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The Russian Federation, Protocol No. 14 (and 14*bis*), and the Battle for the Soul of the ECHR

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Abstract

With a focus on the Russian Federation, this article examines the adoption by the Council of Europe of Protocol No.14 to the European Convention on Human Rights (ECHR), and its long-delayed coming into force. The author starts with the question of the original object and purpose of the Council, and how they have now changed. This leads to an analysis of the nature of the crisis – a crisis of success – now faced by the ECHR system, and the reform process which started, on the 50th anniversary of the ECHR, in 2000. After describing Protocol No.14 itself, and the discussion which has surrounded it, the article turns to the central issue. This is not the question of procedural reform, or even admissibility criteria, but what lies behind – the "soul" of the ECHR system. Should the Strasbourg Court remain a court which renders "individual justice", albeit only for a handful of applicants and with long delays; or should it make become a court which renders "constitutional justice"? The article focuses on the specific problems faced by Russia in its relations with the Council of Europe; and an analysis of the lengthy refusal by the Russian State Duma to ratify Protocol No. 14. The author concludes with an attempted prognosis.

A. Introduction – Protocol No.14*bis*?

This article examines the adoption by the Council of Europe (CoE) of Protocol No. 14 to the European Convention on Human Rights (ECHR), and its long-delayed coming into force. Although the Protocol was adopted in 2004, it could not come into force until it had been ratified by all 47 member states of the CoE. Only on Friday 15 January 2010 did the State Duma of the Russian Federation vote to ratify it.[1] On 1 June 2010 Protocol 14 at last came into force.[2] Nevertheless, the ECHR system is now in deep crisis, and the question arises whether ratification of Protocol No. 14 will in fact play any significant role in alleviating that crisis.

1 See http://www.newsru.com/arch/russia/15jan2010/14.html (last visited 27 August 2010).

2 See A. Burkov, "Improvement in Compliance of the Russian Judicial System with the International Obligations Undertaken by the Russian Federation" (28 June 2010) available at http://www.eu-russiacentre.org/our-publications/column/improvement-compliance-russian-judicial-system-international-obligations-undertaken-russian-federation.html (last visited 27 August 2010).

In 2005 Lord Woolf predicted that the backlog of pending applications to the Court (those that have not been dealt with in any way, and have certainly not been communicated to the relevant government, much less held to be admissible or not) would increase year on year by about 20%, to 250,000 in 2010, in any event.[3] The view of the Rapporteur to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) is that

> "the case-processing capacity of the Court is likely to increase by 20 to 25% if two procedures envisaged in Protocol No. 14 to the ECHR were already now to be put into effect, i.e., the single-judge formation (to deal with plainly inadmissible applications) and the new competences of the three-judge committee (clearly well-founded and repetitive applications deriving from structural or systemic defects)."[4]

Russian delay in ratification meant that the Committee, on the basis of the Rapporteur's report, took the unprecedented step of recommending the adoption of a Protocol No. 14*bis*, which would not require unanimous ratification.

I start with the question of the original object and purpose of the CoE, and how they have now changed. This leads me to an analysis of the nature of the crisis – a crisis of success – now faced by the ECHR system, and the reform process which started, on the 50th anniversary of the ECHR, in 2000.

After describing Protocol No. 14 itself, and the discussion which has surrounded it, I turn to the central issue. This is not the question of procedural reform, or even admissibility criteria, but what lies behind – the "soul" of the ECHR system. Should the European Court of Human Rights (ECtHR) remain a court which renders "individual justice", albeit only for a

3 Lord Woolf, "Review of the Working Methods of the European Court of Human Rights" (December 2005) available at http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOOLFREVIEWONWORKINGMETHODS.pdf (last visited 27 August 2010), 49.

4 K. De Vries, "Draft Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms" (28 April 2009) available at http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11879.pdf (last visited on 27 August 2010), para. 8.

handful of applicants and with long delays; or should it make a painful transition to a court which renders "constitutional justice"?

Next, I analyse the specific problems faced by Russia in its relations with the CoE and the ECHR system; and the background to the lengthy refusal by the Russian State Duma to ratify Protocol No. 14. I add an extremely frank appraisal of the situation by Anatolii Kovler, the Russian judge on the ECtHR.

I conclude with an attempted prognosis.

B. What was the Council of Europe For?

Even though the CoE now includes 47 states, and has a population of around 811 million people from Iceland to the Bering Straits, it had a much more limited significance at its inception. Brownlie and Goodwin-Gill have correctly stated that the CoE was

> "an organization created in 1949 as a sort of social and ideological counterpart to the military aspects of European co-operation represented by the North Atlantic Treaty Organisation. [It] was inspired partly by interest in the promotion of European unity, and partly by the political desire for solidarity in the face of the ideology of Communism."[5]

In other words, the Western European states wished to demonstrate that they were as serious about the "first generation" of rights, the civil and political rights, as the USSR and its allies undoubtedly were with regard to the "second generation" of social and economic rights. After all, the "Communist" states guaranteed the rights to work, pensions, social security, health care, education and so on not only in their constitutions, but in practice. This provided the legitimacy of the "Communist" order, and is a reason why the USSR collapsed, indeed rotted away, rather than being overthrown. It also explains the continuing nostalgia especially in Russia for the late Soviet way of life.

The CoE had its origins in May 1948, when 1000 delegates met at the Hague Conference.[6] This has been called "The Congress of Europe". A

5 I. Brownlie & G. Goodwin-Gill, *Basic Documents on Human Rights*, 5th ed. (2006), 609.

6 http://www.ena.lu/congress_europe_hague_710_1948_overview-03-29731 (last visited 25 August 2010).

series of resolutions were adopted at the end of the Congress. These called, amongst other things, for the creation of an economic and political union to guarantee security, economic independence and social progress; for the establishment of a consultative assembly elected by national parliaments; for the drafting of a European charter of human rights; and for the setting up of a court to enforce its decisions. The last of these was the most revolutionary. There was no precedent in international law for an international court with the power to interfere in the internal affairs of its member states, and to render obligatory judgments.

The Congress also revealed some stark differences in approach. These divided unconditional supporters of a European federation (for example, France and Belgium) from those states that preferred straight-forward intergovernmental co-operation, such as the United Kingdom, the Republic of Ireland and the Scandinavian countries.

On 27 and 28 January 1949, the five ministers for foreign affairs of the Brussels Treaty countries, meeting in Brussels, reached a compromise. This was for a "Council of Europe" consisting of a ministerial committee, to meet in private; and a consultative body, to meet in public. In order to satisfy the United Kingdom and its allies, the Assembly was to be purely consultative in nature, with decision-making powers vested in the Committee of Ministers. In order to satisfy the federalists, members of the Assembly were to be independent of their governments, with full voting freedom. The United Kingdom had demanded that they be appointed by their governments. This important aspect of the compromise was soon to be reviewed and, from 1951 onwards, parliaments alone were to choose their representatives.[7]

The Statute of the CoE[8] which opened for signature and was signed by ten states[9] on 5 May 1949[10], defines "democracy" in the Preamble: "Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".

7 At http://www.coe.az/Latest-News/4.html (last visited 25 August 2010).

8 Available at http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm (last visited 25 August 2010).

9 The 10 states which signed it on that day were Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the UK.

10 It came into force, following 7 ratifications, on 3 August 1949.

The work of drafting the ECHR occupied the Committee of Ministers (meeting in secret) and the Consultative Assembly (meeting in public) from 11 May 1949 until 20 March 1952. The ECHR itself was opened for signature in Rome, 4 November 1950, while the First Protocol was opened for signature in Paris on 20 March 1952. The proceedings, so far as they were public, are published in the 8 volumes of the "Travaux préparatoires".[11]

According to Steven Greer and Andrew Williams, the original consensus was that

> "the Convention's main modus operandi should be complaints made to an independent judicial tribunal by states against each other (the 'inter-state' process). At its inception, therefore, the Convention was much more about protecting the democratic identity of Member States through the medium of human rights […] than it was about providing individuals with redress for human rights violations […]"[12]

Thus, recognition of the right of individual petition did not become a requirement of membership of the system until the 1990s, after the collapse of Communism. Greer has also pointed out that the original raison d'être for the Convention has undergone a profound transformation since its inception in the Cold War: "[…] it now provides an 'abstract constitutional identity' for the entire continent, especially for the former communist states […]".[13]

C. The Crisis of the ECHR System, and the Reform Process

The right of individual petition is at the centre of the ECHR system. But it is also a central cause of its current problems. In his recent Report for the Committee on Legal Affairs and Human Rights of the Parliamentary

11 Council of Europe, *Collected Edition of the "Travaux préparatoires" of the European Convention on Human Rights in Eight Volumes* (1975-1985).

12 S. Greer & A. Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" or "Institutional" Justice?', 15 *European Law Journal* (2009) 4, 462, 464.

13 S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006), 170-171, [Greer, 2006].

Assembly of the Council of Europe, the Rapporteur, Klaas de Vries, set out the nature of the crisis facing the Strasbourg Court.[14]

> "In 1999 [, according to this report] 22,650 applications were lodged and nearly 3,700 disposed of judicially. [Within less than 10 years,] in 2006 over 50,000 applications were lodged of which nearly 30,000 were disposed of judicially. In 2006, the number of incoming applications rose by 11%, with the number of new Russian applications rising by 38%."[15]

At 30 June 2009, 108,350 applications were pending, an increase of 11% from 1 January 2009, when there were 97,300. 57% of that number concerned Romania, Russia, Turkey and Ukraine, an increase of 23% in comparison with 2007. The report stated that

> "[i]n 2008 judgments were delivered in respect of 1,880 applications (compared with 1,735 in 2007 – an increase of 8%) and 32,043 applications were disposed of judicially in 2008, an increase of 11% in relation to 2007."[16]

Mr de Vries added:

> "It follows that the Court must urgently find a way in which to deal with, in particular, three matters: judges must not spend too much time on obviously inadmissible cases (approximately 95% of all applications), they must deal expeditiously with repetitive cases that concern already clearly established systemic defects within states (this represents approximately 70% of cases dealt with on the merits), and by so doing, concentrate their work on the most important cases and deal with them as quickly as possible."[17]

To this should be added the very long time that cases which have been declared admissible must wait for a determination by a chamber of the Court. In one of the Turkish Kurdish cases in which I represented the

14 De Vries, *supra* note 4.
15 *Id.*, 3.
16 *Id.*
17 *Id.*

applicant, *Abdurezzak Ipek v. Turkey*[18], the applicant complained of the "disappearance" at the hands of Turkish forces of two of his sons in 1994. The case was only declared admissible in May 2002, and there was a fact-finding hearing in Turkey, at which I represented the applicant, in October 2002. Judgment was finally pronounced in February 2004 – Turkey was found to have violated the right to life of the two sons – ten years after the violation and after the case was lodged.

There has been no improvement. In 2008 while 34% of Chamber cases had been waiting for a year or less, 23% had been waiting from one to two years, 14% from two to three years, 11% from three to four years, 9% from four to five years, and as many as 9% for more than five years.[19]

Thus, in the words of Laurence Helfer, "[…] the ECtHR has become a victim of its own success [and] […] now faces a docket crisis of massive proportions."[20] Helfer identifies two particular categories of case which are "[both far less and far more momentous than] flagging and clearing roadblocks in domestic democratic processes or adjudicating good faith government restrictions on individual liberties"[21] The two classes of case are first of all the repetitive cases concerned with structural problems in civil, criminal and administrative proceedings. Secondly, there are the complaints of serious and pervasive human rights abuses such as extrajudicial killings, disappearances, torture, and arbitrary detention.

The large number of judgments against Russia fall into both these categories: many concern the failure to enforce judgments given by the Russian courts, while there have also been many grievous complaints arising out of the conflict since 1999 in Chechnya. In many of these cases the prediction made by Robert Harmsen in 2001 came true: the Court ceased "to be a secondary guarantor of human rights and instead finds itself in a more crucial – and exposed – front-line position."[22]

18 *Ipek v. Turkey, ECHR,* Application No. 25760/94, Judgment of 17 February 2004.

19 European Court of Human Rights, 'Analysis of Statistics 2008' (March 2009) available at http://www.echr.coe.int/NR/rdonlyres/55E4E440-6ADB-4121-9CEB-355E527600BD/0/Analysisofstatistics2008.pdf (last visited 25 August 2010), 11.

20 L. R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *European Journal of International Law* (2008) 1, 125.

21 *Id.*, 129.

22 R. Harmsen, 'The European Convention on Human Rights after Enlargement', 5 *The International Journal of Human Rights* (2001) 4, 18, 29.

Leach has provided a detailed critical analysis of the reform process leading to the adoption of Protocol No. 14.[23] Furthermore, the CoE has now published a large (718 pages) compendium entitled "Reforming the European Convention on Human Rights: A work in progress"[24]. This gives a full chronology of the various stages of the process, from 2000 to 2008.

This started with the European Ministerial Conference on Human Rights held in Rome on 3-4 November 2000, on the 50th anniversary of the ECHR.[25] The Committee of Ministers' Deputies established an Evaluation Group of three persons including President Wildhaber, in February 2001. Their report was published in September 2001, and made a number of proposals.[26] Although the Evaluation Group had carried out little consultation with civil society, a very large number of NGOs, including Amnesty International and others, national human rights institutions and bar associations adopted a Response[27] which was highly critical of the proposals. Marie-Benedicte Dembour also commented that "what seems to be envisaged at the highest level […] is a Court that would be more or less free to choose the cases with which it deals."[28]

After a further period of consideration, and somewhat ineffective consultation, in October 2002 the Steering Committee for Human Rights (CDDH) produced a further Interim Report.[29] In April 2003 the CDDH produced its Final Report on proposals for reforming the court[30].

However, the proposed changes to admissibility requirements were strongly criticised by PACE in April 2004, as "vague, subjective and liable

23 P. Leach, 'Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?', 27 *Human Rights Law Journal* (2006) 1-4, 11.

24 Steering Committee for Human Rights (CDDH), *Reforming the European Convention on Human Rights: A Work in Progress. A Compilation of Publications and Documents Relevant to the Ongoing Reform of the ECHR* (2009).

25 *Id.*, 11-51.

26 'Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights', 22 *Human Rights Law Journal* (2001) 5-8, 308.

27 *NGO Response to the Report of the Evaluation Group*; see Leach *supra* note 23, 13.

28 M.-B. Dembour, '"Finishing Off Cases": The Radical Solution to the Problem of the Expanding ECHR Caseload', *European Human Rights Law Review* (2002) 5, 604, 622.

29 Steering Committee for Human Rights (CDDH), 'Interim Report of the CDDH to Be Submitted to the Committee of Ministers – Guaranteeing the Long-term Effectiveness of the European Court of Human Rights', CM (2002) 146, 18 October 2002.

30 CDDH, 'Guaranteeing the Long-term Effectiveness of the European Court of Human Rights – Final Report Containing Proposals of the CDDH', CM (2003) 55, 8 April 2003.

to do the applicant a serious injustice".[31] In February 2004 Amnesty International had also published a critical Comment.[32] Nevertheless, the CoE proceeded to the adoption of the new Protocol.

D. Protocol No. 14

Finally, Protocol No. 14[33] was adopted by the Committee of Ministers in May 2004.[34] The additional admissibility criterion for Article 35 provides that a case may be declared inadmissible if the Court considers that:

> "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."[35]

Leach points out that the question what is "due consideration" will be very difficult to answer in the context of such a variety of legal systems and procedures.[36] It is plain that there will be ample scope for the application of judicial discretion.

The other significant changes proposed by Protocol No. 14 are:

- in certain cases a single judge will be able to decide on inadmissible applications
- a simplified summary procedure will enable a committee of three judges to decide on the admissibility and merits of "repetitive violation" and "clone" cases

31 PACE, 'Opinion No. 251 (2004)', 26 *Human Rights Law Journal* (2005) 1-4, 106.

32 Amnesty International, 'Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights', 2004, AI Index: IOR 61/005/2004.

33 Available at http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm (last visited 26 August 2010).

34 'Protocol No. 14 to the ECHR, Amending the Control System of the Convention, 13 May 2004', 26 *Human Rights Law Journal* (2005) 1-4, 88.

35 Article 12 Protocol No.14 to the ECHR, amending Article 35(3) of the Convention.

36 Leach, *supra* note 23, 19.

- a new procedure will enable the Committee of Ministers to bring proceedings to the Court where a state refuses to abide by a judgment
- judges will be appointed for a single 9 year term
- the CoE's Commissioner for Human Rights will be entitled to intervene in cases as a third party.

That was not the end of the process. In December 2005 Lord Woolf published his Report "Review of the Working Methods of the European Court of Human Rights"[37] at the request of the Secretary General of the Council of Europe and the President of the Court. His terms of reference were:

> "To consider what steps can be taken by the President, judges and staff of the European Court of Human Rights to deal most effectively and efficiently with its current and projected caseload, and to make recommendations accordingly to the Secretary General of the Council of Europe and to the President of the Court."[38]

He made a number of detailed recommendations for reform of procedure. In June 2006 a seminar – "The European Court of Human Rights: Agenda for the 21st Century" – took place in Warsaw[39], followed in November 2006 by the Report of the Group of Wise Persons (which include Venyamin Yakovlev of Russia, former Chairman of the Higher Arbitrazh Court) to the Committee of Minsters[40]. On 22-23 March 2007 a Colloquy took place in San Marino entitled "Future Developments of the European Court of Human Rights in the Light of the Wise Persons Report"[41]. The Secretary General of the CoE, Terry Davis, noted that Protocol No. 14 had still not come into force, three years after its adoption.[42] On 9-10 June 2008 a further Colloquy took place in Stockholm, on the vexed question of

37 Lord Woolf, *supra* note 3.
38 Lord Woolf, *supra* note 3, 2.
39 CDDH, *supra* note 24, 131-215.
40 Available at https://wcd.coe.int/ViewDoc.jsp?id=1063779&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (last visited 26 August 2010).
41 CDDH, *supra* note 24, 217-280.
42 CDDH, *supra* note 24, 224.

implementation of the ECHR at national level.[43] Veronika Milinchuk, then the Russian State Agent at the Court, recognised that "failure to execute, or delays in execution of court decisions was one of the pressing issues addressed by Russian nationals […]" at the Court.[44] She added:

> "Notwithstanding all the efforts taken (including the allocation by the Russian Ministry of Finance of purposeful large-scale transfers), at the beginning of 2007 there were thousands of non-executed court decisions on settlement of 'old' debts, especially indexation of tardy monetary payments, at the expense of the Russian constituent entities' budgets."[45]

This has now become, as I show below, a major source of embarrassment for Russia, threatening its very membership of the CoE.

E. The Soul of the ECHR

The debate around Protocol No. 14 could be said to conceal a much more fundamental argument about the nature and future of the ECHR system. Helfer states that "[t]he individual complaints mechanism of the ECtHR is the crown jewel of the world's most advanced international system for protecting civil and political liberties."[46] But there is now as a result a lively and very serious debate as to whether the Court should provide "individual" or "constitutional" justice. Marie Dembour described the former view as follows: "[…] the raison d'être of the Strasbourg Court is precisely that it will hear any case, from anyone who claims to be a victim of the Convention; there are no unworthy cases (except of course those which traditionally have been declared inadmissible)."[47]

Philip Leach is a strong proponent of the importance of the right of individual application.[48] He cites the words of the CDDH's Reflection Group, which described the right of individual petition as being "the

43 CDDH, *supra* note 24, 463-559.
44 CDDH, *supra* note 24, 506.
45 CDDH, *supra* note 24, 506.
46 Helfer, *supra* note 20, 159.
47 Dembour, *supra* note 28, 621.
48 Leach, *supra* note 23.

distinctive and unique achievement of the Convention system."[49] For Leach, "[…] the right of individual application has become unquestionably by far the most important part of the Convention system, over and above the inter-state process, which is very rarely invoked." He notes that as at January 2004 there had been just 20 inter-state cases.[50] He underlines the fact that at the heart of objections to proposals for limiting individual access to the Court has been a "fundamental concern that the amendments to the admissibility criteria will restrict the right of individuals to seek redress at the European Court, without adequately tackling the problem of the increasing number of Convention violations across Europe."[51]

Leach's use of the word "lottery" derives from the fact that a very high proportion of all applications submitted to the Court are declared inadmissible under the current criteria, more than 96% in 2005; and some 60-70% of the judgments in the cases found to be admissible concern "repetitive cases", a very high proportion of them cases on excessive length of proceedings.[52]

The "constitutional" argument was set out in 2002 by the former President of the ECtHR, Luzius Wildhaber. He identified 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."[53]

In his view, the way forward for the Court was to "concentrate its efforts on decisions of 'principle', decisions which create jurisprudence."[54] These he referred to as the "[…] leading judgments, judgments of principle, the judgments that contribute to the Europe-wide human rights jurisprudence, that help to build up the European 'public order'"[55].

49 Reflection Group on the Protection of the Reinforcement of the Human Rights Protection Mechanism, 'Activity Report', 15 June 2001, CDDH-GDR (2001) 010.
50 Leach, *supra* note 23, 19.
51 Leach, *supra* note 23, 24.
52 Leach, *supra* note 23, 23-24.
53 Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal* (2002) 5-7, 161, 162.
54 *Id.*, 164.
55 *Id.*, 163.

Steven Greer has become the most articulate advocate for a fundamental change in the nature of the ECHR system. In a major article published in 2003[56], he identified three quintessentially constitutional questions for the ECHR usually described as principles of interpretation (for example, positive obligations, dynamic interpretation, subsidiarity, proportionality etc.):

> "the 'normative question' of *what* a given Convention right means, including its relationship with other rights and with collective interests; the 'institutional question' of *which* institutions should be responsible for providing the answer; and the 'adjudicative question' of *how*, by which judicial method, the normative question should be addressed".[57]

The Court has, he argues, fallen short of a proper application of the Convention's constitution first, because its judgments tend to be formulaic, "thin", and in many cases are decisions on the facts, and second, because the interpretive principles are never put into any particular order. He concludes:

> "[t]here is rarely any sense that the implications of deep constitutional values, in a state of dynamic tension with each other, are being carefully teased out, with the result that the jurisprudence has been deprived of the 'constitutional authority' it might otherwise possess and which it clearly requires."[58]

In his later book[59], he argued that, regrettably, none of the Strasbourg Committees contributing to the pre-Protocol 14 debate had adequately considered whether the Court should be concerned with delivering "individual" or "constitutional" justice or both. However, it is noteworthy that the CDDH considered the question, albeit inconclusively:

> "The CDDH does not […] believe that the choice is one between two views that seem radically opposed: one under which the Court would deliver 'individual justice'; the other

56 Steven Greer, 'Constitutionalizing Adjudication Under the European Convention on Human Rights', 23 *Oxford Journal of Legal Studies* (2003) 3, 405-433 [Greer, 2003].
57 *Id.*, 407.
58 *Id.*, 407.
59 Greer, 2006, *supra* note 13.

> under which the Court would deliver 'quasi-constitutional justice'. Both functions are legitimate functions for a European Court of Human Rights, and the proposals set out in this report seek to reconcile the two."[60]

Greer characterised the opposing positions as follows. The desire for "individual justice" he described as

> "[…] the attempt […] to ensure that every genuine victim of a violation receives a judgment in their favour from the Court however slight the injury, whatever the bureaucratic cost, whether or not compensation is awarded, and whatever the likely impact of the judgment on the conduct or practice in question…".[61]

This is of course rather a caricature!

Greer gave "constitutional justice" a rather more sympathetic description:

> "[It is] the attempt by the Convention system to ensure that cases are both selected and adjudicated by the Court in a manner which contributes most effectively to the identification, condemnation and resolution of violations, particularly those which are serious for the applicant, for the respondent state (because, for example, they are built into the structure or modus operandi of its public institutions), or for Europe as a whole (because, for example, they may be prevalent in more than one state)."[62]

Greer made the highly salient point that if in 2005 the Court's capacity for judgment on the merits was 1,039 cases (the figure for 2008 was 1,880 [compared with 1,735 in 2007 – an increase of 8% in the year[63], not much of an increase in reality]) and the population of the Council's 47 states is some 811 million people, then "any given citizen of a Council of Europe state has

60 CDDH, *supra* note 30, para. 11.
61 Greer, 2006, *supra* note 13, 166.
62 Greer, 2006, *supra* note 13, 166-167.
63 European Court of Human Rights, *supra* note 19.

[…] about one in a million chance of having their complaint adjudicated […]".[64]

He was also critical of the position of Amnesty International and the other NGOs. In particular, Amnesty asserted that individuals have a right "to receive a binding determination from the European Court of Human Rights of whether the facts presented constitute a violation […]".[65] Greer points out, quite correctly, that the rights in question are to petition the Court and to receive a response. But, of course, only those whose cases are admissible, a tiny fraction of those who apply, have the right to a determination.[66] Greer then surveyed the practice of the European Court of Justice, with its system of preliminary rulings, and the US Supreme Court, and the German Federal Constitutional Court, both of which have a wide discretion as to which cases to hear.[67] But despite his urgent desire to enhance the constitutional mission of the Court, his conclusion was not so radical:

> "In spite of its weaknesses it would be a mistake to terminate the individual applications process because it would be difficult to find a potentially more effective replacement and because, suitably altered, it may still be capable of facilitating the delivery of constitutional justice. However, individual applications should be selected for adjudication by the Court more because of their constitutional significance for the respondent state and for Europe as a whole, and less because of their implications for individual applicants."[68]

He was less forthcoming as to how, in addition to or in place of Protocol No. 14, this might be achieved. And, of course, he was writing in 2006, in the belief that Protocol No. 14 would be ratified.

Lucius Caflisch, himself a judge of the Court, takes an even more pessimistic view: "Protocol No. 14 will bring some, but insufficient, relief. For this reason, a Protocol No. 15 will be necessary, and work on it has already begun. Accordingly, there will have to be, after the reform of 1998

64 Greer, 2006, *supra* note 13, 170.
65 Amnesty International, *supra* note 32, para. 5.
66 Greer, 2006, *supra* note 13, 173.
67 Greer, 2006, *supra* note 13, 176-189.
68 Greer, 2006, *supra* note 13, 322.

and the 'reform of the reform' of 2004, a 'reform of the reform of the reform'."[69]

F. Continuing Tension Between Russia and the Council of Europe

In addition to the matters discussed above, a further restructuring of the reform of 2004 appeared to the CoE to be necessary because of Russia's continuing failure to ratify Protocol No. 14.

On Wednesday 20 December 2006, the Russian State Duma (lower house of parliament) voted to refuse ratification of Protocol No. 14 to the ECHR, despite the fact that Russia had promised to ratify, and the draft law on ratification had been sent by the government. The debate indicated why the majority of the Duma voted against ratification[70].

The debate in the State Duma and media reactions showed that the refusal to ratify Protocol No. 14 was not based on a critique of the reforms themselves, but were a response to perceived discrimination against Russia.[71]

Russia poses an ever increasing problem for the Strasbourg Court. It has in recent years been losing some high-profile cases in the Court[72].

In *Aleksanyan v. Russia*[73] the applicant, who was held in pre-trial detention, was seriously ill with AIDS. The Court drew attention to the fact that it had

> "[…] indicated to the Government two interim measures[74] […] on 27 November 2007, and then confirmed in December 2007

69 L. Caflisch, 'The Reform of the European Court of Human Rights: Protocol No.14 and Beyond', 6 *Human Rights Law Review* (2006) 2, 403, 415.

70 For further details on the Duma's vote see Bill Bowring, 'Russia and Human Rights: Incompatible Opposites?', 1 *Goettingen Journal of International Law* (2009) 2, 257, 274.

71 "Duma Gives It to the European Court", available at http://www.kommersant.com/p732043/r_500/State_Duma_European_Court/ (last visited 26 August 2010).

72 For an overview of judgments of 2004 and 2005 see Bowring, *supra* note 70, 273.

73 *Aleksanyan v. Russia, ECHR,* Application no. 46468/06, Judgment of 22 December 2008, final on 5 June 2009 following rejection of Russia's request for a hearing by the Grand Chamber.

74 Following the case of *Mamatkulov and Askarov v. Turkey, ECHR* (GC), Application nos 46827/99 and 46951/99, performance of such interim measures is obligatory.

> and January 2008. The Court, in view of the critical state of the applicant's health, invited the Government to transfer him to a specialist medical institution. However, it was not until 8 February that the applicant was transferred to Hospital no. 60. […] What is clear is that for over two months the Government continuously refused to implement the interim measure, thus putting the applicant's health and even life in danger. The Government did not suggest that the measure indicated under Rule 39 was practically unfeasible; on the contrary, the applicant's subsequent transfer to Hospital no. 60 shows that this measure was relatively easy to implement. In the circumstances, the Court considers that the non-implementation of the measure is fully attributable to the authorities' reluctance to cooperate with the Court."[75]

A further interim measure was indicated against Russia:

> "Secondly, the Court notes that the Government did not comply with the second interim measures indicated by the Court on 21 December 2007. Namely, they did not allow the applicant's examination by a mixed medical commission which would include doctors of his choice … Despite the applicant's attempt to form such a team, the Government refused to cooperate with him in this respect."[76]

In the circumstances, the Court held that the Russian Government had failed to honour its commitments under Article 34 of the Convention ("The High Contracting Parties undertake not to hinder in any way the effective exercise of [the right of petition]").

Moreover, Russia is now making a major contribution to the crisis of the Court. This can be shown by a comparison between 2006 and 2008. In 2006, 10,569 (out of a total of 50,500) complaints were made against Russia, of which 380 were referred to the Russian government, and 151 were found to be admissible. There were 102 judgments against Russia (out of 1,498 against all CoE states). In 2008 there were 269 judgments against Russia, and 825 cases were communicated to the government.[77] By the end

75 *Aleksanyan v. Russia*, *ECHR,* Application no. 46468/06, para. 230.
76 *Id.*, para. 231.
77 European Court of Human Rights, *supra* note 19.

of 2006, of 89,887 cases pending before the Court, about 20% concerned Russia, 12% Romania and 10% Turkey.[78] In 2008 Russia was again the leader, with 27,250 pending before a judicial formation, 28.0% of the total.[79]

Consequently, Russia has been the subject of continuing criticism from the CoE.

On 26 May 2008, PACE published the latest in a series of important reports by the Cypriot parliamentarian Christos Pourgourides. The report, "Implementation of Judgments of the European Court Of Human Rights"[80], was prepared for the Committee on Legal Affairs and Human Rights. Pourgourides regretted that the non-execution of the Strasbourg Court's case law remains a (major) problem with respect to 11 States Parties[81] to the ECHR.

The following issues were highlighted with respect to Russia. First, he raised deficient judicial review over pre-trial detention, resulting in its excessive length and overcrowding of detention facilities. Here, Russia was seen to be taking determined steps following the *Kalashnikov* judgment (15 July 2002).[82] Second, Pourgourides turned to the problem of chronic non-enforcement of domestic judicial decisions delivered against the state. Again, he was able to report a series of relevant measures, taken in close cooperation with the CoE. Third, violations of the ECHR in the Chechen Republic continue to cause concern, with the Russian authorities maintaining their refusal to allow access to investigation files.[83]

These concerns were echoed by the Russian judge on the Strasbourg Court, Anatolii Kovler, at a meeting with the Russian Constitutional Court in St Petersburg on Friday 27 February 2009. Kovler reviewed the results

78 European Court of Human Rights, 'Annual Survey of Activity for 2006' (2007) available at http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf (last visited 26 August 2010).

79 European Court of Human Rights, *supra* note 19.

80 Committee on Legal Affairs and Human Rights, 'Implementation of Judgments of the European Court Of Human Rights', AS/Jur (2008) 24, declassified on 2 June 2008.

81 Bulgaria, Germany, Greece, Italy, Moldova, Poland, Romania, Russian Federation, Turkey, Ukraine, United Kingdom.

82 The author can confirm this. He acted as lead expert for the CoE in a seminar in June 2008 in Pskov, with leaders of the Russian penitentiary service (FSIN).

83 See the judgments of the Court in the cases of *Bazorkina v. Russia*, *ECHR* (2006) (No. 69481/01), *Imakayeva v. Russia* (2006) (No.7615/02); Committee of Ministers' Memorandum CM/Inf/DH(2006)32 revised 2, § 15; PACE Resolution 1571 (2007) and Recommendation 1809 (2007) on member states' duty to co-operate with the European Court of Human Rights, Doc 11183 and Addendum.

for Russia before the ECtHR in 2008 (reported above) and asserted that if Russia within the next six months failed to resolve the "systemic problem"[84] of failure to execute court decisions, this could lead to termination of Russian membership in the CoE.

Kovler observed that 2008 had witnessed a "falling dynamic" and a "saturated market"[85] of complaints against Russia. In 2008 10,500 applicants had complained to the ECtHR, however the number of complaints found to be admissible had risen, while the number of judgments was a record (269 as mentioned above). The Court had issued 40 findings of non-effective investigation of crimes in Chechnya, and for the first time had found in more than 20 cases "the absence of effective remedies" for Russians in relation to wrongful use of detention as a pre-trial "measure of restraint", and in relation to conditions in remand prisons (SIZOs). But the most glaring tendency of 2008 had been the lengthy non-execution of judgments of Russian courts and the absence of a mechanism for payment of damages by the government for unlawful actions of judges. Some 72% of judgments against Russia at the ECtHR concern this problem, and there are now more than 5,000 of them awaiting decisions. In September 2008 the Supreme Court, on the proposal of President Medvedev, had submitted to the State Duma a draft constitutional law to remedy this problem. But the draft law had been "cut to the roots" by bureaucrats.[86]

The patience of the ECtHR had, said Kovler, been exhausted by the case *Burdov v Russia No.2*.[87] In this case the applicant, a veteran of Chernobyl, complained of the non-payment of compensation owed to him as the result of judgments of the Russian courts and of the ECtHR.[88] In this repeat complaint the ECtHR not only ordered Russia to pay Mr Burdov 6,000 Euro, but also held that these violations "originated in a practice incompatible with the Convention which consists in the State's recurrent failure to honour judgment debts and in respect of which aggrieved parties have no effective domestic remedy." The Court also delivered what is in effect the first "pilot judgment" against Russia, and ordered that:

84 A. Pushkarskaya, 'Yevropeiskiy sud pozhalovalsya na Possiyu Konstitutsionnomu: Potrebovav ispolneniya sudebnikh resehenii', No.36P (4091), at http://www.kommersant.ru/doc.aspx?DocsID=1128309 (last visited 26 August 2010).

85 *Id.*

86 *Id.*

87 Application No. 33509/04.

88 See *Burdov v. Russia*, *ECHR* (2002) No. 59498/00, Judgment of 7 May 2002.

> "the respondent State must set up, within six months from the date on which the judgment becomes final […], an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments in line with the Convention principles as established in the Court's case-law;
> […] the respondent State must grant such redress, within one year from the date on which the judgment becomes final, to all victims of non-payment or unreasonably delayed payment by State authorities of a judgment debt in their favour who lodged their applications with the Court before the delivery of the present judgment and whose applications were communicated to the Government."[89]

Kovler pointed out that this would, if implemented, enable the ECtHR to get rid of about one thousand cases. He added that Russia is a "front-runner" in failing to execute the judgments of the ECtHR itself and explained that the Committee of Ministers of the CoE will ensure execution of this and other judgments of the ECtHR, including the use of sanctions including resolutions and warnings, right up to the termination of Russia's membership of the CoE: "This is our (the ECtHR's) reply for Russia's failure to ratify Protocol No. 14"[90]. It was reported that Kovler had the full support and understanding of the justices of the Constitutional Court.[91]

The Russian government was in a quite different, more truculent, mood. On the same day, the Collegium of the Russian Ministry of Justice alleged that the Strasbourg Court was guilty of lack of objectivity and of bias in relation to Russia. The Russian Minister of Justice, Aleksandr Konovalov and the Russian Representative (Agent) before the Strasbourg Court (and also a Deputy Minister of Justice) Georgii Matyushkin argued that a series of the Court's decisions concerning Russia suffered from a lack of reasons. These included the decision of the admissibility of the YUKOS claim against Russia, for billions of dollars following the destruction of the company by the Kremlin, and the recognition of the British barrister Piers Gardner as representative of YUKOS. Mr Konovalov also emphasised that recent decisions of the Courts raised doubts as to the "fairness and complete

89 *Id.*, No. 6-7 of the Court's rulings.
90 A. Pushkarskaya, *supra* note 84.
91 *Id.*

objectivity of the Court", since these decisions "remain incomprehensible for Russia".[92]

On 13 July 2009, Mr Matyushkin spoke at a press conference following a meeting between the Ministry of Justice and the Constitutional Court.[93] He stated that the ECtHR had transgressed the boundaries of its own competence in hearing cases concerning events in Chechnya. In his words the Court had allowed itself to be led by the illicit presumption that every person who "disappeared" in Chechnya had been murdered. Mr Matyushkin sought to assert that the fact of killing by the Russian government "should first of all be established according to Russian Law." The answer to this suggestion is to be found in one of the series of Chechen cases[94], in which the Court held, as it has so often done:

> "no explanation has been forthcoming from the Russian Government as to the circumstances of the deaths, nor has any ground of justification been relied on by them in respect of the use of lethal force by their agents. It is thus irrelevant in this respect whether the killings had occurred "with the knowledge or on the orders" of the federal authorities. Liability for the applicants' relatives' deaths is therefore attributable to the respondent State and there has been a violation of Article 2 in respect of the applicants' eleven relatives killed."[95]

It is evident that despite the very frank analysis of Judge Kovler, the Russian government authorities, as represented by the Ministry of Justice and its Deputy Minister, the Russian representative before the ECtHR, seemed determined to keep up the rhetorical offensive against the Court and the ECHR system as a whole.

There was a further complicating factor, connected with the YUKOS case against Russia at Strasbourg.

The YUKOS oil company, which was originally state owned, became the largest, most successful and most transparent oil company in Russia. In July 2003, a series of raids were carried out by Russian law enforcement agencies on YUKOS premises. On 25 October 2003 YUKOS' owner,

92 *Id.*

93 http://www.newsru.com/Russia/13jul2009/stras.html (last visited 26 August 2010).

94 *Musayev and others v. Russia*, *ECHR* (2007) Applications Nos. 57941/00, 58699/00 and 60403/00, Judgment of 26 July 2007.

95 *Id*., para. 155.

Mikhail Khodorkovsky was arrested. On 31 May 2005 Mr Khodorkovsky was convicted of serious offences of fraud and was sentenced to nine years imprisonment, later reduced to eight years. A second trial of him and his colleague Mr Lebedev is now under way in Moscow.

On 23 April 2004 YUKOS lodged its application to the European Court of Human Rights.[96] YUKOS complains of violations of Article 1 of Protocol 1 to the ECHR (right to property). In more detail, these complaints are:

- YUKOS had been deprived of its possessions and that these deprivations had not been in accordance with the law and had imposed a disproportionate burden on it.
- the tax liability and enforcement proceedings were a *de facto* disguised expropriation.
- the seizure of assets was disproportionate in that the authorities ordered YUKOS to pay, and at the same time froze its assets, worth considerably more than its then liability
- the time of merely a couple of days given to YUKOS for payment was absurdly short
- the sale of OAO Yuganskneftegaz was unlawful, conducted at a gross undervaluation through a plainly controlled auction, with the participation of a sham bidder, OOO Baykalfinansgrup.

On 29 January 2009 the Court held that YUKOS' application was partly admissible. Although the Court has yet to make its findings on the merits, this has been taken as an indication that YUKOS may win.

There has now been an oral hearing in this case. It took place before the Grand Chamber on 4 March 2010.[97] Initially, the hearing was to have taken place on 19 November 2009. However, on 20 October 2009 Russia announced the appointment of a new judge *ad hoc* to sit on the case, after the first person appointed, St Petersburg Professor Valerii Musin, recused himself as he had been made a director of Russian state-owned *Gazprom*. The new appointee was not even a professor, but a senior lecturer of the same university, Andrei Bushev, who had studied with President

96 *OAO Neftyanaya kompaniya YUKOS v. Russia* Application No. 14902/04.

97 See B. Bowring, 'The YUKOS Hearing at Strasbourg', EU-Russia Centre (22 March 2010) available at http://www.eu-russiacentre.org/our-publications/column/yukos-hearing-strasbourg.html (last visited 26 August 2010).

Medvedev.[98] Russia then sought and was granted a further adjournment until 14 January 2010, to enable the new judge to familiarise himself with the case file.

However, on 13 January 2010 the Court announced, at the last possible moment, yet another adjournment at the request of Russia, this time to 4 March 2010. The grounds for Russia's request were two-fold. Mr Bushev was said to be in ill-health; and the Russian Agent (Plenipotentiary) at Strasbourg, Georgii Matyushkin, was said to be obliged to return to Moscow as the State Duma were to vote, on 15 January, on ratification by Russia of Protocol No. 14 to the ECHR, on the reform of the Court – the last of the CoE's 47 member states to do so, following a very long delay of six years.[99] The Law on Ratification, signed by President Medvedev, was published in the official *Rossiiskaya Gazeta* on 8 February 2010.

There was intense speculation by informed Russian commentators that the continued delay was the result of an attempt by Russia to ratify Protocol No. 14 before any hearing, in the hope of obtaining from the Court a *quid pro quo*, in the form of a more favourable judgment.[100]

The leading legal affairs journalist, Olga Pleshanova, reported these rumours, strongly denied by Russia, in the daily *Kommersant* on 14 January 2010, and also reported that on 18 December 2009 Mr Matyushkin had used a conference at the Russian Academy of Justice held to celebrate the 50th anniversary of the Strasbourg court, in order to launch a strong attack on the European Court of Human Rights. He spoke of contradictory decisions of the Court, in which it had first recognised the competence of an applicant company despite the objections of the respondent state, then done the opposite. Although he did not name the case, it was clear to all that he was referring precisely to the YUKOS case, and Russia's insistence that YUKOS should be represented by the liquidator, Mr Rebgun.

In late December 2009 President Medvedev presented to the State Duma a package of draft laws to reform the judicial system on the

98 O. Pleshanova, 'Instead of a Professor a Senior Lecturer is sent to Strasbourg" *Kommersant* (20 October 2009) available at http://www.kommersant.ru/doc.aspx?DocsID=1259106&ThemesID=217 (last visited 26 August 2010).

99 O. Pleshanova, 'The protocol on delaying the YUKOS case', *Kommersant* (13 January 2010) available at http://www.kommersant.ru/doc.aspx?DocsID=1302525&ThemesID=217 (last visited 26 August 2010).

100 O. Pleshanova, 'Rules of the Game', *Kommersant* (14 January 2010) available at http://www.kommersant.ru/doc.aspx?DocsID=1302900 (last visited 26 August 2010).

recommendations of the CoE, including the creation of courts of appeal.[101] In Pleshanova's view, Russia hopes that the hearing on 4 March will take place against the background of unprecedented Russian compliance with the CoE's wishes.

G. Why Protocol No. 14*bis*?

The refusal of the Russian State Duma to ratify Protocol No. 14 finally gave rise to a considered response. At its 1054th meeting on 15-16 April 2009, the CoE's Committee of Ministers invited the Parliamentary Assembly to provide it with an opinion on draft Protocol No. 14*bis* to the European Convention on Human Rights, with the request that this be done during its part-session in April 2009, under the urgent procedure provided for in Rule 50 of the Rules of Procedure of the Assembly. On 27 April 2009, the Assembly referred the request of the Committee of Ministers for an opinion to the Committee on Legal Affairs and Human Rights for a report. Mr Klaas de Vries was appointed as Rapporteur. According to the Report of Mr de Vries, dated 28 April 2009,

> "the case-processing capacity of the Court is likely to increase by 20 to 25% if two procedures envisaged in Protocol No. 14 were now to be put into effect, i.e., the single-judge formation (to deal with plainly inadmissible applications) and the new competences of the three-judge committee (clearly well-founded and repetitive applications deriving from structural or systemic defects)." [102]

He could

> "only deplore the State Duma's refusal to provide its assent, since December 2006, to the ratification of Protocol No. 14 by Russia. By so doing, the State Duma has, in effect, considerably aggravated the situation in which the Court has found itself, and has also deprived persons within the jurisdiction of the Russian

[101] O. Pleshanova, 'The President has Proposed a Re-hanging of Signs', *Kommersant* (11 January 2010) available at http://www.kommersant.ru/doc.aspx?DocsID=1301726 (last visited 26 August 2010).

[102] De Vries, *supra* note 4.

> Federation from benefiting from a streamlined case-processing procedure before the Court."[103]

The new proposal was for the adoption of an Additional Protocol. As opposed to Protocol No. 14, which is an "amending protocol" which must be ratified by all states parties in order to enter into force, Protocol No. 14*bis*[104] is to be an "additional protocol" which could enter into force after its ratification by a certain number of states parties, but not all of them. As explained in the Explanatory Memorandum, this additional protocol requires only three ratifications for it to come into force. The number of states is set at three only, in order to allow the protocol to enter into force as quickly as possible.

H. A New Mood in the Russian Elite?

On Tuesday 22 June 2010 there was a true sensation at the Parliamentary Assembly of the CoE. The Russian delegation joined a unanimous vote for a report and resolution condemning Russian policy in the North Caucasus. This is the first time such a resolution has been voted through without dissent in the 14 years of Russia's membership on the CoE.[105] Tom Balmforth asked: "No one doubts this is a signal from the Kremlin, but deciphering it is another matter. Is it all just a PR smoke screen, or are there fresh political winds blowing in the Kremlin?"[106]

There are a number of additional straws in the wind. On 25 March 2010 President Medvedev submitted a draft Federal Law "On compensation of citizens for violation of the right to a fair trial within reasonable time or the right to execution of a judgment within a reasonable time." This law was designed to answer the demands of the ECtHR in *Burdov No.2* (above), and

103 *Id*., para.10.

104 The text of Protocol No. 14*bis* and of the Explanatory Report are to be found at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC11864.htm (last visited 26 August 2010).

105 http://www.newsru.com/world/22jun2010/pace.html (last visited 26 August 2010); see also Vladimir Solovyov, 'Sessiya dobroi voli' (session of good will), *Kommersant* (22 June 2010) available at http://kommersant.ru/doc.aspx?fromsearch=f840399e-3475-490a-bff5-678145ada9e6&docsid=1390526 (last visited 26 August 2010).

106 T. Balmforth, 'Caucasian Consensus' (26 August 2010) available at http://www.russiaprofile.org/page.php?pageid=Politics&articleid=a1277395742 (last visited 27 August 2010).

entered into force on 4 May 2010. The courts have already started receiving applications.[107]

And on 1 July 2010 the Federal Law of 2008 "On securing access to information on the activity of courts in the Russian Federation"[108] came into force. This law requires Russian courts at all levels to publish their judgments and decisions on the internet. The delay between promulgation and coming into force was intended to give the courts the time to acquire the necessary technical means and expertise.[109] As Anton Burkov points out: "This is an unusual step for a country where there is civil law such as Russia, where, until recently, the only judgments accessible to the public were decisions by the Constitutional Court and partial decisions by the supreme courts."[110]

I. Conclusion

Steven Greer and Andrew Williams have recently commented that pursuit by the ECHR system of the individual justice model, "coupled with the ever-increasing case-load, threatens to bring the whole structure grinding to a terminal standstill."[111] At the same time, they do not deny that

> "[t]he ECtHR has effectively become the Constitutional Court for greater Europe, sitting at the apex of a single, trans-national, constitutional system, which links former communist states with the West, and the EU with non-members. The exercise of public power at every level of governance is formally constrained within this framework by a set of internationally justiciable, constitutional rights."[112]

Greer's own proposals for reform of the system arrive at a point on which all agree: the survival of the Court is dependent on a much more

107 See Burkov (2010), *supra* note 2.
108 No. 262-FZ of 22 December 2008.
109 See http://www.newsru.com/arch/russia/01jul2010/courtonline.html (1 July 2010) (last visited 26 August 2010).
110 See Burkov (2010), *supra* note 2.
111 Greer & Williams, *supra* note 12, 463.
112 *Id.*, 470.

effective implementation of the Convention and its jurisprudence by member states in their own legal systems. As Patricia Egli points out:[113]

> "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;[114] the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention;[115] and the improvement of domestic remedies.[116]"

This is also the "embeddedness" of the ECHR system in domestic law about which Lawrence Helfer has written.[117]

In the opinion of this author, the construction of this impressive system would have been impossible without Russian membership of the ECHR system since 1998. It is not only the great irony of history, that Russia is now central to the system originally designed to counter the USSR; it is a great achievement for the system itself, in which Russia is still firmly accommodated even after 10 stormy years. Moreover, membership of the system has been of the greatest importance for Russia itself, enabling it to restore the great legal reforms of Tsar Aleksandr II in 1864, and to firmly

113 P. Egli, 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?', 17 *Journal of Transnational Law & Policy* (2007) 1, 1, 32.

114 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://wcd.coe.int/ViewDoc.jsp?id=743277&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (last visited 26 August 2010).

115 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://wcd.coe.int/ViewDoc.jsp?id=743297 (last visited 26 August 2010).

116 See Committee of Ministers, Recommendation Rec (2004) 6 on the Improvement of Domestic Remedies (May 12, 2004), available at https://wcd.coe.int/ViewDoc.jsp?id=743317 (last visited 26 August 2010).

117 Helfer, *supra* note 20, 159.

position Russian legislation if, not practice, back into the European tradition.[118] A glance at the many textbooks and statutory commentaries published in Russia will show that the ECHR and its case law are a central part of the teaching and understanding of law in Russia, and the process of implementation has begun.[119]

[118] See B. Bowring 'Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation', in E. Orucu (ed.), *Judicial Comparativism in Human Rights Cases* (2003), 159-182.

[119] See A. Burkov, *The Impact of the European Convention on Human Rights on Russian Law: Legislation and Application in 1996-2006* (2007).
Burkov has now completed his Ph.D. thesis, which will present a more complete and up to date analysis.