Introduction

1. Introduction

The relationship between national courts and the European Court of Human Rights (in the following: the Court, or ECtHR) has long been debated, including whether the Court slowly assumes the role of a constitutional Court for Europe. As a regional court for a Europe of 47 member states and over 850 million inhabitants, the ECtHR reaches out to a far larger group of states and potential petitioners than envisaged by the ten founding states of the Treaty of London. There is no doubt that this has implications both for the Court’s institutional architecture and the relationship of the Court and the Council of Europe institution with their member states. Already in 2002, Paul Mahoney, then registrar at the Court wrote that since 1989, the Court acquired a new mission. He found: “Until 1989, the Convention could be described as an international control mechanism for fine-tuning sophisticated national democratic engines that were, on the whole, working well. Now, and in the foreseeable future, this is not a blanket assumption that can be made for many of the participating States that are starting out on the democratic path.”\(^1\) With the enlargement of membership to the Council of Europe and consequently, more and more petitioners discovering that the Court may provide effective remedies to their human rights violations, the Court has been facing new challenges. The envisaged ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) by the European Union also raises new issues, particularly concerning the relationship between the ECtHR and the Court of Justice of the European Union (formerly ECJ). Finally, the ECtHR must increasingly address actions by other international organizations, such as the United Nations. Hence, the Court finds itself in a new institutional setting. In addition to its relationship to national courts, questions of an inter-institutional character at the European and global level become increasingly important. This book examines these new institutional settings.

2. The Court and the member states

The Court’s relationship with the member states is crucial. The increasing importance of the Strasbourg case law puts a serious challenge to national legal orders, the principle of the

separation of powers, the principle of finality and the role of the national constitutional judiciary, and ultimately, to the sovereignty of member states. States, as well as the Court have to find institutional solutions to smoothly integrate Strasbourg’s case law, while at the same time preserving national particularities, institutionally as well as legally. At present, states seem to eye the ECtHR with mixed feelings. On the one hand, studies on Europe’s higher court judges and members of parliament suggest that the ECtHR actually suffers from a legitimacy credit rather than a legitimacy deficit. On the other hand, scholars as well as politicians question the authority of the Court and criticize the widening grip of Strasbourg. They have questioned the legitimacy of the Court and its judgments in several recent cases. Some, such as the Lautsi case, tackle sensitive and highly political issues. These judgments go to the very core of national decision-making, and have provoked strong reactions among the states parties to the ECHR. Ten states intervened as ‘third parties’ in the Lautsi proceedings before the Court’s Grand Chamber. The liaison between the Court and German courts was discussed in Germany in the aftermath of the Federal Constitutional Court’s Görgülü decision (2004). In Norway, the Court has been criticized for its approach to evolutive treaty interpretation, of being too concerned with details, and for extending its scope of jurisdiction, both with regard to the substantive law and to the subjects. In the UK a repeal of the Human Rights Act, which implements the ECHR is openly debated since May 2010.

3. The Court and the Council of Europe institutions

The current reform process to overcome the overload of cases culminated in the amendment and introduction of new admissibility procedures, as suggested by Protocol 14 to the ECHR,
and the recent Interlaken and Izmir Declarations of February 2010 and April 2011. The Interlaken process mostly dealt with internal reform of the Court and its procedures. Beyond Interlaken, several issues must be addressed concerning the Court’s relationship to other Council of Europe institutions: toward the member states, the Committee of Ministers, and its relationship toward the Parliamentary Assembly.

4. The Court and the EU
The relationship of the Court with the European Union (EU) and the global level also needs reconsideration. During the past four years, the Court has had to clarify its relationship with the Court of Justice of the European Union (CJEU), the former European Court of Justice. The EU included in its 2009 Lisbon Treaty the intention to ratify the European Convention on Human Rights. With the adoption of a draft accession agreement, the formal preparations for the EU’s accession are now almost complete. Once ratification takes place by the 47 member states, questions of a more substantive character remain. Following the draft agreement, the EU will be able to become a co-respondent to the ECtHR proceedings, following a modified article 36 ECHR. This means that complaints can be directed directly against the Union. This could imply that the Court will have to develop a new jurisprudence on the attribution of responsibility of the EU organs, also in relation to the member states. Also the Bosphorus jurisprudence of the ECtHR would possibly need modification. And how will either the CJEU or the ECtHR tackle the relationship between the ECHR and the Charter of Fundamental Rights, which has become a substantial part of the TEU and stands on the same footing?

5. The Court and other international organisations, in particular the UN
Finally, the relationship of the Court to international and regional human rights treaty bodies can become an issue. The UN Human Rights Committee has dealt with similar questions as decided by the Court, and the Court may have to clarify its position towards those of that

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10 Compare Article 6(2) TEU.
12 Ibid, Article 3.
14 Article 6(1) TEU.
Committee or other UN human rights committees. The Court must also tackle its relationship with the Security Council and international territorial administrations established by the United Nations. The Court’s case law on the application of the ECHR in peace operations indicates that further questions will arise, for example, concerning the relationship of the Court toward regional security organisations like the North Atlantic Treaty Organisation (NATO).

6. Principles guiding the analyses in this book

The need to rethink the Court’s role toward member states and other international institutions is imminent. Several maxims and principles may guide the exercise of rethinking the future role of the Court. Among the most frequently named are the rule of law principle, the principle of subsidiarity, the principle of effectiveness, as well as the implied powers and the proportionality principle. These are not novel principles. They stem, on the one hand, from the discussions within the Council of Europe or the Court itself and have been used frequently in the course of its reform process. They are part and parcel of the ECHR or the wider Council of Europe framework and firmly established or increasingly recognised in general international law. They apply in the relations of states, but they also bind the ECtHR or the Council of Europe, if only because the practice of both institutions evidences that they consider themselves bound by those principles. The criteria subsidiarity and effectiveness, in particular, were essential in the recent reform discussions in the Izmir and Interlaken conferences of 2011 and 2010, but are also used by the ECtHR on a regular basis. Also the principle of proportionality is used by the Court and has found entry into many national and international review procedures.

19 On the importance of practice for rules binding on international institutions see: OfLA UN, ‘Comments and observations of the Office of Legal Affairs on the draft Articles on Responsibility of International Organizations, adopted by the International Law Commission on first reading in 2009’ (2011) , 2, 5. On the relevance of practice for the attributability of a certain conduct of an international organization under international law, see article 8 of the ILC draft articles.
20 (CoE), ; Council of Europe.
Many of the stated principles have gained prominence in discussions on more general overarching theoretical concepts, above all the new constitutionalism. The principles are held to have a constitutionalist character, in particular as they are found to mitigate certain doubts about the legitimacy of international institutions. Several of the reform suggestions for the ECtHR already concern this constitutional side of the ECtHR. The editors are aware that the use of such principles to assess the performance of the Court as an institution within a greater institutional framework needs to be balanced carefully against the Court’s function in delivering justice to individuals. The Court’s present and future performance is often discussed in light of these two paradigms and the constitutionalist is usually seen as a counterweight to the idea of individual justice. Yet, some of the criteria, particularly effectiveness, or proportionality and even subsidiarity can, do and should also serve the purpose of delivering individual justice. Their ultimate impact is not predetermined by either of the two approaches and leaves enough room for further theoretical deliberations. This book addresses the role of the Court in a multi-level environment of various international and national institutions, which implies that its research is heavy on the institutional and possibly constitutional side. This does not mean that the ultimate aim of individual justice will get lost in the process. Each overarching purpose needs to be balanced carefully against the other, given the individual case at hand.

Nonetheless, the editors regard it imperative that an argumentative framework which adheres to principles like proportionality, effectiveness or comity highlights areas of potential improvement of a system in dire need of further reform. It seems possible and sensible to analyse the ECtHR’s inter-institutional performance along the line of those principles and to


24 Compare RA Schapiro, *Polyphonic federalism: toward the protection of fundamental rights* (Chicago, Ill. u.a.: Univ. of Chicago Press, 2009) for an innovative approach to the subsidiarity principle.
base recommendations for qualitative improvements on some of those yardsticks. For the purposes of this book, the editors focus on this role of the stated principles, and abstain here from further theoretical discussions. This is partly out of consideration for the theoretical approaches of the contributing authors who are not straightjacketed into one particular theoretical framework. The individual contributions develop their own theoretical approaches and decide from case to case, whether and which principles they want to include into their analysis. Indeed, the best interplay of those principles might only be answered on a case-by-case basis, considering all relevant circumstances.

We can illustrate the general notion and character of some of those principles which we consider as relevant for any assessment of the further reform process of the ECtHR. Focus is on considerations of legitimacy, on the principles of comity and subsidiarity, as well as on effectiveness and proportionality.

6.1. Legitimacy
It is common knowledge that, in this day and age, international institutions exercise public authority in addition to states. Authors invoking the principle of legitimacy are mostly concerned with this growing exercise of authority of international institutions and claim that an increase in authority must best be accompanied by an increase in accountability. Dan Bodansky aptly illustrates that the problem of legitimacy dawned on international law only recently. It is owed to the erosion of the consensual basis of international law in the past decades, the growth and concomitant maturing of existing international institutions, the continuous birth of new institutions and the continuous rise of non-state actors.

The current crisis at the ECtHR exemplifies this growth in institutional authority at the international level. With regard to the ECtHR, concerns revolve both around its proper and effective future functioning, its distance to the European polity, as well as around concerns to encroach too far and wide-reaching upon the sovereignty of its member states. As an institution, the Court has undergone significant changes since its establishment in the 1970s. The Strasbourg system has developed from a Commission and Court division into a full

quasi-constitutional review structure with chambers adjudicating admissibility and on first instance on the merits and the Grand Chamber exercising the right to appeal first instance decisions of either the complainant or the state. The move to the two-chamber structure with the coming into force of Protocol 11 to the ECHR multiplied the number of complaints to the court. Whereas prior to the new chamber structure relatively few individual complainants reached the Court, the Court is now overrun with cases and has accumulated a formidable backlog, which, even without new petitions, it would take over 20 years to ablate.\(^\text{27}\) It is thus often held to have become a victim of its success.

The Court adjudicates cases of Europe-wide significance on a frequent basis and via its case law has developed certain standards, such as the margin of appreciation doctrine, which may be perceived as unique to the ECHR system. Still, it is often conceived of as an island disconnected from the polity or the general public in the member states. Even though the Parliamentary Assembly has significantly strived to improve the procedure over the last seven years,\(^\text{28}\) the nominating and appointment process for the judges of the Court has long been conceived of as opaque. Finally, the ECtHR’s interpretative techniques, as well as controversial cases like the A, B, C v. Ireland or the Lautsi v. Italy have recently caused a certain scepticism among the states members to the court. In particular states without a national constitutional court but with a long and strong national tradition of parliamentary autonomy, like the Nordic countries or the UK, feel that the Court’s decisions in difficult cases encroach upon their parliamentary sovereignty and autonomy.\(^\text{29}\) Such concerns are only partly alleviated by the Court’s margin of appreciation doctrine.

A much invoked framework of legitimacy concentrates on process legitimacy, i.e. the way decisions are made. It emphasizes the accountability of international institutions, the coherence and consistency of the decisions made by them, and the adherence of the institution

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\(^\text{27}\) As of May 2011, the backlog of cases before the court had amounted to 157200.


itself to some underlying normative framework. Other frameworks assess legitimacy from a social perspective, focusing on the various actors participating and affected by the exercise of authority by international institutions. Lastly, claims concerned with substantive legitimacy revolve around the substantive output of international institutions and make recommendations on how this output should best be generated. Yet, the content of the concept varies, not least across disciplines: political science scholars sometimes use concepts which deviate from those invoked by international lawyers or political philosophers. For example, legitimacy concepts advanced by political scientists often include criteria like the observance of international human rights standards or legality. However, many international lawyers emphasize that in international law, an action may be legal, but illegitimate. We perceive legitimacy as a standard exceeding legality. It is comprised of criteria which the concepts of international law are not yet able to measure.

The ultimate aim of the book is to assess the ECtHR’s functioning within the inter-institutional framework of the Council of Europe, the EU, the UN and other international organizations as well as with the member states. Factors that focus on the processes of interaction and decision-making may contribute to the further improvement and strengthening of the Court’s role. Accordingly, in addition to factors like effectiveness and subsidiarity, criteria like adherence, coherence, and the concurrence with a wider European consensus may be among the elements of a standard of legitimacy applicable at the ECHR level.

6.2. Principles governing judicial cooperation and interaction: comity and subsidiarity

A few principles are concerned with the modus operandi of (international) judicial institutions and their relation to member states, national courts of the member states and other courts at the international level. They apply, for example, at the level of jurisdiction, the principle of res judicata, including the acknowledgement of decisions made by another court on the same matter at the factual level, or the exhaustion of local remedies. More generally, they impact

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the judicial dialogue between the Court and the national courts of the member states and other European and international courts.

One of the more general commands applying to the general forms of international judicial dialogue and cooperation is comity. Based on the implied powers doctrine, it calls upon courts “to defer, when appropriate, to other courts and to treat their procedures and decisions with courtesy and respect.” The concept entails reference to the broader notion of subsidiarity, i.e. the deference to the decision-making body closest to the case at hand. Thus, each court or tribunal must exercise the competences assigned to it with due regard of the competences of other. Nonetheless, comity is a rather vague concept; it can mean anything from the creation of international law to mere courtesy, from rules of jurisdiction to the discretion to decline a case. It applies at the level of competences of an international institution, as well as at the level of substantive law. There seem to exist various notions of comity that differ according to their common or civil law background, and the underlying perception of the international judicial system as a coherent, hierarchical or fragmented legal order. A number of measures that were emphasised both in the Interlaken and Izmir processes fall within the wider range of this principle, such as the fourth instance doctrine, the secondment of national judges to the ECtHR, or the cooperation with other relevant national bodies and the taking into account the Court’s case law at the national level.

The principle of subsidiarity has dominated reform considerations on the future of the ECtHR all around. Its most general form builds upon respect for smaller entities by greater ones. Its legal adaptation concentrates on the exercise of deference or deferral, i.e. the preference to the exercise of authority by the smaller or lower entity, as opposed to the larger, or hierarchically higher authority. It applies at the substantive rights level and at the procedural

36 Ibid, 166.
38 Worster, 122, 123, 148, 149.
39 Supra note 9.
40 *Infra*, section ###
level, regulating the general relationship of the ECtHR with the member states. Various rules at the procedural level, amongst others, the local remedies rule, the fourth instance doctrine and in the implementation of remedies at the national level express the legal conception of subsidiarity. The ECtHR underlined the subsidiary character of its own jurisprudence, i.e. the fourth instance doctrine, in the Belgian Linguistics case, where it held: “[T]he Court … cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of the collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the convention.”

The margin of appreciation doctrine represents subsidiarity considerations at the substantive rights level. Yet, the shape and prerequisites of subsidiarity exceeding this more descriptive character of deference to the national level are more unclear. Some authors have therefore held that the proportionality test could apply as one of the legs of subsidiarity. Kumm, for example argued that proportionality could function as “a ‘cost-benefit analysis’ which focused on the advantages and disadvantages for ratcheting up the level of decision-making”. This could solve collective action problems involving both the national and the international level. Moreover, there are diverse opinions on where the primary authority to review human rights violations should be located, i.e. at the supranational, or the ECHR level. Some scholars point to the dysfunctional judiciary of some of the member states of the Council of Europe and conclude that subsidiarity cannot provide a solution for the relationship of the ECtHR with those states; others hold that the ECHR system should focus on an approach in which

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42 Føllesdal.
43 European Court of Human Rights, Case relating to certain aspects of the laws on the use of languages in education in Belgium’ (Belgian Linguistic Case), App. No 1474/62); 1677/62, 1691/62, 1769/63, 1994/63, 2163/64, Series A No. 6, Judgment, 23 July 1968 para. 10.
45 Ibid.
47 Keller, Fischer and Kühne.1032.
the ECtHR would be involved only if there are good reasons to depart from the interpretation at the national level.48

6.3. Effectiveness
The principle of effectiveness is part and parcel of all human rights conventions. It is enshrined in several provisions of the ECHR, but it is also part of the international treaty and customary law which tackles the application, interpretation and implementation of international treaties. Together with the principle of subsidiarity, the principle was crucial in the reform debate on the institutional reform of the Court. Several provisions of the ECHR provide for an effective implementation of the rights of the convention. Above all, the preamble calls for an “effective recognition and observance of the rights therein declared” and declares that the convention rights are best preserved by “an effective political democracy”. It must be read together with the general provision of article 1 ECHR, which commends: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”49 Also article 13 demands the provision of an “effective remedy” to those whose rights have been violated, and article 34 calls for an effective implementation of the right of individual complainants to launch complaints before the Court.

Several other provisions of the general international law on treaties also encompass the general provision of effective treaty implementation. To name but one crucial international treaty provision, which has also a status of customary international law, the Vienna Convention on the Law of Treaties in its Article 31 provides for an interpretation in good faith of international treaty provisions. Effectiveness is both inherent in this notion as well as in the notion to interpret treaties following their object and purpose, according to 31(1) of the VCLT.50 In their recent discussion of a case concerning reservations under the Optional Protocol, members of the Human Rights Committee held that the provisions of the CCPR as well as of the Optional Protocol must be interpreted to render utmost effect of the individual rights concerned.51

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48 Ulfstein, supra note 5; Ulfstein, The International Judiciay 126-152, 144; Kumm, 921.
49 Convention as amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010.
50 Gardiner, Treaty Interpretation, at 160.
Concerning the current reform of the ECtHR, it seems clear that effectiveness concerns both the proper functioning of the Court and its Registry, as well as the realization of the rights of the convention for the individuals affected. However, which of the two must take precedence over the other must be decided case by case and often requires careful balancing of all interests involved. Particular reforms may go at the expense of the individual seeking remedies for serious human rights violations. In particular, minor claims may seriously block the workability of the Court.52

6.4. Proportionality
Closely connected to the principle of effectiveness is the principle of proportionality. It measures the intensity of limitations to individual human rights, moderates between the interests of the state involved and the individual and ensures that those are brought into conciliation. One of the first provisions which contained a rough notion of proportionality is article 74 of the Prussian General Law of 1794 (Preussisches Allgemeines Landrecht) the Land, which allowed the police to take the “necessary measures”, thereby focussing on necessity on the measures involved.53 Concerning the judicial review of constitutional rights, the German Constitutional Court cultivated and promoted proportionality analysis toward a level of analytical reasoning, employed to achieve a balance between conflicting interests involved.54 Also other national courts base their analysis of lawful limitations of constitutional rights on a proportionality analysis,55 just as the CJEU, which employs the principle in its assessment of restrictions to the EU Fundamental Freedoms.56 As of today, proportionality analysis has found its way into many national legal systems, including hybrid and common law based, as well as into the case law of the ECtHR. The Court applies the principle
regularly, in particular when assessing the limitations to human rights provisions, e.g. in its analyses of article 8-11 and article 14 of the convention.\textsuperscript{57} Except for the deference to the interests concerned\textsuperscript{58} and a call to carefully balance all the rights affected,\textsuperscript{59} the principle does not contain a strong normative claim. It rather provides an analytical framework without producing substantive outcomes.\textsuperscript{60} By providing such a framework, proportionality analysis can mitigate certain legitimacy concerns,\textsuperscript{61} mostly in that it provides for a coherent procedure to assess the decision-making process. This is particularly valuable in situations where the law evolves primarily through judicial interpretation and application; where provisions are relatively open-ended; and where courts are both the masters of the constitution and of the decision-making by the political branches of government.\textsuperscript{62}

7. The plan of this book
The book is neither a textbook nor a commentary, but a volume of contributions that address the important developments affecting the inter-institutional relationships of the Court. The book aims at being a stimulus to the present debate and of wide usage both for practitioners involved in the reform process as well as for human rights advocates who support complainants before the Court.

Following the institutional structure and environment of the Court, the book consists of three parts. Since the states members to the ECHR are still the primary guarantors for the rights enshrined in the convention, the first part concentrates on the relationship of the states parties to the ECHR and the Court. The second part concentrates on the Court and Europe. It explores the Court’s relationship with the Council of Europe and the EU. The third part of the book deals with the relationship between the Court and the United Nations. A final chapter draws conclusions.

\textsuperscript{58} In form of the least restrictive means analysis.
\textsuperscript{59} Alexy ###.
\textsuperscript{60} Sweet, 76.
\textsuperscript{61} Ibid, 77.
\textsuperscript{62} Ibid, 80, 89.
7.1. The Court and the member states

Procedural aspects (Ian Cameron)
[to be expanded] The Court has to ensure effective protection of human rights in the face of an over-load of cases. There is also a need to ensure consistency, that the parties are heard, and that states and the general public have confidence in the Court – including the need for transparency. This chapter examines various proposals including changes to the admissibility criteria, admissibility decisions taken by the single judge procedure, possible filtering mechanisms, the need for more reasoned non-admissibility decisions, and increased use of oral hearings. The newly introduced Article 35(3)(b) of the ECHR, only partly addresses these issues.

The margin of appreciation (Yutaka Arai-Takahashi)
[to be expanded] This chapter addresses the margin of appreciation doctrine as a central element whereby the Court allows discretion to member states. The chapter explores central issues concerning this doctrine, namely 1) the balance between ensuring effective implementation of international obligations and the need to protect national autonomy, 2) whether the Court should differentiate between different areas of substantive human rights law when applying the margin of appreciation and 3) the need to ensure a consistent application of the ECHR, and of the margin of appreciation doctrine itself.

Dynamic interpretation (George Letsas)
[to be expanded] The Court applies an evolutive interpretation: the Convention is regarded as a ‘living instrument’. This chapter addresses how the Court balances the need for developing the standards of the Convention, e.g. by comparative analysis of member states’ law and practice, while respecting the limits of the Convention’s human rights protection, as well as the interests of member states. The chapter will also address the role of consent in the dynamic interpretation of the ECHR. The Court has often based dynamic interpretations of the Convention on the change of social or factual or legal circumstances within the member states. Accordingly, the ECtHR frequently referred to the consensus of the member states, which supported the respective change in interpretation of the provisions of the Convention.

Remedies (Philip Leach)
[to be expanded] This chapter focuses on the remedy system of the Court which must accommodate two important considerations: subsidiarity and the coherence of the Court’s judgments. This chapter discusses whether the remedy system fits the current and envisaged
role of the Court and whether further or other remedies would better suit the Court’s role. Should the use of pilot judgments be developed? Should the Court assume a more proactive role in suggesting specific remedies, as the Inter-American Court of Human Rights does? Assessment of such proposals must also consider that it is the Council of Europe which executes the Court’s judgments.

**The reception and implementation of the ECHR by national courts (Mads Andenæs and Eirik Bjørge)**

[to be expanded] The effectiveness of judgments by the ECtHR depends on their implementation at the national level. National courts must interpret judgments directed to the particular state as *res judicata* and take account of the general practice of the Court. This chapter discusses the approach taken by national courts in some selected jurisdictions: Does the monist or dualist structure of the national system facilitate its relation with the Court? Do national courts apply a deferential approach, do they resist the ECtHR judgments, or do they apply an approach of accommodation? How are national judgments reflected in the jurisprudence of the ECtHR? Do we see a ‘dialogue’ between the ECtHR and national courts?

### 7.2. The Court and Europe

**The Court as part of the Council of Europe: The Parliamentary Assembly and the Committee of Ministers (Elisabeth Lambert-Abdelgawad)**

[to be expanded] This chapter assesses and evaluates the following three issues: 1) The election of judges 2) the implementation of judgments 3) budgetary aspects. The assessment concentrates in particular on the interplay of the three organs of the Council of Europe when dealing with those issues, i.e. the Committee of Ministers, the Parliamentary Assembly and the Court. The quality of the judges is fundamental to the credibility and legitimacy of the Court. The Parliamentary Assembly plays a pivotal role in their election. The Committee of Ministers is the organ of the Council of Europe in charge of supervision of the execution of the Court’s judgments. The chapter assesses whether the current distribution of tasks between those three organs needs further adjustment, against the backdrop of the reform suggestions made at Interlaken and further institutional reform proposals. How well does the current system meet subsidiarity, effectiveness, or other standards of legitimacy? The chapter also discusses the pros and cons of greater financial autonomy of the Court, and assesses to what extent the Court should be influenced by policy guidelines adopted by the Council of Europe.
**The Court and the EU (Olivier de Schutter)**

[to be expanded] The ECHR has been part of the jurisprudence of the ECJ and will also be part of the jurisprudence of the CJEU. The ECtHR has also accommodated the relationship between the EU and the Court in its *Bosphorus* approach. The new Protocol 14 to the ECHR opens up for a formal EU accession to the ECHR, as also envisaged in the Lisbon Treaty. It has been argued that the EU’s ratification of the ECHR will not ease problems between the CJEU and the ECtHR. This chapter discusses which court can and will be the final arbiter of human rights in Europe. The chapter delineates how the present relationship of the ECtHR and the CJEU is regulated, and assesses whether principles like subsidiarity, margin of appreciation, proportionality or legal pluralism can guide a sensible development of the Court, the EU institutions and the CJEU. Will the approach in the *Bosphorus* judgment hold even after EU accession or does this doctrine need redefinition? Should the ECtHR review EU decisions similarly to decisions by member states, and should the margin of appreciation also be applied to the EU? What would be the proper attribution of responsibility for violations of human rights when member states implement EU decisions?

**7.3. The Court and the United Nations**

**Attribution of responsibility/the substantive law aspects (Christian Tomuschat)**

[to be expanded] At the end of the Cold War, the UN has taken on new responsibilities: the Security Council has mandated regional organizations and member states to use military force under Chapter VII of the Charter, and the UN has taken on territorial administration of post-conflict states or ‘failed’ states. Drawing upon the *Behrami and Saramati* case, the chapter discusses the attribution of responsibilities between the UN and Council of Europe member states both in regard to military operations and territorial administration. The chapter also examines possible conflicts between UN obligations and commitments under the ECHR and EU law, as exemplified by the *Kadi* case. The chapter also explores how the Court could and should develop its further relations with other international organizations, like the ILO or NATO in light of the principles of effectiveness, subsidiarity and legitimacy.