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Behind the Scenes of Protocol No.14: Politics in Reforming the European Court of Human Rights

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By
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I.
INTRODUCTION

It is well known that the European Court of Human Rights ("ECHR" or "the Court") is facing an influx of individual applications, which has obstructed its complaint review procedure.[1] In fact, from 1993 to 1998, the number of applications filed for review increased by 465 percent, further adding to the case backlog.[2] Even worse, the Council of Europe projects that the Court's caseload "would continue to rise sharply if no action were taken."[3] Still more alarming is that, while the Court's caseload continues to increase exponentially, only four-

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1. *See generally The European Convention on Human Rights at 50: what future for the protection of human rights in Europe?* Declaration adopted by the European Ministerial Conference on Human Rights, Rome, Nov. 2000, *available at* http://www.coe.int/T/E/Human_rights/cddh/4._Other_activities/02._Rome_Ministerial_Conference/H-Conf%282000%29001%20E.asp [hereinafter *The European Convention on Human Rights at 50*]; *also available at* Directorate General of Human Rights, Council of Europe, F-67075 Strasbourg CEDEX; Strasbourg: Council of Europe, Human Rights Information Bulletin No. 50 35.

2. Cesare P.R. Romano, *The Price of International Justice*, 4 LAW & PRACTICE OF INT'L COURTS AND TRIBUNALS 281, 290 (2005).

3. *Explanatory Report to Protocol No. 14*, CETS 194 para. 13 (2004), *available at* http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm [hereinafter *Explanatory Report*].

ten percent of applications filed are found admissible.[4] Furthermore, of the four-ten percent admissible cases, sixty percent are regarding issues already decided by the Court, i.e. "repetitive cases."[5] The Court is, therefore, spending a significant amount of time filtering out inadmissible cases and deciding repetitive cases, rather than determining new subject matter cases to further shape human rights law in Council of Europe Contracting States.

To address this concern, the Committee of Ministers appointed an Evaluation Group to research the problem, and thereafter appointed the Steering Committee for Human Rights (CDDH)[6] to draft a reform proposal to "assist the Court in carrying out its functions" and to reflect "on the various possibilities and options" to ensure "the effectiveness of the Court in the light of this new situation."[7] Protocol No. 14 ("Protocol 14") emerged from these discussions as the means of restructuring the Court's process to "guarantee the [Court's] long-term effectiveness"[8] so that it may continue serving its mission by playing a "pre-eminent role in protecting human rights in Europe."[9]

In April 2003, the CDDH presented a package of reforms to the Committee of Ministers, including Protocol 14. The reform package addressed three main areas in need of reform: (1) preventing Member State violations and improving domestic remedies to reduce the number of cases in the first place; (2) facilitating more rapid filtering and applications processing, so as to quickly filter and dispose of repetitive filings; and (3) improving the Committee of Ministers' role in enforcing and accelerating the execution of Court judgments to better ensure Contracting State compliance.[10] The CDDH characterized the three-pronged reform as essential because "only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court's present overload."[11]

More specifically, Protocol 14, once it enters into force, will improve the Court's case filtering process by (1) establishing single-judge formations as opposed to three-judge panels, (2) expediting the process for reviewing "manifestly well-founded" repetitive cases by enabling a panel of three judges to review such cases rather than the Chamber of seven judges or the Grand Chamber of seventeen judges, and (3) adding a new admissibility criterion for applications filed by individuals to raise the bar for admissibility.[12]

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4. *Id.* para. 7. The *Explanatory Report* states that more than 90% of the applications filed are declared inadmissible and in 2003, 96% of the applications filed were disposed of; thus 4-10% of applications are admissible.

5. *Id.*

6. Comite Directeur pour les Droits de l'Homme (CDDH).

7. *The European Convention on Human Rights at 50*, *supra* note 1, para. 3.

8. *Explanatory Report*, *supra* note 3, para. 2.

9. *Id.*

10. *Id.* para. 26.

11. *Id.* para. 14.

12. Council of Ministers, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, CETS 194 (May 13, 2004), *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm, art. 4

Additionally, the Protocol will (4) alter judges' terms of office (5) change the procedure for appointing ad hoc judges, (6) expressly give the Commissioner for Human Rights' a role in the Convention, and (7) enable the European Union (EU) to become a party to the Convention.[13] But there has been significant criticism of the reform, mainly focused on the new admissibility criterion's effect on the ECHR's mission and effectiveness.[14]

The root of this debate is centered on determining and shaping the Court's mission and function to preserve the Court in the long-term. The parties are all concerned with the Court's future, but differ in their interpretation of the appropriate means for reforming the Court. One perspective, mainly that of the Committee of Ministers[15] and the ECHR judges,[16] is that the Court should serve as a quasi-Constitutional court and still promote individual justice for human rights violations.[17] From another perspective, mainly that of non-governmental organizations ("NGOs"), the Parliamentary Assembly and a few Contracting States,[18] the Court should function to promote individual justice.[19] Therefore, all individuals should have the right to access the Court because it provides redress for individuals whose rights have been violated and whose states have

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(changing art. 25 of the Convention), art. 8 (changing art. 28 of the Convention), art. 12 (changing art. 35 of the Convention) [hereinafter *Protocol 14*].

13. *Id.* art. 2 (changing art. 23 of the Convention), art. 6 (changing art. 27 of the Convention).

14. *See* Press Release, Amnesty International, European Court on Human Rights: Imminent reforms must not obstruct individuals' redress for human rights violations, AI Index: IOR 30/012/2004, Apr. 24, 2004 (expressing Amnesty's opposition to the new admissibility requirement); Steven Greer, *Reforming the European Convention on Human Rights: Towards Protocol 14*, P.L. 2003, 663-73 (outlining the debate over the effect of the new admissibility criterion on the Court's mission); Marie-Aude Beernaert, *Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price?*, 5 E.H.R.L.R. 2004, 544-57 (identifying the negative ramifications of the admissibility criterion on the Court's mission); Paul Mahoney, *An Insider's View of the Reform Debate*, 29 NJCM-BULLETIN 171, 175 (2004) (writing independently on his views of the debate over Court mission); Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?* 23 H.R.L.J. 161, 63 (2002) (outlining the pressing need for court reform); Amnesty International, *Joint Response to the Proposals to Ensure the Future Effectives of the European Court of Human Rights*, (Dec. 1, 2003), AI Index: IOR 61/008/2003 (expressing NGO joint opposition to the new admissibility criterion) [hereinafter *Joint Response*].

15. For the purpose of this paper, the Committee of Ministers' view is identified as the collective view of at least 2/3 of the Contracting States Ministers. Also, it should be noted that the Committee's primary goal was to ensure the Court's long-term effectiveness, but it did not promote a particular means until it received suggestions from the CDDH.

16. It should be noted that although the Court "broadly welcomed the reform," judges had different individual opinions on each reform that they did not make public. *See generally* European Court of Human Rights, *Position paper on proposals for reform of the European Convention on Human Rights and other measures as set out in the report of the Steering Committee for Human Rights of 4 April 2003*, CDDH (2003) 006 final (the Position Paper was unanimously adopted by the Court at its 43rd Plenary Administrative Session on Sept. 12, 2003) [hereinafter *Position Paper*].

17. Steven Greer, *Protocol 14 and the Future of the European Court of Human Rights*, P.L. 2005, SPR, 83-106, 94-106.

18. Austria, Belgium, Finland, Hungary, Latvia and Luxembourg; *see* Martin Eaton & Jeroen Schokkenbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 6 H.R.L.R. (forthcoming Apr. 2006) (manuscript at 6, on file with author).

19. Greer, *supra* note 17, at 94-106, *Joint Response*, *supra* note 14, para. 2.

failed to provide an effective remedy.

These conflicting interpretations of the Court's mission and function are reflected in the struggle over amending the Protocol draft. During the drafting process, the Committee of Ministers, Parliamentary Assembly, Contracting States, ECHR Judges and Court Registry, as well as the Commissioner for Human Rights and NGOs/Special Interest Groups, aimed to influence and shape the Court in light of their interpretation of the Court's function.

This paper will serve as an examination of the CDDH's decision-making process regarding the final draft of Protocol 14. To explain the dynamics of decision-making amongst these actors, I will turn to David Caron's theory of "bounded strategic space"[20] to determine which political actors had the greatest influence in drafting the Protocol and how this will affect the Court's mission and effectiveness. I will apply Caron's theory because it serves as a useful heuristic for reviewing the dynamics of institutional change, particularly regarding international tribunals.

Caron defines "bounded strategic space" as a set institutional design in which: "(1) a strategic space is bounded (defined) by the constituent instrument that creates the [International Court and Tribunal], (2) the strategic space consists of the basic structure (DNA) of the institution, the content and size of the docket, and the resources available to the institution, and (3) within the bounded space, there are five sets of actors that each have a logic and that each acts strategically *within and against* the bounded space so as to fulfill their logic."[21] Based on this design, different actors' "bounded strategic actions" aim to shape the institution's structure, procedural law, and substantive law to their ideal form.[22] This theory helps describe the struggle amongst the actors to shape the Court's function through influencing the final Protocol draft.

Part II of this paper will outline the ECHR's origin by reviewing the 1950 Convention for the Protection of Human Rights, the instrument that created the ECHR. Part III will explain the reasons behind the Court's problems with application processing based on its structure, docket size and type, and resources. Part IV will outline the final Protocol draft to be ratified by the Contracting States. Part V will present the different interpretations of the Court's mission, so as to create a better understanding of each party's motivation. Part VI will introduce the actors who influenced the Protocol's creation and will assess their roles in the drafting process by looking at the recommendations that were incorporated into the final draft. Lastly, Part VII will conclude the paper by assessing why certain actors were more successful than others in persuading the CDDH and in shaping the Court's "bounded strategic space."

I conclude that the transparent process and unique interaction between the actors involved in the drafting process led to a final Protocol draft that will

20. David D. Caron, *A Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT.'L L. 401, 402 (2006).

21. *Id.*

22. *Id.*

incrementally reform the Court, rather than radically alter it.[23] Although I find that the Committee of Ministers was the most influential body because, as the decision-making body, it controlled the reform process, this is not to say that it achieved its aims. Rather, Protocol 14 is a partial solution to the problems which must be overcome in order to preserve the Court's long-term effectiveness. The Protocol will not radically transform the ECHR into a quasi-Constitutional Court, as some had aimed.

My conclusion is reflected in the fact that after the adoption of the Protocol, the Committee set up a Group of "Wise Persons" to look into additional necessary reforms and to outline a program of actions to further reform the Court. Therefore, I conclude that although the Committee of Ministers was the most influential, Protocol 14 and the reform package were not entirely adequate in addressing those problems identified by the actors, or their desired reforms, because of the many actors and interests involved in the struggle to shape the Court's "bounded strategic space." At the same time, this diversity of interests also strengthened the draft process by bringing a variety of views and options to the table to more thoroughly consider the Court's future.

II.
ECHR BACKGROUND

Since an institution's "strategic space" is bound by its instrument of creation, an examination of the Council of Europe's 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") is important. The Convention was created following World War II in an effort to promote the "maintenance and further realisation of human rights and fundamental freedoms."[24] As Barbara Koremenos, Charles Lipson, and Duncan Snidal indicate, the purpose of the treaty can bring stability within regime theory. This is especially so where coordination among states is necessary to prevent future harms, or as Koremenos et. al. say, "the 'shadow of the future' can support 'cooperation under anarchy.'"[25] Koremenos's theory supports the idea that Contracting States were willing to forgo sovereignty in order to promote democracy, encourage the rule of law, and prevent further human rights violations.[26]

To enforce these human rights obligations, the Convention established the European Commission of Human Rights (1954) and the European Court of

23. In comparison to Protocol 11, which radically altered the Court's structure. *See* discussion on "ECHR Background," *infra* Part II.

24. Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 13, 1950, ETS No. 5 [hereinafter Convention].

25. According to Koremenos et al., "[o]ur basic presumption, grounded in the broad tradition of rational-choice analysis, is that states use international institutions to further their own goals, and they design institutions accordingly. This might seem obvious, but it is surprisingly controversial." Barbara Koremenos, Charles Lipson, & Duncan Snidal, *Rational Design of International Institutions*, 55 MIT INT'L ORG. 761, 764 (2001).

26. Convention, *supra* note 24, pmbl.

Human Rights (ECHR) (1959) to process and review applications against Contracting States' Convention violations.[27] The Convention also enumerated the Committee of Minister and Parliamentary Assembly's Convention-related tasks such as enforcing judgments and appointing judges.[28] Since its creation, the ECHR has played an increasingly important role in promoting and maintaining democracies. The Court's success is due, in part, to Contracting State approved protocols and amendments drafted to adapt the Court to changing circumstances.[29] In doing so, the Court has maintained its effectiveness in adjudicating human rights claims under the Convention.

One such key reform is Protocol No. 11. Adopted on May 11, 1994 in an effort to address case influx by simplifying Court structure, the Protocol abolished the Commission, transformed the ECHR into a single full-time court, and granted individuals the permanent right to bring their cases directly before the Court.[30] The Convention originally permitted only Contracting States to file complaints against other Contracting States before the Commission, and Contracting States were permitted to voluntarily enable individuals to petition the Commission.[31] However, Protocol 11 granted the ECHR the power to adjudicate Convention violation complaints against Contracting States from individuals, groups of individuals, non-governmental organizations, and other Contracting States.[32] This reform dramatically transformed the Court's function by expanding its jurisdiction beyond adjudicating purely Contracting State cases.

In broadening the Court's jurisdiction, the Protocol also enlarged the Committee of Ministers' role by assigning it the duty to supervise proper execution of judgments in order to guarantee Contracting State compliance with Court judgments.[33] However, when drafting the Protocol, the authors failed to consider the potential influx of cases that could be brought against the new Contracting States of the former Yugoslavia, Russia, and the Ukraine,[34] which is part of the reason for the case backlog today. Further reason for the backlog is the adoption of Protocols Nos. 1, 4, 6, 7, 12, and 13, which "added further rights and liberties to those guaranteed by the Convention."[35] These Protocols greatly expanded the ECHR's scope by granting individuals further grounds under

27. EUROPEAN COURT OF HUMAN RIGHTS (ECHR), ANNUAL REPORT 2001 9 (2002) [hereinafter ECHR ANNUAL REPORT].

28. *Id.*

29. *Explanatory Report*, *supra* note 3, para. 1.

30. ECHR ANNUAL REPORT 2001, *supra* note 27, at 9-10. Although it should be noted that prior to Protocol 11, there was an optional individual right to petition but Contracting States had to recognize this right specifically. But by 1998, all Contracting States had enabled individuals to directly apply and Protocol 11 merely adjusted the Convention to reflect this change and made the individual right to petition permanent.

31. *Id.*

32. *Id.*

33. History of the Court, para. 4 (2005), http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/.

34. Greer, *supra* note 14, at 663.

35. ECHR ANNUAL REPORT, *supra* note 27, at 9-10.

which to file a claim.

III.
PROBLEMS IN CASE PROCESSING: STRUCTURE, RESOURCES AND DOCKET

A tribunal's "bounded strategic space" consists of its basic structure, resources, and docket size and content.[36] As discussed in the previous section, the restructuring of ECHR has significantly affected the size and content of its docket, which has created a greater need for additional resources. The Council of Europe's membership enlargement, along with the Convention's expanded scope, the right to individual petition, and the increasing popularity of the Court in Member States through the publicity given to important cases, has led to a growth in the number of applications filed for review and an increase in the number of cases heard before the Court.[37] To best understand the reasons for the case review delay, it is important to understand the Court's structure, resources, and docket.

A. Structure

The ECHR is a full-time court composed of forty-five judges (one from each Contracting State), who are appointed to six-year terms by the Parliamentary Assembly.[38] The judges, however, do not represent a particular state, but rather serve to promote the mission of the Court to promote and maintain human rights and the rule of law.[39]

The Court is divided into four[40] Sections of judges, each of which "shall be geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties."[41] The Sections are then divided into Committees of three and Chambers of seven judges.[42] Furthermore, a national judge (ad hoc judge) from the state against whom the applicant has filed is permitted to sit on the Committee or Chamber deciding the case.[43] Committees can only determine case inadmissibility, in which decisions must be

36. Caron, *supra* note 20, at 404-05.

37. Beernaert, *supra* note 14, at 544.

38. Although there are only 45 judges, there are 46 Contracting States in which Monaco, a new Contracting State, has yet to appoint a judge. European Court of Human Rights, Council of Europe, Rules of Court, Chpt. III-The Registry, para. 1 (Registry of Court, 2005), *available at* http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOf Court.pdf [hereinafter Rules of Court; *see also* European Court of Human Rights, Organisation of the Court, para. 1, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Organisation +of+the+Court/ [hereinafter Organisation of the Court].

39. *Id.* Rules of Court, Chpt. III-The Registry, para. 1; *see also* Organisation of the Court, para. 1,

40. As of March 1, 2006, there were five Sections.

41. Rules of Court, *supra* note 38, Rule 25-Sections, para. 2.

42. *Id.* Rule 26-Chambers, para. 1, Rule 27-Committees, para. 1; *see also* Organisation of the Court, *supra* note 38, para. 1.

43. Organisation of the Court, *supra* note 38, para. 4.

unanimous.[44] If the decision on inadmissibility is not unanimous, then the application is referred to a Chamber for further review.[45] Chambers mainly decide cases in which there exists established ECHR case law on the issue.[46] Within three months of the Chamber's decision, applicants or Contracting States can request that the Grand Chamber, composed of seventeen judges, review the case.[47] Grand Chamber proceedings are composed of the seventeen judges in addition to three substitute (ad hoc) judges, in which the Court addresses issues that have not previously been considered by the Court.[48]

This structure does not enable quick disposal of inadmissible cases since, at the least, a Committee of three judges must meet to dismiss a case. Moreover, repetitive cases must be reviewed by a minimum of seven judges, requiring a significant amount of resources to review cases similar to ones already decided by the Court. Lastly, under this structure, there are not enough judges to review the complaints since the Court receives around 40,000 cases per year.[49] Therefore, either the Court's structure needs to be drastically reformed or the process must be altered so that the judges can review cases more quickly.

B. Resources, Docket Size and Docket Type

The twelve additional protocols conferred a significant amount of rights on individuals.[50] As a result, the Court's docket size significantly increased and the docket type diversified.[51] Since Contracting States were no longer the only parties to the Convention, and since the rules for admissibility became more numerous, most individual applicants have failed to follow the applications requirements and thus their complaints have been deemed inadmissible.[52] Therefore, a root cause of the case influx may be the lack of education of citizens regarding how to bring a valid claim and what constitutes a valid claim. Yet another significant cause of the case influx is Contracting States' inability to

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44. European Court of Human Rights, Basic Information on Procedures, para. 6, http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basic+information+on+procedures/.

45. *Id.* para. 7.

46. *Id.*

47. *Id.* para. 15; *see also* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms-restructuring the control machinery established thereby, Strasbourg, May 11, 1994, ETS 155, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/155.htm.

48. Rules of Court, *supra* note 38, Rule 26-Chambers, para. 1.

49. European Court of Human Rights, Council of Europe, Survey of Activities 2004, at 35 (Registry of the Court, 2005) [hereinafter ECHR Survey of Activities 2004].

50. *Supra,* Part II.

51. ECHR Survey of Activities 2004, *supra* note 49, at 10-28.

52. In order of hierarchy, the current grounds for an inadmissible application include: (1) anonymous applications (Convention, *supra* note 24, art. 35, § 2[a]); (2) abuse of the right of application (art. 35, § 3); (3) substantially the same as a matter previously examined (art. 35, § 2[b]); (4) has already been submitted to another international procedure (art. 35 § 2[b]); (5) incompatibility (art. 35, § 3): *ratione personae, loci, temporis, materiae*; (6) exhaustion of domestic remedies (art. 35, § 1); and (7) six months rule for statute of limitations (art. 35, § 1), and manifestly ill-founded prima facie case disposal (art. 35, § 3).

provide adequate domestic remedies and Contracting States' failure to reform their laws and practices in compliance with judgments due to structural problems within states.[53] Rather than address these root causes, prior Court reforms have aimed at changing administrative practices/technology and increasing the budget.[54]

Although the Court's budget nearly doubled from 1998 to 2004,[55] the increase was insufficient to resolve the Court's case processing problems. In fact, the Court's caseload has increased significantly each year. In 2002, the caseload increased by ninety percent, leaving the Court able to review only 65 percent of the cases it received in 2003.[56] Although Protocol 11 aimed at restructuring the Court so that it could better review cases, it did not sufficiently address problems in processing cases and issuing judgments.[57] Therefore, more needs to be done to ensure that the Court will continue to influence Contracting States and help to shape their laws and practices.

The problems that the Court faces today are much different from those addressed in 1994. Even though the number of applications has increased drastically, 90-96 percent of applications filed are found inadmissible.[58] Of the remaining 4-10 percent admissible cases, over half involve different claimants asserting violations identical to those that have been previously decided by the Court.[59] These cases arise because Contracting States face "structural or systematic" problems that need to be addressed in order to prevent further violations on the same grounds.[60] On the basis of this reality, as shown by these statistics, the Committee of Ministers instructed the Evaluation Group to research the problem, and later appointed the CDDH to draft a proposal to ensure the "long-term effectiveness of the [Court]."[61] The end result was a solution that would expedite the filtering process, enable quick disposal of

53. *Explanatory Report*, *supra* note 3, secs. A, C.

54. Telephone Interview with John Dalhuisen, Special Advisor to the Commissioner for Human Rights, in Strasbourg France (Dec. 2, 2005).

55. In 1998, the ECHR's budget was $25,297,147 and in 2004, the Court's budget was increased to $50,063,647. Romano, *supra* note 2, at 290.

56. In 1998, the Court received 18,164 applications and in 2002, the Court received 34,546 applications. Also, although the Court decided 1,500 cases per month in 2003, it received 2,300 new cases each month. *See Explanatory Report*, *supra* note 3, para. 5.

57. Of course, this is not to say that Protocol 11 should not have been adopted. As Laurence Helfer and Anne-Marie Slaughter argue, Protocol 11 strengthened the Court's ability to influence Contracting States, as individuals can now bring attention to Convention violations against Contracting States. *See generally* Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

58. *Explanatory Report*, *supra* note 3, para. 7.

59. *Id.* Around ninety to ninety-six percent of the cases are found inadmissible. Of the four to ten percent admissible cases, sixty percent are "repetitive cases;" the applications regard issues already decided by the Court.

60. Beernaert, *supra* note 14, at 545. The most common example of repetitive cases is "length of proceedings" cases, in which applicants claim a denial of the right to a speedy trial. These cases are common in most of the post-satellite states and especially in Italy. *Id.* at 545, n. 6.

61. *Explanatory Report*, *supra* note 3, para. 2.

repetitive cases, and raise the bar for admissibility.[62]

IV.
THE PROTOCOL AND REFORM PACKAGE

The final draft of Protocol 14 includes reforms to improve the function of the Court by (1) establishing single-judge formations,[63] (2) expediting the process for reviewing "manifestly well-founded" repetitive cases,[64] and (3) adding a new admissibility criterion for applicants.[65] Other reforms within the Protocol include (4) altering judge's terms,[66] (5) changing the procedure for appointing ad hoc judges,[67] (6) increasing the Commissioner for Human Rights' role,[68] and (7) enabling the European Union to accede to the Convention.[69]

A. Case Filtering Process

The Protocol aims to expedite case processing by creating single-judge formations, altering the review process for repetitive cases, and adding an additional admissibility criterion for applicants.

Articles 6 and 7 of the Protocol establish single-judge formation in which "a single judge may declare an application inadmissible or strike it out."[70] Prior to the Protocol, the smallest judge formation was a Committee of three, which could only decide on inadmissibility of cases.[71] The rationale behind these judge formations was that they ensured collegiate decisions and repetition to reduce error.[72] The amended procedural review allows a single judge, with two rapporteurs' assistance, to review individual applications, so long as they are not claims against their country of origin.[73] The aim is to expedite the review of inadmissible cases so that judges can deal more efficiently with the 90-96

62. *Id.* para. 36; *see also Protocol 14*, *supra* note 12, art. 6 (changing art. 26 of the Convention), art. 8 (changing Article 28 of the Convention), and art. 12 (changing art. 35 of the Convention).

63. *Explanatory Report*, *supra* note 3, paras. 61-67; *see also Protocol 14*, *supra* note 12, art. 6 (changing art. 26 of the Convention).

64. *Id.* paras. 68-72; *see also Protocol 14*, *supra* note 12, art. 8 (changing art. 28 of the Convention).

65. *Id.* paras. 77-85; *see also Protocol 14*, *supra* note 12, art. 12 (changing art. 35 of the Convention).

66. *Id.* para. 50; *see also Protocol 14*, *supra* note 12, art. 2 (changing art. 23 of the Convention).

67. *Id.* para. 64; *see also Protocol 14*, *supra* note 12, art. 6 (changing art. 26 of the Convention).

68. *Id.* paras. 86-89; *see also Protocol 14*, *supra* note 12, art. 13 (changing art. 36 of the Convention).

69. *Id.* paras. 101-02; *see also Protocol 14*, *supra* note 12, art. 17 (changing art. 59 of the Convention).

70. *Protocol 14*, *supra* note 12, art. 6 (changing art. 26 of the Convention); *id.* art. 7 (inserting new art. 27 into the Convention).

71. RULES OF THE COURT, *supra* note 41.

72. *Id.* Rule 26-Chambers, para. 1; Rule 27-Sections, para. 1; Committees, para. 1.

73. *Protocol 14*, *supra* note 12, art. 4 (changing art. 24 of the Convention).

percent of applications received which are inadmissible or struck-out, allowing them to focus their attention on pressing human rights abuses.[74]

To remedy the problem that the Court faces in reviewing the sixty percent of cases that are well-founded but repetitive, Article 8 of the Protocol states that for cases in which the underlying question has already been decided by established case law, a Committee of three judges may issue a unanimous judgment.[75] This is in contrast to the prior procedure, which only permitted a Committee of three to rule on admissibility while a Chamber of seven reviewed repetitive cases.[76] After the Protocol is implemented, although Committees of three judges will be able to make rulings on repetitive cases, the State Party will be able to accept or contest the application of this well-established case law or to argue that the claim does not fall under the Convention.[77] If judges in the Committee of three are unable to reach a unanimous decision, then the application will be reviewed through the standard procedure, either in the Chamber or Grand Chamber.[78] By allowing Committees of three judges to dispose of repetitive cases, this reform will help to process repetitive cases more quickly in order to enable the Court to rule on new issues.

Article 12 of the Protocol adds an additional admissibility criterion to Article 35 of the Convention.[79] The Court can declare applications inadmissible if the applicant has not suffered "significant disadvantage."[80] The exception is that "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."[81] The motivation behind "raising the admissibility threshold"[82] is to weed out cases in which individuals suffered only minor harm, so that judges may devote their time to more pressing human rights abuses.[83] Although this measure has been the focus of the debate surrounding the Protocol, there was significant debate on other Protocol reforms as well.

B. Other Reforms

Other reforms addressed in the Protocol include altering judges' terms, changing the procedure for appointing ad hoc judges, expanding the role of the Commissioner for Human Rights, and enabling the European Union to accede to the Convention.

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74. *Explanatory Report*, *supra* note 3, para. 67.
75. *Protocol 14*, *supra* note 12, art. 8 (changing art. 28 of the Convention).
76. *Explanatory Report*, *supra* note 3, para. 67.
77. *Id.*
78. *Id.*
79. *Protocol 14*, *supra* note 12, art. 12 (changing art. 35 of the Convention).
80. *Id.*; *see also Explanatory Report*, *supra* note 3, paras. 77-85.
81. *Id.*
82. Eaton & Schokkenbroek, *supra* note 18, at 13.
83. *Explanatory Report*, *supra* note 3, para. 19.

Article 2 of the Protocol increases judges' terms to one nine-year-term, rather than unlimited six-year-terms.[84] The rationale behind this amendment is that there "seemed to be an abuse of the current provisions" in which some countries, for political reasons, would not include current ECHR judges on their list of judges to be appointed when the judges' terms expired.[85] Although the change reduces the institutional memory of the Court, the authors viewed it as necessary to ensure that such abuse of judicial appointment would not continue and also to keep judges from campaigning in their home states.[86]

Article 6 of the Protocol amends the process of appointing ad hoc judges.[87] Ad hoc judges take the place of an elected judge who is unable to hear a particular case.[88] Upon a judge's indication that she must recuse herself, the President of the Court will ask the State from which the judge is from to recommend a judge to hear the case.[89] The Protocol removes the right of the Contracting State to choose the judge who will hear a *particular* case.[90] Instead, it requires states to issue an advance list of potential judges from which the President of the Court will select the appropriate judge to hear the case.[91] This change was motivated by a concern that Contracting States would appoint judges who would find for them in the particular case.

Article 13 of the Protocol grants the Commissioner for Human Rights the ability to "submit written comments and take part in oral hearings" in Chamber and Grand Chamber cases.[92] The purpose of this addition is to enable the Commissioner to comment and provide evidence in support of an applicant since he and his staff visit and investigate human rights conditions in Contracting States and can identify problems for the Court.

Lastly, Article 17 enables the European Union to accede to the Convention.[93] The Council of Europe encourages EU accession to ensure "legal certainty and coherence in European Human Rights protection."[94] Although the European Constitution was not unanimously adopted by EU Member States, and hence did not pass, the Council of Europe encourages the EU to make another effort to accede to the Convention.

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84. *See Protocol 14*, *supra* note 12, art. 2 (changing art. 23).

85. Eaton & Schokkenbroek, *supra* note 18, at 22; *see also* Eur. Parl. Ass., *Candidates for the European Court of Human Rights*, 8th Sitting, Recommendation 1649 (2004), *available at* http://assembly.coe.int/Documents/AdoptedText/TA04/EREC1649.htm.

86. *Id.*

87. *Protocol 14*, *supra* note 12, art. 6 (changing art. 26 of the Convention).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* art. 13 (changing art. 36 of the Convention).

93. *Id.* art. 17 (changing art. 59 of the Convention).

94. Eaton & Schokkenbroek, *supra* note 18, at 25; *see also Explanatory Report*, *supra* note 3, paras. 101-02; *Protocol 14*, *supra* note 12, art. 17.

C. Recommendations to Contracting States

The CDDH's reform package also includes Recommendations to Contracting States on measures to reduce the number of applications filed.[95] The Recommendations aimed to enhance the implementation of the Convention in and by Contracting States, in order to reduce violations and ensure domestic remedies in the event of violations by Contracting States.[96] The CDDH indicates that since the Court was created to serve as a secondary avenue for individuals to have their complaints heard, Contracting States should reform their laws and practices in compliance with the Convention to provide their citizens with adequate domestic remedies for human rights violations.[97] If Contracting States provide adequate domestic remedies, individuals would not need to file applications to the ECHR.

However, under Article 15.2 of the Statute of the Council of Europe, these Recommendations are *not binding* on Contracting States, as the Committee of Ministers may only request compliance.[98] This is due to the principle of subsidiarity, which is the idea that matters should be handled by the most local authority unless supranational authority is necessary to carry out the mission.[99] Because these recommendations deal with administrative practices and policy, the Committee of Ministers did not want to impose a single model for all states because there is significant variation between Contracting States.[100] Nevertheless, Council officials have indicated that Contracting States still take these Recommendations seriously and comply.[101] Based on this rationale, the Committee recommends that states (1) provide training to academics and professionals regarding the provisions of the Convention,[102] (2) verify that

95. Recommendation Rec (2004) 4 of the Committee of Ministers to Member States on the European Convention on Human Rights in university education and professional training, *in* DIRECTORATE GENERAL, COUNCIL OF EUROPE, GUARANTEEING THE EFFECTIVENESS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 56 (Council of Europe, 2004) [hereinafter, Rec (2004) 4]; Recommendation Rec (2004) 5 of the Committee of Ministers to Member States 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, *in* DIRECTORATE GENERAL, COUNCIL OF EUROPE, GUARANTEEING THE EFFECTIVENESS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 62 (Council of Europe, 2004) [hereinafter, Rec (2004) 5]; Recommendation Rec (2004) 6 of the Committee of Ministers to Member States on the improvement of domestic remedies, *in* DIRECTORATE GENERAL, COUNCIL OF EUROPE, GUARANTEEING THE EFFECTIVENESS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 69 (Council of Europe, 2004) [hereinafter, Rec (2004) 6].

96. *Id.*

97. Beernaert, *supra* note 14, at 547.

98. Statute of the Council of Europe, art. 15.2, May 5, 1949, CETS 001.

99. DESMOND DINAN, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 152 (2nd ed. 1999).

100. Eaton & Schokkenbroek, *supra* note 18 at 29; *see also Explanatory Report*, *supra* note 3.

101. *See id.* at 29, n.60 (indicating that many recommendations have resulted in changes in law and practice of many states).

102. Rec (2004) 4 recommends that Contracting States "ascertain" that law schools and professional schools include instruction on the Convention in their core curriculum. The intent is that judges, lawyers, police officers, hospital staff, prison officers, and immigration officers will have a

national laws are compatible with the Convention,[103] and (3) improve domestic remedies.[104]

D. Measures to Improve the Execution of Court Judgments

The aim behind the effort to improve execution of judgments is that if Contracting States fail to comply with judgments, Court judgments will become ineffective. Also, if Contracting States comply with judgments and change their laws and practices, then there should be fewer subsequent filings. The reform, therefore, aims to identify judgments issued on systematic problems in each state, and determine the source of the problem.[105] Structural problems in Contracting States may stem from a variety of sources.[106] By publicizing these judgments, the CDDH hopes Contracting States will comply due to media pressure.

V.
THE MOTIVATION BEHIND ACTORS' PROPOSED AMENDMENTS: COURT MISSION

Fundamental to the debate over the Protocol is what effect it may have on the Court's mission of serving either to promote an individual right to justice or to serve as a quasi-Constitutional court (or both).[107] As Paul Mahoney, former Registrar of the Court,[108] points out, "[T]he mission of the Court, the service that it is expected to render European citizens and European societies, should dictate the contours of any reform."[109] Therefore, there is debate as to whether the Protocol will promote the Court's true purpose. Essential to this discussion is determining what this true purpose is.

Parties worked within and against the "bounded strategic space" to structure the Court in a manner that would promote their interpretation of the Court's mission. NGOs such as Amnesty International, the Parliamentary

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good understanding of the Convention to better address human rights in their realm of work. Included with the recommendation is an Explanatory Appendix, which outlines examples of initiatives that Contracting States can take to implement the recommendations. Rec (2004) 4, *supra* note 95.

103. Rec (2004) 5 asks that Contracting States check the compatibility of the Convention with draft laws and current legislation, as well as with current laws and administrative practices. The recommendation to adapt current laws and administrative practice is not as strong since it uses the language "whenever necessary." The motivation behind this is to improve domestic remedies and prevent Convention violations. Once again, the Appendix includes examples of how to supervise draft laws to ensure their compatibility. Rec (2004) 5, *supra* note 95.

104. To address systematic problems in Contracting States' laws and practices, Rec (2004) 6 suggests that States examine their available domestic remedies based on each of the Convention Articles and investigate ways in which to improve them or make available more remedies. The motivation is to avoid repetitive application filings in which Contracting States fail to remedy the root cause of the Convention violation. Rec (2004) 6, *supra* note 95.

105. Rec (2004) 6, *supra* note 95.

106. *Id.*

107. Greer, *supra* note 17, at 94.

108. In October 2005, Mahoney became the President of the Civil Service Tribunal of the European Union. The new Registrar is Erik Fribergh.

109. Mahoney, *supra* note 14, at 175.

https://scholarship.law.berkeley.edu/bjil/vol24/iss2/13
DOI: https://doi.org/10.15779/Z38SK94

Assembly and the Commissioner for Human Rights believe that the Protocol may cause the ECHR to become a quasi-constitutional body at the expense of individual justice.[110] However, the CDDH, the Committee of Ministers and Court judges believe that the reform will allow the Court to serve both functions.[111]

Which mission(s) will prevail depends on how one views "individual justice." According to Steven Greer, how one views "individual justice" depends on how people characterize the right of individual petition.[112] If one interprets "individual justice" in a broad sense, as granting individuals the right to application, then it is possible for the ECHR to serve both missions.[113] However, if one narrowly interprets "individual justice" to mean that every complaint must be heard no matter its gravity, then the Court cannot serve both missions.[114]

The CDDH argues that the Court can serve to promote both quasi-constitutional justice and individual justice since both are legitimate functions of the ECHR.[115] They indicate that the Protocol aims to "reconcile the two [missions]," since neither mission will survive unless the Court can properly filter cases.[116] President of the Court Luzius Wildhaber explained, "Failing to deal with these cases within a reasonable time not only frustrates the original purpose of the Convention as an early warning system, it also allows prejudice for the [injured] individual to accrue and prevents the taking of timely general corrective measures."[117] Therefore, if a reform measure is not adopted, most agree that the Court will fail to accomplish either mission. And as further indicated in the April CDDH report, it is vital that judges are able to devote a significant amount of time to "constitutional judgments," meaning authoritative and serious human rights violation cases "which raise substantial or new and complex issues of human rights law."[118] From this stance, the reform is

110. Press Release, Amnesty Int'l, *supra* note 14.

111. Resolution I.16 and I.18(i)-(ii) of the Ministerial Conference on Human Rights, *The European Convention on Human Rights at 50*, *supra* note 1, Human Rights Information Bulletin No. 50, at 35, 37. *See also* Greer, *Reforming the European Convention on Human Rights: Towards Protocol 14*, *supra* note 14, at 667.

112. Greer, *Protocol 14 and the Future of the European Court of Human Rights*, *supra* note 17 at 94.

113. *Id* at 94-106; *see also* Mahoney, *supra* note 14, at 173.

114. *Id.*

115. Steering Committee for Human Rights (CDDH), *Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights: Final Report Containing Proposals of the CDDH*, CDDH (2003) 006, *available at* http://www.coe.int/T/E/Human_rights/cddh/3._Committees/01._Steering_Committee_(CDDH)/02._CDDH_Texts/ (follow "03. Activity Reports" hyperlink; then follow "CDDH(2003)006 Final" hyperlink); *see also* Eaton & Schokkenbroek, *supra* note 18 at 8.

116. *Id.*

117. Mahoney, *supra* note 14, at 171.

118. Evaluation Group to the Committee of Ministers, *Report of Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court (2001) 1, para. 98, *available at* http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Steering_committees/CDCJ/Documents/2001/EGCourt(2001)1E.pdf.; *See also* Greer, *supra* note 17, at 96-106.

necessary in order to ensure that the Court continues to address serious human rights concerns effectively and efficiently.

Some even argue that the narrow reading of "individual justice" is not ideal because such a reading may allow individuals to abuse the Court and use it as a "small claims court."[119] They argue that the ECHR was created as a remedy for rights not addressed at the national level and so "insubstantial" claims should not be addressed by the ECHR.[120] As Mahoney explains, "it is generally recognized now, I believe, that right of individual petition cannot mean right to a full, individualized examination of every petition."[121] From this interpretation, it is thus possible for the Court to serve both missions since it should not only review each individual application, but should also produce a substantive body of law from the cases it reviews.[122]

In contrast, NGOs believe that the Court should serve the narrower function of administering "systematic individual justice," as opposed to broad individual justice.[123] They argue that these two missions are mutually exclusive as certain filtering options would allow some human rights violations complaints to slip through the cracks.[124] As Marie-Aude Beernaert argues, the Court will become less accessible as a result of the new filtering scheme, thus eroding the ECHR's human rights protection.[125]

NGOs and others interpret the characterization of "individual justice" as causing the ECHR to become a "small claims court" as inaccurate because the Convention *guarantees* individuals the right to bring forth these claims.[126] Instead, those concerned with the operations of the ECHR should question why the issue was not redressed at the national level.[127] Also, NGOs argue that there are no insubstantial claims because all human rights violations are substantial.[128] Therefore, they argue that the Protocol should not send a signal to individuals that their concerns and experiences are not important. These two interpretations of the Court's mission affected which proposals actors put forth in their aim to influence the final protocol draft.

VI.
DEBATE OVER THE REFORM: ACTORS INVOLVED IN DRAFTING PROTOCOL NO. 14

Six main sets of actors worked within and against the Court's "strategic

119. Mahoney, *supra* note 14, at 175; Greer, *supra* note 17, at 96-106.
120. Mahoney, *supra* note 14, at 175.
121. *Id.* at 173.
122. *Id.* at 171.
123. Greer, *supra* note 17, at 94.
124. *Id.*
125. Beernaert, *supra* note 14, at 556-57.
126. Telephone Interview with Jill Heine, Legal Advisor to Amnesty International, in London, England (Nov. 29, 2005); Eaton & Schokkenbroek, *supra* note 18, at 6.
127. Telephone Interview with Jill Heine, *supra* note 126.
128. *See Joint Response*, *supra* note 14.

space" to impact the reform process and influence the draft.[129] The actors include the Committee of Ministers, the Parliamentary Assembly, Contracting States, ECHR judges and the Court registry, the Commissioner for Human Rights, and NGOs. Each of these actors aimed to influence the drafting process by acting strategically to shape the Protocol in a manner which best promoted its interpretation of the Court's mission.[130]

The CDDH made an effort to ensure that its drafting process was transparent by consulting with concerned parties.[131] In fact, the CDDH invited the Parliamentary Assembly; Court Registry; Commissioner for Human Rights; and NGOs with Observer Status, including Amnesty International, Fédération Internationale des Droits de l'Homme (FIDH), and the International Commission of Jurists to various meetings.[132] Furthermore, the CDDH published its main reports and even posted them on the Council of Europe website.[133] The drafting process became transparent after Amnesty International and other NGOs called on the government bodies to make the process open and to include their ideas and suggestions.[134] Jill Heine, Legal Advisor to Amnesty International, agreed that "the request for transparency was not met with any resistance."[135] Soon thereafter, the CDDH invited national judges and NGOs to drafting meetings, although it is unclear how the CDDH determined whom to invite.

A. Summary of the Protocol Adoption Process

The Committee of Ministers appointed an Evaluation Group and the CDDH, which in turn established a Reflection Group (GDR),[136] to analyze the problem and develop solutions.[137] The Evaluation Group completed its work and issued a report that was available publicly.[138] Then the GDR researched the issue and prepared reports for the CDDH, which in turn drafted Protocol 14.[139] Shortly thereafter, the CDDH welcomed recommendations from the Parliamentary Assembly, judges, NGOs and citizens.[140] The CDDH compiled the research and presented an Interim Activity Report to the Committee of

129. Caron, *supra* note 20, at 402-03.
130. *Id.*
131. Telephone Interview with Jill Heine, *supra* note 126; Eaton & Schokkenbroek, *supra* note 18, at 6; *Explanatory Report*, *supra* note 3, para. 30.
132. Telephone Interview with Jill Heine, *supra* note 126; Eaton & Schokkenbroek, *supra* note 18, at 8-9; *Explanatory Report*, *supra* note 3, para. 30. These NGOs were granted "Observing Status" to the CDDH.
133. Eaton & Schokkenbroek, *supra* note 18, at 8.
134. Telephone Interview with Jill Heine, *supra* note 126.
135. *Id.*
136. "Groupe de Réflection," which was appointed by the CDDH.
137. *Explanatory Report*, *supra* note 3, at para. 29.
138. *Id.* para. 21.
139. *Id.* para. 28-29.
140. *Id.* para. 30.

Minister in November 2003.[141]

The Committee noted this proposal and asked the CDDH for further work on five measures in particular: (1) the admissibility requirement, (2) the application filtering mechanism, (3) the procedure for appointing ad hoc judges, (4) proposals to strengthen the Commissioner for Human Right's role, and (5) increasing the number of judges on the Court.[142] The CDDH then shared its research with the Parliamentary Assembly, the Court, and citizens. In the meantime, the Committee of Ministers requested a final draft by May 2004.[143]

The CDDH presented a draft protocol, but it was still met with opposition by some Contracting States because of disagreement on the new admissibility requirement and on the procedure for appointing ad hoc judges.[144] The CDDH then forwarded the proposal to the Parliamentary Assembly for comments in April 2004, which criticized the same two measures in its opinion to the Committee.[145] The members of the CDDH and the Ministers conducted informal meetings to try to resolve the dispute.[146] From these discussions, the parties reached a compromise on the admissibility criteria.[147]

Finally, on May 12, 2004, the Committee of Ministers adopted Protocol 14 in which 44 Ministers voted for the proposal, zero against, and one abstained.[148] In addition, the three Recommendations were adopted unanimously without debate.[149] The next day, the Protocol was open for signature by the Contracting States. All Contracting States must sign and ratify the Protocol in order for it to take effect. As of December 1, 2005, thirteen states have signed and ratified (and thus have acceded) to the Protocol, while thirty-one have only signed it, and two have not signed or ratified it yet.[150] Whether the drafting process will result in Court reform hinges on whether Contracting States will accede to the Protocol.

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141. *Id.* para. 31; *see also* CDDH, *Interim Activity Report: Guaranteeing the long-term effectiveness of the European Court of Human Rights*, CDDH (2003) 26, Addendum I Final, *available at* http://www.coe.int/t/e/human_rights/cddh/3._committees/01._steering_committee_%28cddh%29/02._cddh_texts/ (follow "04. Meeting Reports" hyperlink; then follow "CDDH(2003)026" hyperlink).

142. Amnesty Int'l, *Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights*, AI Index: IOR 61/005/2004, Feb. 1, 2004, para. 27 [hereinafter Amnesty Interim Activity Report].

143. *Explanatory Report*, *supra* note 3, paras. 31-33.

144. Easton & Schokkenbroek, *supra* note 18, at 6.

145. *Explanatory Report, supra* note 3, para. 31; *see also* Eur. Parl. Ass., *Opinion No. 251 (2004)* 13th Sitting, (2004), *available at* http://assembly.coe.int/Documents/AdoptedText/ta04/EOPI251.htm.

146. *Id.*

147. *See generally Protocol 14*, *supra* note 12.

148. Russia abstained on the grounds of disapproval of the voting procedure. Easton & Schokkenbroek, *supra* note 18, at 7.

149. *Explanatory Report*, *supra* note 3, at 31.

150. Bulgaria and Russia have not signed or ratified the Protocol. List of Contracting State status available online at:http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&DF=05/07/05&CL=ENG.

B. The Actors and Their Institutional Positions

According to Caron, although the functions of an institution's secretariat may vary, most serve to assist the judges, and act as host for meetings of the governing body, but, "[i]n practice, secretariats exhibit a range of powers going from one purely clerical to one critically important to both governance and adjudication."[151] Relating this to the Council of Europe's structure, the Committee of Ministers and the Parliamentary Assembly together fit this role. However, whereas the Committee of Ministers serves as the main legislative body, the Parliamentary Assembly has no legislative power, but rather serves to provide consultative opinions.[152]

1. Committee of Ministers

The Committee of Ministers is composed of the Ministers for Foreign Affairs from each Contracting State.[153] Each Minister has an equally weighted vote.[154] The Committee serves both as a governmental body and also as a regulatory body to ensure Contracting State compliance with judgments and the Convention.[155] Although the Committee is composed of a collection of views—that is, the views of each Contracting State Minister—for the purpose of this paper, I will refer to the Committee's opinion as that of the majority of the Ministers and the CDDH. Minority Ministers' views will be outlined in the "Contracting States" section of this paper.[156]

The Committee has played a significant role in drafting Protocol 14. In fact, the decision to launch this reform process originated at the Council of Europe's Ministerial Conference in Rome in November 2000, during which the Ministers called on the Committee of Ministers to research the root of the case backlog problem and draft recommendations on how to best address the problem.[157] From this Conference, the Committee of Ministers established the Evaluations Group and later mandated its own Steering Committee on Human Rights, which was composed of members of the Committee of Ministers Steering Committee

151. Caron, *supra* note 20, at 416.

152. Telephone Interview with Jeroen Schokkenbroek, former Secretary to the Reflection Group and the CDDH and current Head of the Human Rights Intergovernmental Programmes Department at the Directorate General of Human Rights of the Council of Europe, in Strasbourg, France (Nov. 17, 2005).

153. The Ministers themselves only rarely attend meetings of the Committee of Ministers, as they are normally represented by their permanent representatives (i.e. ambassadors), in Strasbourg. E-mail from Matti Pellonpaa, ECHR Judge, to Christina Hioureas, Student at UC Berkeley School of Law (Boalt Hall) (Dec. 19, 2005, 12:11:08 am PST) (on file with author) [hereinafter *e-mail from Judge Pellonpaa I*].

154. About the Committee of Ministers, http://www.coe.int/T/CM/aboutCM_en.asp (last visited Feb. 13, 2006).

155. *Id.*

156. *See infra*, Part VI.B.3.

157. *The European Convention on Human Rights at 50*, *supra* note 1; *see also Explanatory Report*, *supra* note 3, para. 2.

who volunteered to take on this task.[158] Therefore, those who researched and drafted the Protocol originated from the Committee of Ministers. Based on this information, it is clear that the Committee of Ministers framed the reform discussion and controlled the process by which amendments would be included. The Court's mission, as promoted by the majority of the Ministers and by the CDDH, was to provide broad individual justice while also serving as a quasi-constitutional structure.[159]

The Protocol must be adopted by 2/3 of the Committee of Ministers' Representatives and then signed and ratified by all Contracting States in order to take effect.[160] Although the procedure for adopting the Protocol requires only a 2/3 majority of the Ministers, the Committee's goal was most likely to create a draft that would not only address the Court's problems, but also result in unanimous or near unanimous approval by the Ministers. This is because each Minister represents the views of the appointing Contracting State based on the structure of the Committee of Ministers.[161] Therefore, opposition to the Protocol by a Minister may well indicate the opposition of her Contracting State as well. Thus, achieving only a 2/3 majority would defeat the purpose of adopting the Protocol in the first place because not all Contracting States would sign or ratify the measure.

Based on these adoption procedures and the Committee's aims, it can be inferred that the Committee employed a "minimum winning coalition"[162] strategy in which the Committee conceded only what was needed to win (i.e. accomplish its aims) and nothing more. This way, the Committee conceded as little as possible to gain the votes of the minority Ministers who opposed certain measures of the Protocol draft. In fact, according to one of the main Protocol drafters, former Secretary to the Reflection Group and current head of the Council of Europe's Human Rights and Intergovernmental Programmes Department, Directorate General of Human Rights Jeroen Schokkenbroek, "Contracting State positions became clear at the early stages of the process, well before the Protocol reached the Committee of Ministers," and therefore, the CDDH was able to incorporate these concerns into the early Protocol drafts so as to ensure Contracting State support.[163] The CDDH "negotiated [Contracting] State problems early on, to guarantee that the final result [would be] supported by as many states as possible."[164]

For example, probably the most hotly contested portion of the Protocol is

158. Telephone Interview with Jeroen Schokkenbroek, *supra* note 152.

159. Greer, *Protocol 14 and the Future of the European Court of Human Rights*, *supra* note 17, at 94-106; *see also* Mahoney, *supra* note 14, at 173; *Protocol 14*, *supra* note 12.

160. *See* Statutory Resolution (93) 27 on majorities required for decisions of the Committee of Ministers (I), *at* https://wcd.coe.int/ViewDoc.jsp?id=99211 (Dec. 12, 2003).

161. About the Committee of Ministers, *at* http://www.coe.int/T/CM/aboutCM_en.asp.

162. *See generally* WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

163. Telephone Interview with Jeroen Schokkenbroek, *supra* note 152.

164. *Id.*

the new admissibility requirement.[165] Article 12 of the Protocol indicates that applicants must have suffered "significant disadvantage" in order to have a valid claim "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."[166] As indicated above, the rationale given in the Explanatory Report is to further filter out applications in which the harm is not severe so that judges may devote a greater portion of their time to more serious cases.[167]

In the initial draft, applications would be denied if they did not contain a "substantial issue."[168] However, the CDDH decided that the wording would give too much discretion to judges to determine what constitutes a "substantive issue."[169] Ministers questioned whether judges would interpret the wording strictly or expansively, since the Protocol did not include an author's intent as to how it should be applied.[170] As a result, the CDDH changed the wording early in the process to "substantial harm" and included an exception to its application so as to ensure state approval.[171] However, there was still significant dissent amongst some Ministers.

The parties, therefore, reached yet another compromise in which the new admissibility criteria would only be applied by Chambers and Grand Chambers for the first two years after the Protocol's implementation.[172] This would allow the Chambers and Grand Chambers to establish case law on how to interpret the standard so that it would be applied consistently.[173] Although NGOs still opposed this wording,[174] their recommended amendments were not adopted.[175] This may be because, although they were included in the Protocol discussions, they did not have any voting power,[176] and therefore the CDDH and the Committee of Ministers did not need to follow their opinion.

Yet another example of the Committee's "minimum winning coalition" is the debate over single-judge formation. Although this measure was less controversial, NGOs and the Parliamentary Assembly still opposed the measure because reducing the number of judges who are reviewing a case would remove

165. *See* Press Release, Amnesty Int'l, *supra* note 14; Greer, *Reforming the European Convention on Human Rights: Towards Protocol 14*, *supra* note 14, at 663-73; Beernaert, *supra* note 14, at 544-57; Mahoney, *supra* note 14, at 175; Wildhaber, *supra* note 14, at 163-64; *Joint Response*, *supra* note 14.

166. *Protocol 14*, *supra* note 12, art. 12.

167. *Explanatory Report*, *supra* note 3, paras. 39, 77-78.

168. *Id.* at 34.

169. Bernhadt, *supra* note 14, at 553; *see also* Greer, *supra* note 14, at 668-70.

170. *Id.*

171. *Protocol 14*, *supra* note 12, Article 12.

172. *Id.* art. 20, para. 2; *see also Explanatory Report*, *supra* note 3, paras. 81-85.

173. *Explanatory Report*, *supra* note 3, at paras. 81-85.

174. *See infra* Part VI.B.6 (describing the reasons for NGO opposition).

175. *See generally Protocol 14*, *supra* note 12.

176. Interview with Jill Heine, *supra* note 126.

collegiate decision-making from the process.[177] However, as indicated in the Explanatory Note, currently judges base their decisions almost completely off of the rapporteurs' reports instead of fully discussing the case.[178] In fact, the judges almost never disagree with the rapporteur's report.[179]

Further, a study published by the CDDH in April 2003 indicated that the single-judge formation filtering procedure would affect over fifty percent of the Chamber cases and would represent "a significant increase" in the Court's ability to adjudicate pressing human rights cases.[180] The final version of the Protocol reveals that the Committee ignored the NGOs and Parliamentary Assembly's dissent and maintained the provision because most Ministers supported this measure.

Probably the clearest example of the Committee's use of a "minimum winning coalition" is the debate over allowing a national judge to sit on the Committee panel to review repetitive cases.[181] The rationale behind this reform is that the measure would ensure that it would allow a national judge, who is knowledgeable of the state's law, to insert its opinion during the evaluation of a "repetitive" case.[182] NGOs and the Parliamentary Assembly opposed this measure because they believed it would allow states to influence the procedure and would unfairly prejudice the claimant.[183]

However, the majority of the Ministers did not agree with this view because it is up to the committee of judges to decide whether or not to invite a national judge to sit on the panel.[184] Furthermore, as the Explanatory Report[185] outlines, the reason why a state's ability to contest has been "explicitly mentioned" in paragraph three of the Protocol as "one of the factors which could bring the Committee to solicit the participation of the 'national judge' is that there would otherwise have been no mention at all in the Protocol of the possibility for States to contest the application of the simplified procedure."[186] This measure was included to guarantee that Contracting States would have a say in the expedited review process.[187] In order to ensure the Protocol's passage, the Committee needed to cater to this concern. The result was a compromise in which the Council of Ministers representing the Contracting

177. Amnesty Interim Activity Report, *supra* note 142.

178. Explanatory Note, *supra* note 3, para. 67; p. 4, n. 30. Also, since the publication of the *Explanatory Report*, the practice changed so that the Registry directly presents reports to Committees rather than through rapporteurs. It is still true that judges in Committees rarely disagree with these reports. E-mail from Judge Pellonpaa I, *supra* note 153.

179. Bernhadt, *supra* note 14, at 549, ns. 30, 31; Amnesty Interim Activities Report, *supra* note 142.

180. *CDDH Final Report*, *supra* note 106; *see also* Easton & Schokkenbroek, *supra* note 18, n. 13.

181. *Explanatory Report*, *supra* note 3, para. 71.

182. *Id.*

183. *Id.*

184. Eaton & Schokkenbroek, *supra* note 18, at 21.

185. *Explanatory Report*, *supra* note 3, para. 71.

186. Eaton & Schokkenbroek, *supra* note 18, at 21.

187. *Id.*

States agreed to allow the Court to review repetitive cases in an expedited manner, which could potentially lead to more judgments against states; and in return Article 8, paragraph three, would give states some assurance that the Court will not automatically hold for the plaintiff based on prior case law.[188]

From these examples, it appears that the Committee's aim was to ensure that the Protocol would not only serve to expedite the case review process by eliminating inadmissible and "insubstantial" cases, but also to ensure near unanimous Contracting State approval so as to guarantee adoption of the Protocol. In fact, in an interview, Schokkenbroek agreed that there would be "no point in adopting a treaty like this by a very narrow majority since it requires ratification by all forty-six member states."[189] Without this assurance of support, the effort in drafting a Protocol would have gone to waste.

Whether the Committee of Ministers' "minimum winning coalition" strategy was successful will depend on whether all of the Contracting States sign and ratify the Protocol. However, regarding the final version of the Protocol, the Committee was probably the most successful because it accomplished its aim of shaping the Court's function into more of a quasi-constitutional court. The Committee's success is mainly due to the fact that it controlled the Protocol drafting process, as the CDDH was composed of members of the Committee's Steering Committee and the Ministers had the power to vote or send back for further work any of the Protocol drafts.

Although the Committee of Ministers was the most influential, it was not able to accomplish all of its aims. If adopted, Protocol 14 will incrementally change Court process. The Committee's disappointment with this incremental reform is reflected in the fact that it has already set up another reform committee, the group of "Wise Persons," to research further measures to transform the Court in a more radical manner. Thus, although the Committee controlled the Protocol drafting process, it was unable to achieve its aims, possibly due to the conflicting interests involved in the struggle to shape the "bounded strategic space."[190]

2. Parliamentary Assembly

The Parliamentary Assembly consists of members of domestic parliaments who are either popularly elected or appointed by their governments.[191] There are 630 Representatives and 18 "Observers." The number of Representatives per state varies and is proportional to the state's population.[192] In this way, the

188. *Id.*

189. Interview Jeroen Schokkenbroek, *supra* note 158.

190. However, because the Committee of Ministers controlled the entire process, they were able to significantly limit the impact of the other actors within and outside of the "bounded strategic space." *See infra* Part VI.B.2-6.

191. About the Parliamentary Assembly, *at* http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_framework.htm (last visited Feb. 13, 2006) (Member States choose how to elect the representatives either through direct democracy or through political appointments).

192. About the Parliamentary Assembly Structures, *at* http://assembly.coe.int/Main.asp

Parliamentary Assembly can be characterized as similar to national Parliaments in which the Representatives' opinions more closely represent the concerns of their constituents. Whereas the Committee of Ministers represents the interests of the Contracting States, the Parliamentary Assembly represents the interests of the citizens within each Contracting State. However, it should be noted that the Assembly does not have legislative power, but rather, gives Consultative Opinions to the Committee of Ministers, which they must then adopt or reject.[193] One of the Assembly's most important functions is to appoint ECHR judges.

As indicated above, the Protocol draft procedure was transparent. The CDDH welcomed suggestions from the Parliamentary Assembly, and particularly their Consultative Opinion, which the Committee of Ministers adopted.[194] Most of the Parliamentary Assembly's opposition to or support for certain measures stems from its effort to increase its role and power within the "bounded strategic space."

While the Assembly was concerned with the new admissibility criterion and the procedure for adopting additional ad hoc judges, it also did not want national judges to be permitted to contest the application of existing precedent in the repetitive case review procedure.[195] All of these measures deal with either reducing or increasing the Parliamentary Assembly's role. Since it has no legislative power, it is struggling to remain relevant and influential. In fact, as Schokkenbroek explained, "The Parliamentary Assembly wants to protect their prerogative to appoint judges. However, the Steering Committee felt the need to change the way that ad hoc judges are appointed and so could not cater to [the Assembly's] concern."[196] Therefore, the Assembly was not as successful in shaping the Court's "bounded strategic space" in its favor.

The Parliamentary Assembly agreed with the NGOs and opposed the new admissibility requirement.[197] The Assembly argued that the requirement was "vague, subjective and liable to do the applicant a serious injustice."[198] Nevertheless, the criterion was adopted, although some compromises were reached so as to reduce its severity.[199]

Instead, the Parliamentary Assembly suggested increasing the number of judges at the request of the Plenary Assembly of the Court, which is composed of all forty-five judges.[200] In this proposal, the Assembly would appoint

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?link=/AboutUs/APCE_structures.htm (last visited Feb. 13, 2006).

193. *Id.*

194. Interview with Jeroen Schokkenbroek, *supra* note 158.

195. Parliamentary Assembly, *Opinion No. 251*, *supra* note 145.

196. *Id.*

197. *Id.*; *see also Joint Response*, *supra* note 14.

198. *Id.*; *see also* Stefania Bianchi, *EU: Amnesty Concerned Over Reform of Rights Court*, IPS-Inter Press Service/ Global Information Network, May 12, 2004.

199. *See supra* Part VI.B.1.

200. Greer, *Protocol 14 and the Future of the European Court of Human Rights*, *supra* note 17, at 85.

additional judges from the Contracting States with the greatest violations.[201] The rationale was that increasing the number of judges would expedite the review by taking the workload off of current judges. The members of the CDDH considered the views of Contracting States (through their Ministers) and ultimately rejected this suggestion. One can interpret this recommendation as an effort by the Assembly to increase its role by altering the Court's structure so that it would appoint additional judges and play a more significant role.

The Assembly did not like the provision that altered the ad hoc judge appointment procedure because the procedure would no longer require the Parliamentary Assembly's approval of ad hoc judges.[202] Since one of the Assembly's main roles is to approve ECHR judges, it wanted to increase its role by assuring that it reviewed and approved *all* judges.[203] Additionally, the Assembly aimed to approve who sits on a panel not only to increase the Assembly's role, but also to ensure that the judges that review cases are legitimate.[204] Ultimately, this proposal was not adopted because Ministers argued that this would retard the appointing process since achieving Assembly approval would take a significant amount of time and ad hoc judges need to be able to be appointed quickly. The Assembly's suggestion would add a further layer of bureaucracy.[205] As Schokkenbroek explained, "The Assembly's role in the selection of ad hoc judges goes pretty far. [The old process was] a heavy procedure and the Court needs to move faster without such bureaucracy."[206]

Again, together with the NGOs, the Parliamentary Assembly did not approve of the measure to allow national judge presence at Committee meetings dealing with repetitive cases because this would detract from the Assembly's role of appointing judges. If national judges are permitted to sit on a panel without Parliamentary Assembly approval, then its role and power is reduced.[207] However, the Assembly was unable to persuade the Committee of Ministers, as the final version of the Protocol included the measure allowing national judge presence without Parliamentary Assembly approval.[208]

Considering the suggestions and opinions expressed by the Parliamentary Assembly in comparison to the final version of the Protocol, it is clear that the Assembly was not particularly successful in shaping the Court's "bounded strategic space." Not only were all of its efforts to increase or maintain hold of its power in the Council of Europe rejected, but it also failed to shape the Court's mission to reflect its view of "individual justice."[209]

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201. *Protocol 14*, *supra* note 12; *see also* Eaton & Schokkenbroek, *supra* note 18; *Joint Response*, *supra* note 14.

202. Eaton & Schokkenbroek, *supra* note 18, at 21.

203. *Id.* at 23.

204. *Id.*

205. Interview with Jeroen Schokkenbroek, *supra* note 152.

206. *Id.*

207. Eaton & Schokkenbroek, *supra* note 18, at 21.

208. *See Protocol 14*, *supra* note 11, art. 6 (changing art. 26 of the Convention), para. 4; art. 8 (changing art. 28), para. 3.

209. Due to the institutional structure of the Council of Europe, the Parliamentary Assembly

3. Contracting States ("the Community")

The "Community," or the Contracting States, may have a continuing role in terms of funding and governance.[210] For the purpose of this paper, "Contracting States" will refer to the minority of Committee of Ministers Representatives who expressed opposition to at least one measure (even though they ultimately voted for the Protocol).

There was significant disagreement amongst Contracting States on the proposed new admissibility criterion, particularly by six States: Austria, Belgium, Finland, Hungary, Latvia and Luxembourg.[211] The Austrian Minister presented a compromise proposal to resolve the debate on the wording of the new admissibility criterion.[212] However, most Ministers found the proposal to be too complicated. The Austrian proposal indicated that the language "no significant disadvantage" put forth an unintended negative message that some human rights violations are not significant.[213] NGOs agreed with this interpretation, as the language could be wrongly interpreted as a signal to national authorities that there was no need to redress minor human rights violations.[214] Judges then presented an amendment to the criterion that was adopted into the final version.[215]

Another contested point was the Parliamentary Assembly's proposal to increase the number of judges. Russia strongly opposed this measure. According to Schokkenbroek, because the measure would allow the Parliamentary Assembly to appoint additional judges from states with the greatest number of claims filed against them, Russia had "great difficulties" with this measure because if the Court were to be composed of two Russian judges, this would "visibly expose Russia as having violated a significant number of human rights."[216] The final version of the Protocol did not include this provision.[217]

Considering that these opposing states ultimately adopted the final Protocol version, and since most of their recommendations were taken into consideration, they were successful. Although the Protocol only required support from 2/3 of the Ministers, the Committee aimed for unanimous or near unanimous support

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had little leverage within the "bounded strategic space." *Cf.* Committee of Minister, *supra* Part VI.B.1.

210. Caron, *supra* note 20, at 415-16.

211. Eaton & Schokkenbroek, *supra* note 18, at 6.

212. The proposal setting the standard for inadmissibility was: "if it appears from the file that the object of the application has been duly examined by a domestic tribunal according to the Convention and the Protocols thereto and in the light of the case-law of the Court, unless respect for human rights as defined in the Convention and the Protocols thereto requires a further examination of the application or the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance." *Id.* at 15, n. 36.

213. *Id.* at 18.

214. *Joint Response*, *supra* note 14.

215. Eaton & Schokkenbroek, *supra* note 18, at 18.

216. Interview with Jeroen Schokkenbroek, *supra* note 152.

217. *Protocol 14*, *supra* note 12.

so as to ensure that Contracting States would sign and ratify the Protocol.[218] Therefore, these dissenters were successful in shaping the Court's "strategic space."[219]

4. ECHR Judges and Court Registry

Caron points to "adjudicators" as another group that works within and against the "bounded strategic space."[220] He defines the group as "the sole arbitrator or the panel of judges or arbitrators who will carry out the adjudicative function of the institution."[221] Caron further explains, "[T]he logic of this group may be viewed as one of self-interest expressed in the ability to be retained as an adjudicator, hired within another institution as an adjudicator, or maintain and increase their reputations."[222] He concludes that the group is concerned with "what their task is and most importantly who has defined their task."[223]

Although this definition describes a portion of the ECHR judges' motivation, it should be noted that the judges' also have an interest in ensuring that the Court continues to function so as to continue protecting human rights.[224] Additionally, their motivation for influencing the reform can be seen as one in which they aim to reduce their workload, especially with regard to inadmissible cases, so that they can decide more Chamber cases and have a significant effect on setting precedent.

With regards to the Court's mission, there was no clear consensus amongst judges on whether the Court should serve as more of a quasi-constitutional court or as a court for individual justice. However, ultimately, the judges supported the final Protocol (which included the new admissibility criterion), indicating support of the quasi-constitutional aim.[225] President of the Court Wildhaber was especially vocal about his independent views and goals for the Court as more quasi-constitutional.[226] In fact, he has frequently appeared before the group of "Wise Persons" to express his views on how to further reform the Court.[227]

Currently, judges are appointed by the Parliamentary Assembly for six-year unlimited terms, but Protocol 14 will change this to one nine-year term.[228] NGOs supported this measure, together with the judges, in order to reduce the

218. *See infra* Part VI.B.1.

219. The unanimity requirement for the adoption of the Protocol gave individual Contracting States greater influence within the "bounded strategic space," resulting in several key compromises. *See supra* Part VI.B.3.

220. Caron, *supra* note 20, at 415.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Position Paper*, *supra* note 16.

225. *See id.*; *Protocol 14*, *supra* note 14.

226. *See generally* Wildhaber, *supra* note 14.

227. European Commission for the Efficiency of Justice, CEPEJ (2005) 16 Rev. paras. 14-20, *available at* http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Meetings/1_Plenary/2005plenary6_en.asp.

228. *Protocol 14*, art. 2, *supra* note 12; *Position Paper*, *supra* note 16.

politics involved in judge appointments.[229] Often politics played a role in state's recommendations to the Parliamentary Assembly, and thus states would not include the current ECHR judge from their state on the list because that judge had decided a significant amount of cases against the state.[230] Limiting judicial terms to a single term would therefore remove the politics from appointments and judges would no longer have to worry about campaigning in their states to influence their appointment.[231] The judges supported this change because it would make them appear more impartial and would remove their need to campaign back home.[232] The measure was approved and generally uncontested.

Regarding single-judge formations, the judges did not attain their goals.[233] The CDDH considered alternatives to single-judge formations, including the one promoted by the judges to create a completely separate filtering committee, in which registry lawyers would serve solely to filter cases and dismiss invalid claims.[234] The design would be similar to a regional court of first instance like that of the European Court of Justice.[235] The judges' amendment to create a separate admissibility reviewing institution was ultimately rejected because of the belief that it would de-legitimize the case review process.[236] Opponents argued that the process would not be legal in nature because lawyers rather than judges would review such applications.[237]

There was no consensus amongst the judges regarding the admissibility criterion, which relates back to the lack of judge consensus on the Court's mission.[238] However, the Judge Position Paper indicated general support of the final Protocol which included the admissibility criterion.[239] ECHR Judge, Matti Pellonpaa, explained, "Any opposition may have been based on different motives. Some may have thought that the provision did not go far enough, others would have liked it to be drafted differently, still some others may have been against it as a matter of principle."[240] In the end, the judges, as a whole, supported the measure so that they could focus on "more important" constitutional decisions.[241]

President of the Court Luis Wildhaber was one of the main proponents of the admissibility criterion to transform the Court into a constitutional court similar to that of the Supreme Court of the United States.[242] In fact, Wildhaber

229. *Position Paper*, *supra* note 16; *Joint Response*, *supra* note 14.
230. Eaton & Schokkenbroek, *supra* note 18, at 22.
231. *Id.*
232. *Position Paper*, *supra* note 16.
233. *Id.*
234. Mahoney, *supra* note 14, at 173.
235. *Explanatory Report*, *supra* note 3, para. 34.
236. *Id.*
237. *Position Paper*, *supra* note 16.
238. *Id.*
239. *Id.*
240. E-mail from Matti Pellonpaa, ECHR Judge, to Christina Hioureas, Student at UC Berkeley School of Law (Boalt Hall) (Nov. 12, 2005, 2:0211 am PST) (on file with author).
241. *See Position Paper*, *supra* note 16.
242. Wildhaber, *supra* note 14, at 163-64; Interview with John Dalhuisen, *supra* note 54.

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is one of the individuals behind the creation of the group of "Wise Persons" to further reform the Court because he was unable to accomplish his objectives with Protocol 14.[243] From his perspective, although review of each individual application to the Court is important, it would be even more important to filter out inadmissible claims in order to reach constitutional judgments in key cases.[244] Wildhaber prioritizes new subject matter cases over repetitive claims because he believes the former serve as the "magnifying glass which [reveals] the imperfections in national legal systems," thereby allowing the ECHR to influence Contracting State human rights standards through its judgments.[245] However, Wildhaber's instant move to further reform the Court without allowing Protocol 14 to take effect first may have a negative effect on Contracting States. That is, because the Protocol has not yet been implemented, establishing a group of "Wise Persons" immediately after the passage of the Protocol may dissuade Contracting States from signing and ratifying the Protocol.

But it appears that Wildhaber has taken a pragmatic stance on the status of the ECHR and fears that the current case influx and projected further influx will handicap the Court.[246] His idea of reform would allow judges more time to reflect on more serious cases.[247] As John Dalhuisen, Special Advisor to the Commissioner for Human Rights, explained, "The more time judges have to spend on dynamic cases, the more interesting and significant their decisions will be."[248] With less time to spend on each case and more work being delegated to the Court registry, Wildhaber fears that the Court will devolve into a small claims court and no longer play a preeminent role in human rights jurisprudence.[249] Based on Wildhaber's statements, Dalhusien speculates that "perhaps part of the motivation behind this reform is to alter the perception of the Court as purely an administrative churner."[250]

But Wildhaber's concerns also stem from the history of Court reform. After the adoption of Protocol 11, the Court was reformed administratively by changing practices and updating technology, and was also reformed fiscally by increasing resources. However, neither of these reforms has succeeded in curbing the influx of cases or the number of inadmissible claims.[251] Therefore, Protocol 14 was proposed to change the filtering process in order to reduce the number of cases accepted. Wildhaber's vision of the reform is one of radical change in which he aims to "change the nature of the Court altogether."[252] The

243. Interview with John Dalhuisen, *supra* note 54; Interview with Jill Heine, *supra* note 126.
244. Wildhaber, *supra* note 14, at 164.
245. *Id.*
246. Wildhaber, *supra* note 14, at 163-65.
247. *Id.* at 163-64.
248. Interview with John Dalhuisen, *supra* note 54.
249. Wildhaber, *supra* note 14, at 163-65.
250. *Id.*
251. *See generally supra* note 3 and accompanying text.
252. *Id.*

question now is whether such dynamic change is acceptable to the actors within and outside of the "bounded strategic space."

If one bases the judges' success on their Position Paper, it appears that they were successful on the majority of their suggestions and opinions, but unsuccessful regarding establishing a separate filtering body. However, their joint opinion to transform the Court into more of a quasi-constitutional court was successful. Conversely, President Wildhaber's individual struggle to shape the Court's "bounded strategic space" appears to have not been successful. This is reflected in his almost immediate formation of the group of "Wise Persons" after the close of the Protocol drafting process to further reform the Court in a more radical manner.[253]

5. The Commissioner for Human Rights

The position of Commissioner for Human Rights was created in 1999 and is a separate institution within the Council of Europe.[254] The Commissioner's main tasks include promoting education in human rights, encouraging states to create human rights structures and improve existing structures, identifying problems in human rights law in relation to practices, and generally promoting the Convention in Contracting States.[255] The Commissioner's goal for the Court's reform was mainly to increase his role to more significantly affect human rights jurisprudence.

The Commissioner aimed to increase his role by changing Court process so as to enable him to present proposals to bring forth claims.[256] Rather than accept his complete proposal, a compromise was reached because Ministers expressed concern that one must directly experience the harm in order to bring forth claims.[257] The compromise was to permit the Commissioner to intervene as a third party and provide evidence for cases. Schokkenbroek explained that the Steering Committee hesitated to adopt the Commissioner's proposal because it would have complicated the Commissioner's role by transforming it into something "similar to a prosecutor and this may have a negative impact on his capacity to dialogue with states."[258] Therefore, in the end, the CDDH adopted this more "modest proposal" of allowing the Commissioner to intervene as a third party.[259]

253. The absence of early consensus amongst the judges prevented the creation of a strong role for them within the "bounded strategic space." However, their Position Paper was used by other actors to push their own agendas. *See, e.g.*, Amnesty Interim Activity Report, *supra* note 142. While at the same time, individual judges such as President of the Court Wildhaber, sought to influence the CDDH to reflect his independent goals for the Court. By doing so, Wildhaber, in effect, substituted himself for the role of the judges within the "bounded strategic space."

254. *See generally* The Commissioner for Human Rights, *4th Annual Report to the Council of Europe and the Parliamentary Assembly*, CommDH 10 (2004).

255. *Id* at 9-12.

256. *Id.*

257. Eaton & Schokkenbroek, *supra* note 18, at 24-25.

258. Interview with Jeroen Schokkenbroek, *supra* note 152.

259. *Id.*

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According to Dalhuisen, the Commissioner was "mainly concerned with his own role and strengthening his relationship with the Court."[260] By comparing Commissioner Alvaro Gil-Robles' proposal to the final version of the Protocol, however, it is apparent that he did not get entirely what he wanted.[261] Nevertheless, the Commissioner "welcomes [the compromise amendment] in the European Convention for the Protection of Human Rights and Fundamental Freedoms as an important development."[262] The Commissioner's language indicates that although the Committee of Ministers did not accept his original proposal, the final version was to his liking.

Based on the Commissioner's goals and the end result of the Protocol, one can conclude that the Commissioner was mildly successful. Given that he was not actively involved in the process and given that he was satisfied with any increase in his role, the Commissioner was successful in working within the "bounded strategic space" to encourage the CDDH and the Committee of Ministers to adopt a compromised version of his suggestion.[263]

6. NGOs/Special Interest Groups

Although they do not have an official role in the institution, NGOs/special interest groups may express preferences for a particular proceeding outcome or institutional reform.[264] Caron identifies these groups as "other interested parties" or "outsiders" to the process because they do not serve a direct role in the institution and thus are not within the "bounded strategic space."[265] He further explains, "even though the outsider groups may view the positions they hold as important, they are almost by definition of marginal influence in the process."[266] Thus, the NGOs strive to increase their influence and often work *against* the "bounded space."

The three main NGOs involved in the drafting process, Amnesty International, Fédération Internationale des Droits de l'Homme (FIDH), and the International Commission of Jurists, have Observer Status to the Council of Europe. Therefore, although they are "outsiders" because they do not have

260. Interview with John Dalhuisen, *supra* note 54.

261. Commissioner for Human Rights Report, *supra* note 254, at 17. ("The Commissioner's proposal and the Assembly's Recommendation were not retained in Protocol No. 14 to the European Convention on Human Rights and Fundamental Freedoms, amending the control system of the Convention; the concern being expressed that such a role might prejudice the necessary confidence between the Commissioner and member States."). *See also* Parliamentary Assembly, *Opinion No. 251*, *supra* note 145.

262. Commissioner for Human Rights Report, *supra* note 254, at 17.

263. Because the Commissioner had humble goals for his individual position rather than lofty institutional aspirations, he was able to adapt within the strategic space and work within the framework of the Council of Ministers. The Parliamentary Assembly faced the opposite scenario.

264. Caron, *supra* note 20, at 417-18 (giving an example of environmental non-governmental organizations that have an interest in the work of panels of the World Trade Organization).

265. *Id.*

266. *Id.*

official voting capabilities, they may also be considered "insiders" in that they have participatory status as the Counsel has established this unique relationship with members of civil society. NGOs not only express the views of their respective organizations, but also represent the voices of current and future applicants to the Court. Thus, they serve the purpose of promoting individual human rights by serving as "the living voice of future applicants in their aim to seek redress" for human rights violations in their states.[267]

Probably the most actively engaged NGO was Amnesty International. Jill Heine, Legal Advisor to Amnesty International, characterizes the NGOs' goal as "ensuring that the voice of civil society was heard and considered in the reform discussions."[268] More specifically, NGOs aimed to ensure that the "individual right to decision on their rights and the merits of the claim was not curtailed" by defeating the new admissibility criterion clause.[269] NGOs suggested addressing the root of the case influx problem by encouraging better implementation of the Convention at the national level and stronger domestic remedies, but they also suggested treating the present problem through a filtering mechanism.[270] They wanted to make sure that the reform process addressed the serious challenges identified by better filtering inadmissible cases and expediting the repetitive application review procedure. They view the Court's mission as serving individual justice through upholding the Convention. This includes the right of individuals to seek redress from the Court, the proper "implementation of the Convention at the national level," and the assurance that states will work to provide effective remedies at the national level.[271]

NGOs were actively included in the Protocol reform discussions and although they can be characterized as "outsiders" because they did not have an official institutional role, NGOs were to some extent treated as "insiders" since they were invited to meetings and were encouraged to draft opinions of and suggestions for the Protocol.[272] However, Heine points out a key distinction in that the NGOs were "observers, [who] commented and followed the CDDH carefully" but had no direct influence, such as voting rights.[273] Although NGOs "were privy to documents and discussions," the public in general was as well.[274]

However, NGOs had multiple avenues by which to exert their influence as they lobbied the CDDH, Committee of Ministers, Parliamentary Assembly, Commissioner for Human Rights, and Contracting States.[275] NGOs made efforts to get as many influential individuals and groups to support their recommendations as possible in order to persuade the Committee to adopt their

267. Interview with Jill Heine, *supra* note 126.
268. *Id.*
269. *Id.*
270. *Joint Response*, *supra* note 14.
271. Interview with Jill Heine, *supra* note 126.
272. *Id.*; Interview with Jeroen Schokkenbroek, *supra* note 134.
273. Interview with Jill Heine, *supra* note 126.
274. *Id.*
275. *Id.*

suggestions. Together with 114 NGOs,[276] Amnesty presented "Comments on the [CDDH] Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights."[277] In this report, the NGOs detailed their objections to the CDDH's Interim Report and offered amendments.[278] Their main fear was that the Protocol draft would curtail the right of individual petition.[279] Therefore, the NGOs' main objections were the admissibility criteria and the presence of national judges at Committee hearings on recurring cases.[280]

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276. Signatories to the *Joint Response*, *supra* note 14; The "*Joint Response* to Proposals to Ensure the Future Effectiveness of the European Court of Human Rights" has been signed by the following NGOs and bodies: AIRE Centre (Advice on Individual Rights in Europe) [United Kingdom], Amnesty International, APADOR-CH (The Romanian Helsinki Committee) [Romania], Association internationale pour la défense de la liberté religieuse [Switzerland], Association for the Prevention of Torture (APT) [Switzerland], Association for the Rehabilitation of Torture Victims - Center for Torture Victims [Bosnia and Herzegovina], Association for European integration and human rights, Ældresagen [Denmark], Bar Human Rights Committee, British Institute for Human Rights (BIHR) [United Kingdom], British Irish Rights Watch [United Kingdom], Bulgarian Helsinki Committee [Bulgaria], Bulgarian Lawyers for Human Rights [Bulgaria], Bulgarian Section of ICJ [Bulgaria], Centre for Development of Democracy and Human Rights [Russian Federation], Children's Legal Centre [United Kingdom], Committee on the Administration of Justice (CAJ) [United Kingdom], Conference of European Churches (CEC), Conference of European Justice and Peace Commissions [Netherlands], Dansk Retspolitisk Forening [Denmark],Den Danske Helsingforskomité (Danish Helsinki Committee) [Denmark], European Council on Refugees and Exiles (ECRE), European Human Rights Advocacy Centre [United Kingdom], European Network Against Racism, European Roma Rights Centre (ERRC), Fair Trials Abroad, Fédération Internationale des Assistants Sociaux (FIAS), Fédération Internationale des ligues des droits de l'Homme (FIDH), Folkekirkens Nødhjælp [Denmark], FN-forbundet (United Nations Association) [Denmark], Georgian Young Lawyers Association [Georgia], Gesellschaft Für Bedrohte Völker [Germany], Greek Helsinki Monitor [Greece], Helsinki Foundation for Human Rights in Poland [Poland], Humanistische Union e.V. [Germany], Human Rights Association, Human Rights Watch, Hungarian Helsinki Committee, Ihmisoikeusjuristit ry (Finnish Section of the ICJ) [Finland], Immigration Law Practitioners' Association (ILPA) [United Kingdom], INQUEST [United Kingdom], Institut de formation en droits de l'homme du barreau de Paris [France], International Commission of Jurists (ICJ), Internationale Gesellschaft für Menscherechte (IGFM) [Germany], International Federation of the Action by Christians Against Torture (FIACAT), International Helsinki Federation, Interights [United Kingdom], International Working Group for Indigenous Affairs (IWGIA) [Denmark], Irish Penal Reform Trust [Eire], Justice [United Kingdom], Kindernothilfe e.v. [Germany], Kurdish Human Rights Project (KHRP) [United Kingdom], The Law Society of England and Wales [United Kingdom], League of Human Rights [Czech Republic], Liberty [United Kingdom], Ligue internationale de l'Enseignement, de l'Education et de la Culture populaire [France], Marangopoulos Foundation for Human Rights [Greece], Medical Foundation for the Care of Victims of Torture [United Kingdom], Minority Rights Group [Greece], Moldovan Helsinki Committee for Human Rights [Moldova], Movement against Racism, Nottingham University Human Rights Law Centre [United Kingdom], Nürnberger Menschenrechtszentrum [Germany], Opusgay [Portugal], Pat Finucane Centre [United Kingdom], Peace Brigades International (Deutscher Zweig e.V.) [Germany], PRO ASYL [Germany], Red Barnet (Save the Children) [Denmark], Rehabilitation and Research Centre for Torture Victims (RCT) [Denmark], Reporters Sans Frontières (RFS) [France], Resources Center of Moldovan Human Rights NGO's [Moldova], Scottish Human Rights Centre [United Kingdom], Sokadre (Coordinated Organizations and Communities for Roma Human Rights) [Greece], World Organization against Torture (OMCT)

277. *See generally* Amnesty Interim Activity Report, *supra* note 142.

278. *Id.*

279. *Id.* para. 5.

280. *Id.* paras. 28-37, 52.

Although the admissibility criterion was amended from "substantial harm" to "significant disadvantage" because the former would potentially be interpreted too ambiguously, the NGOs still oppose the amended proposal, arguing that it would contradict the underlying mission of the Court as set out in the Convention, which is the right to individual application and justice, because the criterion could eliminate potentially valid claims.[281] In a press release, Amnesty asserted that the decision-makers must ensure that Protocol 14 "does not curtail the possibility for individuals to gain redress for human rights violations."[282] Amnesty further argued that every human rights violation poses a significant disadvantage and expressed its concern that the criteria in the proposed amended admissibility criterion was "vague [and] could lead to arbitrary decisions," allowing the Court to potentially reject well-founded cases.[283] Fearing that the criterion could be applied differently depending on which state is involved, and fearing that it could be inconsistently applied by different Court Chambers, the NGOs aimed to eliminate any expansion of the admissibility criterion from the Protocol.[284] In the end, the Parliamentary Assembly, Commissioner for Human Rights and some Contracting States agreed with the NGOs' position opposing the measure.

Yet another reason for their opposition is that allowing the Court to dismiss less "substantial" claims would send a signal to Contracting States that they may violate "less significant" human rights and get away with it.[285] Amnesty and the other 114 NGOs, therefore, interpret the additional requirement as "an erosion of the protection of human rights," potentially leaving victims without a remedy.[286]

Further, since ninety to ninety-six percent of applications are already deemed inadmissible, the NGOs argued that there was no need to add another admissibility criterion; rather the reform needed to address and expedite the filtering process. According to Steven Greer, "It was generally agreed, however, that such a test would have little impact upon the Court's case management problems."[287] However, two of the individuals closely involved in drafting the Protocol, Martin Eaton and Jeroen Schokkenbroek, argue that the additional criterion *would* affect the case backlog—it would affect about five percent of the applications filed.[288] Although opponents to the criterion have argued that five percent is insignificant, the authors argue to the contrary because there are currently 16,000 cases pending before the Court and five percent of that would

281. *Id.* paras. 5, 33-37, 67-72.

282. Amnesty Int'l, *supra* note 14.

283. Amnesty Interim Activity Report, *supra* note 142, para. 36; *see also Position Paper*, *supra* note 16, para. 34 (indicating that the admissibility criterion was "rather vague, even potentially arbitrary.").

284. Amnesty Int'l, *supra* note 14.

285. *Id.*

286. Greer, *supra* note 14 (explaining the ramifications of changes in the wording of the new criteria).

287. Greer, *supra* note 17, at 89.

288. Eaton & Scokkenbroek, *supra* note 18, at 14.

be 800 cases.[289] In their opinion, this is a significant number of cases disposed.[290]

Rather than add another admissibility criterion, NGOs urged the Committee of Ministers to focus on improving human rights at the state level, such as the Recommendations described above, and to address the filtering mechanism by implementing a system for expediting case review process.[291] If the reforms addressed the root of the problem, that is, Contracting State violations, this would "lead to fewer violations and the creation or improvement of redress mechanisms in member states."[292] Therefore, the NGOs promoted a Recommendation for the Council of Europe to urge Contracting States to allocate financial resources to lawyers and NGOs so that they can provide legal aid to potential applicants and help to ensure the claims brought forth are valid.[293] This reform would reduce the number of inadmissible cases since citizens could request assistance to file a valid claim. NGOs state, "Our experience is that the provision of such advice has dissuaded people from making misconceived applications."[294] While this measure could help reduce the number of inadmissible claims, this proposal is also possibly a self-serving measure to encourage Contracting States to better fund NGOs and strengthen their role.

Lastly, the NGOs recommended increasing the budget since an adequate budget is key to the Court's continued effectiveness (although the budget process is separate from the protocol process). They noted that the ECHR's budget is only a quarter of the European Court of Justice's budget, and urged that "it is essential that Contracting States show greater commitment to the Court system by providing the Court with sufficient resources to carry out its tasks."[295] However, Schokkenbroek indicated that the budget was not an issue for states because there is a consensus that proper funding for the Court is essential.[296] Therefore, he explained that in a separate budgetary process, Ministers are likely to vote in favor of increasing the budget.[297] For his part, Dalhuisen considered that, "[t]he Committee of Minister's financial tolerance is not infinitely elastic. Although states are not interested in limiting the Court's role to reduce the budget, states are inevitably concerned with increased costs."[298] Although states support the Court and will likely vote to increase the budget if deemed necessary, they aim to reform the Court in a manner which would not require a significant budgetary increase.

289. *Id.*
290. *Id.*
291. Interview with Jill Heine, *supra* note 126.
292. Bianchi, *supra* note 198.
293. *Joint Response*, *supra* note 14, para. 10.
294. *Id* para. 11.
295. *Id.* para. 16.
296. Interview with Jeroen Schokkenbroek, *supra* note 152.
297. *Id.*
298. Interview with John Dalhuisen, *supra* note 54.

Amnesty and the other NGOs also opposed the single judge formation on the grounds that the rapporteurs would be playing a more significant role in the decision-making process, thus taking on a judicial role.[299] NGOs opposed granting rapporteurs this much power because the Convention entitles applicants to have their cases "determined by a court, not by administrative officers."[300] They further argue that the Court will lose its credibility if it adopts such a measure because the decisions would lack collegiality.[301] Since the CDDH did not present any information as to how much time judges spend in committees, the NGOs argue that there is no proof that single-judge formations will be more efficient than committees of three judges deciding admissibility.[302] However, Amnesty indicated that if the CDDH did adopt the single-judge formation measure, then they would recommend that the CDDH limit it only to admissibility.[303] The final version of the Protocol did include single-judge formations, but only to decide admissibility, as Amnesty had recommended.[304]

Likewise, regarding "manifestly well-founded" or "repetitive cases," NGOs did not want a national judge present at such hearings.[305] This would give the Committee of three judges the ability to substitute an elected judge on behalf of the state party if the state opposes the application of the three-judge committee procedure for repetitive cases.[306] The NGO view was that this measure would reduce the Court's appearance of independence and prejudice the applicant.

Amnesty welcomed the change in judges' terms of office to single nine-year terms because longer terms would give judges "greater security of tenure of office" which would reinforce their independence.[307] However, NGOs opposed the Parliamentary Assembly's proposal for changing the manner in which ad hoc judges would be appointed.[308] Instead, Amnesty supported the version that was ultimately adopted by the Committee; that is, that the provision alters the process so that states must first submit a list of judges and the President of the Court will then select which ad hoc judge will sit on the panel depending on the case.[309] This way, states cannot strategically place a judge to hear a specific case because they believe she will find in the state's favor.[310]

Although the Parliamentary Assembly proposed increasing the number of Court judges to expedite the application review process, NGOs did not support

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299. *Joint Response*, *supra* note 14, para. 7.
300. *Id.*
301. *Id.*
302. Amnesty Interim Activity Report, *supra* note 142, para. 46.
303. *Id.* para. 48.
304. *Protocol 14*, *supra* note 12.
305. Amnesty did not want the following language: Article 38(3): "including whether that State has contested the applications of the procedure under paragraph 1(b)." Amnesty Interim Activity Report, *supra* note 142, para. 24.
306. *Protocol 14*, *supra* note 12, art. 38(3).
307. Amnesty Interim Activity Report, *supra* note 142, para. 16.
308. Press Release, Amensty Int'l, *supra* note 14.
309. *Protocol 14*, *supra* note 12, art. 6.
310. Amnesty Interim Activity Report *supra* note 142, para. 52.

this proposal because they did not find it to be a necessary means of expediting the procedure.[311] They argued that since the states that have the greatest number of violations would get to appoint an additional judge, this would not be fair because it would bias the process and "undermine the consistency of the jurisprudence and collegiality of the Court."[312]

Additionally, Amnesty supported increasing the Commissioner's role and also argued for increasing his budget and staff in order to strengthen his role.[313] Although Amnesty and the Commissioner supported each other's proposals, neither claims to have engaged in logrolling, as both "operate on principle."[314] Rather, Dalhuisen explained that Amnesty International's arguments were very persuasive and well articulated, which may explain the similarity in their stances.[315]

Amnesty was, in fact, very persuasive, as it also managed to successfully build a coalition of 114 NGOs that spoke with a unified voice in support and opposition to specific measures.[316] This is especially remarkable considering that special interest groups often battle against one another and try to put forth different proposals. When asked how Amnesty built this coalition, Heine explained that Amnesty participated in meetings with London-based international and national NGOs and other professionals, in which they formulated a plan and reached out to NGOs across states by urging them to voice their opinions.[317] Amnesty would consult with NGOs and at the same time also fix a position on a certain measure and ask the others to sign on.[318] Heine explained that the decision-making process amongst these NGOs was very transparent and democratic.[319]

Asked whether Heine views the NGOs as successful in shaping the final Protocol draft, she replied, "No, we were not successful in ensuring the maintenance of individual right to application by eliminating the admissibility criterion."[320] However, considering that the NGOs were working outside of the "bounded strategic space," they were fairly successful. First, they mounted a tremendous campaign of 114 NGOs that proposed alternative solutions to the case influx and to the enormous number of inadmissible applications. By putting forth these alternative proposals, NGOs influenced the reform process by encouraging debate on certain proposals. Moreover, they succeeded in publishing these views to raise awareness. Second, in the end, some Ministers, the Commissioner for Human Rights, and the Parliamentary Assembly agreed

311. *Id.* paras. 62-63.
312. *Id.* para. 66.
313. *Id.* paras. 49, 53-56.
314. Interview with Jill Heine, *supra* note 126.
315. Interview with John Dalhuisen, *supra* note 54.
316. *See Joint Response*, *supra* note 14.
317. Interview with Jill Heine, *supra* note 126.
318. *Id.*
319. *Id.*
320. *Id.*

with their views. Third, their suggestion that judges' terms be limited to one nine-year term was adopted, as was their recommendation to increase the Commissioner's role. In addition, the Ministers ultimately agreed with the NGOs and rejected the proposal to increase the number of judges based on which states had the most applications filed against them or alter the ad hoc appointment process so that the appointments would require Parliamentary Assembly approval.

However, these successes were insignificant in relation to the entire Protocol. NGOs were unsuccessful in their most important aim, which was to convince states and their Ministers not to accept the new admissibility criterion. This was the focus of their entire effort and was crucial to their goal. By failing to defeat the criterion, they failed to shape the Court's mission to preserve individual justice.[321]

VII.
CONCLUSION: WHO PREVAILED AND WHY?

Some have characterized the Protocol as a "missed opportunity."[322] President of the Court Luzius Wildhaber views the Protocol as a "step in the right direction [but even] with the new reform, the Court will continue to have an excessive workload."[323] However, this comment may merely reflect his loss in the process as he was unable to achieve radical Court reform by transforming it into a constitutional court. But if Wildhaber is correct, what more could have been done, and what prevented that from happening?

The Protocol 14 drafting process was a complex interaction of many actors that resulted in an incremental reform rather than a radical restructuring of the Court. This modest reform is mainly due to the reluctance of states to adopt a more drastic reform. In considering the complex interaction of actors, it is difficult to determine who was the most successful in the effort to shape a tribunal's "bounded strategic space." One interpretation is to consider which actors were the most successful in shaping the Protocol and in determining the Court's mission by considering each actor's political motivations and suggested changes in comparison to the final version of the Protocol.[324] Also key to this

321. Although not completely within the "bounded strategic space," NGOs were able to alter other actors' positions within the space by bringing forth alternative proposals that were taken seriously by other actors within the strategic space. *See, e.g.*, Parliamentary Assembly, *supra* Part VI.B.2; Contracting States, *supra* Part VI.B.3; Commissioner, *supra* Part VI.B.5.; *Contra* Committee of Ministers, *supra* Part VI.B.1.

322. Interview with Luzius Wildhaber, President of European Court of Human Rights (Apr. 21, 2004), http://www.coe.int/t/e/com/files/interviews/20040421_interv_wildhabber.asp.

323. *Id.*

324. Some political scientists have turned to calculating legislative "batting averages," in which they calculate the total legislation proposed and divide it by the amount of legislation that passed. However, to apply this tactic to the *Protocol 14* drafting process by dividing the number of amendments suggested by the number adopted would not serve as a significant measure of success. This is because taking a pure numerical calculation of these reforms ignores the significant

assessment is determining which actors were most restricted by the "bounded strategic space," and were thus unable to shape the Court into their vision.

Those who pushed for narrow individual justice were least successful, as indicated by the fact that the new admissibility criterion was adopted. This included the NGOs, the Parliamentary Assembly, the Commissioner for Human Rights (to some extent), and some Contracting States. Meanwhile, those in favor of a broad interpretation of individual justice to restructure the ECHR into a quasi-constitutional court were the most successful. This includes the Committee of Ministers and judges.

The Committee of Ministers was probably the most influential actor because it controlled the process and only needed to concede enough to get the Contracting States to ratify the Protocol. Thus it was able to succeed in achieving its mission of transforming the Court into a quasi-constitutional Court. However, time will tell if the Protocol will result in these aims. One can characterize the Committee's most important goal as ensuring the Protocol's passage because failure to do so would render the drafting process useless. From this standpoint, it is clear that the Committee was successful in achieving consensus amongst Ministers. However, whether they will be successful in ensuring Contracting State signature and ratification is another story.

Even so, the Committee's efforts may still be interpreted as unsuccessful or incomplete since the Committee set up a group of "Wise Persons" to look into further reforms and to outline a program of actions to further reform the Court almost immediately after the adoption of the Protocol. This move gives the appearance that the Protocol will not accomplish the Ministers' aims. Therefore, although the Committee of Ministers was the most influential, Protocol 14 and the reform package were not entirely adequate in addressing the Committee's identified problems and desired solutions. This result is probably due to the many actors involved in the struggle to shape the Court's "bounded strategic space."

The Parliamentary Assembly was probably the least successful, as it was unable to achieve its main goal of maintaining or increasing its role. Maybe the Assembly's lack of success says something about the Council of Europe's structure, where the body composed of popularly elected representatives is significantly less influential than the body representing the views of Contracting States. It is possible that this reform process sheds light on a democratic deficit in the Council of Europe in which officials directly representing voter views are significantly less influential than appointed bureaucrats.

Despite this possible structural problem within the Council of Europe, the Protocol drafting process was a particularly unique interaction between a significant amount of actors and ideas, which resulted from the transparency of

differences between each proposal. Some amendments aim to change the protocol more significantly than others and thus could be more difficult to reach a consensus on. Not all proposed amendments should be weighed equally and therefore, such a formalistic assessment would not be helpful to this discussion.

the process. At the same time, the process gave an illusion that "outsiders" would be treated as "insiders," in that NGOs were invited to meetings and encouraged to put forth ideas, but most of these recommendations were not adopted.

However, even though the majority of the "outsiders'" views were not ultimately adopted, these actors played a significant role in making the process more deliberative so that the insiders considered the measures and the alternatives that they were voting on more thoroughly. Although NGOs were restricted by the "bounded strategic space" because they do not have voting capabilities, they themselves influenced the reform process by expressing the voice of civil society, as they presented alternative proposals that led to a greater debate on the Court's future. In the end, some Ministers, the Parliamentary Assembly, and the Commissioner for Human Rights agreed with their views and expressed these concerns to the Committee of Ministers. Although the vast majority of NGO proposals were not adopted, and although their main goal to defeat the new admissibility criterion failed, NGOs significantly altered the process, making it more transparent and democratic despite the limitations imposed by the Court's "bounded strategic space."

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