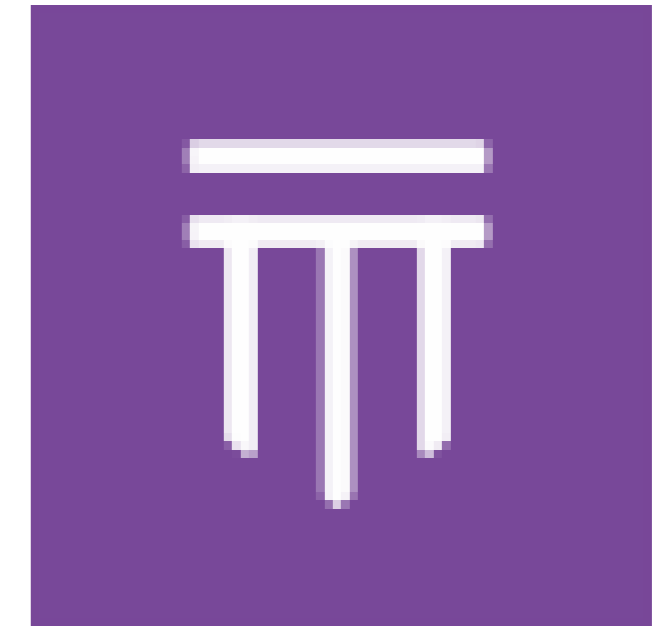


Brno, 19 September 2022

European System of HR Protection



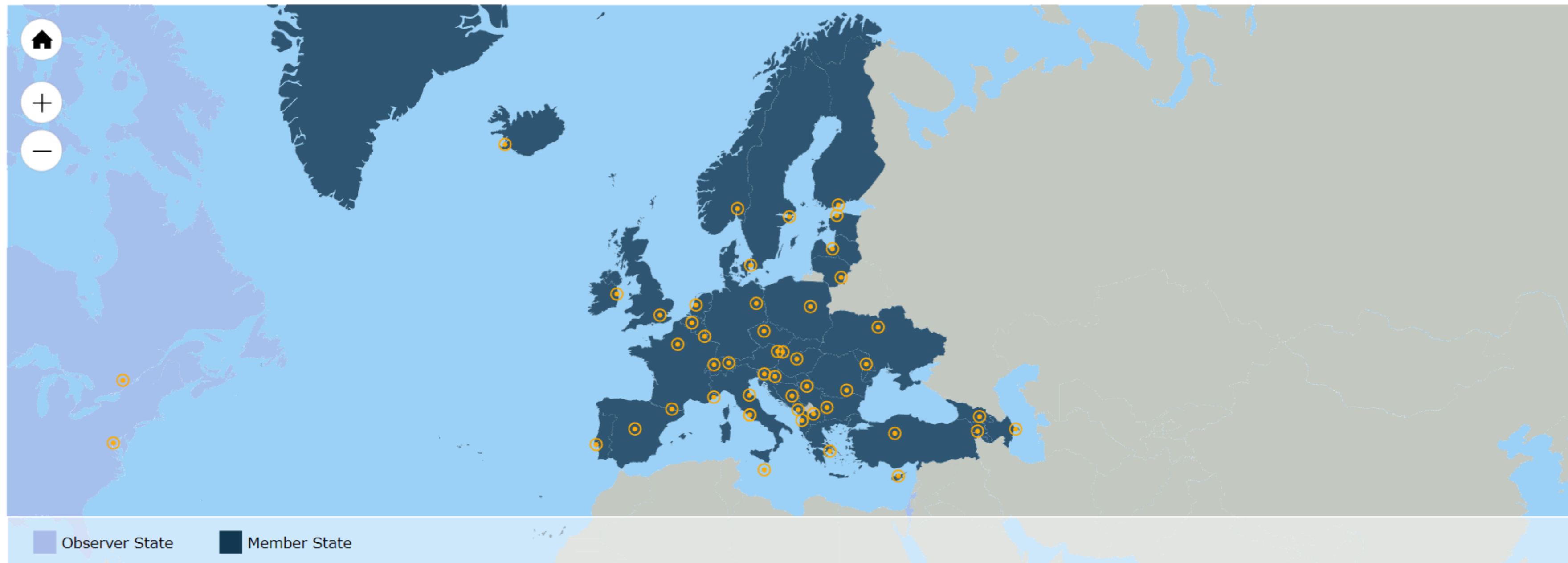
JUSTIN
Judicial Studies Institute
Masaryk University

| Katarína Šipulová



CoE

46 Member States





Council of Europe

- Established 1949
- Intergovernmental (compared to EU)
- ECtHR and a network of various bodies
- ECHR plus more than 200 treaties
 - European Social Charter
 - European Convention on Human Rights
- 47->46 members



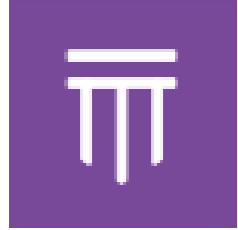
ECtHR





Bringing a case to ECtHR

- Who
- When
- Where
- Which rights?



Bringing a case to ECtHR

ARTICLE 1

Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

ARTICLE 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.



Bringing a case to ECtHR



ARTICLE 33

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

ARTICLE 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.



ARTICLE 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.



ECtHR most important issues

- Armed conflicts
- Damages



Proportionality test

- Relative rights – any limitation to the right must be
 - Prescribed by the Law
 - Necessary in democratic society
 - Pursuing legitimate aim
- **Proportionality** means that the interference must be **no more than is absolutely necessary** to achieve one of the aims in the Convention



Proportionality test



ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



Proportionality test

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

-
-
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.



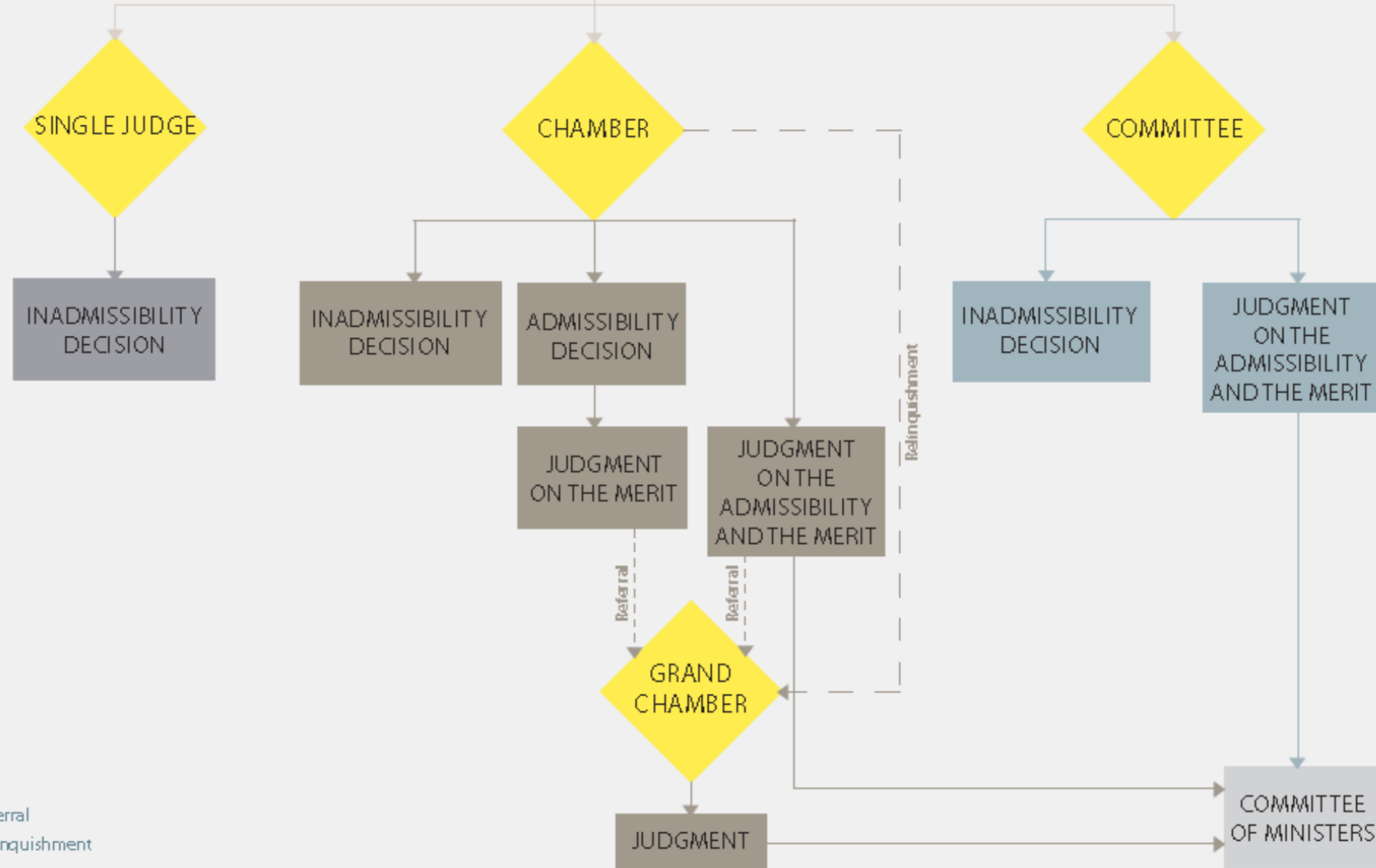
Proportionality test

ARTICLE 9

Freedom of thought, conscience and religion

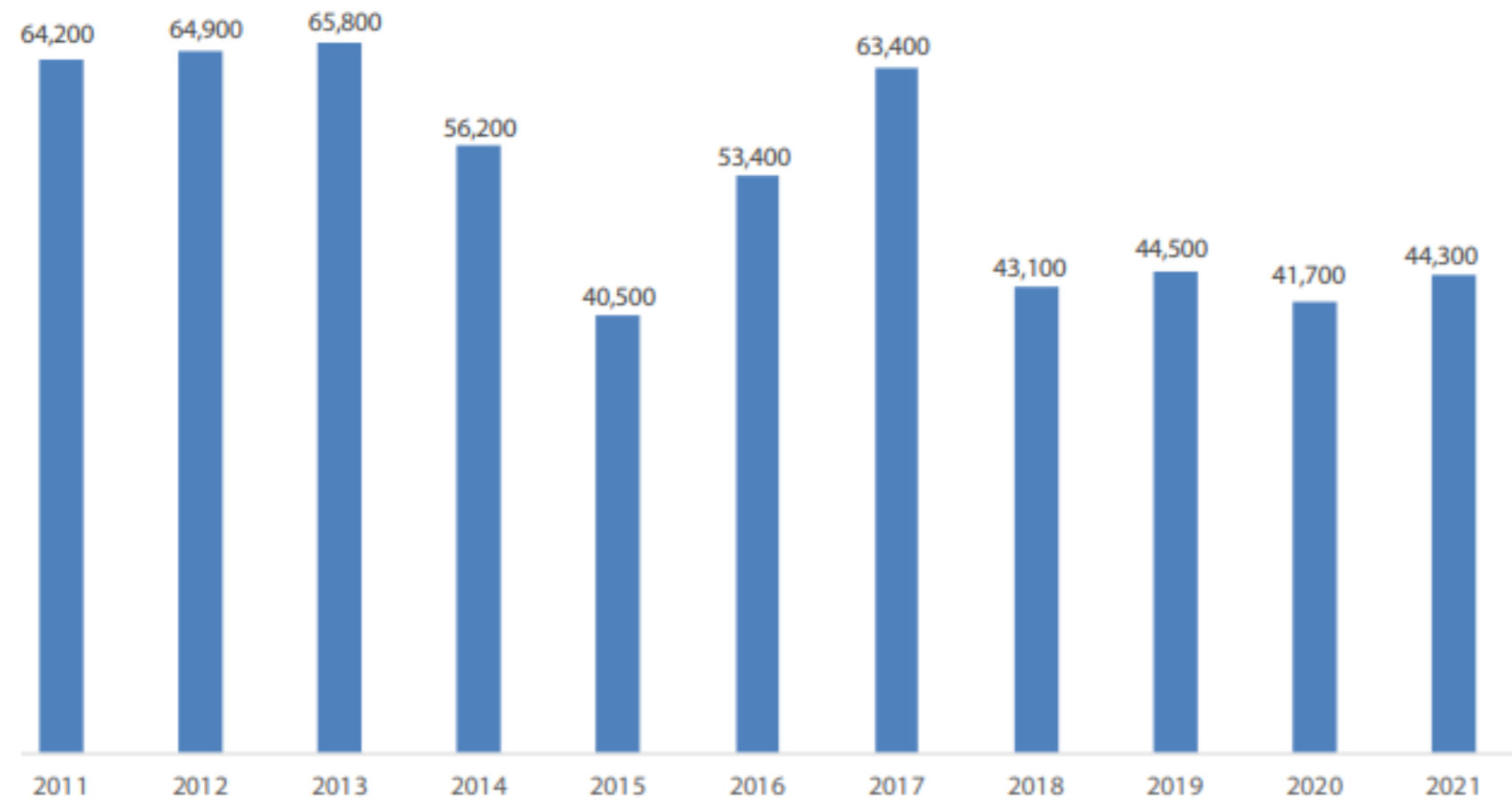
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

INDIVIDUAL APPLICATIONS

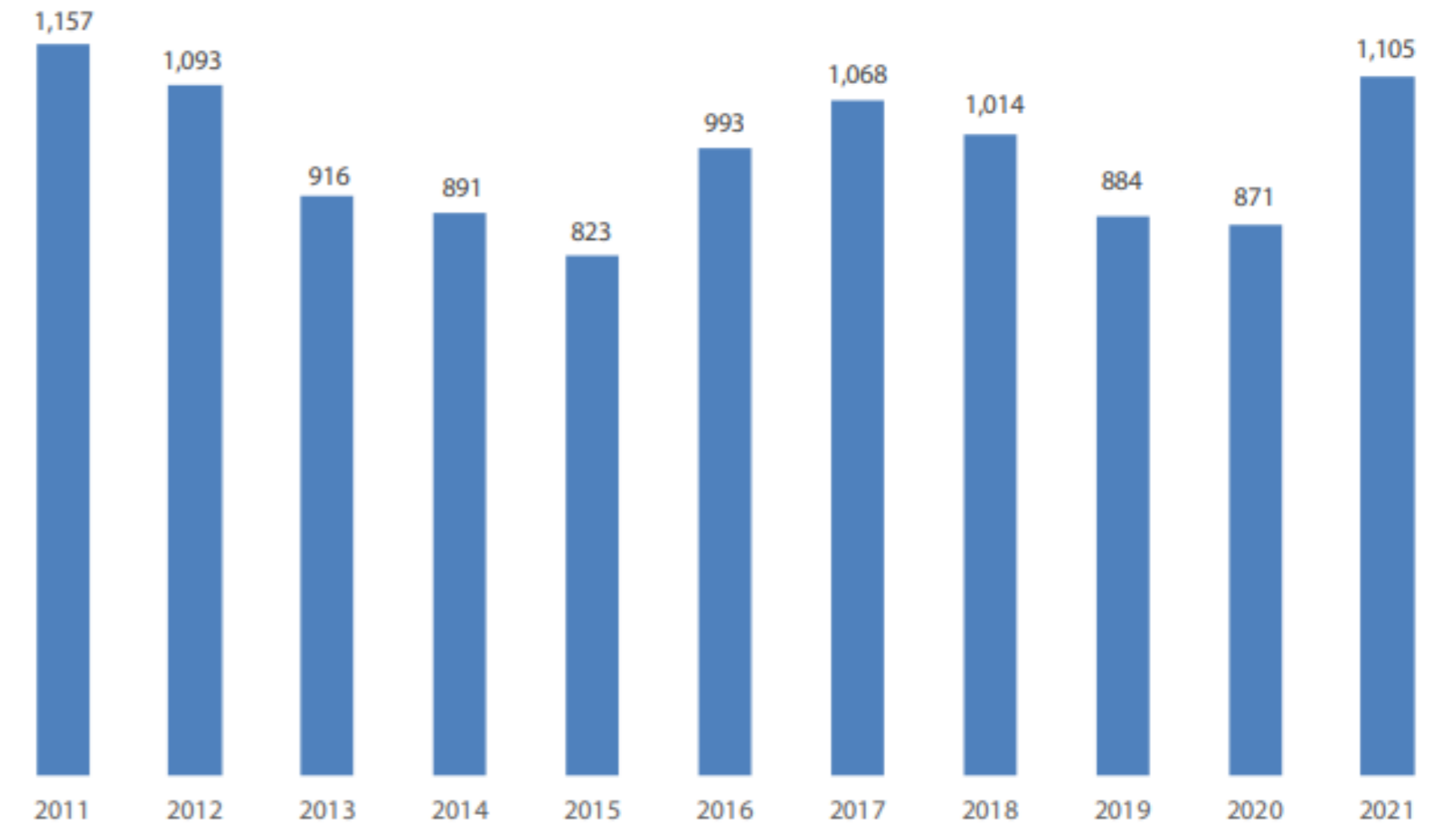




ALLOCATED APPLICATIONS (2011-21)

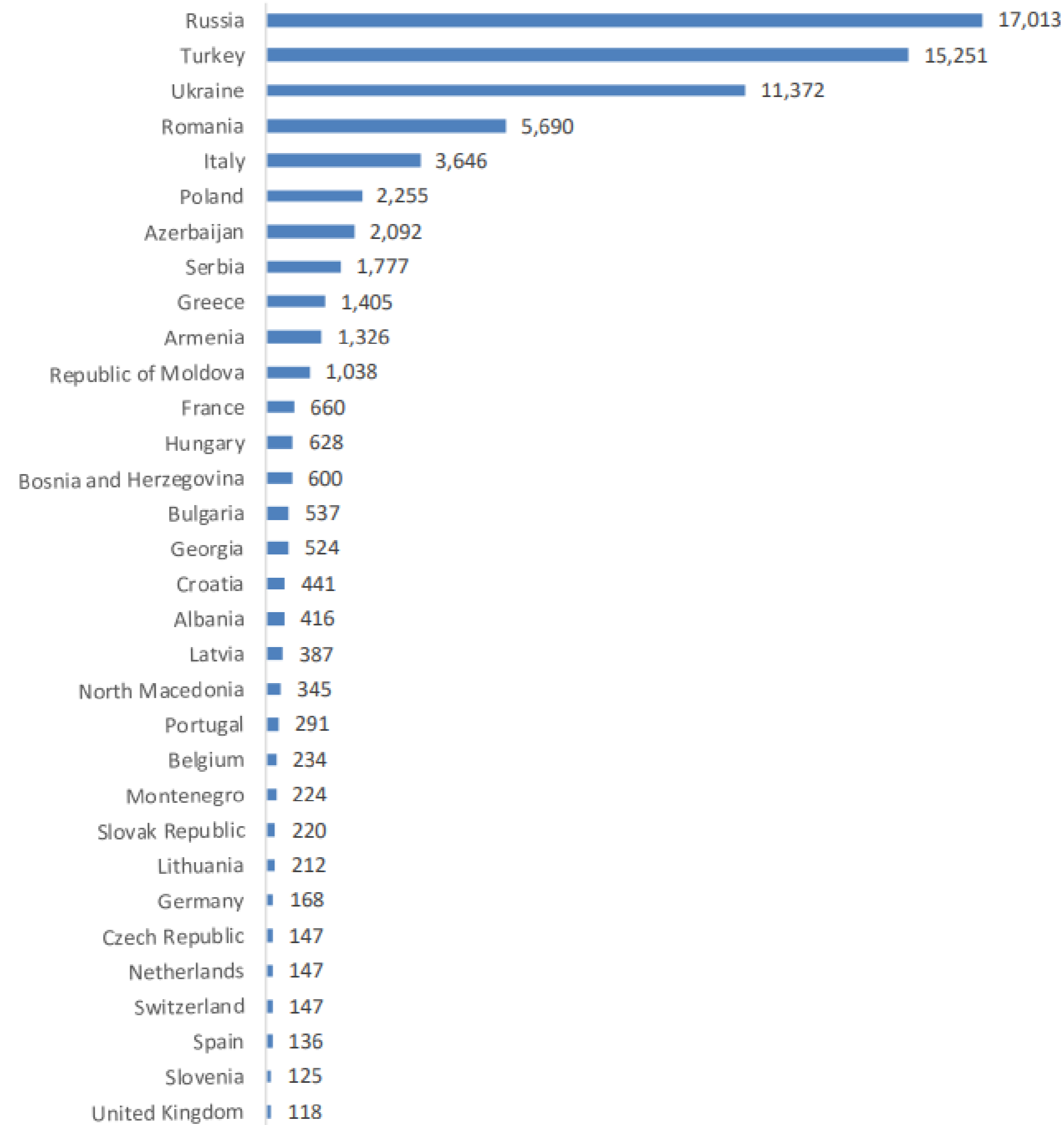


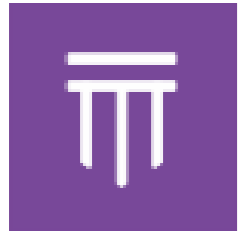
JUDGMENTS (2011-21)



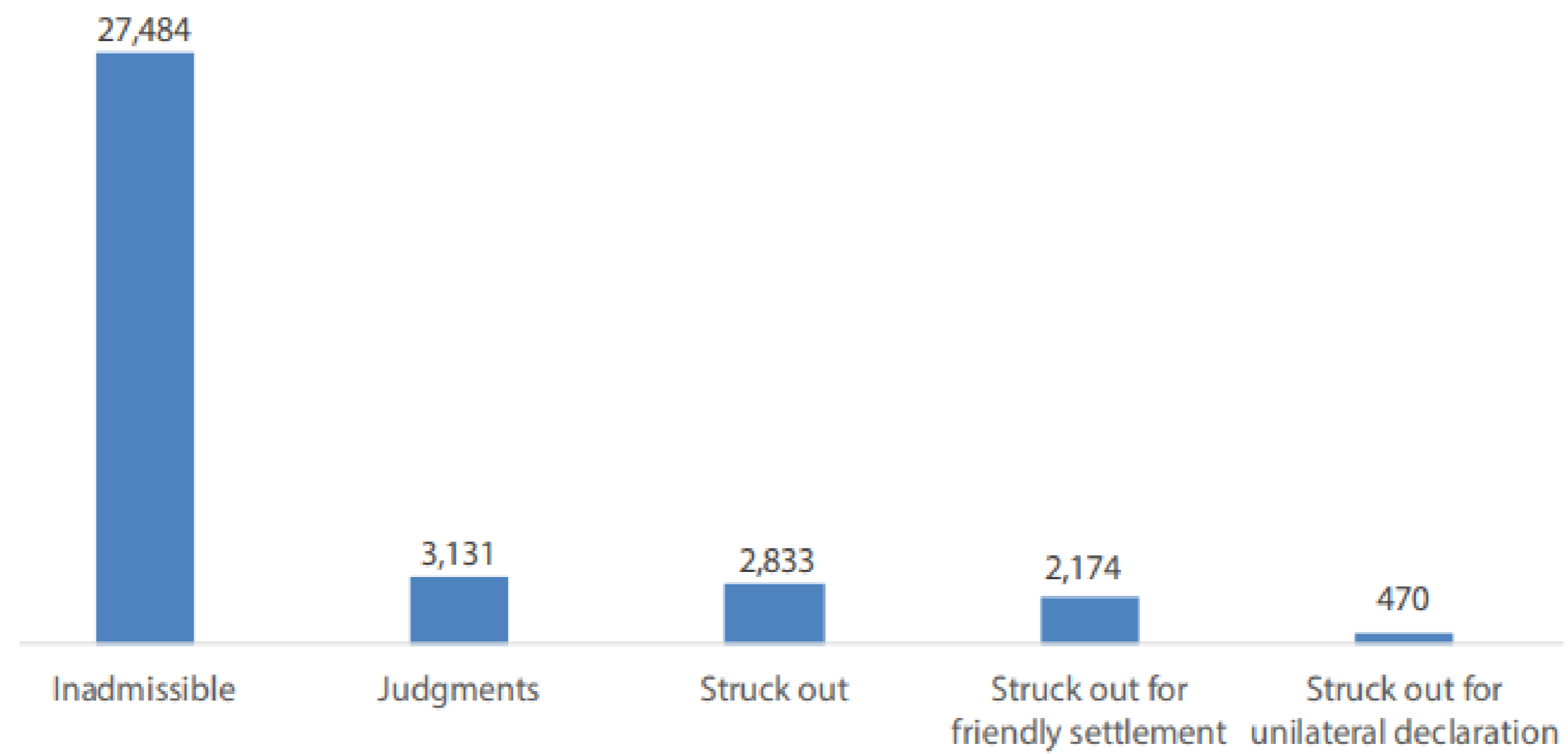


PENDING CASES (BY STATE)





DECIDED APPLICATIONS



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

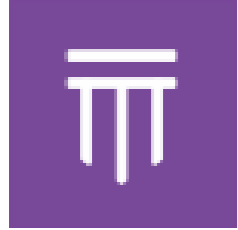




Selection of ECtHR judges

- 46 judges
- Decide in formations:
 - Single judge
 - Three-member chamber
 - Seven-member chamber
 - Grand chamber
- Each state nominates 3 candidates
- PACE interviews and selects one judge per country
- Many controversies
- New Czech judge: Kateřina Šimáčková
- New Court President: Síofra O'Leary





ECtHR key dates:

- 5 May 1949 - Creation of the Council of Europe
- 4 November 1950 - Adoption of the Convention
- 3 September 1953 - Convention enters into force
- 21 January 1959 - First members of the Court elected
- 23-28 February 1959 - Court's first session
- 18 September 1959 - Court adopts its Rules of Court
- 14 November 1960 - *Lawless v Ireland*
- 1 November 1998 - Protocol 11 in force -> **The New Court**
- 1 June 2010 - Protocol 14 enters into force
- 1 August 2018 - Protocol 16
- 16 March 2022 - Russia ceases to be a member state of the CoE

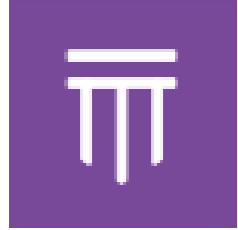


ECtHR key dates:

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.



Current issues

- 3 crises negatively impacting the ECtHR's legitimacy
 - Backlog (victim of its own success)
 - Non-implementation
 - Populist challenge to ECtHR
- 4th? Russia's exit?
- Judicialization
- Independence
- Backslash / pushback against the ECtHR



(Populist) challenge to ECtHR

- Non-majoritarian difficulty squared
 - A. Bickel: counter-majoritarian difficulty of constitutional review
 - Waldron: institutions must respect the fact of deep conflict among citizens on substantive issues
 - only unconstrained majority rule among elected parliamentarians treats all citizens as political equals. Human rights constraints based on judicial review of legislation, on the other hand, violate citizens' equal dignity
 - “it is where responsible representatives of the people engage in what they would probably describe as the self-government of the society.”
 - Any constraint of the legislator = x self-government



(Populist) challenge to ECtHR

- 5 Objections towards constraints on legislator:
 - 1. power of judges cannot be more than power of citizens
 - 2. skewed outcomes
 - 3. role of state (Bellamy: too much focus on negative social and political rights)
 - 4. Mistaken conception of the person (democracy does not endanger individual, tyranny of majority is limited by a sense of justice)
 - 5. damage to public political culture
 - Bellamy: political institutions should allow perpetual contestation about interests, rights, policies



(Populist) challenge to ECtHR

- ECtHR's response
 - Margin of appreciation
 - Principle of subsidiarity
 - Weak review
- A. Follesdal:
 - Liberal contractualism: social institutions must satisfy principles of legitimacy
 - Democratic rule with constraints on legislatures may provide important assurance why citizens should trust institutions
 - The least dangerous branch (risk of domination is small)
 - ECtHR does not replace political, democratic domestic contestation
- BUT: the real challenges
 - Quality of judicial deliberation
 - Risk of unaccountable judges
 - Social legitimacy



Backlash against international HR courts

- Resistance to ICs
 - Who?
 - Why?
 - How?
 - pushback
 - backlash
- UK confusion



Volume 14, Special Issue 2 (Resistance to International Courts) June 2018 , pp. 197-220

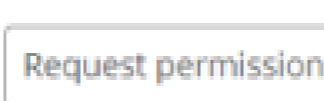
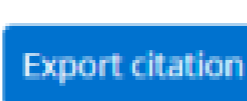
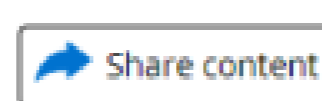
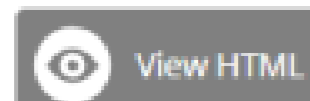
Backlash against international courts: explaining the forms and patterns of resistance to international courts

Mikael Rask Madsen ^(a1), Pola Cebulak ^(a2) and Micha Wiebusch ^(a3)

<https://doi.org/10.1017/S1744552318000034> Published online: 29 May 2018

Abstract

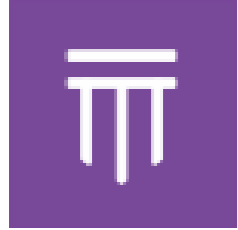
The paper investigates and theorises different forms and patterns of resistance to international courts (ICs) and develops an analytical framework for explaining their variability. In order to make intelligible the resistance that many ICs are currently facing, the paper first unpacks the concept of resistance. It then introduces a key distinction between mere pushback from individual Member States or other actors, seeking to influence the future direction of a court's case-law, and actual backlash – a critique triggering significant institutional reform or even the dismantling of tribunals. On the basis on the proposed theoretical framework, the paper provides a roadmap for empirical studies of resistance to ICs, considering the key contextual factors necessary to take into account in such studies.



THE CHALLENGING AUTHORITY OF THE EUROPEAN COURT OF HUMAN RIGHTS:

FROM COLD WAR LEGAL DIPLOMACY TO THE BRIGHTON DECLARATION AND BACKLASH

MIKAEL RASK MADSEN*



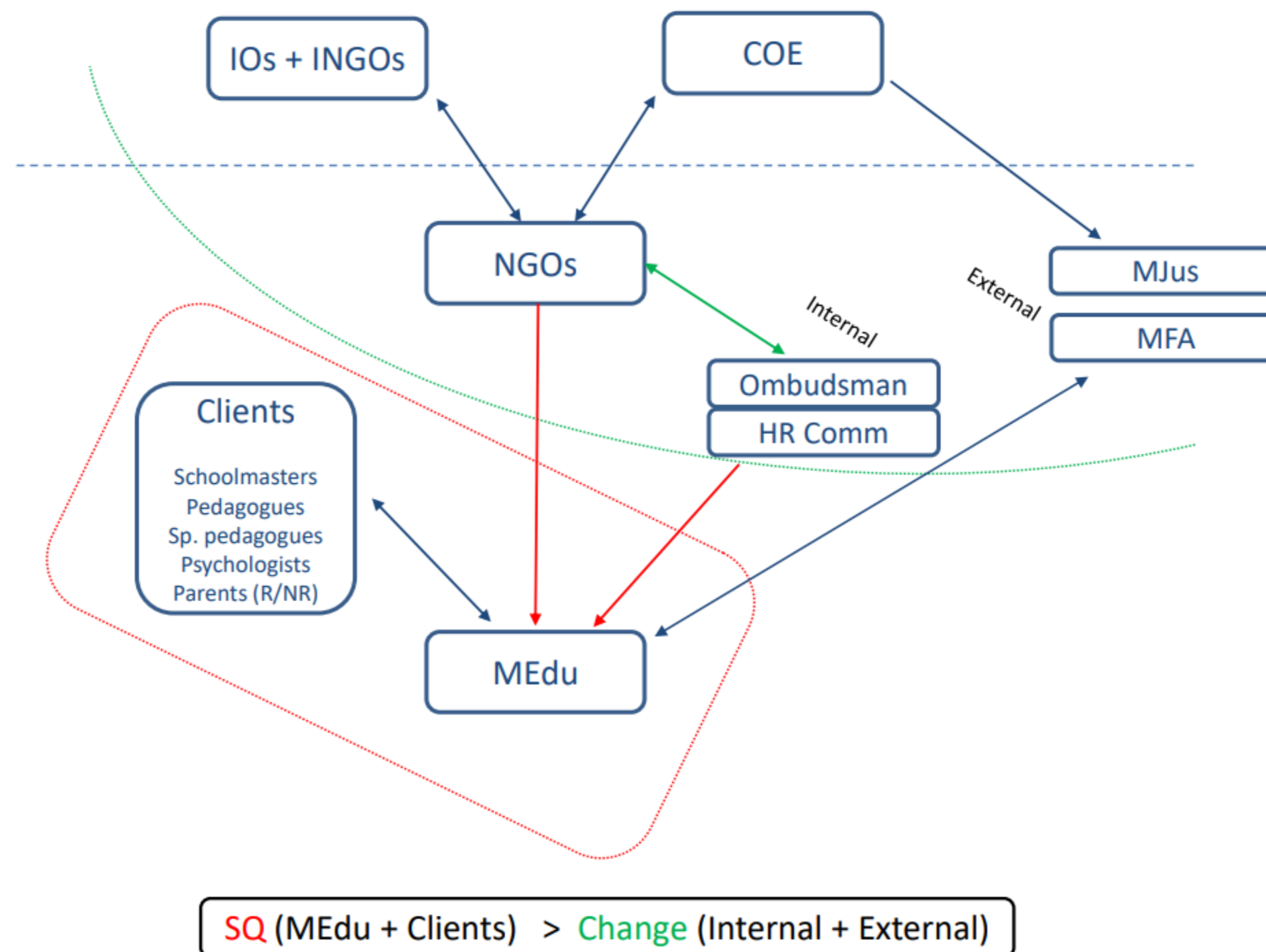
DH vs Czech Republic



Ostrava



DH vs Czech Republic





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