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The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights

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ARTICLE

THE THREE TRADITIONAL APPROACHES TO TREATY INTERPRETATION:

A CURRENT APPLICATION TO THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

The Vienna Convention on the Law of Treaties sets the rules of treaty interpretation in articles 31-33. Yet these rules are quite vague, and they leave a lot of room for judicial discretion. The European Court of Human Rights ("ECHR" or "the Court") has developed its own version of these rules of interpretation—a version that tracks the three traditional approaches to treaty interpretation: the textual approach, the subjective approach, and the teleological approach. Looking at the practice of the ECHR through the lens of these three traditional approaches highlights the logic of some of the court's interpretive choices, including its doctrine of deference: the Margin of Appreciation.

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I. INTRODUCTION

Traditionally, scholars speak about three main approaches to treaty interpretation: (1) the textual approach, suggesting that treaties should be interpreted according to their language; (2) the subjective approach, suggesting that treaties should be interpreted according to the intentions of the state parties that signed them, and (3) the teleological approach, suggesting that treaties should be interpreted according to their object and purpose.[1] Scholars have contrasting views about the relative importance and applicability of these approaches. Some think a certain approach should be supreme. Others think that different approaches should be applied in different situations.[2] What is missing is an organizing theory to explain which approach should be applied when.

Many may wonder if such a theory is at all necessary today after articles 31-33 of the Vienna Convention on the Law of Treaties ("the

1. *See* Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318, 318–20 (1969).

2. *See infra* note 5.

Vienna Convention") created a comprehensive set of rules for treaty interpretation.[3] But while these rules are accepted as customary international law[4] and certainly regulate many aspects of treaty interpretation, they leave judges some room for discretion. Specifically, the crux of these treaty provisions, articulated in article 31(1)—"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"—recalls elements of all three approaches to treaty interpretation and necessitates a theory on their interaction.[5] This Article demonstrates that the three traditional approaches can explain much of the jurisprudence of the ECHR. Moreover, this Article suggests that interpreting the Convention in this manner is normatively legitimate.

The approaches presented above are methods of interpretation. Interpretation is primarily needed when a judge has discretion on how to construe a legal text. Indeed, many times the interpreter has a certain amount of discretion on how to read the text of the treaty. Yet perhaps in some situations no discretion exists at all. If the text of the treaty is clear, then a judge tasked with interpreting the treaty should just apply it. In other words, in some situations the textual approach simply directs the judge to follow the treaty as it is written. The question then is: do such cases actually exist? Are there cases in which the language of the treaty is so clear that there is no interpretive discretion? Several scholars argue that there are such cases.[6] To the extent that they are right, any digression in these cases from the text of the treaty is done without authority.

What if the text of the treaty is not completely clear? Does that mean that the judge can interpret the treaty in any way she wants? Certainly not. The judge is constrained to respect the wishes of the

3. *See* ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 309 (2008).

4. *See* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 524–25 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

5. *See* Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529, 533–35 (2003); Martin Ris, *Treaty Interpretation and ICJ Recourse to Travaux Preparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, 14 B.C. INT'L & COMP. L. REV. 111, 118 (1991) (regarding the textual approach and its limits); ORAKHELASHVILI, *supra* note 3, at 343–44 (regarding the teleological approach); EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 1–3 (2014) (regarding the intention of the parties).

6. *See infra* Part III.A.

parties to the treaty. These parties are obligated to comply only with commitments they consented to. The judge should then read the treaty in light of the intentions of the parties that signed it, as the parties' intentions represent what they willingly agreed to take upon themselves. In other words, when the text is unclear, the judge follows the subjective approach to treaty interpretation.[7]

Yet a judge that does not follow the intention of the parties is not acting without authority. The intention of the parties is clearly something the court is committed to because states are only obligated by commitments to which they consented. But the practice of the ECHR indicates that it sometimes views the actions of states primarily as a proxy for the interests and well-being of individuals that are affected by these states' actions. A way to make sense of the ECHR's jurisprudence is to claim that the court usually works under the *presumption* that states represent the interests of their citizens. But this presumption is rebuttable. It should be used in most of the cases, and it should be replaced by another solution when there is good reason to believe that a democratic failure prevents states from representing the rights of the people at stake.

What is this other solution? It naturally refers the judge to the teleological approach and directs her to interpret the treaty according to the treaty's object and purpose.[8] The purpose of the treaty ultimately refers to more abstract principles that reflect the good of all mankind. These principles underlie the ECHR's common use of the principle of effectiveness to justify so-called "expansive interpretation"—reading into the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") obligations that do not strictly derive from the text.[9] Because humanity as a whole is the ultimate source of authority for all international institutions[10] and is even increasingly viewed today as motivating the principle of state sovereignty,[11] this is the final stop for a judge faced with a text that is not completely clear and with reason to suspect that the parties that

7. *See infra* Part IV.

8. *See infra* Part V.

9. *See* Shai Dothan, *In Defence of Expansive Interpretation in the European Court of Human Rights*, 3 CAMBRIDGE J. INT'L & COMP. L. 508 (2014).

10. *See* ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 210-13 (2014).

11. *See* Anne Peters, *Humanity as the A and Ω of Sovereignty* 20 EUR. J. INT'L L. 513, 514 (2009).

negotiated it did not take the interests of all people involved into account.

The Margin of Appreciation doctrine, which directs the ECHR to defer to the practices of European states under some conditions,[12] could be justified by reference to the same reasoning that justifies relying on state consent. While the Margin of Appreciation is primarily a doctrine of deference, it was also used as a tool that provides interpretive guidance to international courts. As a method of interpretation, the doctrine sets a certain "zone of legality" in which state actions are protected from violation findings.[13] The doctrine could be justified by respect to state sovereignty, just like state consent. This respect is ultimately justified by the fact that states are the proper representatives of their citizens.[14] Also, like state consent, the Margin of Appreciation is unnecessary when the text of the treaty is clear, and it should be left aside when there is good reason to believe that the state does not represent the interests of its citizens. These solutions were suggested by scholars[15] and were even claimed to be evident in the ECHR's judgments.[16] The analysis in this Article puts them in context by connecting them to approaches to treaty interpretation.

Part I presents the ECHR and the unique methods of interpretation it uses. Part II explains the limits of the text and explores situations in which it does not leave any room for interpretive discretion. Part III

12. *See infra* Part II.B.4

13. *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909-10 (2006).

14. *See id.* at 920 (regarding deference by an international court, which is not elected, to democratic decision making); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 HEIDELBERG J. INT'L L. 240, 302-03 (1996) (justifying the Margin of Appreciation by the principle of subsidiarity grounded in the idea that national authorities and national courts are better able to balance the rights of citizens and public interests).

15. *See* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 849 (1999) (arguing that the ECHR should not grant a Margin of Appreciation to states regarding the rights of minorities to the extent that their rights are not guaranteed by national courts)

16. *See* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 27-31 (2012); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CON. L. 1023, 1042 (2012) (arguing that the margin of appreciation varies depending on the respect that should be given to state authorities); Oddný Mjöll Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation Under Article 14 of the European Convention on Human Rights*, 14 HUM. RTS. L. REV. 647, 664-65 (2014) (showing that the social context determines the margin of appreciation given to states).

investigates the principle of state consent, the justification for it, and the situations in which it must retreat in light of higher-order justifications. Part IV deals with the purpose of treaties. Part V applies a similar analysis to the Margin of Appreciation. Part VI concludes.

II. THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS JURISPRUDENCE

A. The Court

The ECHR easily ranks as one of the most influential international courts in history. Since its establishment in 1959, the court has issued over 20,000 judgments[17] and processed about 800,000 different applications,[18] most of which come from individuals claiming that their Convention rights were violated.[19] The ECHR's judgments had a profound effect on the lives of 800 million Europeans under its jurisdiction.[20] It also inspired the creation of other famous international courts such as the Inter-American Court of Human Rights and the African Court on Human and People's rights.[21] You can love the ECHR

17. *See ECHR Overview 1959-2017*, EUR. CT OF HUM. RTS. (Mar. 2018), https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf [https://perma.cc/UBG3-VGG6].

18. *See id.* at 4.

19. There are three tracks in which cases reach the ECHR: (1) an application by a person, a Non-Governmental Organization or a group of people that claim they are victims of a Convention violation by a state under the court's jurisdiction (the Convention art. 34); (2) an application by a member state arguing that another member state committed a Convention violation (the Convention, art. 33); (3) a request by the Committee of Ministers to issue an advisory opinion about the interpretation of the Convention (the Convention, art. 47). Almost all the cases reaching the court come through the first track—individual application. *See* Dragoljub Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, 42 CREIGHTON L. REV. 361, 372 (2009). The number of applications grew rapidly over the ECHR's history until it peaked in 2013 with 65,800 applications, the volume of applications has since slowly declined. *See* EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2016, at 7 (2017), *available at* https://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf [https://perma.cc/ZZW9-R6EG].

20. *See*, *e.g.,* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe,* 68 INT. ORG. 77, 106 (2014) (demonstrating how European states change their laws regarding LGBT rights to comply with the standards set by the ECHR).

21. *See* EUROPEAN COURT OF HUMAN RIGHTS, THE CONSCIENCE OF EUROPE: 50 YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS 16 (2010).

or you can hate it,[22] but no one can afford to ignore it or its jurisprudence. Its contribution to international law is immense.

The Court is tasked with interpreting the Convention, a document that includes key human rights such as the right to life,[23] the right not to be subject to torture,[24] the right to liberty,[25] and the right to a fair trial.[26] The articles of the Convention are very broad and, sometimes, ambiguous. This gives ECHR judges a large measure of interpretative discretion.

Yet the ability of judges to use this discretion is not really unlimited. If it wants its judgments to be complied with, the court must be politically savvy. The ECHR does not have its own enforcement mechanisms. It relies on an external body, the Committee of Ministers, to enforce its judgments.[27] And even this body cannot really force reluctant states to comply.[28] In order to encourage states to follow its judgments and make a real difference, the ECHR has to behave strategically. It has to avoid demanding from states more than they are willing to offer. It has to avoid crossing states that could respond by

22. *See, e.g.,* James Slack, *Social Ties Keep Rapists in Britain*, MAIL ON LINE (Sept. 21, 2011), http://www.dailymail.co.uk/debate/article-2039657/Akindoyin-Akinshipe-Social-ties-rapists-Britain.html [https://perma.cc/WNP5-DZJ4] (the opening words are "Another day, another utterly perverse and sickening human rights ruling which is an affront to British justice"). It was claimed that the Russians dislike the court so much that they even tried to poison its former president Luzius Wildhaber. *See* Luke Harding, *I was poisoned by the Russians, human rights judge says*, THE GUARDIAN (Feb. 1, 2007), http://www.guardian.co.uk/world/2007/feb/01/russia.topstories3 [https://perma.cc/7FUE-FJ7F].

23. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 222.

24. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23, art. 3.

25. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23, art. 5.

26. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23, art. 6.

27. Article 46(2) of the Convention authorizes the Committee of Ministers to monitor the execution of ECHR judgments. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23, art. 46(2).

28. In the Statute of the Council of Europe (1949), Articles 3 and 8 give the Committee of Ministers the power to remove a member state from the Council of Europe if it violates its commitments to the Council of Europe. This extreme sanction, however, was never used. The Committee of Ministers almost used this weapon of last resort against the Greek dictatorship in 1970, but Greece left the Council of Europe before it could be kicked out of it. *See* CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 504 (4th ed., 2006).

non-compliance or other initiatives that could damage the court, such as amending the Convention to curb its power or cutting its budget.[29]

The political dimension of judicial decision-making puts a real constraint on ECHR judges. There are many other challenges they have to deal with as well. The ECHR has forty-seven different judges, one for every state in Europe.[30] The quality of these judges is far from even, and allegations against the abilities of some of them are rife.[31] But such practical challenges are not the concern of this Article. This Article develops a normative argument: it tries to assess the legitimacy of methods of interpretation used by the ECHR, viewed through the perspective of the three traditional approaches to treaty interpretation.

B. Techniques of Interpretation

A major part of the contribution of the ECHR to the international system comes from the jurisprudential techniques it employs.[32] Not all the techniques used by the ECHR are original or distinctive to it, but some of these techniques have been significantly refined and developed by the court. To understand the way the ECHR employs the three traditional approaches to treaty interpretation, it is first crucial to explore its signature interpretive moves.

1. The Principle of Effectiveness

The Convention is a law-making treaty—it creates a regime that should function for a very long stretch of time. The ECHR has often stressed that, because of the law-making nature of the Convention, the court will interpret the Convention in ways that make it an effective

29. In the past, I discussed at length the potential responses of states and the tactics the ECHR can use against them. *See generally* Shai Dothan, *Judicial Tactics in the European Court of Human Rights,* 12 CHI. J. INT'L L. 115 (2011); *see also* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS (2015).

30. Each member state proposes a list of three candidates, out of which one permanent judge is elected by the Parliamentary Assembly of the Council of Europe. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23, arts. 20, 22.

31. *See* David Kosař, *Selecting Strasburg Judges: A* Critique, *in* SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS 120 (Michal Bobek ed., 2015) (arguing that some judges have such low qualifications that they endanger the legitimacy of the court).

32. *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AMER. J. INT'L. L. 225, 246 (2012) (highlighting that international courts do not just focus on compliance with their judgments; they are serving other general goals such as supporting institutional and normative regimes).

protection of human rights.[33] This ambitious goal is fulfilled in practice by a series of interpretive choices that expand the obligations of member states to more than what they agreed upon when they ratified the Convention.[34]

The techniques of so-called "expansive interpretation" are rich and varied. Some judgments expanded the protection of a right mentioned in the Convention to a much greater extent than what a formalistic interpretation requires. An example is the case of *Minelli v. Switzerland*. The case concerned a decision to repeal a defamation case against a journalist solely because a limitation period had expired. The national court decided that the journalist should pay two-thirds of the court's costs based on the assumption that if it was not for the limitation period, the journalist would have clearly been convicted. While the national court did not actually convict the defendant, the ECHR used expansive interpretation to determine that there was a violation of article 6(2) of the Convention, which protects the right to be presumed innocent.[35]

A more radical technique of expansive interpretation is creating and protecting rights that are not mentioned in the Convention's text at all. In the case of *Soering v. the United Kingdom*, the court did exactly that. The case prohibited the extradition of a person to the United States because if he were extradited, he may be detained for years while he expects a potential death sentence. The court ruled that this waiting period would cause such a degree of anxiety that it would violate his right not to be subjected to "torture or inhuman or degrading treatment

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33. *See* Wemhoff v. Germany, 7 Eur. Ct. H.R. (ser. A) at 23 (1968); Soering case, 161 Eur. Ct. H.R (ser. A) at 34 (1989); Ireland v. the United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 90 (1978); Golder v. the United Kingdom, Eur. Comm'n H.R., App. No. 4451/70 (ser. B no. 16) at par. 57 (1973); *see* DAVID J. HARRIS, MICHAEL O'BOYLE & COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (1995); Franz Matscher, *Methods of Interpretation of the Convention*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 63, 66 (Ronald St. J. Macdonald Franz Matscher and Herbert Petzold eds. 1993). Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin,* 11 HUM. R. L. J. 57, 64-65 (1990). However, while scholars argued that the nature of treaties should affect their interpretation, the International Law Commission deliberately did not distinguish between treaty types in the Vienna Convention on the Law of Treaties. *See* SIR ARTHUR WATTS, II THE INTERNATIONAL LAW COMMISSION 1949-1998, at 684 (1999).

34. *See generally* PIETER VAN DIJK & GODEFRIDUS J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 74-76 (3d ed. 1998); J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 98-124 (2d ed 1993).

35. *See* Minelli v. Switzerland, 62 Eur. Ct. H.R. (ser. A) 62.

or punishment," which is protected by article 3 of the Convention.[36] While article 3 does forbid such treatment and its definition can be debated, the article itself says nothing about extraditing a person to another state that may engage in conduct which is forbidden in the Council of Europe.

The ECHR has used expansive interpretation also when it has decided that states must provide practical safeguards to guarantee the actual enjoyment of Convention rights. In the case of *Airey v. Ireland*, for example, the court decided that an applicant who could not afford a lawyer and could not properly represent herself before a national court suffered a violation of her right to a fair trial, protected by article 6(1) of the Convention.[37]

Some judgments viewed articles of the Convention that were designed to protect individuals from their state as articles that also form positive obligations on the state. In the case of *Marckx v. Belgium*, the court read into article 8 of the Convention, which protects the right to private and family life, a positive requirement on the state to take the necessary measures to ensure "illegitimate" children would have a normal family life.[38]

Furthermore, the ECHR sometimes required states to protect people from individuals who might violate their Convention rights. The case of *X and Y v. Netherlands* dealt with a mentally handicapped adult who was raped, but the national laws prevented her father from filing a suit in her name. The court decided that the state violated the Convention because it did not legislate proper laws that would protect the applicants from crimes committed by individuals.[39]

In other judgments, the ECHR stressed that a state cannot avoid responsibility for violations by requiring others to commit them instead of committing them directly by state officials.[40]

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36. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R (ser. A) (1989), *available at* http://hudoc.echr.coe.int/eng?i=001-57619 [https://perma.cc/D83C-93AH].

37. *See* Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) 32. (1979), http://hudoc.echr.coe.int/eng?i=001-57420 [https://perma.cc/EQK5-YV3K]. *See also* Artico v. Italy, 37 Eur. Ct. H.R. (ser. A) (1980), http://hudoc.echr.coe.int/eng?i=001-57424 [https://perma.cc/3DXS-UDGF].

38. *See* Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) (1979), http://hudoc.echr.coe.int/eng?i=001-57534 [https://perma.cc/9A2U-6RP4].

39. *See* X and Y v. the Netherlands, App. No 8979/80, Eur. H.R. Rep. 1, 12 (1885).

40. *See* Van der Mussele v. Belgium, App. No 8919/80, Eur. H.R. Rep. 1, 22 (1983).

In addition, the ECHR decided to apply its jurisdiction expansively, reaching out of the territories of member states.[41] It also ruled that exceptions and derogations from the Convention must be interpreted narrowly.[42] In recent judgments, the ECHR relaxed the procedural limitations on non-victims lodging applications to the court, allowing NGOs to bring cases on behalf of extremely vulnerable people who have already passed away.[43]

2. Evolutionary Interpretation

Law-making treaties should be allowed to evolve in order to conform to current conditions. The ECHR has used so-called "evolutionary interpretation" to transform the content of the Convention into an effective protection of the rights enshrined in it under changing circumstances. Usually, this implies a gradual increase in the protection of human rights over time.

The case of *Tyrer v. United Kingdom* can serve as an example.[44] The case concerned a fifteen-year-old boy who was subjected to birching—a corporal punishment that was traditionally used within his community in the Isle of Man. The ECHR stressed in this case that the Convention should be viewed as a "living instrument" and should be interpreted in light of current conditions across Europe. In view of the development in the accepted standards of punishment in Europe, the penalty of birching was considered a degrading punishment that

41. *See* Al-Skeini and others v. The United Kingdom, 2011-IV Eur. Ct. H.R. 99; Al-Jedda v. The United Kingdom, Judgment of 7 July 2011-IV Eur. Ct. H.R. 305. The decision to expand the court's territorial jurisdiction came only after some back and forth in the court's judgments. In Bankovic and Others v. Belgium and Others, 2001-XII Eur. Ct. H.R. 333, the court decided that it did not have jurisdiction in territories that are out of all member states of the Council of Europe. Some scholars criticized this judgment as digressing from previous judgments that applied the Convention to parts of Cyprus controlled by Turkey. *See* Case of Loizidou v. Turkey, Preliminary Objections, App. No. 15318/89, Eur. Ct. H.R. (1995); Case of Loizidou v. Turkey, Merits, 1996-VI Eur. Ct. H.R. at 2234-35, ¶ 52. A potential explanation for the court's hesitation to apply jurisdiction in Bankovic, before shifting to the new expansive doctrine in Al-Skeini and Al-Jedda, is that Yugoslavia was never under the court's jurisdiction while Cyprus was under the court's jurisdiction before falling under Turkish rule. This sophisticated explanation was criticized by some scholars. *See* Alexandra Ruth & Mirja Trilsch, *Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L 168, 172 (2003).

42. *See* Case of Klass and Others v. Germany, App. No. 5029/71 Eur. Ct. H.R. Rep. 1, 31 (1978).

43. *See* CLR v. Romania, 2014-V Eur. Ct. H.R. 1; *see also* Shai Dothan, *Luring NGOs to International Courts: A Comment on CLR v. Romania*, 75 HEIDELBERG J. INT'L L. 635 (2015).

44. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) 26 (1978).

violates article 3 of the Convention.[45] The Emerging Consensus doctrine, discussed below, is often used by the ECHR to determine how the interpretation of the Convention should evolve to keep track of changing conditions in Europe.

3. Emerging Consensus

According to the Emerging Consensus doctrine, the ECHR should consider current views as it interprets the Convention. There was some divergence on the question of whose views matter in this respect in the ECHR's jurisprudence. Three different understandings of the Emerging Consensus doctrine crystalized in the court's judgments: (1) the doctrine directs the ECHR to follow the laws of states in Europe; (2) the doctrine requires the ECHR to consider the views of experts; and (3) the doctrine obligates the ECHR to consider the views of the European public.[46]

Recent ECHR judgments suggest that the ECHR settled on a single interpretation of the Emerging Consensus doctrine, which it applies in many of its judgments. According to the current use of the Emerging Consensus doctrine, the ECHR will check if a majority of the states in Europe protect a certain human right, if they do, the ECHR will read the Convention as protecting that right and will find states that infringe this right in violation of the Convention.[47] In essence, Emerging Consensus is used by the ECHR to gradually improve the human rights standards in Europe. Whenever a majority of states protect a certain right, the court defines this practice as the new minimal standard of protection and requires all states to grant the same protection or more.

A powerful example of the use of Emerging Consensus to enhance the protection of human rights over time is the series of judgments addressing the protection of transsexuals' rights in the United Kingdom. In the *Rees case*, decided in 1986, the ECHR ruled that keeping the former sex of transsexuals in their birth certificate and

45. *Id.* at ¶ 31, 35.

46. *See* Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L. J. 133, 139-40 (1993).

47. *See* Helfer & Voeten, *supra* note 20, at 106; KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 12, 37 (2015) (claiming that the ECHR will declare an Emerging Consensus even if a right is not universally protected in Europe. It is enough that a significant majority protects this right and the European trend seems to be in favour of protection).

preventing them from marrying a person of their opposite current sex did not violate the Convention.[48] The court observed at the time that there was no consensus in Europe about granting greater protection to transsexuals, as was done in only some states.[49] In contrast, after the laws of several European states changed in favor of transsexuals' rights, the ECHR reconsidered that decision. In the *Sheffield and Horsham case*, the court indicated that only four out of thirty-seven examined states in Europe prevented transsexuals from changing their sex registration in their birth certificate.[50] This was a warning to the United Kingdom that the European consensus was changing. In 2002, in the *Goodwin case*, the court reversed its previous judgments and found the United Kingdom in violation of the Convention, noting that the Emerging Consensus in Europe changed together with a broader international trend toward greater protection of transsexuals' rights.[51]

But what would happen if the European trend would shift against protecting certain human rights instead of for protecting them? Some scholars are concerned that Emerging Consensus would in that case lead to a downturn in the protection of human rights.[52] However, scholars who studied the actual application of Emerging Consensus by the ECHR claim that it is regularly used to protect human rights and minority rights. When the European trend calls for limiting the protection of these rights, judges use their discretion and decide not to apply the Emerging Consensus doctrine.[53]

4. Margin of Appreciation

The Margin of Appreciation doctrine regulates the exercise of judicial deference by the ECHR. Essentially, the doctrine sets the leeway that is given to states to adopt policies that digress from what the ECHR decides is the correct interpretation of the Convention. One way to understand this leeway is as preventing the ECHR from intervening in the discretion of states. Another way is to understand it

48. Rees v. United Kingdom, 2/1985/88/135, Eur.. Ct. H.R. (ser. A) 106 (1986).

49. *Id*. at ¶ 37.

50. Sheffield & Horsham v. United Kingdom, 1998-V Eur. Ct. H.R. 2011, 2029.

51. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1 at ¶¶ 84-85.

52. *See* Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 146-47 (2005); 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, 1231 (1998).

53. *See* DZEHTSIAROU, *supra* note 47, at 122-29.

as suggesting that the Convention itself includes a spectrum of legitimate legal possibilities from which the states are free to choose.[54]

The amount of deference given to states is determined by the width of the Margin of Appreciation. The wider the Margin of Appreciation, the lower the chance that the ECHR will find a violation. The narrower the Margin of Appreciation, the greater the ability of the ECHR to find a violation in state practice.

The width of the Margin of Appreciation depends on several factors, including the rights that were infringed, the interests served by the infringement, and the purpose of the infringement.[55] When the infringement concerns an especially vital part of a person's identity, the Margin of Appreciation will be narrower.[56] When a right is infringed to support a policy grounded in deeply-ingrained moral beliefs, the Margin of appreciation will be wider.[57] Furthermore, the Margin of Appreciation doctrine competes with the Emerging Consensus doctrine. When there is no European consensus on a matter of policy, the Margin of Appreciation will be wider.[58] When there is a clear European consensus, the Margin of Appreciation will be narrower.[59]

The main justification for granting states a Margin of Appreciation is that European states make their decisions through a legitimate democratic process that deserves the respect of the ECHR, an unelected international body.[60] The principle that international intervention in the decisions of democratic bodies should be limited is known as "the principle of subsidiarity."[61]

This Article casts a doubt on the validity of some democratic processes within states and calls for different degrees of deference in certain situations where democratic failures are suspected. That is a solution that was advocated by scholars and even observed in some

54. *See* Shany, *supra* note 13, at 909-10.

55. *See* Judge Dean Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* CELS Working Paper Series, at pp. 9-23.

56. *See* Dickson v. United Kingdom, App. No. 44362/04, Eur. Ct. H.R. at ¶¶ 77-78 (2007).

57. *See* A, B, and C v. Ireland, App. No. 25579/05, Eur. Ct. H.R. at ¶ 233 (2010).

58. *See* Evans v. United Kingdom, App. No. 6339/05, 2006 Eur. Ct. H.R. at ¶ 77.

59. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316-17 (1997).

60. *See* Shany, *supra* note 13, at 918-22 (listing this and several other justifications for the Margin of Appreciation doctrine).

61. *See* Shai Dothan, *Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies*, 9 J. INT'L DISP. SETTLEMENT 145, 146 (2018).

ECHR judgments.[62] But other recent ECHR judgments suggested another, more precise solution to the same problem. Scholars have argued that the ECHR has started to examine the actual decision-making processes within states and to grant a wider Margin of Appreciation when these processes are commendable and a narrower Margin of Appreciation when they are flawed.[63]

III. THE LIMITS OF THE TEXT

A. Are There Easy Cases in International Law?

Legal interpretation usually involves a measure of discretion. American Legal Realism suggests three separate reasons for this discretion: (1) legal rules are indeterminate—they do not point to just one legal solution because they use ambiguous language and because all future situations cannot be foreseen and addressed by the text;[64] (2) there are usually multiple conflicting rules pertaining to the same legal problem;[65] and (3) in order to apply a rule to a factual situation, facts must be constructed according to legal categories. Since facts are amenable to several possible classifications, this act involves judicial discretion.[66]

International law is different from domestic law because it harbors no illusions that legal rules eventually come together to form a harmonious system. Instead, in international law there are not only conflicting rules, but rather rules that are motivated by contradictory goals.[67] Therefore, some scholars argue that even if there is one clear international rule that pertains to a certain fact, that rule is based on reasons that conflict with one another.[68] Because relying on the rule,

62. *See supra* notes 15-16.

63. *See* Robert Spano, *Universality or Diversity of Human Rights: Strasburg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487, 498-99 (2014); Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe*, 9 J. INT'L DISP. SETTLEMENT 199, 203, 214 (2018); Oddný Mjöll Arnardóttir, *The Brighton Aftermath and the Changing Role of the European Court of Human Rights,* 9 J. INT'L DISP. SETTLEMENT 223, 234 (2018).

64. *See* H. L. A. HART, THE CONCEPT OF LAW 124-26 (1961).

65. *See* Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 266 (Dennis Patterson ed., 1996); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 614-15 (2007).

66. *See* Leiter, *supra* note 65, at 266-67; Dagan, *supra* note 65, at 616.

67. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 590-91 (2005).

68. *Id.*

they claim, is never preferable to relying on any of its opposing reasons, any interpretation is legally defensible.[69]

Other scholars, in contrast, insist that some legal arguments cannot be defended. The law is sometimes clear and leaves no room for judicial discretion.[70] These cases are often called "easy cases." In fact, most legal texts are easy cases. They never reach the courts because their meaning is clear. Courts usually deal with more complex cases in which reasonable parties can disagree about interpretation.[71] Easy cases also occur in international law, as some treaties are just as clear as domestic statutes.[72]

When judges face easy cases in international law, they are forced to use the *textual* approach—they simply apply the text of the treaty. Another way to look at it, semantically different but with the same normative implications, is to say that easy cases are cases that do not require the use of interpretive tools at all. While one can dispute whether clear texts require some form of interpretation,[73] it is evident that the Vienna Convention assumes the existence of cases that do not require interpretation of any kind. The conception that clear cases do not require interpretation, known as the "clear meaning doctrine", is reflected in the phrasing of articles 31-33 of the Vienna Convention.[74]

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69. *Id*.

70. *See* BJORGE, *supra* note 5, at 21-22.

71. AHARON BARAK, JUDICIAL DISCRETION 58-66 (1987) (Hebrew).

72. A good example is the number of permanent judges at the International Court of Justice (fifteen, according to article 3(1) of the court's statute). *See* BJORGE, *supra* note 5, at 21.

73. One may argue that even these cases involve interpretation, even though they involve no interpretive discretion. Interpretation of a text does not only imply using judicial discretion to choose between several possible meanings of the text. It also refers to the cognitive act of making sense of a legal provision. This cognitive act is present even when the text is clear. It only refers solely to the text and does not go to other alternative sources. *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 49-51 (2003) (Hebrew). Furthermore, in order to understand a part of the text, one must understand it as whole and comprehend its context, this is an interpretive task. *See* Michael Waibel, *Demystifying the Art of Interpretation* 22 EUR. J. INT'L L. 571, 577 (2011).

74. *See* Ulf Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation* 54 NETHERLANDS INT'L L. REV. 133, 141 (2007) (explaining the clear meaning doctrine and grounding the statement that the Vienna Convention is committed to it in Article 33(4). This article refers to situations in which the comparison of authentic treaty texts discloses a "difference of meaning which the application of articles 31 and 32 does not remove." This assumes that a difference in meaning can be established even prior to the use of interpretative tools mentioned in the Convention).

B. Ultra Vires Court Decisions

International courts are created by treaties—formal legal documents agreed upon by states or international organizations. These treaties set the limits to the courts' authority. Any legal action that directly digresses from the legal power of the court is illegitimate. A possible way to view such an action is as a legal act done without authority, which is known as an "ultra vires" act.[75] This does not mean courts cannot read legal provisions expansively within the boundaries of the text. Courts, both national and international, do that all the time.[76] However, a direct contradiction to the text authorizing the court is not permitted.

Easy cases, by definition, are cases that leave no room for judicial discretion. They are cases in which expansive interpretation is excluded by the limits of the text. In these cases, judges cannot digress from the text without committing an ultra vires act. A digression from a clear text is not ultra vires because it is not the best representation of the will or the interests of the parties to the treaty. The violation is far more fundamental than that. It goes against the norm that authorizes the court itself, namely the text of the relevant treaty.

Sometimes, the text is unclear and leaves room for several potential interpretations. Nevertheless, even such a treaty may exclude many interpretations as contradictory to the text itself. If the court opts for an interpretation that directly contradicts the text, it would render an illegitimate ultra vires judgment.[77]

IV. THE PRINCIPLE OF STATE CONSENT AND EXCEPTIONS TO IT

Often the text of a treaty allows several potential interpretations. Yet, judges cannot choose freely even within this limited set. Treaties are supposed to reflect the will of the parties that consented to them. Judges must respect the principle of state consent and interpret a treaty in a way that concurs with the original intentions of the states that

75. *Cf.* EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 89-92 (2014) (discussing the application of "ultra vires" as the basic doctrine of the rule of law to international organizations and the problems this application raises). For the application of this, admittedly unconventional, term to treaty interpretation by the ECHR, *see* Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN Y. B. INT'L L. 11, 24 (1999).

76. *See* Part II.B.1.

77. *Cf.* BARAK, *supra* note 71, at 35-41 (explaining the limitations on judicial discretion).

signed it—namely, they should use the *subjective* approach to treaty interpretation—unless there is good reason to digress from the states' intentions.

The commitment of judges to state consent is not a strict rule. Rather, it is a principle that is grounded in the notion that treaties accurately represent the wishes of the states that negotiated them and moreover, that these states are the best possible representatives of all the individuals affected by the treaty.[78] Both of these presumptions are often true, and they are essential to support a functioning international system. Sometimes, however, these presumptions prove false.

A. Why Sometimes Treaties Do Not Represent the Will of States

Treaties do not always represent the will of states. Treaties are a result of a complex process of collective bargaining between states with conflicting interests. Some states may have a particularly strong incentive to join a treaty regime for a host of reasons that have nothing to do with commitment to fulfill the obligations in the treaty.[79] These states are vulnerable to extortion by states which have less need for the regime and therefore have a stronger bargaining power. Once the treaty regime is in place, it can set mechanisms for its amendment that often require the agreement of all parties. This gives parties that resist the amendment—either because of its content or in order to extract concessions from other states—a potent veto power.[80]

The Convention results from power struggles among European states—power struggles in which some states had an unfair

78. *See* Malgosia Fitzmaurice & Panos Merkouris, *Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement*, *in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 153, 156 (Malgosia Fitzmaurice et al. eds., 2010) (articulating the view of the International Law Commission that the text of treaties should be presumed to represent the real intention of the parties).

79. *See* Eric Posner & Cass Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 165-66 (2006) (suggesting that states may join treaties because other states have pushed them to do so or because they are offered some form of concession by other states). *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935 (2002); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005) (exploring the reputational incentives of states to join treaties even if they do not intend to comply with them).

80. *See* Dothan, *supra* note 9, at 517-18.

advantage.[81] After the Convention was created, many states joined the Convention without having any practical power to amend or update it.

The very notion of a treaty implies that states bind their future will to the obligations that they previously assumed. If the state intends to commit itself to a provision, the state should be bound by this provision even if its interests change in the future and it wants to break this commitment. In fact, scholars have argued that some states want to tie their own hands in future cases not just as a concession to other states in return for some form of payment, but mainly for internal purposes—in order to prevent their future governments from damaging their long-term interests.[82] The intention that counts in this case is the one that motivated the signature of the treaty to begin with. This intention should guide the court as it interprets the treaty.

If, however, a state reluctantly accepts an obligation as part of the process of give-and-take that leads to the treaty, one may ask if the conclusion of this process—namely, the text of the treaty—accurately reflects the will of all the states that participated in it. If the process gives a clear edge to some states over others, the final text may not reflect the wishes of most of the states that signed the treaty. A court tasked with interpreting such a treaty is still constrained by the treaty's text. But when it comes to deciding between several options left open by the text, the court should not assume that a restrictive interpretation of the text accurately reflects the intentions of the states. Instead, the court is allowed to interpret the treaty expansively.

Restrictive interpretation and expansive interpretation are both legitimate means of interpretation, which are used by national and international courts.[83] However, when the text of the treaty bears

81. *See* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS—FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 92–93, 95, 100 (2010) (explaining how the United Kingdom used its superior bargaining power during the negotiations on the European Convention on Human Rights to create a much weaker Convention than other states wanted).

82. *See* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,* 54 INT'L ORG. 217 (2000) (arguing that states created the ECHR specifically to "lock in" their democracies against future political forces); Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225 (2010) (arguing that some of the states that joined the jurisdiction of the ICC did so in order to commit not to engage in war crimes).

83. *See* Christoph H Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 BRIT. Y. B. INT'L L. 255, 299-301 (1971) (explaining that neither expansive—or so-called "effective" interpretation—nor restrictive interpretation are a universal rule of international law. Domestic courts in different legal systems prefer either one or the other).

several potential interpretations, some of which create smaller obligations on the states than others, the restrictive interpretation is the one that minimizes the obligations of the states. Supporters of this method suggest that it respects states' sovereignty by requiring them to fulfill only obligations they expressly agreed to.[84] The restrictive interpretation therefore tracks the essence of the subjective approach to treaty interpretation.[85]

But if the obligations states took upon themselves expressly do not reflect the intentions of many or most of the states that signed the treaty, expansive interpretation should be preferred. In fact, expansive interpretation may better match the wishes of most states when they signed the treaty. At that point, states that have the least interest in the treaty regime have the greatest bargaining power because they have a credible threat to leave the negotiation table. This means that they can limit the obligations mentioned in the treaty to the minimum, against the interests of the majority of state parties.

By applying the principle of effectiveness, as shown in Part II.B.1., the ECHR expands the obligations of states to more than the text of the Convention strictly requires.[86] This allows the court to follow what may have been the more generous intentions of many of the Convention members, even if internal dynamics of negotiation led to a much more restricted text. This is already the realm of teleological interpretation, discussed in the next Part. Teleological interpretation allows the court to overrule the intention of the parties as reflected in what they actually agreed upon and substitute it with a deeper reading of the purpose of the Convention.

After a treaty enters into force, states may be bound by its provisions for many years. As years pass, material conditions and the interests of states change. While a state may have favored a certain provision when the treaty was negotiated, this provision may not be suited to current circumstances a few years later. While many of the states that signed the treaty may wish to amend it, the amendment

84. *See* Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L. L. 48, 58 (1949); IVAN. A. SHEARER, STARKE'S INTERNATIONAL LAW 436-37 (11 ed., 1994).

85. *Cf.* Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559, 568-69 (1996) (arguing, in contrast, that restrictive interpretation and expansive interpretation are both compatible with all the three approaches to the interpretation of treaties: textual, subjective, and teleological).

86. *See supra* Part II.B.1.

process often requires a unanimous decision of all the states. A single state may deliberately withhold its ratification to put pressure on dozens of other states.

This, in fact, is exactly what Russia did when it refused to ratify protocol 14 of the Convention for several years. All other forty-six members of the Council of Europe already ratified this protocol, which was essential to adapt the ECHR to current conditions. The will of all the states of the Council of Europe was frustrated by the obstinacy of one state that probably acted this way for political reasons.[87]

The tool of evolutionary interpretation applied by the ECHR, which is discussed in Part II.B.2., gives the ECHR the ability to adapt treaties to current conditions.[88] This adaptation may track the wishes of many states that joined the Convention years after it went into force. Additionally, it may track the current views and practices of most member states. Yet, again, this method of interpretation is better viewed as teleological rather than subjective treaty interpretation.[89] Instead of trying to track the actual intentions of the parties when they signed the treaty,[90] the court is allowed to digress from that intention and pursue the purpose of the treaty.

B. Why Sometimes States Do Not Represent All Individuals

The process of treaty negotiation is designed to allow states to pursue their preferences. While this process may sometimes operate imperfectly, it often works and makes the treaty the best possible approximation of the collective will of the states. Nevertheless, this Article argues that the ECHR should not be constrained to follow the

87. Vladimir Putin, the President of Russia, implied that the Russian State Duma (lower house of parliament) did not approve Protocol 14 because of the ECHR's political decisions. *See* BILL BOWRING, THE DEGRADATION OF THE INTERNATIONAL LEGAL ORDER? THE REHABILITATION OF LAW AND THE POSSIBILITY OF POLITICS 97 (2008).

88. *See supra* Part II.B.2.

89. Nevertheless, it is worth mentioning that Article 31(3)(b) of the Vienna Convention states that also "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account in interpretation. *See* Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1980 U.N.T.S. 332. This provision reflects a principle that is in tension with the "principle of contemporaneity" according to which the terms of the treaty shall be interpreted according to their meaning when the treaty was drafted. *See* MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 219 (2005).

90. *See* Vienna Convention on the Law of Treaties, *supra* note 89, art. 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.")

intentions of the state parties even in cases in which the Convention reflects exactly the wishes of *all* state parties.

But how can one be sure that the text of the Convention accurately represents the wishes of all the parties that signed it? The unique amendment mechanism of the Convention creates such a possibility. While additional protocols that change the procedures of the Convention vis-à-vis all member states must be approved by all states of the Council of Europe—creating a veto power for each individual state—states can also undertake to provide greater protection than the Convention allows in a different type of additional protocols. This type of additional protocols effectively functions as a separate treaty from the Convention itself, a treaty which binds only the states that agreed to ratify it.[91] An additional protocol will enter into force once the conditions set by the states—usually ratification by a specified number of states—are fulfilled. From that point on, any state that wishes to be bound by the protocol can simply ratify it. [92] This clearly implies that a state which did not join such a protocol made a conscious and independent choice *not* to be bound by the additional obligations within it.[93]

Protocol 12, for example, is an additional protocol designed to increase the obligations of ratifying states not to discriminate beyond what the Convention requires. While article 14 of the Convention protects the right of people only to enjoy their Convention rights without discrimination, protocol 12 creates a general right to equality.

Although states that did not join protocol 12 decided against committing not to discriminate in the granting of rights that do not fall within the ambit of the Convention itself, the ECHR used interpretative techniques to effectively eliminate this so-called "ambit requirement" regarding certain social rights. For example, in an admissibility decision in *Stec v. United Kingdom* ("*Stec*"), the ECHR decided that social security payments, regardless of whether they are funded by general taxation or by the beneficiaries, fall under the ambit of article 1, protocol 1 which protects the right to property.[94] Judge Borrego Borrego explained in a concurring opinion to the *Stec* judgment, that eventually found no violation, that by viewing property so expansively

91. DONNA GOMIEN, DAVID HARRIS & LEO ZWAAK, LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 18 (1996).

92. *See* Dothan, *supra* note 9, at 519.

93. *Id.*

94. Stec and Others v. the United Kingdom, 2006-VI Eur. Ct. H.R. 1, ¶¶ 53-56.

the ECHR effectively does away with the requirement that discrimination should infringe another Convention right.[95] The ECHR applied to the United Kingdom the heightened general obligation not to discriminate enshrined in protocol 12, a protocol that the United Kingdom chose not to ratify.[96]

Judge Borrego Borrego is right that the ECHR sometimes expansively interprets states' Convention obligations even if the Convention's text fully matches the wishes of the state under examination. Can this be legitimate? To answer that question, the fundamental reason to respect state consent must be understood.

The principle of state consent that underlies the focus on the intention of the parties derives from states' sovereignty. It could be further justified by the presumption that states are the best possible representatives of all individuals affected by the treaty. It is the rights of individual human beings which form the ultimate source of authority of international courts.[97] As international judges exercise their judicial discretion, the rights of all individuals should be their guide.

This does not imply that courts should ignore the decisions of states. There is no global democratic organization, and states represent their citizens better than any other political body.[98] Yet sometimes states are susceptible to democratic failures—situations in which the state probably misrepresents the rights of individuals affected by its actions. International courts cannot investigate whether the actions of the state do indeed go against the interests of individuals in specific cases. Instead, in situations that are prone to democratic failures, courts should be willing to ignore the intentions of the state and prefer a method of interpretation that effectively protects the rights of all individuals involved.

The most evident democratic failure appears in situations in which the actions of a state have implications for other states. In a heavily populated world equipped with modern technology, more and more state actions impinge on other states. Examples include air and water pollution as well as depletion of natural resources.[99] States should not

95. *Id*. (concurring opinion of judge Borrego Borrego).

96. Stec v. United Kingdom (GC), App. No. 65731/01, 2006-VI Eur. Ct. H.R. 131 (2006).

97. *See* BOGDANDY & VENZKE, *supra* note 10, at 210-13.

98. *Id*. at 212-13.

99. *See e.g.*, Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AMER. J. INT'L L. 295, 295-98 (2013); Eyal Benvenisti,

be allowed to jeopardize the interests of other states and their citizens by their treaty obligations.[100] If an international court has reason to believe that a treaty affects the citizens of states that are not party to it, the court should be allowed to interpret the treaty in a way that does not concur with the interests of the state parties.

Furthermore, in a globalized market, multinational companies can make states compete for their favors and take advantage of the states' inability to act collectively. This means that states that act in isolation may not even serve the best interests of their own citizens.[101] Scholars have argued that the ECHR should be aware of these problems and determine the deference it grants to states according to their ability to properly represent all the affected interests.[102] Treaty interpretation can also act as a tool in this regard, allowing the ECHR to use its interpretative discretion in ways that accommodate interests that states failed to account for.

Additionally, states are sometimes home to individuals who are formally excluded from the democratic process, such as residents who are not citizens and, in some states, also prisoners whose right to vote has been suspended or annulled.[103] Courts should be willing to protect the rights of these individuals against encroachment by their states[104] and can read treaties expansively to do so.

Some groups formally take part in the democratic process but, because of imperfections in this process, have a disproportionately small effect on decision-making within their state. A prominent example are so-called "discrete and insular minorities"—small groups which suffer from discrimination that prevents them from closing

The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy, 9 J. INT'L DISP. SETTLEMENT 240, 245 (2018).

100. *See* Vienna Convention on the Law of Treaties, *supra* note 89, art. 34 (noting that a treaty cannot create an obligation on a third state without its consent).

101. *See* Benvenisti, *The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy*, *supra* note 99, at 247-49.

102. *Id.* at 251-52.

103. *See generally* Shai Dothan, *Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement*, *in* COMPARATIVE INTERNATIONAL LAW 379 (Anthea Roberts et al. eds., 2018) (surveying different legal solutions regarding the voting rights of prisoners in different states).

104. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST – A THEORY OF JUDICIAL REVIEW 161 (1980).

political deals.[105] These groups may be excluded from the political game and have only a minor effect on the policy of their states.[106]

Sometimes, it is the wider segments of society, not minorities, which are the most vulnerable.[107] People who are not members of distinct interest groups face great difficulties when they want to inform themselves about the actions of their representatives.[108] These people can hardly coordinate their actions with members of their diffused social groups in ways that can affect political decision-makers because every member of their group has only a minor interest in the success of the group as a whole.[109] Small interest groups can benefit themselves at the expense of these wider groups that cannot come together and defend their interests. These interest groups may also possess greater access to processes of international negotiation, allowing them to shape treaties according to their interests.[110]

When rights of non-voters, minorities, or large and disorganized social groups are at stake, courts should be willing to disregard the intention of the parties in favor of expansive interpretations that protect these rights. If the rights of vulnerable groups are protected by the court, this can serve as a substitute for real political influence. The interests of disadvantaged group members can be safeguarded by setting them as equal to those of all other members of society. Scholars have named this type of right protection "Virtual Representation."[111]

C. Digressing from the Principle of State Consent

When there is no reason to doubt that the treaty represents the will of the state whose obligations the court is circumscribing and the individuals affected by these obligations, the court should follow the subjective approach to treaty interpretation—it should solve

105. *See* United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

106. *Id.*

107. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985).

108. *See* Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AMER. POL. SCI. REV. 809, 812 (1998).

109. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 33-34 (1965). *Cf.* GUNNAR TRUMBULL, STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS (2012) (arguing that in advanced democracies diffuse interests can actually significantly impact policy-making).

110. *See* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 184-86 (1999).

111. *See* ELY, *supra* note 104, at 76-84.

ambiguities in the text in light of the intention of the parties to the treaty. This implies interpreting the treaty restrictively so that states will not be liable for anything that they did not expressly consent to.

In contrast, when the court has reason to suspect that the treaty does not represent the will of the state in question or that this state misrepresents certain individuals, the court should ignore the intention of the parties and use the teleological method of interpretation to expand the state's obligations, within the zone of discretion allowed by the treaty's text.

The instruction to ignore the intention of the parties in some situations does not contradict the principle of state consent. Instead, it represents an attempt to follow its underlying justification. The principle of state consent should still instruct courts. It should guide them to follow the intention of the parties in some situations. But when the ultimate justification for this principle—namely the presumption that it serves the interests of all affected individuals[112]—is undermined, the principle should give way to its own justification and the teleological interpretation mandated by it.[113]

V. THE PURPOSE OF TREATIES

When the court is tasked with interpreting an ambiguous treaty and it has reason to believe that the text as it stands does not reflect the will of all the people affected by the treaty, it must turn to the object and purpose of the treaty. In other words, the court must apply the *teleological* approach to treaty interpretation.

The purpose of the treaty can be learned from the text of the treaty and from the intentions of the state parties to it.[114] A teleological reading of the treaty must seek not only the direct wishes of the parties but also more abstract goals they set for the treaty regime as a whole.[115] In addition, the court should consider the object of the treaty as it

112. *See supra* 97 and accompanying text.

113. *Cf.* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 230 (1991) (suggesting that rules sometimes operate as presumptions: they direct behavior unless their underlying justifications clearly do not hold. The existence of a rule in these cases saves the effort of trying to check if the justifications apply in all cases in which there is no good reason to suspect that they do not apply).

114. *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 183-84 (2004) (describing a similar method of purposive interpretation in domestic law).

115. *Id*.

stands: what hypothetical will could motivate such a treaty if all relevant interests were taken into account? The object of the treaty must be considered in varying degrees of abstraction.[116] Ultimately, the object of the treaty is to serve the interests of all individuals affected by it.[117]

Many times, when courts refer to the purpose of the treaty, they interpret it expansively. There is a close connection between the principle of effectiveness—calling on the interpreter to give real effect to the rights protected by the treaty—and teleological interpretation.[118] Teleological interpretation allows the judge to read expansively the obligations of states to individuals while at the same time restricting the scope of the limitations on these obligations and any reservations from them.[119]

Teleological interpretation is also naturally connected to evolutionary interpretation that allows the meaning of the treaty to develop and change over time. While the text of the treaty and the will of the parties are relatively fixed, the object of the treaty, especially in high levels of abstraction, is malleable and can transform to suit new conditions.[120]

International courts have usually opted for expansive treaty interpretation instead of restrictive treaty interpretation. This tendency is already visible in the Permanent Court of International Justice ("PCIJ") and the International Court of Justice ("ICJ").[121] It is evident in the practice of the ECHR, which uses a variety of interpretative techniques to enhance the protection of human rights in the Convention.[122]

This tendency is hardly surprising. The ECHR is tasked with interpreting a vague law-making treaty that was created to support a human rights regime across many decades. Therefore, the text of the

116. *Id*.

117. *See* BOGDANDY & VENZKE, *supra* note 10, at 48 (explaining that international courts have to take into account the interests and values of the international community as a whole when they adjudicate).

118. *See* Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, *in* TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON (Malgosia Fitzmaurice et al. eds., 2010) 129, 132 (suggesting that methods of interpretation that refer to the object and purpose of the treaty usually lead to results that favor the effectiveness of the treaty in investment treaty arbitration tribunals).

119. *See* Dothan, *supra* note 29, at 131.

120. *See id.*

121. *See* Lauterpacht, *supra* note 84, at 51, 67.

122. *See supra* Part II.B1.

Convention cannot be the only guide of the judges. The power struggles that led to the creation of the Convention, the fact that it was joined by many states who had no practical ability to determine its content, and the veto power given to current members against amendment suggest that the intentions of the parties cannot be relied upon to interpret the Convention in many cases.

Furthermore, many of the individuals affected by the Convention are practically excluded from the political process. They include foreigners,[123] prisoners,[124] ethnic minorities such as the Roma,[125] and wide segments of the public that enjoy welfare benefits but cannot effectively organize to lobby for their rights.[126] In these situations, the court cannot follow only the intention of the parties. It must turn to teleological interpretation and expand the obligations of the states, making the Convention an effective and up-to-date tool for protecting human rights. The practice of the ECHR—that uses expansive interpretation very often to defend such vulnerable groups—is therefore normatively justified.[127]

VI. BETWEEN THE MARGIN OF APPRECIATION AND TREATY INTERPRETATION

The Margin of Appreciation directs the ECHR to defer to some of the policy decisions of the states in Europe and not to find them in violation of the Convention.[128] A potential justification for the

123. For examples of judgments protecting foreigners, *see* Case of Othman (Abu Qatada) v. The United Kingdom, 2012-I Eur. Ct. H.R. 159 (preventing an attempt to deport an extremist Muslim cleric to Jordan because his trial there may include testimonies taken under torture); A. A. v. United Kingdom, App. No. 8000/08, Eur. Ct. H.R. (2011) (preventing the deportation of a Nigerian rapist because he formed social connections in the United Kingdom).

124. For examples for judgments protecting prisoners, *see* Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187 (deciding that a general ban on prisoners' right to vote violates their Convention rights); Greens and MT v. United Kingdom, 2010-VI Eur. Ct. H.R. 57 (a "Pilot Judgment" giving the United Kingdom six months to comply with the Hirst judgment).

125. As an example for a judgment protecting the Roma minority, *see* D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241 (ruling that Roma children suffer from discrimination because they are disproportionately more likely to be sent to special schools with an inferior teaching level).

126. For an example of a case which considers the importance of protecting the large segments of society that enjoy social security benefits, *see* Stec & Others v. the United Kingdom, 2006-VI Eur. Ct. H.R. 1, para. 53-56 (deciding, as explained in Part IV.B, that social security payments, whether funded by taxation or directly by the benefactors, are covered by Article 1 of Protocol No. 1 to the Convention, which protects the right to property).

127. *See supra* notes 123-26.

128. *See supra* Part II.B.4.

deference granted to these states is that the ECHR is not a democratically elected body, while states in Europe are democracies.[129] Usually, the ECHR should rely on the internal democratic process within the states as the best possible safeguard for the rights of individuals.

But scholars have argued that this cannot always be the case. In cases of potential democratic failures, the Margin of Appreciation is unjustified and should not be respected.[130] Scholars have even argued that the ECHR does in fact consider the democratic credentials of states when it sets the limits of the Margin of Appreciation, applying stricter scrutiny to situations in which the state may not effectively represent the rights of its citizens.[131]

The parallel between the three-stage approach to treaty interpretation presented here and this conception of the Margin of Appreciation should be clear by now. The Margin of Appreciation is relevant when the text of the treaty leaves room for interpretation.[132] It directs the court to consider the policies of states for the same reason that courts should usually follow the intention of state parties to international treaties—namely, states' ability to represent the interests of their citizens. However, when states are susceptible to democratic failures, the ECHR should use expansive interpretation and narrow the Margin of Appreciation given to the states. This final move often goes hand in hand with the use of teleological interpretation. The nature of the issues that the ECHR deals with guarantees that the court will frequently reach this final stage of interpretation. Indeed, the court uses many interpretive techniques to effectively protect human rights in Europe, despite the inevitable encroachment on states' sovereignty.[133]

VII. CONCLUSION

The Margin of Appreciation, like the intentions of the parties to the Convention, forms a constraint on the discretion of the ECHR. Within the boundaries of the Convention's text, ECHR judges must consider these constraints out of deference to the will of European states. Yet these constraints are flexible. Sometimes the court has

129. *See* Shany, *supra* note 13, at 919-21.
130. *See* Benvenisti, *supra* note 15, at 849, 853.
131. *See supra* note 16.
132. *See supra* Part II.B.4.
133. *See* Dothan, *supra* note 9, at 512-16.

reason to believe that problems of collective bargaining or democratic failures render the intentions of state parties or their current policies inadequate approximations of the interests of all people involved. In these cases, the ECHR should digress from these constraints.

This Article highlighted that as the ECHR turns away from the intentions of the state parties and ignores the Margin of Appreciation, it usually follows teleological interpretation. As the court seeks to construe the purpose of the Convention, a potential guide is the current policies adopted by the majority of the states in Europe—the so-called "Emerging Consensus."[134] Following the policies that most European states adopt and enforcing them on the minority of deviant states may track the hypothetical objective meaning of the treaty—the interpretation that reflects the best balance of all relevant rights and interests—and serve its purpose.

Here is why: If every state tries to adopt the best policy to suit its own citizens, it uses its decision-making ability to make a calculated and independent decision. The Condorcet Jury theorem suggests that tracking the majority within a group of independent decision-makers is likely to lead to a better decision than each decision-maker could make on her own.[135] Therefore, when the ECHR tracks the current views of most European states by using the Emerging Consensus doctrine, it uses a mechanism that can lead to the best possible interpretation of the Convention, considering all the interests involved.[136] When the states forfeit their Margin of Appreciation, the ECHR often follows Emerging Consensus,[137] thereby fulfilling the purpose of the Convention.[138]

134. *See* Shai Dothan, *Three Interpretive Constraints on the European Court of Human Rights*, *in* THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE 227 (Machiko Kanetake & André Nollkaemper eds. 2016).

135. *See* Posner & Sunstein, *supra* note 79 (2006) (using the Condorcet Jury theorem to justify the use of comparative law).

136. *See* Shai Dothan, *The Optimal Use of Comparative Law,* 43 DENV. J. INT'L L. & POL'Y. 21 (2014) (applying the Condorcet Jury Theorem to justify the Emerging Consensus doctrine as a method that leads to good policies, while stressing that international courts like the ECHR are at a better institutional position to use this tool than national courts).

137. *See* Helfer, *supra* note 46.

138. *See* Shai Dothan, *Judicial Deference Allows European Consensus to Emerge*, 18 CHI. J. INT'L L. 392 (2018) (explaining that a correct application of the Margin of Appreciation doctrine can allow the ECHR to apply Emerging Consensus in a way that maximizes the decisional advantages of the Condorcet Jury Theorem).