

Where is the harm in a privacy violation?

Calculating the damages afforded in privacy cases by the European Court of Human Rights

1. Introduction

In the field of privacy, the notion of harm has always been problematic as it is often difficult to substantiate the harm a particular violation has caused, e.g. what harm follows from entering a home or eavesdropping on a telephone conversation as such when neither objects are stolen nor private information disclosed to third parties? Even so, the traditional privacy violations (house searches, telephone taps, etc.) were often clearly demarcated in time, place and person and the effects are therefore relatively easy to define. In the current technological environment, with developments such as Big Data, however, the notion of harm is becoming increasingly problematic. Often, an individual is simply unaware that his personal data are gathered by either his fellow citizens (e.g. through the use of smartphones), by companies (e.g. by tracking cookies) or by governments (e.g. through covert surveillance). And if an individual does go to court to defend his rights, he has to demonstrate a personal interest, i.e. personal harm, which is a particularly problematic notion in Big Data processes, e.g. what concrete harm has the data gathering by the NSA done to an ordinary American or European citizen?

This example shows the fundamental tension between the traditional legal and philosophical discourse and the new technological reality – while the traditional discourse is focused on individual rights and individual interests, data processing often affects a structural and societal interest and in many ways transcends the individual. This study will analyse how the European Court of Human Rights (ECtHR) determines harm and compensation for harm with respect to infringements on the right to privacy as entailed in the European Convention on Human Rights (ECHR), Article 8: ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Just after the Second World War, several international and continental human rights frameworks were developed. Most importantly, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights. The European Convention on Human Rights was designed on a regional level at the time the ICCPR was still being developed. The idea was to adopt a legal instrument, that could be invoked by citizens, legal persons, groups and other states alike; the European Court of Human Rights was installed to assess cases that were brought under the Convention. The Convention contains two modes of complaint: individual applications and inter-state complaints. The first mode of application is open to natural persons, legal persons (not being governmental institutions) and groups of natural persons. The second mode is open to member states to the Convention. Importantly, cases can only be brought against states and not against private individuals or legal persons – for example, Brown against the Netherlands, but not Brown against Heineken or Brown against Smith.

Under the Convention, a two-tier system exists. Originally, the system was as follows. First, the European Commission on Human Rights (ECmHR) would decide on the

admissibility of cases and functioned as a mere filtering system. It would not provide a substantial review of cases, but would reject those cases that were clearly unfounded, submitted out of time, fell outside the competence of the Court, etc. Second, if a case was declared admissible, the European Court of Human Rights could assess the content of the case and determine whether a state had violated one or more of the provisions contained in the Convention. Currently, the system has been changed somewhat; but although the Commission has ceased to exist, its tasks have been transferred to a separate division of the ECtHR. Consequently, the two-tier model still exists, but is operated by two different sectors of the Court. It should be noted that this study has only analyzed the substantive judgements of the ECtHR (the second-tier) and not the decisions on the admissibility of cases (the first-tier). Until now, about 1700 cases regarding the right to privacy under the ECHR have been dealt with in substance by the ECtHR; by contrast, there have been about 4000 decisions on the admissibility of cases in which the right to privacy was invoked. Of the 1700 cases, those cases that have been delivered until 2010 have been analyzed for this study, which make up about 1000. The cases from 2010 onwards are not studied – this was a matter of time.

The European Convention on Human Rights was adopted in 1950. Although but a few European countries ratified the Convention originally, currently, only very few European countries have not subjected themselves to the ECHR. It is important to underline that the European Convention on Human Rights is not an instrument of the European Union, but of the Council of Europe. The Council of Europe is both older and has more Member States than the European Union. While 47 countries have ratified the European Convention, the European Union only has 28 members. The division of tasks between the two organizations was originally quite clear. The Council of Europe was primarily concerned with the protection of human rights, while the European Union was primarily concerned with developing socio-economic policies. However, especially the EU has tried to dominate the human rights realm as well, among others by adopting the EU Charter of Fundamental Rights, which is overseen by the EU Court of Justice. To make things more complicated, the EU has become an official party to the ECHR and is consequently bound by it.

The European Convention on Human Rights exclusively contains civil and political rights. It lays down the prohibition of death, torture and degrading treatment, the right to liberty and security, the right to a fair trial, the prohibition of retroactive legislation, the right to privacy, the right to freedom of religion, the right to freedom of expression, the right to assembly and demonstration, the right to marry and found a family, the right to petition and the prohibition on discrimination. Different protocols are attached to the Convention, which embody socio-economic rights and third generation rights. Ratifying these protocols is optional for Member States. Article 8 ECHR is a so called qualified right, which means that the first paragraph embodies the core of the right and the second paragraph specifies when and under what conditions states may legitimately curtail the right to privacy. In this sense, it differs from, for example, absolute prohibitions, such as the prohibition of torture (Article 3 ECHR). This will be explained in more detail later in this article.

This study has analyzed the 1016 cases until 2010 in which the ECtHR has assessed cases in substance (second-tier) on a potential violation of the right to privacy under the Convention. Eight factors have been selected in order to evaluate the amount of damages awarded per case. These are: (1) the type of damage that is compensated (explained in the second section of this article); (2) the year in which the judgement was delivered by the Court (third section); (3) the country against which the complaint was lodged (fourth section); (4) the setting of the Court which delivered the judgement (fifth section); (5) the type and (6) the number of applicants (sixth section); (7) the type of privacy at stake (seventh section); (8) and the ground on which a violation was established (eighth section). The article will conclude with a summary of the most important findings and correlations (ninth section).

2. Types of damages awarded

If the European Court of Human Rights finds a violation of a provision contained in the Convention, it may decide to impose a fine or a sanction. It can hold that a state should stop violating the Convention, that it should abstain from executing its plans (for example, extraditing an immigrant) because that would be in violation of the Convention or that it should adopt additional policies to prevent others from violating the rights of the applicant (for example, ensuring that the claimants are adequately protected against systematic harassment by third parties). The Court can also impose an obligation on a state to provide financial relief to the claimant. Article 41 of the ECHR holds on this point: ‘If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.’ The applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention must make a specific claim to that effect. It is for the applicant to submit itemized particulars of all claims, together with any relevant supporting documents.¹

The award of just satisfaction is not an automatic consequence of a violation being found by the ECtHR. The Court will only award such satisfaction if it considers that to be “just” in the circumstances of the case. This means that the particular features of each case are taken into account when making that assessment. Importantly, the Court may decide that the finding of a violation constitutes in itself sufficient satisfaction, without there being any need to afford financial compensation. Indeed, the Court adopts this approach in quite a number of cases, as will be explained later in this article. The Court may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred. A reason for such a decision may be that the situation complained of or the amount of damage or the level of the costs is due to the applicant’s own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant and the Member State and the local economic circumstances.

In general, a clear causal link must be established between the damage claimed and the violation alleged. A merely tenuous connection between the alleged violation and the damage or mere speculation as to what might have been is not enough. It is important to point out that the purpose of the damages is to compensate the applicant and not to punish the Member State. Three types of damage may be awarded by the ECtHR: pecuniary damage, non-pecuniary damage and costs and expenses. These three categories are also used in this article when calculating the amount of damages awarded by the Court. One additional category has been added, ‘Combination’, for cases in which the damages are awarded in total or in respect of a combination of two of these categories. In general, the Court is very explicit on the point of how much damage is awarded per category, but in a handful of cases, it has stressed that it is unable to determine the damages precisely and that it will consider that, for example, the material and immaterial damages taken together amount to a certain sum.

About awarding pecuniary damage, the Rules of the Court make clear that the principle is that the applicant should be placed, as far as possible, in the position in which he would have been had the violation found not taken place, in other words, *restitutio in integrum*. This can involve compensation for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*). Normally, the Court’s award will reflect the full calculated amount of the damage, but if the actual damage cannot be precisely calculated, the Court will make an estimate based on the facts at its disposal. On awarding non-pecuniary damage, the Rules of the Court emphasize that this is intended to provide financial compensation for non-material harm, for example mental or

¹ Rule 60 of the Rules of the Court. The text below is based on the appendix to this document.

physical suffering. Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would be equitable. Importantly, applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation. Finally, awarding money for costs and expenses is intended to compensate for the applicant's travel costs, costs for lawyers and possibly for other expenditures related to the legal proceedings themselves. The Rules of the Court specify on this point that the Court can order the reimbursement to the applicant of costs and expenses which he has incurred – first at the domestic level, and subsequently in the proceedings before the Court itself – in trying to prevent the violation from occurring, or in trying to obtain redress therefor. Importantly, costs and expenses must have been necessarily incurred, meaning that they must have become unavoidable in order to prevent the violation or obtain redress therefor. They must be reasonable as to quantum.

In this study, the amounts awarded by the ECtHR have been calculated in Euro's. After the introduction of the Euro, the Court has (with a few exceptions) used the Euro as its standard currency, even for applicants from countries that have a different currency.² However, the Euro was introduced virtually in 1999 and in notes and coins in 2002; in cases before 2002, the ECtHR used the currency of the state against which a violation was found. These sums have been converted into Euro's using the fixed conversion rates as established by the EU for countries joining the Euro-group;³ for other currencies, a fixed conversion rate has been set too.⁴ Choosing a fixed conversion rate means that no account is taken of the fluctuations in currencies. Although for most countries these are relatively stable, some countries, such as Italy, have historically devaluated their currency a number of times, so that picking one fixed rate may give a somewhat distorted picture. Other choices made are:

1. Only the cases in which Article 8 ECHR was violated are included with respect to the damages; cases in which no violation was found, but in which the Court did award damages in relation to a violation of another provision, are not included with respect of the damages.
2. In cases in which a violation of Article 8 ECHR was found, all damages have been included, even if a violation of more provisions was established; this is because the ECtHR usually awards a total sum for the violations, without differentiating.
3. When awarding damages for costs and expenses, the ECtHR usually grants a total sum and makes clear that from that sum must be deducted the relief the applicants received via other means; in this study, the total sum is included.
4. In some cases, the Court stresses that it will calculate the damages to be awarded in a separate decision, but sometimes, the parties have reached a settlement on the compensation before that judgement. These damages are not taken into account, because the amounts agreed upon are usually not disclosed to the public.
5. The Court often underlines that interests rates should be taken into account, if the country does not pay the damages within the period specified by the Court. These rates have not been taken into account, because it is usually impossible to find out whether the country did pay the damages on time or not.
6. Sometimes, the Court stresses that if a country executes a certain policy, it would act in violation of the ECHR and that if it would go on to execute the policy, it would need to pay damages. These damages have also been taken into account, although it is unclear whether the country has indeed executed its policy.⁵

² The Euro is the currency introduced by the European Union, not by the Council of Europe. Moreover, some EU countries have decided not to join the Euro.

³ <http://www.ecb.europa.eu/euro/intro/html/index.en.html>

⁴ €1 = £ 0,7734 - €1 = \$ 1,1005 - €1 = 9.35332 SEK - €1 = 1.09362 CHF - €1 = 4,2995 Polish Zloty

⁵ See for example: 27527/03

Figure 1 Total amount of Euro's awarded in cases in which a violation of Article 8 ECHR was found

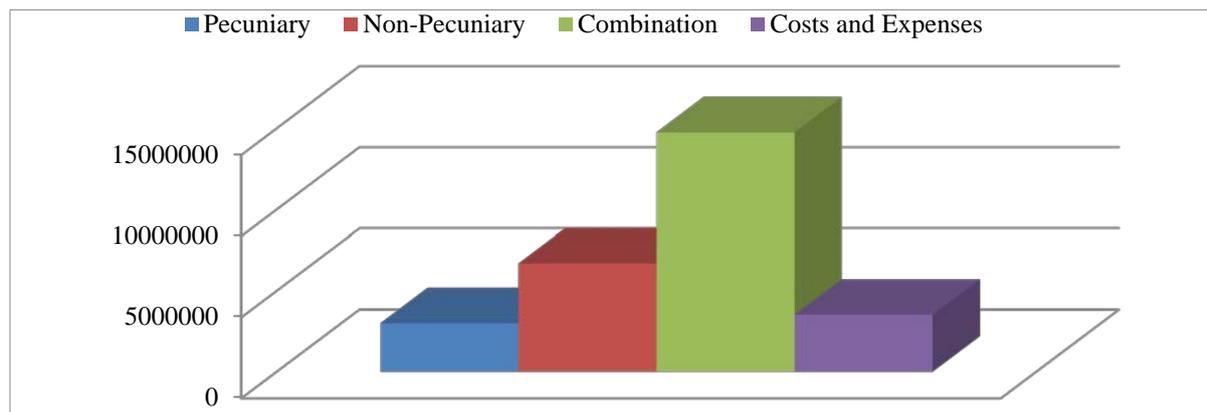
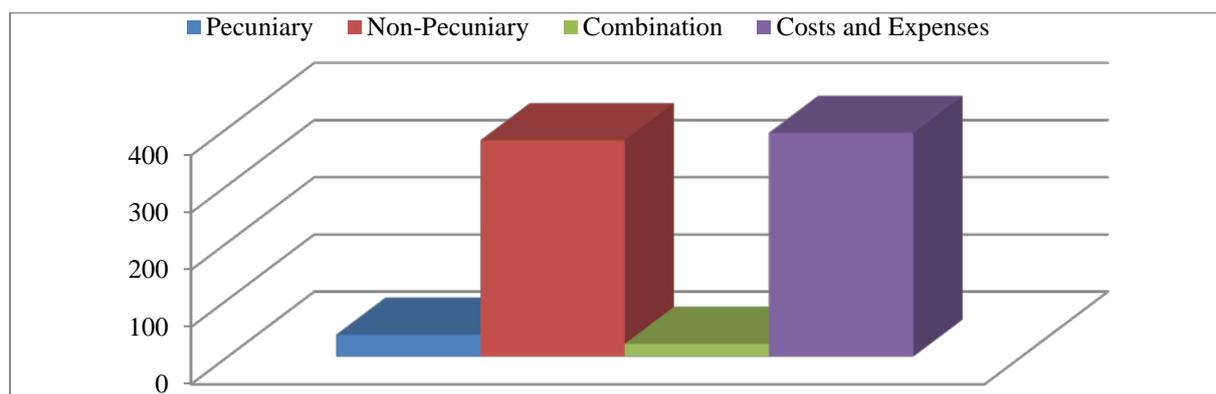


Figure 1 shows the total amount of damages the ECtHR has awarded for a violation of the right to privacy in cases until 2010 per category. In total, €3.001.222,- has been awarded in respect of pecuniary damages. With regard to non-pecuniary damages, this was €6.689.578,-. €14.757.151,- was the total amount of euro's afforded by the ECtHR to claimants in an unspecified manner. Finally, €3.526.334,- was awarded in total for cost and expenses. Divided by the number of cases in which a violation was found of Article 8 ECHR, this means that on average, €4.632,- for pecuniary damage, €10.323,- for non-pecuniary damage, €22.773,- for a combination of categories and €5442,- for costs and expenses have been awarded per case. This is remarkable because the ECtHR has only used the category of combined costs in about 20 cases, while it has awarded non-pecuniary damages and awards for costs and expenses in almost 400 cases. In 38 cases it has granted pecuniary damages.

Figure 2 Number of cases in which the Court has awarded damages in a certain category

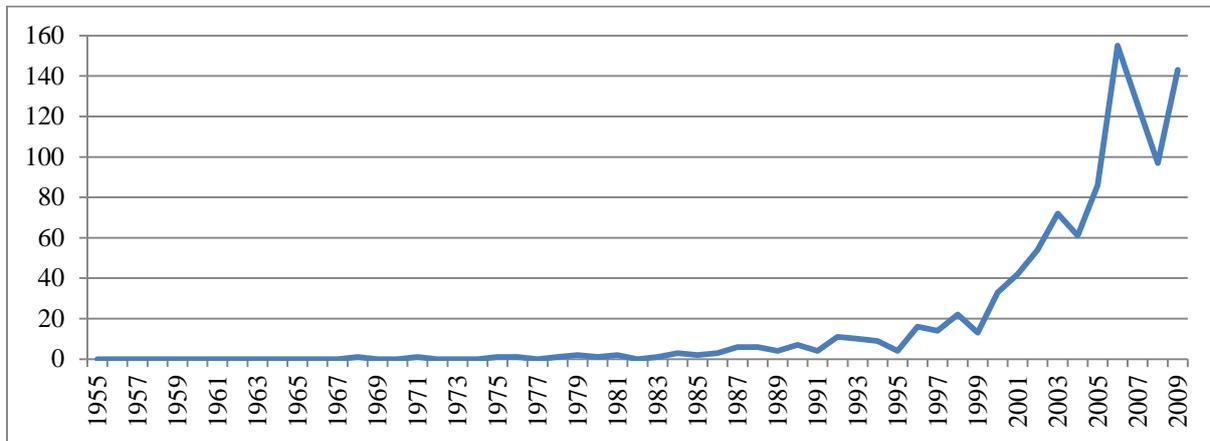


In conclusion, in most cases in which it finds a violation of Article 8 ECHR, the Court awards damages for non-pecuniary and/or for costs and expenses, but these are normally relatively small amounts. In a small number of cases, it will award either pecuniary damage or a combination of different types of damages (mostly including material damage) – in these cases, the amount of damages awarded are typically higher. This is evidently true for the combination of damages, but also for the pecuniary damages. Although the Court has awarded about two times more for non-pecuniary damage than for pecuniary damages in total, the number of cases in which it awarded non-pecuniary damage is about 10 times higher. Finally, it is interesting to note that of the 648 cases in which the Court has found a violation of Article 8 ECHR, it awarded some type of relief in 564 of them and in 440 of them, when the mere procedural costs (the awards for costs and expenses) are excluded.

3. Number of cases and violations

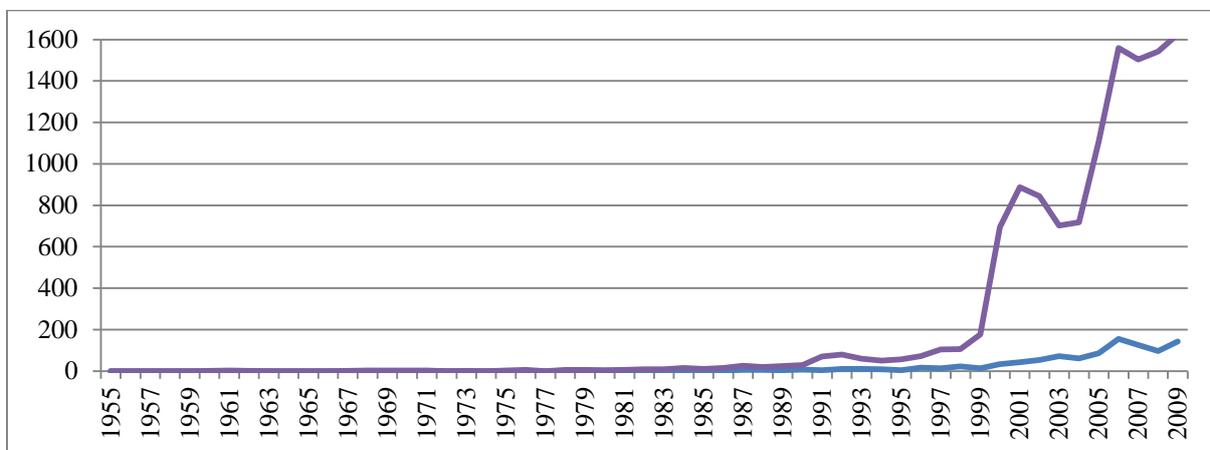
The importance of the right to privacy as protected under Article 8 ECHR and the European Convention on Human Rights in general has increased over time. Likewise, the case load for the ECtHR has grown exponentially. In the 50 years from the moment the Convention was adopted in 1950 until 2000, the Court assessed 145 cases in substance on a potential violation of the right to privacy. In the year 2009 alone, 143 cases were assessed by the ECtHR with regard to a possible violation of Article 8 ECHR, as is shown in Figure 3.

Figure 3 Number of cases in total on Article 8 ECHR



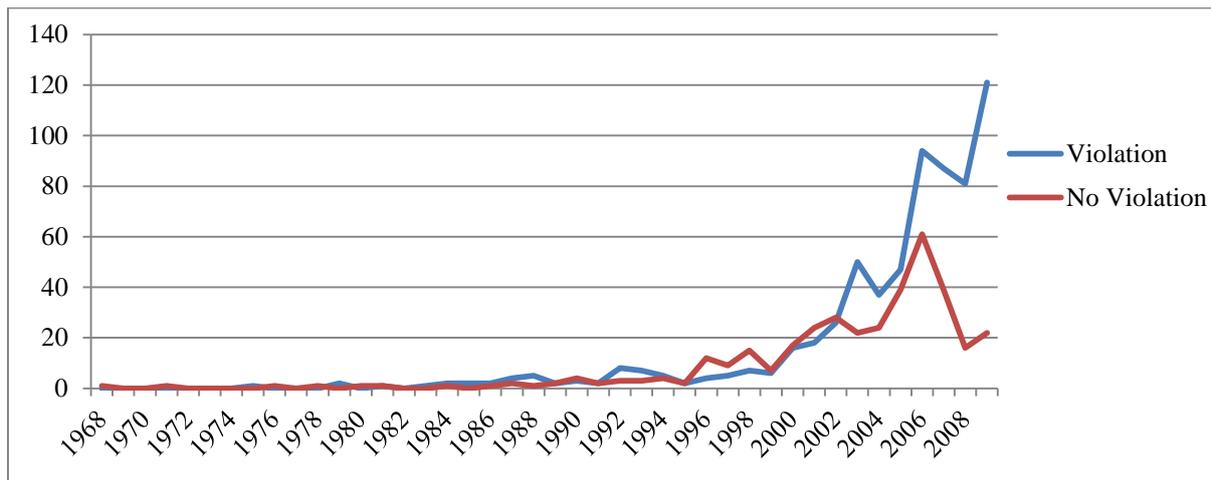
There are a number of potential reasons for this stark increase, such as: (1) There is a general societal tendency to use legal means to resolve disputes. (2) There is more awareness among claimants and lawyers of the existence of and possibilities under the ECHR. (3) The Court has broadened the scope of the provisions under the Convention in its case law, so that more and more cases fall under the Convention’s material scope (see also section 7). (4) More countries have signed onto the Convention. Consequently, the increase in cases before the ECtHR is a general tendency, not particular to Article 8 ECHR, as is shown in Figure 4.

Figure 4 Total number of cases compared to the cases on Article 8 ECHR



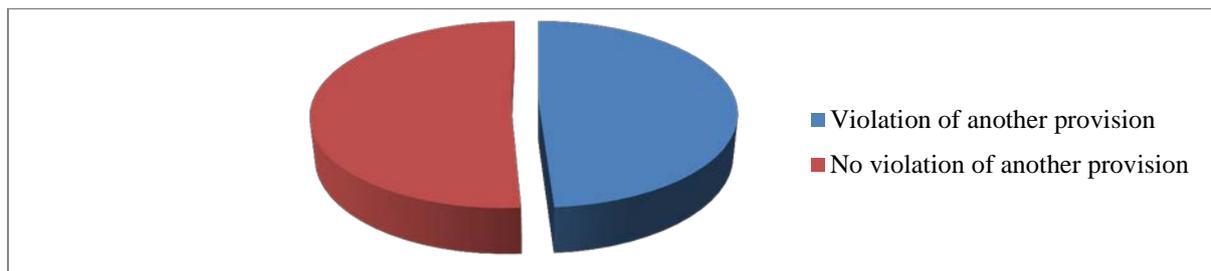
What is interesting to see is that the Court finds a violation of the right to privacy in a higher percentage of the cases before it over the years. Although until 2000, it held a violation of the right to privacy in about half of the cases under Article 8 ECHR, from the beginning of the new millennium, this has changed significantly, as evidenced by Figure 5.

Figure 5 The judgement of the ECtHR on the point of a violation of Article 8 ECHR



Importantly, most cases under the ECHR are combined complaints, either by multiple claimants and/or on multiple different points. For example, a claim might be that the government has violated the right to privacy (Article 8 ECHR) and has denied the right to a fair trial (Article 6 ECHR) of mr. Black. Or, the government has violated the right to privacy of mr. Black and has denied a right to a fair trial of mr. Black’s son and wife, who tried to defend their shared interests in court. Or, the toxic gasses emitted by a power plant violated the right to life (Article 2 ECHR) and the right to private life (Article 8 ECHR) of mr. Jones, mrs. Black, mr. Smith and 20 others living in the neighborhood. Consequently, even in cases in which no violation of Article 8 ECHR was found, the Court will often establish a violation of another provision contained in the Convention. In about half of the cases in which Article 8 ECHR was invoked, but not violated, the ECtHR did find a violation of another provision.

Figure 6 Percentage of the cases in which Article 8 was not, but another provision was violated

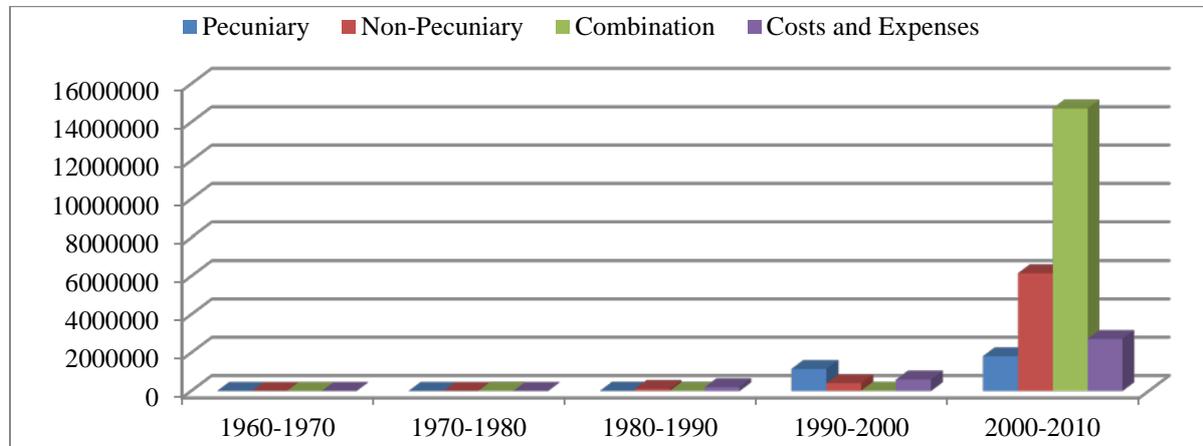


Importantly, of the 187 cases in which Article 8 ECHR was invoked and no violation of any provision under the Convention was established, 67 were not assessed in substance (even though in the second-tier), but struck from the role. A case is generally taken from the role if the parties have come to an agreement, in particular, when a Member State admits having violated the Convention and possibly, to award damages. Consequently, only in about 10% of the cases submitted to the ECtHR on a potential violation of Article 8 ECHR are the applicants left with empty hands.⁶ This is important because originally, the thought was that the admissibility procedure (the first-tier) would filter cases on mainly procedural aspects and the ECtHR would judge in substance (the second-tier) whether a violation of the Convention has occurred. Currently, however, it seems that if a case passes the first-tier, there is a very high chance that a violation of the Convention will be established by the ECtHR.

⁶ Even with regard to these cases, some of them have been submitted to the Grand Chamber and repealed.

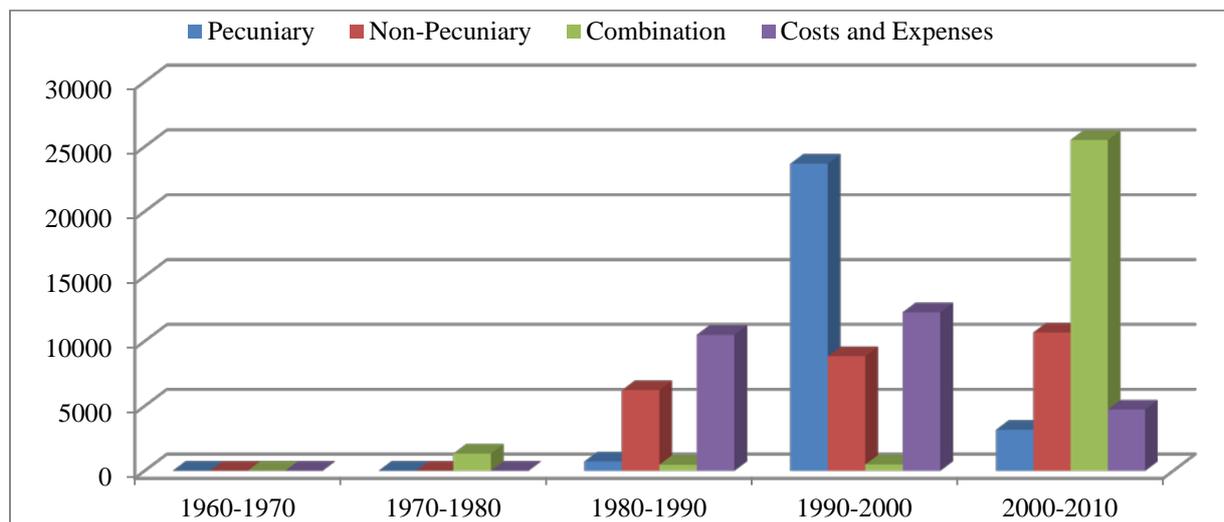
Given the fact that the total number of cases has increased exponentially over the years and added to that, that from 2000 onwards, the ECtHR has held a violation of Article 8 ECHR in a significantly higher percentage of the cases before it, it should not come as a surprise that the majority of the damage that has been awarded by the Court was granted in the last decennium. Especially the Combination and the Non-Pecuniary damages are high (Figure 7).

Figure 7 Damages awarded in absolute numbers per decennium



What is interesting to see, however, is that the amount of damage awarded per case in which a violation was found is relatively stable, as can be seen in Figure 8. The non-pecuniary damage awarded per case has steadily but slowly increased over time. Perhaps more remarkable is that the costs and expenses awarded by the Court on average per case has dropped in the last decennium. Why this is remains unclear. From the comparison between the last two decennia it appears that the categories pecuniary damage and a combination of damages are connected to each other. When the pecuniary damages are high, the combination category is relatively low and vice versa. This should not come as a surprise, because both categories are in particular used in the same types of cases, namely in which Turkey has bulldozed or set fire to villages and homes of the applicants or has evacuated villages by military means and prevented the inhabitants from returning for years. Relatively large sums of money are granted by the ECtHR in these types of cases. Consequently, the larger part of the ‘combination’ category is presumably made up of pecuniary damage.

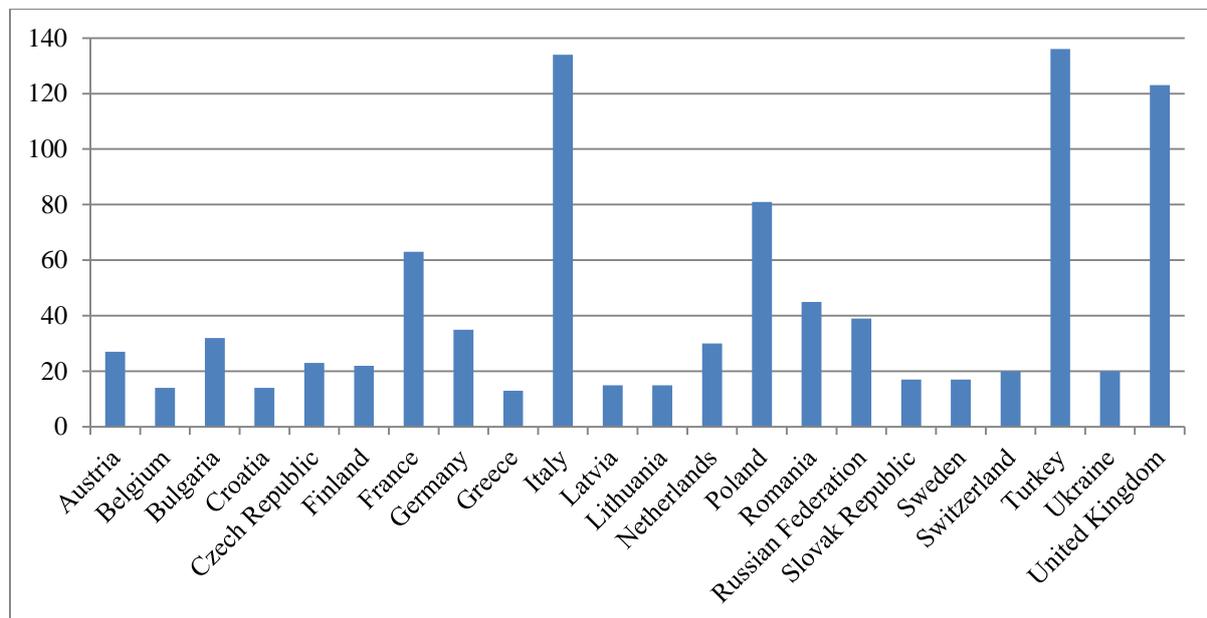
Figure 8 Damages awarded relative to the amount of cases in which a violation was found per decennium



4. Countries

The European Convention on Human Rights was adopted in 1950 by a small number of countries. Subsequently, it was ratified in the 1950's by thirteen states, namely Austria, Belgium, Denmark, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey and United Kingdom. In the 1960's only two smaller countries joined, namely Cyprus and Malta; it was only in the 1970's that a number of bigger European countries, in particular from the south, joined, namely France, Greece, Portugal, Spain and Switzerland. In the 1980's again, only two smaller countries joined, namely Lichtenstein and San Marino; it was only in the 1990's that the ECHR became the standard across Europe, especially because a number of Eastern-European countries joined. Albania, Andorra, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, The former Yugoslav Republic of Macedonia and the Ukraine all became a member to the Convention. Finally, in the new millennium, 6 others countries ratified the ECHR, namely Armenia, Azerbaijan, Bosnia and Herzegovina, Monaco, Montenegro and Serbia. There are currently only a handful of European countries that have not ratified the Convention, such as Vatican City, Belarus and Kazakhstan. It is important to stress, however, that even although countries have ratified the Convention, it is possible for them to make reservations, for example, with respect to the authority of the ECtHR. For example, although Turkey signed the Convention in 1954, it was only in 1995 that the ECtHR first assessed a case against Turkey (second-tier).

Figure 9 Countries with 10 cases or more on a potential violation of Article 8 ECHR until 2010



What is remarkable is that the majority of the Member States that have signed the Convention have been involved with no or only a very limited number of cases regarding a potential violation on Article 8 ECHR. The ECtHR has assessed 10 complaints or more about a violation of Article 8 (second-tier) only with respect to 22 of the 47 countries that have ratified the Convention. The other 25 countries have been involved with no or a only a very limited amount of complaints against them regarding a potential violation of the right to privacy. And of these 22 countries, only 10 were involved in more than 30 cases. In fact, it is clear from Figure 9 that a handful of countries are responsible for most cases, namely Italy, Turkey and the United Kingdom, and to a lesser extent Poland and France.

Figure 10 Number of cases regarding Article 8 ECHR per country per year

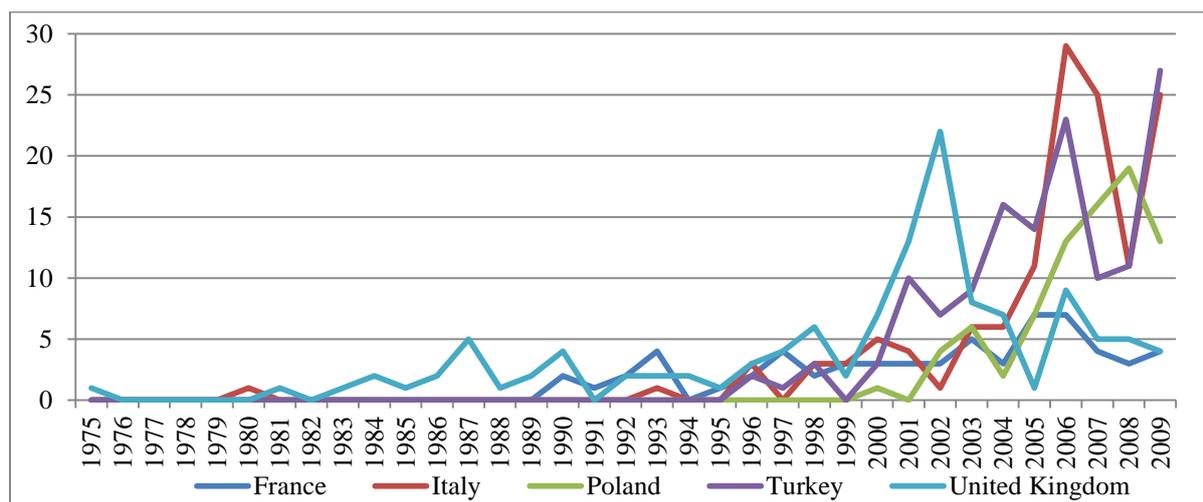
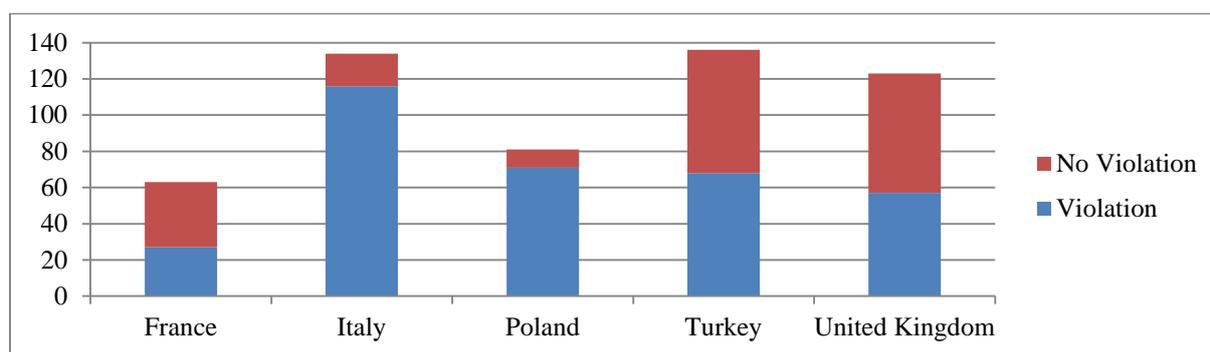


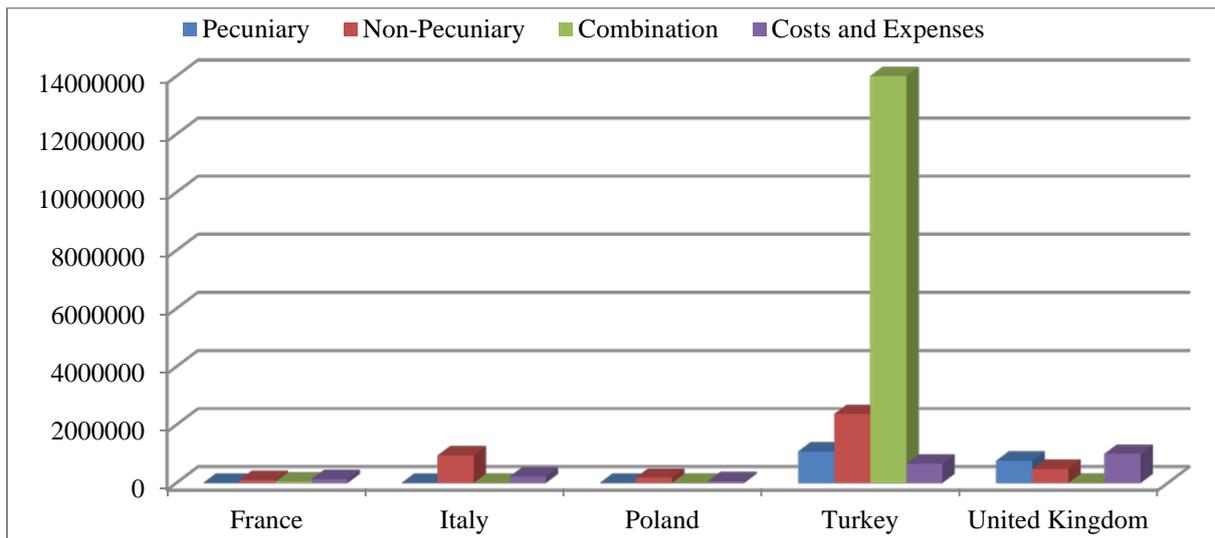
Figure 10 shows the number of cases per year with respect to France, Italy, Poland, Turkey and the United Kingdom. It appears that France has a quite small but steady number of complaints per year, the United Kingdom seems to have peaked in particular in 2001 and 2002 and that Italy, Poland and Turkey have been involved with cases regarding a potential violation of the right to privacy in particular in the new millennium, the first case ever assessed (second-tier) against Italy being in 1980, against Poland being in 2000 and against Turkey being in 1996. It is important to emphasize that there is an important difference between these five countries, as is evidenced by Figure 11. While France has not been convicted for a violation of the right to privacy in the majority of the cases lodged against it under Article 8 ECHR, with respect to Turkey and the United Kingdom, this is about 50% and Italy and Poland are held in violation of the Convention in the majority of the cases.

Figure 11 Number of cases in which the ECtHR has or has not established a violation of Article 8



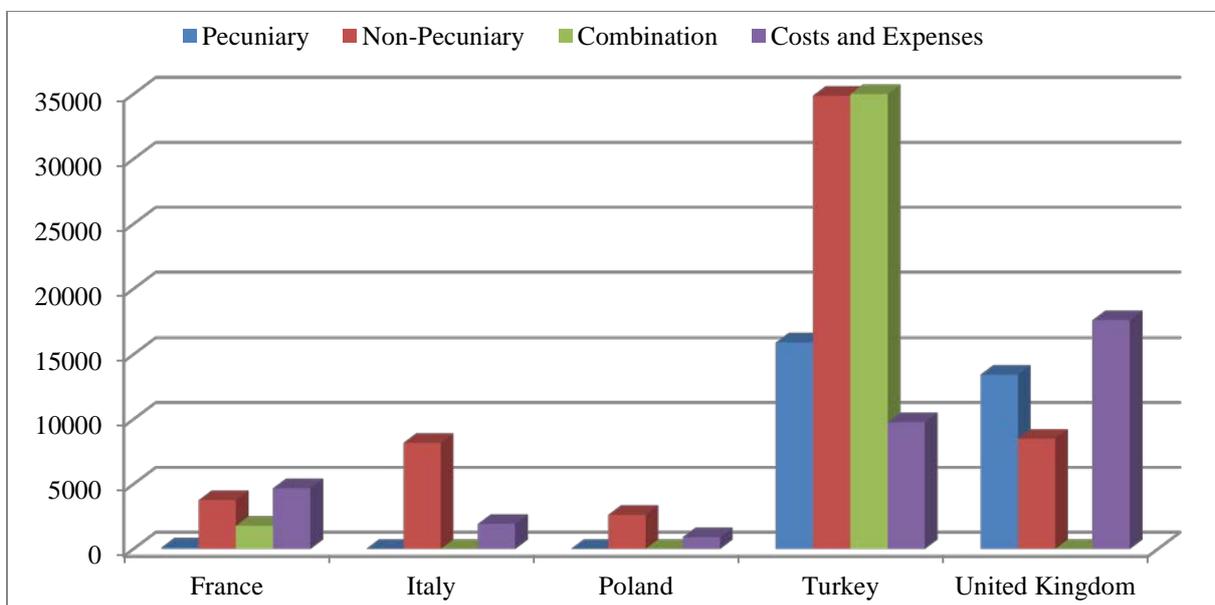
There are a number of other countries with a bad track record. Of the 27 cases (second-tier) regarding a potential violation of Article 8 ECHR against Austria, in 23, the ECtHR established a violation. For Bulgaria, this was 24 of the 32 cases, for Finland 14 of the 22 cases, for Germany, 20 of the 35 cases, for Latvia, 12 out of 15, for Lithuania, 14 out of 15, for Romania, 31 of the 45 cases, for Russia, 30 out of 39 and both Switzerland and the Ukraine were held in violation of Article 8 ECHR in 14 of the 20 cases lodged against them under this provision. In fact, 467 of the 647 cases in which the Court has found a violation of Article 8 ECHR, that is almost 75%, involved either one of these 10 countries: Austria, Bulgaria, France, Germany, Italy, Poland, Romania, Russia, Turkey and United Kingdom. The other 37 countries are responsible for the other 25 % of the violations of Article 8 ECHR.

Figure 12 Total amount of damages awarded per category per country



If the 5 countries are analyzed against which the most cases under Article 8 ECHR were assessed by the European Court of Human Rights, it appears that there exists a significant difference between them. While Poland is the country which is held in violation of Article 8 ECHR most often after Italy, it is required to pay only minimal damages. Italy is primarily required to compensate non-pecuniary damages, while the United Kingdom has to pay quite significant amounts for both material and immaterial damages and for the costs and expenses. Turkey is the champion on the point of both material and immaterial costs, and in particular the ‘Combination’ category, the reason for which was already explained above. Figure 12 shows the total amount of damages the countries had to pay in cases in which a violation of Article 8 ECHR was found. Figure 13 shows the total amount of damages per country divided by the number of cases in which a particular country was held in violation of Article 8 ECHR. The category ‘Combination’ in the case of Turkey was €208.721 on average per case in which the Court considered that it had violated the right to privacy of its citizens (not included in full in figure 13).

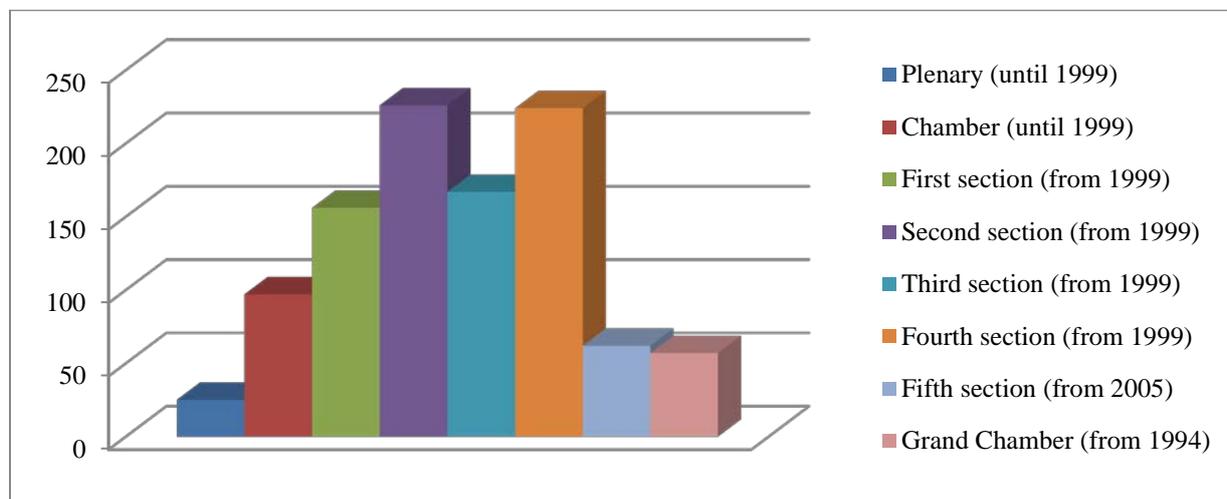
Figure 13 Total damages awarded divided by times a country was held in violation of Article 8 ECHR



5. Courts

As has been explained, the ECHR works under a two-tier system: first a decision on the admissibility of cases and second, a decision on the substance of the matter. This study has analyzed cases in the second-tier, that is, cases that have been declared admissible under Article 8 ECHR. It should be stressed that in fact, a second-and-a-half-tier was introduced in 1994, by establishing the Grand Chamber. After a case has been declared admissible (first-tier) and after the case has been assessed in substance (second-tier), resulting in either a violation of the Convention or not, the parties can refer a case to the Grand Chamber for revision (second-and-a-half-tier). The Grand Chamber may accept the request if the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance.⁷ Another change has been made with respect to the Courts in the second-tier. Originally, the Court could convene either in a plenary setting or in a chamber. From 1999 onwards, the second-tier is dominated by different sections (or chambers) of the Court, namely the first, the second, the third and the fourth section. In fact, it seems that the possibility to judge cases in a plenary setting is now provided for by the possibility of a section to relinquish jurisdiction to the Grand Chamber when a case pending before it raises a serious question affecting the interpretation of the Convention or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.⁸ In 2005, a fifth section has been added.

Figure 14 Amount of cases per setting of the court



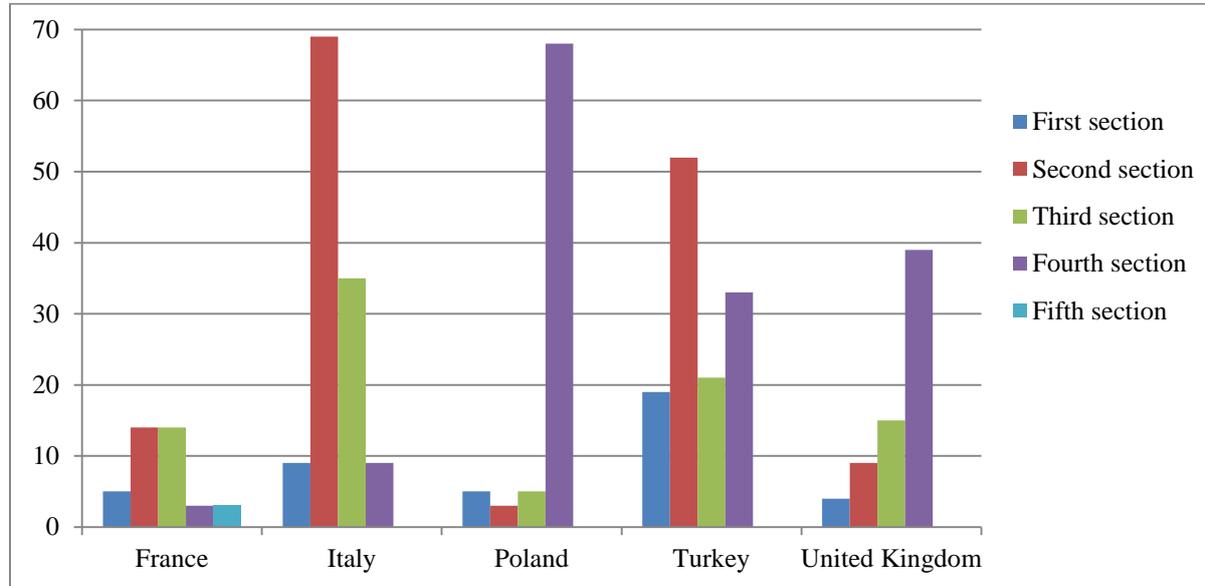
Officially, there is no separation of tasks between the different sections. Still, it is remarkable that the second and fourth section seem to deliver significantly more judgements on the question of a violation of Article 8 ECHR than the first and the third section. Maybe this is because there is, in fact, a separation of tasks between the sections. For example, the second chamber has delivered significantly more judgements on the point of family and relational privacy than the other sections. Likewise, the fourth section has delivered 76 out of the 187 cases on informational privacy. Another possibility is that certain sections deliver more judgements on particular countries than others. For example, of the 27 cases against Austria, 16 have been dealt with by the first section. Of the 32 cases against Bulgaria, 28 were dealt with by the fifth section. In similar fashion, 13 of the 14 cases against Croatia have been dealt with by the first section, etc. It is unclear why this is, but it might have to do with the

⁷ Article 43 ECHR.

⁸ Article 30 ECHR.

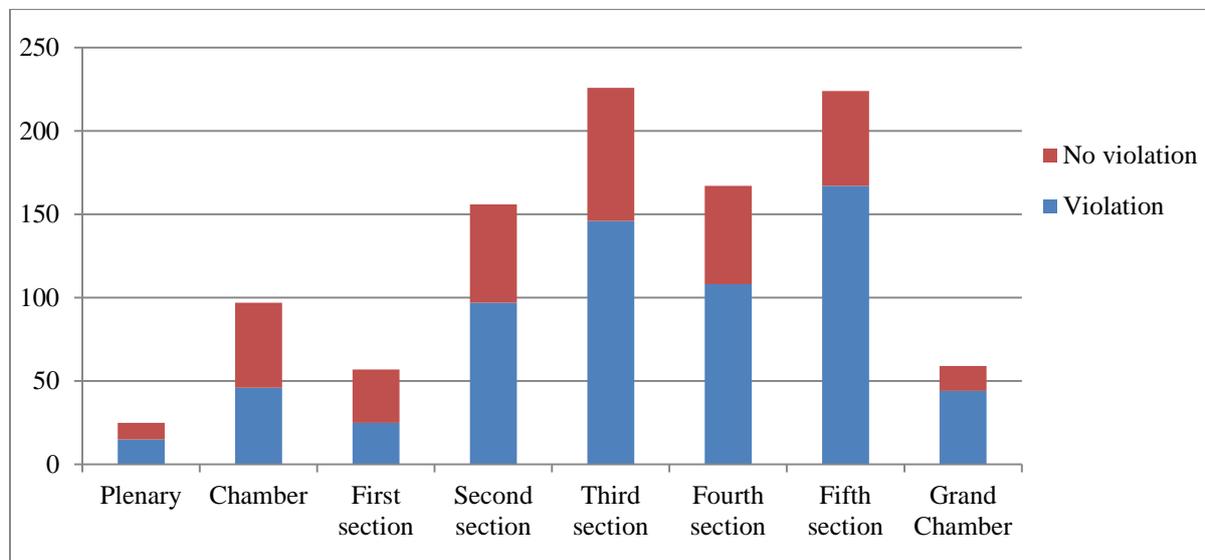
requirement that one of the judges sitting in the chamber dealing with the cases is of the nationality of the state against which the complaint is lodged.⁹ Remarkable is that 22 of the 57 before the Grand Chamber involve a complaint against the United Kingdom.

Figure 15 Number of cases a court has assessed a complaint in substance on Article 8 ECHR per country



The last point which may be interesting is the percentage of cases in which the different chambers, sections and courts established a violation. From the early period, it becomes clear that when the court convened in plenary setting, which would typically be in more weighty cases, a far higher percentage of the cases resulted in a violation than when the ECtHR convened in a chamber setting. This is mirrored with respect to the different sections and the Grand Chamber in the later period. In addition, it is also remarkable that especially the first section will find a violation of Article 8 ECHR in a significantly lower percentage of the cases than the other sections. The reason for this remains unclear.

Figure 16 Number of cases in which a court found or did not find a violation of the right to privacy



⁹ Rule 26 of the Rules of the Court.

Figure 17 Total amount of damages awarded per court

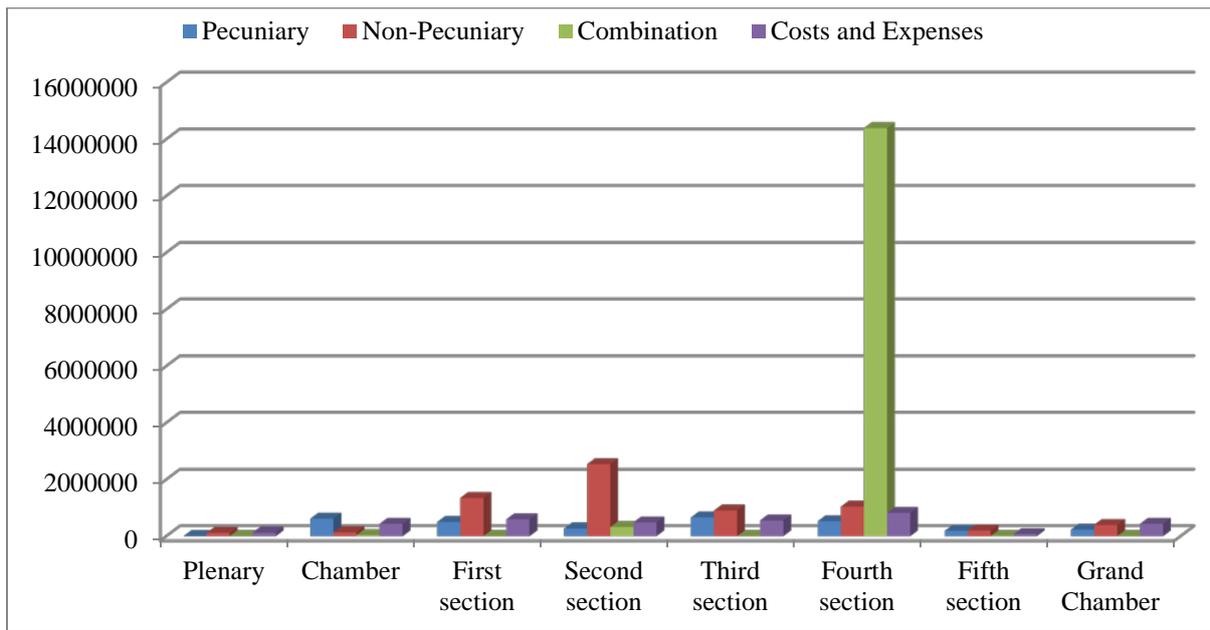
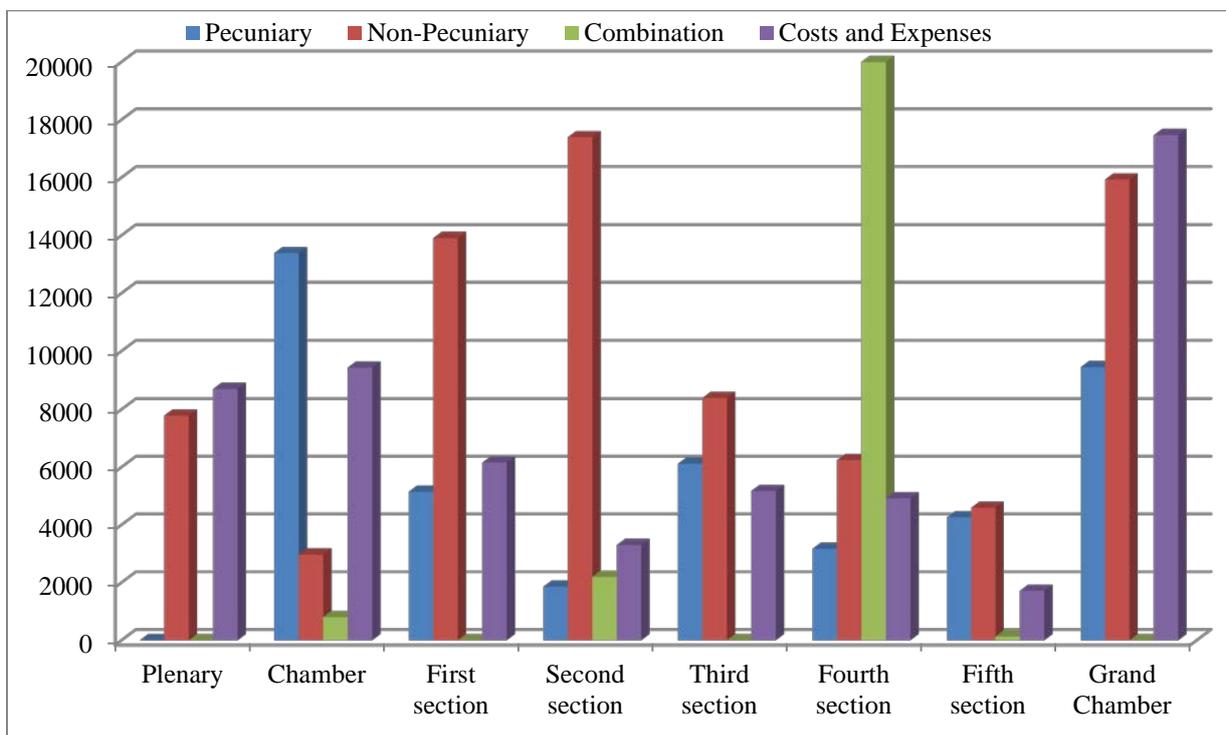


Figure 17 shows the total amount of damages awarded per court. It appears that the fourth section has in particular used the ‘Combination’ category; why this is remains unclear. Apart from that, it is clear that especially the first and the second section and the Grand Chamber attribute higher sums for immaterial damage than the other chambers. From Figure 18, it also appears that the third and fifth section and the Grand Chamber, as opposed to some other sections, have a quite even spread across the pecuniary, non-pecuniary and costs and expenses categories. The average of the ‘Combination’ category per case in which a violation was found by the Fourth section is €86.186,- This graph only goes to €20.000,-.

Figure 18 Total amount of damages divided by the number of cases in which a court found a violation



6. Types and number of applicants

Under the European Convention on Human Rights, two official modes of complaint exist, first the Inter-State cases and second the individual applications. Article 33 ECHR specifies: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.' Next to that, Article 34 ECHR holds: 'The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.' When the Convention was drafted, there was a significant debate about whether there should be a European Court overseeing the Convention or whether it should be left to national courts, international reputational mechanisms or to the International Court of Justice to uphold the provision in the ECHR. When it was finally agreed that a Commission should be established, to judge the admissibility of cases, there was discussion about whether the ECtHR should be created and if so, whether it should have powers to lay down sanctions and require states to provide relief for damages. This latter option was only agreed upon by some of the countries after it had been negotiated that they could ratify the Convention, but make a reservation with respect to the capacity and powers of the ECtHR. Indeed, many countries initially did so, but over time, most countries that have ratified the Convention now also accept the authority of the Court to oversee it.

A second debate was on the question of who should be able to invoke the provisions in the Convention and lodge a complaint. At that time, the most well-known international judicial system was that of the International Court of Justice, which worked with inter-state complaints only. Many Member-States preferred such a system for the ECtHR, stressing that if individuals were also allowed to submit a complaint, large numbers of applications would be made by individuals invoking their right to individual petition, which would paralyze the Commission and the Court. 'I foresee shoals of applications being made by individuals who imagine that they have a complaint of one kind or another against the country.'¹⁰ Proponents of a model of individual complaints denied this fear explicitly. 'I wish to deal for one moment with the argument [] that there would be shoals of complaints. I have never known legislation of any kind which gave to the individual a further change to establish his rights about which the same prophecy has not been made, and in the 30 years in which I have practiced law I have never seen that prophecy come true.'¹¹

Obviously, a compromise had to be found between these two groups. Although both the model of inter-state complaints and individual complaints exist under the Convention, it must be kept in mind that although the opponents of a system of individual petition finally surrendered their opposition, they did so only because the system of inter-state complaints would most likely be the most prominent and commonly used model of application. It was accepted that the Convention supervision consisted of a two-tiered system and that only with respect to the first-tier, on the admissibility of the cases, the mechanism of individual complaints exists. Article 25 of the original ECHR held: 'The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High

¹⁰ Robertson, vol. 2, p. 188. A.H. Robertson, 'Collected edition of the *'travaux préparatoires'* of the European Convention on Human Rights = Recueil des travaux préparatoires de la Convention Européenne des Droits de l'Homme; Council of Europe.

¹¹ Robertson, vol. 2, p. 198.

Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.’ Individual complainants did not have the right to go to the European Court of Human Rights, even if the Commission had declared their complaint admissible. Only four bodies could bring a case before the Court: the Commission, the state whose national is alleged to be a victim, the state which referred the case to the Commission and the state against which the complaint has been lodged.¹² The individual applicant was explicitly excluded from this list.¹³

Although, consequently, the Convention contains the right of a natural person to petition, this represented but a segment of the European supervisory system as a whole. In this respect, it should be noted that an inter-state complaint is not so much concerned with personal harm suffered by one or more natural persons, but focusses rather on general governmental policies or systematic abuse of state powers. For example, if a government invokes the state of emergency and derogates from the rights and freedoms under the Convention, other states may question the legitimacy or necessity of these actions before the Court.¹⁴ Second, the right to individual petition is open to three types of complainants: individuals, non-governmental organizations (e.g. a municipality or province) and groups of individuals. Consequently, not only can a natural person complain about a violation, a legal body may also claim to be the victim of an interference of its rights. Such an infringement does not revolve around personal harm – rather a church’s freedom of religion may be infringed when it is prevented from ringing the church bells in the morning.

Moreover, although earlier drafts of the Convention only referred to the right of natural and legal persons to petition, a third category was added, namely any ‘group of individuals’. The right to petition of a group of individuals was inserted to broaden the width of the right to petition and to ensure that no one was excluded from access to the Commission.¹⁵ The term ‘group of individuals’ referred specifically to minority groups, which must be interpreted against the background of the Second World War, in which such groups were stigmatized, discriminated or worse.¹⁶ In such a claim, a group of natural persons does not claim that these persons have suffered themselves specifically and individually from a certain governmental practice – this is already covered by the right of individual petition by natural persons. Rather, a group of individuals has the opportunity to represent the common interests of the minority group as such.

Over time, however, the Convention has been revised on a number of points, so that, inter alia, individual complainants (individuals, groups and legal persons) have direct access to the Court (second-tier) to complain about a violation of their privacy, when their case is declared admissible.¹⁷ Moreover, over time, the Court has placed a very large emphasis on individual interests and personal harm if it assesses a case regarding a potential violation of Article 8 ECHR. This focus on individual harm and individual interests brings with it that complaints are declared inadmissible by the European Court of Human Rights if the claimant cannot show that he has suffered from significant harm due to the infringement of his right complained of. With respect to the capacity of legal persons to submit a complaint, the Court has accepted that churches may invoke the freedom of religion (Article 9 ECHR) and that press organizations may rely on the freedom of expression (Article 10 ECHR). However, because Article 8 ECHR only protects individual interests, the Court has said that in

¹² Article 48 original ECHR. Article 44 provides: ‘Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court’.

¹³ Robertson, vol. 2, p. 156. Robertson, vol. 4, p. 44.

¹⁴ Article 15 ECHR.

¹⁵ Robertson, vol. 2, p. 270.

¹⁶ Robertson, vol. 1, p. 160-162

¹⁷ Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 6.XI.1990. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Strasbourg, 11.V.1994

principle, only natural persons can invoke a right to privacy.¹⁸ Although this position has been relaxed somewhat by the ECtHR, it is willing to accept legal persons as complainants only in exceptional circumstances.

In similar fashion, the Court has rejected the capacity of groups to complain about a violation of human rights. Against the intention of the authors of the Convention, it has stressed that only individuals who have been harmed personally and significantly by a specific violation or infringement can bundle their claims. They are approached as a collective, rather than a group. Consequently, Article 8 ECHR has been so interpreted by the Court that it primarily aims at protecting individual interests by granting natural persons a right to complain. Finally, the last non-individual mode of complaint under the Convention, the possibility of inter-state complaints, has had almost no role of importance under the Convention's supervisory mechanism. While the Court has delivered more than 15,000 judgments, up 'to January 2006 a total of 19 applications had been lodged by States. Even this very low number provides a distorted picture. In fact only six situations in different States have been put forward in Strasbourg by means of an inter-State application. [] Given the number of violations that have occurred during the more than 50 years that the Convention has been in force, it is evident that the right of complaint of States has not proved to be a very effective supervisory tool.'¹⁹ With only one inter-state complaint in 2009 and another one in 2011, regarding the same matter, this trend seems to be continued after 2006. Consequently, the natural person is in practice the only one who invokes the right to privacy – and he can do so only when his individual interests are at stake.

That is why two factors have been analyzed for this study. First, the type of applicant and second, the number of applicants. With respect to the number of applicants, although the Court does not allow complaints of groups as groups, it does allow individuals to bundle their individual complaints. Thus, if a group of 50 applicants are all suffering from the same violation, for example, a factory nearby a neighborhood polluting the area, the ECtHR is willing to accept and bundle their complaints in one case if they can demonstrate that they have all been harmed individually and significantly by the same violation. Five categories have been distinguished for this study, namely cases in which there was 1 applicant, cases in which there were 2 applicants, cases in which there were between 3 or 10 people involved, cases in which there were between 11 and 50 people and cases in which there were more than 50 applicants. It should be noted that it is often difficult to assess the exact number of applicants. For example, 50 people may lodge a complaint, thereof, 40 people may be declared admissible for their complaint under Article 6 ECHR and 35 under Article 8 ECHR; the Court (second-tier) may then decide that in fact, after a further and more careful assessment, 10 of the applicants complaining about a violation of their right to privacy are actually to be determined under their right to marry and found a family (Article 12 ECHR) and subsequently hold that 15 of the 25 remaining applicants with respect to a potential violation of Article 8 ECHR have indeed suffered from an illegitimate infringement on their right to privacy. And of those 15 applicants in relation to whom a violation of Article 8 ECHR has been established, 5 of them may be compensated only for the Costs and Expenses, 5 of them for pecuniary or non-pecuniary damages and 5 of them may not be awarded any type of relief. Consequently, there is a margin of error with respect to the numbers and categories below and the results must be taken primarily as indicative.

¹⁸ ECmHR, *Church of Scientology of Paris v. France*, application no. 19509/92, 09 January 1995.

¹⁹ P. van Dijk, F. van Hoof, A. van Rijk & L. Zwaak (eds.), 'Theory and Practice of the European Convention on Human Rights', Intersentia, Antwerpen, 2006, p. 50.

Figure 19 Total number of cases in which a certain number of applicants was involved

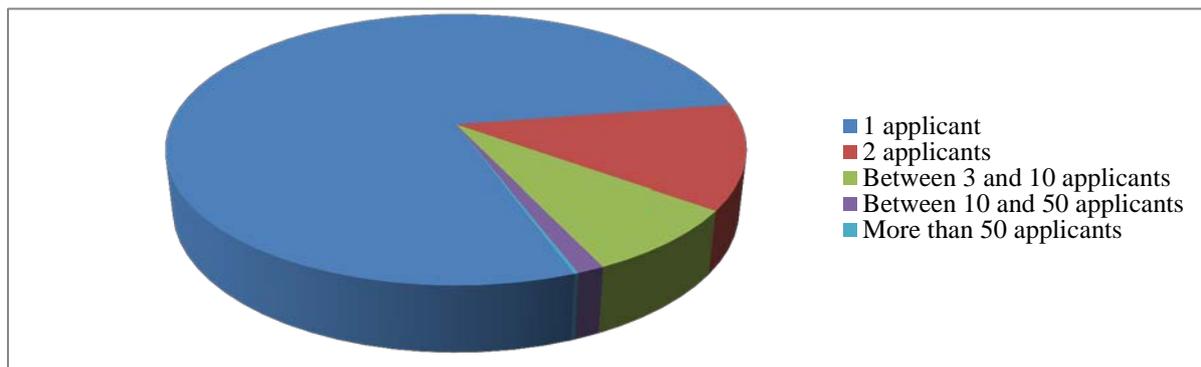


Figure 19 shows that in fact, by far most cases are brought by individuals. In cases in which 2-5 applicants are involved, this mostly concerns a family unit, for example when a political refugee is extradited to Iraq and he argues that this would almost certainly lead to a violation of his right not to be tortured or subjected to degrading treatment (Article 3 ECHR) and his wife and three children complain that his extradition would violate their right to family life (Article 8 ECHR). There seems no significant correlation between the period and the number of applicants, for example a sharp rise or fall of the number of applicants over the years – rather, the cases in which more than 10 applicants were involved seem to be spread quite evenly over the years.

Figure 20 Total number of cases in which a certain type of applicant was involved

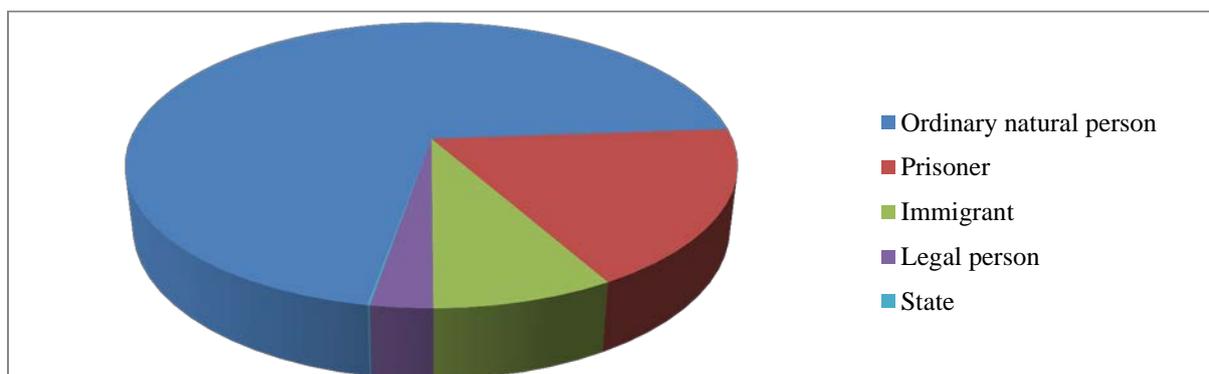


Figure 20 shows which types of applicants were involved with the cases judged in the second-tier with respect to a potential violation of the right to privacy. With respect to the category 'legal persons', a somewhat broader take has been adopted, not only listing organizations themselves that have submitted a complaint, but also incorporating those complaints that have been lodged by natural persons when their interests are part of or connected to those of a legal person, for example their private, one-man firm operated from their home. As has been stressed, groups are never allowed to complain as a group, so that this category has been omitted. With respect to natural persons as complainants, a difference has been made between ordinary natural persons and natural persons being prisoners or immigrants. This is because prisoners, by the very nature of their imprisonment, are limited in their rights and freedoms. With respect to immigrants, it is interesting to see whether, and if so, in how far these cases differ from other cases, because the idea of human rights is precisely that everyone has them by virtue of being human, independent of nationality. If both a natural and a legal person, an immigrant or a prisoner submitted a complaint, it was listed under 'legal person', 'immigrant' or 'prisoner'.

Figure 21 Total amount of damages awarded per number of applicants

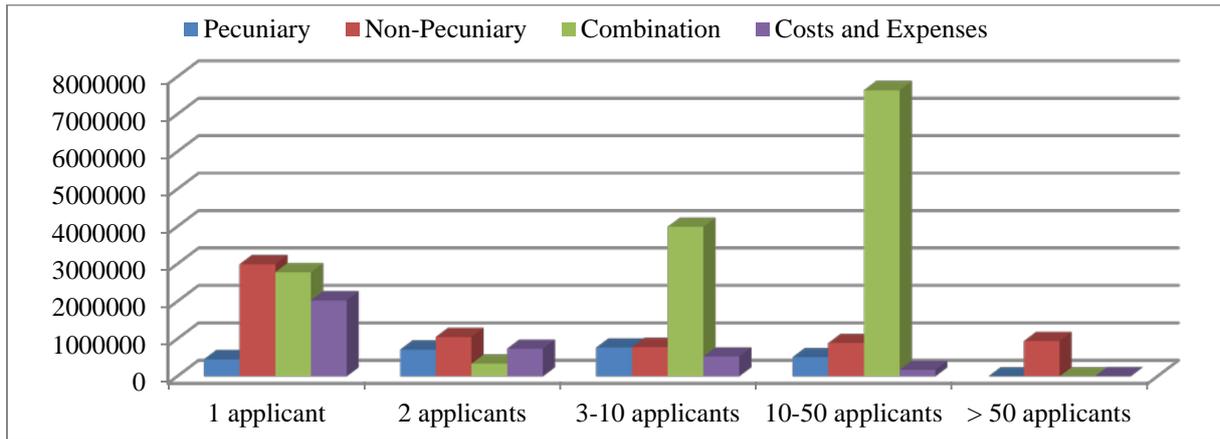


Figure 21 shows the total amount of damages that have been awarded by the ECtHR in cases in which a violation was found of Article 8 ECHR until 2010, per category of applicants. Given the very high number of cases in which there was but one applicant lodged the complaint, it should not come as a surprise that in this category the most damages have been awarded. What is apparent from the figure too is that the cases against Turkey in which high sums of money were awarded to the applicants have been matters in which larger groups have been involved. Figure 22 shows the average amount of money awarded to the applicants in case a violation was found of Article 8 ECHR in the specified categories. What is remarkable is the quite low numbers of damages. When one applicant was involved, on average, € 896,- was awarded for pecuniary damages per case in which a violation of the right to privacy was established, € 5.906,- for non-pecuniary damages, € 5.488,- in the ‘Combination’ category, and €4.004,- for costs and expenses. When two applicants lodged a complaint which resulted in a violation of Article 8 ECHR, this was on average €8.385,- for pecuniary and €12.374,- for non-pecuniary damage, €3.989,- for the ‘Combination’ category and € 8.705,- for cost and expenses. These sums are for the applicants jointly and should consequently be divided by two to calculate the average amount of damages awarded per victim. The more applicants join in a case, on average, the more damage is awarded, which was to be expected. Finally, it should be noted that there are very few cases in which more than 50 applicants have submitted a complaint, so that the results from this category are unreliable.

Figure 22 Total damages divided by the number of cases in which a violation was found per category

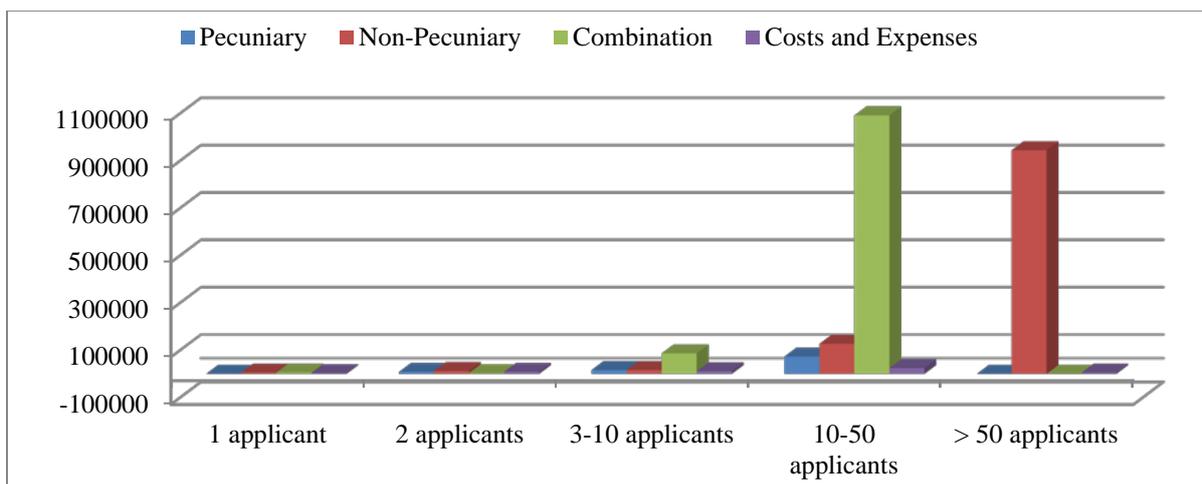


Figure 23 Total amount of damages awarded per type of applicant

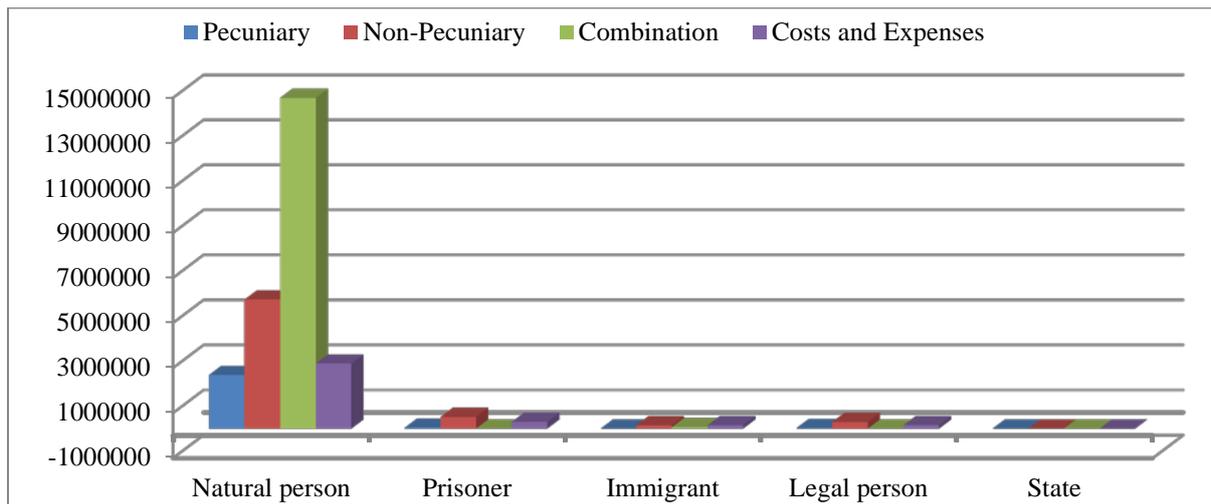
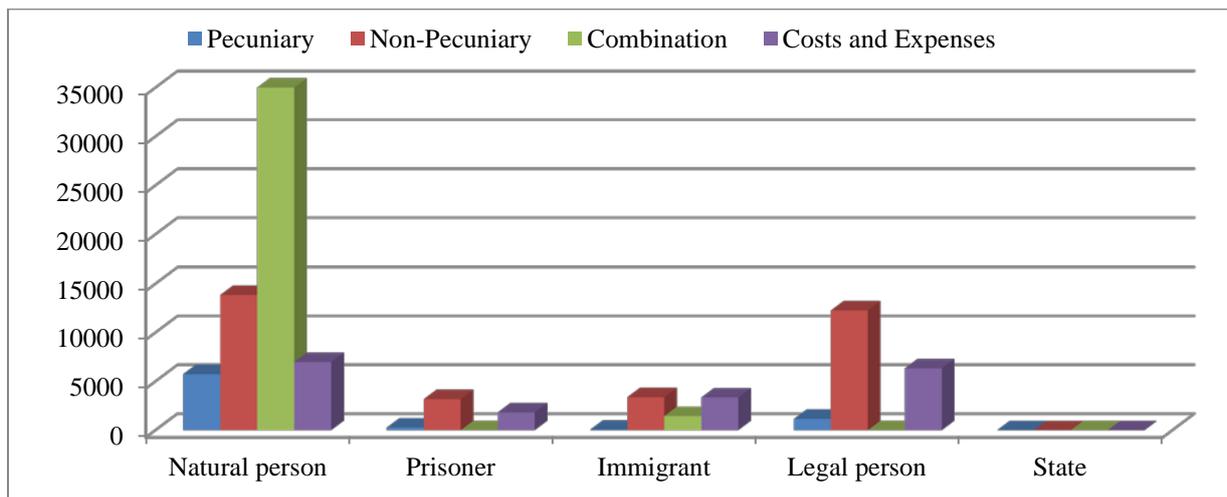


Figure 23 shows the total amount of damages that have been awarded by the ECtHR in cases in which a violation of Article 8 ECHR was established until 2010 per category. It should not come as a surprise that the only relevant category in this respect is that of natural persons. Figure 24 shows the total amount of damages awarded per category, divided by the number of cases in which a violation of Article 8 ECHR was found with respect to a certain category. For example, the total amount awarded to natural persons by the ECtHR, divided by the 414 cases in which a violation of the right to privacy of a natural person was found by the Court. What is interesting is that on average, prisoners and immigrants have been awarded limited amounts of damages. This is because in many cases, the ECtHR stresses that the establishment of a violation in itself constitutes sufficient satisfaction for the applicant, for example, by holding that an immigrant should not be extradited or that a prisoner should have more liberties, for example, with respect to family visits. With regard to legal persons, one could have expected that especially the pecuniary damages and the ‘combination’ category would be high, but the opposite is true. Whether the ECtHR grants non-pecuniary damages to the company or organization itself, or to the owner or other natural person connected to it is unclear, further research is needed on this point. Finally, it should be noted that there are very few cases in which inter-state complaints were made, so that the results from this category are unreliable.

Figure 24 Total damages divided by the number of cases in which a violation was found per category



7. Types of privacy

Categorizing the cases under the right to privacy, Article 8 ECHR, is very difficult for a number of reasons. First, the ECtHR has chosen a very wide and broad interpretation of the different concepts provided protection under this provision: ‘private life’, ‘family life’, ‘home’ and ‘correspondence’. To provide an example, ‘correspondence’ not only refers to letters or telephony, but also modern forms and means of communication. ‘Home’ is not only the home of an individual, but any premises in which a person lives on a quasi-permanent basis and factories, office buildings and restaurants may also qualify as the ‘home’ of a legal person. A ‘family’ relation not only exists between a married couple and their children, but can, depending on the circumstances of the case, also exist between grand-children and grand-parents, between non-biological parents and children, between children and great-uncles and between children and a mentor or supervisor. Finally, ‘private life’ has been used as a term that may include almost anything that remotely relates to a person’s identity or personal development.

Second, the original rationale behind the right to privacy was granting the citizen negative freedom in vertical relations, that is the right to be free from arbitrary interferences by the state. In this line, the Court still holds that the ‘essential object of Article 8 is to protect the individual against arbitrary action by the public authorities’.²⁰ However, the Court has gradually diverged from the original approach of the Convention authors by accepting both positive obligations for national states and granting a right to positive freedom to individuals under the right to privacy. The element of positive liberty was adopted quite early in a case from 1976: ‘For numerous anglo-saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity. [H]owever, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality.’²¹ Likewise, from very early on, the Court has broken with the strictly limited focus of the authors of the Convention on negative obligations (the obligation not to use power in certain ways) and has accepted that states may under certain circumstances be under a positive obligation (the obligation to use power in certain ways) to ensure respect for the Convention. This has had an enormous impact on both the underlying rationales and the material scope of the right to privacy under the European Convention on Human Rights.

Third, the European Court of Human Rights, when discussing cases under the right to privacy, Article 8 ECHR, is often vague about the question of which of the four terms contained in the provision applies to a certain case. Often, it combines two terms, for example stressing that a certain matter affected the applicant’s ‘private and family life’ or his ‘private life and home’. Sometimes, the ECtHR merely points out that the case clearly fell ‘under the scope of the right to privacy’ or that it was not disputed by any of the parties involved that the cases was to be discussed under the right to ‘private and family life, home and correspondence.’ In some cases, the Court simply ignores the question of whether a case falls under the scope of Article 8 ECHR and sometimes, it clearly avoids it by underlining that ‘even if the case fell under the scope of the right to privacy’, it must, for example, be rejected because the infringement was prescribed for by law and necessary in a democratic society. This attitude of the Court makes it very difficult to categorize the cases with respect to the type of privacy that is at stake.

Fourth, the Court has often stressed that the Convention and its Protocols must be seen as a whole. This means that a number of rights and freedoms that are protected by other

²⁰ ECtHR, *Arvelo Apont v. the Netherlands*, application no. 28770/05, 3 November 2011, § 53.

²¹ ECmHR, *X. v. Iceland*, application no. 6825/74, 18 May 1976.

provisions of the Convention, are sometimes included under the scope of the right to privacy. For example, the right to marry and found a family, as protected under Article 12 ECHR, is in fact mostly ignored by the Court; instead, questions revolving around, for example, gay marriage and in vitro fertilization are discussed under Article 8 ECHR. Though the right to a fair trial is incorporated in Article 6 ECHR, the ECtHR has made clear that there are also procedural safeguards implicit in the right to privacy, so that a right to a fair trial is also protected under Article 8 ECHR. Although one's bodily and psychological integrity is protected by Articles 2, 3 and 4 ECHR, the ECtHR has treated cases revolving around these types of question primarily under the right to privacy. Although the right to reputation was explicitly excluded from the right to privacy, and moved to Article 10 ECHR, concerning the right to freedom of expression, the Court has nevertheless underlined that the right to reputation shall be protected under Article 8 ECHR. Consequently, the realm of the right to privacy has been expanded quite considerably.

Fifth and finally, the ECtHR has introduced the 'living instrument' theory when interpreting the Convention. This means that the Court is at liberty to interpret the Convention according to its views in the light of current societal tendencies and developments and to introduce new rights and freedoms under the existing provisions in the Convention. Perhaps quite unsurprisingly, it is primarily article 8 ECHR that has functioned as umbrella for these new rights and freedoms. It goes too far to discuss these matters in detail,²² but in general it can be established that the underlying rationale has moved from obligations on states not to abuse their power, to individual and subjective rights of natural persons to protect their individual autonomy, their human dignity and their personal freedom. Almost everything that is even only remotely connected to personal interests is accepted under the material scope of the right to privacy. For example, the ECtHR has stressed that Article 8 also provides protection to the right to develop one's sexual, relational and minority identity, the right to protect one's reputation and honor, the right to personal development, the right of foreigners to a legalized stay, the right to property and even work, the right to environmental protection, the right to have a fair and equal chance in custody cases, the right to marry and found a family, a right to data protection, the right to a name and/or change one's name, etc. etc. In terms of material scope, the right to privacy has become by far the largest doctrine protected under the ECHR.

Because the scope of Article 8 ECHR has become so broad, this study started by identifying 10 categories. (1) Matters relating to bodily and psychological integrity; (2) family and relational privacy; (3) communicational secrecy; (4) home and locational privacy; (5) protection of honor and reputation; (6) cases on data protection; (7) cases on (mass) surveillance; (8) cases on environmental protection and the right to a healthy living environment; (9) matters in which broader issues relating personality, identity and personal development were at stake; (10) questions in which the enjoyment of property or primarily economical aspects were discussed. Because it proved impossible to do a reliable analysis on the basis of 10 categories, these have been scaled back to 5 categories. The protection of honor and reputation, cases which concerned the healthy living environment of individuals and the broader questions regarding personality and identity have all been included in the first category; cases on data protection and mass surveillance have been combined with the category on communicational secrecy; this category is now coined 'informational privacy'.

Consequently, five categories are used in this study. The choice of categorizing a case in one or another group is often difficult and to some extent arbitrary. Importantly, there are cases in which there are two separate complaints on the right to privacy; for example, the government has wire-tapped a person's telephone in violation of his informational privacy

²² <http://www.ivir.nl/publicaties/download/1555>

and has subsequently decided to enter and search that person's house without a warrant, in violation of his locational privacy. In cases in which both complaints lead to a violation or in which both complaints were rejected by the ECtHR, it has been decided to categorize the cases under the category that seemed most important/prominent. Again, these choices are to some extent arbitrarily. If one part of the complaint, for example the part on the telephone tap, resulted in the Court's consideration that the government did not act in violation of Article 8 ECHR, but that it did violate the applicant's right to privacy because the house search was not prescribed for by law, the case has been categorized under the group in which the violation was established. This is because if damages were awarded by the ECtHR, this would be linked to the correct privacy category.

- (1) *Bodily and psychological integrity*: this is presumably the broadest of the five remaining categories. It includes cases on sexual freedom, for example of homosexuals not to be prosecuted and criminalized;²³ transgenders demanding full recognition of their new gender, inter alia in government documents; the right not to be involuntarily subjected to medical treatment; the right to change one's name; the right to reputational protection; the right to a healthy living environment; etc.
- (2) *Relational privacy*: this category is used for all cases that related to the possibility of a person to engage with others and to develop relationships. Most prominently, this category contains cases about children being placed out of home, custody cases and visiting rights by parents. Importantly, when a person complains that he is unable to communicate with others, for example a prisoner being prevented from sending letters to his family, this is categorized as relational privacy; when the complaint was about the authorities reading the letters, this was categorized as informational privacy.
- (3) *Informational privacy*: this category consists of a combination between different, though related types of cases. It contains matters regarding modern types of surveillance, such as mass surveillance by intelligence services or camera-surveillance through the use of CCTV-camera's. The category also incorporates classic data protection cases, such as people wanting access to documents and information relating to them stored by the government. And it contains cases on communicational secrecy, such as wiretapping telephone conversations by the state; an important part of this category consists of cases in which prisoners complain that their letters are opened and censored by the prison authorities.
- (4) *Locational privacy*: this category consists of cases in which the government accessed the private home of an individual. In addition, the ECtHR has sometimes allowed legal persons an analogous claim, for example, when the police has searched the premises of a company in relation to tax evasion.
- (5) *Economical privacy*: while the previous four categories may be seen as linked to or as an expansion of the four terms listed in Article 8 ECHR (private life, family life, home and correspondence), a fifth category is newly introduced by this study. It incorporates cases which revolved primarily around the enjoyment of property and/or economical aspects. For example, there are cases under Article 8 ECHR in which the homes of individuals are destroyed; this is not, in the classic sense, a violation of the locational privacy of individual, but primarily relates to the loss of property. Similarly, this category includes cases on the right to inherit family assets by bastard children and the special tax status for unmarried couples compared to married couples. It also includes cases on the inability to get a job in the army, because it has a policy of rejecting openly gay people, etc.

²³ The Court usually categorizes homosexual relations under 'private life', heterosexual ones under 'family life'.

Figure 25 Total number of cases per category

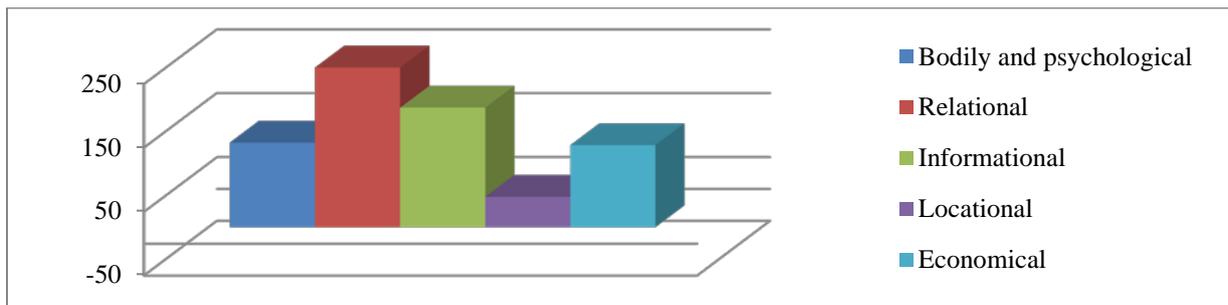


Figure 25 shows the total number of cases that has been assessed by the ECtHR (second-tier) until 2010 under the right to privacy, Article 8 ECHR. It is clear that the second category, the right to relational privacy, is by far the category with the highest number of cases, almost 300, followed by the right to informational privacy, with nearly 190 cases. Interestingly, although the first category is by far the broadest in material scope, it contains a modest number of cases; like bodily and psychological integrity, there are around 130 cases in which the enjoyment of property or economical aspects are central aspects. With respect to the latter category, this might be qualified as a high number. The reason is that there has been considerable discussion on this point by the authors of the Convention. First, when drafting the Conventions, it was discussed at length, whether a separate provision should be included on the enjoyment of property and second, whether Article 8 should make explicit mention of the right to protection of personal property. The authors of the Convention made a conscious decision to exclude the protection of economic interests explicitly from the Convention as a whole and the right to privacy in particular; however, as appears from Figure 25, the ECtHR has overturned that decision. Finally, it is interesting to see that there are very, very few cases on the potential violation of locational privacy, even though this also includes cases in which the office of a company was entered by governmental officials. There are less than 50 cases on this point.

Figure 26 Total number of cases per category per year

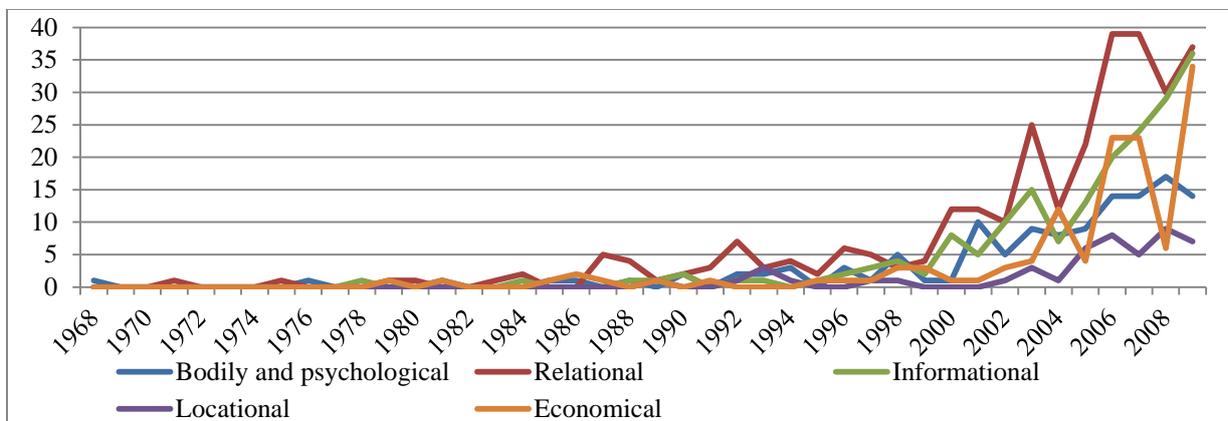
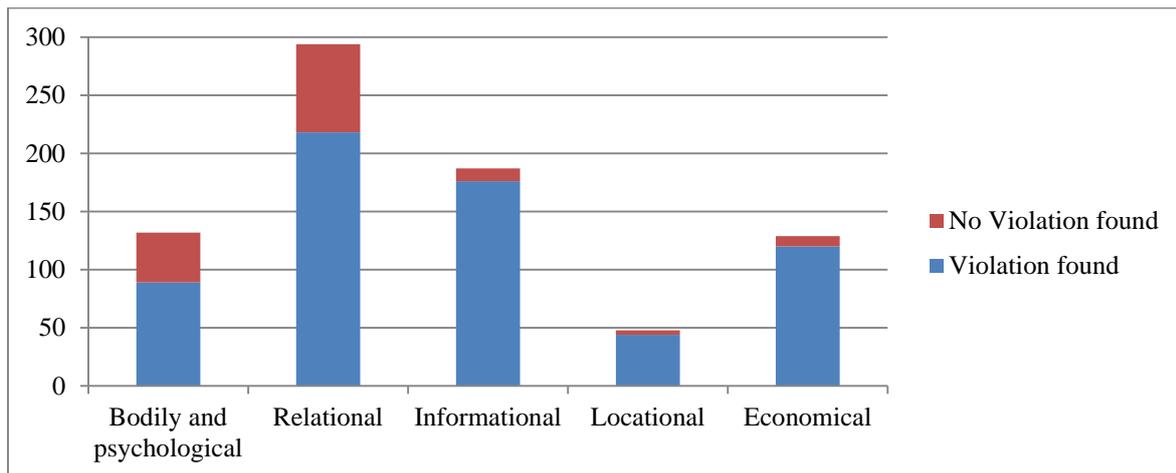


Figure 26 shows the total number of cases per category per year. From this graphic, it is apparent that relational privacy has always been the dominant category in the case law of the ECtHR. However, it is also apparent that informational and economic privacy are becoming especially dominant in the latter years. The increase in cases on informational privacy may have a correlation with the increased focus on surveillance of the terrorist attacks, but more research is needed on this point. Why economic privacy has increased is of yet unclear.

Figure 27 Times a violation was or was not found per category



What appears from Figure 27 is that there is a sharp contrast between the five types of privacy with respect to the percentage of cases on Article 8 ECHR (second-tier) in which a violation is found. If a case is declared admissible on the point of informational, locational or economic privacy, it is almost certain that a violation will be found. With respect to bodily and psychological integrity and relational privacy, about one out of three or one out of four cases will get rejected.

Figure 28 Number of cases per category in relation to five countries

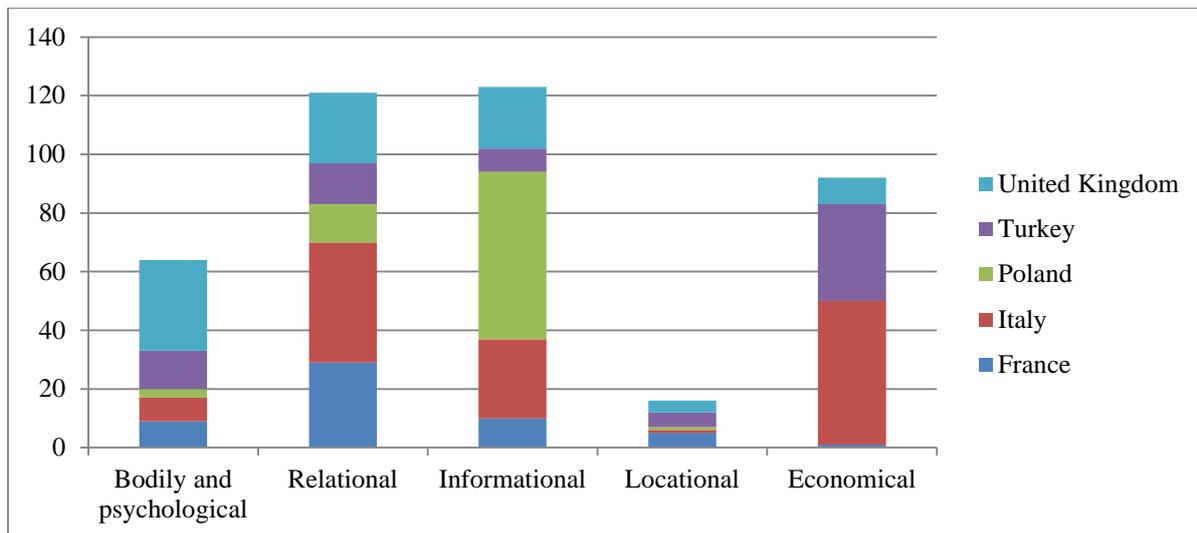
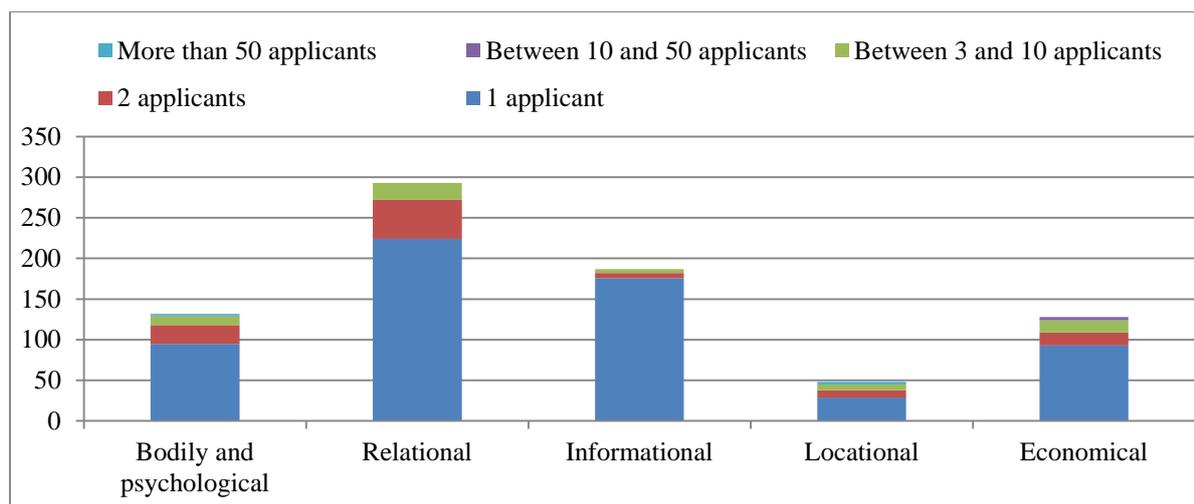


Figure 28 shows the number of cases in the different categories, in relation to the five countries against which most cases were assessed by the Court on the point of a potential violation of the right to privacy. What appears is that certain countries have been involved with cases on certain types of privacy significantly more than others. The United Kingdom is primarily responsible for the cases on the point of bodily and psychological integrity. This may be due to the fact that in the recent past, it had quite strict laws on homosexual practices. Italy is prominent in cases on relational and economic privacy, France is almost absent in the category of economic privacy and is primarily represented in the figures on relational privacy, Turkey, as has been stressed a number of times, has had quite a number of cases against it on the point of the enjoyment of property, and the cases against Poland are almost entirely on the point of informational privacy.

Figure 29 Number of cases per category in relation to the number of applicants



From Figure 29, it appears that especially in relation to relational privacy, there are quite a number of cases in which small units of 2-10 people submit a complaint. These would typically be family units. With respect to informational privacy, cases are almost exclusively lodged by individuals. The other categories have a more equal division.

Figure 30 Number of cases per category in relation to the type of applicant

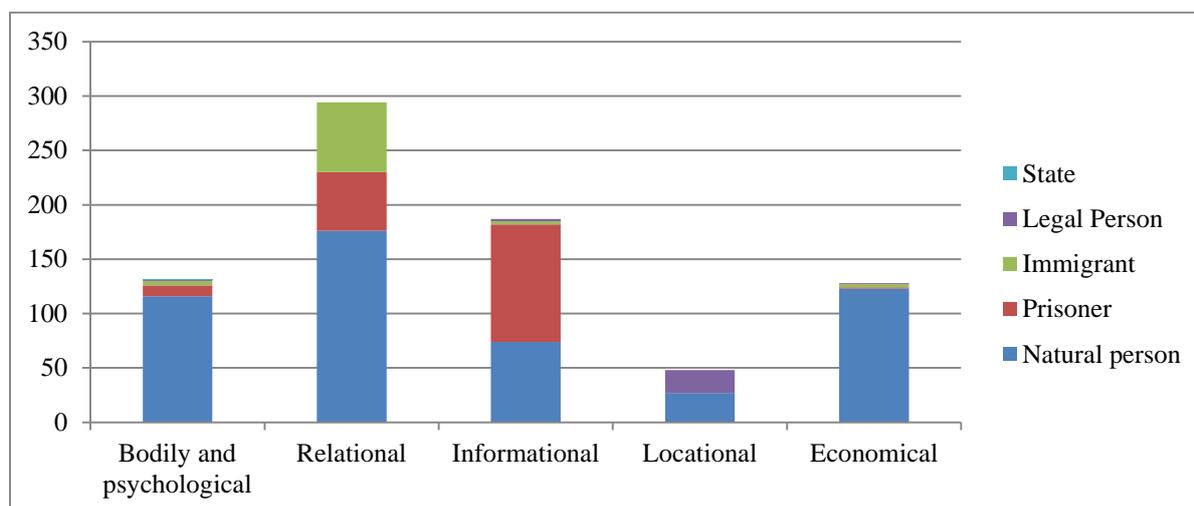


Figure 30 shows that prisoners complain almost exclusively about a violation of their relational or their informational privacy. These cases typically revolve around either their correspondence being monitored and opened or around the fact that they are denied contact with others, such as family members, either in real life (visits) or through corresponding with them. Immigrants complain almost exclusively about a violation of their family life. The typical complaint here would be that if a person gets extradited, this would tear him apart from his family living in that country, which would result in a violation of Article 8 ECHR. This is interesting, because the ECtHR has consistently held that this claim is much stronger than the claim that an extradition would lead to the violation of a person's private life, in the sense that his life, work, friends, future, etc., that he has in a particular country, would be disrupted. Finally, with respect to legal persons, it is clear that these cases are almost exclusively about governmental officials entering their premises.

Figure 31 Total amount of damage awarded per category

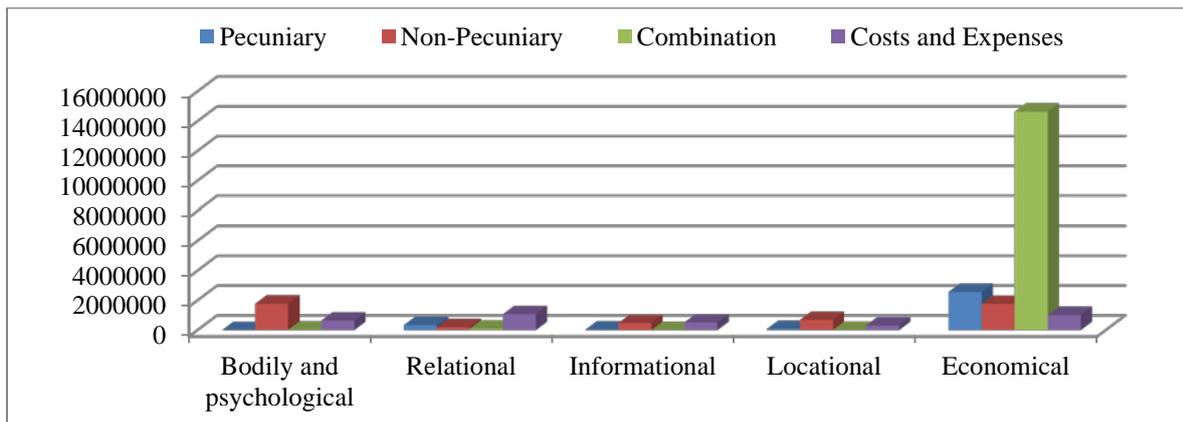
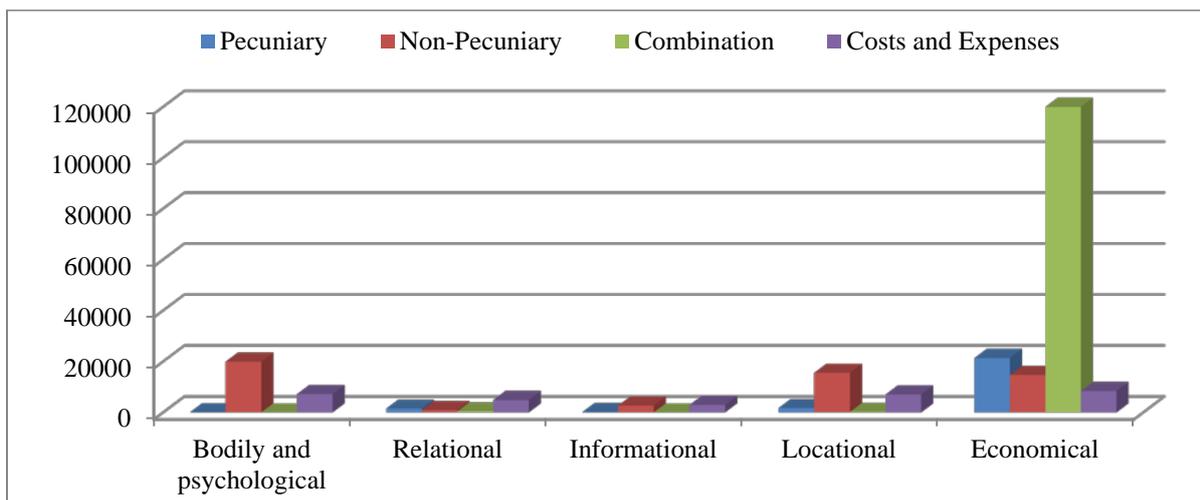


Figure 31 shows the total amount of damages that have been awarded by the Court until 2010 in cases in which it has found a violation of Article 8 ECHR. Figure 32 has divided the total sum per category by the number of cases in which the ECtHR has established a violation of that type of privacy. It should not come as a surprise that most damages have been awarded for a violation of economic privacy. Judging from the amount of damages awarded in the other four categories, it seems that the Court is inclined to provide higher sums of damages for a violation of a person’s bodily or psychological integrity and for an infringement on the privacy of his home, than for a violation of relational or informational privacy. This might be, because in those types of cases, the Court hold that the establishment of the violation itself provides enough satisfaction, for example stressing that prison authorities cannot monitor all correspondence of prisoners or that a parent was wrongly denied access to his children. However, although this indeed holds true for informational privacy, such a finding by the Court is no more frequent with regard respect to relational privacy than in relation to bodily and psychological, locational and economic privacy. Out of the 89 cases in which the ECtHR found a violation of Article 8 ECHR with respect to bodily and psychological integrity, in 20 it provided no relief for damages or compensated only the legal costs in the Costs and Expenses category; for relational privacy, this was 60 out of 218 cases; for informational privacy, this was 73 out of 176; for locational privacy, this was 10 out of 44; and finally, for economic privacy this was 45 out of 120 cases. Consequently, the explanation must be that with respect to relational privacy, the ECtHR does provide damages, but only small sums.

Figure 32 Average amount of damage awarded per case in which a violation of a category was found



8. Grounds for finding a violation

As has been explained, the right to privacy under the European Convention on Human Rights is a so called qualified right. This means that Article 8 ECHR specifies under which conditions the right can be legitimately curtailed by the government; these conditions are listed in paragraph 2 of Article 8 ECHR, which specifies: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’ Consequently, there are three different requirements: (1) the infringement must have a legal basis, (2) must serve one of the legitimate goals as listed in the second paragraph of Article 8 ECHR and (3) must be necessary in a democratic society.

Of the cases assessed by the ECtHR in the second-tier, there may be a number of reasons why no violation of Article 8 ECHR is found. For example, because the Court finds that a case has been wrongfully declared admissible, because a settlement has been reached and the case needs to be struck from the list or because a violation of another provision under the Convention has been established, and the Court finds it unnecessary to determine whether there has also been a separate violation of the right to privacy. These are preliminary and procedural reasons. Alternatively, the ECtHR may find that although there has been an infringement of the right to privacy, this was a legitimate one and thus not in violation of Article 8 ECHR. The ECtHR only reaches this conclusion if all three requirements (legal basis, legitimate aim, necessary) have been fulfilled; if the government fails to fulfil either one of these requirements, a violation of the right to privacy will be found.

The Court may find that an infringement was not prescribed for by law for a number of reasons – the ‘law’, in this sense, is always the national law of a country. The ECtHR uses a quite wide definition of law, it includes not only legislation but also judge-made law typical of common law jurisdictions and secondary sources, such as royal decrees and internal regulations.²⁴ First, a violation of the Convention will be found on this point if the actions of governmental officials are not based on a legal provision granting them the authority to act in certain ways. Second, a violation will be established if the conditions as specified in the law for using certain authority have not been complied with, for example, if police officials have no warrant for entering the home of a private individual. Third, the actions of the governmental officials may be prescribed for by law, but the law itself may not be sufficiently accessible to the public. Fourth, the law may be so vague that the consequences of it may not be sufficiently foreseeable for ordinary citizens. Fifth and finally, the ECtHR has in recent years developed an additional ground, namely that the law on which actions are based does not contain sufficient safeguards against the abuse of power by the government. This typically applies to laws authorizing mass surveillance activities by intelligence agencies that set virtually no limits on their capacities, specify no possibilities for oversight by (quasi-)judicial bodies and grant no or very limited rights to individuals, with respect to redress.

The Court may also find a violation of Article 8 ECHR if the infringement serves no legitimate aim.²⁵ The second paragraph specifies a number of legitimate aims, primarily having to do with security related aspects, such as national security, public safety and the prevention of crime and disorder. These terms are sometimes used interchangeably by the Court, but in general ‘national security’ is applied in more weighty cases than ‘public safety’, and ‘public safety’ in more weighty cases than the ‘prevention of crime and disorder’. The right of privacy may also be legitimately curtailed to protect the rights and freedoms of third

²⁴ [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf)

²⁵ <http://www.tandfonline.com/doi/full/10.1080/13600834.2015.1009714#>

parties; for example, a child may be placed out of home (an infringement of the right to family life of the parents), because the parents sexually molested it. The protection of health and morals may be invoked to curtail the right to privacy, though this category is applied hesitantly by the ECtHR, because the protection of the morals of a country may lead to quite restrictive rules. Still with respect to controversial medical or sexual issues, such as euthanasia or BDSM, the ECtHR sometimes allows a country to rely on this ground to curtail the right to privacy. Finally, a country can rely on the ‘economic wellbeing of the country’; this ground can only be found in Article 8 ECHR and in no other provision under the Convention. It is invoked by countries in a number of cases, for example, if an applicant complains about the fact that a factory or airport in the vicinity of his home violates his right to private life, the country can suggest that running a national airport is in fact necessary for the economic wellbeing of a country.

Much more can be said about the use, extent and interpretation of these aims, but this is unnecessary, because this requirement plays no role of significance. This is due to two factors. First, the ECtHR is often very unspecific about which term exactly applies, stressing that an infringement ‘clearly had a legitimate aim’ or that ‘it is undisputed that the infringement served one of the aims as contained in Article 8 ECHR’. It often combines categories, underlining that the infringement served a legitimate aim, such as “‘the prevention of crime’, ‘the economic well-being of the country’ or ‘the rights of others’” or it merely lists all different aims and holds that one of these grounds applies in the case at hand. Furthermore, it introduces new aims, not contained in Article 8 ECHR, especially in cases revolving around positive obligations for states (explained below). Second, the Court almost never finds a violation of Article 8 ECHR on this point. It usually allows the government a very wide margin of appreciation with respect to the question of whether and which of the aims applies in a specific case and whether the infringement did actually serve that aim. In many cases, it simply ignores this requirement when analyzing a potential violation of the right to privacy or incorporates it in the question of whether the infringement was necessary in a democratic society. Thus, only in 20 cases was Article 8 ECHR violated on this point.

Finally, the third requirement that must be fulfilled by a government wanting to curtail the right to privacy is that the infringement must be necessary in a democratic society. This question is approached by the Court primarily as a question of balancing the different interests at stake. ‘This test requires the Court to balance the severity of the restriction placed on the individual against the importance of the public interest.’²⁶ Consequently, to determine the outcome of a case, the Court balances the damage a specific privacy infringement has done to the individual interest of a complainant against its instrumentality towards safeguarding a societal interest, such as national security. It must be noted that this category is used in this study for three types of cases. First, cases regarding negative requirements of the government, which are or are not necessary in a democratic society. Second, as has been stressed earlier in this contribution, the ECtHR has accepted that a government may also be under a duty to use its powers in certain ways – it may have a positive obligation to protect the right to privacy of its citizens. In these types of cases, the Court usually balances the private interest of the applicant with the general interest (taken broadly, that is, not related to any of the official terms named in Article 8 ECHR). Third and finally, Article 14 ECHR contains an explicit prohibition of discriminatory practices. The ECtHR has decided that this provision may only be invoked if one of the other material provisions under the Convention, such as the right to privacy or the right to freedom of expression have been infringed. To provide an example, if a country has a law that prohibits homosexuals from joining the army, this might lead to a violation of Article 14 in combination with Article 8 ECHR.

²⁶ C. Ovey & R. C. A. White, “European Convention on Human Rights”, Oxford, OUP, 2002, p. 209.

Figure 33 Number of cases in which a violation of Article 8 ECHR was found on a certain ground

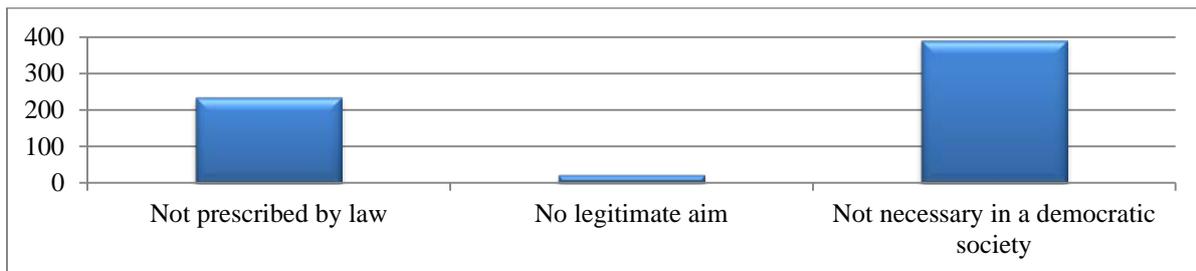


Figure 33 shows the number of cases in which the ECtHR has established a violation of the right to privacy per category. In somewhat less than 250 cases, the Court found that an infringement on Article 8 ECHR was not prescribed by law, in some 20 cases that the infringement served no legitimate aim and in almost 400 cases that the infringement was not necessary in a democratic society. It should be noted that this does not per se mean that the ECtHR did establish that a violation was prescribed for by law and served a legitimate aim; although the Court usually runs through these three requirements meticulously, it will sometimes also use an ‘even if’ argumentation to avoid difficult discussions. For example, it may stress that ‘even if the infringement was prescribed by law’, there has in any case been a violation of the right to privacy because the infringement was not necessary in a democratic society.

Figure 34 Further division of the cases in which the necessity-requirement was breached

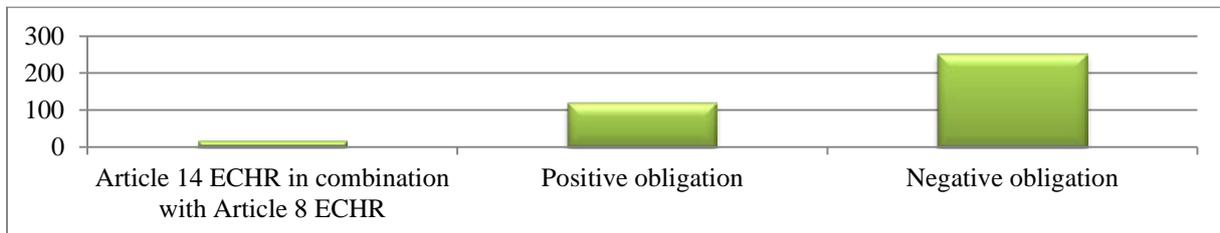


Figure 34 takes the cases which are categorised as violating the necessity-requirement. In reality, this category is a combination of three types of cases: matters regarding negative obligations by the state, positive obligations by the state and cases in which a violation of the right to be free from discrimination was established, in combination with a violation of Article 8 ECHR. It appears that most violations are found on the basis of negligence in relation to the negative obligations by the state, followed by the cases in relation to positive obligations. Still, it must be pointed out that it is often very difficult to establish whether a case revolves around a negative or a positive obligation and even the ECtHR often notes that no real distinction can be made between these two categories. Hence, there is a considerable margin of error and arbitrariness with respect to these numbers, which must consequently primarily be taken as indications rather than exact numbers. Finally, in less than 20 cases has the Court found a violation of the right to discrimination in combination with the right to privacy and even in these cases, it was sometimes one of the less substantial points of the decision, the Court, for example, already having established that the right to privacy and/or another substantial provision under the Convention was violated, and only after that points briefly out that there might also have been a violation of Article 14 and Article 8 combined. In fact, the ECtHR is often willing to judge cases regarding potential discriminatory practices with respect to the right to privacy under Article 8 ECHR, without additionally referring to Article 14 ECHR. Consequently, this latter provision plays only a minor role of significance.

Figure 35 Ground on which a violation of Article 8 ECHR was found divided per year

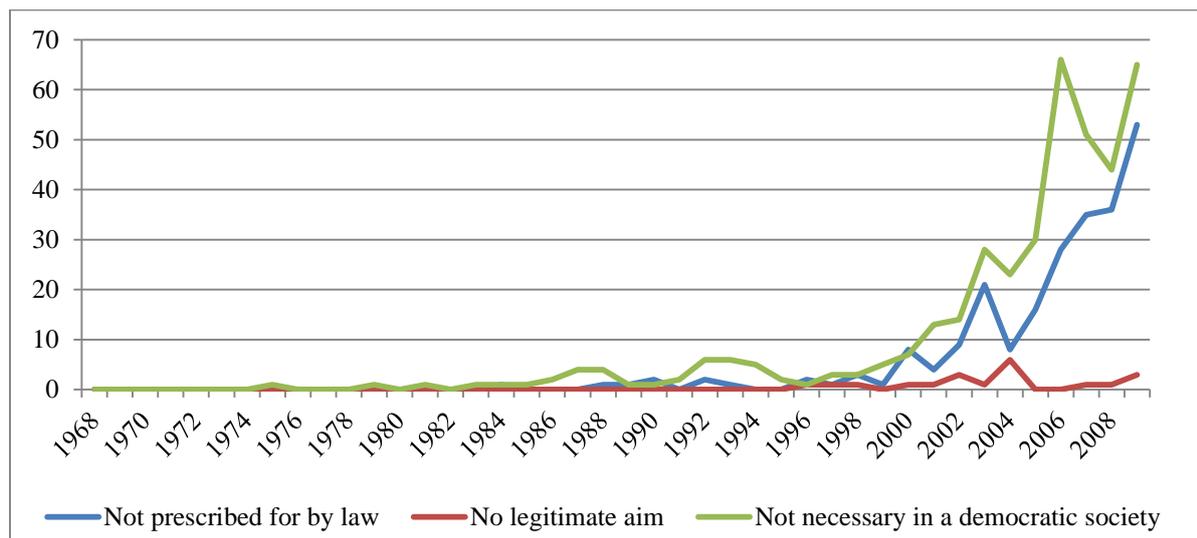


Figure 35 shows the number of cases in which a violation of Article 8 ECHR was established per category per year. It appears that, in fact, the percentages of cases in which certain grounds led to the establishment of a violation of the right to privacy are relatively stable. The necessity-requirement has always been the most frequent ground, followed closely by the requirement of having a legal basis for the infringement. Perhaps the only interesting point in this respect is that in more recent years, there seems a slightly higher percentage of cases in which a violation of the right to privacy was found on the ground that the infringement had no legal basis, but the period is too short to draw reliable conclusions on this point.

Figure 36 Ground on which a violation of Article 8 ECHR was found per type of privacy

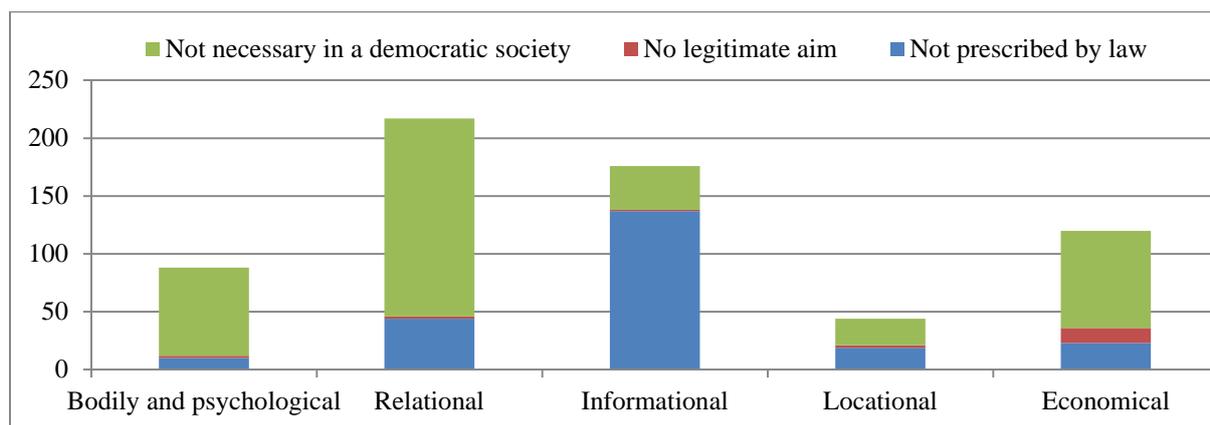


Figure 36 shows the ground on which a violation of the right to privacy was found, divided per type of privacy. It appears that in most categories, it is the necessity requirement that led to a breach of Article 8 ECHR most commonly, but with respect to locational privacy, about half of the cases in which a violation was established were due to the fact that the infringement had no legitimate basis, and with respect to informational privacy, this is true for almost 4/5 of the cases. A typical example of the first is when the private home of an individual is entered without a warrant and of the second is when the correspondence of a prisoner is monitored by prison authorities without a legal basis. Finally, it should be noted that the cases in which a violation of Article 8 ECHR was found because the infringement served no legitimate aim regarded almost exclusively economical privacy.

Figure 37 Ground on which a violation of Article 8 ECHR was found per type of applicant

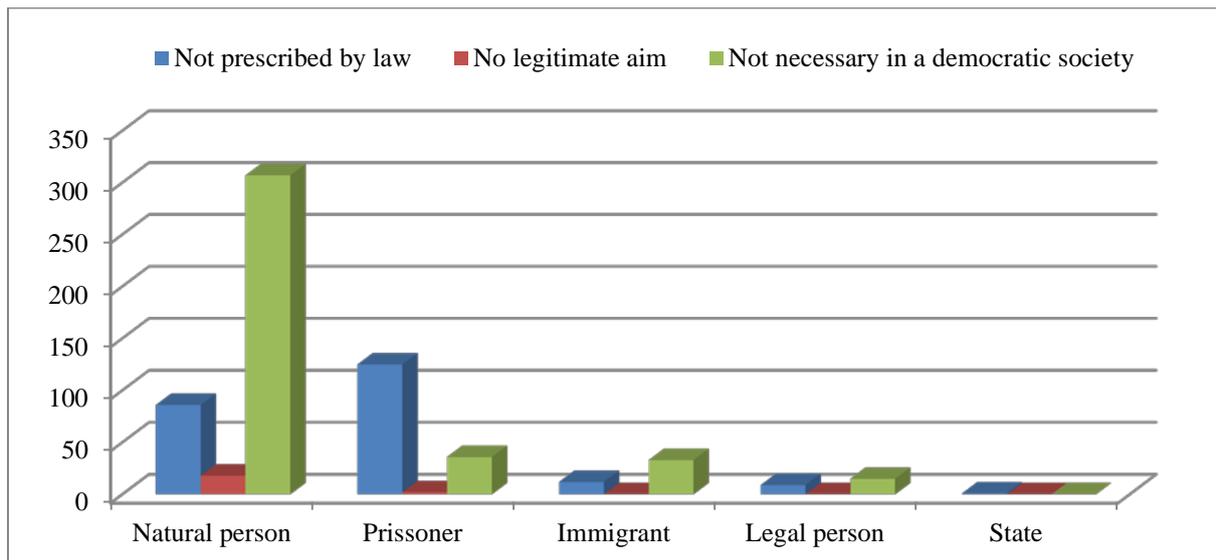


Figure 37 shows the reason for establishing a privacy violation divided per type of applicant. Figure 38 does the same with respect to the five countries against which most cases have been assessed by the Court (second-tier) on the point of a potential violation of Article 8 ECHR. The points made earlier in this article are confirmed by these graphics. Indeed, in most cases, a violation is found on the basis of the necessity-requirement, but with respect to prisoners, this is mostly done on basis of the requirement that the infringement should be prescribed for by law. Poland is the country against which these types of cases are most commonly established. Turkey is also involved in a number of these cases, but is also held in violation of the right to privacy in cases in which it set fire to villages, bulldozed houses or evacuated towns for years in a row. The ECtHR has found a violation of Article 8 ECHR in these types of cases typically because no legal basis was found or because these actions served no legitimate aim.

Figure 38 Ground on which a violation of Article 8 ECHR was found per country

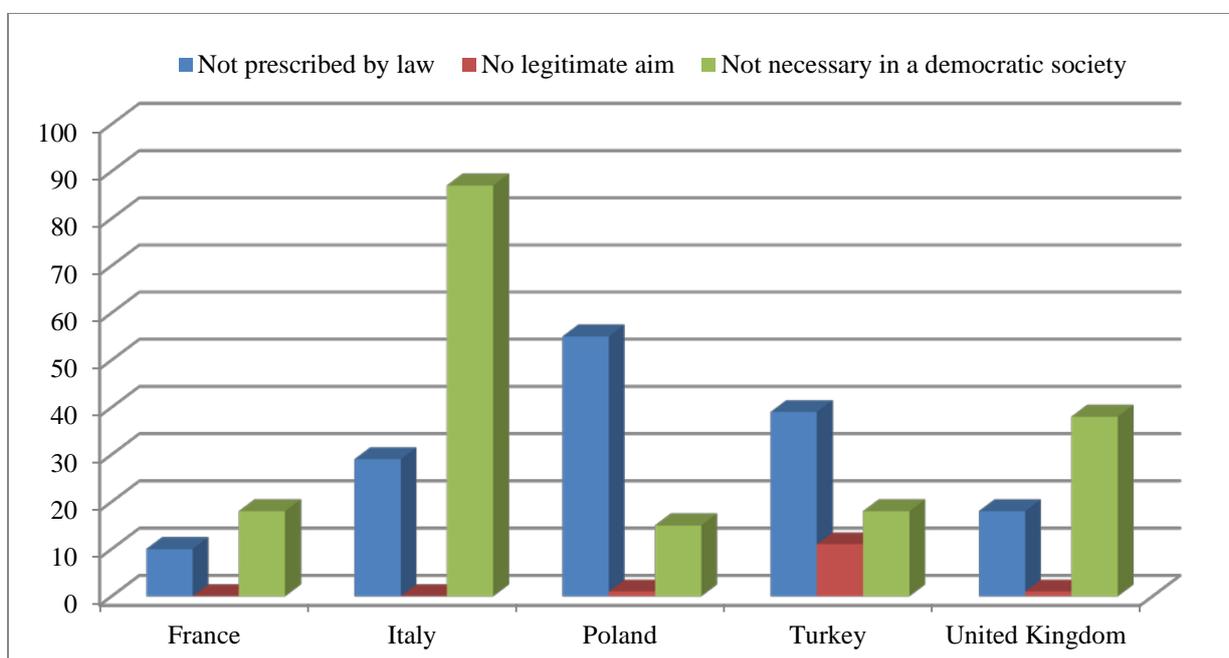


Figure 39 Total amount of damage awarded per category

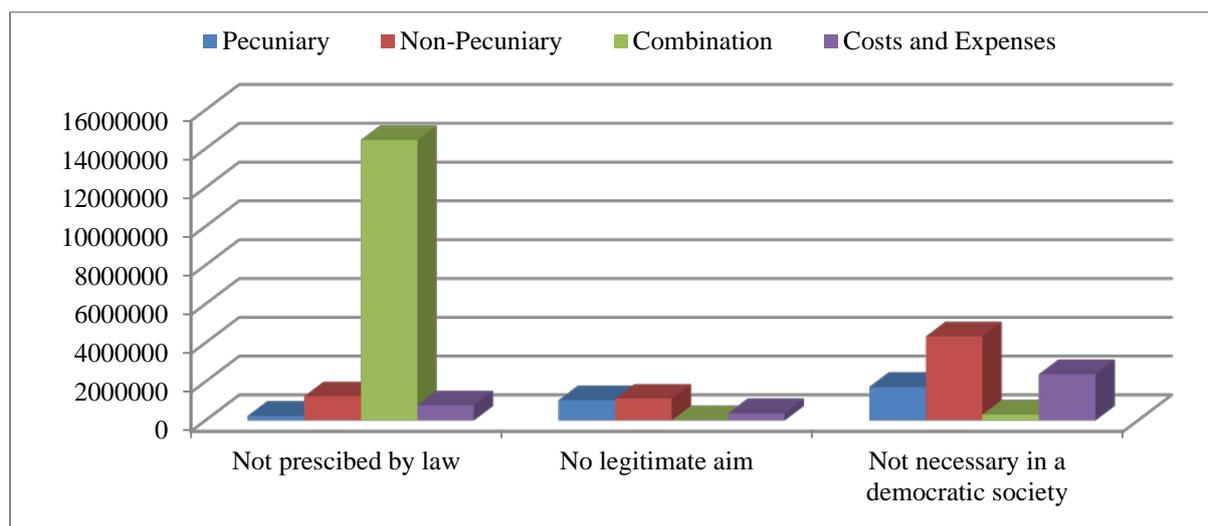
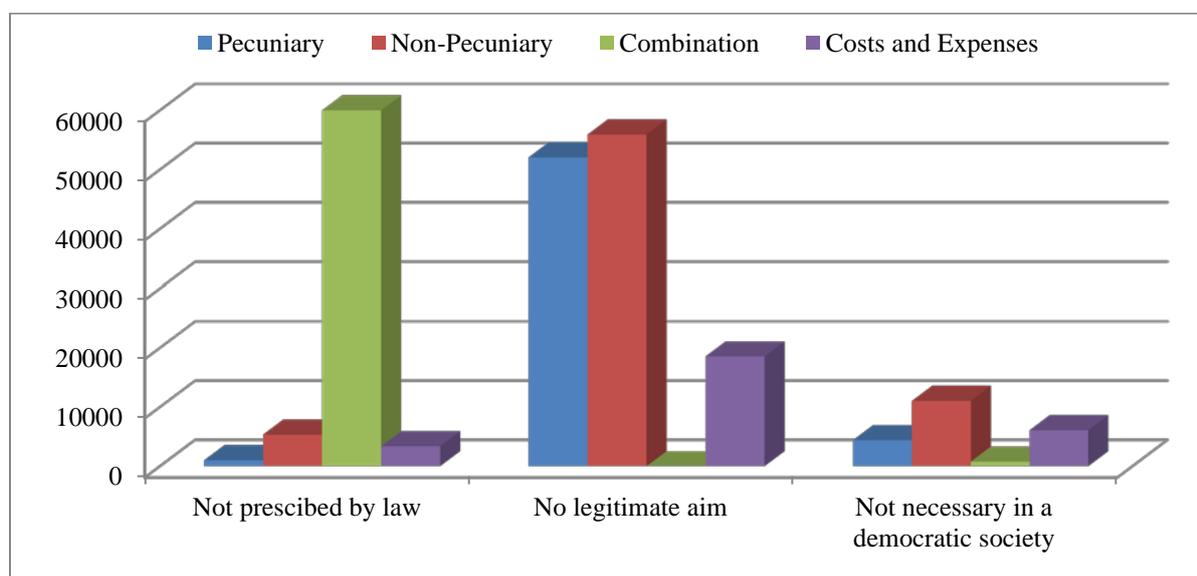


Figure 39 shows the total amount of damages awarded by the ECtHR in cases in which a violation of Article 8 ECHR was found, divided per category. It seems the case that when the ECtHR finds that an infringement has no legal basis, it will provide a larger sum of damages than in other cases. This, however, is a bit misleading. In fact, this number is perverted due to a few cases against Turkey, discussed earlier. In fact, in most cases in which a violation was found on this point, no or very low sums of damages were awarded. Only in 68 of the some 230 cases in which the Court found a violation of Article 8 ECHR because the infringement was not prescribed by law has the Court granted more than €3.000,- for either material or immaterial damages or in the combination category. Of the slightly more than 230 cases in this category, in almost 90 the ECtHR granted no damages in either one of these three categories. In fact, it seems that on average, the Court affords most damages to applicants if no legitimate aim was found for the infringement of Article 8 ECHR. But again, these are quite exceptional cases and moreover, the number is so small that no reliable conclusions can be drawn on this point. With respect to the necessity-requirement, it appears that especially quite considerable amounts are offered to applicants for the relief of non-pecuniary damages.

Figure 40 Average amount of damage awarded per case in which a violation of a requirement was found



9. Summary

This contribution has tried to assess on the basis of which criteria the European Court of Human Rights attributes damages for a violation of the right to privacy (Article 8 ECHR). Eight factors have been taken into account, divided in several subcategories.

- (1) The type of damage that is compensated
 - a. Pecuniary damage
 - b. Non-Pecuniary damage
 - c. Combination of different types of damages
 - d. Compensation for Costs and Expenses
- (2) The year in which the judgement was delivered (1950-2010), in particular 5 decennia
 - a. 1960-1970
 - b. 1970-1980
 - c. 1980-1990
 - d. 1990-2000
 - e. 2000-2010
- (3) The country against which the complaint was lodged, in particular 5 countries
 - a. France
 - b. Italy
 - c. Poland
 - d. Turkey
 - e. United Kingdom
- (4) The court delivering the judgement, in particular the five different sections
 - a. First Section
 - b. Second Section
 - c. Third Section
 - d. Fourth Section
 - e. Fifth Section
- (5) The type of applicant
 - a. Natural Person
 - b. Immigrant
 - c. Prisoner
 - d. Legal Person
 - e. State
- (6) The number of applicants
 - a. 1 applicant
 - b. 2 applicants
 - c. 3-10 applicants
 - d. 10-50 applicants
 - e. > 50 applicants
- (7) The type of privacy at stake
 - a. Bodily and psychological privacy
 - b. Relational privacy
 - c. Informational privacy
 - d. Locational privacy
 - e. Economical privacy
- (8) The ground for finding a violation
 - a. Not prescribed by law
 - b. No legitimate aim
 - c. Not necessary in a democratic society

This contribution has analyzed the judgements delivered by the European Court of Human Rights on the point of Article 8 ECHR until 2010. It has tried to paint a broader picture with respect to the types of cases before the ECtHR, but has focused in particular on the question of how the Court calculates the damages afforded to the victims of a privacy violation. From this analysis, the following may be concluded. Most damages have been awarded in the Combination category, which consists primarily of material damages. This is remarkable because the Combination category is used in a very limited number of cases. Moreover, it may be pointed out that of the 648 cases in which the Court has found a violation of Article 8 ECHR, it awarded some type of relief in 564 of them or in 440 of them, when the mere procedural costs (the awards for costs and expenses) are excluded. In almost 400 cases, the Court has awarded relief for non-pecuniary damages and in a similar number of cases, it has compensated the costs and expenses of the applicants. The damages awarded are usually relatively small figures. Per case in which a violation of the right to privacy was found, on average, €4.632,- was awarded for pecuniary damage, €10.323,- for non-pecuniary damage, €22.773,- for a combination of categories and €5442,- for costs and expenses.

The total number of cases has increased exponentially over the years and from 2000 onwards, the ECtHR has held a violation of Article 8 ECHR in a significantly higher percentage of the cases before it. Consequently, the majority of the damage that has been awarded by the Court was granted in the last decennium. The non-pecuniary damage awarded per case has steadily but slowly increased over time. Perhaps more remarkable is that the costs and expenses awarded by the Court on average per case has dropped in the last decennium. Why this is remains unclear. From the comparison between the last two decennia studied for this contribution, 1990-2000 and 2000-2010, it appears that the categories of pecuniary damage and of the combination of damages are connected to each other. When the pecuniary damages are high, the combination category is relatively low and vice versa.

If the 5 countries are analyzed against which the most cases under Article 8 ECHR were assessed by the European Court of Human Rights, it appears that there exists a significant difference between them. While Poland is the country which is held in violation of Article 8 ECHR most often after Italy, it is required to pay only minimal damages. Italy is primarily required to compensate non-pecuniary damages, while the United Kingdom has to pay quite significant amounts for both material and immaterial damages and for the costs and expenses. Turkey is the champion on the point of both material and immaterial costs, and in particular the 'Combination' category.

It appears that the Fourth section of the Court has in particular dealt with the cases in which the 'Combination' category was used. Apart from that, it is clear that especially the First and the Second section and the Grand Chamber attribute higher sums for immaterial damage than the other chambers. It also appears that the Third and Fifth section, as opposed to some other sections, have a quite even spread across the Pecuniary, Non-Pecuniary and Costs and Expenses categories.

When one applicant was involved with a complaint, on average, €896,- was awarded for pecuniary damages per case in which a violation of the right to privacy was established, € 5.906,- for non-pecuniary damages, €5.488,- in the 'Combination' category, and €4.004,- for costs and expenses. When two applicants lodged a complaint which resulted in a violation of Article 8 ECHR, this was on average € 8.385,- for pecuniary and € 12.374,- for non-pecuniary damage, € 3.989,- for the 'Combination' category and € 8.705,- for cost and expenses. These sums are for the applicants jointly and should consequently be divided by two to calculate the average amount of damages awarded per victim. The more applicants join in a case, on average, the more damage is awarded, which was to be expected.

Most damages have been awarded to ordinary natural persons. What is interesting is that on average, prisoners and immigrants have been awarded limited amounts of damages.

This is because in a number of cases, the ECtHR stresses that the establishment of a violation in itself constitutes sufficient satisfaction for the applicant, for example, by holding that an immigrant should not be extradited or that a prisoner should have more liberties, for example, with respect to family visits. With regard to legal persons, one could have expected that especially the pecuniary damages and the ‘combination’ category would be high, but the opposite is true.

It should not come as a surprise that most damages have been awarded for a violation of economical privacy. Judging from the amount of damages awarded in the other four categories, it seems that the Court is inclined to provide higher sums of damages for a violation of a person’s bodily or psychological integrity and for an infringement on the privacy of his home than for a violation of relational or informational privacy. This might be, because in those types of cases, the Court hold that the establishment of the violation itself provides enough satisfaction. However, although this indeed holds true for informational privacy, such a finding by the Court is no more frequent with regard respect to relational privacy than in relation to bodily and psychological, locational and economic privacy. Out of the 89 cases in which the ECtHR found a violation of Article 8 ECHR with respect to bodily and psychological integrity, in 20 it provided no relief for damages or compensated only the legal costs in the Costs and expenses category; for relational privacy, this was 60 out of 218 cases; for informational privacy, this was 73 out of 176; for locational privacy, this was 10 out of 44; and finally, for economical privacy this was 45 out of 120 cases. Consequently, the explanation is presumably that with respect to relational privacy, the ECtHR does provide damages, but only small sums.

Finally, it seems the case that when the ECtHR finds that an infringement has no legal basis, it will provide a larger sum of damages than in other cases. This, however, is a bit misleading. In fact, this number is perverted due to a few cases against Turkey, discussed earlier. In fact, in most cases in which a violation was found on this point, no or very low sums of damages were awarded. Only in 68 of the some 230 cases in which the Court found a violation of Article 8 ECHR because the infringement was not prescribed by law has the Court granted more than € 3.000,- for either material or immaterial damages or in the combination category. Of the slightly more than 230 cases in this category, in almost 90 the ECtHR granted no damages in either one of these three categories. In fact, it seems that on average, the Court affords most damages to applicants if no legitimate aim was found for the infringement of Article 8 ECHR. But these are quite exceptional cases and moreover, the number is so small that no reliable conclusions can be drawn on this point. With respect to the necessity-requirement, it appears that especially quite considerable amounts are offered to applicants for the relief of non-pecuniary damages.

This research has been a first enquiry into the way the ECtHR calculates damages afforded to victims of a privacy violation. I’m not aware of any other studies that have tried to do the same. More research is needed to explain and deepen some of the aspects and correlations taken into account for this study; perhaps, other criteria could be analysed as well in the future. Moreover, it would be interesting to make a detailed comparison with how American judges provide relief to victims of privacy violations. Consequently, I hope this article is only a first in a number of scientific contributions to come addressing these or similar aspects.

Bart van der Sloot
Institute for Information Law,
University of Amsterdam,
The Netherlands