From the Point of View of National Judiciaries:
The Role of National Courts in the Implementation of the Court's Judgments.

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Introduction

The second topic of the Seminar – the role of national courts in the implementation of the Court's judgments – is both vast and complex. It also raises many important questions for which we have no definitive answers, not least, because relatively systematic, comparative research on implementation did not exist until recently.

We do know[1] that there is wide variance – both across and within national legal orders – in how the Court's rulings are implemented. Variance across national systems is partly determined by how the Convention has been incorporated into national law, and then by how national judges use the Convention in light of their own constitutional arrangements. To make matters more complicated, we also find a great deal of variation inside national legal orders. In a majority of European states, no single "model" of implementation exists. In systems with multiple high courts, for example, national judges do not always agree among themselves on a common approach to enforcing the Convention. In all states, some judges are more receptive than others to the Court's jurisprudence; and resistance to the Court's influence is more pronounced in some areas of the law, compared to other domains. At the same time, incorporation and Protocol No. 11 combined to create a Community of courts, a pan-European, rights-based Commons of which many of you are all important members. In this common judicial space, no court at any level can fulfill its rights-protecting missions without the support and cooperation of other courts.[2]

In my contribution to the Seminar, I will focus in more detail on three of the points just made: (1) the incorporation of the Convention into national law; (2) the impact of incorporation and Protocol No. 11 on rights protection through national courts; and (3) the role of inter-judicial cooperation in building a Community of courts.

I. Incorporation

The European system of rights protection has been transformed by the combined effects of (1) the entry of force of Protocol No. 11 (1998), which confers upon individuals a right to petition the European Court after exhausting national remedies, and (2) the incorporation of the Convention into national law. These structural changes produced a new and unique legal system which, for all of its problems, is the most effective human rights regime the world has known. Managing this multi-level system is the collective responsibility of the European Court, the Committee of Ministers, national governments and parliaments, and national judges. I will begin by focusing on some structural features of this system, as they pertain to national courts.

The first and most basic point is that the Convention is no longer mainly a species of international law: it is *national* law that is directly enforceable by national judges. Today, every Contracting Party has domesticated the Convention. Incorporation proceeded by different routes: through express constitutional

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[1] See Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008); Leonard Hammer and Frank Emmert, *The European Convention on the Human Rights and Fundamental Freedoms in Central and Eastern Europe* (The Hague: Eleven, 2011).
[2] Alec Stone Sweet, "A Cosmopolitan Legal Order," *Journal of Global Constitutionalism* 1 (2012), 53– 90

provision (many states in Central and Eastern Europe and the Balkans); through judicial interpretation, especially of constitutional provisions governing the status of treaty law (most States in Western Europe); and through special human rights statutes (the UK, Ireland, and Scandinavian states). With incorporation, the Convention becomes binding not only on states, as a matter of international law, but on every state official who exercises public authority, as a matter of domestic law. Today, virtually all national courts in the system are capable of enforcing the Convention: individuals can plead it at national bar against virtually any act of public authority; judges are under a duty to identify parliamentary statutes that conflict with rights, and to interpret statutes in light of the Convention, in order to avoid conflicts whenever possible; and judges are expected to refuse to enforce statutes found to be incompatible with the ECHR, although there are notable exceptions (the UK and Ireland).

The vast majority of cases involving Convention rights before national courts do not require the judicial review of statutes. I have, nonetheless, emphasized this form of review to highlight the profound transformation in the nature and scope of judicial authority brought about by the incorporation of the ECHR. National courts are today positioned to enforce the Convention but, to arrive at this point, most systems had to overcome a deeply-rooted constitutional orthodoxy: the prohibition of judicial review of statute. When the ECHR was signed, only Ireland, among original signatories, had any meaningful experience with judicial review, or possessed an enforceable charter or rights. As rights-based, constitutional democracy spread across Europe, most systems established constitutional courts in order to protect fundamental rights, while maintaining the prohibition of judicial review of statute. By conferring upon the Convention at least a *de facto* rank above that of parliamentary legislation, the prohibition was overcome. Similarly, in so-called dualist states, in which treaty law enters into national law with the same rank as statute, the *lex posterior derogat legi priori* rule had to be relaxed, in order for the Convention to be enforceable in a conflict with legislation.

In these and other ways, incorporation has been directly implicated in constitutional change. The Convention now functions as a "surrogate" charter of rights in states that do not possess their own judicially-enforceable charters (including France, the Netherlands, Switzerland, and the UK). Finland, Norway, and Sweden enacted new Bills of Rights, closely modeled on the Convention, in order to fill gaps in their own constitutional law. In those States that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection. This is the situation in Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-Communist States.

With incorporation, the Convention and national constitutional law are not easily dissociated. In Spain, the Constitutional Tribunal enforces the Convention in synergy with constitutional rights. The Tribunal will strike down statutes that violate the Convention as *per se* unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the courts to implement the Strasbourg Court's jurisprudence as a matter of *constitutional* obligation, including precedent generated in cases not involving Spain. If the judiciary ignores the Tribunal's jurisprudence, individuals can appeal directly to the Tribunal for redress. The German Federal Constitutional Court, despite a surface commitment to constitutional dualism, has recently taken a similar position, relaxing the *lex posterior* rule. In many post-Communist States, as well, constitutional judges invoke the Strasbourg Court's jurisprudence as authority, in order to enhance the status of constitutional rights – and hence their own positions – in the national legal order.

Strikingly, some States give the Convention constitutional rank (e.g., Albania, Austria, Slovenia); and, in the Netherlands, the ECHR enjoys supra-constitutional status, which is also the position of the Belgian Supreme Court, but not the Constitutional Court.

Through incorporation, every national legal system has adapted to the post-Protocol No. 11 regime in ways that have fundamentally altered its constitutional structures and practices, and in ways meant to facilitate implementation of the rulings of the European Court.

II. Pluralism within National Legal Orders

Protocol No. 11 and incorporation have combined to create a multi-level, pluralistic system of rights-protection in Europe.[3] I do not use the word "pluralistic" just to be fashionably academic. Pluralism denotes a legal fact, a structural property of a legal system.[4] With respect to national systems of rights protection, it describes two types of situations (legal facts). The first type is "source pluralism," wherein two or more autonomous sources of judicially-enforceable fundamental rights co-exist. In most national legal systems, constitutional rights and Convention rights overlap and, in member states of the European Union, the rights found in EU law are also available. Individuals may have a choice of which source to plead, and judges often have choices of which right to enforce. Such choices are directly implicated in the question of how the European Court's judgments are implemented.

The second form of pluralism is "jurisdictional," wherein at least two high courts claim autonomous authority to interpret and apply fundamental rights, and no one court can consistently impose its interpretation of rights on the other.[5] Consider the Belgian case just mentioned, where two high courts do not agree on the status of the Convention in the hierarchy of norms. Some significant measure of jurisdictional pluralism is found in all states in which judicial power is distributed among specialized courts – the majority of states in the Council of Europe today – but where the right of individual petition to a Constitutional Court is absent. Where individuals can challenge a judicial decision before the constitutional court, or where there is a single final court of appeal, the development of significant jurisdictional pluralism can be blocked.

In many states, the two forms of pluralism combine. Consider the example of France, which for two centuries embraced the prohibition of judicial review of statutes, but which is now a robust example of rights pluralism. From the point of view of the individual rights claimant, the Supreme Civil Court (*Cour de Cassation*) and the *Conseil d'état* (the supreme administrative court) function as the "real" constitutional courts; and litigants and judges treat the Convention as the "real," that is, *de facto* charter of rights. The reason: individuals have no direct access to the Constitutional Council, despite recent constitutional changes; and it is the European Court, not the Constitutional Council, that most directly supervises the rights-protecting activities of the civil and administrative courts. Today, three autonomous high courts in France protect fundamental rights on an ongoing basis.

Incorporation expanded judicial power, with respect to legislative and executive power, throughout Europe. In most states, it also created source pluralism, while enhancing jurisdictional pluralism in those systems in which judicial authority was already divided among separate high courts. These facts are enormously important to our topic. In a pluralist context, judicial outcomes are not generated mechanically, through top-down, command and control mechanisms. Judges have hard choices to make from a complex menu of options. Implementing the Court's important rulings will always involve multiple considerations, including the probable impact of implementation on existing constitutional doctrine and precedent, on other lines of substantive case law, and on relationships with executives,

[3] Stone Sweet, "A Cosmopolitan Legal Order," op cit.
[4] Alec Stone Sweet, "The Structure of Constitutional Pluralism," *International Journal of Constitutional Law*, 11 (2013): 491-500.
[5] Lech Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5 (2007), 44-68; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (Springer 2005): 20-25

legislators, and other judges. In situations of jurisdictional pluralism, rights protection proceeds through delicate inter-judicial dialogues, both cooperative and conflictual. The result of these dialogues can be decisively influenced by rulings of the European Court: the national court that is on the side taken by the Strasbourg Court will usually prevail.

Generally, incentive structures push national judges toward implementation of the Court's judgments. Simplifying a complex topic, and at the risk of sounding like a political scientist, there are three basic logics at work. The first is an "avoidance of punishment" rationale: enforcing Convention rights will make the state – in practice, judges – less vulnerable to censure in Strasbourg. This logic is especially pronounced in systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second dynamic is embedded in domestic law and politics. Individuals, lawyers, and groups may invoke the Convention before national judges as part of a strategy to change national law and policy; and national judges may seek to entrench Convention rights in order to enhance their own authority with respect to legislators and executives, and other national courts. This is a "judicial empowerment" rationale: to the extent that judges respond to demands to protect rights effectively, they will empower themselves, whether or not they intend to do so. Third, as the European Court has consolidated its role as a primary, authoritative source of rights doctrine and standards, the interest national judges have in constructively engaging the Court in dialogue increases. Even for national judges who are relatively jealous of their own autonomy, engaging the Convention and its Court is more likely to inject national values into decision-making in Strasbourg than the more costly alternative: defection and open conflict.

I do believe that it is legitimate for a national court to refuse to implement certain types of rulings of the European Court. When the Strasbourg Court, for instance, balances two rights that are in tension differently than have supreme or constitutional judges beforehand, the Court does not apply higher standards of protection for one right, without lowering it for another. In such cases, what is important is that both courts demonstrate that they have resolved these hard cases in good faith, fully aware that the other court may decide differently.

In any event, in a pluralist system of rights protection, friction among national officials, and between national courts and the European Court, can never be eliminated. How this friction should be managed is, of course, the crucial question for everyone present today.

III. A Community of Courts

I have claimed that Protocol No. 11 and the incorporation of the Convention combined to give birth to a new legal system, one in which a Community of courts shares the formal responsibility to enforce the Convention. The system is pluralistic: neither a national court nor the Strasbourg Court has formal powers to impose its interpretation of rights on the other. Instead, just as in those national legal orders characterized by jurisdictional pluralism, rights protection proceeds through inter-court dialogues. The necessary condition for dialogue is that every high court recognizes the authority and legitimacy of every other high court. Such recognition creates a Community of courts. A necessary condition for successful dialogue within this Community is that each court, including the European Court, recognizes that every other court may have good reasons to differ on how rights are to be interpreted and applied in the context of any specific dispute.

These points made, the Strasbourg Court holds the status of "first among equals" in this Community. Indeed, it has emerged as a kind of transnational constitutional court, and for well-known reasons. The Court performs many of the same functions that powerful national constitutional courts do, using similar techniques, with broadly similar effects. It confronts cases that would be classified, in the context of domestic law, as inherently "constitutional." It holds that its important precedents bind all judges in the

system. It adjudicates qualified rights just as constitutional courts do, through proportionality-based balancing. It routinely indicates how a state might or must reform its law in order to avoid future violations. And its most important rulings place national executives, legislators, and courts "in the shadow" of future litigation, provoking the kind of dynamic adaptation – rights-oriented jurisgenerativity – that one finds in the most effective national systems of constitutional justice. These developments are justified to the extent that they enhance the effectiveness of rights protection, which is, after all, the central priority of the system. Even if we reject the "constitutional" label, the Community of Courts needs a manager, and the Strasbourg Court is the only court positioned to perform this role.

As "first among equals," the European Court is under a special duty to facilitate dialogue within the Community. Most important, it must fully acknowledge the complexity of the national judge's task in enforcing Convention rights, while – simultaneously – considering the transnational dimensions of specific cases. How well the Court does so will bear on implementation. In its rulings, the Court takes great pains to trace the process through which individuals have exhausted remedies, and it responds to all of the arguments submitted by the defendant state. Some state officials may disagree with a finding of violation, but it is not plausible to argue that the Court fails to take domestic law and context, or the state's views, seriously. More controversially, in the context of the qualified rights (Articles 8-12 ECHR), the Court will typically raise standards of protection in a given domain when a sufficient number of States have withdrawn public interest justifications for restricting the right. The margin of appreciation thus shrinks as transnational consensus on higher standards of rights protection emerges.[6] From the point of view of national judges in states that have fallen behind, destabilization is the result. Nonetheless, in considering national law and practice comparatively, in light of transnational values and practice, the Court forcefully proclaims that no national court is alone when it adjudicates rights. Rights protection in a Community of courts is a collective process.

To conclude, I will emphasize a point that deserves to be better appreciated in difficult times. In the Convention system, in which national judges have an integral role, it is individuals – not states – who are the major stakeholders. Under traditional conceptions of international law, states were the dominant actors, the entities that mattered. In practice, the interests of the state typically reduced to the interests of the executive. Today, in the system produced by Protocol No. 11 and incorporation, "states" are mostly legal fictions. Judges do not exercise authority over "states." Judges review how specific national officials, operating in diverse contexts, take decisions that affect the fundamental rights of individuals that come under their jurisdiction. It is their duty to do so because it has been decided that, in Europe, no act of public authority is legally authorized or legitimate if it violates fundamental rights.

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[6] Alec Stone Sweet and Thomas Brunell, ""Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO," *Journal of Law and Courts*, 1 (2013): 61-88.