The European Court of Human Rights

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The European Court of Human Rights

The European Court of Human Rights ("the Court") was established by the Council of Europe in 1959 to enforce the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").[1] The Court, by combining the expansive provisions of the European Convention with a "living document" philosophy of interpretation, has become a powerful international organization in the arena of human rights. Not only has the Court advanced a progressive social agenda throughout the member countries of the Council of Europe (now 44), as an international court interpreting a multi-lateral treaty, its rulings can provide "evidence" of international legal standards/customary international law that broaden its influence beyond the signatories to the Convention.[2]

I. Background on the Council of Europe and the Convention for the Protection of Human Rights and Fundamental Freedoms

The Council of Europe is an intergovernmental body with a broad agenda covering human rights, social, and cultural issues in Europe. The Council originally was the result of post-World War II efforts at reconstructing Europe and enhancing its

[1] 213 U.N.T.S. 221, 1950.
[2] There is ample ammunition available for modern international law enthusiasts to use ECHR decisions as evidence of international legal standards, especially given the recent growth of "customary international law." The decisions of the Court are given weight due to its position as an international court. *See, i.e.*, Article 38¶1(d) of the Statute of the International Court of Justice (stating that such rulings are a "subsidiary means for the determination of rules of law"). On the U.S. Supreme Court Justice Breyer, along with Justice Stevens, most often cites the opinions of international and foreign courts. Accordingly, Justice Breyer has referred to the European Court's decisions in the contexts of campaign finance (*Nixon v. Shrink*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring)) and capital punishment (*Knight v. Florida*, 528 U.S. _ (1999)(Breyer, J., dissenting)). Moreover, because its rulings are interpretations of an international treaty they can be used as evidence of customary international norm that either "crystallized" when the treaty was adopted or subsequently. *See, i.e., North Sea Continental Shelf* cases, 1969 I.C.J. Reports 44.

democratic values in the face of the Soviet domination of the Eastern Europe. Winston Churchill, considered a sort of Founding Father of the Council, made a famous "United States of Europe" speech in Zurich in 1946 calling for political and economic cooperation in Europe.[3] Two years later, a private effort of acting and former European statesmen seeking increased European cooperation met as the "Congress of Europe" in The Hague and laid the groundwork for the establishment of a formal body. The group produced the first Council of Europe Statute and draft Convention on Human Rights and Fundamental Freedoms.[4]

The Council of Europe was formally established in 1949 by the Treaty of London with the stated aim of enhancing the cultural, social, and political life of Europe.[5] The executive organ of the Council is the Committee of Ministers comprising the foreign affairs ministers of the member states or their representatives.[6] In 1950 the Committee, borrowing heavily from the U.N.'s Universal Declaration of Human Rights,[7] drew up its first treaty, [8] the Convention for the Protection of Human Rights and Fundamental Freedoms that went beyond the Universal Declaration by providing for an independent enforcement mechanism. The Committee insisted that some of these provisions be toned

[3] Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, 99 ST. LOUIS-WARSAW TRANS'L 69, 72 (1999); *see also A Short History of the Council of Europe* (Council of Europe web site) <http://www.coe.int>.

[4] Klebes, *supra* note 3, at 71.

[5] BRICE DICKSON ed., HUMAN RIGHTS AND THE EUROPEAN CONVENTION 2 (1997). The ten original signatories were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the U.K. Greece and Turkey signed later the same year. *Id.*

[6] The deliberative body of the Council of Europe is the Parliamentary Assembly which is made up of groups of representatives from the parliament's of the Council of Europe member states approximately based on population (i.e., the U.K., France, Germany and Italy have 18 members each). The Parliamentary Assembly meets periodically and due to its size generally functions through committees. *Id.*, at 4.

[7] The Convention's preamble makes reference to it being the first step in collective enforcement of certain of the rights in the Universal Declaration.

[8] DICKSON, *supra* note 5, at 3. The Council of Europe has over 170 conventions. Klebes, *supra* note 3, at 70.

down, however, and included exceptions and qualifications to most of the provisions. Additionally, the U.K was opposed to the subsequent creation of the Convention's monitoring bodies, the Commission of Human Rights and the Court of Human Rights, and succeeded in persuading the Committee that acceptance of jurisdiction of these bodies should be left to discretion of each member state.[9] As a result, the treaty originally had optional clauses on the right of individual petition [10] and compulsory jurisdiction.

The Convention was open for signature in Rome on November 4, 1950 and entered into force on September 3, 1953.[11] Article I of the Convention states, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Section I contains the substantive provisions of the Convention while Section II contains the procedural provisions. Specific provisions in Section I include the right to life (Article 2), the prohibition of torture, inhuman or degrading treatment (Article 3), the right to liberty and security (Article 5), the right to respect for private and family life (Article 8), and the freedom of expression (Article 10). Section I's general articles include the guarantee of an effective remedy (Article 13), the prohibition of discrimination regarding the Convention's rights (Article 14), and the states' right to derogate certain provisions in time of emergency (Article 15).

Amendments to the Convention take the form of protocols. The Committee of Ministers has approved eleven protocols, but not all have been accepted by every state.

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[9] DICKSON, *supra* note 5, at 6.

[10] Individual petition allows individual applicants (including individuals, groups of individuals, or non-governmental organizations) to lodge complaints against Contracting States for alleged violations. These petitions still had to be assessed by the Commission before possible adjudication by the Court.

These include both procedural and substantive matters. The substantive protocols 1, 4, 6, 7, 12, and 13, contain various additional rights and prohibitions of state actions including the protection of property (Protocol 1), the abolition of the death penalty (Protocol 6), and non-discrimination regarding any legal right (Protocol 12). The most significant procedural protocol is Protocol 11, discussed below, that went into effect in November of 1998 and completely reorganized the Convention's enforcement machinery.

Concerns about submitting to a supranational control mechanism caused many states to delay ratification and acceptance of the optional clauses on compulsory jurisdiction and the right to individual petition. For example, France and Greece, members of the Council of Europe since 1949, signed the Convention in 1950, but didn't ratify until 1974. They did not accept the optional clauses until 1974/1981 and 1979/1985 respectively.[12] The United Kingdom, the first to sign and the first to ratify in 1951, did not accept the optional clauses until in 1966. However, by 1997, all of the states that had ratified the convention (33) had accepted the optional clauses.[13] Subsequently, Protocol 11 codified compulsory jurisdiction and individual petition for all parties.

The Original Enforcement of the Convention

The enforcement mechanism of the Convention was originally based on three organs located in Strasbourg: the Council's Committee of Ministers; the European

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[11] The European Court of Human Rights, historical background, organisation and procedure <http://www.echr.coe.int/Eng/edocs/infodocrevised2.htm>.
[12] Klebes, *supra* note 3, at 72.
[13] DICKSON, *supra* note 5, at 8 and 17. The optional clauses were accepted by most states on a provisional basis for a renewable period of years. For example, the U.K. accepted both for 5-year increments and, despite some debate over individual petition, always renewed. *Id.* at 8. Turkey did not accept compulsory jurisdiction until 1990 and the right to individual petition until 1997. Klebes, *supra* note 3, at 71.

Commission of Human Rights (est. 1954); and, the European Court of Human Rights, which was established in 1959. Members of the Commission of Human Rights were elected by the Committee of Ministers and included one member from each of the states that had ratified the Convention.[14] The Commission met on a part-time basis[15] and was the first step in the complaint process whereby it would rule on the admissibility of the application.[16] If the complaint had merit the Commission could conduct further investigation of the matter and would attempt to forge a friendly settlement between the parties.[17] If a complaint was admissible and no friendly settlement could be reached, the Commission drew up a report establishing the facts and expressing an opinion on the merits of the case, which it then transferred to the Committee of Ministers.[18]

If the respondent state had accepted compulsory jurisdiction, the Commission and/or any Contracting State concerned had a period of three months to bring the case before the Court of Human Rights.[19] If not, the Committee decided whether there was a violation of the Convention (by a two-thirds majority) and, if appropriate, could provide monetary damages, or "just satisfaction", to the victim.[20] The Committee was not bound by the Commission's recommendations. The Committee of Ministers was also responsible for supervising the executions of judgments made by the Court.

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[14] DICKSON, *supra* note 5, at 10.
[15] By the 1990s the Commission met for two-weeks at a time for approximately 8 times a year. *Id*. at 3.
[16] *Id.* at 12. The Commission usually operated in chambers of seven and the commissioner from the respondent state had a right to sit on the chamber. *Id.*
[17] Justice Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 CARDOZO LAW REVIEW 1045, 1057 (2000).
[18] Court of Human Rights web site (History), *supra* note 10.
[19] *Id.* Protocol 9, if the respondent state had ratified, gave individuals the right to refer cases to the Court following the Commission's ruling. Protocol 9 was repealed by Protocol 11. Now under Protocol 11, with no commission and the right of individual petition established, individual complaints go straight to the Court for review.
[20] *Id.*

The Court was established by Section IV of the original Convention and the first election of judges was completed in 1959. Like the Commission, the Court was only a part-time operation and had a commensurate workload. In the early years it sometimes met only once a year and then only because it's rules required an annual meeting.[21] From 1955 to 1987 the Commission/Court received 39,953 initial applications and delivered only 154 judgments.[22] While the Court's workload grew steadily in the 80s, in the 90s it exploded as a result of the increased membership in Council of Europe following the fall of the Berlin Wall[23] and, likely, to the more receptive ear in Strasbourg. In 2002 alone, the Court received 30,828 initial applications and delivered 844 judgments compared with 4,246 applications and 26 judgments in 1988.[24]

The "New" Court

Due to this increased workload and the expanded membership, Protocol 11, established the "New" Court of Human Rights on November 1, 1998,[25] replacing the part-time Commission and Court with a permanent court. The protocol, which required ratification by all contracting states, dissolved the Commission, as well as the adjudicative function of the Committee of Ministers. Any review of violations of the

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[21] John Hedigan, *Brian Walsh and the European Court of Human Rights – The Strasbourg Years, Address at the Irish Society for European Law* (Mar. 3, 2001). As late as 1998, the Court only met for approximately one week a month. *Id.*

[22] EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES 2002 (2003) at 31.

[23] At the end of 1988 21 nations had ratified the Convention. In April of 2002, Armenia became the 44st nation to do so. *See Dates of Ratification* (last modified Jan. 17, 2003) <http://www.echr.coe.int/Eng/EDocs/DatesOf Ratification.html>.

[24] Survey of Activities at 29.

[25] According to a 1994 Council report it took an average of over five years for a case to be completed in Strasbourg. Michael Zander, Q.C., *A Bill of Rights for the United Kingdom – Now*, 32 TEX. INT'L L.J. 441, 441 (1997). Protocol 11 was the result of the first summit meeting of the Council of Europe's Heads of State and Government in Vienna in October, 1993. Andrew Drzemczewski, *Symposium on the Future of International Human Rights: The European Human Rights Convention: A New Court of Human Rights in Strasbourg as of November 1, 1998*, 55 WASH. & LEE L. REV. 697, 697 (1998).

treaty was, therefore, removed from the formal political machinery, but the Committee is still responsible for supervising the enforcement of the Court's judgments.

Also, Protocol 11 formally provides for compulsory jurisdiction and the right of individual petition that were previously optional. The substantive protocols were not affected by the Protocol 11 revisions, however, and are still only enforceable against states that have ratified them.

II. The Structure, Procedure, and Effect of the Court

The Court's judges sit in an individual capacity, but must sit *ex officio* as a judge where his state is a respondent. The number of judges on the Court is equal to the number of High Contracting Parties (currently 44).[26] The judges are elected by the Parliamentary Assembly of the Council and are now elected from a list of three candidates nominated by a High Contracting Party. Terms are for six years and the age limit is 70.[27] Under the new procedures half of the judges are up for election every three years.

The Court is divided into four sections, whose composition is fixed for three years. Cases are heard by "Chambers" of seven judges within each section based on a

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[26] Article 20. Previously there was one judge per member state of the Council of Europe whether or not the state has ratified the Convention. DICKSON, *supra* note 5, at 23 n.89. According to Judge Hedigan judges from Armenia and Ajerbaijan will be elected shortly. Hedigan, *supra* note 21.

[27] Prior to Protocol 11 revisions, the Parliamentary Assembly elected judges from a list of nominees forwarded by the Committee of Ministers, and, judges served terms of nine years with no age limit. DICKSON, supra note 5, at 17. Under the previous rules each state would forward one name that would generally be approved pro forma. Following adverse rulings in 1995, the British Tory government sought more vetting of judges, including more of an opportunity for states to check the background of judges prior to voting. Clare Dyer, *Mackay Takes Britain's Case to Europe: Ministers want judges in Strasbourg to give more weight to UK law and court rulings*, The Guardian (London), Nov. 26, 1996, at 5. Although it is unclear whether the new procedures were a result of the U.K. pressures, they do provide more vetting. In subsequent elections of judges the Committee of Ministers has examined candidates prior to submitting a formal list. Additionally, a subcommittee of the Parliamentary Assembly has conducted interviews, and

rotation. The composition of a section is supposedly geographically and gender balanced and takes into account the differing legal systems of the states.[28] The vast majority of cases are heard on this level.[29]

The Grand Chamber of the Court is made up of 17 members. Chambers may at any time relinquish jurisdiction of a case to the Grand Chamber where a case raises a serious question of interpretation of the Convention or where there is a risk of departing from precedent. Additionally, any party may request referral of a case to the Grand Chamber within three months of a chamber judgment.[30]

Admissibility Procedures

The Court accepts petitions from states and, under Article 34, may receive applications from "any person, non-governmental association, or group of individuals claiming to be the victim of violation."[31] As stated above, originally cases were screened at the Commission level and could be adjudicated by the Committee of Ministers if the Commission or state did not refer the case to the Court. Cases are now referred directly to the Court. Each application is assigned to a section where a judge-*rapporteur* determines if the case should be referred to the Chamber or to a three-judge committee.

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states were asked to provide background information on the candidates. Drzemczewski, *supra* note 25, at 702-03.

[28] Court of Human Rights web site (History), *supra* note 10.

[29] Drzemczewski, *supra* note 25, at 698.

[30] Article 43.

[31] The President of the Court may also "in the interest of the proper administration of justice" (Article 36) accept amicus briefs from concerned parties, including NGOs. This option existed prior to Protocol 11 under the Court's own rules. It is not clear to what effect such briefs have had on the outcome of cases in part because applicants in general are victorious a majority of the time. Nonetheless, NGOs are especially active in prodding the Court where new standards may be applied. As Dinah Shelton wrote in 1994, "[B]ecause non-governmental organizations intervene in the more important cases before the plenary Court where there is no clear precedent and where the Court may be divided, they fulfill the role of assisting the Court in new areas of law where the impact is particularly broad." Dinah Shelton, *Non-governmental Organizations and Judicial Proceedings*, 88 A.J.I.L. 611, 618 (1994).

The committee may by unanimous vote declare inadmissible or strike out an application. If not, the case proceeds to Chamber.[32]

The Chamber first considers the admissibility of the claim by a majority vote. Admissibility criteria are outlined in Article 35. Of primary import, "The court may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized principles of international law, and within a period of six months from the date in which the final provision was taken."[33]

For an individual or group to be able to petition the Court, under Article 34 they must claim to be a "victim of a violation by one of the High Contracting Parties."[34] The Court has been lenient in interpreting this provision, especially when the application raises a new question under the Convention. Actual prosecution is not required for victim status. All that is required for the individual to claim that the measure personally affects him.[35] For example, in the cases concerning anti-sodomy laws, the Commission and Court considered both applicants "victims" even though neither had been arrested nor charged under the challenged laws, nor were they in immediate danger of being so arrested or charged.[36]

There is no state action doctrine, as such, for the Court.[37] Accordingly, the Court has found that certain elements of the Convention, primarily Article 3's restriction on

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[32] State applications proceed directly to chamber.
[33] Article 35, section 1.
[34] Article 34. State applications are more leniently considered. Under Article 33, "Any High Contracting Party may refer to the Court any alleged breach of the provisions…."
[35] P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS 49 (3rd ed. 1998).
[36] *See* Markus Dirk Dubber, Note, *Homosexual Privacy Rights Before the United States Supreme Court and the European Court of Human Rights: A Comparison of Methodologies*, 27 STAN J. INT'L. L. 189, 196 n.44 (1990).
[37] Article 1, requires the states "shall secure to everyone within their jurisdiction the rights and freedoms" of the Convention.

torture or inhuman or degrading treatment, impose positive obligations on states. State obligations have been found where the state was under a duty to protect the health of a person in its custody as well as where the state's actions would open the individual to potential abuse by third parties (as in *Soering*, below). The Court has even imposed obligations where the violation was a purely private matter. In *A. v. United Kingdom*,[38] the U.K. was found in violation of Article 3 for not having more stringent anti-caning measures after a stepfather who had caned his son was acquitted in a British court.

NGOs

NGOs have played a limited, but growing role in the Court's decisions. Prior to the implementation of Protocol 11's reforms, third parties (states as well as NGOs) could provide comments to the Court under the Court's rules if the President of the Court determined it was "in the proper administration of justice."[39] As a result of Protocol 11's reforms, Article 36(2) now codifies the rule, formally providing that the President of the Court may "in the interest of the proper administration of justice" accept "written comments" from "any person concerned" or allow such persons to take part in the proceedings.[40]

Requests and subsequent grants of permission to provide comment have been relatively rare, but are growing. Through 1994 permission was granted in only 16 cases. Nonetheless, NGOs are especially active in prodding the Court where new human rights

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[38]Reports 1998-VI Eur. Ct. H.R. (1998).

[39] Rules of Procedure, Article 37(2) as amended following *Young, James & Webster v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) (1981). Shelton, *supra* note 31, at 631. Prior to this rule the Court allowed information to be submitted to the Court via the Commission on two occasions – one from the U.K. government and one form a trade union group. *Id*.

[40] Article 36, while it is entitled "Third Party Intervention", does not provide for the "intervenor" to become a party to the case.

standards may be applied. Most often requests are before the plenary Court in cases where new law could be made involving rights of a fair trial, freedom of expression, privacy and arbitrary information. According to Professor Dinah Shelton, "[B]ecause non-governmental organizations intervene in the more important cases before the plenary Court where there is no clear precedent and where the Court may be divided, they fulfill the role of assisting the Court in new areas of law where the impact is particularly broad."[41] The primary participants have been UK-based groups including Interights,[42] Article 19 (the International Centre against Censorship),[43] Liberty (a.k.a. the National Council for Civil Liberties)[44] and Amnesty International.[45]

It is not clear what effect such *amicus*[46] "briefs" have on the Court because applicants, once they reach the Court, are successful a great majority of the time.[47] Yet, the Court has referred to NGO submissions a number of times in particularly noteworthy cases, and it appears to be particularly reliant on NGO briefs when it resorts to applying a common European or international human rights standard.

Jurisdiction

Article 1 states that the states "shall secure to everyone within their jurisdiction the rights and freedoms . . . of this Convention." Regarding individuals, the Court has interpreted "everyone within their jurisdiction" without any limitation on nationality.

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[41] Shelton, supra note 31, at 618.
[42] *See* www.interights.org.
[43] *See* http://www.article19.org.
[44] *See* http://www.liberty-human-rights.org.uk.
[45] *See* http://www.amnesty.org.
[46] The first time the Court referred to such submissions as from "amicus curiae" was in *Branigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) (1993), where the Court upheld a British Article 15 derogation regarding Northern Ireland. Shelton, *supra* note 31, at 637.

Even individuals who are not nationals of the state concerned or another contracting state may make a claim so long as he is subject to the jurisdiction of the state in question.[48]

Territorial application is governed by Article 56. Following the language of the Vienna Convention on the Law of Treaties, the Convention applies the territory of the contracting state and "to all or any territories for whose international relations it is responsible." [49] Under this article states are permitted to declare provisions of the treaty inapplicable to any or all of these territories. The Court has not always respected state reservations, however. For example, it held Turkey responsible for alleged violations in the Turkish controlled area of Northern Cyprus despite declarations made by Turkey that it would not accept individual petitions arising from areas outside of the control of the Turkish constitution.[50] And, in *Soering v. United Kingdom*,[51] the Court held that Britain would be responsible for a potential violation of Article 3 if it extradited a murder suspect to the United States where the person could face capital punishment.

Effects of Judgments

Ostensibly, the purpose of the Court's rulings is the identification and the rectification of particular violations of the Convention and not to punish violators.[52] Its judgments are binding in international law on the parties to the case, but are not per se

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[47] Through 1991 applicants were successful over 75% of the time. *Id.* at 638. In 2002 the rate was 75%. SURVEY OF ACTIVITIES 2002 at 29.
[48] VAN DIJK & VAN HOOF, *supra* note 35, at 3.
[49] Id. at 7.
[50] Id. at 4. In the case in question, *Loizidou v. Turkey*, (1997) 23 E.H.R.R 513. Mrs. Loizidou was awarded damages for being refused access to her property in Northern Cyprus. Turkey considers the area a sovereign state and by paying damages Turkey would contradict its stance. Klebes, *supra* note 3, at 78-79.
[51] 161 Eur. Ct. H.R. (ser. A) (1989).
[52] *Soering* is also an example of a rare conditional decision by the Court -- extradition would "give rise to a breach of Article 3." T. BARKHUYSEN, ET AL. eds., THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER 94 (International Studies in Human Rights Vol. 57, 1999).

directly enforceable in national courts. Therefore, the Court does not have the power to strike down the statute that gave rise to the violation, or to overturn final decisions of national courts. As such, its decisions are declaratory in character. According to what the Court refers to as the "subsidiary principle", the states are primarily responsible for guaranteeing the rights and freedoms of the Convention, so it falls to the state in question how it is to comply with the Court's decision.[53] Nonetheless, the Court's decisions have in many cases led to changes in national law or administrative procedures and, more rarely, to constitutional amendments.[54] Additionally, states that were not a party to a decision have made preventive legal changes due to the risk of condemnation by the Court or Committee if they allow a similar situation to continue.[55]

Usually the Court holds that a favorable decision on the merits is enough satisfaction to the claimant – but if the claimant can prove that financial loss has been a direct consequence of the violation it may award 'just compensation' under Article 41.[56] This includes expenses and possibly pecuniary and non-pecuniary damages. Since October 1991, the Court has prescribed a period of three months from the date of decision within which the applicant must be paid.[57] While this remedy is supposedly limited to instances where domestic law does not allow for full reparations, the Court has interpreted the language of the article broadly. It has felt free to award damages

[53] BARKHUYSEN, *supra* note 52, at 7. The Court has made exceptions to this and be specific at times concerning how a state should comply with the Convention. For example, in *X and Y v. Netherlands*, which involved sexual abuse of a mentally handicapped person, the Court said that the civil remedies were insufficient and that criminal law provisions were required. *Id.* at 96.
[54] Klebes, *supra* note 3, at 78. Ireland adopted its Fourteenth Amendment permitting access to information on abortion services in foreign clinics soon after it lost the in *Open Door and Dublin Well Woman v. Ireland*. In that case the Court ruled that an injunction against two organizations that were providing such services was a violation of Article 10 (expression).
[55] BARKHUYSEN, *supra* note 52, at 77.
[56] DICKSON, *supra* note 5, at 19.
[57] Klebes, *supra* note 3, at 78.

whenever a petitioner asks for them, irrespective of national means.[58] It has been less willing to award generous sums, especially regarding non-pecuniary damages.

The Committee of Ministers retains its supervisory function of the Court's judgments or friendly settlements. This may take the form of monitoring legislative or administrative reforms instituted by states in response to the finding of a violation or in the case of just satisfaction (or a monetary "friendly settlement") ensuring the state has made its payments. The Committee considers its role to have been exercised when it has 'taken note' of the information supplied by the state concerning its compliance or, regarding just satisfaction, that it is satisfied that the applicant has been paid.[59]

If the state fails to execute a judgment of the Court, the Committee may decide on measures to be taken by a two-thirds majority of those casting a vote and a majority of those entitled to sit on the committee. The record of states executing Court judgments has been considered quite good.[60] But the Committee has been criticized for not taking a more proactive stance in this area by not pressing the state concerned to supply it with information as to whether the judgment has been properly executed.[61]

Since the Convention relies on the respective states for compliance with Court rulings, states have means available to mitigate the effects of judgments. For example, under Article 15 of the Convention a state may "take measures derogating from its obligations" during time of war or public emergency.[62] In Brogan v. United Kingdom in 1988, the Court held that the U.K. had violated the lawful detention provisions of Article

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[58] BARKHUYSEN, *supra* note 52, at 8.
[59] *Id.* at 84.
[60] *Id.* at 85. Through 1995 there was no case where the Committee of Ministers hads found a state has not complied with its obligations. *Id.*
[61] DICKSON, *supra* note 5, at 22.

5 by detaining without charge suspected IRA terrorists. Following this judgment, the U.K. lodged a derogation -- stating that the detention was necessary under the exigencies of the situation to continue to exercise its powers under the Prevention of Terrorism Act.[63] The Committee of Ministers passed a resolution stating that it was not for the Committee to decide the validity of a derogation. Having taken note of the information supplied by the U.K., the Committee discontinued its examination of the case. When this derogation was questioned in a later case, the Court held that the British government had acted within its authority under the Convention.[64]

On occasion there have been long delays in implementation of remedial legislation following an unfavorable ruling in Strasbourg. For example, it took Belgium almost eight years to even introduce legislation amending "various legal provisions relating to affiliation" of illegitimate children in response to the *Marckx v. Belgium* judgment.[65] Similarly, following the 1979 decision in *Winterwerp v. Netherlands* on the rights of mental patients, legislation affecting a statutory change did not enter into force until 1994, after the Netherlands had been condemned twice more for similar violations.[66]

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[62] The derogation provisions of Article 15 have been controversial, but the Court has generally granted a great deal of latitude, or "margin of appreciation," to states in interpreting these provisions. VAN DIJK & VAN HOOF, *supra* note 35, at 735.
[63] BARKHUYSEN, *supra* note 52, at 85. The Act granted the Secretary of State authority to detain suspected terrorists without charge. *Id.*
[64] *Id.* at 86. Oren Gross argues that the Commission and Court have been too deferential to national authorities in situations of ongoing crises (notably with regard to the U.K. with the IRA) and systematic violations (notably with regard to Turkey with the Kurds). Of note, Turkey in dealing with the Kurdistan Workers Party (PKK) in the southeast derogated from treaty provisions 77% of the time from June 1970 to July 1987. Oren Gross, *"Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 484 (1998). Gross analogizes the Court's first case in 1961, *Lawless v. Ireland*, where the Court reviewed and unanimously upheld Irelands derogation with regard to detention of suspected IRA members, to *Marbury v. Madison* because the fledgling Court established jurisdiction to review derogation claims. *Id.* at 464.
[65] BARKHUYSEN, *supra* note 52, at 82.
[66] *Id.* at 31. Winterwerp, who suffered from mental illness, was compulsory admitted to psychiatric hospital and was divested of his capacity to administer his property. Two years after a favorable judgment for Article 5 (access to court) and 6 (fair public hearing) violations, he was compensated as part of a friendly

The Convention's Relationship with National Law

The Convention does not impose on the states an obligation to make the convention part of domestic law or otherwise to guarantee its applicability and prevalence over national law.[67] Domestic courts are considered independent, rather than hierarchically inferior to the Court; nonetheless, its decisions are generally considered highly persuasive.[68] Previously distinctions could be made between those states that had accorded the Convention the status of internal law and those that had not. But now the only country that has not integrated the Convention into its domestic law is Ireland.[69] Thus, the primary distinction among Convention states is between dualist countries that have procedurally made the Convention part of domestic law and those that recognize its incorporation upon treaty ratification.[70] The level of authority given the Convention and the persuasiveness accorded the Court's decisions, however, does vary from state to state.

Dualistic countries, where international law has effect within the national system only after it has been "transformed" into the national law,[71] include Germany, Italy, and the United Kingdom.[72] Germany, for example, has incorporated the Convention giving it the authority of a federal statute. Its highest court has decided that priority should be given to the Convention over subsequent legislation unless a contrary intention of the

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settlement. While statutory change did take over a decade, the Dutch Minister of Justice issued guidelines to public prosecutors soon after the Court's decision. *Id.*

[67] *Id.* at 16.

[68] ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW 268 (1997).

[69] Klebes, *supra* note 3, at 77 n.25. The U.K. adopted the Convention into domestic law in the Human Rights Act 1998, which went into effect 2 October of 2000.

[70] DRZEMCZEWSKI, *supra* note 68, at 268.

[71] *See, i.e.,* VAN DIJK & VAN HOOF, *supra* note 35, at 16.

[72] DRZEMCZEWSKI, *supra* note 68, at 268.

legislature can be clearly established.[73] In the U.K., the Convention had only an indirect impact on domestic law, but that changed with incorporation of the Convention via the Human Rights Act of 1998, which was adopted October 2, 2000.[74]

Monistic countries, where the domestic legal system is viewed as including the responsibilities of international law whether or not they have been formally incorporated,[75] include France, Belgium, Luxembourg, and the Netherlands.[76] In the Netherlands, for example, under the Constitution precedence is given to directly applicable (self-executing) provisions of treaties if they conflict with the Constitution itself or prior or subsequent legislation. The Dutch Supreme Court considers decisions by the Court of Human Rights to be part of these binding treaty provisions and has used Court of Justice precedent to guide its decision-making.[77]

III. General Principles of the Court

In interpreting the European Convention the Court relies on several principles that take into account its unique position as an "objective" party applying a multi-lateral treaty to the disparate contracting states. Three principles are of particular interest. First, while the Convention and its mechanisms are considered a coherent and autonomous

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[73] VAN DIJK & VAN HOOF, *supra* note 35, at 16.

[74] *Getting In On the Act*, The Lawyer (London), Oct. 30, 2000, at 36. The Tory government was opposed to incorporation and even made some efforts at reforming the Court in 1995-96. Robert Shrimsley, *European News: Euro court offensive*, The Daily Telegraph, Apr. 2, 1996, at 20. The Labour party began supporting incorporation in the early 1990s and it became one of its legislative priorities following victory in May of 1997. Zander, *supra* note 25, at 445.

[75] *See, i.e.,* VAN DIJK & VAN HOOF, supra note 35, at 17.

[76] DRZEMCZEWSKI, *supra* note 68, at 268; see also VAN DIJK & VAN HOOF, *supra* note 35, at 17.

[77] BARKHUYSEN, *supra* note 52, at 77. For example, in 1980 the Dutch Supreme Court overturned a lower court decision and, in a distinct deviation in interpretation, held that the relatives eligible for appointment to guardianship should be expanded to include members of the 'illegitimate family.' The Court argued that views concerning legitimate and illegitimate children had recently greatly changed, and referred to the Court of Human Rights decision in *Marckx v. Belgium* in 1979, where it had produced a similar result in interpreting Article 8 (respect for private and family life). *Id.*

structure, it is, after all, an international treaty. As such the Court interprets the Convention drawing upon, if selectively, international law principles. Second, the Court has explicitly eschewed reliance on the original understanding of the Convention and, instead, relies on a dynamic or "evolutive" approach to interpretation. And finally, the Court considers national particularity and sovereignty by according states a "margin of appreciation" in certain areas covered by the treaty. These principles remain in tension, however, as an emphasis on one requires the Court to explicitly or implicitly de-emphasize another.[78]

International Law

Regarding interpretation of the Convention as a treaty, the Court ostensibly draws upon general principles of international law. Beginning in 1975 in *Golder v. United Kingdom*,[79] the Court announced that it should be guided by the rules of treaty interpretation of the 1969 Vienna Convention on the Law of Treaties.[80] The Vienna Convention's fundamental rule of interpretation is found in Article 31(1) ("General rule of interpretation"), stating: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." This coupling of *ordinary meaning* (in its temporal context) and *object and purpose* was a compromise between advocates of an intent-based approach and those of a teleological approach emphasizing a treaty's objective. The object and purpose of the treaty was to be an important element of interpretation, but not a separate

[78] *See* Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1220. In discussing the tensions within the Court's principles, Paolo Carozza emphasizes the Court's interpretation of the Convention as an autonomous body of law as a separate principle of the Court instead of focusing on the Court's use of international law. *Id.*
[79] (1979-80) 1 E.H.R.R. 524. *See also* VAN DIJK & VAN HOOF, *supra* note 35, at 72
[80] The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27.

element in its own right.[81] While the Vienna Convention does refer to the use of subsequent agreements and practices of members that imply an agreement,[82] the essential element remains the treaty's ordinary terms at the time states consent to be bound.

Yet, in *Golder* the Court determined that the "fair public hearing" requirement regarding "determination of civil rights and obligations or of any criminal charge" in Article 6 constituted a right to access of the courts for civil claims. This, for a prisoner who had been barred from bringing a libel action against a prison guard who had reported that the petitioner had taken part in a prison fracas. The Court, citing the Vienna Convention's explicit reference to preambles as context,[83] resorted to the Convention's preamble on the object and purpose of the Convention as a human rights treaty to justify a broad reading of the Convention. Moreover, the Court cited the Vienna Convention Article 33(c)'s "any relevant rules of international law" to incorporate a right to access to the courts in civil proceedings as a the general principle of international law.[84]

While the Court rarely makes explicit reference to the Vienna Convention and through it to general principles of international law, its interpretive philosophy (explained below) consistently resorts to the "object and purpose" of the treaty –the general

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[81] *See, e.g.*, DAMROSCH, ET. AL., INTERNATIONAL LAW, CASES AND MATERIALS (4th ed., 2001) 508-09.
[82] Article 31 paragraph 3 states:
There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

[83] Article 32 states: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . ."
[84] The relevant general principle was described as follows: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice." *Golder*, at 535.

protection on human rights through “collective enforcement”[85] – as well as its own analogous form of “customary international law” over the “ordinary meaning” of the terms of the Convention well beyond what the states could possibly have brought themselves to agree to in 1950. The Court, instead, continues to ratchet up the requirements of the Convention with little respect for state sovereignty or what the Convention originally meant to the signatories. In doing so the Court has detached itself from the original understanding of the treaty even more so than what international law, as such, would appear to sanction.[86]

Dynamic Interpretation

The divergence from traditional treaty interpretation can be seen by looking at the Court’s dynamic method of interpretation,[87] whereby the Court incrementally raises the requirements of the European Convention to meet its object and purpose and to implement a common European human rights standard. The Court’s dynamic approach takes varied forms, but two complimentary methods stand out: the “effectiveness principle” and the “consensus doctrine”. Regarding the former, the Court will interpret the Convention’s provisions in order to make them “practical and effective” in servicing the broad objective it has adopted. Thus, if the treaty by its plain language is not “effectively” protecting a particular right, the Court will see fit to make it so through

[85] The Preamble of the Convention states the following, “Being resolved, as the government of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration….”

[86] The recent case of *McElhinney v. Ireland*, (2002) 34 E.H.R.R. 13, is a rare example where the Court used reference to the Vienna Convention in the state’s favor by refusing to find a violation where petitioner’s claim against the U.K. in Irish court was barred under sovereign immunity. The Court stated: “The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.” *Id*. at ¶36.

expansive interpretation. For example, in *Soering*, the Court, with the assistance of Amnesty International, ruled that the U.K. would violate Article 3's prohibition on "inhuman or degrading treatment" merely by extraditing the alleged murderer to the United States where he might suffer on death row.[88] The Court was not moved by the fact that the fact that the Convention does not bar capital punishment.[89] The Court explained the coupling of the effectiveness principle with the object and purpose of the treaty:

> In interpreting the Convention regard must be had to its special character as a treaty for collective enforcement of human rights and fundamental freedoms . . . . Thus, the *object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective* . . . . In addition, *any interpretation of the rights and freedoms guaranteed must be consistent with the 'general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.* [90]

The drive to make the Convention "effective" has led to expansive interpretations of the scope and content of the Conventions provisions, including the inference of positive obligations on states. Conversely, this principle has led the Court to interpret exceptions in the Convention narrowly.[91] Of note, even the International Court of

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[87] This has been referred to as a "evolutive interpretive" approach. VAN DIJK & VAN HOOF, supra note 35, at 77.

[88] The Court held that the physical and mental suffering while awaiting execution amounted to a "death row phenomenon" that would be degrading and inhuman treatment. Soering was eventually extradited under an agreement by Virginia not to charge him with a capital offense. He is serving two life sentences and unsuccessfully appealed to the 4th Circuit.

In its opinion the Court quoted Amnesty International's brief as follows: "This 'virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice", to use the words of Amnesty International, is reflected in Protocol No. 6 to the Convention . . . ." *Soering* at ¶102.

[89] The optional Protocol 6 to the Convention does bar capital punishment in peace time. The U.K. did not accede to this provision until 1999.

[90] *Soering*,at ¶87 (emphasis added).

[91] VAN DIJK & VAN HOOF, *supra* note 35, at 74-75.

Justice, not known for its restraint,[92] has refrained from explicitly adopting this principle in interpreting international agreements.[93]

In determining what standard to apply, particularly in the past few decades, the Court resorts to what has been referred to as the "consensus doctrine."[94] In short, the Court attempts to discern a Council of Europe consensus on an issue and then interprets the Convention in light of the new standard. While the Court does not explicitly apply "customary international law," it's consensus doctrine is essentially a regional form of "CIL." The Court finds an internal European consensus, assumes this increase in rights was done in fealty to the Convention, and then imposes this new standard on the straggling state.[95] For example, as early as in 1978 in *Tyrer*, where the Court found judicial corporal punishment of juveniles 'degrading' punishment, it stated, "the Convention is a living instrument which … must be interpreted in light of present-day conditions. In the case before us the Court cannot but be influenced by the development and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[96]

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[92] See, e.g., *Nicaragua v. United States*, XXXXX.

[93] See, *Gabcikovo-Nagymaros Case*, 1997 I.C.J. 7 ("It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" [effectiveness principle] because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question." *Id*. at ¶76).

[94] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999). Paolo Carozza criticizes the way the Court has gone about using comparative references to implement norms. "The only characteristic of the Court's comparative "method" on which virtually all commentators have agreed are its lack of depth, rigor, and transparency. . . . The Court's haphazard and overly casual assertions of similarities or divergences in national laws constitute a serious weakness that undermines the legitimacy of the Court . . . ." Carozzo, *supra* note 78, at 1225.

[95] The consensus doctrine is even more restrictive of sovereignty than "customary international law" in that the post ratification imposition of additional obligations makes state reservations or "persistent dissenter" efforts a practical impossibility because it will not know its obligations until the Court has spoken. For example, it would have been impossible for the U.K. in 1966, when it accepted compulsory jurisdiction, to foresee that it would need to lodge a reservation to protect its courts martial system, which in 1997 was found to be in violation of the Convention in *Findlay v. United Kingdom,* (1966)_ E.H.R.R. _.

[96] *Tyer* at para. _.

Until recently the Court has been satisfied with discerning at least a European standard. Last year, however, informally bound by recent precedent where no consensus was found, the Court looked outside of Europe and found an international "common ground" granting full legal recognition of gender reassigned transsexuals in *Goodwin v. United Kingdom*.[97] While the issue in the case is rather unique, by reaching beyond Europe explicitly connects the Court's interpretation with *evolving* international human rights standards. Unremarkably the Court found a diversity of legal treatment of post-operative transsexuals in Europe in areas such as marriage, filiation, privacy, and data protection. But instead of according deference to the U.K. (see *margin of appreciation* below), it looked beyond Europe and unanimously found the right to full legal recognition in the Convention:

> [T]he lack of such a common approach among 43 Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status . . . . The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.[98]

In finding such an international trend the Court makes explicit reference to an NGO brief, as it had done in *Soering* regarding a Western European standard. The Court explicitly relied on the study referencing various countries submitted by Liberty on an international consensus. The Court stated, "Liberty noted that while there had not been a

[97] (2002) 35 E.H.R.R. 18.
[98] *Goodwin* at para. 85.

statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from outside Europe showed developments in this direction."[99]

Margin of Appreciation

The Court's emphasis on the object and purpose of the Convention and its dynamic approach to interpretation are in contrast to the deference, or "margin of appreciation," that national authorities are due under the Convention. The doctrine was first applied in relation to Article 15 (derogation in time of emergency),[100] but, subsequently, the Court has applied it in some form to most of the other rights in the Convention.[101] The principle would seem to be particularly applicable to Articles 8-11 (privacy, religion, expression, and assembly), which make explicit allowance for legal restrictions that are "necessary in a democratic society" for, among others, the "prevention of disorder" or the "the protection of health or morals." There is no hard and fast rule on the scope of the margin of appreciation, however. It is a self-regulating doctrine for the Court, and as the Convention *evolves*, less and less deference is accorded to the parties.[102] In its early decades the Court granted states a rather wide margin and more national distinctions were tolerated -- especially regarding moral decisions.[103] This

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[99] *Id.* at para. 56. Liberty had also, unsuccessfully, intervened in the previous transsexual case, *Sheffield and Horsham v. United Kingdom* (1999) 27 E.H.R.R. 163. Of note, in *Pretty v. United Kingdom*, (2002) 35 E.H.R.R. 1, Liberty, also unsuccessfully, attempted to persuade the Court to adopt a right to assisted suicide under Article 2. The Court, in a more narrow opinion, held that the U.K.'s refusal to commit to non-prosecution of a husband if he killed his ailing wife was not a violation of Article 2.
[100] *Greece v. United Kingdom*, (1959) _ E.H.R.R._. *See also*, VAN DIJK & VAN HOOF, *supra* note 35 at 84.
[101] VAN DIJK & VAN HOOF, *supra* note 35 at 85.
[102] While the Court agrees that the states are the primary protectors the rights established in the Convention, it has the final ruling. As the Court explained, "The domestic margin of appreciation thus goes hand in hand with a European supervision." *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶49 (1976).
[103] Other relevant factors are the nature of the right or activity and the context of the measure (i.e., for national security or part of broad general policy). *See generally* VAN DIJK & VAN HOOF, supra note 35, at 87-91.

understanding of local prerogatives has not withstood the Courts appetite for a consensus based on its perception of current social standards.

An example of the growth of the Court's dynamic interpretive approach and the subsequent erosion of the margin of appreciation can be seen in comparing the reasoning in the oft-quoted *Handyside v. United Kingdom*[104] with subsequent decisions. In *Handyside* the issue was whether the banning and seizure of an allegedly obscene book violated the Convention. The Court, in language that appears almost quaint today, explained:

> . . . [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by rapid and far reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them.[105]

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[104] While the *Handyside* Court upheld the state restriction, much of its language has been used in later decisions finding violations. Generally, in applying Articles 8-11, once a measure is found to pass the relatively low level scrutiny of 'lawfulness' and a 'legitimate aim', the Court applies a two-part test "necessity" standard. Accordingly, a measure must prove to be "necessary in a democratic society" (from the text of Articles 8-11) and proportional to the desired ends.

Regarding the necessity requirement, the Court said it was up to the state in question "to make the initial assessment of the reality of a *pressing social need*. . . ." [italics mine] *Handyside,* at ¶48. In subsequent decisions the Court has latched on to this language as a requirement that the measure be in response to a *pressing* social need. (*See*, *i.e*., *Olsson v. Sweden* (No.1), 130 Eur. Ct. H.R. (ser. A) (1988) at ¶67: "According to the Court's established case-law, the notion of necessity implies that an interference corresponds to a pressing social need . . . .") Naturally, if the state is in the minority in the Council of Europe on the matter the Court can find it easy to question just how pressing it's measure is.

Also, regarding proportionality, the *Handyside* court explained that in the area of free expression offensive ideas were also worthy of protection. In doing so it stated, "Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no democratic society." Id. ¶49. Subsequently, the "broadmindedness" language has founds its way into many of the privacy decisions where states were found in violation.

[105] *Handyside*, at ¶48, *quoted in* VAN DIJK & VAN HOOF, *supra* note 35, at 83. Following this case, regarding the margin of appreciation, some commentators charged the Court with extending to states "unlimited discretion to restrict the enumerated rights . . . . By applying the doctrine to non-emergency articles, the Commission and Court have effectively abdicated their powers of enforcement under the Convention and have thereby jeopardized the individual rights a freedoms contained therein." Cora Feingold, *The Doctrine of the Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME L. REV. 90, 93-94 (1977), *quoted in* Gross, *supra* note 64, at 498. Similarly, Rosalyn

As a result, the Court was not persuaded that because the book in question was widely available throughout the continent that it could not be banned in England. It explained, "The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories . . . . The fact that most of them decided to allow the work to be distributed does not mean that the contrary decision . . . was a breach of Article 10."[106] Yet, two years later in *Tyrer* the Court was persuaded by a common European standard on corporal punishment. Similarly, in 1981 in *Dudgeon v. United Kingdom*[107] the Court found Northern Ireland's anti-sodomy laws in violation of Article 8 (privacy) largely because of the changing attitudes in other states.

Dudgeon is noteworthy as an example of how the Court has distanced itself from the text of the Convention. Article 8 explicitly allows for restrictions on the "right to respect for his privacy and family life" for the "protection of health or morals." Nonetheless, the Court found that less deference was due because the subject matter "concerns the most intimate aspects of private life."[108] The European "consensus" drew the Court to this conclusion. As it stated,"[T]he Court cannot overlook the marked changes which have occurred in this regard in the domestic law of member states."[109]

Higgins criticized the *Handyside* decision as one that "has gratuitously kept alive a concept which has been increasingly difficult to control and objectionable as a viable legal concept." Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L 281, 286 (1976-77), *quoted in* Gross, supra *note* 64, at 498 n.312.

[106] *Handyside*, at ¶57.

[107] 45 Eur. Ct. H.R. (ser. A) (1981).

[108] *Id.* at ¶ 52. Dudgeon was a campaigner for homosexual rights and had not actually been charged with the offenses – while investigating him for a drug offense police found "papers and materials" but did not charge him. Also, prior to the Court proceedings, a proposed amendment to the law in question failed to gain sufficient support.

[109] *Id.* at ¶ 60.

Through *Dudgeon* and subsequent decisions, the United Kingdom in particular has been a victim of the "consensus doctrine"[110] as its generally more conservative measures have been found wanting when the Court finds a consensus on the continent. For example, in 1999 in *Smith and Grady v. United Kingdom*[111] the Court held that the United Kingdom's ban on homosexuals in the military was also a violation of Article 8. A recent Ministry of Defense study on the issue was not convincing because the policy was based on "negative attitudes." "It [the Court] notes the evidence before the domestic courts to the effect that the European countries imposing a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue."[112] Of note, the case was filed with the Court in 1996, just months after Parliament voted to uphold a ban on homosexuals 188-120.[113]

The Court's treatment of the U.K. approached the point of absurdity in 2000 when in *ADT v. United Kingdom*[114] it unanimously ruled that provisions of the Sexual Offenses Act of 1967, which decriminalized private consensual homosexual conduct between adults, was a violation of Article 8 because it made an exception for more than two participants. Police, while conducting a search pursuant to a warrant, had found videotape of an applicant engaging in acts with up to four other men. The applicant was

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[110] Overall, the Court has cited Italy more than the other nation in the past few years. But, the vast majority of these were for Article 6 (right to fair trial) violations over the length of criminal or civil proceedings. Historically Turkey has also been a big violator regarding its treatment of the Kurds.

[111] App. No. 33985/96 and 33986/96 Eur. Ct. H.R. (1999). Smith concerned members of the RAF. The companion case, *Lustig-Prean and Beckett v. United Kingdom*, App. No. 31417/96 and 32377/96 Eur. Ct. H.R. (1999), concerned members of the Royal Navy.

[112] *Smith and Grady* at ¶104.

[113] Michael White, *MPs Vote to Keep Forces Ban on Gays*, The Guardian (London), May 10, 1996, at 1.

[114] App. No. 35765/97, Eur. Ct. H.R. (2000).

convicted for violating a gross indecency statute and conditionally discharged. The Court nonetheless found a violation of Article 8. In lip service to the text of the Convention and national sovereignty, it conceded "at some point, sexual activities can be carried out in such a manner that State interference may be justified…. Nevertheless, the facts of the present case do not indicate any such circumstances."[115]

IV. Conclusion

The European Court of Human Rights is more than an example of an activist international treaty monitoring body. As a Court, its opinions carry more legal and political weight than the various U.N. commissions. The result has been continuing erosion of national sovereignty in Europe that reaches into the most basic decisions of the national governments and electorate. Additionally, the Court continues to provide more *opinio juris* for customary international law enthusiasts to use in advancing their agendas. The Court's jurisprudence also serves as a warning. A warning of how differently an "objective" international commission or tribunal, like, for example, the International Criminal Court, might approach treaty interpretation. Countries that sign and ratify such treaties may be surprised to find that the treaty that is imposed on them is quite different.

[115] *Id.* at ¶37.