

## **A VIRTUAL WALL OF SHAME: THE NEW WAY OF IMPOSING REPUTATIONAL SANCTIONS ON DEFIANT STATES**

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### ABSTRACT

*The department charged with monitoring compliance with the European Court of Human Rights (ECHR) launched a new website in 2011. This website functions as a virtual wall of shame: it publishes reports by Non-Governmental Organizations (NGOs) accusing states of noncompliance with ECHR judgments. This paper analyzes all the reports posted in the first four years of the website's existence. It shows that NGOs focus their attention on severe violations and legally significant issues. It also shows that NGOs invest more resources in monitoring high-reputation states—namely, states that usually comply with international law—than in monitoring low-reputation states. These findings suggest that opening the arena of reputational sanctions to diverse NGOs may help to make states' reputations more accurate and useful. The analysis of the reports, together with interviews with some of the NGO activists who submitted them, also suggests that high-reputation states have more to lose from reputational sanctions than low-reputation states. High-reputation states are therefore likely to change their behavior when publicly shamed—giving NGOs an incentive to focus their attention on them.*

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## INTRODUCTION

The Committee of Ministers of the Council of Europe (CM) is the body charged with enforcing judgments of the European Court of Human Rights (ECHR). Although the CM is theoretically able to expel a state from the Council of Europe, it has never done so and cannot credibly threaten to use this extreme step. In order to convince states to comply with ECHR judgments, the CM must rely on publicly shaming the states by exposing their defiant behavior in its discussions and in public documents it releases, which are known as "interim resolutions." As the number of disobeyed judgments increased, the CM was pushed to devise a new strategy to make states comply.

This strategy was the creation in 2011 of a website dedicated to publishing reports by Non-Governmental Organizations (NGOs). The reports accuse states of failing to fully comply with judgments of the ECHR. They are published promptly, together with the response of the state accused of non-compliance if the state provided such a response. In this way, hundreds of organizations can take part in exposing the illegal actions of states. NGOs can learn about state behavior from each other, add their own observations in new reports, and spread this information further in their publications.

From the creation of the website until December 2014, 266 NGO reports were published, targeting compliance with 137 ECHR judgments. The paper analyzes all these reports, along with information from interviews with NGO activists who submitted them. The paper suggests that NGOs focus mainly on cases of significant legal importance and on issues that concern severe human rights violations. Furthermore, NGOs focus on states that are usually compliant with international law, so-called "high-reputation states."

These findings shed light on the way reputational sanctions work in international law. Apparently, allowing numerous NGOs that are very different from each other to use shaming sanctions can help focus most of the attention on the cases that matter the most, legally and morally. Moreover, states that built a high reputation through years of good behavior are shamed more often than regularly misbehaving states. The reason for that seems to be that states which acquired a good reputation have more to lose from accusations of inadequate behavior. They are therefore likely to improve their behavior if their noncompliance is exposed. This, in turn, gives NGOs an incentive to target these high-reputation

states instead of wasting efforts on states that don't care much about their reputation.

Part I describes the ECHR and the CM, with special emphasis on the new website where NGOs can publish reports on states' noncompliance. Part II shows which types of judgments lead to the most NGO attention. Part III presents the type of states that are the subject of increased NGO attention. Part IV offers data about the NGOs that were involved in filing the reports, including insights from a series of interviews with NGO activists. Part V explores potential reasons for inaccuracies in the way the international community perceives states' reputations and suggests that the involvements of NGOs may improve the community's reputational assessments. Part VI concludes by highlighting how the findings of this paper lend empirical support to a key argument made in the literature on reputation—that high-reputation states stand to lose more than low-reputation states when they are targeted by a reputational sanction.

## I. THE ECHR AND ITS ENFORCEMENT MECHANISM

### A. THE ECHR

The ECHR is an international human rights court located in Strasbourg, France. It has jurisdiction over violations of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> (Convention) committed by the forty-seven states that comprise the Council of Europe. The Convention protects key human rights such as the right to life and to freedom from torture,<sup>2</sup> as well as numerous other rights such as the right to a fair trial, to privacy, and to freedom of religion.<sup>3</sup> The Convention also requires states to give effective remedies to any violation and not to discriminate between individuals.<sup>4</sup>

Individuals, groups, and NGOs can bring cases to the ECHR as applicants if they were victims of violations.<sup>5</sup> States can also bring cases against other states even if they were not victims of violations,<sup>6</sup> but they rarely do so.<sup>7</sup> The ECHR employs forty-

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<sup>1</sup>Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>2</sup>*Id.* Arts. 2 and 3 respectively.

<sup>3</sup>*Id.* Arts. 6, 8, and 9 respectively.

<sup>4</sup>*Id.* Arts. 13 and 14 respectively.

<sup>5</sup>*Id.* Art. 34.

<sup>6</sup>*Id.* Art. 33.

seven permanent judges, one judge for each state in the Council of Europe.<sup>8</sup> It sits in panels of various sizes: single-judge Formations, Committees of three judges, Chambers of seven judges and a Grand Chamber of seventeen judges.<sup>9</sup> Most of the salient cases are issued by Chambers, with the Grand Chamber cases reserved for issues of extreme legal importance.<sup>10</sup>

Over the years, the number of cases reaching the ECHR has sky-rocketed. While in the first forty-three years since the court was formed it received 45,000 cases,<sup>11</sup> in 2013 alone it received more than 65,000 cases.<sup>12</sup> To address this flood of cases, the ECHR has undergone several reforms. In 1998, the commission that was screening cases before they reached the ECHR was abolished,<sup>13</sup> and in 2010 single-judge Formations were allowed to reject plainly inadmissible cases.<sup>14</sup> Consequently, the ECHR processes an increasingly large volume of cases. In 2013, it

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<sup>7</sup>See Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 CREIGHTON L. REV. 361, 372 (2009) (arguing that more than 95% of the cases brought before the court were not applications by states).

<sup>8</sup> Every state in the council of Europe can suggest a list of three candidates to the parliamentary assembly from which the assembly selects one judge, See the Convention, art. 20, 22.

<sup>9</sup> The Convention, art. 26.

<sup>10</sup> A Chamber that received a case may decide to pass the case to a Grand Chamber if it finds the case raises a serious question of interpretation or if the case might lead to a digression from prior judgments. If the Chamber issues a judgment it doesn't become immediately final. Within three months after the Chamber judgment, a party to the dispute can, in exceptional cases, ask for a referral to the Grand Chamber. A panel of five judges will allow the case to be heard again by a Grand Chamber if the case raises a significant issue of interpretation or an issue of great importance. If three months passed since the Chamber judgment and the parties didn't ask for a referral, if both parties declared they do not wish to refer the case, or if the court decided to reject the request for a referral, the Chamber judgment will become final. See the Convention, Arts. 30-31, 42-44.

<sup>11</sup> From 1955 to 1998, 45,000 applications were allocated to judicial formations, See ECHR – ANNUAL REPORT 2009, available at [http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/2009\\_Annual\\_Report\\_Final.pdf](http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/2009_Annual_Report_Final.pdf) on p.11

<sup>12</sup> In 2013, 65,900 applications were located to judicial formations. see ECHR – ANALYSIS OF STATISTICS 2013, available at [http://www.echr.coe.int/Documents/Stats\\_analysis\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_analysis_2013_ENG.pdf) on p. 4

<sup>13</sup> In Protocol 11 accepted on November 1, 1998.

<sup>14</sup> In Protocol 14 which came into force on June 1, 2010. Protocol 14 also allows three judges Committees to declare admissible and decide on the merits cases that are clearly well-founded. Furthermore, the protocol allows the court to declare cases as inadmissible if they create no significant disadvantage to the applicant and do not raise an important legal question.

disposed of more than 93,000 cases, reducing the accumulated backlog to just a little below 100,000.<sup>15</sup>

Judgments that find states in violation are legally binding. States must comply with them by choosing the appropriate means to remedy the violation.<sup>16</sup> These means can range from specific measures such as releasing prisoners to general measures such as amending statutes.<sup>17</sup> If parties who were harmed by violations were not compensated by their domestic laws, the ECHR can grant them "just satisfaction", which are reparations to cover their harms.

The ECHR cannot enforce its judgments. This task is left entirely to the CM. Though some scholars argue that states regularly comply with ECHR judgments,<sup>18</sup> many are concerned that a large number of the cases reaching the court are in fact repetitive cases—cases that arise from structural defects that were not resolved and continue to harm numerous applicants. To better address these structural defects the court occasionally issues so called "pilot judgments": judgments that prescribe specific actions to remedy the violation.<sup>19</sup>

#### B. THE COMMITTEE OF MINISTERS

The CM monitors compliance with the ECHR's judgments together with the Department of Execution of Judgments (DEJ).<sup>20</sup> These bodies are charged with supervising both the individual measures necessary to amend a violation vis-à-vis the applicant, including the payment of just satisfaction, and the general measures, such as constitutional or statutory amendments, necessary to prevent similar violations. Theoretically, the CM can expel states from the Council of Europe, yet this severe measure

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<sup>15</sup> In 2013, 93,396 applications were processed. This reduced the court's backlog from 128,100 cases at the beginning of the year to 99,900 cases at its end. See ECHR – ANALYSIS OF STATISTICS 2013 on p. 4.

<sup>16</sup> Convention, art. 46.

<sup>17</sup> See Scozzari and Guinta v. Italy, 2000-VIII EUR. Ct. H. R. at par. 249.

<sup>18</sup> See Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L. L. 115, 119 (2011) (presenting the research on compliance rates with the ECHR and arguing that by most accounts compliance rates are high).

<sup>19</sup> See Broniowski v. Poland, judgment of 22 June 2004, 2004-V EUR. Ct. H.R.

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<sup>20</sup> The Convention, Art. 46(2).

has never been used.<sup>21</sup> In practice, the CM therefore limits itself to spreading information and shaming states into compliance.

After a final judgment is issued against a state, the DEJ begins to negotiate with the state how to remedy the violation. After this initial stage, which should last no more than six months, the state is required to submit an "action report". The report describes the measures the state took to comply and a timeline for the measures it intends to take. If the state doesn't comply quickly enough, the CM may examine its actions regularly and request it to act in certain ways. If the state continues to delay compliance, the CM may issue a public proclamation called "interim resolution" condemning the state for noncompliance and urging it to change its practices.<sup>22</sup>

The CM divides its efforts of supervision to two separate tracks. Most cases are directed to the track called "standard procedure". Some cases that need closer attention, such as cases that require urgent action or involve severe structural problems, are directed to the "enhanced procedure" track. Cases supervised under this "enhanced procedure" are regularly raised in the CM meetings.<sup>23</sup>

The CM categorizes cases that deal with general widespread problems—and consequently require general measures of remediation—as "leading cases".<sup>24</sup> The CM supervises the compliance with a leading case together with the repetitive cases that result from the same violation.

In 2011, the DEJ created a website that publishes all the information about states' compliance, including action reports submitted by the states and interim resolutions issued against

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<sup>21</sup> See Statute of the Council of Europe, Art. 8 (stating that the CM may suspend the representation rights of states that violate their commitment to the Council of Europe or even expel such states from the Council). While no state was so far expelled under this provision, Greece withdrew from the Council of Europe in 1969 under a possible threat of expulsion, see Dothan, *supra* note 18 at 119, 139.

<sup>22</sup> Lucja Miara & Victoria Prais, *The Role of Civil Society in the Execution of Judgments of the European Court of Human Rights*, 5 EUR. HUM. RT. L. REV. 528, 531 (2012)

<sup>23</sup> If the most crucial elements of compliance are completed such cases might be downgraded to "standard procedure". In contrast, in cases of persistent noncompliance a case might be upgraded from "standard procedure" to "enhanced procedure". See *id* at 532

<sup>24</sup> See 7<sup>th</sup> ANNUAL REPORT OF THE COMMITTEE OF MINISTERS, available at: [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2013\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf) at p. 33.

them. This new source of information allows civil society to learn about states' compliance behavior and shape states' reputations.

### C. RULE 9.2 PROCEDURE

Rule 9.2 of the CM Rules allows the CM to consider communications from NGOs and national institutions for the protection of human rights.<sup>25</sup> Thus, NGOs are not only passive recipients of information—they can share their own views about states' compliance with the CM. The NGO reports are sent to the state that has five days to respond to them, if it wishes to. After this time, both the report and the state's response, if there was any, are promptly published in the DEJ's website.<sup>26</sup> The reports in the

<sup>25</sup> Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of the Friendly Settlements, from THE COMMITTEE OF MINISTERS' SUPERVISION OF EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS – COLLECTION OF BASIC TEXTS, available at: [http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Exec-Inf\(2010\)4\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Exec-Inf(2010)4_EN.pdf)

<sup>26</sup> Rule 9.3, Miara & Prais, *supra* note 22 at 534, 536. It is important to stress that NGOs have been filing reports long before the DEJ website was created, since May 2006 when Rule 9 was amended and allowed them to intervene. Yet these reports were not transparent and accessible to the public unless NGOs deliberately published them in their own websites or publications (see for example the reports posted by the Russian Justice Initiative NGO <http://www.srji.org/en/implementation/materials/>). Such reports that do not appear on the DEJ website are excluded from the analysis here.

All reports were downloaded from the website at:

[http://www.coe.int/t/cm/System/WCDsearch.asp?ShowRes=yes&FilingPlan=fp\\_ICM-Supervision9\\_2&Language=lanEnglish&ShowBreak=yes&SortBy=Geo&Sector=secCM&ShowFullTextSearch=yes&ResultTitle=Information%20from%20NGOs%20and%20National%20human%20rights%20institutions](http://www.coe.int/t/cm/System/WCDsearch.asp?ShowRes=yes&FilingPlan=fp_ICM-Supervision9_2&Language=lanEnglish&ShowBreak=yes&SortBy=Geo&Sector=secCM&ShowFullTextSearch=yes&ResultTitle=Information%20from%20NGOs%20and%20National%20human%20rights%20institutions) on 4 December 2014.

This website keeps reports also on judgments that were closed by the CM, as indeed were some of the cases analyzed here. In addition on 31/10/13 all reports were downloaded from another part of the website, which contains all communications received on pending cases: [http://www.coe.int/t/dghl/monitoring/execution/Themes/Add\\_info/Info\\_cases\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/Info_cases_en.asp) while cases could be closed and would not appear on the second website, as were some cases in the sample, they continue to appear on the first, specialized website that should contain all reports. Yet some reports are missing from there although they appeared on the second website. These were included in my sample to give the most accurate picture of the reports actually filed and accessible on at least one CM website. Almost all of them are reports issued in the infancy of the website in 2010 or 2011 and may have been unintentionally omitted from the specialized first website. The number of these missing reports are (2010)410, (2010)407, (2010)398, (2011)698, (2010)336, (2011)298,

database analyzed in this paper were filed by over two hundred NGOs of diverse characteristics and backgrounds.<sup>27</sup>

## II. WHICH TYPES OF JUDGMENTS LEAD TO THE MOST NGO ATTENTION?

The reputation of states reflects the beliefs of the international community about their practices. These beliefs evolve based on the accusations targeting the states by foreign governments, courts, and other actors such as NGOs. The DEJ website is only one arena where states are publicly shamed for their practices. Nevertheless, much can be learned about the incentives and strategy of NGOs from how they use this arena. The strategy NGOs employ may carry through to other arenas as well, such as their own media publications and their discussions.

In order to decipher how NGOs divide their attention, two methods can be used to analyze the relevant data. The first method compares the 137 cases that led to NGO reports to the "general population" of cases: a sample made of all the Chamber and Grand Chamber Judgments<sup>28</sup> issued in English<sup>29</sup> from 1/1/2008<sup>30</sup> until

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(2011)680, (2013)380, (2011)787, (2010)610. All ten reports concern cases that were still pending on 28 January 2015.

Another oddity worth mentioning are three reports dating from 2007-2008 against France that were later published in the first website although they were clearly filed long before the website was created together with many other cases that were never published. These reports are (2007)600, (2007)531, (2008)119, they all address the same case: app. no. 25389/05 *Gaberamadhien v. France*. Even an official at ANAFE, the organization that filed the three reports couldn't tell what made them published so late after they were filed while similar reports were not. *See* Conversation with Official at ANAFE (French NGO Assisting Foreigners at the Borders) on 27/5/15. These reports were included in the database to give the most accurate picture of the CM website.

All information about the current status of the cases in the CM and communications filed regarding them was coded or updated on December 2014 and January 2015. This information was collected from queries at [http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp) and from data on resolutions and documents filed taken from other places in the CM's website.

<sup>27</sup> See the analysis on Sub-Part IVA.

<sup>28</sup> Only one (0.73%) of the cases that led to NGO reports was issued by a court committee. Since committee judgments are usually more technical cases that have become common only in recent years due to structural changes initiated by protocol 14, they were excluded from the group.

<sup>29</sup> While some judgments do not have a full English language version on HUDOC, all judgments have their case details coded in English as well. These details appear when English documents are searched, assuring that all the judgments issued by the ECHR at this period are represented in the sample.

31/10/2013<sup>31</sup> in which the court found at least one violation and which are not part of the group of cases that led to NGO reports. In this sample, the court found 7,847 violations<sup>32</sup> in a total of 5,584 judgments. Comparing the judgments that led to NGO reports with the judgments from the general population will help to see if NGOs tend to file reports especially on issues of a certain type.

The second method sorts the cases that led to NGO reports according to the amount of attention that they drew. This method relies on three proxies for special NGO attention: the number of reports,<sup>33</sup> the number of NGOs involved,<sup>34</sup> and the number of

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<sup>30</sup> From 137 cases that led to NGO reports there are only 34 judgments that became final (Grand Chamber judgments are final immediately, Chamber judgments become final three months after they are issued if no referral to the Grand Chamber was requested, see art. 44 to the Convention) before 1/1/2008, with the earliest one becoming final on 30/10/1998: This is the only judgment that became final before Protocol 11 came into force on 1 November 1998. Only 9 cases became final before 1/1/2005. Although the number of applications filed per year increased rapidly between November 1998 and 2008 there was no procedural change in the court at this period and no reason to believe that older judgments, especially the judgments issued only a couple of years before 2008, differ systematically from judgments in the general population.

<sup>31</sup> All the 137 cases that led to NGO reports became final before 31/10/2013. The most recent case became final on 21/10/2013.

<sup>32</sup> According to a HUDOC coding of violations of articles mentioned in Table 1. Many judgments contain more than one violation. In my data and in the HUDOC database, several violations of the same article in the same judgment are counted as one violation.

<sup>33</sup> There are large differences in the amount of attention NGOs devoted to judgments, even when they did file a report: 67.15% of the judgments that led to NGO reports led to only one NGO report; 24.82% led to 2-4 NGO reports; 5.11% led to 5-10 NGO reports; and only 2.92% led to 11 or more NGO reports. Some reports involved several NGOs and often the same NGO submitted many reports. (In all, 92 of the judgments led to only one NGO report, 34 judgments led to 2-4 NGO reports, 7 judgments led to 5-10 NGO reports, and 4 judgments led to 11 or more NGO reports).

There are a few unique examples of extreme attention by NGOs. Take *D.H. and others v. the Czech Republic* app. no. 57325/00. This is the only case issued against the Czech Republic that led to NGO reports and yet it attracted no less than 17 reports which together involved 10 different NGOs. In addition, the case attracted a report by the Public Defender of Rights—a national human rights institution. Just as unique is the fact that 9 NGOs participated as third parties in the application itself, yet none of them are included in the group of NGOs that filed a report later on.

Sometimes, one report addresses several judgments. To make the coding consistent, only judgments mentioned in the formal title page of the report were coded. Usually the title page covers all judgments actually addressed by the report, but in rare cases (see for example report (2011)250

pages.<sup>35</sup> The paper compares the 54 cases that led to "minimal" NGO attention—only one report, filed by only one NGO, and holding no more than 10 pages—with the 38 cases that drew "special" NGO attention: two reports or more, filed by two NGOs or more, and holding 11 pages or more. This comparison can reveal what issues NGOs focus on.

#### A. THE SEVERITY OF THE VIOLATION

### 1. The Violated Right

One proxy for the severity of the violation is the type of right that was infringed. Comparing the types of rights that were infringed in the general population of cases and in the cases that led to NGO reports will reveal whether NGOs submit reports on compliance with cases that found severe violations or minor violations.

Table 1 shows the percentage of violations (the number of violations found divided by the number of judgments) in the general population of judgments and in the judgments that led to NGO reports.

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filed against Bulgaria) the report itself mentioned other judgments that were probably considered less important or less relevant by the DEJ.

<sup>34</sup> The number of NGOs involved in applications regarding a specific case also varies greatly: 60.58% of the judgments led to applications involving only one NGO; 27.01% led to 2-3 NGOs involved; 6.57% led to 4-6 NGOs involved; 5.11% led to 7-10 NGOs involved; another 0.73% led to 11 or more NGOs involved (In all, 83 judgments led to applications involving only one NGO, 37 judgments led to 2-3 NGOs involved, 9 judgments led to 4-6 NGOs involved, 7 judgments led to 7-10 NGOs involved. Only one judgment led to 11 or more NGOs involved).

<sup>35</sup> There are also great differences in the length of the NGO reports submitted. Often NGOs attach appendixes including detailed factual backgrounds to their reports. Reports range from short letters to detailed documents totaling dozens of pages: 4.38% of the judgments led to NGO reports totaling 3 pages or less; 43.07% led to reports totaling between 4 and 10 pages; 17.52% led to reports totaling between 11 and 20 pages; 21.17% led to reports between 21 and 50 pages; and 13.87% led to reports as long or longer than 51 pages (all figures include the introduction page attached by the Department of Enforcement of judgments and the response of the state if there was one, In all 6 judgments led to NGO reports totaling only 3 pages or less, 59 judgments led to reports totaling between 4 and 10 pages, 24 judgments led to reports totaling between 11 and 20 pages, 29 judgments led to reports between 21 and 50 pages in length, 19 judgments led to reports as long or longer than 51 pages).

**Table 1: The Severity of Violations in the General Population and in Cases that Led to NGO Reports**

	All Judgments	Judgments Leading to NGO Reports
<b>Article 2 - right to life</b>	<b>6.64%</b>	<b>13.14%</b>
<b>Article 3 - prohibition of torture</b>	<b>18.48%</b>	<b>27.74%</b>
Article 4 - prohibition of slavery and forced labor	0.05%	0.73%
Article 5 - right to liberty and security	17.37%	13.87%
Article 6 - right to a fair trial	54.15%	27.74%
Article 7 - no punishment without law	0.39%	0.73%
Article 8 - right to respect for private and family life	8.72%	16.06%
Article 9 - freedom of thought, conscience and religion	0.56%	6.57%
Article 10 - freedom of expression	4.14%	7.30%
Article 11 - freedom of assembly and association	1.34%	7.30%
Article 12 - right to marry	0.07%	0%
<b>Article 13 - right to an effective remedy</b>	<b>12.23%</b>	<b>20.44%</b>
<b>Article 14 - prohibition of discrimination</b>	<b>2.01%</b>	<b>13.14%</b>
Protocol 1 Article 1 - protection of property	13.75%	11.68%
Protocol 1 Article 2 - right to education	0.11%	5.84%
Protocol 1 Article 3 - right to free elections	0.14%	4.38%
Protocol 4 - additional freedoms (of movements, aliens, etc.)	0.18%	2.19%
Protocol 6 - abolition of the death penalty	0%	0%
Protocol 7 - additional rights (for appeals, aliens, etc.)	0.18%	2.19%
Protocol 12 - general right to equality	0%	0.73%
Protocol 13 - complete abolition of the death penalty	0%	0%

The table highlights some striking differences. Some of these differences (bolded) may reveal the NGOs tendency to focus on violations of special severity based on the role of the relevant articles in the ECHR's jurisprudence. A Two Tailed Fisher's Exact Test was used to establish the statistical significance of these differences. The same test was carried out throughout the paper.<sup>36</sup> Most importantly, there are more violations of article 2 protecting the right to life in the group of cases that led to NGO reports (13.14% as opposed to 6.64%).<sup>37</sup> There are also more violations of article 3 proscribing torture and inhuman treatment in the group that led to NGO reports (27.74% as opposed to 18.48%).<sup>38</sup> These

<sup>36</sup> Results were checked by this online free website <http://graphpad.com/quickcalcs/contingency1.cfm>. All data on file with author

<sup>37</sup> Statistically significant difference – P value 0.0056

<sup>38</sup> Statistically significant difference – P value 0.0102

differences are statistically significant. Violations under article 2 and 3 are usually considered the most severe violations under the ECHR's jurisdiction; consequently, states cannot derogate from these articles even in times of emergency.<sup>39</sup>

Furthermore, there are more violations of article 13 that concern failing to supply victims with an effective remedy in the group of cases that led to NGO reports than in the general population (20.44% as opposed to 12.23%).<sup>40</sup> An even greater difference between the two groups concerns violations of article 14 requiring states to give equal treatment (13.14% as opposed to 2.01%).<sup>41</sup> These differences are statistically significant. Applicants often accuse states of violating their rights under articles 13 or 14 in addition to the main violation covered by another article of the Convention. Usually, the court decides that finding an additional violation besides the main violated article is unnecessary. But in rare cases when the discrimination of the applicants is severe or when the state doesn't provide any good remedy, the ECHR finds a violation of these articles as well. The existence of article 13 and article 14 violations can serve as a good proxy for the existence of severe and pervasive human rights violations.

The first method for analyzing the data finds significant differences supporting the conclusion that NGOs usually file reports on more severe cases. These are either cases that deal with the most severe types of human rights violations or cases that reveal additional problems, such as discrimination or a lack of an effective remedy for the violation. The second method of analysis can also be used here. However, the data about NGO attention in cases in which at least one NGO report was filed isn't conclusive regarding some of the articles examined. It only suggests that NGOs focus special attention on violations that are severe due to the discrimination they entail between social groups and therefore involve an article 14 violation.<sup>42</sup>

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<sup>39</sup> See the Convention, art. 15(2), see Natasa Mavronicola, *What is an Absolute Right? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights*, 12 HUM. RTS L. REV. 723, 757 (2012) (arguing that article 3 protects an absolute right that states cannot digress from regardless of the implications).

<sup>40</sup> Statistically significant difference p value 0.0081

<sup>41</sup> Statistically significant difference p value less than 0.0001

<sup>42</sup> Cases that drew minimal NGO attention included 18.52% of article 2 violations, 24.07% of article 3 violations, 18.52% of article 13 violations, and 5.56% of article 14 violations. Cases that drew special NGO attention included 10.53% of article 2 violations, 34.21% of article 3 violations, 28.95% of article 13 violations, and 26.32% of article 14 violations. Unexpectedly, therefore,

## 2. Just Satisfaction

Another proxy for the severity of the violation is the "just satisfaction" granted by the court. Just satisfaction compensates the applicant only for harms that will not be redressed by compliance with the court's decree. As a result it is not a perfect proxy for the severity of the violation. Some violations may be very severe and lead to great harm if continued, such as an unjustified arrest, but will lead to small amounts of compensation for damage already incurred. In other cases, the court may be dealing with economic issues that do not raise acute human rights concerns but lead to high sums of compensation. Keeping these caveats in mind, it may be useful to consider just satisfaction as a rough proxy for the severity of violations. This raises the question: which types of cases do NGOs focus on? Comparing cases that led to minimal and to special NGO attention can provide the answer. Table 2 presents this data together with the figures for the entire group of cases that led to NGO reports.<sup>43</sup>

**Table 2: Amounts of Just Satisfaction in Judgments that Led to Special NGO Attention**

Sum of just satisfaction in Euros	All cases leading to NGO reports	Minimal NGO attention	Special NGO attention
None	13.87%	9.26%	10.53%
Less than 1000	3.65%	3.70%	5.26%
1,000-10,000	35.04%	38.89%	13.16%
10,000-100,000	35.77%	35.19%	50.00%
More than 100,000	11.68%	12.96%	21.05%

there are more violations of article 2 in cases that drew minimal NGO attention than in cases that drew special NGO attention. Yet this difference is not statistically significant (P value 0.3828). Although there seem to be more article 3 and article 13 violations in cases that drew special NGO attention, the differences concerning these articles are not significant (P values 0.3495 and 0.3142 respectively). In contrast, the difference regarding article 14, which is more common in cases of special NGO attention, is significant at the 0.01 level (P value 0.0066).

<sup>43</sup> For an analysis of the harms compensated for by just satisfaction see OCTAVIAN ICHIM, JUST SATISFACTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 98-121 (2015). The court has an especially wide discretion in determining non-pecuniary damages, *see id* at 121. To get a sense of the amount of just satisfaction that is usually granted by the ECHR, one can consider that the median sum awarded for the most severe violation, violation of the right to life under article 2, is around 20,000-30,000 EUR, *see id* at 128. Compensation for inappropriate detention conditions is often below 10,000 EUR, *see id* at 129.

In cases with more than 10,000 Euros in just satisfaction, there is a tendency for those cases with special NGO attention to involve higher just satisfaction than cases with minimal NGO attention. This difference is statistically significant at the 0.05 level.<sup>44</sup>

The analysis so far supports the view that reputational sanctions are not a mere source of annoyance but rather focus on issues of real concern. Yet the question remains whether the cases that draw the attention of NGOs are also cases of greater legal importance.

#### B. THE LEGAL IMPORTANCE OF THE CASE

Cases involving severe violations are not necessarily legally important. Cases could address the most terrible human rights violations and at the same time involve no novel legal argument. In fact, important cases can address relatively mild human rights violations. For example, the ECHR's *Von Hannover* case<sup>45</sup> that addressed the permissibility of publishing paparazzi pictures of the princess of Monaco is a very important case because of its innovative legal analysis of the proper balance between the freedom of the press and privacy. However, the violation this case addresses isn't severe compared to the cases the ECHR regularly handles.

Establishing the legal importance of a case seems like a tricky task, a task which requires great doctrinal skills and legal understanding. Fortunately, there are many good proxies for the importance of cases, some of which will be addressed in this sub-part.

#### **1. HUDOC Categorization**

The HUDOC database divides cases according to their importance in four levels: Case Reports, and importance levels 1, 2, and 3. Case Reports cases are selected for official publication. They are usually the most important cases in terms of their legal significance. Level 1 cases are unpublished cases that contributed significantly to the development, modification, or clarification of

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<sup>44</sup> P value 0.0338. However, Comparing the relative part of cases with more than 100,000 Euros just satisfaction in cases that led to minimal and to special NGO attention doesn't render significant results (P value 0.3922).

<sup>45</sup> *Von Hannover v. Germany*, judgment of 24 June 2004, 2004-VI EUR. Ct. H.R. 41.

the court's case-law. Level 2 cases are of medium importance; they do not make a significant contribution but go somewhat beyond mere application of former case-law. Level 3 cases are cases of low importance; they just apply case-law and do not change it.<sup>46</sup>

Cases that led to NGO reports are more likely to be categorized as Case Reports,<sup>47</sup> or as importance level 1 cases.<sup>48</sup> While most of the cases the court decides are in the third category of importance—they just apply the law—more than half of the cases that led to NGO reports are published or contribute significantly to the court's case-law and are therefore classified in the Case Reports or importance level 1 categories.<sup>49</sup>

The data also suggests that cases that draw special NGO attention are usually more important than cases that draw minimal NGO attention—they are significantly more likely to be categorized as Case Reports<sup>50</sup> or importance level 1 cases<sup>51</sup>—indicating that NGOs focus more attention on important cases.<sup>52</sup>

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<sup>46</sup> See HUDOC USER MANUAL, available at: [http://www.echr.coe.int/Documents/HUDOC\\_Manual\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/HUDOC_Manual_2012_ENG.pdf) on pages 11-12.

<sup>47</sup> Statistically significant difference, p value less than 0.0001.

<sup>48</sup> Statistically significant difference, p value less than 0.0001. The cases that led to NGO reports are obviously even more likely to be categorized in these two categories (case reports and importance level 1) taken together (Statistically significant difference, p value less than 0.0001) than cases in the general population.

<sup>49</sup> The importance levels of cases in the general population were divided as follows: Case Reports 1.56%, importance level 1 2.70%, importance level 2 17.25%, importance level 3 78.49% (From 5584 cases in the general population, the cases divided as follows: Case Reports 87, importance level 1 151, importance level 2 963, importance level 3 4383). Contrast that with the distribution of the cases that led to NGO reports: Case Reports 31.39%, importance level 1 18.98%, importance level 2 35.04%, and importance level 3 14.60% (From 137 cases that led to NGO reports the cases divided as follows: Case Reports 43, importance level 1 26, importance level 2 48, and importance level 3 20). The differences are clear.

<sup>50</sup> P value 0.0008.

<sup>51</sup> P value 0.0124. The difference between the proportions of cases in these two categories combined has P value less than 0.0001 .

<sup>52</sup> Cases that drew minimal NGO attention were distributed as follows: Case Reports 18.52%, importance level 1 9.26%, importance level 2 44.44%, and importance level 3 27.78%. Cases that drew special NGO attention were divided between: Case Reports 52.63%, importance level 1 31.58%, importance level 2 15.79%, and importance level 3 0%.

## 2. The Size of the Panel

Only cases of extreme legal importance are decided by the Grand Chamber,<sup>53</sup> because of that, another way to measure a case's importance is to check if the case was decided by a Chamber or by a Grand Chamber. In the general population, only 0.81% of the cases were Grand Chamber judgments while 99.19% were Chamber judgments.<sup>54</sup> Contrast that with the cases that led to NGO reports. There are 137 cases in the group. Only one of them was issued by a Committee of three judges and was excluded from the analysis.<sup>55</sup> Besides that case, the group included 15.33% (21) Grand Chamber judgments<sup>56</sup> and 83.94% (115) Chamber judgments. The difference between the groups is statistically significant.<sup>57</sup> This supports the conclusion that a far greater proportion of the cases that led to NGO reports involved questions of great legal significance that were discussed by the Grand Chamber, compared to the rest of the cases issued by the ECHR.

Similarly, there is a significantly greater proportion of Grand Chamber cases in cases that led to special NGO attention compared to cases that led to minimal NGO attention.<sup>58</sup> This indicates that NGOs focus their attention on cases of greater legal importance, which are more likely to be decided by the Grand Chamber.

## 3. Judicial Dialogue

Another measure of the legal importance of the case is the level of dialogue among the judges. Most judgments of the ECHR are issued unanimously. But sometimes judges dissent or write

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<sup>53</sup> See *supra* note 10.

<sup>54</sup> From 5584 cases in the general population 45 are Grand Chamber judgments and 5539 are Chamber judgments.

<sup>55</sup> All such cases are deliberately not part of the general population to exclude technical cases issued after Protocol 14 went into force

<sup>56</sup> Of these cases, 11 were decided only by a Grand Chamber based on a referral by the Chamber. 10 Cases were decided by the Grand Chamber after a previous Chamber decision and a request by the parties.

<sup>57</sup> P value less than 0.0001.

<sup>58</sup> Cases that led to minimal NGO attention were divided between 1.85% (one judgment) issued by a committee which was excluded from the analysis, 9.26% Grand Chamber judgments, and 88.89% Chamber judgments. In contrast, cases that led to special NGO attention were divided between 36.84% Grand Chamber judgments and 63.16% Chamber judgments. The difference between the groups is statistically significant (P value 0.0032. The test excludes the case decided by a committee).

concurring opinions. These cases are usually more legally significant; otherwise the judges would not be in dispute or at least would not dedicate the time necessary to write a separate opinion. In the general population, only 10.89% of the judgments contained at least one separate opinion. In contrast, 35.77% of the judgments that led to NGO reports contained at least one separate opinion.<sup>59</sup> This difference is statistically significant.<sup>60</sup>

In cases that led to minimal NGO attention, 24.07% contained a separate opinion. In cases that led to special NGO attention the corresponding figure is 57.89%. This difference, too, is statistically significant.<sup>61</sup> These results suggest that NGOs focus their attention on issues of special legal significance, where judges are usually more inclined to present their views by way of a separate opinion.

#### **4. Other Proxies for Salience**

After judgments are issued by the ECHR, the CM has to categorize them in a way that will aid the monitoring of compliance. In 2012 from 11,099 cases pending before the CM only 1,431 (12.9%) were leading cases—namely, cases which raise general structural problems.<sup>62</sup> Contrast that with the data on judgments that drew NGO reports: 91 (76.47%) of the 119 judgments that were still pending on January 2015 were categorized as leading cases. This difference is statistically significant,<sup>63</sup> but it is important to note that the CM may tend to categorize cases as leading cases because they drew NGO attention, which suggests a potential problem of reversed

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<sup>59</sup> Of the 5584 judgments in the general population, 608 judgments contained a separate opinion. Of the 137 judgments that led to NGO reports, 49 contained at least one separate opinion. Many of the judgments with NGO reports attracted a significant number of separate opinions: 10.22% of the judgments attracted three dissenting judges or more, 5.11% of the judgments attracted three concurring judges or more.

<sup>60</sup> P value less than 0.0001.

<sup>61</sup> P value 0.0020.

<sup>62</sup> In 2011 this figure is pretty much the same—from 10,689 cases pending there were 1,337 (12.51%) leading cases.

<sup>63</sup> P value - less than 0.0001. This significance test is unique: It doesn't refer to the general population of judgments referred to throughout this paper but instead to cases categorized by the CM as explained above. Furthermore, because of the very large sample, a different statistical test was used this time—Chi-square with Yates correction. In this case Chi squared equals 400.429 with 1 degrees of freedom.

causality.<sup>64</sup> Of the cases that led to minimal NGO attention, 57.45% were leading cases. Of cases that led to special NGO attention, 91.18% were leading cases. This difference is statistically significant.<sup>65</sup>

It may be useful to compare judgments that drew minimal NGO attention to judgments that drew special NGO attention according to their propensity to lead to interim resolutions by the CM. Interim resolutions are the primary way the CM can use to direct reputational sanctions against recalcitrant states. It is reasonable to assume that this tool is reserved to issues that are of the highest concern to the CM; therefore, if cases with interim resolutions draw increased NGO attention, this can indicate that NGOs focus on severe violations. Only 7.41% of the cases that drew minimal NGO attention led to one interim resolution. None of the cases in this group led to more than one interim resolution. In contrast, in cases that led to special NGO attention, 10.53% led to one interim resolution, 7.89% led to two interim resolutions, and 5.26% led to three interim resolutions. If the propensity to generate at least one interim resolution is compared within the two groups, the difference between them is statistically significant.<sup>66</sup> This understates the difference, of course, as the data reveals that only issues with special NGO attention sometimes led to more than one interim resolution. Despite the apparent difference, it is important to caution that the committee may decide to issue interim resolutions based on the shaming efforts of NGOs or on the behavior of the state itself, which could, in turn, also be affected by NGO reports. In fact, several NGO activists insisted in interviews that the CM issued an interim resolution because of the reports they filed and the pressure they exerted on it to monitor

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<sup>64</sup> Some of the cases that led to NGO reports were closed by the CM and are therefore not categorized either as a leading case or not. An additional 20.17% of the cases that led to NGO Reports were grouped with another leading case; in this group of cases, though the case may not be the prime representative of the structural problem, it is related to a problem that led to another leading case.

<sup>65</sup> P value - 0.0010.

Seven judgments that led to NGO reports (5.11%) are Pilot Cases. Five of them are cases with special NGO attention, and none of them is a case with minimal NGO attention. These cases not only involve a structural problem; the problem is so severe or widespread that the court issued a specific decree detailing how the state should act to remedy it. This novel procedure was only used in a handful of cases in the court's history.

<sup>66</sup> P value - 0.0355.

state compliance.<sup>67</sup> Therefore, the causal connection here is murky.<sup>68</sup>

### C. CONCLUSIONS ON THE FOCUS OF NGO ATTENTION

The preceding sub-parts provide evidence that NGOs focus their efforts on cases that expose severe violations and that are legally important. This supports the view that reputational sanctions are meaningful. The agents who create these sanctions by shaming wrong-doers do not focus on trivial matters. They are concerned with important issues of human rights.

### III. WHICH TYPE OF STATES DRAW THE MOST NGO ATTENTION?

Are reputational sanctions mostly targeted against states that usually fail to comply with human rights norms, so-called "low-reputation states", or against states that enforce high human rights standards, so called "high-reputation states"? A finding that for every case issued against a high-reputation state there is a greater chance that NGOs will file reports than for a case issued against a low-reputation state would support the claim that reputational sanctions actually focus on those who already enjoy a high reputation.<sup>69</sup>

#### A. MEASURING STATES' REPUTATION

Before addressing the question which states are usually targeted by reputational sanctions, it is first necessary to categorize states according to their levels of reputation. But any such attempt

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<sup>67</sup> NGO activist 8, skype interview conducted on 20 May 2015; Official at Russian Justice Initiative, skype interview conducted on 1 June 2015

<sup>68</sup> Another method to check the concern of the CM is the decision to direct a case to the enhanced supervision track instead of the standard supervision track. Only cases that require greater monitoring attention or urgent action, or that involve serious structural problems, are reviewed under enhanced supervision. Of the 47 cases with minimal NGO attention that are still pending on January 2015, 33 (70.21%) are under enhanced supervision. Of the 34 cases with special NGO attention still pending at the time, 25 (73.53%) are under enhanced supervision. This difference is not statistically significant: P value - 0.8066.

<sup>69</sup> If all reports are focused on low-reputation states, this would imply that they are the most vulnerable to such accusations. If many but not all reports are focused on low-reputation states, this doesn't necessarily imply that high-reputation states are immune from reputational sanctions; after all, low-reputation states are responsible for an immense majority of the violations.

is subject to accusations of bias. Many probably have some intuitions about which countries abide by international law and which ignore it most of the time. But these intuitions can be wrong. They could result from stereotypes and not from real data. In contrast, information about the level of democracy,<sup>70</sup> freedom,<sup>71</sup> or corruption<sup>72</sup> in certain states may be quite accurate, but it may have little to do with the state's propensity to comply with international law.

To measure the actual tendency of states to comply with the ECHR—as a useful substitute for the elusive perceptions of the international community about these states' behavior that really constitute their reputation—the paper constructs a new metric.<sup>73</sup> This metric is developed by gathering data on six different facts relating to states:

1. The number of pending cases allocated to a judicial formation on 31 December 2012.<sup>74</sup>
2. The number of judgments finding at least one violation in 2012.<sup>75</sup>
3. The number of judgments finding at least one violation between 1959-2012.<sup>76</sup>
4. The number of cases pending at the CM (supervising compliance) in 2012.<sup>77</sup>
5. The number of leading cases pending at the CM in 2012.<sup>78</sup>
6. The number of pending cases waiting for confirmation of payment of just satisfaction at the end of 2012.<sup>79</sup>

All these indicators try to address the states' human rights practices that are detected by the international community and thus translate into the states' reputation. Each indicator tries to counter

<sup>70</sup> See <http://democracyranking.org/>

<sup>71</sup> See <https://www.freedomhouse.org/>

<sup>72</sup> See <http://www.transparency.org/country>

<sup>73</sup> Part V investigates reasons why the beliefs held by the international community about states' behavior may be wrong or systematically biased. Despite these potential risks, which Part V argues are somewhat alleviated by the nature of the human rights community, the actual behavior of the state remains the best possible proxy for its reputation.

<sup>74</sup> Data from European Court of Human Rights – Annual Report 2012, available at [http://www.echr.coe.int/Documents/Annual\\_report\\_2012\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf) at p. 150.

<sup>75</sup> *Id.*, at pp. 154-155.

<sup>76</sup> *Id.*, at pp. 158-159.

<sup>77</sup> 6<sup>th</sup> Annual Report of the Committee of Ministers 2012, available at [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2012\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf) at pp. 45-47

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*, at pp. 57-59.

the biases of the other measures. The number of judgments that find violations seems like a good measure of compliance with the Convention, but it is exposed to the accusation that the court itself is biased in favor of some states and against others and is consequently likely to find certain states in violation more often.<sup>80</sup> The number of cases filed against states can try to resolve this bias, yet it is possible that applicants target more cases against states that are disfavored by the ECHR, thereby improving their chances of victory. Finally, the last three measures try to assess the compliance of states with the ECHR's judgments themselves, as opposed to compliance with the Convention. The number of cases as well as the number of leading cases awaiting compliance at the CM are both relevant as they address both the raw number of applications and a good proxy for the number of structural problems that led to leading cases. Non-payment of just satisfaction is an additional indicator of unwillingness to comply.

All indicators are highly correlated with each other,<sup>81</sup> suggesting that they all reveal the same quality: the state's general willingness to comply with international law. This quality is presumably perceived by the international community and forms the state's reputation.

For each indicator, the 47 countries were divided into five groups. The 10 countries with the best practices are categorized as 1, the next 10 states as 2, etc. The last group—the states with the worst practices—is smaller; it includes only 7 states. After states receive a number in respect of each metric, the six numbers are averaged and the result rounded to the nearest number to obtain the state's final reputational score between 1-5, where 5 indicates the states with the worst reputations.<sup>82</sup> This proxy of the state's reputation may not be perfect, but it comes as close as possible to an objective measure of the state's willingness to comply with international law.

The information on states with reputation levels 1 and 2 can safely be disregarded. First, the number of cases concerning

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<sup>80</sup> See Dothan, *supra* note 18 (arguing that the ECHR is more willing to find low-reputation states in violation of the Convention compared to high-reputation states).

<sup>81</sup> The CORREL function in Excel was used to calculate the correlation between the propensity of states to be in one the groups 1-5 mentioned in the next paragraph according to each one of the six indicators. The lowest correlation was between indicators 1 and 6 (66.8%). The average of the correlations between all possible pairs of indicators was 80.9%.

<sup>82</sup> There are fewer states in the 5 group for each metric making this score a potent signal of the state's bad practices.

them at the ECHR is negligible—less than 3% from the cases in the general population, as table 5 below shows. This gives no real opportunity to file NGO reports; indeed only one case that led to NGO reports involved a state of reputation level 2, and no such case involved a state of reputation level 1. Second, the population of the countries at this level is very small. Some of these countries can be credited with a high reputation because they usually comply with their Convention obligations, but many just have a miniscule citizenry and fewer opportunities to be charged with violations.<sup>83</sup>

Excluding reputation levels 1 and 2 from the analysis leaves only the comparison between eight states with reputation level 5, which can be called "low-reputation states" and twenty three states with reputation levels 3 and 4, which can be called "high-reputation states".

This empirical metric concurs with long-held views about the nature of states in Europe. It is telling that Russia, Poland, Turkey, and Romania which were nicknamed the "Big Four" because they are known as responsible for the most cases before the ECHR are all coded as low-reputation states.<sup>84</sup> Most of the other results of this metric sit well with intuition and with less systematic methods to address the behavior of states in Europe.<sup>85</sup>

#### B. THE CONNECTION BETWEEN STATE REPUTATION AND NGO APPLICATIONS

A quick glance at the states that led to NGO reports seems to support the hypotheses that NGOs focus on low-reputation states. Countries with low reputations are indeed targeted by most of the NGO reports filed. However, these countries are also responsible for most of the judgments that the court issues. Table 3 summarizes the data on the judgments against different types of

<sup>83</sup> Out of the 16 countries in reputation levels 1 and 2, six have a population smaller than half a million. The country with the smallest population is San Marino, with just 32,000 citizens. The average population of all states in levels 1 and 2 is 3,354,125 and their combined population is just 53,666,000—smaller than the population of Germany or the United Kingdom, which both have a reputation level of 3. Data on population taken from <http://www.nationsonline.org/oneworld/population-by-country.htm> (last visited 3 February 2015).

<sup>84</sup> See Luzius Wildhaber, *The European Court of Human Rights: The Past, The Present, The Future*, 22 *Amer. Uni. Int'l L. Rev.* 521, 527 (2007).

<sup>85</sup> See SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 239-242 (2015). (analyzing data about the human rights compliance of states in Europe without developing a systematic metric of states reputation)

states and the corresponding data on the number of judgments against them that led to reports.

**Table 3: The States, Their Reputations, the Judgments Issued Against Them and the Judgments that Led to Reports**

Reputation	States	Number of judgments - general population	Percent of judgments – general population	Number of judgments with NGO reports	Percent of judgments with NGO reports
3	Albania	23	0.41%	1	0.73%
1	Andorra	2	0.04%	0	0
3	Armenia	25	0.45%	9	6.57%
3	Austria	57	1.02%	0	0
4	Azerbaijan	37	0.66%	13	9.49%
3	Belgium	40	0.72%	1	0.73%
	Bosnia and Herzegovina	19	0.34%	2	1.46%
5	Bulgaria	247	4.42%	8	5.84%
4	Croatia	90	1.61%	4	2.92%
2	Cyprus	14	0.25%	0	0
4	Czech Republic	55	0.98%	1	0.73%
1	Denmark	6	0.11%	0	0
2	Estonia	15	0.27%	0	0
3	Finland	57	1.02%	0	0
4	France	126	2.26%	5	3.65%
3	Georgia	28	0.50%	4	2.92%
3	Germany	66	1.18%	0	0
5	Greece	241	4.32%	3	2.19%
4	Hungary	123	2.20%	1	0.73%
1	Iceland	3	0.05%	0	0
2	Ireland	2	0.04%	1	0.73%
5	Italy	229	4.10%	3	2.19%
3	Latvia	38	0.68%	1	0.73%
1	Liechtenstein	0	0.00%	0	0
3	Lithuania	37	0.66%	1	0.73%
1	Luxembourg	13	0.23%	0	0
2	Malta	22	0.39%	0	0
	Republic of Moldova	123	2.20%	3	2.19%
1	Monaco	2	0.04%	0	0
2	Montenegro	14	0.25%	0	0
2	Netherlands	11	0.20%	0	0
1	Norway	8	0.14%	0	0
5	Poland	395	7.07%	21	15.31%
4	Portugal	58	1.04%	0	0
5	Romania	584	10.46%	5	3.65%
	Russian Federation	899	16.10%	23	16.79%
1	San Marino	1	0.02%	0	0
4	Serbia	51	0.91%	3	2.19%
3	Slovak Republic	109	1.95%	0	0
4	Slovenia	50	0.90%	1	0.73%
3	Spain	37	0.66%	2	1.46%
2	Sweden	13	0.23%	0	0
2	Switzerland	31	0.56%	0	0
	The former Yugoslav Republic of Macedonia	61	1.09%	0	0
3	Turkey	1046	18.73%	9	6.57%
5	Ukraine	424	7.59%	3	2.19%
3	United Kingdom	73	1.31%	10	7.3%
<b>Total:</b>		<b>5605</b>	<b>100.38%</b>	<b>138<sup>86</sup></b>	<b>100.73%</b>

<sup>86</sup> Seven reports concerned a single judgment – app. 30696/09 M.S.S. v. Belgium and Greece. This case is coded here twice, once as a Greek case and once as a Belgian case. Besides the data on tables 3 and 4, the case was coded as addressing only Greece, which is the more direct applicant. The applicant in this case is an asylum seeker. The court found that the conditions of his detention in a Greek holding center and living conditions in Greece violated article 3 to the

To get a clearer view of the types of states that NGOs focus on, Table 4 groups states according to their levels of reputation. The table checks what proportion of the judgments in the general population is targeted at states of every reputation level, and what are the corresponding proportions in cases that led to NGO reports.

**Table 4: The Proportion of Judgments and the Judgments that Led to NGO reports Conditioned on the States' Reputations**

State average level of reputation	Percent of judgments from general population	Percent of cases that led to NGO reports	Ratio of cases with reports to judgments in the general population
1 disregard	0.63%	0%	
2 disregard	2.18%	0.73%	
3 high reputation	12.00%	22.63% <sup>87</sup>	<b>1.89</b>
4 high reputation	12.77%	22.63%	<b>1.77</b>
5 low reputation	72.80%	54.73%	<b>0.75</b>

Cases that led to NGO reports are more likely to be issued against high-reputation states and not low-reputation states compared to cases in the general population. In fact, only 24.77% of the cases in the general population address high-reputation states, compared to 45.26% of the cases in the group that led to NGO reports. This difference is statistically significant.<sup>88</sup> This

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Convention. Belgium violated article 3 by the act of transferring the applicant to Greece—certainly a more incidental violation. Furthermore, the case against Belgium, but not against Greece, was closed by the CM on 4 December 2014 (CM/ResDH(2014)272). Judgments addressing more than one state are rare but sometimes exist. This explains why the number of judgments leading to NGO reports and the judgments in the general population of cases sum to more than 100%.

<sup>87</sup> Or 21.90% when *M.S.S. v. Belgium and Greece* is coded as addressing Greece alone, see *id.* 21.90% is the figure used for the significance test. This choice makes proving the hypothesis that high-reputation states are subject to more judgments harder (and consequently its proof more convincing) because Belgium is a high-reputation state and Greece is a low-reputation state.

<sup>88</sup> P value less than 0.0001 (comparing reputation levels 3 and 4 combined to reputation level 5, excluding reputation levels 1 and 2). This highly significant result occurs despite the fact that the test includes data from all the low-reputation states examined including Poland that is a clear outlier. Poland is responsible for 7.07% of the judgments in the general population, but 15.31% of the judgments with NGO reports. Despite being a low-reputation state, it therefore shows a special propensity to attract NGO reports. This propensity, the reason Poland is such an outlier, may be that Poland showed a remarkable willingness to cooperate with the CM—a factor which, as explained in the next

shows that NGOs are more likely to direct their efforts at cases issued against high-reputation states than against low-reputation states.

It is now possible to check the amount of attention NGOs devote to cases conditioned on the state's reputation.

**Table 5: The Attention NGOs Devote to Cases Conditioned on the States' Reputation**

State average level of reputation	Percent of cases that led to minimal NGO attention	Percent of cases that led to special NGO attention	Ratio of cases with special and cases with minimal attention
1 disregard	0%	0%	
2 disregard	0%	2.63%	
3 high reputation	18.52%	26.32%	<b>1.42</b>
4 high reputation	25.93%	18.42%	<b>0.71</b>
5 low reputation	55.56%	52.63%	<b>0.95</b>

When the likelihood of cases that led to special NGO attention to be directed at high-reputation states and not low-reputation states is compared to the corresponding likelihood in cases that led to minimal NGO attention, no significant difference emerges.<sup>89</sup>

#### C. ALTERNATIVE EXPLANATIONS FOR THE FOCUS OF NGOS ON HIGH-REPUTATION STATES

This sub-part will consider alternative reasons that could explain the result of NGOs' greater likelihood to file reports

sub-part, may independently explain the willingness of NGOs to file reports against a state. Out of the 21 judgments against Poland that led to reports, Poland responded to all NGO reports concerning a judgment in 71.43% of the cases and to some of the reports in an extra 4.76% of the judgments. This sharply contrasts with the corresponding figures in all the judgments that led to NGO reports: 37.96% and 11.68%. 4.76% of the judgments against Poland resulted in action reports filed within 6 months of the judgments became final and another 80.95% included action reports filed after that time. In all the judgments the first figure is slightly higher, 13.14%, but the second is much lower—60.58%. Furthermore, 19.05% of the judgments against Poland were closed by the CM by January 2015, while in all the judgments that led to NGO reports the corresponding figure is 13.14%. Including Poland in the pool tilts the results against the hypothesis—towards greater perceived vulnerability of low-reputation states like Poland to NGO attention. That the results are still significant without excluding Poland testifies to their strength.

<sup>89</sup> P value 1.0000.

against high-reputation states, apart from an inherent preference of NGOs for targeting this type of states. Excluding these potential reasons can help determine if NGOs usually target high-reputation states, not only within the unique framework of the DEJ website procedure.

### **1. Willingness to Reply to NGO Reports**

States are allowed to formally respond to NGO reports, and their responses are attached to the report and published in the same file on the committee of ministers' website.<sup>90</sup> Often states choose not to respond. A potential reason for the focus of NGOs on high-reputation states is that high-reputation states have functioning democratic institutions that are more likely to take NGO reports seriously and reply to them. If state institutions are likely to respond to NGO reports, this could supply another motivation for NGO intervention, because this response creates an opportunity for the NGO to engage in a dialogue with state administrators and to shape their behavior.<sup>91</sup>

A reply doesn't necessarily indicate that the state is willing to make sacrifices to clear its good name. A state may choose the easy course of replying to accusations that garnered attention instead of amending its ways for the future. Indeed, although some government responses try to refute the accusations lodged against the government by offering countering data, others are technical and easily performed. For example, when the Russian Federation was faced with a report that accused it of abducting a person and forcibly transferring him to Uzbekistan, all its representative wrote in response was that the relevant application "was forwarded to the competent state authorities. In order to verify the statements set

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<sup>90</sup> States sometimes file communications that refer and respond to NGO reports filed a long time before (see for example the communication of the Polish government filed on 06.10.14 in response to report (2014)1055 filed on 22.08.14). For the sake of consistency, such responses were not coded. Only responses formally attached to a report, which, besides in a few very early cases, are joined in the same pdf file, were counted.

<sup>91</sup> On the other hand, acting through the CM may be the only way to communicate and receive information from low-reputation countries like Russia, which is otherwise unlikely to collaborate with NGOs. This fact was stressed in an interview with an official at Russian Justice Initiative conducted on 1 June 2015. Even if low-reputation states reveal less information to the CM than do high-reputation states, NGOs may still attempt to draw low-reputation states to respond to the CM, because otherwise they would get no information at all.

out in the application the inquiry is currently in process. Further information will be promptly submitted when the relevant data is received."<sup>92</sup> Such evasive responses are easily produced and certainly do not prove that the state is willing to undertake costly measures to protect its reputation.

Table 6 measures the tendency of states to respond to NGO reports issued against them conditioned on the states' reputation.

**Table 6: States' Responses to NGO Reports Conditioned on the States' Reputation**

Reputation Level	Respond to all	Respond to some	Respond to none
1 disregard	0%	0%	0%
2 disregard	0%	0%	100.00%
3 high reputation	46.67%	20.00%	33.33%
4 high reputation	38.71%	9.68%	51.61%
5 low reputation	34.67%	9.33%	56.00%

When the tendency of high-reputation states to respond to at least some of the NGO reports filed against them in a specific case is compared to the corresponding tendency in low-reputation states, the difference is not statistically significant.<sup>93</sup> Similarly, when the tendency of high-reputation states to respond to all reports filed against them in a specific case is compared to the corresponding tendency in low-reputation states, the difference is also not statistically significant.<sup>94</sup> The data doesn't suggest any reason to believe that NGOs focus their efforts on high-reputation states because they are more likely to reply to their accusations than low-reputation states.

## **2. Willingness to Cooperate with the Committee of Ministers**

States may differ in their willingness to cooperate with the CM by filing action plans—a plan for how they are about to comply with the judgments issued against them—or action reports: a report of the measures already taken to comply. States can show special willingness to cooperate by filing this plan on time, within 6 months after the judgment became final.<sup>95</sup> Just like the last sub-

<sup>92</sup> NGO report (2013)720.

<sup>93</sup> P value 0.1676.

<sup>94</sup> P value 0.3781.

<sup>95</sup> Miara & Prais, *supra* note 22 at 531. The terms "action plan" and "action report" are used interchangeably here—they both describe documents submitted

part argued, differences in the willingness to file action reports raise the possibility that NGOs may prefer to intervene in cases against states that cooperate with the CM in this way, thereby providing NGOs with a visible impact on state behavior.

Writing an action report and undertaking the necessary work to complete it also gives NGOs access to information that may make filing NGO reports easier. In fact, many times NGOs write reports that respond to and criticize claims by states in their action reports. A report filed by the Helsinki Foundation for Human Rights on 26 February 2014 is a good example.<sup>96</sup> This report is more than twenty pages long and it mainly casts doubts on and critiques claims made by Poland in the action report it filed in response to the Trzaska group of cases<sup>97</sup> concerning excessive length of pre-trial detentions.

Table 7 displays information about states' tendency to file action reports in cases that led to NGO reports conditioned on the states' reputation:

**Table 7: Filing Action Reports Conditioned on States' Reputations**

Reputation Level	No action report filed	Action report filed later than 6 months after final judgment	Action report filed within 6 months from final judgment
1 disregard	0%	0%	0%
2 disregard	0%	100%	0%
3 high reputation	16.67%	70%	13.33%
4 high reputation	29.03%	48.39%	22.58%
5 low reputation	29.33%	61.33%	9.33%

When the tendency of high-reputation states and of low-reputation states to file action reports is compared, the differences are not statistically significant.<sup>98</sup> The differences in the tendency to file action reports *on time* are not statistically significant either.<sup>99</sup> Therefore, the data does not suggest that NGOs focus on high-reputation states simply because they are more likely than low-reputation states to cooperate with the CM.

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by states to explain how they are complying or how they will comply with the judgments against them.

<sup>96</sup> NGO report (2014)356

<sup>97</sup> Application no. 25792/94 judgment of 11 July 2000.

<sup>98</sup> P value 0.4395.

<sup>99</sup> P value 0.2026.

### 3. Willingness to Comply with Judgments

Another factor that NGOs may take into account is the willingness to comply with the ECHR's judgments that garnered their attention. Compliance may indicate that the state cares about the reputational sanction attached to misbehavior and is willing to sustain the costs of compliance to avoid this reputational sanction. Nonetheless, the state may comply with a specific case without changing its behavior in other areas. NGOs may still have an incentive to file reports against states that usually comply with judgments subject to such reports, because this allows NGOs to boast the victory of making states comply.

If the state complied fully, the CM will close the case. This is the strongest possible indication of full compliance. Table 8 presents data on cases that led to NGO reports that were closed by the CM until January 2015:

**Table 8: Cases Closed by the Committee of Ministers**

State average level of reputation	Case closed by January 2015	Case still pending on January 2015
1 disregard	0%	0%
2 disregard	0%	100%
3 high reputation	23.33%	76.67%
4 high reputation	9.68%	90.32%
5 low reputation	9.33%	90.67%

The difference between the proportion of cases closed in high-reputation states and in low-reputation states is not statistically significant.<sup>100</sup> There is therefore no reason to suspect that NGOs focus their attention on high-reputation states only because these states are likely to quickly comply with judgments that draw NGO attention.

### 4. NGO Past Involvement

Another possible factor affecting the results may be that NGOs were involved in the case at initial stages by filing amicus curiae briefs, and then followed up on the case by filing reports regarding noncompliance. The possibility that NGOs are interested in monitoring compliance in cases they took part in as friends of the court, or even as legal representatives of the applicants, is certainly intuitive; NGOs that already acquainted themselves with

<sup>100</sup> P value 0.2977.

the information pertaining to a certain issue—and moreover staked their reputation on their success to change state practice on this issue—are likely to monitor compliance with the judgment.<sup>101</sup> Furthermore, some NGO officials stressed that it was considered bad practice in the NGO community to get involved in cases that were first litigated by other NGOs without their permission.<sup>102</sup> Others emphasized that following a case through and making sure the judgment is implemented is part of their holistic strategy of initiating social change.<sup>103</sup> Still others said that if they represented applicants, they view themselves as obligated to ensure that the judgment they received will be implemented as fully as is feasible. This is simply part of the service they provide.<sup>104</sup>

This conjecture is also confirmed by the data: out of the 26 cases in the pool of cases that led to NGO reports that had an NGO who submitted an amicus curiae brief, 15 included at least one report by at least one of the NGOs who were involved as a friend of the court. The other 11 cases included reports filed only by other NGOs. Considering the number and diversity of potential NGOs, these figures are certainly revealing.

NGOs often participate in cases informally by sending their lawyers to represent applicants or even funding legal assistance by external lawyers.<sup>105</sup> However, this type of informal participation is much harder to track down and to quantify than participation as a friend of the court, which is regularly mentioned in the body of the judgment.

<sup>101</sup> See Shai Dothan, *Luring NGOs to International Courts: A Comment on CLR v. Romania*, 75 HEIDELBERG J. INT'L L. 635, 643-644 (2015).

<sup>102</sup> Skype interview with Official at Russian Justice Initiative on 1 June 2015.

<sup>103</sup> Skype interview with Lawyer at Minority Rights Group International on 11 June 2015.

<sup>104</sup> Phone Conversation with lawyer at European Human Rights Advocacy Centre on 25 June 2015.

<sup>105</sup> See for example *P. and S. v. Poland*, app. no. 57375/08 where lawyers from the Center for Reproductive Rights assisted with the representation of the applicants. The Center for Reproductive Rights later filed a report concerning this case - (2014)1055. See LOVEDAY HODSON, *NGOS AND THE STRUGGLE FOR HUMAN RIGHTS IN EUROPE* 55-56 (2011) (suggesting that a large part of the involvement of NGOs in ECHR proceedings is informal).

Another possibility worth mentioning is that an NGO would serve as an applicant itself. See for example, *Jehovah's Witnesses of Moscow and others v. Russia*, app. no. 302/02, where the applicant is itself an NGO. In this case the applicant NGO didn't file a report, but other NGOs did. In contrast, in the case of *Genderdoc-M v. Moldova*, app. no. 9106/06 the applicant is an NGO who later filed a joint report with another NGO - (2014)691.

The data suggests that NGO involvement as third parties doesn't explain the practice of filing more NGO reports against high-reputation states than against low-reputation states. Out of 75 cases that concerned low-reputation states, 10 (13.33%) included NGOs as friends of the court. Out of 61 cases that concerned high-reputation states, 15 (24.59%) included NGOs as friends of the court. The difference between the propensities of high-reputation states and low-reputation states to generate the involvement of NGOs as amicus curiae is not statistically significant.<sup>106</sup> The claim that NGO involvement as third parties explains the patterns in filing NGO reports is therefore not supported by the data.

### **5. A Concentration of Severe and Important Violations in High-Reputation States**

Finally, one may raise a non-intuitive claim: maybe there is a greater proportion of cases that involve severe violations or important legal issues concerning high-reputation states. As part II shows, NGOs focus their attention on severe and important cases. If high-reputation states commit on average more severe violations or lead to more important cases, maybe this is the reason why they face more NGO reports.

It is unlikely that the cases directed at high-reputation states involve, on average, more severe violations. This possibility can be checked by comparing the proportion of judgments finding severe violations in low-reputation states and in high-reputation states in the general population. In fact, there are proportionally more cases involving violations of articles 2, 3, and 13 in low-

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<sup>106</sup> P value 0.1196. Notice this compares both data on friends of the court that filed reports and data on those that didn't file reports, that is, when only other NGOs filed reports. The reason is that this test assumes that filing the amicus curiae brief by itself generates an incentive for the NGO who filed the brief to file a report later on, as could other forms of intervention that may not be visible from the case. To complete the picture, only 7 (11.48%) cases in high-reputation states and 7 (9.33%) cases in low-reputation states have a report by an NGO who submitted itself an amicus curiae brief, this difference as well is not significant – p value 0.7796. It is also possible that NGOs may be influenced by other NGOs' participation; namely, NGOs may be motivated to file reports by the involvement of other NGOs as friends of the court. All this leads to the hypothesis that the reports against high-reputation states are caused by a greater propensity of NGOs to file amicus briefs vis-à-vis these states. Yet since no such propensity appears in the data, the hypothesis is rejected.

reputation states,<sup>107</sup> and these differences are statistically significant.<sup>108</sup> This concurs with the simple intuition that low-reputation states are generally responsible for more severe violations. On the other hand, there are proportionally more article 14 violations in high-reputation states.<sup>109</sup> This difference is statistically significant as well,<sup>110</sup> suggesting that high-reputation states may be especially prone to discriminate in an unlawful manner between individuals, or at least are more often accused of such practice.<sup>111</sup>

High-reputation states also draw a greater proportion of important cases. 0.97% of the cases filed against low-reputation states in the general population of cases are classified as Case Reports, and 2.11% are classified as importance level 1. The corresponding figures for high-reputation states are 4.31% and 5.09%. When the propensity to generate either Case Reports, importance level 1 cases, or cases of these two categories combined is compared, all these differences are statistically significant.<sup>112</sup>

This raises a question: is it the importance of the cases filed against high-reputation states that explains their greater propensity to draw NGO reports? To answer this question, the importance levels of cases that actually led to NGO reports can be compared. 26.67% of the cases that led to NGO reports filed against low-reputation states are Case Reports cases and 22.67% are categorized as importance level 1. The figures for high-reputation states are 36.07% and 14.75%. When comparing the propensity of a case to be categorized at the highest level of importance (Case Reports) or at the two highest levels combined (Case Reports and level 1) no statistically significant differences appear.<sup>113</sup> Therefore, while high-reputation states may indeed usually draw more

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<sup>107</sup> In low-reputation states 7.16% of the judgments found article 2 violations, 17.74% found article 3 violations, 11.09% found article 13 violations. In high-reputation states the respective figures are: 1.86%, 25.69%, and 9.16%.

<sup>108</sup> P values of less than 0.0001 for article 2 and 3, p value of 0.0296 for article 13.

<sup>109</sup> In low-reputation states 1.01% found article 14 violations. In high-reputation states the relevant figure is 3.59%.

<sup>110</sup> P value less than 0.0001.

<sup>111</sup> Note that for this calculation judgments in the general population directed against two states that include a violation were counted twice (even if the judgment found a violation was committed only by one state). Because these cases are very rare, this should not affect the result.

<sup>112</sup> All three comparisons lead to p values of less than 0.0001

<sup>113</sup> P values 0.2663 and 1.0000 respectively.

important cases, this difference cannot explain the fact that they are subject to more NGO reports, since cases that led to NGO reports do not significantly differ in their importance between high and low reputation states.

To complete the picture, it is possible to compare the severity of cases that led to NGO reports in low-reputation states and in high-reputation states. This test can help refute a more distant possibility—although high-reputation states are generally responsible for less severe violations (besides the issue of discrimination), perhaps they are responsible for more severe violations discussed in cases of a special quality (such as legal importance) that usually draws the attention of NGOs. The only article indicating severity that is more common in high-reputation states is article 14, but the difference concerning this article is not statistically significant.<sup>114</sup> In contrast, the tendency of low-reputation states to generate more violations of articles 3 and 13 that led to NGO reports is statistically significant at the 0.1 level.<sup>115</sup> An additional test for severity of violations is the just satisfaction issued in the case. Comparing the just satisfaction issued in cases that led to NGO reports in low-reputation states and in high-reputation states doesn't find statistically significant differences.<sup>116</sup>

The data suggest that judgments discussing severe violations of the kind that is likely to draw NGO reports are not more commonly issued against high-reputation states than against low-reputation states. Perhaps the opposite is correct. It seems only natural to conclude that there are more severe violations committed by low-reputation states that led to NGO reports, although the data are not very strong on this point. If reports against low-reputation states do indeed target more severe violations, the reason may be that low-reputation states simply

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<sup>114</sup> Of the cases filed against low-reputation states that led to NGO reports, 16.00% concerned article 2 violations, 34.67% concerned article 3 violations, 26.67% concerned article 13 violations, and 10.67% concerned article 14 violations. In cases filed against high-reputation states, 9.84% concerned article 2 violations, 19.67% concerned article 3 violations, 13.11% concerned article 13 violations, and 16.39% concerned article 14 violations.

<sup>115</sup> Article 3 – p value 0.0576. Article 13 – p value 0.0580.

<sup>116</sup> In low-reputation states, 16% of the cases that led to NGO reports involved just satisfaction of more than 100,000 Euros, and 50.67% involved just satisfaction of more than 10,000 Euros. In high-reputation states, the corresponding figures are 6.56% and 42.62%. The differences are not statistically significant: more than 100,000 Euros - p value 0.1117; More than 10,000 Euros p value 0.3904.

commit a greater share of the most severe violations in Europe. But it is also possible to interpret this admittedly weak data as further support for the argument that NGOs are more willing to file reports against high-reputation states. This conclusion can be reached because the data suggest that NGOs are willing to extend their shaming efforts even to less severe violations committed by high-reputation states. The human rights standards required from high-reputation states may simply be higher. If high-reputation states commit violations of lesser severity—that would not lead to reports if committed by low-reputation states—they may nevertheless be subject to reports.

#### D. CONCLUSIONS ABOUT THE FOCUS OF NGOs ON HIGH-REPUTATION STATES

This part presents a systematic way to divide states in Europe into high-reputation states and low-reputation states. It shows that NGOs issue more reports per judgment against judgments involving high-reputation states than against judgments involving low-reputation states. This suggests that high-reputation states are more vulnerable to reputational sanctions than low-reputation states. Several explanations for the tendency of NGOs to focus on high-reputation states specifically within the DEJ procedure were examined, but none of these explanations finds support in the data.

#### IV. WHAT DO NGOs REALLY WANT?

Parts II and III present certain patterns in the issues and the states on which NGOs focus their shaming efforts. These patterns may reveal the nature of reputational sanctions in international law. They may reveal, for example, when reputational sanctions cause the most damage, and how accurate is the information transmitted by shaming efforts. These insights are the subject of part V. Before jumping to general insights about reputation, though, the characteristics of the NGOs that published in the DEJ website must be studied. By exposing the incentives of the NGOs involved, it is possible to verify if these incentives, rather than the general nature of reputational sanctions, are responsible for the observed patterns of NGO behavior.

## A. SEPARATING NGOs ACCORDING TO SIZE

As a first take on this problem, it may be helpful to check if NGOs act differently conditioned on their size. If the core players are large well-funded NGOs, maybe they are simply following the interests of their patrons. Could it be that donors from rich democracies support NGOs that focus on their own countries of origin because of the donors' liberal commitments? If this bias is strong enough, the greater wealth and larger human rights community in high-reputation states may very well explain the focus of NGOs on this type of states.

Yet the data shows that big NGOs are actually responsible for a very small part of the reports filed in the DEJ website. The world-wide NGO Human Rights Watch is only responsible for addressing a single case. Even the global mega-organization Amnesty International was involved in filing reports in only seven cases. Liberty is an NGO focused on human rights in the United Kingdom, but at the same time, some consider it to be the most frequent litigator before the ECHR.<sup>117</sup> Yet despite its involvement at the trial phase, this major NGO was involved in reports addressing only one case.<sup>118</sup> No less telling is the fact that in all the cases targeted by reports from these three major players, other NGOs also filed the same or other reports. Furthermore, even this miniscule sample of reports by the big three organizations is evenly divided between four cases concerning high-reputation states and four cases concerning low-reputation states.<sup>119</sup>

This suggests that the community of NGOs is actually incredibly diverse. More than two hundred organizations, big and small, domestic, European, and global in focus submitted reports and took part in the efforts of shaming states for noncompliance. Once, as many as 55 NGOs were involved in filing reports regarding a single judgment.<sup>120</sup> In this open and teeming

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<sup>117</sup> See HODSON, *supra* note 105 at 107.

<sup>118</sup> It may be interesting to theorize about the reasons big organizations filed so few reports. Perhaps these reports are used only by organizations who cannot make an impact in another way, particularly smaller organization. Perhaps the large number of workers at big NGOs, each with her own specialty, prevents one person from having the set of skills necessary for filing a report: a familiarity both with the specific subject matter and the machinery of the CM.

<sup>119</sup> Even the only case in the sample from a state with "reputation level 2" that is excluded from the analysis in Part III saw a report signed by Amnesty International.

<sup>120</sup> Case of Fatullayev v. Azerbaijan, Judgment of 22 April 2010, app. no. 40984/07.

community, fears of a centralized strategy orchestrated by a few tycoons or stemming from the wealth inequalities between European states can be alleviated.

#### B. THE INCENTIVES OF NGOS

Alleviated perhaps, but not eliminated. Several conversations with a NGO activists revealed that foundations that fund NGOs have developed a strategy to bend these organization to their will. More and more foundations would earmark certain funds to certain purposes such as aiding a specific right or a specific region.<sup>121</sup> Small NGOs need money for things as trivial as office supplies and paying salaries. They are forced to take the directives of these foundations seriously.<sup>122</sup> If powerful foundations use this technique efficiently, they could operate indirectly through countless tentacles and sway the general attention of civil society in a specific direction.

Some foundations openly champion this strategy of operating from multiple NGOs simultaneously. The European Program for Integration and Migration (EPIM) even takes centralization up a level. It is a collaboration of thirteen European foundations that work together to strengthen civil society organizations. EPIM doesn't only give grants, it also organizes workshops and funds professional training for NGOs to build their knowledge and capacities. Furthermore, it supports networking between NGOs to facilitate mutual learning and collaboration.<sup>123</sup> Another major network of NGOs, created already in 1994, is called the Human Rights House Network. It unites ninety NGOs in Europe and Africa that cooperate with one another in an effort to improve their effectiveness.<sup>124</sup> Though the different NGOs are independent, the secretariat of this large network, based in Oslo, can doubtlessly exert a substantial influence on the actions of civil society across Europe and beyond. Some wealthy countries, especially Scandinavian countries, do not even operate only

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<sup>121</sup> Foundations differ in how strictly they monitor spending, but often reports of spending must be quite accurate. Skype conversation with NGO Lawyer 10 on 12 June 2015.

<sup>122</sup> Interview with NGO Lawyer 1 on 14 April 2015.

<sup>123</sup> See <http://www.epim.info/>

<sup>124</sup> See <http://humanrightshouse.org/noop/page.php?p=HRHN/index.html&d=1>

through foundations. Rather, they fund directly NGOs who support causes they care about.<sup>125</sup>

To address the possibility that centralized power lies behind the observed patterns in NGO behavior, it is vital to talk to NGO officials and see what it is they really aim at achieving, taking their commitments and constraints into account.

This much seems clear from the interviews: high-reputation states cannot expect an especially lenient treatment because of their status. One NGO lawyer suggested that if a violation was proven against a state, then, by definition, it behaves imperfectly and shouldn't be granted any favors by NGOs.<sup>126</sup> Another NGO lawyer stressed repeatedly that even the most highly acclaimed democracies commit violations and crimes.<sup>127</sup> Interviewees focus on the need to make a difference in the world. This suggests that the most energy shouldn't be dedicated to the best behaving states—they behave well anyway—or to the worst behaving states—they are unlikely to change their behavior in any case—but instead to states that are located somewhere in the middle, states that do commit violations, but could be pressured to correct them.<sup>128</sup>

NGO activists who focus on high-reputation states stress that their government is often receptive to criticism. For example, an official at ANAFE, a French NGO assisting foreigners at the border, said that lawyers and officials in France care about ECHR judgments and change their practices to avoid future violations. ANAFE built a reputation as an expert on migration, and French bureaucrats learn from it and communicate with it directly. For ANAFE, NGO reports, such as the ones studied in this paper, serve as a complementary method to communicate indirectly with French officials. This method carries beneficial results on the ground as state officials learn from the reports and change their behavior.<sup>129</sup>

This stands in sharp contrast to the conditions NGOs face in low-reputation states. A Romanian NGO lawyer confessed that he didn't believe NGO reports have any direct impact on Romania, who replies to their reports in an utterly unhelpful manner. Instead, the NGO's strategy is to exert pressure on the CM in the hope that

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<sup>125</sup> Skype interview with Lawyer at Minority Rights Group International, 11 June 2015.

<sup>126</sup> Interview with NGO Lawyer 1, 14 April 2015.

<sup>127</sup> Skype interview with NGO Lawyer 11, 3 July 2015.

<sup>128</sup> Interview with NGO Lawyer 1, 14 April 2015.

<sup>129</sup> Phone interview with Official at ANAFE, 27 May 2015.

the CM would, in turn, pressure the Romanian government.<sup>130</sup> In Russia, NGOs singled the CM machinery as the only effective way to get information from their government. Russian officials do not communicate with NGOs. Consequently, activists can only get the data they need to pursue further legal action by acting indirectly through the Strasburg system.<sup>131</sup> While in other countries, such as Lithuania, NGOs are in direct contact with their government delegations to the CM,<sup>132</sup> Russian NGO lawyers speak to delegations of *other* countries at the CM to urge them to criticize Russia in the CM's closed meetings. Such efforts may have led to interim resolutions against Russia.<sup>133</sup>

So far, it seems that NGOs' focus on high-reputation states is justified by the willingness of these states to change their practices due to criticism, which, in turn, directly relates to the value they put on their reputation. But the picture is more complex than that. In low-reputation states, NGOs are often subject to effective national measures meant to suppress their activity. NGOs in Russia, at least those who receive money from abroad or engage in actions such as advocacy that involve foreigners, are forced by law to declare themselves as "foreign agents" in all their official documents. This designation carries a powerful stigma, something akin to calling yourself a spy. Furthermore, NGOs are subject to daily acts of harassment by countless forms of bureaucratic hurdles. They have to submit numerous forms and to be subject to frequent inspection. Add to that a public sentiment that views human rights activity as a form of foreign intervention and as a reason for Russia's financial problems, and you have a potential reason for the relative paucity of NGO actions vis-à-vis Russia.<sup>134</sup>

Russia and other states coded here as having low reputations are not alone in their actions against NGO activity. In Azerbaijan, civil society activists are subject to false arrests, to unjustified searches, and even to violence. Furthermore, the government funds GONGOs—governmentally controlled organizations built and funded for the sole purpose of infiltrating

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<sup>130</sup> Skype interview with Romanian NGO Lawyer 9, 25 May 2015

<sup>131</sup> Skype interview with an Official at Russian Justice Initiative, 1 June 2015.

<sup>132</sup> Skype interview with NGO activist 2, 2 May 2015.

<sup>133</sup> Skype interview with an Official at Russian Justice Initiative, 1 June 2015.

<sup>134</sup> Skype interview with Russian NGO activist 4, 15 May 2015. Another NGO official admitted that Russian counter-measures proved effective in leading some Russian NGOs to keep a low profile in the media: Skype interview with an Official at Russian Justice Initiative, 1 June 2015.

and corrupting the human rights community.<sup>135</sup> In other post-communist countries, such as Serbia, there is simply no culture of philanthropic investment in fighting for the public interest.<sup>136</sup> This is a striking difference from countries such as the Netherlands where, with a population of less than 17 million, Amnesty International alone boasts 255,000 members and over 560,000 volunteers.<sup>137</sup> Cultural differences and differences in government practice may certainly affect the results found in this paper. Furthermore, the procedure investigated here is relatively new and many NGOs in low-reputation states may simply not know about it.<sup>138</sup> This, however, may also be true for NGOs in high-reputation states.<sup>139</sup>

Despite these caveats, one cannot ignore the fact that there are still numerous NGOs that do target low-reputation states. Many of them, in fact, are based in other countries and collaborate with local organizations. To understand NGO activity not only the constraints should be addressed, but also the things NGOs are trying, often successfully, to achieve. NGO activists stress that they are committed to making a social change.<sup>140</sup> They insist that they care about actual results, not about the reputation of their own institution.<sup>141</sup> If others can do the work better, so they say, they would let them take the credit for it.<sup>142</sup> This attitude explains why NGOs try to cooperate with as many other NGOs as possible in pursuit of a common cause.<sup>143</sup>

But this may be an overly complacent view. NGOs are not just trying to make the world better by any means possible. First, many NGOs have a specific mandate set in advance: The Lithuanian Gay League fights for equality regardless of sexual orientations in Lithuania, not for other worthy causes or for rights in other countries.<sup>144</sup> Second, NGOs try to prevent an overlap with

<sup>135</sup> [http://www.meydan.tv/en/site/society/3532/In-Azerbaijan-as-the-last-remnants-of-democracy-are-being-destroyed-some-watch-in-silence-\(part-2--%E2%80%9CGONGO%E2%80%9Dids\).htm](http://www.meydan.tv/en/site/society/3532/In-Azerbaijan-as-the-last-remnants-of-democracy-are-being-destroyed-some-watch-in-silence-(part-2--%E2%80%9CGONGO%E2%80%9Dids).htm)

<sup>136</sup> Skype interview with NGO Lawyer 3, 4 May 2015.

<sup>137</sup> <https://www.amnesty.nl/english>

<sup>138</sup> Skype interview with Russian NGO activist 4, 15 May 2015.

<sup>139</sup> Skype interview with Lawyer at Minority Rights Group International, 11 June 2015.

<sup>140</sup> Skype interview with Lawyer at Minority Rights Group International, 11 June 2015.

<sup>141</sup> Skype interview with NGO activist 2, 2 May 2015.

<sup>142</sup> Interview with NGO Lawyer 1, 14 April 2015.

<sup>143</sup> Skype interview with NGO activist 8, 20 May 2015.

<sup>144</sup> [http://www.lgl.lt/en/?page\\_id=116](http://www.lgl.lt/en/?page_id=116).

other organizations and to do things others are not doing.<sup>145</sup> Most importantly, NGOs are competing for a limited amount of funds coming from a limited number of grants and foundations. This is a recipe for jealousy and competition. Some activists voiced resentment towards bigger NGOs that win large grants by investing the money they receive in internal administration and leaving the actual work to smaller NGOs who struggle for survival.<sup>146</sup> Others insist that NGOs mark their territory and get upset when others intervene—for example, by filing reports in cases they initiated.<sup>147</sup>

All this doesn't detract from the fruitful cooperation that does exist between NGOs. NGO activists help each other to form connections and to collect information.<sup>148</sup> They meet one another in conferences<sup>149</sup> and in joint training sessions where they engage with other people they could turn to for advice in the future.<sup>150</sup> Language barriers sometimes make NGO collaboration difficult. So do differences in institutional culture, such as the unequal time it takes to reply to an email.<sup>151</sup> NGOs struggle to collaborate despite these challenges. At the same time, NGOs engage in other forms of collaboration. While there are NGOs who simply send reports as letters to the CM,<sup>152</sup> others have a fruitful cooperation with its members.<sup>153</sup> While some NGOs do not use the media because they deal with less salient issues,<sup>154</sup> others actively try to shape public policy by using the media.<sup>155</sup>

To conclude, despite facing different challenges, NGOs in high-reputation states and in low-reputation states are both adapting their strategy to the realities they are facing. Generally speaking, NGOs are committed to social change, even if some of their policies are mediated by self interest. Criticizing high-reputation states is likely to be more successful because state officials care about the reputation of their country and are willing to work hard to preserve it. Consequently, a focus on high-

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<sup>145</sup> Skype interview with NGO lawyer 3, 4 May 2015.

<sup>146</sup> Skype interview with NGO lawyer 3, 4 May 2015.

<sup>147</sup> Skype interview with an Official at Russian Justice Initiative, 1 June 2015.

<sup>148</sup> Skype interview with NGO activist 2, 2 May 2015.

<sup>149</sup> Skype interview with NGO activist 8, 20 May 2015.

<sup>150</sup> Skype interview with NGO activist 5, 15 May 2015.

<sup>151</sup> Skype interview with Russian NGO activist 4, 15 May 2015.

<sup>152</sup> Skype interview with Romanian NGO Lawyer 9, 25 May 2015.

<sup>153</sup> Skype interview with NGO activist 2, 2 May 2015.

<sup>154</sup> Phone interview with Official at ANAFE, 27 May 2015.

<sup>155</sup> Skype interview with Lawyer at Minority Rights Group International, 11 June 2015.

reputation states is only to be expected. Some low-reputation states care so little about their reputation that they are even willing to launch a public battle against the human rights community, despite the inevitable reputational costs that such a policy entails.<sup>156</sup>

## V. IMPROVING REPUTATIONAL ASSESSMENTS

The analysis of states' reputation so far collects data on the behavior of states and on the shaming efforts against them. In contrast, states' reputation is actually a *belief* of the international community about the states' past behavior—their failure to comply with ECHR judgments—that can help predict their future behavior: their propensity to fulfill their international obligations.<sup>157</sup> This belief is plagued by uncertainty on two accounts: information about the nature of the states' actions is ambiguous and the judgments formed by spectators of the states' actions may be biased. The paper addresses these problems in turn.

### A. IMPERFECT INFORMATION MAKES EVERY DEED COUNT

NGO reports are primarily a method to expose information about states' compliance with ECHR judgments. But even strong and committed NGOs do not have access to all the necessary facts. They must form impressions based on partial and imperfect information, and these impressions may certainly be wrong.

Furthermore, even if the facts of the matter are clear, they may still be subject to interpretation. The ECHR often issues judgments that require several types of measures: paying compensation for damages, undertaking specific measures to redress the violation, and making general legal changes to amend the root cause of the violation.<sup>158</sup> If a state complies with some of these dictates, but not with others, it is unclear whether it should be branded as failing to comply with its obligations.

The problems of dealing with partial compliance are demonstrated in a report filed against the government of

<sup>156</sup> See the criticism of Russian policies in this regard, at <http://www.theguardian.com/world/2013/mar/27/russia-raids-human-rights-crackdown>

<sup>157</sup> See Gregory D. Miller, *Hypotheses on Reputation: Alliance Choices and the Shadow of the Past*, 12 SECURITY STUDIES 40, 42 (2003). (using a similar definition of reputation as: "... a judgment about an actor's past behavior that is used to predict future behavior").

<sup>158</sup> *Scozzari and Giunta v. Italy*, 2000-VIII EUR. Ct. H.R. 471 at 528.

Azerbaijan by The Media Rights Institute, a NGO based in that country. The report concerned how Azerbaijan complied with judgments that found it violated the right to freedom of expression guaranteed by the Convention when it imprisoned certain journalists for defamation. The NGO noted that the journalists whose rights were violated received full compensation and were released from prison. Yet at the same time it stressed that these journalists were pardoned and not retried, and that the legal changes attempted by Azerbaijan did not suffice to prevent future violations.<sup>159</sup> Calibrating the level of Azerbaijan's compliance is a complex matter. It doesn't only require surveying the facts. It also requires making difficult value judgments.

Another problem with detecting compliance is how to treat delay in the state's actions.<sup>160</sup> When states are required to undertake structural changes to their legal system, they never comply instantaneously; nor are they expected to. But what constitutes a reasonable delay? After how long can observers deduce a state is truly unwilling to comply with a judgment? And if a state complies after this point in time, what does this say about its reputation?<sup>161</sup>

The uncertainty shrouding states' reputations runs even deeper than that. States build their reputation by signaling not only to NGOs but primarily to other states that they are willing to sustain certain costs in order to maintain their reputation for the future. No one expects states to suffer limitless costs. Even a state that cares deeply about its reputation will only comply if the reputational sanction it will suffer by noncompliance is greater than the costs entailed by compliance. The problem is that there is no way for NGOs to observe the true costs of compliance for the state.

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<sup>159</sup> DH-DD(2013)971 Communication from a NGO (Media Rights Institute) (12/09/2013) in the cases of Mahmudov and Agazade and Fatullayev against Azerbaijan (Applications No. 35877/04 and 40984/08).

<sup>160</sup> See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 28 (2005)

<sup>161</sup> If a state complies after a long time, it may have already endured severe reputational damage only part of which can be rebuilt by noncompliance. The state's willingness to shoulder the costs of compliance for this partial rehabilitation of its reputation indicate that it views the reputational sanction as particularly large and should therefore signal its high reputation. At the same time, the state's reluctance to comply earlier on should serve as a negative reputational signal. Moreover, if as time passed conditions changed and made compliance less costly, as is often the case, the belated compliance should count as a weaker signal of the state's good reputation.

The actual costs of compliance are unobservable because when the court requires complex legal measures, undertaking them can lead to all sorts of consequences. If the state is required to release prisoners, for example, compliance may damage deterrence of certain crimes. It may also lead to public opposition to the government from certain groups in society. If a government is required to change its laws, doing so may jeopardize its policy goals in a variety of ways. Furthermore, compliance with a judgment has an expressive function, which creates its own costs. States may perceive compliance as an acknowledgment of guilt that has reputational consequences. In contrast, they may view compliance as exonerating the state from guilt for the initial violation by paying the price that legitimizes its actions.<sup>162</sup> Finally, state compliance sets a precedent for its behavior, a precedent it may be pushed to follow in the future at its own cost.<sup>163</sup>

If the costs of the state were observable, only the most demanding judgment a state complied with would count as a signal, because it indicates the limit of what the state is willing to pay to preserve its reputation. Compliance with less demanding judgments would signal nothing new about the state's reputation.<sup>164</sup> In contrast, because real costs of compliance are unobservable, there is always a possibility that a certain judgment costs more than the state was previously willing to pay. As a result, every action of compliance sends a signal that increases the state's reputation. But although the international community cannot know for sure how demanding compliance would turn out to be, it certainly has assessments about the costs of compliance. Compliance with a judgment that appears more demanding, even if its compliance costs cannot be perfectly calibrated, would lead to a much higher reputational boost than a judgment that appears to require only cheaper actions.<sup>165</sup>

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<sup>162</sup> Cf. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEG. STUD. 1, 13-14 (2000) (describing how people sometimes view fines as a price whose payment erases all guilt for the initial transgression).

<sup>163</sup> See DOTHAN, *supra* note 85 at 30-32.

<sup>164</sup> See ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS – A RATIONAL CHOICE THEORY 83 (2008). (arguing that if a state behaves according to prior expectations, this may affirm its reputation but would not change it).

<sup>165</sup> See DOTHAN, *supra* note 85 at 19-20 (suggesting that although states gain a lot of reputational capital from compliance with a demanding judgment this judgment usually indicates that the state initially committed a severe violation which could damage its reputation. This paper, however, is focused only on the conditions prevailing after the violation already occurred and the judgment

The reputation of states is therefore flexible. A state's actions—or, more accurately, the stipulations of actors in the international community about these actions—constantly change the state's reputation for better or for worse. It seems reasonable to assume that as these stipulations multiply, the state's reputation would lead to increasingly better predictions of the state's conduct. Mistakes and exaggerations by different actors about the state's past conduct would offset one another, and the true character of the state would be gradually revealed.

In a community composed of states and their leaders, an additional mechanism may improve the assessments of states' reputation even further: states will acquire a reputation for reliability in their accusations against other states. As the network between the states develops to include strong multiple ties, states will learn which states they can trust to tell the truth about the conduct of other states. As states learn to ascribe differing degrees of credibility to stipulations on other states, their assessments of the reputations of these states will constantly improve.<sup>166</sup>

#### B. OPENING THE SHAMING COMMUNITY TO PREVENT ECHO

The analysis so far describes a network that sociologists define as complying with the so-called "bandwidth hypothesis": the network resembles a pipe through which information is transmitted; the denser the network, the wider the pipe and the more accurate information becomes. But sociologists also speak about a competing hypothesis, a hypothesis that unfortunately may more accurately represent the tension existing between states in the Council of Europe. It is called the "echo hypothesis," and it argues that information flow within a dense network is not enhanced but rather corrupted. As actors report the actions of others, they do not say the whole truth and nothing but the truth. Instead, they are biased by their prior dispositions as well as the

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against the state was issued. At this point in time, state's conduct can rebuild its reputation by compliance or damage it by noncompliance).

<sup>166</sup> Reliability is an asset that can serve states in the long term, but it involves costs in the short term, such as investing in data gathering and facing up to difficult and unpopular truths. Therefore, states with low discount rates—which are also likely to have high reputations for compliance with international law, as argued in Part VI—are going to be considered generally more reliable. The quest for reliability and the quest for compliance reputation intertwine; as states pursue both, they have an incentive to lead international opinion on other states' reputations in the right direction.

dispositions of the actors with which they are conversing.<sup>167</sup> For example, states may be predisposed to think of states with low-reputations as bad actors. Therefore, when they describe their actions, they will color them in negative colors. These biased reports will then be echoed by other predisposed states, and the reputations of the accused states will plummet. In this example, in contrast with the data uncovered in this paper about the activity of NGOs, high-reputation states stand to gain from the echo effect because reports about their behavior will usually be positive and drive their reputation upwards.

Sociologists run complex tests on networks to determine whether they comply with the echo hypothesis or the bandwidth hypothesis. Devising such tests for the multifaceted diplomatic interactions of states seems close to impossible. But there is another, more sinister factor that creates a real danger for an echo effect in the Council of Europe. This factor is the fact that states who accuse other states may suffer painful political repercussions. Sadly, states are not only committed to the protection of human rights within and outside their borders. When a state critiques another state, the ties between the two are almost universally damaged. States who want to maintain their friendship with the accused state are also likely to shun the accuser. States may also use accusations to attack their enemies, contributing their share to the corruption of the system of reputation.

The Council of Europe is a close-knit community. In such a community, formal accusations are likely to be rare, because no state wants to damage its international ties.<sup>168</sup> After all, such a process was already attempted: states can bring cases against other states in the ECHR system according to the Convention. But this process led to very few cases, many of which were plainly political pay-backs,<sup>169</sup> suggesting that powerful states or states with apparently high-reputations may not be subject to any shaming efforts by other states even if they commit human rights violations.

In contrast, powerless and low-reputations states may be subject to repeated accusations, some of which will be false or

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<sup>167</sup> See RONALD S. BURT, *BROKERAGE AND CLOSURE: AN INTRODUCTION TO SOCIAL CAPITAL*, 167-168 (2005).

<sup>168</sup> ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES*, 60-61 (1991) (describing a similar close-knit community of farmers in the Shasta County where close ties usually prevent farmers from bringing each other to court).

<sup>169</sup> See *supra* notes 6-7; Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?* 10 HUM. RTS Q. 249, 254 (1988).

exaggerated. Accusations against such states can start from purely egotistical motives, as a way for states to distance themselves from the accused state and to curry favor with its adversaries. Once accusations start, they may echo and multiply. As states share information about the accused state, they reinforce each other's predispositions and their views are amplified. The result of this process is that when states interact with each other in a closed system, the reputations of states will be pushed to extremes: either very low or very high reputation, depending on what can be a relatively arbitrary starting point.

A different way to look at this problem is that it creates a potential for a so-called "cascade" of views. Cascades occur when members of a group change their opinions by following others. Reputational cascades occur when the group-members are pressured to follow each other to avoid reputational loss. Informational cascades occur when group-members try to learn from each other's decisions to improve their own policies.<sup>170</sup> Both types of cascades may materialize here: states may feel a reputational pressure to conform to the underlying beliefs about the conduct of other states, and they may also use information provided by other states to make their own opinion. As states start to follow other states, which in turn followed other states, they may be driven further and further away from what an unbiased and independent judgment would reveal. An arbitrary or malicious accusation may be endlessly repeated and destroy a state's reputation beyond repair.

Another distortion that can occur when states deliberate among themselves over the actions of other states results from the limited pool of arguments—such as specific or general accusations—available within the group of deliberating states. If states are only exposed to a skewed pool of assessments over a certain state, which, for example, views that state as a bad actor, the process of deliberation will push the assessments of that state to be more and more extreme.<sup>171</sup>

These potential distortions in the formation of states' reputation suggest that leaving it to the states to control the information on the conduct of other states may not be a good idea.

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<sup>170</sup> See Eric Posner & Cass Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 161-163 (2006).; Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes?* 110 YALE L. J. 71, 78 (2000).; CASS. R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER (2015) Chapter 3.

<sup>171</sup> See Sunstein, *supra* note 170 at 89-90.

To depoliticize this system, the community should be expanded to actors that have less to lose from saying the truth. This is where NGOs enter the picture. NGOs are not as vulnerable to revenge by accused states. They do not have global financial and security interests that can be easily jeopardized. If many NGOs submit reports about a state, they are not likely to be systematically biased by political alliances. They don't have old scores to settle by false or exaggerated accusations, and they have less to gain by keeping quiet in the face of injustice. If they have dispositions, they are less entrenched and less uniform than those of states and are therefore less likely to reverberate and echo. The inevitable inaccuracies in NGO reports are likely to balance themselves out and lead to stable and fair reputations.

Furthermore, because NGOs are so diverse in their views and their interests, they are likely to present assessments that are less uniform than the ones of the states. This could prevent the exclusion of certain views or arguments from the agenda and minimize the chances of polarizing views by deliberation among actors with similar assessments. Unlike states, NGOs are not part of an exclusive club, and the social ties between them are far less pronounced than between states. Experimental evidence suggests that groups that do not share a common identity are less likely to go to extremes than more cohesive groups, because they can foster divergent arguments and contain less social pressure to conform.<sup>172</sup>

NGOs possess another great advantage: their purpose as an institution defines a precise role for them. They are expected to criticize states for human rights violations, unlike state representatives that have to maneuver between a series of diplomatic challenges. Many NGOs focus specifically on certain states or on certain types of violations, or quite often on certain

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<sup>172</sup> *Id.*, at 90-92. One way to think about this problem is through so called "threshold models". Imagine that every member of the group has a certain threshold—a number of accusations she must hear from others before she issues an accusation of her own. The number of accusers one needs to hear plausibly depends on the relationship with these individuals. Specifically, the influence of people one is closely connected to is probably much greater than the influence of strangers. This suggests that in groups where people are closely connected to one another thresholds are more likely to be crossed and false rumors would spread more easily. See Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AMER. J. SOC. 1420, 1423, 1429 (1978). The implication is that the group of state representatives who are closely connected to one another are more likely to form strings of false accusations than NGOs who are not so densely connected.

violations within certain states. This means that NGOs have narrowly defined roles. Narrowly defined roles, known to the participants in the dialogue, have been shown in experiments to improve the dissemination of information in groups.<sup>173</sup>

These insights from social science again suggest that opening the arena for the meaningful deliberation of NGOs can prevent the views on states' reputations from polarizing in a way that is deceptive and misleading.

Admittedly, NGOs have their own sinister incentives, but some of them work in favor, not against, the system of reputation. NGOs thrive on publicity. They need publicity to change the world, and most of them need publicity to raise funds and survive.<sup>174</sup> There is nothing that helps get publicity more than saucy gossip, and saucy gossip is usually counter-intuitive.<sup>175</sup> If an NGO can tarnish an otherwise flawless reputation, it is guaranteed to make headlines. This is consistent with the finding of this paper that NGOs focus their attention on high-reputation states, making reputation so difficult to accumulate and turning it—in the manner discussed in Part VI—into a credible signal on states' future actions.

NGOs need publicity to catch the attention of donors, but to get them to open their wallets they need to win their sympathy as well. This raises the specter of NGOs who cater to the interest of powerful players: rich tycoons or, more commonly, governments. These corrupted NGOs—that some refer to as GONGOs: governmental non-governmental organizations<sup>176</sup>—can sometimes be even more dangerous than governments acting in the open. They allow governments to throw mud with impunity, hiding behind the anonymity provided by cheaply maintained organizations. If such accusations become the norm, the high hopes of transparency generated by NGO involvement will soon

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<sup>173</sup>See SUNSTEIN & HASTIE, *supra* note 170 at 111-112.

<sup>174</sup>See Dothan, *supra* note 101. The constant struggle for publicity may affect the issues NGOs focus on, see James Ron, Howard Ramos, & Kathleen Rodgers, *Transnational Informational Politics: NGO Human Right Reporting, 1986-2000*, 49 INT'L. STUD. Q. 557, 573 (2005) (suggesting that Amnesty International selected the countries it reported on not only based on human rights conditions, but also based on so called "information politics". It focused on powerful countries and on countries exposed to media coverage, among other factors, to attract public attention and potential funds).

<sup>175</sup>See BURT, *supra* note 167 at 110.

<sup>176</sup>See Mauro Palma, *The Possible Contribution of International Civil Society to the Protection of Human Rights*, in REALIZING UTOPIA – THE FUTURE OF INTERNATIONAL LAW (Eds. Antonio Cassese, 2012) 76, 81.

be eclipsed by a system of veiled accusations that no state is accountable for.<sup>177</sup>

This is a danger that cannot be ignored, but should not be exaggerated. Indeed, NGOs are easily constructed, but they must struggle for years to gain a reputation for credibility and truthfulness. NGOs that garnered such reputation will not easily forfeit it to serve states' interests. NGOs that didn't build this reputation will not be believed by the international community.

Furthermore, while the accusations lodged against states may not reveal the true identity of the states that initiated the accusations—raising the possibility that low-reputation states are secretly supporting the accusations of NGOs against high-reputation states—these accusations are not judged in secret. They are judged by public opinion based on a reservoir of reports that is open to all: to contribute, to respond, and to criticize. Opening the arena for other views minimizes the echo effect. It lets accusations compete in the realm of ideas and arguments, where the best reports stand a fair chance of winning. More than anything, part II of the paper suggests that this marketplace of ideas actually works: NGOs are focusing their attention on severe violations and on issues of real legal importance. The system did not spiral out of control.

## VI. CONCLUSION

The DEJ website concentrates in one place information gathered from numerous NGOs about the compliance of states with ECHR judgments. This technological and institutional novelty makes it increasingly easy for states to monitor each other's human rights behavior. It is a new reality that states collectively gain from as it builds reputation into a useful method for predicting state behavior, thus facilitating efficient interactions between states.

The focus on severe and important issues ensures that relevant information about state practice is exposed. The exposure

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<sup>177</sup> This raised memories of the terrible Lion's Mouth where innocent venetians were daily accused by cowardly invisible enemies. See MARK TWAIN, *THE INNOCENTS ABROAD*, chapter 22 (1869) (describing the Lion's Mouth: a hole in the wall used in Venice when it was ruled by the Patricians to slip notes accusing people anonymously of plotting against the government. Many innocents were accused by their enemies and tried in secret by masked unnamed judges that composed the Council of Three. Chances to escape a death sentence were slim).

of information ensures that significant violations by the states will not go unnoticed. This means that states that possess high reputations earned them by compliance with their international obligations, making the system of reputation a viable tool for assessing states' behavior.<sup>178</sup>

The focus of NGO attention may reveal which type of state can lose more from reputational sanctions. Presumably, NGOs try to shame states because they want them to change their behavior or at least to be punished for their bad practices. NGOs would probably not invest resources for nothing. They would focus their attention on states that have a lot to lose from reputational sanctions against them. If that is indeed the case, then the focus of NGOs on high-reputation states indicates that a high-reputation state is harmed more by a similar reputational sanction than would a low-reputation state. That is good news for the international system of reputation.

In fact, this finding supports a key assumption made in the literature on reputation. High-reputation states are often assumed to lose more from reputational sanctions based on the intuition that when they violate international law they are acting against the prior expectations of the international community and would therefore cause a greater shift in these expectations than would a non-compliant low-reputation state.<sup>179</sup> This, in turn, gives high-reputation states an incentive to undertake costly actions to preserve their reputation, actions that low-reputation states would not take.

If high-reputation states suffer more from reputational sanctions than low-reputation states, this suggests that earning reputational capital involves constantly increasing costs. If earning more reputation gets harder as the state increases its reputation, only states that are willing to sustain significant costs will possess high reputations. This reputation sets them apart from the other states. In other words, it is a costly signal of their character, and therefore a credible one.<sup>180</sup>

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<sup>178</sup> See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935, 2012 (2002). (arguing that the availability of accurate information about states' conduct is crucial, if the participation of states in human rights regimes is to serve as an effective signal).

<sup>179</sup> See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 510 (2005). GUZMAN, *supra* note 164 at 83, DOTHAN, *supra* note 85 at 13.

<sup>180</sup> Michael Spence, *Job Market Signaling*, 87 Q. J. Econ. 355 (1973). MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES 16-20 (1974) (developing the theory of

But what are states signaling when they incur the costs necessary to maintain their reputation? A possible answer is that they indicate they care more about their future international standing than they care about avoiding immediate costs. Adherence to international law per se is important to other states. But it is the willingness to incur immediate costs to do so that really makes a difference for the states' reputation. The willingness to sacrifice benefits in the present in the hope of gaining more in the future is often termed "low discount rate."<sup>181</sup> States with a low discount rate will be justly perceived as states that are unlikely to break their commitments in pursuit of quick gains. Such states are considered good treaty partners and consequently get better deals in international negotiations. These high-reputation states are therefore compensated for their efforts to maintain international law, but only in future transactions. It is the readiness to sacrifice the present for the future that sets high-reputation states apart from low-reputation states.<sup>182</sup> States that are concerned about the future can be justly perceived as good collaborators that will stay true to their word despite occasional temptations to breach their obligations.

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signalling to counter situations of asymmetric information). See AMOTZ & AVISHAG ZAHAVI, *THE HANDICAP PRINCIPLE – A MISSING PIECE OF DARWIN'S PUZZLE* (1997), page XIV (studying a similar system of signals developed by evolution in the animal kingdom. Male peacocks, for example, grow big and cumbersome tails that signal to the females they are able to escape from predators even despite the tail's weight).

<sup>181</sup> See Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002) (showing how states that enforce human rights protections signal their low discount rate); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879 (2003) (showing how states that comply with international human rights obligations signal their low discount rate); ERIC A. POSNER, *LAW AND SOCIAL NORMS*, 116 (2000) (showing how everyday behaviors, such as taking the effort to display the national flag, can signal the low discount rate of individuals).

<sup>182</sup> See GUZMAN, *supra* note 164 at 35. Yet, reputation is not always a perfect tool to predict behavior, see George W. Downs and Michael A. Jones, *Reputation, Compliance and Development*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION – THEORETICAL PERSPECTIVES* 117, 118 (Eyal Benvenisti & Moshe Hirsch ed., 2004) (arguing that it is possible to predict the behavior of states based on their reputation only in connection with agreements that are subject to similar costs of compliance and that are valued the same or less by the states); Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L. J. 231, 249 (2009); Rachel Brewster, *The Limits of Reputation on Compliance*, 1 INTERNATIONAL THEORY 323, 326, 328 (2009) (voicing the concern that governments have a short life span and will therefore not consider the long-term repercussions of their actions on their state's reputation).

States that were caught violating human rights by the ECHR may lose reputation as a result of shaming by NGOs. But they also gain a significant advantage—they are able to respond to accusations against them and, most importantly, they can rebuild their reputation by complying with judgments to the satisfaction of the CM. A structured process to shape reputation isn't important just for states who conduct themselves perfectly. It also creates a workable method of repentance—allowing states to regain reputation by changing their behavior.<sup>183</sup>

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<sup>183</sup> See Lisa Bernstein, *Opting Out of The Legal System: Extralegal Contractual Relations In The Diamond Industry*, 21 J. LEGAL STUD. 115, 126 (1992) (highlighting the importance of an agreed upon penalty to limit the reputational damage caused by a breach).