups on the reform of the Court, notably the Steering Committee for Human Rights (CDDH) and, most importantly, the CoE member States in the Committee of Ministers (CoM) setting. In this group of 'internal' stakeholders, other CoE bodies, such as the Commissioner for Human Rights and the CoE Secretary-General could also be added in order to provide a more comprehensive analysis. Due to their proximity to the political decision-making process that directly affects the proposals about the reform and future of the ECtHR, I consider the frame-building and frame-setting conducted by these 'internal' stakeholders particularly influential and decisive. As I further show below, the influence of the CoM, in particular, is considerably important in framing and drafting the relevant ECtHR reform proposals. I base this observation on the fact that the CoM is the executive decision-making body, which has unique voting powers on reform-

[3] For the various definitions of 'stakeholders' I used to identify the relevant stakeholders in the ECHR context, see the methodology section (Section 1.4) in the thesis' introduction.

related matters within the CoE and competence to provide technical expert bodies with terms of reference to conduct their evaluation of the ECtHR's reform.

Nevertheless, the participation (or lack thereof) of the 'external' stakeholders in this process is equally important and will also be considered. The role of individual (and collective) rights-holders, often represented by civil society, non-governmental organisations (NGOs) and national human rights institutions (NHRIs), cannot be disregarded.[4] Their function as 'social watchdogs' that hold national authorities to account makes such organisations important actors in the enforcement of the Convention domestically, in the further development of the Convention rights and the strengthening of the wider European human rights architecture.[5] Their views on the ECtHR's reform will thus also be taken into account in the below framing analysis. Apart from the well-established position that the right of individuals to seize the Court is the cornerstone of the Convention system, the central role of the individual was also reflected in the Court's reform process through the various contributions of civil society and the Commissioner for Human Rights.[6] Illustratively, at the beginning of the Interlaken process, civil society representatives highlighted that:

> People in Europe (future applicants to the Court) have an interest at least equal to that of the States in ensuring the long-term effectiveness of the Court. States should therefore inform the public about the debates and consult civil society in the lead-up to the Conference and throughout the reform process which follows it.[7]

What is important here is to examine the extent to which those 'external' stakeholders, who are usually the ones affected the most by the (in)effectiveness of the Convention control system, have the opportunity to influence or contribute to the frame-building and frame-setting of the ECtHR's challenges. As I will argue further below, the various stakeholders

[4] See eg, Antoine Buyse, 'The Draft Copenhagen Declaration – What About Civil Society?' (Stra*sbourg Observers*, 1 March 2018) <https://strasbourgobservers.com/2018/03/01/the-draft-copenhagen-declaration-what-about-civil-society/> accessed 29 May 2021.

[5] See eg, *Társaság a Szabadságjogokért v. Hungary* App no 37374/05 (14 July 2009), paras 27, 36.

[6] See eg, CCBE Proposals to DH-SYSC-V on Enhancing the National Implementation of the European Convention on Human Rights and the Execution of Judgments of the European Court of Human Rights (13 November 2020) <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/PDS_Position_papers/EN_PDS_30201113_CCBE-Proposals-to-DH-SYSC-V.pdf> accessed 29 May 2021; *Joint NGO Response to the Draft Copenhagen Declaration* (20 February 2018) <http://www.omct.org/files/2018/02/24721/joint_ngo_response_to_the_copenhagen_declaration___13_february_2018.pdf> accessed 29 May 2021; Joint NGO Statement, 'Human Rights in Europe: Decision Time on the European Court of Human Rights', in Council of Europe Directorate General of Human Rights and Legal Affairs, Preparatory Contributions – High Level Conference on the Future of the European Court of Human Rights (Interlaken, Switzerland, 18-19 February) <https://www.amnesty.org/download/Documents/48000/ior610092009en.pdf> accessed 29 May 2021; Commissioner for Human Rights, *Memorandum on the Interlaken Conference*, CommDH(2009)38 (7 December 2009).

[7] Joint NGO Statement, 'Human Rights in Europe: Decision Time on the European Court of Human Rights' (n 6) 32.

identified above should have their own say in framing what the underlying challenges facing the Court are. This ensures that entities which are generally excluded from decision-making processes, yet often affected by the (mal)functioning of the ECtHR the most (eg individuals), have the opportunity to contribute to the framing of the Court's fundamental challenges and the broader debate on its long-term future. As acknowledged in the methodology section in the thesis' Introduction, although the present analysis does not intend to answer as to which stakeholder may have greater influence or take priority in the Court's reform debate, it does clarify that *all* relevant stakeholders must have an input in the way the ECtHR functions and participate in shaping its future direction.[8]

Lastly, as shown in the analysis below, conflicting interpretations of the ECtHR's function and mission have been evident throughout the various reform stages over the last decades, which, in turn, are reflected in the power struggle of self-interest stakeholders while shaping, amending and adopting reform proposals. As a result, relevant ECHR stakeholders, as identified above, sought to contribute, to varying extents and levels of success, to influencing and shaping the reform process by acting strategically in light of their own interpretation of the Court's overriding mission and function.[9]

4.2.2 Why Frames Matter

Although the concept of framing has been described in several ways and various definitions have been attributed to the term,[10] it is generally accepted that framing can be seen as a communicative process; a dynamic, rather than static, process involving frame-building (how frames emerge) and frame-setting (how frames interplay between the 'framer' or communicator and the audience).[11] As already explained in the thesis' methodology section, frames have been used as a political and social tool to shape the understanding of a perceived reality by selecting and focusing on certain aspects of it, thus influencing a targeted audience's attitudes on a particular topic.[12] Indeed, as frame studies have shown, people are most likely to interpret particular problems, the causes of these problems and, consequently, the proposed solutions based on the way these issues have been framed. [13] In

[8] For studies in social science supporting this view, see eg, John Hasnas, 'Whither Stakeholder Theory? A Guide for the Perplexed Revisited' (2013) 112(1) *Journal of Business Ethics* 47, 52.
[9] ibid, where the theory of 'bounded strategic space' is developed to review and analyse the degree of influence various political actors exercise during institutional reform processes.
[10] See eg, Erving Goffman, *Frame analysis: An essay on the organization of experience* (Harvard University Press, 1974); Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453; Robert Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (1993) 43(4) *Journal of Communication* 51.
[11] Claes H de Vreese, 'News Framing: Theory and Typology' (2005) 13(1) *Information Design Journal 51-62.*
[12] See n 10. See especially, Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (n 10) 456-458.
[13] Amos Tversky and Daniel Kahneman, 'Rational Choice and the Framing of Decisions' (1986) 59(4) *The Journal of Business* 251-278.

this way, frames seek to promote a particular definition or understanding of an identified problem, provide an explanation of its root causes and influence any decision-making process by suggesting possible remedies for tackling that problem.[14] In social sciences, for instance, the concept of frame has been used to understand and explain the dynamics of a social movement[15] and assess how individuals or societies organise, perceive and communicate about reality.[16] As Entman notes, 'most frames are defined by what they omit as well as include, and the omissions of potential problem definitions, explanations, evaluations, and recommendations may be as critical as the inclusions in guiding the audience'.[17] The way frames exert their power through the selective description of certain characteristics of a situation and the omission of others has also been illustrated by Edelman.[18] Accordingly, 'the social world is…a kaleidoscope of potential realities, any of which can be readily evoked by altering the ways in which observations are framed and categorized'.[19]

The importance of the implications arising from the way the ECHR stakeholders have framed the challenges facing the ECtHR during the past decades becomes evident in the below analysis. More specifically, one observes that negotiations surrounding the reform and future of the ECtHR until the late 2010s reflect the emergence of a 'human rights policy domain',[20] which is largely characterised by the existence of an narrowly-conceived 'epistemic community'.[21] Such 'epistemic community' could be conceived of as 'a network of professionals with recognized expertise and competence in a particular domain and authoritative claim to policy-relevant knowledge in the area'.[22] Based on the identification of relevant ECHR stakeholders (mainly the 'internal' ones), as already outlined, this 'epistemic community' is made up of actors working both in and around the Strasbourg institutions, whose expert knowledge in the development of the Convention system placed them in a more prominent position in the reform debate.

As the following analysis demonstrates, however, this sense of community means that the institutional development of the Convention system and the debate on the future and reform of the Court is primarily framed as a 'technical matter', whose determination is largely left to those legal technocrats 'at Strasbourg'. While expert, technocratic knowledge

[14] Robert Entman, 'Framing: Toward Clarification of a Fractured Paradigm' (n 10) 52.
[15] Robert Benford and David Snow, 'Framing processes and social movements: An overview and assessment' (2000) 26 *Annual Review of Sociology* 611.
[16] See Erving Goffman, *Frame analysis: An essay on the organization of experience* (n 10).
[17] Robert Entman, *Democracy Without Citizens: Media and the Decay of American Politics* (OUP 1989) 54.
[18] M J Edelman, 'Contestable categories and public opinion' (1993) 10(3) *Political Communication* 231.
[19] ibid, 232.
[20] Robert Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights', in Jonas Christoffersen and Mikael R Madsen, *The European Court of Human Rights between Law and Politics* (OUP 2011) 124.
[21] Peter Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination' (1992) 46 *International Organization* 3.
[22] ibid.

would ensure that elements of practice and process are present, other normative considerations of greater constitutional importance remain, to a significant extent, sidelined.[23] As Chapter 2 previously concluded, managerial or technical language related to elements linked to the internal organisation of the ECtHR enables the Court and other CoE actors to construct a positive image of an efficient and well-functioning judicial institution. This prioritisation of efficiency and cost-effectiveness and the recourse to managerial practices preoccupies most of the ECtHR reform process, from the drafting of Protocol No 11 and the establishment of the 'new' Court in 1998 until the completion of the Interlaken process in 2019. Lastly, it is noted that the epistemic community mentioned above has gradually expanded as the reform process progressed further, notably with the more active participation of civil society at the Interlaken Conference and thereafter. In the following analysis, however, I will seek to demonstrate that contributions made from outside the dominant epistemic community 'at Strasbourg' had very little, if any, impact in shaping the frame of the challenges facing the ECtHR and, thus, the ongoing reform debate.

4.3 The 'urgent need' for a 'major reform': Protocol No. 11 and the creation of the 'new' Court

The growing workload pressures that began to be felt at Strasbourg since the late 1970s continued to pose significant challenges to the functioning of both the European Commission of Human Rights (Commission) and the old Court.[24] By the mid-1980s, the rising number of individual applications made the Convention supervisory organs, especially the Commission which started to operate as a *de facto* 'semi-permanent' institution by that point, struggle to cope with the demands of the workload and started to 'reach breaking point'.[25] Concerns over a 'serious backlog' were expressed by the Commission already in 1983, which warned that it was 'high time to provide the organs of the Convention with the means to cope with this situation'.[26] Views from inside the Commission are illustrative of the situation. As noted, the Commission was 'working at a killing pace', while the limited resources meant that Commissioners 'hardly ha[d] time to carry out their *rapporteur* duties, unless they decide[d] not to attend discussion in the Commission'.[27] Commissioner Henry

[23] Robert Harmsen, 'The Reform of the Convention System' (n 20) 124-125.
[24] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 393.
[25] ibid, 422.
[26] Cited in 'Functioning of the Organs of the European Convention on Human Rights: Assessment, Improvement and Reinforcement of the International Control Machinery set up by the Convention', Report Submitted by the Swiss Delegation to the European Ministerial Conference on Human Rights' in (1985) (hereinafter, *Swiss Report 1985*) 6 Human Rights Law Journal 97.
[27] Stefan Trechsel, 'Presentation of Report', in 'Merger of the European Commission of Human Rights and the European Court of Human Rights: University of Neuchâtel, 14-15 March 1986' (hereinafter, *Neuchâtel Colloquy*) (1987) 8 *Human Rights Law Journal* 103, 105; 'Towards the Merger of the Supervisory Organs: Seeking a Way out of the Deadlock', in *Neuchâtel Colloquy*, 11. See also, *Reform of the Judicial Control Mechanism of the*

Schermers in 1988, for instance, reiterated the warnings of the growing workload and noted that the Commission was already unable to cope and, inevitably, the backlog of applications was set to continue to increase in the following years.[28]

The discussion on the reform of the Convention system, therefore, centred on how the backlog and length of judicial proceedings before the Court could be reduced. The excessive delay for the examination of applications reaching the ECtHR, in particular, was seen as a major impediment to the effectiveness of the wider Convention system.[29] Illustratively, the Strasbourg institutions would often need an average of six years to decide (by judgment) that a national procedure lasting three or four years was excessive in relation to certain Convention Articles.[30] Additionally, as Rowe and Schlette describe, 'the most obvious weakness of the old system was its extraordinary complexity: three organs worked together in a protracted, multi-phase procedure. There was considerable overlap between the competencies of the various organs, which meant that work was often duplicated'.[31] As a result, 'the review system was ponderous, expensive and difficult for the complainant to understand', while there was also a 'considerable risk' that the various Convention supervisory organs would reach 'different decisions in substantially similar cases'.[32]

The CoE's 1990s enlargement process resulted in the formal admission of several Central and Eastern European (CEE) States within a very short period of time, making it clear that 'Europe's centre of gravity' was now shifting eastwards.[33] Several ECHR stakeholders, including CoE officials, the Registry and the President of the ECtHR at the time, Rolv Ryssdal, expressed 'major concerns' about the future of the Convention system in light of the enlarged membership of the organisation.[34] As already noted, a significant rise in the activity

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ECHR: Opinion of the Commission (Transmitted to the Committee of Experts and the Steering Committee, 9 September 1992); Committee of Ministers Doc CM(91)193 (15 November 1991), noting that, at that time, it 'could take more than five years before individual applicants receive a final decision from the Convention organs' and that an urgent reform to tackle the ever-increasing workload was necessary to 'ensure the survival of the system' <https://rm.coe.int/native/0900001680780729> accessed 29 May 2021.

[28] Henry Schermers, 'Has the European Commission of Human Rights got bogged down?' (1988) 9 *Human Rights Law Journal* 175. See also, Alastair Mowbray, 'Reform of the Control System of the European Convention on Human Rights' (1993) (Autumn) Public Law 419, 420-421.

[29] See, 'Reform of the Control System of the European Convention on Human Rights', (1993) 14 *Human Rights Law Journal* 31, 33-35.

[30] The calculated average timeframes are cited in Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 424. For criticism of this situation, see, *Swiss Report 1985* (n 26) and Olivier Jacot-Guillarmod, 'Protocol No 11 to the European Convention on Human Rights: A Response to Some Recent Criticism' in *Eighth International Colloquy on the European Convention on Human Rights* (Budapest 1993) (hereinafter, *Budapest Colloquy 1993*) 177, 179.

[31] Nicola Rowe and Volker Schlette, 'The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR' (1998) 23 *European Law Review: Human Rights Survey* 3, 5.

[32] ibid.

[33] Observation made by Catherine Lalumière, former Secretary-General of the CoE, quoted in Denis Huber, *A Decade that Made History: The Council of Europe (1989-1999)* (Council of Europe 1999) 21. The membership of the organisation almost doubled within just a decade, from 23 members in 1989 to 41 in 1999.

[34] Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 451. For further opinions on the new challenges posed on the Convention system by the enlargement, see eg, P Leuprecht, 'Innovations in the

of the Court was already remarkable from the late 1970s/early 1980s and, thus, a matter of serious concern for the control system.[35] The workload situation, however, was expected to further deteriorate and the influx of applications reaching Strasbourg following the CoE's enlargement threatened to clog the Court to the point of asphyxiation, leaving it unable to fulfil its crucial mission of providing legal protection of human rights across Europe.[36] It cannot be claimed, however, that this development was not foreseeable. Indeed, the inclusion of the new democracies from the former Soviet bloc in the Convention system was seen as a major challenge, if not a threat, to the functioning and effectiveness of the Court as the standards of human rights protection between the newly joined States and the older, established democracies varied enormously.[37] CEE States that had recently acceded to the CoE were financially weak countries, while their democratic standards and the rule of law, both fundamental pillars of the Convention system, first had (and arguably still further have) to be established and practised since they were emerging from decades of totalitarian governments.[38]

Apart from the increase in workload, the CoE enlargement was thus expected to lead to a change in the subject matter of the cases brought before the Court. The CoE had to move away from being 'an established club of democracies' to a 'training centre' for democracy.[39] The increasing complexity and importance of cases brought against the 'new' States would also result in lengthier proceedings as the Court would now have to assume a new function, namely that of an 'adjudicator of transition'.[40] In this regard, although the reform leading to

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European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 *Transnational Law and Contemporary Problems* 313, 328-332; Paul Mahoney, 'New Challenges for the European Court of Human Rights resulting from the Expanding Case Load and Membership' (2002) 21(1) *Penn State International Law Review* 101, 102-103.

[35] See eg, Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 393, 420, 430.

[36] See, Luzius Wildhaber's comments in 'Spotlight on Second Restructuring of European Court of Human Rights' (ECtHR, Press Release, 8 June 2000) <http://hudoc.echr.coe.int/eng-press?i=003-68008-68476> accessed 29 May 2021. See also, Explanatory Report to Protocol No 11, Preamble and *Opinion of the European Court of Human Rights on the Control System of the ECHR – Part I* (Transmitted to the Committee of Experts and the Steering Committee, 7 September 1992).

[37] 'Remarks of Robert Badinter' in *The European Court of Human Rights – Organisation and procedure: Questions concerning the implementation of Protocol No. 11 to the European Convention on Human Rights* (Potsdam Colloquy, 19-20 September 1997) 160-162.

[38] Luzius Wildhaber, 'Consequences for the European Court of Human Rights of Protocol No. 14 and the Resolution on Judgments revealing an underlying systemic problem – Practical Steps of Implementation and Challenges', in *Applying and Supervising the ECHR-Reform of the European Human Rights System, Proceedings of the High-Level seminar* (Oslo, 18 October 2004) 27.

[39] Robert Harmsen, 'The European Convention on Human Rights after Enlargement' (2001) 5(4) *International Journal of Human Rights* 18, 21. See also, Andrew Drzemczewski, 'The European Human Rights Convention: Protocol No.11 – Entry into Force and First Year of Application' (2000) 21 *Human Rights Law Journal* 10, expressing his strong skepticism over CoE's enlargement since the legal standards in several CEE States fell below those required by the ECHR system, thus creating a situation which posed a serious threat for the ECHR *acquis*, and Lord Lester, 'The ECHR in the New Architecture of Europe' (1997) 38 *Yearbook of the ECHR* 226, 227, warning against a 'variable geometry' in the protection of human rights across the CoE States.

[40] Robert Harmsen, 'The European Convention on Human Rights after Enlargement' (n 39) 30. This new function was subsequently recognised in Lord Woolf, *Review of the Working Methods of the European Court of*

the adoption of Protocol No 11 was primarily motivated by the need for rationalization and modernization of the Convention system, a wholesale restructuring was also necessary from a democratic viewpoint. Ensuring consistency of the Court's case law, strengthening the judicial character and increasing transparency of the proceedings have also played a role in carrying out the required reforms of the control system, which until then was, arguably, in many respects both 'esoteric' and partially 'obsolete'.[41] Nevertheless, these latter aims were merely seen as a means to an end, in the sense that achieving greater institutional efficiency remained the ultimate goal of the reform throughout the 1990s.[42] Seen from this perspective, since enlargement was not entirely completed by the time negotiations for Protocol No 11 were finalised around 1994, the precise effects of the organisation's expansion on the work and functioning of the control system could not have been accurately anticipated or even speculated, thus fully reflected in the Protocol. Yet, the geopolitical developments within the organisation during the 1990s had an immediate, short-term effect of enhancing the already existing political appetite for reform and, although the CoE enlargement cannot be considered *the* catalyst for the reform of the Convention system, it certainly added more impetus to that agenda.[43] As will be shown further below, though, the four-year period between the adoption and the entry into force of the Protocol was enough to render it already outdated as by that time, the CoE membership had already doubled compared to the preceding decade and the challenges identified prior to its adoption were only worsening.

The ever-growing number of cases brought before the Commission and (to a lesser extent) the ECtHR, the overburdening of the Convention supervisory organs and the enlarged membership of the CoE (and thus the number of States Parties to the Convention) between the 1980s and 1990s were widely considered as the three primary factors threatening the ECHR control system with implosion.[44] As such, these factors had a 'decisive catalysing effect' for the subsequent reform leading to the adoption of Protocol No 11.[45] It was also acknowledged that any measures adopted up until the early 1990s[46] were nothing more

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Human Rights (2005) (hereinafter, *Lord Woolf Report 2005*) 9 <https://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf> accessed 29 May 2021.

[41] Olivier Jacot-Guillarmod, 'Protocol No 11 to the European Convention on Human Rights: A Response to Some Recent Criticism' (n 30), 180.

[42] See eg, Explanatory Report to Protocol No 11, paras 55-56, stating that failure to implement the proposed measures 'would run counter to the aim of the reform to increase efficiency'.

[43] Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 451.

[44] Olivier Jacot-Guillarmod, 'Protocol No 11 to the European Convention on Human Rights: A Response to some Recent Criticism' (n 30) 180. See also, Minutes of the 89th Session of the Committee of Ministers, CM(91)PV4-PV5, (26 November 1991), especially at 22-24 <https://rm.coe.int/native/09000016804d6507> accessed 29 May 2021. See also, Council of Europe, 'Reform of the Control System of the European Convention on Human Rights' (1993) 14 *Human Rights Law Journal* 31-48.

[45] ibid.

[46] For example, the adoption of Protocol No 8 in 1985, enabling the Commission to review many more applications, as well as the adoption of Protocols Nos 9 and 10 in 1990 and 1992, respectively, which further confirmed the trend towards greater 'judicialisation' of the Convention system by facilitating the submission

than a 'stopgap solution to the problems relating to the procedure before the Commission and the Court pending the entry into force of more far-reaching reforms'.[47] The momentum for a more 'radical solution' and a 'fundamental restructuring' of the Convention system thus started to emerge already in the mid-1980s and intensified in the early 1990s.[48] The need for such wide-ranging reform was endorsed by almost all ECHR stakeholders, including the PACE,[49] the CoE Secretary-General at the time, Catherine Lalumiére,[50] the Registry and the then President of the Court, Rolv Ryssdal,[51] as well as by a sufficiently high number of States.[52]

Following from the above, the framing of the challenges facing the Convention control system and, thus, the adoption of the reform measures under Protocol No 11 can be characterised by two elements: the *urgency* for the system's restructuring and the focus on *efficiency* and *cost-effectiveness*. As far as the former is concerned, the 'urgent need'[53] for measures was widely evident in the debates held by the States Parties, which gave 'first priority to speeding up work on the reform of the [ECHR] control mechanism', already from the beginning of the 1990s.[54] ECHR Contracting Parties stressed that it had become 'urgently necessary to adapt the present control mechanism' to the fast-changing geopolitical developments of the time in order to 'maintain in the future effective international protection for human rights'.[55] Equally, as the CoE Secretary-General at the time subsequently admitted, preparations for the adoption of the reform measures under Protocol No 11 were a 'race against the clock' and their 'success was vital in order to ensure

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and examination of individual applications before the Strasbourg institutions. See eg, Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24), 148-149.

[47] Helmut Türk, 'The European Ministerial Conference on Human Rights', in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension – Studies in Honour of Gérard J Wiarda* (1988) 647, referring to the measures introduced under Protocol No 8 to the ECHR.

[48] Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 424. See also, Preamble, Protocol No 11 to the ECHR (1994)

[49] See eg, Recommendation 1194 (1992) of the Parliamentary Assembly (6 October 1992), urging the Committee of Ministers 'to reform the control mechanism […] without delay', 'give clear preference to the proposal to create a single court as a full-time body' and 'refrain from opting for a temporary solution that would further delay the necessary reform'.

[50] See eg, Catherine Lalumiére, 'Human Rights in Europe: Challenges for the Next Millennium' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Nijhoff 1993) xv-xx.

[51] See eg, Herbert Petzold and J Sharpe, 'Profile of the Future European Court of Human Rights' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (n 47) 472, citing a report by the Court's Registry, arguing that the idea of merging the Commission and the old Court into a single, permanent Court was seen as essential if it was to keep the ECHR system functioning and 'alive'.

[52] See eg, *Swiss Report 1985* (n 26) and various reports presented at *Neuchâtel Colloquy* (n 27). As Francis Jacobs concluded in his remarks at the Neuchâtel Colloquy, only the 'somewhat intriguing combination' of the Court Registrar and the UK government appeared to oppose the idea of a single Court at the time. See, Francis Jacobs, 'General Report' in *Neuchâtel Colloquy* (n 27) 195-6.

[53] Preamble, Protocol No 11 to the ECHR (1994) and Explanatory Report to Protocol No 11, para 1.

[54] 89th session of the Committee of Ministers, CM 91 PV 4 (26 November 1991) 7, 10.

[55] Declaration of the Council of Europe's First Summit (Vienna, 9 October 1993) (hereinafter, Vienna Declaration 1993), Appendix I.

the long-term survival of the supervision mechanism provided for by the Convention'.[56] The Protocol No 11 end result was therefore 'a rapid solution' that 'should feature prominently among the Organisation's priorities' as a response to an 'urgent problem', as States identified the 'growing number of complaints' lodged with the Commission and the inevitably 'increasing workload' of the Commission and the Court.[57] The urgency of the reform was also stressed by the PACE, which warned in 1992 that 'the number of individual applications [would] increase disproportionately to the population of the new member States' and that 'the real test for [the] system of the protection of human rights [was] still to come and that the reform of the control mechanism of the Convention [was] therefore of the utmost importance for the Council of Europe'.[58]

Beyond the urgency of the process, the preparatory work leading to the adoption of Protocol No 11 further clarified that the '[t]he purpose of this reform [was] to enhance the efficiency of the means of protection, to shorten procedures and to maintain the present high quality of human rights protection'.[59] Clearly, the States' intention was to create a Court capable of exercising 'an effective filter function', which would also be provided with 'an effective procedure to enable friendly settlements' as a means of eliminating its overwhelming backlog.[60] As already noted above, the ECHR stakeholders identified a series of institutional efficiency problems facing the Convention control system, so efforts to rectify these problems led to the adoption of certain managerial measures, as Chapter 2 previously defined them. Such measures were designed to enhance the organisational structure of the ECHR control system and streamline the entire adjudicatory process, while enhancing the Court's accessibility and simplifying and shortening its judicial procedures.[61]

Protocol No 11 notably abolished the European Commission of Human Rights and established a single, full-time court with compulsory jurisdiction.[62] The quasi-judicial powers of the CoM were also abolished, thus rendering the new Court the solely responsible body for the filtering and examination of applications. According to certain States which led the reform process, this restructuring was 'the most rational way of effectively ensuring

[56] Catherine Lalumiére, 'The Future of the Judicial System' in *Ten Years of the "New" European Court of Human Rights: 1998-2008 Situation and Outlook* (ECtHR 2008) 69.
[57] Explanatory Report to Protocol No 11, para 2, 19. See also, 91st session of the Committee of Ministers, CM (92) PV 4 (5 November 1992), where various ECHR States shared this need for urgent action.
[58] PACE, 'Report of the Control Mechanism of the European Convention on Human Rights', Recommendation 1194 (1992), paras 3-4.
[59] Vienna Declaration 1993 (n 55), Appendix I. See also, Preamble, Protocol No 11 to the ECHR (1994), stating that the reform was needed 'in order to maintain and improve the efficiency of [the] protection of human rights'.
[60] Explanatory Report to Protocol No 11, para 41, 4.
[61] See, Henry Schermers, 'Has the European Commission of Human Rights Got Bogged Down?' (1988) 9 *Human Rights Law Journal* 175. See also, Preamble, Protocol No 11; Explanatory Report to Protocol No 11, paras 3-5, 19-25. For a detailed analysis of the adopted measures, see, Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 460-467.
[62] Explanatory Report to Protocol No 11. See also, Andrew Drzemczewski and Jens Meyer-Ladewig, 'Principal Characteristics of the New ECHR Control Mechanism' (1994) 15 *Human Rights Law Journal* 81.

international control of the undertakings accepted by the European States under the Convention'.[63] Yet, despite the numerous pleas for a whole restructuring of the control system, States explicitly instructed the Steering Committee for Human Rights (CDDH), a technical expert body in charge of proposing reform measures, to do so 'with the aim of improving efficiency and shortening the time for individual applications, at minimum cost'.[64] In Drzemczewski's words, the reform would, first and foremost, entail 'putting the European house in order'.[65] This clearly reflects the Contracting Parties' motives when deciding to embark on this reform process. States opposed to a major overhaul of the system at that stage did not suggest that there should be no reform at all. Instead, a consensus was reached showing that national governments' plan was arguably to undertake the agreed reforms, 'but on the cheap', and by keeping them at an institutional/managerial level so that the involvement of the CoM in the enforcement of Convention rights would remain relatively uncompromised.[66] In many instances even, the very limited terms of the debate on the reform of the ECHR control system resulted more in a debate on the merits and demerits of the 'single Court' and 'two-tier system' proposals, with the technical characteristics of the discussion overshadowing other, more pressing issues related to the underlying purpose of the system's reform.[67]

Besides efficiency and cost-effectiveness as the primary and immediate objectives of the reform process, enhancing the normative effectiveness of the Court in the longer-term was also put forward as a target, albeit in the background of the debate. Apart from creating a control system 'principally aimed' at working 'efficiently and at acceptable costs even with forty member States', States sought to 'maintain the authority and quality of [its] case-law in the future'.[68] Looking beyond the rationalisation measures to optimise the functioning of the institutions at a technical level in order to 'keep the ship afloat',[69] however, certain States appeared disinclined to accept any reforms that would further empower the judicial role of the new Court and limit, at the same time, to an indispensable minimum the role of the CoM in the judicial decision-making process. What is particularly striking in this regard is the argument that there was a belief among certain national governments that 'the Council of Europe had already attained a sufficiently high standard of protection for human rights',[70]

[63] *Swiss Report 1985* (n 26), 114.
[64] Explanatory Report to Protocol No 11, para 4. Further on the relationship between the Committee of Ministers and the Steering Committee for Human Rights, see, Andrew Drzemczewski, 'The Work of the Council of Europe's Directorate of Human Rights' (1990) *Human Rights Law Journal* 89.
[65] Andrew Drzemczewski, 'Putting the European House in Order' (1994) *New Law Journal* 644-646.
[66] Michele de Salvia, 'The Effectiveness of Low-cost Justice: The Great Illusion of Protocol No 11?' in *Ten Years of the "New" European Court of Human Rights: 1998-2008 Situation and Outlook* (ECtHR 2008) 71.
[67] Robert Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights' (n 20) 122-123.
[68] Explanatory Report to Protocol No 11, para 23.
[69] Quote by P-H Imbert, cited in Olivier Jacot-Guillarmod, 'Protocol No 11 to the European Convention on Human Rights: A Response to Some Recent Criticism' (n 30) 183.
[70] H Türk, 'The European Ministerial Conference on Human Rights' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension: Studies in Honour of Gérard J. Wiarda* (1988) 647, 649.

suggesting that a large-scale reform to guarantee the effectiveness and viability of the Convention system might not have been that necessary in the end.[71] The fact that the same argument is still being advanced by certain States until today to express their opposition to any substantial or meaningful reforms makes one wonder about its credibility and good-faith intention.[72] Instead, in an attempt to shift the attention away from the real, underlying challenges facing the ECtHR and the wider Convention control system, some States insisted that there were other, '[more] pressing problems in other areas, particularly in the economic field'.[73] Discussions on the practicalities, efficiency and cost-effectiveness of maintaining a full-time, single-tier court as opposed to the already existing two-tier system, thus, seemed to fit in the wider narrative of a technical-driven institutional reform.

Looking further into the language used in the text of Protocol No 11 to explain the rationale behind the adopted measures may also indicate a degree of compromise and consensus among the various positions expressed by the ECHR stakeholders during the drafting process. The Protocol states that replacing the (then) existing European Commission and the Court with a new permanent Court was 'desirable', rather than essential or required.[74] This "desirability" of the reform measures is, at least, contradictory to the language of imperative and urgent reform that was maintained throughout the preceding negotiating period which projected the restructuring of the control system as a *sine qua non* for its future viability. As commentators later noted, the reform measures reflected a 'lack of imagination' on the part of the Protocol's authors - a statement which, although dismissed as unfair given the compromises that needed to be made during politically complex negotiations, it arguably recognises both the necessity but also insufficiency of the final measures adopted.[75]

Indeed, the logic of the 'minimum cost' approach provided a very limited scope for the Court's reform and had probably shifted the attention of the ECHR stakeholders away from the real challenges facing the Convention control system. Such underlying challenges were already evident in the early 1990s. Although the inability of the Commission and the Court to deal efficiently with the increasing workload had already been identified as one of the

[71] Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24), 426-427.

[72] See eg, The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014). See also, Roger Masterman, 'The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights?' in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016) 465; Helen Fenwick and Roger Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80(6) *Modern Law Review* 1111.

[73] Helmut Türk, 'The European Ministerial Conference on Human Rights', in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (n 47) 648. See also, Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 426.

[74] Preamble, Protocol No 11 to the ECHR (1994).

[75] Jean-François Flauss, '*Le Protocol No 11: Coté Cour'* (1994) 3 *Bulletin des Droits de l'Homme* (*Institut Luxembourgeois des droits de l'homme*)3, 6, cited in *Budapest Colloquy 1993.* For further initial criticisms of Protocol No 11, see, Henry G Schermers, 'Adaptation of the 11th Protocol to the European Convention on Human Rights' (1995) 20 *European Law Review* 559.

factors triggering the need for the urgent reform, a closer analysis of this 'threat' could have pointed the direction of the reform discussions elsewhere. By that time, it was clear that a disproportionally large number of applications reaching Strasbourg was stemming from certain States, notably Italy, and concerned the length of legal proceedings under Article 6(1).[76] The number of those cases continued to grow at a 'worrying rate' throughout the 1990s, while adding additional pressure on the Strasbourg institutions' already scarce resources, and, as will be shown further below, it developed into one of the most pressing challenges for the new Court.[77] This was clearly a situation where a respondent State was refusing for a prolonged time to comply with the ECtHR's judgments, thus failing to undertake the necessary measures to bring its domestic law and practices in conformity with the relevant Convention standards. Although there were warnings at the time about this phenomenon of prolonged non-compliance, the issue did not form part of the reform debate and inevitably the measures adopted under Protocol No 11 completely bypassed it.[78] By solely focusing on the system's institutional deficiencies as the primary reason for the excessively increasing workload, instead of the real, root causes of the problem, the reform debate essentially disregarded other, more fundamental and far-reaching questions concerning the role and purpose that the new Court should serve in an enlarged Europe. As such, 'the size of the [reform] task had been clearly underestimated' and it was no coincidence that very soon after the adoption of Protocol No 11 the 'reform of the reform', as former President Wildhaber put it, began to be actively considered.[79] As the above analysis makes evident, important considerations, as outlined in this section, have not been taken into serious account at that stage of the Court's reform. Consequently, the reform debate in the 1990s was unsuccessful in recognising that the prophetic failure of Protocol No 11 to resolve the underlying challenges facing the (new) ECtHR had little to do with the internal functioning of the control system *per se* or the increasing number of CoE member States.

[76] Colin Warbrick, 'The Europea Convention on Human Rights' (1990) 10 *Yearbook of European Law* 535, 536; Rolv Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1996) 1 *European Human Rights Law Review* 18, 26; Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24), 439-440. See also, European Commission of Human Rights, *Survey of Activities and Statistics*, 1990.

[77] Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24), 439-440.

[78] Lord Lester, 'The ECtHR in the New Architecture of Europe', *Budapest Colloquy 1995*, 234-236.

[79] Luzius Wildhaber, 'The Priorities of the New Court', in *Ten Years of the "New" European Court of Human Rights: 1998-2008 Situation and Outlook* (ECtHR 2008) 73. See also, Linos-Alexandre Sicilianos, 'La "Réforme de la Réforme" du Système de Protection de la CEDH' (2003) 49 *Annuaire Français de Droit International* 611 (in French).

4.4 The 'reform of the reform': Protocol No. 14 and a first attempt for a 'systemic' turn in the reform debate

Only two years after the establishment of the 'new' single Court, the reform measures introduced by Protocol No 11 had already proven entirely inadequate in themselves to deal with the pre-existing as well as new challenges the single Court and the wider Strasbourg system were about to face in the 21st century.[80] As ECtHR President Wildhaber warned in 2000, despite the efforts of the previous reform stage, 'backlog will continue to grow and there will come a point at which the system becomes asphyxiated'.[81] In addition to the already identified, yet dangerously deteriorating, caseload problem, another major challenge that emerged and needed to be addressed at this stage was the fact that the ECtHR was spending a significant amount of time filtering out inadmissible cases and reviewing large volumes of repetitive cases, rather than examining applications raising original subject matters to further develop human rights law within the ECHR system.[82]

By the mid-2000s, it was already clear that the ECtHR was an institution 'in crisis' due to its inability to deal effectively with its ever-increasing caseload.[83] Protocol No 14 was then introduced, whose Preamble, nevertheless, is strikingly similar to that of Protocol No 11, proving that there was no substantial departure from the already established reform framework of the previous decades. They both refer to the 'urgent need' 'to maintain and improve the efficiency' of the Convention system 'mainly in the light of the continuing increase in the workload of the ECtHR'.[84] The need to 'adapt [the Convention control system] to changing needs and to developments' in Europe and, most importantly, to 'guarantee [the ECtHR's] long-term effectiveness' also explained the rationale behind this new reform stage.[85]

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[80] In terms of caseload, the impact of the CoE enlargement was already evident. As Chapter 3 of the thesis demonstrated, although the volume of applications stemming from the original Contracting Parties was not diminishing, the rates of incoming applications from the new democracies were increasing at a higher speed. Indicatively, applications from CEE States in 1999 represented the 39% of the total number of incoming applications to the ECtHR, while by 2001 the figure had risen to 56%. See also, Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (n 34) 104.

[81] ECtHR, 'Documentation: A Further Fundamental Reform for a Court in Crisis' (2000) 21 *Human Rights Law Journal*, 90.

[82] *Explanatory Report to Protocol No. 14* <https://rm.coe.int/16800d380f> accessed 29 May 2021; *Position Paper of the ECtHR on Proposals for Reform of the ECHR and Other Measures as Set Out in the Report of the CDDH of 4 April 2003*, CDDH-GDR(2003)024, para 5. See also, Philip Leach, *Taking a Case to the European Court of Human Rights* (OUP 2005) 25, noting that often an application takes four to five years to be reviewed, if not longer.

[83] *Lord Woolf Report 2005* (n 40) 7. See also, *Position Paper of the ECtHR on Proposals for Reform* (n 82), para 4, acknowledging that the increasing number of applications poses a threat to the effectiveness of the system.

[84] Preamble, Protocol No 11 to the ECHR and Preamble, Protocol No 14 to the ECHR.

[85] *Explanatory Report to Protocol No. 14*, para 2. For a commentary on the challenges facing the ECtHR at the time in relation to its growing backlog and workload, see, Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6(2) *Human Rights Law Review* 403; Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 136-165; Paul

Indeed, the European Ministerial Conference on Human Rights in Rome in 2000, marking the 50th anniversary of the signing of the Convention, acknowledged that 'the effectiveness of the Convention system […] is now at issue' because of 'the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications'.[86] As a result, 'the prospect of further growth of the workload of the [ECtHR] and of the Committee of Ministers (supervision of execution of judgments) in the coming years [was] such that a comprehensive package of measures – including reform of the control mechanism itself – [was] necessary to preserve the system for the future'.[87] As with the negotiations leading to the adoption of Protocol No 11, a reform narrative had again started to be built around the need to relieve the Court from its fast-growing backlog and the need for securing the efficient functioning of the ECHR system through technical/structural refinements. Projecting the case overload challenge as rooted primarily in the Court's deficient internal processes, therefore, presented the same limited scope for proposed measures shown in the previous reform stage. In other words, reform discussions were again pre-determined to concentrate on *how* to improve the internal functioning of the Court as a means to secure its long-term effectiveness, rather than looking at deeper questions as to *what* role it should serve in a novel, rapidly evolving geopolitical context. Inevitably, most of the core features of new Protocol No 14, again, largely concerned the internal institutional mechanics of the Court, seeking to enhance its own case-processing and filtering capacity and reducing its backlog. As discussed further below, the PACE expressed its concerns over the nature of the new reform proposals, noting that (draft) Protocol No 14 was '"technical" and solely concerned with judicial efficiency'.[88]

The already established CDDH was instructed anew to examine the challenges facing the ECtHR at the time and draft a reform proposal with 'urgent measures' to 'assist the Court in carrying out its functions' and to reflect 'on the various possibilities and options' to ensure 'the effectiveness of the Court in the light of his new situation'.[89] The CDDH's analysis of the matter gave rise to Protocol No 14 as a means of restructuring the Court's processes to 'guarantee the [Court's] long-term effectiveness', enabling it to continue serving its mission by playing a 'pre-eminent role in protecting human rights in Europe'.[90] In the Protocol's

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Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership' (n 34) 101-103.

[86] *The European Convention on Human Rights at 50: What Future for the Protection of Human Rights in Europe?*, Resolution I at Ministerial Conference on Human Rights (Rome, 2000), para 16 <https://rm.coe.int/0900001680096f43> accessed 31 May 2021.

[87] Steering Committee for Human Rights (CDDH), *Guaranteeing the Long-term Effectiveness of the Control System of the European Convention on Human Rights* (14 April 2003) CM(2003)55-Add 2, para 1 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805e0161> accessed 31 May 2021. See also, *Position Paper of the ECtHR on Proposals for Reform* (n 82), para 4.

[88] PACE, *Opinion on Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Doc 10162 (27 April 2004), Part III, para 2.

[89] *The European Convention on Human Rights at 50,* Declaration at Ministerial Conference (Rome, 2000), 35.

[90] *Explanatory Report to Protocol No. 14*, para 2.

drafting process, the CDDH identified three main areas requiring reform: i) preventing violations at national level, ii) optimizing the effectiveness of filtering and subsequent processing of applications, and iii) improving and accelerating execution of ECtHR judgments.[91] It further proposed a series of specific measures to achieve these aims.[92] The CDDH characterised the reform around the identified three areas as essential and noted that 'only a comprehensive set of interdependent measures tackling the problem from different angles [would] make it possible to overcome the Court's present overload'.[93] It acknowledged, however, that 'while significant productivity gains will certainly be achieved in this way, they will probably not be sufficient, especially in the longer term'.[94] Instead, it noted that a broader reassessment of the Court's role is necessary, while measures enabling it to deliver 'quasi-constitutional justice' should also be considered.[95]

The seemingly wider scope of the necessary reform measures proposed (or considered) by the CDDH, however, is not reflected in the final product of the negotiation process. The adopted Protocol No 14 featured relatively limited reforms which were primarily motivated by the need to adapt the Convention's procedural framework to the increasing workload demand, speed up the processing of applications and decrease the overall caseload of the Court.[96] Essentially, the 'main purpose' of the reform was to provide the ECtHR with the necessary 'procedural means and flexibility' to expedite the filtering process and enable quick disposal of repetitive or clearly inadmissible applications so that ECtHR judges could concentrate on cases revealing more pressing human rights issues.[97] As such, the workload of the ECtHR was again projected as the primary challenge facing the Court at the time and all reform proposals were shaped around making the Court institutionally more responsive to this problem. Contrary to the CDDH's earlier suggestions, the Explanatory Report to Protocol No 14 explicitly stated that 'preserving the effectiveness of the ECtHR's system was possible only through structural amendments of the system in order to solve the problem of repetitive cases'.[98] This narrowly conceived idea of the challenges facing the Court and the limited scope of measures deployed to resolve them were also identified by legal scholars, who noted that among the various proposed measures examined during the drafting of

[91] Steering Committee for Human Rights (CDDH), *Guaranteeing the long-term effectiveness of the European Court of Human Rights,* CDDH(2003)006Fin (04 April 2003) (hereinafter, *CDDH Report 2003*), para 4.
[92] ibid.
[93] *Explanatory Report to Protocol No. 14*, para 14.
[94] *CDDH Report 2003* (n 87), para 10.
[95] ibid, paras 9, 11.
[96] For an overview of the Protocol No 14 reform package, see *inter alia*, Ed Bates, *The Evolution of the European Convention on Human Rights* (n 24) 500-503; Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No 14 and Beyond' (n 85) 407-413; Paul Lemmens and Wouter Vandenhole (eds), *Protocol No. 14 and the Reform of the European Court of Human Righ*ts (Intersentia 2005).
[97] *Explanatory Report to Protocol No. 14*, paras 35, 37, 62, 67. See also, Jean-Paul Costa, *Speech at the Opening of the Judicial Year* in *Annual Report 2007 of the ECtHR* (Council of Europe 2008) 33. For a critical analysis of the reform approach, see, Marie-Aude Beernaert, 'Protocol No 14 and New Strasbourg Procedures: Towards Great Efficiency? And at What Price?' (2004) 9 *European Human Rights Law Review* 544.
[98] *Explanatory Report to Protocol No 14*, para 7.

Protocol No 14, 'the introduction of the single-judge formation and the new summary procedure for three-judge Committee [was] considered to have the greatest and most immediate effect in increasing the Court's case processing capacity'.[99]

Indeed, the narrative underpinning this stage of the Court's reform, and which shapes much of the official discourse on the debate, essentially presents the ECtHR as 'the victim of its own success', attributing the challenges facing the Court to its 'attractiveness' for a growing range of litigants but also to its own institutional inability to work efficiently.[100] Inevitably, reform proposals that gained traction at the time projected further structural changes as the most appropriate route to resolving the identified problems of increasing workload and excessive length of proceedings. As Chapter 2 demonstrated, assessing the 'success' or effectiveness of the ECtHR requires a multifaceted framework of elements and, therefore, no contemporary reform debate can solely rely on the Court's apparent 'attractiveness' or usage rate nor can it be shaped around the need to 'manage success'. This 'success', instead, needs to be critically evaluated against other factors. More specifically, the dysfunctions or shortcomings of the wider ECHR system to protect effectively the Convention rights, particularly at the national level, need to form part of this assessment.[101] Such an assessment would inevitably indicate that apart from a 'victim of its own success', albeit not openly admitted yet, the Court was also a victim of a general reluctance from ECHR States to take the Convention seriously.

Arguably, the most notable departure from the very limited scope of the previous reform period was that discussions leading to the adoption of Protocol No 14 sought – probably for the first time in the history of the system's reform – to better articulate the relationship of the new ECtHR with other institutions within the wider ECHR system. Protocol No 14 thus featured provisions allowing the CoE's Commissioner for Human Rights a right of third party intervention before the Court[102] and established new institutionalised channels of communication between the CoM and the Court, notably under the novel mechanism of infringement proceedings.[103] This first attempt for a 'systemic turn', in the sense that the ECtHR was no longer seen as an 'isolated institution' in the protection of Convention rights, indicates the Protocol drafters' awareness of the synergies that must exist between the Court and other CoE organs to ensure its overall effective functioning.[104] The drafters, however, failed to equally extend this synergy to other important actors within the ECHR system, namely the national authorities of Contracting Parties, and therefore missed an

[99] Helen Keller, Andreas Fischer and Daniela Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2010) 21 *EJIL* 1025, 1034.
[100] Robert Harmsen, 'The Reform of the Convention System' (n 20) 120. See also, Leo Zwaak and Therese Cachia, 'The European Court of Human Rights: A Success Story?' (2004) 11(3) *Human Rights Brief* 32.
[101] Robert Harmsen, 'The Reform of the Convention System' (n 20) 120-121. See also discussions in Chapter 2 of the thesis.
[102] Article 13, Protocol No. 14, CETS 194 (13.V.2004) and *Explanatory Report to Protocol No 14*, paras 86-89.
[103] Article 16, Protocol No. 14 (2004) and *Explanatory Report to Protocol No 14*, paras 99-100.
[104] Robert Harmsen, 'The Reform of the Convention System' (n 20) 127-131.

important opportunity to make any link between the challenges facing the Court and the level of rights protection afforded at national level. Consequently, this attempt for a 'systemic turn' did not yield any meaningful results in framing the Court's apparent problem of lack of effectiveness in relation to the (mal)functioning of rights protection mechanisms in ECHR States and, thus, in a manner that fully acknowledges the subsidiary character of the Court. Put more explicitly, the attempt to attribute a sense of "collectiveness" in the protection of Convention rights at this stage of the reform process presented a missed opportunity to bring to the surface of the debate the lack of effective implementation of the ECHR rights, or even a lack of judicial engagement to develop the Convention standards, at the national level as the root cause of the Court's long-standing (and increasingly growing) problem of excessive backlog.

In contrast to the debates held in the preceding reform stage, a wider group of ECHR stakeholders, including the PACE, the Commissioner for Human Rights as well as non-governmental organisations were encouraged to participate in the Protocol No 14 drafting process.[105] Widening the 'epistemic community', as described earlier in this chapter, meant that the scope of the debate would also expand significantly and alternative views concerning the reform of the Court would be considered. Apart from the apparent increase in transparency, openness and accessibility of the negotiations, however, these diverse contributions, as already noted, proved of limited importance in shifting the frame of the reform away from the predominantly 'technocratic issues of judicial housekeeping' to more 'profound substantive questions about how the Court accomplishes its core mandate',[106] as outlined in Chapter 2. Illustratively, one of the most fundamental changes to the ECHR control system proposed by PACE in 2001 concerning the creation of the post of public prosecutor at the ECtHR, who can directly bring cases before the Court, to tackle the pressing challenge of mass human rights violations in certain European regions did not materialise.[107] Similarly, a 2003 PACE recommendation that the CoM imposes financial sanctions ('*astreintes'*) on ECHR States which 'persistently fail to execute a Court

[105] *Explanatory Report to Protocol No. 14,* para 30. See eg, Committee on Legal Affairs and Human Rights (PACE), *Report on Draft Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,* (Doc. 10147) (23 April 2004); *Comments by Commissioner for Human Rights on the interim report of the Group of Wise Persons to the Committee of Ministers* (CommDG(2006)18 rev) (12 June 2006); *NGO's Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights* (Amnesty International, 28 March 2003) <https://www.amnesty.org/download/Documents/108000/ior610082003en.pdf> accessed 5 May 2021. For commentary see, Christina Hioureas, 'Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights' (2006) 24(2) *Berkley Journal of International Law* 718, 733-734; Costas Paraskeva, 'Reforming the European Court of Human Rights: An Ongoing Challenge' (2007) 76 *Nordic Journal of International Law* 185, 205-206.

[106] Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) *EJIL* 125, 127.

[107] PACE, *Areas where the European Convention on Human Rights cannot be implemented*, Recommendation 1606 (2003), para 10(b).

judgment',[108] thus tackling the phenomenon of prolonged non-execution of judgments discussed in Chapter 3 of the thesis, failed to be included in the final text of Protocol No 14.[109]

Perhaps one of the most critical, yet controversial, measure under the Protocol No 14 reform package that could have meaningfully addressed the important issue of the relationship between the Court and national authorities was the introduction of the new 'significant disadvantage' admissibility criterion.[110] This is because the application of the new criterion could help ECHR stakeholders to clarify and reaffirm the subsidiary role of the ECtHR and, in turn, the primary obligation of national authorities, in the protection of Convention rights. This discussion, however, was not actually held as the purpose and usefulness of the measure were again framed in technical terms, limiting the justification for its adoption to facilitating 'the more rapid disposal of unmeritorious cases',[111] thus providing the Court with a 'more expeditious means of removing large numbers of otherwise inadmissible cases from its overloaded docket'.[112] The Court itself appeared to favour this measure by also presenting it from an institutional, rather than normative, perspective. In defence of the new admissibility criterion and the rest of the reform package, former ECtHR President Costa repeatedly stressed that failing to expeditiously ratify the new Protocol would result in the Court getting 'bogged down by a continuous flow of applications, the majority of which have no serious prospect of success'.[113] The 'flood of applications reaching a drowning court', as President Costa put it, was thus 'threaten[ing] to kill off individual petition *de facto*' and, in turn, putting the future of the Court at stake.[114] The purely managerial character attributed to the new admissibility criterion attracted strong negative

[108] PACE, *Execution of Judgments of the European Court of Human Rights*, Recommendation 1477 (2000), paras 2-4.
[109] As a political compromise, PACE accepted the CoM's proposal enabling the latter to refer back unexecuted judgments to the Court for further explanation or guidance of how it may be executed, under Article 46 ECHR. See eg, PACE, *Report on Draft Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention* (n 105), para 5.
[110] *Explanatory Report to Protocol No. 14,* paras 77-85.
[111] ibid, para 79.
[112] Robert Harmsen, 'The Reform of the Convention System' (n 20) 128. See also, Marie-Aude Beernaert, 'Protocol No 14 and New Strasbourg Procedures: Towards Great Efficiency? And at What Price?' (n 97); Lize Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 57-58.
[113] Jean-Paul Costa, *Speech at the Opening of the Judicial* Year in *Annual Report 2007 of the ECtHR* (n 97) 32.
[114] Jean-Paul Costa, *Speech at the Opening of the Judicial Year* in *Annual Report 2006 of the ECtHR* (2007) 40. Referring to the persisting backlog challenge, ECtHR President Raimondi shared a similar view about a decade later, noting that '[t]he overloading inevitably means a very long waiting time for the applicants, with the real risk of undermining the value and usefulness of the right to bring a case to Strasbourg'. See, Guido Raimondi, Speech at the Conferral of the Treaties of Nijmegen Medal (18 November 2016) 4 <https://www.echr.coe.int/Documents/Speech_20161118_Raimondi_Nijmegen_ENG.pdf> accessed 31 May 2021.

reactions by other important ECHR stakeholders, such as civil society[115] and the PACE, which warned that a reference to 'a significant disadvantage', without any further explanation or determination, 'is vague, too subjective, and liable to result in the applicant's being subjected to a grave injustice'.[116] The PACE further stressed that no meaningful reform that secures the long-term effectiveness of the Court can take place unless the root causes of its increasing workload are eliminated.[117]

Parallels can be drawn with the establishment of the pilot-judgment procedure, which the ECtHR was encouraged by the CoM to introduce in its jurisprudence in 2004 as part of the reform package to guarantee the effectiveness of the Convention control system.[118] The new mechanism was enthusiastically received as 'the most creative tool the Court has developed in its first fifty years of … existence'[119] and it was seen as 'the boldest attempt to tackle the problem of defective national legislation or practice'.[120] Essentially, the mechanism would enable the Court to identify the underlying systemic problem arising from the case before it and indicate the necessary remedial measures to the respondent State to rectify the root cause of that problem.[121] Pilot judgments have had a significant (longer-term) potential in facilitating the effective implementation of the Convention standards domestically by guiding respondent States to undertake necessary large-scale reforms in their national orders.[122] Nevertheless, as already shown in Chapter 3, the closure of many ECtHR

[115] See eg, Press Release, 'European Court on Human Rights: Imminent Reforms Must Not Obstruct Individuals' Redress for Human Rights Violations' (*Amnesty International*, 2004) <https://www.amnesty.org/en/documents/IOR30/010/2004/en/> accessed 31 May 2021.

[116] PACE, *Report on Draft Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention* (n 105), para 42.

[117] See eg, Committee on Legal Affairs and Human Rights (PACE), *The Future of the Strasbourg Court and Enforcement of ECHR Standards: Reflections on the Interlaken Process*, (21 January 2010), AS/Jur(2010)06, para 10 and para 9, opposing to the idea of the Single Judge mechanism, characterising it a '"fig-leaf" that maintains the legal fiction of a judicial determination of all applications' <http://assembly.coe.int/CommitteeDocs/2010/20100121_ajdoc06%202010.pdf> accessed 31 May 2021. See also, Marie-Aude Beernaert, 'Protocol No 14 and New Strasbourg Procedures: Towards Great Efficiency? And at What Price?' (n 97), discussing the potential negative impact of the new admissibility criterion on the mission of the Court.

[118] Committee of Ministers Resolution Res(2004)3 (12 May 2004).

[119] Antoine Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges' (2009) 57 *Nomiko Vima* (*The Greek Law Journal*) 78.

[120] Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2013) 12 *Human Rights Law Review* 655, 671.

[121] Committee of Ministers Resolution Res(2004)3 (12 May 2004), para 1: the CoM invited the ECtHR 'to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments'.

[122] See, *inter alia*, Philip Leach, Helen Hardman, Svetlana Stephenson and Brad Blitz, *Responding to Systemic Human Rights Violations: An Analysis of "Pilot Judgments" of the European Court of Human Rights and their Impact at National Level* (Intersentia 2010); Philip Leach, 'No Longer Offering Fine Mantras to a Parched Child? The European Court of Human Rights' Developing Approach to Remedies' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and*

judgments by the CoM, including some of those identified as pilot judgments, can be deceptive as the general measures indicated by the ECtHR may not have been fully implemented.[123] Indeed, recent empirical research suggests that in certain cases of gross and systematic human rights violations, the application of the pilot judgment mechanism has diluted the notion of 'effective remedy' to individual monetary compensation, overlooking the need for the respondent State to implement measures to prevent any such violations in the future.[124] As a result, although the pilot judgment procedure has been a useful tool for the ECtHR to handle a large number of repetitive applications arising from systemic legal problems more efficiently, it has not always been effective in tackling the underlying domestic deficiencies giving rise to similar applications, especially when the source of such systemic problems is deeply rooted in ethno-political and ideological disputes.[125]

This aspect of the new mechanism was already identified by Judge Zupančič in the very first pilot judgment delivered by the Court in 2004.[126] In his Concurring Opinion, he noted that '[the mechanism's] ambivalent and hesitant rationale' made apparent that its adoption 'ha[d] quite a different pragmatic goal in mind' as it was primarily motivated by the need for urgently reducing the Court's current backlog.[127] Arguably, 'the true reason for the logic' underpinning the introduction of the pilot-judgment procedure is a principled one and 'has nothing to do with [reducing] the Court's caseload'.[128] Instead of deploying the mechanism 'so as to not to overburden the Convention system with large numbers of applications deriving from the same cause', Judge Zupančič insists that the focus should be on its restorative and preventive nature, through which systemic or structural deficiencies underlying the Court's finding of a violation – the *real* 'threat to the future effectiveness of the Convention machinery' - can be remedied.[129] The fact that a considerable number of repetitive applications can be prevented from reaching Strasbourg should thus be a consequential, however welcome, result deriving from the use of pilot judgments, whereas the effective implementation of the Convention standards at the national level should be seen as its primary objective. In other words, the backlog challenge should be treated merely as the symptom of a deeper cause found in the domestic order of ECHR States which the

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Global Context (CUP 2013) 142; Costas Paraskeva, 'European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures' (2018) 1 *European Human Rights Law Review* 46.

[123] See, Chapter 3, Section 3.4 of the thesis, especially nn 147-152 and accompanying text. See also, Gleb Bogush and Ausra Padskocimaite, 'Case Closed, but what about the Execution of the Judgment? The Closure of *Anchugov and Gladkov v. Russia*' (*EJIL:Talk!*, 30 October 2019) <https://www.ejiltalk.org/case-closed-but-what-about-the-execution-of-the-judgment-the-closure-of-anchugov-and-gladkov-v-russia/> accessed 29 May 2021.

[124] Dilek Kurban, 'Forsaking Individual Justice: The Implementation of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations' (2016) 16(4) *Human Rights Law Review* 731.

[125] ibid.

[126] *Broniowski v. Poland* App no 31443/96 (Merits) (22 June 2004).

[127] ibid, Concurring Opinion of Judge Zupančič. See also, para 190 of the judgment, stating that 'that resolution [establishing the pilot-judgment procedure] has to be seen in the context of the growth in the Court's caseload, particularly as a result of series of cases deriving from the same structural or systemic cause'.

[128] *Broniowski v. Poland* App no 31443/96 (Merits) (22 June 2004), Concurring Opinion of Judge Zupančič.

[129] ibid.

new mechanism should target to resolve.[130] Judge Zupančič's concurring opinion in *Broniowski*,[131] therefore, encapsulates accurately the inherent limitations of the entire reform stage leading to the adoption of the Protocol No 14 reform package and reveals the misapprehended nature of the underlying challenges facing the ECtHR on the part of key ECHR stakeholders, including the CoM and the Court itself.

Skeptical of the adequacy and real impact of Protocol No 14 in guaranteeing the long-term effectiveness of the Court, former President Wildhaber warned that the new measure was 'unlikely to be the end of the story' as it was doubtful that it would be sufficient to get the caseload problem under control.[132] Expressing similar concerns as previously with Protocol No 11, former President Wildhaber noted in 2005 that, despite all its potential, Protocol No 14 'will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow'.[133] The inherent limitations and insufficiency of Protocol No 14 to deal effectively with the underlying problems of the Court were further acknowledged in later years as it became more evident that '[a]lthough Protocol No. 14 is intended to allow the Court to deal more rapidly with certain types of cases, it cannot lessen the flow of new applications. It is therefore widely agreed that further adaptation of the system will in any event be necessary'.[134]

The Explanatory Report to Protocol No 14 seems to share these views as it admits that the new Protocol alone would not suffice to ensure the long-term effectiveness of the Convention control system, but rather, further action must be taken 'to prevent violations at national level and improve domestic remedies, and also to enhance and expedite execution of the Court's judgments'.[135] Yet again, despite these numerous acknowledgements, the Report did not depart from the ECHR stakeholders' dominant position that the major challenge facing the Court was still the Court's own institutional inability to deal with an excessive caseload and the prospect of a continuing increase in its workload.[136] The adoption

[130] See, Sir Nicolas Bratza, *Speech at High Level Conference* (Brighton, 18-20 April 2012) 3, noting the '[f]ailure to implement the Convention properly at national level is a primary source of the accumulation of meritorious cases which constitute the most serious problem that the Court has to cope with'.
[131] See, nn 127-128 above.
[132] Luzius Wildhaber, *Speech at the Opening of the Judicial Year* in *Annual Report 2004 of the ECtHR* (Council of Europe 2005) 32.
[133] Luzius Wildhaber, Speech at Seminar, *Dialogue Between Judges: Most Significant or Critical Issues Arising out of the European Court of Human Rights and its Case-law* (ECtHR, 2005) 39. For similar acknowledgments, see, *Lord Woolf Report 2005* (n 40) 3; *Report of the Group of Wise Persons to the Committee of Ministers*, CM(2006)203 (15 November 2006) (hereinafter, *Group of Wise Persons Report 2006*), para 32 and Explanatory Report to Protocol No 14, para 14.
[134] *Annual Report 2008 of the ECtHR* (Council of Europe 2009) 12. See also, Committee on Legal Affairs and Human Rights (PACE), *Report on Draft Protocol 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms* (28 April 2009), para B.II. 4, noting that 'if a temporary, interim solution is not quickly found to help the Court to substantially increase its case-processing capacity, the Court will be in danger of collapsing under the weight of its caseload'.
[135] *Explanatory Report to Protocol No. 14*, para 14.
[136] ibid, paras 7-9.

of Protocol No 14bis in late 2009, as an emergency response to the 'extremely serious situation facing the Court' due to the prolonged delay in ratifying Protocol No 14 in the first place, makes the above observation even more compelling.[137] It proves that President Costa's warning that '[i]f ratification [of Protocol No 14] does not occur in the near future, other solutions will need to be found'[138] never, in reality, meant a radical departure from the Court or States Parties' firmly established view that the challenges facing the ECtHR result from its own internal malfunctioning and case processing deficiencies.[139] Therefore, a shift in the reform debate by considering any alternative measures towards securing the Court's long-term effectiveness was not, at least at the time, really envisaged. Additionally, the fact that two expert reports had already been published in the period between the adoption of Protocols Nos 14 and 14bis clearly noting the insufficiency of the reform measures adopted thus far and calling for expanding the scope of the debate proved of little significance in altering the dominant frame of the reform discussions in the 2000s.[140]

Importantly, what the reform debate at this stage failed to acknowledge was the increasingly evident shift of the Court's role from a 'fine-tuning' adjudicator of individual applications to a court that was increasingly dealing with serious systematic and structural violations of Convention rights. The focus in this respect is not so much on the internal or administrative functioning of the Court, but, rather, on the effective application of the ECHR domestically and the role of national authorities towards this end – a point that was left largely underconsidered in the reform debate. In contrast to other ECHR stakeholders, however, former President Wildhaber and Court Registrar Mahoney actively called for a reconsideration of the Court's role as part of the wider reform agenda by focusing on the evolving nature of the new Court and its growing constitutionalist function.[141] Admittedly,

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[137] Explanatory Report to Protocol No. 14bis ECHR, CETS No. 204 (2009), para 3. Provisional Protocol No 14bis provided for the same procedural measures indicated in Protocol No 14 (ie creation of a Single-judge formation and a three-judge committee), with the only difference being that these would apply only vis-à-vis those States that expressed their consent.

[138] Jean-Paul Costa, 'Foreword', *Annual Report 2007 of the ECtHR* (Council of Europe 2008) 5.

[139] On the impact of the delayed ratification of Protocol No 14 on the Court's reform process, see, Alastair Mowbray, 'Crisis Measures of Institutional Reform for the European Court of Human Rights' (2009) 9(4) *Human Rights Law Review* 647.

[140] See, *Group of Wise Persons Report 2006* (n 133); *Lord Woolf Report 2005* (n 40) 3. See also, *Opinion of the Court on the Wise Persons' Report* (ECtHR, 2 April 2007), para 32, reiterating the Group's calls for 'exceptional measures' while noting, however, that 'the Wise Persons' proposals cannot be viewed as an alternative to Protocol No. 14' and that realisation of any proposed measures will rely on the extent to which national authorities demonstrate their 'readiness to engage […] in the next stages of the Convention reform' <https://www.echr.coe.int/Documents/2007_Wise_Person_Opinion_ENG.pdf> accessed 31 May 2021. See also, Christina Hioureas, 'Behind the Scenes of Protocol No. 14' (n 105) 756, arguing that the publication of these expert reports shows that 'Protocol 14 and the reform package were not entirely adequate in addressing the Committee [of Ministers'] identified problems and desired solutions'.

[141] See eg, Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161, 164, famously arguing 'Is it not better to take a more realistic approach to the problem and preserve the essence of the system, in conformity with its fundamental objective, with the individual application being seen as a means to an end itself, as the magnifying glass which reveals the imperfectionsin national legal systems, as the thermometer which tests the democratic temperature of

undertaking necessary structural reforms in order to ensure the continued effectiveness of the Court required a serious reflection of another fundamental question, asking why a European Court of Human Rights should exist alongside national human rights protection mechanisms in the first place.[142] As Mahoney put it, 'the basic objective pursued by the Convention system should shape the contours of any possible reform'.[143]

These views, and most importantly the fact that such discussion was taking place at that stage of the reform process, were indeed 'groundbreaking'[144] as they envisioned a radical reform which would 'change the nature of the Court altogether'.[145] Challenging for the first time the principle that 'the individual is the centre of attention'[146] in the ECHR system and questioning the traditional individual justice function, as the primary role and mission, of the ECtHR were important inputs in the reform debate that could potentially direct the discussion towards alternative views in relation to the Court's future.[147] Some States appeared inclined to subscribe to this 'constitutionalist thesis'[148] but opinions in the CoM were far from unanimous.[149] Strong resistance from other stakeholders, including some ECtHR judges[150] and civil society,[151] mainly opposing any proposed reforms impinging on the right of individual petition, meant that conflicting interpretations of the Court's role and function prevented its underlying problem from being expressly addressed.[152] Some legal experts also expressed concerns about the envisaged 'constitutionalist' turn, arguing that the long-term effectiveness of the ECtHR could have been guaranteed through institutional

States?'; Paul Mahoney, 'An Insider's View of the Reform Debate (How to Maintain the Effectiveness of the European Court of Human Rights)' (n 2) 175, warning against the risk that the ECtHR becomes a pan-European 'small claims court'.

[142] Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership' (n 34) 103.

[143] ibid, 104.

[144] Robert Harmsen, 'The Reform of the Convention System' (n 20) 131.

[145] Christina Hioureas, 'Behind the Scenes of Protocol No. 14' (n 105) 746.

[146] Leo Zwaak and Therese Cachia, 'The European Court of Human Rights: A Success Story?' (n 100) 35.

[147] Costas Paraskeva, 'Reforming the European Court of Human Rights: An Ongoing Challenge' (n 105) 212.

[148] See eg, *Declaration – The European Convention on Human Rights at 50: What Future for the Protection of Human Rights in Europe?*, Section 2 in *European Ministerial Conference on Human Rights (Rome, 3-4 November 2000)*, Report of the Secretary General, CM(2000)172 (14 November 2000).

[149] See, ECtHR, *Position Paper on Proposals for Reform of the European Convention on Human Rights* (n 82), paras 43-46 concerning the Court's adjudicative approach to States' systemic or structural problems. See also, Steering Committee for Human Rights (CDDH), *Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights: Final Report Containing Proposals of the CDDH,* CDDH(2003)006, where the CDDH recognises the (quasi)constitutional justice mission of the Court.

[150] Although the ECtHR's *Position Paper on Proposals for Reform* (n 82) shows that the Court 'broadly welcomed the reform', some judges had different individual opinions on certain reform aspects. See eg, Judges Josep Casadavell, Marc Fischbach, Wilhelmina Thommassen and Françoise Tulkens, 'Pour le droit de recours individuel', quoted in G Cohen-Jonathan and C Pettiti (eds), *La Réforme de la Cour Européenne des Droits de l'Homme* (Bruylant 2003), Annex 3.

[151] *NGO's Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights* (n 105).

[152] See, ECtHR, *Position Paper on Proposals for Reform* (n 82). Cf, Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (n 141); Paul Mahoney, 'New Challenges for the European Court of Human Rights resulting from the Expanding Case Load and Membership' (n 34).

and procedural measures that did not diminish an individual's ability to obtain a Strasbourg remedy for a Convention rights violation.[153]

Despite the increased interaction among the various ECHR stakeholders at this stage of the reform, it was clear that the CoM, due to its executive decision-making and voting powers and the control it exercised over the technical group of CDDH, largely framed the reform debate and controlled the entire Protocol No 14 drafting process.[154] The divergent views on the ECtHR's reform, however, meant that the CoM's aim was 'not only to address the Court's problems, but also [to ensure the proposed measures] result in unanimous or near unanimous approval by the Ministers'.[155] Consequently, the reform debate was limited anew to its narrow, technocratic terms, where greater consensus (if not unanimity) was more likely to be reached. This proves the general reluctance of ECHR stakeholders to engage with issues of deeper constitutional importance concerning the object and purpose of the Convention system and, at the same time, their ease to return to technical matters only to keep the reform process going forward. As Glas characteristically put it, stakeholders during this reform stage were prompted 'to leave familiar paths, travel new paths and sometimes make a detour in order to ensure the effective protection of the Convention rights'.[156] Former Director General of Human Rights also admitted in 2008 that apparently 'the time [was] not yet ripe to tackle' the question of 'what today should be the functions of a European Court of Human Rights?', 'at least not at intergovernmental level' – a question, nevertheless, which was 'becoming more and more essential not to lose sight of'.[157]

What the above brief analysis of how the challenges facing the new Court were framed during the 2000s shows is that, despite the radical transformation that the ECtHR had undergone through Protocol No 11 and the pressing need to broaden the scope of the reform debate, Protocol No 14 'only' managed to re-organise the internal processes of the Court in order to enhance its judicial economy and efficacy. Although it was universally acknowledged within the ECHR system that there was an urgent need to expedite the case-processing and filtering capacity of the Court by eliminating clearly inadmissible applications, adopting technocratic or administrative measures, instead of any other measures that could

[153] J Waldham and T Said, 'What Price the Right of Individual Petition: Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights' (2002) 2 *European Human Rights Law Review* 169, 174. See also, Philip Leach, 'Access to the European Court of Human Rights: From a Legal Entitlement to a Lottery?' (2006) 27 *Human Rights Law Journal* 11; Marie-Bénédicte Dembour, '"Finishing Off" Cases: The Radical Solution to the Problem of the Expanding ECtHR caseload' (2002) 5 *European Human Rights Law Review* 604.

[154] Christina Hioureas, 'Behind the Scenes of Protocol No. 14' (n 105) 736-737.

[155] ibid, 737. See also, *The European Court of Human Rights: Agenda for the 21st Century* (Seminar Proceedings) in Steering Committee for Human Rights (CDDH), *Reforming the European Convention on Human Rights: A Work in Progress* (CoE, 2009) 135.

[156] Lize Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 33.

[157] Pierre-Henri Imbert, 'The End of a World', in *Ten Years of the "New" European Court of Human Rights: 1998-2008 Situation and Outlook* (ECtHR 2008) 67.

substantially alter the role of the Court, was proved to be the most practical and widely-accepted means to this end. As former President Wildhaber noted, Protocol No 14 presented a 'missed opportunity' for radically transforming or redefining the Court and equipping it with those characteristics that would enable it to face its underlying challenges – a view subsequently shared by other scholars.[158] It was already acknowledged that Protocol No 14 was a 'step in the right direction [but even] with the new reform, the Court [would] continue to have an excessive workload', he admitted.[159] Although Protocol No 14 'may not solve the current case overload crisis, [it] has, nevertheless, probably bought extra time for further reflection on the Court's future'.[160] Indeed, the reform package under Protocol No 14 has been instrumental in streamlining the ECtHR's procedures and enabling it to process efficiently the excessive backlog of clearly inadmissible cases, the number of which, as Chapter 3 showed, was almost eliminated by the mid-2010s. It was already clear, however, that 'whatever "managerial" changes are made within the existing structures regarding working methods, internal organization, and the procedural treatment of cases' the reform measures would ultimately prove incapable of fulfilling the purpose of securing the future and long-term effectiveness of the Court.[161]

The Court's future and long-term effectiveness, however, still remains seriously at stake. Evidently, Protocol No 14 reformed the ECtHR only in an incremental, rather than radical or conclusive, manner, thus offering a partial solution to the challenges that needed to be overcome in order to preserve its future and long-term effectiveness. In pointing towards further debates on the matter, former ECtHR Registrar and Judge Mahoney stressed that 'the mission of the Court, the service that it is expected to render European citizens and European societies, should dictate the contours of any reform'.[162] Consequently, in the absence of a clear determination of the role and function of the Court, any discussion on its reform and future remains incomplete. Without this, reform measures or proposals are unlikely to reflect the true needs (or indeed challenges) of the Court and, as such, they will be inadequate in realising the aims of the reform process.

[158] Interview with Luzius Wildhaber, President of European Court of Human Rights (21 April 2004), cited in Christina Hioureas, 'Behind the Scenes of Protocol No. 14' (n 105) 755. See also, Steven Greer, 'Protocol No 14 and the Future of the European Court of Human Rights' (2005) Public Law 83, 85.
[159] Interview with Luzius Wildhaber (n 158).
[160] Steven Greer, 'Protocol 14 and the Future of the European Court of Human Rights' (n 158) 104.
[161] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court (2001)1 (27 September 2001), para 39, further adding that 'constant seeking for greater "productivity" obviously entails the risk that [meritorious] applications will not receive sufficient […] consideration to the detriment of the quality of judgments'.
[162] Paul Mahoney, 'An Insider's View of the Reform Debate' (n 2) 175.

4.5 The Interlaken Process: Protocols Nos 15 and 16 - A (re)new(ed) emphasis on subsidiarity and the margin of appreciation

As shown above, Protocol No 14 was adopted with the intention to continue the ECtHR's reform process, rather than to bring it to an end, and, as such, it was only an intermediate step necessary to allow the ECHR control system to 'survive' pending more fundamental reforms for the long term.[163] Russia's persistent refusal to ratify Protocol No 14 prevented the reform package from swiftly coming into force and, thus, demonstrating its potential in realising the aims of the previous reform period.[164] As the identified challenges of an overwhelming backlog and excessive workload continued to deteriorate, the process of the 'reform of the reform of the reform'[165] did not take long to begin with the view of 'giv[ing] human rights protection a second wind' and 'breath[ing] new life into [the ECtHR] and rejuvenat[ing] it'.[166]

The Court's latest reform stage saw the establishment of a new tradition of organising High-Level Conferences where the *future* of the ECtHR would explicitly form part of the discussions.[167] Beginning with a 'major political conference' in Interlaken in 2010,[168] four subsequent conferences took place under the same theme, at the initiative of the ECHR State holding the Chairmanship of the CoM at each relevant time.[169] Each of these conferences resulted in the adoption of a political declaration in which States Parties reaffirmed their 'deep and abiding commitment' to the Convention and the ECtHR, took stock of the reform process, identified the excessive caseload as the ongoing challenge facing the ECtHR and made proposals on how to further strengthen the Convention system and ensure the Court's future and long-term effectiveness.[170] Albeit substantially similar in

[163] Helen Keller, Andreas Fischer and Daniela Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2011) 21(4) *EJIL* 1025, 1031.
[164] Notably, although Protocol No 14 was adopted in 2004, it only entered into force in June 2010, ie about four months *after* the new reform process was launched at Interlaken (18-19 February 2010).
[165] Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (n 85) 415.
[166] Jean-Paul Costa, *Speech at the Opening of the Judicial Year* in *Annual Report 2009 of the ECtHR* (Council of Europe 2010) 37 <https://www.echr.coe.int/Documents/Annual_report_2009_ENG.pdf> accessed 30 April 2021.
[167] ibid, 'Foreword', where President Costa noted that he 'felt that it was necessary to consider the future of this European system of judicial protection, whose fragility is as undeniable as its success'.
[168] ibid.
[169] Interlaken Conference (18-19 February 2010); Izmir Conference (26-27 April 2011); Brighton Conference (18-20 April 2012); Brussels Conference (26-27 March 2015); Copenhagen Conference (12-13 April 2018). See, *Reform of the Court* <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=> accessed 20 April 2021.
[170] See eg, *Conference on the Future of the European Court of Human Rights* (Copenhagen Declaration, 2018), para 1 <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf> accessed 20 April 2021.

their wording, the rhetoric and motives behind each declaration, as shown further below, varied considerably.[171]

The Interlaken Conference, signaling the beginning of a decade-long process for the reform of the Strasbourg control system, had the objective 'to find a solution for the chronic [case] overload' and 'to increase the Court's short-term and long-term efficiency' while revising and amending, if necessary, the ECHR.[172] A 'roadmap for the evolution of the [ECtHR]' would be set, featuring a range of medium and long-term reform measures which would guarantee the Court's effective functioning in the future.[173] When calling for such a major conference, former President Costa made his intention for a broader scope of reform quite explicit. Referring to the fundamental questions pertaining to the Court's role and function which were left largely unanswered in the preceding reform periods, he saw the launch of the Interlaken process as 'the best way of giving the Court […] a clarified mandate'.[174] More importantly, he stressed that the new reform process 'must acknowledge the sharing of responsibility between the States and the Court' with a clear focus on the principle of subsidiarity, while explicitly asking ECHR States to consider 'what sort of Court of Human Rights […] they want for the future' and 'what [the Court] should deal with'.[175] Posing these questions from the outset was critical in order for the ECHR stakeholders not only to accurately identify the root causes of the challenges facing the Court, but, essentially, to adopt measures that could effectively address and resolve those causes and secure its long-term future. Indeed, as shown below, States Parties followed suit and admitted that 'it may be necessary to evaluate the fundamental role and nature of the Court' in order to safeguard the 'future effectiveness of the Convention system'.[176]

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[171] Janneke Gerards and Sarah Lambrecht, 'The Draft Copenhagen Declaration – Food for Thought' (ECHR Blog, 26 February 2018) <https://www.echrblog.com/2018/02/the-draft-copenhagen-declaration_26.html> accessed 31 May 2021; Lize Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?' (2020) 20 *HRLR* 121, 126-128.

[172] *High Level Conference on the Future of the European Court of Human Rights* (Interlaken Declaration, 19 February 2010), para PP9 <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 April 2021; *Memorandum of the President of the European Court of Human Rights to the States with a view to Preparing the Interlaken Conference* (3 July 2009) (hereinafter, *Memorandum of President Costa*) <https://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf> accessed 20 April 2021. See also, Swiss Federal Department of Justice, Press Release 'Interlaken Conference: Switzerland spurs the reform of the European Court of Human Rights' (10 February 2010) <https://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2010/2010-02-10.html> accessed 20 April 2021.

[173] *Memorandum of President Costa* (n 172) 1. See also, Interlaken Declaration (n 172), para PP10 and 'Action Plan' <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 April 2021.

[174] Jean-Paul Costa, Foreword in *Annual Report 2009 of the ECtHR* (n 145). See also, *Memorandum of President Costa* (n 172) 3, noting that 'the relationship between the Court and the national authorities has to be defined with maximum clarity'.

[175] *Memorandum of President Costa* (n 172) 3. See also, Section III. B.1.2 (*'What Court for 2019'*) of the Memorandum, where a decade-long vision for the 60th anniversary of the ECtHR is set.

[176] *High Level Conference on the Future of the European Court of Human Rights* (Brighton Declaration, 2012), para 31 <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 20 April 2021.

In line with the previous reform stages, the extremely heavy caseload was presented, at least in the early stages of the Interlaken process, as the primary and most pressing challenge facing the ECtHR as it 'represent[ed] a threat to the quality and the consistency of [its] case-law and […] authority', and, consequently, constituted the strongest motivation for the launch of the new reform.[177] As the previous reform period already made evident, an outline of the scale of the caseload crisis facing the Court at the time was to be provided from the outset of the new reform stage. Recalling from the statistical analysis in Chapter 3 of the thesis, in the run-up to the Interlaken conference, the growth in the number of applications pending for examination before the Court had been constantly accelerating, inevitably reaching a record high of almost 160,000 applications in 2011.[178] The detrimental impact of the excessive workload was also frequently emphasised at the beginning of the new reform process. As the CoM noted, 'applications to the Court are taking too long to resolve' and 'the Court faces increasing difficulty in fulfilling of its core responsibility' to maintain a clear and coherent jurisprudence through which 'authoritative interpretative guidance' is provided to States Parties.[179] Clearly, in the absence of decisive action to solve the problem, 'the entire system [was] in danger of collapsing'.[180]

References, therefore, to the high levels of 'clearly inadmissible' applications as well as 'repetitive applications' occupied a central place in the framing of the Court's challenges at the early stages of the process,[181] while the focus was more on how the current backlog *per se* could be reduced rather than addressing and analysing the (deeper) causes of the problem with a view to preventing further applications reaching Strasbourg.[182] Former Court Registrar Erik Fribergh did note, however, that tackling the caseload challenge facing the Court had a 'double objective – clearing the backlog and handling the annual influx', which then 'requires different answers since the backlog clearance is of a temporary nature

[177] Interlaken Declaration (n 172), para PP8. See also n 134 above.
[178] See, Chapter 3 of the thesis. See also, *Analysis of Statistics 2018* (ECtHR, 2019) 7 <https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf> accessed 5 May 2021.
[179] CDDH, *Opinion on the issues to be covered at the High-Level Conference on the future of the European Court of Human Rights*, CM(2009)181 (Committee of Ministers, 1073rd meeting, 9 December 2009) (hereinafter, *CDDH Opinion 2009*) item 4 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cffa4> accessed 26 May 2021.
[180] ibid. See also, Interlaken Declaration (n 172), para PP7, 'noting with deep concern that the number of applications brought before the Court and the deficit between applications introduced and applications disposed of continues to grow'.
[181] *CDDH Opinion 2009* (n 179), para 5; Interlaken Declaration (n 172), para (6) of the Conference Conclusions and sections C and D of the 'Action Plan'; Copenhagen Declaration (n 170), para 51.
[182] Cf PACE, *The Future of the Strasbourg Court and Enforcement of ECHR Standards: Reflections on the Interlaken Process* (n 117), para 10, noting that 'the root causes of the Court's workload and increasing backlog have to be eliminated'. See also the observation by Thomas Hammarberg, Commissioner for Human Rights, that 'there is a serious gap of systematic implementation by States of their undertakings under the Convention' in *Contribution of Commissioner at the High-level Conference on the future of the European Court of Human Rights*, (7 December 2009) CommDH(2009)38, para 5. Note also that an 'Implementation of the Convention at the National level' section is included in the 'Action Plan' of the Interlaken Declaration (n 172) but the wording of its importance in preventing future applications reaching Strasbourg is rather weak.

whereas dealing with the annual influx is a permanent requirement'.[183] Evidently, reform measures of an administrative or institutional nature adopted up to that point (ie Protocols Nos 11 and 14) aiming at short and medium-term goals were not sufficient to effectively resolve the latter component of the workload challenge and, consequently, measures of a different nature that would have more sustainable results needed to be considered.[184]

Apart from the Court's serious backlog problem, the large number of judgments pending execution at the beginning of the Interlaken process (amounting to 8,600 in 2009) was identified as 'a new challenge' for the CoM.[185] Even though the ECtHR had already stressed in its jurisprudence that the continuous failure of States to undertake appropriate restorative measures in compliance with its judgments not only constitutes an aggravating factor with respect to their responsibility under the Convention, but also a 'threat to the future of the European human rights system',[186] under no circumstances was this seen by the CoM as *the* biggest challenge for the Court or the Convention system at that point.[187] Nevertheless, the 'deeply worrying' phenomenon of delayed/partial/non-execution of ECtHR judgments was highlighted numerous times by the CoM in its Annual Reports and regular supervision meetings, noting that it constitutes 'a serious threat to the effectiveness of the system of the Convention'.[188] Escalating the gravity of the matter, ECHR States acknowledged at the Copenhagen Conference in 2018 that 'ineffective national implementation of the Convention, in particular in relation to serious systemic and structural human rights problems, remains the principal challenge confronting the Convention system'

[183] 'Presentation to the 3rd meeting by the Registrar of the European Court of Human Rights', GT-GDR-F(2014)021 (24 September 2014), also cited in Steering Committee for Human Rights (CDDH), *The Longer-Term Future of the System of the European Convention on Human Rights*, (11 December 2015) (hereinafter, *CDDH Report 2015*) para 77 <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 26 May 2021.

[184] See, *CDDH Report 2015* (n 183) paras 80-82, detailing proposed measures to deal with current backlog, and paras 83-86, proposing measures for resolving the annual influx of cases. Strikingly, although there is a clear reference to the need for better implementation of the Convention in order to deal with the influx of cases, further technical/procedural/bureaucratic measures feature prominently in the CDDH's proposals in response to both components of the caseload challenge.

[185] *CDDH Opinion 2009* (n 179), item 7.

[186] See eg, *Gaglione and Others v. Italy,* App no 45867/07 (21 December 2010), para 55. See also, *Scordino v. Italy*, App no 43662/98 (09 July 2007), paras 14-15.

[187] *CDDH Opinion 2009* (n 179) and *6th Annual Report of the Committee of Ministers 2012* (Council of Europe 2013) 10, identifying the increasing number of non-executed leading cases among 'other challenges'. Cf, *7th Annual Report of the Committee of Ministers 2013* (Council of Europe 2014) 10, noting that 'the execution of leading cases […] remains a major challenge'.

[188] Decisions of the Committee of Ministers – 1136th meeting (6-8 March 2012), CM/Del/Dec(2012)1136/14, paras 1-2 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805caf0a> accessed 29 May 2021. See also, *9th Annual Report of the Committee of Ministers 2015* (Council of Europe 2016) 10, identifying the prolonged non-execution of ECtHR judgments as a 'major challenge' for the Court and the ECHR system <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d> accessed 5 May 2021.

and needs to be addressed accordingly[189] – a position that was reaffirmed in the CoM's latest Annual Report of 2019.[190]

Against this backdrop, the CDDH warned that the situation concerning the execution of ECtHR judgments was 'untenable and require[d] urgent action, not only to save the Court but also to reinforce the Convention system as a whole – which would have the result of relieving the burden on the Court and enhancing the effectiveness of the protection of individual rights'.[191] As a result, a general reluctance on the part of certain States to implement ECtHR judgments was becoming more apparent.[192] The domino effect on the ECtHR's increasingly excessive caseload as a result of the failure of certain States to fully and promptly implement the ECtHR judgments domestically was also raised by the Court Registrar and the PACE on several occasions.[193] As far as the PACE is concerned, it recognised that 'the scale of the outstanding problems [of dilatory or continuous non-execution of leading ECtHR judgments] is alarming' and that this 'very worrying' situation continues to generate numerous similar applications to the Court and thus threaten the effective function of the Court and the entire Convention system.[194] It is also worth noting that the PACE was among the first key ECHR stakeholders who identified the growing problem of repetitive applications caused by 'persistent defaulters' and its impact on the ECtHR's functioning, calling for enhanced oversight of the national implementation of measures directed to respondent States by the Court following a Convention violation.[195] As the PACE acknowledged, a full and prompt execution of ECtHR judgments, especially those categorised as leading cases concerning structural and complex problems requiring judicial

[189] Copenhagen Declaration (n 170), paras 12, 51.

[190] *13th Annual Report of the Committee of Ministers 2019* (Council of Europe 2020) 26 <https://rm.coe.int/annual-report-2019/16809ec315> accessed 5 May 2021. See also, High-Level Conference on the 'Implementation of the European Convention on Human Rights, our Shared Responsibility' (Brussels Declaration 2015), 'Action Plan', Section B 'Implementation of the Convention at national level' <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf> accessed 20 April 2021.

[191] *CDDH Opinion 2009* (n 179), item 8.

[192] See also, *CDDH Report 2015* (n 183), 'Executive Summary': '[t]he authority of the Convention and its implementation remain among the main challenges for the Convention system' and para 132: 'the authority and the efficiency of the human rights protection system based on the Convention could be seriously undermined if national authorities chose not to fully comply with judgments of the Court'.

[193] See eg, letters from the Registrar of the Court to the Chair of the CoM DD(2012)4 (14 December 2011); DD(2012)4-add2 (22 June 2012) concerning excessively lengthy court proceedings in Italy. See also, Committee on Legal Affairs and Human Rights (PACE), *Implementation of Judgments of the European Court of Human Rights*, Doc. 13864 (9 December 2015) <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMjAwNSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIyMDA1> accessed 29 May 2021.

[194] PACE, *Implementation of Judgments of the European Court of Human Rights* (n 193) paras 5, 31, 46 and 48.

[195] See, Committee on Legal Affairs and Human Rights (PACE), *Contribution to the Interlaken Conference*, para 9: 'it is totally absurd for the Court and its staff to waste time and effort in dealing with repetitive applications surely old democracies, like Italy, not to mention more recent "persistent defaulters"such as Moldova, Poland, Romania, Russia and Ukraine, ought to be subjected to "aggravated", if not "punitive" or "exemplary" damages' <http://assembly.coe.int/CommitteeDocs/2010/20100121_ajdoc06%202010.pdf > accessed 29 May 2021.

or administrative reforms, could often be hindered by the respondent States' lengthy domestic democratic decision-making processes and the lack of available resources.[196] Nevertheless, in many other instances, it was admitted that the persistent refusal of States to implement Court judgments is attributed to national 'pockets of resistance' closely related to political considerations[197] or deep social prejudices,[198] indicating that certain States are simply not willing to undertake the necessary restorative reforms in blatant disregard of their legal obligations under the Convention.[199] As former ECtHR President Raimondi accurately identified, '[t]he second challenge [facing the ECtHR nowadays, apart from the excessive workload] is of a different nature. It is essentially a political one. The challenge is to the very idea of the Convention system. It questions the authority, and even the legitimacy of the European Court of Human Rights'.[200] As shown below, it is precisely toward this direction that the remainder of the Interlaken process would turn its attention.

Having identified that the main challenges facing the ECtHR at this early stage of the Interlaken process are the Court's overwhelming caseload and the ineffective implementation of its judgments domestically, certain ECHR stakeholders, including the CoM, the CDDH and the ECtHR as a whole, appeared more inclined to support additional institutional/procedural measures that could lead to the better functioning of the Court in the short and medium term. Such proposed measures included the creation of special (sub)sections within the current Court structure or a new filtering mechanism to determine the admissibility of applications, a European Court of Justice-inspired preliminary reference mechanism, transparent and rigorous procedures for the appointment of judges and further restrictions to (but not outright abolition of) the right of individual petition by introducing a

[196] PACE, *Implementation of Judgments of the European Court of Human Rights* (n 193), para 46.

[197] See eg, *Ilgar Mammadov v. Azerbaijan* App no 15172/13 (13 October 2014); *Cyprus v. Turkey* App no 25781/94 (10 May 2001) [GC].

[198] See eg, *Alekseyev v. Russia* App no 4916/07 (21 October 2010); *D.H. and Others v. the Czech Republic* App no 57325/00 (13 November 2007) [GC]. See also, *9th Annual Report of the Committee of Ministers 2015* (n 188) 10, referring to increasing difficulties related to 'pockets of resistance' regarding the execution of ECtHR judgments revealing sensitive and complex problems for the respondent States and Committee on Legal Affairs and Human Rights (PACE), *The Implementation of Judgments of the European Court of Human Rights*, Resolution 2178 (2017), para 7 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23987&lang=en> accessed 29 May 2021.

[199] PACE, *Implementation of Judgments of the European Court of Human Rights* (n 193), para 46. See also, Commissioner for Human Rights, *Memorandum for the Interlaken Conference*, CommDH(2009)38 (7 December 2009), para 5, recognising that 'there is a serious gap of systematic implementation by States of their undertakings under the Convention'; *CDDH Report 2015* (n 183), paras 132-136. See also, Sir Nicolas Bratza, Speech at the Brighton High Level Conference (n 130) 1-2 , noting that '[a]t a time when human rights and the Convention are increasingly held responsible in certain quarters for much that is wrong in society, it is worth recalling the collective resolve of Member States of the Council of Europe to maintain and reinforce the system which they have set up'.

[200] Guido Raimondi, *Speech at the Conferral of the Treaties of Nijmegen Medal* (18 November 2016) 4 <https://www.echr.coe.int/Documents/Speech_20161118_Raimondi_Nijmegen_ENG.pdf> accessed 29 May 2021.

fee for lodging an application with the Court.[201] Others, however, were more skeptical on whether further institutional reforms were an appropriate response to the root causes of the challenges facing the ECtHR and appeared reluctant to consider any such measures before assessing fully the impact of the previous reform package under Protocol No 14. The PACE, for instance, highlighted that such further technical measures carried the risk of 'divert[ing] precious time and energy from other essential work', while their usefulness remained, at least until that point, questionable.[202] Similarly, former President Costa, being skeptical of the effectiveness of such purely technocratic, efficiency and cost-effectiveness-driven measures in addressing and resolving the underlying causes of the identified problems facing the Court, urged the ECHR stakeholders to consider additional reforms 'from a broader perspective'.[203] Endorsing a broader reform agenda, the CDDH also noted that the new process for assessing the role and function of the ECtHR and proposing measures to guarantee its long-term future and effectiveness should 'not focus exclusively on the Court' and 'should be as open-minded as possible, allowing for "thinking outside the box"'.[204]

Only a few years into the Interlaken process, however, and it was already widely acknowledged that the growing caseload of the ECtHR due to repetitive cases was directly attributed to the systemic deficiencies in the States' national orders and the poor enforcement of the Convention domestically.[205] Despite this acknowledgement, it was

[201] See *CDDH Opinion 2009* (n 179). See also, *Memorandum of President Costa* (n 172) 4-5. For an overview of the adopted reform measures during the Interlaken reform process, see, Lize Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?' (n 171) 129-145.

[202] PACE, *The Future of the Strasbourg Court and Enforcement of ECHR Standards: Reflections on the Interlaken Process* (n 117), paras 10-11. See also, *Human Rights in Europe: Decision Time on the European Court of Human Rights* (Joint NGO Statement) in Council of Europe Directorate General of Human Rights and Legal Affairs, Preparatory Contributions – High Level Conference on the Future of the European Court of Human Rights (Interlaken, Switzerland, 18-19 February), arguing that '[f]ewer cases would be sent to the Court if States implemented the Court's judgments by providing effective remedy and reparation and by taking steps aimed at ensuring the violation is not repeated, and if States implemented not only judgments against them, but also standards developed in all relevant judgments against other States' <https://www.amnesty.org/download/Documents/48000/ior610092009en.pdf> accessed 20 April 2021.

[203] Jean-Paul Costa, 'Speech on the Occasion of the Opening of the Judicial Year 2009', *Annual Report 2009 of the ECtHR* (n 166) 37, asking in this respect, '[b]ut can we go on like this indefinitely? Can we proceed with an unlimited expansion of the Court and its Registry? Are we not running the risk of exhaustion with this headlong flight?'.

[204] *CDDH Report 2015* (n 183) para 4.

[205] See eg, Committee on Legal Affairs and Human Rights (PACE), *The Effectiveness of the European Convention on Human Rights: The Brighton Declaration and beyond*, Doc. 13719 (02 March 2015), para 20, noting that 'an examination of the most pressing outstanding issues listed above reveals that these must first and foremost be tackled by the member States of the Council of Europe, rather than the Court. The challenges largely stem from the flood of repetitive cases reaching the Court from certain member States with systemic problems' <https://pace.coe.int/en/files/21565/html> accessed 29 May 2021; *CDDH Report 2015* (n 183), para 79, recognising that 'it is important to continue to address the root causes of the high influx of applications, among them, in particular, the insufficient implementation of the Convention and failure to execute judgments promptly', para 195, stating that 'inadequate national implementation of the Convention remains among the principal challenges or is even the biggest challenge confronting the Convention system' and para 198 (iii),

arguably 'too early to come to any general conclusion that [existing procedural mechanisms] are insufficient to respond to the various challenges facing the Court arising from "similar" applications'.[206] As a result, discussions among stakeholders on the adoption of further institutional/technical measures continued throughout the Interlaken process, leading to the adoption, *inter alia*, of additional restrictions to admissibility by limiting the time limit for submitting applications and adjusting the 'significant disadvantage' criterion widening the Court's scope to reject applications, further development of the pilot judgment procedure and emphasis on resolving cases through friendly settlements and unilateral declarations.[207] These measures were regarded as both necessary and the most appropriate *under the circumstances* and were widely supported given their recent success in drastically reducing the Court's backlog of clearly inadmissible applications.[208] At that point, it was already apparent that the long-term effectiveness goal set at the beginning of the Interlaken process required that there should be an equilibrium between the applications reaching the Strasbourg Court and its ability to determine them.[209] Clearly, the dominant approach to 'long-term effectiveness' at that stage of the reform favoured the institutional efficiency attribute of the Court at the expense of its normative effectiveness, thus falling short of the optimal concept of overall effectiveness developed earlier in Chapter 2. Outlining their vision for the future role of the ECtHR under the 'Brighton mandate', therefore, ECHR States envisaged a Court with 'a more focused and targeted role'; one that 'would need to remedy fewer violations itself and consequently deliver fewer judgments'.[210] The potential of the above measures in effectively rectifying the mismatch between the Court's caseload and its case-processing capacity was thus particularly appealing and would serve the individual interests of all key ECHR stakeholders as presented during the Interlaken process and especially post-Brighton.[211]

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concluding that '[c]onsidering the reduction and handling of the annual influx of cases, the CDDH notes that this is primarily dependent on better implementation of the Convention and better execution of the Court's judgments'.

[206] CDDH Report, CDDH(2013)R77 (22 March 2013), paras 22-24.

[207] *Explanatory Report on Protocol No.15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, paras 16-18, 21 <https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 14 June 2021. See also, *CDDH Report 2015* (n 183) 179; Committee of Experts on the Reform of the Court (DH-GDR), *Draft CDDH Report* (7 June 2013) DH-GDR(2013)R4 Addendum I (hereinafter, *Draft CDDH Report 2013*), paras 17-20.

[208] *Preliminary Opinion of the Court in Preparation for the Brighton Conference* (20 February 2012), para 5 <https://www.echr.coe.int/Documents/2012_Brighton_Opinion_ENG.pdf> accessed 20 April 2021; *Draft CDDH Report 2013* (n 207), paras 6-8, 12, 25.

[209] Alastair Mowbray, 'The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights' (2010) 10(3) Human Rights Law Review 519, 521.

[210] Brighton Declaration (n 176), paras 32-33.

[211] In practical (and arguably oversimplistic) terms, these could translate into a vested interest for both the ECtHR and the CoM to gradually decrease their respective dockets, while for the ECHR States to ensure greater deference to their national authorities to determine Convention-related disputes domestically. For more detailed analysis, see Chapter 5 of the thesis.

Drawing also upon the positive results of the measures adopted under Protocol No 14, former Court Registrar Fribergh asserted in 2014 that the ECtHR could continue to work efficiently for many years without any major institutional changes.[212] Reaching a similar conclusion, the CDDH in its interim evaluation of the Interlaken process in 2015, opined that the caseload challenge can be best dealt with through technical measures 'within the framework of the existing structures' as established by Protocol No 14.[213] Therefore, considering possible responses which 'may entail allocating additional resources and more efficient working methods rather than introducing a major reform' would arguably suffice to achieve this aim.[214] In its final evaluation of the Interlaken process, the CDDH reaffirmed its previous position by concluding that there was 'no reason to depart from its assessment made in 2015 that the current challenges the Convention system is facing can be met within the existing framework' and 'the necessity of a new major revision of the system is therefore not apparent'.[215] Once again, the CDDH appeared inclined to sustain the current *status quo* of the ECHR system 'as emerged from the Interlaken process and Protocol No 14' in the hope that it will soon 'demonstrate fully its potential'.[216]

A wider consensus seemed to exist that a simplified procedure for reform was to be followed for any potential changes to the working methods of the Court (via a Statute for the Court) rather than having Contracting Parties engage in another protracted drafting process of an amending/additional Protocol to the Convention.[217] There was clearly no appetite for this given the recent experience with the delayed entry into force of Protocol No 14.[218] As the Court recognised, 'the main thrust of the reform process is to ensure that the Court's case-load is of a manageable size and consists of cases raising important Convention issues'.[219] In this regard, recourse to institutional or technical measures capable

[212] 'Presentation to the 3rd meeting by the Registrar of the European Court of Human Rights' (n 183). Insisting on the necessity of further technocratic measures, Fribergh further argued that a temporary extraordinary budget of 30 million Euros and 40 additional Registry lawyers could eradicate the Court's remaining backlog in less than a decade.

[213] *CDDH Report 2015* (n 183), para 197.

[214] ibid, 'Executive Summary', para 196, stating that 'the above challenges currently do not warrant responses outside the framework of the existing structures', and para 198(i), suggesting that '[i]n light of these developments the CDDH does not discern a need for the adoption of further measures regarding [the backlog of clearly inadmissible and repetitive cases]'.

[215] Steering Committee for Human Rights (CDDH), *Contribution to the Evaluation Provided for by the Interlaken Declaration*, para 221, cited in *The Interlaken Process: Measures Taken from 2010 to 2019 to Secure the Effective Implementation of the European Convention on Human Rights* (CoE, November 2020) <https://rm.coe.int/processus-interlaken-eng/1680a059c7> accessed 29 May 2021.

[216] ibid.

[217] Lize Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?' (n 171) 145-146; Alastair Mowbray, 'The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?' (n 209) 521.

[218] See eg, *CDDH Opinion 2009* (n 179), item 25; PACE, *The Future of the Strasbourg Court and Enforcement of ECHR Standards: Reflections on the Interlaken Process* (n 117), para 10; *Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference* (18 December 2009) SG/Inf(2009)20, paras 29-30 <https://rm.coe.int/09000016805cff31> accessed 29 May 2021.

[219] *Preliminary Opinion of the Court in Preparation for the Brighton Conference* (n 208), para 25.

of achieving this aim was reasonably attractive for the ECtHR too. At the same time, their technical/procedural nature meant they could offer the necessary flexibility and adaptability in addressing systemic issues and could be incorporated later in the Court's working procedures, as the already-established pilot-judgment procedure suggested, without the need to amend the Convention.[220] Other proposals, including the appointment of additional judges to the Court, were excluded due to 'budgetary consequences'.[221]

Despite the initial political momentum and the calls for a broader reform agenda, therefore, the CDDH, in its interim evaluation of the Interlaken process in 2015, had appeared rather conservative in its tone and sought to preserve the existing structure of Strasbourg system rather than calling for more radical reforms.[222] Indeed, there was no apparent intention to tackle more fundamental questions, such as the phenomenon of ineffective national implementation of the Convention, which were identified as the underlying causes of the caseload challenge facing the Court. Indeed, the determination to insist on further incremental changes of the system through the fine-tuning of procedural mechanisms provided by Protocol No 14 is striking.

Halfway through the Interlaken decade, the CDDH's proposals still seemed to be guided by the quest for increased efficiency and cost-effectiveness of the ECtHR's procedures, rather than the need to address the root causes of its backlog problem, thus challenging or reconsidering the object and purpose of the Court within the wider ECHR system. Similar shortcomings became evident at the Copenhagen Conference, where, despite the acknowledgment that national implementation of the Convention is important for securing the long-term effectiveness of the Court, States Parties' emphasis was again on what could be improved 'at Strasbourg' rather than at home. In this regard, civil society organisations expressed their deep regret that the intergovernmental discussions 'once again focus[ed] on the functioning and methods of the Court rather than on meeting existing legal and political commitments on national implementation'.[223] As the NGOs argued, too much attention was given to a collateral problem, while the underlying issue at stake, ie the persistent and systemic deficiencies at the national level, remained sidelined.[224] Consequently, it was highlighted that 'together with the implementation of the Convention obligations at domestic level, the full, consistent and effective execution of judgments remains the most

[220] ibid.
[221] *Draft CDDH Report 2013* (n 207), para 15.
[222] See, Kanstantsin Dzehtsiarou, 'A Bird in the Hand is Worth Two in the Brush: Reform of the European Court of Human Rights' (*ECHR Blog*, 3 December 2015) <https://www.echrblog.com/2015/12/reform-of-european-court-guest-post.html> accessed 29 May 2021.
[223] Joint NGO Statement following the Danish Chairmanishp's High-Level Expert Conference in Kokkedal, Denmark (11 December 2017), 1, stating also that '[b]etter implementation of the Convention at the national level and the full and prompt execution of the European Court of Human Rights ('the Court') judgments are at the core of securing the effectiveness and preserving the overall credibility of the Convention system' <http://www.omct.org/files/2017/12/24636/joint_ngo_statement_on_echr_reform_following_the_kokkedal_meeting__issued_on_11_december_2017.pdf> accessed 29 May 2021.
[224] ibid.

effective way to alleviate the workload of the Court and thus to preserve its longer-term future'.[225] In light of the Copenhagen Conference in 2018, civil society organisations thus insisted on their reform proposals for tackling this challenge, including encouraging the CoM to use more effectively its powers under Article 46(4) ECHR to address cases of prolonged non-execution as well as clarifying the notion of 'enhanced dialogue' between State governments and the ECtHR in order to prevent any political intereference from undermining the Court's authority and independence.[226]

The increasing institutional pressures imposed on the ECtHR as a result of its ever-growing workload contributed, however, to a greater systemic awareness and a logic of fair(er) division of labour among ECHR actors.[227] Following suit from President Costa's 2009 Memorandum, the CDDH stressed that 'in order to ensure the long-term effectiveness of the Convention system, the principle of subsidiarity must be made fully operational' and that it should become the central aim of the Interlaken Conference.[228] Many key stakeholders in the Convention system have gradually started to openly recognise that 'part of the problem in finding long-term solutions to the [ECtHR's] problem […] is that there is no clear information on its causes'.[229] The need to make a clearer and more direct link between the repetitive cases reaching Strasbourg, on the one hand, and the structural and systemic human rights problems at the national level, on the other hand, became more evident.[230] The ECHR system, as the CoE Secretary-General recognised, 'urgently need[ed] new responses to this problem: at national and European levels'.[231] In this regard, 'strengthening the structural integration of the Convention into national legal systems and stronger implementation at national level are essential' and would 'reinvigorate the entire system'.[232] As further acknowledged, '[o]ne cannot blithely blame the Court if systemic problems remain unresolved for years and years' and the ECHR actors 'should also investigate other possibilities' in tackling this challenge, beyond the already proposed technocratic measures directed at 'Strasbourg'.[233] In response, ECHR States encouraged the Court 'to give greater prominence to' the subsidiarity principle and the margin of appreciation doctrine.[234] As Chapter 5 below argues, however, it is not quite clear how this emphasis on subsidiarity is going to remedy the persistent problems identified at the national level.

The Interlaken decade thus signaled a notable shift in the narrative of the Court's reform debate from an almost exclusive, one-dimensional concern with institutional or technical

[225] ibid.
[226] ibid.
[227] See eg, Interlaken Declaration (n 172), para PP6; Brighton Declaration (n 176), paras 4, 10-11, 12(b).
[228] *CDDH Opinion 2009* (n 179), item 10.
[229] *Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference* (n 218), para 24.
[230] ibid, para 20.
[231] ibid.
[232] ibid, para 16.
[233] ibid, para 20.
[234] Brighton Declaration (n 176), para 12(a).

questions regarding efficiency and cost-effectiveness, to an increasing concern with questions regarding the 'constitutional architecture and overriding objectives of the Convention system'.[235] The renewed[236] emphasis on the principles of subsidiarity and shared responsibility was widely supported across the ECHR stakeholders, including States Parties, the ECtHR, the PACE and the CoE Secretary-General, as it carried both a normative and a practical significance.[237] First, it would encourage a greater clarification of the normative relationship between the ECtHR and States' national authorities and, second, from a more practical perspective, it would enable the Court to reduce the high number of repetitive applications before it and, therefore, better control its overall workload.[238] This stance was eventually endorsed at Interlaken and reaffirmed at subsequent high-level conferences on the future of the Court, notably at Brighton in 2012, and other occasions during the reform process,[239] leading to the adoption of Protocols Nos 15 and 16.[240] As former President Spielmann noted, the renewed emphasis on subsidiarity 'is consistent with the essential thrust of the reform process […] which takes as its major premise the need to improve the

[235] Robert Harmsen, 'The Reform of the Convention System' (n 20) 121.

[236] The term 'renewed' is used here to denote the revival of the concept of subsidiarity as a key characteristic of the Interlaken reform process. Subsidiarity was already recognised by former President Ryssdal in 1995 as 'probably the most important of the principles underlying the Convention', reflecting 'a distribution of powers between the supervisory machinery and the national authorities which has necessarily to be weighted in favour of the latter'. See, Rolv Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1996) 1(1) *EHRLR* 18, 24. See also, Interlaken Follow-Up – Principle of Subsidiarity (Note by the Jurisconsult) (ECtHR, 2010) <https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 29 May 2021. The impact of this renewed emphasis on subsidiarity since the beginning of the Interlaken reform process is further analysed in Chapter 5 of the thesis.

[237] *Memorandum of President Costa* (n 172) 4; PACE, *The Future of the Strasbourg Court and Enforcement of ECHR Standards: Reflections on the Interlaken Process* (n 117), paras 12-14; *Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference* (n 218), paras 5-6, 16-17.

[238] See eg, *CDDH Report 2015* (n 183), para 83, stating that '[t]he reduction of the annual influx of cases depends primarily on better implementation of the Convention, including execution of the Court's judgments'. See also, Brussels Declaration 2015 (n 190), 'Action Plan', Section B 'Implementation of the Convention at national level'. See also, Alastair Mowbray, 'The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?' (n 209) 528, noting that 'if "persistent defaulters" […] effectively address their repeated failures to safeguard Convention rights within their domestic jurisdictions then the Court's workload should decline'.

[239] See eg, Interlaken Declaration (n 172) paras PP6, 2, 9; Brighton Declaration (n 176), paras 11-12, 29; Copenhagen Declaration (n 170), paras 7, 10, 28.

[240] Protocol No 15, notably introducing preambular references to the 'principle of subsidiarity' and the 'doctrine of the margin of appreciation' and Protocol No 16, extending the ECtHR's advisory jurisdiction. See also, *Explanatory Report to Protocol No 15*, paras 7-9 <https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 14 June 2021; *Explanatory Report on Protocol No 16*, paras 1-2 <https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf> accessed 14 June 2021. Protocol No 15 enters into force on 1 August 2021, after all ECHR States have ratified it, while Protocol No 16 entered into force on 1 August 2018, following its ratification by ten ECHR States. For a timeline of signatures and ratifications of all Protocols to the ECHR, see, Council of Europe, Treaty Office, <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/webContent/en_GB/7435985> accessed 14 June 2021.

protection of human rights at the domestic level'.[241] Arguably, '[t]his is the only sustainable way to alleviate the huge pressure on the European mechanism'.[242] Consequently, discussions at that point ceased to be limited to 'ongoing technical reform' in the sense that the adopted measures did not intend to leave the Convention system intact.[243] ECtHR Judges have also embraced this (renewed) emphasis on subsidiarity and its importance in securing the long-term effectiveness of the Court in their judicial[244] and extra-judicial undertakings.[245]

As noted above, the growing systemic dimension in the Court's jurisprudence since Brighton has found prominent expression in the further development of the pilot-judgment procedure[246] as well as the more frequent recourse to strike-out decisions,[247] friendly settlements and unilateral declarations.[248] As far as the former two jurisprudential

[241] Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (Speech at Max Planck Institute for Comparative Public Law and International Law, 13 December 2013), 8 <https://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf > accessed 29 May 2021.
[242] ibid.
[243] Jonas Christoffersen and Mikael Madsen, 'Postscript: Understanding the Past, Present and Future of the European Court of Human Rights' in J Christoffersen and M Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2013) 239. Cf, Noreen O'Meara, 'Brighton rocked! Next Steps for Reforming the European Court of Human Rights' (*UK Constitutional Law Association*, 20 April 2012), arguing that 'the changes are […] marginal' and that the Brighton Declaration will not really change how the ECtHR functions <https://ukconstitutionallaw.org/2012/04/20/noreen-omeara-brighton-rocked-next-steps-for-reforming-the-european-court-of-human-rights/> accessed 21 May 2021.
[244] See eg, *Burmych and Others v. Ukraine*, app no 46852/13 (12 October 2017), paras 192-193, reiterating 'the subsidiary nature of the supervisory mechanism established by the Convention, and in particular the primary role played by national authorities' while emphasising 'the importance of the full, effective and prompt execution of judgments and of a strong political commitment by the States Parties in this respect'; *Kurić and others v. Slovenia,* app no. 26828/06 (12 March 2014) paras 136, 143-144, emphasising that 'in the context of systemic, structural or similar violations, the potential inflow of future cases was also an important consideration in terms of preventing the accumulation of repetitive cases and decided that the examination of other similar application should be adjourned pending the adoption of the remedial measures in issue' and *Animal Defenders International v. UK*, app no. 48876/08 (22 April 2013) 108-110 and 112.
[245] See eg, Guido Raimondi, President of the ECtHR, 'Foreword' in *Annual Report 2017 of the ECtHR* (Council of Europe 2018) 8-9 <https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf> accessed 20 April 2021; *Dialogue Between Judges – Subsidiarity: A Two-sided Coin?* (ECtHR Seminar Proceedings, 2015) <https://www.echr.coe.int/Documents/Dialogue_2015_ENG.pdf> accessed 5 May 2021; Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (n 241).
[246] See eg, *Greens and M.T v. United Kingdom* App nos 60041/08 and 60054/08 (11 April 2011); *Yuriy Nikolayevich Ivanov v. Ukraine* App no 40450/04 (15 October 2009). See also, *Lord Woolf Report 2005* (n 40) 39-40; *Group of Wise Persons Report 2006* (n 133), paras 100-105, encouraging the ECtHR to further develop its pilot-judgment procedure already in the 2000s' reform period. For an updated account of the Court's pilot judgments, see *Pilot Judgments – Factsheet* (ECtHR, May 2020) <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 20 April 2021.
[247] See notably, *Burmych and Others v. Ukraine* (n 244).
[248] See eg, *Analysis of Statistics 2018* (ECtHR, January 2019) 4-5 <https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf> accessed 20 April 2021; *ECHR is to Test a New Practice Involving a Dedicated Non-contentious Phase* (ECtHR Press Release, 18 December 2018) <http://hudoc.echr.coe.int/eng-press?i=003-6283390-8191707> accessed 21 May 2021; ECtHR, *Unilateral Declarations: Policy and Practice* (2012) <https://www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf> accessed 21 May 2021. See also,

mechanisms are concerned, despite their potential normative impact in clarifying the conceptualisation of the institutional relationships between the Court and other ECHR actors, their increasingly frequent use, as the Court admitted, has been primarily motivated by the need to drastically tackle its 'serious problem of case overload', especially the part of 'which originates in structural or systemic situations in different contracting States'[249] and, ensure, in this way, 'the long-term effectiveness of the Convention machinery'.[250] Although it is well accepted that the constantly increasing inflow of repetitive cases poses a 'general threat to the proper functioning of the Convention system', more emphasis ought to be placed on the root causes of this phenomenon by acknowledging that 'the effective execution of the Court's judgments is crucial in securing the long-term effectiveness of the Convention's supervisory bodies'.[251] Indeed, the fact that the ECtHR was 'forced to conclude'[252] that the disposal of individual applications – especially in a summary manner – should be made on account of a heavy caseload and as 'a matter of judicial policy only'[253] looks rather inconsistent with the Court's principled approach to addressing the serious challenge of ineffective implementation of the Convention domestically. At the same time, it does little to address and resolve the underlying causes of repetitive applications reaching Strasbourg.[254] Instead, it constitutes 'a major retrograde step for the Convention mechanism' and the overarching aims it seeks to achieve in securing its long-term future.[255]

Following Judge Zupančič and the dissenting Judges' logic in *Broniowski*[256] and *Burmych*[257] respectively, the 'damage to the effectiveness and credibility of the Convention and its supervisory mechanism' and the 'threat to […] the authority of the Court' is *not*, in reality, caused by the growing 'deficit between applications introduced and applications disposed of' *per se* as the ECHR States 'noted with deep concern' at Interlaken and subsequent high-level conferences.[258] Instead, the underlying challenge to the effectiveness and authority of the ECtHR is the ineffective implementation of the Convention at the national level, as

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Helen Keller, Magdalena Forowicz and Lorenz Engi, *Friendly Settlements before the European Court of Human Rights* (OUP 2010) 59, 65-67, 75-76; Lize Glas, 'Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant' (2018) 25(5) Maastricht Journal or European and Comparative Law 607, 624-626; Nino Jomarjidze and Philip Leach, 'What Future for Settlements and Undertakings in International Human Rights Resolutions?' (*Strasbourg Observers*, 15 April 2019) <https://strasbourgobservers.com/2019/04/15/what-future-for-settlements-and-undertakings-in-international-human-rights-resolution/> accessed 29 May 2021.

[249] *Burmych and Others v. Ukraine* (n 244), para 210.

[250] ibid, para 58.

[251] ibid, para 218.

[252] ibid, para 199.

[253] ibid, Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc, para 1.

[254] ibid, para 26.

[255] ibid, para 13.

[256] *Broniowski v. Poland* (n 126), Concurring Opinion of Judge Zupančič.

[257] *Burmych and Others v. Ukraine* (n 244), Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc.

[258] See, Interlaken Declaration (n 172), paras PP7-8; Brighton Declaration (n 176), para 5.

manifested by the delayed or prolonged non-execution of the Court's judgments and the deep-rooted structural or systemic domestic deficiencies leading to repetitive human rights violations, which the ECtHR has a duty to address in its jurisprudence rather than avoiding for the sake of procedural efficiency.[259]

As previous chapters argued, it is highly doubtful whether transferring the judicial responsibility on to the CoM could be seen compatible with how the ECtHR itself has framed its own major challenge throughout the Interlaken process.[260] This observation becomes even more problematic if one considers that the Court's judicial responsibility is transferred to a political body, where the respondent State itself forms part of a decision-making process that failed to effectively resolve the root causes of the identified issues in the first place.[261] In doing so, the ECtHR not only allows for additional repetitive cases on the same matters to reach it anew but also fails to assist (and indeed compel) the CoM, and consequently the States, to effectively address and resolve the underlying root cause of the problem. Consequently, any reform measures adopted, 'must be such as to remedy the systemic defect underlying the Court's finding of a violation'.[262] Otherwise, adoption of measures solely on the basis of reducing the Court's backlog without effectively addressing or assisting in the tackling of the underlying systemic and structural problems at national level risks invalidating the *raison d'être* of the ECtHR as a supranational human rights court and transforming it, instead, into a 'filtering body for the Committee of Ministers'.[263]

The greater systemic awareness among ECHR stakeholders, however, did not necessarily reflect a uniform understanding of the subsidiary nature of the Court. Even when adopting Protocol No 15, the CDDH gave clear instructions that any reference to the principle of subsidiarity and margin of appreciation in the new Protocol should be kept to a minimum in order to 'accommodate potentially conflicting positions' among States, mainly as to the role

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[259] See nn 126-127 above (*Broniowski*, Concurring Opinion) and accompanying text. See also, *Burmych and Others v. Ukraine* (n 244), Joint Dissenting Opinion of Judges Yudkivska, Sajó, Bianku, Karakaş, De Gaetano, Laffranque and Motoc, paras 3-9.

[260] See relevant analysis in Chapters 2 and 3 of the thesis. For academic criticism of the usefulness and effectiveness of the infringement proceedings under Article 46(4 ECHR), see eg, Kanstantsin Dzehtsiarou, 'How Many Judgments Does One Need to Enforce a Judgment? The First Ever Infringement Proceedings at the European Court of Human Rights' (*Strasbourg Observers*, 4 June 2019) <https://strasbourgobservers.com/2019/06/04/how-many-judgments-does-one-need-to-enforce-a-judgment-the-first-ever-infringement-proceedings-at-the-european-court-of-human-rights/> accessed 12 June 2021; Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66(2) *International & Comparative Law Quarterly* 467.

[261] ibid. See also, Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46' (2014) 32(3) *Netherlands Quarterly of Human Rights* 235; Hellen Keller and Cedric Marti, 'Reconceptualizing Implementation: the Judicialization of the Execution of the European Court of Human Rights' Judgments' (2015) 26(4) *EJIL* 829.

[262] *Broniowski v. Poland* (n 126), Concurring Opinion of Judge Zupančič.

[263] *Burmych* (n 244), Joint Dissenting Opinion, para 6.

of the ECtHR under these principles.[264] As the CoE Secretary-General highlighted, the Interlaken process made apparent that there is a growing number of States which now openly challenge the authority of the ECtHR by refusing to comply with its judgments while invoking supremacy of national constitutions, parliaments or public opinion.[265] Arguably, this growing threat of resistance to the authority of the ECtHR, based on a misguided understanding, or even deliberate misframing, of its subsidiary role, started to gain traction among CoE Member States post-Brighton and now risks becoming 'contagious' with 'far-reaching deleterious consequences' that could well signal 'the beginning of the end of the ECHR system'.[266] Unsurprisingly, therefore, despite States' numerous statements emphasising the importance of effective national implementation in safeguarding the effectiveness and well-functioning of the ECtHR, hardly any concrete reform measures are to be found in the declarations made during the Interlaken process answering to former President Costa's initial question of 'what sort of Court […] do [States] want for the future?'.[267]

The general reluctance of ECHR stakeholders to firmly and unequivocally recognise the lack of effective implementation of Convention standards domestically as the underlying challenge facing the Court encourages certain States to project a distorted formulation of the subsidiarity principle.[268] The latest in the series of conferences on the reform and future of the ECtHR at Copenhagen exemplified this observation as the Draft Declaration sought to strengthen primary national protection of Convention rights, while diluting the Court's

[264] CDDH Report (31 October 2012) DH-GDR(2012)R2, para 6 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804706b4> accessed 31 May 2021.

[265] See eg, Council of Europe Secretary-General, Speech at the 126th Session of the Committee of Ministers (18 May 2016) <https://www.coe.int/en/web/secretary-general/-/126th-session-of-the-committee-of-ministers> accessed 31 May 2021; CoE Secretary-General, 'Enhancing national mechanisms for effective implementation of the European Convention on Human Rights' (23 October 2015) <https://www.coe.int/en/web/secretary-general/speeches-2015-thorbjorn-jagland/-/asset_publisher/TQ9ylWpDFtLP/content/international-conference-enhancing-national-mechanisms-for-effective-implementation-of-the-european-convention-on-human-rights-?inheritRedir> accessed 31 May 2021.

[266] Commissioner for Human Rights, *Memorandum to Nick Gibb MP* (20 October 2013) 3 <https://rm.coe.int/16806db5c2> accessed 31 May 2021. See also, 'Spielmann: UK Leaving ECHR would be a "political disaster"' (BBC, 14 January 2014), noting, inter alia, that withdrawing from the ECHR would undermine the 'credibility of the United Kingdom when it comes to promoting human rights in other parts of the world' <https://www.bbc.co.uk/news/av/uk-politics-25729321> accessed 31 May 2021; Paulo Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' (2018) 2 *European Human Rights Law Review* 119, 127, noting the contagious effect of non-compliance with ECtHR judgments.

[267] *Memorandum of President Costa* (n 172) 3.

[268] Similar attempts to alter the definition of related concepts, such as 'shared responsibility', 'dialogue' and 'participation', also became evident at the Copenhagen Conference, aiming at re-balancing the Convention protection system by increasing State intervention in Court procedures while weakening the Court's supervisory role in the process. See eg, Janneke Gerards and Sarah Lambrecht, 'The Draft Copenhagen Declaration – Food for Thought' (n 171); Jacques Hartmann, 'A Danish Crusade for the Reform of the European Court of Human Rights' (*EJIL:Talk!,* 14 November 2017) <https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/> accessed 21 May 2021.

subsidiary supervisory function.[269] Although the final Copenhagen Declaration reiterated that 'strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection', one cannot disregard that attempts to bolster subsidiarity in the latest reform stage have also resulted in increased attempts to weaken or restrict the Court's jurisdiction regarding certain Convention-related disputes or (further) delimit its supervisory role to a merely procedural, rather than substantive, review.[270] The fact that certain States saw the Interlaken process as a key opportunity to instrumentalise the principle of subsidiarity in order to make the Court's caseload more workable and achieve greater efficiency of procedures, instead of emphasising the importance of national authorities' responsibility to effectively implement the ECHR domestically, is indeed a risky enterprise that puts the future of the ECtHR and the wider ECHR system in more danger.[271] Although States' attempts at Copenhagen (and the run-up to the conference) were arguably a type of '"pushback" within existing rules rather than a "backlash" seeking to fundamentally changing the rules and the authority of the Court', as the following chapter demonstrates, the (potentially) negative impact on the ECtHR's authority and judicial independence, as a progressive human rights court, is already evident.[272]

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[269] *Draft Copenhagen Declaration*, paras 25-26, 54 <https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf> accessed 31 May 2021. See also, *High Level Conference on the Future of the European Court of Human Rights* (Izmir Declaration, 2011), Follow-up Plan para A(3), stating that 'the Court is not an immigration Appeals Tribunal' <https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 20 April 2021. For academic commentary, see eg, Ian Cram, 'Protocol 15 and Articles 10 and 11 ECHR – The Partial Triumph of Political Incumbency Post Brighton' (2018) 67 *International and Comparative Law Quarterly* 477, 478. Cf, *Opinion on the Draft Copenhagen Declaration* (ECtHR, 19 February 2018) paras 9-10 <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf> accessed 20 April 2021.

[270] Copenhagen Declaration (n 170), para 10. For commentary on the risks of a distorted understanding of the subsidiarity principle on the ECtHR and its future role, see, *Joint NGO Response to the Draft Copenhagen Declaration* (13 February 2018) <https://www.icj.org/wp-content/uploads/2018/02/Europe-JointNGO-Response-Copenhagen-Declaration-Advocacy-2018-ENG.pdf> accessed 31 May 2021; Sarah Lambrecht, 'Undue Political Pressure is not Dialogue: The Draft Copenhagen Declaration and its Potential Repercussions on the Court's Independence' (*Strasbourg Observers*, 2 March 2018) <https://strasbourgobservers.com/2018/03/02/undue-political-pressure-is-not-dialogue-the-draft-copenhagen-declaration-and-its-potential-repercussions-on-the-courts-independence/> accessed 26 May 2021; Andreas Follesdal and Geir Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' (*EJIL:Talk!*, 22 February 2018) <https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/> accessed 12 June 2021.

[271] See eg, Sir Nicolas Bratza, *Speech at the Brighton High Level Conference* (n 130) 2-3, stressing that the Court is 'uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it', while also noting that '[t]he true test of any proposed amendments is the extent to which it will actually help the Court cope more easily with the challenges facing it'.

[272] Mikael Rask Madsen, 'Two-level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights' (2020) 22(4) *British Journal of Politics and International Relations* 728, 729.

4.6 Conclusion

Throughout the process contemplating the reform and future of the ECtHR there has been an omnipresent danger for all relevant stakeholders involved in the debate. That is, the confusion between the symptoms of the Court's malfunctioning and the underlying, fundamental causes of it. The exponential growth of its backlog was consistently framed as the primary threat to the effectiveness of the wider ECHR system and, arguably, the biggest challenge the ECtHR has been faced with in its entire history. Yet, ECHR stakeholders have been too slow in moving away from a purely institutional/technical understanding of the Court's backlog challenge and for a long period of time appeared hesitant to engage with more normative questions of deeper constitutional importance underpinning the very nature and limits of the ECtHR's remit within the wider ECHR system.

The major restructuring of the Convention control mechanism under Protocol No 11, albeit vital for the survival of the system, did not in itself present a sustainable and sufficient solution to equip the new Court for the growing challenges of the future. Little consideration was given to wider, underlying systemic issues concerning, for example, the role and purpose that the new Court should serve in an enlarged, diverse Europe and its relationship with national political and legal actors. Based on the mantra that the ECtHR became the 'victim of its own success', the frame of the entire reform debate during the 2000s continued to be driven by the misconception that the workload and backlog challenges facing the Court principally result from its own institutional deficiencies which prevent it from examining and ruling on incoming applications in a timely and efficient manner. Reform measures of primarily technical nature, therefore, were adopted to optimise the Court's working methods and improve its ability to manage more efficiently and cost-effectively its growing backlog of cases. Advances at institutional level, however, were again outstripped by the continuous increase in incoming applications, thus rendering any measures adopted already outdated and incapable of producing sustainable results. Inevitably, by largely disregarding questions underpinning the very fabric, ie object and purpose, of the Court, the *real* threat to its long-term effectiveness could not be identified and resolved and, as such, its future would remain in serious danger.

The launch of the Interlaken decade has signaled a notable shift in the narrative of the reform debate from an almost exclusive, one-dimensional concern with institutional or technical questions regarding efficiency and cost-effectiveness to an increasing concern with questions regarding the deeper political purpose of the Court. Perhaps for the first time in the reform process, the root causes of the growing number of applications before the Court and its unsustainable caseload was directly linked more to the failure of Contracting Parties to fully and promptly execute ECtHR judgments, rather than to institutional shortcomings in the internal functioning of the ECtHR itself. In this respect, a closer attention was drawn to

the need for ECHR States to effectively resolve their domestic structural and systemic deficiencies. Consequently, the lack of effective implementation of the Convention at the national level was identified as *the* major, underlying challenge facing the ECtHR, whose resolution, admittedly, falls outside the direct control of the Court. By acknowledging that 'it is common ground that the long-term effectiveness, indeed survival, of the Convention system depends on better implementation at national level', the Interlaken reform process marked a greater systemic turn for the protection of human rights, highlighting the need for the ECHR political and judicial actors, both at national and European level, to honour their 'shared responsibility' commitment in order for the ECHR system to function effectively as a whole.[273]

Essentially, what the above framing analysis clearly demonstrated is that, throughout the various reform stages, the debate on the reform and future of the ECtHR was guided not by measures that could address and resolve the real, underlying challenges facing the Court, but rather by intermediate solutions that the ECHR States were prepared to accept, even if their effectiveness in the long-term was already doubtful. Also, despite the growing systemic turn noted above, the renewed emphasis on the principle of subsidiarity appears to be deployed more as a negotiating euphemism which allows ECHR stakeholders to engage in a continuous, yet inconclusive, debate on the reform and future of the ECtHR. Normative conflicts as to the (future) role and purpose of the ECtHR due to different understandings and interpretations of the subsidiarity concept have usually been mitigated by a common ground of pragmatism. Strengthening the subsidiary role of the ECtHR would potentially mean that national authorities could enjoy greater deference to determine Convention-related disputes domestically while limiting European oversight. At the same time, both the Court and the CoM can achieve their long-standing goal to gradually reduce their respective dockets. The way this emphasis on subsidiarity finds practical application in the ECHR context post-Brighton, and the extent to which it is capable of realising the aims of the Interlaken process in securing the ECtHR's future and long-term effectiveness will be further examined in subsequent Chapter 5.

The 2000s reform process was characterised by President Wildhaber as a 'missed opportunity' due to its failure to clearly rearticulate the relationship of the ECtHR with other ECHR actors, notably national political and judicial authorities, and conclusively determine what role and function the Court should serve in the future. On this same basis, one may reasonably argue, the end of the Interlaken reform process presents a yet another missed opportunity to guarantee the long-term effectiveness of the Court.[274] Not only this, but the general reluctance of ECHR stakeholders to substantially depart from this so far inadequate

[273] *Preliminary Opinion of the Court in Preparation for the Brighton Conference* (n 208), para 26.
[274] Stefanos Xenofontos, 'The End of the Interlaken Process: A (Yet Another) Missed Opportunity to Guarantee the Long-term Future of the ECtHR?' (*Strasbourg Observers*, 29 April 2020) <https://strasbourgobservers.com/2020/04/29/the-end-of-the-interlaken-process-a-yet-another-missed-opportunity-to-guarantee-the-long-term-future-of-the-ecthr/> accessed 12 June 2021.

reform framework has already shown that the Court's future, and the protection of human rights in Europe more generally, have become even more uncertain and fragile.

Chapter 5
Brighton and beyond: Critical analysis of the ECtHR's 'constitutionalist' reform measures

'The future imagined at Brighton is one where the centre of gravity of the Convention system should be lower than it is today, closer temporally and spatially to all Europeans, and to all those under the protection of the Convention'.[1]

5.1 Introduction

Subsidiarity has probably become *the* key concept in the legal and political vocabulary since the beginning of the Interlaken process, based on which reform proposals have been formulated during the Court's latest reform stage. Despite gaining considerable attention during the last decade, the principle of subsidiarity is certainly not a novel concept within the ECHR context. Indeed, already in the 1990s, the then President of the Court, Ryssdal, referred to it as 'probably the most important of the principles underlying the Convention', reflecting 'a distribution of powers between the supervisory machinery and the national authorities which has necessarily to be weighted in favour of the latter'.[2] In acknowledging this established position, current President Spano noted that the developments in relation to subsidiarity in the ECtHR's recent case law amount to 'a further refinement or reformulation of pre-existing doctrines, influenced by recent Declarations of the Member States'.[3]

The Copenhagen Declaration claimed that the reform process has been successful in 'strengthening subsidiarity'.[4] The present chapter seeks to critically assess the validity of this claim. In parallel, it will also ask whether this development, if proven true, has indeed been a result of the reform process and the measures adopted by the ECHR stakeholders with a view to securing the effectiveness and long-term future of the Court. As will be shown below, developments in the way the ECtHR performs its judicial review have shown that the

[1] Dean Spielmann, 'Whither the Margin of Appreciation' (2014) 67 *UCL-Current Legal Problems* 49, 65.
[2] Rolv Ryssdal, 'The Coming of Age of the European Convention on Human Rights' (1996) 1(1) EHRLR 18, 24. See also, Interlaken Follow-Up – Principle of Subsidiarity (Note by the Jurisconsult) (ECtHR, 2010) <https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 12 June 2021. For a reference to subsidiarity in the Court's early jurisprudence, see, *Belgian Linguistic* (merits), Series A no 6 (23 July 1968), para 10, recognising the 'subsidiary nature of the international machinery of collective enforcement established by the Convention'.
[3] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *HRLR* 487, 491.
[4] *Copenhagen Declaration* (23 April 2018), para 4 <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed 20 April 2021.

Court is inclined to engage in a (re)distribution of powers between itself and other actors within the European system for the protection of human rights. In doing so, it gives greater recognition, thus being more deferential, to those States whose national authorities are considered to faithfully apply the Convention standards domestically. Arguably, this increasingly deferential approach by the Court, facilitated by greater prominence for the principle of subsidiarity, reflects a 'sign of maturity' and a natural step in the evolution of the Convention system.[5] Whether this observation holds true or whether the Court's changed course of action is a (direct or indirect) consequence of, or reaction to, the relatively hostile political climate against it since the beginning of the Interlaken process cannot be determined with precision. Indeed, the timing between that growing criticism and the arrival of the so-called 'age of subsidiarity'[6] is striking and cannot be disregarded.[7] Greater prominence for the principle of subsidiarity also indicates that the ECtHR is now inclined to exercise greater self-restraint with regard to certain Convention-related issues. Arguably, this may present a good opportunity for the Court to clearly articulate a stance over judicial self-restraint (and similarly judicial activism) and how this is reconciled with its (future) role and function within the ECHR system.

The High-Level Conference at Brighton was a decisive moment in the debate on the reform and long-term future of the ECtHR. As Chapter 4 previously showed, the 'constitutionalist' measures introduced with the subsequent adoption of Protocol No 15, in particular, have sought to shift the dynamics of reform away from the original intent that motivated the launch of the Interlaken process. Instead, States have explicitly aspired to influence and control the future role of the Court based on their own national interests, rather than those of the wider ECHR system. The ECtHR's adoption of an 'appeasement approach'[8] post-Brighton, as I argue in the present chapter, appears to be a conscious decision to contain the increasing backsliding of certain ECHR States on their Convention obligations. This stance, nevertheless, has arguably been misguided as, almost a decade later, it has proved not only incapable of achieving this aim, but also counter-productive since State backlash against the

[5] Oddný Mjöll Arnardóttir, 'Organised Retreat? The Move from 'Substantive to 'Procedural' Review in the ECtHR's case law on the Margin of Appreciation' (2015) *ESIL Conference Papers No 4/2015,* 21-22. See also, Robert Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) *HRLR* 473, 473-475; Paul Mahoney, 'The Changing Face of the European Court of Human Rights: Its Face in 2015' (2015) 1 *Queen Mary HRLR* 4, 9-10.

[6] Robert Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity', (n 3) 491. Due to the importance of the passage, it is worth citing in full: '[I] would even go so far as to claim that the next phase in the life of the Strasbourg Court might be defined as the *age of subsidiarity*, a phrase that will be manifested by the Court's engagement with empowering Member States to truly "bring rights home", not only in the UK but all over Europe'. (emphasis in the original).

[7] See n 5 above.

[8] Helen Fenwick, for instance, has used the term 'appeasement approach' to problematise the ECtHR's jurisprudential stance towards certain States, as evidenced by its retraction of previous rulings with the purpose of mitigating criticisms against it for being too interventionist. See, Helen Fenwick, 'Enhanced Subsidiarity and a Dialogic Approach – Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg against the UK?' in Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 193.

Court continues. In other words, the Court's decision to give (more) way to State demands, as expressed at Brighton, by virtue of an enhanced focus on subsidiarity was driven by a mere *hope* that such an approach would be sufficient to breathe fresh air in the tense relationships between the Court and the Contracting Parties and eventually revitalise the latter's commitment to the protection of Convention rights. As I argue in the chapter below, in doing so, the Court has been engaging in a dangerous act of Mithridatism,[9] by means of a more deferential approach to decision-making, in an effort to appease a growing political backlash against it. Yet, there is no indication so far guaranteeing that this stance will prove effective in resolving the underlying challenge facing the Court, as identified and explained in previous chapters, in the medium or long-term. Instead, the Court's appeasement approach has arguably exacerbated the underlying problem facing the ECtHR and maintained the non-effective functioning of the Court.

Subsidiarity is an integral part of the European human rights architecture and considered a fundamental principle without which the Convention system cannot be viable and effective. A sustainable concept of subsidiarity, therefore, cannot unduly minimise, or even exclude, the role of the ECtHR from the European human rights decision-making process. Subsidiarity presupposes co-existence and interaction between the national and European levels of rights protection. Arguably, the continuous development of the subsidiarity principle and the doctrine of margin of appreciation by the ECtHR in its jurisprudence makes States' insistence on adding a preambular reference to these concepts as part of Protocol No 15 rather questionable.[10] As former ECtHR President Bratza noted at the Brighton Conference, any 'Convention amendment must be consistent with the object and purpose of the treaty and must satisfy rule of law principles, notably that of judicial independence'.[11] Former President Bratza further questioned whether this proposed measure of adding a reference to subsidiarity in the Protocol's Preamble would 'actually help the Court cope more easily with the challenges facing it'.[12] Apart from its symbolic character, as a reaffirmation of the States' concerns regarding the allegedly interventionist role of the Court, the added value of the new recital on how the subsidiary relationship between the Contracting Parties and the

[9] The metaphor of 'Mithridatism' refers to the practice of seemingly protecting oneself against a poison by self-administering small, yet gradually increasing, doses of the same substance aiming to develop immunity. Achieving immunity through this practice, however, is not guaranteed, and fatal implications may arise in the process.

[10] In support of this argument, see also, William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 54, acknowledging that an amendment of an international treaty's preamble is an 'exceedingly unusual development' in international law, and at 58, characterising the addition of 'subsidiarity' and 'margin of appreciation' in the ECHR Preamble as 'unusual initiative'.

[11] Sir Nicolas Bratza, Speech at the Brighton High Level Conference (18-20 April 2012) 2, adding also that the Court is 'uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it' <https://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf> accessed 31 May 2021.

[12] ibid, 3. See also subsequent comments at 6, noting the Court's dissatisfaction with the proposed Preamble amendments: 'we have difficulty in seeing the need for, or the wisdom of, attempting to legislate for it in the Convention, any more than for the many other tools of interpretation which have been developed by the Court in carrying out the judicial role entrusted to it'.

Strasbourg institutions can be better understood remains doubtful. Explicit reference to subsidiarity and margin of appreciation in the Convention, however, is likely to exert additional pressure on the ECtHR to incorporate these principles even more in its case law. As shown below, the renewed focus on subsidiarity can only be effective vis-à-vis certain States, ie those which cooperate with the Court and undertake their Convention responsibilities seriously and in good faith. Moreover, I will seek to demonstrate that the Court's appeasement approach risks transforming it from a subsidiary to a redundant judicial body, with adverse consequences for the protection of human rights across the Continent. Finally, this apparent appeasement approach shifts the reform dynamics toward the more dominant stakeholders within the ECHR system (ie the States) and tends to serve their own interests. Essentially, the chapter argues that this practice gradually dilutes the credibility, and thus authority, of the ECtHR and makes it all the more difficult for the Court to abandon its growing deferential practice in the long-term in fear of further State backlash without further impacting on its legitimacy as a supranational human rights court.

5.2 The 'Brighton Effect': The Brighton Conference as a turning point in the Court's reform process

Prior to the Brighton Conference in 2012, certain ECHR States, including Russia,[13] Turkey[14] and the UK,[15] had occasionally shown defiance towards the ECHR regime. Actions of resistance had been previously observed, for example through criticism of, partial compliance or non-compliance with specific judgments of the Court and non-cooperation in executing certain cases.[16] The nature of the resistance experienced in the run up to as well

[13] See eg, *Burdov v Russia (No 2)* App no 33509/04 (15 January 2009). See also, Philip Leach, Helen Hardman and Svetlana Stephenson, 'Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? *Burdov* and the Failure to Implement Domestic Court Decisions in Russia' (2010) 10(2) *Human Rights Law Review* 346; Aaron Matta and Armen Mazmanyan, 'Russia: In Quest for a European Identity' in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights – Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2016) 481-490; Azar Aliyev, 'Decision of the Russian Constitutional Court on Enforcement of the Yukos Judgment: The Chasm Becoming Deeper' (2018) 6 *European Human Rights Law Review* 578, 579-580.

[14] See eg, Olgun Akbulut, 'Turkey: The European Convention on Human Rights as a Tool for Modernisation' in Patricia Popelier *et al*, *Criticism of the European Court of Human Rights – Shifting the Convention System: Counter-dynamics at the National and EU Level* (n 13) 416-422, 465.

[15] See eg, Roger Masterman, 'The United Kingdom: From Strasbourg Surrogacy towards A British Bill of Rights?' in Patricia Popelier *et al*, *Criticism of the European Court of Human Rights – Shifting the Convention System: Counter-dynamics at the National and EU Level* (n 13) 453-457. See also, David Cameron, 'Balancing Freedom and Security – A Modern British Bill of Rights' (*Speech to the Centre for Policy Studies*) (*The Guardian*, 26 June 2006) <https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution> accessed 12 June 2021; Dominic Grieve, 'Can the Bill of Rights Do Better than the Human Rights Act?' (Guest Lecture, Middle Temple Hall, 30 November 2009); *Conservative Manifesto 2010*, 79-80 <https://general-election-2010.co.uk/2010-general-election-manifestos/Conservative-Party-Manifesto-2010.pdf> accessed 12 June 2021.

[16] See eg, Marc Bosuyt, 'Judges on Thin Ice: The European Court of Human Rights and the Treatment of Asylum Seekers' (2007) *Inter-American and European Human Rights Journal* 3; Leonard Hoffman, 'The Universality of Human Rights' (2009) 125 *LQR* 416; Barbara Oomen, 'A Serious Case of Strasbourg-bashing? An Evaluation of

as after the Brighton Conference, however, went well beyond this and materialised by States threatening, for example, to withdraw from the ECtHR's jurisdiction and denounce the Convention.[17] Certain Contracting Parties, older and newer signatories to the ECHR alike, thus argued against the necessity and importance of the ECHR control mechanism and pleaded that an exclusively national system of human rights protection, independent from any international overview, would provide equivalent or better protection than the ECtHR, making the latter's role in the national system redundant.[18] Such State resistance, arguably amounting to 'backlash', is also manifested in attempts to narrow the jurisdiction of the Court and constrain its authority or competence when reviewing the compliance of State conduct with the Convention.[19] In the UK, for instance, it was not until the ECtHR decided against the government on a series of politically sensitive issues, such as national security, asylum and migration, and prisoners' voting rights, that resistance against the Court escalated so as to amount to State backlash, as described above.[20]

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the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands' (2016) 20(3) *IJHR* 407; Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (n 8).

[17] See n 15 above. See also, Wayne Sandholtz, Yining Bei and Kayla Caldwell, 'Backlash and International Human Rights Courts' in Alison Brysk and Michael Stohl (eds), *Contracting Human Rights: Crisis, Accountability and Opportunity* (Elgar, 2018) 159-160 and Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14(2) *International Journal of Law in Context* 197, 199-200. See further, Richard Ekins, *Protecting the Constitution: How and Why Parliament should Limit Judicial Power* (Policy Exchange, 2019) 8, advising the UK Government to 'take back control from the European Court of Human Rights' by 'considering not complying with select judgments of the [ECtHR] that brazenly depart from the terms of the European Convention on Human Rights' <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf> accessed 12 June 2021.

[18] See eg, Sarah Lambrecht, 'Bringing Rights *More* Home: Can a Home-grown UK Bill of Rights Lessen the Influence of the European Court of Human Rights?' (2014) 15(3) *German Law Journal* 407; Erik Voeten, 'Populism and Backlashes against International Courts' (2020) 18(2) *Perspectives on Politics* 407; Mikael Rask Madsen, 'Two-Level Politics and the Backlash against International Courts: Evidence from the Politicisation of the European Court of Human Rights' (2020) 22(4) *British Journal of Politics and International Relations* 728; Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 *International Studies Quarterly* 770. See also, Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law* (Conservative Party 2014).

[19] Wayne Sandholtz *et al*, 'Backlash and International Human Rights Courts' (n 17) 160 and Mikael R Madsen *et al,* 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (n 17) 206.

[20] Wayne Sandholtz *et al*, 'Backlash and International Human Rights Courts' (n 17) 166-167; Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79(1) *Law and Contemporary Problems* 141, 144. See also, David Cameron, *Speech on the European Court of Human Rights* (25 January 2012) <https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights> accessed 12 June 2021. For an analysis of how controversial judgments prior to Brighton affected the relationship between the UK and the ECtHR, see eg, Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *HRLR* 503; Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (n 8); K Brayson, 'Securing the Future of the European Court of Human Rights in the face of UK Opposition – Political Compromise and restricted rights' (2017) 6 *HRLR* 53; Martha

As already discussed in Chapter 4, the High-level Conference in Brighton is often regarded as a significant turning point in the ECtHR's reform process, in particular within the Interlaken process on the future of the Court. At Brighton, ECHR States attempted to shift the focus of the reform from technical tinkering aimed at enhancing the institutional efficiency and cost-effectiveness of the ECtHR to a greater emphasis on the constitutional challenges facing it. For the first time during the reform process, issues concerning the very legitimacy, authority, future role of the Strasbourg Court and its relationship with other actors within the ECHR system, especially at national level, were seriously addressed.[21] The Brighton Declaration, therefore, could be distinguished from previous declarations on the reform of the ECtHR as it goes beyond the identification of technical and institutional matters and, instead, openly addresses questions of deeper constitutional importance about the Court's future. Brighton, in this sense, highlighted that the jurisdiction of the ECtHR was no longer beyond political debate and signalled the beginning of a new relationship between the Court and States' national authorities. The 2012 Brighton Declaration also stands out in comparison with previous reform statements as it was the first instance where the quality of the Strasbourg Court's judgments and judges was directly criticised and where reform was based on the need for national authorities to assume a more central role in interpreting and developing the Convention.[22] Finally, the Brighton Conference constitutes a turning point in the Court's reform process as it marks a shift toward a renewed, greater emphasis upon the primary responsibility of ECHR States' role in safeguarding the effective realisation of Convention rights and freedoms.

Against this backdrop, subsequent Protocols Nos 15 and 16 were explicitly designed to 'rebalance' the ECHR system in favour of national authorities, although the actual content of these protocols was also carefully framed to imply the Court's empowerment.[23] Essentially, among the various reform measures Protocol No 15 introduces, for present purposes the focus will be on the direct references to the principle of subsidiarity and the doctrine of the margin of appreciation that were inserted into the Preamble of the Convention.[24] It is

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Routen, 'Examining the "Backlash" against the European Court of Human Rights in the United Kingdom' (2019) 9(2) *King's Student Law Review* 75.

[21] See eg, Jonas Christoffersen and Mikael Rask Madsen, 'Postscript' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2013) 240-242.

[22] *High-Level Conference on the Future of the European Court of Human Rights* (Brighton Declaration, 2012) para 22, 25(c) <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 20 April 2021. See also, Oddný Mjöll Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights' (2018) 9 *Journal of International Dispute Settlement* 223, 224; Mikael R Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (n 20) 169.

[23] The need for 'rebalancing' the relationship between ECHR States and the ECtHR was noted by the UK Prime Minister prior to the Brighton Conference, see, David Cameron, *Speech on the European Court of Human Rights* (n 20). See also, Jonas Christoffersen and M Madsen, 'Postscript' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP, 2013) 241.

[24] Explanatory Report to Protocol No 15, paras 7-9 <https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 14 June 2021. Following the entry into force of Protocol No 15 on 1 August 2021, the added recital to the Preamble will read:

suggested that ECHR States may have had recourse to such a 'constitutionalist' reform measure in an attempt to persuade the ECtHR to take a more 'State friendly' approach by giving '*great prominence to and apply[ing] consistently these principles in its judgments*'.[25] The substantial Convention amendments introduced under Protocol No 15 could be seen as a culmination of the roadmap for the reform of the Court established at Interlaken, where States 'invited' the ECtHR to 'avoid reconsidering questions of fact or national law that have been considered by national authorities' while '[c]onfirming in its case law that it is not a fourth-instance court'.[26] In highlighting the importance of subsidiarity, States further requested that 'both *the Court* and the States *must* take [it] into account'.[27] As a result, and in line with the framing analysis in Chapter 4, this is the first time in the reform process where the ECtHR's reluctance to intervene in national authorities' considerations of 'question of fact or national law' is explicitly portrayed as a measure to enhance 'the authority and credibility of the Court' and, thus, its long-term effectiveness.[28]

Although the adoption of Protocol No 15 may be seen as States' "mission accomplished" following Brighton, the pursuit of even greater prominence to the principle of subsidiarity through, *inter alia*, an increasingly enlarged margin of appreciation, continued throughout the rest of the Interlaken reform process.[29] More specifically, calls in subsequent declarations for the Court 'to remain vigilant' in upholding the margin of appreciation and to

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'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'. See, Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms (2013) <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf> accessed 12 June 2021. See also, 'Italy ratified the Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms' (21 April 2021) <https://www.coe.int/en/web/human-rights-rule-of-law/-/italie-ratified-the-protocol-no-15-amending-the-convention-for-the-protection-of-human-rights-and-fundamental-freedoms> accessed 12 June 2021.

[25] (Emphasis added). Brighton Declaration (n 22) para 12. For a commentary on the drafting of Protocol No 15, see, William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 74-80. See also, Andreas Føllesdal, 'Subsidiarity to the Rescue for the European Courts? Resolving Tensions between the Margin of Appreciation and Human Rights Protection' in Dietmar Heidermann and Katja Stoppenbrink (eds), *Join or Die – Philosophical Foundations of Federalism* (de Gruyter 2016) 251.

[26] *High Level Conference on the Future of the European Court of Human Rights* (Interlaken Declaration, 19 February, 2010), Action Plan, para 9(a) <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 April 2021; High Level Conference on the Future of the European Court of Human Rights (Izmir Declaration, 27 April 2011), Follow-up plan, section F, para 2(c) <https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 20 April 2021.

[27] (emphasis added). Izmir Declaration (n 26), para 5.

[28] Jon Petter Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (2013) 31(1) *NJHR* 28, 33.

[29] See eg, Mikael Rask Madsen and Jonas Christoffersen, 'The European Court of Human Rights' View of the Draft Copenhagen Declaration' (*EJIL:Talk!,* 23 February 2018), noting that 'there has been increased demand for subsidiarity since the Brighton Declaration' <https://www.ejiltalk.org/the-european-court-of-human-rights-view-of-the-draft-copenhagen-declaration/> accessed 29 May 2021.

further develop the subsidiarity principle in its jurisprudence[30] demonstrate 'an unusual and very strong signal from the Member States, urging the Court to change direction' as well as a continuous attempt to influence or control the way it exercises its judicial functions under Articles 19 and 32 ECHR.[31] Furthermore, the 'conventionalisation' of the subsidiarity principle and the margin of appreciation did not have any impact in containing the Conservative-led UK Government's desire to entirely 'break the link' between domestic courts and the ECtHR during the last decade,[32] nor did it prevent the Danish government from seeking to restrict the Court's competence to intervene in cases concerning 'constitutional traditions' and 'national circumstances' of ECHR States.[33] Moreover, as the latest in the series of high-level conferences in the Interlaken process demonstrated, States sought to deny the ECtHR jurisdiction over politically sensitive cases, such as those arising from armed conflicts or related to immigration and asylum, on the ground that alternative mechanisms need to be found to relieve the Court from the overwhelming backlog of such cases.[34] As civil society representatives highlighted, the ECtHR is thus risking 'becom[ing] a battleground for member States' national interests' and that 'the Court is not in need of political admonitions about subsidiarity'.[35]

Arguably, a distorted understanding of the subsidiarity principle developed by certain States allegedly permits national governments to dictate to the Court how its case law should evolve, or how the latter should exercise the judicial functions conferred to it, and serves as a basis for asserting the primacy of national law over Convention law.[36] As I further explain below, this is contrary to the traditional understanding of subsidiarity, which indicates that national authorities, acting as first-line defenders of Convention rights domestically, remain

[30] *High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility"* (Brussels Declaration, 27 March 2015), para (7) <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf> accessed 20 April 2021; Copenhagen Declaration 2018 (n 4) para 31.

[31] Jon Petter Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 35.

[32] Helen Fenwick and Roger Masterman, 'The Conservative Project to 'Break the Link between British Courts and Strasbourg': Rhetoric or Reality? (2017) 80(6) *Modern Law Review* 1111, 1114-5, 1120-1. See also, Mark Elliott, 'After Brighton: Between a Rock and a Hard Place' (2012) *Public Law* 619.

[33] Draft Copenhagen Declaration (5 February 2018), paras 7-15 <https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf> accessed 20 April 2021.

[34] ibid, paras 26 and 54(b).

[35] Danish Helsinki Committee for Human Rights, *Response to the Draft Copenhagen Declaration on the continuing Reform of the Council of Europe's Convention System* (16 February 2018) <http://helsinkicommittee.dk/6957-2/> accessed 14 June 2021.

[36] See eg, Alice Donald and Philip Leach, 'A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten' (*EJIL:Talk!,* 21 February 2018) <https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/> accessed 14 June 2021. See also, Jean-Marc Sauvé, *The Role of the National Authorities*, Speech at Seminar *Subsidiarity: a two-sided coin?* (Strasbourg, 30 January 2015) 4, noting that 'subsidiarity does not provide for the primacy of national safeguards over European guarantees: on the contrary, it ensures their complementarity and interweaves them'.

'subject to the supervisory jurisdiction' of the ECtHR.[37] In this regard, the duty of sharing the responsibility for the protection of human rights, as the subsidiary nature of the ECHR system requires, cannot legitimise any demand by national governments for also sharing the interpretation task of the Convention with the ECtHR.[38]

Furthermore, this mischaracterisation of the subsidiarity concept is in direct contrast to the aims of the Interlaken process, namely to enhance the authority and legitimacy of the ECtHR and, thus, safeguard its long-term future. To this extent, and recalling President Bratza's notes of caution at Brighton, any Convention amendment, or indeed any reform proposal, must be consistent with the object and purpose of the ECHR,[39] adhere to the rule of law principles, including that of judicial independence, and seek to enable the ECtHR to deal with its ongoing challenges more easily.[40] In this regard, it is difficult to see how States' attempt to influence the way the Court functions, under the subsidiarity principle, by restricting, *inter alia*, its competence to authoritatively interpret and apply the Convention on certain cases involving sensitive national matters can be reconciled with the objective of enabling it to cope more effectively with the underlying challenges facing it, as identified in previous chapters.

Despite the upcoming entry into force of Protocol No 15,[41] it is apparent that no clear and/or uniform understanding of subsidiarity exists within the ECHR system as certain States very often misconstrue the principle and result in various misconceptions as to its proper function and purpose. Crucially, throughout the Interlaken process, States have based their arguments for further widening the margin of appreciation they should be granted on the subsidiary nature of the Convention system, while undermining the supervisory role of the

[37] *Subsidiarity: A Two-sided Coin?* (Background Paper, Seminar to mark the official opening of the Judicial Year) (Strasbourg, 30 January 2015), 2 <https://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf> accessed 14 June 2021. See also, *Mennesson v France* App no 65192/11 (26 June 2014) para 81, noting that 'the solutions reached by [national authorities] – even within [their] limits – are not beyond the scrutiny of the Court'.

[38] See eg, Başak Çalı, 'Coping with Crisis: Towards a Variable Geometry in the Jurisprudence of the European Court of Human Rights?' (2018) *Wisconsin Journal of International Law* 237, 241 and Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"' in Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (Intersentia 2014) 61.

[39] On the object and purpose of the ECHR, as defined in the thesis, and the meta-effective function of the ECtHR, see Chapter 2.

[40] Jon Petter Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 35. See also, Speech by ECtHR President Nicolas Bratza (Brighton Conference, 18-20 April 2012) 2-3 <https://www.echr.coe.int/Documents/Speech_20120420_Bratza_Brighton_ENG.pdf> accessed 20 April 2021.

[41] Protocol No 15 enters into force on 1 August 2021, following its ratification by all ECHR Contracting Parties. See, Council of Europe Treaty Office, Details of Treaty No.213 – Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213> accessed 14 June 2021; Direcotrate-General Human Rights and Rule of Law, 'Italy Ratified the Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms' (n 24).

Court to review the compatibility of States' undertaking with the ECHR.[42] Consequently, vague references to 'shared responsibility' and 'collective enforcement' that Contracting Parties often employ should be approached with caution as they could serve to occlude the 'rebalancing' exercise that continues to be pursued since Brighton, ie to empower the States' domestic authorities, in particular the executives and their majority positions, while further restricting the ECtHR and its role in protecting human rights and upholding European values.[43] In other words, certain national governments increasingly deploy the concepts of subsidiarity and margin of appreciation implying that the ECtHR should do *less*, instead of recognising that their domestic authorities themselves need to do *more* in upholding the Convention and their international legal obligations thereunder.

5.3 The Court's Reaction to Brighton and the Impact on its Case law

The ECtHR has used every opportunity to emphasise the importance of safeguarding its authority and autonomy in the politically intense, almost hostile, environment characterising the Interlaken process, as shown in the previous section. It reaffirmed, for example, that the principle of subsidiarity is about *sharing*, rather than *shifting*, the responsibility for human rights protection in Europe, and that the States' undertakings under the Convention do not cease to remain subject to the supervisory jurisdiction of the Court.[44] The Court further noted that the significance attributed to subsidiarity and the degree, if any, of the margin of appreciation available in a given case cannot be pre-determined, or indeed dictated, by the States.[45] Instead, this is a context-based decision which falls under the ultimate judicial discretion of the Court. As a result, however narrowly or widely defined and applied, the issue of the margin of appreciation enjoyed by a State cannot be an area that outright excludes the application of the Convention.[46] As the ECtHR clarified, 'the solutions reached by the legislatures – even within [their] limits – are not beyond the scrutiny of the Court'.[47] The ECtHR further asserted that this assessment will be made each time when reviewing a particular case, based on factors including 'the Convention provisions involved, the exact

[42] See eg, Alice Donald and Philip Leach, 'A Wolf's in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten' (n 36); Argelia Queralt Jiménez, 'The Copenhagen Declaration: Are the Member States about to Pull the Teeth of the ECHR?' (*Verfassungsblog*, 09 April 2018) <https://verfassungsblog.de/the-copenhagen-declaration-are-the-member-states-about-to-pull-the-teeth-of-the-echr/> accessed 14 June 2021.
[43] Andreas Follesdal and Geir Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' (*Ejil:Talk!*, 22 February, 2018) <https://www.ejiltalk.org/the-draft-copenhagen-declaration-whose-responsibility-and-dialogue/> accessed 14 June 2021.
[44] See eg, *ECtHR Opinion on the Draft Copenhagen Declaration* (19 February 2018) 9-10; *Contribution of the Court to the Brussels Conference* (26 January 2015); Sir Nicolas Bratza, Speech at the Brighton High Level Conference (n 40) 5. See also, *Subsidiarity: A Two-sided Coin?* (Seminar Background Paper) (n 37).
[45] ibid.
[46] Jean-Marc Sauvé, *The Role of the National Authorities*, Speech at Seminar *Subsidiarity: a two-sided coin?* (Strasbourg, 30 January 2015) 3.
[47] *Mennesson v France* App no 65192/11 (26 June 2014) para 81.

nature of the complaints raised, the particular facts of the case and its procedural background.'[48]

Despite these formal, extrajudicial reassurances of preserving the authority and autonomy of the ECHR system and the ECtHR, there is evidence in recent (post-Brighton) case law showing that the Court is gradually adapting to the current political climate by adopting a more deferential decision-making approach under the margin of appreciation doctrine. President Spano, for example, writing extra-judicially asserted, 'albeit cautiously, that there are signs in the case law that the Court is engaged in the process of more robustly applying the principle of subsidiarity when the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously'.[49] This empirical observation, however, deserves a more careful analysis,[50] not least because of the wider political context it currently takes place in, but also due to its serious 'consequences for the overall status of human rights protection in Europe'.[51] It transpires, therefore, that States' perception of subsidiarity throughout the reform process was, in fact, about a future trajectory for the Court, guided by the need for 'an increased diversity in the protection of human rights' – a position that, following President Spano's statement, the ECtHR has apparently aligned itself with.[52]

As relevant studies confirm, despite the fact that this shift to an increased subsidiarity-focused reasoning 'began well before' the Brighton Conference, 'the ECtHR does provide more subsidiarity overall following the Brighton Declaration'.[53] Moreover, although this is not a general phenomenon, in the Court's recent jurisprudence 'the usages of the doctrine are either continued at a high level or further increased following the Brighton Declaration'.[54] A selection of post-Brighton case law is, therefore, presented below in order

[48] *ECtHR Opinion on the Draft Copenhagen Declaration* (n 44) 13.

[49] Robert Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-Based Review and the Rule of Law' (n 5) 481.

[50] For a comprehensive, empirical analysis of the ECtHR's post-Brighton case law demonstrating the increased use of subsidiarity and margin of appreciation-oriented reasoning by the Court, see, Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 *Journal of International Dispute Settlement* 199.

[51] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (n 3) 491, where further adding that '[b]y its nature, the principle of subsidiarity is an express manifestation of the diversified character of the implementation of human rights guarantees at national level. The unequivocal call for an increased emphasis by the Strasbourg Court on applying a robust and coherent concept of subsidiarity is thus, by definition, *a call for an increased diversity in the protection of human rights'* (emphasis added).

[52] ibid.

[53] Mikael Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50) 221.

[54] ibid. See also, CDDH Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers (10 February 2012), para 14 and 'Appendix', where the CDDH appears to support the above perception by stating that 'the CDDH does not see the role of the jurisprudence of the Court as an instrument of judicial harmonization of the way the Convention is applied in Contracting Parties', while noting also that *'[t]he full functioning of subsidiarity necessarily implies a tolerance of (and even welcome for) the fact that Convention rights can be implemented differently by different Contracting Parties, in*

to assess the merits of the above observations. Indeed, as the following analysis shows, adhering to this more robust application of subsidiarity, the ECtHR appears, in some cases, to restrict the material scope of Convention rights by revisiting its previous interpretation of certain substantive concepts, thus lowering the applicable standard of protection. Additionally, States' 'encouragements' to the Court to give more prominence to subsidiarity seem to have paid off as the post-Brighton jurisprudence indicates that due procedural diligence has been increasingly, and quite decisively, relied upon by the ECtHR to facilitate greater deference to the national authorities, judicial and political alike. This section will consider whether, and to what extent, the subsidiarity-driven proposals have had an impact on the Court's jurisprudence since Brighton.

5.3.1 Material or Substantive changes in the Court's 'Age of Subsidiarity' case law

In *Austin v UK*, a judgment delivered right before the Brighton Conference and concerned the right to liberty and security under Article 5, the ECtHR appeared to shift its approach regarding the substantive interpretation of the right in question, leading to a finding of no violation of the Convention.[55] In reaching this conclusion, the majority highlighted the importance of subsidiarity by stating that '[t]he Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case'.[56] The ECtHR's extensive reference to subsidiarity when applying the general case law principles in the present case,[57] however, came as a surprise as it was rather unusual in its previous jurisprudence regarding Article 5 ECHR.[58] As the dissenting judges critically noted, the Court failed to follow the interpretation of the right as developed in its case law by making 'no reference whatsoever' to its previous, well-established jurisprudence on the same matter and, thus, disregarding the previously established criteria to determine the substantive issues concerning the interpretation of that particular right.[59] According to its common jurisprudential practice, the ECtHR normally conducts a substantive assessment of the facts to determine whether the State actions

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keeping with their distinct national conditions, provided that they are in fact implemented. This […] goes to the heart of the relationship between the Court and the Contracting Parties' (emphasis added).

[55] *Austin and Others v UK* App nos 39692/09 et al. (15 March 2012). ECtHR's approach to be contrasted with that in previous case law on the matter, eg, *A and Others v United Kingdom* App no 3455/05 (19 February 2009) and *Gillian and Quinton v United Kingdom* App no 4158/05 (12 January 2010).

[56] *Austin and Others v UK* (n 55), para 61, adding also that '[t]hough the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts'.

[57] ibid.

[58] J Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 40-41.

[59] *Austin and Others v UK* (n 55), Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki, paras 4 and 6.

complained of amounted to 'deprivation of liberty' under Article 5 ECHR.[60] In *Austin*, however, the ECtHR introduced another legal novelty suggesting that 'in normal circumstances it requires cogent elements to lead it to depart from the findings of facts reached by the domestic courts'.[61] By deploying the principle of subsidiarity, therefore, the ECtHR shifted its review approach from a substantially longer and more exhaustive 'inner, material approach' to a much more simplistic 'outer, procedural approach'.[62] Arguably, this illustrates the Court's shift towards a more lenient interpretation of substantive elements of Article 5 ECHR while relying on the principle of subsidiarity to establish a relatively high threshold for overruling the domestic courts' finding of facts and/or law.[63] In particular, following *Austin*, new factors of relativism were introduced to the otherwise absolute concept of 'deprivation of liberty', including for example the context within which the alleged violation took place.[64] This made the Court's revised interpretation of Article 5 ECHR difficult to reconcile with earlier legal precedents and it did so on the basis of very broad public interest grounds, regarded by the dissenting judges as 'questionable and objectionable'.[65] More importantly, as Rui further observes, the new interpretation of Article 5 provided by the ECtHR considerably weakens the individual's protection under the Convention as States could now circumvent the guarantees laid down in the relevant ECHR provisions by introducing measures based on the Article's limitation clauses more flexibly.[66]

In the same vein, the Grand Chamber's decision in *Scoppola v Italy (No. 3)* confirms the Court's new tendency to refine the interpretation of substantive Convention provisions in a way that allows for greater flexibility (and discretion) for national authorities to formulate

[60] See cases in n 50. See also, *Engel and Others v Netherlands* App nos 5100/71 *et al* (8 June 1967); *Al-Jedda v United Kingdom* App no 27021/08 (7 July 2011) and *Al-Skeini and Others v United Kingdom* App no 55721/07 (7 July 2011).

[61] *Austin and Others v UK* (n 55), para 61. For similar criticism of the ECtHR's novel interpretation in relation to Article 10 ECHR and its departure from its established case law, see, Tom Lewis, '*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (2014) 77(3) *Modern Law Review* 460, 471, arguing that the Court's reasoning this case had a 'distinctly dubious doctrinal provenance', and that no such legal analysis had ever before been cited in the Court's Article 10 jurisprudence or in its recent decisions on restrictions to political advertising and free expression. The case of *Animal Defenders International v United Kingdom* is discussed from a procedural perspective in the following section.

[62] J Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 41.

[63] See also, nn 55, 59.

[64] ibid. See also, J Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 40, 48; Helen Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (*UK Constitutional Law Association*, 5 April 2012) <https://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/> accessed 14 June 2021.

[65] *Austin and Others v UK* (n 55), Joint Dissenting Opinion of Judges Tulkens, Spielmann and Garlicki, para 3. For a similar shift in the Court's recent jurisprudence, ie where the Court transformed a substantive concept in a Convention right from an absolute to a relative one, see *Al Khawaja and Tahery v UK* App nos 26766/05 *et al* (15 December 2011) paras 146-147, Concurring Opinion of Judge Bratza, para 3 and Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajó and Karakas.

[66] J Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 40.

measures and test their compatibility against the Convention standards.[67] Indeed, the revised interpretation of the right to vote in *Scoppola (No. 3)* appears to grant a wider margin of appreciation to States to the detriment of the individual applicant as it weakens the level of protection afforded by the Convention and diminishes the normative relevance and importance of its previous case law on the matter.[68] As such, this interpretive 'retreat'[69] by the ECtHR was criticised as being an example of 'strategic judging',[70] and an act of 'appeasement' towards national authorities both in the light of State reform proposals put forward during the Interlaken process as well as in the wake of a growing State backlash resulted from highly contested judgments against certain ECHR States.[71] Beyond the legal uncertainty and confusion this regressive stance by the ECtHR can create, it further raises concerns about 'double standard[s] within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it'.[72]

The over-reliance of the ECtHR on the subsidiarity principle in order to allow the respondent government a wide margin of appreciation, thus finding that the State's practices did not violate the Convention, is arguably also well reflected in *Correia de Matos v Portugal*.[73] By a narrow majority of nine votes to eight, the ECtHR found that denying the applicant to conduct his own defence in domestic criminal proceedings against him did not violate his right to a fair trial under Article 6 ECHR.[74] The majority's assessment in this case was heavily criticised as 'deficient review standards' were applied to reach its conclusions.[75] As per common jurisprudential practice, the ECtHR based its deferential approach on the argument that a State's domestic authorities enjoy a 'direct democratic legitimation' and, as such, 'are better placed' than the Court itself to assess local needs and conditions related to a

[67] *Scoppola v Italy (No. 3)* App no 126/05 (22 May 2012).
[68] ibid, Dissenting Opinion of Judge Thór Davíd Björgvinsson highlighting, *inter alia*, that the interpretation of the right at stake is incompatible with that established in the Court's earlier *Hirst v UK (No 2)* judgment and that the Court has given 'a very unconvincing and unsatisfactory argument' to support its 'retreat' from its earlier case law. See also, Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *HRLR* 503, 509, 517-18.
[69] See, *Hutchinson v UK* App no 57592/08 (17 January 2017), Dissenting Opinion of Judge Pinto de Albuquerque, para 35, arguing that the ECtHR is facing an 'existential crisis' in view of its 'retreat', 'regression' and 'reversal' of its established jurisprudential positions in numerous cases involving the UK, and due to the fact that it is 'still suffering from the ongoing Hirst saga on the voting rights of prisoners'.
[70] Marko Milanovic, 'Prisoner Voting and Strategic Judging' (*Ejil:Talk!*, 22 May 2012) <https://www.ejiltalk.org/prisoner-voting-and-strategic-judging/> accessed 14 June 2021.
[71] Helen Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (n 64). See also, Helen Fenwick, 'Enhanced Subsidiarity and a Dialogic Approach – Or Appeasement in Recent Cases on Criminal Justice, Public Order and Counter-Terrorism at Strasbourg against the UK?' (n 8) 193.
[72] *Animal Defenders International v United Kingdom* App no 48876/08 (22 April 2013), Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para 1. See also, Tom Lewis, '*Animal Defenders International v United Kingdom*: Sensible Dialogue or a Bad Case of Strasbourg Jitters?' (n 61) 472, warning that, due to the apparent differential treatment the UK received in *Animal Defenders International* case, 'States like Switzerland, Norway and Denmark, all of which reformed their systems in order to comply with earlier Strasbourg rulings, might feel aggrieved at the Grand Chamber's apparent U-turn'.
[73] *Correia de Matos v Portugal* App no 56402/12 (4 April 2018).
[74] ibid, paras 158-159, 169.
[75] ibid, Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó, para 2.

particular issue concerning broader policy questions.[76] Nevertheless, apart from this vague formulation of the 'better placed' argument, no sufficient justification was given to support the Court's utilisation of a wide margin of appreciation in this case and there was no engagement with the reasons leading the Court to the above conclusion.[77] Similar shortcomings seem to be present also with regard to a substantive elements of the question at stake, namely the 'overall fairness of the trial' and the 'proper administration of justice', which the Court again failed to consider/examine sufficiently.[78] According to the dissenting Judges, the majority also failed to duly consider in its assessment the fact that thirty one ECHR States have already recognised the right to self-representation in criminal proceedings as a general rule – a development that the majority called a 'tendency' rather than a 'consensus'.[79] As a result, by deploying subsidiarity in such manner, the ECtHR appears as a self-restrained human rights court, whose 'abdication of judicial responsibility' pre-determines the applicant's case by endorsing *a priori* the national authorities' 'better position' and without challenging the presumed proportionality of the State's practices.[80]

Consequently, one may conclude that this kind of 'relativisation' of certain Convention concepts is a response to States' subsidiarity-driven dictates that the Court should further clarify in its case law that it is not a fourth-instance court and, therefore, should refrain from re-examining questions of facts. Worryingly enough, though, the ECtHR has impliedly shown in its 'age of subsidiarity' jurisprudence that it may well deploy the subsidiarity principle not merely in relation to fact-finding, but also in relation to the interpretation of substantive elements of the Convention and retreat from its previous case law while lowering the applicable protection standards under the Convention.[81] Arguably, the ECtHR increasingly shows through its jurisprudence that it does 'not feel at ease adjudicating in important areas of social life'.[82] As the above jurisprudential examples show, this apparent 'self-imposed minimalistic approach to judicial power' adopted occasionally by the ECtHR post-Brighton may lead it to backtrack from its own established principles of interpretation.[83] Camouflaged with the need 'to develop a more robust and coherent' application of subsidiarity, as

[76] n 73, paras 116, 123. See also, *Handyside v the United Kingdom* App no 5493/72 (7 December 1976, Series A no 24) para 48, stating that 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge' to decide implementing measures are to be enacted and how Convention rights can be most effectively protected in the local context.

[77] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75), paras 4, 7.

[78] n 73, Joint Dissenting Opinion of Judges Tsotsoria, Motoc and Mits, paras 37-41.

[79] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75), paras 13-18.

[80] n 73, Joint Dissenting Opinion of Judges Tsotsoria, Motoc and Mits, paras 11-12 and Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75), para 54.

[81] Helen Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (n 64).

[82] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75), para 10. See also, Fiona de Londras, 'When the European Court of Human Rights Decides Not to Decide' in Panos Kapotas and Vassilis P Tzevelekos, *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP 2019) 311.

[83] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75), para 10.

President Spano put it,[84] the Court's increasingly deferential approach has evidently led to notable incidents of regressive standard-setting with enduring, negative effects on the European human rights protection system.[85] In Judge de Albuquerque's words, this kind of 'judicial self-restraint in the field of fundamental rights morphs easily into agnosticism as to principles and values'.[86]

5.3.2 Systemic or Procedural changes in the Court's 'Age of Subsidiarity' case law

It is recalled that under Article 32 ECHR, the ECtHR enjoys a wide-reaching jurisdiction of deciding 'all matters concerning the interpretation and application of the Convention' and is expressly authorised by the Convention to decide itself on the limits of this jurisdiction. The traditional approach that the ECtHR has followed is to begin its normative engagement with the applicant's complaint by elaborating its interpretation of Convention rights *in abstracto* and then to proceed to an *in concreto* application of those principles to the facts of the case at hand, which involves some kind of proportionality assessment, if and as necessary.[87] This classic approach of the Court, therefore, presents a full substantive review of each case before it with a view to pronouncing on the merits.

Under this traditional review model, the ECtHR has stated that its task is not to substitute its own view for that of the relevant national authorities, unless there is evidence of a manifest error or arbitrariness in the domestic proceedings.[88] As part of its proportionality assessment, however, the Court will engage normatively on the merits of the relevant case at hand, as 'it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient"'.[89] In conducting its own review, as a subsidiarity organ, the Court further reiterated that 'States have only a limited margin of appreciation, which goes hand in hand with rigorous

[84] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (n 3) 491.
[85] Paulo Pinto de Albuquerque, 'Is the ECHR Facing an Existential Crisis?', Speech at the Mansfielld College, Oxford (28 April 2017), 8 <https://www.law.ox.ac.uk/sites/files/oxlaw/pinto_opening_presentation_2017.pdf> accessed 14 June 2021.
[86] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75), para 12.
[87] Normally a proportionality assessment takes place in relation to limited rights, namely those under Articles 8-11 ECHR. The ECtHR's jurisprudence has clarified, however, that this type of review can be extended so as to cover a wider range of matters, including, for example, the application of procedural obligations under absolute rights. See eg, *Beganovic v Croatia* App no 46423/06 (25 June 2006) para 78.
[88] Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (2016) 61 *American Journal of Jurisprudence* 69, 80; Eva Brems, 'The "Logics" of Procedural Type Review by the European Court of Human Rights' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights* Cases (CUP 2017) 22; ECtHR Jurisconsult, *Interlaken Follow-Up: Principle of Subsidiarity* (2010) 1.
[89] *Parti Nationaliste Basque v France* App no 71251/01 (7 September 2007) para 46; *Jehovah's Witnesses of Moscow and Others v Russia* App no 302/02 (22 November 2010) para 108.

European supervision embracing both the law and the decisions applying it'.[90] The Court's traditional approach of assessment, therefore, is to undertake its own independent, full substantive review whereby it engages normatively with the applicant's complaint, examines the merits of each individual case, and applies the margin of appreciation doctrine to adjust and determine the strictness of its review.[91]

During the last decade, and notably since the Brighton Conference, legal scholars have observed that the ECtHR's margin of appreciation jurisprudence has taken a novel, indeed interesting, turn compared to its so far established approach described above.[92] In its recent case law the ECtHR has seemed to pay increased attention to the margin of appreciation doctrine's 'systemic' or 'procedural' function of (re)defining clearer jurisdictional boundaries between the tasks performed by the ECtHR and those left to the national authorities.[93] Recent case law suggests that this novel approach has been applied in relation to both domestic courts and national political bodies, notably national legislatures.

With regard to domestic courts, this novel approach of the ECtHR's post-Brighton deployment of the margin of appreciation suggests that the Court has been inclined to abandon its established method of full substantive review. The ECtHR has been prepared to do so on the condition that if the balancing exercise under the proportionality principle 'has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts'.[94] Elaborating further on its new approach, the ECtHR stated that this model of review 'presupposes that an effective legal system was in place and operating for the protection of the [rights at stake in the relevant case], and was available to the applicant'.[95] The Court's new model of review, therefore, implies that a certain degree of self-restraint needs to be exercised by Strasbourg when it comes to the application of relevant Convention standards to the specific facts of the case at hand.[96] More specifically, when the necessary *Von Hannover (No2)*[97] and *Aksu*[98] conditions are fulfilled - ie the domestic legal system functions effectively and the assessment of the domestic court shows a diligent application of the relevant Convention principles, as established in the Court's jurisprudence – the ECtHR, acting as a subsidiary supervisory organ, will defer to the decision

[90] *Parti Nationaliste Basque v France* (n 89) para 46.
[91] Oddný M Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights' (n 22) 228.
[92] ibid.
[93] Dean Spielmann, 'Whither the Margin of Appreciation?' (n 1) 6; Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review' (2012) 14 *Cambridge Yearbook of European Legal Studies* 381, 411.
[94] *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (7 February 2012), para 107; *Aksu v Turkey* App nos 4149/04 and 41029/04 (15 March 2012), para 67.
[95] *Aksu v Turkey* (n 94), para 68.
[96] *Von Hannover v Germany (No2)* (n 94), paras 114-123.
[97] *Von Hannover v Germany (No 2)* (n 94).
[98] *Aksu v Turkey* (n 94).

reached by the national court when conducting the fine-tuning or 'fair balancing' task under the proportionality principle. In this way, the ECtHR has developed a 'systemic limitation' on its own jurisdiction which enables it to fully defer to (certain) national courts.[99] At the same time, this 'systemic limitation' exempts the ECtHR from performing an *in concreto* proportionality assessment for every single case brought before it.[100] In cases, however, where 'the reasoning of the national court demonstrates a lack of sufficient engagement with the general principles of the Court', the domestic court will most likely be found to have underperformed, and, consequently, 'the degree of margin of appreciation afforded to the authorities will necessarily be narrower'.[101]

Apart from the application of this new approach to review regarding 'responsible courts', as shown above, the ECtHR has extended its deferential practice vis-à-vis 'responsible domestic political decision-makers', notably national legislatures, seeking to redefine its relationship with them within a framework of enhanced subsidiarity.[102] In this regard, the Strasbourg Court acknowledged that '"special weight" [is] to be accorded to the role of the domestic policy-maker in matters of general policy on which opinions within a democratic society may reasonably differ widely'.[103] In support of its apparently growing tendency to defer to the national authorities, the Court further added that 'only in exceptional circumstances' and when 'a certain threshold' had been reached would it proceed with an *in concreto* proportionality assessment to review the effects of the general measure in question.[104] Consequently, by deciding to deploy its novel 'systemic' review method, the ECtHR's analysis turns its focus to the quality of the domestic decision-making processes by examining, *inter alia*, whether the adopted measures had been 'the subject of a lengthy and detailed public consultation', in order to identify any possible shortcomings of the domestic system highlighted in the process.[105] Evidently, as shown above, it can now do so without

[99] Oddný M Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights' (n 22) 229-230.
[100] ibid.
[101] *Matúz v Hungary* App no 7657/10 (21 October 2014) para 35.
[102] The term 'responsible domestic political decision-makers' is used as a parallelism to the 'responsible courts' doctrine coined in Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders* (Routledge 2016).
[103] *MGN v UK* App no 39401/04 (18 January 2011) para 200. See also, *S.A.S v France* App no 43835/11 (1 July 2014) para 129.
[104] *MGN v UK* (n 103), para 200.
[105] ibid, para 203, 203-217. See also, *S.A.S v France* App no 43835/11 (n 103), para 159, noting that 'the Court has a duty to exercise a degree of restraint in its review of Convention compliance, since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The Court has, moreover, already had occasion to observe that in matters of general policy, on which opinion within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight'.

undertaking its own proportionality assessment of the effects of the adopted measure on the individual applicant in the case at hand.[106]

Relevant ECtHR case law has clarified that this new approach can be used particularly in cases concerning sensitive and highly contested policy matters, including, for example, questions related to socio-economic and property entitlements as well as prisoners' voting rights. In such cases, the primary focus of the Court's assessment clearly shifts to the national policymaker's justification for adopting the relevant general measures and the quality and/or extent of the proportionality assessments conducted at the national level by domestic courts, instead of its own.[107] As *Animal Defenders* has illustratively shown, the ECtHR is now prepared to draw positive inferences from the due diligence exhibited by national policy-makers when assessing the compatibility of their adopted measures with the Convention, thus showing greater deference to the national authorities while self-restricting/minimising its own interventionist role.[108] More specifically, when it comes to the adoption of 'general measures' in sensitive policy areas, the Court will 'primarily assess the legislative choices underlying' any limitations on Convention rights while placing particular emphasis on the 'quality of the parliamentary and judicial review of the necessity of the measure'.[109] Clarifying further its new systemic approach vis-à-vis national political bodies, the ECtHR added that 'the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case'.[110]

5.4 Assessing the impact of the subsidiarity-driven post-Brighton jurisprudence

Following from the above, some important observations can be made with regard to the ECtHR's new approach introduced in *Von Hannover (No2)*[111] and *Animal Defenders*,[112] which, in effect, redefines the relationship of the Court with national authorities (ie both domestic courts and national political bodies). First, the acceptance of the outcome of the domestic proportionality assessment by the ECtHR is conditional upon a diligent, careful consideration

[106] Cf. *Hatton and Others v UK* App no 36022/97 (8 July 2003) para 122-128, as an example of earlier jurisprudence where the ECtHR used to undertake its own *in concreto* proportionality assessment, while attributing lesser importance to the domestic policy-making processes, even with regard to difficult (eg socio-economic) matters.

[107] As discussed in detail below, in cases where national legislatures had in fact assess the competing interests at length, more deference was shown to the respondent State, whereas in cases where no such explicit assessment had taken place, a negative inference was drawn in respect of the domestic decision. See eg, *Evans v UK* App no 6339/05 (10 April 2007), para 86; *Animal Defenders International v UK* (n 72), paras 114-116. Cf, *Hirst v UK (No 2)* App no 74025/01 (6 October 2005), paras 79-80.

[108] *Animal Defenders International v UK* (n 72).

[109] ibid, para 108.

[110] ibid, para 109.

[111] *Von Hannover v Germany (No 2)* (n 94).

[112] *Animal Defenders International v UK* (n 72).

of the latter's jurisprudence, and only operates under the presumption that the domestic legal system functions effectively. As such, the ECtHR 'places a certain amount of trust in States to correctly apply the proportionality test in the concrete set of circumstances of the case'.[113] This presumption, however, is rebuttable and the burden of proof for such 'relative institutional capacity' is borne by the national authorities, which need to demonstrate that they are 'better placed' than the Strasbourg Court to make this assessment.[114] Equally, this raises the threshold for the ECtHR, which would need to justify more vigorously any finding for a Convention violation in a case where a national court has already followed the Strasbourg jurisprudence carefully and, yet, reached a different conclusion. Second, and in line with the previous point, the degree of the margin of appreciation granted to States appears to fluctuate depending on the quality of the domestic decision-making process; the higher the quality of the process, as evidenced by factors including the depth of parliamentary debates during law-making processes and the extent to which the Court's relevant jurisprudence was considered/discussed in judicial proceedings, the wider the margin, and vice versa.[115] Lastly, the new approach allows the Court to take the level of deference to new heights as it may now defer proportionality assessment fully, or to a great extent, to the national courts, subject to the conditions detailed above.

Essentially, the ECtHR's increasingly deferential approach towards national authorities is accompanied by an attempt to establish clearer systemic, jurisdictional boundaries vis-à-vis both national judicial and political bodies. The Court does so by suggesting that if the latter (ie domestic decision-making authorities) undertake their Convention responsibilities diligently, then the need for the ECtHR to intervene with the same intensity as otherwise, or even at all, becomes less compelling.[116] As shown above, 'Convention loyalty',[117] meaning due Convention diligence from domestic courts and policymakers, through a careful and

[113] J Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324, 329.

[114] See, Jeffrey Jowell, 'What Decisions Should Judges Not Take?' in Mads Andenas and Duncan Fairgrieve, *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP 2009) 130, using the term 'relative institutional capacity' to explain the relationship between domestic judicial and political bodies, noting that 'the question is often not whether the judge lacks capacity to decide the matter, but whether another body is better equipped to make that decision — a matter of relative institutional capacity. If so, a further question is whether the courts should therefore abdicate their authority to decide the matter, or merely accord a degree of weight to the primary decision-maker's judgment. And the last question is, what degree of weight?'. See also, George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *Oxford Journal of Legal Studies* 705, 721; Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) *International Journal of Constitutional Law* 466, where this structural use of the margin of appreciation is described as 'deferential review'.

[115] See also, Eirik Bjorge, *Domestic Application of the ECHR: The Courts as Faithful Trustees* (OUP 2015) 180-181.

[116] See in this regard, Wildhaber's vision in 'A Constitutional Future for the European Court of Human Rights' (2002) 23 *HRLJ* 161, 162.

[117] See, Jean-Marc Sauvé, *The Role of the National Authorities*, Speech at Seminar *Subsidiarity: a two-sided coin?* (Strasbourg, 30 January 2015) 5, citing F Sudre, '*A Propos de l'obligation d'exécution d'un arret de condemnation de la Cour européenne des droits de l'homme*', (2013) *RFDA* 103.

good-faith consideration of the Strasbourg jurisprudence, can facilitate a more lenient review by the ECtHR, or even result in complete deference in respect of the proportionality assessment to the national level. At the same time, however, lack of thorough engagement by national authorities with the Convention principles, as developed in the ECtHR's case law, can lead the Court to draw negative inferences as to the sufficiency of their performance and, thus, exercise its own, stricter or more detailed review.[118]

Looking at the ECtHR's increasing process-based review as a means for the revival of the subsidiarity principle, the Court reiterates the importance of shared responsibility between Strasbourg and domestic actors in protecting Convention rights, thus encouraging the latter to deliver their primary duty in the realisation of this objective.[119] For the States, the normative implication arising from this understanding of subsidiarity is that a more relaxed supranational scrutiny by the ECtHR can be justified 'where national systems of independent oversight of executive policy-making are well established, appear robust and command respect'.[120] In this regard, the principle of subsidiarity 'is not simply a device to constrain the Court' but also imposes certain obligations on the States Parties, notably the obligation to 'pay attention to the Court's established jurisprudence'.[121] Çalı, for example, has introduced the 'responsible (domestic) courts doctrine' in an attempt to conceptualise the ECtHR's shift to a variable standard of judicial review, arguing that the Strasbourg Court increasingly allows domestic courts 'a larger discretionary interpretive space' in determining Convention rights violations, provided that the latter take ECtHR jurisprudence 'seriously'.[122] As I have shown above, this observation confirms the Court's stance on the matter, which previously noted that 'if the reasoning of the national court demonstrates a lack of sufficient engagement with the general principles under [the relevant Convention right], the degree of the margin of appreciation afforded to the authorities will necessarily be narrower'.[123] Additionally, it reflects both the 'better placed' and the 'fourth instance Court' arguments

[118] Contract, for example, this principle established in *Von Hannover (No2)* with earlier case law, such as *Hirst v UK (No 2)* (n 107), paras 79-80, where the Grand Chamber noted that the otherwise wide margin of appreciation available to States regarding the subject-matter of the case should be narrowed down since neither a judicial nor a legislative Convention-type proportionality assessment of the contested measure was performed. See further, Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34 OJLS 443, 473-475; Janneke Gerards, 'Procedural Review by the ECtHR – a Typology' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (n 88) 140-155.

[119] See eg, Brussels Declaration (2015) OP3; Copenhagen Declaration (2018) paras 6-11.

[120] Ian Cram, 'Protocol 15 and Articles 10 and 11 ECHR – The Partial Triumph of Political Incumbency Post Brighton' (2018) 67 *International and Comparative Law Quarterly* 477, 487.

[121] Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *HRLR* 313, 332**.** See also, Dean Spielmann, 'Whither the Margin of Appreciation?' (n 1) 13, where he notes that the Court's new process-based review method is 'neither a gift nor a concession […] but an incentive to national courts to conduct the requisite Convention review'.

[122] Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights' (n 102) 144.

[123] *Erla Hlynsdottir v Iceland (No 3)* App no 54145/10 (2 September 2015), para 59. See also, *Animal Defenders International v UK* (n 72), para 108.

underpinning the subsidiary nature of the ECHR control system, suggesting that 'it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level' by national authorities,[124] whose knowledge of and proximity to the specific circumstances of each case enable them to adopt the necessary measures to strike an appropriate balance between the individual rights and the competing national interests.[125]

The Court's growing process-based review has arguably attached greater importance to the participation of relevant domestic bodies in the national decision-making process, which it understands as enhancing the decision's overall quality. As President Spano argued, the ECtHR's procedural turn reflects a 'parliamentary-oriented conception of subsidiarity', which, in turn, presents a '*qualitative, democracy-enhancing approach* in the assessment of domestic decision-making in the field of human rights'.[126] In this regard, the Court will very often need to assess the quality of domestic legislative processes from a rule of law angle, 'verifying that the law does afford sufficient protection against arbitrary interference by public authorities'.[127] In doing so, the Court will normally consider the intensity and depth of parliamentary debates to determine whether an appropriate balance between the competing interests has been struck and the extent to which the views of all interested parties, political minorities in particular, have been taken into account during the policy-shaping and decision-making procedures as evidence that domestic assessment of proportionality had taken place.[128] While certain competing interests under the Convention are subject to a 'mere' fair balance assessment, others may require a distinct, indeed more stringent, type of review and the ECtHR will need to be satisfied that the appropriate level of scrutiny has been met by the national authorities.[129] As such, the overall quality of

[124] *Varnava and Others v Turkey* App nos 16064/90 et al. (18 September 2009), para 164. See also, Interlaken Declaration, Action Plan, point 9.

[125] *Scordino v Italy (no 1)* App no 36813/97 (29 March 2006), para 140; ECtHR Jurisconsult, *Interlaken Follow-up: Principle of Subsidiarity* (ECtHR, 2010), paras 6-9.

[126] R Spano, Comment on *Parliaments and Human Rights Protection* (*UK Human Rights Blog,* 13 October 2016) < https://ukhumanrightsblog.com/2016/10/13/a-new-book-on-parliaments-and-human-rights-protection-judge-robert-spano/> accessed 14 June 2021; R Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity', (n 3) 487, 499 (emphasis in the original).

[127] Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 139.

[128] See eg, Matthew Saul, 'Structuring Evaluation of Parliamentary Processes by the European Court of Human Rights' (2016) 20(8) *International Journal of Human Rights* 1077, 1079-1089; Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights' (n 127) 140. See also, *Hirst v UK (No 2)* (n 107) para 79; *Greens and MT v UK* App no 60041/08 (23 November 2010) paras 111-15.

[129] The wording of Convention Articles is, in this regard, illustrative. While certain qualified rights require that an interference can be justified if it is 'necessary in a democratic society' (see eg, Articles 8(2)-11(2) ECHR), others require that such interference is 'absolutely necessary' (eg, Article 2(2) ECHR), 'strictly necessary' (eg, Article 6(1) ECHR) or 'strictly required' (eg, Article 15(1) ECHR). Moreover, although certain Convention rights are recognised as absolute and non-derogable (eg, Article 3 ECHR), the ECtHR has previously sought to engage in a balancing exercise in its assessment, at least in relation to some elements of such rights. See, Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) *Human Rights Quarterly* 251; Hemme Battjies, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of

parliamentary debates on the subject-matter and the extent to which national authorities had performed a Convention-type proportionality assessment when formulating and/or adopting the measures in question while demonstrating also the degree of integration of relevant Convention standards into domestic decision-making processes will be used as factors by the Court to determine the degree of margin available to States.[130] The assessment of the quality of parliamentary processes, therefore, has become a particularly useful analytical tool for the ECtHR in determining the level of deference to be granted to the respondent State and in assessing the extent to which the State is 'better placed' to deliver a judgment on the issue at hand (proportionality analysis of the adopted measure).[131]

However, while the ECtHR's own expertise and understanding of good judicial practice may serve as a benchmark for the assessment of the processes before domestic courts, the same may not necessarily be the case with regard to other types of national authorities, such as the legislatures or executives. Normatively, therefore, the question of deference to national policymakers differs significantly from the question of deference to national courts and the ECtHR ought to approach the former even more cautiously. Indeed, Judges at the ECtHR have previously warned that '[it is] not for the Court to prescribe the way in which national legislatures carry out their legislative functions',[132] and that '[t]his is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other'.[133] Although it is to be expected that deference towards legislative bodies at the national level may form a standard, and indeed welcome, practice of domestic judicial decision-making, the role and nature of the ECtHR, as a supranational subsidiary judicial body, needs to be borne in mind when pleading for a deferential approach by the latter. The striking difference here is that the Strasbourg Court does not decide to defer to domestic legislatures for reasons of separation of powers, as a national court would normally do. Instead, such a decision is made when the Court deems appropriate for reasons of the sharing of international legal responsibility of the respondent State. A self-imposed minimalistic approach to its own judicial power is, therefore, hard to reconcile with the Court's duty of 'ensur[ing] the observance of the engagements undertaken' by the States Parties under the Convention.[134] In other words, any attempt by the ECtHR to use deferential tools (eg subsidiarity and margin of appreciation) as a means of limiting its core

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Refoulement under Article 3 ECHR Reassessed' (2009) 22(3) *Leiden Journal of International Law* 583; Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (n 129); Patricia Popelier and Catherine Van de Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2013) 9(2) *European Constitutional Law Review* 230; Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76(3) Modern Law Review 589.

[130] Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) *OJLS* 443, 473-478.

[131] M Saul, 'Structuring Evaluation of Parliamentary Processes by the European Court of Human Rights' (n 128) 1078-80. See also, *Animal Defenders International v UK* (n 72) para 108.

[132] *Hirst v UK* (No 2) (n 107), Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, para 7.

[133] ibid, Joint Concurring Opinion, Judges Tulkens and Zagrebelsky.

[134] ECHR, Art 19.

judicial functions will run contrary to its own evolving, subsidiary role as a supranational human rights court entrusted with the task of developing and maintaining uniform, albeit minimum, standards of rights protection across European States.[135]

In order to avoid similar criticism suggesting that it is overstepping its mandate, the ECtHR ought to provide clear justification as to the importance of including parliamentary process in its reasoning (margin of appreciation and/or proportionality analyses) as well as clear guidance as to what aspects of this process will be required by the Court to demonstrate that an appropriate balance has been struck at the national level. In conducting its own domestic procedural quality assessment, the Court must therefore be cautious that there might exist considerable differences in the functions, contexts, structures, expertise and resources among the legislative bodies of ECHR States so the Court would be expected to adopt a holistic, rather than a one-size-fits-all, approach.[136] This need becomes even more pressing especially since it has been noted that there is lack of precision and clarity from the Court on both the purpose and importance of such 'parliamentary-oriented' review.[137] In any case, the Court should be very careful in deciding to completely exempt 'general measures' from its full substantive analysis due to the far-reaching consequences a systemic deficiency arising from such measures would have on a larger group of individuals as well as on the institutional functioning of the Court itself.[138] As repeatedly highlighted in the thesis, systemic or structural national deficiencies giving rise to repetitive applications form the underlying cause of the Court's perpetual backlog challenge and, therefore, their prompt identification and tackling is imperative for securing the long-term effectiveness of the ECtHR.[139] While the Court may appear hesitant to embark on far-reaching changes in a policy environment outside its material expertise, it must not send the wrong message to States suggesting that certain areas are entirely free from its supervisory jurisdiction.[140]

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[135] See comments by Judges Thór Björgvinsson and Pinto De Albuquerque, nn 108, 114 below. See also, Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 53-54, arguing that international courts, such as the ECtHR, failing to hold national governments accountable for their human rights violations could lose the support of important compliance constituencies, namely individual applicants and civil society.

[136] M Saul, 'Structuring Evaluation of Parliamentary Processes by the European Court of Human Rights' (n 128) 1082-5, 1087-8.

[137] ibid, 1081-2.

[138] *Animal Defenders International v UK* (n 72), Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vucinic and De Gaetano, para 9-10.

[139] See relevant discussions in Chapters 3 and 4.

[140] See comments by former Judge Thór Björgvinsson, stressing that 'by increasing its reliance on the margin of appreciation and referring more to the democratic process in the Member States, in other words by beginning to try to appease the Court's most prolific critics, be they political or judicial on a national level, the Court runs the risk of losing its moral capital', cited in G Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the ECHR' (2015) 31 *Utrecht Journal of International and European Law* 104, 110. See also, Thór Björgvinsson, 'The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual' (2015) *iCourts Working Paper Series*, No. 23.

The growing emphasis on procedure also raises concerns about detracting from a substantive review of the issue at hand leading to a potential reduction in the level of protection of rights.[141] Indeed, proceduralisation in human rights adjudication an be a 'laudable added value in so far as it complements substantive justice, but an irresponsible abdication of the Court's supervisory powers when it replaces the latter'.[142] While process can generally increase the prospects of good outcomes domestically, it does not guarantee that this will be the case from the review of international human rights perspective.[143] As Christoffersen has also argued, the 'proceduralisation' of the Court's review can be valuable only to the extent it aims to increase process efficacy, ie it has the 'purpose and effect of improving the process in order to achieve good results'.[144] Over-reliance on the process can consequently weaken substantive human rights protection, if procedural review is used to replace, rather than complement, the substantive scrutiny of the relevant issue.[145] Indeed, some degree of supranational assessment on substantive grounds remains necessary, even in cases where the systemic mechanisms at the national level *seem* to be functioning well. Suggesting otherwise risks transforming the ECtHR 'into an agnostic' as to potentially problematic outcomes due to deficient national decision-making procedures, thus leading to a reduced level of standard-setting, as shown in Sections 5.3.1 and 5.3.2 above.[146]

Interestingly, comparing the Court's analysis in its post-Brighton case law with earlier case law on similar issues, it becomes evident that the material or substance-based review under the traditional approach is 'substantially longer and more exhaustive' than the assessment conducted under the novel, procedural review method.[147] In turn, as evidenced in its post-Brighton case law, the Court's process-based method of review of whether a Convention interference is proportional to the reasons adduced by the respondent State to be necessary and legitimate often appears to be narrow and 'surprisingly concise'.[148] Further evidence suggests that, despite the growing procedural turn, the ECtHR appears to deploy its procedural proportionality approach inconsistently.[149] More precisely, the Court seems to

[141] See examples of case law discussed in Section 5.3.1 above. See also, M Saul, 'Structuring Evaluation of Parliamentary Processes by the European Court of Human Rights' (n 128) 1082.
[142] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75) para 41.
[143] Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights' (n 127) 159.
[144] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 462.
[145] ibid, 455; Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights' (n 127) 159.
[146] Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó (n 75) paras 41-42. See also, comments by former Judge Thór Björgvinsson, 'The Role of Judges of the ECtHR as Guardians of Fundamental Rights of the Individual' (n 140).
[147] Jon Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 41.
[148] ibid, 45, citing *Mouvement Raëlien v Switzerland* App no 16354/06 (13 July 2012) as an example of this observation.
[149] Oddný M Arnardóttir, 'Organised Retreat? The Move from 'Substantive to 'Procedural' Review in the ECtHR's case law on the Margin of Appreciation' (n 5) 12-13.

apply this novel review method predominantly to cases concerning sensitive policy matters, which the Court, as a subsidiary organ, can allegedly more easily defer to national authorities.[150] Therefore, as already shown above, the ECtHR risks limiting its own role to an 'outer procedural control' as opposed to an 'inner material' oversight of the States' engagements under the Convention.[151] As Madsen bluntly argues, despite any underlying motivations for an enhanced subsidiarity, Protocol No 15 remains 'part of a larger rescue plan' seeking to relieve the ECtHR from its caseload by turning it into a more focused Court that would hear fewer cases and consequently pass fewer judgments.[152] Although this novel procedural approach may serve the purpose of enhancing the *efficiency* of the ECtHR by enabling it to deal with its pending caseload faster, it is difficult to see how this can enhance its normative *effectiveness* and the value of its jurisprudence as authoritative precedent for the further development and protection of the Convention standards.

Critical scholarship has claimed that certain States, including the UK, receive 'special treatment' in Strasbourg,[153] and accused the Court of maintaining 'double standards' by allegedly conducting stricter review against developing, newly-established European States than against Western European ones.[154] Cram advanced this argument and opined that well-established democracies seem to be the primary beneficiaries of a less strict substantive review, and thus of a more deferential treatment, by the Court as they often *appear* to have well-functioning domestic mechanisms of executive scrutiny.[155] As Madsen further argues, while the ECtHR has indeed made increasing references to 'subsidiarity' and 'margin of appreciation', in general, during the last decade (2009-2015), empirical research shows that more established Western ECHR States (and original signatories to the ECHR) are likely to be twice as successful when invoking either concept before the Court as their newly-established Eastern European counterparts.[156] Indeed, more recent empirical research confirms this precise point. Stiansen and Voeten have shown that there is 'strong evidence' of a new variable geometry, whereby the ECtHR increasingly gives more deference to consolidated

[150] Janneke Gerards and Eva Brems, *Procedural Review in European Fundamental Rights cases* (n 88) 146-147. See also, n 76 above.
[151] Jon Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (n 28) 41.
[152] Mikael Rask Madsen, 'Rebalancing European Human Rights: The Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50) 207.
[153] Başak Çalı, 'Coping with Crisis: Towards a Variable Geometry in the Jurisprudence of the European Court of Human Rights?' (2018) *Wisconsin Journal of International Law* 237. As far as the UK is concerned, Madsen's research shows that it has been among the States claiming margin of appreciation or subsidiarity most frequently before the ECtHR, both before and after the Brighton Declaration. See, Mikael Rask Madsen, 'Rebalancing European Human Rights: The Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50) 220-221.
[154] Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) *Chicago Journal of International Law* 115.
[155] Ian Cram, 'Protocol No 15 and Articles 10 and 11 ECHR – the Partial Triumph of political incumbency post-Brighton?' (n 119) 489-490.
[156] Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50) 219-221.

democracies compared to non-consolidated democracies by rendering fewer violation judgments against the former, while noting that the UK is an especially large beneficiary under this practice.[157] These findings reveal significant discrepancies regarding the successful use of deferential concepts at Strasbourg between old and new, Western and Eastern ECHR States.[158]

Cram's above observation thus seems to find empirical foundation in Madsen's as well as Stiansen and Voeten's studies; the stronger the legal and political structures of the State, the more likely the State is to benefit from the Court's novel procedural approach (and the more inclined the Court will be to defer to the State's well-functioning national authorities). Dothan has attempted to conceptualise this phenomenon following a reputation model. Arguably, high-reputation States, normally Western European States and, thus, original signatories to the Convention, pose a larger threat to the Court's reputation in case of non-compliance with or criticism of its judgments and therefore enjoy more lenient treatment.[159] Under this latter approach, the ECtHR may use a more lenient procedural review to appease critical Contracting Parties, and in particular the UK, as shown in the analysis of post-Brighton case law above.[160] Evidently, as legitimacy challenges from consolidated democracies can pose 'a greater threat to the authority of an international human rights court', the ECtHR has become more deferential towards such States.[161] By mitigating backlash through strategic judicial self-restraint, the Court thus strives to not lose the support of such States, which might prove costlier than losing the support of other, non-consolidated or new democracies.[162] Therefore, building on previous findings suggesting that the extent to which a State can demonstrate it fulfils the requirements of the 'responsible

[157] Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (n 18) 771.

[158] Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50). The jurisprudential privileges afforded to (Western European) established democracies, including the UK, and the risks this practice may entail were also identified and criticised in the ECtHR's case law. See, *Hutchinson v UK* (n 69), Dissenting Opinion of Judge Pinto de Albuquerque, noting that 'this also entails a biased understanding of the logical obverse of the doctrine of the "diversity of human rights", namely the doctrine of the margin of appreciation: the margin should be wider for those States which are supposed "to set an example for others" and narrower for those States which are supposed to learn from the example. This evidently leaves the door wide open for certain governments to satisfy their electoral base and protect their favourite vested interests'.

[159] Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (CUP 2014). See also Mikael Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50) 219.

[160] See eg, Patricia Popelier and Catherine Van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as Answer?' (2017) *LJIL* 5, 23. See also, Commissioner for Human Rights, *Memorandum to Nick Gibb MP* (20 October 2013) 3, stressing that non-compliance of ECHR States with the Court's judgments now risks becoming 'contagious' with 'far-reaching deleterious consequences' that could well signal 'the beginning of the end of the ECHR system'.

[161] Stiansen and Voeten cite both the Court's institutional design, including States' budgetary contributions, and States' reputation in the international arena as reasons in support of this argument. As also argued, 'the effectiveness of liberal institutions depends on continued participation by established democracies'. See, n 18, 771, 773-774.

[162] ibid, 773.

courts' and 'responsible political decision-makers' doctrines influences the degree of deference it may enjoy from the ECtHR,[163] Stiansen and Voeten's latest study empirically proves that the stronger an ECtHR-critic and the more established as a democracy a State is, the more likely it is to benefit from a such deferential treatment by the Court.[164]

The fact, nevertheless, that a State is perceived as having a well-established legal and political order should not be regarded as conclusive in the Court's decision to exercise a more lenient review. This is because there lies the risk that national authorities of certain seemingly well-functioning democracies may only pay lip service to the Convention standards and perform their balancing exercise 'in a tokenistic manner, allowing flimsy public interest arguments to prevail'.[165] In such cases, the apparent Convention-type proportionality assessment conducted by the national authorities is nothing more than 'window dressing', which can easily escape the scrutiny of the ECtHR unless the latter decides to engage normatively with the legal issues at hand.[166] The impression given in such cases is that the ECtHR is retracting its rights-oriented practice and substituting it with strategic, process-based adjudication for enhanced efficiency of proceedings.

The Court, therefore, must carefully consider to what extent enhanced subsidiarity should and can be pursued as part of its growing procedural turn so that it represents a welcome attempt to further embed the Convention at the national level and, thus, ensure better and more effective protection of human rights domestically. In embarking on this novel course of action, however, the ECtHR ought not to relinquish its own role as an independent and authoritative interpreter of the Convention that ensures human rights protection at the international level. In principle, there is a substantial difference between conducting an independent assessment as to whether there has been a Convention violation based on Strasbourg's established case law, on the one hand, and not finding any reasons to depart from the domestic court's conclusions, on the other. While the former suggests that the ECtHR has fulfilled its duty under Article 19 ECHR by substantively examining a Convention-related dispute brought before it, the latter denotes a mere transfer of such duty to the national authorities by limiting the scope of the Court's own intervention to certain procedurally-deficient domestic reviews only. In this regard, the procedural review should not be conceived as a substitute for substantive scrutiny of legal issues reaching Strasbourg, but, rather, a supplementary layer of independent review of national authorities' assessment of a Convention-related dispute. In a different case, the ECtHR risks undermining

[163] See eg, Mikael R Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (n 50); Başak Çalı, 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights' (n 153); Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (n 121).

[164] Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (n 18) 771, 779-781.

[165] Helen Fenwick, 'An Appeasement Approach in the European Court of Human Rights?' (n 64).

[166] Janneke Gerards and Eva Brems, *Procedural Review in European Fundamental Rights cases* (n 88) 6.

its role in providing authoritative interpretation of the Convention rights and determining the scope of States' obligations under the ECHR.[167]

As Føllesdal and Ulfstein argue, the subsidiary relationship between national authorities and the ECtHR does not create a zero-sum of responsibilities.[168] Instead, the subsidiary role of the ECtHR is complementary to the States' efforts to effectively enforce Convention rights domestically.[169] In this sense, subsidiarity requires the Strasbourg institutions, and the Court in particular, to continuously support the well-functioning of domestic authorities in this task. Subsidiarity, therefore, cannot be used as a basis for asserting the *a priori* primacy of national law over Convention law or for delimiting 'national spheres of exclusive competence, free from Strasbourg's supervision'.[170] Similarly, attempts by States to acquire a say on when and how judicial tools of interpretation, including the margin of appreciation, apply, in the name of subsidiarity, are fundamentally incompatible with the principle as developed in the ECtHR jurisprudence and risk morphing 'shared responsibility' into 'no one's responsibility'.[171] Indeed, the application and development of subsidiarity and margin of appreciation remain an exclusive responsibility of the Court regardless of some States' demands for an enhanced subsidiarity.

Having said that, the procedural turn suggests that in the post-Brighton era, where the relationships between States and the Court are being 'rebalanced' to address concerns of a perceived problem of 'Strasbourg overreach', the ECtHR appears inclined to dilute the intensity of its substantive review, and to place more emphasis on procedural safeguards for its proportionality assessment.[172] Consequently, the 'rights-oriented jurisprudence' that became the Court's trademark in its transformative years is now being replaced by 'new

[167] Eva Brems, 'Procedural Protection: An Examination of Procedural Safeguards Read Into Substantive Convention Rights' (n 127) 159. See also, *Contribution of the Court to the Brussels Conference* (26 January 2015), para 3, stressing that the subsidiarity principle is about *sharing*, rather than *shifting*, the responsibility for the protection of human rights (emphasis added in the original) <https://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf> accessed 14 June 2021.

[168] Andreas Føllesdal and Geir Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' (n 43).

[169] ibid. See also, See also, *Handyside v the United Kingdom* (7 December 1976, Series A no 24) para 49 noting that 'the domestic margin of appreciation thus goes hand in hand with a European supervision'.

[170] Alice Donald and Philip Leach, 'A Wolf's in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten' (n 36). For a similar understanding of the concept, see also, Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?' (n 88) 72, arguing that 'subsidiarity is not a free rein to States' appreciation, but a reminder of the possibility of reversing the priority or "primarity" of domestic human rights implementation when the protection of ECHR rights is not effective'.

[171] Andreas Føllesdal and Geir Ulfstein, 'The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?' (n 43).

[172] Ian Cram, 'Protocol No 15 and Articles 10 and 11 ECHR – the Partial Triumph of political incumbency post-Brighton?' (n 119) 489. See also, Davíð Þór Björgvinsson, 'The Role of the European Court of Human Rights in the Changing European Human Rights Architecture' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU and National Legal Orders* (n 102).

forms of strategic judging' resembling the legal diplomacy of its early years.[173] Legal diplomacy had proved to be an essential and, indeed, successful strategy by the ECtHR to firmly establish itself within the European human rights architecture during the initial years of its operation. It enabled the Court to gradually gain valuable support from some hesitant States Parties to the Convention and enhance in this way its legitimacy and authority as a supranational court for the protection of human rights.[174] The ECtHR seems to turn to this very same strategy as a response to the growing criticism against it by certain States during the last decade, and post-Brighton in particular. Indeed, as Helfer and Voeten's study shows, and in line with the analysis in Section 5.3 above, the growing number of 'walking back dissents' at Strasbourg post-Brighton, ie minority opinions arguing that the majority is backtracking, suggests that there is an increasing concern among ECtHR judges that the Court is becoming all the more restrained.[175]

Whether the deployment of legal diplomacy, as a legitimacy-enhancing tool, by the ECtHR will have again similarly positive results remains, however, debatable. Arguably, by trying to appease a small, yet considerable, group of States critical of its role as a supranational and regional human rights court, the ECtHR risks jeopardising its credibility and support from the rest of the Council of Europe membership and domestic compliance constituencies (ie individual applicants and broader civil society) which continue to favour its empowerment.[176] It is also for this reason that the Court has previously been criticised for

[173] Mikael Rask Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (n 20) 171. See, Daniel Thym, 'A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's N.D. & N.T. Judgment on 'Hot Expulsions'' (*EU Immigration and Asylum Law and Policy*, 17 February 2020) <http://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/> accessed 16 June 2021; Moritz Baumgärtel, 'Reaching the dead-end: *M.N. and Others* and the Question of Humanitarian Visas' (Strasbourg Observers, 7 May 2020) <https://strasbourgobservers.com/2020/05/07/reaching-the-dead-end-m-n-and-others-and-the-question-of-humanitarian-visas/> accessed 16 June 2021, for similar criticism with regard to the Grand Chamber's approach in recent cases *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (13 February 2020) and *M.N. and Others v Belgium* App no 3599/18 (Decision, 5 March 2020) respectively.

[174] See, Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 171-174; Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (n 20).

[175] Laurence Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(2) *European Journal of International Law* 797, 799. See also, Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (n 18) 777; Paulo Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' (2018) 2 *European Human Rights Law Review* 119, 126-128, expressing serious concerns over the 'existential crisis of the Court'as a result of the 'Court's backtracking from its own principles of interpretation' that has 'an enduring, negative effect on the European system of human rights protection'.

[176] See in this regard, Kanstantsin Dzehtsiarou, 'Hutchinson v UK: The Right to Hope (Revisited)…' (*ECHR Blog*, 10 February 2015), expressing similar concerns: 'Is the Europea Court of Human Rights a strategic actor that can sacrifice certain achievements in certain areas of human rights protection in order to save the "Strasbourg project"? … [O]ne can wonder what price the Court should and is prepared to pay to have the UK on board' <https://www.echrblog.com/2015/02/hutchinson-v-uk-right-to-hope-revisited.html> accessed 14 June 2021. A similar argument was also developed in Başak Çalı, Anne Koch and Nicola Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35(3) *Human Rights Quarterly* 955, 982, noting that 'the lack of objectivity or concern for double standards' can lead to

appearing to avoid the determination of difficult or sensitive issues 'by focusing on procedural safeguards instead of substantive issues'.[177]

As the dynamics between the national and international, legal and political levels have changed over the years and the ECtHR has now developed itself into a progressive court with a central role in the protection of human rights in Europe, there is an entrenched expectation, one may argue, that the Court should continue to proceed steadily on its dynamic jurisprudential path.[178] As one of the first and most important judgments delivered by the 'new' Court highlighted, 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[179] The ECtHR nowadays, therefore, should remain firm to its own purpose of safeguarding the Convention rights, which, admittedly, forms part of its identity as a supranational supervisory human rights body. Although some degree of legal diplomacy may seem unavoidable for a judicial institution operating in an international setting of such political complexity, the ECtHR ought to be cautious not to allow this restrictive approach to derail its so far evolutionary process, thus, backtracking on past achievements.[180]

5.5 Conclusion

The present chapter sought to critically analyse the subsidiarity-driven reform measures adopted post-Brighton, notably under Protocol No 15. The idea that the Brighton Conference has significantly influenced the subsequent reform process as well as the ECtHR's need for reconsidering its relationship with both judicial and political national authorities and adopt a more deferential approach in its jurisprudence forms the basis of the discussion (what is coined as the 'Brighton effect' in the present chapter). Building on the framing analysis conducted previously in the thesis showing that ECHR States have developed a distorted understanding of the underlying problems facing the ECtHR, in this chapter I sought to examine whether, and to what extent, the ECtHR has materialised States' subsidiarity-driven proposals and whether this renewed emphasis on subsidiarity post-Brighton has had any impact on the Court's jurisprudence. I then argued that States'

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legitimacy concerns against the ECtHR, while suggesting that 'by aiming to increase its legitimacy in States with good human rights records, the Court may lose it in States with bad records'.

[177] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (n 144) 460.

[178] Paulo Pinto de Albuquerque, 'Plaidoyer for the European Court of Human Rights' (n 175) 121-122.

[179] *Selmouni v France* App no 25803/94 (28 July 1999), para 101.

[180] Cf, Ernie Walton, 'Preserving the European Convention on Human Rights: Why the UK's Threat to Leave the Convention could Save it' (2014) 42 *Capital University Law Review* 977, 980, 998, putting forward an argument that favours the ECtHR-skeptic stance adopted by some State, arguing that the ECtHR should appease the increasing State backlash against it by 'adopt[ing] a countervailing historical jurisprudence to strengthen the rule of law and preserve the Convention'.

'encouragement' to the Court to give greater prominence to subsidiarity have led to a change in the way the Court conducts its review, which has then resulted in both material/substantive as well as methodological/procedural changes. Examples of the ECtHR's 'age of subsidiarity' jurisprudence were discussed to support the above observations. Furthermore, the chapter critically assessed these subsidiarity-driven changes in the Court's case law and observed that the renewed emphasis on subsidiarity, and thus Protocol No 15, remains, in the end, part of a larger rescue plan to alleviate the Court of its caseload. Drawing upon empirical evidence in recent legal scholarship, it concluded that in the post-Brighton era, where the relationships between States and the Court are being 'rebalanced' to address concerns of a perceived problem of 'Strasbourg overreach', the ECtHR appears inclined to dilute the intensity of its substantive review, while emphasising more on procedural safeguards for its proportionality assessment.

Essentially, the chapter served to answer the question of whether the 'constitutionalist', subsidiarity-focused measures put forward by States and other key ECHR stakeholders during the Interlaken process have had any positive effect in achieving the objectives of the ongoing reform. As shown above, these measures, as applied by the ECtHR so far, have not yielded any positive or encouraging results in identifying and resolving the underlying challenges facing the ECtHR. On the contrary, embarking on a more deferential approach vis-à-vis national authorities of certain States has arguably exacerbated the already-existing challenges and rendered the safeguarding of the future and long-term effectiveness of the Court even more difficult and uncertain. If the above measures and the Court's approach to subsidiarity have proven incapable of achieving the above aim, then the question remains: what alternative measures can successfully achieve the objectives set at the Interlaken Conference back in 2010 and during the subsequent reform process in the past decade? How can (and should) the ECtHR best be reformed in order for its viability and long-term effectiveness to be secured? The following chapter of the thesis will deal with these exact questions and will seek to provide answers in this regard.

Chapter 6
Re-designing the European Court of Human Rights: Towards (further) Constitutionalisation?

'You never change things by fighting against the existing reality. To change something, build a new model that makes the old model obsolete'.[1]

'The Convention's procedures should become more flexible: in some situations, it will be essential that the Court continue to deliver individual justice; in others, the Court's role may be to give guidance to national courts and authorities. […] We need to create an upward dynamic: if States have "got their house in order", […] there should be the possibility for the Court and the Committee of Ministers to interact with them differently than were this not to be the case'.[2]

6.1 Introduction

Having established in previous chapters that normative effectiveness, rather than institutional efficiency, is the underlying challenge facing the ECtHR and that measures adopted during the Court's various reform stages so far have been inadequate to address and/or resolve this underlying challenge, there remains the question of how this shortcoming could be tackled. That is the central aspect of this chapter. As a forward-looking contribution to the debate on the reform and future of the ECtHR, in this chapter, I suggest that an alternative or revised approach to enhance the authority, thus normative effectiveness, of the ECtHR is needed, with a particular focus on further enhancing the constitutionalist role of the Court. I will thus argue that the (further) constitutionalisation of the ECtHR, ie the evolution of the ECtHR into a European Constitutional Court for human rights, might be an appropriate and viable solution to the ongoing fundamental challenge facing the Court and capable of ensuring the long-term future stability and integrity of the entire European human rights project. In making this argument, efforts are made to consider and accommodate the potential as well as limits of the Convention system and particularly the ECtHR in relation to the complicated, challenging and fast-changing geopolitical realities

[1] Buckminster Fuller, 1982
[2] *Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference*, SG/Inf(2009)20 (18 December 2009), para 29.

of which they form part – a factor which has already been identified in previous chapters as an indispensable element of the Court's overall effectiveness.[3]

In this regard, the chapter presents a normative basis that can further justify the way the ECtHR decides to exercise its constitutionalist function vis-à-vis certain ECHR States. It is argued that considering the ECtHR as 'quasi-constitutional' is nowadays anachronistic and does not fully reflect the present reality of the Court. Instead, the chapter deploys the term *hybrid constitutional* to characterise the manner the Court assesses the application of the Convention rules domestically by national courts and also scrutinizes the malfunctions identified in the domestic orders of certain States, acting in this way as a regional governance actor while establishing common standards and upholding fundamental values across the European continent.

Based on the idea of hybrid constitutionalism, I put forward the argument that the (further) constitutionalisation of the Court can be a viable alternative that can guarantee its long-term future and effective functioning. I then present a series of reform measures for enhancing the Court's constitutionalist role, as outlined further below. Firstly, an institutional measure is proposed, which nevertheless carries normative implications for the functioning of the ECHR system. The idea of establishing ECtHR "Regional Branches" in certain "designated geographic areas" in Europe is, thus, presented. Secondly, it is suggested that greater emphasis should be given in building and strengthening European consensus as an interpretive tool for assessing the scope of Convention rights in the Court's judicial reasoning. Thirdly, the idea of re-introducing the "judgments of principle", as a jurisprudential measure, in the debate on strengthening the *erga omnes* effect of the ECtHR judgments is explored. Although this proposal originates from previous reform suggestions which were however rejected by the Steering Committee on Human Rights (CDDH), I will seek to demonstrate that it can still be a beneficial reform measure for the ECHR system. Finally, in line with the ECtHR's identified turn to a more procedural approach of rights review, it is submitted that an additional procedural admissibility criterion should be introduced, whereby, under certain clearly pre-determined requirements, national authorities could enjoy greater deference from the Strasbourg institutions.

6.2 Between European constitutional pluralism, regional governance and individual protection of rights: Rethinking the future (role) of the ECtHR

Soon after the inception of the ECtHR and the initial development of its case-law, the Strasbourg institutions started to establish (or envisage) a role for the Court and an identity for the ECHR system. Although the Convention's limited capacity to exert only 'moderate'

[3] See discussion on the 'context' variable in Chapter 2 of the thesis.

change within its Contracting Parties was initially recognised, the idea of the ECHR as a 'constitutional instrument of European public law'[4] in the field of human rights that could place certain boundaries on the actions even of the democratic States of Western Europe started to gain more prominence.[5] The exact type and extent of those boundaries were yet to be established but a consensus existed that the role of the Convention system, and the ECtHR in particular, was to uphold *common European values* in the field of human rights.[6] Indeed, the former European Commission had already highlighted that one of the fundamental features of the ECHR distinguishing it from any other international treaty is the non-reciprocal character of the obligations of States Parties under the Convention, and, in turn, the shared commitment to 'realise the aims and ideals of the Council of Europe', including the triad of human rights, democracy and the rule of law.[7] As Sørensen also argued:

> [T]he Convention [was] not designed to promote social reform, but it [could] be used both to preserve what ha[d] been achieved and also express a newly emerging consensus and bring States which are lagging behind into the line with a general trend in ideas and institutions in Europe. In this sense it may be instrumental in bringing about reform in the Contracting States.[8]

As Chapter 2 has already shown,[9] the role of the Strasbourg institutions, including the ECtHR, evolved gradually. With further development of the Court's jurisprudence in more recent times, it has been widely accepted that the Court now performs both an adjudicatory as well as a constitutionalist function.[10] The ECHR has evolved into a sophisticated legal system whose Court can be expected to exercise substantial influence on the national legal systems of its Contracting States. The Court nowadays, for example, goes far beyond rendering individual justice and many of its decisions concern how the national legal systems must be reformed structurally, and such reforms are often constitutionally significant.[11] Indeed, apart

[4] *Loizidou v Turkey* (preliminary objections) Series A no 310 (23/03/1995) para 75.
[5] Ed Bates, 'Consensus in the Legitimacy-Building Era of the European Court of Human Rights' in Panos Kapotas and Vassilis P. Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP 2019) 50.
[6] ibid.
[7] *Austria v Italy* (1961) *Yearbook of the European Convention on Human Rights*, 138. See also, *Ireland v United Kingdom* (Plenary) App no 5310/71 (18 January 1978), para 239.
[8] Max Sørensen, 'Do the Rights and Freedoms Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?', in *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights, Rome* (Strasbourg: Council of Europe, 1975) 86.
[9] See Chapter 2, Section 2.3, discussing the multi-functionality of the ECtHR.
[10] See eg, Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 153-158; Fiona de Londras, 'Dual functionality and the Persistent Frailty of the European Court of Human Rights' (2013) *EHRLR* 38.
[11] Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008) 24-25. See also, George Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) 40 *Texas International Law Journal* 359, 373-381; Eirik Bjorge, 'National Supreme Courts and the Development of ECHR Rights' (2011) 9(1) *International Journal of*

from its primary role, as an international human rights court, to adjudicate individual or inter-State human rights disputes, the ECtHR also performs constitutionalist functions: through its decision-making, it clarifies and further develops human rights protection standards by adding to ECHR law's normative substance, thus, sometimes, further expanding the scope of those standards that the Convention's drafters originally envisaged in 1950.[12] As Stone Sweet and Keller reaffirm, 'States are routinely required to reform their internal law and practices in response to findings of violation by the Court, not simply to provide compensation to individual victims'.[13] In the same vein, the increasing implementation of ECtHR judgments domestically has led ECHR States to improve their civil and criminal justice procedures, strengthen the checks and balances vis-à-vis national executives and make democratic decision-making process more effective and transparent.[14] As further discussed below, by resembling a constitutional court, the ECtHR also creates a 'Conventional floor' setting the required standards of rights protection that the 'elected branches of government' of every ECHR State need to satisfy.[15] The multi-functionality of the ECtHR can therefore demonstrate the influence and importance of the institution on a series of levels: the individual, the national and the global/regional level.

Attempting to determine the extent to which the ECtHR resembles a constitutional court, on the basis of (dis)analogies with national constitutional courts, may not always prove helpful.[16] Indeed, various national constitutional courts may well perform different functions and illustrate different constitutional characteristics. The extent to which the ECtHR can really be considered constitutional will therefore depend on the yardstick used to measure its constitutional character as indicated by the impact of the Court on States' domestic orders. While, for example, the US Supreme Court has the power to strike down national laws as unconstitutional, other national superior courts, such as the UK Supreme Court, can *solely* declare national legislation incompatible vis-à-vis a rights-detailing instrument of normatively higher value.[17] Similarly, although the ECtHR does not have the power to

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Constitutional Law 5; Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe* (CUP 2016) 6-13.

[12] See nn 44-55 in Chapter 2 and accompanying text.

[13] Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on the National Legal Systems' in H Keller and A Stone Sweet (n 11) 703.

[14] See eg Eirik Bjorge, 'National Supreme Courts and the Development of ECHR Rights' (n 11); George Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (n 11) 373-375. For an overview of the impact of ECtHR judgments on national legal orders by means of amendments of national constitutions, see, Department for the Execution of Judgments of the European Court of Human Rights, *Thematic Factsheet – Constitutional Matters* (Council of Europe 2020) <https://rm.coe.int/thematic-factsheet-constitutional-matters-eng/16809e512a> accessed 31 May 2021.

[15] Koen Lemmens, 'The Margin of Appreciation in the ECtHR's Case Law' (2018) 20 (2-3) *European Journal of Law Reform* 78, 88.

[16] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) 71 *Yale Law School Faculty Scholarship Series* 1.

[17] The primacy of EU law over national legislation of EU member States is a notable exception to this. See eg, Michal Bobek, 'The Effects of EU law in the National Legal Systems' in Catherine Bernard and Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020) 154.

immediately challenge the legal validity of a defective national law, its judgments finding an incompatibility with the Convention impose a duty on States to take individual and, most importantly, general remedial and preventive measures, including amendments in their national legislations and practices. The ECHR, in turn, is often regarded as having equal value as national constitutions, thus enjoying 'superior authority' over national legislation/statutory law.[18] Furthermore, in many occasions, a strong alliance is built between the ECtHR and national constitutional courts as the latter choose to make frequent references to the former's jurisprudence, ensure that the interpretation of their national constitutions is ECHR-compatible and, when necessary, change their own established case law in order to align with the ECtHR's jurisprudence.[19] National constitutional courts are thus no longer alone in confronting their domestic political branches, ie the executive and legislature. The ECtHR, by exercising its constitutionalist function, has demonstrated its 'ability to penetrate the surface of the State' when identifying systemic defects in a national legal system and prescribing necessary legislative and administrative changes, thus piercing the veil of the State as a unitary entity.[20]

What the above observation shows is that the ECtHR contributes to the protection of human rights *per se*, through its adjudicative function and the examination of individual applications. Beyond this, and most importantly, the Court contributes to the reduction of administrative and governmental arbitrariness as well as the promotion of the rule of law, democracy and good governance in ECHR States, notably through the identification of systemic problems in national legal orders and the ordering of general restorative or preventive measures.[21] The ECtHR has increasingly embarked on routinely assessing the compatibility of States' national laws and practices with the Convention and identifying structural, deep-rooted defects, on which the complaints brought before it rely. National authorities are then obliged to reform their internal laws and practices, rather than merely providing monetary compensation to the individual applicant, in response to findings of violation by the ECtHR against them. As such, the role of the ECtHR 'is not very different from the role of national Constitutional Courts, whose mandate is not only to defend constitutional provisions on human rights, but also to develop them'.[22] Indeed, Stone Sweet argues that 'judges in Strasbourg confront the same kinds of problems that their

[18] See eg, Eirik Bjorge, 'National Supreme Courts and the Development of ECHR Rights' (n 11) 21-22 and 25-26, citing the examples of France and Germany.

[19] Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP 2012) 23-24. See also Helen Keller and A Stone Sweet (n 11) 677-682, 703. See also, Wilhelmina Thomassen, 'The Vital Relationship between the European Court of Human Rights and National Courts' in Spyridon Flogaitis, Tom Zwart, Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Elgar 2013) 97-99.

[20] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale LJ* 273, 288.

[21] L Wildhaber and I Wildhaber, 'Recent Case Law on the Protection of Property in the ECtHR' in C. Binder, U Kriebaum, A Reinisch and S Wittich (eds), *International Investment Law for the 21st century: Essays in Honour of Christoph Schreuer* (OUP 2009) 674-6.

[22] *Öcalan v Turkey* App no 46221/99 (12/05/2005) Dissenting Opinion of Judge Garlicki, para 4.

counterparts on national constitutional courts do'.[23] National judiciaries and national Constitutional courts, in particular, just like the Strasbourg Court, regularly exercise review of domestic law on the basis of rights derived from the Convention and, thus, adjudicate on the conventionality (ie compatibility with the ECHR) of States' national laws all the more often.[24] Resembling a national Constitutional court, the ECtHR often engages in such conventionality exercise even in relation to internal 'matters of general policy',[25] including national security and socio-economic affairs, or issues constituting 'a choice of society',[26] such as sensitive moral and bioethical matters.[27] For a long time, these areas fell within the State's *domaine réservé*[28] and were thus categorically excluded from any judicial, let alone international, scrutiny.[29] The ECtHR's function and scope of authority, therefore, can nowadays only be seen as 'comparable' to that of other (European) national apex courts.[30]

Consequently, the constitutionalist features of the ECtHR do not need to match those of a national constitutional court within the traditional nation-State context. Such generalisations derived from what can be considered undoubtedly or 'truly' constitutional can often prove intuitive and thus counter-productive. Instead, it is argued that the notion of constitutionalism must come to grips with the post-national order in which 'various forms of power and social organization … escape the template of the state into more local, private or transnational domains'.[31]

In this regard, Greer and Wildhaber argue that acknowledging the constitutional character of the ECtHR does not threaten the independence of national constitutional courts.[32] Their role

[23] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (n 16) 1.
[24] See eg, Eirik Bjorge, 'National Supreme Courts and the Development of ECHR Rights' (n 11) 21.
[25] See eg, *S.A.S v France* App no 43835/11 (1 July 2014), paras 129, 159, acknowledging, however, that in such areas, 'the role of the domestic policy-maker should be given special weight'. See also, nn 103-105 in Chapter 5, Section 5.3 and accompanying text.
[26] *S.A.S v France* (n 25), para 153.
[27] See eg, *A, B, C v Ireland* App no 25579/05 (16 December 2010); *Haas v Switzerland* App no 31322/07 (20 January 2011).
[28] See eg, Katja Ziegler, 'Domaine Réservé' in *Max Planck Encyclopedia of Public International Law* (OUP 2013), defining *domaine réservé* as 'the areas of State activity that are internal or domestic affairs of a State and are therefore within its domestic jurisdiction or competence' and noting that '*domaine réservé* describes areas where States are free from international obligations'.
[29] ibid. See also, Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 243; Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 *European Journal of International Law* 25, 27-28; Thomas Kleinlein, 'Constitutionalization in International Law' (2012) 231 *Contributions to Max Planck Institute for Comparative Public Law and International Law* 703, 706, <https://www.mpil.de/files/pdf2/beitr231.pdf> accessed 16 June 2021.
[30] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (n 16) 1. See also, Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders' in H Keller and A Stone Sweet, *A Europe of Rights* (n 11) 7.
[31] Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *MLR* 363, 366.
[32] Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12(4) *HRLR* 655, 675.

is, and should be, complementary rather than antagonistic.[33] Arguably, the ECtHR has demonstrated through its jurisprudence that its underlying objective is to provide national authorities with 'a clear indication of the constitutional limits provided by the Convention rights upon the exercise of national public power' and, ultimately, to promote 'convergence in the way institutions at every level of governance operate in Europe'.[34] As Fassbender notes, 'it is a profound misunderstanding to equate the advancement of the constitutional idea in international law with a weakening of the institution of the independent state'.[35]

Apart from a 'truly' constitutional court, a constitutional order to be functional arguably requires a certain degree of homogeneity within its structures. The diversity and heterogeneity of the CoE's constituency, which was further enhanced following the organisation's Eastward enlargement, may have been seen as signalling a *de*-constitutionalisation of the ECHR system. However, as shown below, the actual accession of new Member States but also the very prospect of CoE's enlargement was a powerful reason that incentivised the institutional designers and decision-makers within the ECHR regime to develop constitutional aspirations.[36] In reality, the necessary degree of homogeneity that the ECHR system needs to operate as a constitutional order derives from the ECtHR's role to protect a common liberal-democratic ideology of human rights and other pan-European values, as enshrined in the Convention.[37] The ECtHR acts, in this way, as 'an impactful and weighty instrument of European integration'[38] and contributes to the 'development of a rights-based, pan-European constitutionalism'.[39]

[33] See eg, *Shamayev and Others v Georgia and Russia* App no 36378/02 (12 April 2005), para 500, noting that '[t]hrough its system of collective enforcement of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level'.

[34] Steven Greer, *The European Convention on Human Rights: Achievements, Problems, Prospects* (CUP, 2006), 171.

[35] Fassbender, 'The Meaning of International Constitutional Law' in Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (CUP 2007) 326.

[36] See discussion in later sections.

[37] See Preamble, ECHR and Preamble and Art 1, Council of Europe Statute.

[38] Christos Rozakis, 'The European Convention on Human Rights as a Tool of European Integration' (2020) 1 *ECHR Law Review* 22, 24.

[39] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (n 16) 1. See also, Boštjan Zupančič, 'Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis' (2003) 1 *Journal for Constitutional Theory and Philosophy of Law* 57, suggesting that it is 'an empirical fact that Europe has had in Strasbourg, for the last forty years, its own constitutional court'; Andreas Follesdal, 'Building Democracy at the Bar: the European Court of Human Rights as an Agent of Transnational Cosmopolitanism' (2016) 7(1) *Transnational Legal Theory* 95, 99-100. See further, Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 227, arguing that 'democracy and human rights are constitutionalist principles, therefore securing these principles makes the ECtHR constitutionalist or at least quasi-constitutionalist'.

6.2.1 Individual or Constitutional Justice? The unanswered question

A question that gained particular prominence in reform debates both before and during the Interlaken reform process is whether the Court should be concerned with delivering individual or constitutional justice or both.[40] Arguably, despite its urgent importance, the issue of how the multiple, but often conflicting, functions of the ECtHR should be prioritised or even reconciled has been left largely unanswered to date.[41]

In order to give a definite answer to the above questions, two important aspects need to be more fully examined. First, the extent to which each of these functions are compatible with the underlying objectives of the Convention and the Court and, second, the extent that each of them can realistically be materialised given the current, or even future, circumstances of the Court. The fact that these two questions have not been given a comprehensive answer at any of the Court's various reform stages so far is even more problematic.[42] It is thus hereby submitted that a return to fundamentals is necessary and the examination of the role and functions of the ECtHR should form the prerequisite to the above discussion. Crucially, the debate goes beyond the definitional question of what individual and constitutional justice functions represent and the concern of how or whether they should apply. Instead, it goes to the core of the ECtHR's identity and role as well as the choices that need to be made within the ECHR system, and with regard to the Court in particular, in order to resolve its underlying challenges as identified in earlier chapters.

The ECtHR has acknowledged that '[a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States'.[43] The Court's 'twin role' was later reaffirmed in the Brighton Declaration, noting that while the Court acts as a 'safeguard for individuals whose rights and freedoms are not secured at the national level', in the long-term and 'in response to more effective implementation at the national level', it should 'focus its efforts on serious or widespread violations, systematic and structural problems, and important questions of interpretation

[40] Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (n 32) 662-3; Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership' (2002) 21 *Penn State International Law Review* 101.
[41] Luzius Wildhaber, 'Rethinking the European Court of Human Rights' (n 39) 211; Steven Greer, *The European Convention on Human Rights* (CUP 2006), 165-167; See also Brighton Declaration (2012), paras 32, 33, 39.
[42] S Greer and L Wildhaber, 'Revisitng the Debate about 'constitutionalising' the European Court of Human Rights' (n 32) 663; Françoise Hampson, 'The Future of the European Court of Human Rights' in Geoff Gilbert, Françoise Hampson and Clara Sandoval (eds), *Strategic Visions for Human Rights: Essays in Honour of Professor Kevin Boyle* (Routledge 2011) 142-143.
[43] emphasis added; *Ramtsev v Cyprus and Russia* App no 2596/04 (07 January 2010), para 197; *Karner v Austria* App no 40016/98 (24 July 2003), para 26.

and application of the Convention'.[44] These statements, apart from the twin role of the Court, reflect the overlapping, but often competing, visions of its function. The ECtHR appeared, in various occasions, to prioritise its individual justice role, which, arguably, 'lies at the heart' of the ECHR system.[45] Yet, the ECHR States at the Brighton Conference reached a consensus that the Court's constitutional dimension should be further pursued, even at the expense of individual justice, openly indicating the direction to be followed in the future.

Arguably, granting individual relief is very often of secondary importance to the 'primary aim of raising the general standard of human rights protection and extending human rights jurisprudence throughout the community of Convention States'.[46] In other words, as Chapter 2 already discussed, rather than providing individual redress to each and every applicant whose Convention rights had been violated, the core objective of the ECtHR should be to ensure that systemic and structural violations of the Convention are revealed, thus creating the conditions whereby appropriate, general remedial measures are adopted at the national level in order to prevent future repetition of similar breaches.[47] Even if individual redress can be achieved, in certain cases, by awarding just satisfaction to the applicant(s), the Court emphasised that 'there is a strong general interest in espousing an approach which is capable, in the longer run, of preserving the respective roles … [under the Convention] of the Court [and] the respondent Government'.[48] It is now evident that 'nothing is to be gained' by the judicial determination of every single individual case, especially when identified as repetitive by the Court, 'nor will justice be best served'.[49] Such an approach would, by contrast, 'place a significant burden on [the ECtHR's] own resources, with a consequent impact on its considerable caseload'.[50] Most crucially, though, leaving the individual justice narrative regarding such cases to go unchallenged 'would not contribute usefully or in any

[44] Brighton Declaration (2012), paras 33, 35(c). See also, Luzius Wildhaber, 'Changing Ideas about the Tasks of the ECtHR' in Luzius Wildhaber, *The ECtHR 1998-2006: History, Achievements, Reform* (Engel 2006) 136-149.
[45] Amnesty International's Comments on 'Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights' (February, 2004), para 5 <https://www.amnesty.org/download/Documents/96000/ior610052004en.pdf> accessed 16 June 2021.
[46] Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *HRLJ* 161, 163. For a similar view from a practitioner, see also, Bill Bowring, 'The crisis of the ECtHR in the face of authoritarian and populist regimes' in Avidan Kent, Nikos Skoutaris, Jamie Trinidad (eds), *The Future of International Courts: Regional, Institutional and Procedural Challenges* (Routledge 2019).
[47] Laurence Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) *EJIL* 125, 155; Robert Harmsen, 'The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform', in John Morison, Kieran McEvoy, Gordon Anthony, *Judges, Transition, and Human Rights* (OUP 2007) 37-38; Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership' (n 40) 104-105.
[48] *Burmych and Others v Ukraine* App no 46852/13 (12 October 2017), para 173.
[49] ibid, para 174.
[50] ibid.

meaningful way to the strengthening of human rights protection' domestically until the State eliminates the root cause of the problem.[51]

By focusing on its constitutionalist function, therefore, the role of the ECtHR is mainly corrective and preventive. It seeks the means to most effectively identify and 'facilitate the rapid and effective suppression of a malfunction found in the national system of human rights protection'.[52] The ECtHR's objective thus shifts towards aligning the State's conduct with the Convention standards through necessary reforms rather than 'solely' redressing the individual complainant. Lawson supported this view with a provocative, albeit realistic, metaphor: 'the Court must not seek to rescue every drowning person'; instead its mission is 'to oversee that, in every Member State, the ship of State is seaworthy and makes adequate provision for lifeboats'.[53] Importantly, the above observations are reaffirmed by recent empirical research which illustrates that the individual 'is clearly not at the centre of the Court's analysis' when awarding non-pecuniary damages in its judgments.[54] Instead, the ECtHR focuses on States' internal structures in order to identify, condemn and resolve the underlying problem in the most effective manner.[55] The ECtHR's current practice, therefore, seems to favour its constitutionalist dimension, rather than the individual justice narrative the Court often portrays about itself, in an attempt to further facilitate the embeddedness of the Convention into States' national legal systems and deter similar future violations.[56] As such, the Court's gradual shift towards a greater constitutionalist approach, as evidenced in its more recent decision-making, aims to motivate and incentivise States to alter their behaviour in relation to certain Convention-incompatible practices and align the *modus operandi* of their institutions with the applicable ECHR standards.[57]

The ECtHR's efforts to facilitate the effective implementation of the Convention at national level clearly reflect the subsidiary character of the Court, as an additional layer of rights protection at the international level that complements the national judiciaries, and the ECHR System more generally. In parallel, it is evident that this objective can be more effectively met when the ECtHR discharges its constitutionalist function in the hybrid manner discussed

[51] ibid.
[52] *Scordino v Italy* (no.1) App no 36813/97 (29 March 2006), para 236.
[53] from translation, cited in R Harmsen, 'The European Court of Human Rights as a "Constitutional Court"' (n 47) 38. It is worth noting, however, that I share the concerns expressed by some scholars that this is a particularly troubling metaphor, especially given the current context of ongoing migration and refugee crisis in Europe. See eg, Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015). Instead, the metaphor is only used here in relation to the overwhelming number of incoming individual applications received by the ECtHR, as originally cited in R Harmsen's work above.
[54] Veronika Fikfak, 'Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim; it's all about the State' (2020) 33 *Leiden Journal of International Law* 335*,* 355, 360.
[55] ibid, 343, 360.
[56] ibid. See also, Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (n 47) 141.
[57] Veronika Fikfak, 'Non-pecuniary Damages before the European Court of Human Rights: Forget the Victim; it's all about the State' (nn 54-55).

above. The notions of subsidiarity and constitutionalism, therefore, are not necessarily contradictory, but rather interdependent and complementary to each other.[58] Cautious of its own (institutional and constitutionalist) limits, the Court is called upon to deploy its various characteristics in a balanced and realistic way.[59] As I will further argue in the chapter, individual and constitutional justice, in the ECHR context, should not be seen as binary oppositions or the products of a zero sum game. By prioritising and strengthening its constitutional function, the Court does not abandon its mission to provide redress to individual applicants. What changes, instead, is the method with which the Court seeks to achieve this aim. Both pragmatism and the nature of the ECtHR, as a subsidiary court, suggest that 'the time has now come for it to redefine…its role' and move towards a more targeted, balanced and purposeful pursuit of constitutional justice.[60]

Consequently, the ECtHR's present reality clearly proves that over-reliance on the Court's systematic delivery of individual justice (ie the idea that the Court is inescapably committed to delivering individual justice for every meritorious application, whatever the bureaucratic cost and whatever the likely impact of the judgment on the respondent State's practices) is no longer empirically sustainable or normatively effective to achieve the Court's long-term objectives as identified above. Instead, shifting the Court's focus to a constitutional model of justice is arguably the only viable alternative that can guarantee the long-term effectiveness of the Court and the Convention system more broadly.[61]

6.2.2 Rethinking the role of the ECtHR: The ECtHR as a *hybrid* constitutional court

It has been repeatedly stressed that the responsibility to protect Convention rights lies, first and foremost, with the national authorities.[62] As current President Spano noted, the subsidiary nature of the ECHR system allows States the opportunity 'to put matters right through their own legal system'.[63] As explained in the sections above, however, failing to do so will *trigger* the responsibility and, thus, supervisory jurisdiction of the ECtHR to uphold

[58] See eg, Kanstantsin Dzehtsiarou and Alan Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' (2013) *Public Law* 710, 712-713.
[59] See next section. See also, Ed Bates, 'Strasbourg's Integrationist Role, or the Need for Self-restraint?' (2020) 1 *ECHR Law Review* 14, 17-18.
[60] *Burmych and Others v Ukraine* (n 48), para 182.
[61] Fiona de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (n 10); Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (n 32).
[62] See eg, Jean-Marc Sauvé, Speech at Seminar *Subsidiarity: A Two-Sided Coin? – The Role of the National Authorities* (30 January 2015); Samantha Besson, 'Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights' (2016) 61(1) *American Journal of Jurisprudence* 69, 71-72. See also, Brussels Declaration (27 March 2015), Action Plan, Section B, noting that national authorities are 'the first guardians of human rights' <https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf> accessed 20 April 2021. In the ECtHR case law, see, *inter alia*, *Scordino v Italy (no 1)* App no 36813/97 (29 March 2006) para 140.
[63] Robert Spano, 'Universality or Diversity of Human Rights?' (2014) 14 *HRLRev* 487, 500.

the required level of rights protection. At the same time, where necessary, the Court will require the respondent State to end the systemic violation at national level by adopting appropriate measures, such as reforming its national laws and practices in response to the identified violation.

In such cases, as the ECtHR's well-established jurisprudence shows,[64] the Court will need to depart from its traditional individualised justice approach and shift towards a more generalised justice stance even if it is seen as if it 'behaves more as a general and prospective lawmaker than as a judge whose reach is primarily particular and retrospective'.[65] The individualised assessment of cases traditionally exercised by the ECtHR could eventually be elevated to more general level, as shown already, enabling the Court to identify any systemic problems at the domestic level and provide directions as to how these may be resolved. Consequently, one may argue, the degree of constitutionalism that the ECtHR may exercise through its judgments may elevate depending on whether it identifies such a systemic deficiency in a particular case. It is worth noting here - the importance of this statement will be demonstrated further below - that although there has been a small handful of 'full' pilot judgments against original CoE Member States,[66] the vast majority of occasions where the Court chose to elevate its degree of constitutionalism to date concerns cases originating from the newly established democracies which joined the ECHR system during the 1990s enlargement.[67]

The term 'quasi-constitutional' was originally coined to describe the ECtHR's expanding judicial function and, thus, its turn to more active constitutionalist adjudication.[68] However, when the term was first used in the 1990s, 'a European constitutional legal system of human rights protection [was still] emerging' and the Court itself was, at the time, 'gradually assuming the mantle of a European constitutional court'.[69] Although the use of the 'quasi-constitutional' label would certainly reinforce and complement the status and role of the Court, arguably, nowadays it does little justice to how the ECtHR has been developed jurisprudentially to date and the impact it has had across ECHR Contracting Parties. Such description is, in this sense, rather anachronistic. The analysis in previous chapters,

[64] It is noted that the ECtHR has used the key phrases 'systemic defect' and 'systemic' or 'widespread' problem to categorise a ruling as a pilot judgment. See eg, *Sejdovic v Italy* App no 56581/00 (10 November 2004), operative Part 2A, para 46; *Sejdovic v Italy (II)* (1 March 2006), paras 109 and 120; *Scordino v Italy (No1)* App no 36813/97 (29 March 2006) paras 230-231 and 236; *Xenides-Arestis v Turkey* App no 46347/99 (22 March 2006) para 38.

[65] Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in H Keller and A Stone Sweet, *A Europe of Rights* (n 11) 703.

[66] See eg, *MC and Others v Italy* App no 5376/11 (03 September 2013); *Athanasiou and Others v Greece* App no 50973/08 (21 December 2010); *Greens and MT v UK* App no 60041/08 (23 November 2010); *Rumpf v Germany* App no 46344/06 (02 September 2010).

[67] See, Factsheet – Pilot Judgments (ECtHR Press Unit, January 2020) <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 16 June 2021.

[68] R Ryssdal, 'The Coming of Age of the ECHR' (1996) 1 *EHRLR* 18, 22.

[69] R Ryssdal, 'The Expanding Role of the European Court of Human Rights' in A Eide and Helesen (eds), *The Future of Human Rights Protection in a Changing World* (Norwegian University Press 1991) 115, 118.

especially Chapter 4, showed that this inconsistency between the ECtHR's internally driven evolution, which has largely favoured a turn towards greater constitutionalism,[70] and the State-led vision for the future role of the Court as a cost-efficient and technocratic judicial institution[71] is well reflected throughout the reform process of the last decades. It is now evident that the scope of the ECtHR's authority has become comparable to that of national constitutional and supreme courts and it is commonly accepted that the Court today is 'well positioned to exercise decisive influence on the development of a rights-based, pan-European constitutionalism'.[72] Consequently, the term 'quasi-constitutional' does not give full acknowledgement to the constitutionalist function of the Court as it has been developed to date. Instead, I argue that the ECtHR nowadays can be better seen as a *hybrid constitutional* court. Hybrid constitutionalism, I submit, can better reflect the Court's reality, as shown by the growing 'systemic turn' in its jurisprudence through pilot-judgments: it exemplifies the well-established and increasingly deployed constitutionalist function of the ECtHR while, at the same time, it indicates that the extent to which the Court will decide to use this function will depend on the willingness (or ability) of the States' national authorities to cooperate in addressing and rectifying the identified systemic deficiency domestically.

Hybrid constitutionalism thus goes beyond a traditional understanding of constitutionalisation that sees it 'as an analytical tool that can distinguish between trivial adjudicatory decisions and more serious constitutionalist judgments'.[73] Instead, I use the term hybrid constitutionalism as a normative manifestation to encapsulate the ECtHR's targeted and dynamic jurisprudential approach to bringing ECHR States in line with their Convention obligations, thus ensuring a uniform level of rights protection across Europe. On an imaginary spectrum, where individual and constitutional adjudication functions form the two extremes,[74] the ECtHR would fluctuate its principled stance on the basis of two factors:

[70] See Chapter 4, Section 4.4.
[71] ibid.
[72] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (n 16) 1.
[73] Kanstantsin Dzehtsiarou and Alan Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' (n 58) 713. See also, Luzius Wildhaber, 'Rethinking the European Court of Human Rights' (n 39) 226.
[74] I use the said imaginary spectrum here only as an illustration to further explain the idea of hybrid constitutionalism. As I argued above, I consider the ECtHR's individual and constitutional adjudication functions *not* a zero sum game. As such, in reality, no ECtHR judgment finding a violation of the Convention can ever be placed at the very extreme of either side of this spectrum. This is because behind every 'constitutionalist' judgment there is an individual applicant whose ECHR rights have been breached and who will be entitle to some kind of individual remedy, regardless of any other general measures directed against the respondent State. Similarly, no ECtHR judgment can be solely 'individual' in nature; in every judgment, regardless of the absence of any identified system problems at the national level, the ECtHR protects and promotes the fundamental values underipinning the ECHR system, ie human rights, democracy and the rule of law, which are 'constitutionalist principles, therefore securing these principles makes the ECtHR constitutionalist or at least quasi-constitutionalist'. See, Luzius Wildhaber, 'Rethinking the European Court of Human Rights' (n 39) 227. See also, Jean-Marc Sauvé, *The Role of the National Authorities*, Speech at Seminar *Subsidiarity: a two-sided coin?* (Strasbourg, 30 January 2015) 4, arguing that 'States are subject to a triple "obligation of result" where a breach is found: they must remedy its detrimental effects; put it to an end where it is ongoing; and prevent

first, the gravity and scope of the violation, as illustrated in *Broniowski*[75] and *Hutten-Czapska*[76]; and, second, the national authorities' approach to the matter. Essentially, cases which present a 'systemic deficiency' at the national level would cross the boundaries between individual and constitutional adjudication. As a result, the less willing and/or capable the national authorities prove to be in addressing and rectifying the identified systemic deficiency, the greater the extent of the general measures that the ECtHR would decide to indicate to the respondent State and, thus, the greater the degree of the constitutionalist function the Court would seek to exercise. Hybrid constitutionalism presents therefore a dynamic concept and better reflects the inherent synergy, instead of tension, between the Court's subsidiary and constitutionalist function. Finally, some parallels can be drawn between the idea of hybrid constitutionalism, as presented above, and the concept of trustee courts. As Stone Sweet and Brunell explain, under trusteeship, 'judicial lawmaking will be "sticky" and path dependent', in the sense that the exercise of lawmaking functions will take place in situations where States have proved to be unable to overcome bargaining impasses domestically, and that the outcomes produced from this function will depend on (political, societal) changes.[77] In other words, hybrid constitutionalism attests to the fact that the balance between the discharge of the Court's constitutionalist function and the competence of States to regulate their internal affairs is constantly readjusted based on the extent to which States comply with the required Convention standards.

Hybrid constitutionalism thus envisages the ECtHR assuming a 'broadly defined pedagogical role across a heterogonous community of States', thus, ensuring that the minimum Convention standards are universally guaranteed.[78] Developing the idea further, it is submitted that the ECtHR's hybrid constitutional role can therefore have both a negative as well as positive character: the Court, on one hand, employs constitutional provisions enshrined in the Convention as 'brakes' regulating the manner governmental powers can be exercised, as and when needed, in order to constrain any arbitrary interference with Convention rights.[79] On the other hand, it fulfils its mandate of progressively developing the Convention standards on the basis of present-day conditions and societal changes.[80] At the

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future violations'. As Sauvé further explains, this 'triple "obligation of result"' often requires a combination of individual and general measures.

[75] *Broniowski v. Poland* App no 31443/96 (Merits) (22 June 2004).

[76] *Hutten-Czapska v Poland* App no 35014/97 (16 September 2006).

[77] Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organisation' (2013) 1 *Journal of Law and Courts* 61, 66.

[78] Robert Harmsen, 'The European Court of Human Rights as a "Constitutional Court"' (n 47) 40. On the need to focus on the 'pedagogical function' of the Court, see also, Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights' (n 32) 676.

[79] On the idea of constitutional provisions as 'brakes', see, Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 35. For an outline of positive and negative constitutionalism, see eg, N. W. Barber, *The Principles of Constitutionalism* (OUP 2018) 2-9.

[80] *Öcalan v Turkey* App no 46221/99 (12 May 2005) Dissenting Opinion of Judge Garlicki, para 4. See also, L Wildhaber and I Wildhaber, 'Recent Case Law on the Protection of Property in the ECtHR' in C Binder, U

same time, as noted further above, when exercising its constitutional function the ECtHR is not solely concerned with limiting the power of the State. Rather, its objective is to guide the national authorities to develop the necessary institutional structures through the adoption of appropriate remedial measures, thus ensuring the compatibility of the State's overall governance with ECHR requirements.

An illustrative example of how the ECtHR's hybrid constitutionalism is exercised is the examination of pilot judgments and the manner in which the Court decides to deploy both its 'pedagogical' and 'therapeutic' functions. As Judge Garlicki identifies, a significant difference in the way the ECtHR had chosen in the past to deploy its constitutionalist discourse in certain pilot judgments can be observed.[81] Notably, 'systemic problem(s)' language in a series of Italian cases was carefully placed in the *reasoning* on the merits,[82] whereas such language was instead included in the *operative* parts of the earlier pilot judgments of *Broniowski* and *Hutten-Czapska*.[83] This subtle, but nevertheless important, difference, according to Judge Garlicki, shows how the ECtHR - vis-à-vis the 'Italian' cases - chose to exercise a certain degree of judicial restraint in applying a *Broniowski*-like pilot judgment procedure, 'i.e. a procedure in which both the identification of a systemic violation and the call for general measures are included in the operative part of the judgments'.[84]

Although this difference in the Court's approach may be seen as giving effect to 'semi-pilot judgments',[85] one may argue that this judicial strategy also reflects the hybrid constitutionalism of the Court, as discussed further above. In line with the analysis of the hybrid constitutional function of the Court, and as acknowledged by Judge Garlicki, the ECtHR may decide to deliver a 'full', unrestrained pilot judgment, instead of a 'semi-pilot judgment', in situations where, in a State Party, 'a stalemate among the proponents and the opponents of a Convention-friendly solution of a [systemic] problem arises'.[86] The ECtHR's ruling could then serve 'as an additional argument and tip the balance in the right direction'.[87] When no such confrontation between the national authorities can be clearly identified, a 'tougher' constitutional-type intervention of the ECtHR may be seen counter-productive or even illegitimate and, thus, provoking a backlash against the Court.[88] Finally, Judge Garlicki identifies a second reason the ECtHR may choose to exercise its 'tougher'

Kriebaum, A Reinisch and S Wittich (eds), *International Investment Law for the 21st century: Essays in Honour of Christoph Schreuer* (OUP 2009) 674-6.

[81] Lech Garlicki, 'Broniowski and After: On the Dual Nature of 'Pilot Judgments' in Caflisch et al. (eds) *Human Rights – Strasbourg Views; Droits de l'homme – Regards de Strasbourg*' (2007) 177.

[82] Sej*dovic v Italy (II)* 2006, paras 109 and 120; *Scordino v Italy (No1)* 230-231 and 236.

[83] Rule 61, para 3 of the Rules of Court identifies pilot judgments in the strict sense as those judgments which specify in their operative provisions (rather than in the reasoning part) both the nature of the systemic problem and the type of remedial measures that the respondent State *must* adopt.

[84] L Garlicki, '*Broniowski* and After: On the Dual Nature of 'Pilot Judgments'' (n 81) 190.

[85] ibid, 191.

[86] ibid, 190.

[87] ibid.

[88] Ed Bates, 'Strasbourg's Integrationist Role, or the Need for Self-restraint?' (n 59) 18.

constitutional function (mainly) through 'full' pilot judgments. Arguably, such a firm stance may be a means of last resort, in special circumstances where the Court is determined that no 'other, less convincing, means of persuasion', such as its traditional individualised justice approach or even 'semi-pilot judgments', may be effective in ending the 'malfunctioning' at the domestic level.[89]

Essentially, what the above analysis demonstrates is that the constitutionalist character of the jurisdiction of the ECtHR, instead of being assessed through a 'quasi-constitutional' frame, which may give rise to a binary outcome, is better reflected through the idea of hybrid constitutionalism. Importantly, the question is when and to what extent the ECtHR exercises its constitutionalist function, rather than whether it does so. As Sadurski argues, 'just as the existence of a constitution…is a matter of degree, so is the "constitutionality" of a court'.[90] More specifically, as far as the ECtHR is concerned, the question is about identifying a relevant trend – 'not about reaching an extreme point on the spectrum of the constitutionality of courts'.[91] More importantly, though, the prism of hybrid constitutionalism allows for a much-needed repositioning of the ECtHR as the essential institution, with the ultimate supervisory jurisdiction to review and decide on any Convention-related matter, in the broader 'shared responsibility' architecture of the subsidiary ECHR system. In doing so, it rebalances the institutional relationships of ECHR stakeholders within the Convention system and urges the ECHR States to honour their Convention obligations, as the primary defenders of Convention rights. A the same time, the concept of hybrid constitutionalism avoids any potential "fine-tuning versus policy-shaping" dilemma that could jeopardise the Court's constitutionality, as presented above. The judicial, hybrid, constitutional review exercised by the ECtHR is to be seen, therefore, as an 'emergency' procedure, which is only employed in its maximum extent when ordinary (domestic) democratic mechanisms fail to secure the required protection standards under the Convention and when 'a legal aberration is so egregious that extraordinary, non-majoritarian devices' need to be used.[92] Finally, a ECtHR with hybrid constitutionalist functions will be empowered with the necessary flexibility, through its developing case-law, to further refine its role within the ECHR system and sharpen its focus where and to the extent it is genuinely needed, with the ultimate aim of ensuring the continuing relevance of the Convention as a constitutional instrument of European public order. Indeed, recognising the ECtHR as a hybrid constitutional court is not a revolution within the ECHR system, but rather a consolidation of the Court's evolving jurisprudential practice.

[89] L Garlicki (n 81) 190.
[90] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9(3) *HRLRev* 397, 449.
[91] ibid.
[92] Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (n 19) 44-45.

Consequently, looking at the Court as a hybrid constitutional court would allow it to assume a more focused and targeted role by ensuring that applications submitted to it are chosen and adjudicated in a manner which better contributes to the identification, denunciation and resolution of Convention rights violations. This task would be especially important for those violations which reveal deep-rooted deficiencies in the *modus operandi* of States' domestic structures. Indeed, there is a range of cases reaching the ECtHR, which require it to discharge its constitutionalist function and protect, apart from the applicant's Convention rights, the fundamental principles of democracy and the rule of law. It has now become clear that in instances where national authorities of ECHR States have persistently, deliberately or otherwise, subverted the rule of law and obstructed the effective deliberation of justice by failing to protect the applicant's Convention rights domestically, the ECtHR simply cannot hide away from its crucial constitutionalist function and leave those domestic deficiencies unaddressed.[93] It is therefore submitted that further enhancing the constitutionalist function of the ECtHR through the prism of hybrid constitutionalism is not only normatively justified, but also necessary for its, and the wider ECHR system's, long-term survival.

6.3 Proposals for (Further) Constitutionalisation of the ECtHR

As the theoretical framework of hybrid constitutionalism presented above shows, the Court's process towards (further) constitutionalisation entails an array of powers and limitations that allows the Court to choose when and how its constitutionalist function should be deployed. Importantly, this allows the Court to exercise a qualified judicial activism (and self-restraint, at the same time) while remaining within its own jurisdictional boundaries as set by the ECHR and ensuring the progressive development of the Convention.

As hybrid constitutionalism suggests, the constitutionalist function of the ECtHR, as a subsidiary, regional and supranational court, can be better understood and further enhanced through the increasingly important principles of shared responsibility and complementarity.[94] This is certainly a dynamic process: as shown above, the Court may

[93] See eg, Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 53-54, arguing that international courts, such as the ECtHR, failing to hold national governments accountable for their human rights violations could lose the support of important compliance constituencies, namely individual applicants and civil society; Thór Björgvinsson, arguing that by not addressing systemic human rights deficiencies at the national level, 'the Court runs the risk of losing its moral capital', cited in G Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the ECHR' (2015) 31 *Utrecht Journal of International and European Law* 104, 110. See also, *Correia de Matos v Portugal* App no 56402/12 (4 April 2018), Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judge Sajó, para 41, noting that the failure to review substantively alleged human rights violations constitutes an 'irresponsible abdication of the Court's supervisory powers' and transforms the Court into 'an agnostic as to outcomes' of deficient domestic decision-making procedures.

[94] Further on the relationship between subsidiarity and complementarity vis-à-vis regional human rights institutions, see eg, Kaoru Obata, 'The Emerging Principle of Functional Complementarity for Coordination Among National and International Jurisdictions' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias

exercise its constitutionalist function at different degrees of 'intensity' depending on the ability or willingness of domestic authorities to act in accordance with their legal obligations under the ECHR. Strengthening the Court's constitutional character is therefore a continuous balancing exercise which often requires a gradual and targeted approach to its end goals – an apparent characteristic underpinning all proposed reform measures presented below. The ECtHR's constitutionalisation process aims, *inter alia*, at ensuring that long-established democracies remain faithful to their liberal democratic values, on one hand, and, on the other, that developing democracies continue their transformation process toward further European integration while eliminating the risk for a potential rule of law backsliding. This is indeed a recurring theme throughout this part of the chapter when discussing the suggested proposals as this is thought to secure a more harmonised and, thus, effective protection of the Convention standards across the ECHR system.

Essentially, seen through the prism of hybrid constitutionalism, the following proposals intend to create the necessary synergies and set the foundations for establishing the long-term future of the ECtHR within a more viable Convention system. In doing so, the suggested measures will seek to reconcile the perceived conflicts among the Court's various inherent characteristics as presented above. Despite, for example, a *prima facie* antagonistic relationship between subsidiarity and the (further) constitutionalisation of the ECtHR, the chapter argues that the two notions are complementary and parallel functions, at both procedural and substantive levels. The below reform proposals will seek to demonstrate how a symbiotic relationship between the two is not only possible, but also necessary for securing the long-term future of the Court.

Against this background, the following sections develop four separate, yet intertwined, reform proposals as concrete and innovative alternatives to the current reform framework that can meaningfully contribute to addressing and resolving the underlying challenge of normative effectiveness facing the ECtHR, as identified and analysed in the thesis. Going beyond this, the below ideas intend to place the question of what role the ECtHR should assume in the coming years at the centre of its reform debate – a question that, as the thesis has demonstrated, has been strategically, systematically and disproportionately sidelined throughout the Court's previous reform stages.[95] For these reasons, the chapter presents: Proposal 1 - an institutional measure consisting of the establishment of ECtHR "Satellite Courts"/"Regional Branches" in certain "designated geographic areas" within the CoE territory; Proposal 2 - an interpretive measure involving a shift towards a strengthened European consensus in the ECtHR's judicial reasoning; Proposal 3 - a jurisprudential measure aimed at strengthening the *erga omnes* effect of the ECtHR's (Grand Chamber) case law by

Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (CUP, 2018) 451; E Voeten, 'Competition and Complementarity between Global and Regional Human Rights Institutions' (2017) 8(1) *Global Policy* 119; Samantha Besson, 'Subsidiarity in International Human Rights Law- What is Subsidiary about Human Rights' (2016) 61(1) *American Journal of Jurisprudence* 69. See also, discussions in Chapter 4 of the thesis.

[95] See Chapter 4 of the thesis.

establishing 'judgments of principle'; and Proposal 4 – a procedural measure in the form of an additional (procedural) admissibility criterion codifying the ECtHR's current practice of an increasingly apparent turn to a more process-based review. These four proposals are thoroughly examined in turn below.

Arguably, the suggested proposals reflect the current reality of the ECtHR, as explained in this and previous chapters, and anticipate what may well follow in the absence of original, yet realistic and viable solutions to the challenges facing the Court. It is expected that the following proposals will trigger disagreements and tensions on fundamental questions regarding the role and function of the ECtHR within the ECHR system, and European societies more broadly, as the ultimate authoritative interpreter of the Convention standards and, thus, a (hybrid) Constitutional Court of Human Rights in Europe. The necessary synergies and convergences have been therefore sought when developing the ideas. The quest for convergence is particularly apparent, for example, in the Court's attempt to identify 'consensus', as Proposal 2 shows below. In this case, 'consensus' does not mean unanimity, but it is rather used in the sense of a trend, a general direction, which, therefore, requires the Court to strive to identify a convergence between the laws and practices among and within ECHR States.[96]

Finally, a common underpinning that exists behind all four proposals is the ECtHR's identified turn to an enhanced process-based review, which may indeed form the connecting link between the Court's principal characteristics as a subsidiary, constitutional and supranational court. The ECtHR's growing proceduralisation process is apparent not only in the final proposal calling for an additional procedural admissibility criterion, which is a procedural measure *par excellence*, but in the previous proposals as well. As I demonstrate further below, this is evidenced, for instance, in the ECtHR's procedural approach in determining European consensus based on comparative research, which presupposes a significant engagement with Convention rights both *within* and *among* ECHR States, and the proposal to establish 'judgments of principle' as a complementary mechanism to the already existing pilot judgment procedure. Essentially, the rationale behind the below proposals suggests that the growing trend of proceduralisation of human rights review at the ECtHR can also contribute to strengthening its constitutionalisation process. The two processes work in synergy in an attempt to examine the interaction between different decision-making bodies within the same legal system, thus addressing the underlying question of *who decides what* in the ECHR system. This question has, to some extent, been dealt with in the above theoretical framework, especially through the prism of hybrid constitutionalism. The effect of 'proceduralisation' on the constitutionalisation of the ECtHR will be further elaborated through the development of the following reform proposals, showing how both concepts

[96] See eg, Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) *Public Law* 534, 542, 548.

can be strengthened in parallel with the purpose of securing the long-term future and effective functioning of the ECtHR.

6.3.1 Establishment of ECtHR "Satellite Courts"/"Regional Branches"

The first among the proposals presented here for strengthening the constitutionalisation of the ECtHR is the establishment of ECtHR "Satellite Courts" or "Regional Branches" at certain "designated geographic areas" across the CoE territory. The proposal is to be seen in line with the ongoing programme 'Bringing the Convention closer to home' aiming at facilitating accessibility to the Court and understanding of its role and function at the national level.[97] As former ECtHR Registrar and Judge Paul Mahoney stated in the early 2000s, 'bringing rights home' is not a 'misnomer'.[98] Indeed, 'repatriating' much of the human rights review function performed by the ECtHR in Strasbourg to the States' domestic legal systems is the most viable way to guarantee the normative effectiveness of the Court and the significance of this process has arguably never been greater due to the ever-growing challenges facing the ECHR system.[99]

The proposed "designated geographic areas" where the ECtHR "Regional Branches" are to be located refer to those European sub-regions which include States that (i) generate the highest number of applications and judgments, (ii) have the highest violation rates within the ECHR system, and (iii) have the highest number of judgments pending execution domestically. States combining some or all of these characteristics normally belong to certain geographical areas and generate a high number of repetitive applications as a result of systemic and structural deficiencies as well as a large amount of priority cases (currently representing 40% of the Court's entire backlog) – situations which, as Chapter 3 and 4 previously identified, remain 'principal challenge[s]' to the functioning and effectiveness of the ECtHR.[100]

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[97] *Annual Report 2016 of the ECtHR* (Council of Europe 2017) 169; *Annual Report 2019 of the ECtHR* (Council of Europe 2020) 111-120. See also, Robert Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity', (2014) 14(3) *HRLR* 487, 491, referring to the 'age of subsidiarity' as 'a phrase that will be manifested by the Court's engagement with empowering Member States to truly "bring rights home", not only in the UK but all over Europe'. (emphasis in the original).

[98] Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21(1) *Penn State International Law Review* 101, 105.

[99] ibid. See discussion below and also in Chapter 2 on '*erga omnes* effectiveness'. See also, Costas Paraskeva, 'Human Rights Protection Begins and Ends at Home: The "Pilot Judgment Procedure" Developed by the European Court of Human Rights' (2007) 3(1) *Human Rights Law Commentary* and Catherine J Van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' (2012) 31(1) *Yearbook of European Law* 128.

[100] See eg, Copenhagen Declaration (13 April 2018), para 12 <https://rm.coe.int/copenhagen-declaration/16807b915c> accessed 5 May 2021; Guido Raimondi, *Speech for the Opening of the Judicial Year* in *Annual Report 2019 of the ECtHR* (Council of Europe 2020) 12 <https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf> accessed 20 April 2021; *ECtHR* -

Among their main functions, "Regional Branches" would serve the purposes of: enhancing the physical presence of the CoE in general, and the ECtHR in particular, in these challenging European sub-regions; facilitating the identification of systemic and structural deficiencies of the States' national orders; engaging in fact-finding missions on the ground in cooperation with local and national actors; encouraging friendly settlements of existing disputes and, finally, facilitating the execution of ECtHR judgments by working closely with national authorities, national human rights institutions (NHRIs) and civil society groups, as well as the CoE's advisory and monitoring bodies and its already existing Liaison and Information Offices in various States.

These mechanisms do not need to be permanent, neither in time nor in place. Rather, "Regional Branches" could operate on a specific mandate, with clear, set objectives and timeframe (eg fixed-term, for 5 years, renewable upon evaluation by the CoM and based on recommendations from the CoE various advisory and technical bodies). In order to enhance the legitimacy and credibility of the measure, the "Regional Branches'" impact and effectiveness could be frequently assessed through country visits in the "designated geographic areas" and technical reports by PACE delegations, the Commissioner for Human Rights, the Venice Commission and the CDDH.[101]

Similar proposals for amending the Court's institutional structure were made by various stakeholders following the adoption of Protocol No 11 in order to tackle its growing backlog. Notably, a similar idea for a separate (administrative) filtering body was put forward by the Court and the Evaluation Group to the Committee of Ministers on the ECtHR ('Evaluation Group') in the run-up to the adoption of Protocol No 14.[102] However, the idea was later rejected mainly on the ground that admissibility decisions should not be made by unelected, non-judicial persons.[103] The Evaluation Group also expressed its reluctance in endorsing this measure due to the alleged risk that it would run contrary to the CoE mission of establishing uniform European human rights protection standards.[104] The idea of regionalising the Convention control system was also put forward by Lord Woolf in his 2005 Report.[105] Lord

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Analysis of Statistics 2019 (ECtHR 2020) 5-8 <https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf> accessed 20 April 2021.

[101] For similar recommendations about enhancing the role of advisory bodies in the monitoring of States' human rights performance, see, Elizabeth Lambert, 'The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability' (2009) 69 *ZaoRV* 471, 483-488.

[102] See eg, M Eaton and J Schokkenbroek, 'Reforming the Human Rights Protection System established by the ECHR (Protocol 14)' (2005) *Human Rights Law Journal* 1, 3, 5; M Eaton, 'The New Judicial Filtering Mechanism: Introductory Comments' in *Reforming the ECHR: A Work in Progress* (CoE, 2009) 251, 251-252.

[103] ibid.

[104] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court (2001) (27 September 2001), para 83, stating that 'the Evaluatio Group [was] not attracted by this solution: it carries a risk of diverging standards and case-law, whereas the essence of the Convention system is that uniform standards, collectively set and enforced, should obtain throughout the Contracting States'.

[105] *Review of the Working Methods of the European Court of Human Rights* (hereinafter, *Lord Woolf Report 2005*).

Woolf's idea, however, only envisaged the establishment of 'Satellite Offices of the Registry' which were to be located in specific States and would work exclusively as application filtering bodies while providing information on the Court's admissibility criteria and encouraging alternative dispute resolution initiatives locally.[106] For reasons explained in detail further below, I believe that my proposal constitutes a considerably improved version of those previous suggestions as it aims at not only tackling the Court's excessive caseload but also strengthening its authority and legitimacy, thus answering to both institutional and constitutional challenges facing the ECtHR. Therefore, this current proposal will seek to circumvent concerns and reservations that held those previous reform measures back from materialising, while providing further reasons as to the added value of the idea of ECtHR "Regional Branches".

The envisaged ECtHR "Regional Branches" would consist of ECtHR judges, assisted by lawyers and legal professionals, directly deployed from Strasbourg and further complemented through local recruitments by States as local rapporteurs and Seconded National Experts. Greater use could be made of the already nominated *ad hoc* Judges to the ECtHR to further staff the "Regional Branches", if and when needed, so that the "Regional Branch" Judges could also sit in Chamber and Grand Chamber cases, especially when they act as 'national judges' in the case under examination.[107] The new structure would act as separate, regional filtering bodies for the rapid administrative or judicial disposal of clearly inadmissible applications, whose role, however, would extend to the more effective judicial resolution of well-founded repetitive and routine cases. The presence of elected ECtHR judges will therefore appease past concerns and ensure that the "Regional Branches" retain their independent, judicial character and that individual applications, if admissible, result in a prompt, reasoned judicial decision. In this regard, the Strasbourg Court can be relieved of a large number of repetitive and routine cases originating from those "designated geographic areas" and thus focus on its essential constitutionalist role. Judges sitting at the "Regional Branches" would have their jurisdiction limited to hearing applications raising admissibility issues and identifying manifestly well-founded (uncontested repetitive) cases based on the

[106] ibid, 28. Previously, a similar idea was advanced by the former President of the French *Conseil Constitutionnel*, Robert Badinter, who based his proposal on the premise that within the enlarged community of States Parties that now form part of the ECHR system the level of human rights protection capable of being maintained by the domestic legal orders varies enormously. At one end of the spectrum, Badinter argued, some of the former Soviet States have a young and unstable democratic base while, at the other end, established democracies have highly sophisticated and developed human rights protection mechanisms. His underlying argument was that the human rights realities across Europe are substantially different and the ECHR enforcement system should be adapted to this accordingly. See, *The European Court of Human Rights – Organisation and Procedure: Questions Concerning the Implementation of Protocol No 11 to the European Convention on Human Rights* (Proceedings of the Colloquy organised by the Human Rights Centre of the University of Potsdam, 1997) 158.

[107] In this regard, see, CDDH Report (CDDH(2012)R74, Add I), 44-47.

well-established jurisprudence of the ECtHR.[108] They would also undertake a first examination of priority cases, the vast majority of which originate from only a small number of States,[109] currently presenting the largest backlog of Committee and Chamber pending cases and considered part of the biggest institutional challenge facing the ECtHR at the moment.[110] Consequently, "Regional Branches" can function as filtering bodies for the Chambers in Strasbourg, to which they may only refer cases presenting complex or novel legal questions, and therefore increase the ECtHR's general case-processing capacity. This mechanism would arguably allow the Strasbourg Court to maintain some discretion as to which cases are to receive full examination by Chambers, thus providing it with new 'possibilities of applying the principle de *minimis non curat praetor*' as noted in the Interlaken Declaration.[111]

Despite its significantly positive institutional impact, the proposal is expected to raise justified concerns about, *inter alia*: (i) whether this risks simply transferring the Court's caseload problem to the "Regional Branches" and, thus, away from 'Strasbourg'; (ii) whether the budgetary costs of operating the various satellite judicial organs would be too high to make it a feasible proposal; and, ultimately, (iii) whether this suggestion simply shifts the underlying problem of normative effectiveness from 'Strasbourg' to the "Regional Branches" rather than solving it in a sustainable manner. Similar concerns had been raised regarding previous reform suggestions, including the Wise Persons' proposal for establishing an additional filtering mechanism to complement the existing ECtHR structure during the 2000-2004 reform debate.[112]

Firstly, this proposal takes serious consideration of the aims and achievements of the reforms introduced by Protocol No 11, and it does not intend to re-introduce the old, two-tier Commission system. As described above, the suggested deployment of permanent, full-time ECtHR judges along with other expert/professional staff from Strasbourg would ensure consistency in the decision-making by the "Regional Branch" and eliminate any non-judicial influence in the decision-making process or any possibility of divergence from the Strasbourg Court's jurisprudence. The proposal is also mindful that under the Court's existing structure, following the introduction of Protocol No 14, the great bulk of clearly inadmissible and

[108] The present suggestion incorporates features found in an earlier Wise Persons' proposal for the creation of a separate filtering body within the existing ECHR system. See Wise Persons Report, para 55. See also, M Eaton, 'The New Judicial Filtering Mechanism' (n 102) 252-254.

[109] The ECtHR in its *Annual Report 2019* attributes the high increase in priority cases (18% compared to 2018) to the detention conditions in Russia and the lawfulness of detention in Turkey. See, *ECtHR - Analysis of Statistics 2019* (n 100) 5.

[110] *Annual Report 2019 of the ECtHR* (n 97) 13, 127-128, 130-131. See also statistical analysis in Chapter 3 of the thesis.

[111] Interlaken Declaration (19 February 2010) 5.

[112] *Report of the Group of Wise Persons to the Committee of Ministers (*hereinafter, *Wise Persons Report 2006)* CM(2006)203 (2006), para 55 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893> accessed 5 May 2021. See also, M Eaton (n 102) 252-254.

routine or repetitive cases is dealt with by the Registry, rather than the ECtHR itself.[113] Although single Judges and the three-Judge Committees decide judicially on these applications, this only comes after a careful examination of the applications by the Registry, which, admittedly, bears the biggest workload burden up to this stage of the life of the application. The current proposal takes this institutional shortcoming into account and seeks to increase the ECtHR Registry's capacity by deploying additional number of administrative and expert staff, reinforced by local recruitments and secondments from ECHR States, without necessarily increasing the existing number of permanent Judges. By doing so, the proposal aims at keeping the overall cost for the realisation of the new mechanism low as local recruitment and secondment costs would be covered by ECHR States within the "designated geographic area".[114] Budgetary concerns could be further alleviated by noting that the establishment of ECtHR "Regional Branches" could considerably benefit from the already available resources and existing infrastructure in ECHR States, many of which already host local liaison or 'field and programme offices' of the CoE and its various bodies.[115]

Despite the institutional improvements brought by Protocol No 14, the newly established filtering mechanism was characterised as 'a "fig-leaf" that maintains the legal fiction of a judicial determination of all applications'.[116] Admittedly, since the entry into force of the Protocol, clearly inadmissible and repetitive cases receive the very minimum of treatment at Strasbourg.[117] Their permanently large numbers throughout the last decade, nevertheless, continue to place a substantial burden on the effective functioning of the Court and call into question the effectiveness of the institutional measures in reducing the numbers of future applications reaching the ECtHR in the long-term. As discussed above, Registry staff at the "Regional Branches" are expected to have better knowledge of the local structures and available domestic remedies in States within their particular "designated geographic area". They could therefore operate as the connecting link between CoE bodies and national institutions, including NHRIs, civil society groups and national ombudsmen and other national compliance constituencies and raise awareness of the type/nature of alleged rights violations received through individual applications while encouraging those national actors to initiate domestic enquiries to address and resolve any potential violations. "Regional

[113] See eg, *Annual Report 2016 of the ECtHR* (n 97) 14, 19.

[114] Cf. Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 271, arguing that it will be unlikely for 'resource-intensive' institutional measures previously considered for the alleviation of the Court's backlog, including 'branch offices' of the Court outside Strasbourg to be implemented any time soon due to the current political climate within the Council of Europe, as reflected by the withdrawal of financial contributions of certain States.

[115] See eg, Quarterly Report of Council of Europe Offices (12 May 2020) <https://rm.coe.int/odgp-der-coe-quarterly-reports-january-march-2020-en/16809e540c> accessed 16 June 2021. See also, CoM Resolution on the Status of Council of Europe Offices (CM/Res(2010)5, 07 July 2010); CoE Secretary-General's Proposals on the Reform of the CoE external presence <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ced06> accessed 16 June 2021.

[116] Committee on Legal Affairs and Human Rights (PACE), 'The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process' (21 January 2010).

[117] Ed Bates, *The Evolution of the European Convention* (n 10) 514.

Branches" could thus gradually divert from the Registry and the ECtHR a significant number of cases that should have never reached it in the first place. Similarly, a large percentage of the applications declared inadmissible is disposed of administratively, due to the non-fulfilment of technical or procedural criteria, such as the currently applicable 6-month deadline,[118] despite being otherwise meritorious. Apart from the ECtHR's obvious institutional benefit when erasing those applications from its backlog, this practice certainly does not improve the human rights situation in the State concerned nor does it prevent similar future application from reaching the Court anew. In such cases, therefore, the "Regional Branches" are expected to refer these otherwise meritorious cases for examination back to national authorities and institutions, as indicated above, and request, by emphasising the State's primary responsibility in enforcing the Convention, that the relevant issues are examined and resolved domestically.[119]

Additionally, as previously argued, a number of 'high case-count' States have made no serious efforts to implement previously agreed reform measures for the restructuring and enhancement of the ECHR system.[120] In this regard, questions have also been raised about some States' lack of commitment to an effective Convention system.[121] Under the present proposal for "Regional Branches", I claim, States will no longer be able to hide behind the overwhelmed Strasbourg Court and its time-consuming judicial proceedings. Rather, the physical presence of the Court in their geographic area would mean that examination of cases coming from those States will represent the 'magnifying glass which reveals the imperfections in [their] national legal systems' and 'the thermometer which tests the democratic temperature of the States'.[122] In the same vein, States which may happen to fall within the same "designated geographic area", where a ECtHR "Regional Branch" is located, but do not necessarily face the same systemic or structural problems as their neighbouring States, would have a vested interest in further collaborating with and encouraging their 'underperforming' counterparts to align their national legislation and practices with the ECHR and the Court's case law. The fact that they share similar cultural and political characteristics will be key in the process of facilitating and enhancing European integration in their sub-region.

For the identification of the proposed "designated geographic areas", the empirical basis suggested above should also be complemented by a normative basis as well. In this regard,

[118] Following the entry into force of Protocol No 15, the time-limit within which an application may be made to the Court will be reduced to four months.
[119] See eg, *Lord Woolf Report 2005* (n 105) 32-33.
[120] See eg, Chapter 3 of the thesis. See also, PACE, 'The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process' (n 116), para 4.
[121] See eg, L Caflisch, 'The Reform of the European Court of Human Rights': Protocol No 14 and beyond (2006) 6 *Human Rights Law Review* 403, 414.
[122] Parallelism is inspired by Luzius Wildhaber's vision of focusing on the constitutional mission of the Court, in L Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161, 122-123.

one should reflect on how the CoE enlargement in the 1990s took place. Admittedly, certain candidate States for accession did not comply even with the minimum Convention standards; they were still accepted in the organisation on the basis that it is better to have a 'troublesome', as Sadurski put it, country *in* than *out*.[123] For the Central and Eastern European (CEE) States, acceding to the Convention system was seen as an incentive to join the club of the 'like-minded' European democratic States and demonstrate to the international community their growing commitment to pluralistic democracy, human rights and the rule of law.[124] The Convention system thus served as a credible model for CEE States to enable them materialise this commitment. It was expected that post-Soviet and other newly-established democracies would overcome any shortcomings, become fully-fledged members of the organisation and that they would be encouraged to complete their process of democratic transition more rapidly from within the organisation than had they been kept outside.[125]

Strong skeptics of the enlargement process, however, warned that the legal standards in several CEE States fell below those required by the ECHR system, thus posing a serious threat for the ECHR *acquis*[126] and potentially resulting in a 'two-track Europe'[127] or a '"variable geometry" of human rights which pays undue deference to national or regional sensitivities'.[128] As Peter Leuprecht bluntly put it, 'intellectual honesty requires acknowledging that some of the countries admitted […] clearly did not comply with the statutory requirements at the time of accession'.[129] Regarding the newer member States' commitment to human rights protection, Leuprecht further noted that 'as far as the ECHR is concerned, some of the new member states ha[d] rushed into ratification without bringing domestic law and reality into line with its requirements'.[130] The admission of CEE States to the Convention system was, therefore, seen less as a certification that a State had successfully passed the 'membership test' and had become a full rights-respecting democracy, and more as an incentive for that State to continue its transition to democracy

[123] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 90) 410.
[124] Daniel Tarschys, 'The Council of Europe: Towards a vast Area of Democratic Security' (1994) 42(6) *NATO Review,* 8 <https://www.nato.int/docu/review/1995/9501-2.htm> accessed 16 June 2021.
[125] Robert Harmsen, 'The European Convention on Human Rights after Enlargement' (2001) 5(4) *International Journal of Human Rights* 18, 21-22.
[126] Andrew Drzemczewski, 'The European Human Rights Convention: Protocol No.11 – Entry into Force and First Year of Application' (2000) 21 *Human Rights Law Journal* 10.
[127] Alec Stone Sweet and Helen Keller, 'The Reception of the ECHR in National Legal Orders', in H Keller and A Stone Sweet (eds), *A Europe of Rights* (n 11) 8.
[128] Lord Lester, 'The ECHR in the New Architecture of Europe' (1996) *Public Law* 5, 7. See also, Paul Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership' (2002) 21(1) *Penn State International Law Review* 101.
[129] Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (1998) 8 *Transnational Law and Contemporary Problems* 313, 328.
[130] ibid, 333.

and carry out the necessary reforms, with the hope that eventually it will catch up with its CoE counterparts and the Convention standards.[131]

It is now evident that the enlargement experiment has, to *some* extent, failed as the transformative power the CoE exercised over some of its new members and its impact in aligning them with their (Western) European counterparts remains questionable.[132] Consequently, the ECHR system, in its present form and structure, already preserves a *de facto* multi-speed Europe, at least as far as the protection of human rights is concerned.[133] Despite the considerable achievements of the ECtHR's previous reform stages, this constitutional shortcoming has not been adequately addressed and/or resolved. Newer CoE member States, however, cannot be exclusively blamed for the accession's subsequent impact on the ECHR system. As shown above, CoE enlargement-skeptics already warned that the Organisation had 'embarked on a risky policy'[134] and essentially 'gambled' in rushing States to ratify the ECHR within a very short time after joining the CoE while manifestly being unprepared to meet the Convention's established minimum standards.[135] Nevertheless, the above observations should by no means suggest that the proposed "Regional Branches" should be used exclusively for or for the entirety of the CoE's newer member States. It is commonly accepted that the extent or sustainability of the democratic reform process of different CEE States could vary considerably and the ECHR may have had different impact on their domestic orders.[136] Similarly, established democracies - some of them among the original ECHR signatories – have occasionally shown declining democratic and rule of law standards and account for a substantial portion of the Court's caseload.[137] Arguably, 'serious violations of human rights also take place in countries that are considered [democratically]

[131] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 90) 405-406.

[132] See eg, Luzius Wildhaber, 'Rethinking the European Court of Human Rights' (n 39) 224.

[133] See, Luzius Wildhaber, 'Some Remarks about the Realistic Idealism of the European Court of Human Rights' in Mahnoush H. Arsanjani *et al* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff 2011) 571.

[134] Elizabeth Evenson, 'Reforms Ahead: Enlargement of the Council of Europe and the Future of the Strasbourg System' (2001) 1(2) *HRLR* 219, 239.

[135] Peter Leuprecht, 'Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?' (n 129) 333.

[136] See eg, Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 90) 442-443; Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (CUP 2016) 2-5.

[137] Most notable examples include the so-called 'Greek' and 'Northern Irish' cases. See, *Denmark, Norway, Sweden and the Netherlands v Greece* App nos 3321/67, 3322/67, 3323/67 and 3344/67 (Commission Report, 05 November 1969) Yearbook 12; *Ireland v United Kingdom* (18 January 1978) Series A no 25. See also, *Cyprus v Turkey* App no 25781/94 (10 May 2001) [GC].

stable'[138] and that '[e]ven in the political life of the best regulated democracies there may from time to time be aberrations'.[139]

What this proposed measure of "Regional Branches" intends to achieve in the long-term is exactly to facilitate the efforts of certain CoE member States in fulfilling their political commitment to a sustainable democratic reform process while containing or tackling any democratic backsliding tendencies in the older CoE States. The measure's ultimate objective is thus to rectify the existing imbalance of human rights protection in the continent in a more targeted and effective manner. More than jeopardising the unity of the CoE and the equality of its members, this proposed mechanism - corrective, rather than punitive, in character - specifically focuses on certain sub-regions of the continent to ensure and further encourage their democratic transition and European integration process. As such, the idea is closely linked back to the need to strengthen the normative effectiveness of the ECtHR, as presented in Chapter 2, by further facilitating the embeddedness of the Convention standards in the States Parties' national legal orders.

Last but not least, the establishment of "Regional Branches" could be further encouraged by sociological perspectives which, in turn, are expected to have important normative implications on the ECtHR's general impact. A basic premise upon which the internationalisation of human rights developed is that the protection of human rights can be made more effective, and therefore should take place, closest to the rights beneficiaries.[140] 'Closest to the beneficiaries' should, ideally, mean at the national level where enforcement can be more effective due to the structures of the domestic order. Indeed, ECHR stakeholders repeatedly noted that 'human rights protection begins and ends at home'.[141] Nevertheless, it was recognised that 'international(ised) courts and tribunals are almost always situated far from the situation country' and 'do not benefit from the daily support of State structures in the same way as domestic courts usually do'.[142] As Huneeus further argues, 'lack of information about the local context and tenuous legitimacy' are both particularly challenging issues that international human rights courts face.[143] Consequently, international courts and tribunals have been criticised in the past for being 'too remote'

[138] Thomas Hammarberg, Commissioner for Human Rights, *Recommendation on systemic work for implementing human rights at the national level* (CommDH(2009)3) Strasbourg, 18 February 2009, 1.
[139] C M H Waldock, 'Address by C.M.H. Waldock' in Council of Europe, *Fifth Anniversary of the Coming into Force of the ECHR: Brussels Exhibition, 3 September 1958* (Strasbourg: Council of Europe 1959) 33.
[140] Solomon T. Ebobrah, 'International Human Rights Courts' in Cesare Romano, Karen Alter, Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 235.
[141] See eg, Walter Schwimmer, Speech at Ministerial Conference and Commemorative Ceremony of the 50th anniversary of the European Convention on Human Rights, (Council of Europe, 2002) 20.
[142] Olga Kavran, 'Public Proceedings, Outreach and Reconciliation' (FICHL Policy Brief Series No.40, 2015) <https://www.legal-tools.org/doc/752bd6/pdf/> accessed 16 June 2021.
[143] Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40(1) *Yale Journal of International Law* 1, 35.

from affected populations.[144] Addressing this issue, the International Criminal Tribunal for the former Yugoslavia (ICTY) noted that 'within the international community, there are no such mechanisms to ensure the dissemination and interpretation of the work of the Tribunal. The gap thus created between justice and its beneficiaries […] is exacerbated by the Tribunal's physical location far from the former Yugoslavia'.[145] At the same time, another paradox has been also recognised: 'international rights regimes and the supranational tribunals that enforce them have been most effective in the States that arguably need them least: those whose officials commit relatively few, minor, and discrete human rights violations'.[146] Despite the indisputable impact the ECtHR has had across the Convention States and although the ECtHR's public relations and outreach capacity have considerably improved during the last decades,[147] the above observations still raise concerns within the ECHR context.

"Regional Branches" could therefore play a central role in shaping public understanding of justice and can make the ECtHR more relevant to the communities most affected by repetitive, continuous or large-scale human rights violations. The ECtHR's jurisdiction extends to various post-conflict areas or areas where conflicts are still taking place. Due to the lack of physical and causal proximity with the ECtHR, human rights victims, especially in those areas, may feel unconnected to or even alienated from the justice process taking place at Strasbourg. "Regional Branches" could thus constitute 'pedagogical tools that strengthen a moral consensus' in these affected areas by promoting peacebuilding, democratic change and state building as well as social reconstruction with local and national actors.[148] The normative and sociological legitimacy of the Court, and the Convention system more broadly, could also be strengthened this way.[149]

Additionally, this role of the "Regional Branches" may prove to be particularly important regarding inter-State applications, which worryingly saw a considerable increase in the last decade and their numbers are expected to continue to rise in the coming years.[150] In this

[144] See eg, Joanna Nicholson, 'Learning Lessons through the prism of Legitimacy' in Avidan Kent *et al* (eds), *The Future of International Courts: Regional, Institutional and Procedural Challenges* (n 46) 169. See also, Yvonne McDermott and Wedad Elmaalul, 'Legitimacy' in William Schabas and Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Elgar 2017) 244.
[145] ICTY Annual Report 1999 (A/54/187, S/1999/846) para 147.
[146] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 20) 329.
[147] See eg, *Annual Report 2019 of the ECtHR* (n 97) 117-119.
[148] Michaelina Jakala and Alex Jeffrey, 'Communicating law, Building Peace: The Pedagogy of Public Outreach from War Crimes Courts' (2017) 21(2) *Space and Polity Journal* 206, 207.
[149] Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (n 143) 35.
[150] See eg, Isabella Risini, Justine Batura and Lukas Kleinert, 'A "Golden Age" of Inter-state Complaints?: An Interview with Isabella Risini' (*Völkerrechtsblog,* 16 September 2020) <https://voelkerrechtsblog.org/a-golden-age-of-inter-state-complaints/> accessed 16 June 2021; Geir Ulfstein and Isabella Risini, 'Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges' (*EJIL:Talk!*, 24 January 2020) <https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-

regard, they could contribute to the delivery of justice in politically sensitive, legally and factually complex cases where facts are disputed and local investigations untrusted.[151] By enhancing the geographical nexus, it is expected that the participation of individuals directly affected by the cases under examination before the ECtHR will be encouraged while civil society groups and NHRIs could be closer involved in the prompt and effective resolution of the identified systemic problems on the ground.[152] As 2019 marked the 50th anniversary of the 'Greek case',[153] one may reflect upon the vital role the former European Commission had had in fact-finding and evidence-gathering activities on the ground regarding landmark inter-State cases and contemplate the possibility of revitalising this connection between physical proximity and the justice process through "Regional Branches": 'the value of hearing evidence in a local venue cannot be overestimated. […] No written description, however colourful, could have been as informative as the visit to Boubolinos Street in Athens'.[154] Lastly, national authorities may no longer feel obliged to follow 'foreign' or 'European' orders imposed on them by 'Strasbourg' but, rather, they could develop a sense of national or local *ownership* in how human rights are protected and enforced domestically.[155]

6.3.2 A Shift towards a Strengthened European Consensus

As Chapter 5 previously demonstrated, excessive reliance on, or improper use of, the principle of subsidiarity and the margin of appreciation doctrine by States Parties may risk leading to further fragmentation within the ECHR system and a multi-speed Europe, at least as far as human rights protection is concerned. Such practice would arguably hinder effective implementation of Convention standards across the ECHR system and allow certain States to continue to slide backwards from the founding values of the CoE and basic notions of liberal democracy. Moreover, as already shown in Chapter 2, this would also have serious negative consequences on the normative effectiveness of the Court and its ability to wield its normative power, as an authoritative interpreter of Convention rights, over States Parties.

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rights-strengths-and-challenges/> accessed 16 June 2021; Elif Erken and Claire Loven, 'The Recent Rise in ECtHR Inter-State Cases in Perspective' (ECHR Blog, 22 January 2021) <https://www.echrblog.com/2021/01/guest-post-recent-rise-in-ecthr-inter.html accessed 16 June 2021. See also, Linos-Alexandre Sicilianos, *The European Court of Human Rights marks 60 years of work for Peace, Democracy and Tolerance* (Speech, 30 September 2019) <https://www.echr.coe.int/Documents/Speech_20190930_Sicilianos_60_years_ECHR_ENG.pdf> accessed 16 June 2021.

[151] Some of the key shortcomings experienced in the examination of inter-State applications by the ECtHR were recently identified and addressed in *Georgia v Russia (II)* App no 38263/08 (21 January 2021), Concurring Opinion of Judge Keller, para 11, noting that 'the Court's usual fact-finding methodology is ill-suited, in its flexibility and forbearance, to inter-State cases, in which neither party is subject to the difficulties in gathering evidence that confront individual applicants'.

[152] See eg, Victor Bekkers, Geske Dijkstra, Menno Fenger (eds), *Governance and the Democratic Deficit: Assessing the Democratic Legitimacy of Governance Practices* (Ashgate 2007) 214-215.

[153] *Denmark, Norway, Sweden, Netherlands v Greece* (n 137).

[154] *Ireland v United Kingdom* App no 5310/71 (18 January 1978), Separate Opinion of Judge O'Donoghue.

[155] Michaelina Jakala and Alex Jeffrey, 'Communicating law, Building Peace: The Pedagogy of Public Outreach from War Crimes Courts' (n 148) 208-213.

An unscrutinised, increasingly deferential practice of the ECtHR also risks transforming the Court from a subsidiary organ to a redundant one.[156] Among the present proposals for achieving the Court's long-term effectiveness, I argue that the concept of European consensus, as an interpretive tool, should acquire a more prominent position in the ECtHR's judicial reasoning.

The concept of European consensus in the jurisprudence of the ECtHR is often regarded as a mediator between evolutive (dynamic) interpretation and the margin of appreciation doctrine.[157] Despite its fundamental significance in ensuring the rights under the Convention are made practical and effective,[158] evolutive interpretation by the Court has raised numerous legitimacy-related concerns by certain ECHR States Parties and even ECtHR judges.[159] For instance, warnings have been expressed against the ECtHR becoming a 'legislative' organ, through its 'judicial activism', bypassing in this way the sovereign consent of States,[160] particularly when extending the scope of Convention rights by means of insufficiently articulated or defined judicial interpretation.[161] Others have argued that the dynamic interpretation of the Convention contradicts fundamental principles of justice, such as predictability, legal certainty and consistency in case law.[162] Arguably, a more methodologically robust and consistent use of European consensus could provide the necessary convergence between, on one hand, concerns about the 'unlimited' flexibility and 'judicial activism' of the Court under evolutive interpretation and, on the other hand, fears that (over)reliance on the margin of appreciation will lead to a (further) fragmentation of the

[156] See eg, Laurens Lavrysen, 'Strand Lobben and Others v Norway: From Age of Subsidiarity to Age of Redundancy?' (*Strasbourg Observers*, 23 October 2019) <https://strasbourgobservers.com/2019/10/23/strand-lobben-and-others-v-norway-from-age-of-subsidiarity-to-age-of-redundancy/> accessed 16 June 2021.

[157] See *inter alia*, Alexander Morawa, 'The "Common European Approach", "International Trends", and the Evolution of Human Rights Law: A Comment on *Goodwin and I v the United Kingdom*' (2002) 3(8) *German Law Journal*; Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1730; Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 25(3) *European Public Law* 445; Ed Bates, 'Consensus in the Legitimacy-Building Era of the European Court of Human Rights' in Panos Kapotas and Vassilis Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP 2019). For an extensive study on ECtHR Judges' approaches to European consensus, see, Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 177-206.

[158] See eg, Luzius Wildhaber, 'European Court of Human Rights' (2002) 40 *Canadian Yearbook of International Law* 310; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009) 79.

[159] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 157) 143-149. See also, K Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (n 157).

[160] See eg, Luc Tremblya, 'General Legitimacy of Judicial Review and the Fundamental basis of Constitutional Law' (2003) 23 *Oxford Journal of Legal Studies* 525.

[161] See eg, *Golder v UK* App no 4451/70 (21 February 1975), Separate Opinion of Judge Fitzmaurice, para 30.

[162] See eg, JLM Gribnau, 'Legitimacy of the Judiciary' (2002) 6 *Electronic Journal of Comparative Law* 26.

application of Convention and, in certain cases, the lowering of the applicable protection standards.[163]

As shown below, the legitimising potential of European consensus partly derives from the fact that it is a product of a comprehensive comparative research of national and international law and practice and, as such, often the by-product of democratic decision-making processes at the national level.[164] Arguably, comparative research is inherent in the development and application of the Convention and better reflects the subsidiary and regional character of the ECtHR. European consensus, in turn, as a legitimising method of judicial reasoning, generally provides for greater 'clarity and foreseeability' as well as certainty and objectivity into the ECtHR's case law.[165] At the same time, it encourages the Court to 'progress gradually, pedagogically' and to carefully qualify the deployment of evolutive interpretation when extending the scope of certain rights.[166] It can thus constitute a persuasive tool of judicial interpretation in the hands of European judges, which may improve the consistency and predictability of the ECtHR reasoning. Shifting the focus of judicial interpretation to European consensus seems to enjoy an increasingly favourable opinion among the ECtHR judges, who recognise the concept's dual persuasive effect: on the ECtHR judges themselves and the Contracting Parties.[167] Finally, this persuasive effect could also enhance the acceptability of the judgment and, thus, prove particularly helpful when it comes to the prompt and full execution of ECtHR judgments by respondent States.[168]

The ECtHR uses 'necessity analysis' to determine the extent to which States Parties may exercise their discretion, under the margin of appreciation doctrine, when they seek to interpret and apply non-absolute Convention rights.[169] Following the 'necessity analysis', the ECtHR raises the standard of protection in a given domain according to the number of States that have lowered their public interest justifications for restricting the scope of a particular right. In other words, the stronger the evidence before the ECtHR that consensus on higher standards emerges, the more the margin of appreciation enjoyed by States in that area of law shrinks and the heavier the burden of proof the respondent State will have to bear in justifying its relevant laws and practices.[170] Similarly, in cases where the Court concludes that the 'tipping point' at which the law is ripe for evolution has not yet emerged or

[163] L Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 20) 317.
[164] K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) *Public Law* 534, 541-548.
[165] ibid, 534.
[166] Interview with Judge Tulkens, in K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 157) 185.
[167] For ECtHR Judges' views on European consensus, see K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 157) 183-196.
[168] ibid.
[169] Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organisation' (n 77) 78.
[170] ibid; L R Helfer and A-M Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (n 20) 317.

consolidated, it will refrain from extending the scope of that particular right, thus answering to any legitimacy-related concerns regarding extensive judicial activism by the Court.[171] Insufficient justification or lack of evidence for consensus may, therefore, prevent the ECtHR from engaging in a dynamic interpretation of the Convention and encourage it to adopt a more self-restraint stance favouring a subsidiarity-oriented standard-setting.[172]

In determining whether new consensus among States has emerged, the ECtHR uses a series of techniques and sources which broadly include (a) examination of the law and practices of the ECHR States on the relevant Convention-related question (ECHR States consensus), (b) how State practice is reflected against any international treaties to which the respondent State is a party (international consensus), (c) evidence of State practice, which either limits or 'liberalises' the scope of application of the right under examination before the Court, for example through national legislation, case law, reports, administrative practices or even referendums (domestic consensus), and (d) technical evidence from experts (expert consensus).[173] As noted,[174] the ECtHR often reaches its conclusion on whether consensus on a particular issue has emerged after combining evidence from the various sources *within*, *across* and *beyond* ECHR States.[175] Consequently, European consensus does not *exclusively* depend on a general agreement among the majority of ECHR Contracting Parties about the scope of certain rights, but also reflects relevant developments on the subject-matter *within* a given State and, in some cases, outside the ECHR context.[176] Arguably, in determining consensus, the Court looks to identify 'a trend rather than an agreement as such or an outright majority' and it is therefore in this sense that the concept is better understood.[177]

Suggesting that the ECtHR relies solely on the position of ECHR States, as a justification of finding consensus, reflects an anachronistic view of last-century customary international law, which regards the sovereign State as the sole actor on the international plane and, thus, rejects the very nature of the Convention as a 'living instrument'. Furthermore, this approach undermines the Court's aspirational role in promoting common European values and harmonising (minimum) Convention standards across ECHR States, as described earlier

[171] See eg, *Schalk and Kopf v Austria* App no 30141/04 (24 June 2010) para 105; *Vo v France* App no 53924/00 (8 July 2004) para 82.
[172] Ed Bates, 'Strasbourg's Integrationist Role, or the Need for Self-restraint?' (n 59) 16.
[173] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 157) 38-56.
[174] Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organisation' (n 77) 79.
[175] For an illustration of how the ECtHR has deployed its 'consensus analysis', see eg, *Alekseyez v. Russia* App no 4916/07 (21 October 2010), paras 83-85; *S.H and Others v Austria* App no 57813/00 (3 November 2011) paras 83-106.
[176] See eg, K Dzehtsiarou, 'Does Consensus Matter?' (n 164) 541-548.
[177] Paul Mahoney and Rachael Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' in Mads Andenas and Duncan Fairgrieve, *Courts and Comparative Law* (OUP 2015) 122.

in this chapter.[178] The same logic would apply in the opposite scenario where a clear consensus among ECHR States on a particular issue has not yet formed. In that case, it does not mean that the Convention itself is entirely silent on the matter; nor that the Court should transfer its role as the ultimate interpreter of the Convention to the States and remain silent until consensus among the Contracting Parties is reached. Such an approach would unavoidably lead to a piecemeal evolution of ECHR standards and, in certain occasions, prevent the ECtHR from exercising its crucial task as the 'guardian against the tyranny by majorities' at both national and European level.[179] It is therefore recalled that consensus *per se* is only a legitimising factor in the Court's reasoning and although it cannot predetermine the outcome of the case, it is one of the 'indicative or persuasive factors capable of justifying interpretive leaps forward'.[180] Chapter 5 has already analysed and criticised the distorted understanding of subsidiarity, as presented by some States, seeking to limit the jurisdiction of the Court regarding certain Convention-related issues.[181] Similarly, 'abandon[ing] the *living* European consensus model and interpret[ing] the [ECHR] text based on a *historical* European consensus model that focuses solely on Contracting States', as some scholars may argue,[182] cannot be an appropriate response neither to the increasing State backlash against the ECtHR nor to the ongoing efforts to preserve the ECHR system and secure the long-term effectiveness of the Court.

Placing European consensus in the centre of the ECtHR's judicial reasoning does not, therefore, suggest that the Court should abandon its anti-majoritarian role and cease to protect individuals from the dictates of the majority.[183] As shown already, the views of ECHR States, however significant and/or persuasive, cannot be the only decisive factor for determining consensus, and, in turn, the outcome of the case. Suggesting otherwise would be a far-fetched claim and, indeed, an oversimplistic way of looking at consensus. Instead, the Court needs to consider a wider range of sources in establishing consensus on a particular issue. Mindful of the fact that the 'majority can always be wrong',[184] some ECtHR Judges have not excluded the possibility of diverting from European consensus when this contradicts their own personal (moral) beliefs, as reflected through the Convention, or when

[178] See eg, G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 158) 123-4.
[179] See discussion further below. Kanstantsin Dzehtsiarou, 'Does Consensus Matter?' (n 164) 540. Cf Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) *International Organization* 77, 80, arguing that the ECtHR follows a strategy of 'majoritarian activism' and uses the laws and policies of most ECHR States as a benchmark for developing standard.
[180] P Mahoney and R Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' (n 177) 121.
[181] See, Chapter 5, Section 5.4, especially nn 168-170 and accompanying text.
[182] Ernie Walton, 'Preserving the European Convention on Human Rights: Why the UK's Threat to Leave the Convention could Save it' (2014) 42 Capital University Law Review 977, 998.
[183] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 158) 3, 120-31; G Letsas, 'The Truth in Autonomous Concepts' (2004) 15(2) *EJIL* 279, 304.
[184] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 156) 201.

they find convincing reasons against it.[185] In those cases, it is expected that a strong justification for such a departure would be needed.

By focusing on its constitutionalist function, as discussed previously, the Court is capable of addressing and overcoming certain limits of its consensus-driven approach and ensure that the protection of Convention rights is made 'practical and effective'.[186] This is particularly important in cases 'when the majority of States are rights laggards' and obstruct the progressive development of the Convention standards.[187] The fact that certain ECHR States may appear reluctant to expand the scope of Convention rights has already been recognised as a potential risk leading to a regressive, rather than progressive, evolution of rights protection.[188] Equally, the ECtHR risks acquiescing to such regressive trends in the quest for consensus or in fear of State backlash against it.[189] As Judge Casadevall warned, the principle of non-regression must prevail in such cases and a '"standstill" technique' should be adopted by the Court that would prevent it 'from turning back once it has moved forward'.[190] In this regard, the very nature of the Convention, as a 'constitutional instrument of European public order', and the constitutionalist function of the ECtHR can be seen as the primary limits that can justify any divergence from the allegedly majoritarian character of European consensus. Indeed, the ECtHR should remain loyal to its responsibility to authoritatively interpret the Convention and provide unambiguous and consistent normative guidance vis-à-vis the application of ECHR rights.

It must be noted, however, that the Court has not always lived up to this expectation and has inconsistently deployed consensus, especially in 'borderline', 'sensitive' or 'contested' cases raising particular policy difficulties for the Court.[191] The lack of a clear and precise definition of (the scope of) 'European consensus', as an interpretive principle,[192] in the ECtHR's jurisprudence has made it even more difficult for the Court to (convincingly) resolve acute normative dilemmas.[193] Plurality of possible consensus sources can create ambiguity. Uncertainty as to the weight to be attached to each 'type' or source of consensus, or as to how the results of a comparative research are to be evaluated in its determination has also

[185] Interviews with Judges, ibid, 190-2.
[186] *Airey v Ireland* App no 6289/73 (9 October 1979), para 24.
[187] Michael Hamilton and Antoine Buyse, 'Human Rights Courts as Norm-Brokers' (2018) 18 *HRLRev* 205, 216.
[188] Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 89; P Mahoney and R Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' (n 177) 124.
[189] See nn 180, 182 above.
[190] Partly Dissenting Opinion in *Gorou v Greece (no 2)* App no 12686/03 (20 March 2009), para 9.
[191] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (n 157) 117, 188-9.
[192] P Mahoney and R Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' (n 177) 121-2.
[193] For a critical analysis of the ECtHR's approach in this regard, see Fiona de Londras, 'When the European Court of Human Rights Decides not to Decide: The Cautionary Tale of *A, B & C v. Ireland* and Referendum-Emergent Constitutional Provisions' in Panos Kapotas and Vassilis Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (n 5).

been a matter of concern for the Court and has indeed caused 'significant internal disagreement' among Judges.[194] Regarding the impact of external sources, for instance, it was admitted that 'it is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them'.[195] In other cases, overreliance on domestic consensus, which arguably reflected 'profound moral and ethical values' in the respondent State, had proven capable of trumping well-established European consensus on the matter.[196] It is easily understood, therefore, that the identification of consensus is merely one of the factors determining the outcome of a case. At the same time, the Court retains a considerable flexibility and discretion as to when and how this interpretive tool could be deployed, so inconsistencies in its application are unavoidable.

Apart from the above normative shortcomings, concerns have also been expressed regarding the procedural aspect of how comparative research and data collection is conducted by the ECtHR when examining the levels of consensus on a particular topic across the ECHR system.[197] As acknowledged, the methodology to ascertain whether consensus is emerging or already exists is not elaborated upon or codified in the Rules of Court, thus allowing the Court wide discretion in choosing the means and sources of its analysis.[198] Comparative research is useful if, of course, properly done. Appropriate procedural safeguards should thus be put in place to ensure that the Court's assessment is objective, transparent and consistent. Firstly, strengthening the concept of European consensus would require the ECtHR and its Registry to develop a clear and transparent 'methodological toolbox' that would provide explicit and authoritative guidance to (European and national) Judges, national governments, individual applicants and their lawyers on the matter. This would offer greater predictability in the decision-making process and prevent any potential judicial *ad hocery* or inconsistencies in the application of the concept.[199] In this respect, the legitimacy, and thus acceptability, of the Court's judgments can be reinforced and its critics will be denied fertile ground on which to challenge its authority.

The above institutional shortcoming can hinder the undertaking of any effective, timely and high-quality comparative and empirical research necessary for establishing European

[194] M Hamilton and A Buyse, 'Human Rights Courts as Norm-Brokers' (n 187) 216.
[195] *Tanase v Moldova* App No 7/08 (27 April 2010), para 176.
[196] See eg, *A, B and C v Ireland* App no 25579/05 (16 December 2010), paras 185, 234-241. See also, Fiona de Londras, 'When the European Court of Human Rights Decides not to Decide' (n 193) 312-315.
[197] P Mahoney and R Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' (n 177) 127-136; Kanstantsin Dzehtsiarou, 'Does Consensus Matter?' (n 164) 539; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 158) 124. See also, *X and Others v Austria* App no 19010/07 (19 February 2013), paras 78 and 149 and Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos, paras 13, 15, expressing disagreement regarding the 'sample' of ECHR States to be considered in the Court's consensus analysis.
[198] M Hamilton and A Buyse, 'Human Rights Courts as Norm-Brokers' (n 187) 216.
[199] ibid; L Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 23 *Cornell International Law Journal* 133, 164.

consensus.[200] Although recent years have seen a considerable development and expansion of the Court's Research Division, certain institutional shortcomings still exist. As Mahoney and Kondak note, the Research Division in 2015 counted no more than twelve lawyers and three assistants and the comparative research produced for consensus analysis was only distributed to trial Judges and remained confidential.[201] Furthermore, the permanently excessive backlog and limited resources of the ECtHR and its Registry can reasonably place an additional obstacle in the Court's effectiveness and 'intellectual-legal gravitas'.[202] Reinforcing the Research Division, for example to enable it produce and publish thematic, comparative research reports to provide detailed guidance on the development of Convention rights within the ECHR system would therefore be a practical, additional step in enhancing the legitimising potential of European consensus in the Court's reasoning. Equally, the Court should also show greater 'openness' in its consensus analysis and carefully consider similar developments in other international/regional jurisdictions within the broader spirit of judicial dialogue and legal cooperation.[203]

As Stone Sweet and Brunell highlight, the ECtHR bodies which routinely engage in consensus analysis when assessing the necessity of State measures are the Court's section Chambers.[204] Importantly, Chambers (as well as Committees) are also the segments of the ECtHR which possess the vast majority of pending cases for examination, currently amounting to 57% of all cases, and due to the complexity or novelty of these cases this situation poses a great challenge to the functioning of the Court.[205] Linking this to the previous proposal, the establishment of ECtHR "Regional Branches" in "designated geographic areas" which are responsible for the great bulk of the Court's current workload could be seen as a practical, institutional measure seeking to alleviate the Court from its backlog at the Committee and Chamber stage. At the same time, since such consensus analysis involves a comprehensive examination and investigation of the State practice on the matter, the physical proximity of the "Regional Branches", as explained above, can also increase the credibility and legitimacy of the Court's findings. As explained in the previous proposal, the role of Convention-compliant States in influencing their neighbouring counterparts which are lagging behind in the protection of a certain right to align with the required ECHR standards, and therefore

[200] ibid.
[201] P Mahoney and R Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' (n 177) 125.
[202] W Sadurski, *Constitutionalism and the Enlargement of Europe* (n 19) 7; K Dzehtsiarou, *European Consensus* (n 157) 199.
[203] G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) *EJIL* 509, 541.
[204] Alec Stone Sweet and Thomas Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organisation' (n 77) 79.
[205] *Annual Report 2019 of the ECtHR* (n 97) 130. See also, President Raimondi, 'Speech for the Opening of the Judicial Year' in *Annual Report 2019 of the ECtHR* (n 97) 13. See also statistical analysis in Chapter 3.

achieve 'greater unity between [CoE's] Member States', as per the Organisation's Statute,[206] will be key.

To further overcome some of the identified substantive and procedural 'consensus analysis' shortcomings and deploy the full potential of this interpretive tool, the ECtHR should also collaborate more closely with the CoE's Venice Commission. This CoE institution is already internationally recognised as an independent research body, whose expertise can ensure the credibility, legitimacy and quality of the Court's legal assessments. The Venice Commission itself has recently encouraged the CoE's relevant organs as well as the member States 'to take full advantage of its expertise for strengthening the execution of judgments of the ECtHR' and, therefore, this call should be taken into serious consideration.[207] As acknowledged, the expert reports, studies and recommendation of the Venice Commission are already used by the Court for normative and empirical guidance but synergies among CoE bodies should continue to grow.[208] The Venice Commission's subject-matter expertise should also inform the development of the 'European consensus methodological toolbox' proposed above, as it has done in relation to other technical guides in the past.[209] Furthermore, research conducted by the Court and other CoE advisory bodies should be further supplemented by technical reports and guidance produced by expert bodies, including NGOs. While it is widely recognised that different stakeholders within the ECHR system may have different political agendas, the impact expert reports may have (especially) on the determination of cases presenting novel issues that are still under-developed in the Court's jurisprudence cannot be disregarded. Additionally, closer co-operation with civil society groups means that the ECtHR can avail of already existing expertise and resources, thus overcoming some its own institutional shortcomings.[210]

As shown above, establishing or building European consensus is not without dangers, and the Court's current practice in this regard is subject to critique. Admittedly, the ECtHR maintains a considerable leeway as to the type, range and appropriate weight of sources it consults when engaging in its legal assessment for the determination of consensus as well as to which parameters of the question at stake should be considered for the purposes of this inquiry.[211] It is also acknowledged that developing a clear methodological underpinning for

[206] Statute of the Council of Europe 1949, Article 1 (a).
[207] Committee of Ministers, *The Implementation of Judgments of the European Court of Human Rights*, CM/AS(2018)Rec2110-final (8 February 2018), para 20 <https://rm.coe.int/16807875b8> accessed 16 June 2021.
[208] W Hoffmann-Reim, 'The Venice Commission of the Council of Europe' (2004) 25 EJIL 585. See also, Stefanie Schmahl and Marten Breuer (eds), *The Council of Europe: Its Law and Policies* (OUP 2017) 741-743.
[209] See eg, the Venice Commission's Rule of Law Checklist (March 2016) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> accessed 16 June 2021.
[210] P Mahoney and R Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' (n 177) 126-7.
[211] Panos Kapotas and Vassilis Tzevelekos, 'How (Difficult Is It) to Build Consensus on (European) Consensus?' in P Kapotas and V Tzevelekos (eds), *Building Consensus on European Consensus* (n 5) 9-12.

European consensus can be a real challenge for the ECtHR as there is no scientific formula that can guarantee the 'correctness' of this interpretive tool.[212] The normative and procedural safeguards proposed above could, however, form a step in this direction and enhance the legitimising potential of European consensus. This would encourage the ECtHR to place it at the heart of its judicial reasoning and ensure that its deployment 'is *reflecting* reality, rather than *creating* law'.[213] In the face of normative divergence both within and beyond its jurisdictional boundaries, it is argued that European consensus, when applied systematically and determined with the necessary methodological rigour and consistency, undoubtedly offers opportunities for the Court to engage in a dynamic act of convergence-building and standard-setting. As argued, 'there is a fine line between appropriate judicial humility and excessive judicial caution'.[214] If, however, the ECtHR is genuinely driven by the need for effective implementation of minimum Convention standards (as determined in its jurisprudence at the relevant time), then it may well pursue a gradual, yet progressive and more harmonised protection of Convention rights on the basis of a strengthened consensus, without 'overstepping' its subsidiary character.

6.3.3 Strengthening the *erga omnes* effect of the ECtHR jurisprudence

Chapter 2 has already explained that an effective ECtHR is an ECtHR which is no longer needed to resolve every single Convention-related dispute – particularly those which present similar rights violations arising from repetitive or 'clone' cases. Arguably, embeddedness of the Convention in the national legal orders of the States Parties is key in guaranteeing the effectiveness of the ECHR system and the ECtHR.[215] In this regard, national authorities, including national courts, have a vital role to play towards the more effective implementation of the ECHR domestically and, indeed, the majority of them have already 'taken the lead in incorporating the Convention' at the national level.[216]

States Parties to the Convention are under the legal obligation to 'abide by the final judgments of the Court in any case to which they are parties'.[217] Recalling from Chapter 2 of

[212] ibid.
[213] Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (n 188) 79.
[214] M Hamilton and A Buyse, 'Human Rights Courts as Norm-Brokers' (n 187), 225. See also, Ed Bates, 'Strasbourg's Integrationist Role, or the Need for Self-restraint?' (n 59).
[215] See eg, Laurence Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (n 47) 125. See also discussion in Chapter 2, Section 2.4.
[216] H Keller and A Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in H Keller and A Stone Sweet (eds), *A Europe of Rights* (n 11) 687. See also, Ed Bates, *The Evolution of the European Convention* (n 10) 515; K Dzehtsiarou and A Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12 *German Law Journal* 1707, 1708.
[217] Art 46(1), ECHR.

the thesis, ECtHR judgments are only formally binding *inter partes* and do not have a binding *erga omnes* ('towards all') effect across the non-respondent States.[218] The Court's jurisprudence thus constitutes *res judicata* and the obligation to abide by a Court's judgment applies only to States parties to the relevant proceedings where an ECHR right violation was found, while the rest of the States which were not directly concerned by the judgment can merely regard the final decision as having 'persuasive' effect in their own domestic systems.[219] The *erga omnes* effect of ECtHR judgments, therefore, largely depends on their own persuasive authority.[220] The absence of a Convention-based legal obligation upon States to abide by ECtHR final judgments in cases to which they are not parties has been also recognised more recently by the CDDH.[221] This normative shortcoming can inevitably limit the domestic legal impact that the ECtHR judgments might otherwise have to a considerable extent.

Despite this limitation, I subscribe to the opinion that although 'judgments of the Court do not have an *erga omnes* effect… they have an *orientation* effect'.[222] Arguably, the (*de facto*) *erga omnes* effect of ECtHR case law is indicative of the shared responsibility of States within the ECHR legal order: not only are national authorities required to comply with ECtHR judgments against their own States, but they are encouraged to proactively consider necessary legislative or administrative changes in light of adverse judgments against other States 'where the same problem of principle exists within their own legal systems'.[223] As shown previously, the ECtHR, as a policy-shaping actor, can exert influence through its rulings, at least *de facto*, even on those States which are not directly concerned with the specific legal dispute.[224] In this regard, the jurisprudence of the ECtHR may serve as a pretext for governments to address the importance of certain human rights issues on the domestic political agenda and encourage national authorities to undertake corrective measures in order to pre-empt future litigation at the international level.

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[218] See eg, Samantha Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights: What's in a Name?' in Samantha Besson (ed), *The European Court of Human Rights after Protocol No. 14: Preliminary Assessment and Perspectives* (Schulthess 2011) 125; Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Effect to the Judgments of the European Court of Human Rights' (2017) 28(3) EIJL 819, 821.

[219] S Greer, *The European Convention on Human Rights: Achievements, Problems, Prospects* (CUP 2006) 279-280. See also, Laurence Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (n 47) 136; Dean Spielmann, Speech at International Conference "Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges" (Baku, 24-25 October 2014) <https://www.echr.coe.int/Documents/Speech_20141024_OV_Spielmann_ENG.pdf> accessed 16 June 2021.

[220] Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71(2) *MLR* 206.

[221] See eg, CDDH Report on 'The Longer-Term Future of the System of the European Convention on Human Rights', (2015) paras 37-38, 197.

[222] George Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (n 11) 374.

[223] Interlaken Declaration (2010), Section B(4)(c).

[224] See eg, Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change' (n 179). See also discussion in Chpater 2, Section 2.3 and Section 6.2 in this chapter.

Although there is no formally recognised doctrine of precedent in the ECHR context, the rich jurisprudence of the Court suggests that, in the absence of substantial reasons to the contrary, the same legal questions will be resolved in the same way in subsequent cases.[225] This is proved by the extensive references the ECtHR makes to its previous case law in order to support its analysis and justify its decision in a later case, often in a way that resembles the use of judicial precedent in domestic review courts.[226] Indeed, in exercising its constitutionalist role, as discussed above, the ECtHR 'performs its most important governance functions through the building of a precedent-based jurisprudence'.[227] Importantly, as Lupu and Voeten demonstrate, country-specific factors *per se* do not determine the case law on which the ECtHR relies when examining a dispute.[228] Instead, the Court cites its previous jurisprudence based on the substantive legal issues in the case at hand. By doing so, the ECtHR arguably enhances the consistency, transparency and, thus, legitimacy of its decision-making while persuading States to comply with its judgments and eliminating any possible backlash over politicised rulings.[229] Concerns, therefore, that ECtHR judgments cannot have *erga omnes* effect because they only reflect specific factual circumstances limited to the relevant case or country-specific factors/characteristics, such as the respondent State's legal culture, cannot be sustained. While certain parts of the judgments correspond primarily to the case under study (eg award of just satisfaction and specific measures against the respondent State), some other parts decided purely on legal substance indicate how general ECHR principles are to be upheld (eg general measures against the respondent State). Those parts are considered normatively binding on all States, irrespective of their involvement in a particular dispute and are, therefore, capable of having wider applicability to States facing the same or similar underlying issues.[230] Consequently, national courts increasingly engage with the Court's developing case law and draw their conclusions also from judgments delivered against other States, thus giving effect to the ECtHR's rulings in a manner that resembles a horizontal application of the Court's jurisprudence, often resulting in changes to national laws and practices of non-respondent States too.[231] In this same regard, the PACE has noted that the 'principle of solidarity implies

[225] Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2011) 42 *British Journal of Political Science* 413, 416; L Wildhaber, 'Precedent in the European Court of Human Rights' in P Mahoney (ed), *Protecting Human Rights: The European Perspective – Studies in memory of Rolv Ryssdal* (Heymann, 2000) 1529-45.

[226] Y Lupu and E Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (n 225) 415-6, 439.

[227] A Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (n 16) 1.

[228] Y Lupu and E Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (n 225) 415, 421-2, 429,

[229] See eg, A Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (n 16) 1.

[230] Oddný M Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Effect to the Judgments of the European Court of Human Rights' (n 218) 822.

[231] See eg, A Bodnar, 'Res Interpretata: Legal Effect of the European Court of Human Rights' Judgments for other States than those which were Party to the Proceedings' in Y Haeck and E Brems (eds), *Human Rights and*

that the case law of the Court forms part of the Convention, thus extending the legally binding force of the Convention *erga omnes* [to all other States Parties]'.[232]

One may question the existence of such 'principle of solidarity' in the ECHR system. This, however, can be circumvented with a careful reading of the Preamble and Article 1 of the ECHR, where references to 'greater unity', 'common understanding' and 'collective enforcement' can be found, as well as a serious consideration of the 'shared responsibility' principle discussed above. Nevertheless, there is a different, rather jurisprudential argument against attributing an *erga omnes* effect on the ECtHR judgments. As Greer explains, it would not always be possible to identify concrete legal norms from the 'thinly reasoned Strasbourg jurisprudence' and national authorities would have difficulties in determining which judgments may have such an 'orientation effect'.[233] Similar concerns have been expressed by CoE expert bodies when discussing the possibility of extending the legally binding effect of ECtHR judgments to non-respondent States but, as explained below, there are sufficient normative and procedural tools to address and resolve these ambiguities.

Since the *erga omnes* effect of the ECtHR judgments has not been sufficiently developed in the jurisprudence of the Court, express references to the term are only limited to certain dissenting or concurring opinions of individual judges.[234] The proposal of establishing a Convention-based and legally-binding *erga omnes* effect for the Court's jurisprudence, notably the Grand Chamber's decisions, vis-à-vis all States Parties was tabled by various legal academics and practitioners in the context of the ECtHR reform process following the Interlaken Conference in 2010.[235] However, these proposals, like any other innovative ideas or ideas that would require more fundamental changes to the object and purpose of the Convention, were excluded from the CDDH's reform agenda.[236] The CDDH decided, instead, to emphasise to States the importance of the 'principle of *res interpretata*' and the need for them to 'integrate the Strasbourg Court's case-law into national law'.[237] Essentially, the principle of *res interpretata* refers to the obligation of national authorities of a State Party to take into account the interpretation of the Convention as this is established in ECtHR

Civil Liberties in the 21st Century (Springer 2014) 223-262. See also, PACE, Contribution to the Conference on the Principle of Subsidiarity (2010) AS/Jur/Inf(2010)04.

[232] PACE, 'Execution of Judgments of the European Court of Human Rights' Resolution 1226 (2000) para 3.

[233] Steve Greer, *The European Convention on Human Rights: Achievements, Problems, Prospects* (n 219) 281.

[234] See eg, *Perincek v Switzerland* App no 27510/08 (15 October 2015), Joint Dissenting Opinion of Judges Spielmann, Casadewall, Berro, De Gaetano, Sicilianos, Silvis and Kuris, paras 6-7, referring to the *erga omnes* scope of human rights as 'their quintessential defining factor today'.

[235] See eg, Dzehtsiarou and Greene, *Contribution* <www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Dzehtsiarou.pdf> accessed 22 February 2021; Saura I Estapa, *Contribution* <www.coe.int/t/dghl/standardsetting/cddh/reformechr/GT-GDR-F/Saura.pdf> accessed 31 May 2021. See also, S Greer and L Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (n 32) 682.

[236] Steering Committee for Human Rights (CDDH), Report on the Longer-Term Future of the System of the European Convention on Human Rights (CDDH Report 2015) Doc CDDH(2015)R84 Add I, para 64.

[237] CDDH Report 2015 (n 236) para 37.

judgments delivered against a different State, despite the fact that there is no explicit doctrine of binding precedent under the Convention.[238]

Despite this development, an obligation merely to 'take into account' the interpretative authority of the ECtHR judgments against other States is far from sufficient in strengthening the authority of the Court's judgments, the embeddedness of the Convention domestically and, thus, the overall effectiveness of the Convention system. The effectiveness of the measure regarding preventing unnecessary (inadmissible, repetitive or ill-founded) applications to reach the Court is also questionable. I propose, therefore, to revive the debate on strengthening the *erga omnes* effect of the ECtHR judgments, especially the Grand Chamber's decisions. As I already discussed in Chapter 2, this is the only effective way in which the above objectives can be met. I, therefore, suggest that the reflection on the possibility for the Court, and especially the Grand Chamber, to deliver 'judgments of principle' with legally binding effect beyond the respondent State shall be reconsidered.[239] The idea of delivering 'judgments of principle' with wider legal applicability was also supported by the ECtHR before the launch of the Interlaken reform process, noting that 'although its judgments do not, strictly speaking, have *erga omnes* effect […], all States should take due notice of judgments against other States, especially judgments of principle, thereby pre-empting potential findings of violations against themselves'.[240]

The idea of 'judgments of principle' was initially examined but then rejected by the Evaluation Group on the basis, *inter alia*, that it would be difficult to reach 'a precise definition of this category of judgments' and that it would not be 'always possible to identify in advance all the cases that might give rise' to such judgments.[241] The following part will seek to address these concerns in more detail and provide some recommendations as to how they can be resolved. I thus argue that such 'judgments of principle' are envisaged to work in parallel with, but also go beyond, the existing pilot judgment procedure in the sense that they would identify and deal with issues of general application affecting several States Parties. While the pilot judgment procedure has proved to be an essential mechanism in addressing and eliminating systemic dysfunctions in the national order of the respondent State, due to their vertical applicability, the ECtHR still needs to examine and determine judicially cases against other ECHR States raising the same or similar legal questions if their legal effect was to be expanded beyond the respondent State. Inevitably, these systemic problems at national level generate numerous repetitive applications before the ECtHR. As

[238] See also, Interlaken Declaration <www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 April 2021.
[239] See eg, Ewa Letowska, 'Co-operation of the ECHR with Supreme National Judiciary Bodies (Consultative Opinions) and the Role of Popularising the Case-law of the ECHR' in *Reforming the ECHR: A Work in Progress* (Proceedings: The European Court of Human Rights: Agenda for the 21st century) 209.
[240] Opinion of the Court on the Wise Persons' Report (2007), para 3.
[241] *Wise Persons Report 2006* (n 112), para 68.

the Court's current practice stands, there is no other jurisprudential mechanism enabling it to deal with such cases as a "network" of thematic issues affecting a wider group of States.

Delivering 'judgments of principle' could be seen in line with the observation made that the underlying mission of the ECHR system and role of the ECtHR's jurisprudence goes beyond the mere adjudication of an individual dispute, extending to determining issues on public policy grounds in the common interest of ECHR States.[242] As the ECtHR further highlighted, its jurisprudence 'serve[s] not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties'.[243] In this regard, the ECtHR could invite States and encourage them to intervene in cases where issues giving rise to a 'judgment of principle' arise allowing them to express their legal views on the subject-matter within the spirit of enhanced cooperation. 'Judgments of principle', therefore, would facilitate the extension of influence of ECtHR case law on 'public policy' areas of common interest to other (non-respondent) States whose national legislation, case law and practices are not fully in line with the general standards of protection developed under the Convention.[244] The encouragement of States Parties to intervene in such cases would further enhance the quality, and thus authority and legitimacy, of ECtHR judgments and ensure greater harmonisation in the protection of these general standards across all States. If we accept that the position of ECHR States on a particular topic is a decisive factor that can influence the ECtHR's decision-making, in line with the previous proposal about enhancing European consensus, then States would have a vested interest in getting more actively involved in the development and shaping of Convention standards through their third-party interventions.[245]

As discussed earlier in this chapter, the consistently large backlog of the ECtHR has formed the basis for a long debate of whether the ECtHR should rethink its position vis-à-vis domestic authorities and domestic courts, in particular, and whether a re-consideration of its dual functionality is desirable and/or necessary. As the present proposal suggests, the ECtHR should strengthen its constitutionalist function by focusing on the delivery of direction-changing 'judgments of principle', rather than double-checking established facts

[242] Luzius Wildhaber, 'Rethinking the European Court of Human Rights' (n 39) 217. See also, *Konstantin Markin v Russia* App no 30078/06 (22 March 2012) para 89; *Ramtsev v Cyprus and Russia* App no 2596/04 (07 January 2010), para 197.
[243] *Ireland v United Kingdom* App no 5310/71 (18 January 1978), para 154.
[244] See eg, Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change' (n 179).
[245] See eg, ECtHR, *Opinion on the Draft Copenhagen Declaration* (19 February 2018), para 15-18, where the ECtHR encourages the States to make use of the available mechanisms for dialogue between national authorities and the Court and enhance their participation in court proceedings through third-party interventions <https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf> accessed 29 May 2021.

and expending valuable resources on the examination of clearly inadmissible cases or complaints that can be determined on the basis of the Court's well-established case law.[246]

During the pre-Protocol No 14 reform debate, the Evaluation Group suggested that developing the idea of 'constitutional judgments' was worth considering.[247] Such judgments were then defined as 'fully reasoned and authoritative judgments in cases which raise substantial or new and complex issues of human rights law, are of particular significance for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication'.[248] 'Judgments of principle' may therefore be delivered in cases dealing with novel issues through which the established Convention standards can be clarified and, most importantly, the scope of ECHR rights can be further developed.[249] Moreover, the constitutionalist character of 'judgments of principle' means that such decisions may be delivered in cases revealing systematic/repetitive human rights violations arising from endemic problems and in cases where the prolonged non-adaptation of national laws to the rights protection standard required by the Convention risks undermining the legitimacy of the ECHR system as a whole.[250]

The ECtHR may also choose to deliver 'judgments of principle' in situations where its final judgment in relation to the respondent State(s) is likely to have wide-ranging implications for a larger number of States, either across the continent or in a particular sub-region of it, which may face the same or closely similar legal issue to the one under examination by the ECtHR at the relevant time. Judgments in cases dealing with grave breaches of human rights or revealing structural or systemic deficiencies in national orders (eg arbitrary national administrative or legal proceedings, excessive length of court proceedings, failure to execute final domestic court judgments) could also fall under this category.[251] 'Judgments of principle' could be delivered as well in cases revealing a 'general repercussion in (European) society', including, for example, cases concerning the systematic elimination of effective political opposition and lack of protection of minority groups.[252] Looking at the Court's statistics, rights enshrined under Article 3, Article 6 and Article 1 of Protocol 1 are the Convention rights that have been violated the most during the Court's history (1959-

[246] C J Van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' (2012) 31(1) *Yearbook of European Law* 128, 149.
[247] Report of Evaluation Group (2001), para 98, cited in S Greer, *The European Convention on Human Rights* (n 219) 165.
[248] ibid, para 98.
[249] See, *inter alia*, Fiona de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (n 10) 40; Kanstantsin Dzehtsiarou and Alan Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' (n 58) 714.
[250] Report of Evaluation Group (247) para 98. See also, Kanstantsin Dzehtsiarou and Alan Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' (n 58) 714.
[251] See also, Luzius Wildhaber, 'Changing Ideas about the Tasks of the ECtHR' in L. Wildhaber, *The ECtHR 1998-2006: History, Achievements, Reform* (N.P. Engel, 2006) 121.
[252] Luzius Wildhaber, 'Rethinking the European Court of Human Rights' (n 39) 211.

2019).[253] Violations under these rights concern cases of, *inter alia*, poor prison conditions, excessive length of judicial proceedings and inadequate or denied compensation following property appropriation by the State, respectively. The ECtHR may well decide to deliver 'judgments of principle' in these cases which evidently affect a wider group of ECHR States. By extending the legal applicability of such judgments, the ECtHR would contribute to 'elucidating, safeguarding and developing' the Convention protection standards while offering clear guidelines for national authorities of all States concerned, in a horizontal manner, on how to implement the relevant principles effectively in their domestic orders.[254] At the same time, similar legal issues raised in a large percentage of the Court's caseload would be more effectively addressed in a more procedurally efficient manner.

Increased third-party intervention should be encouraged in cases identified as likely to lead to a judgment of principle as a means of advancing States' understanding of the application and interpretation of the general principles of the ECtHR's case law. Encouraging greater third-party intervention could allow States not directly involved in a particular dispute to identify and pro-actively correct or remedy domestic laws and practices at an early stage, in preventive anticipation of possible violations. A more active third-party participation of States in ECtHR judicial proceedings could assist the Court in delivering well-reasoned judgments by providing information on the legal and factual situation at the national level. Also, attributing *erga omnes* effect on 'judgments of principle' could ensure a more harmonised protection of the required Convention standards in ECHR States. It can therefore offer more effective protection of individual rights domestically through prompt identification and remedy of national Convention-incompatible laws or practices.[255] Ensuring that ECHR States comply with certain ECtHR judgments even if they are not directly involved in the dispute is expected to have significant impact in promoting and broadening the scope of Convention rights in the pan-European space. The measure could also strengthen the Court's cooperation with civil society through enhanced participation of civil society groups as third parties in judicial proceedings.

Finally, as mentioned above, certain procedural measures would need to be adopted to make the proposal practical and effective. These may include a processing mechanism allowing for the systematic and timely identification of cases likely to lead to judgments of principle by the Court and its Registry. In this regard, States would be informed as early in the proceedings as possible, thus allowing those concerned sufficient time to prepare and submit their observations/third-party interventions before the Court. The fact that 'judgments of principle' are to be delivered by the Grand Chamber means that the case

[253] *Annual Report 2019 of the ECtHR* (n 97) 136-137.

[254] *Konstantin Markin v Russia* App no 30078/06 [GC] (22/03/2012) para 90. See also, Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights' (2002) 23 *HRLJ* 161, 164.

[255] See also, CDDH Final Opinion on 'Putting into practice certain procedures envisaged to increase the court's case-processing capacity and activity report guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights' CDDH(2009)007-add1, paras 26-30.

would have been previously examined by a Chamber, during which stage the identification of legal questions of principle can already start shaping. In line with the previous proposals presented above, enhanced cooperation among the various CoE bodies could considerably facilitate the identification of matters of principle. The ECtHR should thus avail itself of the country reports, recommendations and resolutions produced by the Human Rights Commissioner, the PACE and the CoM which detail the main challenges facing the Contracting Parties in the implementation of Convention rights domestically.

6.3.4 Introducing a new, procedural admissibility criterion

During the Interlaken reform decade, a number of administrative and procedural measures were proposed or adopted in order to resolve the problem of clearly inadmissible cases.[256] Those were identified as 'measures to regulate access to the Court'[257] and emerged mainly as a response to the post-Izmir invitation of States to the CoM to consider 'possible new procedural rules or practices concerning access to the Court'.[258] As shown in Chapter 3, however, these measures have proved to be insufficient in resolving the underlying challenges facing the ECtHR. In line with the proposals presented in the Chapter so far, it is recalled that the long-term effective functioning of the ECtHR requires, *inter alia*, national judicial bodies to develop an autonomous Convention-related jurisprudence, based on Convention standards as developed in the ECtHR's case law, so that ECHR disputes are addressed and resolved more effectively domestically. It is therefore argued that a new, procedural admissibility criterion should be introduced, under which the ECtHR would have the discretion to declare an application inadmissible if 'substantially the same as a matter that had already been [*duly*] examined by a domestic tribunal applying the rights guaranteed by the Convention and the Protocols thereto'.[259] This proposed measure, as will be further explained below, intends to enhance not only the institutional efficiency of the Court, by enabling it to better handle the large number of inadmissible applications, but also its

[256] For example, the 'significant disadvantage' admissibility criterion introduced in Protocol No 14. Some of the measures which, however, did not materialise included a proposal for introducing fees for applicants to the Court and compulsory legal representation. See, CDDH Final Report on Measures Requiring Amendment of the European Convention on Human Rights (adopted by the CDDH on 10 February 2012), cited in *Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and beyond* (Council of Europe 2014) 233-234, 252-265. See also, Izmir Declaration (27 April 2011), Follow-up Plan, A.2 <https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 20 April 2021.

[257] CDDH Final Report on Measures Requiring Amendment of the European Convention on Human Rights (n 256) 232.

[258] Izmir Declaration (n 256), Follow-up Plan, A.2.

[259] Based on CDDH's proposal, with '*duly*' being an addition here. See, CDDH Final Report on measures requiring amendment of the European Convention on Human Rights, CDDH(2012)R74 Add I (15 February 2012), 37 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045fdc5> accessed 14 June 2021.

normative effectiveness, by emphasising its subsidiary nature and, thus, further clarifying and strengthening its relationship with national authorities.[260]

The basis for this measure is a proposal already put forward by the CDDH in its Final Report ahead of the Brighton Conference in 2012 and was intended to be included in Protocol No 15 which was at the time in drafting stage.[261] A lack of consensus on the proposed measure among governments of ECHR States, however, resulted in its rejection and the adoption, instead, of the relevant amendment to the ECHR Preamble with an explicit reference to subsidiarity and the margin of appreciation as a political compromise.[262] Yet, States called for a stricter and more consistent approach by the Court when declaring applications inadmissible on procedural grounds, while further 'clarifying its case law to this effect as necessary'.[263] Interestingly, some States opposed the adoption of a new procedural admissibility criterion on the basis that it 'would limit the jurisdiction of the Court and its ability to address gaps in protection of Convention rights'.[264] Instead, they appeared more inclined to support the 'further elaboration of the doctrine of margin of appreciation',[265] which, however, as Chapter 5 showed, had exactly the same negative impact on the Court's supervisory role they allegedly wanted to prevent. Arguably, by rejecting the creation of a legal basis for a more structured procedural review by the ECtHR, some States may have expected to benefit from the already existing (and increasing) procedural deference practice of the Court and the perceived flexibility current admissibility criteria (eg 'manifestly ill-founded') may offer, without explicitly subjecting themselves to such (procedural) scrutiny.[266]

Such admissibility criterion would confer on the Court discretion to decide which cases to consider substantively (on the merits), rather than procedurally. The idea goes back to a previous CDDH proposal to develop the ECtHR into a 'constitutional court', which was taken to mean a 'Court with some degree of power to choose from amongst the applications it receives' and thus enabling it to prioritise and better manage its caseload.[267] Admittedly, CDDH's proposal was not received with enthusiasm by States since it was seen as a way to

[260] ibid, 37-38.
[261] ibid, 37-40.
[262] David Milner, 'Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road' (2014) 1 *Zeitschrift für Europarechtliche Studien* 19, 28-30.
[263] Brighton Declaration (2012), para 15(d). See also, William Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 75.
[264] CDDH Final Report, CDDH(2012)R74 Add I (n 259) 8.
[265] ibid.
[266] More on this argument follows further below. See also, Reto Walther, 'Procedural Deference at Strasbourg: A Trend Calling for a New Admissibility Criterion?' (*EJIL:Talk!, 3 January 2020*) <https://www.ejiltalk.org/procedural-deference-at-strasbourg-a-trend-calling-for-a-new-admissibility-criterion/> accessed 16 June 2021.
[267] CDDH Final Opinion on 'Putting into practice certain procedures envisaged to increase the court's case-processing capacity and activity report guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights' CDDH(2009)007-add1, para 47. See also, Explanatory Report to Protocol No 14 to the ECHR, para 34.

instrumentalise judicial economy arguments to achieve the Court's constitutionalisation. The CDDH, however, acknowledged that 'the Court might ultimately one day develop in this direction, but the time is not yet ripe to discuss the proposal further'.[268] Moreover, as already shown in Chapter 4, in calling for the prompt entry into force of Protocol No 14, the CDDH noted that measures included therein only 'intended by [their] drafters as an intermediate step in a longer process of reform', thus leaving the possibility for re-consideration of the measure open should the future circumstances of the Court so required. Additionally, the CDDH based its opinion to reject the idea of a new procedural admissibility criterion in 2012, *inter alia*, on the fact that '[t]he level of implementation of Convention standards in domestic law in the various High Contracting Parties does not currently allow for the introduction of such a measure'.[269]

The above observations encourage the development of the present proposal. The continous improvement of domestic legal systems in examining Convention-related disputes suggests that the above proposal should now be reconsidered. Furthermore, the addition of a new procedural admissibility criterion at this point reflects the ECtHR's current judicial practice and its growing 'procedural turn' towards more deference 'to the reasoned and thoughtful assessment by national authorities of their Convention obligations', discussed in detail in Chapter 5.[270] As acknowledged, the Court uses procedural grounds either to determine the degree of the margin of appreciation afforded to national authorities when protecting certain qualified rights (ie a 'procedural margin of appreciation'),[271] or to declare an application inadmissible from the outset.[272]

At first glance, this measure might be seen as an attempt to widen the margin of appreciation afforded to States and, therefore, contradictory to what has been suggested in previous proposals. As the below analysis shows, however, the procedural deference to States envisaged through the proposed admissibility criterion does not provide national authorities with a *carte blanche*; instead of undermining the reform proposals presented above, it further complements them. Arguably, the deferential aspect of this procedural turn should not be seen as a signal of the Court's retreat, and thus weakening, due to the

[268] CDDH Final Opinion, CDDH(2009)007-add1, para 47.
[269] CDDH(2012)R74 Add I (n 259) 39.
[270] R Spano, 'Universality or Diversity of Human Rights?' (n 63) 491. See also, R Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) *HRLRev* 473; Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention compliance' (2017) 15(1) *International Journal of Constitutional Law* 9; Janneke Gerards, 'Procedural Review by the ECtHR: A Typology' in J Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017).
[271] Armin von Bogdandy, 'In the Name of the European Club of Liberal Democracies: How to Evaluate the Strasbourg Jurisprudence' (*EJIL:Talk!,* 20 December 2018) <https://www.ejiltalk.org/in-the-name-of-the-european-club-of-liberal-democracies-how-to-evaluate-the-strasbourg-jurisprudence/> accessed 31 May 2021.
[272] Reto Walther, 'Procedural Deference at Strasbourg: A Trend Calling for a New Admissibility Criterion?' (n 266).

increasing criticism by States, as some scholars may suggest.[273] Rather, it is seen as a strategic use of the margin of appreciation aiming at encouraging States to fulfil their 'shared responsibility' and implement more effectively the Convention at the national level while strengthening the supervisory, and constitutionalist, role of the ECtHR.[274] In other words, rather than encouraging leniency of substantive ECHR review, the proposed measure aims at ensuring a quality, evidence-based assessment of Convention-related disputes by national courts, while ensuring that, with appropriate safeguards, the role of the ECtHR as the ultimate, authoritative arbiter of Convention-related issues remains intact.[275] As Chapter 5 argued, it is evident that procedural control cannot replace substantive control of Convention rights. Rather than disregarding, or even rejecting, this already existing practice, therefore, it is submitted that this should be codified into a formal, clearly-defined requirement as it would be preferable over current, often unpredictable, judicial 'ad-hocery'.[276] This would also serve the principles of transparency and legal certainty in judicial proceedings as well as the interests of individual applicants when petitioning the ECtHR by ensuring that existing or new admissibility criteria do not deprive well-founded applications (which have not been properly examined domestically) of sufficient review.[277]

It is expected that this criterion could apply to the application as a whole or to a particular complaint within the broader context of the case. The possibility for a State to hide behind a superficial consideration of the complaint or the duly consideration of some, but not all, of the complaints raised in the application in order to bypass the 'intervention' of the Court will be considerably diminished. The examination of the application on the merits by the ECtHR would not be prevented *a priori* even if this procedural requirement is satisfied, ie the individual's complaint had been considered by a domestic court. This is because for the fulfilment of the procedural admissibility criterion, apart from the mere existence of a

[273] See eg, Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'' in Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law* (Intersentia 2014) 61; Jon Petter Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention on Human Rights' (2013) 31 Nordic Journal of Human Rights 28, 54.

[274] Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68(1) *International & Comparative Law Quarterly* 91, 99-104; Oddný M Arnardóttir, 'Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation' (2015) 5(4) *ESIL Conference Paper Series*, 1, 19-22.

[275] T Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (n 274) 99-104.

[276] Reto Walther, 'Procedural Deference at Strasbourg: A Trend Calling for a New Admissibility Criterion?' (n 266); Ben Jones, 'European Court of Human Rights: Is the Admissions System Transparent Enough?' (*UK Human Rights Blog*, 27 January 2012) <https://ukhumanrightsblog.com/2012/01/27/european-court-of-human-rights-is-the-admissions-system-transparent-enough-ben-jones/2012> accessed 16 June 2021. See also relevant discussion in Chapter 5 of the thesis.

[277] See eg, H Keller, A Fischer, D Kühne, 'Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals' (2011) 21 *EJIL* 1025, 1047; Janneke Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' (2014) 14(1) *HRLRev* 148.

domestic judicial review of the matter, the quality of this review (ie the extent to which the Court's jurisprudence has been taken into account and applied by the domestic court) will also need to convince the ECtHR.

Undoubtedly, the role of the Court as an authoritative interpreter of the Convention must be maintained. Certain safeguards which could guarantee the competence of the Court to exercise its jurisdiction should thus be established. The CDDH has already proposed that these should include occasions where (a) the domestic tribunal 'had manifestly erred in its interpretation or application of the Convention rights' and (b) 'the application raises a serious question affecting interpretation or application of the Convention'.[278] These exceptional grounds may be extended to cover cases revealing systemic or structural deficiencies in the national order or cases of 'principle' or 'constitutional importance' (in line with the previous proposal) so that the ECtHR is not prevented from substantively examining cases likely to reveal underlying threats for the Convention system as a whole. Another safeguard clause ensuring that an application cannot be declared inadmissible if respect for human rights requires a substantive examination of the case on the merits, ie when questions affecting the general observance of the Convention are raised or when the domestic court could not determine the case simply on the basis of the ECtHR's well-established case law, could also be added.[279] As such, the proposed measure would ensure both procedural as well as substantive grounds of subsidiarity: while the ECtHR would be able to defer to diligent domestic decision-making, it could also reserve its right to intervene and re-examine the substance of the case when deemed necessary.

The proposal could be particularly useful with regard to the examination of cases involving certain qualified Convention rights, such as those found in Articles 8 to 11, where States can exercise their margin of appreciation when conducting a proportionality assessment to determine whether an interference with a right is justified under the Convention standards.[280] A *prima facie,* procedural assessment of the application can thus be conducted at the admissibility stage and only when the ECtHR is not convinced, subject to the safeguard clauses, that the domestic courts have diligently considered and applied the required ECHR standards, the application should proceed further.[281] It is expected that if national courts examine alleged Convention rights violations with the necessary procedural diligence and in light of the ECtHR's current and well-established jurisprudence, the occasions when the Strasbourg Court would need to reconsider the case and reach a different outcome than that of the national court would be relatively limited. The measure is therefore seen as a

[278] CDDH Final Report, CDDH(2012)R74 Add I (n 259) 37.
[279] See eg, *Tyrer v. UK*, para 2. Similar provisions exist in Articles 37(1) and 39(1) regarding strike-out applications and friendly settlement decisions respectively.
[280] Applications based on these Articles fall under Category IV of the ECtHR's Priority Policy, which currently accounts for 25,4% of its overall caseload. See, Analysis of Statistics 2019 (ECtHR, 2020) 7.
[281] Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (n 274) 93-95.

mechanism not to pre-emptively determine the substance of the case, but rather as a mechanism to assist the ECHR States to develop their own 'autonomous jurisprudence on the Convention at the domestic level'.[282] Moreover, the proposal should be seen as a complementary incentive for States to prove to the ECtHR that they have taken due consideration of the applicant's complaint in the domestic proceedings and that there is no need for it to re-examine an application which would most likely lead to the same outcome.[283]

As expected, various ECHR stakeholders may raise concerns over the desirability, effectiveness or unintended consequences of the introduction of an additional procedural admissibility criterion. Arguably, an increased procedural turn by the ECtHR could further restrict the right of individual petition and the ability of individuals to seek redress at the international level.[284] The PACE[285] and, perhaps to a greater extent, civil society[286] have repeatedly opposed this possibility whenever measures having a similar effect were presented during the reform process. Some may also argue that judicial determination of individual applications by the Court is indispensable to effective human rights protection. As noted, a greater emphasis on the procedural rather than substantive review of ECtHR cases could create more unpredictability and uncertainty as to the applicable principles under the Convention at the relevant time since the Court might be prevented from providing a clear guidance as to the substance of a well-founded ECHR-related dispute.[287] Additionally, the added value of the introduction of a new procedural admissibility criterion as the one proposed above could be called into question since the effectiveness of a domestic remedy is still required under Article 13 of the Convention. Similarly, Article 35(1) ECHR already provides that all domestic remedies have to be exhausted. Finally, it has been argued that the measure would unavoidably create certain unintended consequences, including, for example, generalisations concerning the overall functioning and quality of a national legal system, thus preventing the ECtHR from focusing on whether the domestic court has treated

[282] Fiona de Londras, 'Dual functionality and the Persistent Frailty of the European Court of Human Rights' (n 10) 39-40.
[283] See eg, *Mohammad v Denmark* App no 16711/15 (13 December 2018), paras 35-36; *Neagu v Romania* App no 49651/16 (21 February 2019), paras 30-31.
[284] Peter Cumper and Tom Lewis, 'Blanket Bans, subsidiarity, and the procedural turn of the European Court of Human Rights' (2019) 68(3) *International & Comparative Law Quarterly* 611. See also CDDH Final Report, CDDH(2012)R74 Add I (n 259) 38.
[285] See eg, PACE (Committee on Legal Affairs and Human Rights), *The Effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond*, Report Doc 13719 (2 March 2015), paras 68, 73.
[286] See eg, *Joint NGO Statement: The Brighton Declaration must strengthen human rights protection in Europe and preserve the integrity and authority of the European Court of Human Rights* (13 April 2012), noting that '[w]e firmly oppose the adoption of additional admissibility requirements which would unduly restrict the Court's substantive jurisdiction under Article 19 of the Convention by preventing an assessment on the merits of the States parties' observance of their engagements under the Convention' <https://files.justice.org.uk/wp-content/uploads/2015/03/06172420/Brighton-Declaration-Joint-NGO-Statement-13-April.pdf> accessed 29 May 2021.
[287] Peter Cumper and Tom Lewis, 'Blanket Bans, subsidiarity, and the procedural turn of the European Court of Human Rights' (n 284) 628.

the relevant case in a careful, diligent and convincing manner based on the applicable Convention standards.[288] Essentially, a greater emphasis on procedural review by the ECtHR could mostly affect 'vulnerable minorities whose voices may struggle to be heard in the democratic forums of States parties, no matter how rigorous those institutions' processes are'.[289]

While acknowledging the importance of the individual within the ECHR system and the need to protect the role of the Court in judicially determining concrete, meritorious cases, the above concerns can be either rebutted or reconciled. In response to the above, I argue that the ability of individuals to lodge an application with the Court remains intact with the introduction of a procedural criterion as long as clearly-defined safeguards, as presented above, are put into place. Indeed, an additional requirement imposed on States to exhaustively or duly consider the applicant's complaints in the domestic proceedings further enhances the protection of individual justice and ensures that the alleged violation of the applicant's rights can be better addressed and remedied at the national level. Evidently, the current proposal for increased proceduralisation fully takes into account the subsidiary character of the Court. It is expected that national courts, in their effort to comply with the new procedural admissibility requirement and, thus, 'avoid' triggering the jurisdiction of the ECtHR, will engage into a more thorough and exhaustive examination of the individual's complaint and deliver well-reasoned arguments by considering more carefully the Court's case law.[290] As such, introducing an additional admissibility criterion, as presented above, places more emphasis on the judicial protection of Convention rights offered at the domestic level. The proposed measure will further advance the idea that the Court cannot act as a 'fourth instance' tribunal, thus limiting itself to the careful examination of cases of general importance for the Convention and the delivery of well-reasoned judgments. More emphasis on procedural review by the ECtHR could 'incentivise national authorities to fulfil their [primary] obligations to secure Convention rights, thereby raising the overall level of human rights protections in the European legal space'.[291] As shown above, the identification of systemic defects and malfunctions in national legal systems has become an integral part of the Court's constitutional function, which, in turn, compels the respondent State 'to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed'.[292]

Furthermore, the current proposal balances the burden of case admissibility between the individual applicant and the (respondent) State. One may argue that what has been

[288] CDDH Final Report, CDDH(2012)R74 Add I (n 259) 39.
[289] Peter Cumper and Tom Lewis, 'Blanket Bans, subsidiarity, and the procedural turn of the European Court of Human Rights' (n 284) 613.
[290] See also, *Scordino v. Italy*, App no 43662/98 (09 July 2007), para 140.
[291] Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) *Human Rights Law Review* 473, 492.
[292] *Maestri v Italy* App no 39748/98 (17 February 2004), para 47.

disproportionately onerous for many applicants is, instead, the introduction of the 'significant disadvantage', 'manifestly ill-founded' and other administrative (eg time-limit) admissibility criteria.[293] The proposed codification of the Court's process-based review is unlikely to create even more unpredictability in admissibility decisions than, for example, the 'manifestly ill-founded' criterion already does, as long as clear guidance for its use is provided by the Court.[294] To the contrary, the codification of the Court's procedural turn through an admissibility criterion will add certainty and transparency to what increasingly becomes established legal practice. Besides this, the adoption of some of the already existing admissibility criteria had as their primary objective the control of the influx of cases reaching the Court while little have they contributed to the more effective implementation of the Convention domestically.

Equally, while the growing efforts of the CDDH and the Court's Registry to promote resolution of cases in non-contentious proceedings may result in a satisfactory remedy for the individual (ie through friendly settlements and unilateral declarations), their contribution in enhancing the effective implementation of the Convention domestically, again, remains disputable.[295] Ironically, what was characterised as 'the crown jewel'[296] has been considerably, directly or indirectly, diminished throughout the Court's reform process.[297] At the same time, there is currently no explicit requirement, at least on a procedural level, that requires States to duly consider and examine a Convention rights complaint domestically. While the individual must show that they have suffered a 'significant disadvantage', there is no clear indication in the Convention imposing a similar burden on the State to ensure that the subsidiary character of the Court is respected. The proposed admissibility criterion, therefore, intends to impose a higher, evidence-based, procedural standard for domestic examination of individual complaints.

In this regard, facilitating a procedural turn in the ECtHR's review, as described in the present proposal, could be seen as a sign of an enhanced constitutional turn empowering the Court to take more control over its docket. More importantly, though, it allows the Court

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[293] A Morawa, 'The European Court of Human Rights' Rejection of Petitions Where the Applicant Has Not Suffered a Significant Disadvantage: A Discussion of Desirable and Undesirable Efforts to Safeguard the Operability of the Court' (2013) 1 *Journal of Transnational Legal Issues* 1; Nikos Vogiatzis, 'The Admissibility Criterion under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?' (2016) 65(1) *International & Comparative Law Quarterly* 185. See also, Philip Leach, 'Access to the European Court of Human Rights: From a Legal Entitlement to a Lottery?' (2006) 27 *Human Rights Law Journal* 11.

[294] A Tickell, 'Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a 'Bureaucratic Rational' Construction of the Admissibility Decision-Making of the European Court of Human Rights' (2011) 12(10) *German Law Journal* 1786, 1793.

[295] Elisabeth Lambert Abdelgawad, 'The Practice of the European Court of Human Rights when Striking out Applications' (2018) 36(1) *Netherlands Quarterly of Human Rights* 7, 21-23. See also, CDDH Report on 'Encouraging resolution of the Court's proceedings through a dedicated non-contentious phase of the proceedings' CDDH(2019)09.

[296] Laurence Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (n 47) 159.

[297] See n 293 above.

to choose the cases that reveal structural and systemic dysfunctions in the national system as those that need 'Strasbourg's' attention the most.[298] By doing so, the measure encourages the ECtHR to observe the compliance of national administrative procedures with the ECHR standards and make recommendations for improving good governance and eliminating procedural arbitrariness when and as needed. This would assist national courts to improve their decision-making capacity, at least in Convention-related cases, while enabling the ECtHR to continue its vital constitutionalist function of standard-setting. At the same time, the Court would be inclined to give more leeway to responsible national authorities that conduct the requisite Convention review and faithfully implement the Convention principles.[299]

Far from limiting the role and scope of intervention of the ECtHR, therefore, the measure ensures that the principle of subsidiarity is respected by explicitly urging ECHR States to assume their shared responsibility, as 'first guardians' of human rights, by enforcing the Convention domestically and fully embedding ECHR guarantees into their administrative and judicial procedures.[300] As already acknowledged in the first part, while the focus of the ECtHR was once centred on the outcome of the case *per se*, rather than the quality of the decision-making process leading to it,[301] its focus has now shifted so that it seeks to find 'whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests'.[302] Since deficient national implementation of the Convention rights is an underlying factor contributing to the Court's unsustainable workload, it is towards this direction that the proposed measure has sought to make a contribution. It is thus believed that both the interests of the individual applicant as well as the long-term effectiveness of the Court, and the Convention system more broadly, could significantly benefit from the introduction of such additional procedural admissibility criterion.

6.4 Conclusion

The present chapter moved away from the restrictive and insufficient dominant reform approaches regarding the role and future of the ECtHR (problematised earlier in Chapters 4 and 5) and sought to provide an alternative perspective in this ongoing debate. It argued that the further constitutionalisation of the ECtHR, that is the gradual evolution of the ECtHR into a European Constitutional Court for Human Rights, might be an appropriate and viable

[298] Oddný M Arnardóttir, 'Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation' (n 274) 21-22.
[299] Dean Spielmann, 'Whither the Margin of Appreciation' (2014) 67(1) *Current Legal Problems*, 49, 63-64.
[300] Brussels Declaration (2015).
[301] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (n 90) 413.
[302] *Martinez v Spain* App no 56030/07 (12 June 2014) para 147.

solution to the ongoing fundamental challenge of normative effectiveness facing the Court. I thus submitted that strengthening the constitutionalist hypostasis of the Court could ensure its long-term future and, in turn, the stability and integrity of the entire European human rights project.

As the analysis above has shown, the ECtHR has now placed itself at the pinnacle of the European human rights architecture, as the final arbiter of human rights disputes arising under the Convention. This is not because the ECtHR is to be seen as 'infallible',[303] as the previous chapter has also shown, but, instead, because it has established itself as an authoritative interpreter of the Convention and a uniform human rights standard-setter across all ECHR States. As also noted, the ECtHR does not merely act as an adjudicator of individual human rights disputes, but it also retains its ultimate supervisory jurisdiction even in relation to 'matters of general policy'[304] and often requires States to reform their domestic laws and practices and align them with the applicable Convention standards.

By deploying the idea of *hybrid constitutionalism*, I sought to describe the manner the ECtHR nowadays assesses the application of the Convention standards domestically by national executives and judiciaries and also scrutinizes the malfunctions identified in the domestic orders of certain States. Essentially, the question currently is not *whether* the ECtHR performs a constitutionalist function, but, rather, *how* it does so. In this chapter, I argued that the extent to which the Court decides to discharge its constitutionalist function depends on the willingness as well as ability of States' national authorities to seize the opportunity offered to them - by virtue of the subsidiary nature of the ECHR system – to 'put things right through [their] own legal system' first before the ECtHR intervenes.[305] In this regard, I used hybrid constitutionalism as a normative manifestation that encapsulates the ECtHR's targeted and dynamic jurisprudential approach to bringing ECHR States in line with their Convention obligations, thus ensuring a more harmonised and effective protection of Convention standards across Europe.

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[303] Interesting parallels can be drawn, in this regard, with the Concurring Opinion of US Supreme Court Justice Robert Jackson in *Brown v Allen*, 344 U.S. 443 (1953) 540, noting that '[w]henever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final'. See also, Guido Raimondi, *Speech to the Supreme Court of the Netherlands* (18 November 2016) 3, noting that '[t]he final assessment of the European Court will not be totally free of controversy. It is not uncommon for judges at Strasbourg to reach different conclusions on exactly th[e same] issue…'
<https://echr.coe.int/Documents/Speech_20161118_Raimondi_Supreme_Court_Netherlands_ENG.pdf> accessed 16 June 2021.

[304] *S.A.S v France* App no 43835/11 (1 July 2014) para 129.

[305] *Maslov v Austria* App no 1638/03 (23 June 2008) para 59. See also, *Demopoulos and Others v Turkey (dec.)* App no 46113/99 *et al*, para 101.

As already observed in the previous chapter, the Interlaken reform process signalled a new phase in the development of the ECHR system, both institutionally and normatively. The ECtHR's 'age of subsidiarity'[306] implies the need for creating new tools and structures for strengthening the subsidiary character of the Convention system. As I sought to demonstrate in the chapter above, this could be achieved by further strengthening the constitutionalist role of the Court. In this respect, I presented a series of reform proposals, including an institutional, an interpretive, a jurisprudential and a procedural one as alternatives to the existing reform framework. Inspired by the Court's growing procedural turn, the above proposals have shown how both the subsidiary and constitutionalist role of the Court can be strengthened in parallel with the purpose of securing its long-term future and effective functioning. The chapter concludes by suggesting that in the absence of alternative, innovative and targeted reform measures, as the ones presented above, the very viability of the ECtHR will remain at stake.

[306] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *HRLR* 487, 491.

Chapter 7
Conclusion – Securing the long-term future of the ECtHR: Towards further constitutionalisation? Achievements, Prospects and Challenges

'In conclusion, bringing this chapter in the Convention system's history to a close does not mean that the different actors in that system can be complacent about its future. The Court has just celebrated its 60th anniversary in 2019 and as it prepares to celebrate the 70th anniversary of the European Convention on Human Rights in 2020, it cannot but endorse the CDDH's assessment that the Convention system remains of vital importance for peace, rule of law and democracy in Europe. Yet, it should also be recognised that the system remains fragile and vulnerable to different challenges. […] The end of the Interlaken process in no way diminishes the need for dialogue between the Convention actors, in particular the Court and the States Parties'.[1]

7.1 Securing the long-term future of the ECtHR: An alternative view

2019 marked the completion of the decade-long Interlaken reform process and the latest debate on the future of the ECtHR, which also coincided with the 60th anniversary of the establishment of the Court. Reaching this milestone, the key message various CoE stakeholders seek to convey is that the overall picture regarding the functioning of the ECtHR and the wider ECHR system looks rather positive; that the Court is not only functioning well today, but the foundations set over the past reform periods will enable it to continue on this positive track in the future.[2] The thesis, therefore, sought to add a layer of considerations to the debate on the reform and future of the ECtHR that can offer an alternative perspective on how the ongoing challenges facing the ECtHR should be understood and how its long-term effectiveness and viability can be achieved.

The first substantive chapter of the thesis, Chapter 2, identified a gap in the ongoing debate on the reform of the ECtHR, pertaining to the failure of the dominant actors involved in the reform process to clearly articulate what it means for the ECtHR to be effective and how (ie on what basis) the Court's long-term effectiveness should be measured and evaluated. Chapter 2 thus looked further into the notion of effectiveness and sought to establish a

[1] ECtHR, 'Comment from the European Court of Human Rights on the CDDH Contribution to the Evaluation of the Interlaken Reform Process' in *The Interlaken Process* (Council of Europe, 2020) 123.
[2] See eg, Linos-Alexandre Sicilianos, Foreword, *Annual Report 2019 of the ECtHR*, 8, suggesting that the CDDH report shows the Court 'in a very positive light'.

conceptual framework, by developing clear and measurable benchmarks, for defining, measuring and evaluating the Court's effectiveness. Adopting a goal-based approach for assessing the effectiveness of the ECtHR, I aimed at emphasising the multi-functionality of the Court by explaining that its effectiveness cannot be merely assessed based on the number of cases examined or its compliance rate. Rather, I argued that the ability of the Court to assert its authority vis-à-vis ECHR States when requesting general measures or legal and regulatory changes in States' domestic orders needs also to form part of the equation. Given the Court's multi-functionality and, notably, its (quasi)constitutional character, I claimed that the real challenge for the Court's effectiveness has now shifted from what could have initially been considered solely a problem of institutional efficiency to being, first and foremost, a problem of effective authority. As a result, while compliance of respondent States with ECtHR judgments is already a major challenge for the Court, the real challenge for the Court to be considered effective is to have the power to assert its authority, as this is expressed through its transformative jurisprudence, to non-respondent States. Therefore, in further recognising the ECtHR's meta-effective authority, Chapter 2 argued that altering State behaviour beyond a particular human rights dispute to ensure States' compliance with the applicable Convention standards may well constitute the benchmark for establishing an outright effective Court embracing its constitutionalist function. Consequently, I argued that, in order to achieve the long-term effectiveness of the Convention system and the ECtHR in particular, the primary focus should be on further embedding the Convention principles into the national jurisdictions of the ECHR Contracting Parties. In this respect, any reform measures aimed at improving the Court's efficiency and cost-effectiveness are alone inadequate to fully address and resolve the underlying challenges hindering its overall, normative effectiveness.

Against the above conceptual framework of effectiveness, the following chapter, Chapter 3, examined the present reality of the Court's performance from a statistical perspective. This quantitative analysis recognised that the Interlaken reform process has indeed resulted in a number of positive developments, both in relation to the Court's backlog of pending cases as well as the overall number of judgments pending execution domestically. The statistical analysis in Chapter 3, however, served to demonstrate that, despite the considerable progress achieved, certain underlying challenges facing the ECtHR not only remain unresolved after years of constant reforms, but they are also much more widespread than it may first appear.

As Chapter 3 showed, the "success story" of the Interlaken process that the CoE bodies seek to present through their annual reports forms only a one-sided perspective of the bigger picture, which does not accurately reflect the current, let alone future prospective, of the Court's functioning. Chapter 3's analysis further sought to demonstrate that most of the positive results noted since the beginning of the Interlaken process are largely attributed to the technical rationalisation of the ECtHR, which, alone, has proved inadequate to address

and/or resolve the underlying challenges facing the Court. I also showed that the reform process of the last decade has disproportionately placed the burden of guaranteeing the long-term future of the ECtHR on its own (and the Registry's) ability to reduce the backlog of cases, mainly through technical/institutional restructuring. At the same time, strengthening the normative relationship between the Court and ECHR States has been sidelined for the most part of the process. Ultimately, Chapter 3 showed that while the achievements in the Court's latest reform stage need to be acknowledged, they ought not to gloss over the remaining, or even growing, challenges facing the ECtHR.

In light of the above findings, I further questioned the accuracy of the Steering Committee for Human Rights' (CDDH) conclusion that '[t]he necessity of a new major revision of the system is therefore not apparent', projected in its final evaluation of the Interlaken reform process.[3] The fact that the CDDH saw 'no reason to depart from its assessment made in 2015 that the current challenges the Convention system is facing can be met within the existing framework'[4] was found equally problematic, especially when no particular progress was achieved on key aspects regarding the functioning of the Court since then. I concluded, therefore, that all dominant actors within the ECHR system, including the ECtHR, have an interest in maintaining the illusion that the Court is not only working well, but its functioning is also set to continue improving and, thus, no further reforms are needed.

More worryingly though, the generally welcomed decision 'to allow the Convention system as it has emerged from the Interlaken process and Protocol No. 14 … to demonstrate fully its potential' reflects an unjustified optimism that the real benefits of the Court's achievements during the Interlaken period will become apparent in the longer-term.[5] Such an approach, however, risks exacerbating the already growing underlying challenges facing the ECtHR and further undermining its authority. As argued in subsequent chapters, following the same direction for reform as shaped in the last decade, and notably post-Brighton, entails a number of risks for the Court, many of which are already looming (see Chapter 5).

Chapter 4 then engaged further with the substantive aspect of the central research question. It explored the reasons the current, dominant reform agendas have not adequately addressed and/or resolved the fundamental, underlying challenges facing the ECtHR so far. Through a chronological analysis of past and recent reform proposals, Chapter 4's analysis indicated that this failure of the current and previous reform processes is largely attributed to the fact that the design of the problem has been misframed, and thus misapprehended, as primarily institutional, rather than constitutionalist in nature. The chapter further showed that, as a result of the (mis)framing of the ECtHR's challenges as primarily institutional in nature, the ongoing reform process has been misguided, thus incapable of revealing and resolving the underlying problems of deeper constitutional importance facing the Court.

[3] *CDDH Contribution to the Evaluation of the Interlaken Reform Process* in *The Interlaken Process* (n 1) 103.
[4] ibid, 104.
[5] ibid.

In Chapter 4 I further observed that the Court's various reform stages are characterised by an omnipresent danger for all relevant actors involved in the debate: the confusion between the symptoms of the Court's malfunctioning and the underlying causes of this problem. A striking finding was that at the Brighton Conference, and for the first time in the reform process, the underlying cause for the major institutional challenge facing the Court (ie its ever-growing and unsustainable backlog of cases) was directly linked more to the failure of ECHR States to fully and promptly execute the ECtHR judgments, rather than to institutional shortcomings in the functioning of the Court itself. It had then become evident that without an appropriate change in the course of action with regard to the reform and future of the ECtHR, the Court may well continue to underperform and remain hostage to its own institutional deficiencies while conducting its endless, but often ineffective, Sisyphean task of adjudicating an unsustainable docket. As the ECtHR more recently admitted, 'there is no single miraculous solution to the backlog and there is also a limit to what the Court can achieve through introducing new working methods'.[6]

Despite these acknowledgements, even post-Brighton, as I explained in Chapter 4, both the ECtHR and other key ECHR stakeholders had a clear preference for a simplified procedure for amending the Court's working methods that institutional measures could offer. The challenges facing the ECtHR, as identified at various reform stages, prompted the ECHR stakeholders to 'leave familiar paths, travel new paths and sometimes make a detour in order to ensure the effective protection of the Convention rights'.[7] The adopted reform measures, however, despite producing positive results in the short and medium term, were not revolutionary enough to challenge the overarching object and purpose of the ECHR system, thus, addressing and resolving the underlying challenges facing the Court.[8] Chapter 4, therefore, concluded that any reform proposals developed within this frame were (and still are) unlikely to be effective in the long term, even though the functioning of the Court may show some *prima facie* positive signs of improvement. Conversely, any institutional reforms proposed or implemented so far must be complemented by additional measures of constitutionalist character if a viable and effective long-term future for the Court is to be guaranteed. Consequently, in conducting the above analysis, Chapter 4 intended to re-shape the debate on the reform and future of the ECtHR and place it in its real, constitutional dimension in order to provide a robust and viable response to its ongoing underlying challenges.

The need to re-frame the ECtHR's challenges during the Interlaken process marked what I called a 'system turn' in the reform debate, prompting the Court to reconsider its relationship with national authorities (political and judicial decision-makers) and become

[6] 'Comment from the European Court of Human Rights on the CDDH Contribution' in *The Interlaken Process* (n 1) 120.
[7] Lize Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 33.
[8] ibid, 55-56.

more deferential in the process. The latest decade of reform, therefore, has laid greater weight, and indeed a renewed emphasis, on the principle of subsidiarity, encouraging the ECtHR to now exercise greater self-restraint with regard to certain Convention-related issues. Through a critical evaluation of recent developments in the ECtHR's ongoing reform process, as presented in the Brighton Declaration and at subsequent High-level Conferences as well as by the introduction of the Amending Protocol No 15, Chapter 5 examined States' attempts to weaken the influence of the Strasbourg Court in favour of their own national mechanisms for rights protection. Most importantly, Chapter 5 sought to determine whether the problem of improving/enhancing the authority and normative effectiveness of the Court has been adequately addressed and/or resolved as a result of the shift to more deference to national authorities as illustrated by the adoption of recent 'constitutionalist' measures.

As my analysis showed, the latest 'constitutionalist' measures have not, in reality, resolved the effectiveness and authority problem facing the ECtHR, as identified previously in the thesis, but, crucially, exacerbated this fundamental problem. Developments in the way the ECtHR performs its judicial review have shown that the Court is now inclined to engage in a (re)distribution of powers between itself and other actors within the European system for the protection of human rights. In doing so, it gives greater recognition, thus being more deferential, to those States whose national authorities are considered to faithfully apply the Convention standards domestically. Yet, the timing between the Court's evident eagerness to exercise greater self-restraint with regard to certain Convention-related issues and the growing criticism from certain States is striking and cannot be disregarded.

Chapter 5 served to demonstrate that the Brighton Conference was a decisive moment in the debate on the reform and future of the Court. The 'constitutionalist' measures introduced subsequently have sought to shift the dynamics of reform away from the original intent that motivated the launch of the Interlaken process, ie to ensure the viability of the ECtHR. By deploying means of a more deferential approach to its decision-making in an effort to appease a growing political backlash against it, the Court is arguably engaging in a dangerous act of Mithridatism. This approach, I argued, is unlikely to revitalise States' commitment to the protection of Convention rights and ensure the Court's long-term effectiveness.

Having established the root causes of the underlying challenges facing the ECtHR and demonstrated that the approach currently pursued for guaranteeing its future and long-term effectiveness is fundamentally flawed and inadequate, Chapter 6 sought to provide a fresh thinking of how these challenges could be better resolved and what the future role of the Court should look like. As a forward-looking contribution to the debate on the reform and future of the ECtHR, Chapter 6 suggested that an alternative approach to strengthen the authority of the ECtHR is needed, with a particular focus on further enhancing its constitutionalist role. As argued, the (further) constitutionalisation of the ECtHR, meaning the evolution of the ECtHR into a European Constitutional Court for human rights, could be

an appropriate and viable solution to the ongoing fundamental challenges of the Court and one that is capable of guaranteeing the long-term future stability and integrity of the entire European human rights project.

Developing the idea of "hybrid constitutionalism", I submitted that the ECtHR could be better regarded as a hybrid constitutional court due to the manner it decides to deploy its constitutionalist functions vis-à-vis ECHR States when ensuring the latters' compliance with the applicable Convention standards in a given case. Looking at the ECtHR as a hybrid constitutional court, Chapter 6 argued, would allow the Court to assume a more focussed and targeted role by engaging in a more structural reform litigation, thus contributing more effectively to the identification and resolution of States domestic orders' deficiencies. As explained, further enhancing the constitutionalist function of the ECtHR through the prism of hybrid constitutionalism is not only normatively justified, but also necessary for its, and the wider ECHR system's, long-term survival.

Based on this framework, Chapter 6 then put forward a series of reform proposals that could further enhance the Court's constitutionalist role. I first proposed an institutional measure, which nevertheless carries normative implications for the ECHR system. The idea of establishing ECtHR "Regional Branches" or "Satellite Courts" in certain "designated geographic areas" in Europe was thus presented. This measure was essentially proposed with a view to facilitating the identification and resolution of structural or systemic deficiencies in the domestic order of certain States which, as the thesis previously showed, reflect the root cause of the Court's underlying challenges. The proposal would also serve as a means to halt the preservation of a *de facto* multi-speed Europe, at least as far as the protection of human rights is concerned. Secondly, I suggested that emphasis on strengthening European consensus as an interpretive tool for assessing the scope of Convention rights in the Court's judicial reasoning is needed to tackle the ineffective and/or fragmented implementation of Convention standards across the ECHR system. I thus suggested that a more methodologically robust and consistent use of European consensus could provide the necessary convergence between concerns about the perceived unlimited flexibility and judicial activism of the Court under evolutive interpretation, on the one hand, and fears that (over)reliance on the margin of appreciation will lead to (further) fragmentation of the application of Convention and, in certain cases, the lowering of the applicable protection standards, on the other hand. Thirdly, I supported the idea of introducing 'judgments of principle' in the debate on strengthening the *erga omnes* effect of the ECtHR judgments. By complementing the existing pilot-judgment procedure, 'judgments of principle' would have legally binding effect beyond the respondent State. Such judgments would enable the ECtHR to deal with cases concerning 'public policy' areas of common interest as a 'network' of thematic issues impacting Contracting Parties beyond a particular respondent State. Finally, in line with the Court's identified turn to an enhanced process-based review, I suggested the introduction of an additional procedural admissibility criterion.

Such a criterion would allow the ECtHR to declare an application inadmissible if the matter in question had already been duly examined by domestic authorities by following the applicable Convention standards and applying the relevant jurisprudence of the Court. As argued, this measure would enable national judicial bodies to develop an autonomous Convention-related jurisprudence so that ECHR disputes are addressed and resolved more effectively domestically.

The proposals presented in the thesis intend to create the necessary synergies and set the foundations for establishing the long-term future of the ECtHR within a more viable Convention system. Strengthening the Court's constitutional character is a continuous balancing exercise which often requires a gradual and targeted approach to its end goals – an apparent characteristic of all the reform measures proposed further above. Essentially, the above reform ideas intend to place the question of what role the ECtHR should assume in an enlarged, diverse Europe in the coming years at the centre of its reform debate – a question that, as the thesis has demonstrated, has been strategically and systematically sidelined throughout the Court's previous reform stages.

7.2 Towards (further) Constitutionalisation: Achievements, Prospects and Areas for Further Research

The thesis, written in a critical yet constructive tone, by no means disregards the achievements and successes of the Convention system. On the contrary, these are numerous and have been extensively and widely reported.[9] The extraordinary contribution that the ECtHR has made to European and wider public international law, by enforcing and developing the Convention standards, cannot be overstated. During its 60 years of activity, the ECtHR has been contributing to the harmonisation of European protection standards of the rights and freedoms enshrined in the Convention.[10] Throughout this sixty-year period, the Court has interpreted the Convention dynamically and in a manner so that the rights protected therein are made 'practical and effective' rather than 'theoretical and illusory'.[11]

[9] See more recently, Linos-Alexandre Sicilianos, *The European Convention on Human Rights at 70: The Dynamic of a Unique International Instrument* (Kristiansand, 5 May 2020) <https://www.echr.coe.int/Documents/Speech_20200505_Sicilianos_70th_anniversary_Convention_ENG.pdf> accessed 5 May 2021; Robert Spano, *Opening Remarks - The European Convention on Human Rights at 70: Milestones and Major Achievements* (Strasbourg, 18 September 2020) <https://echr.coe.int/Documents/Speech_20200918_Spano_Opening_Conference_70_years_Convention_ENG.pdf> accessed 5 May 2021; Angelika Nussberger, 'The European Court of Human Rights at Sixty – Challenges and Perspectives' (2020) 1(1) *European Convention on Human Rights Law Review* 11.

[10] n 9 above. See also, Ed Bates, 'Strasbourg's Integrationist Role, or the Need for Self-restraint?' (2020) 1 *ECHR Law Review* 14; Angelika Nußberger, *Promoting Peace and Integration among States – Speech at Conference 70th anniversary of the European Convention on Human Rights* (Strasbourg, 18 September 2020) <https://echr.coe.int/Documents/Speech_20200918_Nussberger_Conference_70_years_Convention_ENG.pdf > accessed 19 June 2021.

[11] See eg, *Airey v Ireland* App no 6289/73 (9 October 1979), para 24.

Similarly, the Strasbourg Court jurisprudence has been generally regarded as a reference standard and a guiding source in all domestic cases concerning fundamental rights. For decades, the ECtHR has provided an additional layer of protection for individuals, whose rights were not upheld in domestic proceedings, thus allowing them to seek redress directly before an international court – arguably a unique feature in the international arena. As Chapter 3 showed, however, by over-praising the achievements of the past, what risks going unmentioned is the number of remaining underlying challenges still facing the Court, many of which reflect a worsening trend in recent years and thus a worrying outlook for the future.

An important achievement of the Interlaken process was the entry into force of Additional Protocol No 16, which was adopted with the view to strengthening judicial dialogue between the national and international level through institutionalised means.[12] It does so by extending the Court's advisory jurisdiction on questions of principle relating to the interpretation or application of Convention rights received from national courts.[13] As noted in the thesis' introduction, however, due to some necessary limitations in the scope of the present research, the implications arising from this development were not explored in the thesis. Recent developments[14] confirm former President Sicilianos' view that the Court 'shall undoubtedly be seeing further such requests in the future'.[15] For the moment, however, this newly established mechanism remains *terra incognita* for both the national courts and the ECtHR. The real effects of the so-called 'dialogue Protocol'[16] on the effective implementation of the Convention at the domestic level, the relationship between highest national courts and the ECtHR as well as on the latter's workload in the long term remain to be evaluated.[17]

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[12] Explanatory Report on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms <https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf> accessed 14 June 2021.

[13] ibid.

[14] At the time of writing, the ECtHR has heard and delivered advisory opinions under the new Protocol in relation to two cases, while another two requests under this mechanism have been lately submitted to the Court for consideration. See, *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* Req No P16-2018-001 (10/04/2019) and *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* Req No P16-2019-001 (29/05/2020). See also, *Lithuania seeks advisory opinion from the European Court of Human Rights* (ECtHR Press Release, 11 December 2020) <https://hudoc.echr.coe.int/eng-press#{"itemid":["003-6882811-9233735"]}> accessed 16 June 2021; *Slovakia seeks advisory opinion from the European Court of Human Rights* (ECtHR Press Release, 04 December 2020) <http://hudoc.echr.coe.int/eng-press?i=003-6874910-9219803> accessed 16 June 2021.

[15] Linos-Alexandre Sicilianos, Foreword, *Annual Report 2019 of the ECtHR*, 8.

[16] Dean Spielmann, Opening Remarks at the International Conference 'Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges' (October 2014) 2 <https://www.echr.coe.int/Documents/Speech_20141024_OV_Spielmann_ENG.pdf> accessed 5 May 2021.

[17] See, *inter alia*, Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention on Human Rights: A Comparative and Critical Appraisal' (2014) 21(4) *Maastricht Journal of European and Comparative Law*, 630; Kanstantsin Dzehtsiarou and Noreen O'Meara, 'Advisory Jurisdiction

Similarly, whether the Strasbourg Court will seek to benefit from this reform measure, given its advisory and non-binding nature, by further expanding the normative boundaries of the Convention in complex and politically or socially sensitive cases - and the extent to which national courts will follow suit - may well form a topic for further research. Equally interesting will be the extent to which national judicial bodies will seek to influence the interpretation and application of the Convention through this newly established mechanism, thus seeking a more proactive role in the development of ECHR law. Moreover, the synergies between 'the dialogue Protocol' (Protocol No 16) and 'the subsidiarity Protocol' (Protocol No 15), as well as their interaction in strengthening the relationships of the ECtHR with domestic judicial and political bodies, respectively, will continue to draw attention. If Protocol No 16 'will put the finishing touches to the legal architecture built around the European Convention on Human Rights, and will strengthen still further the dialogue between the national courts and the Strasbourg Court'[18] and whether it will lead to an 'important "cultural" change in how the Convention system operates and is perceived' remain to be seen.[19]

7.3 Challenges for the 2020s and beyond

Reflecting on the achievements of the past and in anticipation of future challenges, the CoE Director General of Human Rights and Rule of Law, on the occasion of the 70th anniversary of the Convention, recognised that '[t]he next decade will be crucial to ensure the Convention's continued relevance and sustainability in an increasingly turbulent world'.[20] The unprecedented attacks on multilateralism and international cooperation witnessed over the previous decade did not leave the ECtHR unaffected, whose legitimacy and authority have been often under attack by a number of States as a result of allegedly non-favourable judgments against them.[21] Indeed, the challenges facing the Court, as analysed in the thesis,

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and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34(3) *Legal Studies*, 444; Björg Thorarensen, 'The Advisory Jurisdiction of the ECtHR under Protocol No.16: Enhancing Domestic Implementation of Human Rights or a Symbolic Step?' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection – Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge 2016); Koen Lemmens, 'Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?' (2019) 15(4) *European Constitutional Law Review* 691.

[18] Speech by Emmanuel Macron at the European Court of Human Rights (31/10/2017) 6 <https://www.echr.coe.int/Documents/Speech_20171031_Macron_ENG.pdf> accessed 21 May 2021.

[19] 'Comment from the European Court of Human Rights on the CDDH Contribution' in *The Interlaken Process* (n 1) 121.

[20] Christos Giakoumopoulos, 'European Convention on Human Rights at 70: Current Challenges' (MGIMO University, 19 October 2020) <https://www.coe.int/en/web/human-rights-rule-of-law/speech-by-christos-giakoumopoulos-19-october-2020> accessed 16 June 2021.

[21] See eg, Jan Petrov, 'The Populist Challenge to the European Court of Human Rights' (2018) *Jean Monnet Working Paper 3/18*; Wolfgang Benedek, 'Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?' (2020) 2(1) *European Convention on Human Rights Law Review* 151; Başak Çalı 'Autocratic Strategies and the European Court of Human Rights' (2021) 2(1) *European Convention on Human Rights Law Review* 11.

could be read against this backdrop. In light of backsliding of democracy and the rule of law, a shrinking civic space and an ever-changing geopolitical context, the Strasbourg Court is called upon to build on its 60-year experience and reaffirm its role as 'a beacon which lights the way for all those, throughout the world, who seek to strengthen the principles of rule of law and democracy'.[22]

The long-lasting effects of growing Eurosceptic and other forms of populist sentiment on the Convention system, in general, and the ECtHR, in particular, need to continue being carefully considered and mitigated.[23] The fact that many of the aspects concerning the underlying challenges identified in the thesis reflect systemic failures at the national level of only a relatively small number of States should not distract from the significance of this phenomenon. The ECtHR does not operate in a vacuum. In an interdependent, complex and highly sensitive political environment, withdrawal of political backing for the Court by influential States could very likely result in a domino effect with wide-ranging, catastrophic consequences for the Convention system.[24] Institutional instability caused by such developments could eventually trigger the disintegration of the entire European human rights infrastructure, thus 'finishing the unfinished business of human rights destruction'.[25]

Every high-level conference during the Interlaken process resulted in a resounding reaffirmation of the States' commitment to both the Convention system and the ECtHR.[26] This must be welcomed, especially in times of unprecedented political hostility as witnessed over the past decade. Yet, a paradox of the latest reform process is that, despite these reaffirmations, there were also attempts to unduly influence the Court's different areas of judicial practice – another example that the ECtHR's achievements and challenges are often intertwined.[27] In light of unprecedented criticism in recent years from a number of national authorities, judicial and political alike, the ECtHR ought to safeguard its role as the authoritative voice for the interpretation of the Convention and as an independent arbiter of human rights standards in Europe. Undue political pressure, as manifested at various occasions during the Interlaken reform process, risks jeopardising the authority and independence of the Court and should thus be distinguished from any good-faith proposals

[22] Guido Raimondi, Speech at the Opening of the Judicial Year, *Annual Report 2019 of the ECtHR*, 14.
[23] See eg, Frederick Cowell, 'Understanding the Causes and Consequences of the British Exceptionalism towards the European Court of Human Rights' (2019) 23(7) *International Journal of Human Rights* 1183.
[24] ibid. See also, Dimitrios Giannoulopoulos, 'The next target in the project to "take back control"? Strasbourg and the Human Rights Act' (*Prospect*, 4 March 2020) <https://www.prospectmagazine.co.uk/politics/the-next-target-in-the-project-to-take-back-control-strasbourg-and-the-human-rights-act-brexit-law-constitution> accessed 16 June 2021.
[25] Conor A Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) xiii.
[26] See eg, High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration (20 April 2012), paras 1-2; Copenhagen Declaration (13 April 2018), para 1, where States 'reaffirm[ed] their deep and abiding commitment to the Convention' and 'their strong attachment to the … [ECtHR]'.
[27] These attempts have been discussed in Chapter 5 of the thesis.

aimed at enhancing constructively cooperation between different actors within the ECHR system.[28]

As Chapter 5 noted, the renewed emphasis on subsidiarity that characterised the Interlaken reform decade revealed an attempt by certain States Parties to strengthen the position of their national judicial and political authorities in the Convention system, often by undermining the supervisory role of the ECtHR. As I argued in the thesis, this shift of the centre of gravity for the protection of human rights from Strasbourg to the national level entails a series of risks and challenges for the Court. More worryingly though, as Chapter 5 showed, the ECtHR appeared at times to be susceptible to such pressure from national governments and arguably resorted to appeasing, State-friendly rulings as a strategic means to respond to it. It remains doubtful, however, that this kind of approach can create a basis for 'ensuring a stronger interaction between the national and European levels of the system'.[29] For the Court, the quest for effective authority is essentially a continuous effort to maintain a balance between the national and international, legal and political forces that pull and push the development of the Convention standards. Without a doubt, the success of any measures adopted during this ongoing reform process aiming at guaranteeing the effectiveness and long-term future of the ECtHR remains highly contingent upon the political will ECHR Contracting Parties are ready to demonstrate in this regard. Having said that, and as the ECtHR has now developed itself into a progressive court with a central role in the protection of human rights in Europe, there is an entrenched expectation, one may argue, that the Court should continue to proceed steadily on its well-established dynamic jurisprudential path. The deployment of strategic judging and legal diplomacy by the ECtHR, however necessary it might be, must not derail its so far evolutionary process, thus, backtracking on past achievements.

The ECtHR now operates in what could arguably be viewed as the most challenging political landscape since the end of the Cold War.[30] Despite the repeated assurances by the Contracting Parties and their renewed commitment to the Convention system, rights violations continue to take place with cynical disregard for human dignity and international law in various places across the European continent.[31] Following the completion of the

[28] See eg, Sarah Lambrecht, 'Undue Political Pressure Is Not Dialogue: The draft Copenhagen Declaration and its potential repercussions on the Court's independence' (*Strasbourg Observers*, 2 March 2018) <https://strasbourgobservers.com/2018/03/02/undue-political-pressure-is-not-dialogue-the-draft-copenhagen-declaration-and-its-potential-repercussions-on-the-courts-independence/> accessed 26 May 2021; Opinion of the ECtHR on the draft Copenhagen Declaration (19 February 2018), paras 15-16 <https://echr.coe.int/Documents/Opinion_draft_Declaration_Copenhague%20ENG.pdf> accessed 26 May 2021.

[29] Copenhagen Declaration (2018), paras 33, 36.

[30] See eg, Secretary-General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law in Europe* (14th Session of the Committee of Ministers, Vienna, 5-6 May 2014) 5.

[31] In addition to the statistics presented in Chapter 3, see also, Commissioner for Human Rights of the Council of Europe, *Annual Activity Report 2019*, Foreword, <https://search.coe.int/commissioner/Pages/result_details.aspx?ObjectId=09000016809e2117#_Toc37076076

decade-long Interlaken process, an immediate launch of another reform process looks very unlikely at the moment. 'Reform fatigue' due to the continuous efforts to re-design and revive the ECtHR risks crystallising the latest reform direction as set in the previous decade, thus attributing a more long-lasting effect to the shortcomings, risks and remaining challenges that the Interlaken process is leaving behind, as outlined in this thesis. At the same time, as the CDDH's latest reform evaluation made evident, making any deviation from the existing reform framework and considering alternative responses to the ongoing challenges facing the ECtHR becomes more difficult. The tradition established at Interlaken in 2010 with the organisation of High-level political conferences, however, is more likely to continue into the coming decade as these occasions provide an opportunity for ECHR States Parties to renew their commitment to the Convention system and maintain a sense of collectiveness in the protection of human rights. In a similar vein, fundamental questions concerning the future role and function of the ECtHR, which were left largely unanswered in previous reform processes, will continue to preoccupy the political discussions on such occasions.

7.4 Concluding remarks

Celebrating the 70th anniversary of the signing of the ECHR must be seen as a (re)consolidation opportunity for all relevant stakeholders to renew their unconditional commitment to human rights and ensure their protection in the future. This, of course, translates into a tangible reaffirmation of the shared responsibility principle in defending and upholding both the Convention system and the ECtHR. Conversely, open and repeated threats to withdraw from the ECHR system,[32] (threats of) withdrawal of financial support for the Court,[33] especially by those States responsible for the majority of its current backlog, (attempts of) giving precedence to ECHR States' national (constitutional) law over international law[34] and persistent refusals to comply with ECtHR judgments are all steps to

> accessed 23 June 2021; Commissioner for Human Rights of the Council of Europe, *Annual Activity Report 2020*, Foreword, <https://search.coe.int/commissioner/Pages/result_details.aspx?ObjectId=0900001680a2150d#_Toc67645166 > accessed 23 June 2021.

[32] See eg, Helen Fenwick and Roger Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80(6) *Modern Law Review* 1111; Dimitrios Giannoulopoulos, 'The next target in the project to "take back control"? Strasbourg and the Human Rights Act' (n 24). See also, Anushka Asthana and Rowena Mason, 'UK must leave European Convention on Human Rights, says Theresa May' (The Guardian, 25 April 2016) <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> accessed 23 June 2021.

[33] See eg, Lize R Glas, 'Russia Left, Threatened and Won: Its Return to the Assembly without Sanctions' (*Strasbourg Observers*, 2 July 2019) <https://strasbourgobservers.com/2019/07/02/russia-left-threatened-and-has-won-its-return-to-the-assembly-without-sanctions/> accessed 12 June 2021.

[34] See eg, Rachel Fleig-Goldstein, 'The Russian Constitutional Court versus the European Court of Human Rights: How the Strasbourg Court should Respond to Russia's Refusal to Execute ECtHR judgments' (2017) 56 *Columbia Journal of Transnational Law* 172, 198-208; Sibilla Bondolfi, '"Swiss Law First" Initiative: What's at stake?'

the opposite direction to the one set out at every High-Level Conference during the Interlaken process and, indeed, contrary to the above-mentioned commitment.[35] Exceptional, even disproportional at times, demands are placed on the Strasbourg Court, which has – generally speaking – strived to craft a coherent body of jurisprudence while maintaining a more specific relevance across a wide range of cases deriving from established democracies, 'new' democracies, but also regimes that have repeatedly shown disregard for the fundamental principles of democracy and the rule of law during their time as CoE members. As the Court appears to have done its part, by showing the necessary institutional creativity, flexibility and maturity to enable it to respond to current, but also future, challenges, it is now high time for the Contracting Parties to assume their own burden of shared responsibility, both individually and collectively, by taking the ECtHR seriously at national level.

If, in the end, the underlying challenges facing the ECtHR, as identified and analysed in the thesis, derive from a clear lack of commitment toward the ECHR system on the part of some States, how, and to what extent, does this engage the responsibility of the rest of the Contracting Parties? Similarly, how appropriate, or even viable, is it to continue pointing at the few law-defying and counter-productive States for the ineffectiveness of the ECtHR at a time when their otherwise compliant counterparts within the system are often unwilling to address and resolve the root causes of this phenomenon? As the Court acknowledged:

> Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above, a network of mutual, bilateral undertakings, objective obligations, which, in the words of the Preamble, benefit from "collective enforcement".[36]

In this regard, ECHR States should not only strive to enforce the Convention domestically, but should also be concerned with its implementation by their fellow States. As a result, the CDDH's conclusion that another round of major reform is unnecessary at this stage must be read in line with the wider sentiment that political momentum behind the States' collective attempts to revive the ECtHR, as witnessed in the beginning of the previous decade, has potentially started to decline. Measures to promote synergies between the various CoE stakeholders will be of paramount importance in the coming years for maintaining the necessary reform appetite for the 2020s and beyond. I thus hope that the timing of the completion of this thesis will contribute, through its analyses and proposals, to breathing a

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(SwissInfo, 25 October 2018) <https://www.swissinfo.ch/eng/directdemocracy/vote-november-25--2018_-swiss-law-first--initiative--what-s-at-stake-/44490464> accessed 12 June 2021.

[35] Iryna Marchuk, 'Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case' (EJIL:Talk!, 13 February 2017) <https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of-the-authority-of-the-ecthr-in-the-yukos-case/> accessed 12 June 2021.

[36] *Ireland v United Kingdom* (Plenary) App no 5310/71 (18 January 1978), para 239.

"second wind" to the continuing efforts to guarantee the viability and effectiveness of the ECtHR.

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