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Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime

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Abstract

The European Court of Human Rights (ECtHR) is the crown jewel of the world's most advanced international system for protecting civil and political liberties. In recent years, however, the ECtHR has become a victim of its own success. The Court now faces a docket crisis of massive proportions, the consequence of the growing number of states subject to its jurisdiction, its favourable public reputation, its expansive interpretations of individual liberties, a distrust of domestic judiciaries in some countries, and entrenched human rights problems in others. In response to this growing backlog of individual complaints, the Council of Europe has, over the last five years, considered numerous proposals to restructure the European human rights regime and redesign the European Convention on Human Rights (ECHR). This article argues that these proposals should be understood not as ministerial changes in supranational judicial procedure, nor as resolving a debate over whether the ECtHR should strive for individual or constitutional justice, but rather as raising more fundamental questions concerning the Court's future identity. In particular, the article argues for recognition of 'embeddedness' in national legal systems as a deep structural principle of the ECHR, a principle that functions as a necessary counterpoint to the subsidiary doctrine that has animated the Convention since its founding. Embeddedness does not substitute ECtHR rulings for the

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decisions of national parliaments or domestic courts. Rather, it requires the Council of Europe and the Court to bolster the mechanisms for governments to remedy human rights violations at home, obviating the need for individuals to seek supranational relief and restoring countries to a position in which the ECtHR's deference to national decision-makers is appropriate.

1 Introduction

The achievements of the European Convention on Human Rights (the European Convention; the Convention; ECHR)[1] and its supreme judicial tribunal, the European Court of Human Rights (the ECtHR or the Court), are widely acclaimed by scholars, lawyers, government officials, and human rights advocates. Since its founding over 50 years ago, the Convention has expanded along three axes – jurisprudentially, institutionally, and geographically. What was once an agreement among a small group of Western European states to guarantee core civil and political liberties by means of an optional judicial review mechanism has now been supplemented by 14 protocols, one of which – Protocol No. 11 – recast the ECtHR as a permanent, full-time court with compulsory jurisdiction over all member states to which aggrieved individuals enjoy direct access.[2] Following the accession to the Council of Europe of former Soviet bloc states, the ECtHR's reach now extends to more than 800 million people in 47 countries stretching the length and breadth of the continent and beyond, from Azerbaijan to Iceland and from Gibraltar to Vladivostok. It is no exaggeration to state that the Convention and its growing and diverse body of case law have transformed Europe's legal and political landscape, qualifying the ECtHR as the world's most effective international human rights tribunal.

Recent news from the Council of Europe's headquarters in Strasbourg, France, is not so good, however. Since 2000, the Council's political bodies, legal experts, and the judges of the Court have been engaged in an intensive exercise in institutional reform.[3] To state the problem bluntly, the ECHR is becoming a victim of its own success and now faces a docket crisis of massive proportions. A combination of factors – the Court's positive public reputation, its expansive interpretations of the Convention, a distrust of domestic judiciaries in some countries, and entrenched human rights problems in others – has attracted tens of thousands of new individual applications annually. The crush of cases shows no sign of abating and threatens to bury ECtHR judges and Registry lawyers in paper.[4] Dozens of resolutions, recommendations, and

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222 (hereinafter European Convention).

[2] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, ETS No. 155.

[3] For a useful review of these activities and a discussion of their significance see Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond', 6 *Human Rts L Rev* (2006) 403, at 403–415; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006), at 136–165.

[4] See Caflisch, *supra* note 3, at 404 ('With its 45 judges and about 250 Registry lawyers, the Court is presently confronted with an accumulated case-load of 82,600 applications, out of which 45,550 were made in 2005, the yearly capacity of absorption of the Court now being at around 28,000 cases').

experts' reports reiterate the same prophetic message: if drastic steps are not taken, the rosy picture of the ECtHR's efficacy sketched in the previous paragraph may soon be only a historical portrait.

Discussions of how to ensure the survival of the ECtHR have been framed principally in terms of modifying the Court's institutional structures and its procedures to manage more efficiently the growing backlog of cases. For example, what additional resources and personnel does the Court require? How many judges should review complaints at different stages of the proceedings? Is there a need for a separate chamber dedicated to deciding admissibility issues? Can judges do more to encourage friendly settlements? Yet lurking beneath these often technocratic issues of judicial housekeeping are profound substantive questions about how the Court accomplishes its core mandate – protecting civil and political liberties enshrined in the Convention – and whether the mechanisms it uses to achieve that goal need to be revised in response to changes in the legal and political landscape of human rights protection in Europe.

To the extent that the substantive dimension of the ECtHR reform process has received a public airing, the debate has focused on whether the Court should provide 'individual' or 'constitutional' justice. Advocates of the former view argue that the right of individual petition is the centrepiece of the Strasbourg supervisory system and, as a result, that the ECtHR should 'hear any case, from anyone who claims to be a victim of the Convention' and provide a remedy to every individual whose human rights have been violated.[5] Proponents of the latter position – including the most recent past President of the Court and its Registrar[6] – argue that the ECtHR should concentrate on providing 'fully reasoned and authoritative [decisions] in cases which raise substantial or new and complex issues of human rights law, are of particular significance for the State concerned or involve allegations of serious human rights violations and which warrant a full process of considered adjudication'.[7]

In this article, I argue that neither the technocratic, procedural view of the ECtHR reform process nor the debate between individual and constitutional justice proponents adequately captures the nature and scope of the challenges facing the

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These statistics are current as of 1 May 2006: *ibid.*, at 404 n. 3. The backlog of cases 'is projected to rise to 250,000 by 2010'. The Right Hon. The Lord Woolf *et al.*, *Review of the Working Methods of the European Court of Human Rights* at 8 (Dec. 2005), available at: www.echr.coe.int/eng/press/2005/Dec/LORDWOOLFSREVIEWONWORKINGMETHODS2.pdf

5 Dembour, '"Finishing Off" Cases: the Radical Solution to the Problem of the Expanding ECTHR Caseload' [2002] *European Human Rts L Rev* 604, at 621; see also Leach, 'Access to the European Court of Human Rights – From a Legal Entitlement to a Lottery?', 27 *Human Rts LJ* (2006) 11.

6 See, e.g., Wildhaber, 'A Constitutional Future for the European Court of Human Rights', 23 *Human Rts LJ* (2002) 161, at 162–163; Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Caseload and Membership', 21 *Pennsylvania State Int'l L Rev* (2002) 101, at 105.

7 Committee of Experts for the Improvement of Procedures for the Protection of Human Rights, *Report of the Evaluation Group to Examine Possible Means of Guaranteeing the Effectiveness of the European Court of Human Rights*, Doc. EG Court (2001), at para. 98 (27 Sept. 2001) (internal quotations omitted).

Strasbourg supervisory system. In particular, the looming docket crisis has exposed and accelerated an incipient identity crisis for the Court, one whose origins date back nearly a decade to the structural changes ushered in by Protocol No. 11. This crisis has led the ECtHR to become increasingly embedded in the national legal systems of the Convention's member states, often exercising functions that differ radically from those that the treaty's drafters and the first generations of ECtHR judges had envisaged. More provocatively, I argue that 'embeddedness' should serve as the touchstone for evaluating the diverse array of proposals to redesign and restructure the Court to ensure its future success.

Even casual observers of the ECtHR will immediately take issue with these claims. They appear, on first impression, to be directly contrary to the principle of subsidiarity that has served as a cornerstone of the European Convention since its founding. In the context of European human rights adjudication, subsidiarity orients the relationship between supranational and national decision-makers.[8] It proceeds from the premise that the Strasbourg institutions are 'supplementary and subsidiary to the protection of rights and freedoms under national legal systems', whose political, administrative, and judicial authorities retain the 'primary responsibility' for guaranteeing the rights of individuals.[9] Although not expressly mentioned in the Convention, subsidiarity finds its animating spirit in textual provisions such as the exhaustion of domestic remedies rule and the obligation to provide an effective national remedy.[10] It also informs ECtHR jurisprudence, including the margin of appreciation doctrine and the tribunal's refusal to act as a fourth-instance appeal of national court rulings.[11]

Both functional and normative rationales justify the subsidiarity principle. From a functional perspective, treating the Strasbourg supervisory system as ancillary to national mechanisms of human rights protection is a practical necessity. 'In view of the limited resources at [the system's] disposal, considerations of judicial expediency and efficiency', require domestic judges and administrative bodies to act as the first-line defenders of Convention rights and freedoms.[12] Normatively, subsidiarity helps to legitimize ECtHR review by providing a measure of deference to national actors in situations where such deference is appropriate – such as identifying the content

[8] For a more comprehensive analysis of subsidiarity that extends beyond the European Convention see Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *AJIL* (2003) 38, at 39 (explaining the 'original and most comprehensive sense' of subsidiarity and exploring its 'deep affinities … with many of the implicit premises of international human rights norms, including presuppositions about the dignity and freedom of human persons, the importance of their association with others, and the role of the state with respect to smaller social groups as well as individuals').

[9] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), at 236.

[10] European Convention, *supra* note 1, Art. 13 (obligating member states to provide an effective national remedy) and Art. 35 (exhaustion of domestic remedies).

[11] See R. Blackburn and J. Polakiewicz, *Fundamental Rights in Europe: The ECHR and its Member States, 1950-2000* (2001), at p. xiv.

[12] Arai-Takahashi, *supra* note 9, at 235.

of and values underlying national laws and practices or choosing among a range of Convention-compatible implementation measures.[13]

These twin justifications for subsidiarity have shaped the evolution of the Strasbourg supervisory system. National governments established the Convention as an early warning system to sound the alarm in case Europe's fledgling democracies began to backslide toward totalitarianism.[14] Over time, the Court assumed additional functions that are implicit in the Convention's text and structure – 'protecting individuals and groups from the excesses of majoritarianism in healthy democracies' and resolving the relatively minor and discrete conflicts of interests prevalent in any complex society.[15] A supranational judicial system designed to achieve these goals need only supplement, not supplant, national courts and other domestic mechanisms of human rights protection.

By the first decade of the 21st century, however, the ECtHR was exercising these functions with decreasing frequency. The Court now primarily concerns itself not with flagging and clearing roadblocks in domestic democratic processes or adjudicating good faith government restrictions on individual liberties, but rather with issues that are both far less and far more momentous. At one end of the spectrum, over half of the Court's docket is populated with repetitive, 'cookie cutter' complaints challenging insufficiently resourced and overburdened domestic judicial systems.[16] Cases of this type have led the ECtHR to identify structural problems in civil, criminal, and administrative proceedings in countries that are otherwise stable and well-functioning democracies.[17] At the other end of the spectrum are claims of serious and pervasive human rights abuses such as extrajudicial killings, disappearances, torture, and prolonged arbitrary detention.[18] Applicants in these cases have no meaningful

[13] See, e.g., Greer, *supra* note 3, at 216; Petzold, 'The Convention and the Principle of Subsidiarity', in R. St. J. Macdonald, F. Matscher, and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993), at 41, 60.

[14] See Moravcsik, 'The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *Int'l Org* (2000) 217.

[15] Greer, *supra* note 3, at 40; see A.H. Robertson and J.H. Merrills, *Human Rights in the World* (3rd edn., 1989), at 62.

[16] See Caflisch, *supra* note 3, at 405 (estimating that 'more than half of the applications addressed to the Court concern Article 6 (fair trial), and at least half of these – i.e. one quarter of the total number of applications – concern the excessive length of proceedings'); Greer, *supra* note 3, at 74–76 (analysing ECtHR judgments finding breaches of the Convention from 1999 to 2005 and concluding that over 75% concerned violations of fair trial rights or length of proceedings rules); see also Cichowski, 'Courts, Rights and Democratic Participation', 39 *Comparative Political Stud* (2006) 50, at 65 (noting the large number of fair trial cases before the ECtHR and explaining how the Court's judgments 'play a critical role in expanding domestic access to legal institutions for private parties').

[17] See App. No. 31210/96, *Kudła v. Poland* (2000), at para. 148 (stating that the Court has 'draw[n] attention to the important danger that exists for the rule of law within national legal orders when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy') (quotations omitted); see also Wolf, 'Trial Within a Reasonable Time: the Recent Reforms of the Italian Justice System in Response to the Conflict with Article 6(1) of the ECHR', 9 *Eur Public L* (2003) 189.

[18] See Mahoney, 'Speculating on the Future of the Reformed European Court of Human Rights', 20 *Human Rts LJ* (1999) 1, at 4 (predicting that, with accession of former Soviet bloc countries to the Convention, the ECtHR would be confronted with 'serious human rights violations' such as 'minorities in conflict with [a] central government' and cases relating to 'terrorism, violence, and civil strife').

domestic remedies to exhaust, forcing the Court to function as both a first instance finder of fact and a legal arbiter with respect to governments that sometimes resist its powers of review.[19]

The arguments for subsidiarity and for deference to national decision-makers are far less persuasive in cases that occupy both ends of this spectrum. But these cases also highlight a more general and more fundamental point. If the ECHR now confronts human rights problems unlike those that motivated its founding after the Second World War, the actors that control the Court's future – the member states, the Council of Europe's political and expert bodies, and the ECHR judges themselves – must devise new structural solutions to those problems. Strategically embedding the ECtHR in national legal systems provides such solutions where the justifications for subsidiarity are lacking.

Embeddedness, as defined in this article, does not ask the Court to take the place of national parliaments or national courts. To the contrary, it requires the redesigning of the Council of Europe's supervisory system – including the work of its political and expert bodies as well as those of the ECHR – to bolster the remedies that domestic judges and legislatures provide to individuals whose rights have been violated.[20] Such bolstering is essential to move (or to restore) countries to a position in which greater deference to national decision-makers is (or is once again) appropriate. Stated differently, embeddedness is a deep structural principle of the European Convention, one that provides an essential counterpoint to the deep structural principle of subsidiarity described above.[21]

The remainder of this article makes the case for redesigning the Strasbourg supervisory system to embed the ECtHR more firmly in national legal systems. Part 2 begins by situating the embeddedness principle in existing interdisciplinary scholarship and analysing the values of embeddedness for the long-term effectiveness of the European human rights regime. It then explains the distinction between direct and diffuse embeddedness and distinguishes those concepts from the individual and constitutional justice rationales for ECtHR review. Part 3 documents how, in numerous and

[19] See Memorandum on Threats to Applicants to the European Court of Human Rights in Cases from Chechnya, in Parliamentary Assembly, Report of the Committee on Legal Affairs and Human Rights, *Member States' Duty to Co-operate with the European Court of Human Rights*, Doc 11183, App. I (9 Feb. 2007), available at: *http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11183.htm* (documenting the Russian authorities' 'lack of willingness to effectively investigate' the murder, disappearance, beating, and harassment of individuals who had filed applications with the ECtHR alleging extrajudicial killings and disappearances of civilians in Chechnya).

[20] See generally Slaughter and Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)', 47 *Harvard J Int'l L* (2006) 327, at 328 ('[T]he primary terrain of international law must shift … from independent regulation above the national state to direct engagement with domestic institutions. The three principal forms of such engagement are strengthening domestic institutions, backstopping them, and compelling them to act').

[21] See Bradley Kar, 'The Deep Structure of Law and Morality', 84 *Texas L Rev* (2006) 877, at 882 (explaining that many scholars use the term 'deep structure' to describe the foundational principles embedded in laws and legal institutions); Fletcher, 'What Law is Like', 50 *Southern Methodist U L Rev* (1997) 1599, at 1604 and n. 22 (discussing the increasing prevalence of the term 'deep structure' to describe these same principles).

diverse ways, the Court's judgments are already becoming more deeply embedded in national legal systems. In some instances, member states and the Council of Europe's political bodies have endorsed these developments. In others, the ECtHR has modified its jurisprudence to establish greater control over domestic political and judicial decision-makers. Part 4 uses the embeddedness principle to evaluate several recently adopted and proposed reforms of the ECtHR. It then considers additional ways further to embed the European human rights regime in national legal systems in appropriate cases, as well as impediments to these proposals.

2 The Concept of Embeddedness and the European Human Rights Regime

This part first briefly reviews earlier international law and international relations scholarship that examines the effects of embedding international institutions in national legal and political systems. It then analyses the values of embeddedness for protecting the rights enshrined in the European Convention and further refines the concept by distinguishing between direct and diffuse varieties of embeddedness. Part 2 concludes by situating embeddedness in recent debates over whether the ECtHR should strive to provide individual or constitutional justice.

A *Previous Analyses of Embeddedness*

Several strands of scholarship consider how embedding international institutions in national legal systems improves the prospects for compliance with international law in general and the judgments of international tribunals in particular. Scholars use different labels to describe various facets of embeddedness. But the central idea that unites their work is the claim that compliance with international law increases when international institutions – including tribunals – can penetrate the surface of the state to interact with government decision-makers and private actors and to influence domestic politics.

In an early and influential contribution, Robert Keohane described the process of 'institutional enmeshment', which 'occurs when domestic decision making with respect to an international commitment is affected by the institutional arrangements established in the course of making or maintaining the commitment'.[22] States that are not enmeshed institutionally 'may be legally obligated by international law to comply with their commitments'. But because these obligations are 'not constitutionalized' in the country's domestic legal and political structures, 'they can be met or not as the state decides'.[23] By contrast, Keohane argues, countries that are institutionally enmeshed have 'an increase[d] … probability of compliance', all other things being equal.[24]

[22] Keohane, 'Compliance with International Commitments: Politics within a Framework of Law', 86 *Am Soc'y Int'l L Proceedings* (1992) 176, at 179.

[23] *Ibid.*

[24] *Ibid.*, at 180.

Harold Koh's transnational legal process theory emphasizes a different dimension of embeddedness. He describes the 'vertical internalization of international norms into domestic legal systems'[25] that occurs when 'nation states, corporations, international organizations, and nongovernmental organizations interact in a variety of fora to make, interpret, enforce, and ultimately internalize rules of international law'.[26] For Koh, these interactions generate a complex process 'whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes' through 'executive action, legislation, and judicial decisions which take account of and incorporate international norms'.[27] With respect to human rights in particular, Koh argues that 'embed[ding] certain human rights principles into international and domestic law should trigger transnational interactions, that generate legal interpretations, that can in turn be internalized into the domestic law of even resistant nation states'.[28]

Other scholars have analysed embeddedness as an aspect of an international tribunal's institutional design. In a study of the ECtHR and the European Court of Justice (ECJ), Anne-Marie Slaughter and I stressed the 'supranational jurisdiction' of the two European Courts as a key ingredient of their success.[29] Such jurisdiction gives private parties direct access to the tribunals and 'creat[es] a constituency for their judgments that is interested and able to pressure domestic government institutions to take heed and comply with those judgments'.[30] We also emphasized how 'the judges on the ECJ and the ECHR have exploited the opportunities granted them by the provision of supranational jurisdiction', in particular by forging relationships with the disaggregated branches of national governments. 'The ECJ deliberately wooed national courts, and the ECHR earned support from courts, administrative agencies, and some national legislators.'[31]

A later article by Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter identified embeddedness as one of three variables that influences the effectiveness of international tribunals.[32] The study defined embeddedness as 'the extent to which dispute resolution decisions can be implemented without governments having to take actions to do so'.[33] Such implementation is automatic where 'autonomous national courts can enforce international judgments against their own governments'.[34] But it is also possible where a state 'has incorporated or transposed [a treaty] into domestic

[25] Koh, 'How is International Human Rights Law Enforced?', 74 *Indiana LJ* (1999) 1397, at 1403.
[26] Koh, 'On American Exceptionalism', 55 *Stanford L Rev* (2003) 1479, at 1502.
[27] Koh, 'Transnational Legal Process', 75 *Nebraska L Rev* (1996) 181, at 205, 204.
[28] Koh, supra note 26, at 1502.
[29] Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale LJ* (1997) 273, at 277.
[30] *Ibid.*, at 387.
[31] *Ibid.*
[32] Keohane *et al.*, 'Legalized Dispute Resolution: Interstate and Transnational', 54 *Int'l Org* (2000) 457. The two other variables are the tribunal's access rules and its independence from the states subject to its jurisdiction.
[33] *Ibid.*, at 458.
[34] *Ibid.*, at 467.

law subject to the oversight of an autonomous domestic legal system'.[35] As an example of the latter type of embeddedness, the authors cite the fact that '[m]any governments have … incorporated the European Convention into domestic law, permitting individuals to enforce its provisions before domestic courts. Despite the lack of a direct link [between European and domestic judges], there is evidence that domestic courts tend to follow the jurisprudence of the ECHR in interpreting the Convention.'[36]

B *The Values of Embeddedness for the Strasbourg Supervisory System*

Building upon these prior analyses, this section identifies and analyses the values of embeddedness as a principle for protecting the civil and political liberties enshrined in the European Convention.

At a practical level, embedding the regional human rights regime in national legal systems protects a larger number of individuals in a more expeditious fashion. Even after the reforms of Protocol No. 11, budget increases, and the appointment of additional Registry staff, review by the ECtHR remains a complex and time-consuming process. Thousands of individuals file complaints with the Court too early (before exhausting domestic remedies) or too late (beyond the Convention's six-month limitations period),[37] a statistic that illustrates the widespread lack of knowledge about the Strasbourg system and the large pool of applicants whose possibly meritorious claims are beyond the ECtHR's review. For applicants who successfully hurdle the treaty's admissibility rules, there is a considerable delay before the Court issues a judgment on the merits. Indeed, it is something of an irony that the length of time cases remain pending before the ECtHR sometimes exceeds the maximum length of proceedings that the Convention allows in national courts.[38]

Embeddedness also significantly improves the prospects for compliance with the European Convention.[39] It does so by enabling national courts to protect the Convention's civil and political liberties as incorporated into domestic law – whether in the form of a self-executing treaty, the individual rights clauses of a constitution, or ordinary legislation. When Strasbourg rights and freedoms are fully domesticated in one of these ways, compliance with international law and national law approaches convergence. Stated differently, to the extent that a state accepts the rule of law at home, it also necessarily adheres to the rule of law internationally. Courts can further increase compliance (and pre-empt the filing of potentially embarrassing complaints

[35] *Ibid.*, at 468.

[36] *Ibid.*

[37] See Caflisch, *supra* note 3, at 405 (stating that the ECtHR rejects over 90% of complaints because the applicants cannot satisfy the Convention's admissibility rules).

[38] See European Convention, *supra* note 1, Art. 6(1) (requiring a hearing to determine criminal charges and civil rights and obligations 'within a reasonable time'); S. Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (1993), at 77–115 (analysing the right to proceedings of a reasonable length). I am grateful to David Weissbrodt for drawing my attention to this arresting fact.

[39] Whether embeddedness enhances member states' compliance with ECtHR judgments is a more complex subject that I address in the next section.

in Strasbourg) by providing remedies to individuals whose rights have been violated.[40] Moreover, embeddedness creates a dynamic compliance process. As discussed in greater detail below, courts often adjust their interpretation of the Convention as incorporated in domestic law in response to evolutions in ECtHR case law.

In addition to these practical benefits, embeddedness is normatively desirable. The framers envisaged the European Convention not as a rigidly uniform charter but rather as 'set[ting] a universal minimum standard which nonetheless … allows some scope, albeit not unlimited, for properly functioning democracies to choose different solutions adapted to their different and evolving societies'.[41] It is precisely because 'legally, politically, and culturally heterogeneous national governments can develop divergent but not necessarily incompatible approaches to common legal problems that the Court has afforded them a context-based zone of discretion when reviewing compliance with their treaty obligations and in balancing those obligations against other important interests'.[42] Seen from this perspective, embeddedness helps to promote a shared regional responsibility for protecting human rights, one that helps to create a European 'community of law'[43] by 'giv[ing] room to national institutions to appropriate the Convention and make it their own'.[44]

C *Direct and Diffuse Embeddedness Compared*

The studies reviewed above identify the basic contours of embeddedness. But they do not fully capture the ways in which international courts can be entrenched in domestic legal and political institutions. In this section, I provide a more fine-grained analysis of judicial embeddedness and apply it to the European human rights regime. A key component of this more nuanced approach is the distinction between 'direct' and 'diffuse' embeddedness. The ECHR is not directly embedded in national legal systems. But its diffuse embeddedness in those systems provides the Court with numerous opportunities to influence the decision-making of judges, legislators, and executive officials. It is those opportunities, I argue later in this article, that the Council of Europe should exploit when considering how to redesign the region's human rights regime.

[40] Cf. Kumm and Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', 3 *Int'l J Const L* (2005) 473, at 486 ('To prevent international embarrassment, both the national courts and the political branches feel that it is better to protect rights "at home," as it were').

[41] Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' [1997] *European Human Rts L Rev* 364, at 369.

[42] Helfer, 'Adjudicating Copyright Claims under the TRIPs Agreement: the Case for a European Human Rights Analogy', 39 *Harvard Int'l LJ* (1998) 357, at 396; see also *Sunday Times v. United Kingdom*, ECtHR, Series A No. 30 (1979), at para. 61 ('[T]he main purpose of the Convention is to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction. This does not mean absolute uniformity is required and, indeed, since the Contracting States remain free to choose the measures which they consider appropriate, the Court cannot be oblivious of the substantive or procedural features of their respective domestic laws') (internal quotations omitted).

[43] Helfer and Slaughter, *supra* note 29, at 367–373, 389–391.

[44] Carozza, *supra* note 8, at 75.

Consider direct embeddedness first. The ECtHR does not occupy a formal place in the judicial hierarchies of the European Convention's member states. It has no appellate jurisdiction to review the decisions of national courts, nor is there any mechanism for judges to refer to Strasbourg questions of human rights law that arise during the course of domestic litigation. The Court cannot quash national court rulings nor order national governments to amend legislation or revise administrative practices.[45] In addition, ECtHR judgments are, with only two exceptions, not 'executable within … domestic legal systems'.[46] Thus, if an international tribunal's embeddedness is characterized by its inclusion in an integrated judicial hierarchy – what I label as 'direct' embeddedness – the ECHR is not embedded in national legal systems. This provides a sharp contrast with the ECJ, which, as a result of the preliminary reference procedure and the doctrines of supremacy and direct effect, occupies a place at the apex of the judicial systems in all European Union Member States with respect to issues of EU law.[47]

Although the ECtHR lacks direct embeddedness, it has numerous characteristics of 'diffuse' embeddedness. A diffusely embedded international tribunal employs a variety of mechanisms to influence the behaviour of national decision-makers. The efficacy of these tools hinges not on the coercive power that a higher court exercises over a lower judicial body. Rather, it requires the skilful use of persuasion to realign the interests and incentives of decision-makers in favour of compliance with the tribunals' judgments. In this sense, diffuse embeddedness is linked to the socializing functions that international institutions can exert over the behaviour of national actors.[48]

Several design features of the European human rights regime reflect the ECtHR's diffuse embeddedness in national legal systems. First, the Court frequently reviews challenges to domestic judicial decisions that interpret and apply constitutions, legislation, and administrative practices. When Strasbourg judges conclude that these decisions violate one or more Convention-protected liberties, states must, whenever possible, restore the complainant to the position he or she occupied prior to the violation. To

[45] See, e.g., *Saïdi v. France*, ECtHR, Series A No. 261-C, at 57 (1993); Wildhaber, *supra* note 6, at 162.

[46] Ress, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order', 40 *Texas Int'l LJ* (2005) 359, at 374. Until recently, the Netherlands was the only member state in which ECtHR judgments could be executed in the same manner as domestic judicial rulings: *ibid.* (noting this fact and stating that 'the situation in the Netherlands is an absolute singularity'). In 2006, the Ukraine adopted a statute and a Presidential decree to follow the same approach. See Sviriba, 'Enforcing Judgments of the ECHR', Magister & Partners, International Law Office (12 Sept. 2006), available at: www.magisters.com/publication.php?publicationid=33 (stating that under the new laws 'an ECHR judgment against [the Ukraine] now constitutes an executive document in itself and can be filed directly for enforcement').

[47] Some national constitutional courts have refused to surrender to the ECJ their authority over the interface between domestic constitutions and EU law, instead negotiating a cooperative relationship with the judges in Luxembourg: see Hoffmeister, 'Germany: Status of European Convention on Human Rights in Domestic Law', 4 *Int'l J Const L* (2006) 722, at 730. In practice, however, even the most assertive of these courts – the German Constitutional Court – has never held an ECJ judgment to be invalid: *ibid.*

[48] See Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights', 54 *Duke LJ* (2004) 621, at 635–638.

meet this obligation, national governments have quashed criminal convictions, expedited trials, and re-opened closed judicial proceedings.[49]

In this sense, ECtHR judgments do modify and overturn the rulings of domestic courts. But achieving these outcomes requires the affirmative intervention of a state's political branches, and the Court has traditionally avoided policing such interventions. As I explain below, however, the ECtHR has recently begun to identify remedies with greater specificity and to scrutinize more intensively how states enforce its judgments.[50]

A second dimension of diffuse embeddedness concerns the relationship between the ECtHR and national parliaments. Consistent with the Strasbourg supervisory system's lack of direct embeddedness, the Court's judgments are binding only as a matter of international law and only upon the parties to the dispute.[51] But their practical effects are often more extensive. Parliamentarians across Europe sometimes consult ECtHR case law when drafting and revising statutes and administrative regulations.[52] When these consultations occur, they extend the Court's influence even in the absence of an adverse judgment against the state.[53] There is no obligation, however, for government decision-makers to give ECHR judgments this *erga omnes* effect.[54] This is so even for Systemic human rights problems that adversely affect numerous individuals. As I explain below, however, the ECtHR has recently developed a mechanism to address such systemic violations, one that will increase the dialogue between the Court and national parliaments.

A third manifestation of diffuse embeddedness relates to the common legal texts that the ECtHR and national courts interpret. For the first few decades of the Convention's life, its member states were divided into two camps – those that had incorporated the treaty into domestic law and those that had not. In the latter group of countries, domestic courts could not provide a remedy to individuals whose rights had been violated. These states fulfilled their treaty obligations by giving effect to ECtHR judgments on a case-by-case basis.[55] As the Strasbourg system matured, the number of incorporation countries increased so that, by the early years of the new millennium,

[49] See Committee of Ministers, *List of Individual Measures Adopted*, H/Exec (2006) 2 (Apr. 2006) (comprehensively listing the measures that member states have adopted following adverse ECtHR judgments to remedy the effects of Convention violations for individual applicants).

[50] See *infra* Part 3C.

[51] See European Convention, *supra* note 1, Art. 53(1) ('The High Contracting Parties undertake to abide by the final judgment of the Court in a case to which they are parties').

[52] See Barkuysen and van Emmerik, 'A Comparative View on the Execution of Judgments of the European Court of Human Rights', in T. Christou and J.P. Raymond (eds), *European Court of Human Rights: Remedies and Execution of Judgments* (2005), at 1, 15, 19.

[53] See *ibid.*, at 12 (describing revisions several legislative initiatives in the Netherlands relating to the right to property, the content of which 'was motivated by the requirements of Article 1 of Protocol 1 … as interpreted in the case law of the [ECtHR]').

[54] See Ress, *supra* note 46, at 374 (stating that 'judgments of the [ECtHR] do not have an erga omnes effect, but they have an orientation effect'); see also Greer, *supra* note 3, at 279 (stating that the 'orthodox view' is that 'any state is obliged to observe *only* those judgments made directly against it').

[55] See A. Drzemczewski, *The European Human Rights Convention in Domestic Law* (1983), at 260–303.

the Convention had 'become an integral part of the domestic legal orders of all states parties'.[56] This integration enables national courts to apply the treaty directly as embodied in domestic law.

There is, however, no necessary correlation between the continent-wide incorporation of the Convention and the embeddedness of ECtHR judgments. As the treaty has come to stand on a firmer domestic footing, judges have paid greater attention to the growing number of international cases interpreting it. Yet consistently with the ECHR's lack of direct embeddedness, domestic courts have reserved to themselves at least a modicum of independent interpretive authority. This judicial independence exists even in states in which the Convention is on a par with the constitution. According to former ECtHR Judge Georg Ress, it may seem obvious that national courts in such countries would 'feel obliged to scrupulously follow any reasoning of the ECHR'. In fact, he explains, there is:

> a difference between the Convention as part of the constitution and the Convention as an international treaty interpreted by the ECHR. Within the domestic legal order, the Convention is only one element in the mosaic of different constitutional provisions and its interpretation in that context may differ considerably from an interpretation based on the Convention alone.[57]

As a result of this distinction, domestic courts may not 'fully follow the reasoning of the ECHR' if it does not accord with the text and *aquis* of national law.[58] The result, in short, is that ECtHR judgments are persuasive authority. They are highly persuasive, to be sure. But they retain their status as interpretations of international law until they have been domesticated by national courts.[59] Whether such domestication in fact occurs may depend on which judge hears the case. Constitutional courts in Europe have a consistent track record of taking Strasbourg case law seriously. Lower tribunals, by contrast, have shown a decided 'lack of enthusiasm' for applying the Convention as interpreted by the ECtHR.[60] The challenge the Strasbourg tribunal

[56] Appendix to Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (12 May 2004), at 3–4. This new unity harbours a diversity of a different sort. In two or three countries, the treaty has supra-constitutional status or is on a par with the national constitution. The remaining states are divided between those in which the Convention is inferior to the constitution but superior to domestic statutes and those in which it is equivalent to ordinary legislation. See Hoffmeister, *supra* note 47, at 726–728; Ress, *supra* note 46, at 375–376.

[57] Ress, *supra* note 46, at 376.

[58] *Ibid.*

[59] This view is confirmed by a 2002 conference of European constitutional courts at which 21 such courts 'declare[d] themselves not bound by the rulings of the [ECHR]', but an even larger number noted 'the preponderant influence of [Strasbourg] case law … when it comes to determining the substance of the basic rights guaranteed by internal law and the extent of the restrictions that can be placed on them': Conference of European Constitutional Courts, XIIth Congress, *General Report: The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts* (14–16 May 2002), at 48.

[60] *Ibid.*, at 50. The general report noted two reasons for this reluctance: first, that lower courts 'prefer to base their decisions on regulations of internal law rather than on international provisions'; and, secondly, that analysing ECtHR case law seemed 'pointless' where the same rights had been recognized by both the Convention and the constitution: *ibid.*

faces, therefore, is how to encourage judges at all levels of domestic judicial systems to follow its jurisprudence.

D *Distinguishing Embeddedness from Constitutional and Individual Justice*

Claims that the ECtHR is a *sui generis* international tribunal have a distinguished academic pedigree. The Court itself has fuelled these claims by interpreting the Convention not as set of reciprocal promises among nations, but, far more momentously, as a 'constitutional instrument of European public order'.[61] The ECtHR maintains that order by calibrating the proper balance between independent judicial review and deference to national decision-makers. On the one hand, the Court stresses the subsidiary nature of the treaty's 'supervision machinery' in relation to 'national human rights protection systems'.[62] Once a dispute comes before it, however, the ECtHR reviews domestic legislation, administrative practices, and judicial rulings using distinctive methods of treaty analysis – such as the doctrine of effectiveness, the principle of autonomous interpretation, and an evolving understanding of protected rights and freedoms.[63] Over time, the Court has manipulated these jurisprudential tools to engender 'a slow but constant change of the sphere of sovereignty of the modern [European] state'.[64] As a result of this incremental erosion of state power, many scholars now argue that the ECtHR has transformed itself into a regional constitutional court.[65]

The consequences of this appellation are muddied, however, by the multiplicity of meanings associated with constitutional courts and constitutional review. At the most basic level, labelling the ECtHR as a constitutional court merely acknowledges that Strasbourg judges test the validity of legislation against higher-order rules protecting individual rights, much as do their domestic counterparts.[66] A second, more sophisticated approach defines constitutional review as a method of judicial decision-making. Seen in this light, the ECtHR pursues 'constitutional justice' when it adjudicates on cases that contribute 'to the identification, condemnation, and resolution of [Convention] violations … which are serious for the applicant, for the respondent state … or

[61] *Loizidou v. Turkey*, 310 ECtHR, Series A No 310 (1995), at 27.

[62] *Sadik v. Greece,* 24 EHRR (1996) 323, at 339.

[63] For a discussion of the Court's interpretive methodologies see Helfer, *supra* note 42, at 401–407; Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rts L Rev* 57, (2005) 60.

[64] Ress, *supra* note 46, at 364.

[65] See, e.g., Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court', in P. Mahoney *et al.* (eds), *Protecting Human Rights: The European Perspective* (2000), at 41; Cameron, 'Protocol 11 to the European Convention on Human Rights: The European Court of Human Rights as a Constitutional Court?', 15 *YB Eur L* (1995) 219, at 236–237, 243–244; Cours Européenne des Droits de L'homme et Cours Constitutionnelles (2005), available at: www.oboulo.com/cours-europeenne-droits-homme-cours-constitutionnelles-13715.html; Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', 23 *Oxford Journal of Legal Studies* (2003) 405; Wildhaber, *supra* note 6, at 162–163.

[66] Cameron, *supra* note 65, at 223–224; Flauss, 'La Cour européenne des droits de l'homme est-elle une Cour constitutionnelle?', 36 *Revue Française de Droit Constitutionnel* (1998) 711, at 711–728.

for Europe as a whole'.[67] A third perspective sees the ECtHR as a constitutional court when it acts didactically, shaping its case law to socialize domestic institutions to the democratic and rule of law values that the Convention embodies.[68] These three views of the Strasbourg system's constitutional functions contrast with an 'individual justice' conception of human rights adjudication, in which the ECtHR 'ensure[s] that every genuine victim of a violation receives a judgment in [its] favour from the Court, however slight the injury, whatever the bureaucratic cost, whether or not compensation is awarded, and whatever the likely impact of the judgment on the conduct or practice in question'.[69]

What, then, are the differences between the constitutional and individual justice approaches on the one hand and, on the other, the embeddedness principle advocated in this article? Analysing the ECtHR as embedded in national legal systems differs from the individual justice approach in its recognition that the Court's continent-wide geographic and demographic reach makes it impossible to remedy every violation of the Convention. It also shares with those who conceptualize the ECtHR as a constitutional court the belief that Strasbourg judges should be strategic in selecting cases to advance a normative vision of the Convention and its supervisory machinery. But it parts company with constitutional justice adherents regarding the substance of that vision.

Constitutional justice proponents urge the ECtHR to develop trans-jurisdictional solutions for weighty human rights problems rather than focus on plaintiff- or country-specific issues. In contrast, an embeddedness perspective seeks first and foremost to augment the mechanisms available to remedy human rights violations in national law, obviating the need for individuals to seek relief at the regional level. Where these national mechanisms are inadequate, the ECtHR should increase its supervision of domestic courts and political bodies and provide incentives for government actors faithfully to follow the Court's case law and to remedy Convention violations at home.

Admittedly, the two perspectives overlap if embeddedness is itself treated as a principle of constitutional magnitude. But most constitutional court advocates do not view the ECtHR's constitutional functions as extending so broadly. Setting aside this definitional alignment, there are many issues where embeddedness and constitutional justice approaches are likely to diverge. These include, for example, cases of only minor value for explaining novel or unsettled interpretations of civil and political rights but much greater significance for enhancing the penetration of the Convention and ECtHR case law into national legal systems. In addition, whereas constitutional justice scholars focus almost exclusively on the work of the Court, an embeddedness approach gives equal weight to the activities of the Council of Europe's political and expert bodies.

[67] Greer, *supra* note 3, at 166; see also Wildhaber, *supra* note 6, at 162–163 (describing the Court's 'constitutional' mission as 'determining issues on public policy grounds in the general interest' and extending its 'jurisprudence throughout the community of Convention States').

[68] Harmsen, 'The European Convention on Human Rights After Enlargement', 5 *Int'l J Human Rts* (2001) 18, at 32–33; see also Cameron, *supra* note 65, at 252 (emphasizing the Court's future 'pedagogical' role in the 'creation of a legal culture' when reviewing cases from former Soviet Bloc countries).

[69] Greer, *supra* note 3, at 166 (articulating but not endorsing this approach).

An additional concrete example may help to illustrate the differences between an embedded court and a constitutional court.[70] The legal system in post-Second World War Italy gave the Italian Constitutional Court exclusive authority to determine whether domestic legislation was compatible with Italy's foundational charter.[71] But it also separated the court from the country's ordinary and administrative tribunals and its political processes.[72] As a result of this formal separation, the Constitutional Court initially found it difficult to exercise its powers of review. The court faced stiff resistance from other divisions of the judiciary, which were 'reluctant to acknowledge [its] authority' or refer cases to the court.[73] In addition, the Italian Parliament was often unaware of or disregarded those few rulings that the court issued.[74] Stated differently, the Italian Constitutional Court was not embedded in the Italian legal system.

In response to this state of affairs, the Constitutional Court 'began to use its power in a very pervasive way' to expand its jurisdiction and to develop a productive relationship with lower-level tribunals.[75] When the court found a statute unconstitutional, the Italian Constitution prescribed a single response – strike the statute down. But the court slowly extended the available remedies to include 'declaring a law partially void', replacing 'one or more words in the law with other words in order to make the same statute conform to the Constitution', or interpreting a statute to avoid constitutional infirmity.[76] In addition, the court encouraged ordinary and administrative tribunals to identify constitutional questions and refer them for a definitive ruling.[77] This process 'implicate[d] ordinary judges in the constitutional review process' by giving them 'a share in the task of safeguarding the constitution against offensive legislation'.[78] But it did so 'in a moderate way' that preserved the Constitutional Court's ultimate authority.[79] As the court's powers increased, so too did the Italian Parliament's acceptance of constitutional constraints on domestic lawmaking.[80] As a result of these interrelated developments, over the course of several decades the Italian Constitutional Court

[70] I thank Elizabeth Sepper, NYU School of Law, JD 2007 and LL.M 2008, for drawing my attention to this example.

[71] See La Pergola and Del Duca, 'Community Law, International Law and the Italian Constitution', 79 *AJIL* (1985) 598, at 604.

[72] See Baldassarre, 'Structure and Organization of the Constitutional Court of Italy', 40 *St Louis Univ LJ* (1996) 649, at 650.

[73] See Volcansek, 'Judicial Activism in Italy', in K.M. Holland (ed.), *Judicial Activism in Comparative Perspective* (1991), at 117, 120; Nardini, 'Passive Activism and the Limits of Judicial Self Restraint: Lessons for America from the Italian Constitutional Court', 30 *Seton Hall L Rev* (1999) 1, at 42 n. 18.

[74] See Volcansek, 'Judicial Review and Public Policy in Italy: American Roots and the Italian Hybrid', in D.W. Jackson and C.N. Tate (eds), *Comparative Judicial Review and Public Policy* (1992), at 89, 98.

[75] Baldassarre, *supra* note 72, at 652–654.

[76] *Ibid.*; Nardini, *supra* note 73, at 18.

[77] See Ferejohn and Pasquino, 'Constitutional Adjudication: Lessons from Europe', 82 *Texas L Rev* (2004) 1671, at 1689.

[78] *Ibid.*; Cornella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?', 2 *Int'l J Const L* (2004) 461, at 472–473.

[79] Ferejohn and Pasquino, *supra* note 77, at 1689.

[80] See Volcansek, *supra* note 74 , at 98 (noting that the Parliament has created an office dedicated to evaluating the Constitutional Court's decisions and formulating an appropriate response).

embedded itself in the country's legal and political systems and 'profoundly modified the traditional way of making and applying law typical of Italian legal culture'.[81]

In the discussion that follows, I document several ways in which the ECtHR is following an analogous trajectory, modifying its jurisprudence and expanding its review powers to embed itself more firmly in the national legal systems of the Convention's member states.

3 The Council of Europe's Response to the ECtHR's Docket Crisis and Examples of Increasing Embeddedness in Recent ECHR Jurisprudence

The current drive to reform the Strasbourg supervisory system dates back to a November 2000 ministerial conference marking the fiftieth anniversary of the signing of the European Convention. The recent entry into force of Protocol No. 11 in 1998 had transformed the ECtHR into 'a truly permanent, professional judicial body'.[82] Only two years later, however, the ministers issued a troubling announcement, warning that 'the effectiveness of the Convention system … is now at issue' because of 'the difficulties that the Court has encountered in dealing with the ever-increasing volume of applications'.[83]

As noted above, two factors were principally responsible for the rising number of complaints: (1) the accession of former Soviet bloc countries whose transitions to democracy were often slow and fitful; and (2) systemic human rights problems in longstanding Convention member states.[84] The ministers' call for a response to the ECtHR's looming docket crisis was answered by convening several committees and working groups to study the problem and propose potential solutions.

The most tangible result of their efforts was Protocol No. 14,[85] adopted in May 2004 and now ratified by 46 of 47 member states.[86] The Protocol's major features are: (1) a procedure for single judges to decide manifestly inadmissible cases; (2) a new admissibility standard that authorizes the dismissal of complaints whose authors have not suffered 'significant disadvantage'; (3) provisions to facilitate friendly settlements;

[81] Pizzorusso, 'Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies', 38 *Am J Comp L* (1990) 374, at 385–386; Pizzorusso, 'Constitutional Review and Legislation in Italy', in C. Landfried (ed.), *Constitutional Review & Legislation: An International Comparison* (1988), at 109, 126.

[82] Caflish, *supra* note 3, at 403.

[83] European Ministerial Conference on Human Rights, Resolution I, Institutional and Functional Arrangements for the Protection of Human Rights at National and European Level (Rome, 3–4 Nov. 2000).

[84] See Res. 1226, Parliamentary Assembly of the Council of Europe, Execution of Judgments of the European Court of Human Rights (2000), at para. 7.

[85] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, ETS No. 194, opened for signature 13 May 2004.

[86] Russia is the only hold-out. In Dec. 2006 the State Duma refused to ratify the treaty. I discuss the significance of Russia's (perhaps temporary) refusal to ratify Protocol No. 14 in Part 4C.

and (4) measures to improve the execution of the Court's judgments.[87] The drafters believe that Protocol No. 14 will ameliorate the Court's docket crisis. They recognize, however, that it is only one component of a multi-dimensional, long-term reform strategy.[88]

Consistently with that intent and even before the adoption of Protocol No. 14, the ECHR started to respond to the underlying causes of the surge in applications by modifying its jurisprudence in three ways. First, the Court adopted the role of a first-instance finder of fact where states failed to investigate alleged human rights violations. Secondly, the ECtHR expanded its interpretation of Article 13 of the Convention, a provision that requires an effective domestic remedy for violations of protected rights and freedoms. Thirdly, Strasbourg judges, in a stark reversal of past practice, began to specify remedies that national governments must provide to individuals whose rights they have violated. The most notable consequence of this change was the ECtHR's creation of a 'pilot judgment' procedure to address systemic human rights problems affecting large numbers of similarly situated individuals. As I explain below, each of these three jurisprudential shifts has increased the Court's diffuse embeddedness in national legal systems.

A *The ECHR as First Instance Tribunal and Fact Finder*

The subsidiarity principle that infuses the Convention's supervisory system restricts the ECtHR's relationship to the national authorities whose decisions it reviews. The Court often repeats the mantra that it cannot 'assume the role'[89] nor 'take the place of' those authorities.[90] This prohibition applies with particular force to domestic judicial proceedings. The ECtHR refuses to 'act as a court of appeal, or as sometimes is said, as a court of fourth instance from the decisions taken by domestic courts'.[91] It generally refrains from interpreting domestic laws and it defers to national courts' assessments of 'the credibility of witnesses and the relevance of evidence to the issues in the case'.[92]

The Court scrupulously follows these principles when reviewing the actions of domestic decision-makers in well-functioning democracies. But its responsibility to

[87] For detailed analyses of Protocol No. 14 see Caflisch, *supra* note 3, at 407–412; Beernaert, 'Protocol 14 and New Strasbourg Procedures: Toward Greater Efficiency and at What Price?' [2004] *Eur Human Rts L Rev* 544, at 547–555; Mowbray, 'Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases', 4 *Human Rts L Rev* (2004) 331, at 331–335.

[88] Council of Europe, *Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention* (13 May 2004), at para. 14 ('Only a comprehensive set of interdependent measures tackling the problem from different angles will make it possible to overcome the Court's present overload').

[89] *Belgian Linguistics Case*, ECtHR, Series A No. 6 (1968), at 35.

[90] *Observer and Guardian v. United Kingdom*, ECtHR, Series A No. 216 (1991), at 30.

[91] App. Nos 29458/04 and 29465/04, *Sokurenko and Strygun v. Ukraine* (2006), at 13 (joint dissenting opinion of Judges Lorenzen and Maruste).

[92] *Ibid.* (citing *Vidal v. Belgium*, ECtHR, Series A No. 235-B, at para. 32; *Edwards v. United Kingdom*, ECtHR, Series A No. 247-B (1992), at para. 34.

adjudicate Convention violations applies with equal force where a government fails to investigate alleged human rights abuses or to provide a judicial forum for applicants to substantiate their claims. In such cases – which often involve widespread civil unrest – the ECtHR 'inevitably confront[s] … the same difficulties as those faced by any first-instance court'.[93] It must review the parties' conflicting accounts and establish the relevant facts. It must create appropriate evidentiary rules and determine the burden and standard of proof necessary to substantiate a violation of the Convention. And it must decide how to proceed when the government has exclusive access to information that may corroborate or refute the applicant's allegations but fails to provide that information to the Court.[94]

The ECtHR's first sustained treatment of these issues arose in cases involving human rights abuses by military and police officials in the Kurdish regions of south-eastern Turkey. In the latter half of the 1990s, complaints alleging forced disappearances, extrajudicial killings, torture of detainees, and destruction of villages in these regions began to arrive in Strasbourg. In response, the ECtHR (and before it the European Human Rights Commission) 'regularly undertook fact-finding missions for the purpose of taking depositions from witnesses' and inspecting the locations where the alleged violations had occurred. 'Thus, even when presented with conflicting accounts of the events or with the Government's eventual lack of cooperation, the Court … could draw factual conclusions bas[ed] on those first-hand testimonies, to which particular importance was attached.'[95]

The ECtHR and the Commission assumed these new tasks with hesitation, recognizing that they 'must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case'.[96] The tribunals openly acknowledged the challenges of first instance fact-finding, including the inability to compel witnesses to appear or testify at hearings,[97] language problems, and the 'lack of detailed and direct familiarity with the conditions pertaining in the region'.[98]

Over time, however, the ECtHR became more confident in exercising these fact-finding powers. Faced with repeated allegations of flagrant violations of the right to life and the prohibition of torture and degrading or inhuman treatment or punishment, the Court applied 'a particularly thorough scrutiny' even where 'there have been criminal proceedings in the domestic court[s] concerning [the applicant's] allegations'[99] or where 'certain domestic proceedings and investigations have already taken place'.[100] At the same time, however, the Court also hinted that it would adopt

[93] App No 7615/02, *Imakayeva v. Russia* (2006), at para. 111.
[94] *Ibid.*, at paras 111–115.
[95] *Ibid.*, at para. 117 (summarizing case law involving human rights violations in Turkey).
[96] E.g. App. No. 25657/94, *Avşar v. Turkey*, ECHR 2001-VII, at para. 283.
[97] App. No. 65899/01, *Taniş v. Turkey* (2005), at para. 160(c).
[98] App. No. 23819/94, *Bilgin v. Turkey* (2000), at para. 66.
[99] *Avşar v. Turkey*, *supra* note 96, at para. 183.
[100] E.g., App. No. 21689/93, *Ahmet Özkan v. Turkey* (2004), at para. 84.

a more deferential posture if Turkish officials more thoroughly investigated such cases.[101]

The ECtHR's decision to take on the role of a first instance domestic court 'represent[ed] a significant redefinition of the institution's role'.[102] In such cases – which now include complaints alleging extrajudicial killings, forced disappearances, and torture in the Chechnya region of Russia[103] – the Court 'ceases to be a secondary guarantor of human rights and instead finds itself in a more crucial – and exposed – front-line position'.[104] Scholars have questioned whether the ECtHR possesses the resources and institutional qualifications necessary to carry out these functions.[105] But there is little doubt that this exception to the subsidiarity principle reflects the Court's commitment to closing gaps in domestic accountability where member states insufficiently investigate credible claims of serious human violations.[106]

B *Enhancing Effective Domestic Remedies for Convention Violations*

In addition to its many substantive provisions, the European Convention contains, in Article 13, a requirement that member states provide 'an effective remedy before a national authority' to '[e]veryone whose rights and freedoms as set forth in [the treaty] are violated'.[107] The ECtHR has significantly expanded the scope of this 'obscure'[108] provision in recent years, encouraging states to augment existing domestic remedies and create new ones tailored to the violation of different civil and political liberties.

The ECtHR adopted a rather restrictive approach to Article 13 in its early judgments. It refused to interpret the provision to mandate either domestic incorporation of the Convention or judicial remedies.[109] Nevertheless, the Court required an 'effective'

[101] See, e.g., *Avşar v. Turkey, supra* note 96, at para. 283 ('*Where domestic proceedings have taken place*, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them') (emphasis added); App. No. 51480/99, *Erikan Bulut v. Turkey* (2006), at paras 39–43 (holding that police officials had conducted an adequate investigation into the applicant's defenestration); App. No. 41964/98, *Cennet Ayhan and Mehmet Salih Ayhan v. Turkey* (2006), at para. 83 (rejecting the applicants' attempt to prove a Convention violation by relying on a government report of an investigation of the causes of unrest in south-eastern Turkey, and characterizing the report as 'a serious attempt to provide information on and analyse problems associated with the fight against terrorism from a general perspective and to recommend … investigative measures').

[102] Harmsen, *supra* note 68, at 29.

[103] See, e.g., *Imakayeva v. Russia, supra* note 93, at paras 117–119.

[104] Harmsen, *supra* note 68, at 29.

[105] See Kamminga, 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?', 12 *Neth Q Human Rts* (1994) 153.

[106] See App. No. 22494/93, *Hasan İlhan v. Turkey* (2004), at para. 123 (stating that 'defects' in the 'investigatory system' in 'south-east Turkey in the first half of the 1990s' 'undermined the effectiveness of criminal-law protection' and 'fostered a lack of accountability of members of the security forces for their actions which was not compatible with the rule of law in a democratic society').

[107] European Convention, *supra* note 1, Art. 13.

[108] *Malone v. United Kingdom*, ECtHR, Series A No. 82 (1984), at 37 (partly dissenting opinion of Judges Matcher and Pinheiro Farinha) (stating that Art. 13 'constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation').

[109] See *Silver v. United Kingdom*, ECtHR, Series A No. 61 (1983), at para. 113; *Swedish Engine Drivers' Union v. Sweden*, ECtHR, Series A No. 20 (1984), at para. 50.

mechanism or mechanisms to review 'arguable' claims that the government had violated the Convention or analogous provisions of national law. Such mechanisms had to be independent of the officials or bodies that committed the alleged violation, effective in practice as well as in law, capable of investigating allegations fully, and authorized to make legally binding decisions granting relief to aggrieved individuals.[110] Although these cumulative requirements suggest a robust view of domestic remedies, the ECtHR's early application of these principles rarely resulted in a finding of an Article 13 violation.[111]

In recent years, however, the Court has more rigorously scrutinized claims that governments have failed to provide effective domestic remedies. The ECtHR has, for example, found violations of Article 13 even after concluding that the state had not breached the substantive right that formed the basis of the applicant's complaint.[112] It has 'strictly examined the powers, procedures and independence of non-judicial bodies when evaluating if they provide effective remedies under Article 13'.[113] And it has emphasized that 'the requirements of Article 13 … take the form of a guarantee' that is 'one of the fundamental principles of a democratic society'.[114]

Tailoring domestic remedies to 'the nature of the applicant's complaint' is among the more significant developments in Article 13 jurisprudence.[115] '[I]n cases of suspicious death or ill-treatment', for example, the ECtHR has held that the 'fundamental importance' of the right to life and the prohibition of torture require 'a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the acts of ill-treatment'.[116] Similarly, in asylum and deportation cases, the Court has stressed 'the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged [by the applicant] materialised'. It has accordingly interpreted Article 13 to require the government to suspend deportation proceedings pending an 'independent and rigorous scrutiny' of the applicant's claims.[117]

To determine whether states have satisfied their Article 13 obligations, the ECtHR has carefully analysed domestic remedies, often in excruciating detail.[118] Such

[110] See A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), at 205–207; D. Shelton, *Remedies in International Human Rights Law* (2nd edn., 2006), at 123.

[111] See Thune, 'The Right to an Effective Remedy in Domestic Law: Article 13 of the European Convention on Human Rights', in D. Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorne Eide* (1993), at 79, 82, 83 (stating that 'Article 13 is often invoked by complainants, but … the complaint is rarely successful', and noting that, as of 1992, the ECHR had found violations of Art. 13 in only 3 of 46 cases in which applicants alleged a violation of the provision).

[112] See, e.g., App. No. 59450/00, *Ramirez Sanchez v. France* (Grand Chamber, 2006), at paras 157–160.

[113] Mowbray, *supra* note 110, at 207.

[114] App. No. 51564/99, *Čonka v. Belgium* (2002), at para. 83.

[115] E.g. App. No. 38361/97, *Anguelova v. Bulgaria* (2002), at para. 161.

[116] App. No. 48254/99, *Cobzaru v. Romania* (2007), at para. 82 (summarizing earlier case law).

[117] *Čonka v. Belgium*, *supra* note 114 , at para. 79; App. No. 40035/98, *Jabari v. Turkey* (2000), at para. 50.

[118] See, e.g., *Čonka v. Belgium*, *supra* note 114 , at para. 83 (reviewing the procedures and practices by which the Belgian Conseil d'Etat may stay execution of a collective expulsion order and concluding that the remedy was 'too uncertain to enable the requirements of Article 13 to be satisfied'); App. No. 75529/01, *Sürmeli v. Germany* (Grand Chamber, 2006), at paras 80–115 (examining in detail four distinct remedies

scrutiny has triggered a sharp response from some states, which have argued that this approach risks overburdening their judicial and administrative systems. The Court's reply has been unyielding: 'Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements.'[119]

The ECtHR has even required remedies for excessively lengthy judicial proceedings, which, as noted above, account for a large percentage of applications to Strasbourg. In doing so, the Court bolstered the treaty's speedy justice right by compelling states to 'prevent[] the alleged violation or its continuation, or … provid[e] adequate redress for any violation that ha[s] already occurred'.[120] In the absence of such domestic remedies, 'individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system'.[121] In short, the ECtHR has used Article 13 both to ameliorate its own docket crisis and, more fundamentally, to reshape national legal systems to increase the likelihood that state officials will remedy human rights violations at home.

C *Expanding the ECtHR's Remedial Powers: Non-monetary Reparations and Pilot Judgments*

The ECtHR long adhered to a modest conception of its remedial powers. Its judgments simply declared whether a violation of the Convention had occurred. The Court did 'not even consider [itself] competent to make recommendations to the condemned State as to which steps it should take to remedy the consequences of the treaty violation'.[122] Only if national law failed to provide full reparation did the ECtHR award 'just satisfaction' to the complainant in the form of monetary compensation.[123] In all other respects, the Court entrusted responsibility for executing its judgments to the Committee of Ministers.[124] This deference was consistent with the intention of the treaty's

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that the government alleged were available to challenge excessively lengthy proceedings – a constitutional complaint, an appeal to a higher authority, a special complaint alleging inaction, and an action for damages – and concluding that all four were ineffective and thus insufficient to satisfy Art. 13).

119 *Ibid.*, at para. 84; see also App. No. 18015/03, *Schutte v. Austria* (2007), at para. 36 (rejecting the government's argument that states parties 'should not be required under Article 13 to provide a remedy against delays caused by one of its highest courts'); *Sürmeli v. Germany*, *supra* note 118, at para. 104 (stating that the ECtHR had recently 'undertaken a closer examination of the effectiveness, within the meaning of Article 13 of the Convention, of remedies in a number of Contracting States in respect of the length of proceedings').

120 App. No. 30210/96, *Kudła v. Poland* (2000), at para. 158. In more recent judgments, the ECtHR has stated that 'the best solution' is 'a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy' in the first instance: see, e.g., *Sürmeli v. Germany*, *supra* note 118, at para. 100.

121 *Kudła v. Poland*, *supra* note 120, at para. 155.

122 Barkuysen and van Emmerik, *supra* note 52, at 3.

123 European Convention, *supra* note 1, Art. 41.

124 See Barkuysen and van Emmerik, *supra* note 52, at 20 (describing supervision and enforcement of ECtHR judgments by the Committee of Ministers).

drafters, who sought to create a 'sovereignty shield' that limited the Court's intrusiveness by specifying that any 'reparation to the injured party was to be owed only to the extent that it could be provided within the confines of the domestic legal order'.[125]

Within the last few years, however, the ECtHR has included specific remedial obligations in several high-profile judgments. This change, which some commentators characterize as a 'radical' departure from the Court's past practice,[126] developed in response to the Council of Europe's judicial reform process launched in 2000. Political and expert bodies in the Council, tasked with identifying ways to improve the execution of ECHR judgments, identified the Court's unwillingness to identify specific remedies as an impediment to speedy and full compliance.[127] The refusal had sometimes generated disputes within the Committee of Ministers concerning the scope of a respondent state's legal obligations.[128] It also allowed states to interpret judgments narrowly, arguing that they were 'free to make minimal changes to national law or no changes at all'.[129]

Shortly after the publication of these criticisms, the ECtHR first articulated specific reparations in judgments finding a violation of the Convention. The Court initially confined these pronouncements to 'a limited number of specific areas where there [was] an obvious limited choice as to how implementation should be conducted'.[130] The practice soon became more commonplace, with the ECtHR ordering or recommending remedies that penetrate deeply into the fabric of national law.[131] They include re-opening closed judicial proceedings, revising statutes, releasing illegally detained individuals, and restoring seized property to its owner.[132] Reviewing these

[125] Von Staden, 'Assessing the Impact of the Judgments of the European Court of Human Rights on Domestic Human Rights Policies', paper prepared for delivery at the Annual Meeting of the American Political Science Association (1 Sept. 2007), at 7 (citing D. Leeb, *Die innerstaatliche Umsetzung der Feststellungsurteile des Europäischen Gerichtshofes für Menschenrechte im entschiedenen Fall* (2001), at 18).

[126] Leach, 'Beyond the Bug River – A New Dawn for Redress Before the European Court of Human Rights' [2005] *Eur Human Rts L Rev* 147, at 149 ('in one notable area the Court has begun to throw off former constraints and to embark on a more expansive, radical agenda: in its provision of redress to successful applicants').

[127] See European Commission for Democracy Through Law (Venice Commission), *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, Op. No. 209/2002 (Dec. 2002); see also Bates, 'Supervision of the Execution of Judgments delivered by the European Court of Human Rights: The Challenges Facing the Committee of Ministers', in Christou and Raymond, *supra* note 52, at 49, 70 and n. 94 (citing reports and resolutions criticizing the ECtHR for lack of clarity in specifying remedial measures).

[128] Bates, *supra* note 127, at 70 and n. 93; see also von Staden, *supra* note 125, at 9 (stating that 'even though [a] case decided at Strasbourg implicates a general governmental policy, such as a particular legal provision, the state may seek to portray the violation found by the Court as unique and thus limit its response to the individual case, thereby avoiding a change in its general policy').

[129] Cameron, *supra* note 65, at 228.

[130] Bates, *supra* note 127, at 70 and n. 94.

[131] The remedies that the Court indicates are legally binding when they are phrased in mandatory language and appear in the operative part of the judgment. In other cases, the Court phrases remedies as recommendations rather than obligatory commands: see Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assandize, Broniowski* and *Sejdovic* Cases', 7 *Human Rts L Rev* (2007) 396, at 397–399.

[132] See *ibid.*, at 398–403 (reviewing case law).

cases, one commentator has proclaimed, perhaps prematurely, that 'the shackles of a merely declaratory approach to redress have now, rightly, been thrown off for good'.[133]

A second remedial issue that has received significant attention in the Council of Europe reform process concerns human rights problems that affect large groups of similarly situated individuals. In 2004, the Committee of Ministers issued a resolution inviting the ECtHR to identify in its judgments 'what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments'.[134]

Only a month later, the ECtHR delivered its first 'pilot judgment' in *Broniowski v. Poland*,[135] a case involving a landowner forced to abandon property after a shift in the country's borders following the Second World War. The dispute 'originated in a widespread problem which results from a malfunctioning of Polish legislation and administrative practice' affecting 80,000 property claimants and 167 pending applications.[136] After finding a violation of the right to property, the ECtHR held that Poland was obligated to provide a remedy 'at national level' that 'take[s] into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause.'[137] One year later, the Court approved a friendly settlement of the dispute, but only after Poland had enacted new legislation that provided compensatory remedies to all of the former property owners.[138]

The ECtHR's creation of international law's first class action mechanism[139] 'saved the Court an enormous amount of time and labour' and dramatically publicized its determination to find comprehensive solutions to systemic human rights problems.[140] The Court has since applied the pilot judgment procedure to civil and political rights violations in other member states.[141] And it has indicated that its review encompasses not only identifying structural violations but also scrutinizing the legislation and administrative regulations that national governments adopt to comply with its

[133] Leach, *supra* note 126, at 149. But see Colandrea, *supra* note 131, at 411 (concluding that '[o]nly when the violation is such that it excludes any choice as to the means of reparation open to the State will the Court formulate a specific measure').

[134] Res. (2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem (12 May 2004).

[135] App. No. 31443/96 (Grand Chamber, 2004).

[136] *Ibid.*, at para. 189.

[137] *Ibid.*, at para. 193.

[138] *Broniowski v. Poland*, *supra* note 135, at paras 39–42 (Grand Chamber, 2005) (friendly settlement).

[139] See Aceves, 'Actio Popularis? The Class Action in International Law' [2003] *U Chicago Legal Forum* 353, at 391 ('[c]lass action litigation is not recognized as a procedural mechanism in international law').

[140] Caflisch, *supra* note 3, at 413; see also Leach, *supra* note 126, at 162–163.

[141] See Garlicki, 'Broniowski and After: On the Dual Nature of "Pilot Judgments"', in L. Caflisch *et al.* (eds), *Liber Amicorum Luzius Wildhaber* (2007), at 177, 186–191.

remedial orders and recommendations.[142] Stated differently, the ECtHR has arrogated to itself the power to monitor compliance with its most far-reaching judgments, a power that was previously the exclusive province of the Council of Europe's political bodies.

4 Evaluating Proposals to Redesign the ECtHR: Embeddedness as a Deep Structural Principle of the Strasbourg Supervisory System

The previous parts of this article identified several areas in which the ECtHR has revised its case law to increase its scrutiny of member states' human rights practices. Ameliorating the Court's looming docket crisis provides a partial explanation of these marked jurisprudential shifts. The new pilot judgment procedure, for example, compels governments to find systemic solutions for widespread human rights problems and thereby preclude large numbers of applicants from filing complaints in Strasbourg.

At a more fundamental level, however, the recent changes in the Court's case law reflect the emergence of diffuse embeddedness as a deep structural principle of the European human rights regime.[143] Embeddedness does not supplant subsidiarity, a long-held tenet of the Convention's supervisory system. Rather, embeddedness serves as subsidiarity's necessary complement. It authorizes the ECtHR to adopt a more interventionist stance when the justifications for deference to national decision-makers are diminished or absent. Where, for example, regions or localities are overwhelmed by violence, or inefficient domestic judicial systems make timely and effective remedies a practical impossibility, the core values underlying the Convention's 'special character as a treaty for the collective enforcement of human rights',[144] are best served by giving the ECtHR a more assertive (but hopefully temporary) supervisory role.

To be clear, enhanced regional supervision does not seek to aggrandize the powers of the ECtHR or those of the Council of Europe. Its short-term objectives are, instead, to bolster the capacity of national institutions and to 'backstop domestic political and legal groups trying to comply with international legal obligations'.[145] The ultimate aim, however, is to revive the subsidiarity doctrine when domestic decision-makers have resumed their rightful position as the Convention's first-line defenders.

Admittedly, these goals are audacious. They cannot be achieved by the Court alone. And even with the full backing of the Council of Europe's political and expert bodies,

[142] See App. No. 36813/97, *Scordino v. Italy (No. 1)* (Grand Chamber, 2006) (finding that new legislation, enacted by the government to remedy widespread and systemic delays in judicial proceedings that the ECtHR had reviewed in earlier judgments, itself violated the Convention).

[143] That alleviating docket congestion is not the sole or even the primary rationale for these doctrinal developments is illustrated by cases in which the ECtHR acts as a first instance tribunal: see *supra* Part 3A. The Court's assumption of this role can only increase its case load in the short and medium term.

[144] *Soering v. United Kingdom*, ECtHR, Series A No. 161 (1989), at 34.

[145] Slaughter and Burke-White, *supra* note 20, at 333.

they face several potential obstacles. These challenges notwithstanding, I argue that the embeddedness principle is an appropriate aspiration for the world's most advanced human rights system – a system that has proved its ability to evolve institutionally, politically, and legally, and whose member states have now unanimously incorporated international human rights standards into their respective national laws.

In the sections that follow, I first review judicial reform proposals that the Council of Europe has already adopted or is currently considering that would increase the connections between the ECtHR and national courts and parliaments, further embedding the Court in domestic legal systems. I then discuss several additional measures that would augment the diffuse embeddedness principle and extend it to the Council of Europe's political and expert bodies. I conclude by discussing the obstacles to implementing these and other reform proposals.

A *Reforms that Further Embed the ECtHR in National Legal Systems*

As explained above, the ECtHR is not directly embedded in domestic legal systems.[146] It has no mechanism – such as the ECJ's preliminary reference procedure – to forge direct links to national courts or government institutions. Four recently implemented or proposed reforms of the Strasbourg supervisory system would, however, strengthen the Court's connections to national courts and, to a lesser extent, to national parliaments.

The first reform is already underway. In 2000, the Committee of Ministers launched an ambitious programme to convince national governments to authorize their courts to reopen judicial proceedings following an adverse ECtHR judgment.[147] In response to this initiative, '[m]ore than a dozen member states have adopted legislation providing for the reopening of criminal proceedings and a number of courts have developed their case-law so as to allow for such reopening'.[148] As of 2006, such remedies are now available in 80 per cent of member states in criminal cases and about half of the Convention countries in civil and administrative cases.[149] These changes are likely to enhance embeddedness in two complementary ways. First, an increasing number of national courts will be empowered to execute, more or less automatically, ECtHR judgments that find fault with domestic trials. Secondly, Strasbourg judges, aware of this fact, can target their increasingly precise remedial orders and recommendations directly to their domestic judicial counterparts.

[146] See *supra* Part 2C.

[147] See Recommendation Rec(2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR (19 Jan. 2000), at 2.

[148] Steering Committee for Human Rights, Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), Draft Follow-up Sheets on the Implementation of the Five Recommendations, DH-PR(2006)002 Addendum I (4 Apr. 2006), available at: www.coe.int/t/f/droits_de_l'homme/DH-PR(2006)002EAddendumI.asp, at 5.

[149] See *Ensuring the continued effectiveness of the European Convention on Human Rights – The Implementation of the reform measures adopted by the Committee of Ministers at its 114th Session*, 116th Session of the Committee of Ministers, CM(2006)39 final (12 May 2006), at 6.

A second reform was recently proposed by the 'Group of Wise Persons', a panel of experts charged with studying the long-term effectiveness of the European human rights system. In its final report published in November 2006, the experts recommended 'institutionalising the links between the [ECtHR] and the highest courts in the member states' by authorizing the latter courts to 'apply to the [ECtHR] for advisory opinions'.[150] The goal of this 'innovation' is to 'foster dialogue between international and domestic judges' and 'enhance the Court's "constitutional" role'.[151] To reduce the pressure on the ECtHR's already overburdened case load, the report proposed that 'only constitutional courts or courts of last instance' be authorized to seek non-binding opinions from the ECtHR and that their requests should 'only concern questions or principle or of general interest relating to the interpretation' of the Convention.[152]

A third proposal to redesign the ECtHR, also advocated by the Group of Wise Persons, would shift responsibility for awarding monetary damages to successful complainants from the ECtHR to national courts. Under the Group's proposal, each member state would 'designate a judicial body with responsibility for determining the amount of compensation' within the time limits set by the Court and following the 'criteria laid down in the Court's case-law'.[153] Dissatisfied complainants could challenge these damage awards before the ECtHR.[154] If the member states agree to adopt this new remedial structure, the ECtHR will, for the first time, exercise appellate review over domestic judges, who, in turn, will act as compliance partners for the monetary component of all ECtHR judgments.

A fourth institutional reform with ancillary embedding effects concerns an ongoing effort to ensure that draft statutes, existing legislation, and administrative practices comply with the Convention and with ECtHR case law. In 2004, the Committee of Ministers urged member states to adopt 'appropriate and effective mechanisms for systematically verifying' the treaty-compatibility of domestic laws.[155] These review procedures – which are now in place in various forms in all member states – help

[150] Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203 (15 Nov. 2006), at 21. The Group of Wise Persons considered, but ultimately rejected, creating a preliminary ruling procedure for domestic judges to refer legal questions to the ECtHR – an institutional linkage that exists between the ECJ and European national courts. According to the Final Report, such a mechanism 'represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court's workload': *ibid.*

[151] *Ibid.*, at 21. Although the report refers to the ECtHR's constitutional justice function, its proposal for advisory opinions provides a mechanism for the Court more deeply to embed its interpretations of the Convention in national legal systems.

[152] *Ibid.*, at 22. The experts further recommended that the ECtHR 'have discretion to refuse to answer a request for an opinion' without the need to give reasons for its refusal: *ibid.*

[153] Group of Wise Persons, *supra* note 150, at 25–26. For a similar proposal see Mahoney, 'Thinking a Small Unthinkable: Repatriating Reparation from the European Court of Human Rights to the National Legal Order', in Caflisch *et al.* (eds), *supra* note 141, at 263.

[154] Group of Wise Persons, *supra* note 150, at 26.

[155] 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 (12 May 2004), at 2.

domestic institutions to identify potential treaty violations before they generate complaints to Strasbourg.[156] The Committee of Ministers has recently recommended that the ECtHR become more involved in this verification process.[157] This would occur, for example, if member states adopted the Group of Wise Persons' proposal to allow constitutional and supreme courts to request advisory opinions from the ECtHR. When exercising the verification functions already entrusted to them under national law,[158] these domestic courts could ask Strasbourg judges to review the Convention-compatibility of existing or proposed legislation.

These four initiatives raise complex issues of institutional design. Some may increase the ECtHR's already overburdened case load, at least in the short term. Others are long-term solutions that require revising not only the ECtHR's powers – revisions that the Court itself may view unfavourably[159] – but also the jurisdiction of domestic courts.[160] Taken together, however, the initiatives reveal that many reform proposals nominally intended to ease the ECtHR's docket crisis will also enhance the links between the Court and the disaggregated branches of national governments.

B *Additional Proposals to Promote Diffuse Embeddedness*

The initiatives reviewed above would further embed the ECtHR in national legal and political systems. However, the proposals were drafted with different aims – to reduce the Court's case load and improve compliance with its judgments. To more firmly implant diffuse embeddedness as a deep structural principle of the Convention, additional measures will be likely to be needed. Some measures can be implemented by the ECtHR itself. Others will require action by the Council of Europe and its member states.[161] I discuss several proposals below, reviewing them roughly in the order of the ease of their implementation. Before doing so, however, I note an important caveat – each proposal is preliminary and deserves more extended analysis than I can provide in this article.

[156] *Ibid.*; Committee of Ministers, *supra* note 149, at 7.

[157] See *Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels* (19 May 2006), at para. X(g).

[158] A recent Council of Europe survey found that national courts play a pre-eminent role in reviewing existing legislation and administrative practices to determine their compatibility with the Convention: see Committee of Experts, *supra* note 148, at 47–51.

[159] See J.-P. Costa, 'Comments on the Wise Persons' Report from the Perspective of the European Court of Human Rights', in *Colloquy on the Future Developments of the European Court of Human Rights in the light of the Wise Persons' Report* (San Marino, 22–23 Mar. 2007), at 39, 42 (hereinafter *San Marino Colloquy*) (noting that Group of Wise Persons' proposal that domestic courts be authorized to request advisory opinions from the ECtHR and to determine compensation to prevailing complainants were ideas 'in respect of which the Court is unfavourable or at least has reservations').

[160] See Thomassen, 'Relations between the Court and States Parties to the Convention', in *San Marino Colloquy, supra* note 159, at 58, 64 (stating that proposal to refer damages remedies to domestic courts could be 'incompatible with national systems' and suggesting an alternative proposal).

[161] Cf. Mahoney, 'Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights', 26 *Human Rts LJ* (2005) 345, at 346 (asserting that 'further reform, quite radical – in the sense of structural changes that redesign the architecture of adjudication by the Court – is called for in addition to the oft-cited "managerial" changes').

The easiest and least controversial measure concerns the new admissibility rule in Protocol No. 14. This provision authorizes the ECtHR to dismiss a complaint if it determines that the applicant 'has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols 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'.[162] According to Protocol No. 14's explanatory report, dismissal of cases in which an individual has suffered only 'trivial' harm is consistent with the subsidiarity principle and allows the ECtHR to manage its workload more effectively.[163] The Court cannot reject such complaints, however, if respect for human rights requires an examination of their merits or if the claims have never been considered by a domestic court. The drafters left these two 'safeguard' clauses, as well as the 'significant disadvantage' clause itself, 'open to interpretation' to allow the ECtHR to clarify their precise meaning.[164]

Consistent with this intent, the ECtHR should interpret the new admissibility rule to bolster its indirect control over national courts. In particular, it should create an incentive for domestic judges to apply the Convention as interpreted by the ECtHR. Consider as an example a case concerning a civil or political right with respect to which the Court has developed an extensive jurisprudence. When a national court, reviewing a complaint alleging a violation of that right, applies the treaty's text (or its national law equivalent) without considering this case law, the ECtHR should hold that the complaint has 'not been duly considered by a domestic tribunal' and cannot be dismissed under the new admissibility rule. This interpretation sends a clear signal to domestic judges – the closer they adhere to ECtHR jurisprudence, the greater the chance they will avoid the 'international embarrassment' of a later reversal in Strasbourg.[165] Over time, this strategic interpretation will increase the respect that national courts give to ECtHR judgments and enhance the opportunities to remedy treaty violations at home.

A second way to enhance embeddedness concerns the award of non-monetary remedies. As described above, the ECtHR recently changed its longstanding practice of refusing to identify the remedial measures that states must adopt to comply with its rulings.[166] The Court has not, however, indicated such measures in every judgment, creating needless uncertainty for states and inequity among applicants. Consistently with Protocol No. 11's grant of direct access to individuals and with the Convention's effectiveness principle,[167] the Court should identify appropriate non-monetary

[162] Protocol No. 14, *supra* note 85, Art. 12(b).

[163] See Protocol No. 14 Explanatory Report, *supra* note 88, at paras 77–82.

[164] See *ibid.*, at paras 80–82. The proposal to add this discretionary admissibility criterion to the Convention generated considerable controversy among NGOs, members of the Court, and the Council of Europe's political and expert bodies: see Beernaert, *supra* note 87, at 552 and nn. 43–46.

[165] Kumm and Comella, *supra* note 40, at 486.

[166] See *supra* Part 3C.

[167] Mowbray, *supra* note 63, at 72 ('Another significant method of interpretation developed by the Court has been to interpret the Convention in a manner that seeks to ensure that … rights and freedoms are applied in ways that are of "practical and effective" use to complainants').

remedies in its judgments whenever such remedies will restore applicants to the *status quo* prior to the violation.[168] Such remedial specificity has important consequences for embeddedness. It helps applicants to pressure governments to comply with the Court's judgments and it facilitates the Council of Europe's enhanced efforts to monitor domestic enforcement of those rulings.[169]

The new pilot judgment procedure raises a third embeddedness issue. The ECtHR has now issued several judgments addressing systemic human rights problems. Although the Court does not always use the pilot judgment label to describe such cases, it consistently indicates general measures that governments should adopt to implement its rulings.[170] The Court has given almost no attention, however, to the fairness of the procedure itself.

The very name 'pilot judgment' signifies that the ECtHR uses the first application that comes before it to address systemic violations of the Convention challenged in other complaints. But there is no guarantee that that first case accurately reflects all of the factual and legal issues raised by such violations. In addition, the first applicant enjoys privileged status relative to other complainants. During the time that the first complaint is under review, the other applications remain in stasis.[171] More troubling is the possibility that the first applicant will negotiate a friendly settlement that favours an individual damages award over systemic non-monetary remedies.[172] If the pilot judgment procedure is to serve as an effective tool for improving compliance with the Convention, the ECtHR must pay greater heed to the procedure's legitimacy. The Court must develop safeguards to ensure that class-wide relief applies to all similarly situated applicants and is appropriate to the systemic human rights issues it has adjudicated on.

A fourth and more far-reaching way to anchor embeddedness as a deep structural principle would be to expand member states' obligations to provide effective domestic remedies for Convention violations. The ECtHR has already taken the first steps toward this goal in its recent interpretations of Article 13 analysed above.[173] The Council of

[168] See Shelton, *supra* note 110, at 281 ('Protocol No. 11 now makes the individual an initiating party to the proceedings and a direct focus or object of the case. The Court should therefore rely upon the inherent powers of international tribunals to afford adequate remedies to the injured party before it').

[169] See Greer, *supra* note 3, at 160; see also Leach, 'The Effectiveness of the Committee of Ministers in Supervising Enforcement of Judgments of the European Court of Human Rights' [2006] *Public L* 443, 445 ('In recent years the Ministers' Deputies have sought to improve the efficiency and publicity of the execution control process and to develop their responses, in particular, to situations of delay and negligence').

[170] See Garlicki, *supra* note 141, at 186–191.

[171] See Registrar of the European Court of Human Rights, '"Pinto" cases adjourned pending decision on test case, Press Release 014 (18 Jan. 2005) (stating that the ECtHR had adjourned 'over 800 Italian length-of-proceedings cases, pending its decision in a test case concerning the application of Italy's "Pinto Law"').

[172] Cf. von Staden, *supra* note 125, at 9 and n. 46 (noting that 'a state may prefer to simply pay just satisfaction without taking substantive steps to remedy the situation and fully remove the consequences of the violation' and suggesting that many governments enter into friendly settlements for this reason). To be sure, the ECtHR may not approve a friendly settlement unless it manifests a 'respect for human rights as defined in the Convention and the Protocols thereto' European Convention, *supra* note 1, Art. 37. It remains unclear, however, how stringently the Court will apply that requirement in pilot judgment cases.

[173] See *supra* Part 3B.

Europe's political bodies have cited these developments with approval. In a 2004 recommendation 'on the improvement of domestic remedies', the Committee of Ministers urged the member states 'constant[ly to] review' the Court's case law to ensure that such remedies 'exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found'.[174]

The Committee's endorsement provides political support for the ECtHR further to expand its Article 13 jurisprudence.[175] The Court could, for example, more precisely define the type of investigations or compensatory relief required for different Convention violations and tighten the standards for deciding whether domestic remedies qualify as effective.[176] There is, however, only so far that Strasbourg judges can plausibly stretch Article 13's text. A more radical expansion of domestic remedies will require a new protocol, subject to ratification by each member state. If political support for such a protocol is uncertain, its drafters could adopt a moderate text that requires states to 'make available at the national level some easily accessible mechanism for making full and rapid reparation for any violation of the Convention that has been found in a judgment by the Court'.[177] A more ambitious protocol would build upon the recent incorporation of the European Convention into the domestic laws of all member states and 'require effective *judicial* remedies'. Such a protocol could 'grant … jurisdiction to all domestic courts … to consider complaints about the violation of Convention standards when adjudicating complaints against public authorities' and provide 'individual constitutional complaints processes to all national constitutional courts or their equivalents'.[178]

As the foregoing discussion illustrates, the more far-reaching initiatives to promote embeddedness will require the support of the Council of Europe. The member states of the Council, acting as a collective, must provide the political and financial assistance needed to encourage, cajole, and, where necessary, sanction insufficiently resourced or recalcitrant countries to deter human rights violations from occurring and to remedy breaches of the Convention once they have occurred.

To achieve these results, the Council should, first and foremost, increase the resources available for educating and training government authorities, law enforcement officials, and domestic judges (especially those serving on lower and administrative

[174] Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (12 May 2004), at 2.

[175] A different Committee of Ministers recommendation adopted on the same date provided the impetus for the ECtHR to create the pilot judgment procedure: see *supra* note 134 and the text accompanying it.

[176] C. Ovey and R. White, *Jacobs and White on the European Convention on Human Rights* (4th edn., 2006), at 471 (stating that the 'potential for the development through interpretation of the rights contained in Article 13 remains high').

[177] Mahoney, *supra* note 153, at 282; see also Group of Wise Persons, *supra* note 150, at 24 (proposing the adoption of a protocol that obligates member states 'to introduce domestic legal mechanisms … to redress the damage resulting from any violation of the Convention, and especially those resulting from structural or general shortcomings in a state's law or practice').

[178] Greer, *supra* note 3, at 281.

courts) about the European human rights regime.[179] The goal is to convert these public actors into the Convention's first-line defenders and, failing that, into 'compliance constituencies' for the Court in the wake of an adverse ruling against the state.[180] Given the large number of countries and audiences to which such outreach efforts might be directed, 'it makes more sense … for scarce resources to be targeted upon low-compliance states than all states equally',[181] and to emphasize rights and freedoms that are relevant to different audiences.

The Council should also consider more focused strategies to promote embeddedness. One such strategy involves expanding the activities of National Human Rights Institutions (NHRIs).[182] The Council of Europe could restructure the Convention's supervisory system to enable these domestic advocates for civil and political liberties to assist it in a variety of ways. Such assistance could include preparing periodic reports of human rights 'hot spots' in Europe; empowering NHRIs to file complaints alleging Convention violations with constitutional or high courts; authorizing them to intervene in pilot judgment cases to provide additional information about the systemic human rights problems under review; and assisting the Committee of Ministers and the Parliamentary Assembly in policing compliance with the Court's judgments.[183]

More difficult issues arise where a country fails to comply with ECtHR judgments against it. The Council should develop a suite of 'positive incentives' and 'punishment mechanisms' – carrots and sticks, to use more colloquial language – that it deploys to induce compliance with ECtHR rulings.[184] Positive incentives include foreign aid, democracy assistance programmes, and funds to support domestic non-governmental organizations. In the past, the Council has used these measures to reward former Soviet bloc countries for implementing the commitments they made when joining the organization and to spur additional reforms.[185] It could follow a similar strategy to encourage compliance with ECtHR judgments, in particular those that address systemic human rights problems.[186]

Sanctions for non-compliance should be graded according to the nature of the violation and the reason the state proffers for failing to comply. The sticks available to the Council include fact-finding missions to investigate the causes of non-compliance,

[179] Programmes for training and assistance already exist, but they have been criticized as 'under-funded and extremely limited in scope': *ibid.*, at 108 (internal quotations omitted).

[180] Kahler, 'Conclusion: The Causes and Consequences of Legalization', 54 *Int'l Org* (2000) 661, at 675.

[181] Greer, *supra* note 3, at 131.

[182] See *ibid.*, at 289–301 (discussing the activities and functions of NHRIs).

[183] This para. is inspired by Steven Greer's thoughtful reform proposals: see *ibid.*, at 310–311.

[184] Sundstrom, 'Carrots and Sticks for Democracy in the OAS: Comparison with the East European Experience', 10 *Canadian Foreign Pol* (2003) 45, at 46.

[185] See Jordan, 'Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms', 25 *Human Rts Q* (2003) 660, at 681 (stating that 'in November 2002, the Council granted Russia 18 million euros toward implementing a number of new legal reforms, and in recognition of its fulfilling Council obligations' relating to human rights).

[186] Such measures must be used sparingly to avoid the perception that the Council rewards countries that refuse to comply with ECtHR judgments. Seen from this perspective, cases involving lack of capacity present more attractive cases for 'carrots' than those of willful non-compliance.

meetings with political representatives to elicit specific timetables for implementation, and, as a last resort, suspending the benefits of Council membership. In April 2000, for example, the Parliamentary Assembly temporarily suspended Russia's voting privileges in reaction to a critical report by Council of Europe experts who had recently visited Chechnya. Commentators are divided, however, over whether even this relatively mild sanction engendered any material improvement of human rights practices in the region.[187]

C. *Impediments to Redesigning the ECtHR*

Proposals to redesign the ECtHR have thus far been developed with strong backing from the Council of Europe's member states. The widespread support for these reforms is remarkable, given that the Court will possess greater authority to restrict government regulation of an expanding array of civil and political liberties. It is uncertain, however, how far the political will for change extends. In particular, the Council faces two obstacles to embedding the ECtHR more deeply in national legal systems.

The first impediment involves the growing geographic disparity in the Court's case load. As of 1 January 2007, five states – Poland, Romania, Russia, Turkey, and the Ukraine – together accounted for 57 per cent of all applications to the ECtHR, with Russia alone the source of more than 21 per cent of complaints.[188] The disproportionate number of cases emanating from this small number of countries creates political fault lines that threaten to derail the ECtHR reform process.

The most overt resistance has come from Russia, which in December 2006 became the only member of the Council of Europe to reject Protocol No. 14, thus preventing its entry into force. Some representatives in the State Duma pointed to the Protocol's single-judge screening procedure to justify the refusal to ratify the treaty.[189] But resistance to reforms runs far deeper and reflects the government's opposition to ECtHR judgments involving extrajudicial killings in Chechnya, the refusal to extradite Chechen rebels from Georgia, and a dispute involving the separatist Transdniestria region of Moldova.[190] These cases have soured the relationship between the Russian government and the Council.[191]

[187] Compare Sundstrom, *supra* note 184, at 50 (asserting that Russia was 'clearly embarrassed about this punishment … and was eager to satisfy the [Council] demands quickly to restore its status in the [Council]') with Baker, 'Europe Council Restores Russia's Rights', *NewYork Times*, 26 Jan. 2001, at A14 (reporting statements by Council officials that the suspension of Russia's voting privileges weakened the Council's ability to monitor human rights standards in Chechnya).

[188] Registry of the European Court of Human Rights, *Survey of Activities 2006* (2007), at 51.

[189] 'Duma Gives It to the European Court', *Kommersant* (21 Dec. 2006), available at: www.kommersant.com/p732043/r_500/State_Duma_European_Court/.

[190] See App. No. 36378/02, *Shamayev and Others v. Georgia and Russia* (2005); App. No. 48787/99, *Ilaşcu and Others v. Moldova and Russia* (Grand Chamber, 2004); Kaye, 'International Decisions: *Isayeva, Yusupova and Bazayeva v. Russia* and *Khashiyev and Akayeva v. Russia*', 99 *AJIL* (2005) 873.

[191] President Vladimir Putin has explained the Duma's rejection of Protocol No. 14 as a reaction to 'a politisation of the Court's judgments'; O. Spijkers, *How Russia Hijacks the European Court of Human Rights*, 1948: an International Blog at the University of Leiden, available at: http://weblog.leidenuniv.nl/fdr/1948/2007/03/how_russia_hijacks_the_european_court_of_human_rights_1.php.

Russia's rejection of Protocol No. 14 may, however, be only a temporary ploy. The country's status as the only protocol hold-out state offers a tempting opportunity to negotiate concessions from other European countries – a tactic Russian government employed when it first rejected but later ratified the Kyoto Protocol.[192] On the other hand, the growing number of complaints against Russia, which, as noted above, now comprise nearly one quarter of all applications to the ECtHR, may entrench resistance to reforms that 'facilitate[e] the efficient determination of cases by the Court'.[193]

A second obstacle to creating a more embedded human rights regime concerns the ECtHR's relationship with national courts. As noted above, many proposals to redesign the ECtHR seek to strengthen the ties between the judges in Strasbourg and their domestic colleagues.[194] The cooperation of national judiciaries is essential to maintaining and improving compliance with European human rights standards. Enhancing domestic judicial support for the ECtHR faces at least two challenges, however.

First, in countries where courts are not fully independent, judges may be reluctant to exercise the muscular judicial review needed to remedy Convention violations at home. Where executive branch officials or legislators maintain substantial control over judicial appointments, retentions, or salaries, a judge's interest in professional survival sharply diminishes his or her incentive to hold governments accountable for human rights abuses. This highlights the importance of developing long-term initiatives to promote judicial independence, bolster democratic institutions, and educate and train judges and other public officials concerning the Convention's requirements.[195]

A second and more serious challenge to the ECtHR's collaboration with national courts arises where those courts are themselves the source of Convention violations. As noted above, more than half of the Court's recent judgments concern unfair trials and excessively lengthy judicial proceedings.[196] These defects in the domestic administration of justice reveal that the primary guarantors of individual rights in Europe are also often its primary violators. Since most due process violations are committed by lower-level tribunals, the ECtHR should encourage constitutional and supreme courts to apply Convention case law to resolve such cases before they generate a wave of complaints to Strasbourg.[197] The Court should also use the pilot judgment procedure to require national parliaments to remedy due process violations caused by inadequately resourced and overburdened domestic judiciaries. These approaches may be supplemented by political strategies, including the 'carrots and sticks' discussed in the previous section.

[192] See *ibid.*; see also Grubb and Safonov, 'Why is Russia Dragging its Feet on Kyoto?', *Financial Times*, 14 July 2003.

[193] Mowbray, 'Faltering Steps on the Path to Reform of the Strasbourg Enforcement System', 7 *Human Rts L Rev* (2007) 609, at 610.

[194] See *supra* Part 4A and 4B.

[195] *See supra* text accompanying notes 179–181 (reviewing these proposals).

[196] *See supra* note 16.

[197] See, e.g., *Scordino v. Italy (No. 1)*, *supra* note 142 (pilot judgment representing over 800 cases challenging the excessive length of proceedings in lower-level Italian courts).

5 Conclusion

The individual complaints mechanism of the ECtHR is the crown jewel of the world's most advanced international system for protecting civil and political liberties. In this article, I have argued that the recent proposals to redesign the ECtHR in response to a growing backlog of complaints should be understood not as ministerial changes in judicial procedure, nor as resolving the debate over whether the ECtHR should strive for individual or constitutional justice, but rather as raising more fundamental questions concerning the Court's future identity. In particular, I have asserted that the Council of Europe, its member states, and ECtHR judges should recognize diffuse embeddedness as a deep structural principle of the European Convention, a principle that functions as a necessary complement to the subsidiary doctrine that has animated the region's human rights regime since its inception.

Embeddedness, as defined in this article, requires the Council of Europe's political and judicial bodies to bolster domestic mechanisms for remedying Convention violations at home, obviating the need for aggrieved individuals to seek relief at the regional level. The absence or inadequacy of these mechanisms justifies expanding the ECtHR's review powers, albeit temporarily, until national decision-makers begin to function (or once again function) as the first-line defenders of the Convention's rights and freedoms.

In recent years, the ECtHR has modified its jurisprudence to embed itself more firmly in national legal and political systems. Where domestic authorities refuse to investigate human rights abuses, for example, the Court has acted as a first instance tribunal with the power to find facts necessary to decide whether the government has violated the applicant's rights. The ECtHR has also developed a more capacious understanding of the Convention's domestic remedies provision. And it has markedly expanded its remedial powers, issuing rulings that require states to provide specific non-monetary reparation and creating a novel pilot judgment procedure to remedy systemic violations.

This article has identified several ways to extend these jurisprudential trends to enhance the ECtHR's embeddedness. In addition to these judicial responses, strengthening the capacity of domestic institutions to remedy human rights violations requires political strategies. Short-term strategies include deploying positive incentives and graded sanctions to induce compliance with specific ECtHR judgments. Longer-term approaches include expanding resources devoted to promoting judicial independence and training public officials in Strasbourg case law, actions that are appropriate when the will to remedy violations exists but the capacity to do so is lacking. In addition to improving adherence to ECtHR judgments, this combination of judicial and political action will help galvanize domestic interest groups to lobby and litigate for greater compliance, encouraging governments to remedy human rights violations at home and providing a more lasting solution to the ECtHR's docket crisis.