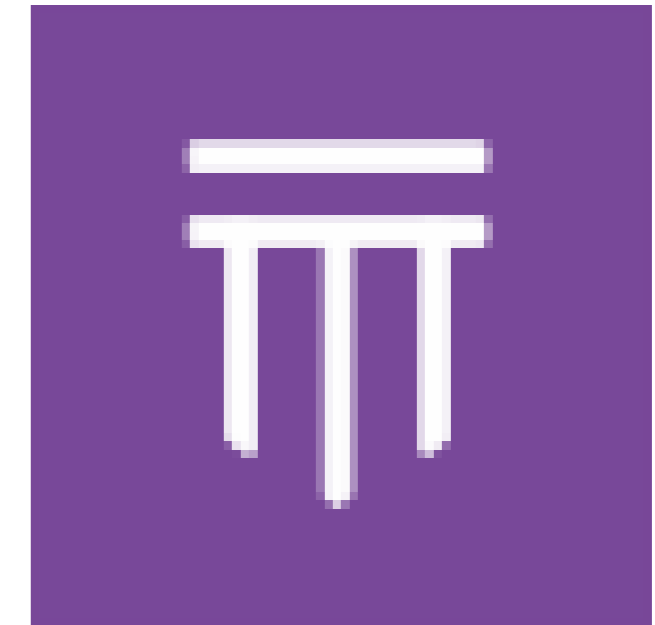


Brno, 30 September 2024

European System of HR Protection



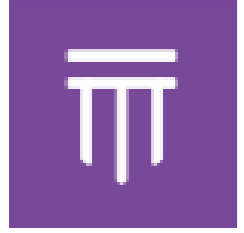
JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová



European road to HR regime

1. Rights conferred on people by an enlightened ruler
2. Rights seized by the people
3. Rights existing outside of the realm of politics (God, Nature)



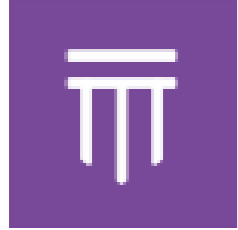
Magna Charta 1215

- Subjective rights
- But limited in the category of subjects
- **Rights conferred on subjects of Crown or taken by subjects of Crown?**



John Locke

- Self-evidence rights
- Right to life, liberty, freedom from arbitrary rule, property
- State of nature
- REJECTION OF MAGNA CHARTA
- “The state of nature has a law of nature to govern it which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.”



Post WW2 – Universal Declaration of Human Rights

- FDR: Search for 4 great freedoms
 - Freedom from fear
 - Freedom from war
 - Freedom to speak
 - Freedom of religion
- *We the people of United Nations are determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.*
- *– E. Roosevelt: human rights start in small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the factory, farm, or office where he works*



Post WW2 – Universal Declaration of Human Rights

- „Disregard and contempt for human rights have resulted in barbarous acts which have **outraged the conscience of mankind**, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. **All human beings are born free and equal in dignity and rights.**”
- Central idea = inherent dignity of human beings and the universality of their rights
- Recognition of pre-existing rights
- Focus on socio-economic rights along the more familiar civil and political rights



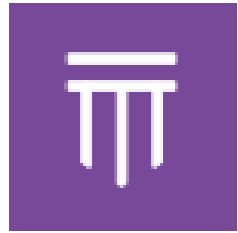
European HR Regime (CoE) and European Union

1. Strasbourg: Council of Europe
2. Luxembourg: European Union

(Other relevant HR systems?)



Council of Europe



Global physical integrity rights

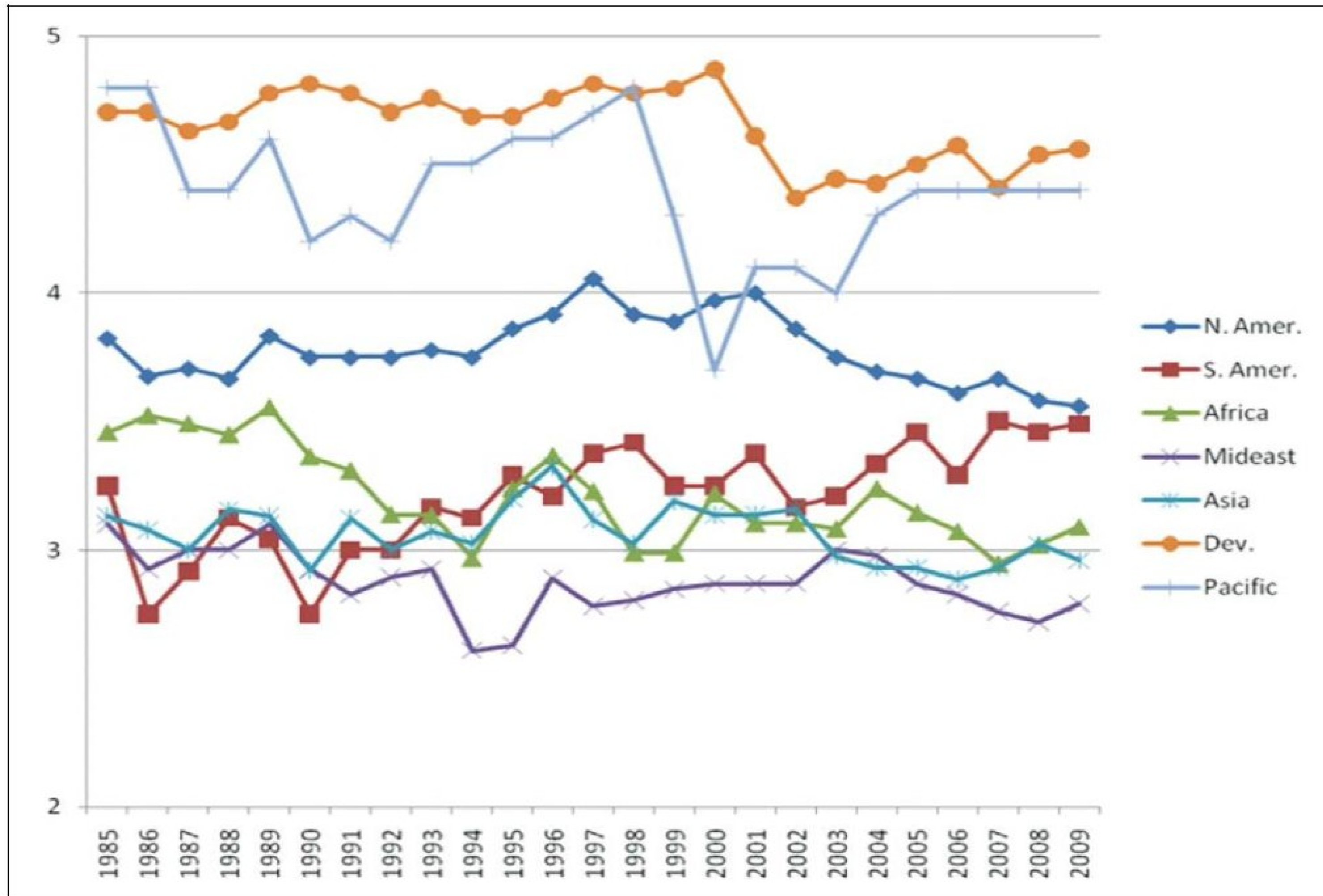
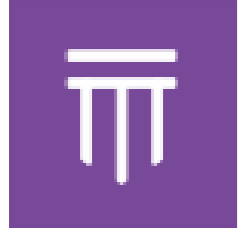


Figure 2. Global physical integrity rights (Political Terror Scale), 1985–2009.



Global physical integrity rights

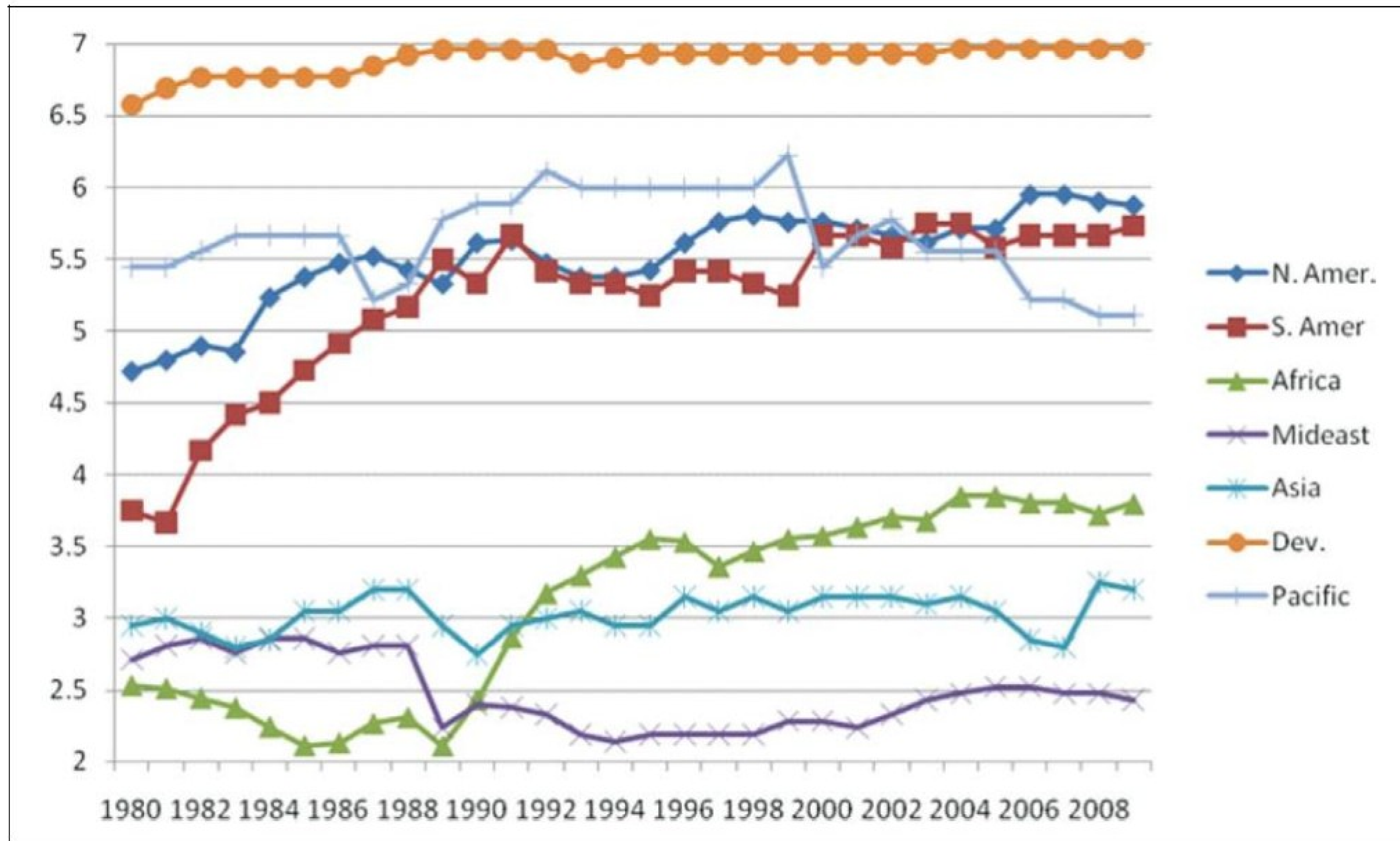


Figure 4. Global political rights (Freedom House), 1980–2009.



Differences across regions

- Europe
 - Americas
 - Africa
 - Islamic states
-
- **European states the most willing to be internationally bound**



Why do States Ratify Treaties?

1. Why is it important?
2. What is a ratification?



Differences across regions

- In the text of a convention
- In the activity of the control mechanism

- In the form of commitment (x reservations)
- In compliance

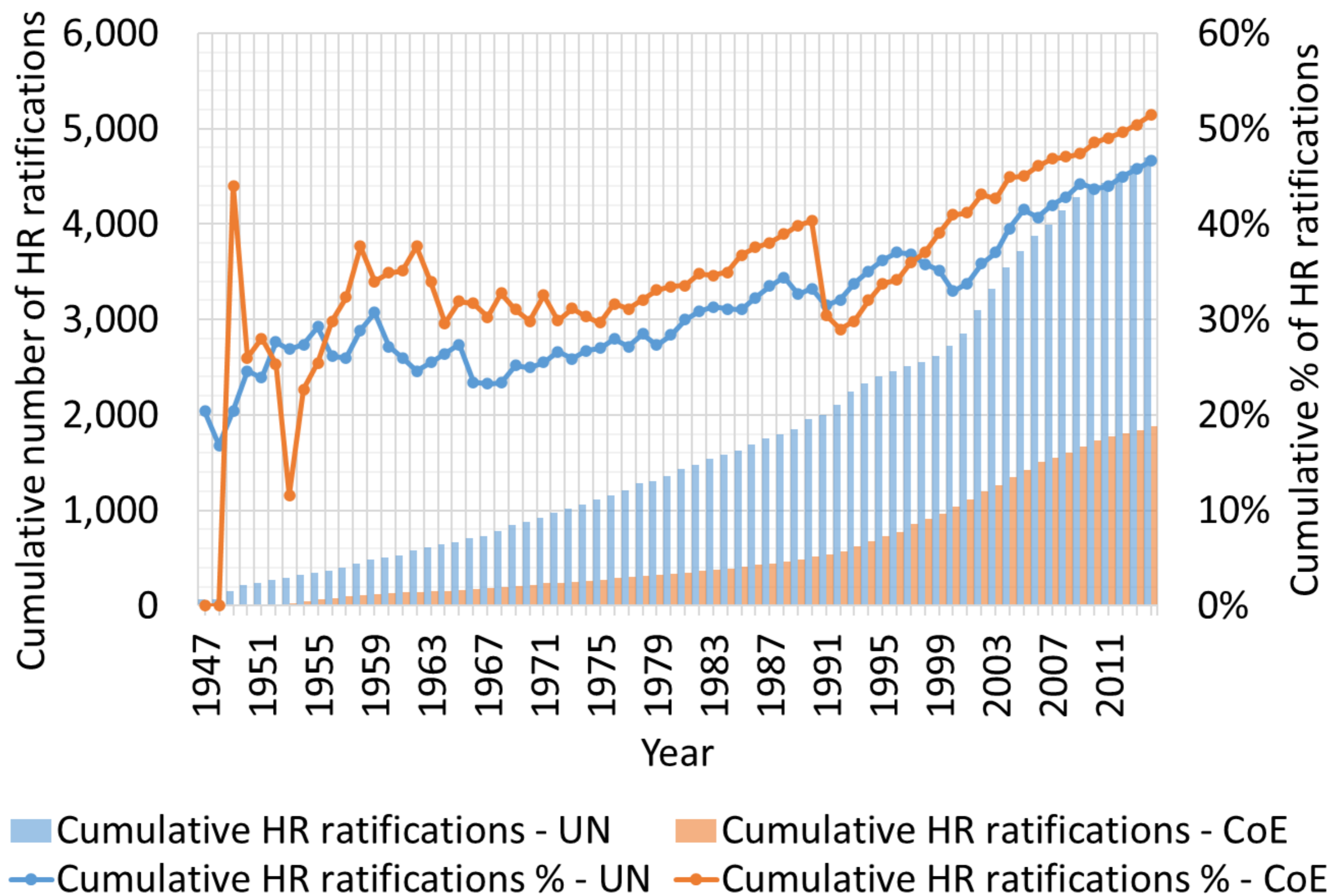


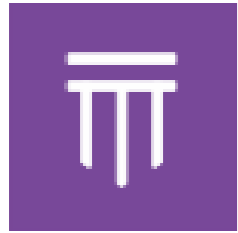
European Approach?

- Differences among states? (right to life)
- Differences within the states
- Highest level of norm diffusion – treaties, constitutions, supranational courts + constitutional courts (frequent references, conferences ,academia, activists, ...)



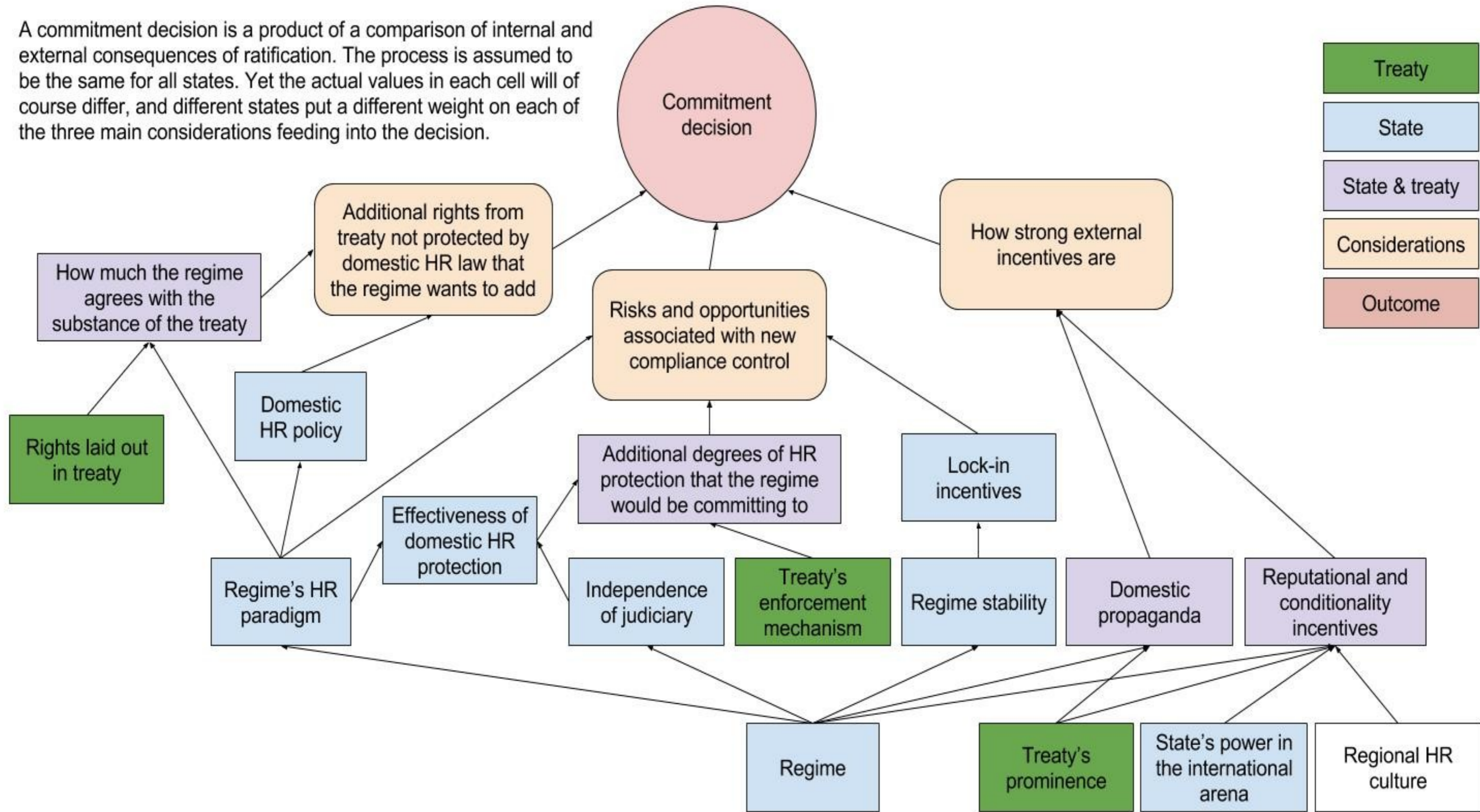
Expansion of rights (in IR)





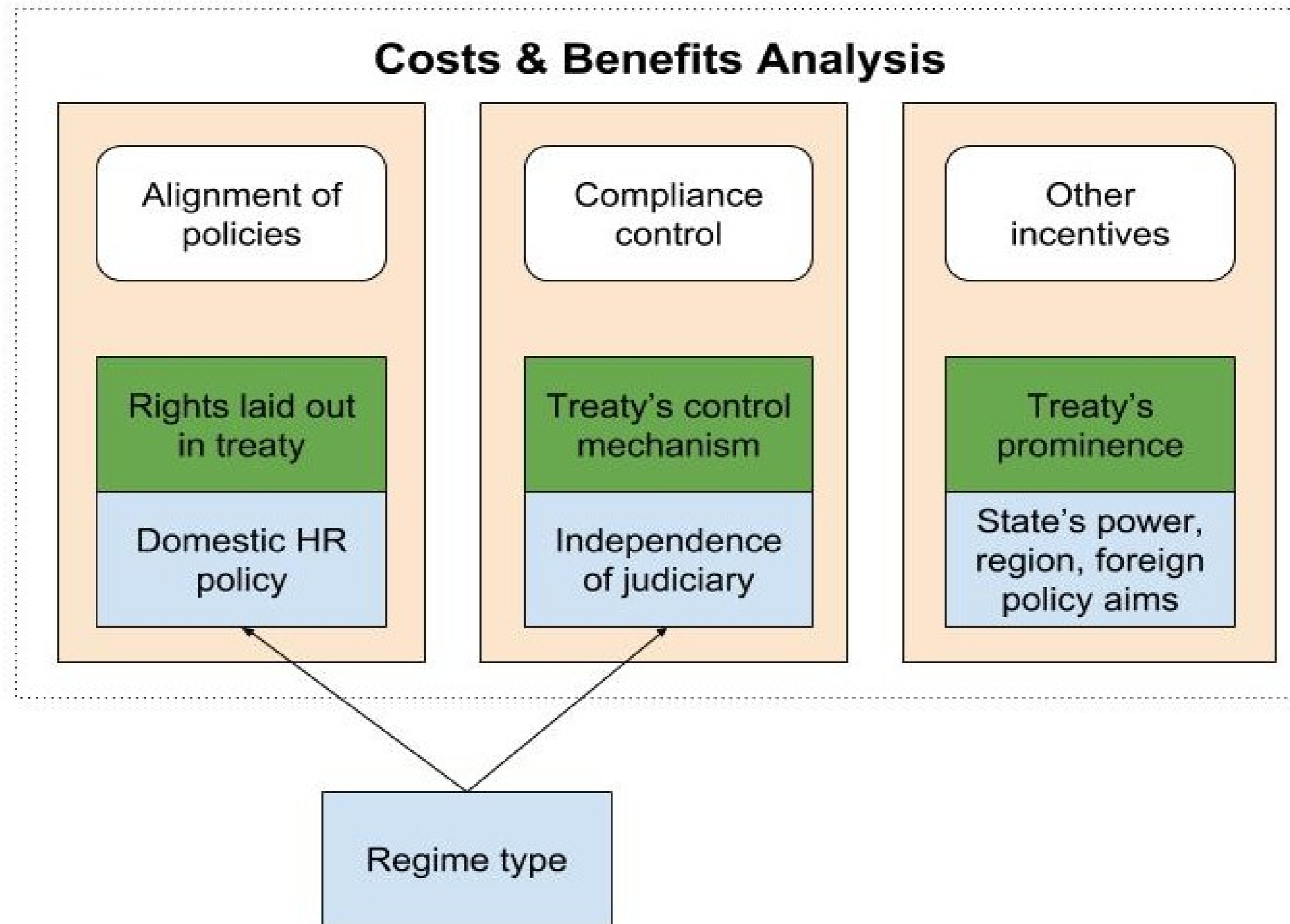
Expansion of rights: Why do states ratify HR?

A commitment decision is a product of a comparison of internal and external consequences of ratification. The process is assumed to be the same for all states. Yet the actual values in each cell will of course differ, and different states put a different weight on each of the three main considerations feeding into the decision.



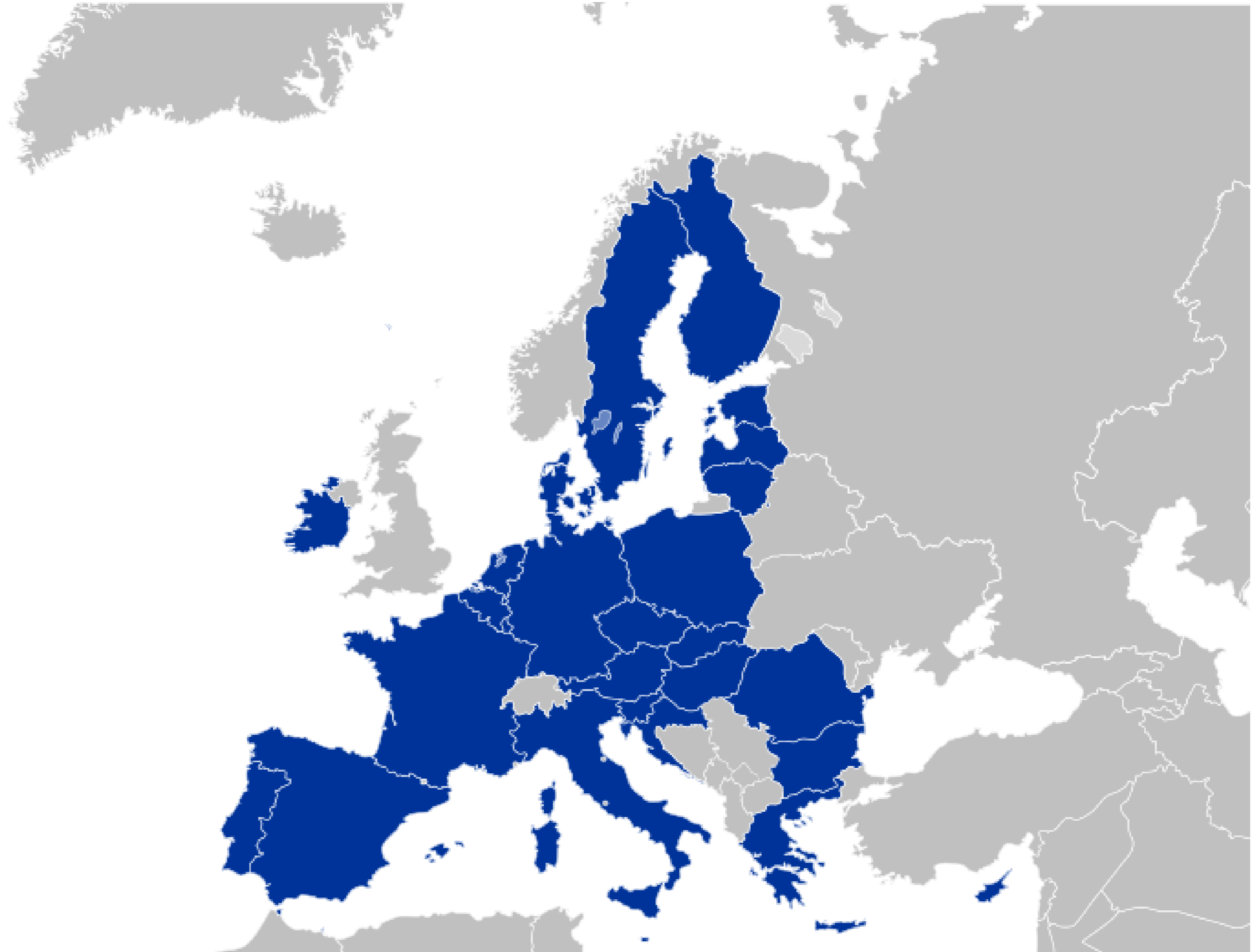


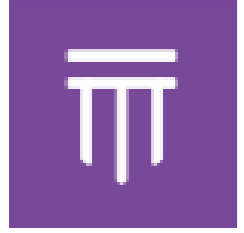
Expansion of rights: Why do states ratify HR?





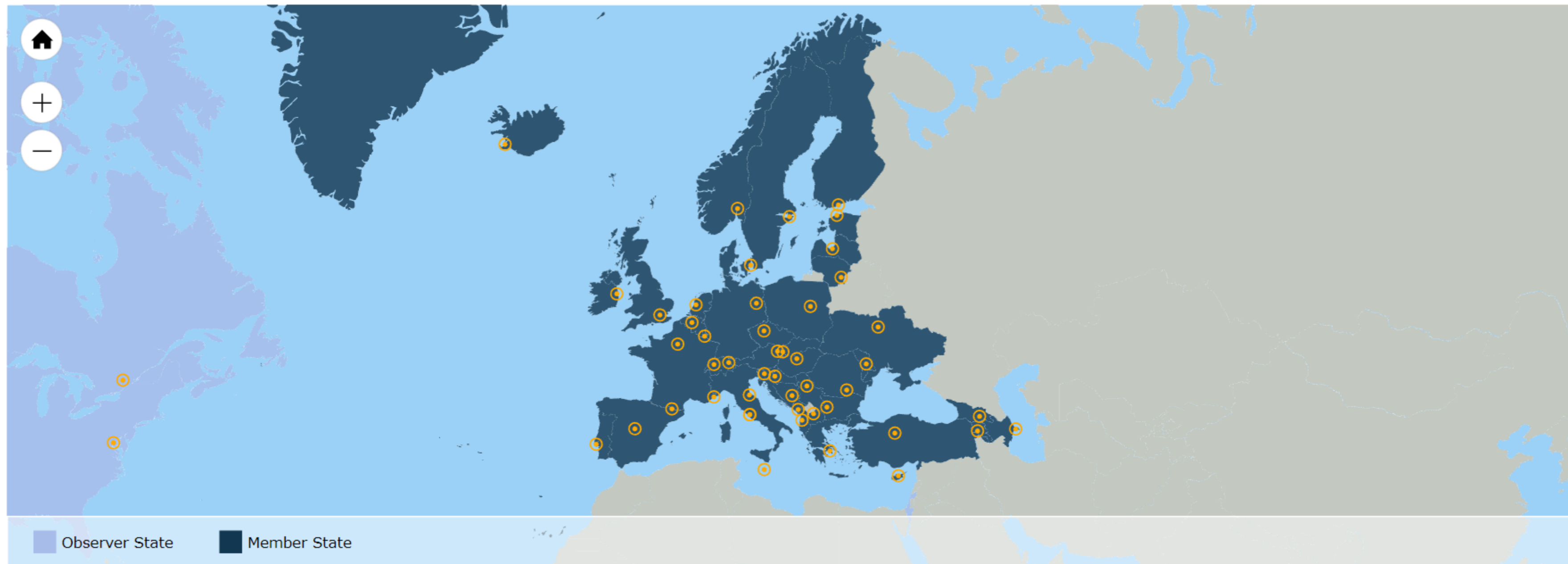
EU





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



First mention: Churchill 1943

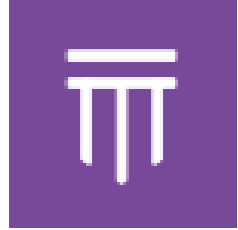
[National Address, 21 March 1943](#), in an attempt to „peer through the mists of the future to the end of the war.“



Winston Churchill – Zurich Speech

“What is this sovereign remedy? It is to recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, safety and freedom. We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living. The process is simple. **All that is needed is the resolve of hundreds of millions of men and women to do right instead of wrong and to gain as their reward blessing instead of cursing.**”





Winston Churchill – Zurich Speech

I am now going to say something that will astonish you. The first step in the re-creation of the European family must be a partnership between France and Germany. In this way only can France recover the moral and cultural leadership of Europe. There can be no revival of Europe without a spiritually great France and a spiritually great Germany.

...

I now sum up the propositions which are before you. Our constant aim must be to build and fortify the United Nations Organisation. Under and within that world concept we must recreate the European family in a regional structure called, it may be, the United States of Europe, and the first practical step will be to form a Council of Europe. If at first all the States of Europe are not willing or able to join a union we must nevertheless proceed to assemble and combine those who will and who can.





Council of Europe: Three narratives

1. Prevention of war and massive atrocities and HR violations
2. Bullwark against totalitarianism in Eastern Block
3. Nascent „United States of Europe“



Council of Europe

- Hague 1948: The Congress of Europe
- Discussion of the future structure of the Council of Europe



Voices of HISTORY

Important public figures such as Konrad Adenauer, Winston Churchill, Harold Macmillan, Sir David Maxwell-Fyfe, Pierre-Henri Teitgen, François Mitterrand **Paul Reynaud**, Edouard Daladier, Paul Ramadier, Paul van Zeeland, Albert Coppé and Altiero Spinelli took part in the **Congress of Europe**.



Council of Europe

Message to Europeans

Europe is threatened, Europe is divided, and the greatest danger comes from her divisions.

Impoverished, overladen with barriers that prevent the circulation of her goods but are no longer able to afford her protection, our disunited Europe marches towards her end. Alone, no one of our countries can hope seriously to defend its independence. Alone, no one of our countries can solve the economic problems of today. Without a freely agreed union our present anarchy will expose us tomorrow to forcible unification whether by the intervention of a foreign empire or usurpation by a political party.

The hour has come to take action commensurate with the danger.

Together with the overseas peoples associated with our destinies, we can tomorrow build the greatest political formation and the greatest economic unit our age has seen. Never will the history of the world have known so powerful a gathering of free men. Never will war, fear and misery have been checked by a more formidable foe.

Between this great peril and this great hope, Europe's mission is clear. It is to unite her peoples in accordance with their genius of diversity and with the conditions of modern community life, and so open the way towards organised freedom for which the world is seeking. It is to revive her inventive powers for the greater protection and respect of the rights and duties of the individual of which, in spite of all her mistakes, Europe is still the greatest exponent.

Human dignity is Europe's finest achievement, freedom her true strength. Both are at stake in our struggle. The union of our continent is now needed not only for the salvation of the liberties we have won, but also for the extension of their benefits to all mankind.

PLEDGE

- (1) We desire a United Europe, throughout whose area the free movement of persons, ideas and goods is restored;
- (2) We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;
- (3) We desire a Court of Justice with adequate sanctions for the implementation of this Charter;
- (4) We desire a European Assembly where the live forces of all our nations shall be represented;
- (5) And pledge ourselves in our homes and in public, in our political and religious life, in our professional and trade union circles, to give our fullest support to all persons and governments working for this lofty cause, which offers the last chance of peace and the one promise of a great future for this generation and those that will succeed it.



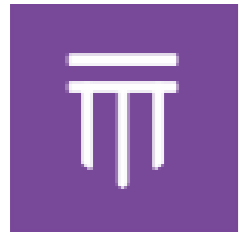
Council of Europe

- Nov 1948-Jan 1949 Committee for the Study of European Unity (to draw the blueprint)
- Two competing schools of thought:
 - 1. Classical IO
 - Representatives of governments
 - => Committee of Ministers
 - 2. Political forum
 - Members of parliaments
 - => Consultative (Parliamentary) Assembly
- **Treaty of London 5 May 1949**
 - Trinity of democracy, HR, RoL
 - 10 states (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, the United Kingdom)



Council of Europe: Statute

- Preamble
 - Convinced that the pursuit of peace based upon **justice** and international co-operation is vital for the **preservation of human society and civilisation**;
 - Reaffirming their devotion to **the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law**, principles which form the **basis of all genuine democracy**;
- Goals:
 - European political authority (Paul-Henri Spaak)
 - Preparation of the European Convention on HR



Council of Europe: Statute

- Aim

- **Article 1(a)**

The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.

- Membership

- **Article 3**

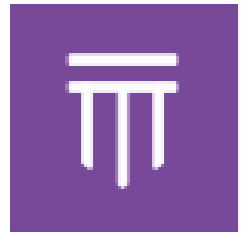
Every member of the Council of Europe **must accept the principles of the rule of law** and of the **enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms**, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

- Article 4

Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be **invited to become a member of the Council of Europe** by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.

- **Article 8**

Any member of the Council of Europe which **has seriously violated Article 3** may be **suspended from its rights of representation** and **requested** by the Committee of Ministers to **withdraw** under Article 7. If such member does not comply with this request, the Committee may decide that it has **ceased to be a member** of the Council as from such date as the Committee may determine.



Council of Europe: Structure

- **Secretary General**
 - Elected by PACE for 5 years
- **Committee of Ministers**
- **Parliamentary Assembly**
- **Congress of Local and Regional Authorities**
- **European Court of Human Rights (ECtHR)**
- **Commissioner for Human Rights**
 - Elected by PACE for 6 years (since 1999)
- Conference of INGOs, Joint Council on Youth of the CoE, Information Offices, Congress of Local and Regional Authorities
- **European Commission of Human Rights**
- *Partial Agreements*
 - *Venice Commission*
 - *Group of States Against Corruption (GRECO)*



ECtHR





Milestones:

1948

Adoption of the Universal Declaration of Human Rights

Charter of hope

The Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, was the result of the experience of the Second World War.

1953

Entry into force of the European Convention on Human Rights

Pioneering instrument

The Convention for the Protection of Human Rights and Fundamental Freedoms came into force on 3 September 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and to make them binding.

1998

Entry into force of Protocol No. 11 to the Convention, instituting “the new Court”

First major reform

In 1998 Protocol No. 11 replaced the original two-tier structure comprising the Court and the Commission on Human Rights, which sat a few days per month, by a single full-time Court. This change put an end to the Commission’s filtering function, enabling applicants to bring their cases directly before the Court.

2018

Entry into force of Protocol No. 16 to the Convention allowing the Court to deliver advisory opinions

The “dialogue Protocol”

Protocol No. 16 enables the highest national courts and tribunals of the member States to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto. The advisory opinions, delivered by the Grand Chamber, are reasoned and are not binding.

2023

The fourth Summit of Heads of State and Government of the Council of Europe in Reykjavik

United around our values

The fourth Summit of Heads of State and Government of the Council of Europe took place in Reykjavik between 16-17 May 2023. Gathering together heads of State and Government from the Council of Europe’s member States, it aimed to refocus the Council of Europe’s mission in the light of new threats to democracy.



Milestones

- 70 years since ratification of the ECHR
- 25 years of the Protocol 11

- 700 million persons are served by the Convention
- 1 million application
- 26 000 judgments issued

- 25



Bringing a case to ECtHR

- Who
- When
- Where
- What rights?



Proportionality test

- Relative rights (A 8-11) – any limitation to the right must be proportional. That means:
 - 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 HRA/Convention

ARTICLE 8

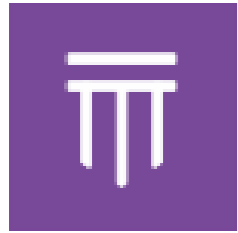
Right to respect for private and family life

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.

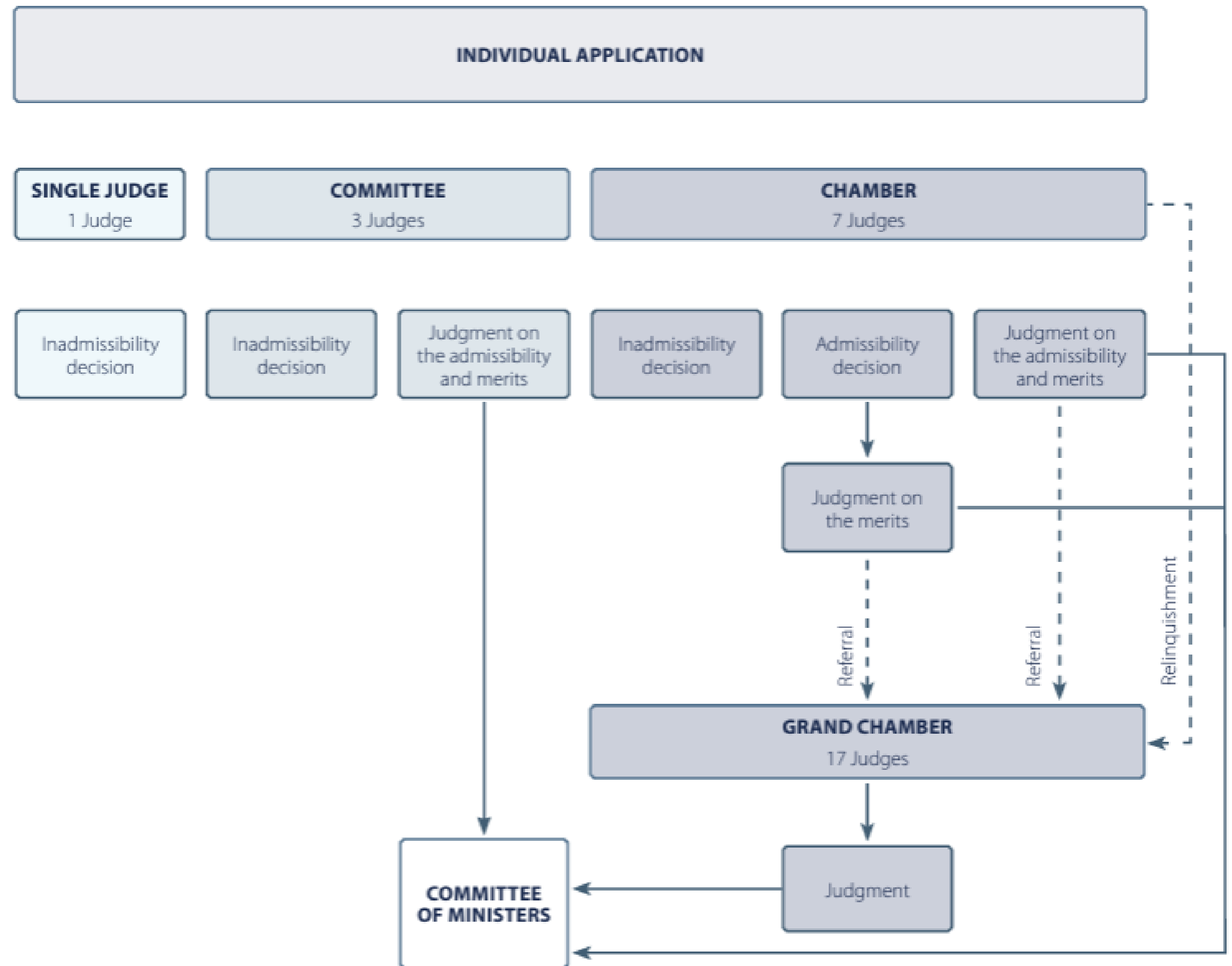


Proportionality test

- How is the test applied?
- 1. Does the case (petition) belong under the particular ECHR right? (I.e. is the Article of ECHR applicable?)
- 2. Was there an interference in petitioner's right?
- 3. Was this interference based on Law/In accordance with the Law?
 - Was it explicitly enabled by a legal act?
 - Was it accessible?
 - Was it clear enough?
 - Was it predictable?
- 4. Did the interference follow one of legitimate aims (sometimes mentioned explicitly, sometimes not)
- **5. Was the interference necessary in the democratic society?**



How does it work?

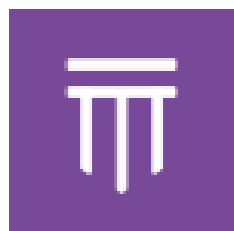


36

phone calls per day

are handled by the Registry's phone reception in 11 languages in addition to English and French.

The information about the Court is provided in Bosnian, Croatian, German, Italian, Polish, Romanian, Russian, Serbian, Spanish, Turkish and Ukrainian.



ECtHR Statistics

Judicial metrics: a year in review

68,450

pending applications

decrease of 8%

319

judgments

delivered by Chambers

682

judgments

delivered by Committees of three judges

25,834

applications

declared inadmissible or struck out by single judges

5,344

applications

declared inadmissible or struck out by Committees

151

applications

declared inadmissible or struck out by Chambers

77 M€

budget 2023

covers Judges' remuneration, staff salaries and operational expenditure (IT, official journeys, translation, interpretation, publications, representational expenditure, legal aid, fact-finding missions, etc.). It does not include expenditure on the building and infrastructure (telephone, cabling, etc.).

Grand Chamber activities

13

judgments

and 1 admissibility decision delivered by the Grand Chamber

8

oral hearings

held by the Grand Chamber

9

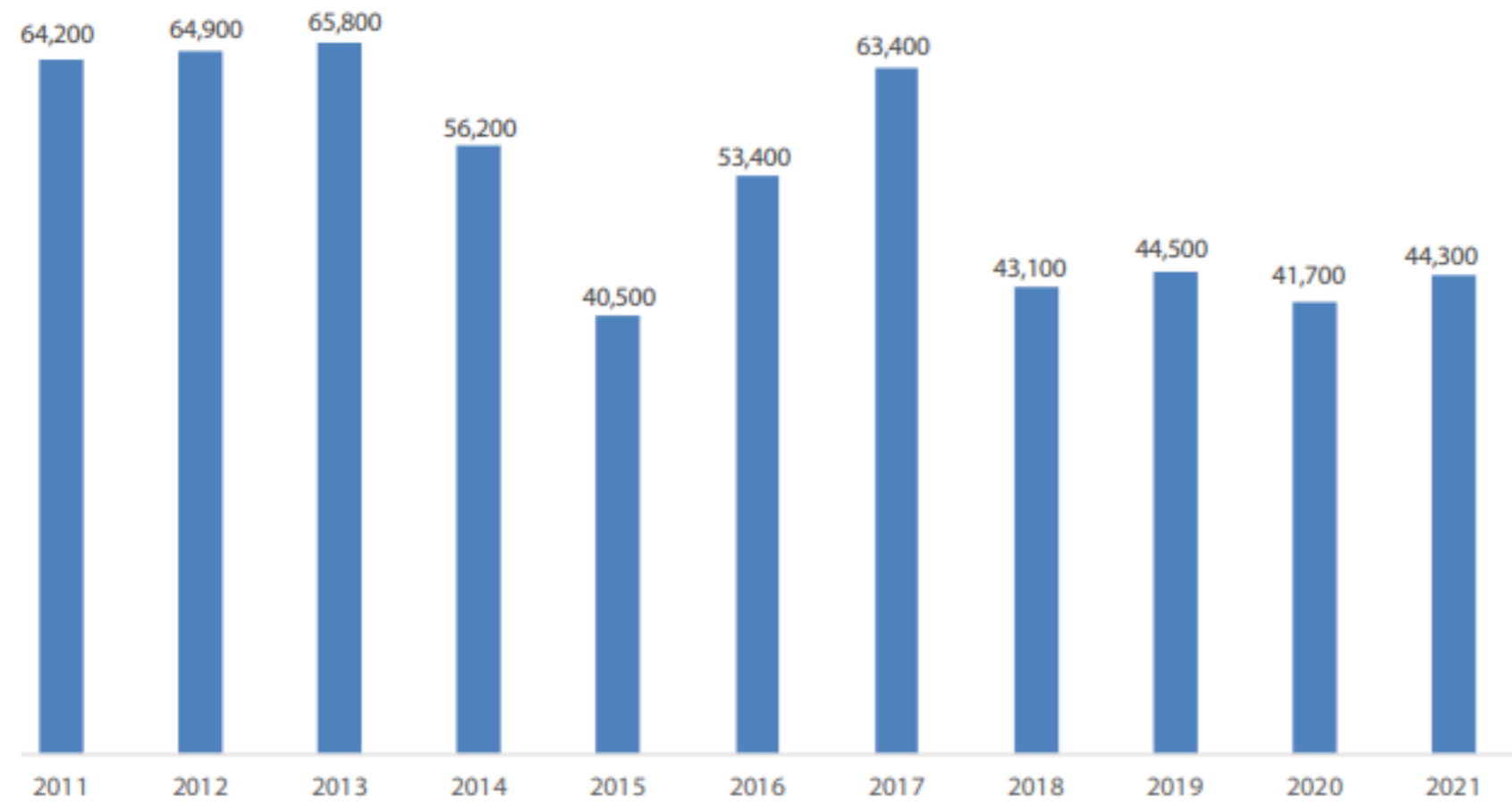
meetings

held by the Panel of the Grand Chamber

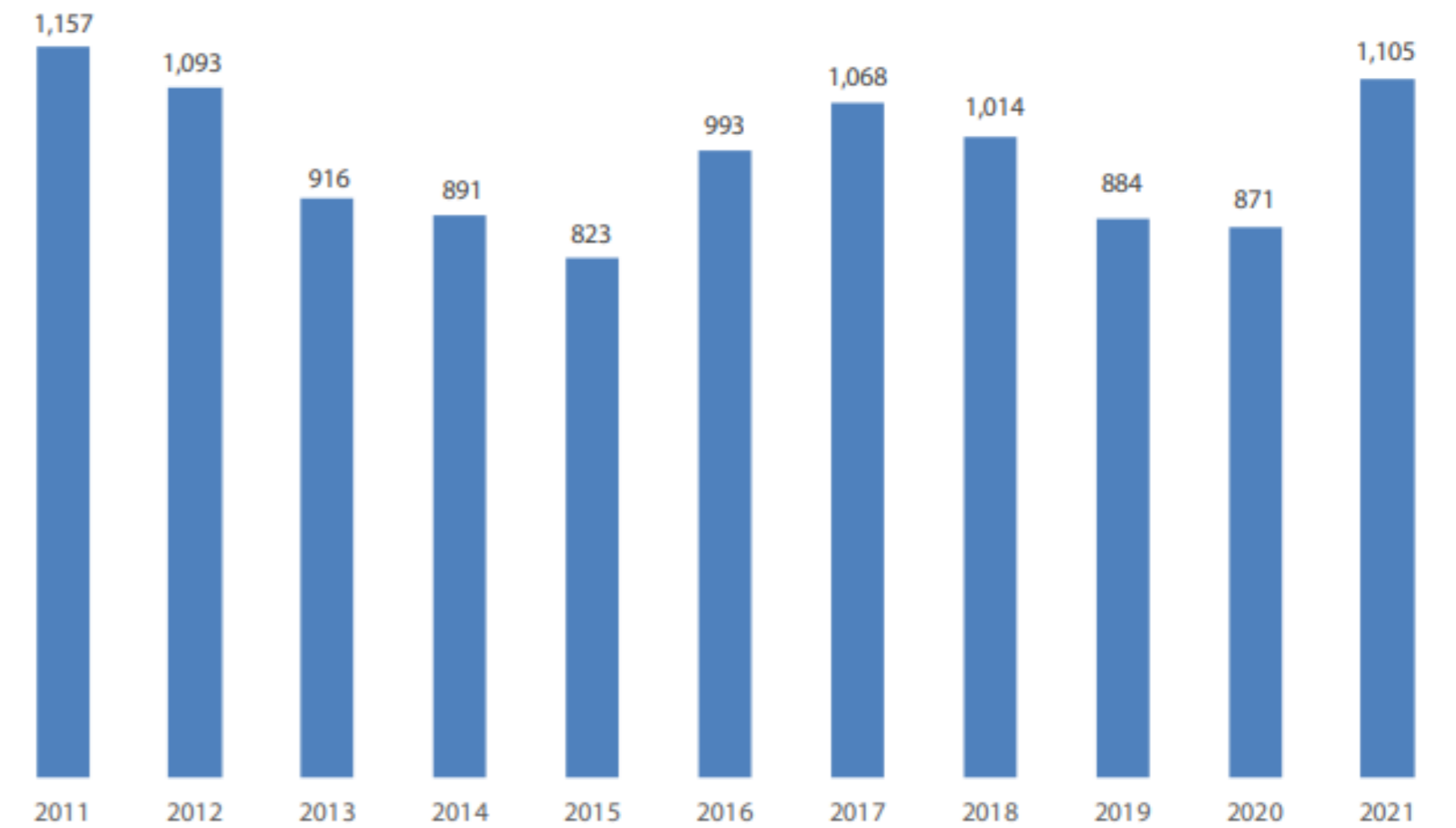


ECtHR Statistics

ALLOCATED APPLICATIONS (2011-21)



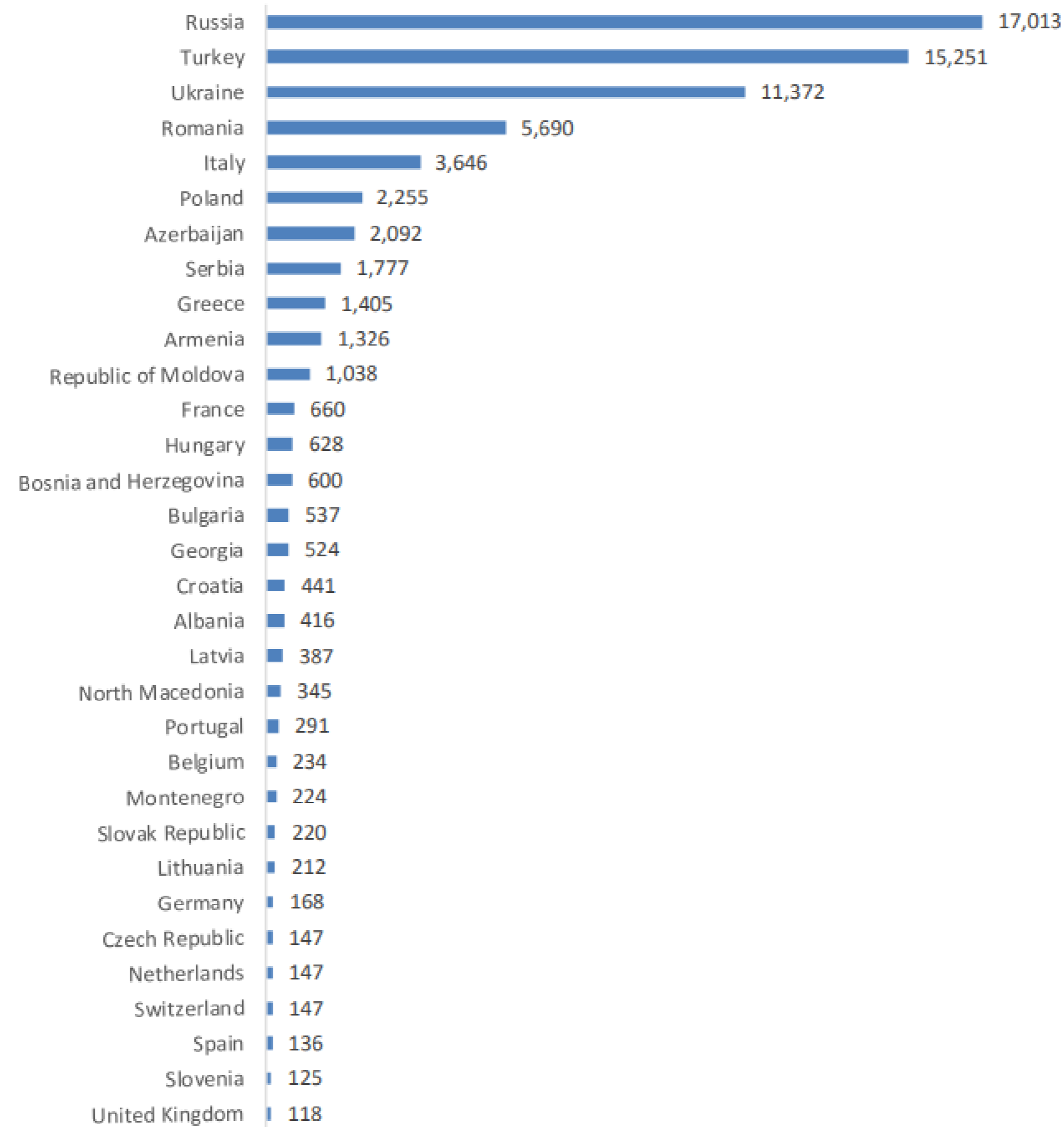
JUDGMENTS (2011-21)





ECtHR 2021

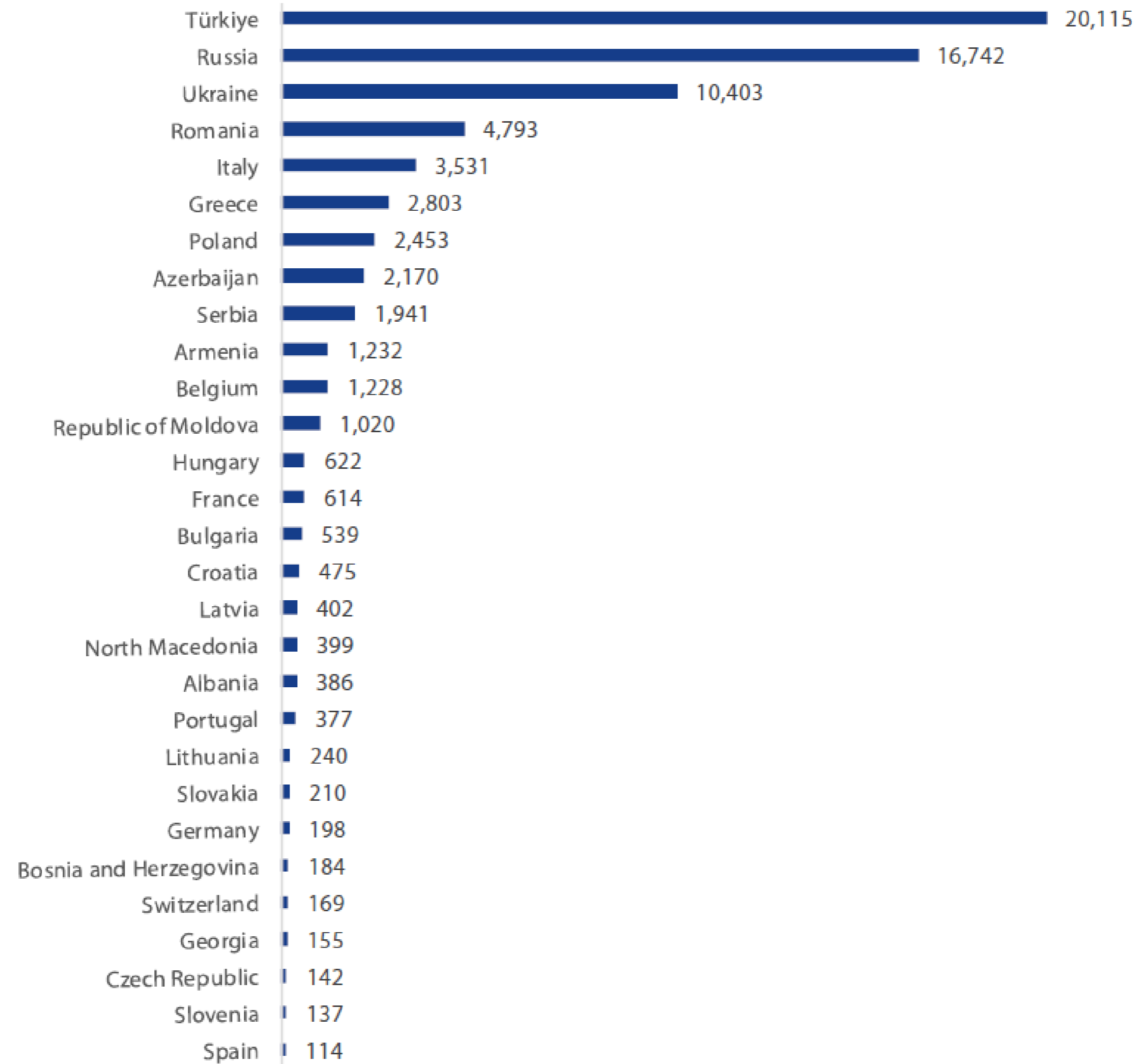
PENDING CASES (BY STATE)





ECtHR 2022

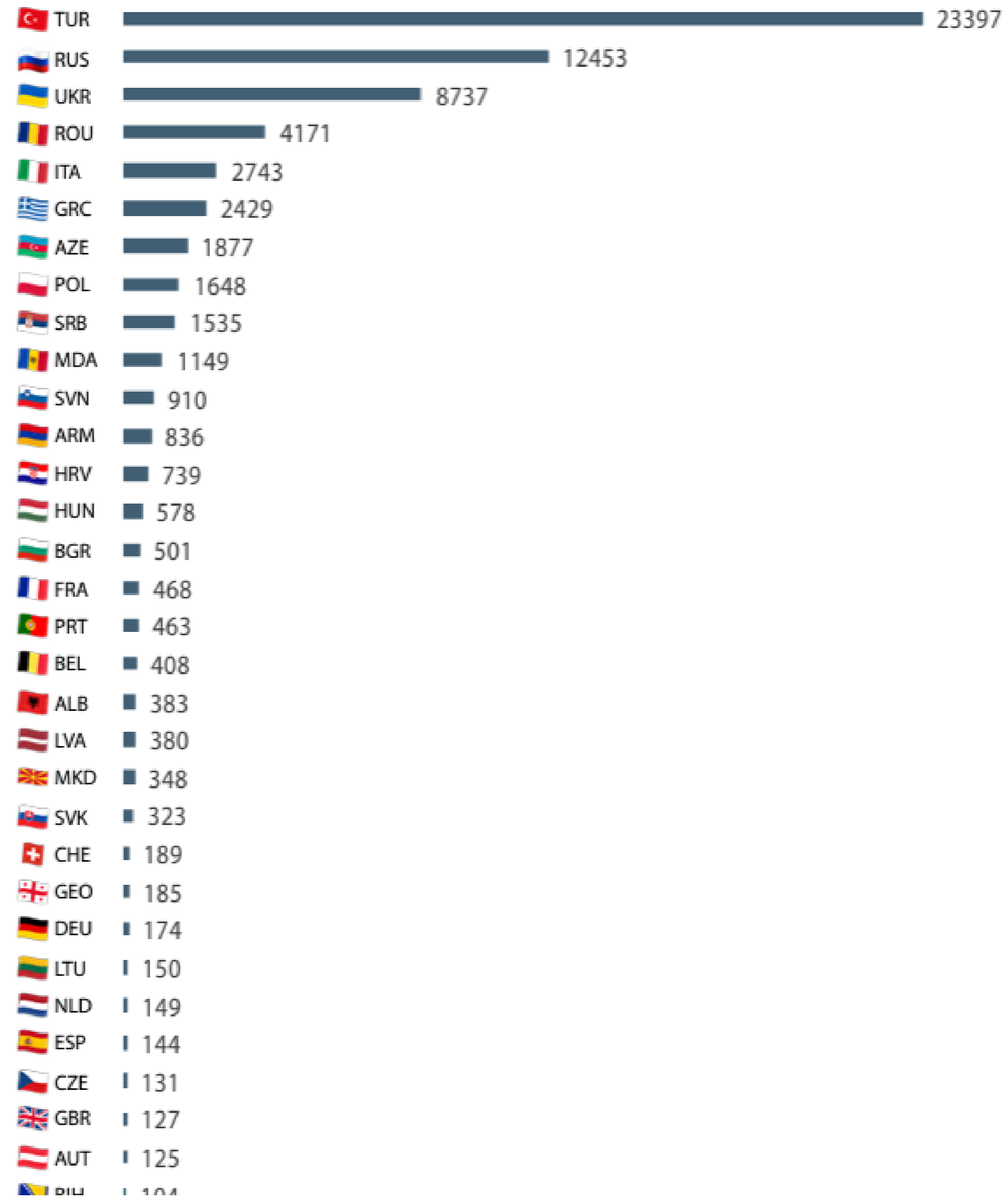
PENDING CASES (BY STATE)





ECtHR 2023

Pending cases (by State)





ECtHR 202

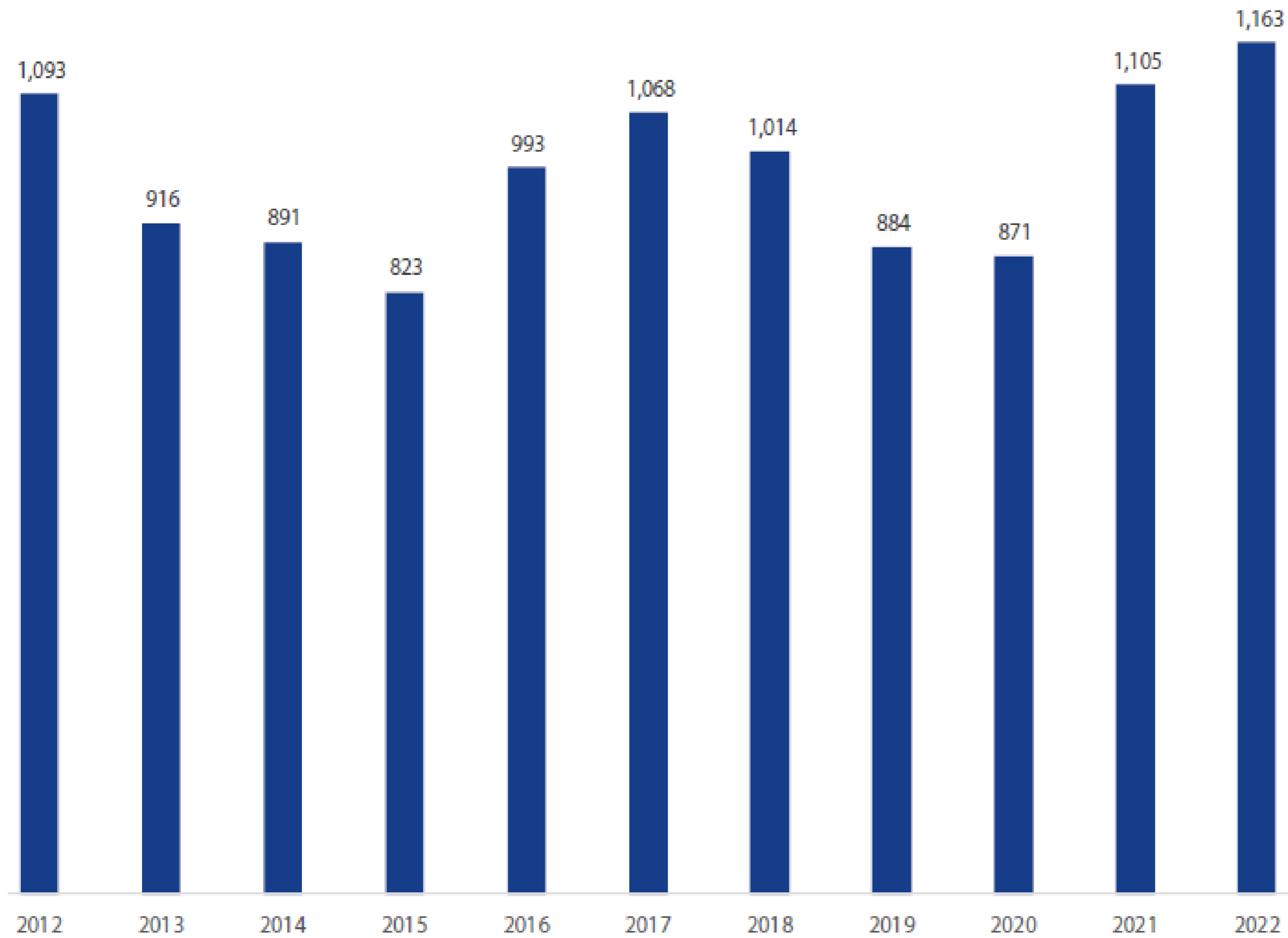
	2022	2023	
Allocated applications*	45,500	34,650	24% ↘
Communicated applications	6,822	16,623	144% ↗
Decided applications	39,570	38,260	3% ↘
by judgment delivered	4,168	6,931	66% ↗
by struck out or inadmissibility decision	35,402	31,329	12% ↘
Pending applications*	74,650	68,450	8% ↘
Chamber and Grand Chamber	35,100	18,150	48% ↘
Committee	34,800	46,150	33% ↗
Single-judge	4,750	4,150	13% ↘

* Round figures [50] as of 31 December of the reference year.



ECtHR 2022

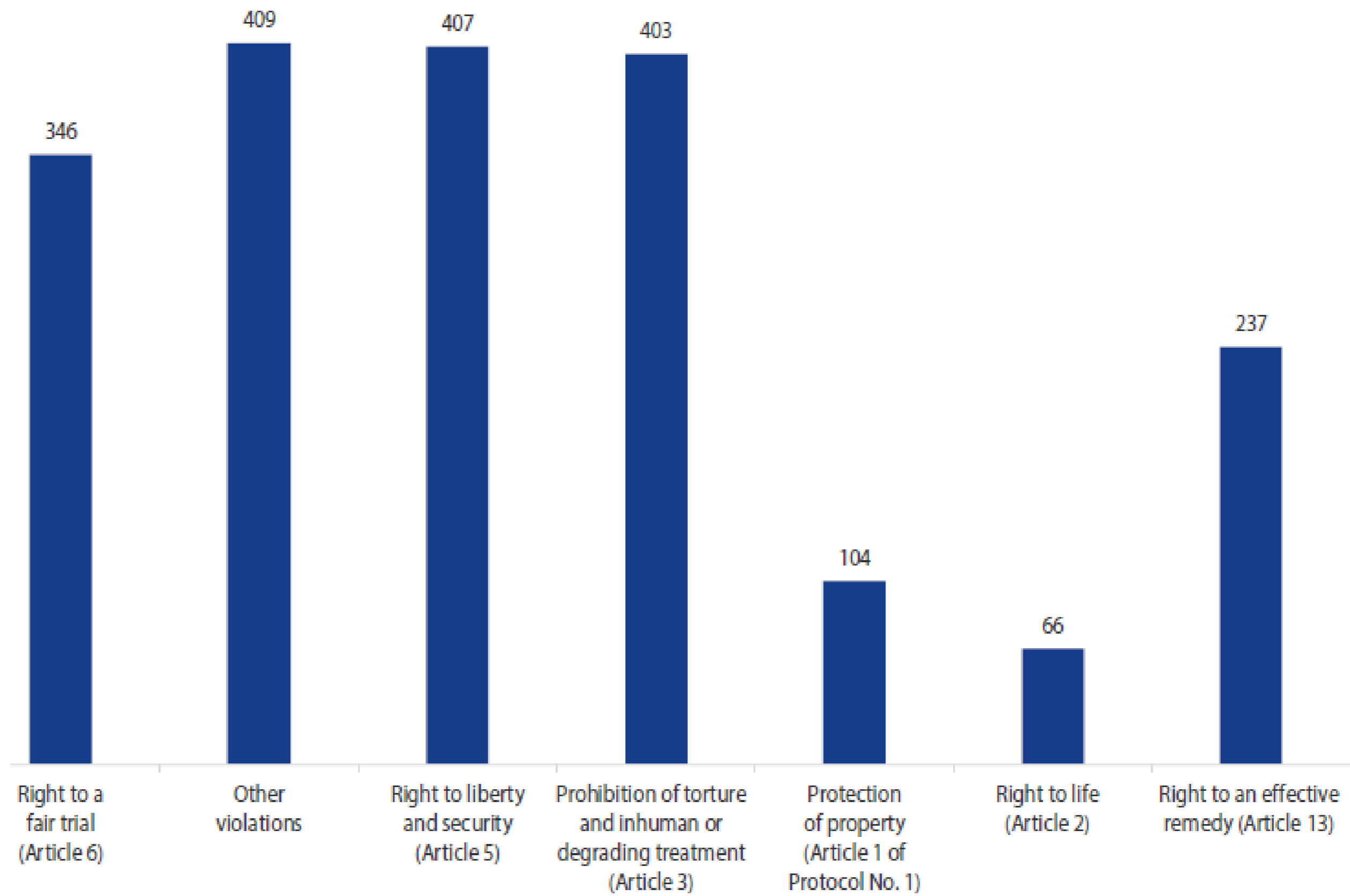
JUDGMENTS (2012-22)

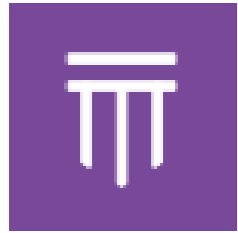




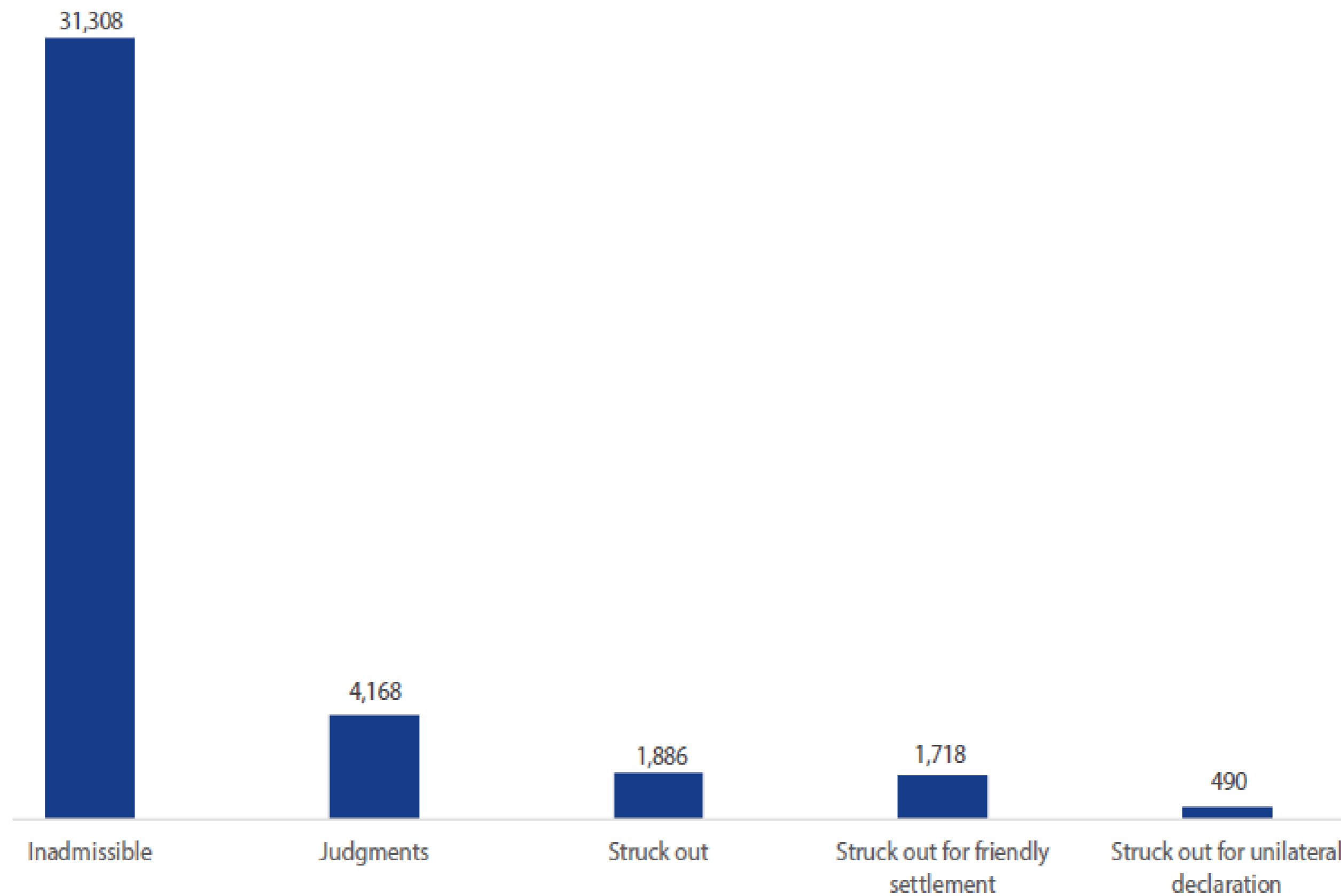
ECtHR 2022

VIOLATIONS BY SUBJECT MATTER





DECIDED APPLICATIONS







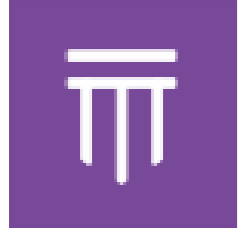
Selection of ECtHR judges

- 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



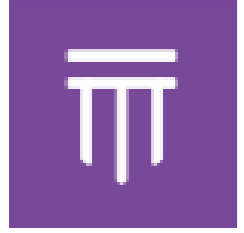
ECtHR key dates:

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



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

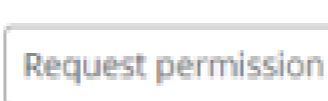
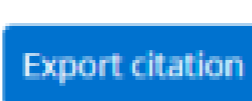
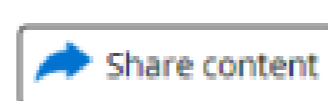
Backlash against international courts: explaining the forms and patterns of resistance to international courts

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

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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

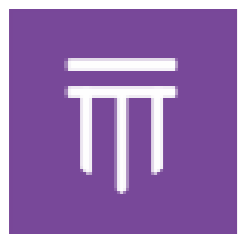
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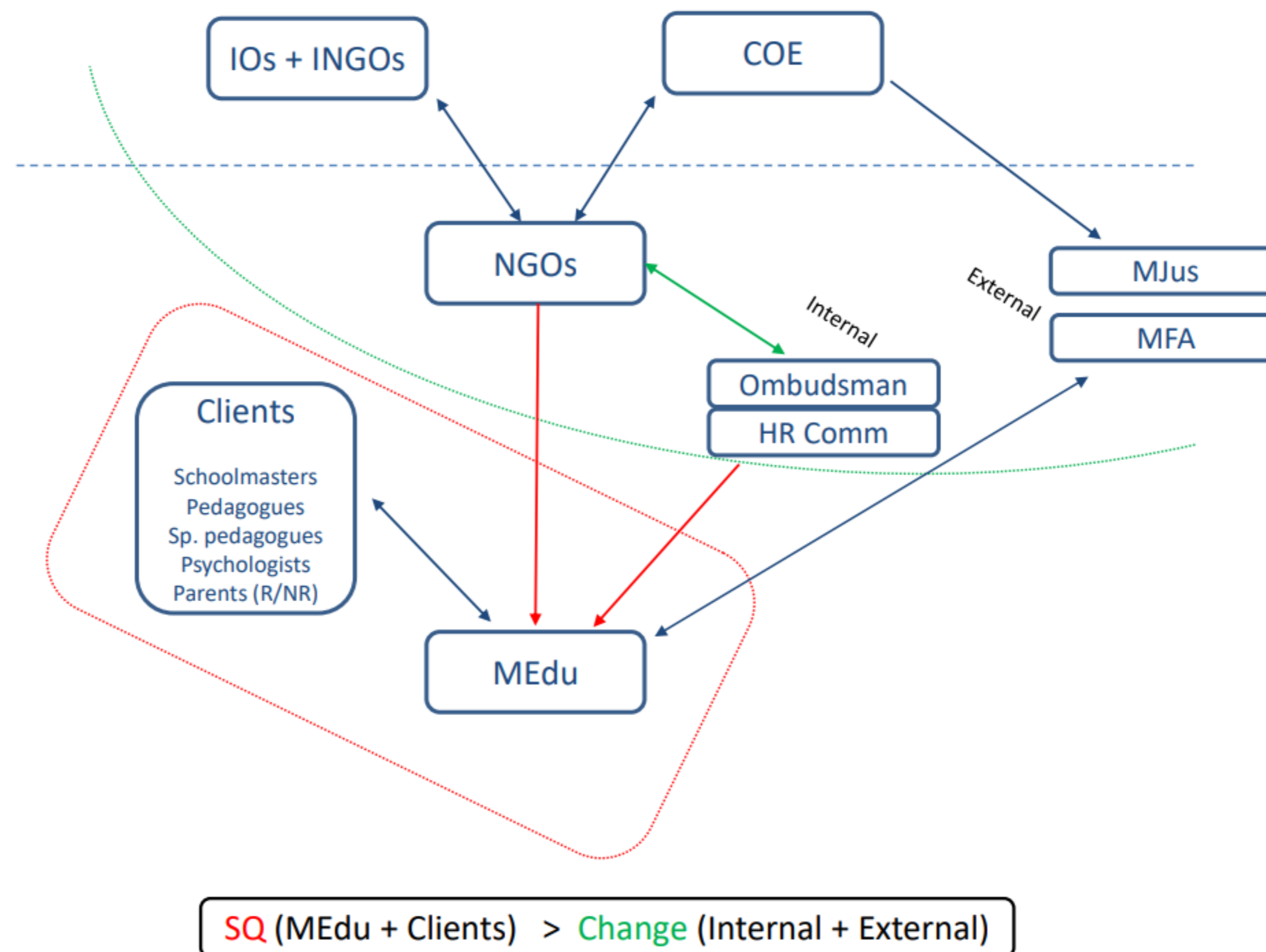
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