

Recent Development

PROTOCOL NO. 14 ECHR AND RUSSIAN NON-RATIFICATION: THE CURRENT STATE OF AFFAIRS

INTRODUCTION

Crafted in the wake of World War II, the European Convention on Human Rights (“ECHR”) was the first regional expression of fundamental human rights protection as asserted in the United Nations’ 1948 Universal Declaration of Human Rights (“UDHR”).¹ Its codified rights, primarily civil and political rights such as the right to life and the right to be free from torture,² were to be protected by the European Commission on Human Rights (“the Commission”), (now defunct) and its supervisory body, the European Court of Human Rights (“ECtHR” or “the Court”), which now sits in Strasbourg, France as the largest international court operating in the world.³ Additionally, the Council of Europe (“the Council”) organs now include a Parliamentary Assembly with parliamentarians drawn from all participating nations, and the Committee of Ministers, a political committee comprised of representatives of all Foreign Ministers. While it cannot invalidate national laws or domestic judgments, all forty-seven Member States of the Council of Europe are bound to accept the judgments of the Court, and Strasbourg “can be seen as carrying out a judicial control, on the international plane, of the exercise of democratic discretion at the national level by domestic authorities (legislative, executive or judicial).”⁴ Strasbourg’s control is sometimes said to be “quasi-Constitutional”—providing both generalized standards of human rights for the European space, and through the right of individual petition, specific relief for distinct violations.⁵

The ECtHR has its own independent rules but its basic outlines are governed by the ECHR itself, which can only be amended through the addition

1. See generally Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95 (2003); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.unhchr.ch/udhr/index.htm>.

2. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

3. Paul Mahoney, *Speculating on the Future of the Reformed European Court of Human Rights*, 20 HUM. RTS. L.J. 1, 1 (1999).

4. *Id.* at 2.

5. Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161, 161 (2002).

of protocols, unanimously ratified by the Member States.⁶ To date, fourteen protocols have been adopted and twelve ratified, with most adding additional rights to the Convention,⁷ some addressing Convention procedures,⁸ and a few addressing the powers of the Court.⁹ Of this last group, the two most important are Protocol No. 11 and Protocol No. 14, which seek, respectively, to improve the efficiency and quality of Court judgments.¹⁰ Protocol No. 14 was adopted to improve the efficiency and maintain the effectiveness of the Court, as the simplified, full-time Court created by Protocol No. 11 still suffered the “risk of . . . becoming totally asphyxiated.”¹¹

Protocol No. 14, however, has become an object of controversy within the Council, as the Russian State Duma—the federal parliament—has yet to ratify it. Already suffering from deteriorating conditions unabated by

6. EUR. CT. HUM. RTS., REVISED RULES OF COURT (2008), <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesofCourt.pdf> [hereinafter EUR. CT. HUM. RTS., REVISED RULES].

7. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, Europ. T.S. No. 009 [Protocol No. 1]; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Sep. 16, 1963, Europ. T.S. No. 046; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Apr. 28, 1983, Europ. T.S. No. 114; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Europ. T.S. No. 117; Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, May 3, 2002, Europ. T.S. No. 187, *all available at* <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.

8. Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention, May 6, 1963, Europ. T.S. No. 045; Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention, Jan. 20, 1966, Europ. T.S. No. 055; Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 19, 1985, Europ. T.S. No. 118; Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 25, 1992, Europ. T.S. No. 146, *all available at* <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.

9. Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give Advisory Opinions, May 6, 1963, Europ. T.S. No. 044; Protocol No. 10 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, Europ. T.S. No. 140; Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, May 11, 1994, Europ. T.S. No. 155; Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, May 13, 2004, Europ. T.S. No. 194, *all available at* <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.

10. On European Convention and European Court of Human Rights history, see generally EUR. CT. HUM. RTS., INFORMATION DOCUMENT ON THE COURT (Sept. 2006), *available at* http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf.

11. Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights: A New Protocol No. 14 to the Convention and Other Measures to Guarantee the Long-Term Effectiveness of the Convention System*, 26 HUM. RTS. L.J. 1, 2 (2005). See generally Christina G. Hioureas, *Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT'L L. 718, 718–719 (2006) (describing the Court's heavy caseload).

Protocol No. 11, the Court now finds itself in an international tug-of-war between other Council Member States and Russia. As the preeminent model for the international judiciary, the fate of the European Court of Human Rights should concern scholars, jurists, and human rights defenders the world over.

This Recent Development summarizes the background to, drafting of, and key provisions of Protocol No. 14 and its pending reforms. It then goes on to describe the current stalemate created by the Russian Federation's non-ratification of the reorganization, critiquing Russia's apparent reasons for inaction. While arguing in favor of immediate ratification, it attempts to offer some indications of how the Court may move forward.

I. A DIRE SITUATION

Protocol No. 11 proved very effective. While the Commission and the Court had released 38,389 decisions and judgments between 1954 (when the Commission was created) and 1998 (when Protocol No. 11 abolished the Commission), the reformed Court alone nearly doubled that total in its first five years.¹² Nonetheless, the enlargement of the Council of Europe¹³ and the concomitant increase in awareness of human rights throughout Europe (especially in the post-Soviet world) has resulted in a skyrocketing number of applications. From 1990 to 1994, applications increased by 96%; between 1994 and 1998, applications increased another 76%; and in the next four years to 2002, applications nearly doubled yet again, increasing by 90% to 34,546. Even with the advent of Protocol No. 11 reforms, the Court had only reached 65.2% efficiency by 2003—leaving 800 unprocessed applications per month.¹⁴ The situation has only worsened. Despite the more-than-doubling of the Court's Registry staff in the previous seven years, over 20,000 of 50,000 incoming applications were left unaddressed in 2006¹⁵ and there were 79,400 applications pending in 2007.¹⁶ In 2007, 45% of all applications awaiting the initial three-judge committee

12. Council of Europe, Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, ¶ 5 [hereinafter Explanatory Report to Protocol No. 14], available at <http://www.conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

13. With the entry of an independent Montenegro in May 2007, Belarus remains the only European non-member state. The Convention system now covers about 800 million Europeans. See Council of Europe, The Council of Europe's Member States, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Mar. 16, 2009); Council of Europe, A Short History of the Council of Europe, http://www.coe.int/T/E/Com/About_Coe/10_points_intro.asp (last visited Mar. 16, 2009).

14. Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 5.

15. Erik Fribergh, *Why the European Court of Human Rights Needs Protocol No. 14*, in HUMAN RIGHTS: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 78, 78 (Feb. 2007) (publication founded by Russian Federation's the Council of Judges and the International Union of Jurists).

16. EUR. CT. OF HUM. RTS., ANALYSIS OF STATISTICS 2007, at 5 (2008), available at http://www.echr.coe.int/NR/rdonlyres/C8F656AA-94C4-4A3F-A69D-0E4C6D510CA8/0/Analysis_of_statistics_2007.pdf.

review had been lodged a year or more previously.¹⁷ Court Registrar Erik Fribergh estimated that, for the first six months of 2008, the number of pending cases was “roughly 89,000.”¹⁸

The Council of Europe’s response to this dire situation was immediately to begin discussions on further reforms to the system. These efforts culminated in Protocol No. 14, which was opened for signature and ratification in 2004.¹⁹ At the time, the Committee of Ministers expressed the hope that complete ratification could be achieved within two years.²⁰ Poland became the 46th, and currently last, state to ratify the Protocol on October 12, 2006.²¹ All Council of Europe Member States have signed Protocol No. 14, attesting to both its multilateralism and the consensus on its necessity for the survival of the Court. However, five years since the Protocol was opened and nearly a decade since the critical problems of the Court were first identified,²² a single country—Russia—has held out on ratification. Negotiations between the Russian State Duma’s Legal Committee and the Council of Europe Parliamentary Assembly’s Committee on Legal Affairs and Human Rights are ongoing, but “the Court cannot wait much longer.”²³

II. BACKGROUND: PROTOCOL NO. 11

The rapid accumulation of pending cases and the long delays that result as a consequence risk undermining the unique right of the individual application that underpins the Convention system. While debate exists as to the original mission of the Strasbourg system and whether it was meant to be a court of last resort for claims for accountability and justice in individual cases, rather than primarily a norm-setting body, Protocol No. 11 tipped the debate in favor of the proponents of individualized justice. Making the acceptance of individual petitions compulsory for member states, Protocol No. 11 ensured that the flood of claimants would continue. While the purpose of this piece is not to engage in this debate, which has been ably

17. ANALYSIS OF STATISTICS 2007, *supra* note 16, at 10. See also Eur. Parl. Ass. (PACE) Committee on Legal Affairs and Human Rights, *The Russian Federation’s Non-Ratification of Protocol No. 14 to the European Convention on Human Rights*, Doc. AS/Jur (2008) 45, Sep. 5, 2008, ¶¶ 1–3.

18. Erik Fribergh, Registrar, Eur. Ct. Hum. Rts., Address to a Joint Meeting of the Parliamentary Assembly of the Council of Europe (PACE) Committees on Economic Affairs and Development, and Legal Affairs and Human Rights (June 26, 2008) (personal notes of author).

19. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, May 13, 2004, Europ. T.S. No. 194 [hereinafter Protocol No. 14], available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>.

20. See Fribergh, *supra* note 15, at 78.

21. For a list of signature and ratification dates of all Council Member States, see Council of Europe, Protocol No. 14 Signature and Ratification Information, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=10&DF=7/27/2008&CL=ENG> (last visited Apr. 16, 2009).

22. *Id.*

23. Fribergh, *supra* note 18, at 80.

discussed elsewhere,²⁴ some historical context concerning the transition of the Court is worth noting.

The Council of Europe emerged out of the unique circumstances of post-war Western Europe in response to burgeoning Soviet power and to the horrors exerted by authoritarianism.²⁵ Thus, at its inception the European Convention on Human Rights and the court it created were

much more about protecting the democratic identity of member states through the medium of human rights, and about promoting international cooperation between them, than . . . about providing individuals with redress for human rights violations by national public authorities.²⁶

The right of individual petition was initially optional for Member States, and for most of its existence the Court was part-time, and “largely ignored,” receiving only 800 or so individual applications per year.²⁷ Furthermore, the original conception of Court action—the adjudication of interstate complaints—never gained much traction, likely because this adversarial approach was contrary to the cooperative ethos of the Council itself.²⁸

The situation, however, changed drastically in the last decade of the twentieth century with the inclusion of nearly all of the former Communist nations of Central and Eastern Europe and the former Yugoslavia in the Council. Today, the number of Member States has expanded from ten to forty-seven; the numbers alone give some idea that the Council of Europe institutions as originally conceived may not be equipped to handle the demands of its members, especially in light of the complex and violent ethnic and religious disputes that dominate the political narratives post-Soviet states.

Protocol No. 11 was drafted and ratified in the milieu of a system already beginning to resemble an apex court.²⁹ Protocol No. 11 abolished the European Commission on Human Rights and transferred the Commission’s

24. See generally Basak Cali, *The Purpose of the European Human Rights System: One or Many?*, 3 EUR. HUM. RTS. L. REV. 299 (2008); Patricia Egli, *Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?*, 17 J. TRANSNAT’L L. & POL’Y 1, 3–4 (2007); Steven Greer, *What’s Wrong with the European Convention on Human Rights?*, 30 HUM. RTS. Q. 680 (2008).

25. See Greer, *supra* note 24, at 681.

26. *Id.* at 682.

27. *Id.*

28. *Id.*

29. See generally Council of Europe, Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter Explanatory Report to Protocol No. 11], available at <http://www.conventions.coe.int/Treaty/EN/Reports/Html/155.htm>; Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT’L L. 145 (1995); Andrew Drzemczewski & Jens Meyer-Ladewig, *Principle Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11, Signed on 11 May 1994*, 15 HUM. RTS. L.J. 81 (1994).

responsibilities to a full-time, fully judicialized Court.³⁰ Jurisdiction and right of individual petition against Contracting States became compulsory. The number of judges now equals the number of Member States, and they are elected for a six-year, renewable term.³¹ In the interests of manageability, the Court currently sits in a Grand Chamber of seventeen judges. Smaller chambers of seven judges initially consider cases and committees of three judges consider questions of admissibility.³² The smaller chambers and committees are balanced by gender and by national legal system, according to the Rules of the Court.³³ The Committee of Ministers, deemed to be too much of a political institution to settle cases on the merits, henceforth only ensures the execution of the Court's judgments.³⁴ However, despite the efficiency gains made by full judicialization, it soon became evident that Protocol No. 11's reforms would not have a lasting effect on the Court's capabilities, and that additional transformations were still necessary.³⁵

III. THE DEVELOPMENT AND PROVISIONS OF PROTOCOL NO. 14

During celebrations for the fiftieth anniversary of the Convention in 2000, the Council of Europe Ministerial Conference recognized that the Court was at a critical stage and called on the Committee of Ministers to initiate an inquiry into what could be done to ameliorate the situation. A year later, the Committee of Ministers responded by issuing a directive to their Deputies on the subject.³⁶ The Steering Committee on Human Rights ("CDDH") was then created to produce a concrete set of proposals. Composed of representatives from Council of Europe Member States, including Russia,³⁷ the CCDH submitted its final report to the Committee of

30. These included registering applications, fact-finding, determining admissibility, and attempting to mediate friendly settlements. Greer, *supra* note 24, at 683.

31. ECHR, *supra* note 2, arts. 20, 23(1).

32. *Id.* art. 27(1).

33. EUR. CT. HUM. RTS., REVISED RULES, *supra* note 6, at 13 (Rule 25).

34. Greer, *supra* note 24, at 683. One major problem with the current system not related to efficiency remains that the Committee of Ministers supervises execution of the Court's declaratory judgments (per the doctrine of subsidiary, it is up to the individual State to determine how best to rectify the situation identified by the Court), but does not have real means of forcing action, with perhaps the "nuclear option" of invoking Article 8 of the Statute of the Council of Europe, providing for suspension or expulsion from the Council. Statute of the Council of Europe art. 8, May 5, 1949, Europ. T.S. No. 1, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm>.

35. This is not to say that Protocol No. 11 was therefore a failure. It certainly gave the Strasbourg system additional legitimacy by removing the possibility of overt political pressure on decision-making.

36. Comm. of Ministers, *Declaration on the protection of Human Rights in Europe guaranteeing the long term effectiveness of the European Court of Human Rights*, 109th Sess. (Nov. 8, 2001), available at <http://wcd.coe.int/ViewDoc.jsp?id=236869&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

37. Eaton & Schokkenbroek, *supra* note 11, at 2, 3.

Ministers on April 4, 2003.³⁸ Out of these proposals, specific amendments were then drafted and presented to the Committee of Ministers in April 2004.³⁹

The final Protocol involved consultation and discussion with multiple interested parties, including Assembly Parliamentarians, the Court Registry, and Non-Governmental Organizations (NGOs), and incorporated concurrent independent findings by an Evaluation Group (GDR). Internal disagreement⁴⁰ and a negative response to some of the proposals by the Parliamentary Assembly of the Council of Europe (PACE)⁴¹ ultimately provoked the formation of a compromise text. Following the consultative process, Protocol 14 was adopted by a vote of forty-four to zero.⁴² The Protocol opened for signature and ratification on May 13, 2004.⁴³

The thrust of Protocol 14 is a major re-organization in the operation of the Court in order to deal with problems in efficiency and efficacy. Under Protocol 14, judges on the ECtHR are to serve a single, nine-year term in office, rather than the renewable six-year period formerly in place.⁴⁴ While this change does not affect the efficiency of the Court *per se*, the amendment was suggested in order to provide increased stability within the Court and to remove any temptation to politicize the election process.⁴⁵

The Protocol also empowers the Committee of Ministers to initiate proceedings in the Court (as a Grand Chamber) against states who do not fulfill their obligations to execute Court judgments.⁴⁶ Again, while this change does not affect the efficiency of the Court *per se*, it is intended to supply the Committee of Ministers with an additional means of applying political pressure.⁴⁷ Other changes regarding the Committee of Ministers include: a streamlined friendly settlement procedure;⁴⁸ clarifying the position of the

38. Steering Comm. for Hum. Rts. (CDDH), *Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights: Final Report Containing Proposals of the CDDH*, adopted April 4, 2003, Doc. CM(2003)55E, available at <http://wcd.coe.int/ViewDoc.jsp?id=25033&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

39. Steering Comm. for Hum. Rts. (CDDH), *57th Meeting Report*, April 5–8, 2004, Doc. CDDH(2004)006, available at http://www.coe.int/t/e/human_rights/cddh/3._committees/01.%20steering%20committee%20for%20human%20rights%20%28cddh%29/05.%20meeting%20reports/57th_en.asp#TopOfPage.

40. Eaton & Schokkenbroek, *supra* note 11, at 3.

41. See Eur. Parl. Ass., Opinion No. 251 (2004), ¶ 11, available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta04/EOPI251.htm>.

42. Eaton & Schokkenbroek, *supra* note 11, at 3.

43. For a detailed account of the Protocol No. 14 drafting process and the balancing of the various interests therein, see generally Hioureas, *supra* note 11.

44. Protocol No. 14, *supra* note 19, art. 2.

45. See Eaton & Schokkenbroek, *supra* note 11, at 11. The nine-year term was a suggestion of PACE. See Eur. Parl. Ass., *supra* note 41, ¶ 8.

46. Protocol No. 14, *supra* note 19, art. 16.

47. See Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 99; see also Comm. of Ministers, *supra* note 34.

48. See Protocol No. 14, *supra* note 19, art. 15. Friendly settlements are, of course, the fastest method to a mutually suitable conclusion and may be especially useful in repetitive cases.

Ministers vis-à-vis supervision;⁴⁹ and the ability of the Ministers—upon request of the Court—to reduce the number of Chambers judges from seven to five, for a *fixed* period.⁵⁰ The existing ability of the Commissioner for Human Rights to participate as a third-party in Court cases is also formalized.⁵¹

Similarly, the Court, upon application from the Committee of Ministers, may offer an explanation of a previous final judgment that Ministers are attempting to enforce,⁵² again facilitating State compliance and Ministerial enforcement in cases where there is a dispute about the exact meaning of a judgment. The Ministers must vote by a two-thirds majority to pose such a question, a requirement that is intended to ensure that the procedure is used sparingly so that interpretive questions do not become an additional burden to the Court.⁵³ While the Court is free not to reply to such a request, if it chooses to do so, the “manner and form” are discretionary.⁵⁴

The true heart of Protocol No. 14, however, begins with Articles 6 and 7 (which amend current Articles 26 and 27 of the ECHR), establishing an entirely new judicial formation: a competent single judge. This judge is empowered to declare cases inadmissible “where such a decision can be taken without further examination.”⁵⁵ As the Explanatory Report clearly explains, this provision is intended for use “only in clear-cut cases, where the inadmissibility of the application is manifest from the outset.”⁵⁶ In other words, this provision pertains to cases that violate Court rules and whose merits need not be explored. Examples of such cases include applications lodged past the Court’s six-month expiration date; claims against non-Member States; and cases initiated before the exhaustion of national remedies. Currently, these decisions are hugely time consuming for the three-judge committees: “the considerable amount of time spent on filtering [the applications] has a negative effect on the capacity of judges . . . to process” admissible cases.⁵⁷ Thus, this provision increases the potential efficiency of the Court threefold in such cases, which comprise about 95% of the ECtHR caseload.⁵⁸

Unlike an earlier proposal to empower the Registry to decide such cases,⁵⁹ the single judge procedure preserves the essential judicial nature of

49. See Protocol No. 14, *supra* note 19, art. 15; Explanatory Report to Protocol No. 14, *supra* note 12, ¶¶ 91–94.

50. Protocol No. 14, *supra* note 19, art. 6.

51. Protocol No. 14, *supra* note 19, art. 13; see Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 87.

52. Protocol No. 14, *supra* note 19, art. 16.

53. Explanatory Report to Protocol No. 14, *supra* note 12, ¶¶ 96–97.

54. Protocol No. 14, *supra* note 19, art. 16; see Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 97.

55. Protocol No. 14, *supra* note 19, art. 7.

56. Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 67.

57. *Id.* ¶ 8.

58. Fribergh, *supra* note 15, at 78.

59. See, e.g., Eaton & Schokkenbroek, *supra* note 11, at 5.

the proceedings. However, to ensure that a necessary level of knowledge is applied to each application, each judge will be assisted by a rapporteur from the Registry who is an expert on relevant national law. In all borderline cases, the judge is obliged to refer the matter for further review by a three-judge committee or a seven-judge chamber.⁶⁰

On the other end of the spectrum, Protocol No. 14 also addresses manifestly well-founded cases that are admissible but “repetitive” in that they stem from structural problems addressed by the Court in previous judgments.⁶¹ Such cases often arise before nations have had the opportunity to bring their national law in line with their obligations under the Convention and do not require lengthy legal analysis—merely an examination of the merits. Prime examples are cases complaining of excessive lengths of proceedings before national tribunals.⁶² Under Protocol No. 14, the three-judge committees would have competence to dispose of these cases—rather than employing a seven-judge chamber.⁶³ Thus, by reducing the number of judges needed for the application of pre-existing doctrine, the Court can more than double efficiency in this area, as well. The Court has already taken steps to facilitate this new procedure by identifying cases addressing structural problems as “pilot judgments” that can be followed in subsequent complaints stemming from that *same exact* structural defect.⁶⁴

Leaving the ability of the committee of judges to declare inadmissibility unchanged, Protocol No. 14 thus increases the power of the three-judge committee by combining both admissibility and merits decisions.⁶⁵ The Protocol, however, preserves the judicial nature of determinations and maintains the use of careful, apolitical deliberation by requiring that all committee judgments be given unanimously and by allowing a State Party to contest the application of the procedure in the specific instance. Moreover, if not already a member of the committee, a judge elected to represent the Member State concerned in the complaint may be invited to participate in the proceeding.⁶⁶ If the case cannot be considered “already the subject of well-established case-law of the Court,”⁶⁷ then the case is referred—as is the current practice—to a seven-judge chamber for additional analysis, with the continuing possibility of further review on appeal to the Grand Chamber.

60. Fribergh, *supra* note 15, at 79; Explanatory Report to Protocol No. 14, *supra* note 12, ¶¶ 67–72.

61. Protocol No. 14, *supra* note 19, art. 8.

62. See Egli, *supra* note 24, at 13.

63. Protocol No. 14, *supra* note 19, art. 8.

64. This new approach was first used in *Broniowski v. Poland*, Grand Chamber, App. No. 31443/96 (Eur. Ct. H.R. Sept. 28, 2005) ¶¶ 34–37, available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=Hudoc-en> (search for application number).

65. See Protocol No. 14, *supra* note 19, art. 8.

66. Protocol No. 14, *supra* note 19, art. 8.

67. *Id.*

While seemingly increasing the power of the Court, the pilot judgment procedure in fact reinforces the essential subsidiarity of the Court to national tribunals by stressing that it is the responsibility of each nation to ensure that human rights norms are safeguarded within their own legal traditions. The Court functions best by merely ensuring the consistency and fairness of those standards—hopefully, purely through the political impact of its very existence.⁶⁸

The final change to ECtHR practice, the introduction of a new admissibility criterion, proved to be the most controversial during drafting.⁶⁹ Under Protocol No. 14, applications may be declared inadmissible if “the applicant has not suffered a *significant disadvantage*, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”⁷⁰

The new admissibility criterion was thought essential to the entire scheme because the CDDH was doubtful that any other reform measure could withstand the projected increase in future applications.⁷¹ They did not want to compromise the position of the Court both as a guarantor of “individual justice” and “quasi-constitutional justice.”⁷² A stricter admissibility standard, it was thought, would significantly reduce the workload of the judges—removing over 800 applications⁷³—without fundamentally changing the current Convention system.

During negotiations, six states raised strong objections to the new criterion: Austria, Belgium, Finland, Hungary, Latvia, and Luxembourg—but, significantly for our purposes, not Russia.⁷⁴ The Austrians proposed an alternative clause, because the phrase “no significant disadvantage” risked “put[ting] forth an unintended negative message that some human rights

68. See Jean-Paul Costa, President of the Eur. Ct. Hum. Rts., Address to the Constitutional Court of the Russian Federation (May 10, 2007); Comm. of Ministers, *Recommendation on the verification of the compatibility of draft laws, existing laws, and administrative practice with the standards laid down in the European Convention on Human Rights*, May 12, 2004, Doc. Rec(2004)5, available at <http://wcd.coe.int/ViewDoc.jsp?id=743297&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>; Comm. of Ministers, *Recommendation on the improvement of domestic remedies*, May 12, 2004, Doc. Rec(2004)6, available at <http://wcd.coe.int/ViewDoc.jsp?id=743317&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (both recommendations adopted as part of the package of measures that included Protocol No. 14).

69. See Eaton & Schokkenbroek, *supra* note 11, at 6–7; Eur. Parl. Ass., *supra* note 41, ¶ 11.

70. Protocol No. 14, *supra* note 19, art. 12 (emphasis added). This language is similar to the filtering language employed by the United Nations Committee on Economic, Social and Cultural Rights in its Optional Protocol setting up a complaints procedure for the first time. See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, U.N. Hum. Rts. Council Res. 8/2, Annex, art. 4, A/RES/63/117 (June 18, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf.

71. Eaton & Schokkenbroek, *supra* note 11, at 6–7.

72. *Id.* at 6.

73. *Id.* at 7.

74. Hioureas, *supra* note 11, at 743.

violations are not significant.”⁷⁵ This point of view was supported by several NGOs involved, as they feared this would give Member States an excuse to ignore violations as merely minor. Ultimately, however, the judges then serving on the Court approved the current language.⁷⁶

While Austrian objections represent valid fears, there are a few mitigating points that support the provision. The final version was a significant departure from other, earlier suggestions giving the Court much wider discretion—similar to the certiorari procedure exercised by the United States Supreme Court⁷⁷—something deemed inappropriate given the complexities of dealing with (at that time) forty-five different legal systems.⁷⁸ Furthermore, it is estimated that, despite its significant effect in real numbers, statistically speaking, this change could only affect 5% or so of the current caseload.⁷⁹ Nonetheless, the final wording ensures that “cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law” will still be addressed. This acts as a safety valve, allowing the Court to hear close cases.⁸⁰

The new admissibility standard is also problematic to some in the sense that it contrasts to some extent with the Court’s established case law, where complaints may be admissible notwithstanding potential or indirect effects of the violation in question. This broad notion of victim-hood is now constrained by considerations of “physical, moral, legal or pecuniary prejudice,” and access—as compared to current levels—may be limited.⁸¹ The safeguard clause, which provides for admissibility despite no significant disadvantage when “respect for human rights . . . requires an examination . . . on the merits *and* provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal,”⁸² however, ensures that (1) all complaints receive a hearing, whether on the national or supranational level and that (2) all cases disputing constructions of national law —*i.e.*, systemic problems—will get a hearing in front of the European Court of Human Rights.

The second point is drawn from the concept that systemic problems, even those that are individually minor, collectively represent a grave threat

75. *Id.* The Austrian proposal was: “[I]f it appears from the file that the object of the application has been duly examined by a domestic tribunal according to the Convention and the Protocols thereto and in the light of the case-law of the Court, unless respect for human rights as defined in the Convention and the Protocols thereto requires a further examination of the application or the case raises a serious question affecting the interpretation or application of the Convention and the Protocols thereto, or a serious issue of general importance.” Eaton & Schokkenbroek, *supra* note 11, at 4 n.35.

76. Hioureas, *supra* note 11, at 743.

77. See Steering Comm. for Hum. Rts. (CDDH), *supra* note 38, ¶ 14.

78. Eaton & Schokkenbroek, *supra* note 11, at 6.

79. *Id.* at 7.

80. See Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 83.

81. Egli, *supra* note 24, at 16. See also Hioureas, *supra* note 11, at 751.

82. Protocol No. 14, *supra* note 19, art. 12 (emphasis added).

to human rights and should therefore still be heard. The Protocol takes into account the time that will be needed to develop clear interpretations of this new criterion in order for it to be effectively applied by single- and three-judge committees: Article 20 of Protocol No. 14 states that the new criterion cannot be used by these “lower” judicial bodies for two years—allowing for the necessary initial commentary by the chambers and the Grand Chamber. Nor can the criterion be retroactively applied to cases admitted before the Protocol goes into force.⁸³ This grant of deliberative space aligns closely with the Court’s dynamic self-perception, proving responsive to the needs of the moment and willing to stretch the boundaries of the “living” Convention and incorporate new rights or new procedures if necessary.⁸⁴ Finally, it cannot be emphasized enough that these changes to the Convention are drawn with very broad brushstrokes. The Court itself will, over time, determine the exact effects of Protocol No. 14⁸⁵—not only in legal interpretation, but in its own rules as well.

IV. RUSSIA AND THE RATIFICATION OF PROTOCOL NO. 14

A. *Initial Obstacles to Ratification of Protocol No. 14*

There is no suggestion in the existing, declassified documents that Russia was particularly obstructive during the negotiation process. Russia’s main contested issue was a proposal by the Parliamentary Assembly to add judges from countries that produced particularly large numbers of applications. “Russia had great difficulties with this measure because if the Court were to [include] two Russian judges, this would visibly expose Russia as having violated a significant number of human rights.”⁸⁶ The proposal was accordingly rejected. However, generally speaking, Russia does not have a sterling reputation in terms of cooperation with the Council of Europe.

The Russian Federation was admitted to the organization in 1996 under the shadow of abuses in Chechnya, and a report prepared for the Bureau of the Parliamentary Assembly noting that “the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the statute of the Council and developed by the organs of the European Convention on Human Rights.”⁸⁷ Issues of compliance with accession rules were generally brushed aside, however, given the

83. Explanatory Report to Protocol No. 14, *supra* note 12, ¶¶ 84–85, 105. Patricia Egli suggests that the Registry may also be helpful on this point, having previously noted for example, that the Convention’s non-derogable rights surely involve a “significant disadvantage.” Egli, *supra* note 24, at 15 n.77.

84. Egli, *supra* note 24, at 6 (quoting *Tyrer v. United Kingdom*, Chamber Judgment, App. No. 5856/72, ¶ 31 (Eur. Ct. H.R. Apr. 25, 1978)).

85. See Explanatory Report to Protocol No. 14, *supra* note 12, ¶ 59.

86. Hioureas, *supra* note 11, at 743 (internal quotations omitted).

87. Eur. Parl. Ass., Bureau of the Assembly, *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, Oct. 7, 1994, cited in Mark Janis, *Russia and the ‘Legality’ of*

political importance of integrating post-Soviet nations into Western Europe's liberal democratic tradition. This context is particularly significant in regards to Protocol No. 14, because those same political concerns "make it especially difficult for Strasbourg to force the Russian government to comply" with its obligations. Thus, as early as 1997, Professor Mark Janis foresaw a "two-tier legal order" that would enable Russia's continued participation in the system, but which would undermine the legitimacy of the Strasbourg institutions.⁸⁸

On December 11, 2006, two months after Poland became the penultimate Member State to ratify Protocol No. 14, the Russian State Duma Committee on Civil, Criminal, Arbitration and Procedural Legislation ("Legal Affairs Committee") issued a recommendation against ratification by the full Duma. On December 20, 2006, despite recommendations to ratify issued by then-President Vladimir Putin, ratification was duly rejected with 27 votes in favor, 138 against, and 286 abstentions.⁸⁹ The following January, President Putin reaffirmed his support for the Protocol, but his support was highly qualified by two significant objections. Putin's first objection concerned the possibility that the Protocol's "simplified system . . . could result in a deterioration in quality of examination of these matters." Second, Putin objected to the "politisation [sic] of judicial decisions" that "undermin[ed] the confidence in the international judicial system."⁹⁰

Although Putin's first objection aligns with qualms over gaps in human rights protection expressed by other Member States during the drafting process, it is unclear why Russia did not make more hay of it earlier, before ratification by all other member states. The second objection, while troubling on its face, is a poor excuse. Any nation finding itself at the wrong end of a string of cases would likely say the same thing, irrespective of the merits of the cases. On the contrary, however, other states that have appeared before the Court at similar rates, such as Turkey, have ratified the Protocol without raising this objection.⁹¹

Strasbourg Law, 8 EUR. J. INT'L L. 93, 93 (1997). See also Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, 6 EUR. HUM. RTS. L. REV. 732 (2008).

88. Janis, *supra* note 87, at 97–98. See also Jeffery Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 GA. J. INT'L & COMP. L. 511, 533 (2008).

89. See Fribergh, *supra* note 15, at 78.

90. Vladimir Putin, former President of Russia, Remarks Regarding the European Court of Human Rights and Non-ratification of the Protocol No. 14 to the Convention, at the meeting with the Council to Promote Development of the Civil Society Institutions and Human Rights, Moscow (Jan. 11, 2007), in HUMAN RIGHTS, *supra* note 15, at 77. Putin specifically cited the case of *Ilaftcu and Others v. Moldova and Russia*, Chamber Judgment, App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004) (determining that Russia and Moldova both had jurisdiction over separatist Moldovan-Romanians and thus were responsible for violations of human rights suffered subsequent to Convention ratification when the men were detained and prosecuted for anti-Soviet activities beginning in 1992), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=HUEDoc-en> (search for application number).

91. See, e.g., *infra* notes 100, 103.

PACE immediately responded to the Duma's rejection in a Current Affairs debate at its following January part-session. Dick Marty, then-chairman of the PACE Committee on Legal Affairs and Human Rights, went so far as to suggest that "[i]f the country felt that it could not comply with the principle of the independence of the Court then surely that country no longer belonged in [the Council of Europe]."⁹² Serhiy Holovaty, a parliamentarian from Ukraine, quoted from the *Novaya Gazeta* that "the Duma would not have refused ratification without the Kremlin's permission"—implying that the Russian executive branch was not being fully truthful with the international community in its expressions of support for the Protocol and that such manipulation of the Council of Europe was intolerable.⁹³ Nevertheless, the Parliamentarians generally followed the lead of one Dutch representative who recognized that "[t]he Russian Duma has the right to say no" but arguing that in the interests of justice the Protocol should be approved.⁹⁴ At that time, Leonid Slutsky of the Russian Federation noted the "groundwork" being done among Duma members and hoped for ratification prior to the December 2007 elections.⁹⁵

At the beginning of April 2007, Mr. Marty and Eduard Lintner, then-chairman of the PACE Monitoring Committee, were sent as PACE emissaries to Moscow to begin discussions on what needed to be done to get the Protocol ratified as quickly as possible. In meetings with high-level Russian officials, they were informed that there was a general possibility that ratification might be envisaged within a few months, and received reaffirmations of the Russian government's support of the Protocol. By July, the situation at the Court was dire enough that Jean-Paul Costa, the president of the Court, felt compelled to reiterate to then-PACE President René van der Linden that "we need concrete measures and we need them rapidly."⁹⁶ President Costa himself then visited Moscow, where he was "exceedingly well received":

Everybody said to us, "there is some resistance but we are sure that protocol 14 will be ratified by Russia very soon." When we tried to find out why it was not so, they either gave no explanation or explanations that were very strange—that decisions by a

92. Remarks of Mr. Marty (Switzerland), Current Affairs Debate, Eur. Parl. Ass., 2007 Ordinary Session First Part Report, Jan. 25, 2007, Doc. AS(2007)CR07, available at <http://assembly.coe.int/Main.asp?link=/Documents/Records/2007/E/0701251000E.htm>. See also EUR. PARL. ASS., RULES OF PROCEDURE OF THE ASSEMBLY, arts. 50 and 52, available at http://assembly.coe.int/RulesofProcedure/2008/Reglement_2008.pdf (procedures regarding conduct of Urgent Procedures and Current Affairs debates).

93. Remarks of Mr. Holovaty (Ukraine), Current Affairs Debate, *supra* note 92.

94. Remarks of Mr. Kox (Netherlands), Current Affairs Debate, *supra* note 92.

95. Current Affairs Debate, *supra* note 92.

96. Letter from Jean-Paul Costa, President of the Eur. Ct. Hum. Rts., to René van der Linden, then-President of the Parliamentary Assembly of the Council of Europe (July 5, 2007).

single judge would be contrary to the legal tradition of Russia. I could not take that very seriously.⁹⁷

However, no advancements were made, and negotiations ceased until March 2008, when the PACE Legal Affairs and Human Rights Committee again took up the subject at a regular committee meeting. The new chairwoman, Mrs. Herta Däubler-Gmelin, placed the Protocol at the top of the Committee's priorities, due to the deteriorating conditions of the Court. The Committee faced no official obstacles from the Russian delegation, but the process stagnated yet again as newly elected Duma representatives⁹⁸ familiarized themselves with the key issues at stake. Mrs. Däubler-Gmelin requested a face to face meeting during the April 2008 PACE session, and suggested that the presence of Mr. Pavel Krasheninnikov, chairman of the Duma Legal Affairs Committee, at her June 2, 2008 committee meeting would be greatly welcomed. Mr. Krasheninnikov did not appear at the meeting. Consequentially, the Committee authorized Mrs. Däubler-Gmelin to go to Moscow to meet personally with members of the Legal Affairs Committee.⁹⁹ A date was set for negotiations to be held in Moscow in October 2008.

B. *Further Objections to Protocol No. 14*

By far the largest of all the Council Member States with a population of 141.7 million people (nearly 18% of the Council of Europe's combined population), Russia is an essential component of the Council, and its participation in the ECtHR is fundamental to the Court's proper function, as Russian-based cases currently make up a quarter of pending allocated cases—more than any other Member State.¹⁰⁰ Thus, even with a rudimentary understanding of probability one should expect Russia's raw numbers to be quite high. Controlling for population, however, the picture looks much different. According to numbers compiled by the Permanent Representation of Germany to the Council of Europe, Russia has 143.23 cases pending per million people—below the 161.85 per million case average, and well below Slovenia, which tops the list at a count of 1,349 cases per million people.¹⁰¹

97. Joshua Rozenberg, *Stalemate in Strasbourg*, THE LAW GAZETTE, Oct. 16, 2008, <http://www.lawgazette.co.uk/opinion/comment/stalemate-strasbourg>.

98. The lower house of the Russian parliament was re-elected in December 2007.

99. Secretariat of the PACE Committee on Legal Affairs and Human Rights, Synopsis of the meeting held in Paris on June 2, 2008, June 5, 2008, Synopsis AS/Jur No. 2008/04.

100. EUR. CT. HUM. RTS., PENDING APPLICATIONS ALLOCATED TO A JUDICIAL FORMATION (Jan. 5, 2009), http://www.echr.coe.int/NR/rdonlyres/BBFE7733-3122-40F5-AACA-9B16827B74C2/0/Pending_applications_chart.pdf.

101. Statistics from or based on data as of Dec. 31, 2007, obtained from the German Ministry of Justice, Mar. 2008. See also PACE Committee on Legal Affairs and Human Rights, *supra* note 17, ¶ 5.

Nonetheless, it is apparent that Russia feels itself subjected to a higher level of scrutiny than is faced by other countries.¹⁰² In April of 2000, Russia's voting rights were suspended by the Parliamentary Assembly as a result of evidence of widespread human rights abuses in Chechnya. Although they were fully reinstated to the Council less than a year later,¹⁰³ this rebuke was swiftly followed by a series of judgments by the Court, confirming the responsibility of the Russian authorities in cases of enforced disappearances in Chechnya, either directly or for failure to carry out effective investigations.¹⁰⁴ These judgments appear to be central to Russia's aforementioned accusations of politicization of judicial decisions.¹⁰⁵ The former deputy speaker of the Duma, Sergei Baburin, for example, publicly "complained that Russia's membership fees [in the Council of Europe] simply fund 'attacks' on Russia by the Council."¹⁰⁶ The late 2008 crisis between Russia and Georgia in South Ossetia has already generated thousands of applications as well—suggesting that Russian issues will be on the Court's docket for some time to come.¹⁰⁷ As the Russian press sarcastically commented recently:

Dissatisfaction of Russian authorities with the strong motivation of the European Court of Human Rights to tackle the Russian cases should be replaced by . . . gratitude. After all, [the] Strasbourg Court only struggles to win the cases that were dismissed by Russian courts: most of the plaintiffs appealed to the Strasbourg Court with banal complaints, considering that at home they do not receive a fair trial. Their motivation could be explained by the previous success of the claimers before them. Over 10 years after having ratified the European Convention on Human Rights, Russia has reached a solid first place on the num-

102. See Rozenberg, *supra* note 97.

103. *Council of Europe Readmits Russia*, BBC NEWS, Jan. 26, 2001, <http://news.bbc.co.uk/2/hi/europe/1137382.stm>.

104. *Cf.* Baysayeva v. Russia, Chamber Judgment, App. No. 74237/01 (Eur. Ct. H.R. Apr. 5, 2007); Alikhadzhiyeva v. Russia, Chamber Judgment, App. No. 68007/01 (Eur. Ct. H.R. July 5, 2007); Magomadov and Magomadov v. Russia, Chamber Judgment, App. No. 68004/01 (Eur. Ct. H.R. July 12, 2007); Bazorkina v. Russia, Chamber Judgment, App. No. 69481/01 (Eur. Ct. H.R. July 27, 2006); Chitayev and Chitayev v. Russia, Chamber Judgment, App. No. 59334/00 (Eur. Ct. H.R. Jan. 18, 2007); Bitiyeva and X v. Russia, Chamber Judgment, App. Nos. 57953/00 & 37392/03 (Eur. Ct. H.R. June 21, 2007), available at <http://www.echr.coe.int/echr/en/hudoc> (search for application number).

105. *European court backlog: Interview with Egbert Myjer* [Dutch ECtHR judge], RADIO NETHERLANDS, Feb. 22 2008, <http://home.coe.int/Wires/WiresLectureE.asp?WiresID=73259> (excerpted in English translation); *Rights court struggles with spiraling backlog: Terry Davis Interview*, FINANCIAL TIMES (UK), Apr. 19, 2008, available at <http://home.coe.int/Wires/WiresLectureE.asp?WiresID=98924>.

106. Kahn, *supra* note 88, at 538 (quoting Asya Umarova & Laura Aldamova, *Chechnya: Human Rights Hopes Dashed*, INST. FOR WAR AND PEACE REPORTING: CAUCASUS REPORTING SERVICE, Mar. 15, 2007, http://www.iwpr.net/?p=crs&s=F&o=334109&spc_state=henpcrs). See also Leach, *supra* note 87.

107. See Rozenberg, *supra* note 97.

ber of lawsuits filed in Strasbourg. It far outstripped the previous leaders—Poland, Turkey and Ukraine.¹⁰⁸

Council of Europe officials highly contest the suggestion that the Court accepts insignificant cases and uses them as a tool with which to attack Russia.¹⁰⁹ Judges themselves argue that such cases reflect the purpose of the Court: “We are a human rights court which hands down rulings in situations where citizens’ rights have been violated. Sometimes this happens in Chechnya, but also in Turkey regarding the PKK [Kurdish separatist group].”¹¹⁰

Thus, Russia’s main concern over Protocol No. 14 reforms seems to be that they would serve to increase the allegedly unfair pressure on Russia by delivering an even higher number of negative judgments and by continuing to highlight sensitive political issues (for example, conflicts with Georgia).¹¹¹ Consideration of the nature of the cases however, reveals that 70 to 80% of all judgments so far delivered against Russia (and of the potentially admissible pending cases) relate to a very small number of systemic problems in the Russian judicial system—excessive length of pretrial detentions, low quality judicial remedies, and domestic non-enforcement of decisions against the state—problems that even some authorities will acknowledge do exist.¹¹² Protocol No. 14 is addressed only to the European Court of Human Rights and is thus of no relevance to the true, political issues animating the Russian cases before the Court. Improved Court functioning can only serve to buttress authorities’ attempts to introduce the reforms so badly needed. Commissioner for Human Rights, Thomas Hammarberg, has been particularly harsh on this point, calling the Duma no-vote “sabotage against the European Court of Human Rights.”¹¹³ When asked if he believed that Russia was attempting to use Protocol No. 14 to “blackmail” the Court, President Costa was unsure: “My impression is that Russia, when it signed the convention, did not expect that an international court—such as the European Court of Human Rights—could be in a position to condemn a state such as Russia.”¹¹⁴

108. *The European Court of Human Rights: the School of Strasbourg*, VEDOMOSTI NEWS SERVICE (Russia), July 9, 2008, available at <http://home.coe.int/Wires/WiresLectureE.asp?WiresID=103872> (with partial English translation).

109. FINANCIAL TIMES, *supra* note 105 (quoting Council Secretary General Terry Davis as “not accept[ing]” the Russian point of view that the Court is “hypocritical and has double standards”).

110. RADIO NETHERLANDS, *supra* note 105.

111. See, e.g., *Troops Enforce Georgia Emergency*, BBC NEWS, Nov. 8, 2007, <http://news.bbc.co.uk/1/hi/fr/-/2/hi/europe/7084357.stm> (describing accusations of Russian government intervention in Georgian internal affairs).

112. Informal discussions between Andrew Drzemczewski and the author, May/June 2008.

113. *Thomas Hammarberg: Russia Witnessing Positive Trends in the Protection of Human Rights*, INTERFAX, Oct. 4, 2007, <http://news.rin.ru/eng/news/10948>.

114. Rozenberg, *supra* note 97.

C. Addressing Russia's Objections

In terms of politically sensitive cases, a more constructive and professional dialogue between Russia and the Council of Europe is infinitely preferable to non-ratification. Expressing political concerns via the judicial process is destructive to the core of the ECHR system to which Russia has pledged its support and has indiscriminate effects throughout the entire continent. All cases in the system are being affected by the increasing wait for ratification, not just Russian ones.

Given the consensus among all other Member States—even those with more per capita cases pending and with similar sensitive issues—the Russian response to PACE attempts at negotiation is troubling. President Costa speculates that Russian behavior goes to the heart of its relationship to the Convention itself: “[f]or them it is very difficult to denounce the convention and leave the Council of Europe . . . so purely my personal impression . . . is that they prefer to be in the system but not to strengthen it [by ratifying the protocol].”¹¹⁵ Leaving the system entirely would generate extensive negative publicity worldwide, but very few people would raise any red flags if they raised objections to a seemingly “technical” treaty amendment.¹¹⁶ If that is the Russian intention, then this tactic is quite effective, as the Council itself has thus far shown it will do little more than attempt to negotiate and hope.

As expelling Russia would remove any moral or legal obligations on the Russians to respect human rights at all, it would likely be detrimental for the Council from a public relations perspective. The Council would risk looking as though it was willing to “abandon” 142 million Europeans when diplomacy—a core part of the Council’s mission—became a bit difficult. However, Council’s longstanding emphasis on negotiating this issue indicates that the leadership believes that it is better to have Russia be a defaulting member within the system than to remove even formalistic restrictions. Thus, to make any headway on this impasse, the PACE negotiators must take Russia’s objections seriously, despite any possible ulterior motives. Russian concerns can be boiled down and addressed individually.¹¹⁷

First, PACE must address Russia’s argument that the new admissibility criterion is really a substantive assessment and thus risks infringing applicants’ rights. As discussed above, this concern has already been ameliorated by the two safeguard provisions, as well as the protocol’s two-year implementation period on the Court developing “sophisticated, precise and constraining jurisprudence on this criterion.”¹¹⁸

115. Rozenberg, *supra* note 97.

116. *Id.*

117. See PACE Committee on Legal Affairs and Human Rights, *supra* note 17.

118. *Id.* ¶ 9.

Second, the Russians have expressed unease with the change in judges' terms of service. If politicization of judgments is a main concern, then the Russians should be in full support of a single term system as this has eliminated any judicial receptivity to political lobbying, preserving complete "independence and impartiality."¹¹⁹ Any efficiency effects created may be hard to measure, but common sense suggests a judiciary more focused on cases (rather than self-preservation) will produce judgments faster and of higher quality. Independence also reinforces the full judicialization of the Court, as intended by Protocol No. 11.

A third problem seems to be the formal recognition of the ability of the Human Rights Commissioner to intervene in cases. However, as is noted above, this provision does not materially change anything. Under the current Convention, Russia and every other Member State has already agreed by virtue of Article 36 in the ECHR that third parties may intervene upon consent of the president of the Court. Given that Protocol No. 14 does not enable the Commissioner to independently bring applications before the Court, it adds no further obligations. Rather, Protocol No. 14 merely improves efficiency of implementation.¹²⁰

A fourth objection recognized by PACE is a fear of bias against non-European Union Member States if the European Union were permitted to join the Council. Even if the European Union were to begin such procedures, Russia, as a Council Member State, would be intimately involved in the negotiations over the terms.¹²¹ Moreover, with Ireland's recent rejection of the Lisbon treaty, it is increasingly unclear if the European Union will even allow itself to contemplate accession.¹²²

Finally, some in the Russian delegation have objected to what they see as half-hearted efforts to deal with a systemic problem and are of the opinion that energy should not be spent on such "provisional" arrangements. The Secretariat of the PACE Committee on Legal Affairs and Human Rights has forcefully responded to this argument, stating that:

Protocol No. 14 certainly does not pretend to be a definitive answer to the problems facing the Court, but in no sense is it provisional. It is a considerable improvement on the present system and should be put into effect as soon as possible. *Justice delayed is justice denied*: An overburdened court will result in poorer judgments as well—hurting all of Europe, including Russia. It will

119. *Id.* ¶ 11.

120. *Id.* ¶ 14.

121. *Id.* ¶ 10.

122. See, e.g., *New Irish Vote on Lisbon 'Legal,'* BBC NEWS, Nov. 28, 2008, <http://news.bbc.co.uk/2/hi/europe/7754044.stm> (discussing the Irish no vote on the Lisbon Treaty in June 2008 and the possibilities for another vote thereon).

mean a tremendous weakening of the common European legal space created by the Council of Europe.¹²³

PACE negotiators also need to stress that Russia was at the table during the entire negotiating period, and “took a firm stand within the Committee of Ministers, together with all other Council of Europe member states, in strongly urging ratification by 2006.”¹²⁴ If authorities are concerned that the (merely) formal inclusion of the Human Rights Commissioner in the text of the ECHR will be unfairly used against their State¹²⁵ or that Committee of Ministers referrals to the Court for non-execution of judgments will be unfairly directed at Russia,¹²⁶ they had ample time to bring these questions up before the Protocol was opened for signature, or even before all other Member States had ratified the changes.

V. GOING FORWARD

The PACE Committee on Legal Affairs and Human Rights’ Secretariat suggests that the State Duma’s Legal Affairs Committee’s opinion on Protocol No. 14 was perhaps,

prepared in some haste after a change in rapporteur, without appropriate analysis of all the background information that led to the Protocol’s adoption. Perhaps insufficient emphasis was placed on the *raison d’être* of this text Also, since a majority [of] members abstained in the vote, parliamentarians may simply have been unaware of all the aspects at issue and the full implications of non-ratification.¹²⁷

The Council has therefore left space within which Russia can revise its position without losing face in the international community. President Costa for one, remains unconvinced that progress will ever be made, commenting of late that, “[L]ogically, [Russia] should not [allow Protocol No. 14 to come into effect.] If they have not ratified yet, why should they soften their attitude towards the court at a time when they have this very serious conflict with Georgia?”¹²⁸ However, the Committee of Ministers has recently discussed the issue and Council of Europe Secretary General Terry Davis has raised the issue directly with Russian Foreign Minister Sergey Lavrov.¹²⁹ Pressure for action is increasing.

123. PACE Committee on Legal Affairs and Human Rights, *supra* note 17, ¶ 15 (emphasis in original).

124. *Id.* ¶ 17.

125. Protocol No. 14, *supra* note 19, art. 13.

126. Protocol No. 14, *supra* note 19, art. 16.

127. PACE Committee on Legal Affairs and Human Rights, *supra* note 17, ¶ 18.

128. Rozenberg, *supra* note 97.

129. Press Release, Council of Europe, 1040th Meeting of the Committee of Ministers (Nov. 5, 2008), http://www.coe.int/t/dc/press/news/20081105_cm_EN.asp; Press Release, Council of Europe,

In a speech at the April 2008 PACE session, German Chancellor Angela Merkel also called upon Russia to drop its objections to Protocol No. 14 and said her government had raised the issue with Vladimir Putin personally.¹³⁰ Meanwhile, Putin himself has continued to express support for ratification, noting after the Duma vote that, “Russia is not downsizing the amount of its cooperation with the Strasbourg Court and works there fully as it did before.”¹³¹ As noted above,¹³² that expression may not be genuine. Many have anticipated, however, that now, under the stewardship of Putin’s successor Dmitry Medvedev, it *would* be politically possible for the Russians to soften their stance (without losing face) and finally accept the Protocol.¹³³ In a July 2008 speech outlining his foreign affairs agenda, President Medvedev stated that:

Russia . . . is ready to play a constructive role in assuring a civilized compatibility in Europe . . . Russia stands for the fortification of the role of the Council of Europe as an independent universal pan-European organization, defining the level of judicial standards in all member states of the Council of Europe without discrimination or privileges for anybody, an important instrument in the abolishment of the dividing lines on the continent.¹³⁴

Given that Russian responses in this situation have not all been negative; the question raised is whether Russia’s more positive statements are sincere. Protocol No. 14 is a vast contribution to the very goal Medvedev lauds: ensuring that the system created by the European Convention on Human Rights, and maintained by the Council of Europe, remains for future generations as an effective institution of last resort to safeguard the “fundamental freedoms which are the foundation of justice and peace in the world.”¹³⁵ As we approach the sixtieth anniversary of the Council and the fiftieth anniversary of the Court, the best way that Russia can “play a constructive role” in assuring a “civilized” Europe is for the State Duma to ratify Protocol No. 14 as quickly as possible. If Medvedev really believes in the system he

Council of Europe Secretary General Terry Davis Meets Russian Foreign Minister Serguey Lavrov in Moscow (Nov. 12, 2008), <https://wcd.coe.int/ViewDoc.jsp?id=1368449&Site=DC&BackColorIntranet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>.

130. Angela Merkel, Federal Chancellor of Germany, Address to PACE, 2008 Ordinary Session Second Part Report (Apr. 15, 2008), Doc. AS(2008)CR12, *available at* <http://assembly.coe.int/main.asp?Link=/Documents/records/2008/e/0804151000e.htm#6>.

131. Putin *supra* note 90.

132. *See supra* text accompanying notes 92, 94.

133. *See* FINANCIAL TIMES, *supra* note 105.

134. Proposed External Policies of the Russian Federation, Accepted by the President of the Russian Federation D. A. Medvedev, July 12, 2008 (translated from the original Russian), <http://www.mid.ru/ns-osndoc.nsf/0e9272bafa34209743256c630042d1aa/d48737161a0bc944c32574870048d8f7?OpenDocument> (in the original Russian).

135. ECHR, *supra* note 2, pmb1.

promotes, he should be doing all he can to work with the Duma to pass Protocol No. 14.

Unfortunately, Russian inertia on the topic seems to be continuing, as the proposed October 2008 meeting between Mrs. Däubler-Gmelin and the Duma Legal Committee never took place. The PACE Committee on Legal Affairs and Human Rights finally made it to Moscow in early November 2008, where an “exchange of views particularly regarding the non-entry into force of Protocol No. 14 to the European Convention on Human Rights” was prominent on the agenda.¹³⁶ Documents relating to the exchange have recently been declassified¹³⁷ and reveal a Committee increasingly frustrated by Russians making the “same arguments”¹³⁸ over and over again. Some committee members expressed fears that “a very senior figure in the Russian hierarchy did not want the Protocol to be ratified, and that this was the only reason why the Duma had not approved it long ago.”¹³⁹ Others pushed the Duma to “take it or leave it” and were prepared to end negotiations altogether, as the Russians’ behavior seemed to indicate “a deliberate decision to stop the Court from functioning properly.”¹⁴⁰ Even those members who did not assume any nefarious Russian intent continued to find Russia’s behavior “difficult to understand.”¹⁴¹

Clearly, the conversation did not go well: on November 19, 2008, the Deputies of the Committee of Ministers followed up with the Liaison Committee to the European Court of Human Rights.¹⁴² Reiterating that, “it is urgent to adopt measures aimed at enabling the Court to increase its case-processing capacity,” the Deputies instructed the CDDH and the Committee of Legal Advisers on Public International Law (“CAHDI”) to provide the Committee of Ministers with “a preliminary opinion on the advisability and modalities of inviting the Court to put into practice certain procedures which are already envisaged to increase the Court’s case-processing capacity, in particular the new single-judge and committee procedures.”¹⁴³ Thus, it seems that the Council of Europe has exhausted political and diplomatic pressure on Russia, and is attempting to find a way out of this crisis with

136. Parliamentary Assembly of the Council of Europe (PACE) Committee on Legal Affairs and Human Rights, Synopsis of the Meeting held in Moscow (Russian Federation) on November 10–11, 2008, Synopsis AS/Jur No. 2008/08, Nov. 18, 2008 (on file with author).

137. Parliamentary Assembly of the Council of Europe (PACE) Committee on Legal Affairs and Human Rights, Extract of the Minutes of the Meeting held in Moscow (Russian Federation) on November 10–11, 2008, Item 4: Meeting with Representatives of the State Duma of the Russian Federation, November 10, 2008 (morning), Jan. 29, 2009 (on file with author).

138. *Id.* at 1 (Remarks of Mr. Cilevišs [Latvia]).

139. *Id.* (Remarks of Mrs. de Pourbaix-Lundin [Sweden]).

140. *Id.* at 3 (Remarks of Mr. Leyden [Ireland], Mr. Sasi [Finland], and Mr. Herkel [Estonia]).

141. *Id.* at 4 (Remarks of Mr. Varvitsiotis).

142. Committee of Ministers, Ministers’ Deputies, Agenda: 1041st Meeting (10am), CM/Del/OJ(2008)1041, Nov. 19, 2008, available at <https://wcd.coe.int/ViewDoc.jsp?Ref=DEL1041&Language=lanEnglish&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

143. *Id.* (decisions relating to item 4.7, ¶¶ 3–4).

its legitimacy somewhat intact by ignoring Russia's lack of cooperation. This is a particularly interesting solution, as it both averts inducing a public relations nightmare by expelling (or threatening to expel) the Russian Federation, and also demonstrates a refusal by the Council to remain impotent. This solution does, however, raise some questions.

As a signatory to the European Convention on Human Rights, Russia does have *some* obligation not to frustrate the purpose of the Protocol, despite the fact that it has not ratified the Protocol itself. According to international law, as expressed in the Vienna Convention on the Law of Treaties (VCLT),¹⁴⁴ "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification . . . until it shall have made its intention clear not to become a party . . ."¹⁴⁵ Additionally, the VCLT, to which Russia is a party, provides for the provisional application of pending treaties provided that either "the treaty itself so provides" or the "the negotiating States have in some other manner so agreed."¹⁴⁶ If the Committee of Ministers were to unanimously resolve to apply less controversial, key pieces of Protocol No. 14 (*e.g.*, the single judge formation and the three-judge committee for manifestly well-founded cases), to the forty-six ratified states (while *still* awaiting the forty-seventh), one could plausibly argue that no illegitimate decision had taken place. This would, however, create a two-stream system within the Council,¹⁴⁷ and the argument could be made that such a situation amounts to capitulation to Russian bullying. However, retaining Council membership is still valuable to the Russian government¹⁴⁸ and a clearly delineated double standard would undermine the strategy of "flying under the radar" that President Costa, at least, sees in Russia's behavior.¹⁴⁹ Such a step is thus perhaps the Council's best tactic to force Russia's hand. Moreover, non-unanimous *additional* (rather than unanimous amending) Protocols have been employed in Strasbourg before (for example, Protocol No. 9)¹⁵⁰—such a step is not incongruous with current Council practices.

The fly in the ointment to this scenario is, of course, that such a resolution would at least partially circumvent the basic concept of individual state sovereignty to authorize its accession to a treaty. It is unclear if such a move would be palatable in an organization founded on notions of international cooperation, democracy, and the rule of law. In particular, PACE,

144. Vienna Convention on the Law of Treaties, May 31, 1969, 1155 U.N.T.S. 331.

145. *Id.* art. 18.

146. *Id.* art. 25, ¶ 1.

147. *See supra* text accompanying note 88.

148. *See, e.g., supra* note 103.

149. *See supra* text accompanying note 116.

150. Protocol No. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 6, 1990, Europ. T.S. No. 140, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/140.htm> (repealed Nov. 1, 1998, the date of entry into force of Protocol No. 11).

which views itself as a check on the power of Council of Europe's executive organs, may not be able to stomach such a move. Only time will tell how this issue will be resolved, but developments are clearly coming at an accelerating pace. Perhaps a final resolution to the conundrum of Protocol No. 14 is not far off.

ADDENDUM

As this piece was being prepared for publication, the Parliamentary Assembly of the Council of Europe debated and released Opinion No. 271 (2009).¹⁵¹ It called for the Committee of Ministers to adopt a Protocol No. 14*bis*, which would institute some of the efficiency measures within Protocol No. 14 without requiring unanimous ratification of all Member States. The language used was notably stronger than had been used to address the Russian Federation in the past:

{T}he Assembly strongly deplors the position taken by the Russian Federation's State Duma to refuse to provide its assent, since December 2006, to the ratification of Protocol No. 14 to the Convention, which is an important amending protocol that can only enter into force when all States Parties to the Convention have ratified it. By so doing, the Russian State Duma has, in effect, considerably aggravated the situation in which the Court has found itself, and has also deprived persons within its jurisdiction from benefiting from a streamlined case-processing procedure before the Court. The Russian State Duma is urged, in the strongest possible terms to recognise that the changes of the control system envisaged in Protocol No. 14 (and Protocol No. 14 *bis*), will permit the Court to deal with applications in a timely fashion so that it can concentrate on important cases requiring in-depth examination.¹⁵²

At their 119th session on May 12, 2009, the Committee of Ministers did indeed adopt Protocol No. 14*bis*. Pending ratification from three Member States, the single judge and three-judge formations provided for under Protocol No. 14 will apply to those states adopting it. Separately, an agree-

151. Eur. Parl. Ass., Draft Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion No. 271 (2009), Apr. 30, 2009, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/EOPI271.htm>.

152. *Id.* ¶ 4. See also Eur. Parl. Ass., Draft Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, Doc. 11864, Apr. 22, 2009, available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11864.htm>; Parliamentary Assembly of the Council of Europe (PACE) Committee on Legal Affairs and Human Rights, Draft Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, Doc. 11864, Apr. 28, 2009, available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11854.htm>; and associated documents.

ment was reached among the Member States permitting application of those provisions, prior to entry into force, on a case-by-case basis with permission of the responding State. Nonetheless, pressure on Russia lingers as the enforcement of Protocol No. 14 proper remains a priority for the Council of Europe.¹⁵³

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153. Press Release, Council of Europe Directorate of Communication, Council of Europe Adopts New Decisions to Improve the Effectiveness of the European Court of Human Rights (May 12, 2009) (on file with author).

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