
Determinants of Compliance Difficulties among ‘Good Compliers’: Implementation of International Human Rights Rulings in the Czech Republic

David Kosar* and Jan Petrov**

Abstract

The aim of this article is to explore factors that account for compliance difficulties that may eventually result in a variable level of implementation of the rulings of the European Court of Human Rights and the United Nations Human Rights Committee. We do so by focusing on the high-cost rulings requiring complex legislative measures rendered against the Czech Republic, which ranks among the best compliers among Central and Eastern European countries as well as overall. Our study shows that the level of compliance achieved depends on a repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance against international reputational costs of non-compliance. Subsequently, we argue that the lapse of time is critical in understanding the compliance processes as, sometimes, even a short moment of time, when domestic political costs of compliance become lower than international reputational costs of non-compliance, may create a ‘window of opportunity’ for adopting legislation that is necessary for implementing the given rulings of international human rights bodies. Pro-compliance actors then have to take full advantage of such ‘windows of opportunity’. If they fail to do so, this window may close for a long time, if not forever.

* Head of the Judicial Studies Institute (JUSTIN), Faculty of Law, Masaryk University, Brno, Czech Republic. Email: david.kosar@law.muni.cz. The authors are grateful to the participants of JUSTIN research meetings, to audiences in New York, Oslo and Prague as well as to the anonymous reviewers for helpful comments on earlier versions of this article. The research leading to this article has received funding from the Czech Science Foundation under Grant Agreement no. 16-09415S, Panel P408 (‘Beyond Compliance – Domestic Implementation of International Human Rights Case Law’).

** Jan Petrov, PhD researcher, JUSTIN, Faculty of Law, Masaryk University, Brno, Czech Republic. Email: jan.petrov@law.muni.cz.

1 Introduction

Rulings of international human rights bodies (IHRBs¹) have had a tremendous impact on national legal systems.² However, compliance with IHRBs' rulings cannot be taken for granted. Views of the United Nations (UN) Human Rights Committee (HRC) have not been complied with on a large scale and have even provoked fierce opposition at the domestic level.³ Resistance and backlash have spread to international human rights courts as well. The Inter-American Court of Human Rights (IACtHR) has faced a rather low level of compliance and resistance from national actors in the rising number of cases.⁴ Even the European Court of Human Rights (ECtHR), which is regularly depicted as the most effective human rights court in the world,⁵ has been facing numerous failures to comply with its judgments.⁶ Compliance does not take place automatically even in generally well-complying countries. The United Kingdom's resistance to the ECtHR's judgments in cases involving prisoners' voting rights even escalated to explicit threats of withdrawal from the European Convention on Human Rights (ECHR).⁷

The latter cases show that not only the HRC's and IACtHR's decisions but also the ECtHR's judgments are actually not always complied with.⁸ Fiona de Londras and Kanstantsin Dzehtsiarou argue that non-execution of ECtHR judgments emanates from principled discontent or dilatoriness.⁹ Yet, there are many more issues hindering the implementation of international human rights rulings. Partial and à la carte

¹ By IHRBs, we mean international human rights courts and quasi-judicial bodies. For reasons specified below, we concentrate on the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC) and in the latter case only on the HRC's individual communications procedure.

² E.g. Helfer and Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', 68 *International Organization (IO)* (2014) 77; C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002).

³ See, e.g., the Dutch reactions to HRC, *Broeks v. Netherlands*, Communication no. 172/1984, Decision of 9 April 1987; HRC, *Danning v. Netherlands*, Communication no. 180/1984, Decision of 9 April 1987; HRC, *Zwaan de Vries v. Netherlands*, Communication no. 182/1984, Decision of 9 April 1987; HRC, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Decision of 31 March 2016. For further details, see C. Tomuschat, *Human Rights: Between Idealism and Realism* (2014), at 84, 254, 267 (on the Netherlands).

⁴ Huneus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in J. Couso, A. Huneus and R. Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010) 112; C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2014), at 114–125.

⁵ E.g., Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law (EJIL)* (2008) 125, at 126.

⁶ Hillebrecht, *supra* note 4, at 125–132.

⁷ Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg', 14 *Human Rights Law Review* (2014) 503.

⁸ We are aware of the fact that from a strictly legal point of view there are several differences between compliance with the HRC's views and compliance with judgments of international human rights courts. We will address these differences in Section 5 below.

⁹ De Londras and Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights', 66 *International and Comparative Law Quarterly (ICLQ)* (2017) 467, at 468.

compliance, for instance, have been labelled as 'a remarkably stable and common outcome'.¹⁰ At the same time, many cases of narrow reading and minimalist compliance with international human rights decisions have been reported by various scholars.¹¹ Delayed compliance is yet another problem as it brings about new human rights violations of a similar kind and repetitive applications lodged at the IHRBs, which is undesirable from the point of view of both human rights protection and the effectiveness of these human rights regimes.¹²

We call this phenomenon 'compliance difficulties', which, in our understanding, include cases where the international ruling did not cause the intended effects and did not bring about the respective change as well as cases where it took unduly long to change the *status quo*. Compliance difficulties thus encompass instances of non-compliance, partial compliance and substantial compliance delays.¹³ It is crucial to understand the logic underlying the emergence of these compliance difficulties. Even though generating compliance is not the only task of IHRBs, it remains one of the central measures of their effective functioning.¹⁴ Compliance difficulties imply that the issue addressed by the international decision has not been fully redressed, which increases the risk of future human rights violations of a similar nature. At the same time, compliance difficulties can have troublesome effects for the international body's social legitimacy and its backlog.

The aim of this article is to explore factors that account for compliance difficulties. In order to do so, we treat compliance as a process and study compliance difficulties through an in-depth intra-country comparison.¹⁵ More specifically, we analyse three high-cost rulings of IHRBs against the Czech Republic.¹⁶ By doing so, we make the following contributions to the existing literature on compliance with international human rights rulings. First, we offer a contribution as to the implementation

¹⁰ Hawkins and Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights', 6 *Journal of International Law and International Relations* (2010) 35, at 83.

¹¹ Martinico, 'National Courts and Judicial Disobedience to the ECHR: A Comparative Overview', in O.M. Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (2016) 59, at 72–77; A. von Staden, *Strategies of Compliance with the European Court of Human Rights: Rational Choice within Normative Constraints* (2018).

¹² See Parliamentary Assembly of the Council of Europe, *Implementation of Judgments of the European Court of Human Rights: 9th Report* (2017). See also D. Baluarte and C. De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010), at 120.

¹³ By partial compliance we mean: (i) split decisions, where states do some of what a court orders but not all; (ii) state substitution, where states sidestep a court order, implementing an alternative response to the decision and (iii) ambiguous compliance amid complexity, in which states face particularly daunting and demanding tasks. Here we rely on Hawkins and Jacoby, *supra* note 10, at 38 (we just single out compliance delays as a separate category).

¹⁴ We acknowledge that even non-complied decisions can have important effects, such as raising the salience of the addressed human rights issue, shifting the discourse or contributing to norm development. See Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127.

¹⁵ See Hillebrecht, 'Compliance: Actors, Context and Causal Processes', in W. Sandholtz and C.A. Whytock (eds), *Research Handbook on the Politics of International Law* (2017) 27, at 29–30.

¹⁶ For justification of this case selection, see Section 3 of this article.

of international human rights rulings based on the in-depth analysis of an original and extensive range of documents in an understudied jurisdiction. Second, we identify factors that account for the variable level of implementation in a well-complying new democracy and show how they interact together.

More specifically, our study shows that the level of compliance achieved depends on a repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance against international reputational costs of non-compliance. The higher the domestic political costs and the lower the international reputational costs are, the more likely compliance difficulties will occur. On the contrary, cases distinguished by low domestic political costs and high international reputational costs tend to lead to full and timely compliance, at least in the conditions of a liberal democracy with developed institutional capacities. Importantly, these costs can change over time, and, thus, the result of the balancing exercise may in the later phases of compliance processes change as well. Hence, a lapse of time is critical in understanding the compliance processes as sometimes even a short moment of time, when domestic political costs of compliance become lower than international reputational costs of non-compliance, may create a ‘window of opportunity’ for adopting legislation that is necessary for implementing IHRBs’ rulings.

This article proceeds in the following way. Section 2 sets out the state of the art of scholarship on IHRBs and domestic policy change. Section 3 provides justification why the Czech Republic was selected. Section 4 includes a qualitative intra-country comparison of the compliance processes in the Czech Republic. Section 5 theorizes about compliance difficulties more broadly, and Section 6 concludes.

2 IHRBs and Domestic Policy Change: The State of the Art

International courts and tribunals, including the human rights ones, have undergone a significant transformation in recent decades. Generally, they have shifted towards predominantly compulsory jurisdiction¹⁷ and gained a higher degree of independence from the nation-states’ control, wider access and further domestic embeddedness.¹⁸ Besides the traditional role of dispute settlement, international courts have also acquired the functions of enforcement, administrative review and constitutional review.¹⁹ As a result of the international courts’ proliferation and strengthening,²⁰ some even talk about a paradigm change in their creation and use.²¹

¹⁷ Romano, ‘The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent’, 39 *New York University Journal of International Law and Politics* (2007) 791.

¹⁸ Keohane, Moravcsik and Slaughter, ‘Legalized Dispute Resolution: Interstate and Transnational’, 54 *International Organization (IO)* (2000) 457, at 469.

¹⁹ Alter, ‘Delegating to International Courts: Self-Binding vs. Other-Binding Delegation’, 71 *Law and Contemporary Problems* (2008) 37, at 37.

²⁰ See, e.g., Romano, Alter and Shany, ‘Mapping International Adjudicative Bodies, the Issues, and Players’, in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 3.

²¹ K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014), at 3.

At the same time, the number of quasi-judicial bodies charged with individual human rights complaints has also increased.²² Such bodies resemble international human rights courts in their function as they determine whether a state party has violated its human rights commitments under the respective treaty and, thereby, engage with internal policies and activities of the state. Unlike the rulings of international courts, quasi-judicial bodies' decisions are not strictly legally binding.²³ Nevertheless, they do have significant normative effects²⁴ and produce domestic change, at least in liberal democracies. For instance, the HRC's views were labelled as 'strong indicators of legal obligations' and the 'authoritative determination' of the content of the International Covenant on Civil and Political Rights (ICCPR), to which should be ascribed 'great weight'.²⁵ Therefore, we speak about compliance even with regard to the HRC's views, even though some doctrinal scholars would say that there is no legal obligation to comply with these views. Still, views are pronouncements of 'behavioural obligations to which some expectation of compliance is attached'.²⁶ The expectation of compliance can be demonstrated by the HRC's developing practice of formulating remedies,²⁷ establishing follow-up procedures,²⁸ categorizing and monitoring the states parties' replies²⁹ and the HRC's own efforts to increase the authority of its views.³⁰

However, despite their strengthening and autonomization, international courts (and, still less, quasi-judicial bodies) have no influence over 'either the sword or the purse'.³¹ IHRBs are empowered to interpret the law in their rulings, but, on their own, they lack effective formal instruments to enforce them.³² How then can we explain compliance with international bodies' rulings and the resulting policy changes? The vast literature has tried to address this question, and many theoretical strands have

²² Ulfstein, 'Individual Complaints', in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 73, at 73–74.

²³ *Ibid.*, at 74; van Alebeek and Nollkaemper, 'The Legal Status of Decision by Human Rights Treaty Bodies in National Law', in Keller and Ulfstein, *supra* note 22, 356, at 356.

²⁴ See Von Staden, 'The Political Economy of the (Non-)Enforcement of International Human Rights Pronouncements by States', in A. Fabbricotti (ed), *The Political Economy of International Law* (2016) 230, at 240.

²⁵ See sources cited in Ulfstein, *supra* note 22, at 92ff. International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

²⁶ Von Staden, *supra* note 24.

²⁷ D. Shelton, *Remedies in International Human Rights Law* (2005), at 184–185.

²⁸ Inter-Committee Meeting of the Human Rights Treaty Bodies, Follow-up Procedures on Individual Complaints, UN Doc. HRI/ICM/WGFU/2011/3, 16 December 2010.

²⁹ Report of the Human Rights Committee, Doc. A/64/40, vol. 1 (2009), ch. 6.

³⁰ The HRC described its views as 'an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument'. General Comment no. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. C/PR/C/GC/33, 5 November 2008.

³¹ Hamilton, 'Federalist no. 78', in C. Rossiter (ed), *The Federalist Papers* (2003), at 464.

³² Dothan, 'A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States', *27 Duke Journal of Comparative and International Law* (2017) 141, at 147.

emerged.³³ Since we aim specifically to uncover factors contributing to the difficulties emerging when complying with IHRBs' rulings, we believe that the theories of compliance that focus on domestic politics and political mobilization provide the best answer.³⁴ This is so because, despite the aforementioned proliferation of international (human rights) judiciary, national institutions have retained the instruments of coercion and enforcement.³⁵ Approaches drawing upon domestic politics are then well situated to adequately explain the compliance processes with the rulings of the IHRBs.

Since the IHRBs are not able to enforce their rulings themselves, the domestic institutions may remedy this lack of enforcement capacity.³⁶ The international ruling thus may lead to domestic policy change through the medium of domestic politics.³⁷ As Courtney Hillebrecht puts it with regard to the Strasbourg Court: '[D]omestic actors hold the key to the Court's ability to affect human rights on the domestic level.'³⁸ Similarly, Martin Scheinin emphasizes the importance of domestic political backing with respect to the implementation of the UN treaty bodies' decisions.³⁹ Several studies have shown that domestic policy responses to rulings of IHRBs do not take place automatically. While international human rights rulings can operate as 'tipping points'⁴⁰ or 'tool[s] to support political mobilization',⁴¹ domestic responses depend instead on the ability and willingness of domestic actors to push through such a change. Some authors, therefore, notice that the theories that treat the state as a monolithic block tend to overlook domestic political dynamics that are crucial for compliance, and they argue for the opening of the black box of the state.⁴² Within the state, various scholars have focused on the role of different institutions, some dealing with the potential of civil society and non-governmental organizations (NGOs)⁴³ and pressure groups,⁴⁴

³³ The compliance scholarship is too extensive to be cited here. For an overview of the main theories of compliance, see, e.g., Delcourt, 'Theory of Compliance', in *Max Planck Encyclopedia of Public International Law* (2013).

³⁴ See below for references.

³⁵ Slaughter and Burke-White, 'The Future of International Law Is Domestic (or, the European Way of Law)', 47 *Harvard International Law Journal* (2006) 327, at 343.

³⁶ Heyns and Viljoen, *supra* note 2, at 6; Hillebrecht, 'The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System', 34 *Human Rights Quarterly* (2012) 959, at 964.

³⁷ See generally Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law', 11 *Chicago Journal of International Law* (2010) 127, at 133, 135.

³⁸ Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change', 20 *European Journal of International Relations* (2014) 1100, at 1108.

³⁹ Scheinin, 'The International Covenant on Civil and Political Rights', in Geir Ulfstein *et al.*, *Making Treaties Work: Human Rights, Environment and Arms Control* (2007), at 69; see also Baluarte and De Vos, *supra* note 12, at 136.

⁴⁰ Alter, 'Tipping the Balance: International Courts and the Construction of International and Domestic Politics', 13 *Cambridge Yearbook of European Legal Studies* (2011) 1.

⁴¹ Beth Simmons, *Mobilizing for Human Rights* (2009), at 135.

⁴² Kosař and Petrov, 'The Architecture of the Strasbourg System of Human Rights: The Crucial Role of the Domestic Level and the Constitutional Courts in Particular', 77 *Heidelberg Journal of International Law (HJIL)* (2017) 585; Trachtman, *supra* note 37, at 129–130.

⁴³ Miara and Prais, 'The Role of Civil Society in the Execution of Judgments of the European Court of Human Rights', *European Human Rights Law Review* (2012) 528.

⁴⁴ Trachtman, *supra* note 37.

while others consider the power of the judiciary,⁴⁵ legislature⁴⁶ or the executive⁴⁷ to push through policy changes.

Still, the processes of compliance are multi-faceted. Hence, recent scholarship suggests that domestic pro-compliance coalitions are crucial for compliance, and its degree,⁴⁸ because '[n]o single domestic actor, not even the strongest executive, can satisfy all of the tribunals' mandates, legally or logistically. Changing the country's law and policies, developing new programs, and striking down existing legislation require a coalition of domestic actors willing and able to comply with the tribunals' rulings'.⁴⁹ These domestic institutional mechanisms are complex and comprise a number of actors with diverse capacities, interests and attitudes towards human rights in general. According to Sonia Cardenas, the domestic battle over compliance may be affected more by the distribution of institutional power than by the greatest commitment to international human rights law.⁵⁰ Hillebrecht complements this consideration, stating that '[i]nternational law, and particularly the tribunals' rulings, can provide an impetus for action for individual actors or coalitions of actors, but their ability to act on that impetus will be limited – or enhanced – by their domestic political power'.⁵¹

Therefore, in order to understand the logic and politics of compliance in a particular country, it is necessary to examine domestic mechanisms of compliance in a complex and thorough way. Only then can we decipher the factors that account for compliance difficulties. However, it is also important to keep in mind that the constructivist domestic politics theories discussed above often operate in tandem with rational mechanisms.⁵² Domestic policy change is also dependent on the international reputational costs for a non-complying state,⁵³ and, thus, domestic actors can use international human rights rulings as an 'additional weapon for shaming' in order to increase the pressure on policy-makers to engage in a cost-benefit analysis.⁵⁴ Nevertheless, third states usually have little incentive to push openly for enforcement human rights

⁴⁵ See Nollkaemper, 'The Role of National Courts in Inducing Compliance with International and European Law: A Comparison', in M. Cremona (ed), *Compliance and the Enforcement of EU Law* (2012) 158; J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (2014); Roberts, 'Comparative International Law? The Role of National Court in Creating and Enforcing International Law', 60 *ICLQ* (2011) 57.

⁴⁶ A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (2016), at 99–108.

⁴⁷ Hillebrecht, *supra* note 36.

⁴⁸ Trachtman, *supra* note 37; Hillebrecht, *supra* note 4; Alter, *supra* note 21; Helfer and Voeten, *supra* note 2, at 106.

⁴⁹ Hillebrecht, *supra* note 4, at 25 (referring to X. Dai, *International Institutions and National Policies* [2007]).

⁵⁰ S. Cardenas, *Conflict and Compliance: State Responses to International Human Rights Pressure* (2007), at 13.

⁵¹ Hillebrecht, *supra* note 4, at 25

⁵² Krommendijk, 'The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies', 10 *Review of International Organizations* (2015) 489, at 495.

⁵³ Hawkins and Jacoby, *supra* note 10, at 41; Risse and Ropp, 'Introduction and overview', in T. Risse, S. Ropp and K. Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (2013) 3.

⁵⁴ Checkel, 'Why Comply? Social Learning and European Identity Change', 55 *IO* (2001) 553, at 569.

obligations in the non-complying states since it is costly and rarely brings direct benefits for an enforcing state.⁵⁵

To summarize, the IHRBs pronounce on what the law is and judge whether the state's behaviour conforms to the rule or not. Thereby, these bodies provide incentives for domestic policy change and make potential non-compliance more costly. However, the actual decision whether and how to comply rests primarily on the domestic political actors and on the dynamics of their mutual positions and relations.

3 Why the Czech Republic?

The theoretical starting point of our inquiry is that the outcome of implementation of an IHRB's ruling is dependent primarily upon domestic politics, especially on the alliance of an IHRB with the domestic actors.⁵⁶ Yet, regarding the concept of compliance difficulties, we believe the existing theories are not sufficiently detailed to explain what specific factors contribute to compliance difficulties and how. In order to address this gap and probe the factors that contribute to the emergence of compliance difficulties and account for the variable level of implementation of high-cost rulings of IHRBs, we conducted an intra-country comparison of the internal dynamics of compliance processes. Concentration on a single country was apt for our research aim as it allowed us to go into substantial depth in the domestic dynamics of implementation of the IHRBs' rulings. In addition, intra-country comparisons hold many of the eventually intervening factors constant. At the same time, however, concentration on a single country limited the applicability of our conclusions. Nevertheless, our findings should also be applicable in other liberal democracies with sufficient legal infrastructure and domestic institutional capacity⁵⁷ and with reasonable governmental alteration.⁵⁸

We chose the Czech Republic since it is the most likely case for the implementation of IHRBs' rulings within the Central and Eastern European region. It is the most stable liberal democracy in the region and also one of the 'best compliers' among the new European democracies,⁵⁹ and, at the same time, it displays few instances of prolonged compliance processes or even straightforward non-compliance. Such a constellation

⁵⁵ This is due to the very nature of international human rights law, which, unlike other areas of international law such as trade or security, has effects almost entirely domestic and lacks the element of reciprocity. Von Staden, *supra* note 24, at 250. However, there are exceptions to this rule (see, e.g., the *D.H.* case, *infra* note 61, discussed in Section 4B).

⁵⁶ See the preceding notes.

⁵⁷ Anagnostou and Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *EJIL* (2014) 205.

⁵⁸ See also note 181 below.

⁵⁹ Greer labels the Czech Republic as a good complier (at 119–123) and posits it in the high compliance group of states. S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006), at 119. Von Staden's, *supra* note 11, more recent statistics show that the Czech Republic has one of the best compliance rates with the ECtHR case law (183 out of 191 final judgments rendered against the Czech Republic until 2015, which required a remedial response, had been fully complied with as of March 2017, which means 96% compliance rate).

is particularly suitable for exploring sources of compliance difficulties outside the context of established Western democracies and for contributing to the existing theories of compliance. Most importantly, a most likely case selection enables the analysis of mechanisms and conditions under which specific IHRBs' rulings have faced compliance difficulties that eventually accounted for a variable level of implementation.

The logic of selection of the three particular cases studied in section 4 is as follows. We concentrated on rulings that touched upon the structural problems of the national legal system and required legislative amendments (for the sake of brevity, we refer to them as 'high-cost rulings') rather than on rulings that pointed out violations in individual exceptional cases. First, we selected the two most striking cases of compliance difficulties with IHRBs' rulings in the Czech Republic: (i) a case of non-compliance, which involved the HRC's views on the Czech restitution laws and the requirement of Czech citizenship for a successful restitution claim in *Adam v. Czech Republic*⁶⁰ and (ii) a case of a delayed compliance process involving the ECtHR's 2007 Grand Chamber judgment in *D.H. v. Czech Republic*, which concerned the segregation of Roma children in primary education and has not been fully implemented even after a decade-long process.⁶¹ We chose these two outlier cases, which deviated from the ordinary practice and the image of the Czech Republic as a good complier, since we believe that a detailed examination of such unusual cases has a particularly high potential to identify factors contributing to compliance difficulties.⁶² As a counterfactual,⁶³ we added (iii) a case of full compliance – namely, the cluster of ECtHR judgments dealing with excessively lengthy proceedings – which posed a challenge to the Czech civil law and faced significant compliance hurdles but, despite these challenges, were eventually fully implemented.⁶⁴ This lengthy proceedings saga allowed us to distil the factors of compliance difficulties that control the false positives – if one of the factors appears both in full compliance cases and in cases with compliance difficulties, it is not a likely cause of compliance difficulties.

All three rulings were high-cost rulings that faced domestic opposition. In addition, none of the three studied cases was a stand-alone isolated case of human rights violation. Both the restitution laws and the lengthy proceedings were challenged by several applicants and addressed by numerous decisions of the respective international human rights organs throughout a longer period of time. Also the *D.H.* case clearly pointed out the existence of a structural issue. Although only one judgment of the Strasbourg

⁶⁰ See, in particular, HRC, *Adam v. Czech Republic*, CCPR/C/57/D 586/1994, Decision of 23 July 1996 (citizenship). For further details, see Section 4B.

⁶¹ ECtHR (GC), *D.H. and Others v. Czech Republic*, Appl. no. 57325/00, Judgment of 13 November 2007. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/>.

⁶² On the logic of the selection of the deviant (or outlier) cases, see, e.g., Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', 53 *American Journal of Comparative Law* (2005) 125, at 146–152; Linos, 'How to Select and Develop International Law Case Studies', 109 *American Journal of International Law* (2015) 475, at 482–483.

⁶³ On the use of counterfactuals, see A. George and A. Bennet, *Case Studies and Theory Development in the Social Sciences* (2005), at 167–180.

⁶⁴ See especially ECtHR, *Bořánková v. Czech Republic*, Appl. no. 41486/98, Judgment of 7 January 2003; ECtHR, *Hartman v. Czech Republic*, Appl. no. 53341/99, Judgment of 10 July 2003 (lead cases).

Court has been issued so far, it concerned 18 applicants arguing widespread discriminatory practices in the elementary education system. Hence, the *D.H.* judgment also concerned a cluster of cases. Moreover, other cases of Roma children were pending before the Czech courts at that time. In other words, all three rulings were high-cost rulings that required a legislative change, all of them addressed a repetitive issue that resulted in a cluster of cases, all of them potentially affected many applicants at different stages of domestic litigation and all of them faced domestic opposition.

Our inquiry includes both the ECtHR's and the HRC's decisions. From the point of view of an ideal research design, it might have been more appropriate to focus only on the ECtHR rulings and choose a non-complied judgment of the Strasbourg Court instead of a non-complied view of the HRC. Such a case of overt non-compliance with a Strasbourg judgment, however, does not exist in the Czech Republic. Thus, we decided to include the HRC restitution case. On the one hand, it complicates the inquiry as it brings in the differences between the two regimes (most importantly, the legal status of the decisions and the design of supervisory mechanisms). On the other hand, the inclusion of the HRC case adds a new dimension to the domestic compliance mechanisms. It allows us to trace whether the domestic attitudes towards the ruling were affected by the features of the given international regime and to theorize about the significance of the features of the international decisions for their (non-)implementation. Moreover, we do not lump the three cases together without acknowledging the differences between the UN and the Strasbourg human rights regimes.

In evaluating the level of compliance with an international decision, we relied on the assessment of the respective international human rights regime in order to minimize our own subjective judgments about the level of compliance.⁶⁵ In the ECHR system, we considered judgments as fully complied if the Committee of Ministers (CoM) had adopted a final resolution expressing satisfaction with the measures taken by the respondent state and decided to close the examination of the case. In the HRC context, we considered the views to be fully compliant if the Committee classified the state's follow-up reply as satisfactory.

4 Determinants of Compliance Difficulties in the Czech Republic

Before discussing the particular cases, it is necessary to briefly introduce the status of international human rights law in the Czech legal order. According to the Czech Constitution, international human rights treaties enjoy application priority over ordinary legislation.⁶⁶ However, the Czech Constitutional Court (CCC) *de facto*

⁶⁵ Therefore, we do not engage in the debates whether the ECtHR and the HRC potentially made their assessments on inadequate or opaque information, which could be contested by other actors.

⁶⁶ See Art. 10 of the Czech Constitution. Prior to 2002 international human rights treaties had even suprallegal (but not constitutional) status. See Bobek and Kosař, 'The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview', in G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (2010) 157.

constitutionalized international human rights treaties, and, thus, they serve as a benchmark for the constitutional review of legislation.⁶⁷ Regarding the decisions of IHRBs, the CCC has held that complying with the ECtHR's judgment against the Czech Republic is a constitutional duty⁶⁸ and that public authorities are obliged to take into account the ECtHR case law even if it concerns other states.⁶⁹ The HRC's views are seen by the judiciary as legally non-binding.⁷⁰ Only recently, the CCC has specified that, though not legally binding, the HRC's views provide reliable interpretation by the authority established by states to strengthen rights protection and, thus, have to be taken into account.⁷¹

In regard to the implementation of IHRBs' rulings, the Government Agent for representation of the Czech Republic before the ECtHR plays an important role. The Government Agent operates under the auspices of the Ministry of Justice and represents the state before the ECtHR as well as before the UN human rights treaty bodies. Apart from defending the state before these IHRBs, he plays the crucial role in the domestic implementation of the Strasbourg judgments and all decisions of UN human rights treaty bodies based on individual petitions.⁷² While the Government Agent and his office are not equipped with powers to change the domestic policies themselves, they play an important coordinating and expertise-providing role as they formulate – together with the relevant authorities – conceptions of necessary individual and general measures of non-repetition and propose the strategy and timetable leading to their adoption.⁷³ Domestic authorities are under a statutory obligation to cooperate and to implement the necessary individual and general measures.⁷⁴

Now we can move to the analysis of the three earlier-mentioned high-cost rulings. We start with the case of non-compliance, followed by the case of significant compliance delays, and we finish with the case of full compliance.

⁶⁷ Bobek and Kosař, *supra* note 66, at 175–176.

⁶⁸ CCC, Case no. II. ÚS 604/02, Judgment of 26 February 2004.

⁶⁹ CCC, Case no. I. ÚS 310/05, Judgment of 15 November 2006.

⁷⁰ See, e.g., Czech Supreme Administrative Court, Case no. 8 As 116/2011–251, Judgment of 27 September 2012; Czech Supreme Administrative Court, Case no. 2 As 71/2013–65, Judgment of 15 November 2013.

⁷¹ CCC, Case no. I. ÚS 860/15, Judgment of 27 October 2015. The judgment considered the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Yet we believe its conclusions are generalizable to UN treaty bodies' views as well.

⁷² Note that the Government Agent took over the implementation of the HRC's views already in 2003, while implementation of decisions of other UN human rights treaty bodies based on individual petitions was transferred from the Ministry of Foreign Affairs to the Government Agent only in 2017. However, the latter development is not critical for this article as we focus only on the implementation of the ECtHR's and the HRC's rulings.

⁷³ More recently, the minister of justice established the collegium of experts dealing with the implementation of the ECtHR's judgments (*Kolegium expertů k výkonu rozsudků Evropského soudu pro lidská práva a provádění Evropské úmluvy o lidských právech*), which is convened biannually by the Government Agent and which helps him to formulate recommendations about appropriate compliance measures. Cf., Arts 4(1)(e) and 9 of the Statute of the Agent of the Government for the Representation of the Czech Republic before the European Court of Human Rights, Annex to Government Resolution no. 1024, 17 August 2009.

⁷⁴ Act no. 186/2011 Coll.

A Non-Compliance: Restitution of Property and the Condition of Citizenship

Restitution in the Czech context encompasses the return of property taken by both the Nazi and communist regimes from its original owners. The key constitutional litigation in the Czech Republic concerned Law no. 87/1991 on Extrajudicial Rehabilitation (LER), and, hence, we will focus primarily on this statute.⁷⁵ Initially, the LER stipulated two key limiting conditions for restitution: (i) citizenship of the Czech and Slovak Federal Republic (CSFR) and (ii) permanent residence in the territory of the CSFR.⁷⁶ These two conditions de facto excluded from restitution persons who emigrated from Czechoslovakia between 1948 and 1989 because these emigrants either lost their Czechoslovak citizenship as a result of adopting the citizenship of another country or no longer had a permanent residence in Czechoslovakia due to their emigration. This design of the LER was a deeply political choice, which was adopted after a heated parliamentary debate.

After the division of Czechoslovakia, a group of Czech members of parliament immediately challenged the second condition (permanent residence) before the newly established CCC and won.⁷⁷ Energized by this victory, the individual applicants sought to have the second condition struck down as well. However, the CCC rejected this challenge and upheld the citizenship requirement.⁷⁸ In the meantime, both conditions were challenged before the HRC, which eventually concluded that not only the permanent residence requirement,⁷⁹ but also the citizenship requirement, violates the principle of equality guaranteed by Article 26 of the ICCPR.⁸⁰ More specifically, it opined that ‘the State party itself is responsible for the departure’ of the property owner and concluded that ‘the continued practice of non-restitution to non-citizens of the Czech Republic has had effects’ on the children ‘that violate their rights under Article 26 of the Covenant’.⁸¹ Later on, the HRC reaffirmed this stance⁸² and even broadened its conclusions so as to also cover restitution to persons whose property was confiscated between 1945 and 1948 – that is, before the communist coup d’état.⁸³

However, the Czech Republic has refused to comply with these rulings. In fact, the reaction of all key domestic stakeholders was rather chilly. The government has not

⁷⁵ Law no. 87/1991 Coll., on Extrajudicial Rehabilitation, 21 February 1991.

⁷⁶ Art. 3(1) of the Act no. 87/1991 on Extrajudicial Rehabilitation (1991) (in the original wording).

⁷⁷ CCC, Case no. Pl. ÚS 3/94, Judgment of 12 July 1994.

⁷⁸ CCC, Case no. Pl. ÚS 33/96, Judgment of 4 June 1997.

⁷⁹ HRC, *Simunek v. Czech Republic*, CCPR/C/54/D/516/1992, Decision of 31 July 1995 (residence).

⁸⁰ *Adam*, *supra* note 60.

⁸¹ *Ibid.*, paras 1.2.6, 1.2.8.

⁸² See HRC, *Blazek et al. v. Czech Republic*, CCPR/C/72/D/857/1999, Decision of 9 August 2001, para. 5.8; HRC, *Des Fours Walderode v. Czech Republic*, CCPR/C/73/D/747/1997, Decision of 2 November 2001, para. 8.4.

⁸³ HRC, *Brok v. Czech Republic*, CCPR/C/73/D/774/1997, Decision of 31 October 2001 (pre-communist confiscation – restitution of property confiscated between 1945 and 1948). Cf. HRC, *Malik v. Czech Republic*, CCPR/C/D 669/1995, Decision of 21 October 1998 (where the HRC found no violation of equality regarding the denial of restitution to Sudeten Germans).

only disagreed with the HRC's interpretation of Article 26 of the ICCPR as such,⁸⁴ it has also considered the restitution decisions of the HRC to be poorly argued,⁸⁵ and argued that the HRC's rulings are not legally binding anyway.⁸⁶ It also used the CCC's judgments⁸⁷ and the Strasbourg case law as a sort of shield against the HRC.⁸⁸ More specifically, the ECtHR held that Article 1 of Protocol no. 1 only protects 'existing possessions'⁸⁹ or 'assets ... in respect of which an applicant can argue that he has at least a 'legitimate expectation' that they will be realized'.⁹⁰ Hence, a 'long-extinguished' property right cannot be revived within the meaning of Article 1 of Protocol no. 1.⁹¹ The fact that the ECtHR held in favour of the Czech Republic in similar cases increased the legitimacy of the Czech government's 'anti-HRC' position domestically,⁹² as the Czech government portrayed the situation as the requirement to follow either the ECtHR, the rulings of which are binding, or the HRC, the rulings of which are not legally binding.⁹³

The HRC's decisions also found virtually no support among the major political parties and key political figures. By opening up the possibility⁹⁴ that the Czech Republic could be forced also to return confiscated property to Sudeten Germans,⁹⁵ the HRC opened a proverbial Pandora's box of historical injustices and alienated the public

⁸⁴ See, e.g., Decision of the Czech Government no. 527, 22 May 2002, Annex 2; Decision of the Czech Government no. 620, 23 June 2003.

⁸⁵ The government considered them internally inconsistent and having little support in doctrinal literature (interview with a member of the Government Agent's office from 12 June 2017).

⁸⁶ See *ibid.*; the same argument was made by the minister for human rights and national minorities in the Czech Senate on 18 July 2008 in response to the criticism of Senator Martin Mejstřík (see note 102 below). See also the Dutch cases referred to note 3 above.

⁸⁷ *Infra* note 97.

⁸⁸ See Decision of the Czech Government no. 527, 22 May 2002, Annex 2 *in fine*.

⁸⁹ ECtHR (GC), *Gratzinger and Gratzingerova v. Czech Republic*, Appl. no. 39794/98, Decision of 10 July 2002, para. 69, and the case law cited therein.

⁹⁰ *Ibid.*

⁹¹ For further details regarding the Strasbourg case law on restitution, see Allen, 'Restitution and Transitional Justice in the European Court of Human Rights', 13 *Columbia Journal of European Law* (2006–2007) 1. Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952, ETS 9.

⁹² *Gratzinger and Gratzingerova*, *supra* note 89. See also ECtHR (GC), *Malhous v. Czech Republic*, Appl. no. 33071/96, Decision of 13 December 2000.

⁹³ Even though the ECtHR's and the HRC's rulings were compatible and, thus, the either/or logic was merely a rhetorical device.

⁹⁴ This was the perception of the HRC's jurisprudence, despite the fact that in *Malik*, *supra* note 83, the HRC explicitly rejected the restitution claims of Sudeten Germans.

⁹⁵ Sudeten Germans were ethnic German speakers who inhabited northern, southern, and western parts of the interwar Czechoslovakia (the so-called Sudetenland). Czech citizens considered them part of Hitler's 'fifth column' after the escalation of Nazi atrocities in occupied Czechoslovakia, and most Czechs demanded expulsion of all Sudeten Germans after the end of World War II. This eventually happened in 1945, and more than 2 million ethnic Germans were eventually expelled from post-war Czechoslovakia, often under inhuman conditions. No compensation has been paid by the Czech Republic to date to the expellees, and any suggestion to do so is 'political suicide' in the Czech Republic as the wounds from World War II have not yet healed.

at large. For those reasons, the NGOs and civil society did not take on this issue and focused on other marginalized groups. The Ministry of Foreign Affairs, which was responsible for implementing the HRC's views when the first restitution cases were decided, shared the official line of the Czech government. Even the CCC, a major ally of the IHRBs and often referred to as a Czech 'champion' in the application of human rights treaties,⁹⁶ has openly defied the HRC's conclusions. It 'reinterpreted' the HRC's decision in *Adam* and de facto backed the Czech government's position, according to which HRC's decisions are not legally binding and, thus, do not have to be strictly followed.⁹⁷ The Government Agent was vested with the representation before the HRC only in 2003, and, thus, he did not take part in the proceedings before the HRC in the formative cases in the 1990s and early 2000s. Later on, in response to the HRC's decisions in *Pezoldová*⁹⁸ and *Czernin*,⁹⁹ he proposed the *ex gratia* compensation scheme, but the Czech government found even this step politically unfeasible and rejected his proposal.¹⁰⁰

The HRC thus found itself in a difficult position. The only bearers of the pro-compliance flag were the applicants negatively affected by the citizenship requirement and the foreign associations of Czech compatriots,¹⁰¹ who were occasionally supported by the US government.¹⁰² This coalition was loose and weak. Moreover, it was run primarily from abroad, and its ideas had found little traction among the Czech NGOs or among other actors located in the Czech Republic. On the contrary, the HRC faced a strong anti-compliance bloc of virtually all governmental institutions backed by the CCC and popular sentiment. This bloc had been fairly stable since the 1990s, and, thus, even the moderate proposals by the Government Agent to ensure at least minimalist compliance in the mid-2000s had failed. As a result, the HRC's decision in *Adam* has not been complied with so far,¹⁰³ and it is unlikely that it ever will be, despite additional HRC restitution decisions against the Czech Republic, repeated criticism in periodic reports and various formal and informal meetings between the HRC and the representatives of the Czech government.

The fate of the HRC's restitution rulings in the Czech Republic also shows that when an IHRB touches upon a sensitive issue of transitional justice even the CCC, a generally pro-human rights body, is willing to 'creatively' reinterpret the HRC's decision so as to

⁹⁶ Bobek and Kosař, *supra* note 66, at 178.

⁹⁷ CCC, Case no. Pl. ÚS 24/98, Judgment of 22 September 1999.

⁹⁸ HRC, *Pezoldová v. Czech Republic*, CCPR/C/76/D/757/1997, Decision of 9 December 2002.

⁹⁹ HRC, *Czernin v. Czech Republic*, CCPR/C/83/D/823/1998, Decision of 25 May 2005.

¹⁰⁰ The internal discussion on the proposal took place in July 2005, but it was eventually rejected by the government representatives.

¹⁰¹ The Canadian association of Czech compatriots called 'Czech Coordinating Office' led by Jan Sammer and the Bavarian association of Czech compatriots were particularly active in this effort in the 1990s and the early 2000s, but then their activity declined.

¹⁰² See, e.g., the speech of Senator Martin Mejstřík at the Czech Senate (the upper chamber of the Czech Parliament) on 18 July 2008 (transcript available at www.senat.cz).

¹⁰³ Macklem, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law', 16 *EJIL* (2005) 1.

completely declass it. In fact, the dealings with the past after the Velvet Revolution, which led to the adoption of specific lustration laws,¹⁰⁴ restitution laws¹⁰⁵ and the equalizing of Slovak pensions by the CCC,¹⁰⁶ has arguably become a part of the Czech constitutional identity and, as such, is vigorously defended by the Czech actors against any external interference that could alter the specific Czech narrative of its transition to democracy. Moreover, the HRC's views have touched upon the citizenship requirement, which raises the identity stakes even further.¹⁰⁷ Therefore, a broader lesson from the HRC's challenge to the Czech restitution laws is that it is particularly hard to find domestic support for the implementation of international human rights rulings if such rulings impinge upon the constitutional identity.¹⁰⁸

B Compliance Delays: Segregation in Elementary Education

The case of *D.H. and Others* is the most politically and publicly controversial Strasbourg judgment against the Czech Republic. The case concerns the applications of 18 Roma children who challenged their enrolment in the so-called special schools intended for pupils with learning disabilities whose graduates had fewer possibilities in higher education. The seven-member chamber of the ECtHR decided in a six-to-one judgment that there had been no violation of the right to education (Article 2 of Protocol no. 1) or of the right not to be discriminated against (Article 14 of the ECHR).¹⁰⁹

However, the Grand Chamber came to a different conclusion. Even though it admitted that they may not be entirely reliable, the ECtHR took into account the statistics implying that the number of Roma children in special schools is disproportionately high. That gave rise to a suspicion of indirect discrimination, and the Strasbourg Court reversed the burden of proof. According to the Grand Chamber, the government had failed to meet the burden of proof as it did not prove that the high proportion of Roma children in special schools resulted from objective and non-discriminatory factors. The Grand Chamber was not satisfied with the arguments of the government. It stated that the tests used to assess children's abilities are potentially biased and that they do not take into account the specifics of the Roma population. Second, the Court held that the parents' consent to the placement of their children in the special schools had not been fully informed. These two shortcomings, among other things, contributed to the poor education of Roma children, which eventually hampered their future prospects of a high quality life. For all of these reasons, the Grand Chamber decided

¹⁰⁴ On the perseverance of the Czech lustration laws, see, e.g., Kosař, 'Lustration and Lapse of Time: Dealing with the Past in the Czech Republic', 4 *European Constitutional Law Review* (ECLR) (2008) 460.

¹⁰⁵ See, e.g., Macklem, *supra* note 103.

¹⁰⁶ This led to a famous *ultra vires* judgment of the CCC that openly challenged the CJEU; see Jan Komárek, 'Playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU *ultra vires*.' (2012) 8 *ECLR* 323.

¹⁰⁷ See M. Rosenfeld, *The Identity of the Constitutional Subject* (2009); L. Orgad, *Cultural Defense of Nations* (2015).

¹⁰⁸ See Orgad, *supra* note 107; G. Jacobsohn, *Constitutional Identity* (2010).

¹⁰⁹ ECtHR, *D.H. and Others v. Czech Republic*, Appl. no. 57325/00, Judgment of 7 February 2006, para 49.

the Czech Republic had violated the applicants' right not to be discriminated against in conjunction with the right to education.¹¹⁰

The Czech Republic has faced the challenge of complying with the decision since then under the enhanced supervision of the CoM¹¹¹ and under pressure from the Nordic countries.¹¹² Only in the proceedings before the CoM did it become clear what changes the implementation of the judgment actually required and how far it was necessary to go in reforming the Czech educational system. The 'guidelines' for the implementation of the judgment provided by the CoM not only pointed out the necessity of reforming the enrolment tests and the parental consent standard, but also stated that the system should generally move towards greater inclusion in mainstream education.¹¹³

The domestic reactions to the Grand Chamber's judgment have varied profoundly. The advocates of inclusive education praised the judgment and thought of it as a promise of future change in the Czech Republic's system of primary education. Many other actors, on the contrary, heavily criticized the judgment and tried to advocate for the persisting system of the special schools. Even prior to the Grand Chamber's judgment, the Parliament had adopted a new School Act, which abolished the category of special schools.¹¹⁴ But most of the former special schools were just given a new label of 'practical schools' and kept following the curriculum for children with mild mental disabilities, and the problem persisted.¹¹⁵ The subsequent strategy to achieve more inclusive education was formulated in the National Action Plan of Inclusive Education.¹¹⁶ Yet this plan was not put into practice in its entirety especially due to the politics of the new minister of education who did not prioritize the issue of inclusive education.¹¹⁷ Therefore, many of the legislative plans were postponed, and only changes on the level of secondary legislation were made.¹¹⁸

¹¹⁰ ECtHR (GC), *D.H. and Others v. Czech Republic*, Appl. no. 57325/00, Judgment of 13 November 2007. For a more detailed discussion of the case, see, e.g., Medda-Windischer, 'Dismantling Segregation Education and the European Court of Human Rights. *D.H. and Others v. Czech Republic: Towards an Inclusive Education?*', 7 *European Yearbook of Minority Issues* (2007–2008) 19.

¹¹¹ See the HUDOC EXEC database, available at hudoc.exec.coe.int/.

¹¹² Representatives of the Nordic countries were particularly harsh in their criticism of the Czech (non-)implementation within the Committee of Ministers. Interview with a member of the Government Agent's Office, 12 June 2017.

¹¹³ Committee of Ministers, Supervision of the Execution of the Judgments in the *Case of D.H. and Others against Czech Republic*, Judgment of 13 November 2007, Memorandum CM/Inf/DH(2010)47, 24 November 2010. See also Smekal and Šipulová, *infra* note 117, at 303.

¹¹⁴ Act no. 561/2004 Coll.

¹¹⁵ Boučková, 'Nesnesitelná těžkost výkonu rozhodnutí: výkon rozsudku ESLP postihujícího segregaci ve vzdělávání', in M. Bobek *et al.*, *Dvacet let Evropské úmluvy v České republice a na Slovensku* (2013) 193, at 198–199.

¹¹⁶ National Action Plan of Inclusive Education, 15 March 2010, available at www.databaze-strategie.cz/cz/msmt/strategie/narodni-akcni-plan-inkluzivniho-vzdelavani-2010-2013.

¹¹⁷ Smekal and Šipulová, 'DH v Czech Republic Six Years Later: On the Power of an International Human Rights Court to Push through Systemic Change', 32 *Netherlands Quarterly of Human Rights* (2014) 288, at 305–306.

¹¹⁸ Ministerial Decree no. 147/2011 Coll. amending Decree no. 73/2005, 25 May 2011; Ministerial Decree no. 116/2011 Coll. amending Decree no. 72/2005, 15 April 2011; cf. Boučková, *supra* note 115, at 206–208.

The implementation of this judgment has been hampered by the existing strong coalition of domestic stakeholders opposing compliance and defending the *status quo*. This broad coalition encompasses some of the parents of both Roma and non-Roma children and some of the headmasters and teachers of ordinary and practical schools. NGOs,¹¹⁹ the Ombudsman and the Czech Human Rights Commissioner are on the other side of the spectrum as they argue for equal access to education and inclusive forms of education.¹²⁰ However, none of these pro-compliance actors possesses sufficient formal powers and the political capacity to push through the systemic change against the existing opposition. The impact of the domestic judiciary after the *D.H.* judgment was limited because there have been only a few cases initiated by the affected Roma children and their parents.¹²¹

The attitude of the Ministry of Education was shown to be crucial for the implementation of *D.H.* Yet the Department of Education has suffered from instability, the attitude of the ministry has fluctuated with the frequently changing ministers and their varying attitudes to the issue in question. Things started moving ahead under the minister of education in 2012, and, since then, the Czech authorities have communicated with the CoM more actively and introduced a revised action plan for the execution of the *D.H.* judgment, which also reflected the 'post-*D.H.* case law' of the ECtHR.¹²² In addition, the EU has also stepped in. As a part of the EU's anti-discrimination policy, the European Commission has adopted the Framework for National Roma Integration Strategies, and the elimination of school segregation is one of its priorities.¹²³ In reaction to the slow progress in implementing the strategy, the European Parliament has urged the Commission to take a 'strong action' in cases of violations of the fundamental rights of Roma in member states.¹²⁴ Accordingly, in 2014, the Commission initiated infringement proceedings¹²⁵ against the Czech Republic under the so-called Racial Equality Directive,¹²⁶ building on the conclusions made by the ECtHR in the *D.H.* judgment.¹²⁷ If the issue is not resolved by the member state and the Commission,

¹¹⁹ The Open Society Fund and Amnesty International have been particularly active in this area.

¹²⁰ Smekal and Šipulová, *supra* note 117.

¹²¹ The recent judgment of the Constitutional Court, which clarified the conditions under which Roma children placed in the special schools may claim compensation for indirect discrimination is a rare exception. See CCC, Case no. III. ÚS 1136/13, Judgment of 12 August 2015.

¹²² See Consolidated Action Plan for the Execution of the Judgment of the European Court of Human Rights in the Case of *D.H. and Others v. Czech Republic*, 16 November 2012; as well as subsequent updates of this document (all available at hudoc.exec.coe.int/).

¹²³ EU Framework for National Roma Integration Strategies, Doc. COM(2011) 173 final, 5 April 2011.

¹²⁴ European Parliament Res. 2013/2924, 12 December 2013, on the progress made in the implementation of the National Roma Integration Strategies.

¹²⁵ Treaty on the Functioning of the European Union (TFEU), OJ 2012 C 326/47, Art. 258.

¹²⁶ Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, at 22–26.

¹²⁷ Amnesty International, *EU Action against Czech Republic for Discrimination in Schools Is a Victory for Rights, Justice, and Roma*, 25 September 2014, available at www.amnesty.org/en/latest/news/2014/09/eu-action-against-czech-republic-discrimination-schools-victory-rights-justice-and-roma/.

the case can eventually be referred to the Court of Justice of the European Union, which significantly raises the stakes.

Simultaneously, important developments have taken place in the domestic political arena. The Ministry of Education prepared two inclusion-oriented amendments to the School Act.¹²⁸ These amendments, *inter alia*, guarantee auxiliary measures to every pupil with special educational needs and a compulsory year of kindergarten for children from the age of five. In the end, these reforms were adopted by the Parliament, although they faced significant opposition from certain members of parliament, the president and the tabloid media who strongly disagreed with the idea of inclusive education.¹²⁹ A major factor was the support of the new minister of education, Kateřina Valachová, who not only continuously advocated for the inclusion-oriented reform but also tried to reframe this reform. She patiently downplayed the alleged ‘radicalness’¹³⁰ of the reform and kept explaining that the new model of inclusive education does not only help socially excluded kids (such as Roma children) but also kids with light mental and physical disabilities (including children of the Czech majority population). NGOs welcomed the newly introduced measures, but they emphasized their concern about the implementation of these measures in practice and about their financing.¹³¹

Thus, after a long and complicated domestic battle, enriched by the inputs from the international level, some important legislative reforms leading closer to compliance were adopted. However, changes on the ground – namely, the ratio of Roma children in practical schools – have been rather limited, and the supervision process concerning the *D.H.* judgment has been still pending, even 10 years after the Grand Chamber judgment. The implementation of the *D.H.* judgment thus shows that even the ECtHR’s judgment faces significant compliance difficulties, if it challenges deeply entrenched constitutional sentiments,¹³² namely cultural homogeneity, repugnance of social engineering and apathy to socio-cultural inequalities that result in an aversion to anti-discrimination laws.¹³³ Most importantly, even though the state authorities have adopted several compliance-ensuring documents on the central level, they could not change the mindset of the headmasters and teachers of the practical schools whose practices are deeply entrenched and who therefore vigorously defend

¹²⁸ Acts no. 82/2015 and 178/2016 Coll. The amendment introduces some other measures thought to enhance compliance with the *D.H.* judgment. For details, see Revised Action Plan for the Execution of the Judgment of the European Court of Human Rights in the Case of *D.H. and Others v. Czech Republic*, 10 February 2015, available at hudoc.exec.coe.int/.

¹²⁹ Š. Drahoukoupil, *Discrimination against Roma in Education: Waiting for Changes on the Ground* (2017), available at http://european-implementation.net/ein-voices/2017/3/22/discrimination-against-roma-in-education-waiting-for-changes-on-the-ground#_ftn6.

¹³⁰ This was a common theme in the tabloid articles criticizing the reform; see *ibid.*

¹³¹ Communication from NGOs (COSIV, Open Society Fund Prague, Open Society Justice Initiative) in the case of *D.H. and Others against Czech Republic*, 23 February 2015, available at hudoc.exec.coe.int/.

¹³² See A. Sajó, *Constitutional Sentiments* (2011).

¹³³ See Havelková, ‘Resistance to Anti-Discrimination Law in Central and Eastern Europe: A Post-Communist Legacy?’, 17 *German Law Journal* (2016) 627.

the *status quo*. Unfortunately for the ECtHR, this anti-compliance camp managed to persuade the significant portion of the Czech majority population that inclusive education harms their children.

C Full Compliance: Lengthy Proceedings

The largest proportion of the ECtHR judgments against the Czech Republic have concerned the violation of the right to trial within a reasonable time.¹³⁴ L'ubomír Majerčík refers to the lengthy proceeding cases as 'the most pressing issue' since they make up approximately 40 per cent of cases against the Czech Republic at the ECtHR.¹³⁵ In these judgments, the Strasbourg Court found the existing preventive mechanisms ineffective and the existing compensatory measures insufficient because the State Liability Act did not allow non-pecuniary damages to be awarded.¹³⁶ In the implementation efforts,¹³⁷ the Czech Ministry of Justice first prepared a legislative amendment introducing a mechanism of complaints to prevent excessively long proceedings.¹³⁸ The bigger step was the introduction of a new compensatory measure. The Ministry of Justice prepared a bill amending the State Liability Act.¹³⁹ According to the amendment, failure to decide a case in a reasonable amount of time constitutes maladministration for which the litigant may seek damages, including non-pecuniary damages. The amendment states that compensation for non-pecuniary damage does not depend on there being pecuniary damage, and it lays down criteria for the determination of the amount of just satisfaction to be awarded, which is clearly inspired by the Strasbourg case law.¹⁴⁰ The bill was eventually adopted in 2006.

The context of adopting the amendment to the State Liability Act shows that the introduction of the new compensatory measure was not absolutely straightforward though. The new measure went beyond the existing concept of the scope of damages in Czech civil law and had important budgetary and institutional implications. The pre-existing civil law concept of damages in the Czech Republic would traditionally encompass, with the exception of certain standardized cases, only pecuniary damage.¹⁴¹ The proposed compensatory measure, however, also introduced the liability of the state for non-pecuniary damage and thus introduced a significant novelty. In

¹³⁴ See especially *Bořánková*, *supra* note 64; *Hartman*, *supra* note 64.

¹³⁵ Majerčík, 'Czech Republic: Strasbourg Case Law Undisputed', in P. Popelier, S. Lambrecht and K. Lemmens, *Criticism of the European Court of Human Rights* (2016) 131, at 140.

¹³⁶ See, e.g., *Hartman*, *supra* note 64, paras 66–69. Law no. 82/1998 Coll., on Liability for Damage Incurred in the Course of Exercise of Public Powers through a Decision or Incorrect Administrative Procedure, 17 March 1998.

¹³⁷ Besides the above-mentioned measures, the Czech Republic adopted several other pieces of legislation aimed at speeding up court trials. Still, we are concentrating on the preventive and compensatory measures, which were designed as direct responses to the ECtHR's judgments.

¹³⁸ See section 174a of Act no. 6/2002 Coll. on Courts and Judges.

¹³⁹ See Act no. 82/1998 Coll. on State Liability.

¹⁴⁰ See Act no. 160/2006 Coll., which amended Act no. 82/1998 Coll. on State Liability.

¹⁴¹ J. Fiala *et al.*, *Občanské právo* (2006), at 254; J. Švestka *et al.*, *Občanský zákoník: Komentář* (2006), at 771; see also the judgment of the CCC, Case no. Pl. ÚS 16/04, Judgment of 4 May 2005.

institutional terms, the amendment brought a new agenda both to the administrative bodies and to courts.

This novelty met mostly with doctrinal opposition from some of the major legal figures in the country, including academics and civil servants. Some of the political figures were not adamant supporters of the new measure either. For example, the then minister of justice was reluctant to support such a novelty, even though he did not openly oppose it. On the other hand, there was no principal domestic political opposition against complying with the lengthy proceedings judgments of the ECtHR.¹⁴² The issue of slowly delivered justice had been salient even before the Strasbourg judgments. The CCC, the parliamentary political parties¹⁴³ and civil society articulated the issue of lengthy proceedings and called for redress. Nevertheless, it was the case law of the ECtHR that triggered concrete reforms, particularly the compensatory mechanism.

Despite this opposition, which was predominantly doctrinal, the government – informed by the dozens of cases lost in Strasbourg and supported by a strong pro-compliance coalition – proposed a bill introducing the new compensatory measure. It took a while before the Czech Parliament voted on it,¹⁴⁴ but once the new minister of justice came to power and replaced the former hesitant minister, the anti-compliance camp lost its only ally with any real political capacity to delay or block the change. The new minister of justice, Pavel Němec, reframed the issue, downplayed the corruption potential of the broader applicability of non-pecuniary damages and sidelined the key civil servants within the Ministry of Justice who opposed the change. He relentlessly pushed the bill through, and the Parliament eventually approved it by a great majority.

However, adopting legislation is not always enough. The implementation of the new compensatory mechanism in daily practice was facilitated by the stable support of key domestic actors. The Government Agent played a crucial role as it provided advice and expertise on the relevant ECHR issues. He prepared a detailed manual for application of the new compensatory measure.¹⁴⁵ The manual provided thorough information to the administrative bodies and the judiciary about the criteria for assessing lengthy proceedings and the amount of damages to be awarded when applying the new mechanism.¹⁴⁶ The judiciary, which reviewed the decisions of the Ministry of Justice on compensation for lengthy proceedings, was another key player. Most importantly, the Supreme Court's specialized chamber that was designated for deciding disputes concerning the state's liability for damages abandoned some of its conclusions made with respect to the older wording of the State Liability Act and adopted an approach inspired by the ECtHR's case law.¹⁴⁷ Acknowledging all of the domestic

¹⁴² Such an attitude cannot be taken for granted, though, as the German experience shows. Some of the German authorities believed in the efficiency of the domestic judiciary and claimed there was no need to make changes. Donald and Leach, *supra* note 46, at 290.

¹⁴³ See the respective manifestos of parliamentary parties at that time.

¹⁴⁴ This is another sign that implementation of these Strasbourg rulings was not as straightforward as it seems at first sight.

¹⁴⁵ See Schorm, 'Česká republika před ESLP: bilance prvních dvaceti let pohledu vlády', in Bobek *et al.*, *supra* note 115, 59, at 70–71.

¹⁴⁶ P. Vojtek, *Odpovědnost za škodu při výkonu veřejné moci* (2012), at 281.

¹⁴⁷ *Ibid.*; see, e.g., Czech Supreme Court, 30 Cdo 1614/2009, Judgment of 8 September 2010.

developments, both the Strasbourg Court and the CoM expressed satisfaction with the implementation of the compensatory measure for lengthy judicial proceedings.¹⁴⁸

To summarize the lengthy proceedings saga, the ECtHR triggered the adoption of the new preventive and compensatory measures regarding lengthy proceedings, although the compensatory measure introduced significant novelties to the Czech legal order. The key turning point for full compliance was the appointment of the new minister of justice, who joined the pro-compliance camp, reframed the issue and downplayed the corruption potential of the new legislation. In contrast to the previous two examples of compliance difficulties, the following factors were largely missing in the lengthy proceedings saga: a strong anti-compliance camp, difficulties in reframing the issue in a way that would be more palatable for the key actors and long periods of inaction. Moreover, the hesitant individual (the minister of justice) and anti-compliance persons (civil servants at the Ministry of Justice) at the key ministry were quickly replaced or sidelined. Finally, the very issue being implemented did not touch upon constitutional identity or involve constitutional sentiments.

D Distilling the Sources of Compliance Difficulties

The three sets of analysed IHRB rulings show that implementation of high-cost rulings does not take place automatically even in a country that is generally depicted as 'a good complier'.¹⁴⁹ There is always a strong gravitational pull in favour of the *status quo*, and it requires a mobilization of significant energy, resources, and willingness to overcome it. So what explains the fact that some high-cost rulings are eventually implemented and some are not and why does it sometimes take ages to do so? We will explore this question by comparing the three cases studied above. We may trace certain similarities as well as differences among them. In all three cases, the relevant international human rights ruling raised the salience of a given human rights issue, and, in each case, there were always certain actors that pushed for implementation. At the same time, the implementation process in each of these cases was non-linear. Moreover, in all three cases, there was a turnover of key ministers, but it helped to steer the course in favour of implementation only in two cases – the lengthy proceedings saga and the *D.H.* case.

However, there were also important differences. There were periods of inaction in all three cases, but, in contrast to the *D.H.* case and the restitution rulings, the period of time was relatively short in the lengthy proceedings saga. Similarly, the anti-compliance bloc in the restitution cases and in the *D.H.* case was always strong, stable and vocal,¹⁵⁰ whereas, in the lengthy proceedings saga, it lost ground relatively quickly, and the support of the key actors waxed and waned over time. In the lengthy proceedings saga, the strong pro-compliance actors continuously pushed for implementation.

¹⁴⁸ ECtHR, *Vokurka v. Czech Republic*, Appl. no. 40552/02, Decision of 16 October 2007, para 65; Committee of Ministers, Res. CM/ResDH(2013)89, 29 May 2013.

¹⁴⁹ *Supra* note 59.

¹⁵⁰ Recall the tabloid criticism of the main pro-compliance actors. *Supra* note 129.

In the *D.H.* case, there was a dedicated pro-compliance coalition, which consisted of NGOs, the Ombudsman and the Czech Human Rights Commissioner, but it took a long time to bring the minister of education, who has the real political power, on board. In contrast, the pro-compliance camp in the restitution cases has always consisted of a loose alliance of weak actors.¹⁵¹

The other subtle difference between the *D.H.* case and the restitution cases, on the one hand, and the lengthy proceedings saga, on the other, is the domestic framing of the issue or the potential for domestic reframing. There was arguably no way to reframe the state citizenship condition in the restitution cases so that the implementation of the HRC's views would become politically more palatable to the Czech public. This factor proved extremely difficult in the *D.H.* case as well. Even though the Minister of Education Valachová took pains to explain at every occasion that the new model of inclusive education would not aim primarily at improving the education of Roma children but, rather, would help all children with disabilities, the tabloids, teachers and significant segments of the Czech population did not accept that narrative. In contrast, the lengthy proceedings saga offered this potential. Minister of Justice Němec dismissed the arguments about the potential negative repercussions of broadening the scope of non-pecuniary damages as being speculative and, instead, appealed to the efficiency and speediness of judicial proceedings, the value of which is highly praised across the Czech political spectrum.

To make things even more complicated, international pressure and unanticipated external shocks had also played a varying role. In the lengthy proceedings saga, the ECtHR's judgments were persuasive and well embedded in the previous Strasbourg case law.¹⁵² Moreover, the ECtHR kept putting pressure on the Czech Republic by confirming new case law both against the Czech Republic and against other states. In contrast, both the HRC's views in the restitution cases and the ECtHR's Grand Chamber judgment in *D.H.* were novel, perhaps even surprising,¹⁵³ and had only limited support in the previous decision-making practice of both bodies. The HRC's views in the restitution cases as well as the ECtHR's *D.H.* judgment were initially also considered to be poorly argued.¹⁵⁴ In the *D.H.* case, the strong dissenting opinions did not help implementation either as they provided arguments for the anti-compliance camp.¹⁵⁵ Yet the ECtHR has

¹⁵¹ *Supra* section 4B.

¹⁵² See especially ECtHR (GC), *Kudla v. Poland*, Appl. no. 30210/96, Judgment of 26 October 2000.

¹⁵³ Note that in *D.H.*, the Grand Chamber judgment overturned the 6:1 chamber judgment in favour of the Czech Republic (see Section 4C above). The HRC's views on the Czech restitutions also came as a surprise, as the HRC's application of Art. 26 of the ICCPR (prohibition of discrimination) in this context without further ado (without taking into account the unique context of transition from a totalitarian regime to democracy) was unexpected.

¹⁵⁴ See Majerčík, *supra* note 135, and references cited therein (regarding the doctrinal criticism of the *D.H.* judgment); *supra* note 85 above (regarding the HRC's restitution decisions).

¹⁵⁵ Smekal and Šipulová, *supra* note 117, at 299–300. Note that there is an emerging literature suggesting that visible dissent may impact the persuasiveness and social legitimacy of an IHRB decision and provide justification for delayed compliance or even non-compliance. See D. Naurin and Ø. Stiansen, 'Judicial Dissent and Compliance with the Inter-American Court of Human Rights' (2017) (unpublished, on file with authors). To our knowledge, no such study has been conducted on the ECtHR.

subsequently clarified its position and confirmed the basic tenets of the *D.H.* judgment in cases against other signatory parties.¹⁵⁶ By doing so, it has increased the pressure on the Czech government. In contrast, the HRC has not issued similar decisions against other states and has failed to improve its reasoning in its 'restitution rulings'.

Moreover, the pressure of the supervisory bodies varied as well. While the HRC's practice in follow-up procedures has been the most developed among the UN treaty bodies,¹⁵⁷ it has not exercised any significant pressure on the Czech Republic due to a lack of resources. In contrast, the CoM has increased its scrutiny especially in the *D.H.* case, which was upgraded to an enhanced supervision mode.¹⁵⁸ It has exercised a constant and intense pressure on the Czech government to adopt new implementation measures. Due to the regular meetings of the CoM, the Czech Republic has repeatedly faced the question of implementation of the *D.H.* judgment. This issue has been put on the table again and again, backed, in particular, by the Nordic states and influential and dedicated international NGOs, which has been an additional incentive for the dynamics of the domestic compliance process and has contributed to steps towards compliance.¹⁵⁹

Finally, the *D.H.* case also appealed to other constituencies beyond the Strasbourg system.¹⁶⁰ Notably, the Nordic countries and their representatives have criticized the Czech government for not implementing the *D.H.* case properly, both at the CoM meetings as well as at other diplomatic fora.¹⁶¹ In this endeavour, the Nordic countries have joined forces with Amnesty International and other international NGOs.¹⁶² Perhaps even more importantly, the European Commission has further increased pressure on the Czech Republic to implement the *D.H.* judgment since it has initiated the infringement procedure against the Czech Republic under the Racial Equality Directive, using the shortcomings of the Czech Republic that were exposed by the *D.H.* judgment as a major argument.¹⁶³ Some domestic pro-compliance actors have even claimed that the threat of initiating infringement procedures has given them more domestic leverage than the enhanced supervision reviews by the CoM.¹⁶⁴ In contrast, the HRC has not managed to engage the EU nor other signatory parties to the ICCPR in the implementation of its 'restitution views' against the Czech Republic.

In other words, the international reputational costs of non-compliance have been much higher in the *D.H.* case than in the restitution cases. While this difference is

¹⁵⁶ See, e.g., ECtHR, *Sampanis v. Greece*, Appl. no. 32526/05, Judgment of 5 June 2008; ECtHR, *Oršuš v. Croatia*, Appl. no. 15766/03, Judgment of 17 July 2008; ECtHR, *Horváth and Kiss v. Hungary*, Appl. no. 11146/11, Judgment of 29 January 2013.

¹⁵⁷ See Von Staden, 'Monitoring Second-Order Compliance: The Follow-up Procedures of the UN Human Rights Treaty Bodies', 9 *Czech Yearbook of International Law* (2018) 329.

¹⁵⁸ *Supra* note 111.

¹⁵⁹ *Supra* notes 119, 127, 129 and 131.

¹⁶⁰ See also the countries against which the 'post-*D.H.*' case law was targeted (*supra* note 156).

¹⁶¹ *Supra* note 112.

¹⁶² *Supra* note 159.

¹⁶³ *Supra* notes 125-127.

¹⁶⁴ Interview with an employee of the Czech Ombudsman's Office, 14 November 2017.

partly caused by the differences in powers of the relevant supervisory bodies and the lower normative force of the HRC's views, this is not the whole truth. The pressure from the EU and the Nordic countries, as well as the subsequent Strasbourg rulings on indirect discrimination of Roma children against other signatory parties, has been instrumental in raising the international reputational costs in the *D.H.* case. Conversely, the inability of the HRC to engage the European Commission in the restitution cases during the Czech accession process,¹⁶⁵ as well as HRC's failure to develop its 'restitution case law' against other states, has contributed to the low international reputational costs of non-compliance with the HRC's views on the Czech restitution laws.

Apart from domestic politics and international pressure, there is one more element in the implementation process that can make the difference, even though it is seemingly unrelated to the given human rights issue. Sometimes unexpected external shocks may reduce or increase domestic political costs of compliance with international human rights rulings. Recall that the key legislation for implementing the *D.H.* case was adopted in 2015 and 2016. This was actually the peak of the EU migration crisis that overshadowed any other human rights issue, both among politicians and the media. In comparison to the refugee resettlement quotas imposed by the EU, the requirements of the *D.H.* judgment seemed all of a sudden to be relatively meek and less salient.¹⁶⁶ To put it bluntly, the threat of a flow of migrants became the main target of criticism, not the educational changes helping the Roma community. In such an environment, the issue of inclusive education became relatively easier to push through the Czech Parliament. The EU migration crisis thus helped to create a 'window of opportunity' for adopting inclusive education laws, which would have otherwise been difficult to sell to the members of parliament due to the high salience of the issue and the potential retaliation of a significant portion of the Czech electorate. Minister of Education Valachová fully exploited this unique opportunity and pushed these bills through the Parliament successfully.

Some of the factors mentioned in this article have already been discussed in the compliance literature. It is known that the domestic 'battle' over compliance¹⁶⁷ is inseparable from an international human rights ruling,¹⁶⁸ from the subsequent input of

¹⁶⁵ The principle of the rule of law and prohibition of discrimination were discussed in the accession reports at length. The HRC thus missed the opportunity to team up with the European Commission and exercise the synergic pressure on the Czech Republic to comply with the HRC's views on the Czech restitution laws.

¹⁶⁶ The Visegrad countries (including the Czech Republic), supported by the polls, significantly resisted the quota.

¹⁶⁷ Marmo, 'The Execution of Judgments of the European Court of Human Rights: A Political Battle', 15 *Maastricht Journal of European and Comparative Law* (2008) 235.

¹⁶⁸ See, e.g., Voeten, 'Does Professional Judiciary Induce More Compliance?', *Social Science Research Network* (2012), at 25 (regarding the ECtHR); Larsson *et al.*, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union', 50 *Comparative Political Studies* (2017) 879, at 902 (regarding the Court of Justice of the European Union) (all claiming that international rulings that are perceived of as being of high legal quality have a better chance being quickly and extensively complied with as they are more likely to persuade domestic actors).

international human rights bodies during the follow-up procedures¹⁶⁹ and from the actions of other supranational actors.¹⁷⁰ We also know that an international human rights ruling can shift the domestic discourse and strengthen the bargaining position of certain domestic actors.¹⁷¹ More specifically, it can provide the political coverage for human rights reform or even lead to popular mobilization demanding compliance.¹⁷² By doing so, it can help to overcome domestic opposition¹⁷³ and tip the balance in favour of implementation.¹⁷⁴ However, IHRBs can achieve this goal only if they find the support of domestic and transnational interlocutors.¹⁷⁵ In other words, the strength and mindset of the pro-compliance camp as well as of the anti-compliance coalition matter.

Our contribution to the existing compliance literature is the identification of additional factors that affect the compliance process – the possibility of reframing the human rights issue that is being complied with, the synergic effects with the EU and external shocks. These factors have not been sufficiently discussed in the compliance scholarship. Yet they have played an important role in the three sets of judgments against the Czech Republic and, to a large extent, explain the emergence of compliance difficulties. While the cumulative effect of the synergy with the EU and the external shock provided an implementation boost in the *D.H.* case, the difficulty in reframing the *D.H.* case has hampered full implementation since the very beginning. In a similar vein, the impossibility of reframing the citizenship requirement in restitution laws, the low international reputational costs due to the uniqueness of the transitional setting and the non-binding status of the HRC's views, the lack of synergy with the EU and no relevant external shock have helped us explain non-compliance with the the HRC's restitution rulings. Moreover, these new factors might be the proverbial missing pieces in the compliance puzzle. If we add them to the puzzle, a clearer picture starts to emerge. We sketch this picture in the next section of this article.

5 Towards a Theory of Compliance Difficulties

The previous section has illustrated the dynamics of compliance mechanisms in the Czech Republic and identified the factors affecting the emergence of compliance

¹⁶⁹ See Cali and Koch, 'Foxes Guarding the Foxes?', 14 *Human Rights Law Review (HRLR)* (2014) 301 (regarding the role of the Committee of Ministers in supervising the execution of the ECtHR judgments); Baluarte and De Vos, *supra* note 12, at 122ff (regarding the HRC's follow-up procedure and the role of the special rapporteur for following up on views).

¹⁷⁰ Hillebrecht, *supra* note 15, at 39–40.

¹⁷¹ De Stefani, 'The European Court of Human Rights: A New Actor of Multi-level Governance?', in L. Bekemans (ed), *Intercultural Dialogue and Multi-Level Governance in Europe. A Human Rights Based Approach* (2012) 293, at 298.

¹⁷² Simmons, *supra* note 41, at 15.

¹⁷³ Helfer and Voeten, *supra* note 2, at 79.

¹⁷⁴ Alter, *supra* note 40.

¹⁷⁵ *Ibid.* See also, *mutatis mutandis*, Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors', 26 *Comparative Political Studies* (1994) 510.

difficulties in high-cost rulings. This section will analyse how these factors have operated together and led to a variable level of implementation. Although we believe these factors can be generalized beyond the Czech case, it is necessary to consider the limitations of this case study research. First, it is extremely difficult to make definite causal claims in such a complex endeavour since the implementation of high-cost rulings of the IHRBs require the action of many stakeholders. Second, with respect to country selection, our conclusions are likely to be restricted to other liberal democracies with developed institutional capacities.¹⁷⁶

While we find it difficult to single out the factors that account for variable implementation, we believe that there is a clear pattern in how these factors operate together within the compliance process. Our study shows that the level of compliance achieved depends on a repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance, on the one hand, with the international reputational costs of non-compliance, on the other.¹⁷⁷ Importantly, this balancing exercise is repeated as it is conducted not only immediately after the ruling of IHRB is rendered but also at later stages when the political actors receive a sufficiently strong impulse. As will be shown below, the political costs of compliance as well as the reputational costs of non-compliance may change over time, each of them in both directions, which may alter the result of the balancing exercise. Sometimes, even a short moment of time when the domestic political costs of compliance become lower than the international reputational costs of non-compliance may create a ‘window of opportunity’ for adopting legislation that is necessary for implementing the high-cost ruling.

The simple logic of this balancing exercise is as follows: the higher the domestic political costs and the lower the reputational costs are, the more likely compliance difficulties occur. On the contrary, cases that are distinguished by low domestic political costs and high international reputational costs tend to lead to full and timely compliance, at least in the case of a liberal democracy with well-developed institutional capacities. We understand the domestic political costs of compliance to be the costs of overcoming domestic opposition. General measures implementing international human rights rulings change the *status quo*, and there will always be some actors opposing the change. The domestic perception of the issue addressed by the international decision then affects what kind of actors and opposition will be involved in the compliance process.

If the issue can be framed so that it is perceived domestically as being technical (like the lengthy proceedings in the Czech Republic), it is not likely that the ruling will attract the attention of strong political actors. Thus, the opposition will rather be doctrinal and/or technocratic. In such cases, the political costs of overcoming the opposition and implementing the required policy change are rather low. At the other end

¹⁷⁶ See Section 3 above. This is, of course, subject to further research.

¹⁷⁷ We can easily reframe this cost-versus-cost balancing into a more traditional cost/benefit analysis (in which domestic political costs of compliance are balanced against international reputational benefits of compliance), but we believe that treating international reputation side of equation as ‘reputational costs of non-compliance’ better reflects the reality.

of the spectrum are cases with extremely high political costs of policy change. Those cases touch upon issues concerning the constitutional identity of the given polity (like the restitutions, which arguably became a part of the Czech constitutional identity). They are very likely to produce fierce opposition in strong political actors. As a result, the political costs of eventual policy change in such cases are extremely high. Similarly, cases touching upon constitutional sentiments (such as the *D.H.* case) likely produce considerable opposition in the political actors, which implies high political costs for policy change.¹⁷⁸

There are few ways to weaken the domestic political opposition, but most of them are not available immediately after the international human rights ruling is rendered. Perhaps the only measure that can be employed from the outset is reframing.¹⁷⁹ If the pro-compliance actors manage to give the issue a different 'spin', which makes the change more palatable, they may weaken or even disintegrate the anti-compliance camp and, thus, reduce the political costs of overcoming domestic opposition. However, even reframing is sometimes not an option as some issues are almost impossible (such as the state citizenship condition in the Czech restitution cases) or difficult (such as reducing the number of Roma children in practical schools) to reframe.

On the other end of the balancing scale are the international reputational costs of non-compliance. In general, third states rarely intervene directly in the implementation of an IHRB's ruling in a non-complying state.¹⁸⁰ However, if the international human rights ruling addresses a structural issue that is also present in other signatory states and this issue is particularly dear to the third states (such as Nordic states in the *D.H.* case) and other international actors (such as the EU and international NGOs in *D.H.*), the international reputational costs are no longer negligible and may alter the result of the balancing exercise. However, as mentioned above, this balancing exercise is not static. In fact, the lapse of time is an important intervening factor in the compliance process. As time passes, the domestic political costs, as well as the international reputational costs, may change. These changes may create 'windows of opportunity' for implementing the international human rights ruling. This may happen when either initial domestic political costs decrease or when initial international reputational costs increase (or both phenomena occur at the same time) to such an extent that it alters the result of the balancing exercise in favour of compliance.

First of all, the lapse of time can bring about inputs that may rearrange the domestic political costs of compliance. The clearest one is the change of electoral preferences of the people and the respective governmental alteration. However, sometimes even the change of a key minister can make the difference.¹⁸¹ Another possible input

¹⁷⁸ *Supra* note 132.

¹⁷⁹ The other measures (discussed below) such as wearing the anti-compliance camp out, altering the government or changing the attitudes of the public require more time. External shocks cannot be, by their very nature, triggered internally.

¹⁸⁰ *Supra* note 55.

¹⁸¹ See the role of the new Minister of Education Valachová in the *D.H.* case, *supra* note 131, and the impact of the new Minister of Justice Němec in the lengthy proceedings saga (see Section 4C above).

is a decision of a domestic (top) court advocating for,¹⁸² or, on the contrary, rejecting,¹⁸³ the conclusions adopted by an IHRB. The volatile pressure of civil society and the changing attitudes of the general public operate in a similar fashion. The relentless pressure of dedicated pro-compliance actors, such as NGOs, may simply wear out the anti-compliance camp over time.¹⁸⁴ Conversely, the decreasing interest of NGOs in a certain human rights issue may weaken the pro-compliance camp.¹⁸⁵ Attitudes of the wider public may also change in favour of compliance (typically in lesbian, gay, bisexual, transgender and intersex issues) or against it (typically in asylum law). Those issue-reframing efforts of the pro-compliance actors are again relevant in this regard. Next, the costs of overcoming the domestic opposition can be temporarily weakened by unrelated external shocks that may divert the attention from the relevant international human rights ruling and the given human rights issue.¹⁸⁶ Moreover, a lapse of time can imply changes on the international reputation side of the scale too. As mentioned above, the pressure of the CoM, HRC, other states and international NGOs can affect the domestic compliance processes. These pressures can raise the international reputational costs of non-compliance.

In sum, IHRBs must ‘read’ domestic, as well as international, politics well. No international body can impose its own legal solutions in the absence of the support of domestic and transnational interlocutors.¹⁸⁷ As a result, international judges and members of IHRBs ‘must make a political calculation about the power and potential of certain interlocutors and they must take into account the counter-forces that want the opposite interpretation’.¹⁸⁸ This is not to say that international judges should become ‘spin doctors’. We merely argue that they should know their compliance constituencies (domestic as well as international)¹⁸⁹ since the preferences of these compliance constituencies are more important than the preferences of litigants and the defendant states.¹⁹⁰ Pro-compliance actors should then be aware of the fact that the ‘windows of

¹⁸² Sadurski, for instance, shows how the alliance of the ECtHR and the Polish Constitutional Court changed the domestic political costs and eventually helped to overcome domestic political opposition regarding the deregulation of rents. Sadurski, ‘Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’, 9 *HRLR* (2009) 397.

¹⁸³ See, e.g., the CCC’s restitution judgment (*supra* note 97).

¹⁸⁴ See, e.g., the pressure of international non-governmental organizations in the *D.H.* case (*supra* notes 119, 127, 129 and 131).

¹⁸⁵ See, e.g., the declining activity of associations of Czech compatriots in the restitution cases (*supra* note 101).

¹⁸⁶ See the example of the *D.H.* case and the migration crisis. The same dynamics might also take place in ECtHR (GC), *Hirst v. United Kingdom (no. 2)*, Appl. no. 74025/01, Judgment of 6 October 2005. In the wake of Brexit, the issue of the prisoners’ right to vote might lose salience significantly. As a result, the long-standing resistance to implement the Grand Chamber judgment in *Hirst* is starting to crumble. See Dzehtsiarou, *Prisoner Voting and Power Struggle: A Never-Ending Story?* (2017), available at <http://verfassungsblog.de/prisoner-voting-and-power-struggle-a-never-ending-story/>.

¹⁸⁷ Alter, *supra* note 40, at 20. See also, *mutatis mutandis*, Weiler, *supra* note 175.

¹⁸⁸ Alter, *supra* note 40, at 20.

¹⁸⁹ E.g., the stance of the CCC was a good ‘barometer’ of compliance difficulties in the Czech context (*supra* notes 97 and 121).

¹⁹⁰ See, *mutatis mutandis*, Alter, *supra* note 40, at 3.

opportunity' for implementing the high-cost rulings can be quite short, and they thus must be ready to act when such a window opens.

6 Conclusion

Compliance difficulties pose a major challenge to the effective and legitimate functioning of IHRBs. Building on the compliance processes in the Czech Republic, this article has aimed to explain under what conditions compliance difficulties occur in well-complying liberal democracies and what factors contribute to their overcoming these difficulties. We have argued that compliance difficulties emerge as a result of the domestic battle over compliance, which is fuelled by the internal characteristics of the given international human rights ruling and the subsequent inputs by IHRBs and other international actors. However, we went deeper and showed that the fate of compliance difficulties is also affected by other understudied factors such as the possibility of, and the eventual success in, reframing the given human rights issue, synergic effects with the EU and external shocks.

We have also identified a recurring pattern that explains the occurrence of compliance difficulties and their inability to overcome these difficulties – the level of compliance achieved depends on a repeated balancing exercise, in which domestic political actors balance the domestic political costs of compliance with the international reputational costs of non-compliance. The higher the domestic political costs and the lower the international reputational costs are, the more likely compliance difficulties occur. On the contrary, cases with low domestic political costs and high international reputational costs tend to lead to full and timely compliance.

Importantly, such balancing is exercised repeatedly as the lapse of time can bring additional incentives, which may alter the domestic political costs as well as international reputational costs. This ongoing dynamics implies that compliance difficulties can be overcome at later stages of the implementation process, but only if domestic political costs of compliance become lower than the international reputational costs of non-compliance. We call this moment a 'window of opportunity'. Our study shows that pro-compliance actors have to take full advantage of such 'windows of opportunity' in order to overcome compliance difficulties and adopt measures necessary for complying with the rulings of IHRBs. If they fail to do so, this window of opportunity may close for a long time, if not forever.