

The Implementation of the European Convention on Human Rights and Fundamental Freedoms in New Member States of the Council of Europe - Conclusions Drawn and Lessons Learned

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Introduction

When Italy decentralized many governmental functions in the early 1970s and transferred significant responsibilities, powers, and budgetary means to its various regions, Robert Putnam saw a unique opportunity to undertake a long-term study and compare how the different regions were going to implement their new powers, allocate their new resources, and dispense with their new responsibilities.¹ The results of his seminal study, which found “dramatic differences in institutional performance,”² and his explanations of those differences, have not only triggered many similar studies and even more academic discussions, they have changed our understanding of why some institutions and governments succeed while others fail.

The fall of the iron curtain and the return of Central and Eastern Europe into the family of democratic states governed by the rule of law presented a similar opportunity. A large group of countries, which had previously been part of the Soviet Union or carved out a niche existence in the shadow of the larger Communist experiment, decided within a very short time frame to join the Council of Europe, ratify the European Convention on Human Rights and Fundamental Freedoms, and subject themselves to the compulsory jurisdiction of the European Court of Human Rights.³ And what happened then? How did these countries do with regard to the protection of human rights and fundamental freedoms? It is well known that the European Court is drowning in applications, not only but primarily from the new Member States, and it has been said many times that the ECHR is becoming a victim of its own success. So where did these countries do well and where did they fall short? Were there patterns of failure that could be identified across the region, in spite of differences in the constitutional and legislative implementation of rights, freedoms, and enforcement procedures? And if so, how could these patterns be explained? Finally, how might they be remedied and overcome, to save the European system of human rights protection from collapsing under hundreds of thousands of applications?

¹ See Robert D. Putnam, *Making Democracy Work - Civic Traditions in Modern Italy*, Princeton 1993.

² Ibid, at p. 5.

³ For discussion of the Communist legacy and the challenges to be overcome during the transformation process see, for example, Maureen Barry Fitzmahon, *Vestiges of Soviet Control Mechanisms in the District Court of Ukraine*, *Journal of East European Law*, Vol. 7, 2000, No. 2, pp. 341 et seq.; WRR Scientific Council for Government Policy, *Towards a Pan-European Union*, Reports to the Government No. 59, The Hague 2001, in particular pp. 73-89; Zdenek Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, *American Journal of Comparative Law*, Vol. 52, 2004, No. 3, pp. 531 et seq.; Tamara Čapeta, *Courts, Legal Culture and the Enlargement of the EU*, *Croatian Yearbook of European Law & Policy*, Vol. 1, 2005, pp. 23 et seq.; Zdenek Kühn, *European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries*, *Croatian Yearbook of European Law & Policy*, Vol. 1, 2005, pp. 55 et seq.; Martin Krygier, *Rethinking the Rule of Law After Communism*, in Adam Czarnota/Martin Krygier/Wojciech Sadurski (eds.), *Rethinking the Rule of Law After Communism*, Budapest 2005, pp. 266 et seq.; and most recently Zdenek Kühn, *The Judiciary in Central and Eastern Europe - Mechanical Jurisprudence in Transformation?*, The Hague 2011.

These were the questions we have been pursuing in the present volume. Two dozen experts from twenty countries spent almost two years doing research, conducting hundreds of interviews, comparing notes, and sharing their insights and findings in the chapters of this book. The following pages are an attempt to summarize the findings, to draw some conclusions, and to make some recommendations. By necessity, there will be a certain measure of generalization and not every finding will be representative of every country, not every conclusion will be fair to every country, and not every recommendation will be useful for every country covered in the book. Nevertheless, we believe that there are indeed certain patterns, that certain problems exist virtually throughout the region, and that certain conclusions can indeed be drawn.

A. The Constitutional Systems of the Member States and the Protection of Human Rights

I. Findings in General

The first finding of the national experts is the fact that not a single country specifically changed its constitution to reflect ratification of the ECHR.⁴ In particular, not a single constitution in the region specifically mandates that its three branches of government respect the ECHR in their work at all times. Since all countries went through a process of constitutional reform after the fall of communism and added more or less ambitious catalogs of human rights to their national constitutions, there was probably a widespread perception that sufficient guarantees were already in place when the ECHR came up for ratification. The widespread and persistent problems our experts found in most of the new Member States, however, suggest that the national guarantees - as applied by the executive branches and as interpreted by the national courts - are either substantively inferior to the guarantees provided by the European system and/or fail to provide effective remedies on procedural grounds.

Moreover, the national experts also found that relatively few legislative changes were made at the time of ratification of the ECHR or in the immediate aftermath. By and large, there were not even systematic studies undertaken to assess which kinds of changes might be necessary in the national law to make it conform to the requirements of the ECHR.⁵ If there have been changes to such important pieces of legislation as criminal codes, criminal procedure codes, civil procedure codes, administrative procedure codes, laws on the courts, laws governing the rights and obligations of prosecutors, police laws, anti-discrimination laws, family laws, as well as press and media laws, they were typically made only after one or even many well publicized convictions of the respective country at the hands of the EuCrTHR.

⁴ While constitutional amendments were implemented in a number of countries, they typically provided for better national catalogs of human rights and/or better national remedies, *without specific reference to the ECHR*. For example, Azerbaijan introduced the office of Ombudsman, as well as a right of individual complaint to the Constitutional Court against decisions of the legislative, executive, and judicial branch, but the reference is only to “implementation of human rights and freedoms” without specification that these could include - let alone be based on - the *European* standards of the ECHR as interpreted by the EuCrTHR (see Gadirov’s report on *Azerbaijan*, pp. 75 et seq., at pp. 80-81).

⁵ This is apparent, directly or indirectly, from most reports in the book. See, for example, Kanev’s report on *Bulgaria*, pp. 115 et seq., at p. 115. *Hungary* is a notable exception, see the report by Bárd on p. 246. See also the report on *Moldova*, at p. 319.

Against this background, it will not be surprising that the national experts also found that the national courts, all the way up to the supreme or constitutional courts, were slow to apply the ECHR. Throughout the region, we found a preference for the application of *national* human rights provisions, even if they are less clear and/or less beneficial. Very rarely did a national court apply an expansive interpretation of national human rights with specific reference to requirements imposed by the ECHR, although there are a number of instances, in particular in more recent times, where national rules were interpreted progressively because of the ECHR but still without explicit acknowledgment that this was done to comply with ECHR requirements.

References to the case-law of the EuCrthR were even rarer in the decisions of the national courts, and one could almost claim that there is a correlation between the rank of the national court or judges and their application of the ECHR: the higher the court in the national hierarchy, the less likely it seems to make explicit reference to the ECHR, let alone the case-law of the EuCrthR.⁶ On the basis of many relevant decisions, it became quite obvious that the knowledge about the European system among lawyers in the new Member States is typically limited to the text of the ECHR and maybe a few of the most widely discussed judgments *against their own Member State*. One possible explanation for this would seem to be the age of the judges. They tend to be older on the higher courts and, thus, longer out of law school and less likely to have received systematic training on European and international human rights.⁷ However, another explanation must also be acknowledged: There is no systematic translation of the case-law of the EuCrthR into the various languages of the Member States. Translations are being done by government agencies and/or NGOs but typically limited to the cases *against the respective Member State*.⁸

Other interesting findings of the national experts include a noticeable difference between the courts of countries that have negotiated membership in the EU from the mid 1990s and countries that are not currently candidates for or members in the EU. It seems that a combination of training in EU law and access to the preliminary rulings procedure under Article 267 TFEU also triggered a greater willingness or ability among those judges to engage with the ECHR and

⁶ In several of the countries it does not even seem clear *whether* the national courts, including the supreme or constitutional courts, *are allowed* to rely on case law from Strasbourg as precedents to review the compliance of national laws with the European standards. See, for example, Belov's report on *Bulgaria*, pp. 101 et seq., on p. 106.

⁷ This is not a general rule, however. Kovalová and Vargová come to differentiated conclusions for Slovakia. On the one hand, proficiency in Convention matters is relatively low among first instance judges and very high among Constitutional Court judges, who are applying the ECHR and the case law of the European Court "almost on a daily basis". On the other hand, there is a difference between younger judges who tend to have a good functional knowledge of the European system - defined as being able to apply it in their practice - whereas older judges tend to stick to their established methods and rely on national human rights guarantees. See the report on *Slovakia*, pp. 499 et seq., at p. 507.

⁸ In this context it is most unfortunate that Recommendation Rec(2002)13 of the Committee of Ministers to Member States on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-law of the European Court of Human Rights only specifies that "*relevant case-law developments*" (emphasis added) should be "rapidly and widely published, through state or private initiatives, in their entirety or at least in the form of substantial summaries or excerpts [...] in the language(s) of the country...". The Committee of Ministers missed the opportunity of clarifying that *relevant* is by no means limited to judgments against the respective Member State. Rec(2002)13 is available online at <https://wcd.coe.int/ViewDoc.jsp?id=743317>.

the case-law of the EuCrthR.⁹ The judges in the other countries are clearly less habituated to the idea of considering international norms in their decision-making.

Finally, time does not seem to be on the side of the implementation of the European Convention. Although there is a growing number of courses on the ECHR offered in the law schools, in most, if not all of the new Member States, the general interest in the European system seems to have declined after a wave of initial interest around the time of the ratification of the Convention. As a consequence, it is at best unclear whether growing numbers of applications to the EuCrthR are primarily caused by growing awareness or by unresolved problems.

II. Recommendations

In the absence of a constitutional endorsement of the ECHR, national judgments by and large rely on national constitutional guarantees when evaluating alleged infringements of human rights or fundamental freedoms. Even in cases where attorneys or NGOs, representing victims of alleged infringements of human rights, make explicit reference to the ECHR, it is extremely rare that a national court would enter into a detailed discussion of the European provisions, including their interpretation in the case-law of the EuCrthR. This unwillingness, on behalf of the lawyers, and in particular the judges in the new Member States, to engage intellectually with the European Court and the international discourse on human rights, has many undesirable consequences.

First, it is by no means clear that national guarantees, even if they were initially adopted to reflect the European standards, are always at least equivalent to the latter. If anything, the high number of cases brought to the EuCrthR on substantive issues, for example the right to liberty and security, the right to respect for private and family life, and the protection of property, are strong indicators that many Member States, and not only the new ones, are struggling to provide equivalent levels of protection on the basis of their national constitutional provisions.

Second, both the European system and the national systems are dynamic systems and in constant evolution. However, while the European system is known for a pretty linear evolution towards slowly increasing protection levels, national systems are more prone to ups and downs in their recognition and enforcement of human rights, in particular after significant shifts in political power and/or upswings in ethnic or racial tensions between different groups in a given society. The dramatic deterioration regarding rule of law and protection of human rights in Ukraine under President Yanukovich, after many years of admirable progress, is a good example.¹⁰ The fact that such a decline remains possible in a Member State of the Council of Europe is also a reminder that oversight by the EuCrthR is inadequate to prevent this kind of problem. In the absence of

⁹ Keller and Stone-Sweet come to the same conclusion, see Helen Keller/Alex Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in Helen Keller/Alex Stone Sweet (eds), *A Europe of Rights - The Impact of the ECHR on National Legal Systems*, Oxford, 2008, pp. 677-712, at p. 681. See also András Inotai, *The 'Eastern Enlargements' of the European Union*, in Marise Cremona (ed.), *The Enlargement of the European Union*, Oxford 2003, pp. 79 et seq.; as well as Marionlina Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England*, Groningen 2009, in particular pp. 11-16.

¹⁰ See Meleshevich and Khvorsotyankina in their report on *Ukraine*, pp. 557 et seq., in particular p. 593. Concerns are also raised in *Azerbaijan*, where the President has been packing the Supreme Court with politically friendly judges, regardless of their objective qualification and commitment to the rule of law. *Hungary and Russia* would be further examples of legal regression after political radicalization.

national cooperation and commitment, the European system can barely provide some sort of compensation for the worst kind of infringements, and even that may take many years to happen.

We submit that things could be quite different if Member States were required to adopt a specific clause in their respective constitutions for the application of the ECHR. Maybe such a clause could be phrased as follows:

“All branches of government, including the legislature, executive, and judiciary, are committed to the protection of human rights and fundamental freedoms pursuant to the standards enshrined in the European Convention on Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.¹¹ In case national guarantees differ from European standards, the most advantageous interpretation for the individual shall prevail.

The legislature shall review existing legislation to ensure conformity with European standards for the protection of human rights and fundamental freedoms and shall refrain from adopting new legislation that falls short of these guarantees.

The executive branch, on all levels, shall protect and promote human rights and fundamental freedoms at all times. Derogations shall be permitted only to the extent necessary in a democratic society, conforming to the principle of proportionality, and otherwise in conformity with the European Convention and the case-law of the European Court of Human Rights.

The judiciary, including all courts on all levels and all proceedings, shall oversee and enforce respect of human rights and fundamental freedoms pursuant to these standards both by the other branches of government and by private parties against each other. The judiciary is firmly committed to providing adequate remedies against possible infringements of human rights and fundamental freedoms on the national level to eliminate, as much as possible, the need of parties to call upon the European Court of Human Rights.”¹²

Arguably, the adoption of a constitutional provision along these lines, as a pre-condition for accession to the Council of Europe, would have made a major difference in the new Member States here examined. It would have provided the necessary mandate for every lawyer and every judge in the country to contribute to the resolution of human rights violations on the national level and, as a consequence, it would have made many an application to Strasbourg unnecessary. While the clock cannot be turned back, current Member States can be encouraged to show their commitment to human rights by adopting the model clause, and future applicants could be so

¹¹ Stone Sweet promotes a similar obligation as a central pillar of his appeal for a Cosmopolitan Legal Order - in the sense of a Kantian code for universal justice; see Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, forthcoming in *Journal of Global Constitutionalism* 2012.

¹² The Council of Europe’s European Commission for Democracy through Law (Venice Commission) would seem to be the appropriate forum for the promotion of this kind of constitutional amendment (see http://www.venice.coe.int/site/main/Presentation_E.asp). The Commission has substantial credibility and influence, in particular in the new Member States of the Council of Europe. However, it has also been brought to the attention of the authors that the Venice Commission has been unresponsive, for example when problems with a planned amendment of the Georgian constitution were brought to its attention by local NGOs and academics. If this was not an exceptional oversight but an example of a broader inability or unwillingness to work closely with local experts and human rights activists, it would shed a rather unfavorable light on the Commission and diminish its usefulness rather significantly.

required.¹³ Furthermore, as Burkov suggests, much of the same results can still be achieved if national supreme or constitutional courts would commit to systematically squashing and remanding lower court decisions that fall short of the standards of the ECHR as interpreted in the case-law of the European Court.¹⁴ On the basis of the ratification and direct effect of the ECHR, most supreme or constitutional courts of the Member States would have the power to do just this.¹⁵ The question remains whether they have the willingness and the technical skills as well.¹⁶

Likewise, regarding the implementation of the ECHR and the case-law of the EuCrHR in the legislation of the Member States, more could and should be done. General mandates that all public and private subjects of the law must adhere to the European Convention as interpreted by the European Court of Human Rights can be valuable reminders in key national laws, such as the criminal code, the code on criminal procedure, the law on courts, etc. This would be particularly helpful in the absence of a general constitutional clause to the same end.¹⁷ More specifically, candidate countries should be required to undertake an impact assessment to show that their national laws are compatible with the requirements they are about to accept, respectively which changes will be necessary and how they will be accomplished.¹⁸ In all Member States, old and new, there should be a parliamentary commission, or even a joint commission composed of members of the legislative, executive, and judicial branch, to oversee and sign off on the ECHR compatibility of all draft legislation before parliament.¹⁹ Furthermore, such a (joint) commission should continually review existing legislation for compatibility with the European standards, in particular after important decisions by the European Court.

As will be discussed in more detail below, there is a general under-appreciation of the *erga omnes* nature of EuCrHR decisions. In particular when the European Court delivers a

¹³ The Council of Europe, in particular its Parliamentary Assembly, did apply a flexible approach and did provide different Member States with different accession requirements. For example, Moldova was told to amend its constitution within a year of accession to guarantee judicial independence; see Steven Greer, *The European Convention on Human Rights - Achievements, Problems and Prospects*, Cambridge 2006, at p. 108. Therefore, the present proposal would not seem outside of the powers and possibilities of the Council.

¹⁴ See Burkov in his report on *Russia*, pp. 425 et seq., at pp. 475-477. Interesting but excessive is the 2004 amendment to the Law on Courts in Azerbaijan that provides for the possibility of disciplinary responsibility of judges “if they violate the law and such violation results in a decision by the European Court of Human Rights” (see Gadirov’s report on *Azerbaijan*, on p. 83).

¹⁵ In Azerbaijan there is a Presidential Decree which “recommends” that the courts should “organize the study of the case law of the European Court of Human Rights and [...] take it into account in judicial practice” (see Gadirov’s report on *Azerbaijan* on p. 82). Indeed, no further invitation should be needed.

¹⁶ At least for Russia, Burkov concludes that “as of today the Russian Federation has not clearly decided what place judgments of the EuCrHR should occupy within its legal system” (at p. 476). Maybe the assessment and proposals in the present volume can contribute to a firmer stand in favor of European human rights.

¹⁷ Legislative mandates, instead of a general constitutional mandate, present an inherent danger, however. If only some (newer) laws refer explicitly to the ECHR, lawyers and courts might conclude that any (older) laws that don’t are not meant or at least not required to be interpreted and applied in conformity with the ECHR and the case law of the EuCrHR.

¹⁸ For an example how this was NOT done see Kanev’s report on *Bulgaria*, pp. 115 et seq., at p. 115.

¹⁹ In Estonia, the Chancellor of Justice has a similar function, albeit with a mandate to ensure general legality of draft legislation, without specific mention of the ECHR as interpreted by the EuCrHR; see Värk and Ginter in their report on *Estonia*, pp. 183 et seq., on p. 185. By contrast, an Ombudsman usually has a more limited mandate of accepting and investigating private complaints against acts of public authorities.

Grand Chamber judgment, respectively a judgment in what it calls a “leading” versus an “other” case, *regardless of the respondent State*, there should be an immediate review in each Member State whether the decision necessitates an amendment to national legislation. By pro-actively reviewing existing legislation and by presenting draft amendments to parliament, national parliamentary and/or joint commissions could dramatically reduce the number of “clone” cases that typically follow after important leading cases.²⁰

The Council of Europe Directorate of Human Rights and Rule of Law, in cooperation with like-minded governmental and non-governmental organizations, could make an important contribution to the ECHR compatibility of national laws of the Member States by providing targeted expertise and, in particular, by promoting the drafting and dissemination of model laws for countries entering into reform and modernization procedures. The European Union has gained valuable experience, both in the development of common laws (“Regulations”), which are directly applicable in all Member States, and with the development of framework laws (“Directives”) and model codes in areas where it does not have direct legislative powers. The most advanced of the latter kind is the Draft Common Frame of Reference, a sophisticated model law of obligations,²¹ destined to replace one day such prestigious national laws like the French Code Civil or the German Bürgerliches Gesetzbuch (BGB). There is no good reason why the Council of Europe²² should not support similar projects for model codes on criminal law,

²⁰ Greater involvement of national parliaments in the implementation of Strasbourg judgments for the ultimate reduction of clone cases is also promoted by the Parliamentary Assembly of the Council of Europe. See the Progress Report on behalf of the Committee on Legal Affairs and Human Rights by Rapporteur Christos Pourgourides, *Implementation of Judgments of the European Court of Human Rights*, Strasbourg 2009, in particular pp. 6 et seq. However, the Committee Report is focused on persistent violations by one and the same Member State due to non-implementation of judgments against it. Our proposal goes further in suggesting that Member States should implement all leading cases, regardless who is the respondent State. We are aware that our proposal goes beyond the obligation of the Member States pursuant to Article 46 which requires only that they “undertake to abide by the final judgment of the Court in any case to which they are parties.” However, the European Court, at least in its leading cases, in spite of granting a certain margin of appreciation that may differ from one Member State to another, by and large develops common standards for the protection of human rights and fundamental freedoms that need to be respected by all Members equally.

²¹ The entire code, with chapters on general provisions, contracts and other juridical acts, obligations and corresponding rights, specific contracts and the rights and obligations arising from them, benevolent intervention in another’s affairs, non-contractual liability arising out of damage caused to another, unjustified enrichment, acquisition and loss of ownership of goods, proprietary security in moveable assets, as well as trusts, is available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

²² And indeed, the CoE has been active in this area. For example, it supported the Albanian Minister of State for Legislation Reform and Relations with the Parliament in drafting some 22 pieces of legislation, including the Code of Administrative Procedure, and the Law on the Organization of the Judiciary; see <http://www.ipls.org/services/judicial/j10.html>.

criminal procedure,²³ police powers,²⁴ prison rules and regulations, administrative procedure, civil procedure,²⁵ judicial conduct,²⁶ etc.²⁷

²³ A Model Code of Criminal Procedure for Iberoamerica was completed in 1988 by prominent Latin American and Spanish jurists, see http://www.oas.org/juridico/mla/en/ven/en_ven-int-des-codepenal.html. Like in the case of the DCFR, the authors were by and large academics who neither required large amounts of money nor expertise from the limited resources of the sponsoring organization. By contrast, an initiative in the European Parliament for the development of a Quality Charter for Criminal Justice did not see much progress after its launch in 2004; see P. Albers, *Quality Assessment of Courts and the Judiciary: From Judicial Quality to Court Excellence*, in A. Uzelac/C.H. van Rhee (eds.), *Access to Justice and the Judiciary - Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication*, Antwerp 2009, pp. 57 et seq., on p. 66.

²⁴ See also below, note ???.

²⁵ Useful inspiration can be found in the joint project of the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) for development of Principles of Transnational Civil Procedure. Although the Principles, which were adopted by the UNIDROIT Governing Council in 2004, were primarily intended for transnational litigation, already their preamble states that they “may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure”; see <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>. For academic analysis of the Principles see, e.g., C.H. van Rhee (ed.), *Judicial Case Management and Efficiency in Civil Litigation*, Antwerp 2008, in particular the chapters by R.R. Verkerk, *What is Judicial Case Management? A Transnational and European Perspective* (pp. 27-55), and R. Verkijk, *Beyond Winning: Judicial Case Management and the Role of Lawyers in the Principles of Transnational Civil Procedure* (pp. 57-78). See also C.H. van Rhee/A. Uzelac (eds.), *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ*, Antwerp 2008.

²⁶ Due to its federal structure, where many legislative powers are exercised by the several states, the USA also relies heavily on model codes to ensure some kind of consistency between the legislation of the 50 states. Examples are the *Uniform Commercial Code* (UCC) by the National Conference of Commissioners on Uniform State Laws, maybe the best known of the model codes, as well as the *Model Code of Judicial Conduct* by the American Bar Association (ABA). The U.S. National Association of Administrative Law Judiciary (NAALJ) adopted a similar *Model Code of Conduct for State Administrative Law Judges* (see http://www.naalj.org/assets/documents/publications/naalj_%20model_code_of_judicial_conduct_for_state_aljs.pdf). Although American models, due to certain important differences compared to continental European legal systems, will not be transplantable without major revisions, they can still provide useful guidance and inspiration. On the European level, the Consultative Council of European Judges (CCJE) has done useful work; see, for example, its *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*.

²⁷ Development of model laws by Western partners or donors for adoption in CEECs (or anywhere in the less developed world) is by no means unproblematic, however. The literature on so-called “legal transplants” is vast and mostly critical. It would certainly be foolish to try to transplant specific rules or mechanisms from one legal system into another without any adjustments. However, like good surgeons will be able to select suitable organs for a transplant and prepare both the imported organ and the receiving organism for the operation to ensure success, a good expert team should be able to achieve a similar result in the legal field and potentially save a country from years and years of experimentation, let alone permanently dysfunctional mechanisms. For further discussion see, for example, Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 1995 *American Journal of Comparative Law*, Vol. 43, No. 1, pp. 93-117; Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 2003 *American Journal of Comparative Law*, Vol. 51, No. 1, pp. 163-204; Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 2003 *European Economic Review*, Vol. 41, No. 1, pp. 165-195; Donald Clarke, *Lost in Translation? Corporate Legal Transplants in China*, 2006 GWU Legal Studies Research Paper No. 213; Thad Dunning & Grigore Pop-Eleches, *From Transplants to Hybrids: Exploring Institutional Pathways to Growth*, 2004 *Studies in Comparative International Development*, Vol. 38, No. 4, pp. 3-29; Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 2006 *Journal of Legal Studies*, Vol. 35, No. 2, pp. 339-364; Peter Grajzl & Valentina Dimitrova-Grajzl, *The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law*, 2009 *Review of Law and Economics*, Vol. 5, No. 1, pp. 615-660; Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in Mathias Reimann & Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford 2007, pp. 441-476; Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 1974 *Modern Law Review*, Vol. 37, No. 1, pp. 1-27; Jeremy J. Kingsley, *Legal Transplants: Is This What the Doctor Ordered and Are the Blood Types Compatible?*

B. Awareness of the ECHR and its Reception by the Legal Community

I. Findings

Our findings on awareness can be summarized relatively easily. First, there is reasonably good *substantive* knowledge of the European Convention itself among judges, prosecutors, and at least the somewhat specialized attorneys. The situation is quite different when it comes to *functional* knowledge, i.e. the ability to apply the European norms in practice and - as a consequence - the willingness to do so.²⁸ Many of our experts found widespread hesitation, in particular among judges, to rely on the ECHR, let alone the case-law of the EuCrTHR, in their motivations for a particular decision. Instead of detailed analysis of relevant precedents from Strasbourg, we typically found reliance on national standards, even if they did not really justify the outcome, and/or vague and general references to the ECHR.

Arguably, the reluctance of judges to engage in European human rights discourse is not based on a fundamental rejection of the European standards as such.²⁹ Rather, it is an expression of insecurity and fear of exposing a lack of knowledge and understanding. We believe that many judges in the new Member States, in particular the younger ones, would actually like to use the ECHR more actively, both because they would like to help the victims of human rights violations, and because they are frustrated by the inadequacies of their national political and legal

The Application of Interdisciplinary Research to Law Reform in the Developing World, 2004 Arizona Journal of Int'l & Comparative Law, Vol. 21, No. 2, pp. 493-534; Pierre Legrand, *The Impossibility of Legal Transplants*, 1997 Maastricht Journal of European & Comparative Law, Vol. 4, No. 2, pp. 111-124; Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 1994 International Review of Law & Economics, Vol. 14, pp. 3-19; Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 2003 American Journal of Comparative Law, Vol. 51, No. 4, pp. 839-885; Katharina Pistor et al., *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 2003 World Bank Research Observer, Vol. 18, No. 1, pp. 89-112; Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, 2000 CID Working Paper No. 44; Jan Smits, *Import and Export of Legal Models: The Dutch Experience*, 2003 Transnational Law and Contemporary Problems, Vol. 13, pp. 551-574; Gunther Teubner, *Legal Irritants: How Unifying Law Ends up in New Divergencies*, in P.E. Hall & D. Soskice (eds.), *Varieties of Capitalism, The Institutional Foundations of Comparative Advantage*, Oxford 2001, pp. 417-442; Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 1st ed. 1974, re-published in Athens (USA) 1993.

²⁸ The very useful distinction between substantive knowledge and functional knowledge was proposed by Kovalová and Vargová in their report on *Slovakia*, see p. 507. Another useful tool are the *Four Levels of Interaction* Burkov has identified among judges confronted with arguments about the ECHR, see his report on *Russia*, pp. 425 et seq., at p. 475.

²⁹ Although Burkov quotes a Russian judge as saying "You will leave the court room now together with your international law." See his report on *Russia*, pp. 425 et seq., at p. 475.

systems and the widespread resilience to reform.³⁰ However, they have been poorly prepared to apply the European norms.

Almost all individuals who were interviewed by our national reporters expressed the view that more training for attorneys and judges in matters related to the ECHR would be useful. What was far less obvious, however, was the question what kind of training should be offered and whether the respondents themselves would take the time to participate.

For future lawyers, the introduction of law school courses on the ECHR often did not happen until after ratification of the Convention. Nevertheless, an overwhelming majority of schools in the region are now offering these courses. Several problems remain, however. First, the ECHR is often only taught in stand-alone courses. The European standards are rarely incorporated (also) into courses on constitutional law, administrative law, criminal law and procedure, and all the other subjects that are regularly concerned with - or should at least be concerned with - the protection of human rights and fundamental freedoms.³¹ As a result, many law students will not easily understand the relevance of the European guarantees in the daily work of all legal professionals. Second, even the stand-alone courses are often not mandatory for all law students and/or there are no serious and mandatory exams to motivate the students to take the subject seriously.³² Third, even where there are required courses and exams, they often suffer from a lack of suitable literature. High quality textbooks in the respective languages of the new Member States are still few and far between. The same is true for high quality law reviews, in particular those that would (also) deal with international law in general and the ECHR in particular. Furthermore, the case-law of the EuCrTHR is not systematically translated into these languages either. Typically, only important cases against a country will be translated into the language of that country by the government or by NGOs. Judgments against other countries, even if they establish or develop key principles or doctrines, are rarely given much attention. Finally, even where courses and materials exist, the teaching itself often remains rather theoretical, with frontal lectures and rote learning still being widespread.³³ As a consequence, we continue to produce

³⁰ The assumption of broad basic support for the values incorporated in the ECHR is debatable. As has been pointed out many times, there can be a problem when modern legislation, for example a new bankruptcy code, is essentially imposed on transformation countries by foreign donors or international organizations such as the EU without a genuine local debate with local input and ultimately local ownership. As Channell has persuasively argued, policy debate, policy change, and policy making at the local level has to precede law making, while law making imposed from above, let alone abroad, will often fail to achieve genuine policy changes; see Wade Channell, *Lessons Not Learned: Problems With Western Aid for Law Reform in Postcommunist Countries*, Carnegie Endowment Paper No. 57, Rule of Law Series, Washington, May 2005, in particular at pp. 4-9. And it is true that not much local debate and effort at persuasion of local stake holders was happening prior to the ratification of the ECHR by the new Member States of the Council of Europe. However, we maintain that the field of human rights is different in this respect from other areas where far reaching legal reform has been brought to the former Communist countries, and that protection of human rights against state oppression does enjoy rather broad support even without much open and open ended initial debate on the matter.

³¹ Again, as a good example, see Burkov's report on *Russia*, pp. 425 et seq., at p. 444.

³² Ibid., at pp. 443-445. See also Shirazyan's report on *Armenia*, pp. 55 et seq., at pp. 68-69; Kanev's report on *Bulgaria*, pp. 115 et seq., at p. 116; Arghir and Stănculescu's report on *Romania*, pp. 389 et seq., at pp. 405-406; etc.

³³ This is only the tip of the iceberg of a wider problem with the reform of higher education, not only in law. In many countries in the region, legal education is delivered on the one hand by at least partly unreformed state universities in old buildings with outdated furnishings, and on the other hand by profit oriented private universities. In the absence of suitable quality standards and accreditation or peer review procedures, neither of these types is delivering a world class

generation after generation of lawyers that enter the profession without a good understanding of the impact of international law, and the ECHR in particular, in the national legal order, and its relevance for their daily work.

II. Recommendations

The preparation of professionals in the new Member States - and not only there - for the application of the European Convention as interpreted by the European Court of Human Rights needs to be improved on all levels.³⁴ The first step has to be a realization that application of the ECHR is not just a matter for the lawyers and judges. Human rights and fundamental freedoms will not be effectively guaranteed until every person who is potentially going to be a victim or a perpetrator has been educated about his or her rights and obligations. Just like every person has to have a basic sense of what is required and what is prohibited under the laws on crimes and misdemeanors, and just like every person needs to understand the basic traffic rules, each Member State should educate the public at large about human rights and the guarantees provided by the ECHR. This does not require sending every person into law school courses. Short TV spots, along the lines of public interest commercials, and other forms of information dissemination, can already make a big difference. More importantly, government officials who are not legally trained but part of law enforcement, in particular prison wardens and police officers, have to receive systematic training on (European) human rights and fundamental freedoms. Model codes of conduct, best practice standards, and similar tools for these professionals would also help if made available in the respective languages and endorsed either by the governments themselves or by the relevant professional organizations.³⁵ Every problem that can be avoided at the level of these professionals will already not burden the domestic, let alone the international judicial review procedures.

education. In several countries the situation is exacerbated by a proliferation of institutions, virtually guaranteeing that not a single one of them will have the economies of scale and means to improve itself and become a world class institution. (In Moldova, for example, there are currently 18 law schools for a population of 4.2 million; see the report by Gribincea, Hriptievski and Chicu on *Moldova*, pp. 309 et seq., at p. 320. Similar problems exist in Armenia and several other countries.)

³⁴ Merely *reminding* judges and other legal professionals that their “clients” are entitled to effective protection of fundamental rights, including the right to a fair trial and the right to have their case decided within a reasonable time, as suggested by Repšs, Stankevičs and Rugāte in their report on Latvia, pp. 279 et seq., at p. 292, won’t be enough in this respect.

³⁵ The development of such codes does not have to start from scratch. Very good examples exist and it is disappointing that they have remained largely unknown and ignored. See e.g. the *1979 United Nations Code of Conduct for Law Enforcement*, G.A. Resolution 34/169, U.N. Doc. A/34/46, and the *Guidelines for the Effective Implementation of the Code*, adopted by the EcoSoC on 24 May 1989. See also the *1990 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, available at <http://www.ohchr.org/english/law/pdf/firearms/pdf>. For prosecutors and judges, the International Commission of Jurists adopted in 2004 the *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners Guide*, available at <http://www.mafhoum.com/press7/230S24.pdf>. See also the *1990 United Nations Guidelines on the Role of Prosecutors*. Specifically on the subject of human rights of prisoners, the *1957 United Nations Standard Minimum Rules for the Treatment of Prisoners* are still the most comprehensive, see EcoSoC Res. 663 C (XXIV) of 31 July 1957 and Res. 2076 (LXII) of 13 May 1977. On the entire subject see, in particular, Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development - Charting the Fragile Path of Progress*, Cheltenham 2008, with many additional sources and references.

Moreover, one of the most widely neglected group of government officials in the modernization and re-training effort are the enforcement officers. Very rarely has anybody bothered to ask them which changes in the laws and which kind of training or other assistance they would need to be able to better and faster enforce the judgments handed down by their courts. As a consequence, years of investments in court reform and training of judges may have increased the capacity of courts to handle growing case-loads and to produce generally better and better argued decisions. But the results are often disappointing because of problems at the enforcement stage.³⁶

With regard to the education of legal professionals, improvements have to be made both for the law students and the practitioners. A striking result of our study was the fact that the majority of the countries in the region do not have any requirements regarding continuing legal education for their practitioners,³⁷ let alone specific requirements that private attorneys have to participate in training related to the ECHR. Unfortunately, this continues a tradition that is also widespread in the Western Member States of the Council of Europe and in general in the Continental European tradition. Legal education is largely understood as acquisition of knowledge, rather than the study of tools, skills, and methodologies.³⁸ And once this knowledge has been acquired, which is generally monitored by exams under the responsibility of the (state) universities or (state) examination boards, and not the (private) bar associations, it is up to each individual to determine whether and how she wants to stay abreast of new developments in her field. Naturally, where CLE is not required, few if any opportunities for CLE will actually be organized by the bar associations and/or relevant NGOs. Even where opportunities for private practitioners are available, those who would need them most are the least likely to attend. As a result, too many practitioners all over Europe, and in particular in the countries examined in our study, essentially remain frozen in time, unable to provide high quality legal services to their clients and communities which adequately take into account the fundamental changes triggered by their countries' opening to the ECHR, the EU, and globalization in general. Last but not least, even where CLE is offered and wide attendance is happening, all too often the focus of the training is again, like in law school, on the acquisition of (updated) knowledge and not practical skills like legal writing and persuasive argumentation in a given field of substantive law,³⁹ which

³⁶ On this issue see, inter alia, Wade Channell, *Lessons Not Learned: Problems With Western Aid for Law Reform in Postcommunist Countries*, Carnegie Endowment Paper No. 57, Rule of Law Series, Washington, May 2005, at p. 7.

³⁷ See, for example, the report by Kovalová and Vargová on *Slovakia*, pp. 499 et seq., at pp.508 and 511; as well as Gadirov's report on *Azerbaijan*, pp. 75 et seq., at p. 97. By contrast, *Romania* made CLE mandatory in 2008, see Arghir and Stănculescu, pp. 389 et seq., at p. 402.

³⁸ Burkov provides examples of the purely theoretical questions included in Russian bar exams and the lack of any questions about the practical domestic application of the ECHR; see his report on *Russia*, pp. 425 et seq., at p. 446. For an excellent - and indeed award winning - analysis of the historic origins of the problem see Zdeněk Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, American Journal of Comparative Law, Vol. 52, 2004, No. 3, pp. 531 et seq., at pp. 532-549.

³⁹ Unsurprisingly, the bulk of legal writing and argumentation training in Central and Eastern Europe was provided by the American Bar Association's Central European and Eurasian Law Initiative (ABA-CEELI, now re-named ABA Rule of Law Initiative, see <http://apps.americanbar.org/rol/>). Similarly, when American academics went to Central and Eastern Europe to build law clinics there, many of the local academics at first thought - and quite a few in Western Europe who hear about it still think - that they were about training in some kind of health law.

Although legal writing and clinical professors in American law schools are also not always regarded as

brings us back to the distinction of *substantive versus functional knowledge* introduced by Kovalová and Vargová above.⁴⁰ Unfortunately, there is no shortcut to excellence and judges will only engage with the ECHR and the case-law of the European Court if the attorneys before them present well-crafted arguments.⁴¹

What the new Member States have to realize is that the lack of suitable CLE requirements and the absence or insufficiency of training opportunities for private practitioners not only contributes to the poor record of these countries in the application of the ECHR, which in turn is reflected both in the high number of cases going to Strasbourg, the relatively high percentage of judgments finding a violation, and the serious problems these countries seem to have with the execution of the judgments of the EuCrTHR.⁴² The absence or insufficiency of CLE has much broader consequences, not only for the respect for human rights and fundamental freedoms. Where a significant percentage of practitioners are regularly providing mediocre legal services and/or are unable or unwilling to keep up to date about developments on the international level with relevance to their area(s) of practice, the rule of law is compromised at its core.⁴³ While some of the data we will present below seem to suggest that at least some of the governments in the region care rather little about effective guarantees for human rights, they must not forget that rule of law is not only about lofty goals of individual rights and freedoms. Rule of law is also about legal certainty for domestic and foreign investors and a legal environment that is broadly supportive of legitimate and successful business practices which, in turn, is all about job creation, know-how transfer, competitive industries and service providers, tax revenue, and related issues, the governments are very much interested in.

One way of improving the situation with regard to lawyers in the profession could be the introduction of special certificates like we know them in other professions. Medical doctors are usually only qualified to be “general practitioners” after they graduate from medical school. In

highly as their research professor colleagues, at least they have become a fully accepted and integrated part of every law school and at least some of their courses are required of every student. By contrast, legal clinics are very nearly non-existent in Western Europe and skills based courses like legal writing are not required, or not offered at all, or at least delegated to teaching assistants, since no self-respecting law professor in Europe, where academic writing will often be the more highly regarded the more theoretical and complicated it is, would want to be associated with this rather mundane part of legal education

⁴⁰ See note ???.

⁴¹ This point is very persuasively made by Burkov in his report on *Russia*, pp. 425 et seq., on p. 472.

⁴² More on this subject below, on pp. ???

⁴³ For a discussion of the concept of “Rule of Law” and a proposal for a better definition see Frank Emmert, *Rule of Law in Central and Eastern Europe*, Fordham Int’l Law Journal, Vol. 32, No. 2, 2009, pp. 551-586, in particular pp. 553-569. See also Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Public Law 1997, pp. 467-487; Frank Emmert, *Market Economy, Democracy, or Rule of Law - What Would You Pick, if You Had to Choose?*, in Epiney/Haag/Heinemann (eds.), *Challenging Boundaries - Essays in Honor of Roland Bieber*, Baden-Baden 2007, pp. 104-116; Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, Georgetown J. Int’l L. 2005, Vol. 36, No. 3, pp. ???; Raz, *The Rule of Law and its Virtue*, The Law Quarterly 1977, Vol. 93, pp. 195-211; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004; David M. Trubek, *The ‘Rule of Law’ in Development Assistance: Past, Present, and Future*, CALE Occasional Papers 2004; and finally Hague Institute for the Internationalisation of Law (ed.), *Rule of Law Inventory Report*, The Hague, 2007, with a bibliography on ‘rule of law’ of almost 100 pages, and United Nations General Assembly (ed.), *Report of the Secretary-General: The Rule of Law at the National and International Levels*, A/63/64, 12 March 2008, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/63/64.

order to become surgeons, urologists, or pediatricians, they need to take advanced courses and obtain additional diplomas or certificates. Similarly, the (private) bar associations or the (public) judges or prosecutor schools⁴⁴ could offer advanced courses on subjects such as international business law, intellectual property protection, and of course international/European protection of human rights, which attorneys could volunteer to take to obtain additional diplomas or certificates to demonstrate their up-to-date and advanced knowledge to their (potential) customers. If such courses would be organized in a serious manner, with attendance requirements, emphasis on real world application, and serious examinations,⁴⁵ they could provide not only better training for legal professionals but also a way for those practitioners to distinguish themselves in an increasingly crowded marketplace. In particular, if national organizations would cooperate with international organizations like the Council of Europe and/or suitable associations of peers, and have their programs evaluated or even accredited, similar to ISO certifications,⁴⁶ quality would be assured and market pressure would increase for serious professionals to participate.⁴⁷

As long as *functional* knowledge remains limited among judges, pressure on the European system can also be alleviated via the creation of specialized *pilot courts* in the Member States. Rather than physically separate courts, these should be conceived as specialized judges or chambers inside regular trial and appellate courts who will either have jurisdiction over or provide expertise in certain types of cases if a violation of the ECHR has been claimed.⁴⁸ A similar effect could be achieved with the creation of a preliminary reference procedure along the lines of Article 267 TFEU. In such a procedure, any court or tribunal of a Member State could refer questions about the correct interpretation and application of the ECHR and the case-law of the EuCrHR in a given case to its own supreme or constitutional court, where a specialized judge or chamber would provide a binding answer, without however deciding the actual case. Both models would serve the purpose of using a relatively small number of specially trained and

⁴⁴ The public institutions may already face capacity problems, however. For example, the Russian Academy of Judges has developed high quality modules for the continuing education of judges. But with more than 23,000 judges under its jurisdiction, it takes about 20 years for every judge to have even one single training opportunity; see Burkov's report on *Russia*, pp. 425 et seq., at p. 447. Similar shortages are reported from *Romania*, where training sessions of good quality are being offered by the National Institute of Magistracy; see the report by Arghir and Stănculescu, pp. 389 et seq., at p. 421. Private service providers will be needed to help with training of government officials, let alone large numbers of private practitioners. However, whether they are for-profit or not, good training modules with emphasis on practical skills require a small group format and are, therefore, rather expensive. While private users of CLE services can afford reasonable fees, public officials need to be sponsored by the government.

⁴⁵ Typical weaknesses of training units organized by international partner or donor organizations are discussed in Frank Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, Fordham Int'l Law Journal, Vol. 27, No. 2, 2004, pp. 642-678, in particular at pp. 672-673.

⁴⁶ For more information see <http://www.iso.org/iso/home.htm>.

⁴⁷ By contrast, it does not seem realistic to suggest that the Council of Europe should introduce mandatory CLE for legal professionals as a requirement prior to accession of new Member States as long as many of the old Member States do not have such requirements.

⁴⁸ For additional discussion of the strengths and weaknesses of pilot courts see, inter alia, Maria Dakolias and Javier Said, *Judicial Reform: A Process of Change Through Pilot Courts*, European Journal of Law Reform 2000, Vol. 2, No. 1, pp. 95-117.

qualified judges to gradually educate the judiciary at large, while also resolving actual cases before they would have to be brought to the European Court.⁴⁹

Twinning of certain organizations and professionals in the new Member States with their counterparts in Western Europe⁵⁰ as a vessel for institutionalized exchange of experience between peers can also be a useful tool. To take these collaborative exercises beyond the level of professional tourism, they need to be goal oriented, for example providing judges in the new Member States with technical assistance for legal writing and argumentation,⁵¹ better case-flow management, and other tools for dealing with growing numbers of cases without compromising quality. Specialized training courses for judges and administrators from Central and Eastern Europe have sometimes been offered also by organizations and institutions like the European Institute of Public Administration (EIPA)⁵² or the Academy of European Law (ERA) in Trier.⁵³ The problem is usually that the courses are short and the audiences diverse so that impact is limited. Also, it is generally a problem for judges and administrators from the region to get time off their already busy schedules to pursue such programs in the West. More promising would be courses, in particular if structured as certificate or diploma programs, developed by EIPA or the Trier Academy or the Ecole Nationale d'Administration (ENA)⁵⁴ and delivered in the capitals of the new Member States. If structured similar to the Master Program of Indiana University Robert H. McKinney School of Law in Cairo, which is delivered over the course of 18 months in an evening format and which, thanks to generous subsidies by USAID, is affordable to local judges, prosecutors, public administrators, and private sector attorneys,⁵⁵ a new elite of internationally qualified legal professionals could be developed who are already and will remain integrated in the professional structures in their respective countries. If implemented, like the Cairo program, in close cooperation with a local law school, such programs can also serve the additional purpose of capacity development for legal education in the region.

At the level of the law schools, outside of international partnerships and programs like the one in Cairo, the current challenge can be summarized as one of unfinished reform, with the result of perpetuation of mediocrity. Under the Communist regimes, there was a conscious effort at discouraging critical and independent thinking in the educational system. Professors, in

⁴⁹ For information on the creation of three “experimental” courts in the *Ukraine* for exactly this purpose see the report by Meleshevich and Khvorostyankina, pp. 557 et seq., on p. 587.

⁵⁰ There are many potentially suitable organizations, starting with the International Bar Association (IBA) and its Human Rights Institute, see <http://www.ibanet.IBAHRI.aspx>. The International Rule of Law Directory lists over 200 associations and organizations active in the promotion of rule of law, see <http://www.roldirectory.org>. Of specific interest for high court judges is the Network of the Presidents of the Supreme Judicial Courts of the European Union, see <http://www.network-presidents.eu/rpcsjeu/>. See also J. Bell, *Mechanisms for Cross-fertilization of Administrative Law in Europe*, in Beatson/Tridimas (eds.), *New Directions in European Public Law*, Oxford 1998, pp. 147 et seq.

⁵¹ Unfortunately, language barriers have proven formidable barriers in this respect.

⁵² See <http://www.eipa.nl>.

⁵³ See https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=ansicht&_aktion=detail&schluessel=era. There is also a three month program and a full Master Program in Public Management in English language offered at the German University of Administrative Sciences Speyer, see <http://www.dhv-speyer.de/ENGL/>.

⁵⁴ See <http://www.ena.fr/index.php?/en>.

⁵⁵ For more information on this program see <http://indylaw.indiana.edu/llm/egypt.htm> or contact Prof. Frank Emmert, the director of the program, at femmert@iupui.edu.

particular in sensitive areas such as law and political science, were selected and promoted only if they professed loyalty to the political system and did not ferment dissent with the prevailing autocratic regimes. Students had to spend a large part of their education on subjects such as “Scientific Communism”, “History of State and Law”, and other purely theoretical courses mainly designed to indoctrinate. Learning outcomes were generally measured in closed book exams measuring memorization versus problem solving. Rule by Law, rather than Rule of Law, was the goal and anyone who disagreed with it was either marginalized in the universities or straight out removed. As a consequence, the best and brightest minds often avoided politically sensitive subjects for natural sciences and engineering. And those who did make a career out of law or political science either became conformists, if not supporters of the system, or sought to carve out niche existences by careful self-censorship. Systemic mediocrity was exacerbated by decades of neglect of physical facilities and the omnipresence of large, powerful, and self-serving university bureaucracies.

The challenges for reform of the law schools after the fall of Communism were, therefore, rather formidable and the renovation of the buildings and classrooms was the smallest of them. Since faculty and many administrators typically had lifetime tenure,⁵⁶ it was generally not possible to flush out of the universities those staff members that were either unwilling or unable to adapt to the pursuit of excellence in student and result oriented programs, where creative and critical thinking would be stimulated. Sure enough, a relatively small minority of East European legal academics just had to be unleashed to shake off the old habits of self-censorship and quickly catch up to their Western European and international peers. The majority, however, quickly came to realize that their previous positions had been rather cozy and comfortable as long as they knew when to shut up and that the competitive pressures of the newly globalizing academic community were going to leave them behind. In all too many cases, therefore, these old school professors, in cahoots with the bloated administrative services, began to slow down or block the reform process wherever they could. And they found many ways and means to their selfish ends. For example, they could often attract larger numbers of students by giving generous grades on memorization exams and ignoring rampant cheating, while their quality minded colleagues in the next lecture rooms demanded hard work and real understanding from their students and scared many away by using the entire grading scale.⁵⁷ The most unfortunate consequence of the unfinished reform of the law schools is the fact that many of the largest schools in the region continue to this day to graduate generation after generation of lawyers who are at best unevenly prepared for the demands imposed on lawyers in open and democratic societies in

⁵⁶ Only in East Germany, very nearly all law professors (and judges) who had been appointed under the Communist regime were fired after re-unification. And even this was only possible because West Germany had a sizeable population of under-employed legal academics and practitioners who were able to fill the chairs and courts and other legal jobs in East Germany at short notice. One result, however, was the alienation of the East German people with their new lawyers. The term “Besser Wessi”, a derogatory combination of the terms for someone who always knows better and someone who came from the West, captured the spirit of those years, not only but also for the imported lawyers. The imposition of the West German legal system, including its legal professionals, lock, stock, and barrel, on East Germany was one important factor for the perception that before unification the Germans were one people in two countries, while after unification, they became two peoples in one country.

⁵⁷ A more detailed analysis of the problems which still plague the law schools in Central and Eastern Europe and the South Caucasus area would be beyond the scope of the present publication. This will be done in a similar study already launched by the editors and some of the authors of the present volume.

the 21st century. At worst they are producing clones of the indoctrinated and increasingly corrupt blockheads of an earlier age.

As with the other elements of the reform process, there is no easy solution to the problems continuing at many law schools. It is not even just a generational issue where one merely has to wait for the representatives of the previous system to retire. Since they are still the ones who educate and thus shape many of the new lawyers, it is by no means assured that a newly appointed professor will pursue academic excellence and honesty just because she is young. Even where well intended and highly qualified academics are being appointed, they often struggle with archaic bureaucratic rules and reform inhibiting governmental oversight procedures.

On the level of the individual professors, the field of human rights is fortunate because the field is new and, therefore, not dominated by older and conservative professors. Quite to the contrary, those academics who have created and who are teaching the courses on human rights law have often grown out of the resistance movement and have retained their spirit of idealism and not-for-profit activism. Where qualified academics are still missing, the Academic Fellowship Program (AFP) of the Open Society Institute (OSI)⁵⁸ has been doing a great job in providing opportunities for young academics from Central and Eastern Europe, the South Caucasus region, and Central Asia, to be educated in Western graduate programs and to receive financial and academic support as they become established in their home universities. Another option for quickly upgrading skills among academics from a certain country or region, for example around the time a new country joins the Council of Europe and ratifies the ECHR, would be to conduct an intensive summer program like the East-West Forum hosted by the European University Institute (EUI) in Florence in 1993.

On the level of the academic institutions themselves, the best results toward comprehensive and sustained reform have been accomplished with the introduction of accreditation procedures like they have been in place in the UK and the United States for many years. For example in Lithuania, academic institutions and programs can only award state recognized diplomas after they have been accredited by an independent government agency. To ensure first of all objectivity and secondly the gradual achievement of international best practice standards, the commissions visiting and evaluating the programs on behalf of the agency are composed of international experts without affinity to any of the national institutions. A first assessment of a new program can result in denial of accreditation, provisional accreditation for two years, or full accreditation for seven years. Follow-up visits to accredited institutions serve not only to assess whether previous accomplishments are sustained but also to progressively push the programs and institutions to higher levels until they can be counted among the finest in the world with state-of-the-art physical, financial, and academic support for research, teaching, and service.⁵⁹ Having participated in Lithuanian and other accreditations in the region, several of the editors and authors of the present volume can attest to the effectiveness of the system, which has yet to be matched by any other system. Given the relatively modest cost and proven impact of comprehen-

⁵⁸ For more information on this and related activities financed by George Soros see <http://www.soros.org/initiatives/hesp/focus/afp>.

⁵⁹ The procedures and standards of the Lithuanian accreditation system are available on the website of the Lithuanian Centre for Quality Assessment in Higher Education at <http://www.skvc.lt/en/?id=0>.

sive accreditation systems, one can only wonder why such systems have not been introduced by more countries in the region. The American practice, where accreditations of law schools are done by the American Bar Association (ABA),⁶⁰ provides a model for countries where the (central) government is uninterested or unable to organize a meaningful accreditation system for law schools. Where neither the government nor the bar association is interested, the law schools themselves should seek the advice and endorsement of international peers. The ABA, the OSI, and other like minded institutions could and should provide support to this end.⁶¹

C. The Case Law of the EuCrTHR and its Influence in the National Legal Orders of the Member States

I. Findings

Our findings regarding the reception of the jurisprudence of the European Court of Human Rights in Central and Eastern Europe and the South Caucasus can be divided into two groups. The first group concerns the impact of the actual decisions of the EuCrTHR in the region, i.e. the problems highlighted in the decisions finding violations of rights protected by the ECHR, the awareness of legal professionals of those decisions, issues related to compliance, and the prospective impact as regards potentially required changes in legislation, administrative practice, and/or court procedure. The second group concerns feedback to the EuCrTHR, in particular a growing frustration among legal professionals in the region with the lengthy proceedings in Strasbourg and the low levels of compensation awarded to victims of human rights violations.

1. Patterns of Violations

The first and maybe most important finding is the stunning number of cases that have been and continue to be brought to Strasbourg from complainants in the new Member States. Anybody who thought that Italy has issues with lengthy court proceedings and Turkey is still struggling to

⁶⁰ For more information see http://www.americanbar.org/groups/legal_education/resources/accreditation.html.

⁶¹ See also Recommendation Rec(2004)4 of the Committee of Ministers on the European Convention on Human Rights in University Education and Professional Training (available at <https://wcd.coe.int/ViewDoc.jsp?id=743277&SiteCM>), which is too general, however. While it does recommend that European human rights should be taught as part of the core curriculum of law schools, should be a required component of bar exams, should be taught to judges and prosecutors, and should be included in the initial and continuing training of law enforcement personnel, it does not elaborate *how* the subject should be taught. As I have elaborated earlier, the typical training sessions for professionals provided all over Central and Eastern Europe consist of series of essentially frontal lectures, often provided in a language other than the working language of the audience, where the audience can be broken down into three groups. In the first two rows, one usually finds a group of highly committed and knowledgeable professionals who basically don't need and could provide the training themselves. In the middle of the room will be a slightly larger group honestly trying to learn but struggling to understand, either because of language limitations or because they did not get to attend the earlier and more foundational seminars. Finally, in the back of the room, which often comprises at least half of the audience, the participants drift in and out of the room to take calls on their cell phones, and usually don't come back after the lunch or coffee break, allegedly but not necessarily because they have to attend pressing business at their respective courts or offices. See Frank Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, Fordham Int'l Law Journal, Vol. 27, No. 2, 2004, pp. 642-678, in particular at pp. 672-673.

ensure humane treatment of suspects in its police detention centers but otherwise the European system is generally dealing successfully with occasional violations of human rights or fundamental freedoms that do not get remedied at the national level, has to reconsider. Twenty years into the reform process, the new Member States in Central and Eastern Europe and the South Caucasus clearly have not reached a level of protection of human rights and fundamental freedoms that would be comparable with the Western “old” Member States, let alone a level that can be called satisfactory. Table 1 shows a comparison in purely numeric terms, which reveals how much “work” is generated for the EuCrTHR by the various Member States. The table has the number of judgments finding at least one violation for each Member State, as well as the number of cases pending against each Member State. To take account of size and length of membership, the table also includes some corrected numbers, although these, of course, cannot be directly and mathematically compared for reasons outlined in the annotations.

Table 1
Comparison of Number of Cases Brought to the EuCrTHR per Member Country⁶²

Country	ECHR in force since	Population (as of 2008)	Judgments finding at least one violation	Average per year of membership*	Average per year* per 100,000 population	Number of cases pending (Sept 2011)	Pending cases per 100,000 population
Albania	Oct 1996	3.2 mio	23	1.73	0.05	302	9.44
Andorra	Jan 1996	84,500	2	0.13	0.16	12	14.20
Armenia	Apr 2002	3.2 mio	24	2.82	0.09	923	28.84
Austria	Sep 1958	8.3 mio	215	4.13	0.05	567	6.83
Azerbaijan	Apr 2002	8.6 mio	38	4.42	0.05	1,254	14.58
Belgium	Jun 1955	10.7 mio	113	2.05	0.02	580	5.42
Bosnia Herzegovina	Jul 2002	3.8 mio	14	1.65	0.04	1,315	34.61
Bulgaria	Sep 1992	7.6 mio	343	18.74	0.25	3,466	45.61
Croatia	Nov 1997	4.4 mio	154	11.85	0.27	1,594	36.23

⁶² The number of judgment finding at least one violation and the number of cases pending are based on information provided by the EuCrTHR. Instead of only comparing absolute numbers, the table also factors in the years of applicability of the ECHR in the different countries and the size of their populations on the assumption that a larger population over a longer period of time will yield more applications to the EuCrTHR. However, the adjusted numbers are merely indicators of trends and not scientifically exact. First, a twice or three times larger population does not necessarily result in two or three times more cases. If there is a problem in a country, for example with investigative judges also sitting in judgment over a case (a situation found, for example, in Azerbaijan; see Gadirov on *Azerbaijan*, pp. 75 et seq., at p. 85), a single complaint can resolve the issue if the country immediately changes its rules after a conviction from Strasbourg. This can be completely independent of population size. Second, during the 1960s and 70s, the EuCrTHR issued far fewer judgments than in more recent years, which means that a country which has been subject to the oversight of the Court twice or three times longer than another does not necessarily have twice or three times as many cases. That being said, the trends remain statistically significant and raise important questions.

The EuCrTHR itself composes similar statistics that also factor population size into the analysis. See, for example, European Court of Human Rights (ed.), *Analysis of Statistics 2010*, Strasbourg 2011, available online at http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38-85F4-A93113A78F10/0/Analysis_of_statistics_2010.pdf, in particular Table 2 on pp. 12-13.

Cyprus	Oct 1962	797,000	50	1.04	0.13	141	17.63
Czech Republic	Jan 1993	10.4 mio	142	7.89	0.08	1,302	12.52
Denmark	Sep 1953	5.5 mio	13	0.22	0.004	121	2.20
Estonia	Apr 1996	1.3 mio	19	1.31	0.10	502	38.62
Finland	May 1990	5.3 mio	119	6.10	0.12	551	10.40
France	May 1974	64 mio	604	16.55	0.03	2,676	4.18
FYROM	Apr 1997	2.0 mio	72	5.33	0.27	1,029	51.45
Georgia	May 1999	4.4 mio	32	2.78	0.06	2,812	63.91
Germany	Sep 1953	82.3 mio	128	2.23	0.003**	2,381	2.89
Greece	Nov 1974	11.2 mio	541	15.03	0.13	802	7.16
Hungary	Nov 1992	10.0 mio	200	11.11	1.11	1,576	15.76
Iceland	Sep 1953	320,000	9	0.16	0.05	19	6.33
Ireland	Sep 1953	4.4 mio	15	0.26	0.006	59	1.34
Italy	Oct 1955	59.7 mio	1,617	29.29	0.05	10,208	17.10
Latvia	Jun 1997	2.3 mio	37	2.74	0.12	572	24.87
Liechtenstein	Sep 1982	35,000	5	0.27	0.91	14	40.00
Lithuania	Jun 1995	3.4 mio	52	3.35	0.10	443	13.03
Luxembourg	Sep 1953	492,000	29	0.51	0.10	54	10.80
Malta	Jan 1967	413,600	25	0.57	0.14	26	6.50
Moldova	Sep 1997	3.6 mio	178	13.38	0.37	3,826	106.28
Monaco	Nov 2005	31,100	1	0.20	0.65	14	45.16
Montenegro	Jun 2006	620,000	3	0.66	0.11	688	114.67
Netherlands	Aug 1954	16.4 mio	73	1.29	0.08	994	6.06
Norway	Sep 1953	4.7 mio	20	0.35	0.007	80	1.70
Poland	Jan 1993	38.1 mio	761	42.28	0.11	6,452	16.93
Portugal	Nov 1978	10.6 mio	138	4.30	0.04	271	2.56
Romania	Jun 1994	21.5 mio	719	43.58	0.20	11,950	55.58
Russia	May 1998	142 mio	1,019	81.52	0.06	40,295	28.38
San Marino	Mar 1989	31,300	8	0.37	1.22	6	19.35
Serbia	Mar 2004	7.4 mio	46	6.87	0.09	3,514	47.49
Slovakia	Jan 1993	5.4 mio	218	12.11	0.22	1,235	22.87
Slovenia	Jun 1994	2.0 mio	220	14.19	0.71	3,434	17.17
Spain	Oct 1979	45.3 mio	56	1.79	0.004	980	2.16
Sweden	Sep 1953	9.2 mio	47	0.82	0.09	941	10.23
Switzerland	Nov 1974	7.7 mio	71	1.97	0.03	837	10.87
Turkey	May 1954	71.5 mio	2,245	39.73	0.06	15,206	21.27
Ukraine	Sep 1997	46.4 mio	709	52.91	0.11	10,434	22.49

United Kingdom	Sep 1953	61.2 mio	271	4.72	0.007	3,172	5.18
Average			243	10.16		2,971	23
Total		812 mio	11,438			139,630	

* See footnote ??? for explanations.

** This number does not reflect the fact that the German population was significantly smaller before re-unification in 1990.

Shaded fields in Table 1 indicate a disproportionate use of EuCtHR resources and, by and large, unacceptably high figures which, in turn, indicate urgent reform needs on the national level. Something is not working in these countries. Either there are too many human rights violations, or the national remedies are too often failing, or both.

A closer look at the countries with above average numbers of convictions *and* very large numbers of cases pending reveals certain patterns:

Table 2
The Most Common Problems in the Countries with the Largest Number of Cases⁶³

Country	Most common problem	Second most common problem	Third most common problem
Bulgaria	Right to liberty and security, Art. 5 (219 convictions)	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (191 convictions)	Right to an effective remedy, Art. 13 (99 convictions)
France	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (520 convictions)		
Greece	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (473 convictions)	Right to an effective remedy, Art. 13 (100 convictions)	
Italy	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (1,382 convictions)	Protection of property, Prot 1-1 (297 convictions)	Right to respect for private and family life, Art. 8 (131 convictions)
Moldova	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (103 convictions)	Protection of property, Prot 1-1 (71 convictions)	Prohibition of torture, inhuman or degrading treatment, lack of effective investigation, Art. 3 (59 convictions)
Poland	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (477 convictions)	Right to liberty and security, Art. 5 (251 convictions)	Right to respect for private and family life, Art. 8 (83 convictions)
Romania	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (442 convictions)	Protection of property, Prot 1-1 (431 convictions)	Prohibition of torture, inhuman or degrading treatment, lack of effective investigation, Art. 3 (73 convictions)

⁶³

Data provided by the EuCtHR. The findings of violations cover the period 1959-2010.

Russia	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (691 convictions)	Protection of property, Prot 1-1 (430 convictions)	Prohibition of torture, inhuman or degrading treatment, lack of effective investigation, Art. 3 (380 convictions)
Slovenia	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (213 convictions)	Right to an effective remedy, Art. 13 (202 convictions)	
Turkey	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (1,145 convictions)	Protection of property, Prot 1-1 (574 convictions)	Right to liberty and security, Art. 5 (516 convictions)
Ukraine	Right to fair trial, length of proceedings, non-enforcement, Art. 6 (5 convictions)	Protection of property, Prot 1-1 (293 convictions)	Right to an effective remedy, Art. 13 (136 convictions)

What Table 2 clearly shows is that the issues resulting in the largest numbers of cases pending and the most findings of violations, with few exceptions, are not about substantive matters but about procedures, about fair and effective remedies. In essence, they show *a breakdown of the national judicial system*. How can it be that these countries are picking up dozens of judgments year after year, finding a violation for excessively lengthy national proceedings? What is wrong in a country where dozens of cases every year lead to a finding of violations of the right to a fair trial and/or the right to an effective remedy? More importantly, why is nothing being done about these problems? Other than “disgraceful”, how can we call the fact that Italy has accumulated over many years more than 1,100 convictions for excessively lengthy national proceedings and has thousands of similar cases pending? What is going on in Russia, which alone is responsible for 28% of the 140,000 cases pending before the EuCrTHR?

In particular if a country is found in violation of a certain human right on numerous occasions over an extended period of time and seems unwilling or unable to do anything about the underlying problem(s), we have a clear indication not only of a lack of respect for human rights but also for the lack of effective national remedies. Although the effective implementation of the ECHR *and the case-law* of the EuCrTHR is the responsibility of all three branches of the governments of the Member States, the ultimate responsibility always rests with the judiciary. The reason why the ECHR requires the exhaustion of national remedies before a case can be brought to Strasbourg (Art. 35(1) ECHR) is precisely to give the national courts the opportunity to fix the problem before it has to be brought to the international level. The primary function of the EuCrTHR cannot be to provide individual justice for over 800 million Europeans. In accordance with the principle of subsidiarity,⁶⁴ the EuCrTHR can only solve the new and leading cases.⁶⁵ The national courts have to understand themselves as agents of the European Court, the guardians of human rights, as enshrined in the ECHR, and defined and continuously re-defined

⁶⁴ See, for example, the *Explanatory Report to the Agreement of Madrid* of 12 May 2009 (CETS No. 194) on Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, available at <http://conventions.coe.int/Treaty/EN/reports/Html/194.htm>.

⁶⁵ Avbelj and Černič are aptly stating that “international human rights enforcement can only be the *emergency break* that complements judicial protection within national legal orders” (see their report on *Slovenia*, on p. 556, emphasis added).

by the EuCrTHR. If the judgments of the European Court are not effectively implemented at the national level, the entire system is bound to fail.⁶⁶

If the judiciary is indeed the single most important factor in the poor track record of the countries that need a disproportionate share of the resources of the EuCrTHR, the next question is whether the problem is one of quantity or quality. Therefore, Table 3 shows a comparison of the resources dedicated by the different Member States to their respective judiciaries.

Table 3
Quantitative Data on the Judiciaries of the Member States⁶⁷

Country	No. of professional judges (FTE) per 100,000 capita	Budget of entire justice system in € per capita	Budget allocated to courts and prosecutors in € per capita	Number of cases pending in national 1 st instance courts*					
				civil			criminal**		
				new in 2008	resolved in 2008	pending 31/12/08	new in 2008	resolved in 2008	pending 31/12/08
Albania	11.8	22.2	5.9	19,980	18,418	6,369	83	76	69
Andorra	27.2	N/A	N/A	3,255	3,129	1,175	257	301	208
Armenia	6.8	4.6	5.1	31,373	26,991	9,994	1,321	1,055	266
Austria	19.9	140.6	77.9	110,497	111,245	39,227	24,782	24,630	6,429
Azerbaijan	5.7	7.0	7.0	70,593	70,119	8,157	1,752	N/A	N/A
Belgium	15.2	151.0	74.1	661,149	N/A	N/A	44,015	46,072	9,719
Bosnia Herzegovina	22.3	42.5	25.2	147,807	136,664	292,476	83,962	82,475	26,303
Bulgaria	28.3	28.4	24.7	N/A	N/A	N/A	N/A	N/A	N/A
Croatia	42.5	80.2	N/A	140,283	145,069	198,067	41,012	43,438	35,586
Cyprus	12.5	60.2	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Czech Republic	29.2	49.3	34.9	360,945	368,048	155,472	N/A	N/A	N/A
Denmark	6.9	N/A	48.0	59,670	58,366	32,873	14,525	13,231	5,964
Estonia	17.7	88.2	33.8	19,778	19,630	12,466	19,984	19,768	983
Finland	17.4	141.2	55.7	9,703	9,399	5,929	N/A	N/A	N/A
France	9.1	101.6	52.8	1,744,350	1,645,161	1,287,706	610,674	618,122	N/A
FYROM	32.2	23.0	14.8	47,357	55,113	33,843	14,855	17,213	10,718

⁶⁶ The same argument can be found, inter alia, in Mads Andenas/Eirik Bjorge, *National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention*, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2011-5 (available on SSRN). Andenas and Bjorge examine and compare the national implementation in Belgium, Czech Republic, France, Germany, Norway, Russia, and the United Kingdom. See also Steven Greer, *The European Convention on Human Rights - Achievements, Problems and Prospects*, Cambridge 2006, in particular p. 106, with reference to H.R. Lanham/D.P. Forsythe, *Human Rights in the New Europe: A Balance Sheet*, in D.P. Forsythe (ed.), *Human Rights in the New Europe - Problems and Progress*, Lincoln/London 1994.

⁶⁷ The information is based on European Commission for the Efficiency of Justice (CEPEJ) (ed.), *European Judicial Systems - Efficiency and Quality of Justice*, Edition 2010 (data 2008), in particular the tables in the appendices, pp. 295 et seq.

Georgia	6.4	5.7	5.4	9,105	12,513	4,162	1,986	2,300	664
Germany	24.5***	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Greece	33.3	31.8	31.9	N/A	N/A	N/A	N/A	6,979	N/A
Hungary	28.9	177.9	40.4	189,644	191,002	88,769	137,541	136,333	55,462
Iceland	14.7	59.5	23.6	N/A	N/A	N/A	N/A	N/A	N/A
Ireland	3.3	588.9	48.8	N/A	N/A	N/A	N/A	N/A	N/A
Italy	10.2	122.1	69.9	2,842,668	2,693,564	3,932,259	1,280,282	1,204,982	1,205,567
Latvia	20.8	75.0	31.3	50,318	36,914	30,718	12,394	11,278	4,827
Liechtenstein	49.1****	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Lithuania	22.5	31.4	30.8	185,878	180,071	27,172	N/A	N/A	N/A
Luxembourg	37.4	130.7	125.4	3,144	9,094	N/A	N/A	4,251	N/A
Malta	8.7	21.9	28.1	N/A	N/A	N/A	25	23	67
Moldova	12.9	10.0	3.6	61,427	58,007	12,649	N/A	N/A	N/A
Monaco	64.3	274.8	196.7	723	689	1,252	40	43	1
Montenegro	39.7	60.2	39.7	14,680	16,273	11,752	8,501	10,752	6,097
Netherlands	13.1	355.1	89.0	N/A	200,000	N/A	220,634	219,393	N/A
Norway	11.3	456.1	36.8	16,104	16,982	6,861	N/A	N/A	N/A
Poland	25.9	63.7	40.3	746,926	719,296	326,809	496,855	499,014	167,100
Portugal	18.0	130.8	N/A	314,729	311,797	367,573	116,178	130,962	109,387
Romania	19.2	35.7	25.1	706,381	664,608	287,768	N/A	N/A	N/A
Russia	24.2	16.9	22.9	10,16 mio	10,26 mio	391,000	347,000	360,000	35,000
San Marino	60.8	N/A	N/A	837	880	1,601	524	651	469
Serbia	34.1	45.3	N/A	191,862	222,818	1,398,556	6,049	6,360	5,024
Slovakia	25.7	54.4	37.7	128,924	140,626	133,416	N/A	N/A	N/A
Slovenia	53.5	121.4	87.5	31,221	33,788	42,612	19,386	20,505	21,903
Spain	10.7	89.2	81.4	1,620,717	1,324,577	1,074,748	354,707	310,280	259,358
Sweden	11.3	330.4	57.5	51,348	50,845	27,433	N/A	N/A	N/A
Switzerland	14.1	179.8	132.6	87,232	88,114	40,636	17,966	16,819	9,263
Turkey	10.0	18.0	10.3	1,117,212	1,069,043	N/A	796,920	758,610	720,127
Ukraine	15.5	N/A	5.4	N/A	N/A	N/A	N/A	N/A	N/A
United Kingdom	4.7	170.5	47.5	298,769	N/A	N/A	137,826	175,857	41,582
Average	20.9	114.8	47.3						

* The Appendices in the CEPEJ Report are broken down into Table 6 Number of Civil (and Commercial) Litigious Cases at 1st Instance Courts; Table 7 Number of Civil (and Commercial) Non-litigious Cases at 1st Instance Courts; Table 8 Number of Land Registry Cases at 1st Instance Courts; Table 9 Number of Business Registry Cases at 1st Instance Courts; Table 10 Number of Administrative Law Cases at 1st Instance Courts; Table 11 Number of Enforcement Cases at 1st Instance Courts; Table 12 Number of Criminal Cases (Severe Criminal Cases) at 1st Instance Courts; Table 13 Number of Misdemeanour Cases at 1st Instance Courts; Table 14 Number of Litigious Divorce Cases at 1st Instance Courts; Table 15 Number of Employment Dismissal Cases at 1st Instance Courts; Table 16 Number of Robbery Cases at 1st Instance Courts; and Table 17 Number of Intentional

Homicide Cases at 1st Instance Courts. Tables 18 to 42 provide similar information for the 2nd instance or appellate courts and the highest instance courts. The data included in Table 3 is taken from Table 6 and Table 12, with the latter presumably including the numbers of Tables 16 and 17.

** As explained in the previous annotation, this is defined as “severe criminal cases” and excludes misdemeanour cases.

*** In general, the data is provided for 2008. For Germany, the last available number is for 2006. The data for 2008 should not differ significantly.

**** For Liechtenstein, the most recent number is for 2004. Again, the data for 2008 should not differ significantly.

What Table 3 shows us is that there is no obvious connection between the number of judges in a country or even the amount of financial resources spent on the judiciary and their ability to stay on top of their dockets and deal with cases in a fair and timely manner. The shaded fields on the left side show expenditures significantly below averages. On the right side, the shaded fields indicate very high numbers of pending cases, in particular if the number of civil and/or criminal cases currently pending is close to or over a full year’s capacity of the respective judiciary. For example, in Italy, the judiciary receives about 1.2 million new criminal cases per year, deals with about 1.2 million, and has about 1.2 million pending, which means that the judges in Italy would have to keep working for a full year to clear out their backlog even if not a single new case would be brought to them. The situation is even worse in civil cases, where the backlog is about 150% of the annual capacity of the Italian judiciary. By comparison, the backlog of criminal cases in Estonia is only about 5% of the annual capacity of the trial judges there.

A correlation of the expenses does not lead to obvious conclusions about capacity and backlog. For example, Georgia spends very little on its judiciary, only some 5-6 Euro per capita per year, but does not have a significant backlog of cases. Similarly, the number of judges per capita does not show any clear correlations. Denmark has only 1/10 of the number of professional judges per capita of its population compared to San Marino but San Marino has the backlog of civil cases (almost 200% of annual capacity). Similarly, Serbia seems to have many judges, but it also has a phenomenal backlog of over 600% of annual capacity in civil cases. Even a look beyond quantitative analysis to the quality of the work of the judges does not show a clear connection between the number of judges and resources spent on the one side and the number of substantive problems on the other side. If we correlate the overall number of complaints in Table 1 and in particular the number of convictions on substantive issues in Table 2, for example the right to liberty and security, or the protection of property, or the right to respect for private and family life, with the countries having fewer than average judges per capita and/or spending below average on their judiciary, we can see that Italy spends a lot but does not seem to get corresponding results. The same is true for France, Poland, and Slovenia. However, we also have to acknowledge that several of the countries who spend the most on their judiciary do have the fewest problems, for example Austria, Belgium, Finland, Ireland, Luxembourg, Monaco, the Netherlands, Norway, Sweden, and Switzerland. Still, it can safely be concluded that money alone does not buy a good system of human rights protection on the national level. On the one hand, this is good news for the new Member States because most of them cannot easily increase their spending on the judiciary very much in the foreseeable future. On the other hand, this is bad news for the new Member States because it means that the real problems are lying elsewhere.

2. Awareness of Legal Professionals in the New Member States

What our research found time and again in the new Member States is a concentration of the interest in the legal community on leading cases against the respective country. Cases against other countries, including important milestones in the jurisprudence of the Court, and other leading cases developing the understanding of certain articles of the Convention, are usually ignored. Similarly, if case-law of the EuCrTHR is discussed at all in national proceedings about human rights and fundamental freedoms, it is usually only the case-law against the respective Member State. The reasons for this myopic perspective of legal professionals are twofold. First, the European case-law is published by the European Court only in English and French. Usually, only the more important cases against a particular Member State will be translated into the language(s) of that State, either by the Government, or by private NGOs or publishers. Since the majority of legal professionals in Central and Eastern Europe and the South Caucasus region cannot easily work in English or French, careful study of cases that are not translated into their national language(s) and/or Russian would be time-consuming and difficult. Second, there is a fundamental misunderstanding of the importance of leading cases against other Member States⁶⁸ and the concept of *precedents* in general. Many legal professionals in the region are stuck in an extreme form of legal positivism, which acknowledges only *statutory* law as binding law.⁶⁹ When it comes to case-law, binding force is rejected with the argument that the national legal systems in Central and Eastern Europe and the South Caucasus are civil or statutory legal systems *and not common law systems* like those of the United Kingdom and the United States. Since there is no principle of *stare decisis*, there cannot be a binding force of precedents⁷⁰ - and if precedents don't have binding force, they are not even worth analyzing, let alone arguing in court.⁷¹

⁶⁸ The situation in Hungary is interesting in this respect. While the Representative of the Hungarian Government in ECHR cases has publicly declared that leading cases finding human rights violations must be taken into consideration by all Member States, this view is not shared by the different branches of the Hungarian Government and Hungarian legislation typically does not get amended after parallel provisions in other Member States have been found wanting by the European Court; see Bárd's report on *Hungary*, pp. 223 et seq., at pp. 246-248. Russia is also interesting. Although the legislative situation would not seem to support this conclusion, the Constitutional Court has shown a remarkable openness to "generally recognized principles and norms of international law" and in particular the rules of the ECHR. In 1996, only days before Russia was admitted to the Council of Europe, the Constitutional Court went as far as stating unambiguously that Russia was bound by all judgments of the European Court of Human Rights that gave interpretation to the Convention, regardless of the respondent State; see Burkov's report on *Russia*, pp. 425 et seq., at pp. 433-436.

⁶⁹ In addition to the sources mentioned above in note ??, see Siniša Rodin, *Discourse and Authority in European and Post-Communist Legal Culture*, Croatian Yearbook of European Law & Policy, Vol. 1, 2005, pp. 1-22.

⁷⁰ See, for example, Belov's report on *Bulgaria*, pp. 101 et seq., on p. 102; as well as the report on *Ukraine* by Meleshevich and Khvorostyankina, pp. 557 et seq., on p. 564.

⁷¹ An example for this attitude was a case we argued before an Estonian court. In our brief, we referred to several similar cases already decided by Estonian courts in a certain way. The local co-counsel, however, removed those references and explained that the judge would not appreciate them and would consider them an attack on her independence. Surprised by this argument, we then undertook an empirical study into perceptions of judicial independence in Estonia. The results were even more stunning. A significant majority of respondents answered the question whether Estonian judges had sufficient independence to the effect that they had *too much* independence. Pressed for explanations, they declared that the judges basically gave what seemed random decisions, including opposite decisions in seemingly identical cases, without any or at least without persuasive reasoning. This made the Estonian judges look either corrupt or incompetent and, in any case, *too independent*. For additional discussion see Frank Emmert, *The Independence of*

What the judges are overlooking, however, is the fact that their decisions will not enjoy legitimacy if they are not properly explained. In particular, if different courts in the same country, let alone different judges in the same court, or even the same judges at different times, are deciding similar cases differently without explaining why, they will be perceived as corrupt or incompetent.⁷² If this happens regularly, the entire system of judicial remedies will eventually be seen as unpredictable and arbitrary.

The confusion among the judiciary in Central and Eastern Europe is about the difference between *binding precedents* and *persuasive precedents*. They are correct in arguing that in the continental European legal tradition, precedents are not binding. Judicial independence, properly understood, requires the judges to obey “the law”, understood as the constitution and general principles, as well as statutory law in force. They do not have to follow - in the sense of obey - the earlier decisions of the courts.⁷³ However, any preceding decision by a relevant court in a case that is genuinely or at least looks the same as one currently pending, will be a more or less persuasive precedent. If the respective court was a high level court and, in particular, if it gave detailed and persuasive reasons for its decision(s), then the same and all other courts dealing with similar or identical problems have to provide detailed and persuasive reasons if they want to deviate from such a highly persuasive precedent. The most important arguments for a different subsequent decision are a) the facts of the case are not the same after all and the differences in the facts matter for the outcome, or b) the law has changed after the precedent was decided, or c) times have changed and this justifies a different approach, or d) the precedent was ultimately wrong because, because, because... By contrast, if a subsequent court or tribunal does not provide reasons for adopting a different decision, either the first or the second court will necessarily be seen as wrong.⁷⁴ For example, if several previous owners of real estate, who were all expropriated during World War II or in the process of Communist collectivization, are bringing claims for restitution of their property rights, and some are granted restitution while others are not,⁷⁵ the interested public will look for explanations why this applicant was successful while that one was not. If a lower court does not follow a higher court, the public perception may be that the lower court is less competent and did not understand the law correctly. If the pattern is widespread, however, and involves both higher and lower courts following and not following the precedents, the perception will be that the outcome is random, and since the judges are probably not simply

Judges - a Concept Often Misunderstood in Central and Eastern Europe, European Journal of Law Reform 2001, Vol. 3, No. 4, pp. 405-409.

⁷² A third explanation is probably no longer relevant today but public perception may well remain strong: Cases of at least some importance and/or political relevance used to be handled with the well known system of “telephone justice” during Soviet times. This means that the (presiding) judge got a phone call from the Communist party leadership in which she was told how to decide the case, regardless of the underlying law. See, for example, Gribincea, Hriptievtschi and Chicu in their report on *Moldova*, pp. 309 et seq., at pp. 326-327.

⁷³ It may be wise for judges to follow precedents by their appellate courts if they want to avoid being overturned on appeal. However, there is no such obligation and judges can certainly deviate successfully from such precedents if they provide solid reasons for their decisions which stand up on appeal and may even change the case-law of the appellate court(s) on the matter.

⁷⁴ This was explicitly admitted by the President of the Supreme Court of Justice in *Moldova*; see the report by Gribincea, Hriptievtschi and Chicu, pp. 309 et seq., at p. 328.

⁷⁵ An example is provided by Arghir and Stănciulescu in their report on *Romania*, pp. 389 et seq., at p. 416.

tossing coins in their deliberation rooms, the best explanation often seems to be that the outcome depends in each case on who pays the largest bribes.⁷⁶

As a consequence, if the courts in Central and Eastern Europe and the South Caucasus region do not follow relevant precedents, in our case the case-law of the European Court of Human Rights, without giving detailed and persuasive reasons for their decisions, the public perception will increasingly be that those courts and judges are either incompetent or corrupt and that the entire system of legal remedies is unpredictable and a waste of time and money. In the end, increasing numbers of “users” of dispute settlement services will seek alternative solutions. Larger businesses will resort to international commercial arbitration, finding equitable help but at the expense of brain drain and capital export. Other elements of society will resort to self-help, essentially sending individuals or entire gangs of thugs for the enforcement of real or alleged claims. And those who can neither avoid the official dispute settlement system, nor otherwise achieve success outside of it, will become frustrated and disillusioned with the judiciary and potentially the entire legal and political system.

Moreover, the unwillingness of the judiciary in Central and Eastern Europe to consider all decisions of the European Court of Human Rights, at the very least all those adopted in leading cases, regardless of the respondent State, also shows a lack of understanding of the proper roles of the national courts versus the European Court. As has been said before, the EuCrthR cannot serve the role of being a super-appellate court for everything that goes wrong in the courts of the Member States. As the huge backlog of cases and the problematic length of proceedings before the EuCrthR clearly show, even with 47 judges, this Court cannot solve the individual problems of over 800 million citizens. Unless and until all national judges recognize their obligation to do their best and to use all their judicial powers to solve issues related to possible violations of human rights or fundamental freedoms at the national level, and prevent those cases from burdening the European system, the EuCrthR is in mortal danger. And one important power at the disposal of every single judge in every single Member State is the application of all relevant precedents of the EuCrthR, regardless of the respondent State, in order to ensure the proper application of the European Convention, in the proper and current interpretation given to it by the European Court. The only cases that should actually go to Strasbourg would be those where the national judges have carefully considered every aspect *and every precedent of the European Court* and have found no useful interpretation of the ECHR or only interpretations rendering a result that would be unjust or otherwise unsatisfactory. Only in such a case should the national judges turn to the European judges for advice and - potentially - for a further evolution of the understanding and interpretation of the ECHR.

3. Compliance

After we found a widespread lack of appreciation, and even ignorance, of the case-law of the European Court, we were hardly surprised to also find widespread problems with the execution of its decisions by the new Member States. Compliance has to be seen in two ways. First, this

⁷⁶ See, for example, the report by Avbelj and Černič on *Slovenia*, pp. 527 et seq., on pp. 535-536; as well as below, on p. ???.

section discusses the immediate execution of judgments of the European Court of Human Rights. If the Court finds a violation, the respondent State has to undue the violation.⁷⁷ Since actual restitution is often impossible, this is usually done by an award of financial compensation, commonly referred to as *just satisfaction*. Occasionally, specific measures are also required to achieve *restitutio in integrum*, for example “the re-opening of unfair criminal proceedings, the destruction of information gathered in breach of the right to privacy, the enforcement of an unenforced domestic judgment or the revocation of a deportation order issued despite a real risk of torture or other forms of ill-treatment in the country of destination.”⁷⁸

If a judgment finding a violation is not executed within reasonable time⁷⁹ and/or if there is no promising communication between the Committee of Ministers and the respondent Member State, the Committee may conclude that the Member State “refuses to abide by a final judgment in a case to which it is a party”⁸⁰ and refer the matter to the Court. Across all Member States, the number of cases under review by the Committee of Ministers for problems with execution has grown by 150% from around 4,000 to almost 10,000 between 2004 and 2010. Table 4 shows which countries are primarily responsible for this increase and how many judgments are remaining unexecuted as of 31 December 2010.

Table 4
Cases Pending Before the Committee of Ministers for Lack of Execution⁸¹

Country	No. of Judgments in Leading Cases	No. of Judgments in Clone, Repetitive, or Isolated Cases	Total No. of Judgments Remaining to Be Executed	% of All Judgments Remaining to Be Executed
Albania	14	7	21	0.23%
Andorra	1	1	2	0.02%
Armenia	12	11	23	0.25%
Austria	15	27	42	0.45%
Azerbaijan	21	10	31	0.33%
Belgium	16	35	51	0.55%
Bosnia Herzegovina	8	4	12	0.13%
Bulgaria	92	202	294	3.15%
Croatia	31	57	88	0.94%

⁷⁷ See Rule 6.2 of the *Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements*.

⁷⁸ See Council of Europe Committee of Ministers (ed.), *Supervision of the Execution of Judgments of the European Court of Human Rights - 4th Annual Report 2010*, Strasbourg 2011, at p. 16.

⁷⁹ Since implementation of the Interlaken Process (see below, p. ???), this is generally a term of 6 months.

⁸⁰ See Rule 11.1 of the *Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements*.

⁸¹ Data as of 31 December 2010; the information is based on Council of Europe Committee of Ministers (ed.), *Supervision of the Execution of Judgments of the European Court of Human Rights - 4th Annual Report 2010*, Strasbourg 2011, in particular Table II on p. 42.

Cyprus	7	25	32	0.34%
Czech Republic	12	69	81	0.87%
Denmark	1	2	3	0.03%
Estonia	3	2	5	0.05%
Finland	15	60	75	0.80%
France	36	31	67	0.72%
FYROM	15	57	72	0.77%
Georgia	23	6	29	0.31%
Germany	9	50	59	0.63%
Greece	49	317	366	3.92%
Hungary	12	168	180	1.93%
Iceland	4	0	4	0.04%
Ireland	3	4	7	0.08%
Italy	48	2,433	2,481	26.61%
Latvia	9	8	17	0.18%
Liechtenstein	0	1	1	0.01%
Lithuania	6	9	15	0.16%
Luxembourg	6	11	17	0.18%
Malta	9	5	14	0.15%
Moldova	53	114	167	1.79%
Monaco	1	0	1	0.01%
Montenegro	3	0	3	0.03%
Netherlands	7	3	10	0.11%
Norway	1	0	1	0.01%
Poland	64	667	731	7.84%
Portugal	13	66	79	0.85%
Romania	77	507	584	6.26%
Russia	88	874	962	10.32%
San Marino	2	2	4	0.04%
Serbia	14	42	56	0.60%
Slovakia	13	122	135	1.45%
Slovenia	6	213	219	2.35%
Spain	12	11	23	0.25%
Sweden	4	2	6	0.06%
Switzerland	6	2	8	0.09%
Turkey	134	1,413	1,547	16.59%
Ukraine	60	610	670	7.18%
United Kingdom	21	9	30	0.32%

Total	1,056	8,269	9,325	100.00%
Average	22.5	175.9	198.4	2.13%

The first thing that needs to be said about these numbers is that every single judgment which remains unexecuted by the Member States is one judgment too many. The shaded areas in the table highlight particularly dissatisfying numbers. As can be seen, with the exception of Italy, and to a lesser extent Greece and France, the problems are again concentrated in the new Member States in Central and Eastern Europe and the South Caucasus. Since the reputation of the judiciary in these countries is already tainted by accusations of incompetence and/or corruption because of too many unpersuasive and seemingly erratic judgments, the public will often look to Strasbourg for relief from a poorly functioning national system. Subsequent failure of rapid and complete execution of the judgments from Strasbourg necessarily exacerbates an already serious problem with the legitimacy of the entire legal and political system in the respective States.

There is a second dimension of compliance, however. The Committee of Ministers is not only obliged to supervise whether a respondent State has taken the necessary measures⁸² to provide *restitutio in integrum* to the individual. The rules also require an examination whether “general measures have been adopted, *preventing new violations* similar to that or those found or putting an end to continuing violations.”⁸³ This is about pro-active measures, in particular adjustments to existing legislation and/or judicial or administrative rules and practices, to bring those rules and practices in compliance with the requirements of the ECHR and thus, to prevent future violations of human rights and fundamental freedoms from happening in the first place. As has already been elaborated, these kind of pro-active measures should be taken *after every leading case decision of the European Court!* Only if and when all Member States systematically review the potential impact of all leading decisions of the EuCrTHR and make any necessary adjustments in their laws and practices right away, will all of Europe reap the full benefits of its human rights protection system. After all, the goal is not to have a functioning system of review in Strasbourg. The goal is not even to have a functioning system of review at the national level to dramatically reduce the number of cases that need to be brought to Strasbourg. The goal is not to have the violations of human rights and fundamental freedoms in the first place and not to have to call on any courts for help.

4. Frustration in the New Member States with the European Court of Human Rights

We have seen that the Central and Eastern European countries, in particular, are relying on the European Court in Strasbourg to fix what is going wrong at home, and have been slow to improve their domestic human rights situation, both in substantive terms and in terms of available and effective remedies. This, in turn, has led to a steep increase in cases being brought to the EuCrTHR, far exceeding the capacity of the Court to deal with them in a timely manner. It is also endangering the ability of the EuCrTHR to distinguish truly important cases, from the perspective

⁸² According to the principle of subsidiarity, the Member States have considerable discretion

⁸³ See Rule 6.2 (b)(ii) of the *Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements*.

of entire countries, societies, and legal systems, from those that are only important from the perspective of an individual applicant and/or are “clone” cases, largely identical to issues already decided by the Court.

The consequences are multiple. First, the backlog of the European Court has increased dramatically.⁸⁴ With an annual handling capacity around 40,000 cases and a total backlog of over 140,000 cases overall, the European Court would need almost four years to work off its backlog *even if there was not a single new case coming in*. Alas, new cases keep coming in, of course, and the number of new cases arriving in Strasbourg is now over 60,000 per year, exceeding the Court’s annual handling capacity of 40,000 cases by a total of 20,000 cases per year or 1,600 cases per month. As a result, the EuCrTHR is in a far worse situation than any of the national trial courts analyzed above in Table 3. Only a handful of cases are being decided by a final judgment within the first two to four years and hundreds of cases allocated to a judicial formation remain “awaiting first examination” after four to five years.⁸⁵ Unsurprisingly, the lengthy proceedings in Strasbourg are causing increasing frustration in the Member States,⁸⁶ not only because justice delayed is perceived as justice denied, but also because the Court is perceived as applying double standards when it convicts the Member States for their similarly lengthy proceedings. Finally, the fact that the overload of the European Court is also causing problems with the quality of its own judgment cannot be surprising and has already been discussed elsewhere.⁸⁷ The Court is very much aware of its own capacity problems, of course, and has taken a number of steps to address the problem. Some of those measures, however, have their own unintended side-effects.

Until recently, the most important way the Court was able to control its docket was by declaring large numbers of cases “manifestly ill-founded” according to Art. 35(3) ECHR. For lack of other tools for rejecting cases the Court did not consider worthy of its time, this tool had been rather overused, meaning the Court declared as “manifestly ill-founded” even many cases where a violation of individual rights was likely, simply because the underlying problem had already been solved and/or did not seem systemic and/or the damage to the individual seemed small.⁸⁸ As can easily be seen, this caused and causes much frustration in the Member States. In particular, if a petitioner and her lawyers genuinely believe in their case, have already spent years and large amounts of money before the national courts, and finally prepare elaborate briefs for their last chance at obtaining redemption from the EuCrTHR, the disappointment is great when

⁸⁴ In addition to the data presented above in Table 1, see the most recent analysis in European Court of Human Rights (ed.), *Analysis of Statistics 2010*, Strasbourg 2011, available online at http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38-85F4-A93113A78F10/0/Analysis_of_statistics_2010.pdf.

⁸⁵ Ibid., in particular Charts 9 and 10 on p. 11.

⁸⁶ This will be revisited below, in the final part, when we discuss the declining interest in European human rights law in the new Member States.

⁸⁷ See, in particular, Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, European Law Journal 2003, Vol. 9, No. 3, pp. 288-315.

⁸⁸ Examples can be found in Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, previous note.

the answer from Strasbourg, after some two years or so, comes in a single line: “manifestly ill-founded”.⁸⁹

After entry into force of Protocol No. 14 in June 2010, the European Court now has another justification for declaring a case inadmissible. Protocol No. 14 added to Art. 35 the provision that the Court shall declare inadmissible any individual application if it considers that “the applicant has not suffered a significant disadvantage”. Whether this will make the rejections more acceptable at the national level remains to be seen.

Even if the Court does find a violation, however, it has pursued a policy of keeping the level of compensation very low.⁹⁰ Presumably, this is done for two reasons. On the one hand, low damage awards should make it easier for the respective State to execute the judgment and pay the award to the victim(s). Arguably, much higher awards, like we know them from American and increasingly also West European tort litigation, could be a further disincentive regarding compliance by the Member States. On the other hand, it is fairly clear that the Court is also keeping the awards on the low side to reduce the incentive for national attorneys to bring cases all the way to Strasbourg. In particular, the Court does not want to facilitate a business model where it could be a lucrative practice area to litigate in Strasbourg. The drawback of this strategy, however, is a situation where the Member States still have plenty of problems with execution,⁹¹ and the national practitioners are frustrated with the European Court and disillusioned with the remedy or remedies it is supposed to provide.⁹² While it may be legitimate not to encourage profiteering from human rights appeals to Strasbourg, the Court has unintentionally also taken away one of the incentives for practitioners to become knowledgeable about European human rights law.

II. Recommendations

If the large majority of cases coming to the European Court of Human Rights were about individual cases where national substantive protection *and* national remedies exceptionally failed to provide the required protection, the system would be in balance, the docket would be short, and human rights would be well protected under the umbrella of the Council of Europe. However, reality is not like this. As we have shown, there are patterns of systemic failure on the national level, substantive *and* remedial problems the Member States seem to be unable or unwilling to fix. In combination with the systemic overload of the EuCrHR, a less than ideal situation is increasingly becoming unacceptable. The instruments needed to address these problems are

⁸⁹ More than 90% of all applications are declared inadmissible; however, this includes not only *prima facie* valid applications but also applications which are formally or otherwise lacking, including failure to exhaust national remedies.

⁹⁰ This is criticized in almost every report in this book. For an example see the report by Värk and Ginter on *Estonia*, pp. 183 et seq., on p. 193.

⁹¹ See above, in particular pp. ???.

⁹² This is specifically mentioned in several reports. See, for example, Värk and Ginter in the report on *Estonia*, on p. 195, and Burkov in the report on *Russia*, on pp. 439-440. See also Pavlovic in the report on *Serbia*, who provides an example of a damage award of all of 662 €, which would seem to cover about two hours of attorney’s work; at p. 488.

beyond the reach of the European Court, however. Some steps have been taken but more needs to be done.

Member States experiencing repeated convictions at the hands of the European Court in parallel cases, in particular if this occurs over a period of several years, obviously do have a systemic problem. Unless they make an equally systemic - and ultimately successful - effort at fixing the problem and terminating the human rights violation on the national level, they withdraw a disproportionate amount of judicial resources from the European level, without ever coming to terms with the underlying issues. For example, Italy obviously has issues with the length of judicial proceedings. The same is true for a number of countries in Central and Eastern Europe. The reasons for this have probably been identified⁹³ but measures to address the problem have either not been taken at all or have been limited to minor adjustments to procedures and incremental changes to institutions, none of which have managed to contain, let alone resolve the problem. Unless the Member States change their approach and finally begin to think and take action outside the box of established structures and patterns, it would almost be more honest and decent to renounce the European Convention and admit that the respective country is not really willing and able to protect the human rights and fundamental freedoms of its citizens at the required level.

When a private firm is falling behind in competitiveness, efficiency, and/or the execution of decisions and strategies, they usually hire a team of management consultants to make the proposals that insiders are unable to make, either because they are too track dependent and cannot think outside the established patterns, or because of political reasons. Is it really asking too much for a country like Italy to bring in an international expert commission to examine its courts and court procedures and to come up with whatever legislative, institutional, and procedural proposals necessary to ensure that in the future Italian courts and judges will be willing and able to function effectively and efficiently?⁹⁴ Or if national court judgments in Slovenia, Croatia, and other countries in the region often cannot be executed for years and years, is it really asking too much for the respective governments to appoint an (international) expert commission to identify the problems and come up with the necessary solutions to put an end to them? If management has

⁹³ For the Eastern European countries, Channell explains how private attorneys, in cahoots with the judges themselves, learned over decades how to blunt the impact of the resented rule of Communist parties by bogging down court procedures. "Failures to appear, to produce evidence, or to meet deadlines generally result in a grant of extensions without sanctions. As a result, even simple cases can be tied up for years in court." See Wade Channell, *Lessons Not Learned: Problems With Western Aid for Law Reform in Postcommunist Countries*, Carnegie Endowment Paper No. 57, Rule of Law Series, Washington, May 2005, at pp. 10-11. Since the procedural rules have largely stayed in place and the personnel is either the same or has at least been trained by the old masters of protraction, it is not surprising that modern procedures face similar obstacles although the goal is now the representation of particular interests against a democratic government or even against another private party.

⁹⁴ Indeed, in its *Explanatory Report to the Agreement of Madrid* of 12 May 2009 (CETS No. 194) on Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (available at <http://conventions.coe.int/Treaty/EN/reports/Html/194.htm>), the Committee of Ministers specifically recalls that "States have a duty to monitor the conformity of their legislation and administrative practice with the requirements of the Convention and the Court's case-law. In order to achieve this, *they may have the assistance of outside bodies*" (see para. 15 of the Report, emphasis added). See also Recommendation Rec(2004)5 of the Committee of Ministers to Member States on the Verification of the Compatibility of Draft Laws, Existing Laws and Administrative Practices with the Standards Laid Down in the European Convention on Human Rights, available at <https://wcd.coe.int/ViewDoc.jsp?id=743297>.

an obligation to its shareholders, would not government owe even more to its citizens and rights' holders? The European Court can only help with identification of the problems by bringing them from the national level to the attention of an international audience.⁹⁵ The original hope that this naming and shaming, in combination with the onus of providing redress to individual applicants, would induce the Member States to change, seems increasingly out of place.

While real remedies must be provided by the Member States, there are things that could be done or done better at the European level. For one, the Court could more clearly identify those judgments in "leading cases" that should be translated into all Member State languages and should be taken into consideration as *erga omnes* precedents by all lawyers everywhere.⁹⁶ Although the Committee of Ministers does not have the authority to adopt binding decisions to this effect, at the very least its resolutions should be clear and unambiguous so that at least those Member States that care about their adherence to the European Convention *as interpreted by the European Court*, know what is expected of them.⁹⁷ In this respect, it is not helpful that the title of "Recommendation Rec(2004)5 of the Committee of Ministers to Member States on the Verification of the Compatibility of Draft Laws, Existing Laws and Administrative Practices with the Standards Laid Down in the European Convention on Human Rights" does not continue "and the Case-law of the European Court of Human Rights." True, the text of Rec(2004)5 does recommend that "Member States [...] ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention *in the light of the case-law of the Court*."⁹⁸ If only the Committee had said "in light of the *entire* case-law of the Court"!

⁹⁵ And contrary to the "invitation" that the Court should "identify [...] what it considers to be an underlying systemic problem and the source of that problem [...] so as to assist states in finding the appropriate solution..." in Resolution Res(2004)3 of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem (<https://wcd.coe.int/ViewDoc.jsp?id=743257&Site=COE>), the already hopelessly overloaded Court is not well equipped to search for the causes in cases where it now just sees the symptoms.

⁹⁶ The Court has already been invited to "indicate [...] the judgments and decisions *which constitute significant developments of its case-law*" (emphasis added) by Resolution Res(2002)58 of the Committee of Ministers on the Publication and Dissemination of the Case-law of the European Court of Human Rights, which was adopted on 18 December 2002, almost 10 years ago (see <https://wcd.coe.int/ViewDoc.jsp?id=331559>). Unfortunately, neither the Committee of Ministers nor the Court of Human Rights have made it unambiguously clear that *all* "leading cases" - regardless of the respondent State - should be viewed as significant developments of the case-law and, therefore, are in essence binding *erga omnes*, and *must be translated* by all Member States into their respective languages, and included in the training of their law students, private practitioners, prosecutors, judges, law enforcement officers, and other relevant professionals.

⁹⁷ In Recommendation Rec(2002)13 of the Committee of Ministers to Member States on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-law of the European Court of Human Rights the Member States are told that "it is important" to translate "judgments and decisions which constitute relevant case-law developments" into their respective languages. Besides being non-binding, this Recommendation is also unclear. First, it leaves open the question what is *relevant* case-law. Second, it misses the opportunity to clarify that relevant case-law can also emanate *from decisions taken against other Member States*. See also the discussion in note ??? above, and the associated text.

⁹⁸ See <https://wcd.coe.int/ViewDoc.jsp?id=743297> (emphasis added). Interestingly, the recommendations regarding existing laws and administrative practices *do not make a parallel reference to the case-law of the Court*. One cannot but wonder whether this is just sloppy drafting or whether the references were omitted on purpose.

Second, the Council of Europe should be more specific in its recommendations to the Member States regarding university education, as well as initial and continuing education for legal professionals. The set of recommendations adopted in 2004 and discussed on the preceding pages has obviously not made even a dent into the upward trajectory of cases brought to the EuCrthR for substantive and procedural violations.⁹⁹ The time has come for clearer language, specific targets, and the introduction of national reporting systems. If Member States have to show how they are implementing educational and training programs to ensure functional knowledge of the European human rights protection system on behalf of all lawyers and all other relevant professionals, it will quickly become evident what does and what does not work. Similarly, if they have to report how they are monitoring the case-law of the European Court for any necessary changes on the national level, it will become clear who is and who is not making an effort at preventing human rights violations before they even happen. A subsequent step could then be the introduction of international expert commissions with a mandate of assisting the respective Member States with the reform of their legislation, institutions, and/or procedural practices. One of the measures the commissions are likely going to suggest are the above-mentioned clauses for the national constitutions and important legislative documents, requiring all civil servants, all legal professionals, and indeed all citizens, to respect human rights and fundamental freedoms as enshrined in the ECHR and as interpreted by the EuCrthR in all they do.

While these measures take time to adopt and even more time to show results, the Council of Europe can and should do more to address the problems at the European level. With regard to the execution of the judgments of the European Court by the Member States, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, finally entered into force in June 2010. Among other changes,¹⁰⁰ the Protocol introduces a procedure whereby the Committee of Ministers, in charge of supervising the execution of the judgments of the Court, can bring proceedings before a Grand Chamber of the Court if a Member State refuses to implement an earlier judgment. The effectiveness of this change must be doubted. It reminds us too much of Arts. 258 and 260 of the Treaty on the Functioning of the European Union (TFEU). The EU also has the problem that judgments of its Court of Justice against Member States are first and foremost declaratory judgments and require the cooperation of the Member States for implementation. Like in Protocol 14, the EU Commission has the power to drag a Member State a second time before the same Court. While the initial judgment found a breach of the law, the second judgment is bound to find a breach of the obligation to execute the earlier judgment of the Court. Like the first

⁹⁹ This is true for all Recommendations in the package, in particular for the new Member States in Central and Eastern Europe. However, the situation in the old Member States has not improved either. To give but one example, although Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies (<https://wcd.coe.int/ViewDoc.jsp?id=743317>) specifically asks that Member States address the problem of excessive length of judicial proceedings - and does so in several places - the number of cases coming to the EuCrthR, including those from Italy, continues to go up unabated.

¹⁰⁰ For a complete presentation of the changes see the *Explanatory Report to the Agreement of Madrid* of 12 May 2009 (CETS No. 194) on Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, available at <http://conventions.coe.int/Treaty/EN/reports/Html/194.htm>, in particular paras. 34-47.

judgment, that will be a declaratory judgment, however. Both of them rely on voluntary cooperation, ideally nudged ahead by naming and shaming. Contrary to the EuCrthR, the European Court of Justice even has the possibility, if so requested by the EU Commission, to condemn the reluctant Member State to the payment of a lump sum or periodic penalty payment. Unfortunately, the EU system does not work and neither will the Council of Europe system. Declaratory judgments remain declaratory judgments, with or without financial penalties. As long as the supra- or international bodies do not have executive arms to enforce their decisions, they depend on the Member States to do so. And if a Member State refuses to implement a judgment in spite of pressure by the Committee of Ministers, we can simply not see why it should suddenly comply only because of a second judgment from the same Court that it has already been ignoring. Moreover, the procedure introduced by Protocol No. 14 may well prove to be counterproductive. Not only will it add to the workload of the EuCrthR, it will also add to the number of its judgments in general, and the number of its judgments that remain unimplemented in particular. Like a child that becomes tone-deaf to the constant nagging of a parent, many Member States have become tone-deaf to the convictions coming out of Strasbourg. As our reporters have shown time and again, the very first cases going to Strasbourg and coming back with a guilty verdict did cause significant media hype and professional discussion in the new Member States. By now, however, being found wanting in Strasbourg has become normal, any effect of naming and shaming has worn off, and a few cases or judgments more or less really don't make a difference in the eye of the public. There is a reason why every self-respecting lawyer in the United States will be aware of the latest cases adopted by the Supreme Court in his or her practice area, while this kind of awareness has long become the prerogative of a small number of experts in the European Union and in the European system of human rights protection: The US Supreme Court limits itself to some 90 judgments a year and it certainly does not adopt second judgments to confirm that it was serious the first time around.

With regard to the monetary damages awarded by the EuCrthR, we believe that the strategy of keeping those small to facilitate execution and discourage profiteering has failed on the first goal and is unfair on the second. Given the fact that successful applicants have typically fought for many years for their final victory in Strasbourg and have overcome many hurdles along the way of exhaustion of national remedies and extremely strict admission standards in Strasbourg, their final remedy has to be more than one of moral victory. At the very least, just satisfaction must also cover reasonable compensation for the amount of time and money expended on the litigation itself. It is simply not fair to subject the interests of the victims of genuine human rights violations in receiving compensation to the interests of the perpetrator States in balancing their budgets. Arguably, such a strategy is itself a violation of the ECHR which, after all, mandates *restitutio in integrum*. Finally, unless private attorneys can earn a reasonable salary with work in human rights, they will soon enough be asking themselves why they should study the field in the first place and go to the significant trouble of staying up-to-date on the case-law and other developments on the European and international level.

Here is, however, an opportunity to learn from the European Union and the practice of the European Court of Justice in Luxembourg. While the introduction of the lump sum or periodic penalty awards under Art. 260 TFEU was more of a symbolic act than an actual remedy for unimplemented judgments under Art. 258, the introduction of Member State liability on the

national level via the so-called Francovich decision¹⁰¹ had a much greater impact and actually lead to the EU Member States taking their European obligations considerably more serious. This begs the question whether the EuCrHR could stipulate, for example in those cases where it identifies or suspects systemic problems, that anybody whose rights are violated on the national level should be entitled to full and effective damages directly from the national courts. At least to the extent that well intended national judges would pick up the invitation, this might become a powerful tool to cut down on the number of clone cases, and ultimately provide the incentive for the respective Member State to address and fix the systemic problem.

D. Other Influences and Developments and Recommendations for the Future

I. Findings

One other surprising discovery of several of the country reporters is worth noting. What was somewhat to be expected is the fact that interest in the European Convention on Human Rights among the general public and even among non-specialized lawyers started fading rather quickly after strong initial interest around the time of ratification. What was not to be expected, by contrast, and is entirely unacceptable, is an indication that after good efforts and good improvements in the first couple of years after ratification, the human rights record of several Member States does not seem to be improving in recent years; indeed some seem to be sliding back.¹⁰²

These findings are confirmed in other sources, for example the Economic Freedom of the World Index.¹⁰³ A selection of the dataset is reproduced in the table below. What this data shows can be summarized as follows: i) Among the five main categories that are fed into the “Average” (all 42 categories),¹⁰⁴ the “Legal Structure and Security of Property Rights” is typically the lowest. Its subcategories “Judicial Independence”, “Impartiality of Courts”, “Protection of

¹⁰¹ See Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Others v Italian Republic*, judgment of the European Court of Justice of 19 November 1991, European Court Reports 1991 I-5357. The judgment can be found in every casebook on EU law, for example in Frank Emmert, *European Union Law - Cases*, 2nd ed., Utrecht 2007, at p. 66.

¹⁰² To this effect, see the reports by Gadirov on *Azerbaijan*, pp. 75 et seq., Burkov on *Russia*, pp. 425 et seq., and Meleshevich and Khvorostyankina on *Ukraine*, pp. 557 et seq., in their final chapters respectively. See also note ??? above.

¹⁰³ James Gwartney, Robert Lawson & Joshua Hall, *Economic Freedom of the World: 2011 Annual Report*, Montreal et al, 2011.

¹⁰⁴ Ibid. These five categories are 1) Size of Government (with subcategories Government Consumption, Transfers and Subsidies, Government Enterprises and Investment, and Top Marginal Tax Rate); 2) Legal Structures and Security of Property Rights (with the subcategories reflected in the table plus Military Interference in Rule of Law and Politics); 3) Access to Sound Money (with subcategories Money Growth, Standard Deviation of Inflation, Inflation - most recent year, and Freedom to Own Foreign Currency Bank Accounts); 4) Freedom to Trade Internationally (with subcategories Taxes on International Trade, Regulatory Trade Barriers, Size of Trade Sector Relative to Expected, Black-Market Exchange Rates, and International Capital Market Controls); and 5) Regulation of Credit, Labor, and Business (with subcategories Credit Market Regulations, Labor Market Regulations, and Business Regulations). Most subcategories are examined for several indicators - 42 in total - providing a reasonably good overall assessment of economic freedom in the respective countries. The relevance and/or accuracy of individual data points can be disputed but what remains is the fact that countries with better scores are consistently outperforming countries with lower scores when it comes to important indicators of well-being, such as economic growth, per capita income, per capita income of the poorest 10% of the population, life expectancy, etc.

Property Rights”, overall “Integrity of the Legal System”, and “Enforceability of Contracts” are usually below the overall average in the entire region. This means that problems with the legal system and in particular the quality of the judiciary are holding back the economic development of the countries in the region we have examined. ii) What is even more troubling is the fact that many countries in the region - while making gains overall - have experienced a slide in “Judicial Independence” and “Impartiality of Courts” from 2000 to 2009. Instead of making improvements, the quality of the judiciary remains problematic and arguably is falling behind, at least in comparison to other factors of (economic) development.

Table 5
Economic Freedom of the World Index re Judicial Remedies

Country	Average (all 42 categories) 2000 - 2009		Judicial Independence 2000 - 2009		Impartiality of Courts 2000 - 2009		Protection of Property Rights 2000 - 2009		Integrity of Legal System 2000 - 2009		Enforceability of Contracts 2005* - 2009	
Albania	6.04	7.54	N/A	3.77	4.31	4.70	N/A	3.91	3.33	4.17	5.20	5.17
Armenia	N/A	N/A	N/A	2.71	N/A	3.40	N/A	4.45	N/A	5.00	7.20	7.16
Azerbaijan	N/A	N/A	N/A	3.86	N/A	4.19	N/A	4.76	N/A	5.83	7.30	7.55
Bulgaria	5.27	7.21	4.18	3.26	4.51	2.93	3.35	3.72	6.67	4.17	4.80	4.77
Croatia	6.10	6.49	N/A	3.53	6.07	2.79	N/A	4.93	8.33	7.50	5.40	5.40
Czech Republic	6.48	6.82	6.17	4.96	3.58	3.70	4.54	5.65	8.33	8.33	3.50	3.85
Estonia	7.36	7.45	N/A	7.43	6.94	5.39	5.00	7.22	6.67	6.67	6.10	5.66
Georgia	N/A	N/A	N/A	3.22	N/A	3.68	N/A	3.74	N/A	N/A	6.50	6.50
Hungary	6.55	7.47	6.51	5.06	6.35	3.45	5.53	5.59	6.67	6.67	7.20	6.58
Latvia	6.62	6.73	N/A	4.44	6.20	3.07	3.82	5.45	8.33	8.33	7.40	6.73
Lithuania	6.28	7.02	N/A	4.32	6.07	3.86	3.20	5.65	8.33	6.67	7.40	6.96
Moldova	N/A	N/A	N/A	2.12	N/A	3.35	N/A	3.86	N/A	7.50	6.70	6.44
Poland	6.19	6.90	5.34	5.56	5.85	3.48	4.63	5.98	6.67	7.50	4.30	4.27
Romania	5.19	6.93	N/A	4.12	5.52	3.20	4.10	5.29	6.67	6.67	5.20	4.85
Russia	5.27	6.50	3.51	2.87	5.18	3.13	1.88	3.23	5.00	6.67	7.50	7.53
Serbia	N/A	N/A	N/A	2.55	N/A	2.71	N/A	3.68	N/A	5.83	4.00	3.92
Slovakia	6.16	7.53	5.01	3.17	5.18	2.43	4.67	5.41	6.67	6.67	4.60	4.38
Slovenia	6.36	5.41	N/A	5.41	7.14	3.96	5.37	6.04	8.33	7.50	3.90	4.23
Ukraine	4.70	5.69	3.17	1.66	3.51	2.11	2.38	2.66	6.67	6.67	5.30	5.34
Switzerland**	8.39	7.93	8.68	8.98	8.52	7.35	9.17	9.02	10.00	8.33	6.00	5.86

* Data was not collected before 2005.

** For comparison; Switzerland was the highest ranked European country in 2009, and no. 4 in the World overall.

Similarly disappointing results can be found in the 2010 Corruption Perceptions Index, the benchmark on public sector corruption compiled annually by Transparency International. The most recent report covers 178 countries and the following table shows how the countries surveyed in our study are faring. First, the low overall scores are disappointing because one would hope that Member States of the Council of Europe who are subject to the ECHR would do better. Second, and even more disheartening, a number of countries are moving in the wrong direction, becoming more corrupt instead of less corrupt. Countries with declining scores, i.e. increasing perception of corruption, are shaded in the table.

Table 6
Transparency International Corruption Perception Index

Country	Rank		Score*	
	2005 (out of 158)	2010 (out of 178)	2005	2010
Albania	126	87	2.4	3.3
Armenia	88	123	2.9	2.6
Azerbaijan	137	134	2.2	2.4
Bulgaria	55	73	4.0	3.6
Croatia	70	62	3.4	4.1
Czech Republic	47	53	4.3	4.6
Estonia	27	26	6.4	6.5
Georgia	130	68	2.3	3.8
Hungary	40	50	5.0	4.7
Kosovo	N/A	110	N/A	2.8
Latvia	51	59	4.2	4.3
Lithuania	44	46	4.8	5.0
Moldova	88	105	2.9	2.9
Poland	70	41	3.4	5.3
Romania ¹⁰⁵	85	69	3.0	3.7
Russia	126	154	2.4	2.1
Serbia	97**	78	2.8**	3.5
Slovakia	47	59	4.3	4.3
Slovenia	31	27	6.1	6.4
Ukraine	107	134	2.6	2.4
Average of Western 15 EU Members***		23		7.32

¹⁰⁵ Specifically regarding Romania see also Peter W. Schroth and Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations: Romania in Comparative Perspective*, American Journal of Comparative Law 2004, Vol. 52, pp. 625-711.

* Scores range from 0.0 (most corrupt) to 10.0 (very clean). In 2010, the highest ranked country was Denmark, with a score of 9.3 and the lowest ranked country was Somalia, with a score of 1.1.

** In 2005, the survey still applied to “Serbia and Montenegro” jointly.

*** This includes Denmark (1 / 9.3), Finland (4 / 9.2), Sweden (4 / 9.2), Netherlands (7 / 8.8), Luxembourg (11 / 8.5), Ireland (14 / 8.0), Austria (15 / 7.9), Germany (15 / 7.9), United Kingdom (20 / 7.6), Belgium (22 / 7.1), France (25 / 6.8), Spain (30 / 6.1), Portugal (32 / 6.0), Italy (67 / 3.9), and Greece (78 / 3.5). Again, the methodology of TI can be questioned but it is interesting that in the current Euro crisis, there is a strict correlation between low performance on the TI index and low performance in financial stability and credibility.

What all these findings show, above all, are *missed opportunities*. How can it be that countries are sliding on the most important indices for quality of the judiciary and are becoming more corrupt, rather than less, although they have been members of the Council of Europe, and subject to the European Convention on Human Rights and Fundamental Freedoms and supervision by the EuCrTHR for many years? What is the impact of the ECHR in these countries, if any? More importantly, what can be done to improve the situation with regard to clean government, rule of law, and effective protection of human rights?

II. Recommendations

This book and these Conclusions contain a plethora of suggestions and recommendations for the improvement of the human rights situation in the new Member States and the improvement of the national remedies so that fewer violations will occur and even fewer will need to be brought before the European Court of Human Rights. At the very heart of the system, however, are the prosecutors and judges, the police and law enforcement officials, and the administrative and other civil servants, of these new Member States. The unsatisfactory situation reflected in this volume is a reflection of the unfinished reform of the legal profession, beginning with legal education at the university level, and continuing through the initial and continuing education of the lawyers on all levels. And as long as (re-)training will be measured in hours x participants, without better efforts at measuring quality and effectiveness of instruction, and at examining results in accordance with international best practice standards, this is hardly going to change.

In the meantime, new elites are becoming entrenched in the new Member States and are becoming good and better at undermining the rule of law, and the effective protection of human rights of others, for personal gain. Both the Council of Europe and its old Member States, and the people in the new Member States, deserve better than this.

Annex: The Questionnaire Initially Provided to the National Experts

A. The Constitutional System and the Position of International Agreements in General and the European Convention on Human Rights and Fundamental Freedoms (ECHR) in Particular in the National Legal Order

1) What is the position of the Supreme or Constitutional Court in the legal system of your country, in particular in relation to the Legislature and the Executive? Has the Supreme or Constitutional Court taken an active role in recent years in overseeing the other branches of Government or has it been rather deferential to them? Does the Court's behavior vary based on the subject matter of the cases (e.g., property, commerce, human rights)? Provide examples, if possible.

2) When and how was the European Convention ratified and incorporated into your national legal system? What is generally the status of international agreements in your national legal order?

3) Was the Constitution changed in connection with the ratification of the ECHR? What are the provisions in your Constitution that guarantee human rights and fundamental freedoms? To what extent do they mirror the ECHR and/or refer to it, i.e. how does the language in your Constitution compare to the language in the ECHR? Please provide official translations into English of key articles in our Constitution, where possible.

4) Which other legislative changes were made in connection with the ratification of the ECHR? Were changes made in the Criminal Code? Criminal Procedure Code? Civil Procedure Code? Family law? Press and media laws? Anti-discrimination laws? Other laws dealing with the courts, the police, the administrative procedure? Do these laws nowadays mandate observance of the ECHR explicitly or implicitly? Please provide sources and examples, where possible. Is there a government organ implementing or coordinating the implementation of anti-discrimination laws?

B. Awareness of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its Reception by the Legal Community

5) What is the level of awareness and substantive knowledge of the ECHR among prosecutors and judges? Did the prosecutors and judges obtain training before or after the ratification of the ECHR? If so, how much training was provided by whom and for whom?

6) Have there been complaints about corruption or other shortcomings regarding the independence of the judiciary in your country? How have such complaints been addressed, if at all? Please provide examples, where possible.

7) What is the level of awareness and substantive knowledge of the ECHR among private attorneys? Did the members of the bar receive optional or mandatory training before or after the ratification of the ECHR? If so, how much training was provided and by whom? Do you have continuing education (CLE) requirements for the members of your bar?

8) Are there NGOs promoting awareness and/or assisting victims of human rights abuses in bringing claims before national courts that make reference to the ECHR? Provide some examples of cases, if possible.

9) Describe course offerings at the law schools in your country regarding human rights in general and the ECHR in particular. Give some details about the subjects offered, the level, the number of hours, whether the courses are mandatory or elective, how many students are taking them, etc.

C. The Case Law of the European Court of Human Rights (EuCrtHR) and its Influence in the National Legal Order

10) Give examples of cases where the ECHR has been discussed in proceedings before your courts. Cite cases, if possible, and explain who complained about what and the outcome of the litigation.

11) Describe typical and/or significant cases / judgments of national courts applying national human rights law and/or the ECHR, as well as cases / judgments that fail to make reference to national human rights law and/or the ECHR although they should have. If possible, provide positive and negative examples of application, non-application, and misapplication of the ECHR.

12) What are the domestic legal remedies available to individuals who claim that their human rights or fundamental freedoms were violated by public authorities? What does it take to exhaust local remedies and open a way to the European Court in Strasbourg?

13) Describe the most important cases brought against your country to Strasbourg and in particular what happened in your country during or immediately after the proceedings in Strasbourg. To what extent have these cases received much or any public attention and was there a discussion of the underlying issues in the national media and/or among your lawyers, judges, and/or administrative officials?

14) Are there important cases pending in Strasbourg against your country? To what extent is there currently an awareness of these cases or even a public discussion of the issues in your country?

15) What happened in your country after cases described under 11 and 13 were adjudicated in Strasbourg? Please explain whether the underlying issues have been resolved (for example whether significant and/or successful steps have been taken to reduce the average length of criminal proceedings), and whether the victims of human rights violations have actually received compensation and in what amount?

16) On the basis of the foregoing discussion, please identify two or three rights or freedoms that have become particularly important in your country and provide examples and references!

D. Analysis of Other (Possible) Influences and Developments Resulting from the ECHR Process and Recommendations for the Future

17) On the basis of representative polls or interviews or conversations with judges, prosecutors, attorneys, and NGO lawyers, try to analyze the practical impact of the ECHR in your national legal system. To what extent is the case-law of the European Court, in particular also the judgments against other member states, of interest to your lawyers and gets discussed among legal professionals in your country? Has the legal culture – at least in certain areas – actually changed as a consequence of the ratification of the ECHR? Provide examples, where possible.

18) Is there an interest or need that seems underserved among your legal professionals, for example did you hear that judges, prosecutors, attorneys, administrative officials, NGO lawyers, or other legal professionals would like to receive more literature and/or training on subjects related to the ECHR but there are no or not enough suitable offerings?

19) Can you identify trends regarding the appreciation of the ECHR in your country? Is there a growing interest among students, judges, prosecutors, attorneys, administrative officials, NGO lawyers, or other legal professionals? Or has the general interest rather faded after initial attention given around the time of the ratification of the ECHR?

20) Are you aware of any cooperation of legal professionals in your country with their counterparts in other CEECs or in any other member countries of the Council of Europe? Provide examples, where possible.

21) Finally, please try to provide any suggestions or recommendations how the impact of the ECHR in your legal system could be enhanced for the benefit of individuals and society at large!