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THE EUROPEAN HUMAN RIGHTS SYSTEM AS A SYSTEM OF LAW

*Richard S. Kay**

The territory under the jurisdiction of states adhering to or about to adhere to the European Convention of Human Rights encompasses almost all of Europe.¹ The rapid expansion of the authority of the Convention to the countries of Central and Eastern Europe has properly been noted as a development of historic significance. This is, in large part, because the Convention system has, in the close to fifty years of its existence, enjoyed unparalleled success in enforcing a set of internationally produced standards of government conduct towards individuals. A similar experience in the new regions in which it applies would go a long way towards assuring that those nations will succeed in negotiating the perilous transition from repression and arbitrary government to democracy and the rule of law.

In this paper I propose to examine the character of the system of rules and institutions which have developed under the Convention. More particularly I will discuss the extent to which it makes sense to describe that system as a legal system. This question presupposes that we can identify the defining qualities of a system of law. Any such identification is arbitrary to some degree. The words "law" and "legal" are commonly employed to describe a wide variety of phenomena. The criteria to which I will refer, and on which I will elaborate further below, are therefore, in some measure, stipulations. But I believe they define a distinct category of influences on state behavior that is helpful in understanding that behavior. The presence of such influences may be said to make a system of practices and decisions more "law-like." I do not think the presence or absence of law is an all or nothing proposition. But there are paradigm cases to which most people would feel comfortable according or denying the title of law. With regard to the behavior of nation-states, I think we can distinguish a more or less mature international legal system from a (mere) treaty arrangement. Put too simply, adherence to the latter is—mainly and most of the time—a matter of political calculation, while adherence to the former is—mainly and most of the time—a matter of felt obligation.²

To ask whether the complex of rules, institutions and practices under the Convention are law suggests a venerable and unresolved question: Is international law really "law"?³ It is not surprising that progress on this issue has faltered on just the kind

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¹ Several states have recently been admitted to the Council of Europe on condition that they will, within a period of one to three years, ratify the convention and submit to the compulsory jurisdiction of the European Court of Human Rights. The only European countries which have not joined the Council are Belarus, Bosnia, Yugoslavia, Monaco and the Vatican.

² See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2601 n.3 (1997) (defining "obedience" to a rule as "rule-induced behavior" resulting from incorporation of the rule "into its own internal value system").

³ See, e.g. Louis Henkin, *How Nations Behave: Law and Foreign Policy* 88-98 (1st ed. 1968); Anthony D'Amato, *Is International Law Really "Law"?*, 79 Nw.U. L. Rev. 1293 (1984-85).

of definitional problems noted. One aspect of those difficulties is particularly relevant to my inquiry. That is the precise specification of the content of international law. The problem is usually discussed in gross, as if international law were one big thing.⁴ But this seems to me an inevitably futile inquiry. As anyone who has looked at it even casually knows, international law consists of lots of very different things. The various sources of international law—international adjudication, treaties and custom—differ with respect to source, form and content.⁵ Nor is the law that results from any of those sources in any way uniform. Particularly related to the subject of this paper is the fact that the variety of treaties is vast with respect to subject matter, detail, and institutional apparatus. The question of the extent to which international law is “law,” therefore, can only be reasonably asked about particular instances. It is possible to characterize the activity associated with the European Human Rights Convention as law without making a similar judgment as to “international law” in general.

Before examining the legal quality of the European Human Rights system, it will be useful to sketch very briefly the history and practice under the Convention.⁶ The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 and came into force upon the ratification of eight parties in 1953. The Convention was inspired by the general revulsion at the abuse of state power in Europe in the inter-war and war periods. In its first article the Convention obliges the parties to “secure to everyone within their jurisdiction” the rights defined in it. The rights referred to, listed in the first part of the Convention and in some of the subsequent protocols, are unremarkable. They are the standard fare of modern liberal constitutions.

The great innovation of the Convention was the establishment of international institutional machinery for the investigation and determination of claims that states had violated the rights provided. Most significantly, the Convention established the European Court of Human Rights and authorized it to issue binding judgments on claimed violations of the treaty. Even more extraordinary, the Convention provided that the institutions so created, including the Court, could act on the initiative of individuals who alleged that they were the victims of state actions infringing the protected rights. While both the jurisdiction of the court and the right of individual petition were originally optional for adhering states, all of the parties have now agreed to them. The recent adherents were required to do so as a condition to admission to the Council of Europe, and such recognition has now become mandatory under a recently adopted protocol to the Convention.⁷

⁴ See, e.g. D’Amato, *supra* note 3.

⁵ See generally Mark W. Janis, *An Introduction to International Law* (2d ed., 1993).

⁶ The following discussion relies on Mark W. Janis, Richard S. Kay & Anthony W. Bradley, *European Human Rights Law: Texts and Materials* 3-29 (2d ed., Oxford Univ. Press 1995).

⁷ The “optional clauses” were arts. 25 (right of individual petition) and 46 (jurisdiction of the Court). Protocol 11, agreed to in 1994 by deleting arts. 19-56, eliminated the optional character of both the jurisdiction of the Court and the right of individual petition. Protocol 11 effected a major revision of the institutional and procedural character of the Court. By its terms, the protocol required ratification by every signatory to the convention before it could go into effect. The last ratification was secured in October, 1997 and the new institutions began functioning in November, 1998. See Stichting Algemeen Nederlands Persbureau, ANP English News Bulletin, October 2, 1997, in LEXIS, News Library, Cumws File. For a summary and analysis of the new protocol, see Henry G. Schermers, *Adaptation of the 11th Protocol to the European Convention on Human Rights*, 20 Eur. L. Rev. 559 (1995).

By almost all accounts this system has been remarkably effective. That is, the judgments of the European Court of Human Rights have been almost uniformly respected. In each case, the Court may order payment to the applicant-victim of "just satisfaction." This almost always consists of payment of some amount of money and these sums have, indeed, been paid. More significantly, however, the states found in violation have regularly reformed their domestic law to bring it into conformity with the Convention as interpreted in the judgments. I will be concerned later in this paper with the kind of response judgments of the court elicit in the states party. At this point it may be sufficient to note, as examples, the Belgian revision of inheritance law with respect to children born out of wedlock and the fundamental reform of the Italian Criminal Code, both undertaken, in substantial measure, as responses to decisions of the Court in Strasbourg.⁸

This record is more impressive in light of the kind of contentious issues with which the Court has dealt. Of course, many of the complaints brought to Strasbourg concern mundane and often technical aspects of the relevant legal systems. But, like municipal constitutional law, European Human Rights law not infrequently touches on matters of the greatest political sensitivity. Thus the Court has held states to be in violation of the Convention for allowing politicians to bring libel actions against journalists,⁹ for failing to accommodate the new gender of a transsexual on public records,¹⁰ and for the killing of terrorists believed to be about to detonate a bomb.¹¹

The increasing importance of the Convention is reflected in the remarkable increase in the number of cases with which it deals. In the first twenty years of its existence (1960-1980), the European Court of Human Rights issued a total of 36 judgments.¹²

By the end of the 1980s, it had decided another 169 cases and in the nine years 1990-98 the number of judgments exploded to 818.¹³ The latter number represented more than ten percent of the total number of applications registered since the Commission opened for business in 1955.¹⁴ This extraordinary activity is an indication of a more profound change. The notion that individuals have rights that are good against the nation state, and that may be vindicated in an international forum, has become visible and entrenched in the popular culture of most European countries.

It is clear from this picture that something significant has happened in Europe with respect to the treatment of individuals by states and to the idea of state sovereignty. That development has more prominently, and quite properly, been associated with the dramatically enlarged authority of the European Union.¹⁵ The perhaps equally

⁸ Georg Ress, *The Effects of Judgments and Decisions in Domestic Law*, in *The European System for the Protection of Human Rights* 801, 836-839, 845 (Ronald St.J. MacDonald, et al., eds., 1993).

⁹ *Lingens v. Austria*, 8 Eur. H.R. Rep. 407 (1986).

¹⁰ *B. v. France*, 16 Eur. H.R. Rep. 1 (1992).

¹¹ *McCann v. United Kingdom*, 21 Eur. H.R. Rep. 97 (1995).

¹² *Janis, Kay & Bradley*, *supra* note 6, at 28.

¹³ European Court of Human Rights, 1994 List of Judgements and Decisions, 1990-94, December 16, 1997; European Court of Human Rights, 1994 List of Judgements and Decisions, 1996-98, February 24, 1999 at both <<http://www.dhcour.coe.fr>>.

¹⁴ European Commission of Human Rights, 1994 Survey of Activities and Statistics 22 (1995) <<http://dhcommrhr.coe.fr>>.

¹⁵ The jurisprudential literature on this subject is vast. Some notable recent contributions are collected in a symposium, *Constructing Legal Systems: "European Union" in Legal Theory*, 16 *Law & Phil.* 331

significant entrenchment of the European human rights system has not received quite as much attention. I wish to ask whether that system has progressed to the point where it is most helpfully described as a system of law.

As I noted above, this requires some attempt to state criteria for the identification of a developed legal system in distinction to mere treaty adherence. The use of the words "law" and "legal system" are recognizably employed to designate many phenomena of varying content. I want to focus on those features of the idea of law which are present when people refer to obligatory standards of conduct, promulgated and enforced by political agencies and regarded as holding their force by virtue of some perceived authority in those agencies. That is, when I refer to the qualities of "law", I mean something different from the law of gravity or the law of the jungle or, even, the law of the family, although we might well conceive of "legal systems" associated with such varieties of law. I mean rather something more like what we mean when we speak of the "law and legal system of Sweden."¹⁶

It is proper to mention again a point that I will consider more fully below—that a legal system implies more than a pattern of conformity of behavior to pre-existing standards. It is certainly true, as Louis Henkin observes, that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."¹⁷ But this is not enough to define a legal system. It is possible that behavior conforms to a norm without being a response to a norm. My edict that no elephant may enter my office has, so far, never been violated, but that does not entitle me to call it an effective law. More significantly, even conformity that is a deliberate response to the presence of such standards may not itself demonstrate the existence of a mature legal system. I will elaborate what I take to be the relevant criteria below but, in brief, I think that a more confident description depends on a conviction that the

(1997).

¹⁶ It is also important to distinguish the question under study from a different but related one. That is the effect of the Convention on national legal systems. In all but two of the signatory states the Convention is part of national law by virtue of its status as an international agreement to which the state is a party, although its exact status in the hierarchy of law varies according to the legal system affected. Janis, Kay & Bradley, *supra* note 6, at 448-450. One of the two exceptions, the United Kingdom, has recently enacted legislation which will incorporate the principal Convention rights into domestic law, effective January, 2000. Human Rights Act 1998, sec. 1-4; <<http://www.homeoffice.gov.uk/hract/hrfaq.htm>>. Judicial enforcement of the Convention rights, however, will not affect the validity of acts of Parliament. In cases where statutes are challenged judicial remedies will be limited to a declaration of incompatibility and the triggering of an expeditious parliamentary review, Human Rights Act 1998, sec. 4, 10. To the extent that incorporation exists, it reinforces the claim that the decisions of the European Human Rights system are properly called law. This facet of the law of the European Communities is stressed by Mark L. Jones in his argument that what is now called the European Union should be regarded as a legal system. See Mark L. Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis Using H.L.A. Hart's Model of Law and a Legal System*, 17 *Cornell Int'l L.J.* 1, 32-49 (1984). But this fact, in some ways, may be regarded as contrary to my thesis in this paper. European Human Rights law is indeed law in this sense, but it is German or French or Hungarian law. To the extent the judgments of the European Court of Human Rights are authoritative in such systems, it may be seen as an institution of the national legal system. My concern in this paper is with European Human Rights law as constituting an autonomous legal system. Consequently my inquiry is into the reaction of the states, the direct subjects of the system, to the decisions of law generated by the system. This will sometimes, but need not invariably, result in a systemic change in national law.

¹⁷ Henkin, *supra* note 3, at 47.

response to these standards is accompanied, in the case of at least some actors, by, to paraphrase Henkin, a sense of obligation to certain institutional authority and a sense of violation when observance fails.¹⁸

More specifically, the legal system I will be discussing depends on "positivist" criteria, in particular that version of a legal system best explicated by H.L.A. Hart.¹⁹ Among the central features of this view is the recognition that law is a human, and therefore contingent, artifact. It achieves its effect not from any intrinsic quality, but from the way it is regarded in the society in which it exists.²⁰ This view of law has sometimes been problematic for advocates of the legal quality of international law, who have, unsurprisingly, often been more concerned with the ideal than the actual. When, however, we narrow our focus, the European Human Rights system appears to exhibit qualities which make more plausible its characterization as a system of law even in this positivist sense. I will mention three such features: the role of individuals, the effective presence of both primary and secondary rules and the existence of a special point of view toward the authority of the rules and institutions of the system.

The first factor, the relation of individuals to the practices of the system, sharply distinguishes European Human Rights from more common treaty arrangements. The typical international agreement is limited to states, in both its creation and its operation.

Indeed, traditionally, international law, in general, has been regarded as restricted to rules of behavior imposing duties on states, where such duties are owed to other states.²¹

The resulting character of these arrangements is substantially affected by the very small number of actors involved, in comparison to the very large number of individuals under the jurisdiction of ordinary state law. It is reasonable to think that this difference in numbers translates into a difference in the extent to which the rules of the system influence the behavior of those subject to it. As a practical matter, where a small number of relatively powerful entities agree on certain abstract standards of conduct, we can be less confident that those standards will exert a consistent influence on subsequent behavior than is the case when a very large number of relatively powerless entities are engaged to a single set of standards. If the association vests the monitoring of rule compliance in institutions, those institutions will be less formidable in the former case. Those monitoring institutions, to the extent they exist solely to administer the relevant rules, may be viewed as surrogates for the rules themselves. In that light, in a traditional state legal system, the rules turn out to be big relative to the people; in a typical treaty arrangement the states are big relative to the rules.

In this respect, the European Human Rights system displays elements of both state law and treaty arrangements. The Convention is, indeed, a treaty among a relatively

¹⁸ Id., at 14. I think, however, that much of what Henkin describes as law observance may only tentatively be so described. See *infra* note 43.

¹⁹ Herbert L.A. Hart, *The Concept of Law* (2d ed. 1994). Although my emphasis is slightly different, my argument is similar to that made by Mark L. Jones with the respect to the (then) European Community. See Jones, *supra* note 16, at 4-27.

²⁰ This is my own distillation of the relevant features of Hart's legal positivism. Like law itself, there are many formulations of positivism with different emphases. See Thomas Morawetz, *The Philosophy of Law: An Introduction* 11-16 (1980).

²¹ For a useful discussion, see Mark W. Janis, *Individuals as Subjects of International Law*, 17 *Cornell Int'l L.J.* 61 (1984).

small number of parties, and only those parties have duties under it.²² On the other hand, the explicit beneficiaries of the imposition of human rights standards are the individuals subject to the jurisdiction of those states. And, crucially, its rules may be invoked by individuals against the state in the European Court of Human Rights. That is, millions of people have "rights" under the Convention—not just the obvious substantive rights granted—but rights in the system as participants in its operation. This participation by individuals does not make the system identical to a state system in the sense discussed. The direct subjects of the system are still few in number and relatively independent entities among whose concerns the authority of the European human rights system is unlikely to be the most compelling. But in the regular administration of the system, these governments find themselves from time to time at the bar of the Court of Human Rights as no more than equal participants with their own citizens in ostensibly legal proceedings. To the extent that those states, for separate reasons, view themselves as in some ways answerable to their own inhabitants (parties to the Convention are supposed to satisfy the Council of Europe before admission that they are functioning democracies), they may well come to accept a role as fellow-subjects with individuals in a single system.

The participation of individuals is also likely to alter the behavior of the Convention's own institutions, making them relatively more sensitive to the pre-existing rules and relatively less sensitive to the political dynamics of state behavior. The judges and staff of the Court of Human Rights cannot regard themselves merely as responsible to—as having only to deal with—a limited number of powerful states. They necessarily must answer to the large number of individuals who take advantage of the Convention procedures. And the stake of those individual participants is most accurately defined in terms of the substantive rules on which they base their claims.²³

The second factor which makes it reasonable to regard the European Human Rights system as a system of law is also structural. That system consists of what H.L.A. Hart called a union of primary and secondary rules. Primary rules for Hart are those which attach consequences to primary conduct. Secondary rules specify how law is made,

²² There is some dispute in the literature on the system as to whether the Convention may be said to have "horizontal effect" so that it imposes duties on private individuals. The most plausible argument for this position, however, builds upon a supposed "positive obligation" imposed by the Convention on states to require such conduct from private persons. See David J. Harris et al., *The Law of the European Convention on Human Rights*, 19-22 (1995); Janis, Kay & Bradley, *supra* note 6, at 247-253.

²³ The participation of individuals thus makes this an especially clear example of situations where "the norm's 'interpretive regime,' that is, those who interpret and elaborate upon the meaning of the norm, . . . embraces a far larger and more complex group than those institutions and parties that comprise the treaty regime." Koh, *supra* note 2, at 2640 (emphasis added). It is worth noting that among effective international arrangements, the European Human Rights system appears to have gone the furthest in terms of individual access to the international institutions. The institutional machinery of the European Union is also open to individuals in a limited class of cases. But for most substantive matters, the European Court of Justice only decides issues of concern to private individuals through the device of references from national courts. The European legal rights of individuals thus depend on the incorporation of European law as interpreted in those references into the municipal legal systems. See K.P.E. Lasok, *The European Court of Justice, Practice and Procedure* 8-12 (2d ed. 1994); Jones, *supra* note 16, at 27-50. Many of the arguments set forth in this paper, however, are equally relevant, and possibly further developed, in the case of the European Union. See generally Jones, *supra* note 16.

identified, interpreted and enforced. They are, in short, rules about rules.²⁴ It is possible to have a kind of legal system which has nothing but primary rules. But Hart thought such a system was feasible only in "a small community closely knit by ties of kinship, common sentiment, and belief".²⁵ Such a rudimentary legal system would otherwise be troubled by continuous uncertainty and an inability to make definitive changes in standards of behavior.²⁶ The response to these difficulties, one that characterizes every developed legal system, is the union of the primary rules with secondary rules. The secondary rules tell us how to distinguish that system's law from not-law, how its law may be made and changed, and how it is to be interpreted.²⁷ Secondary rules suppose the presence, in some form, of constitutional rules or understandings, legislatures, courts and sanctions for noncompliance.

Hart's discussion of international law treated it as a kind of primitive legal system exactly because he understood it as consisting of primary rules without significant secondary rules.²⁸ But, like so many commentators on the nature of international law, Hart took international law pretty much as a whole.²⁹ When we look more particularly at the experience of the European Human Rights system, the institutional picture looks rather different. As already described, that system has, at its center, a well developed set of procedures and institutions for investigating and adjudicating violations of the substantive rules of the Convention.³⁰ The subjects of the legal system accept as obligatory (in a sense to be discussed below) not merely the primary rules of state behavior, but the rules vesting the authority to interpret and apply those in the authoritative organs of the Convention.

The last feature of European Human Rights system which I wish to discuss is probably the most important, and I will give it somewhat more attention. That is the way in which the rules of the system—primary and secondary—are regarded by the people who are subject to them. Again I am relying substantially on H.L.A. Hart's description of a legal system. Hart established his concept of law, in part, by contrasting it to the earlier positivist definition of law put forth by John Austin in the nineteenth century. Austin conceived of law as habitually followed general orders backed by threats.³¹ Hart found this description inadequate. It was both broader and narrower than the actual systems of law it attempted to describe. It was too broad because it included any situation where people complied with demands for conformity without regard to the reason for such compliance. It encompassed, to use Hart's illustration, the authority of an armed robber "writ large."³² But our experience tells us that legal obligation is not, in the most familiar cases, sustained by a likelihood that

²⁴ Hart, *supra* note 19, at 27-33, 80-81, 94.

²⁵ *Id.*, at 92.

²⁶ *Id.*, at 92-94.

²⁷ *Id.*, at 91-99.

²⁸ *Id.*, at 218, 227.

²⁹ See generally *id.*, at 213-37.

³⁰ See Thomas M. Franck, *Legitimacy in the International System*, 82 *Am. J. Int'l L.* 705, 751-752 (1988). On the union of primary and secondary rules in the European Community see Jones, *supra* note 16, at 18-25.

³¹ Hart, *supra* note 19, at 20-25.

³² *Id.*, at 82.

nonconformity will be attended by adverse consequences. A system of efficient terror in which all behavior were dictated only by an evaluation of consequences, without regard to the presence of a general understanding that such conformity was proper as well as prudent, could not be long sustained, nor does it resemble most successful systems of law.³³

On exactly the same ground, Austin's simple criteria are too narrow because they suppose that conformity as a matter of law occurs only when there is a high probability that adverse consequences will follow defiance. But, again, we can speak quite sensibly about the presence of legal rules, and an obligation to obey those rules, even in instances in which it is quite certain that the violation of law will attract no sanctions.³⁴

Both of these defects amount to the same thing. They miss an element that is essential to a functioning and temporally extended system of law and that makes unnecessary the requirement that there be probable adverse consequences to any departure from law—an attitude of acceptance of the rules of the system qua rules. This “internal attitude” is one of the things that distinguishes rule-governed behavior from that which is a mere matter of habit. Group habits consist merely in a pattern of observable convergent behavior. There is no need for such behavior to be thought of as conforming to some appropriate standard:

By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an “internal” aspect, in addition to the external aspect. . . . What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of “ought,” “must,” and “should,” “right” and “wrong.”³⁵

That is, in a mature legal system there exists not only a widely shared pattern of behavior conforming to the rules, but a shared attitude that it is right to render such obedience.³⁶

It is, moreover, an important feature of such a mature system that the “internal viewpoint” should extend not merely to the primary rules but to the secondary rules as well. It is the presence of such a viewpoint that makes possible the persistence of a single legal system over a long period of time.³⁷ So the internal viewpoint will govern not merely the propriety of adhering to particular rules of conduct but to a “rule of recognition.” Such a rule provides the criteria, within a given system, for the identification of binding law, containing a specification of the qualities that define the person or persons that may make such law.³⁸ Similarly, it will exist in relation to rules of adjudication providing that the interpretation and application of rules of the system

³³ *Id.*, at 82, 90-91.

³⁴ *Id.*, at 83-85. See also D'Amato, *supra* note 3, at 1297-99.

³⁵ Hart, *supra* note 19, at 56-57.

³⁶ *Id.*, at 58.

³⁷ *Id.*, at 98-99.

³⁸ *Id.*, at 94-96.

should be resolved by a specified judicial authority and identifying who holds that judicial authority at any given time.³⁹ In a mature legal system, the general tendency of the relevant actors to conform to the substantive rules generated by that system will be "content independent." It will be triggered not by any quality inherent in the rule itself but by the fact that the rule was created in a way authorized by the system. The hallmark of a developed system of law is the presence not merely of effective rules, but of rules which are effective because they are promulgated, interpreted and applied by institutions whose authority is accepted from an internal viewpoint, formed by a shared critical reflective attitude.⁴⁰ In Thomas Franck's phrase, "obligation is owed not only to the rules of the game, but also to the game itself."⁴¹

There is reason to think that the European Human Rights system has achieved this kind of acceptance. There is at least some evidence that the actors subject to the system generally hold such an internal viewpoint toward the rules of the Convention. More importantly, the governments that must account for their behavior before the Court and Commission at Strasbourg appear, increasingly, to take an internal viewpoint towards the decisions of those institutions. They take those decisions as providing presumptively sufficient reasons for acting in the way they direct.⁴²

This conclusion may be made clearer by reverting to the distinction between legal systems and treaty arrangements I made at the beginning of this paper. We can suppose there are two different ways to explain the general effectiveness of the judgments of the European Court of Human Rights. We can call the first explanation prudential calculation. That is, the statesmen affected by a judgment make a political calculation of the costs and benefits of compliance with the decision. The ingredients of this calculation will be much the same as those of any other political determination. They would consider how seriously defiance would injure their relations with other states, how it might affect the kind of image the state was trying to project to the world, and how one response or another would affect the political position of the government at home. I suspect this process is fairly common when states are called to account for breach of an international obligation.⁴³ One entirely plausible explanation of the

³⁹ *Id.*, at 96-98.

⁴⁰ This is a quality Thomas Franck refers to as the "legitimacy of a rule—that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process." Franck, *supra* note 30, at 706. See generally *id.* at 706-713. See also Jones, *supra* note 16, at 52 (The effectiveness of claims of law generated by the European Community legal system depends on acceptance of such claims by officials of the national legal systems.)

⁴¹ Franck, *supra* note 30, at 753.

⁴² Since the only actors with obligations under the Convention are states, the character of the acceptance of the obligatory character of the rules and decisions of the system need not be qualified, as Hart does, by noting that the internal viewpoint needs to be held only by some class of officials in the system. For the remainder of the population it is sufficient if there is general conformity with the rules generated. See Hart *supra* note 19, at 60-61, 113-114.

⁴³ In the helpful taxonomy offered by Harold Koh, this kind of response may encompass cases of both "conformity" where subjects conform to a rule "when convenient, but feel little or no legal or moral obligation to do so" and "compliance" where "entities accept the influence of the rule, but only to gain specific rewards . . . or to avoid specific punishments." See Koh, *supra* note 2, at 2600-01, n.3. In his excellent treatment of the operation and character of international law, Louis Henkin (notwithstanding his restriction of the term "law" to situations involving "a sense of obligation, and a sense of violation," Henkin *supra* note 3, at 14.) recounts how the usual balance of cost and advantage favors state compliance with

success of the European Convention on Human Rights is that the international and national factors at work in the relevant period have almost always resulted in a balance that favored adherence to the judgments of the Court. The second explanation we can call law following. If this is what happens, statesmen do not (usually) look behind the judgment itself as a conclusive reason for compliance. This is just another way of saying that the national governmental actors display the internal viewpoint of a subject of a binding legal system.

There is no certain way to determine if behavior which conforms, in fact, to certain rules or directives is really an instance of prudential calculation. The resulting external manifestations will be the same regardless of the actual explanation.⁴⁴ Hart acknowledges that there may be individuals who "reject the rules and attend to them only from the external point of view as a sign of possible punishment"⁴⁵ but that the response of such persons "may very nearly reproduce the way in which the rules function."⁴⁶ The problem, especially acute in the context of the behavior of states, is to distinguish between such actors and those for whom "the violation of the rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility."⁴⁷

A characterization of the behavior of the states party to the Convention in reaction to the judgments of the Court as law-following, therefore, can only be based on an estimate of the psychological reaction of the parties involved. And since "the devil himself knoweth not the thought of man,"⁴⁸ no such estimate can be made with assurance. Nonetheless, I believe that if we observe the way the relevant parties behave in response to the judgments and listen to what they say in connection with that behavior, such a description seems increasingly plausible. The consistent pattern of submission is, itself, a reason for such characterization. It exists (if not perfectly evenly) in all of the countries that have been found in violation. It is exhibited, moreover, over a wide range of vastly different subject matters.⁴⁹ The single constant in these otherwise disparate governmental decisions is the adverse judgment of the Court, raising a strong inference that it exercises an ordinarily conclusive influence.⁵⁰

international law and obligation. See *id.* at 49-68. It is certainly true, as Henkin notes, that at a certain level every decision to follow law is political and strategic. See *id.* at 51-52. That is, the development of an international point of view is a consequence of an explicit or tacit decision that such behavior is, on balance, advantageous. The question really comes down to some sense of the generality of that decision. A system is more plausibly described as one of law where the conformity to its norms is more often a consequence of a general affirmation of the propriety of adherence to whatever rules the system generates, and less so to the extent conformity is decided *ad hoc*, on each occasion. This is so even if the latter decisions take into account, as one factor, the value of the maintenance of the system as a whole. Henkin's clear and reasonable discussion of national responses to international norms seems more often to resemble the latter process.

⁴⁴ See Joaquín Tacsan, *The Dynamics of International Law in Conflict Resolution* 42-43 (1992).

⁴⁵ Hart, *supra* note 19, at 91.

⁴⁶ *Id.* at 90.

⁴⁷ *Id.*

⁴⁸ 1477 Y.B. Pasc. 7 Edw. 4, fol. 2 (Brian, C.J.).

⁴⁹ An extremely useful index of the judgments of the Court through mid-1995, arranged chronologically, alphabetically, by country and by subject matter is Donna Gomien, *Judgments of the European Court of Human Rights 1959-95: Reference Charts* (1996).

⁵⁰ This conclusion is reinforced by the fact that one of the most common aspects of conformity induced by political calculation is considerably weaker in the context of a human rights treaty. Unlike in

This interpretation is consistent with the way the relevant parties usually speak about the judgments of the Court and about the options open to them in case of an adverse judgment. The reaction of the British Home Secretary after a holding that the United Kingdom's immigration law discriminated on the basis of gender captures this attitude. "We are signatories to the Convention," he said, "and have to abide by the Convention. We will have to make the changes that are necessary to ensure our compliance with it."⁵¹

The response to a particularly sensitive decision of the Court against Ireland gives some indication that these judgments are perceived as having inescapable force. On October 26, 1988 the Court issued its judgment in the Norris Case, holding that Ireland had violated Article 8 of the Convention, on the protection of private life, by criminalizing male homosexual acts between consenting adults.⁵² Although its initial reaction was measured and noncommittal,⁵³ the Irish government, fearing the domestic political repercussions of a reform of the sodomy law, delayed taking any action in response to the decision. But in 1992 it answered criticism from the Committee of Ministers of the Council of Europe by announcing that it would introduce a bill to decriminalize homosexual conduct. A proposed bill was published in June, 1993.⁵⁴ The government defended the reform on grounds independent of the European judgment, with the Minister of Justice insisting that it was "an Irish solution to an Irish problem."⁵⁵

But she also made clear that the government regarded the measure as, in any event, required by the ruling of the Strasbourg court, saying that Ireland had no choice in the matter.⁵⁶ A participant in the Seanad debate confirmed this necessity observing that the legislation would never have been proposed by the government if the applicant "had not taken his case to Europe."⁵⁷ Opposition parties refused to obstruct the bill, again in part,

the case of the ordinary international agreement, violation cannot be deterred or punished by a reciprocal violation by the non-breaching party. See Henkin, *supra* note 3, at 54-60.

⁵¹ Reuters International News, May 28, 1985, in LEXIS, News Library, Arcnws File. The United Kingdom did comply with judgment, but it did so by extending the exclusionary rule complained of to the wives as well as husbands of resident aliens. See Andrew Byrnes, Recent Cases: Abdulaziz et al. v. U.K., 60 Austl. L.J. 182, 185 (1986).

⁵² Norris v. Ireland, 13 Eur. H.R. Rep. 186 (1988). The substance of the holding had already been decided in 1981 in Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981), which had held the same nineteenth century British statute incompatible with the Convention as it applied in Northern Ireland. The lawyer for the applicant, David Norris, was Mary Robinson, who was President of Ireland at the time the law was finally changed. See Maire Nic Suibhne, Outcasts from Another Age, *The Independent*, July 29, 1992, at 12, in LEXIS, News Library, Arcnws File.

⁵³ See Chris Ryder, Ireland Ordered to Repeal Laws on Homosexuality, *The Daily Telegraph* (London), Oct. 27, 1988, at 4, in LEXIS, News Library, Arcnws File.

⁵⁴ See Mary O'Halloran, Changing of Law Takes 15 Years, *The Irish Times*, June 25, 1993, at 5, and Sean Flynn, European Focus on UK Policy on Security, *The Irish Times*, Sept. 7, 1993, at 10, in LEXIS, News Library, Arcnws File.

⁵⁵ See Mary O'Halloran, Bill on Homosexuality Passes Second Stage, *The Irish Times*, June 30, 1993, at 4, in LEXIS, News Library, Arcnws File.

⁵⁶ See Eire:EC-BriefNotes, Reuter Textline, Agence Europe, May 1, 1993, in LEXIS, World Library, Txtlne File.

⁵⁷ See Leo Flynn, The Significance of the European Convention on Human Rights in the Irish Legal Order, 1994 Irish J. Eur. L. 4, 22. In the article just cited, Leo Flynn argues that the Convention has had, at best, a minor influence on Irish law. In part, his conclusion represents a judgment not on the topic of this paper, the Convention as a legal system in its own right, but on the separate question of the role of the

based on the supposition that the change was compelled by European Human Rights law.⁵⁸ And, in the lower house of the Irish Parliament, the Bill passed on June 24 without a division. The measure, which was part of a broader act defining sexual offenses, occasioned debate but its provisions on homosexuality were barely mentioned.⁵⁹ A similar perfunctory approval followed in the Seanad.⁶⁰ The original delay in acting was ended only after pressure from the Council of Europe, and the reform was a profound break with deep and widely held Irish attitudes. All of this suggests that the Strasbourg determination of the breach of the Convention was the critical triggering cause.⁶¹

To the extent, moreover, that states conform with the judgments of the Court, subsequent compliance becomes more likely. Success feeds upon success. A pattern of compliance eventually becomes a routine. Aristotile said that "the law has no power to compel obedience beside the force of custom, and custom only grows up in large lapse of time."⁶² Indeed, as writers on international law have recognized, such a pattern of behavior "remakes [the actors'] interests so that they come to value rule compliance."⁶³ If we assume the underlying reasons for the acceptance of law and legal institutions (for their legitimacy) are rooted in values peculiar to the relevant community, it may be that such a continuous practice itself contributes to a shared

Convention in the admittedly independent Irish legal system. He also maintains, however, that the actions of the Irish state after judgments specifically directed at Ireland by the European Court of Human Rights are not best understood as responses to those judgments. That is, Ireland was not acting as the subject of a binding legal system. As noted in text, this is a matter which can never be resolved conclusively and, in any case, the actions at issue were almost certainly undertaken with multiple motives. It is worth noting, however, that the evidence assembled by Flynn is entirely consistent with the interpretation in text. After every adverse judgment indicating a defect in Irish law, the law was changed in a way intended to achieve conformity with the Court's interpretation of the Convention. While, as noted in text with respect to the Norris case, these actions were often defended on grounds apart from the Convention, the Convention and the judgments of the Court were also prominently mentioned. Finally, the fact that Irish reaction was sometimes grudging and half-hearted, see *id.* at 19-27, does not contradict the inference that it was done to comply with the judgment. Indeed, the lack of enthusiasm for the substantive result appears to make the controlling force of the judgment more probable.

⁵⁸ See Deaglan de Breadun, *The Party that Neither Grows or Dies*, *The Irish Times*, May 31, 1993, at 5, in LEXIS, News Library, Arcnws File.

⁵⁹ See Joe Carroll, *Battle of the Sexes, Straight and Gay*, *The Irish Times*, June 25, 1993, at 5, in LEXIS, News Library, Arcnws File; Irish Parl. Deb. (1993): 2250-2292.

⁶⁰ See O'Halloran, *supra* note 55, at 4.

⁶¹ A similar resistance to the Court's jurisprudence on the rights of homosexuals and a similar response to that resistance by state officials has developed in Cyprus. The attorney general criticized the hesitation of the parliament to make changes to conform the Court's decisions saying "I do not see how you can avoid this obligation. You have no alternative. It is an international obligation of the Cyprus republic." *Cypriots Protest Against Decriminalizing Homosexual Acts*, *Agence France Press*, May 8, 1997, in LEXIS, News Library, Curnws File. A year later he made the same point stressing the content-independent character of legal obligation: "in principle, whether you talk about the right to property or the right to private life is the same thing." *Masis de Partogh, Cyprus in the Dock Over Delay in Homosexual's Bill*, *Deutsche Press-Agentur*, April 7, 1998, in LEXIS, News Library, Curnws File. Shortly thereafter the Parliament enacted the conforming legislation. *Cyprus Parliament Approves "Gay Sex" Law Days Ahead of Deadline*, *Agence France Presse*, May 21, 1998, in LEXIS, News Library, Curnws File.

⁶² Aristotle, *Politics* 131 (H. Rackham trans., Harvard Univ. Press 1977) (1937). See also Max Weber, *Max Weber on Law in Economy and Society* 12 (Max Rheinstein ed., Harvard Univ. Press 1966).

⁶³ Koh, *supra* note 2, at 2634 (describing an "American constructivist" theory of international law). See also *id.* at 2655.

understanding that the states involved are members of such a community.⁶⁴ At the end compliance becomes mainly unreflective—a habit. I mean by this not the habit of doing or not doing the particular acts prescribed and proscribed by the law. I mean rather the habit of doing that which the law requires, or more exactly, whatever the authorized creators and interpreters of the law declare it to require—the entrenchment of an internal viewpoint with respect to secondary rules.

None of this, of course, is to say that a system of rules and institutions must be perfectly effective to be a system of law, nor that compliance must be automatic and immediate. No legal system would qualify if that were the test. It is enough if an internal attitude exists in the relevant population and actual compliance is the norm.⁶⁵

Nor is it necessary that compliance always be unreflective. That is, political calculation may factor into compliance decisions without affecting the legal quality of the system. Indeed, as the Irish experience noted illustrates, this will inevitably be the case in a system like the one under study. The decisions that issue from the Court in Strasbourg may affect national policies which are so important to the states involved that the standard response to legal decision does not follow. Such a critical evaluation of European Human Rights decisions, moreover, may arise at different levels. With respect to the Irish decision on the criminalization of homosexual activity, the response indicates a serious concern about the substantive change required in Irish law. But there seemed to be no suggestion that the ultimate law-making and law-applying authority of the European machinery was in doubt. Indeed, it was the employment of other aspects of that machinery (the Committee of Ministers) and threats of a return to the Court, that appeared to secure compliance.⁶⁶

It is, however, possible that certain developments may jeopardize the entrenched position of the internal point of view itself. While a particular action may, as a matter of morality, politics or self-interest, engender resistance, delay or even defiance without jeopardizing the continuing legal character of the system, a series of such decisions (a “long train of abuses and usurpations” to quote the American Declaration of Independence) may undermine the ordinarily unreflective deference given to the institutions of the legal system. When the legitimacy of those institutions is lost, the legal system loses its viability. In established systems of law, when such a development occurs abruptly, we call it a revolution.⁶⁷

The European Human Rights system is not immune to such risks. Indeed, its likenesses to treaty arrangements, its relative immaturity and the unusually sensitive subjects with which it deals may make it especially vulnerable to them. The reaction to a 1995 judgment in the United Kingdom, which was one of the first countries to ratify the Convention and which has accepted the right of individual petition and the compulsory jurisdiction of the Court for thirty years,⁶⁸ are illustrative. In September

⁶⁴ See *id.* at 2642 (discussing the work of Thomas Franck).

⁶⁵ See Franck, *supra* note 30, at 712 (“The variable to watch is not compliance but the strength of the compliance pull, whether or not the rule achieves actual compliance in any one case.”)

⁶⁶ See O’Halloran, *supra* note 54, at 5; Flynn, *supra* note 54, at 10.

⁶⁷ See Hart *supra* note 19, at 117-23; Cf. Tascan, *supra* note 44, at 31.

⁶⁸ The United Kingdom ratified the Convention on March 8, 1951 and it entered into force in September, 1953. It accepted both optional provisions on January 14, 1966, The 39 Member States of the Council of Europe According to Their Date of Membership (as of 31 July, 1996), 17 Hum. Rts. L.J. 234

1995, the Strasbourg Court found the United Kingdom to have violated Article 2 of the Convention, guaranteeing the right to life, in connection with the shooting in Gibraltar by special services soldiers of three Irish Republican Army members who, the soldiers believed, were about to detonate a bomb. The government was held to have acted unreasonably in its planning of the operation and its training of the responsible personnel.⁶⁹ The reaction to the judgment in Britain was appropriately described by *The Times* as one of "outrage and defiance." The Prime Minister said the ruling was "madness" and the Deputy Prime Minister called it "ludicrous." The government refused to agree to pay the costs of the applicants that had been ordered by the Court and, most significantly, announced that it would reconsider its submission to the Court's jurisdiction.⁷⁰ In the following weeks the legitimacy of the European Human Rights institutions and the United Kingdom's relation to them were the subject of intense scrutiny in the government, in Parliament and in the public media. Questions were raised which went to the heart of the legal authority of the system. One Member of Parliament complained that "time and again the decisions of [the House of Commons] are referred to a court of foreigners who don't have our traditions, don't have an understanding of our culture, and are often reversed."⁷¹ But in the end, the British government paid the costs and decided not to withdraw from the system, contenting itself with the circulation to other states of proposals to reform the process of judicial appointment and declare a standard of adjudication more deferential to national decisions.⁷² The fact that the system remained in place even after a self-conscious re-examination of the basis of its authority, and in the face of furious political controversy, is some evidence that the social preconditions to its effectiveness as law are well-entrenched.

The experience in the United Kingdom over the Gibraltar decision, however, also highlights the contingent character of any legal system. With respect to European Human Rights law, there is a real risk that its viability as a system of law will be threatened by developments far more serious than any one judicial decision. The emergence of the necessary attitudes that are essential to the development and maintenance of an internal point of view is, definitionally, a contingent phenomenon. Its appearance in the European Human Rights system is the result of the convergence of a number of fortunate historical circumstances. A full consideration of the character and dynamics of those circumstances would require a substantial study in its own right, but there are some obvious aspects: the revulsion at the atrocities of the authoritarian European governments of the thirties and forties, the association of economic well-being with pan-European institutions after the war, and the cooperation of European

(1996).

⁶⁹ *McCann v. United Kingdom*, 21 Eur. H.R. Rep. 97 (1995).

⁷⁰ See Philip Webster and Charles Bremner, *Outrage over Death on the Rock Verdict* by Euro Court, *The Times* (London), Sept. 28, 1995, in LEXIS, News Library, Arcnws File.

⁷¹ See David Cracknell, *Redwood Urges MPs' Input on EU Plans*, *Press Association Newfile*, Feb. 1, 1996, in LEXIS, News Library, Panews File.

⁷² See Arthur Leathley, *40,000 Paid to Death on Rock Families*, *The Times* (London), Dec. 27, 1995; Francis Gibb and Jill Sherman, *Euro-sceptics Denounce Court*, *The Times* (London), Jan. 13, 1996, in LEXIS, News Library, Arcnws File; See also Paddy Smyth, *British Seek Dilution of Human Rights Court*, *The Irish Times*, May 7, 1996, at 2, in LEXIS, News Library, Cumws File.

democracies inspired by the common threats to security posed by the Soviet Union. It is clear that the social and political background is now quite different.⁷³

Some of the changes, most notably the increasing success of the European Communities, may reinforce the tendency to regard to the human rights system as law. (Although more recently it has become clear that neither the direction nor the pace of this movement is uniform.⁷⁴) But other developments have a distinctly different potential. As noted, since the removal of the Communist governments of Central and Eastern Europe, the number of countries adhering to the Convention and its procedures has drastically increased. The incorporation of these new states into the Convention system poses serious challenges to its continued success. Some of these, while creating great difficulties, are mainly practical. The sheer volume of activity before the Strasbourg institutions has increased sharply⁷⁵ and the enlargement of the system to forty states with added millions of population threatens to inundate it. Protocol 11 to the Convention, which went into effect in November, 1998, has instituted dramatic changes to the systems's structure and procedures.⁷⁶

With respect to the subject matter of this paper, however, the more important changes are those affecting the critical psychology which makes reasonable the claim that European Human Rights law is law-like, in the sense discussed. At least in many of the newly adhering states, the political values and traditions which underlie the Convention rights and the kind of reasoning employed by the Court in interpreting and applying those rights, if present at all, have been long suppressed. Furthermore, the actual state of affairs in these countries often deviates substantially from the standards of state behavior developed by the Court. The gravity and immediacy of the economic and social problems faced in these nations will, moreover, make compliance with those standards appear more costly.⁷⁷ Certainly, in these difficult circumstances, it is

⁷³ For an extremely useful and interesting discussion of the general factors that contribute to the creation and maintenance of the attitudes necessary to support a legal system see generally Franck, *supra* note 30.

⁷⁴ Michael H. Abbey & Nicholas Bromfield, *A Practitioner's Guide to the Maastricht Treaty*, 15 Mich. J. Int'l L. 1329, 1354 (1994).

⁷⁵ See *infra* p.7 and note 1.

⁷⁶ See *infra* note 7.

⁷⁷ See generally Hanna Suchocka, *Effects on the European Convention on Human Rights of the Enlargement of the Number of Contracting Parties* (Report presented at the Eighth International Colloquy on the European Convention on Human Rights, September 20-23, 1995, Budapest, Hungary). Very similar questions may be raised in connection with the participation of Turkey. Turkey did not make declarations recognizing the right of individual petition or the jurisdiction of the Court until 1987 and 1990 respectively. Council of Europe, *European Treaties. Chart of Signatures and Ratification*, <<http://www.coe.fr/tablconv/dec125-46.htm>>. Therefore it has only recently begun to feel the bite of adverse judgments. In a number of cases dealing with very serious infringements on the right to life (Art. 2) and the prohibition of torture and inhuman or degrading treatment (Art. 3), it has been found in violation of the Convention. See e.g., *Askoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996); *Mentes v. Turkey*, 26 Eur. H.R. Rep. 595 (1997); *Yasa v. Turkey*, 28 Eur. H.R. Rep. 408 (1998). Turkey's initial response to these decisions, while not amounting to explicit defiance, has been vehemently negative. Turkey Condemns European Decision on Cyprus, *Agence France Presse*, Dec. 19, 1996. Turkey has posed another serious question to the effectiveness of the judgments of the Strasbourg court in connection with another case not directly related to the mistreatment of dissidents in Turkey. In *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, the Court held that Turkey was responsible for the loss of property of Greeks living in Northern Cyprus after the Turkish invasion of 1974. It ordered compensation of 457,084 Cypriot Pounds, equivalent to about

unreasonable to expect that a regard for the European Human Rights system as a binding and legitimate system of law will spring up fully formed. One may well doubt whether compliance will be possible even as a matter of political calculation, and such relatively uniform and consistent compliance is the essential first step before a widespread internal point of view can develop.

Should European Human Rights law fail to take hold in these states, that experience will provide an instructive contrast with its success in western Europe. Besides having the advantage of more congenial political and legal traditions, those states had the opportunity to ease gradually into the perception of European legality.

As I have noted, the Strasbourg institutions, which today process thousands of complaints, started off slowly and, indeed, rather timidly. Both the jurisdiction of the Court and the right of individuals to petition were originally optional for each state. Consequently, there was an extended period in which the idea that the institutions of the system were entitled to make binding law could, step by step, be incorporated into the ordinary thinking of the relevant national actors.

The new states, on the other hand, are expected to ratify the Convention, allow individual application and accept the jurisdiction of the court, all within a relatively short period of time. Thus a process which took France twenty-eight years is to be completed by Russia in three years.⁷⁸ Moreover, while the first cohort of adhering countries was able to absorb the sometimes non-obvious judicial interpretations of the Convention, one by one, over a period of years, the new countries must digest a well developed and sometimes detailed jurisprudence more or less at a stroke.

All of these disadvantages cast doubt on the capacity of European Human Rights law to achieve legal status in the new democracies. To the extent it fails to do so, moreover, its failure in those countries has the potential to subvert its position in those places where it has been so accepted. A general practice of compliance reinforces the internal attitude that the relevant standards are binding, and, conversely, a pattern of persistent noncompliance reduces that perception. It refutes the notion that there is a significant, if not perfect, relationship between an undertaking to behave in ways determined by the system and the actual resulting behavior. Since the acceptance of legal authority depends upon an explicit or implicit political decision on the advantages of participating in a system of reciprocal restraint, the consequent visible absence of

\$850,000. Turkey has denied responsibility for the violation and refused to pay notwithstanding repeated demands by the Council of Europe. Council of Europe Presse Ankara to Reimburse Cyprus Robbery Victim, Agence France Presse, Oct. 7, 1999, in LEXIS, News Library, Cumws File.

⁷⁸ France accepted the jurisdiction of the Court in 1974 and the right of individual petition in 1981. Janis, Kay & Bradley, *supra* note 6, at 28. Russia was admitted to the Council of Europe in February, 1996 on condition that it ratify the Convention within one year and that it effect the abolition of the death penalty (which is, in most cases, prohibited by protocol 6 of the Convention) within three years. Russia has now signed but not ratified Protocol 6, but there remain substantial political obstacles to abolishing the death penalty. See Russia Signs European Convention Abolishing Death Penalty, ITAR-TASS News Agency, Apr. 16, 1997, in LEXIS, News Library, Tass File; Press Conference with Prosecutor General Yuri Skuratov, Official Kremlin Int'l News Broadcast, Sept. 11, 1997; Russia's Death Penalty or CE Membership, Moscow News, Oct. 16, 1997, in LEXIS, News Library, Moscow News File. In September, 1998 the Minister of Justice predicted the formal abolition of the death penalty would be accomplished by the Spring of 1999. Russia Must Abolish Capital Punishment - Official, Interfax News Agency, Sept. 1, 1998 in LEXIS, News Library, Interfax File.

such reciprocity makes it harder to hold unreflectively to the internal point of view.⁷⁹

As a system of law, the European Human rights system is especially fragile and its capacity to survive the strains which it must now undergo is a matter of genuine doubt.

For people who believe that collective power needs to be restrained and that such restraint is best effected by the existence of knowable, stable, a priori rules, that prospect is troubling. But the vulnerability of this system, while unusually acute, is one shared by any system of law, no matter how well established. Every legal regime rests, at the end, on a foundation of human trust.

⁷⁹ Cf. Franck, *supra* note 30, at 740.

