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# Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter

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## Abstract

*Over the past couple of years, international law and international relations scholarship has shifted its focus from the question of whether human rights treaties bring any state-level improvements at all to investigations in the domestic context of the factors and dynamics influencing state compliance. In this direction, and focusing on the European Court of Human Rights, this study inquires into the factors that account for variable patterns of state compliance with its judgments. Why do national authorities in some states adopt a more prompt and responsive attitude in implementing these judgments, in contrast to other states that procrastinate or respond reluctantly? On the basis of a large-N study of the Strasbourg Court's judgments and a comparison across nine states, this article argues that variation in state implementation performance is closely linked to the overall legal infrastructure capacity and government effectiveness of a state. When such capacity and effectiveness are high and diffused, the adverse judgments of the Strasbourg Court are unlikely to be obstructed or ignored, even when the government, political elites, or other actors are reluctant and not in favour of substantive remedies.*

Since World War II, a variety of human rights treaties have sprung up around the world, with a large number of states ratifying them to demonstrate their newly

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assumed or ongoing commitment to democracy.<sup>1</sup> A burgeoning literature in international relations and comparative politics has debated whether human rights treaties have, in fact, any demonstrable effect in improving state practices.<sup>2</sup> Some studies challenge their ability to do so, especially in repressive regimes, where they are seen to be needed most.<sup>3</sup> Indeed, ratification of a human rights treaty may be only ‘loosely coupled’ with actual state performance,<sup>4</sup> or it may be accompanied by continuing gaps or even increased violations by states.<sup>5</sup> Others, though, counter that a treaty-based commitment to protect human rights sets in transnational and domestic dynamics with positive consequences for national level practices and rights protection.<sup>6</sup> The most highly developed treaty-based regimes, like the European Convention on Human Rights (the ECHR) and the Inter-American Convention of Human Rights (the IACHR), provide for the right of individuals to bring complaints against states. Established tribunals adjudicate on these claims, and when violations are detected, the respective contracting state(s) have an obligation to comply with their judgments.

Domestic implementation of human rights court rulings is an especially demanding and obtrusive kind of state observance of international norms. It involves the efforts of national authorities to redress detected violations and to bring existing laws and practices in line with the underlying standards and principles. In this process, the violating states, including established democracies, display various forms and degrees of compliance with international norms and judicial rulings, raising significant questions about the factors accounting for such differences.<sup>7</sup> The extent to which states successfully and expeditiously implement human rights judgments is crucial for the credibility and legitimacy of the international protection and adjudicatory mechanisms that issue them. Over the past couple of years, academic scholarship has shifted its focus from the question whether human rights treaties bring any state-level improvements at all, to investigations in the domestic context of the factors and dynamics that account for differences in state compliance. In this direction, and through a large-N study focusing on the European Court of Human Rights’ (ECtHR) judgments across nine states, this article explores the patterns of variation in human

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<sup>2</sup> Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 111 *Yale LJ* (2002) 1935.

<sup>3</sup> Hafner-Burton and Tsutsui, ‘Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most’, 44 *J Peace Research* (2007) 407.

<sup>4</sup> Clark, ‘Technical and Institutional States: Loose Coupling in the Human Rights Sector of the World Polity’, 51 *Sociological Q* (2010) 65.

<sup>5</sup> S. Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (2007).

<sup>6</sup> Goodman and Jinks, ‘Measuring the Effects of Human Rights Treaties’, 14 *EJIL* (2003) 171; Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’, 49 *J Conflict Resolution* (2005) 925; Simmons, ‘Treaty Compliance and Violation’, 13 *Annual Rev Political Science* (2010) 273.

<sup>7</sup> Koh, ‘The 1998 Frankel Lecture: Bringing International Law Home’, 35 *Houston L Rev* (1999) 623.

rights compliance. It also inquires into the factors that influence how expeditiously states implement the relevant Court judgments.

From a perspective focusing on state–society relations, scholars argue that implementation of human rights (and of international law more broadly) is influenced by interested non-state actors, who mobilize treaty norms to legitimate their claims, and raise public awareness and the costs of non-compliance for governments.<sup>8</sup> State compliance may vary across different rights and issue areas, depending on the social mobilization that can be rallied, the extent to which a right is centrally administered, and thus easy to observe, or whether national security claims can be used to justify non-compliance with a norm.<sup>9</sup> Alternatively, compliance is arguably influenced by domestic constituencies, including potential victims of non-compliance, who, depending on their informational endowment and electoral leverage, are able to exert variable degrees of pressure *vis-à-vis* their governments.<sup>10</sup> A management-related perspective, on the other hand, disagrees that the cardinal sources of (non-)compliance are to be found in the wilful disobedience of national governments, or in the pressures exerted by interested social actors. Instead, it is seen to result from the ambiguity of norms and the capacity limitations of domestic institutions and actors to abide by their treaty-based obligations.<sup>11</sup>

Domestic implementation of international human rights rulings is a multi-faceted and inherently political process. It involves different national institutions and actors – executive, legislative, judicial, as well as societal – with divergent preferences and priorities, who may be in conflict over whether and how to implement human rights rulings.<sup>12</sup> Recent studies argue that as the gate-keeper *vis-à-vis* international institutions and courts, the executive has a powerful, albeit not always decisive, role in facilitating or conversely hampering domestic implementation of human rights rulings.<sup>13</sup> Without disputing the centrality of the executive, other studies see that national justice systems are equally important interlocutors of international courts, yet less likely to support domestic implementation of human rights. For example, Huneeus argues that national judges and prosecutors have on the whole displayed resistance to compliance with the rulings of the IACtHR.<sup>14</sup> Placing less emphasis on the motivation and purposeful actions of the main institutional actors, other studies are interested in the institutional and political arrangements that are best able to generate and sustain

<sup>8</sup> B. Simmons, *Mobilizing for Human Rights – International Law in Domestic Politics* (2009), at 372–373; T. Risse, S.C. Ropp, and K. Sikkink (eds), *The Power of Human Rights – International Norms and Domestic Change* (1999).

<sup>9</sup> Simmons, *supra* note 8, at 357–358.

<sup>10</sup> X. Dai, *International Institutions and National Policies* (2007).

<sup>11</sup> A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), at 9–17.

<sup>12</sup> Hillebrecht, ‘The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System’, 34 *Hmn Rts Q* (2012) 959.

<sup>13</sup> *Ibid.*, at 966.

<sup>14</sup> Huneeus, ‘Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights’, 14 *Cornell Int’l LJ* (2011) 101.

government will for compliance. They argue that the existence of robust, domestic institutional capacity is essential for domestic implementation of international human rights judgments.<sup>15</sup>

Domestic implementation of European and international court rulings is often less than perfect. While compliance with the judgments of the ECtHR has been seen ‘as effective as those of any domestic court’,<sup>16</sup> a large number of repeat violations have cast this appraisal in doubt.<sup>17</sup> In fact, partial state compliance with the decisions of the ECtHR and the Inter-American Court of Human Rights (IACtHR) and various forms of state obstructionism are more widespread than was originally thought.<sup>18</sup> Bringing domestic law and practice into line with a ruling may be hampered by outright resistance, political reluctance, or mere inertia on the part of national authorities. The result may be full compliance or non-compliance, but more frequently restrictive or partial implementation. Scholars have begun to investigate the factors and conditions that account for variation in how expeditiously, completely, or effectively national authorities implement the human rights judgments of international tribunals, as well as how extensive and appropriate are the executing measures.<sup>19</sup> They also examine whether the nature of remedial measures required (legislative, executive, judicial, or administrative action) has any bearing on how speedily or effectively a judgment is complied with.<sup>20</sup>

In sum, implementation of human rights rulings, including those of the ECtHR, engages a variety of domestic actors and institutions. It displays substantial variation across states, with important ramifications for the credibility and legitimacy of the Convention system as a whole. What factors account for the fact that some states implement the ECtHR’s judgments more expeditiously and successfully than others?

<sup>15</sup> Hillebrecht, ‘Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights’, 13 *Hmn Rts Rev* (2012) 279.

<sup>16</sup> Helfer and Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, 107 *Yale LJ* (1997), 273, at 296.

<sup>17</sup> As is shown in the latest 2011 CoM report, clone or repetitive cases make up 80–85% of the Court’s caseload, suggesting that major structural problems persist and require more effective and timely domestic implementation: See Committee of Ministers, *Supervision of the Execution of Judgments of the ECtHR*, (2010), at 11.

<sup>18</sup> Scribner and Slagter, ‘Domestic Institutions and Supranational Human Rights Adjudication: The ECtHR and the IACtHR Compared’, paper presented at the 2009 Annual Meeting of the American Political Science Association, 3–6 Sept. 2009, Toronto, Canada, at 14, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1449192>; Hawkings and Jacoby, ‘Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights’, 6 *J Int’l L and Int’l Relations* (2010): 35. Hawkings and Jacoby assess partial compliance on the basis of pending cases, cases in which individual measures are instituted but general measures are insufficient, as well as on the basis of interim resolutions issued by the CoM.

<sup>19</sup> For such a distinction in relation to domestic implementation of the rulings of the CJEU see L. Conant, *Justice Contained – Law and Politics in the EU* (2002). With regard to ECtHR rulings see Anagnostou and Psychogiopoulou, ‘Under what Conditions can ECtHR Rulings Promote Rights-expansive Policy Change? Religious and Ethnic Minorities in Greece’, in D. Anagnostou (ed.), *The European Court of Human Rights: Implementing the Strasbourg’s Judgments into Domestic Policy* (2013), at 143–165.

<sup>20</sup> Huneus, *supra* note 14.

In addressing this question, the present study explores the influence of legal infrastructure capacity and government effectiveness of a state on successful human rights performance. The first two sections of this article (sections 1 and 2) define implementation performance and how it is assessed in this study. They also discuss the selection of cases, and present the results of the statistical analysis concerning the factors that account for variation in it. The rest of the article (sections 3 and 4) engages in a qualitative analysis of the case studies in order to identify and depict the institutional, structural, legal, and political arrangements that shape successful implementation performance. On this issue, this study draws from a Convention-specific body of scholarly research that adopts an interdisciplinary perspective on the conditions under which national authorities respond positively to adverse judgments, or at other times in a recalcitrant and resistant manner.<sup>21</sup> This emergent body of research departs from the mainly legal genre of scholarship on the issue that provides descriptive accounts of the processes and modes of execution of judgments.<sup>22</sup>

## 1 State Implementation of Human Rights Judgments in the European Convention System

Located in Strasbourg, the ECtHR is seen as the single most important rights-protecting tribunal in the world,<sup>23</sup> which has been undergoing a process of constitutionalization over the past 15 years.<sup>24</sup> It forms the central pillar of the ECHR, a highly advanced and decentralized regional system. The Convention system combines judicial review of individual complaints against states, European oversight and monitoring, as well as national-level actors and departments charged with implementation of the ECtHR's judgments that detect violations. These judgments do not overrule national court decisions or quash decisions by other state institutions, yet states have a firm obligation to implement them. In line with the principle of subsidiarity, and unlike in the IACHR system, national authorities have wide discretion in deciding the specific forms of action and the reforms necessary to implement these judgments. Domestic

<sup>21</sup> H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008); L. Hammer and F. Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe* (2011); S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006); Anagnostou, *supra* note 19.

<sup>22</sup> See, e.g., T. Christou and J.P. Raymond (eds), *European Court of Human Rights Remedies and Execution of Judgments* (2005). See also Sundberg, 'Control of Execution of Decisions Under the ECHR', in G. Alfredsson *et al.* (eds), *International Human Rights Monitoring Mechanisms* (2001), at 561–585; Ress, 'The Effect of Decisions and Judgments of the ECtHR in the Domestic Legal Order', 40 *Texas Int'l LJ* (2004–2005) 359; and E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, Human Rights files No. 19 (2002).

<sup>23</sup> Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', 1 *Global Constitutionalism* (2012) 53.

<sup>24</sup> See Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the ECHR, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 9 *Hmn Rts L Rev* (2009) 397; D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (1995), at 648.

implementation is overseen and monitored by the Committee of Ministers (CoM or the Committee), the political arm of the Council of Europe (CoE) (Article 54 ECHR), composed of representatives of the Contracting States, their Ministers of Foreign Affairs, and their permanent representatives.

Implementation of the ECtHR's rulings is the responsibility of states, and it is a task that engages courts, legislatures, governments, and often civil society actors. Courts, especially high courts, have a central role, especially in judgments in which the underlying violation stems from national judicial interpretation. Domestic implementation arrangements vary considerably across states, yet they have a common feature: they predominantly rely on the executive. In most countries the government is the key implementing agency, while designated departments and offices have been set up to define the necessary remedial measures and to take action to adopt them. Legislatures on the other hand do play a role in some states, but barely any role in others. National authorities eventually adopt some measures, even if token and minimal, in response to most of the ECtHR's adverse judgments against them. Outright state refusal to comply with a judgment has been the exception rather than the rule.<sup>25</sup>

In response to each adverse judgment, national authorities must provide an individual remedy through measures such as payment of just satisfaction, the reopening of domestic proceedings, and the revision or revocation of an administrative order, among others.<sup>26</sup> State authorities are also obliged to institute general measures aimed at the underlying sources of a violation in order to prevent the recurrence of similar infringements in the future (Article 46 ECHR). These may involve legislative (and in rare instances even constitutional) amendments, and administrative or executive measures (i.e., ministerial circulars or regulations) in areas of state laws and policies that directly or indirectly come under the Court's purview in the context of examining individual cases.<sup>27</sup> They may also include other actions, such as translation and dissemination of the ECtHR's judgments to national judges, as well as educational activities and other practical measures.<sup>28</sup> In its periodic but regular meetings, the CoM, with the assistance of the Directorate General of Human Rights, reviews the information about the individual and general measures, which has been communicated to it by national authorities.<sup>29</sup> When these are considered to be sufficient to remedy the underlying violation, as well as to prevent its recurrence, the CoM terminates

<sup>25</sup> Kaminis, 'I simorfosi tis Elladas stis apofaseis tou Evropaikou Dikastiriou Dikaiomaton tou Anthropou: Genika Simperasmata' ['Greece's compliance with the decisions of the ECtHR: general findings'], 2 *To Sintagma* (March–April 2003) 281, at 285.

<sup>26</sup> For an overview and discussion of individual measures see Barkhuysen and van Emmerik, 'A Comparative View of the Execution of Judgments of the ECtHR', in Christou and Raymond, *supra* note 22, at 5–7.

<sup>27</sup> It has been estimated that legislative changes correspond to somewhat more than 50% of the general measures taken by states, while the remaining percentage involves various administrative measures (i.e., ministerial circulars or regulations), changes in domestic judicial approach and interpretation, educational measures, and other practical measures. See Sundberg, *supra* note 22, at 573–574.

<sup>28</sup> Lambert-Abdelgawad, *supra* note 22, at 20–21.

<sup>29</sup> Hunt, 'State Obligations following from a Judgment of the ECtHR', in Christou and Raymond, *supra* note 22, at 25, 37.



its supervision of a case by adopting a final resolution. In some cases, when specific obstacles hamper implementation, the Committee may adopt as a form of pressure an interim resolution criticizing a state's failure to abide by a judgment and urging it to take further action.<sup>30</sup>

In exploring state responses to the ECtHR's judgments, the present study uses the terms 'compliance' with and 'implementation' of human rights judgments interchangeably. We must explicate why we have opted for this conceptual conflation. International law and international relations scholarship have typically distinguished between these two notions. Some juxtapose 'compliance' as adherence to a legal rule, to implementation as the behavioural change that such adherence produces;<sup>31</sup> others see compliance as an advanced phase of instrumental (as opposed to principled) conformity, in the continuum from the coincidental abiding with a rule to its full internalization domestically;<sup>32</sup> and yet others see compliance as referring to the degree of a state's deviation from the central tenets of a treaty but also extending to the depth of a state's commitment to it. In this last sense, compliance encompasses ratification of a treaty, acceptance of international supervision and monitoring, but also implementation of its legal norms domestically.<sup>33</sup> In sum, different authors draw the line differently along the continuum from an ostentatious, legalistic, and superficial observance of a human rights standard to its substantive incorporation in the internal rules, practices, and values of a state and its society.

The distinction between compliance and implementation is significant in revealing the gap that may exist between formal or even fortuitous adherence to international law and actual state performance and practices; the former is more of a passive form of conformity, while the latter presupposes active commitment and effort by state authorities. Yet, the significance of this distinction as such apparently fades with regard to states obliged to adjust their laws and practices in response to regional court judgments, which are in part precisely geared to detecting such gaps, apart from levelling up existing standards. Concerning the ECtHR's judgments, the supervision of the CoM is tantamount to compliance in the sense of seeking to bring existing legal standards into line with the Convention and the case law, but it also extends to review of their actual application and implementation domestically. Compliance and implementation take place through administrative measures, judicial and legal training, and legislative reforms to introduce new standards, or to enhance and properly put into practice existing ones, so as to render them more appropriate for particular issues and contexts.

Therefore, our study, like other studies examining the domestic execution of international court judgments,<sup>34</sup> does not distinguish between compliance and

<sup>30</sup> On the different rationales of an interim resolution see Lambert-Abdelgawad, *supra* note 22, at 37.

<sup>31</sup> Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve J Int'l L* (2000) 387.

<sup>32</sup> Koh, *supra* note 7, at 628.

<sup>33</sup> Cardenas, *supra* note 5, at 7.

<sup>34</sup> See Huneeus, *supra* note 14 and Hillebrecht, *supra* note 12.

implementation but refers to the two as intrinsically linked manifestations of state responses to human rights law, which it makes little sense to distinguish in the ECHR context. We do not assume that compliance or implementation necessarily provides an effective response to a social conflict or a detected infringement – on the contrary. Some kinds of state responses and measures may be more appropriate and therefore more effective in potentially redressing the underlying social problem or dispute,<sup>35</sup> while other kinds of measures may reflect only a minimalist set of actions by state authorities that are ostensibly but not substantively responsive to the spirit of a court ruling. In this case, *prima facie* compliance with a human rights judgment may, paradoxically even go hand in hand with actual non-implementation of it, or, more likely, with imperfect implementation.<sup>36</sup>

For a long time, the supervisory role of the CoM had been viewed to be highly deferential to national authorities.<sup>37</sup> It was criticized for accepting minimal government action, such as distributing the content of a judgment, as sufficient to acknowledge compliance and terminate its proceedings on cases. Since 2000, however, despite the political constraints that underpin the CoM as a body, its role has become more proactive, transparent, and scrutinizing in order to determine the efficacy of state actions, particularly, but not only, with regard to structural problems.<sup>38</sup> Following the introduction of new Rules in 2001 and subsequently in 2006, the agenda and content of the CoM meetings are no longer confidential, but they make available to the public detailed information on the state of progress in the execution of pending judgments.<sup>39</sup> This has opened up the execution process to a variety of institutional and civil society actors, apart from the Parliamentary Assembly of the Council of Europe (PACE). The CoM is now entitled to receive information pertaining to execution of the ECtHR's judgments from national human rights institutions, from other states, civil society, as well as from international organizations and other CoE organs such as the Committee on the Prevention of Torture.<sup>40</sup> While in the vast majority of adverse rulings the CoM eventually issues a final resolution signalling the completion of implementation, the length of time it takes national authorities to implement judgments greatly varies across cases and states. In some cases state responses to remedy a violation are prompt and expedient, while in other cases they are slow and pending for several years.

The present study starts from the assumption that time to implementation together with the percentage of judgments executed by each state provides a highly reliable

<sup>35</sup> Neyer and Wolf, 'The Analysis of Compliance with International Rules: Definitions, Variables, and Methodology', in M. Zurn and C. Joerges (eds), *Law and Governance in Postnational Europe* (2005), at 41–42.

<sup>36</sup> Neyer and Wolf, *supra* note 35, at 42.

<sup>37</sup> S. K. Martens, 'Commentary', in M.K. Bulterman and M. Kuijer (eds), *Compliance with Judgments of International Courts* (1996), 71, at 77; see also Greer, *supra* note 21, at 71.

<sup>38</sup> See Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the ECtHR* (2013), at 21–27.

<sup>39</sup> Bates, 'Supervising the Execution of Judgments Delivered by the ECtHR: The Challenges Facing the Committee of Ministers', in Christou and Raymond, *supra* note 22, at 60.

<sup>40</sup> Sitaropoulos, 'Supervising Execution of ECtHR Judgments Concerning Minorities – the Committee of Ministers' Potentials and Constraints', 3 *Annuaire International des Droits de l'Homme* (2008) 523, at 530–532.



measure of a state's human rights performance. Hitherto, studies have assessed state compliance with the ECHR by taking violation rates of states as a benchmark.<sup>41</sup> Yet, violation rates cannot serve as a reliable measure of variability in state compliance, due to the fact that they are often a consequence of higher levels of reporting. Indeed, higher reporting often stands at the root of the puzzling fact that more open and liberal states tend to show higher levels of rights violations. In this study, we argue that the length of time that it takes states to give practical effect to an unfavourable judgment in tandem with the number of adverse judgments a state has implemented at each point in time captures a key parameter of human rights implementation – namely, foot-dragging. Reluctance to comply often takes the form of procrastination or purposeful neglect on the part of national authorities.

For various reasons, the government or other actors may be unwilling, ambivalent, or unable to take action and to initiate reforms to redress a human rights violation. Implementation then becomes a protracted process, in which state representatives unsuccessfully attempt to convince the CoM that their authorities have taken adequate remedial measures. The CoM in turn continues its monitoring, and steps up its efforts and pressure towards national authorities to make further progress. Longer periods of implementation, taken together with the number of pending judgments that a state has executed, are generally symptomatic of domestic resistance on the part of at least some of the actors involved in implementation, or of other kinds of hurdles that can stand in the way even when government will or judicial acceptance is there. They extend the time during which infringements can recur, increasing the number of repetitive petitions and violations, overburdening the functioning of the Convention system, and therefore undermining its credibility and legitimacy as a whole.

To be sure, an objection could be raised here that delays in implementation might be a reflection of the extensiveness of measures that an adverse judgment required, rather than the lack of willingness to comply. It is true that some of the ECtHR's rulings may be implemented easily if they mainly require individual measures or an administrative order issued by a single government department. Other rulings, by contrast, may involve a shift in judicial interpretation or a legislative amendment, which take a longer time to occur,<sup>42</sup> especially if they have to grapple with the time-consuming task of securing cooperation among different branches of government.<sup>43</sup> The extensiveness of the necessary remedial measures may indeed delay implementation, but this is only one among many and varied hurdles that may be encountered domestically, and which are certainly not confined to the lack of government will.

In the overall picture of state performance, the resulting length of time to implementation in tandem with the percentage of the respective judgments that have been implemented is a reflection of the different kinds of unresolved problems that arise when national authorities try to give effect to a judgment, including those linked to the nature of the remedial measures that are required in each case. Yet, it is extremely

<sup>41</sup> Greer, *supra* note 21, especially chap. 2.

<sup>42</sup> Sundberg, *supra* note 22, at 574–579.

<sup>43</sup> Huneeus, *supra* note 14.

difficult to specify at the outset and with accuracy the specific measures that must be instituted to remedy a violation, and to introduce such a differentiation in our assessment of time to implementation. At least, we could not do so without making arbitrary assumptions about how individual human rights judgments should be translated into legal reform and policy change at the national level. It is well known that, unlike its counterpart in Latin America, the ECtHR has generally refrained from indicating the kind of measures that national authorities must undertake to remedy a violation and pre-empt its recurrence, except to order payment of just satisfaction. The CoM confirms in its latest report that “as regards the nature and scope of other [besides payment of just satisfaction] execution measures, whether individual or general, the judgments are generally silent”.<sup>44</sup> This continues to be its dominant approach today, as it is in line with the fundamental principle of subsidiarity. The discretion accorded to national authorities in defining implementation measures often makes it difficult to determine *a priori* how extensive they must be. Such discretion prevails even as innovations in legal rules and judicial practice (such as pilot judgments,<sup>45</sup> or when the ECtHR orders specific individual measures, such as release from arbitrary detention<sup>46</sup>) have prompted the Court partly to diverge from it.<sup>47</sup>

In sum, despite its limitations as an indicator, time to implementation, seen together with the percentage of implemented judgments, forms a central parameter of, and on the whole a reliable indicator for, the degree of commitment, willingness, and ability of a state to implement the Strasbourg Court’s judgments. Time to implementation alone has also been used in the context of other studies as a benchmark for assessing state compliance with human rights. Hawkings and Jacoby identify length of time during which cases are pending as one measure of partial compliance with the ECtHR’s judgments, but they do not develop or explore it systematically.<sup>48</sup> The length of time it takes to fulfil their reporting obligations in the context of UN human rights conventions is similarly used as a measure for determining variation in states’ compliance.<sup>49</sup> Average execution time is also used as an off-hand measure by PACE and the CoM to distinguish states that are better implementers from those that are more

<sup>44</sup> See Committee of Ministers, *supra* note 38, at 24.

<sup>45</sup> In these judgments, the ECtHR orders states to undertake structural measures in order to redress the systemic causes of human rights infringements. For a discussion of pilot judgments see Leach, ‘Beyond the Bug River – A New Dawn for Redress before the ECtHR’, 2 *European Hmn Rts L Rev* (2005) 148; and Frowein, ‘The Binding Force of ECHR Judgments and its Limits’, in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law* (2007), at 266.

<sup>46</sup> Committee of Ministers, *Supervision of the Execution of Judgments of the ECtHR*, Committee of Ministers 4th Annual Report 2010 (Strasbourg: Council of Europe, 2011), 17.

<sup>47</sup> Prot. 14 empowers the CoM to ask the Court to clarify the meaning of a judgment so as to facilitate its implementation, as well as to bring infringement proceedings before the Court against a state for non-compliance with a judgment. See Art. 16 of Prot. 14, amending Art. 46 ECHR through new paras 3, 4, and 5. Prot. 14 finally entered into force on 1 June 2010, 3 months after its ratification by Russia, the last state to ratify it.

<sup>48</sup> Hawkings and Jacoby, *supra* note 18, at 66 and 69.

<sup>49</sup> LeBlanc, Huibregtse, and Meister, ‘Compliance with the Reporting Requirements of Human Rights Conventions’, 14 *Int’l J Hmn Rts* (2010) 789.

problematic.<sup>50</sup> What accounts then for the fact that national authorities in some states are more prompt and responsive in adopting remedial measures, while others procrastinate or respond reluctantly to these?

## 2 Case Selection, Data and Empirical Findings

In order to identify and assess variability in time to implementation and percentage of pending judgments in which execution was completed we created a database of 754 adverse judgments issued by the ECtHR. Of these judgments, 422 had been implemented by the date of the study (31 May 2008) and closed following a resolution issued by the CoM. In order to avoid selection bias, we used all judgments related to Articles 8–11 ECHR (alone or in conjunction with Article 14 ECHR) from the nine countries under study, and from the very first judgment of the ECtHR. Articles 8–11 (right to family and private life, religious freedom and conscience, freedom of expression, and freedom of association) represent core civil liberties that are fundamental to European democracies. Article 14 ECHR prohibiting discrimination is not a free-standing clause, but it can be raised only in a dispute falling within the ambit of another Convention provision.<sup>51</sup> A substantial body of the ECtHR's case law concerns these selected Convention provisions.<sup>52</sup> In interpreting these in the context of individual complaints brought to the ECHR, its case law demarcates and elaborates upon the conditions under which state authorities can justifiably restrict these rights.<sup>53</sup>

We also additionally selected the ECtHR's judgments originating in complaints brought by immigrants, asylum seekers, and individuals from various kinds of minorities (ethnic, religious, sexual) from the selected nine countries. We did so because these in large part interface with claims raised on the basis of Articles 8–11/14 ECHR. Both immigrant- and minority-related judgments and judgments raising Articles 8–11/14 ECHR, *par excellence* raise claims on behalf of individuals from the non-dominant or marginalized segments of society. That is, they explicitly or implicitly involve

<sup>50</sup> See Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the ECtHR*, 6th Annual Report of the Committee of Ministers 2012, 61.

<sup>51</sup> O'Connell, 'Cinderella Comes to the Ball: Art. 14 and the Right to Non-discrimination in the ECHR', 29 *Legal Stud* (2009) 211, at 215. A general prohibition of discrimination has been introduced with Prot. 12, which opened for signature in 2000 and entered into force in Apr. 2005 after 10 states ratified it. However, as of Feb. 2012, 29 countries had not yet ratified it, while 10 countries had not even signed it.

<sup>52</sup> While the vast majority of individual petitions to the ECtHR since 1958 involve claims and infringements of the right to fair trial (Art. 6 ECHR), 1,049 Court judgments concern Arts 8–11, out of a total of 8691 judgments issued by the ECtHR from 1958 until 2007, that is 11.5% (author's estimates based on data drawn from the *European Court of Human Rights Annual Report 2007*; Arts 8 and 10 are among the top 10 Convention provisions invoked before the Strasbourg Court. See Cichowski, 'Courts, Rights and Democratic Participation', 39 *Comparative Political Stud* (2006) 50, at 63.

<sup>53</sup> Arts 8–11 ECHR have a common structure. In their 2nd para. they similarly define the conditions under which these rights can be restricted: restrictions upon individual rights must be provided by law, they must be directed to a broader legitimate aim, such as national security or state integrity, public order or health, and they must be 'necessary in a democratic society' or made imperative by a 'pressing social need'. In any case, the imposed limitations must be 'proportionate' to the legitimate aim pursued.

rights claims by individuals whose beliefs, ethnic identity, way of life, actions, etc. place them apart from and bring them into conflict with the societal majority and how it defines its ‘common good’, whether in relation to public order, national security, or state integrity. In this sense, both Articles 8–11 ECHR and minority/immigrant-related judgments are squarely about the non-majoritarian elements of European democracy, which the Convention has at its heart. Over the years, though, the range of rights claims by individuals from various minorities has expanded to include most Convention provisions such as Articles 2 (right to life), 3 (prohibition of torture, inhuman or degrading treatment), and 5 (right to liberty and security) among others.

Scholars studying the Convention and the ECtHR have observed that most judgments are eventually implemented (exceptions notwithstanding) with the CoM issuing a final resolution. The information that we introduced in our database for each of the judgments included its status (open/closed), the Convention provision that was infringed, country of origin, number of months from the issuing of a Court judgment until a resolution was issued by the CoM (for the 422 closed cases), policy area, and whether or not a case was concluded with a friendly settlement. Closed cases were those in which the CoM had terminated its proceedings and open cases those in which the CoM was continuing its supervision at the cut-off date (May 2008). Closed cases were not necessarily those that were least controversial or least demanding in terms of the measures they required, that is, they were not necessarily the easiest to implement. Indeed, variation in the implementation of the closed cases was significant, ranging from a few months to several years: many took a long time to implement while the execution of others was prompt and quick.

As was already discussed in the previous section, the extensiveness of remedial measures in each case was difficult to code quantitatively *a priori*, in light of the far-reaching discretion that national authorities have in how to implement a judgment. More generally, while case-related variables could in principle have been more numerous, in practice any attempt to describe cases in greater detail in the database did not work out; categorization and coding of more qualitative characteristics of each individual case would have been quite arbitrary. Instead, our goal in this study is to demonstrate the appropriateness of measuring domestic implementation on the basis of time to execution and percentage of cases executed, as well as to offer a general significance test to the main hypotheses, leaving the rest to qualitative analysis as well as to further research.

The selected countries are Austria, Greece, Italy, Turkey, Bulgaria, Romania, Germany, France, and the United Kingdom. They were selected because they were the longstanding members of the Convention system<sup>54</sup> that until the 2000s generated the highest number of judgments in the Convention provisions under focus.<sup>55</sup> Greece,

<sup>54</sup> Bulgaria and Romania were the last among the selected group of countries to join the CoE and accede to the Convention in 1991–1992.

<sup>55</sup> Over the past few years, countries like Russia, Ukraine, and Moldova have also had a rapidly growing number of adverse judgments under the selected Convention provisions. However, these are too recent to provide us with a basis for studying implementation.

Italy, Turkey and Romania, are also among the countries with the highest violation rates in the Convention system overall. While all of these countries are democratic, they underwent democratic transition at a different time, some earlier in the 19th century (the UK), others immediately after World War II (Italy, Austria), while others later in the 1970s (Greece), 1980s, and 1990s (Bulgaria, Romania, Turkey). While we consider such differences not to have any direct bearing on implementation, we assume that their different experiences with and length of time under a democratic system provide a distinct context for the functioning of the rule of law, rights protection, and the delivery of justice.

In measuring the time to execution of judgments in our data set, we observe substantial differentiation in implementation performance across the nine countries. Table 1 presents our countries' implementation record. Italy, Romania, and Turkey have the fewest cases implemented from the total number of judgments against them in our sample. There is a significant association between implementation record and country, as is shown in a significant chi-square test. Averaging the time to implementation within closed cases we still find Romania as the negative outlier taking the longest time to implement. As the number of cases closed varies greatly, the two results (percentage of implemented cases from all cases *and* time to implementation – for closed cases) should be considered together for a complete understanding. To explain variation, once we knew that a significant association existed between country and implementation record we formulated a number of hypotheses. We hypothesized that such differences are related to:

- (a) their different human rights regimes, understanding by this the domestic treatment of human rights, both in legislation and practice; as indicator we used the Freedom House Civil Liberties score; and
- (b) their different legal infrastructural capacities; in other words the capacity to enact and enforce legal rules predictably and impartially. As indicator for that, we used alternatively two closely correlated World Governance Indicators: rule of law, which captures perceptions of the extent to which agents have confidence in

**Table 1.** Countries' implementation record at a glance

Country of origin of action	N (closed cases)	% cases closed of total cases (753)	Mean (standard deviation) in months
UK	94	61	23 (32)
Austria	45	64	32 (25)
Germany	12	80	36 (20)
<b>All</b>	<b>315</b>	<b>42</b>	<b>37 (34)</b>
Turkey	75	31	38 (25)
Bulgaria	11	38	41 (43)
France	29	57	45 (52)
Italy	16	18	47 (35)
Greece	27	42	60 (30)
Romania	6	15	80 (33)

**Table 2.** Description of model components

Dependent variables	Determinants (scales in parentheses)	
Implementation status (dummy; 1- closed; else-0)	Context (national) factors	Case related factors (all dummies)
Time since implementation (months)	Freedom House Civil Liberties score (1 to 7, with 7 less liberty, multiplied by 10)	Friendly settlements
	Government effectiveness in a given country (World Governance Indicator, WBI), percentiles 0–100, with most successful countries on top	Policy area:
	Rule of law in a given country (World Governance Indicator, WBI) percentiles 0–100, with most successful countries on top	1. Ethnic linguistic minority policies
		2. Religious rights/minorities
		3. Immigration and asylum policies (immigrant involved)
		4. Sexual minorities
		5. Gender/sex discrimination
		6. Criminal law/alien or minority
		7. Administrative or civil law procedure/alien or minority
		8. Article in the Convention

and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts; and government effectiveness, which captures perceptions of the quality of public services, the impartiality and political independence of bureaucracy, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies. The nine countries under study have different domestic institutional arrangements which are responsible for implementing individual and general measures in response to adverse judgments. In some countries the government is the key implementing agency, in others high courts or legislatures are also involved.

To test our hypotheses we used two dependent variables, *implementation status*, a dummy made of closed cases versus those still open, and the length of time taken to implement a judgment (*months to closure*) which applies only to closed cases. We ranked the independent variables in two categories (see [Table 2](#)):

- Case-specific (policy area of the case, Convention Article, if the case was the object of a friendly settlement, if the case was isolated or part of a 'cluster' of cases, if an interim resolution existed), and
- Context-specific (development and institutional background, such as the country's GDP, rule of law, human rights regime, government effectiveness).

The results are displayed in [Table 3](#), and, despite the differences in our dependent variables and the respective two different types of regression, they are fairly consistent. According to our findings, policy area did not matter much for different patterns of



**Table 3.** Explaining implementation at country level

Determinants	Model (1)	Model (2)	Model (3)	Model (4)
Government	0.060***		-1.039**	
Effectiveness	(0.008)		(0.295)	
Freedom House Civil Liberties	0.044**	0.024	-0.653	-0.649
	(0.018)	(0.016)	(0.484)	(0.501)
Rule of Law		0.055***		-0.768*
		(0.007)		(0.231)
Friendly settlement (1 = Yes; 0 = No)	0.479**	0.492**	-21.247**	-22.266**
	(0.222)	(0.220)	(4.889)	(5.157)
Immigrant (1 = Yes; 0=No)	0.122	0.029	16.320**	16.510**
	(0.241)	(0.242)	(4.844)	(4.709)
Minority (1 = Yes; 0=No)	0.095	0.108		
	(231)	(230)		
Constant	-5.432	-5.234	132.935**	109.261**
	(0.867)***	(0.836)***	(31.35)	(25.00)
N	754	754	316	316
Pseudo R/Adjusted R <sup>2</sup>	0.09	0.09	0.135	0.118

Models 1, 2 Logit regressions with implementation status as dependent variables (dummy: 1 closed, else 0); Models 3, 4 Linear regressions with months to closure as dependent variable (allowing for country clustered error terms); \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ .

implementation, with the exception of minority- and immigrant-related judgments, which tend to be implemented somewhat faster. However, when controlling for either rule of law or government effectiveness minority-related cases lose significance in models 1 and 2 (see Table 3). The rest of policy issues are also inconclusive in explaining differences in how expeditiously national authorities implement ECtHR decisions. We did not find an association between religious rights/minorities, sexual minorities, gender/sex discrimination, criminal law/alien or minority and administrative or civil law procedure and the governmental capacity to implement ECtHR rulings. The legal area (Article of the Convention) also mattered only in the simpler versions of the model. The most robust predictor proved to be the existence of a friendly settlement, which led to the swiftest implementation. While friendly settlements proved a highly effective way to close a case, the question remains how substantial the domestic implementation measures actually are.

With regard to context specific determinants, we found no significant effect of development (indicator used was income–gross domestic product power purchase parity). In contrast, all our primed variables, human rights regimes and especially legal infrastructure were significant in all the models. The better a country is rated by Freedom House under Civil Liberties, the speedier the implementation. However, this predictor is weaker than either rule of law or government effectiveness and loses its significance when tested together with either of them. Both the World Governance indicators, rule of law and government effectiveness, are strong determinants, but we used them only

alternatively, due to their strong correlation (Pearson index 0.98), despite being statistical aggregates (unobserved components) from quite different sources. Government effectiveness (models 1 and 3 in [Table 3](#)) is a slightly more powerful determinant than the rule of law indicator (models 2 and 4 in [Table 3](#)). While it originated in the World Bank's technocratic approach to development linked to aid conditionality, the government effectiveness indicator composition has over time diversified beyond its policy focus to incorporate assessment of the capacity of state institutions, as well as the decision-making framework that they establish.<sup>56</sup> Therefore, in countries where legal implementation capacity is higher in general the ECtHR's rulings are also implemented better and faster regardless of the original issues the cases relate to.

### 3 Domestic Implementation Arrangements and Legal Infrastructure Capacity

How do we understand the strong correlation that emerges from the statistical analysis between legal infrastructure capacity and state performance in implementing the ECtHR's judgments? Human rights protection is a cross-cutting issue that permeates nearly the entirety of state policies and spheres of action, and therefore implicates a broad range of institutions and actors with distinct competences. Due to the cross-cutting nature of such protection, the domestic arrangements for implementing the Strasbourg Court's case law are closely linked to the broader policy-making processes in the legislative, administrative, and executive spheres. Therefore they both reflect and in turn reinforce the quality of legal infrastructure capacity of the state more broadly, namely, the capacity to enact and enforce laws and policies predictably and impartially. What are the characteristics of the human rights implementation structures at the national level that augment, or conversely undermine, the capacity to enact and enforce laws and policies? In this section, we describe and comparatively analyse the designated structures for implementing Strasbourg rulings, and how they are linked to and affect the broader law- and policy-making processes in the best and worse performing states of our sample.

The statistical importance of legal infrastructure capacity points to the following conclusion: the greater the capacity and effectiveness of state institutions to enact laws and policies, as well as to enforce them in practice, the more efficacious and conducive they are likely to be to pursuing the necessary reforms to comply with the Strasbourg Court's rulings too. In other words, state performance in human rights implementation is closely linked to the capacity and effectiveness of a government to enact laws and deliver policies more broadly. In accordance with the World Bank index, government here does not narrowly refer to the governing party or coalition of the day, but to the entire state apparatus, its administrative personnel and infrastructure, and the organization and functioning of public offices and institutions assigned

<sup>56</sup> Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality', 7 *Georgetown Public Policy Rev* (2001) 1.

to and involved in decision-making and policy implementation. Our statistical findings are not surprising; indeed, they can be seen to be common sense. Yet, the significance of legal infrastructure capacity has not so far been researched and tested in existing studies of domestic compliance with human rights law.

The statistical significance of government effectiveness and the rule of law lead us to a number of observations that merit further analysis. First, the execution of human rights judgments is more effective in states where sufficient resources and expertise are allocated to government and other state branches to deliver policy implementation and reform, and specifically to do so by substantively incorporating into the various policies the relevant human rights norms. Secondly, the best performing countries are characterized not only by robust rights protection by national courts but also by substantial diffusion and mainstreaming of human rights awareness, monitoring, and related expertise across the state administration, the legislature, and branches of the government.

In the best performing states of our sample (the United Kingdom and Austria), the designated domestic structures for implementing the ECtHR's judgments both reflect and also promote a strong capacity to enact and enforce laws and policies. Implementation is assigned to institutions and offices with strong political weight, as well as the resources and ability to intervene in the law-making and policy processes to enforce human rights. In Austria, responsibility rests with the Constitutional Service (Division V) of the Austrian Federal Chancellery, reflecting the high political importance attached to the implementation of Strasbourg judgments. The Constitutional Service collaborates with all the competent ministries and with the Constitutional Court in order to implement individual and general measures in response to the ECtHR's judgments issued against Austria. In this direction, it also reviews draft legislation from all ministries and provinces with a view to rendering it compatible with constitutional and ECHR law and case law, and, if necessary, recommends legislative changes. It often invites political parties and interest groups to comment on the results of its review, which are in turn published on the website of the Austrian Parliament and have influence in the discussion of new statutes.<sup>57</sup> When federal legislation is considered incompatible with constitutional and ECHR law, the Constitutional Court and the Constitutional Committee of the Austrian National Assembly also give their opinion. Human rights issues related to the Convention and the ECtHR's judgments are therefore systematically reviewed and scrutinized at the planning stage of new legislation, even if the recommendations of the CS are not always taken into consideration.<sup>58</sup>

The best performing country, the UK, exemplifies how successful human rights implementation is closely linked to structures endowed with strong political weight, and the ability effectively to intervene in and influence the law- and policy-making

<sup>57</sup> Thurnherr, 'The Reception Process in Austria and Switzerland', in Keller and Stone Sweet, *supra* note 21, at 44–45.

<sup>58</sup> Tretter, Liegl, Buchinger, and Steinkellner, 'Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Austria', JURISTRAS Project (2008), at 16, available at: [www.echr.coe.int/LibraryDocs/JURISTRAS-2007-EN-Austria.pdf](http://www.echr.coe.int/LibraryDocs/JURISTRAS-2007-EN-Austria.pdf)

processes in the ministries, Parliament, and public administration. In the UK, the main actor in the domestic implementation arrangements is the Ministry of Justice (MoJ) and its Human Rights Division. It works together with the Joint Committee of Human Rights (JCHR) comprising representatives from both the House of Commons and the House of Lords. Both have a powerful coordinating role – they systematically monitor, oversee, and provide regular guidance to the different branches of the state and the government on how to respond to adverse ECtHR’s rulings. In addition, they are both endowed with substantial resources and high quality legal expertise in carrying out these tasks. Largely composed of members who are strong human rights proponents, the JCHR often urges the UK government to pursue full rather than minimal compliance. It is cardinaly concerned with how effective, adequate, and expeditious the procedures are that it follows in facilitating parliamentary scrutiny of legislation and in ensuring the implementation of Strasbourg rulings.<sup>59</sup> The UK has taken concrete initiatives to streamline and expedite implementation of the ECtHR’s adverse judgments, including through fast-track remedial legislation revision, if legislative reform is seen as compelling or if the matter is urgent.<sup>60</sup>

Domestic implementation arrangements in the UK combine empowered structures of centralized coordination with review and monitoring processes that ensure decentralized engagement of the different ministries, agencies, and state branches that have competence to act in response to the various Strasbourg Court rulings. The JCHR has a powerful and central place in the UK’s parliamentary system of government. It acts ‘as a conduit between the executive, legislature and judiciary on human rights concerns and [it] also brings transparency to the compliance process, thus facilitating the involvement of civil society groups and the media in monitoring compliance and holding the state to account for its obligations’.<sup>61</sup> A powerful and resource-endowed centralized coordinating structure is especially important if we consider that domestic institutions can, and often do, have divergent preferences and priorities regarding human rights, which may constrain or delay the implementation of different Strasbourg Court rulings. At the same time, the UK has done the most to mainstream human rights issues linked to the Convention and the ECtHR’s judgments into the domestic legislative and decision-making processes. Following the enactment of the Human Rights Act in 1998, it reinforced and institutionalized preventive conventionality review: it has made it mandatory for ministries to examine the human rights implications in all legislation that they prepare, as well as for the government to issue a statement of Convention compatibility with each bill that it introduces into Parliament.<sup>62</sup>

By contrast, the worse performing countries, such as Romania and Greece, are characterized by domestic implementation structures with limited political clout,

<sup>59</sup> See House of Lords and House of Commons Joint Committee of Human Rights, *Enhancing Parliament’s Role in Relation to Human Rights Judgments*, 15th Report of Session 2009–2010, HL Paper 85, HC 455 (2010), at 10 and 52–56.

<sup>60</sup> Besson, ‘The Reception Process in the UK and Ireland’, in Keller and Stone Sweet, *supra* note 21, at 74.

<sup>61</sup> Hillebrecht, *supra* note 15, at 293.

<sup>62</sup> Besson, *supra* note 60, at 74.

resources, and ability to influence the law- and policy-making processes. They also display a weakly developed human rights awareness and expertise in the parliamentary, government, and administrative branches of the state. Implementation arrangements are dominated by bodies belonging or linked to the Ministry of Foreign Affairs (MFA) that both represent the state before the Strasbourg Court and are responsible for implementing its adverse rulings (the Office of the Government's Agent in Romania<sup>63</sup> and the Legal Council of the State in Greece<sup>64</sup>). These two roles reflect conflicting commitments that may undermine execution: the same body that defends the state against alleged rights violations must also ensure that national authorities institute effective measures to remedy such violations when they are detected by the Strasbourg Court. Staffed by small numbers of diplomats, administrative officials, and legal experts, the MFA-dominated implementation structures lack the political weight to influence the law- and policy-making processes in parliament and in the government. It comes as no surprise that a minimalist approach has apparently tended to prevail in the domestic implementation of the ECtHR's rulings in Greece and Romania.

Implementation structures in Greece and Romania are also weakly placed to play an effective coordinating role among the different ministries and branches of government that are competent in the different issue areas affected by adverse ECtHR judgments. They are unable to amass the necessary human rights knowledge and expertise to define the implications of these judgments and to formulate the most effective measures to remedy the respective violations. With the exception of the Ministry of Justice, most of the other ministries usually lack specialized bodies or departments with the expertise and resources specifically to review human rights issues, including in connection with the Strasbourg Court's case law. Furthermore, in both countries parliamentary actors are involved only minimally, if at all, in the processes of implementation. Parliamentary committees responsible for human rights are not explicitly required to check for compatibility with the Convention and the ECtHR's case law, nor do they have an active role in assessing the implications of violations for national laws and policies. While the relevant parliamentary committees are in principle informed about the ECtHR's judgments against their country, a relatively small number of deputies are involved in and have knowledge of human rights issues. References to the Strasbourg Court's case law in parliamentary discussions and deliberations about draft legislation are also scant.<sup>65</sup> The limited parliamentary involvement and activity

<sup>63</sup> Our analysis of Romania is based on Bogdan, 'Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Romania', JURISTRAS Project Report (2008), at 16–22 (unpublished report, on file with authors).

<sup>64</sup> While distinct from the MFA, the LCS unit responsible for implementing the ECtHR's judgments operates from within the Greek MFA: see Anagnostou and Psychogiopoulou, 'Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Greece', JURISTRAS Project Report (2008), at 12 (unpublished report, on file with authors).

<sup>65</sup> For instance, in Greece there is no parliamentary committee with an explicit mandate to monitor ECtHR judgments in a system of parliamentary committees that is weak to begin with. While occasionally deputies refer to such judgments in exercising parliamentary control of government, their influence and input is weak: *ibid.*, at 14.

around human rights judgments forecloses the possibility for public debate and civil society engagement, rendering an already opaque and bureaucratic implementation process completely inaccessible.

Weak inter-ministerial and inter-institutional coordination of domestic implementation structures and limited resources and human rights expertise account for the fact that national authorities in Greece and Romania are weakly placed to influence the policy process. When there is insufficient or reluctant political will, they are not in a position to promote or encourage legislative, executive, or administrative action in a timely and effective way to bring domestic law and practice into line with the ECtHR's judgments. The result is lengthy implementation periods and often partial measures that fail to address the root causes of violations. The requisite legislative and other measures that may flow from a judgment are not always properly evaluated; they are often adopted slowly and are unable to prevent future infringements. While such shortcomings have political causes, in some issue areas they are also linked to the scale of reforms required, to public opinion, resource constraints, or other practical reasons, as is acknowledged by the Parliamentary Assembly of the Council of Europe.<sup>66</sup>

In sum, successful implementers that rank high on legal infrastructure and government effectiveness have in place domestic execution arrangements that markedly differ from those in the states that have weak performance in this regard. In particular, successful state performance in executing Strasbourg Court rulings is closely linked to domestic implementation structures that are (a) endowed with the legal capacity and the political weight to influence the law-making and policy processes in the direction of human rights-compliant measures and reforms, and (b) accompanied by diffused embeddedness of human rights awareness, review, and control in the law- and policy-making processes, as well as in the administrative practices of rule application and enforcement.<sup>67</sup> By contrast, domestic arrangements in the worse implementers lack the political clout and resources to influence policy formulation and enforcement. They are also characterized by the absence of diffused human rights awareness and the limited involvement of parliamentary and civil society actors in the process of defining and instituting appropriate and effective remedies in response to ECtHR rulings.

#### 4 Theoretical and Analytical Implications of Findings

The present study contributes to a burgeoning literature on human rights compliance that shifts the focus of analysis to the domestic context. It identifies the main sources

<sup>66</sup> See Report by Mr. Erik Jurgens on behalf of the PACE Committee on Legal Affairs and Human Rights, 'Execution of Judgments of the ECtHR', 12 July 2000, Doc. No. 8808, at 9; European Commission for Democracy Through Law, Comments by Mr. Peter Van Dijk on the Preliminary Report of the PACE on the Execution of the Court, Strasbourg, 12 April 2000, available at: <http://assembly.coe.int/documents/workingdocs/doc00/edoc8808.htm>.

<sup>67</sup> On the principle of 'diffused embeddedness' see Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *EJIL* (2008) 151.



of (non-)compliance with international and human rights case law in the domestic policy process, legal infrastructure, and institutional capacity. It does so on the basis of a strong statistical relationship, showing that the greater the legal infrastructure capacity and government effectiveness, the more expeditious the implementation of the ECtHR's rulings is likely to be. In exploring the domestic institutional configurations that improve or conversely undermine such a capacity, the qualitative analysis in the preceding section focused on the government, parliamentary, and administrative branches of the states. National courts are also central actors, as compliance with many Strasbourg Court judgments requires a shift in their approach and jurisprudence. The various dissemination and training activities of the domestic implementation authorities, which seek to galvanize support for the Convention and the ECtHR case law, influence the extent to which domestic judges conform to the Strasbourg Court's jurisprudence. Overall, appellate and higher courts have been more willing, especially since the 1990s, to adjust to the ECtHR's case law than governments, legislatures, and administrative officials.<sup>68</sup>

Admittedly, our study is based on a small sample of the Court's overall case law and covers only nine respondent states. We are therefore cautious in generalizing our claims for the factors influencing the execution of ECtHR judgments as a whole. In our study, cross-state variation emerges as predominantly significant, while different issue and policy areas do not appear to influence variation in implementation performance. It may be that in other human rights norms and case law beyond Articles 8–11/14 ECHR, on which this study has focused, variation across issue or policy areas may turn out to be more important than cross-state differences. Given the relatively limited (but not small) empirical basis, we see our study as a first step that – we hope – will be carried forward by others who may be interested in refining the compliance measurement that we advance, as well as in further testing hypotheses concerning different patterns of variation, and the factors and conditions that influence them. Notwithstanding its limits at present, our study is original in offering (a) a highly appropriate and fairly accurate way of measuring domestic implementation, and (b) a statistically strong indication about the factors – legal infrastructure capacity – influencing it.

Both the statistical findings and the qualitative analysis of our study lend credence to the argument that critical for domestic compliance with the ECtHR's rulings is the existence of 'robust domestic institutions with the capacity *and* willingness to implement the ECtHR's rulings, even when doing so is politically divisive or unpopular'.<sup>69</sup> Preferences on the part of governments, as well as the attitude of and interaction among central actors, such as the judiciary and legislature, but also civil society, undoubtedly influence implementation performance. At the same time though, state compliance with treaties that encompass a variety of different rights, like the ECHR, appears to be an integral part of and closely linked to the overall legal infrastructure along with the government effectiveness of a state. This is particularly the case as such

<sup>68</sup> Krisch, 'The Open Architecture of European Human Rights Law', 71 *MLR* (2008) 183.

<sup>69</sup> Emphasis added. See Hilebrecht, *supra* note 15, at 297.

treaties are often accompanied by demanding and systematic monitoring and execution mechanisms that lock national officials and bureaucrats into continuous interaction and contact with international supervisory bodies.

Thoroughgoing and timely state implementation of human rights rulings involves a diffused commitment that extends beyond the central government elites and encompasses a variety of different domestic actors and institutions. It is embedded in the broader processes whereby a government develops and enforces effective and balanced policy responses to social problems and conflicts. The centrality of governmental and bureaucratic actors in the process of domestic implementation of international law has already been highlighted.<sup>70</sup> Scholars have also noted capacity limitations as important barriers in the implementation of EU law, such as executive inability to transpose it in a timely manner, administrative deficiencies, and gaps in internal coordination.<sup>71</sup> Yet, the legal infrastructure and policy enforcement capacity in relation to human rights rulings, as well as the domestic institutional configurations that can increase or constrain such capacity have until now received scant attention.

Besides the allocation of sufficient institutional and financial resources, expeditious compliance also requires diffused human rights awareness, expertise, and sustained commitment among a significant cross-section of executive, parliamentary, and administrative officials, independent of the will of the government of the day. When such a diffused capacity and awareness exist, the laws and policies adopted are unlikely to escape scrutiny of their human rights implications, and the adverse judgments of the Strasbourg Court are unlikely to be obstructed or ignored because the government or political elites are not in favour of substantive remedies.

The significance of legal infrastructure and government effectiveness for state implementation of human rights judgments can in part be understood in the frame of the management-based perspective in the study of compliance with international law, advanced in the seminal work by Chayes and Chayes. From this perspective, non-compliance or partial compliance does not stem from deliberate decisions to violate. Instead, it is seen to stem from capacity limitations arising from a government's inability to ensure that public and private actors meet international commitments, as well as from the inherent ambiguity involved in putting into practice legal and normative principles. As Chayes and Chayes argue, state compliance depends not only on formally enacting implementing legislation but also on a government's ability to enforce it in practice and to change behaviour through detailed administrative regulations and vigorous enforcement efforts, 'despite the vagaries of legislative and domestic politics'.<sup>72</sup> The construction of a domestic enforcement apparatus 'quite apart from government will ... entails choices and requires scientific and technical judgments, bureaucratic capacity, and [scarce] fiscal resources'.

<sup>70</sup> Koh, *supra* note 7.

<sup>71</sup> Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', 56 *Int'l Org* (2002) 609, at 630.

<sup>72</sup> Chayes and Chayes, *supra* note 11, at 14.

In the end, successful state compliance with international and human rights law needs to rely both on political will and on management capacity and infrastructure.<sup>73</sup> From this perspective that is also supported by our study, a significant degree of political commitment may be a necessary, but it is not a sufficient condition. It must also be accompanied by diffused and well-coordinated efforts and synergies among the civil service, parliamentarians, and administrative elites, courts, independent authorities, and other state bodies. The need to forge synergies and ensure coordination among various institutions and actors at the national level has been highlighted in recommendations issued by the CoM with a view to improving domestic capacity for the execution of the ECtHR's judgments.<sup>74</sup> Diffused human rights awareness and relevant legal expertise across the different branches and institutions of the state are also significant in defining, enacting, and enforcing the appropriate measures and reforms to put into practice abstract rights principles and their judicial interpretations by the ECtHR. In this process the role of civil society actors can be salient: they provide insiders' information and expertise in the field of their concern, they help check and verify reports, and analyse and critique the performance of parties, exposing persistent offenders and organizing human rights supporters.<sup>75</sup>

There is no easy way to increase a state's weak infrastructure capacity, and efforts to boost the rule of law and government effectiveness take time to bear fruit. Actions to improve state implementation of human rights rulings and progressively relieve the ECtHR of its excessive caseload must focus on building up the domestic institutions' capacity.<sup>76</sup> They should also focus on socialization and persuasion-related activities aimed at educating not only national judges, but also parliamentarians, administrative officials, decision-makers, and civil society members about human rights and the role of the ECtHR jurisprudence. Promoting such diffused embeddedness of the Strasbourg-based human rights regime at the national level is seen as an essential counterpart to the subsidiarity principle, as well as the only way to uphold the regime's longer term credibility and survival.<sup>77</sup>

<sup>73</sup> Tallberg, *supra* note 71.

<sup>74</sup> Recommendation CM/Rec(2008)2 of the CoM to member states on efficient domestic capacity for rapid execution of judgments of the ECtHR, adopted by the CoM on 6 Feb. 2008 at the 1017th meeting of the Ministers' Deputies.

<sup>75</sup> Chayes and Chayes, *supra* note 11, at 111.

<sup>76</sup> Hillebrecht, *supra* note 15, at 297.

<sup>77</sup> Helfer, *supra* note 67.