Florida State University Journal of Transnational Law & Policy

Volume 17 | Issue 1 Article 1

2007

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Cover Page Footnote

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The author wishes to thank Molly Beutz for her comments and encouragement, and the editing team at the Florida State University Journal of Transnational Law & Policy for all their effort.

PROTOCOL NO. 14 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: TOWARDS A MORE EFFECTIVE CONTROL MECHANISM?

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I. INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[1] was drawn up within the Council of Europe, an international organization formed after the Second World War in the course of the first post-war attempt to unify Europe. As a reaction to the serious human rights violations that Europe witnessed during the Second World War, the European Convention was established with a specific ob-

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5. [hereinafter European Convention], *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm.

ject and purpose announced in its preamble: to take the first steps for collective enforcement of certain rights stated in the Universal Declaration of Human Rights.[2] The European Convention represents, therefore, a collective guarantee in the European context of a number of fundamental principles set out in the Universal Declaration of Human Rights.[3] In addition to articulating a catalogue of civil and political rights and freedoms,[4] the Convention established a mechanism for the enforcement of the obligations agreed upon by contracting states.[5] Compared to most other international and regional human rights treaties, this enforcement system proved very effective because it provides for both inter-state applications[6] and (considerably more important in practice) individual applications.[7]

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2. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949).

3. This purpose has been underlined in the case-law of the Strasbourg organs. In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 239 (1978), the Court observed that, "[u]nlike international treaties of the classic kind, the [European] Convention comprise[d] more than mere reciprocal engagements between contracting states. [The European Convention] create[d], over and above a network of mutual, bilateral undertakings, objective obligations which . . . benefit from a 'collective enforcement.'"

4. The European Convention contains a list of civil and political rights: art. 2 (right to life); art. 3 (prohibition of torture); art. 4 (prohibition of slavery and forced labour); art. 5 (right to liberty and security); art. 6 (right to a fair trial); art. 7 (no punishment without law); art. 8 (right to respect for private and family life); art. 9 (freedom of thought, conscience, and religion); art. 10 (freedom of expression); art. 11 (freedom of assembly and association); art. 12 (right to marry); art. 13 (right to an effective remedy); and, art. 14 (prohibition of discrimination).

5. The enforcement mechanism established by the 1950 European Convention had a tripartite structure: (1) the European Commission of Human Rights -- to consider the admissibility of applications, to establish the facts, to promote friendly settlements and, if appropriate, to give an opinion as to whether or not the applications reveal a violation of the Convention; (2) the European Court of Human Rights -- to give a final and binding judgment on cases referred to it; (3) the Committee of Ministers of the Council of Europe -- to give a final and binding decision on cases which cannot be referred to the Court or which, for one reason or another, are not referred to it. For an overview, see PIETER VAN DIJK & GODEFRIDUS J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 97-284 (3d ed. 1998). This structure was radically reformed by Protocol No. 11 to the European Convention. *See infra* note 31 and accompanying text.

6. Inter-state applications under Article 33 of the European Convention are characterized by a general approach in that they seek to secure compliance with the obligation under the Convention by another member state in the common interest, regardless of whether there is a special relation between the rights and interests of the applicant state and the alleged violation. *See generally* DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 39-42 (1996); Hans C. Krüger & Carl A. Nørgaard, *The Right of Application*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 659-661 (Ronald St. J. Macdonald et al. eds., 1993); VAN DIJK & VAN HOOF, *supra* note 5, at 40-44.

7. *See* European Convention, *supra* note 1, art. 34, stating:

> The Court may receive applications from any person, non-governmental 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 un-

The key role of the Convention's control mechanism is two-fold. First, it gives every victim of an alleged violation of the European Convention the right to seek and obtain vindication both for his or her infringed rights, and where appropriate, for financial compensation of the harm suffered.[8] As the European Court of Human Rights ("Court") recently stressed in *Mamatkulov v. Turkey*, "the Convention right to individual application . . . has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention."[9] Second, as the Court stated in *Ireland v. United Kingdom,* its judgments serve not only to decide individual cases but, more generally, "to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."[10] The Court therefore has two functions to fulfill that are commonly referred to as "individual justice" and "constitutional justice," respectively.[11]

However, the massive influx of individual applications is leading to a rapid accumulation of pending cases before the Court, resulting in lengthy proceedings.[12] It is alarming that the Strasbourg organs, which have repeatedly and quite rightly declared, on the basis of Article 6(1) of the European Convention,[13] that the duration of proceedings before the domestic courts is unreasonable, can now scarcely comply with that same obligation.[14] Against this

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dertake not to hinder in any way the effective exercise of this right.

8. *See* Pietro Sardaro, *The Right of Individual Petition to the European Court, in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 47-50 (Paul Lemmens & Wouter Vandenhole eds., 2005); DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 31-34 (1995).

9. Mamatkulov & Askarov v. Turkey, App. Nos. 46827/99, 46951/99, Eur. Ct. H.R. para.122 (Feb. 4, 2005), *available at* http://www.echr.coe.int/echr (follow "Case Law" and search "HUDOC" for "Mamatkulov & Askarov v. Turkey").

10. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 154 (1978).

11. *See* Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161, 162-63 (2002); Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 OXFORD J. LEGAL STUD. 405, 406-07 (2003).

12. It is estimated that 50, 500 individual applications were lodged in 2006 with the European Court of Human Rights (Court). *See* COUNCIL OF EUROPE, SURVEY OF ACTIVITIES 2 (2007), [hereinafter SURVEY OF ACTIVITIES] *available at* http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf.

13. Article 6(1) of the European Convention provides that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. European Convention, *supra* note 1, art. 6(1).

14. *See, e.g.*, Ipek v. Turkey, App. No. 25760/94, Eur. Ct. H.R, (Feb. 17, 2004), *available at* http://www.echr.coe.int/echr (follow "Case Law" and search "HUDOC" for "Ipek v. Turkey") concerning the disappearance of the applicant's two sons after they had been taken into police custody. The application was lodged with the Court in 1994 and declared admissible in May 2002. However, the Court's judgment was finally pronounced in February 2004,

background it becomes clear that reform of the European Convention's control system is imperative and that failure to realistically address the problem of delay will undermine the achievements of the system and public confidence in it. If, as expected, the caseload continues to rise, the Court will be able to administer neither individual justice nor constitutional justice effectively. Thus, the European Ministerial Conference on Human Rights, held in Rome in November 2000 to mark the 50th anniversary of the signing of the European Convention, found that "the effectiveness of the Convention system . . . is now at issue" because of "the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications."[15] Hence, it called on the Committee of Ministers of the Council of Europe to "initiate, as soon as possible, a thorough study of the different possibilities and options with a view to ensuring the effectiveness of the Court in the light of this new situation."[16] Three and a half years after this reflection process about guaranteeing the continued effectiveness of the Court was launched, Protocol No. 14[17] to the European Convention was adopted by the Committee of Ministers at its 114th Ministerial Session in May 2004.[18] The member states have committed themselves to ratifying Protocol No. 14 as speedily as possible so as to ensure its entry into force within two years. However, Protocol No. 14 has not yet entered into force because Russia's ratification is still pending.[19]

After examining the main reasons for the Court's dramatically increased caseload, this paper addresses the basic features of the Convention's control system as it currently functions. The paper

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about ten years after the application's introduction.

15. European Ministerial Conference on Human Rights, Rome, Italy, Nov. 3-4, 2000, *Resolution I on Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level*, ¶ 16, *reprinted in* COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AT 50, 36 (2000), *available at* http://www.humanrights.coe.int/Bulletin/eng/ib50e.pdf.

16. *Id.* ¶ 18(ii).

17. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *opened for signature* May 13, 2004, Council of Europe T.S. No. 194 [hereinafter Protocol No. 14], *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm (last visited Nov. 27, 2007).

18. For the principal stages in the preparation of Protocol No. 14 *see* Council of Europe, *Explanatory Report to the Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, ¶¶ 20-33 [hereinafter *Explanatory Report*], *available at* http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm.

19. On December 20, 2006, the State Duma of the Council of the Russian Federation refused to ratify Protocol No. 14. *See* Press Release, Council of Eur., Parliamentary Assembly, We Have a Responsibility to Future Generations to Safeguard the Court's Independence (Jan. 25, 2007), *available at* http://www.coe.int/t/dc/files/pa_session/jan_2007/20070125_news_cour_en.asp.

then discusses the key reform measures adopted in Protocol No. 14 and their potential impact on the control system's effectiveness. Although some of the reform measures respond to current challenges and will introduce important changes enhancing the system's effectiveness, this paper argues that the new admissibility criterion will curtail the Court's ability to deliver individual justice without, however, strengthening the Court's ability to deliver constitutional justice. The paper concludes with a discussion of reform measures beyond Protocol No. 14 which could contribute to the long-term effectiveness of the Convention's control mechanism.

II. THE NEED FOR REFORM

The European Convention's control mechanism is considered to be "the most effective international system for the protection of individual human rights to date."[20] However, the system's success has brought with it an increased caseload which the Court has found more and more difficult to handle. The main threat to the effectiveness of the control system is the exponential growth in the number of individual applications lodged with the Court under Article 34 of the European Convention. This can be illustrated by the following figures: the number of individual applications registered annually with the Court increased from 404 in 1981 to 44,100 in 2004, with an estimated increase to 50,500 in 2006.[21]

The problem of this excessive rise is aggravated by the accession of new member states to the Council of Europe. Since the European Convention was signed in 1950, membership in the Council of Europe has more than tripled. Moreover, there has been a corresponding increase in the number of parties to the European Convention, from eight when it came into force in 1953, to forty-seven in 2007. Since 1989, an increasing number of Eastern and Central European states have been admitted to the Council of Europe, all of which have ratified the Convention.[22] As can be imagined, the case-law of the Court has had, and hopefully will continue to have, an important influence on legal reform in these states still in transition to democracy.[23] Hence in 2007, the Con-

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20. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 792 (2006).

21. *See* Survey of Activities, *supra* note 12, at 2.

22. Council of Europe, Chart of Signatories and Ratifications for the Convention for the Protection of Human Rights and Fundamental Freedoms, *available at* http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG.

23. *See* Paul Mahoney, *Speculating on the Future of the Reformed European Court of Human Rights?*, 16 HUM. RTS. L.J. 4 (1995); Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, ¶ 15, EG

vention system was open to no fewer than 800 million people in Europe.[24]

Another contributing factor to the Court's increasing caseload is its dynamic approach to the interpretation of the European Convention which has widened its protection.[25] In *Tyrer v. United Kingdom*, the Court held that "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."[26] Hence, the concepts used in the Convention are to be understood in the context of the democratic European society of today, thereby raising the protection afforded by the Convention to a higher level than that of 1950. In addition, the protection of the European Convention has been widened by the inclusion of additional Protocols.[27] Furthermore, the dissemination of knowledge about the European Convention and its control mechanism encourage more and more people to explore its possibilities.[28]

Court (2001)1 (Sept. 27, 2001) [hereinafter *Evaluation Group Report*], *reprinted in* 22 HUM. RTS. L.J. 308 (2001), *available at* https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr.

24. In addition, the accession of the European Union to the European Convention has been discussed for several years. *See* Wolfgang Peukert, *The Importance of the European Convention on Human Rights for the European Union*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1107-1122 (Paul Mahoney et al. eds., 2000); Jean Paul Jacqué, *The Convention and the European Communities*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 901-02 (R. St. J. Macdonald et al. eds., 1993); Steering Committee for Human Rights [CDDH], *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*, DG-II(2002)006 [CDDH(2002)010 Addendum 2] (June 28, 2002), *available at* http://www.coe.int/T/e/com/files/events/2002-09-Symposium-Judges/CDDH2002_010.asp.

25. *See* Søren C. Prebensen, *Evolutive Interpretation of the European Convention of Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1123-37 (Paul Mahoney et al. eds., 2000); Franz Matscher, *Methods of Interpretation of the Convention*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 68-70 (R. St. J. Macdonald et al. eds., 1993); VAN DIJK & VAN HOOF, *supra* note 5, at 77-80.

26. Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 31 (1978).

27. Further substantive rights and freedoms have been introduced by the following additional Protocols: Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, Europ. T.S. No. 9 (*entered into force* May 18, 1954); 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, *opened for signature* Sept. 16, 1963, Europ. T.S. No. 46 (*entered into force* May 2, 1968); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114 (*entered into force* Mar. 1, 1985); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 11, 1984, Europ. T.S. No. 117 (*entered into force* Nov. 1, 1988); Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 2000, Europ. T.S. No. 177 (*entered into force* Apr. 1, 2005); and, 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, *opened for signature* May 3, 2002, Europ. T.S. No. 187 (*entered into force* July 1, 2003); *all available at* http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.

28. As the European Convention has a major influence on the protection of human rights in Europe, it has been described as the "jewel in the Council of Europe crown." *See*

III. THE CONTROL MECHANISM TODAY

A. *The European Court of Human Rights*

The increasing workload of the European Convention control mechanism since 1980 has prompted a lengthy debate on the necessity for a reform of the mechanism to shorten the length of proceedings. The first important step in the reform process was the adoption of Protocol No. 11[29] in May 1994, which radically reformed the control mechanism established by the 1950 European Convention.[30] The aim of Protocol No. 11, which came into force on November 1, 1998, was to simplify the original control system with a view to shortening the length of proceedings while strengthening the judicial character of the system. The main effect of Protocol No. 11 was to replace two supervisory organs created by the 1950 Convention, the part-time European Commission and the European Court of Human Rights, with a single, full-time court able to perform all the functions of the original organs.[31]

The Court created under the European Convention, as amended by Protocol No. 11, is composed of a number of judges equal to that of the member states.[32] Judges are elected for a term of six years with the possibility of reelection.[33] Because a court of forty-seven judges is too large to function as a single unit, the Court sits in a Grand Chamber of seventeen judges, in chambers of

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Markus G. Schmidt, *A Fresh Impetus for the European Social Charter*, 41 INT'L & COMP. L.Q. 659 (1992).

29. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (Nov. 1, 1998), 33 I.L.M. 943 (1994) [hereinafter Protocol No. 11], *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/155.htm.

30. *See generally* Council of Europe, *Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby* [hereinafter *Explanatory Report to Protocol No. 11*], http://conventions.coe.int/Treaty/en/Reports/Html/155.htm (last visited Nov. 27, 2007).

31. For commentary and description of Protocol No. 11, *see* 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, *Principal 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); Henry G. Schermers, *Adaptation of the 11th Protocol to the European Convention on Human Rights*, 20 EUR. L. REV. 559 (1995); HARRIS ET AL., *supra* note 8, at 706-14.

32. European Convention, *supra* note 1, at art. 20.

33. *Id.* at art. 23(1). Note, however, that according to Protocol No. 14, the judges will be elected for a single nine-year term instead of the present six-year renewable term. This reform measure has its origins in concerns of the Court, the Parliamentary Assembly and the Committee of Ministers in regards to a few instances where there seemed to be abuse. Some sitting judges of recognized competence and effectiveness had not been renominated by their countries on expiration of their term, apparently for purely political reasons. *See* Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 26 HUM. RTS. L.J. 1, 10 (2005).

seven judges and in committees of three judges.[34] For its day-to-day work, the Court is divided into four Sections; the composition of these is balanced by geography and by gender reflecting the contracting states' different legal systems.[35] Within each section, smaller chambers of seven judges are constituted to consider cases brought before the Court.[36] Screening functions previously implemented by the European Commission are carried out by committees of three judges and individual judge rapporteurs.

B. Procedure Before the European Court of Human Rights

Any individual claiming to be a victim of a violation of the European Convention may lodge directly with the Court in Strasbourg an application alleging a breach of any Convention right by a state party. Once an individual application has been registered, it is assigned to a Section, where it will be dealt with by a Committee or a Chamber. Where the material submitted is clearly sufficient to disclose that the application fails to meet the admissibility criteria, it is referred to a Committee of three judges.[37] The Committee may, by a unanimous vote, declare the application inadmissible or decide to strike it off the list without further examination.[38] If no such decision can be taken by a Committee, the application will be referred to a Chamber of seven judges. One member of the Chamber will act as Judge Rapporteur for the case. The Chamber will decide on both the admissibility and merits of the case.[39]

When an application has been declared admissible, the Chamber has two functions: to examine the case, undertaking an investigation if necessary, and to place itself at the parties' disposal with a view to securing a friendly settlement.[40] Once the Chamber has admitted the application, it may invite the parties to submit

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34. European Convention, *supra* note 1, at art. 27(1). The plenary Court comprising all judges will only deal with matters of organisation. *See id.*, *supra* note 1, at art. 26.

35. *Id.* at art. 26(b); European Court of Human Rights, Revised Rules of Court, rule 25 (July 2006) [hereinafter Rules of Court], http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf (last visited Nov. 27, 2007).

36. Each Chamber "must include the President of the Section and the judge elected in respect of" the state concerned by the case, even if he or she is not a member of the Section. Rules of Court, *supra* note 35, rule 26(1)(a).

37. *Id.* at rule 49(1).

38. European Convention, *supra* note 1, at art. 28.

39. Rules of Court, *supra* note 35, rule 53(3). For inter-state cases, the procedure is slightly different as a Chamber must decide on their admissibility and merits. *See* European Convention, *supra* note 1, at art. 29(2).

40. European Convention, *supra* note 1, at arts. 38(1)(a), 38(1)(b).

further evidence and written observations.[41] If no hearing has taken place at the admissibility stage, it may decide to hold a hearing on the merits of the case. Hearings relating to the merits, like those concerned with admissibility, must normally be public,[42] but proceedings concerning a possible friendly settlement are confidential.[43] If there is no friendly settlement, the case concludes with a Chamber's judgment subject to referral to the Grand Chamber. Judgments on the merits are taken by a majority vote and must be reasoned, as must all decisions declaring applications admissible or inadmissible.[44]

At any time before judgment, the Chamber may relinquish jurisdiction in favor of the Grand Chamber where a case 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 previous judgment by the Court. However, relinquishment cannot take place if one of the parties to the case objects.[45]

The Convention also provides for the possibility of a rehearing of the case before the Grand Chamber.[46] Within three months of a Chamber's judgment, any party to the case may "in exceptional circumstances" request that it be referred to the Grand Chamber.[47] Then a panel of five judges of the Grand Chamber accepts the request "if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a

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41. Note that Article 36 of the European Convention only provides for limited third party interventions. "In all cases before a Chamber or the Grand Chamber, a [state party] one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings." In addition, "the President of the Court may, in the interest of the proper administration of justice, invite any [state party] which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings." According to Protocol No. 14, however, the Council of Europe Commissioner for Human Rights, as *amicus curiae*, may submit written comments and take part in hearings in all cases before a Chamber or the Grand Chamber. *See* Eaton & Schokkenbroek, *supra* note 33, at 12; Anthony Lester, *Amici Curiae: Third-Party Interventions Before the European Court of Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 341, 341-50 (Franz Matscher & Herbert Petzold eds., 2d ed. 1990).

42. European Convention, *supra* note 1, at art. 40(1).

43. *Id.* at art. 38(2).

44. *Id.* at art. 45(1).

45. *Id.* at art. 30.

46. During the negotiations of Protocol No. 11,
> some states firmly insisted . . . on the right to appeal decisions of the . . . Court considered by them to be unacceptable and harmful to their internal legal order. Since a two-tier system with a court of first instance and an appeals court was not accepted by the other [member states], a compromise . . . was found and incorporated in the single-court control system. Bernhardt, *supra* note 31, at 152. Bernhardt expressed the concern that this compromise could seriously endanger the coherence of the case-law of the Court. *Id.* at 153.

47. European Convention, *supra* note 1, at art. 43(1).

serious issue of general importance."[48] If the panel accepts, the Grand Chamber renders a judgment that is final.[49]

C. The Court's Judgments

The control system's effectiveness depends to a large extent on the fast and faithful execution of the Court's judgments. However, the Court's judgments are declaratory in character and have no direct effect in the internal law of the member states.[50] The Court rules on whether a European Convention provision has been breached in the impugned case, without repealing, annulling or modifying domestic provisions or decisions.[51] As the Court concluded in *Marckx v. Belgium*[52] and in *Vermeire v. Belgium*,[53] it does not have the power to order remedial measures in a certain case. In view of the principle of subsidiarity,[54] it is the respondent state, not the Court, which determines the measures needed to implement its obligations.[55] Traditionally, the contracting states, there-

48. European Convention, *supra* note 1, at art. 43(2). A serious question affecting the interpretation of the Convention is raised "when a question of importance not yet decided by the Court is at stake, or when the decision is of importance for future cases and for the development of the Court's case-law." Further "[a] "serious question concerning the application of the Convention may be at stake when a judgment necessitates a substantial change to national law or administrative practice but does not itself raise a serious question of interpretation of the Convention. A serious issue considered to be of general importance could involve a substantial political issue or an important issue of policy." Explanatory Report to Protocol No. 11, *supra* note 30, ¶¶ 100-02.

49. European Convention, *supra* note 1, at art. 44(1).

50. *See* Pelladoah v. The Netherlands, 297-B Eur. Ct. H.R. (ser. A) at 44 (1994).

51. A proposal in this sense at the time when the Convention was drafted was not accepted. *See* HARRIS ET AL., *supra* note 8, at 683-84.

52. Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 55-59 (1979).

53. Vermeire v. Belgium, 214-C Eur. Ct. H.R. (ser. A) at 26 (1991).

54. Under Article 1 of the European Convention, it is with the member states that the obligation lies to "secure to everyone within their jurisdiction the rights and freedoms" guaranteed by the European Convention, whereas the role of the Court, under Article 19, is "[t]o ensure the observance of the engagements undertaken by the [member states] in the Convention." European Convention, *supra* note 1, at arts. 1, 19. *See generally* Herbert Petzold, *The Convention and the Principle of Subsidiarity, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 41,43 (R. St. J. Macdonald et al. eds., 1993); Kersten Rogge, *Examining the Merits of Human Rights Applications - The Legal Issues, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1215,1220-21 (Paul Mahoney et al. eds., 2000).

55. This contrasts with Article 63(1) of the American Convention on Human Rights which not only authorizes the Inter-American Court of Human Rights to "rule that the injured party be ensured the enjoyment of his right or freedom that was violated" but, if appropriate, "that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied." Organization of American States, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S 123 (*entered into force* July 18, 1978), *reprinted in* 9 I.L.M. 673 (1970). The American Convention on Human Rights was modelled on its European counterpart. On this subject, *see generally* Thomas Buergenthal, *The European and Inter-American Human Rights Courts: Beneficial Interaction, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 123, 123-33

fore, have a wide margin of appreciation in deciding which measures are necessary to execute the judgment of the Court and to discharge their legal obligation under Article 46(1) of the Convention.[56] However, in its recent case-law, the Court seems prepared to include in its judgments more explicit indications of measures that the respondent state must take to execute the judgment of the Court.[57]

The judgments of the Court are transmitted to the Committee of Ministers of the Council of Europe which supervises their execution. The Committee of Ministers verifies whether states in which a violation of the Convention has been found have taken adequate remedial measures to comply with the specific or general obligations arising out of the Court's judgments.[58] However, the European Convention does not provide the Committee of Ministers with means to force a defaulting state to execute the judgment of the Court. Nevertheless, given its position, the Committee of Ministers may bring considerable political pressure to bear on such a member state, including recourse to Article 8 of the Council of Europe's Statute[59] providing for suspension or even expulsion from the Council of Europe.

IV. MAIN CHANGES TO THE CONTROL SYSTEM

To guarantee the long-term effectiveness of the control system

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(Paul Mahoney et al. eds., 2000); Antônio Augusto Cançado Trindade, *The Inter-American Court of Human Rights at a Crossroads: Current Challenges and its Emerging Case-law on the Eve of the New Century, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 167, 184-86 (Paul Mahoney et al. eds., 2000).

56. The member states, under Article 46(1) of the Convention, "undertake to abide by the final judgment of the Court in any case [in] which they are parties." European Convention, *supra* note 1, art. 46(1).

57. See, for example, the case *Broniowski v. Poland,* in which the Court held that the violation found originated in a systemic problem and that *general* remedies were to be taken in respect of a similarly affected class of citizens as the claimant in the judgment. Broniowski v. Poland, App. No. 31443/96, Eur. Ct. H.R. paras. 189, 193-194 (June 22, 2004), *available at* http://www.echr.coe.int/echr (follow "Case Law" and search "HUDOC" for "Broniowski v. Poland"). All similar applications were adjourned, pending the implementation of the relevant general measures asked for in the "pilot judgment." *Id. See also* Pierre-Henri Imbert, *Follow-up to the Committee of Ministers' Recommendations on the Implementation of the Convention at the Domestic Level and the Declaration on "Ensuring the Effectiveness of the Implementation of the European Convention on Human Rights at National and European Levels," in* COUNCIL OF EUROPE, REFORM OF THE EUROPEAN HUMAN RIGHTS SYSTEM 33, 39 (2004).

58. *See* GOMIEN ET AL., *supra* note 6, at 90; Peter Leuprecht, *The Execution of Judgments and Decisions, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 791, 796-99 (R. St. J. Macdonald et al. eds., 1993).

59. Statute of the Council of Europe, art. 8, *opened for signature* May 5, 1949, 87 U.N.T.S. 103, Eur. T.S. 1, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm.

of the European Convention, Protocol No. 14 introduces the following principal changes: (1) measures for optimizing the effectiveness of filtering and subsequent processing of applications; (2) a new admissibility criterion; and (3) measures to reinforce the execution of the Court's judgments. These reform measures will be discussed in turn.

A. Optimizing the Filtering and the Subsequent Processing of Applications

The Court's excessive caseload manifests itself in two areas in particular. First, the case-processing capacity at the pre-admissibility stage is a key area of concern. More than ninety percent of all lodged applications are terminated without a ruling on their merits, usually because they are declared inadmissible.[60] In 2006, there were some 28,160 applications declared inadmissible or struck out of the list of cases by the Court; only 1,634 applications were considered admissible.[61] Thus, the first step of the filtering procedure, the admissibility decision of the Committee of three judges, proves very time-consuming. "It is clear that the considerable amount of time spent on filtering [the applications] has a negative effect on the capacity of judges . . . to process" cases already declared admissible.[62]

To address this first issue, Protocol No. 14 provides for the establishment of a single-judge procedure. "A single judge may declare inadmissible or strike out" an individual application from the Court's list of cases "where such a decision can be taken without further examination."[63] Hence, the single judge may take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the first examination of the case. If admissibility is doubtful, the judge will refer the application to a Committee or a Chamber. Moreover, the "judges will [also] be relieved of their rapporteur role when sitting in a single-judge formation."[64] The function of rapporteur will be exercised by the lawyers of the Court's registry which "will examine the application, and in most cases will undoubtedly also prepare a draft decision

60. *Explanatory Report*, *supra* note 18, ¶ 7; CDDH, *Final Report Containing Proposals of the CDDH*, ¶ 8, CM (2003)55 (Apr. 8, 2003) [hereinafter *Final Report*], *available at* http://www.coe.int/T/F/Droits_de_l'Homme/2003cm55.asp#TopOfPage (last visited on Nov. 27, 2007).

61. SURVEY OF ACTIVITIES, *supra* note 12, at 40.

62. *Explanatory Report*, *supra* note 18, ¶ 8.

63. Protocol No. 14, *supra* note 17, at art. 7.

64. *Explanatory Report*, *supra* note 18, ¶ 62.

for the judge."[65]

The second challenge relates to the nature of cases that are brought before the Court. Some sixty percent of the remaining admissible cases are so-called repetitive cases; they derive from the same structural cause as an earlier application leading to a judgment finding a breach of the European Convention.[66] The *Broniowski* judgment provides a definition of such systemic violation "[where] the facts of the case disclose the existence, within the [relevant] legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied [their Convention rights]" and "[where] the deficiencies in national law and practice identified . . . may give rise to numerous subsequent well-founded applications."[67] Most individual applications concerning the length of civil or criminal proceedings before domestic authorities must be considered as repetitive cases deriving from systemic violations of the European Convention.[68]

With respect to repetitive cases, the filtering mechanism is improved by extending the competence of the Committees of three judges to cover repetitive cases. Under new Article 28(1)(b) of the European Convention, they are empowered to rule, in a simplified summary procedure, not only on the admissibility but also on the merits of an application if the underlying question "is already the subject of well-established case-law of the Court."[69] This applies, in particular, to cases where an application is one of a series deriving from the same systemic defect at the national level; hence, a repetitive case.

In addition, the Court is given more latitude to rule simultaneously on the admissibility and the merits of individual applications.[70] This joint procedure enables the Court to deal with cases more rapidly, without unnecessary duplication and delay, inherent

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65. *Explanatory Report*, *supra* note 18, ¶ 62; *see also* Paul Lemmens, *Single-Judge Formations, Committees, Chambers and Grand Chamber*, *in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 31, 33-34 (Paul Lemmens & Wouter Vandenhole eds., 2005).

66. *Explanatory Report*, *supra* note 18, ¶ 7.

67. In *Broniowski v. Poland*, the Court found a violation of Article 1 of Protocol No. 1 to the Convention (right to property). This violation had originated in a systemic problem caused by the Polish authorities' failure to implement an effective mechanism to compensate persons for the property abandoned in the territories beyond the Bug River as a result of boundary changes following the Second World War. *See* Broniowski v. Poland, App. No. 31443/96, Eur. Ct. H.R., para. 189 (June 22, 2004), *available at* http://www.echr.coe.int/echr (follow "Case Law" and search "HUDOC" for "Broniowski v. Poland").

68. *See, e.g.*, Voggenreiter v. Germany, App. No. 47169/99, Eur. Ct. H.R., (Jan. 8, 2004); Patane v. Italy, App. No. 29898/96, Eur. Ct. H.R., (Mar. 1, 2002), *available at* http://www.echr.coe.int/echr (follow "Case Law" and search "HUDOC" for "Voggenreiter v. Germany" and "Patane v. Italy", respectively).

69. Protocol No. 14, *supra* note 17, at art. 8.

70. *Id.* at arts. 8, 9.

in taking separate decisions on the admissibility and on the merits.[71]

Furthermore, the drafters of Protocol No. 14 intended to enhance the Court's important friendly settlement practice.[72] Thus, every stage of the application procedure allows for the possibility of negotiating a friendly settlement.[73] This may provide a fast and effective way of redressing individual grievances; it may also be attractive to the applicant, the respondent state, and the Court alike. Friendly settlements will prove particularly useful in repetitive cases, as well as other cases where questions of principle or changes in domestic law are not involved.[74]

B. New Admissibility Criterion

To provide the Court with an additional tool to assist it in its filtering work, Protocol No. 14 inserts a new admissibility criterion in Article 35 of the European Convention.[75] Under new Article

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71. Article 29(3) of the European Convention provides that "[t]he decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise." European Convention, *supra* note 1, art. 29(3).

72. *See* Hans C. Krüger & Carl A. Nørgaard, *Reflections Concerning Friendly Settlement under the European Convention on Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 329, 334 (Franz Matscher & Herbert Petzold eds., 2d ed. 1989); HARRIS ET AL., *supra* note 8, at 711; Herbert Petzold & Jonathan L. Sharpe, *Profile of the Future European Court of Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 471, 473 (Franz Matscher & Herbert Petzold eds., 2d ed. 1989). *See also* Committee of Ministers, Resolution Res (2002)59 Concerning the Practice in Respect of Friendly Settlements (Dec. 18, 2002), https://wcm.coe.int/ViewDoc.jsp?id=331569&Lang=en (last visited Nov. 27, 2007).

73. Protocol No. 14, *supra* note 17, art. 15.

74. *See* Final Report, *supra* note 60, Proposal B.3; Explanatory Report, *supra* note 18, ¶ 93. For critical remarks see Fiona Ang & Eva Berghmans, *Friendly Settlements and Striking out of Applications*, *in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 89, 94-97 (Paul Lemmens & Wouter Vandenhole eds., 2005).

75. Article 35 of the European Convention states:

> 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
>
> 2. The Court shall not deal with any application submitted under Article 34 that:
>
> a. is anonymous; or
>
> b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
>
> 3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
>
> 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

35(3)(b) of the European Convention, the Court shall declare inadmissible an individual application when

> 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.[76]

The new admissibility criterion aims at excluding those cases from the control mechanism in which a violation of the Convention may have occurred but did not result in a "significant disadvantage" for the applicant. However, Article 35(3)(b) mentions two circumstances (so-called "safeguard clauses") under which the Court still can decide that an application that otherwise meets these criteria nonetheless requires an examination on the merits.

The main element contained in the new admissibility requirement is whether the applicant has suffered a "significant disadvantage." These terms require interpretation; the Court first will have to develop the necessary case-law principles to apply the new admissibility criterion.[77] However, this new criterion implies an additional restraint for the applicants and contrasts with the established case-law of the Strasbourg organs which declares admissible even cases in which applicants are characterized as "potential" or "indirect" victims of a Convention violation.[78] Although the European Convention system does not allow for *actio popularis*,[79] the Strasbourg organs have found the threat of future injury sufficient to establish the status of victim under Article 34 of the Convention. Hence, a "potential victim" can lodge an individual application with the Court.[80] Additionally, the Strasbourg organs have

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European Convention, *supra* note 1, art. 35.

76. Protocol No. 14, *supra* note 17, art. 12.

77. Some guidance as to the interpretation of the term "significant disadvantage" could be drawn from an impact assessment made by a study group of the Court's Registry. In view of the study group, applications concerning some particular rights (in particular the non-derogable rights) cannot but entail "a significant disadvantage." Non-derogable rights are the rights from which no derogation can be made, even in time of war of other public emergency threatening the life of a nation. *See* Frédéric Vanneste, *A New Inadmissibility Ground, in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 69, 76-79 (Paul Lemmens & Wouter Vandenhole eds., 2005).

78. For further details and references see Kersten Rogge, *The "Victim" Requirement in Article 25 of the European Convention on Human Rights, in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 539 (Franz Matscher & Herbert Petzold eds., 2d ed. 1989).

79. GOMIEN ET AL., *supra* note 6, at 43; VAN DIJK & VAN HOOF, *supra* note 5, at 46.

80. Such is the case when a law or practice has not yet been applied to the complain-

developed in their case-law the concept of "indirect victim," meaning that a close relative of the victim or any other third party can refer the matter to the Court on his own initiative if the violation is prejudicial to him or if he has a personal interest in terminating it.[81] Applying this broadly interpreted notion of victim, the applicant need not have suffered direct harm as a result of the alleged violation under the Court's current jurisprudence.[82] With the introduction of the new admissibility requirement, however, the physical, moral, legal or pecuniary prejudice that an individual has suffered will play an important role in assessing admissibility. Therefore, the new "significant disadvantage" criterion poses a risk of limiting access of individuals to the Court, impairing the Court's function to provide individuals who claim to be victims of human rights violations with an effective international remedy.[83]

However, the new admissibility requirement contains two safeguard clauses: even where the applicant has not suffered a significant disadvantage, the application will not be declared inadmissible if "respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits" or if the case "has not been duly considered by a domestic tribunal."[84] The first safeguard clause will include cases which raise important questions affecting the application or the interpretation of the Convention or major issues concerning national law.[85] The second safeguard clause ensures that every case will receive a judicial examination -- whether at the national or at the Convention level. Indeed, it is in the first place the task of the domestic tribunals to consider all human rights complaints, even if there appears to be no significant disadvantage for the individual. If the domestic tribunals fail, however, the Court still has the option to examine these cases brought to Strasbourg. The second

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ing party, but where the possibility exists for the state to do so in future. *See* Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) at 42 (1986); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 27 (1979); Open Door & Dublin Well Woman v. Ireland, 246-A Eur. Ct. H.R. (ser. A) at 41-44 (1992).

81. GOMIEN ET AL., *supra* note 6, at 46; HARRIS ET AL., *supra* note 8, at 637; VAN DIJK & VAN HOOF, *supra* note 5, at 56-58.

82. *See, e.g.*, Eckle v. Germany, 51 Eur. Ct. H.R. (ser. A.) at 66 (1982); Prager & Oberschlick v. Austria, 313 Eur. Ct. H.R. (ser. A.) at 26 (1995). *See also* Krüger & Nørgaard, *supra* note 6, at 663-64.

83. The new admissibility criterion may therefore encourage European human rights claimants to turn to other complaint mechanisms in international law, for example to the individual petition provided for under the First Optional Protocol of the International Covenant on Civil and Political Rights. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302; *See generally* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993).

84. Protocol No. 14, *supra* note 17, art. 12.

85. *Explanatory Report*, *supra* note 18, ¶ 83.

safeguard clause in particular should guarantee that applications deriving from systemic problems of the adjudication system of the newer contracting states will not be declared inadmissible.[86]

C. Measures to Reinforce the Execution of the Court's Judgments

The control system's effectiveness also depends on a large extent on the fast execution of the Court's judgments. Failure or too much delay in taking individual or general measures to execute judgments, especially judgments concerning repetitive cases, will inevitably generate further individual applications to the Court. Consequently, the introduction of individual and general measures capable of providing redress to both current and future applicants will help to ease the Court's caseload.

The Committee of Ministers' experience of supervising the execution of judgments shows frequent difficulties due to disagreement as to the interpretation of judgments.[87] Therefore, the European Convention will be amended by Protocol No. 14 to empower the Committee of Ministers to refer a case to the Court for a ruling on the question of interpretation if it considers that the supervision of the execution of a final judgment hindered by a problem of interpretation.[88] A referral decision shall require a majority vote of two-thirds of the representatives on the Committee of Ministers. The Court's reply will settle any argument concerning a judgment's exact meaning, giving the member state concerned as well as the Committee of Ministers guidance for a correct execution of the judgment.[89]

The Committee of Ministers has only the power to supervise the execution of a judgment by a state; it has no power to force a defaulting state to take adequate remedial actions to comply with

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86. *See* CDDH, *Interim Activity Report*, ¶ 38, CDDH(2003)026 Addendum I Final (Nov. 26, 2003) [hereinafter *Interim Activity Report*], *available at* http://www.coe.int/t/f/droits_de_l%27homme/CDDH(2003)026_%20E%20Interim.asp#TopOfPage.

87. European Commission for Democracy Through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, ¶ 76, Op. No. 209/2002, CDL-AD (2002)034 (Dec. 18, 2002) [hereinafter *Venice Commission Opinion*], *available at* http://www.venice.coe.int/site/interface/english.htm.

88. In addition, the Committee of Ministers adopted a resolution in which it invites the Court as far as possible

> to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.

Comm. of Ministers, Resolution Res (2004) 3 on Judgments Revealing an Underlying Systemic Problem (May 12, 2004), https://wcm.coe.int/ViewDoc.jsp?id=743257&Lang=en.

89. *Explanatory Report*, *supra* note 18, ¶¶ 96-97.

the Court's judgment. The ultimate sanction of suspension of voting rights in the Committee of Ministers or expulsion from the Council of Europe are extreme measures that would prove counterproductive in most cases.[90] It can be argued that a state which refuses to execute a Court's judgment would need to be subjected to the discipline of the Council of Europe, rather than to be excluded from it. Protocol No. 14 therefore empowers the Committee of Ministers to bring infringement proceedings in the Court against any state which refuses to comply with a Court's judgment. The Committee's decision to bring such infringement proceedings must be adopted by a two-thirds majority vote.[91] Since the political pressure exerted by proceedings for non-compliance is assumed to secure execution of the Court's judgment by the state concerned, Protocol No. 14 does not provide for payment of a financial penalty by a member state found in violation of its treaty obligations.[92] Protocol No. 14 suggests that the procedure's mere existence, and the threat of using it, should provide for an effective new incentive to execute the Court's judgments.[93]

D. A More Effective Control Mechanism?

It will not be possible to make a final assessment of the effects of Protocol No. 14 until it has entered into force and has been in operation for some time. However, some of the Protocol's effects on the control mechanism can be anticipated based on the foregoing considerations. The three main areas of reform identified in the previous chapter will be discussed in turn.

The reform measures aimed at optimizing the effectiveness of filtering and subsequent processing of applications surely will allow the Court to improve its procedure shortly after Protocol No. 14 enters into force. The new single-judge formation is introduced to examine and decide manifestly inadmissible applications. Thus,

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90. *See* Eaton & Schokkenbroek, *supra* note 33, at 15; Bernhardt, *supra* note 31, at 153.

91. Protocol No. 14, *supra* note 17, art. 16.

92. The Steering Committee for Human Rights first proposed that the infringement procedure could include a competence for the Court to order payment of a financial penalty (in the form of a lump sum) payable to the Council of Europe. *See Final Report*, *supra* note 60, Proposal C.4. However, the European Commission for Democracy through Law concluded that the added value of the introduction of a penalty-imposing mechanism in the Convention system would be insufficiently clear. *See Venice Commission Opinion*, *supra* note 87, ¶ 85.

93. Such a mechanism of financial penalties was introduced in the Treaty Establishing the European Community in 1993 as a tool of ensuring adequate and timely execution by member states of judgments of the Court of Justice of the European Communities. *See* Maria A. Theodossiou, *An Analysis of the Recent Response of the Community to Non-Compliance with Court of Justice Judgments: Article 228(2) E.C*, 27 EUR. L. REV. 25 (2002).

it takes over the task entrusted in the present system to the Committee of three judges.[94] Therefore, the introduction of a single-judge formation reduces Court time spent on clearly inadmissible applications.[95] This has considerable potential for removing a bottleneck in the Court's mechanism.[96]

In addition, the Committee of three judges will be able not only to declare applications inadmissible or to strike them out; but also, under certain conditions, to declare them admissible and to hand down a judgment on the merits. Repetitive cases will also be eligible for examination by a Committee. The new competence of the Committee, therefore, will increase substantially the Court's effectiveness, since repetitive cases, a majority of the admissible cases, can be decided by a three-judge Committee, instead of a seven-judge Chamber currently required.[97] Moreover, the length of proceedings will be reduced by ruling simultaneously on the admissibility and the merits of an application as well as by the encouragement of friendly settlements at any stage of the proceedings. The implementation of these measures therefore should contribute to a more simple and expeditious treatment of a majority of the cases lodged with the Court.[98]

Based on the foregoing analysis, however, it cannot be assumed that the new admissibility criterion will decrease the workload of the Court in a substantial way. With respect to the filtering work, the drafters of Protocol No. 14 suggest that the new admissibility criterion will enable the Court to dispose of inadmissible cases more rapidly.[99] However, one must know that the unclear terms of the new admissibility criterion first need to be interpreted and clarified by the Court to allow a faster disposal of inadmissible cases. It can be expected that the Court will have to devote a significant amount of time and resources to the development of the necessary clear-cut case-law to apply the new admissibility criterion.[100] This holds especially true because in the two years follow-

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94. *See* Lemmens, *supra* note 65, at 31.

95. *Id.* at 34.

96. *See id.*; Alastair Mowbray, *Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases*, 4 HUM. RTS. L. REV. 331, 332 (2004).

97. *See Explanatory Report*, *supra* note 18, ¶¶ 7, 70; Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUM. RTS. L. REV. 403, 408 (2006); *see also* Philip Leach, *Access to the European Court of Human Rights — From a Legal Entitlement to a Lottery?* 27 HUM. RTS. L.J. 11, 24 (2006).

98. *See* Eaton & Schokkenbroek, *supra* note 33, at 16.

99. *Explanatory Report*, *supra* note 18, ¶ 79.

100. *See also* Amnesty International, *Council of Europe: Ensuring the Long-term Effectiveness of the European Court of Human Rights - NGO Comments on the Group of Wise Persons' Report*, ¶ 24, AI Index IOR 61/002/2007 (Jan. 16, 2007), *available at* http://web.amnesty.org/library/index/engior610022007.

ing the entry into force of Protocol No. 14, the new admissibility criterion may be applied only by the Chambers and the Grand Chamber of the Court, not by the single judges and the Committees.[101] Hence, it can be argued that the new admissibility criterion will not enable the Court to process inadmissible cases in a significantly more rapid manner shortly after Protocol No. 14 enters into force.

In addition, the drafters of Protocol No. 14 state that the new criterion will result in a more effective filtering because additional applications can be declared inadmissible.[102] However, only very few additional cases will probably be declared inadmissible under the new Article 35(3)(b). Under the current control system, ninety percent of all lodged applications are declared inadmissible.[103] The new criterion therefore applies in principle only to ten percent of the individual applications not declared inadmissible under existing admissibility criteria provided in Article 35 of the European Convention. The majority of these cases must be considered as repetitive cases.[104] One feature of these cases is that they are almost by definition well-founded; thus, they cannot be declared inadmissible, not even under the new admissibility criterion. These considerations do not only show that the amount of additional cases declared inadmissible under the new criterion will be very small but also that it does not address adequately the Court's problem to process more effectively the mass of repetitive applications, allowing the judges to concentrate more on decisions of principle.[105]

Moreover, the Court already can exercise a high degree of discretion in declaring an application inadmissible and deciding not to go into the merits of a case.[106] Under Article 35(3) of the European Convention, the Court has wide flexibility to declare inadmissible an application which it considers "manifestly ill-founded." According to the case-law, the term "manifestly ill-founded" has been broadly interpreted as encompassing cases which have no merit, either because they were unsubstantiated or because the facts alleged did not disclose any appearance of a *prima facie* violation of the rights and freedoms set out in the European Convention.[107] Thus, it can be argued that many of the applications to

101. Protocol No. 14, *supra* note 17, art. 20.

102. *See Explanatory Report*, *supra* note 18, ¶ 79.

103. *Id.* ¶ 7.

104. *See Explanatory Report*, *supra* note 18, ¶ 7.

105. *See* Leach, *supra* note 97, at 23-24.

106. *See* Vanneste, *supra* note 77, at 85.

107. By far the greatest numbers of individual applications are declared inadmissible because they are considered to be "manifestly ill-founded." *See* GOMIEN ET AL., *supra* note 6, at 66; VAN DIJK & VAN HOOF, *supra* note 5, at 162-65; HARRIS ET AL., *supra* note 8, at 627;

which the new admissibility criterion applies already can be declared inadmissible under the existing Article 35(3).

If the new provision is incapable of achieving the practical aims for which it was designed -- to enable the Court to process unmeritous and repetitive cases more effectively and to devote more time to cases which warrant examination on the merits[108] -- then the restriction on the right of individual access to the Court is even more questionable. These concerns were also stressed by the Parliamentary Assembly of the Council of Europe, which stated that it "cannot accept the proposal to add a new admissibility criterion to Article 35 of the (individual application) Convention because it is vague, subjective and liable to do the applicant a serious injustice, and would exclude only 1.6% of existing cases."[109] Fundamental objections to the new admissibility criterion were also expressed by various NGOs which stated that such a criterion would have "little impact on the main source of the Court's overburdening, which is disposing of the high number of cases that are inadmissible under the current criteria."[110]

It remains questionable whether the interpretation and infringement proceedings introduced by Protocol No. 14 will meet the goals of improving and speeding up the execution of judgments. The new procedure's effectiveness is particularly problematic in cases where non-enforcement depends on problems or delays relating to the internal democratic processes of the member state, or where execution has been initiated but may be inadequate or insufficient, or where the delay is caused by the lack of financial means. In addition, in cases where the government in question willfully has not abided by a judgment, it is unlikely that much additional pressure will result from a declaratory default judgment by the Court.[111]

JOHN G. MERRILLS & ARTHUR H. ROBERTSON, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 311-12 (4th ed. 2001); Rogge, *supra* note 54, at 1217-18.

108. *See Explanatory Report*, *supra* note 18, ¶ 77.

109. Parliamentary Assembly of the Council of Europe, *Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* ¶ 11, Op. No. 251 (2004) (Apr. 28, 2004), *available at* http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2Fta04%2FEOPI251.htm.

110. Amnesty International, *Joint Response to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights*, ¶ 8, AI Index IOR 61/008/2003 (Dec. 1, 2003) [hereinafter *Joint Response*], *available at* http://web.amnesty.org/library/index/engior610082003.

111. In the case *Loizidou v. Turkey* for example, the Turkish government refused for years to pay the just satisfaction ordered by the Court, notwithstanding the political pressure from the Council of Europe and even the European Union. *See* Wouter Vandenhole, *Execution of Judgments, in* PROTOCOL NO. 14 AND THE REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 105, 120 (Paul Lemmens & Wouter Vandenhole eds., 2005).

The improvements in the control mechanism's efficiency achieved by Protocol No. 14 should thus not be overestimated. True, the reform measures aimed at optimizing the effectiveness of filtering and subsequent processing of applications surely will allow the Court to improve its procedure shortly after Protocol No. 14 enters into force. However, according to estimates prepared by the Court, the increase in productivity resulting from the implementation of Protocol No. 14 might be between twenty and twenty-five percent.[112] Given the enormous case-load of the Court, this increase in productivity will not suffice to guarantee the Court's long-term effectiveness which can be illustrated by the following figures. The latest activity report of the Court estimates that 50,500 new applications were lodged with the Court in 2006. In the same year, the Court disposed of 28,160 cases, either by rendering a final judgment, declaring them inadmissible or striking them from the Court's list of cases.[113] Assuming hypothetically that the amount of individual applications filed with the Court does not continue to rise in the future and that Protocol No. 14 results in a productivity increase of twenty-five percent, the number of new applications still exceeds the number of cases disposed of by the Court by about 15,300 applications. As a consequence, the number of cases pending before the Court is constantly growing.[114] It is therefore widely agreed that additional reform measures will be needed in the foreseeable future.[115] This position was also entertained by the Council of Europe member states which decided, even before Protocol No. 14 has entered into force, to establish a Group of Wise Persons to draw up a comprehensive strategy to secure the long-term effectiveness of the European Convention and its control mechanism.[116] In addition, the Secretary General of the Council of Europe and the President of the Court asked a team of experts to conduct a review of the Court's working methods to pro-

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112. *See* Minister's Deputies, *Report of the Group of Wise Persons to the Committee of Ministers*, ¶ 32, CM(2006)203 (Nov. 15, 2006) [hereinafter *Group of Wise Persons Report*], *available at* https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB5&BackColorLogged=FDC864.

113. *See* SURVEY OF ACTIVITIES, *supra* note 12, at 38.

114. As of December 31, 2006, 89,900 applications were pending before the Court. *See id.*

115. *See* Paul Mahoney, *Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights*, 26 HUM. RTS. L.J. 345, 346 (2005); Mowbray, *supra* note 96, at 336; Caflisch, *supra* note 97, at 423.

116. *See* Third Summit of Heads of State and Government of the Council of Europe, Warsaw, Poland, May 16-17, 2005, *Warsaw Declaration*, ¶ 2, *available at* http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp?; Third Summit of Heads of State and Government of the Council of Europe, Warsaw, Poland, May 16-17, 2005, *Action Plan*, ¶ I.1., CM(2005)80 final (May 17, 2005), *available at* http://www.coe.int/t/dcr/ summit/20050517_plan_action_en.asp?.

pose administrative steps to be taken, without amending the European Convention, to enable the Court to cope more effectively with its current and projected caseload.[117]

V. BEYOND PROTOCOL NO. 14

The acknowledged need for further reform measures to guarantee the Convention's control mechanism presents a more fundamental question: what shall the premises for the new reform be? Would it be desirable to establish a more constitutional Court, not accessible for everyone but dealing with more cases of principle, thereby setting human rights standards for Europe? Or should the member states try to preserve the Court's ability to deliver individual as well as constitutional justice?

A. A More Constitutional Court?

The reform process has prompted a fundamental discussion about the two basic purposes of the European Convention's control mechanism; to provide alleged victims of human rights violations with an effective international remedy; and, more generally, to decide cases of principle, thereby contributing to the elaboration of a higher human rights standard for Europe. In view of the Court's increasing caseload, some argue that the only way to reform the Court's control mechanism is to emphasize the constitutional justice function over the individual justice function.[118]

Some proposals made in the early reform discussion went in that direction. Certainly the most far-reaching suggestion was to grant to the Court unrestricted discretion in accepting a case for examination.[119] This proposal aimed at introducing a system comparable to the *certiorari* procedure of the United States Supreme Court by leaving the Court free to select cases involving sufficiently serious questions regarding the Convention's rights. However, this proposal was rejected in the further reform discussion on grounds that such a radical change would have been "tantamount to calling into question the entire philosophy on which the Euro-

117. Lord Woolf et al., Review of the Working Methods of the European Court of Human Rights (Dec. 2005) [hereinafter Lord Woolf Report], *reprinted in* 26 HUM. RTS. L.J. 447 (2005).

118. *See* Wildhaber, *supra* note 11, at 163-64; Greer, *supra* note 11, at 406-07.

119. *See* Reflection Group on the Reinforcement of the Human Rights Protection Mechanism, *Activity Report*, Appendix II, ¶¶ 9-13, CDDH-GDR (2001)010 (June 15, 2001) [hereinafter *Reflection Group Report*], http://www.coe.int/t/f/droits_de_l%27homme/cddh-gdr(2001)010%20e.asp#P87_2086. *See also Evaluation Group Report*, *supra* note 23, ¶ 91.

pean Convention on Human Rights was based."[120] It was stressed that any individual claiming to be a victim of a violation of the European Convention had the right to lodge an application alleging a breach of a Convention right directly with the Court in Strasbourg. This policy should be firmly upheld as a "cornerstone of the Convention."[121]

However, the Evaluation Group, which was charged with making further reform proposals, argued in its report that "a vital consideration must be to ensure that judges are left with sufficient time to devote to what have been called 'constitutional judgments.'"[122] Accordingly, this Group proposed to empower the Court "to decline to examine in detail applications which raise no substantial issue under the Convention."[123] Although this proposal was less radical than the one suggested to introduce a procedure like *certiorari*, it encountered strong opposition. More than seventy NGOs, national human rights institutions and bar associations in twenty-two Council of Europe countries adopted a joint response, stating that the reform must "ensure that the right of individual application . . . is not prejudiced, restricted or weakened."[124] This joint statement therefore rejected the Evaluation Group's proposal and stressed that applicants must not be denied effective access to the Court.[125] The proposal was subsequently considered by the Steering Committee for Human Rights, which had been instructed to create a set of concrete and coherent reform proposals. In its final report, the Committee rejected the Evaluation Group's proposal to allow the Court to dismiss cases which raise no substantial issue, as providing the Court with "too wide a discretion enabling it to pick and choose the cases it would wish to deal with."[126] Nevertheless, the Steering Committee retained in principle the idea of giving some additional discretion, however limited, to the Court in the form of a new admissibility criterion. The Committee finally proposed to allow the Court to declare a case inadmissible if the applicant has not suffered a "significant disadvantage," a proposal which was adopted within new Article 35(3)(b) of Protocol No. 14 with minor changes regarding the provision's safeguard clauses.[127]

Hence, it can be argued that the Council of Europe member

120. *Reflection Group Report*, *supra* note 119, ¶ 9.
121. *Id.*
122. *Evaluation Group*, *supra* note 23, ¶ 98.
123. *Id.* ¶ 93.
124. *Joint Response*, *supra* note 110, ¶ 2.
125. *Id.* ¶ 8.
126. *Final Report*, *supra* note 60, ¶ 14.
127. *Id.* ¶ 15.

states were not prepared to abandon the Court's function to deliver individual justice, at least in principle, in favor of constitutional justice. Although the new admissibility criterion introduced by Protocol No. 14 restricts the access of individuals to the Court, the drafting history bears witness to the political will to preserve the goal of individual justice.[128]

B. Individual and Constitutional Justice as Interdependent Functions

It can be argued that a shift to a more constitutional Court would fail to acknowledge that the two functions of the Court are not separate, but interdependent. There is no fundamental dichotomy between the Court's role to provide individuals who claim to be victims of human rights violations with an effective international remedy and the Court's constitutional role to establish a human rights standard for Europe.[129] On the contrary, by preserving the right to individual application, the Court enhances its constitutional function. The legitimacy theory of compliance, propounded by Thomas M. Franck, provides a useful theoretical tool for explaining this interrelation. The basic premise of Franck's legitimacy theory is that an international rule (as well as an international institution) perceived to have a high degree of legitimacy generates a correspondingly high measure of compliance by those to whom it is addressed.[130] The legitimacy of a rule or of a rule-applying institution "is a function of the perception of those in the community concerned that the rule, or the institution, has come into being endowed with legitimacy: that is, in accordance with right process."[131] Franck identifies four elements as indicators for the legitimacy of an international institution: determinacy, symbolic validation, coherence, and adherence.[132]

With regard to the European Court of Human Rights, it is im-

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128. For an analysis of the goals and influences of the different political actors in drafting Protocol No. 14, *see* 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 (2006).

129. But see Wildhaber, *supra* note 11, at 162, who stresses that "there is a fundamental dichotomy running throughout the Convention. This is as to whether the primary purpose of the Convention system is to provide individual relief or whether its mission is more a 'constitutional' one of determining issues on public policy grounds in the general interest."

130. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 93 (2006).

131. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 711 (1988).

132. *Id.* at 725.

portant to remember that it is not -- in contrast to the constitutional courts in the member states -- established according to a democratically legitimated constitution. The Court is an international institution established by an international treaty, and the implementation of its decisions is unsupported by an effective structure of coercion comparable to a national enforcement system.[133] Compliance with the "constitutional" decisions of the Court therefore depends in part on the perception of the Court as legitimate international institution. This perception is affected decisively by the institution's symbolic validation which is described as the "cultural and anthropological dimension"[134] of Franck's legitimacy theory. The Court's legitimacy thus is enhanced by the right to individual application which is considered a "basic feature of European legal culture"[135] by the Court itself. This assessment is shared by the Group of Wise Persons' report whose importance was stressed by the Council of Europe member states.[136] These statements mirror the public opinion on the right to individual application, which is considered a "highly symbolic"[137] element of the Convention system. As Paul Mahoney stresses:

> European institutions are often . . . perceived by the public as distant, bureaucratic machines, issuing uniformising regulations over our daily lives and hermetically closed to the ordinary person. The Council of Europe, through its European Court of Human Rights, has made freely available to individual men and women in Europe an international remedy allowing them to ventilate openly complaints about alleged human rights violations committed against them by their national authorities . . .[138]

Therefore, the Court's goal to provide any individual who claims to be a victim of a human rights violation with an effective international remedy can add to the perceived legitimacy of the

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133. *See* HARRIS ET AL., *supra* note 8, at 700-05; GOMIEN ET AL., *supra* note 6, at 90.

134. Franck, *supra* note 131, at 725.

135. European Court of Human Rights, *Opinion of the Court on the Wise Persons' Report*, at 1 (Apr. 2, 2007), http://www.echr.coe.int/NR/rdonlyres/26457EAB-2840-4D71-9ED7-85F0F8AE0026/0/OpinionoftheCourtontheWisePersonsReport.pdf.

136. *Group of Wise Persons Report*, *supra* note 112, ¶ 23; Ministers' Deputies, Decisions, 984th mtg., Item 1.6, ¶ 2, CM/Del/Dec (2007) 984 (Jan. 22, 2007), *available at* https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2007)984&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

137. Mahoney, *supra* note 115, at 346.

138. *Id.*

institution. A higher degree of legitimacy, in turn, results in stronger compliance with the Court's judgments, thereby promoting its constitutional function. Hence, a reform beyond Protocol No. 14 should reaffirm the two basic roles the Court has played to date: to deliver individual as well as constitutional justice.

This position seems to be also entertained by the Group of Wise Persons which rejected the idea to introduce a *certiorari* system similar to that of the United States Supreme Court. The Group stressed that "a power of this kind would be alien to the philosophy of the European human rights protection system"[139] and stated that the present system should be upheld which "confers on the Court at one and the same time a role of individual supervision and a 'constitutional' mission."[140]

C. Introducing a New Filtering Mechanism

Two major challenges for the Court's control mechanism have been identified: first, the filtering of the clearly inadmissible cases which make up approximately ninety percent of all applications lodged with the Court; and second, the processing of the mass of repetitive cases deriving from a systemic violation of the European Convention.[141] Protocol No. 14 opens up significant possibilities for more efficient filtering and subsequent processing of the cases by introducing a single judge for inadmissibility decisions and by assigning a Committee of three judges to rule on both the admissibility and the merits of an application. However, these measures will not be enough to control the current and expected caseload of the Court.[142] Therefore, proposals for additional reform measures in these two main areas of concern should be discussed.

One proposal put forward in the drafting process of Protocol No. 14 contained the establishment of a special "filtering" division as an integral part of the Court. This special division, with responsibility for preliminary examination of applications, would be composed of so-called "assessors," "appropriately appointed independent and impartial persons invested with judicial status."[143] The idea behind this special division is to separate the functions of filtering and adjudication on the merits. This division of labor is in-

139. *Group of Wise Persons Report*, *supra* note 112, ¶ 42.

140. *Id.* ¶ 24.

141. *See Explanatory Report*, *supra* note 18, ¶ 7; *Final Report*, *supra* note 60, ¶ 8.

142. *See Group of Wise Persons Report*, *supra* note 112, ¶ 32; *see also* Lord Woolf Report, *supra* note 117, at 453.

143. Evaluation Group Report, *supra* note 23, ¶ 98; *see also* Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN. ST. INT'L L. REV. 101, 108-10 (2002).

tended to increase efficiency of output. The filtering division composed of additional personnel would specialize in the admissibility examination of individual applications, thereby speeding up the filtering procedure. As a consequence, the Court's judges not involved in the filtering work could concentrate on the adjudication of cases which raise substantial issues under the Convention. The Court strongly supported this suggestion, stressing that "ultimately a separate filtering body will be required."[144] That proposal, however, was finally rejected, mainly because of the financial implications and concerns about creating lower status judges. In addition, the drafters of Protocol No. 14 were worried that the establishment of a separate filtering mechanism would be perceived as reverting to the two-tiered system, encompassing the Commission and the Court, which was abolished with Protocol No. 11 in 1998.[145]

Nonetheless, in the long run, the establishment of a separate, specialized filtering mechanism may prove an important additional measure to process more effectively the mass of inadmissible and repetitive cases.[146] The Group of Wise Persons has also recommended introducing a judicial filtering body attached to, but separate from the Court. This new filtering body -- the so-called "Judicial Committee" — would have jurisdiction to hear "all applications raising admissibility issues," and "all cases which could be declared manifestly well-founded or manifestly ill-founded on the basis of well-established case-law of the Court."[147] The Judicial Committee thus would in particular process the mass of inadmissible and repetitive cases which, under Protocol No. 14, are assigned to single judges and Committees of three judges. As a consequence, a large number of applications would be transferred to the specialized Judicial Committee, enabling the Court to concentrate more on cases of principle and its constitutional role.

The Group of Wise Persons suggested that the new, full-time

144. Group on the Reinforcement of the Human Rights Protection Mechanism, *Response of the European Court of Human Rights to the CDDH Interim Report Following the 46th Plenary Administrative Session on 2 February 2004*, ¶ 7, CDDH-GDR(2204) 001 (Feb. 10, 2004), *available at* http://www.coe.int/T/F/Droits_de_l'Homme/CDDH-GDR(2004)001%20E%20Response%20of%20Court%20to%20CDDH%20Interim%20Report.asp#TopOfPage.

145. *See* Steering Committee for Human Rights (CDDH), *Interim Report of the CDDH to the Committee of Ministers "Guaranteeing the Long-term Effectiveness of the European Court of Human Rights,"* ¶¶ 23-31, CM(2002)146 (Oct. 18, 2002), *available at* http://www.coe.int/t/f/droits_de_l%27homme/2002cm146.pdf.

146. The proposal of establishing a separate filtering body was also supported by various NGOs. *See* Amnesty International, *Council of Europe: Ensuring the Long-term Effectiveness of the European Court of Human Rights - NGO Comments on the Group of Wise Persons' Report*, ¶ 26, AI Index IOR 61/002/2007 (Jan. 16, 2007), *available at* http://web.amnesty.org/library/index/engior610022007.

147. *Group of Wise Persons Report, supra* note 112, ¶¶ 55-56.

judges sitting on the Judicial Committee should, like those of the Court, be of high moral character and possess qualifications required for appointment to judicial office.[148] They would enjoy full guarantees of independence and be subject to the same requirements as the members of the Court with regard to impartiality.[149] Candidates' professional qualifications and language skills should be evaluated by the Court "in an opinion prior to their election by the Parliamentary Assembly."[150] The Group also suggested that the number of judges sitting on the Judicial Committee should be smaller than the number of Convention member states.[151] However, the Committee's composition "should reflect a geographical balance as well as a harmonious gender balance and should be based on a system of rotation between states."[152]

As a consequence of creating this Judicial Committee and according to the "logic underlying the new role proposed for the Court," the Group of Wise Persons suggested that the reform "should lead in due course to a reduction in the number of judges" of the Court.[153] The Group thus recommended limiting the number of members of the Court which, under the present system, equals the number of Convention member states.[154] The Group's report, however, did not mention how many judges the Court should contain; it only referred to the fact that the International Court of Justice consists of fifteen members and the Inter-American Court of Human Rights of seven members. To ensure the presence of a national judge of the member state party to a dispute before the Court, the Group suggested appointing an *ad hoc* judge.[155]

It can be expected that the Group's proposal to establish a Judicial Committee will confront the same objections put forward in earlier reform discussions. The appointment of new judges for the Judicial Committee will lead to more costs, hence budgetary con-

148. Under Article 21(1) of the European Convention, "[t]he judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence." European Convention, *supra* note 1, art. 21(1).

149. See Article 21(3) of the European Convention, according to which, "[d]uring their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office." European Convention, *supra* note 1, art. 21(3).

150. *Group of Wise Persons Report*, *supra* note 112, ¶ 54.

151. *Id.* ¶ 53.

152. *Id.*

153. *Id.* ¶ 120.

154. *Id.* ¶ 53.

155. *Id.* ¶ 122. Under Article 27(2) of the European Convention, the judge elected in respect of a member state shall sit as an *ex officio* member on the Court whenever a case against the respective member state is heard. If there is no elected national judge or if he is unable to sit, an *ad hoc* judge shall sit in the capacity of a judge. European Convention, *supra* note 1, art. 27(2).

cerns. Moreover, compared to the Court's judges, the members of the Committee will be "lower status" judges. In contrast to the Court's judges who enjoy full jurisdiction, the jurisdiction of the Committee's judges will be limited to applications which raise admissibility issues or can be decided with reference to well-established case-law. In addition, the election of the Committee's judges will depend on the assessment of their professional qualifications and language skills by the Court. Concerns will also be raised that the establishment of a Judicial Committee amounts to a return to a pre-Protocol No. 11 two-tiered filtering system.[156]

These concerns should be taken seriously and the Group's proposal modified accordingly. Instead of appointing new Committee judges, the members of the new filtering mechanism could be drawn from the existing Court judges.[157] One could imagine that the Judicial Committee, composed of thirty-eight judges of the existing Court, would deal with applications that raise admissibility questions or can be decided based on well-established case-law. Further, that the Court itself, composed of nine judges, would deal with the other cases, raising more complex issues.[158] The decisions of the Judicial Committee should, as under Protocol No. 14, be taken by a single judge or by panels of three judges. Undoubtedly, the Judicial Committee would have to rely on the support of rapporteurs, introduced by Protocol No. 14, to increase the filtering capacity. It will be up to the Court to decide how many rapporteurs are needed, and how and for how long they will be appointed.[159]

This approach would have several advantages. First, the new filtering mechanism would be composed of existing judges, avoiding additional costs for newly appointed Committee judges. Second, the members of the Judicial Committee and the members of the Court would be elected according to the same rules, guaranteeing the same legitimacy. To ensure that all judges enjoy the same status regarding their jurisdiction, it would be equitable to assign the judges to the Committee or the Court on the basis of a system of rotation. Such a rotation system would facilitate electing highly qualified judges, because it may be difficult to find enough competent judges for the Committee who would limit themselves to de-

156. *See* Caflisch, *supra* note 97, at 414.

157. *See* Vanneste, *supra* note 77, at 84. For critical remarks, *see* Alastair Mowbray, *Beyond Protocol 14*, 6 HUM. RTS. L. REV. 578, 583 (2006).

158. The new number of Court judges would of course require a rethinking of the composition of the Court's Grand Chamber and the possibility of a rehearing of cases before the Grand Chamber. For reform proposals regarding the Grand Chamber, *see* Caflisch, *supra* note 97, at 414-15.

159. *See Explanatory Report*, *supra* note 18, ¶ 59.

ciding issues of jurisdiction and admissibility.[160] Third, the fact that the members of the Committee and the Court enjoy the same judicial status and that the Committee is attached to the Court should resolve concerns that this new filtering mechanism amounts to a return to the two-tier system operating prior to Protocol No. 11. In addition, drawing the members of the Committee from the existing Court judges would guarantee that at least one judge from every member state is sitting on the Committee or the Court. As a consequence, when the presence of a national judge in a case against a member state is required, it would not be necessary to appoint an *ad hoc* judge who had not been through the regular election process and approved by the Parliamentary Assembly.[161]

VI. CONCLUSIONS

Protocol No. 14, adopted by the Committee of Ministers of the Council of Europe at its 114th Ministerial Session in May 2004, is responding to current challenges and introducing some significant changes to the existing enforcement system of the European Convention. However, even if it is a step in the right direction, it will not guarantee the long-term effectiveness of the Court. In addition, a major flaw of Protocol No. 14 is its negative impact on the access of individuals to the Court without reducing significantly the workload of the Court. The Court's function of delivering individual justice thus is impaired without reinforcing the constitutional function of the Court. This article argues that these two functions are closely interrelated, and that any future reform should be designed to reaffirm the Court's dual role.

As for the Convention's control mechanism, one next important step in the reform process is to create additional tools to improve the filtering of inadmissible cases and the processing of repetitive cases. Thus, the proposal to establish a specialized Judicial Committee along the above-developed lines deserves further considera-

160. *See* Caflisch, *supra* note 97, at 414.

161. Note that under the present rules of procedure, the practice has been for the President of the Court to invite the state to make the appointment of an *ad hoc* judge at the same time as communicating the case. However, NGOs expressed concerns about the independence of *ad hoc* judges, and the Parliamentary Assembly was concerned because of the number of cases in which *ad hoc* judges were appointed who had never been through the election process of approval by the Assembly, and accordingly, in their view, lacked legitimacy. Because of these concerns, Protocol No. 14 provides for a new system of appointment of *ad hoc* judges. Under the new rule, each member state is required to draw up a reserve list of *ad hoc* judges from which the President of the Court shall appoint someone when the need arises. *See Explanatory Report*, *supra* note 18, ¶ 64; Eaton & Schokkenbroek, *supra* note 33, at 11.

tion. However, in accordance with the principle of subsidiarity, any reform of the Convention aimed at guaranteeing the long-term effectiveness of the Court must be accompanied by effective measures on the national level. Therefore, at its 114th session in May 2004, the Committee of Ministers of the Council of Europe adopted three recommendations addressed to the member states concerning, respectively, university education and professional training;[162] the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention;[163] and the improvement of domestic remedies.[164] It is important to stress that the implementation of the Convention's guarantees at the national level will undoubtedly reduce the need to apply to the Court for redress. In addition, better dissemination of information about the Convention and of the Court's case-law, in particular regarding the admissibility criteria, may reduce the number of inadmissible applications lodged with the Court.[165] As the experiences from the Warsaw pilot project show, the establishment of an information office at the national level can support this goal.[166] However, it is clear that only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the present challenges of the control mechanism of the Convention, thereby ensuring its long-term effectiveness. As former Court's President Luzius Wildhaber explained, Protocol No. 14 is "not the end of the story."[167]

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162. *See* Committee of Ministers, Recommendation Rec (2004) 4 on the European Convention on Human Rights in University Education and Professional Training (May 12, 2004), *available at* https://wcm.coe.int/ViewDoc.jsp?id=743277&Lang=en.

163. *See* Committee of Ministers, Recommendation Rec (2004)5 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), *available at* https://wcm.coe.int/ViewDoc.jsp?id=743297&Lang=en.

164. *See* Committee of Ministers, Recommendation Rec (2004)6 on the Improvement of Domestic Remedies (May 12, 2004), *available at* https://wcm.coe.int/ViewDoc.jsp?id=743317&Lang=en.

165. *See* Committee of Ministers, Recommendation Rec (2002)13 on the Publication and Dissemination in the Member States of the Text of the European Convention on Human Rights and of the Case-law of the European Court of Human Rights (Dec. 18, 2002), *available at* https://wcd.coe.int/ViewDoc.jsp?id=331657&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75; *see also* Committee of Ministers, Resolution Res (2002)58 on the Publication and Dissemination of the Case-law of the European Court of Human Rights (Dec. 18, 2002), *available at* https://wcd.coe.int/ViewDoc.jsp?id=331559&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

166. The main objectives of the Warsaw Information Office are "to provide [potential] applicants with information on the requirements as to Convention admissibility, to make them aware of the domestic remedies available," and to inform them about alternative dispute resolution systems on the domestic level. Lord Woolf recommended in his report to develop the Warsaw Information Office concept further to create "Satellite Offices of the Registry" in the member states. *See* Lord Woolf Report, *supra* note 112, at 453-54.

167. Luzius Wildhaber, *Consequences for the European Court of Human Rights of Pro-*

tocol No. 14 and the Resolution on Judgments Revealing an Underlying Systemic Problem — Practical Steps of Implementation and Challenges, in COUNCIL OF EUROPE, REFORM OF THE EUROPEAN HUMAN RIGHTS SYSTEM 23 (2004).