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**Pulled from the Edge of Legal Nihilism: Russia and the European
Human Rights Regime
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“Without exaggeration, Russia is a country of legal nihilism.
No European country can boast of such disregard for law”
- Dimitrii Medvedev, 22 January 2008

Introduction

Russia has had a troubled relationship with the institutions of the Council of Europe devoted to the protection of fundamental rights in the region. The country ratified the European Convention on Human Rights [hereinafter ECHR] in 1998 after considerable hesitation and despite significant scepticism within and outside of Russia. In the nearly fifteen years since, it has attracted a disproportionately large portion of the work of the Council’s institutions because of the number of petitions alleging Russian violations of the ECHR and the state’s reluctance to implement some of the decisions of the Court. The resulting tension between Russia and the Council of Europe led the former to refuse for several years to ratify Protocol 14 of the ECHR. Protocol 14 is the most recently-implemented reform to the structure of the European Court of Human Rights [hereinafter ECtHR], designed to improve the efficiency of the Court by enhancing its discretion to determine which cases to hear. Protocol 14 also enables the Committee of Ministers to request an interpretation of judgment and initiate proceedings against a member-state for non-compliance. Russia had resisted ratifying the protocol since 2006, single-handedly blocking its adoption, in protest of what it considered to be “politically motivated” judgments against it by the Court.¹ Ultimately it succumbed to pressure to ratify after it was agreed that a Russian judge would always sit on any panel or committee issuing a judgment on the merits of an application against Russia. Russia has also not ratified Protocol 6 or 13 (concerning the abolition of the death penalty), or Protocol 12. Russia did sign Protocol 6 in 1997, shortly after joining the CoE, but is currently the only member state not to have ratified it. The issue of abolishing the death penalty is politically contentious in Russia, although the Constitutional Court has imposed a *de facto* moratorium on the practice since 1999.² Russia did ratify Protocol 11 – the most significant reform of the ECHR system, which established mandatory jurisdiction of the ECtHR and individual appeals to the Court – in the lead-up to its accession.

Russia’s hesitations regarding the ECHR regime reflect a broader and deeper ambivalence regarding the country’s identity, whether it wishes to define itself as fundamentally European or not.³ As the Council of Europe moves forward with plans for further reforms, Russia’s position vis-à-vis the ECHR is as important for the entire Council regime as it is domestically for respect for human rights in the country.

This memo in Part I will map out the place of the ECHR in Russian law and practice, highlighting the most important hurdles to smoother relations between Russia and the ECtHR as well as to fuller enjoyment of

¹ See Antoine Buyse (2), “Russian Duma Has Accepted Protocol 14 Today” (January 15, 2010) available at <http://echrblog.blogspot.ca/2010/01/russian-will-ratify-protocol-14-today.html>.

² See BBC News, “Russia enshrines ban on death penalty” (November 19, 2009), online: <http://news.bbc.co.uk/2/hi/europe/8367831.stm>.

³ See Angelika Nussberger, “Russia and European Human-Rights Law: Progress, Tensions and Perspectives – Foreword”, (2012) 37 *Review of Central and East European Law* 155.

Convention rights by individuals in the country. Part II will consider the current round of proposed reforms of the European human rights regime as embodied in the 2012 Brighton Declaration, with particular attention to the relevance of such reforms for Russia in view of the elements highlighted in Part I.

Part I. Russia and the European Convention on Human Rights

1.1. Introduction

Since acceding to the ECHR system in 1998, Russia has become the largest contributor of individual applications to the European Court in Strasbourg. In 2011 alone, of 64,000 total applications allocated to a judicial formation, 12,465 (19.5%) came from Russia. Of the current backlog of cases (151,624 as of the end of 2011), Russia accounted for 40,225 (26.5%). Russia is of course also the state with the largest population in Europe, which accounts to a degree for the large number of applications stemming from that country; on a per capita basis, the country does not feature among the top ten contributors of applications to the ECtHR. Nevertheless, the sheer number of applications against Russia remains a major stumbling block for the ECHR regime. For this reason, ongoing efforts by the Council of Europe to reduce the Court's massive backlog depend heavily upon Russia. These efforts include structural reforms to the ECHR system on one hand and institutional reforms within individual member states on the other. Part I will focus on domestic factors within Russia which contribute to the ECtHR's backlog and hinder prospects for reform, and assess the prospects for overcoming these barriers in the future.

1.2. An overview of Russia's judiciary and legal system in light of the ECHR

Russia's judiciary is large and complex, comprising 37,000 judges and 2,600 courts, often with weak ties to any central judicial authority. Moreover, on a model common in Continental Europe, the judiciary is divided into three discreet "streams": General courts, arbitrazh courts, and the Constitutional Court. General courts operate under the authority of the Russian Supreme Court (RSC) and deal generally with criminal, civil, and administrative matters. Arbitrazh courts operate under authority of the Superior Court of Arbitration and deal with commercial disputes. The Constitutional Court for its part determines whether laws and treaties conform to the federal constitution and deals with jurisdictional disputes between branches or levels of government.

Judicial independence is an issue of significant concern in Russia. According to Trochev,⁴ judges are an integral part of the apparatus of government and therefore have little incentive to "speak truth to power" or rule against the government. Several Constitutional Court judges have been forced to resign after commenting on the high levels of influence exerted by government officials -- and particularly the

⁴ Alexei Trochev, "All Appeals Lead to Strasbourg? Unpacking the Impact of the European Court of Human Rights on Russia" (June 18, 2009). *Demokratizatsiya*, Vol. 17, No. 2, pp. 145-178, at 156, Spring 2009; Univ. of Wisconsin Legal Studies Research Paper No. 1082. Available at SSRN: <http://ssrn.com/abstract=1421342>

office of the president -- upon members of the judiciary.⁵ Moreover, due to decentralization, judges in outlying regions such as the North Caucasus often develop close ties to local law-enforcement agencies which may cause them to deviate from the rulings or guidelines set down by higher courts.⁶

An additional challenge for Russia's judiciary is its relative political weakness. As President Dmitry Medvedev noted in his 2008 address to the Congress of Judges, as many as half of non-criminal judgments go unenforced.⁷

That being said, people active within the Russian legal system have underscored the enormous progress which has been realised over the last fourteen years since the country's ratification of the ECHR. Legislative reforms have changed judicial, procedural, civil and criminal law to reflect the requirements of the ECHR. In a general sense, there has been progress of the rule of law in Russia, an evolution which some observers directly link to participation in the European human rights regime.⁸

Despite these improvements, the general dynamic of the relation of the judiciary to the executive and legislative branches remains problematic when considering human rights issues, which pit courts against the other branches. This is all the more serious for the ECHR given that the Convention must first and foremost be implemented through each member state's domestic legal structure, with European institutions like the Court intervening only in situations in which domestic institutions fail to correct violations of human rights. This brings up the question of the legal status of the ECHR under Russian law as well as the domestic recognition of judgments issued by the European Court in Strasbourg.

1.2.1 Domestic force of the ECHR in Russia

Like all state parties to the ECHR, Russia is under an international treaty obligation vis-à-vis the CoE and its member states to extend to all persons under its jurisdiction the rights contained in the Convention and to abide by the decisions of the ECtHR in this regard. As Russia is formally a monist state, this treaty obligation is in theory automatically incorporated into domestic law; however, this does not always translate well into practice. For example, Russia does not routinely harmonize its jurisprudence with relevant judgments of the ECtHR.⁹

⁵ See Gregory L. White, "Judge Set to Retire Amid Kremlin Row", Wall Street Journal (December 3, 2009) online: <http://online.wsj.com/article/SB125979340320873615.html>

⁶ Trochev p. 154; Lauri Malksoo, "Concluding Observations. Russia and European Human Rights Law: Margins of the Margin of Appreciation" (2012) 37 *Review of Central and East European Law* 359, at 360.

⁷ Philip Leach, Helen Hardman, & Svetlana Stephenson, "Can the European Court's Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia" (2010) 10:2 *Human Rights Law Review* 346-59, at 352.

⁸ See Vladislav Starzhenetskii, "Assessing Human Rights in Russia: Not to Miss the Forest From the Trees – A Response to Preklik, Schonfeld and Hallinan" (2012) 37 *Review of Central and East European Law* 349, at 350.

⁹ Keller & Stone Sweet p. 688. See S.Y. Marochkin, "Place and Role of Norms and Sources of International Law in the Legal System of the Russian Federation: The Doctrinal Exploration and the Legislative Development of the Constitutional Principle" (2012) 3 *Beijing Law Review* 31-41.

The interaction of Russian law with the ECHR is well captured in *Konstantin Markin v. Russia* (2010), the first time the ECtHR explicitly contradicted a legal finding of the Constitutional Court. The case concerned the question of whether a law prohibiting the military from granting parental leave to male personnel (but not female personnel) was discriminatory. The Constitutional Court held that it was not, due to constitutionally-justified limits on the equality principle and the unique legal status and role of the military. The ECtHR reached the opposite conclusion in a Chamber decision in 2010, a position affirmed by the Grand Chamber in March 2012.¹⁰ This triggered internal opposition to the ECtHR in Russia from various quarters: President Medvedev stated that “we will never surrender that part of our sovereignty, which would allow any international court or any foreign court to render a decision, changing our national legislation.”¹¹ The Chairman of the Constitutional Court, Valerii Zorkin, offered that under Russian constitutional law the ECHR had precedence over ‘laws’ but not over the Constitution, in addition to insisting on the need for a dialogue between the courts in Strasburg and Moscow with the constitutional court playing a necessary role as mediator between the Russian and European legal orders.¹² Finally in 2010 a legislative proposal was introduced in the Duma that would formally have given the Constitutional Court power to uphold a law notwithstanding ECtHR objections (“limiting Russia’s international flexibility” to meet its treaty obligations).¹³ This position appears, on the face of it, inconsistent with Russia’s obligations under the ECHR, which provides for the binding nature of the Court’s decision. It is not altogether clear whether the legislative proposal enjoyed the support of the Russian presidency, and in any case the proposal was withdrawn in July 2011.¹⁴

1.2.2 Enforcing ECtHR judgments in Russia

In general terms, ECtHR judgments give rise to three sorts of state obligations: the obligation to pay compensation to the victim, the obligation to restore the individual (through non-pecuniary means) to the situation he should have been in but for the violation (*restitutio in integrum*), and the obligation to undertake legislative or policy reforms to prevent the violation from recurring (“general measures”). General measures often require more creative solutions than simply resolving legislative deficiencies, as some structural problems are too deeply-rooted in the day-to-day practices of authorities.¹⁵ Russia has a strong record of paying compensation ordered by the Court -- a better record than it does with domestic courts’ judgments -- yet its record is not as good with regard to other types of measures -- particularly

¹⁰ *Markin v. Russia*, Appl. No 30078/06, Judgment of the Grand Chamber, 22 March 2012. See Issaeva, Sergeeva & Suchkova p. 78.

¹¹ Ekaterina Butorina, Artem Kobzev, “Tekst iskhodil ne ot nas [The Text Did Not Come From Us]”, *Moskovskie Novosti*, 21 June 2011, available at: <http://www.mn.ru/>, cited in William Pomeranz, “Uneasy Partners: Russia and the European Court of Human Rights”, (2012) 19:3 *Human Rights Brief* 17, at 19. <http://www.mn.ru/> society/20110621/302663946-print.html.

¹² Valerii Zorkin, “Predel ustupchivosti [The Limit of Concessions]”, *Rossiiskaia gazeta*, 29 October 2011, available at: <http://www.rg.ru/printable/2010/10/29/zorkin.html>.

¹³ Issaeva, Sergeeva & Suchkova p. 80.

¹⁴ See Malksoo, at 364.

¹⁵ Issaeva, Sergeeva & Suchkova p. 82.

legislative reform, conducting proper investigations, and holding individual officials accountable for misdeeds.¹⁶

Various domestic barriers with regard to the enforcement of Court judgments will be discussed in detail in the coming sections, such as weak or inconsistent judicial authority, political animosity to the Court, insufficient resources, institutional inefficiencies, and bureaucratic obstacles. Another such barrier worth noting here is the complexity of Russian judicial procedure. There are separate codes of procedure for criminal, civil, and commercial matters, each outlining slightly different criteria for the reopening of cases.¹⁷ For example, while the Criminal Procedural Code expressly authorizes reopening a domestic case based on the finding of a violation by the ECtHR,¹⁸ no such provision can be found in the Civil Procedural Code. An additional problem is that Russia's Duma is not well-structured to oversee the government's performance on human rights issues; no specific committee exists to monitor human rights, as human rights are deemed to be a cross-cutting issue which affect all areas of law.¹⁹

1.3. Root causes of Russian applications to the ECtHR

Of the 1,140 judgments of the Court (through the end of 2011) which found at least one violation of the ECHR by Russia, precisely half (570) found violations of the art. 6 right to a fair trial. 456 judgments concerned the protection of property, 422 the right to liberty and security, and 291 the right to an effective remedy. Russia recently supplanted Turkey as the country with the most art. 2 and art. 3 (right to life and prohibition on torture) judgments against it; of particular note, 202 judgments against Russia found a deprivation of the right to life, and 357 found inhuman or degrading punishment.²⁰

Scholars have identified a number of systemic problems in Russia which contribute to its large share of the ECtHR's case load, upon which I will elaborate individually in the subsections which follow. First, bureaucratic overlap, resource deficiencies, and the decentralization of the judiciary have resulted in the frequent delayed enforcement or non-enforcement of domestic courts' decisions. Second, the process of *nadzor* (supervisory review of judicial decisions) allows authorities to re-open closed cases, including criminal cases where the defendant was acquitted, which has been found to infringe on the principle of legal certainty. Third, harsh detention conditions in prisons have often been found to amount to inhuman or degrading punishment. Finally, political and bureaucratic obstacles often result in a failure to investigate serious allegations of human rights violations.

¹⁶ Bigg p. 2.

¹⁷ Issaeva, Sergeeva & Suchkova p. 71

¹⁸ Art. 413(4)(2).

¹⁹ Issaeva, Sergeeva & Suchkova p. 75

²⁰ ECtHR Annual Report 2011, p. 161.

1.3.1. Delayed- or non-enforcement of domestic rulings: The Burdov decisions

By far the largest single source of Russian cases at the ECtHR is the non-execution of domestic judgments in civil and administrative cases.²¹ The case of *Burdov v. Russia* (2002) was the first ECtHR decision concerning Russia. Mr. Burdov was a Chernobyl rescue worker who was injured and consequently entitled to government benefits. Even after a four-year legal struggle and a ruling in his favour from a domestic court, his pension was not paid to him. The ECtHR held that Russia had violated his art. 6(1) right to a fair hearing by making him wait four years after appealing to a domestic court, and his art. 1 Protocol 1 right to property by denying him income that he was reasonably entitled to expect.²²

The CoE Committee of Ministers, responsible for overseeing the implementation of ECtHR decisions, identified four systematic problems in Russia which hinder the domestic enforcement of decisions: 1) inefficiencies within the bailiff system; 2) lack of coordination between domestic agencies; 3) domestic courts' failure to clearly identify the debtor in administrative cases; and 4) administrative confusion over how to claim the required funds from the Finance Ministry.²³ Some positive steps were implemented in response to the 2002 *Burdov* decision: In 2005, citing *Burdov*, the Constitutional Court struck down part of the federal budget because it did not require authorities to pay compensation for procedural delays within a fixed time frame. In 2007, also citing *Burdov*, the Russian Supreme Court found that courts' tolerance of procedural delays violated the Constitution and the ECHR, and it encouraged the Duma to speedily adopt legislative reforms on the right to trial within a reasonable time.²⁴

However, Mr. Burdov was still not paid the full amount that was owed to him, leading him to bring his case back to the ECtHR in *Burdov v. Russia (no. 2)* (2009). This case was selected to be a pilot decision on Russian non-compliance with the ECtHR, the first pilot judgment concerning Russia.²⁵ In addition to finding violations of art. 6(1) and art. 1 Protocol 1, the Court this time also found a violation of art. 13 -- the right to an effective remedy for the violation of a Convention right -- even though this argument was not raised by the applicant. Moreover, the Court deviated from its past practice by ordering Russia to remedy the situation within a strict time limit.

The 2009 *Burdov (no 2)* case raised awareness within Russia of the need to address entrenched and systemic human rights shortcomings, and received acknowledgement from then-President Dmitry Medvedev. In the words of Anatoly Kovler, the Russian judge on the ECtHR, *Burdov (no 2)* was

²¹ Trochev p. 149.

²² *Burdov v. Russia (no. 1)* (2002), para. 37.

²³ Leach, Hardman & Stephenson p. 348.

²⁴ Leach, Hardman & Stephenson p. 352.

²⁵ A pilot judgment is a procedure used to deal with systematic human rights violations which give rise to a large number of applications from a particular country. The Court selects a "pilot" case to decide in its instance, and in addition to individual compensation it indicates general measures which should be taken to remedy the situation which gave rise to it. Other comparable cases are then put on hold until the state has the opportunity to respond to the findings of the pilot decision.

symbolically selected as the pilot case to remind Russia of the repeated nature of the violation -- “like Pavlov’s dog”. According to Kovler, the 2009 *Burdov (no 2)* case signalled the exhaustion of the ECtHR’s patience with Russia, and its continued failure to resolve its systemic problems could result in its expulsion from the CoE.²⁶ Although Russia’s response to *Burdov (no. 2)* was far from perfect, the Committee of Ministers noted with satisfaction Russia’s 2010 law granting compensation to individuals whose right to a speedy trial is violated.²⁷ It is generally said that *Burdov (no 2)* sparked an improvement in the cooperation between Russia and the CoE Committee of Ministers.²⁸

1.3.2. Nadzor: Supervisory review of judicial decisions

A second significant systemic hurdle to fuller implementation of the ECHR in Russia is the institution of *nadzor*. Under art. 320 of the Russian *Code of Civil Procedure* (1964), government officials had the discretionary authority to reopen final judgments where they fear that there has been a wrongful application of the law, a procedure which clashes with the principle of *res judicata*. The conditions under which *nadzor* can be activated in civil cases have been restricted by legislative reforms in 2002 and again in 2007. It nevertheless remains an important institution of civil and criminal law in Russia today.²⁹ *Nadzor* has been explained by the Constitutional Court as necessary to balance the rights of the victim with those of the accused.³⁰ In *Ryabykh v. Russia* (2003), the ECtHR found that this process of *nadzor* violated the right to legal certainty implied by art. 6(1) of the ECHR.³¹ Despite this, the practice continues, raising tensions between Russia and the ECtHR. Attempts to ban it have been quashed by the Constitutional Court. In 2007, 180,000 criminal cases were reviewed under *nadzor*, though the practice has since diminished substantially.³²

1.3.3. Detention conditions amounting to inhuman or degrading punishment

In cases such as *Khodorkovskiy v. Russia* (2004), Russia has been taken to task by the ECtHR for the poor conditions in its pre-trial detention and prison facilities -- specifically, lack of space, poor sanitary conditions, and humiliating treatment by prison officers. The Court has further noted that Russian judges appear to routinely approve extension of detention orders requested by law-enforcement officials without considering whether they are actually necessary or the availability of alternative options. After

²⁶ Leach, Hardman & Stephenson p. 355.

²⁷ Issaeva, Sergeeva & Suchkova p. 76.

²⁸ Lisa McIntosh Sundstrom, “Advocacy Beyond Litigation: Examining Russian NGO Efforts on Implementation of European Court of Human Rights Judgments”, (2012) *Communist and Post-Communist Studies* 1, at 7; Leach, Hardman & Stephenson p. 356.

²⁹ William Pomeranz, “Supervisory Review and the Finality of Judgment under Russian Law” (2009) 34 *Review of Central and East European Law* 15-36.

³⁰ Trochev, p. 158

³¹ *Ryabykh* para 49. http://sutyajnik.ru/rus/echr/judgments/ryabykh_eng.htm

³² Trochev p. 159.

Khodorkovskiy and other judgments, Russia improved the conditions in many pre-trial detention centres in what has been called a gesture of goodwill toward the Court.³³

Other routine practices in Russia, such as excessive physical punishment of soldiers, have similarly been found to constitute a violation of art. 3 (prohibiting torture).³⁴

1.3.4. Failure to investigate grave human rights violations: The Caucasus cases

Finally, crimes allegedly committed by Russian security forces during the Second Chechen War (1999-2004) have been the subject of thousands of applications to the ECtHR. The conflict with Georgia occasioned a further bulk of applications from South Ossetia in the more recent period. In addition, Georgia introduced an interstate application against Russia, one of only a handful of such applications in the history of the ECtHR. Both situations constitute one of the key flashpoints of the tensions between Russia and the ECtHR because of their politically sensitive nature.³⁵

In many of these cases Russia failed to cooperate with the Court by refusing to share requested documents, in violation of art. 38, and not adequately investigating instances of killings, forced disappearances, and torture, in violation of arts. 2 and 3. In at least four instances, the government explicitly refused to investigate alleged crimes even after the ECtHR ordered it to do so.³⁶ Russia has sometimes invoked art. 161 of its Code of Criminal Procedure (which prohibits compromising the interests of the parties while an investigation is ongoing) to justify its refusal to turn over documents to the Court, but the Court has rejected this argument saying that Russia's application of art. 161 has been inconsistent and that in any event the parties' privacy can be adequately protected by Rule 33 of the ECtHR.³⁷

Even in cases where Russia did agree to launch internal investigations, it often refused to provide adequate information to the victims' families, in violation of their art. 13 right to an effective remedy, and in many cases the ECtHR found that the government's superficial responses to applicants' complaints to constitute inhuman punishment in violation of art. 3.³⁸ Legal and bureaucratic barriers often hinder investigations, such as institutional overlap and a prohibition on disclosing names of officers involved in counter-terrorism operations.³⁹ A report by Human Rights Watch found that in none of the

³³ Bigg p. 2.

³⁴ Trochev p. 150.

³⁵ Petr Preclik, "Culture Re-Introduced: Contestation of Human Rights in Contemporary Russia", (2012) 37 *Review of Central and East European Law* 173, at 206-207.

³⁶ Human Rights Watch p. 14.

³⁷ Solvang p. 15; Rule 33 of the ECtHR provides that Court documents, which are ordinarily made public, can be shielded from public scrutiny in the interests of public order or national security.

³⁸ E.g. *Bazorkina v. Russia*, cited in Human Rights Watch p. 13ff.

³⁹ Human Rights Watch p. 29.

cases it analyzed were individuals held accountable for crimes they committed in Chechnya, even when powerful evidence against them was available.⁴⁰

In *Tangiyeva v. Russia* (2007), the Court penalized Russia for its failure to investigate the alleged crimes and turn over requested documents to the Court by drawing inferences in favour of the applicant. Having found that the applicant had made a *prima facie* case against the government, the Court held that the burden of proof had shifted to Russia, and found Russia liable for the killings of the applicant's family.⁴¹ This prompted rare dissent from the Russian and Azerbaijani judges on the Court who thought this decision went too far. Later cases determined the limits to how far the Court was prepared to go: in the subsequent *Zubayrayev* case, the court found that there was not sufficient evidence to draw a similar inference in favour of the applicant despite Russia's failure to investigate. For some, there is a risk that this case will signal to Russia that it can sometimes benefit from non-cooperation with the Court.⁴²

These are the four main causes which directly impede fuller implementation of the ECHR in Russia, to which could be added a number of secondary ones such as the general unavailability of the ECtHR jurisprudence in the Russian language or obstacles to the free operation of civil society organisations in the country. More broadly, commentators have questioned whether the attitude of various segment of Russian society regarding the ECHR is sufficiently positive to foster a local human rights culture. This is the issue to which the memo turns to now.

1.4. Russian attitudes toward the ECtHR

Like many governments around the world, Russia tends to resist external constraints on its exercise of sovereign authority. Europe is a figure of exception in this respect, with every state accepting the mandatory competence of the ECtHR. In Russia, as indeed in a number of other European countries like the United Kingdom, political figures often deliver polemical speeches against the Court. Some senior Russian judges have forcefully argued that the ECHR should be subordinate to the Russian Constitution. Even among ordinary Russians, support for the ECtHR is not universal.

1.4.1. Attitudes of ordinary Russians

Polls indicate that in the early years after Russia's accession to the ECtHR, ordinary Russians knew very little about the Court and its functioning. As the confidence of Russians in their own judiciary has decreased, their knowledge of and willingness to apply the ECtHR has increased. Between 1996 and 2004, the number of Russians who indicated a willingness to challenge government actions in a domestic forum decreased from 41% to just 1%. Trochev argues that domestic pressure on courts to cover up abuses by the government rather than properly investigate them feeds people's willingness to submit applications to the ECtHR and largely accounts for the rise in applications. In some regions, civil society

⁴⁰ Human Rights Watch p. 11.

⁴¹ Solvang p. 16.

⁴² Solvang p. 17.

organisations have realised the political leverage which could be generated from merely filing an application before the ECtHR, again resulting in a dramatic spike in the number of Russian applications to the Strasbourg court.⁴³ In 2008, 61% of Russians knew of their ability to bring complaints to the Strasbourg Court, 29% indicated that they were prepared to do so, and 68% agreed that such a court should exist.⁴⁴

It has been argued that the attitudes of Russian society towards the ECHR regime reflect a broader uncertainty regarding the country's identity as a European state. For Russia, straddling the border between Europe and Asia, European integration presents a complex, arduous and progressive process. In relation to the ECHR, the ambition should realistically be seen as the vernacularisation of European human rights standards rather than the forced adoption, lock stock and barrel, of a monolithic Strasbourg law.⁴⁵ That said, observers within the effort to implement human rights in Russia have denied that there is anything like a fundamental incompatibility between human rights and Russian values.⁴⁶

1.4.2. Attitudes of the Russian judiciary

Russia's 1993 Constitution grants citizens the right to bring complaints to international bodies, yet politicians and jurists alike agree on the need to find means of stemming the flow of Russian complaints to the ECtHR by improving Russians' reliance on domestic forums. The issue is particularly sensitive when the Russian Constitutional Court's interpretation of certain human rights conflicts with that of the ECtHR.

Constitutional Court Chairman Zorkin has adamantly defended Russia's judicial sovereignty, emphasizing the primacy of the national constitution and stating that the public interest must be determined first and foremost at the domestic level. He does recognize ECtHR case law as binding if it reflects international legal norms, but denies that Russia ever surrendered to the ECtHR the power to change Russian law without the intervention of Russian courts. That said, even in his knee-jerk reaction to the overturning of the Constitutional Court decision in the *Markin* case, he insisted on the positive nature of the dialogue between the ECtHR and the Constitutional Court, providing examples of Russian decisions which gave effect in domestic law to holdings of the Strasbourg court.⁴⁷ His position can be contrasted with that of Thorbjorn Jagland, the secretary-general of the Council of Europe, that human rights (and by implication, ECtHR judgments) categorically enjoy primacy over national law.⁴⁸

The principles of subsidiarity and the margin of appreciation appear to support the notion that the ECtHR should show a significant level of deference to national courts' interpretations of human rights, yet the tension surrounding the question of how much deference is appropriate remains ongoing. Krug argues that an over-emphasis on the ECtHR's perceived preeminence could serve as a disincentive for the

⁴³ Sundstrom, p. 4.

⁴⁴ Trochev p. 148.

⁴⁵ Preclis p. 204 & 229.

⁴⁶ Starzhenetskii p. 356.

⁴⁷ Zorkin, *passim*.

⁴⁸ Issaeva, Sergeeva & Suchkova p. 80.

development of Russian constitutional law; he believes that the two fields should begin to merge organically. Indeed, Krug points to developments in the area of civil defamation law (specifically, an RSC directive ordering lower courts to “take into account” ECtHR practice in that field, which will be discussed further below) to show that Russia has begun a transition from “mere compliance” with ECtHR judgments to “genuine respect” for the ECHR’s norms; he expects this to have broad effects on freedom of speech and freedom of the press.⁴⁹ Another example of the ECtHR’s influence on Russian judicial attitudes can be seen in the law of capacity, where in 2009 the Russian Constitutional Court amended the law so as to recognize intermediate stages of capacity, internalizing the ECtHR decision in *Shtukaturov v. Russia* (2008).⁵⁰

Individual judges differ widely in their attitudes toward the ECtHR. On one hand, many influential judges appear more prepared to support the ECHR through words than through action. Many may not have time to properly understand or apply ECtHR decisions, decline to hear arguments based on ECtHR case law, or neglect to fully explain their judicial reasoning (contrary to RSC guidelines).⁵¹ Yet, overall, there are indications that judges -- including many of those appointed by Vladimir Putin (known for his hostility to the Court) -- are increasingly drawing on ECtHR case law, including cases to which Russia was not a party, without fear of political sanction. In doing so, these judges are asserting their independence from the political apparatus, and helping to improve public confidence in the courts.⁵² Russian judges regularly participate in international conferences with other CoE members, and ECtHR judgments are becoming more easily available in Russian. Local and international civil society organisations and the CoE have invested significant effort to train lawyers and judges in ECHR law over the last decade, with some positive results.⁵³ In 2003, the plenum of the Russian Supreme Court adopted a resolution mandating that judges should know and apply the jurisprudence of the ECtHR.⁵⁴ Trochev opines that the Constitutional Court is the judicial body which has the most stable and positive attitude toward the ECtHR.⁵⁵

The systemic effect of the ECHR in Russia is to push towards better enforcement of domestic court decisions, improved professionalism of judges, and greater independence from political interference. For at least a portion of the Russian judiciary, the ECtHR offers an inspiring model to emulate at the national level.⁵⁶

1.4.3. Attitudes of the Russian Executive Branch

Although it is far from the only government to exhibit antipathy to the Court, the Russian Executive has shown mounting hostility to the ECtHR as the wave of judgments against Russia brought increasing

⁴⁹ Krug p. 43.

⁵⁰ Cited in Issaeva, Sergeeva & Suchkova p. 77.

⁵¹ Trochev p. 157.

⁵² Trochev p. 166.

⁵³ Sundstrom p. 4.

⁵⁴ Id.

⁵⁵ Trochev p. 157.

⁵⁶ Sundstrom p. 6 & 12.

international scrutiny and condemnation of Russia’s human rights practices – and contradicting President Putin’s claims to have brought law and order to Russia. This tension is particularly evident surrounding politically-contentious issues such as the war in Chechnya. There have been documented instances of political intimidation and coercion aimed at discouraging Russians from filing applications with the Court, and officials have called applicants “anti-Russian” and “public enemies”.⁵⁷

Moreover, Russian officials have shown resistance to implementing reforms mandated by the European Court where such reforms would be inexpedient or would reduce their own power or influence. Given the fragile state of democracy and rule of law in Russia, the task of effecting systemic reform that would satisfy the CoE’s standards seems like a daunting one. Along with Turkey and Ukraine, Russia has been singled out by the Parliamentary Assembly of the CoE as one of the least cooperative states, and one with the most substantial implementation problems.⁵⁸

In 2007, President Putin restructured the office of Russia’s representative to the ECtHR to make it subordinate to the Justice Ministry. Previously it had been under the office of the President, and this change was seen as in effect a bureaucratic demotion.⁵⁹

Yet, the picture is not entirely bleak, and there are a number of success stories and causes for optimism. As Keller and Stone Sweet note, the ECHR is not merely an external regime but rather one which inevitably operates in significant ways within national legal orders.⁶⁰ In many fields of law, ECtHR case law is being gradually internalized by Russian courts, as law professor Gennady Danilenko predicted it would in 1999.⁶¹ For instance, in 2003, the RSC affirmed that the ECHR is binding within the Russian legal system, and it instructed lower courts to “take into account” relevant ECtHR practice when deciding cases.⁶² A number of politicians (most notably Dmitry Medvedev) have espoused the cause of judicial reform in response to ECtHR judgments, and funding for prisons and the judiciary has been increased. Prison conditions in many areas have improved, and there have been arguable improvements in judicial procedure, such as the introduction of the doctrine of “effective remedy” for procedural delays.⁶³

1.5. Conclusion

Trochev argues that given the massive numbers in which Russian citizens have flooded the ECtHR, the Court is turning into something like a “supercassation” court for Russia.⁶⁴ In fact, however, it should be noted that relative to its population Russia does not contribute especially disproportionately to the Court’s case load. Judgments of the Court have placed serious pressure on Russian leaders, often demanding radical overhauls of public institutions beyond what officials were willing or able to

⁵⁷ Trochev p. 146.

⁵⁸ Bigg p. 2.

⁵⁹ Trochev p. 151

⁶⁰ Keller & Stone Sweet p. 710.

⁶¹ Krug p. 42.

⁶² Krug p. 34ff.

⁶³ Trochev p. 155.

⁶⁴ Trochev p. 165.

implement. This has resulted in frequent friction between the CoE and Russia, perhaps more than most other member-states.

Yet construing the Court as an external force bullying Russia into compliance or eliciting resistance would not be entirely accurate. As noted, the Court also operates as an internal force in many respects. Most notably, the mere prospect of ECtHR litigation is sometimes sufficient to alter the behaviour of Russian citizens or authorities. Scholars have noted that in many areas Russian law is gradually converging with the ECHR and CoE practice, and there is reason to expect that this trend will continue.

After several years of increases, the number of Russian applications to the ECtHR dropped significantly in 2011. This should be seen as a decidedly positive development, as ultimately the success of Russia's integration into the CoE can be measured by whether actions taken in response to adverse judgments result in a reduction of the number of analogous applications filed.

Despite the more recent decrease, which remains to be confirmed as a long-term trend, Russia still stands as the largest state contributor to the ECtHR's docket. Beyond Russia, there are still institutional issues marring the Court making it imperative to continue the work of improving its structures after the coming into force of Protocol 14. The memo now turns to consider the latest round of discussions within the CoE, centred on the 2012 Brighton Declaration, with a view to assessing whether it offers the promise of better implementation of human rights in Russia.

Part II. The Brighton Declaration and Reforms to the European Convention on Human Rights

2.1. Introduction

The ECHR now provides protection to roughly 800 million people across an area that is significantly more vast than Europe itself. The Court's jurisdiction expanded steadily over the 1990s to include post-Soviet states, but few reforms have been passed to cushion the impact of their arrival in the Council of Europe. Enlargement brought not only more people, but also a broader range of issues, a more diverse cultural context, a wider spectrum of national capacities, and differing degrees of political commitment to the ECHR project. As a result, since the Court's creation in 1959, more than 90% of its judgments have been delivered following the "enlargement process".⁶⁵ The Convention's main enforcement tool, the ECtHR, has not been transformed in a manner that matches the changes to the *espace juridique* of the ECHR; as a result, the Court is stretched to the breaking point. Added to the excessive number of applications reaching the Court, concerns exist over the disproportionate number of applications coming from a small group of states, the enforcement of the Court's judgments, and the frequency of repetitive cases.⁶⁶

⁶⁵ European Court of Human Rights, *50 Years of Activity: The European Court of Human Rights—Some Facts and Figures* (Strasbourg: Council of Europe, 2010) at 5, online: Council of Europe <http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf>.

⁶⁶ See generally, Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010) at 475-517.

The 2012 Brighton Declaration is the latest development in the continuing attempt to reform the ECHR system. This memo outlines the problems that have plagued the ECHR system leading up to Brighton (I), and analyses how the declaration addresses those problems (II). The memo concludes with an analysis of the impact that Brighton will have on Russia and its relationship to the Convention system as a whole.

2.2. Persistent problems of the Court needing reform

Enlargement of the ECHR brought with it not only the promise that human rights would be respected throughout Europe but also the risk that the European Court of Human Rights would fail to absorb its increased workload. While the ECHR system has evolved since enlargement, certain problems are recurring: caseload, repetitive cases, national concentration of cases, execution of judgments, and preservation of the individual petition. I address each of these in turn.

2.2.1 Caseload

From 1999-2011, the number of applications allocated to a judicial formation—that is, a formation of either a full panel of judges to decide on the merits or a smaller committee to decide on admissibility—rose by an alarming 767%.⁶⁷ In 2007, Jean-Paul Costa, then president of the Court, remarked that “without far-reaching reforms—some would say radical reforms—the flood of applications reaching a drowning court threatens to kill off individual petition de facto.”⁶⁸ Since this warning, the flood has continued despite the introduction of new protocols, declarations, and the work of various conferences. Although 90% of cases reaching the Court are rendered inadmissible, the Court must still process these claims. As of 1 January 2012, there were 151,600 cases pending before a judicial formation.⁶⁹ Consequently, this enormous volume of applications saps much of the judicial attention of the Court, leaving less time to address urgent matters and develop important case law.⁷⁰

Protocol 14, which came into effect in 2010 after Russia finally relented in its opposition, introduced new procedures to reduce the amount of judicial attention given to admissibility decisions—declarations of inadmissibility can now be made by one instead of three judges, for instance—but the protocol did not itself limit the number of applications reaching the Court. Former president of the Court judge Costa

⁶⁷ European Court of Human Rights, *Annual Report: 2011* (Strasbourg: Council of Europe, 2011) at 14 [ECtHR, *Annual Report*].

⁶⁸ Jean-Paul Costa, Speech Given on the Occasion of the Opening of the Judicial Year, in *European Court of Human Rights: Dialogue Between Judges* (Strasbourg: European Court of Human Rights, 2007) at 7.

⁶⁹ European Court of Human Rights, *The European Court of Human Rights in Facts and Figures—2011* (Strasbourg: Council of Europe, 2011) at 5, online: Council of Europe < http://www.echr.coe.int/NR/rdonlyres/C99DDB86-EB23-4E12-BCDA-D19B63A935AD/0/FAITS_CHIFFRES_EN_JAN2012_VERSION_WEB.pdf > [ECtHR, *Facts and Figures*].

⁷⁰ On this point, see European Court of Human Rights President Jean-Paul Costa’s remarks in his 2011 annual address: ECtHR, *2011 Annual Report*, at 37; Council of Europe, *Explanatory Report—Protocol 14*, para 37 [Council of Europe, *Explanatory Report*].

doubted as recently as 2011, however, that the gains made by this streamlined procedure would keep pace with the ever-increasing number of applications made to the Court.⁷¹

2.2.2 Repetitive cases

Repetitive cases are cases which centre on a similar legal issue. They are a troubling phenomenon at the Court for two reasons: they drain the Court's resources when national courts could address these cases by following the Court's jurisprudence; and, they indicate a failure at the national level to fully implement the ECHR. As Ed Bates puts it, "[r]epetitive cases contribute nothing new to the jurisprudence of the ECHR, however they clearly sap the Court's ability to function efficiently and threaten to deprive it of the opportunity to focus sufficient attention on cases raising new or otherwise more important features of ECHR law."⁷²

Unlike the judicial resources devoted to admissibility hearings, repetitive cases are difficult to address by changes in procedure. They are usually well founded and most often reflect a systemic failure at the national level to implement the ECHR.⁷³ Much of the phenomenon of repetitive cases can be attributed to enlargement: "The consequence of [enlargement] was that certain of the newer States joined the ECHR before putting their house in order, so to speak, and so brought with them 'structural problems of Convention compliance' that were entirely foreseeable."⁷⁴ These states react to decisions of the ECtHR on an ad hoc basis rather than engaging in the true reforms that are often at the root of the problem.

In 2004, Protocol 14 became open for signature, which contained some measures to reduce the number of repetitive cases. Protocol 14 empowers three-judge committees to decide on the merits of a case that "is already the subject of well-established case-law of the Court."⁷⁵ The previous regime required seven-judge panels to decide upon the merits of a case. The protocol additionally encourages friendly settlements by making Court available to secure this end and avoid a lengthy trial.⁷⁶

Despite these reforms to stem the tide of repetitive cases, the phenomenon continues to preoccupy the Court. The explanatory report for Protocol 14 clearly acknowledged that, "[o]nly a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court's present overload."⁷⁷

In order for repetitive cases to diminish in number, reform will likely need to occur at the national level and address specific aspects of the ECHR. In 2011, more than a third of the Court's decisions where a violation of the ECHR was found concerned article 6, the fairness and length of a trial; another 15%

⁷¹ ECtHR, *2011 Annual Report*, at 37.

⁷² Bates, at 486.

⁷³ ECtHR, *2011 Annual Report*, at 38.

⁷⁴ Bates, at 492.

⁷⁵ Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004, CETS No 194 (entered into force 1 June 2010), art 8.

⁷⁶ *Ibid*, art 15.

⁷⁷ Council of Europe, *Explanatory Report*, at para 14 cited in Bates, at 502.

concerned the prohibition of torture and inhumane or degrading treatment.⁷⁸ Such cases will continue to reach the Court so long as national governments like Russia fail to address systemic failures to fully implement the ECHR.

2.2.3 National concentration of applications

Related to the issue of repetitive cases is the concentration of applications coming from a small group of member states. More than half of the pending cases on 1 January 2012 came from four member states: Russia (26.6%), Turkey (10.5%), Italy (9.1%), and Romania (8.1%).⁷⁹ The national concentration has varied over time, with different states producing the bulk of applications to the Court. The majority of the Court's cases in the mid-2000s on the length of proceedings came from Italy, France, Slovakia, the Czech Republic, and Poland. In the well-known case of *Kudla v. Poland*, the Court remarkably ordered the reform of domestic law in order to avoid similar cases reaching the Court in the future.⁸⁰ Despite this specific attention given to repetitive cases in *Kudla*, just three years later the Court found itself delivering 50-60% of its judgments on repetitive cases.⁸¹ In addition to the systemic failure that national concentrations indicate, they also risk "creat[ing] political fault lines that threaten to derail the ECtHR reform process."⁸² The heavy burden that these few states generate for the Court also gives them disproportionate negotiating leverage in any reform discussions.

Perhaps due to the politically sensitive nature of national concentrations, the matter hardly figures in the various post-enlargement reform efforts; where it is addressed at all, it comes up under the issue of repetitive cases.

2.2.3 Delays in execution of judgments

Although the vast majority of respondent states comply with the vast majority majority of judgments delivered against them, occasionally states do disregard the Court's pronouncements in politically sensitive matters. In addition to flat-out refusals to comply, which remain unusual, some states are simply slow to execute the Court's judgments. The impact of these refusals and delays is felt on an individual and a systemic level: applicants do not receive their individual rewards, which risks undermining faith the in ECHR broadly.

Currently, the Council of Ministers is responsible for overseeing the execution of judgments, leaving the problem to be dealt with through political arm-twisting. In an ideal setting, their work would be minimal

⁷⁸ ECtHR, *Facts and Figures 2011*, at 9.

⁷⁹ ECtHR, *Facts and Figures 2011*, at 5.

⁸⁰ *Kudla v Poland*, 30210/96, 26 October 2000 (Grand Chamber). See also Bates, at 483.

⁸¹ *Ibid.* Given the systemic failure of local law that underlies national concentrations, this phenomenon dovetails with the problem of repetitive cases.

⁸² Laurence R Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Court of Human Rights" (2008) 19:1 EJIL 125 at 157.

in nature. Since enlargement, however, the Council has had to increase the time it devotes to enforcing judgments. The Council now releases annual reports on the matter, which figured prominently in the conferences in Interlaken and Izmir, as well as the work of the Group of Wise Persons.⁸³

2.2.4 Balancing individual petitions and systemic reform

A tension has emerged in recent years as to whether the Court should remain accessible to all as a guarantor of individual relief or should select the cases that present the most interesting prospects for developing ECHR jurisprudence. This reflects different constitutional models, with a supreme court playing either the role of a high court of justice directly accessible through petition, or a constitutional court agreeing to hear only cases of fundamental significance.

In the lead up to drafting Protocol 14, an Evaluation Group was struck to consider ways to reduce the Court's workload; chief among the group's proposals was empowering the Court to decline to examine applications that "raise no substantial issue under the Convention."⁸⁴ The proposal was subsequently championed by the co-author of the Evaluation Group's report, then-President of the ECtHR Lucius Wildhaber, who felt that the primary aim of the Court should be to probe and raise the bar of human rights across Europe.⁸⁵ Despite his efforts, the proposal did not make its way into Protocol 14. Opponents challenged President Wildhaber's view of the Court and argued that instead "the soul of the ECHR is the entitlement of each and every complainant to examination of his or her complaint."⁸⁶

While this tension does not present a serious problem for the Court directly, it does have an impact on other areas of reform. Favouring the individual petition forces the Court to take on repetitive cases, whereas a constitutional-style court could turn its attention away from similar cases. Moreover, a leaner 'constitutional' court would have an overall reduced workload, producing fewer judgments requiring the Committee of Ministers to supervise their enforcement.⁸⁷

2.3. The Brighton Declaration

The Brighton Declaration was adopted in April 2012 by States Parties to the ECHR at the conclusion of a "High Level Conference on the Future of the European Court of Human Rights" convened by the United Kingdom as Chair of the CoE Committee of Ministers.

The Brighton Declaration focuses broadly on the role of national authorities to preserve the ECHR system and make it more effective, whereas finer points of procedural reform were contained in Protocol 14 and

⁸³ See e.g. Committee of Ministers (Council of Europe), *Supervision of the execution of judgments and decisions of the European Court of Human Rights: Annual Report—2011* (Strasbourg: Council of Europe, 2012).

⁸⁴ Bates, at 497. See also Costas Paraskeva, "Reforming the European Court of Human Rights: An Ongoing Challenge" (2007) 76 *Nordic J Int'l* 185 at 213-214.

⁸⁵ *Ibid* at 498.

⁸⁶ Paraskeva, at 213.

⁸⁷ See also *ibid*.

are slowly having an impact.⁸⁸ This holistic approach of the Declaration is in line with what one commentator sees to be the fundamental problem that the ECHR faces: “the need for effective implementation of the Convention at the national level so as to reduce the extent of the tasks required of what, after all, remains an international system capable of achieving only so much.”⁸⁹ While the themes in Brighton only address some of the problems identified in the preceding section head-on, they do indirectly tackle the overall efficiency of the ECHR system. The following is a presentation of the main themes raised in Brighton.

2.3.1. Main themes raised in Brighton

The Brighton Conference and Declaration touched on a number of issues, including most centrally the national implementation of the ECHR, the interaction between the ECtHR and national authorities, the need to control applications to the Court, the processing of such applications, the nomination of judges and the execution of judgments.

2.3.1.1. Implementation of the Convention at national level

The ECHR varies in its effectiveness at the national level, reflecting the varied strength of domestic judicial structures, solidity of the rule of law, and degree of public commitment to the ECHR. Bilateral assistance and assistance from the Court itself can help improve the implementation of the ECHR. Specific measures that states can adopt if they have not already done so include: establishing national human rights commissions; ensuring compatibility of national legislation and draft bills with convention law; introducing new legal remedies that best conform with the ECHR; encouraging national courts to take note of convention decision; training public officials, judges, lawyers on the ECHR; providing convention information to potential applicants; and translating significant decisions and practical guides on admissibility criteria into national languages.⁹⁰

2.3.1.2. Interaction between the Court and national authorities

The Brighton Declaration notably invites states to accept advisory opinions of the Court. This development would take the form of an optional protocol, which the Committee of Ministers is invited to draft by the end of 2013. Advisory opinions would not only promote dialogue between the national authorities and the Court but also reduce the number of applications made to the Court: stronger, local application of the ECHR lessens the burden on the Court to enforce the convention.

The Brighton Declaration also notes that national authorities interact with the Court through the principle of subsidiarity and the doctrine of the margin of appreciation, which combine to promote dialogue and allow for local variations of ECHR implementation. These two aspects of interaction are

⁸⁸ The number of repetitive cases in 2011, for example, decreased for the first time in many years: See Committee of Ministers, *Supervision*, at 9.

⁸⁹ Bates, at 515.

⁹⁰ Committee of Ministers (Council of Europe), The Brighton Declaration, 2012, section A [Brighton Declaration].

reaffirmed in the Brighton Declaration by inviting the Committee of Ministers to include them in a revised Preamble to the ECHR.⁹¹ It is unclear, however, what force this change to the Preamble would have. The Committee could have been invited to make the change to the text of the Convention itself, as opposed to the Preamble, thus leaving less interpretative room for the Court to decide what impact this change will have. As it stands, there might be little gained from this proposed amendment.⁹²

2.3.1.3. Applications to the Court

The Declaration affirms the right of individual application to the Court as the cornerstone of the ECHR system, but aims to reduce the burden it places on the Court by encouraging the Committee of Ministers to shorten the period within which an application can be made from six to four months. Stricter application of admissibility criteria, applicants better informed of admissibility criteria, and developed case law on the exhaustion of domestic remedies are also envisioned by the Declaration as ways of reducing the burdensome number of applications reaching the Court.⁹³

2.3.1.4. Processing of applications

The processing delays remain a major preoccupation of Court reform. Continuing with the adjustments made by Protocol 14—namely the reduced number of judges required to dismiss an application or hear one based on well-established case law—the Brighton Declaration proposes minor modifications that should accelerate application processing. For instance, the secondment of national judges and lawyers to the Court’s Registry increases its handling capacity. The Declaration also encourages the Court to consider grouping a sample of representative cases to be decided as applicable to the whole group. Protocol 14 empowered the Court to hear cases on “well-established case law” in committees of three rather than seven; the Declaration supports a broad application of the term “well-established” so as to make increased use of this change of procedure from Protocol 14. The Declaration also contemplates the appointment of additional permanent judges and invites the Committee of Ministers to determine whether the ECHR should be amended and more judges appointed by the end of 2013.⁹⁴

2.3.1.5. Judges and jurisprudence of the Court

The Declaration notes the importance of selecting high-quality judges who are nominated at stages early enough in their career. To these ends the Declaration supports the work of an expert advisory panel on

⁹¹ *Ibid*, section B.

⁹² See Antoine Buyse, “Brighton Outcomes”, ECHR Blog (23 April 2012), online: ECHR Blog <<http://echrblog.blogspot.ca/2012/04/brighton-outcomes.html>>; Ed Bates, “The Brighton Declaration and the ‘Meddling Court’”, UK Human Rights Blog (22 April 2012), online: UK Human Rights Blog <<http://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/#more-13662>>.

⁹³ Brighton Declaration, section C.

⁹⁴ *Ibid*, section D.

judicial nominations and invites the Committee of Ministers to amend the ECHR to bar nominations of judges older than 65 years of age.⁹⁵

The Declaration, without using the expression “*stare decisis*” or “binding precedent”, affirms “the Court’s long-standing recognition that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases.”⁹⁶ This echoes and amplifies the reliance on “well-established case law” mentioned previously.

2.3.1.6. Execution of judgments of the Court

While noting the delays and sometimes non-compliance in executing the Court’s judgments, the Declaration mildly pushes for improvement in this area: it encourages the Committee of Ministers to continue its work overseeing the execution of judgments, calls on national authorities to publicize action plans to implement judgments, and invites national parliaments to scrutinize more closely compliance with the Court’s rulings.⁹⁷

2.3.1.7. Longer-term future of the Convention system and the Court

The penultimate section of the Declaration acknowledges the steps that the Committee of Ministers has taken, following the conferences in Interlaken and Izmir, to reflect on the future of the ECHR system. No specific action plan is proposed in the Declaration, but there is recognition of the fundamental importance of effective implementation of the ECHR at the national level.⁹⁸

2.3.2. Problems remaining

The Brighton Declaration steers clear of the institutional changes made by Protocol 14—reducing judicial attention given to admissibility decisions and applications regarding well-established case law—and focuses instead on the overall effectiveness of the ECHR system. This orientation of the Declaration stems partly from a desire to allow the Protocol 14 changes to take effect, and from a clearly stated aim to follow the direction taken at Izmir and Interlaken, namely, to consider the long-term future of the Court.⁹⁹ There are few concrete proposals in the Declaration that could secure the viability of the Court for years to come. Moreover, there are areas of reform that were notably undertreated in Brighton and will remain issues that will need to be addressed in the future, including the execution of judgments, national concentration of cases, the right of individual petition, and domestic implementation of the ECHR.

⁹⁵ *Ibid*, section E.

⁹⁶ Committee of Ministers (Council of Europe), The Brighton Declaration, 2012 at para 25(c).

⁹⁷ Brighton Declaration, section F.

⁹⁸ *Ibid*, section G.

⁹⁹ Noreen O’Meara, “Brighton Rocked! Next Steps for Reforming the European Court of Human Rights”, UK Constitutional Law Group (20 April 2012), online: UK Constitutional Law Group <<http://ukconstitutionallaw.org/2012/04/20/noreen-omeara-brighton-rocked-next-steps-for-reforming-the-european-court-of-human-rights/>>.

2.3.2.1. Execution of judgments

No significant change was proposed in Brighton to ensure execution of the Court's judgments. Primary responsibility remains with the member states to implement the Court's judgments, but there is little change to the structure that leaves non-compliance with the Committee of Ministers.

2.3.2.2. National concentration of applications

The national concentration of the Court's workload is not even mentioned in the Brighton Declaration. While the proposals were made to support local application of the ECHR, there appears to be no publicly stated desire to address repeat offenders of the Convention. This omission is not very surprising given that, while national concentration statistics are available in ECHR documents and the problem is well known, the politically sensitive nature of the matter has likely been the main reason why it has not figured prominently in previous reform discussions. Unsurprising as this omission may be, the unwillingness to even name the issue signals how deep the problem lies.

2.3.2.3. Individual petition

The changes to admissibility proposed in Brighton may reduce the workload of the Court, but they also pose a threat to the right to individual petition. The Declaration recommends to reduce the application period from six to four months, which will likely result in fewer applications reaching the Court. This reduction in number, however, would have nothing to do with an increase in respect for human rights.¹⁰⁰ It is an arbitrarily selected cut-off, and there is no indication for those who do not file within the proposed four-month window that their rights have been protected or reaffirmed by some other means. Ultimately, the wisdom of reducing the application window depends on the promise of a more effective application of the ECHR locally—but here too Brighton may fall short.

2.3.2.4. Local application of ECHR

Finally, while the overall approach of the Declaration is to enact low-key, incremental changes that address the efficacy of the ECHR system, there is little in the text that suggests major improvements in how the Convention will be applied locally. The principle of subsidiarity places primary responsibility for the ECHR's application with the member states. The Declaration reaffirms this responsibility and encourages member states to set up national human rights commissions, but there is no movement toward a binding commitment to create a national body that oversees the implementation of the ECHR.

¹⁰⁰ See also, Joint NGO statement, "The Brighton Declaration must strengthen human rights protection in Europe and preserve the integrity and authority of the European Court of Human Rights" (13 April 2012), online: Justice <<http://www.justice.org.uk/data/files/resources/321/Brighton-Declaration-Joint-NGO-Statement-13-April.pdf>>.

2.3.3.. Follow-Up to the Brighton Declaration

Following the adoption of the Brighton Declaration in April 2012, the Committee of Ministers directed the CoE Steering Committee for Human Rights (CDDH) to prepare drafts of two additional protocols to the ECHR.

The initial draft of Protocol 15 was made public in a provisional manner on 30 October 2012. Draft Protocol 15 provides for a new paragraph to be added to the Preamble of the ECHR which refers to the principle of subsidiarity and the doctrine of the margin of appreciation, as reflective of member states' primary duty to ensure respect for the rights enshrined in the Convention via their domestic legal systems. The protocol further sets 65 as the maximum age for nominees for appointment as a judge of the ECtHR and facilitates relinquishment by a chamber of the Court in favour of the Grand Chamber in cases that warrant it. Finally, Protocol 15 reduces from six to four months the delay within which to file an application with the ECtHR and eliminates the need for an applicant to show that he would suffer a "significant disadvantage" if the case is not heard.¹⁰¹

The initial draft of Protocol 16 was made public in a provisional manner on 30 October 2012. Draft Protocol 16 provides for the possibility for the highest court of any member state to request an advisory opinion from the ECtHR regarding a case pending before the national court. If the ECtHR agrees to deliver such an advisory opinion, it shall not be binding on member states, including the state whose high court requested the opinion.¹⁰²

The preliminary nature of the text of the two draft protocols means that it is too early at this stage to analyse precisely the significance and shortcoming of these reforms. That said, the drafts do signal a desire by the CoE to move ahead in reforming the ECHR, however slowly and partially such movement may be.

2.4. Relevance of the Brighton Declaration for Russia

The Brighton Declaration's broad approach to the ECHR has little specific impact on Russia and leaves many recurring issues related to Russia's application of the Convention unaddressed. Brighton seems to be, therefore, a politically palatable document that is unlikely to raise concerns from the Russian government or, conversely, provide concrete solutions to a better interface between the ECHR and the Russian legal order.

¹⁰¹ Steering Committee for Human Rights – Committee of Experts on the Reform of the Court, "Draft Explanatory Report to Protocol 15", COE Doc DH-GDR(2012)R2 Addendum IV (31 October 2012).

¹⁰² Steering Committee for Human Rights – Committee of Experts on the Reform of the Court, "Draft Explanatory Report to Protocol 16", COE Doc DH-GDR(2012)020 (31 October 2012).

2.4.1. Regional lawlessness

Pockets of the Russian Federation are afflicted by more rights abuses than others, and the Strasbourg court seems incapable of curbing the violations. The Northern Caucasus region has produced a high number of applications to the Court, and many applicants have received favourable judgments. The execution of these judgments has been less than satisfactory, however. While monetary awards have been paid, state officials have not been convicted of criminal offences. Moreover, where the violations are committed by paramilitary forces that are not state agencies within the terms of the ECHR, those forces escape the Court's jurisdiction.¹⁰³ This situation leads to further gaps in the rights protection that the ECHR system is supposed to provide.

2.4.2. Execution of judgments

An office in the Russian Ministry of Justice is responsible for ensuring execution of the Court's judgments, among other tasks that deal with the relationship between the Russian government and the Court. This office, however, "lacks the resources and political weight to engage in a comprehensive coordination of the execution of judgments as concerns general measures."¹⁰⁴ While recommendations could have been made to equip local authorities with the necessary tools to ensure execution, the focus at Brighton was on the sharing of good practices between states, encouraging parliamentary supervision of execution, and making locally developed action plans.¹⁰⁵ These proposals are certainly valid, but it is unclear whether they would have any material impact on the Russian office that is responsible for the execution of ECtHR judgments.

Moreover, although encouraging parliamentary supervision is laudable, this proposal lacks the institutional details to make the role of parliaments effective. Russia, for example, has adopted a horizontal approach to human rights protection within its Duma. This means that no single committee is responsible for human rights, let alone execution of the Court's judgments.¹⁰⁶ Sharing this responsibility can increase overall awareness of human rights protection among parliamentarians; it may also, however, allow the issue to fall through the cracks. The latter scenario appears to have taken hold in Russia.¹⁰⁷

¹⁰³ Grigor Avetisyan, "Strasbourg: Supreme Court of the North Caucasus" Open Democracy (24 August 2012), online: Open Democracy <<http://www.opendemocracy.net/od-russia/grigor-avetisyan/strasbourg-supreme-court-of-north-caucasus>>.

¹⁰⁴ Issaeva, Sergeeva & Suchkova, at 74.

¹⁰⁵ Brighton Declaration, at para 29.

¹⁰⁶ Issaeva, Sergeeva & Suchkova, at 75.

¹⁰⁷ Cf. *ibid.*

2.4.3. *Stare decisis* and Russia's civil law system

Parliamentarians and academic commentators in Russia, a civil law jurisdiction, have questioned the force of the Court's precedents;¹⁰⁸ parts of the Brighton Declaration could spark further debate. The authors of one article argue that the reasoning that fuels the debate is erroneous. They argue that Court is entrusted with the responsibility to ensure that the contracting parties of the ECHR meet their obligations. Whether the Court itself decides to bind itself to its own judgments, as the Brighton Declaration timidly invites it to do,¹⁰⁹ has no bearing on whether Russia must follow decisions made against it.¹¹⁰ It remains to be seen, however, whether parliamentarians will be convinced of this argument.

2.4.4. Government review of judicial decisions

The Court has raised issue with Russia's practice of allowing government officials to reopen judicially settled matters—otherwise known as the practice of *nadzor*—but this is not addressed in the Declaration. While the practice has diminished, each use is nevertheless a violation of legal certainty provided in article 6 of the Convention.¹¹¹

Conclusion

The impact of enlargement on the ECHR system will continue to be felt at the Court for years to come. While the reforms contained in Protocol 14 are beginning to show signs of a reduced caseload and more efficient processing of applications, the attention of the Committee of Ministers has now turned to its most urgent matter: effective implementation of the ECHR at the national level. If this matter is left unaddressed, then Protocol 14 will likely have been for naught. Former ECtHR President Costa has already doubted that the protocol's reforms will keep pace with the rise in applications.

The proposals in Brighton are a timid step in the direction of more effective implementation at the national level. The recommendation for states to accept advisory opinions, as framed in draft Protocol 16, would allow the Court to intervene at a stage that would prevent possible, future violations. The Brighton Declaration also encourages states to share good practices and set up national human rights commissions. These proposals would all help shift some of the burden of applying the ECHR from the Court to national authorities.

While the Brighton Declaration is a noteworthy effort to address national, systemic shortcomings in implementing the ECHR, it lacks detail and leaves some thorny issues simply unaddressed. For instance,

¹⁰⁸ *Ibid* at 81-82.

¹⁰⁹ See Brighton Declaration, section F.

¹¹⁰ Issaeva, Sergeeva & Suchkova, at 81-82.

¹¹¹ See *Ryabykh v Russia*, 52854/99, 24 July 2003 (Court (First Section)).

it remains to be seen how states are to give supervisory responsibilities of the Convention over to parliaments. National concentration of applications is not even mentioned in Brighton—which might signify how deeply run and sensitive the issue is, rather than signify its unimportance.

The reforms in Brighton are unlikely to have a significant impact on the country that produces the largest number of applications, Russia. There is nothing to address its occasionally troubling disregard of the Court's decisions, and regional areas of lawlessness are left untouched by Brighton. While Russian compliance with the ECHR has improved over the past years, its continued cooperation is essential to future reforms and viability of the Convention system. At present it remains to be seen how cooperative it will be once these reforms become as robust as they need to be for a sustainable ECHR system.