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In Defense of Expansive Interpretation in the European Court of Human Rights

Shai Dothan[*]

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ABSTRACT

The European Court of Human Rights (ECHR) applies a series of interpretive techniques that systematically expand states' human rights obligations far beyond the obligations states took upon themselves by ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms. Some commentators argue that this practice is illegitimate because states represent their citizens and their decision not to undertake certain human rights obligations should be respected. This paper argues that expansive interpretation is nonetheless legitimate in two important situations which often occur in the international arena. First, in situations where most states would have subscribed to the additional obligation but for a minority of states that use their veto power to prevent an amendment of the Convention, expansive interpretation will bring the states' actions into better alignment with their own desires and the desires of their citizens. Second, in situations where democratic failures lead states to misrepresent the interests of individuals affected by their human rights policies, expansive interpretation can help align the policies of states with the true interests of the citizens they represent. Although the paper does not provide a general justification for expansive interpretation, it does suggest that in certain limited contexts where the conditions identified above hold, it might well serve the goals of international law and international courts.

I. INTRODUCTION

In the course of interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention),[1] the European Court of Human Rights (ECHR) commonly invokes a wide variety of jurisprudential approaches and policy based arguments that have had the effect of expanding the obligations the Convention imposes on its signatories—often requiring them to assume obligations that go far beyond those they contemplated when they signed the Convention. Commentators have widely criticized these aspects of the court's operation. They argue that even though the court has special expertise in protecting human rights

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

(as compared to that of state parties), it should not be allowed to expand the obligations of state parties.[2] These commentators explain that because the ECHR is not democratically accountable, its expansion of treaty obligations undertaken in the guise of interpretation may well have the effect of thwarting the democratic decisions of signatory states.

This paper suggests that while there are many situations in which the court's tendency towards expansive interpretation may indeed be inconsistent with democratic decisions of signatory states, there are two important contexts in which its approach may in fact be more consistent with democratic theory (and hence the court's normative legitimacy) than a more narrow approach to interpretation: first, when a democratic state voted or would have voted for a treaty amendment whose inclusion was thwarted by the opposition of other states; second, in situations where the state itself fails to represent its citizens, that is in situations where there has been some type of democratic failure. In both cases, the ECHR will sometimes be able to engage in expansive interpretation, while either retaining, or perhaps enhancing, its normative legitimacy.

Part II describes the doctrinal methods of treaty interpretation generally and the expansive interpretation methods used by the ECHR. Part III explores the legitimacy of the ECHR's adjudicative approach in contexts where the refusal of a small group of states to sign a treaty or particular protocols means that the democratic will of representative states is not fully reflected in the treaty text. Part IV explores the approaches to legitimacy in contexts where a state does not represent the will of its citizens. Part V studies the possible responses of states to expansive interpretation—arguing that states can respond to expansive interpretation by refusing to sign protocols to the Convention whose content, strictly construed, they view as beneficial to their interests. Part VI presents a case study that demonstrates this analysis—the attempts by the ECHR to expansively interpret the right to equality that appears in the Convention. By this expansive interpretation the ECHR obligated states that did not sign Protocol 12 to grant their citizens the same level of protection as the one protected by the protocol. Part VII concludes and offers more general implications of the argument.

II. EXPANSIVE TREATY INTERPRETATION

[2] For the argument that the ECHR should not digress from the will of the state parties *see* Judge Borrego Borrego's concurring opinion in the case of *Stec v. United Kingdom*, *infra* note 84. For an analysis of arguments favoring restrictive interpretation by the ECHR raised by the British delegation before the ECHR in the *Golder case*, see *infra* note 6, and by the dissenting judges in this judgment, especially judge Fitzmaurice *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 293-301 (2010). For a strongly worded attack on the ECHR by the media—arguing that it is not representative and not accountable to the European public, *see* James Slack: Social Ties Keep Rapists in Britain, MAIL ON LINE 21 September 2011, available at http://www.dailymail.co.uk/debate/article-2039657/Akindoyin-Akinshipe-Social-ties-rapists-Britain.html: "The court's 'one country, one judge' rule means that Liechtenstein, San Marino, Monaco and Andorra each have a seat on the court's bench despite their combined populations being smaller than the London borough of Islington's. However, it is able to over-ride the wishes of the British people, its Parliament and its court. This has to end".

A. TREATY INTERPRETATION IN GENERAL

There are three main approaches to the interpretation of treaties: the textual approach, the subjective approach, and the teleological approach. The textual approach emphasizes the text of the treaty itself as the primary tool of interpretation. The subjective approach uses the intent of the parties to interpret the treaty. The teleological approach calls for interpreting the treaty according to its object and purpose.[3] These three approaches are not mutually exclusive and courts often use all of them to clarify treaties.[4]

The Vienna Convention on the Law of Treaties codified the basic rules of treaty interpretation.[5] Its provisions are commonly accepted as reflecting customary international law and were used by international courts even before the treaty came into effect in 1980.[6] The most important provision is: "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 the light of its object and purpose."[7] Authors and commentators noted that this provision favored the textual approach to interpretation and placed the text of the treaty as the most important source of interpretation.[8] Yet other provisions that call attention to subsequent practice and agreements of the parties[9] and to the preparatory work for the treaty[10] attest that the teleological and subjective approaches are not completely neglected.[11] Indeed, the interpreter usually has to consider the purpose of the treaty, even if only to verify that the clear meaning of the text is the correct one.[12]

The Vienna Convention and all three approaches to treaty interpretation are consistent with either expansive or restrictive interpretation.[13] The International Law Commission that drafted the Vienna Convention took the position that if the treaty can be interpreted in two different ways, only one of which gives the treaty an appropriate effect, then this is the interpretation that should be adopted, since only it interprets the treaty in good faith and in accordance with its

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[3] *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, 318-319 (1969).

[4] *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2ND ED., 1984) 124.

[5] Vienna Convention on the Law of Treaties (23 May 1969), Articles 31-33.

[6] *See* Herbert W. Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AMER. J. I. L. 470, 471-472 (1979). See for example Case of Golder v. the United Kingdom judgment of 21 February 1975 EUR. Ct. H.R. (ser. A)18 at par. 29 (stating that that the ECHR will apply articles 31-33 to the Vienna Convention before it entered into force because they reflect "generally accepted principles of international law").

[7] Vienna Convention on the Law of Treaties, Art. 31(1).

[8] *See* SIR ARTHUR WATTS, THE INTERNATIONAL LAW COMMISSION 1949-1998, vol. II, at 687 (1999) See Jacobs, *supra* note 3 at 326; SINCLAIR, *supra* note 4 at 115.

[9] *See* art. 31(3)(a) and 31(3)(b)

[10] *See* art. 32, which states that these supplementary means may be used to confirm the meaning reached by the application of art. 31 or to determine the meaning when art. 31 leaves the meaning "ambiguous or obscure" or leads to a "manifestly absurd or unreasonable" result.

[11] *See* Jacobs, *supra* note 3 at 326-327.

[12] *See* SINCLAIR, *supra* note 4 at 116.

[13] *See* 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, 568-569 (1996).

object and purpose.[14] But what if two interpretations of the treaty are possible, the first gives it some effect, causing a few obligations on the states, and the other gives it a greater effect, causing greater obligations on the states? In this case an expansive interpreter will adopt the latter interpretation. Often it will champion the need to give effect to the treaty in the name of the so called "principle of effectiveness", but in fact it will give the treaty a greater effect rather than a lesser effect.[15] A restrictive interpreter will adopt the former interpretation. This interpreter will protect states' sovereignty by preventing any limitations on states' actions that they didn't agree to expressly in the treaty.[16]

Authors argued that international tribunals have limited the use of restrictive interpretation only to the almost impossible situations in which all other considerations fail to lead to a result. By this account, international tribunals have made their choice—to prefer expansive interpretation over restrictive interpretation.[17] The next sub-part will investigate the methods of interpretation used by the ECHR and will argue that it too adopted an expansive interpretation of treaties.

B. TREATY INTERPRETATION BY THE ECHR

The ECHR is an international court that has jurisdiction over forty seven states within the Council of Europe that ratified the European Convention. It has the largest caseload of any international court,[18] a caseload that is constantly expanding.[19] This makes it a court whose methods of treaty interpretation are worth investigating. Almost all the cases decided by the ECHR were initiated by individual applicants that complained their human rights protected by the Convention have been breached.[20] This makes the choice of the court between expansive interpretation and restrictive interpretation easier to analyze than in courts that deal with the mutual obligations of two opposing states.

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[14] *See* WATTS, *supra* note 8 at 684.

[15] *See* Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L. L. 48, 70 (1949).; YORAM DINSTEIN, INTERNATIONAL TREATIES 133-135 (1974) (Hebrew). The International Law Commission made a deliberate decision not to refer to the principle of effectiveness fearing that it would lead to an overly expansive interpretation of treaties, which would illegitimately contradict the "letter and spirit" of the treaty, *See* WATTS, *supra* note 8 at 684.

[16] *See id* at 58; IVAN. A. SHEARER STARKE'S INTERNATIONAL LAW, 436-437 (11th ed., 1994).

[17] *See* Lauterpacht, *supra* note 15 at 67.; 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, 534 (2003) (Arguing that restrictive interpretation is almost never used in international law).

[18] *See* Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L. ORG. 669, 671 (2007)

[19] In 2011 the number of pending applications exceeded 150,000 and 64,500 new applications were allocated to the judges.

[20] A state party to the convention may also refer violations committed by other state parties to the ECHR, even if the referring state wasn't harmed by the violation, according to art. 33 of the convention. Yet, this method of referral is almost never used. *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) (suggesting that more than 95% of the cases result from individual applications).

The European Convention may be different from many other treaties because it creates a community and institutions that function within it, rather than regulating the cooperation between separate states. Furthermore, it is a law-making treaty that sets norms to protect human rights, rather than a treaty that serves as a contract between two states.[21] The ECHR explicitly decided that because of the law-making nature of the Convention it should be interpreted in a way that realizes the object of the treaty and makes its safeguards effective, and not in a way that restricts states' obligations.[22] Due to the special nature of the Convention, the interpretive choices of the ECHR may not be shared by international courts that interpret other types of treaties.[23]

The ECHR relied on the principle of effectiveness to make many interpretative choices that constitute expansive interpretation:[24] it rejected formalistic interpretation in favor of interpretation that fulfills the purpose of protecting rights;[25] it read into the Convention certain rights that do not appear clearly within the text;[26] it required the states to provide practical safeguards that ensure the actual enjoyment of the rights protected in the Convention;[27] it read

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[21] *See* François OST, *The Original Canons of Interpretation of the European Court of Human Rights*, *in* THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 283, 288 (Mireille Delmas-Marty ed., 1992).

[22] *See* Case of Wemhoff v. Germany judgment of 27 June 1968 EUR. Ct. H.R. (ser. A) 7 at 23.; Soering case, judgment of 7 July 1989, EUR. Ct. H.R (ser. A)161 at 34. *See also* Case of Ireland v. the United Kingdom judgment of 18 January 1978 EUR. Ct. H.R. (ser. A) 25 at 90.; Golder v. the United Kingdom, App. No. 4451/70, Eur. Comm'n H.R., (ser. B no. 16) 1 June 1973, par. 57.; DJ. HARRIS, M. O'BOYLE & C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (1995).; F. Matscher, *Methods of Interpretation of the Convention*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 63, 66 (R. St. J. Macdonald F. Matscher, H. Petzold eds. 1993).

[23] *See* 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) (calling for special rules of interpretation for the convention that would allow it to continue and protect human rights over a long time despite changing conditions). Yet the International Law Commission deliberately didn't make the distinction between different types of treaties in the Vienna Convention, despite the views of scholars that the nature of the treaty may affect its interpretation, see WATTS, *supra* note 7 at 684.

[24] See generally P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 74-76 (3rd ed., 1998). G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 98-124 (2nd ed.,1993).

[25] See Case of Golder v. the United Kingdom judgment of 21 February 1975 EUR. Ct. H.R. (ser. A)18 at 34 (par. 5 to the separate opinion of Justice Fitzmaurice) (deciding that preventing the applicant, a prisoner, from writing to a solicitor interferes with his correspondence, even though the applicant didn't write any letters since he was informed his letters will be stopped); Minelli Case, judgment of 25 March 1983, EUR. Ct. H.R. (ser. A)62. (In this case a journalist was prosecuted for defamation, and the prosecution was repealed because a limitation period passed. But the national court ordered him to bear two thirds of the court's costs based on the presumption that he would be convicted if it wasn't for the limitation period. The ECHR decided this violates his presumption of innocence protected by article 6(2) to the convention, even if there is no formal decision that the accused is guilty).

[26] *See* Soering, *supra* note 22 (deciding that extraditing the applicant to the United States, where he might be detained for a long time awaiting a death penalty, would violate article 3 of the convention, even though the text of the article 3 prevents only subjecting a person to "torture or to inhuman and degrading treatment or punishment" and not extraditing him to a state where he might be subject to these conditions).;

[27] *See* Case of Artico v. Italy, judgment of 13 May 1980 EUR. Ct. H.R. (ser. A)37 (deciding that the right to free legal representation guaranteed in article 6(3)(c) to the convention is not fulfilled by merely supplying a defendant with a lawyer, but by ensuring effective legal representation by either causing the lawyer to represent properly or replacing him). Airey Case, judgment of 9 October 1979, EUR. Ct. H.R. (ser. A)32. (deciding that the right to access the court, protected by article 6(1) to the convention was violated since the applicant could not afford to pay for a

articles that provide protection from actions of the states as creating positive obligations on the states,[28] and even as creating an obligation on the states to protect individuals from infringements of their rights by private parties;[29] it interpreted narrowly the exceptions and the derogations from the rights within the Convention,[30] as well as the reservations of states from the Convention;[31] it prevented states from evading responsibility for violations by not recognizing attempts to delegate responsibility to other actors;[32] it relaxed the condition that applicants have to be victims,[33] and even allowed non-victims to serve as applicants in unique circumstances;[34] it decided that states are responsible for actions taken outside their territory;[35] and finally, it recently shifted from issuing only declaratory judgments, which let the states choose the means to remedy their violations, to issuing in some cases judgments that required specific actions from states.[36]

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lawyer to represent her before the national court, and, even though she could legally argue in person, she would not be able to represent her case properly).

[28] *See* Marckx Case, Judgment of 13 June 1979 EUR. Ct. H.R. (ser. A)31 (deciding that article 8 to the convention protecting the right to private and family life doesn't only protect individuals from actions of the state, it includes positive obligations to shape the legal regime to allow illegitimate children to lead a normal family life); *See also* Mehemi v. France (No. 2), judgment of 10 April 2003, 2003-IV EUR. Ct. H.R. 311, 325. VAN DIJK & VAN HOOF, *supra* note 24 at 74.

[29] *See* Case of X and Y v. the Netherlands, Judgment of 26 March 1985 EUR. Ct. H.R. (ser. A)91 (Miss Y was a mentally handicapped adult person who was raped. Her father, Mr. X was legally prevented from filing a complaint in her name. The ECHR decided that the state's legal system didn't adopt the necessary measures to protect the applicants' right to private life from infringements by other individuals).

[30] Case of Klass and others Judgment of 6 September 1978 EUR. Ct. H.R. (ser. A)28 at 21; MERRILLS, supra note 24 at 116.

[31] *See* MERRILLS, *supra* note 25 at 116-119.

[32] *See* Van der Mussele case, judgment of 23 November 1983 EUR. Ct. H.R. (ser. A)70 at 15 (In this case the applicant was a lawyer who complained he was forced to represent defendants without receiving any compensation. Although the applicant was ordered to represent the defendant by the local bar and not directly by the state, the state compelled the bar to compel its members to represent without compensation and was therefore equally responsible as if it acted directly in this manner.)

[33] *See* VAN DIJK & VAN HOOF, supra note 25 at 76.

[34] *See* Fairfield and Others v. the United Kingdom, Decision of 8 March 2005 (stating that relatives of a deceased victim can bring cases concerning the violations of her right to life under article 2 to the convention). For a recommendation to expand this exception to the victimhood requirement even further *see* Shai Dothan, *Luring NGOs to International Courts* (draft, on file with author).

[35] *See* Al-Skeini and others v. The United Kingdom, Judgment of 7 July 2011 (Application. No. 55721/07) (deciding that state's jurisdiction expands to territories under their effective control even if they are not members of the convention). This judgment resolved an ambiguity in past judgments of the ECHR in favor of an expansion of states' extraterritorial jurisdiction. For a strategic analysis of this case as reflecting the ECHR's increasing reputation *see* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS (*Forthcoming* Cambridge University Press). For an analysis based on the decreasing salience and the increasingly negative attitude towards foreign military intervention in European public opinion *see* Shai Dothan, *How International Courts Enhance their Legitimacy*, 14 THEO. INQ. L. 455, 475-476 (2013).

[36] The ECHR issues so called "Pilot Judgments" that require states to take specific actions to repair structural problems that could affect many other applicants, see for example Broniowski v. Poland, judgment of 22 June 2004, 2004-V EUR. Ct. H.R. 1. *See* Joshua L. Jackson, *Broniowski v. Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court*, 39 CONN. L. REV. 759, 783-784 (2006). (describing the incremental shift in the ECHR judgments towards demanding specific actions from the states).

As these interpretive choices demonstrate, the ECHR has clearly favored expansive interpretation over restrictive interpretation. Yet there are limits to the willingness of the ECHR to expand the obligations of the states. The ECHR is limited by the text of the Convention—it can interpret the text but it cannot revise the text or bend it to reach any result it wishes. Furthermore, the object of the Convention is not to protect every right, and protecting rights is not its only purpose. The ECHR also considers the interests of states and defers to some of their decisions by granting them a so called "margin of appreciation".[37] Moreover, the ECHR often invokes the "principle of proportionality". According to this principle states are allowed to infringe rights enshrined in the Convention if other legitimate interests of proportionate weight necessitate this infringement, and if this infringement doesn't impair the essence of the protected right.[38]

The interpretation of the Convention didn't remain static; rather, the ECHR interpreted the Convention in an evolutionary manner and took into account changing conditions in European states.[39] When a European consensus emerged that certain rights must be protected, the ECHR interpreted the Convention as granting protection to these rights.[40] Over time, the ECHR incrementally increased its demands on states and the protection of human rights.[41] The ECHR often used teleological interpretation to expand states' obligations.[42] While expansive interpretation may be achieved by other interpretive approaches, the teleological method allowed the ECHR the necessary flexibility to widely interpret the states' obligations and narrowly interpret the limitations to these obligations, as well as to change the interpretation of the treaty over time.[43]

III. WHY AND WHEN STATES' TREATY OBLIGATIONS DO NOT REPRESENT THEIR INTERESTS

[37] *See* MERRILLS, *supra* note 25 at 119-122.
[38] *See* Case of Mathieu-Mohin and Clerfayt, judgment of 2 March 1987 EUR. Ct. H.R. (ser. A)113 at 23.; Case of Lithgow and others, judgment of 8 July 1986 EUR. Ct. H.R. (ser. A)102 at 71. Ashingdane case judgment of 28 May 1985, EUR. Ct. H.R. (ser. A) 93 at 24-25. Case of James and others, judgment of 21 February 1986 EUR. Ct. H.R. (ser. A) 98 at p. 34. For an analysis of ECHR's use of the "principle of proportionality" *see* KEIR STARMER, EUROPEAN HUMAN RIGHTS LAW – THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 169-176 (1999); Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (St. J. Macdonald F. Matscher, H. Petzold eds., 1993) 125.
[39] See Tyrer case, judgment of 25 April 1978 EUR. Ct. H.R. (ser. A) 26.
[40] See Christine Goodwin v. the United Kingdom, judgment of 11 July 2002, 2002-VI EUR. Ct. H.R. 1 at 26.; See Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L. J. 133 (1993).
[41] *See* Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L. L. 115 (2011).; Mahoney, *supra* note 23 at 66-68.
[42] *See* OST, *supra* note 21 at 292.
[43] *See* Dothan, *supra* note 41 at 131. *Cf.* Dinstein, *supra* note 15 at 133 (tying together the teleological approach to treaty interpretation and the principle of effectiveness)

If states represent their citizens, there is good reason for the ECHR to respect the choices they made when they signed the European Convention, and to adopt a restrictive interpretation.[44] Even if the ECHR can lead to better results than what the states agreed to because of its human rights expertise, for instance even if the court can lead to better utility for all individuals involved,[45] deciding against the will of the public under the court's jurisdiction would damage its normative legitimacy.[46] Because the court is not an elected or a representative body it should normally defer to the decisions of bodies that are democratically elected and therefore better represent the views of the majority of individuals affected by the court's decisions.

This argument may be used against any expansive interpretation by international courts, but it applies with special force to issues of human rights, since they primarily affect the states' own citizens and therefore usually do not create a risk of harmful externalities to individuals to whom the state is not accountable. This argument also rings especially true for the ECHR, which deals with the behavior of democratic states, where some measure of deliberative democracy exists.[47] Yet this argument only applies if the Convention accurately represents the preferences of the states at the time the ECHR interprets it.

The Convention would not represent the preferences of the states at the time the ECHR interprets it if the states could not foresee the relevant changing circumstances when they ratified the Convention. Over the years, conditions may have changed, and the states would have preferred to agree to different terms than the original Convention, but they are prevented from doing so by the cost of renegotiating the Convention.

Furthermore, the Convention reflects the agreement of many different states and its provisions reflect the power struggles within this group of states, including efforts of coercion, persuasion and logrolling.[48] In order to secure the agreement of all states that negotiated the initial version of the Convention the drafters narrowed the protection of human rights granted in the Convention, omitted the protection of political liberty rights, and weakened the enforcement

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[44] *See* Dunoff & Joel P. Trachtman, *supra* note 72 at 399.; Vijay M. Padmanabhan, 'The Human Rights Justification for Consent' *Forthcoming* UNI. PENN. J. INT'L L. available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319509 at. p. 39 (arguing that courts should respect the states' right to assume or not to assume international obligations, because of the need to protect the rights of individuals to self determination and to determine the obligations of their communities).

[45] The ECHR uses certain doctrines that allow it to reach good decisions. For example, the court uses the Emerging Consensus doctrine that directs it to follow the policies of the majority of the states in Europe. Assuming that states make their policies independently and in an informed manner, the majority of states is likely to opt for good policies. *See* Shai Dothan, *The Optimal Use of Comparative Law* (draft, on file with author); Shai Dothan, *Three Interpretative Constraints on the European Court of Human Rights* (draft, on file with author).

[46] The problem of a court that doesn't defer to elected and democratically accountable institutions and thus digresses from the will of the public is often termed the "Counter-Majoritarian Difficulty". National courts that do not adhere to the legislator can suffer from this difficulty that damages that their normative legitimacy, even if their expertise ensures they will make good legal decisions, *see* Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty*, 11 INT'L J. CON. L. 13, 14-15 (2013).

[47] *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?* 16 EUR. J. INT'L L. 907, 919-921 (2006) (using similar arguments to justify the margin of appreciation doctrine, which checks the ECHR's ability to engage in expansive interpretation).

[48] *See* Eric Posner & Cass Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 165-166 (2006).

regime by making the rights of individual's to petition the court conditional on a separate agreement by the state. The attempt to reach unanimity across the negotiating states gave a minority of states that were concerned about their sovereignty, primarily the United Kingdom, the power to impose on the majority of states a weak and partial convention, and caused much resentment among the representative of other states.[49]

Therefore, even at the inception of the Convention the political constraints on the negotiating process rendered it unrepresentative of the views of the majority of the states. A minority of states should certainly be allowed to use logrolling to promote its views and may have a disproportionate power if its preferences are especially strong. Nevertheless the need to reach unanimity gave the recalcitrant states a disproportional power which rendered the Convention much closer to their preferences than to the preferences of the majority. After the Convention's initial acceptance in 1950 it was ratified by many other states that had to accept the Convention as is, if they wanted to join it, and didn't have a real ability to renegotiate its provisions. In addition, the inevitable brevity of the Convention results in ambiguity of its provisions that consequently do not offer certain protections that the states may have agreed to if they had limitless space.[50]

While the Convention is certainly legitimate despite these considerations, and the court should not be allowed to contradict it because this would exceed its mandate given to it by the consent of sovereign states, all these considerations point to the fact that the Convention does not represent the wishes of the majority of the states and, consequently, of the people of Europe. Therefore, if the court engages in expansive interpretation, within the discretion allowed to it by the text, it does not contradict the established will of the citizens of Europe and therefore doesn't raise a normative legitimacy problem.

These arguments solve the legitimacy problem with the use of expansive interpretation in cases in which states' treaty obligations do not reflect their real interests. Yet there is another method for states to increase their human rights obligations where these arguments sometimes do not apply—states can ratify additional protocols to the Convention.[51]

There are two types of additional protocols: the first type of protocol changes the procedures of the Convention system regarding all states and constitutes, in essence, an amendment of the

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[49] *See* BATES, *supra* note 2, 92-93, 95, 100.

[50] Even in commercial contracts some argue that allowing courts to digress from the plain meaning of the words of the contract and incorporate commercial practices can save on the so called "specification costs" of addressing any possible contingency within the contract, see Jody Kraus and Steven Walt, *In Defense of the Incorporation Strategy*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=170011 at p. 11. *Cf.* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 UNI. CHI. L. REV. 710, 716 (1999) (arguing, based on empirical evidence, against the incorporation of commercial customs as a tool for contract interpretation).

[51] New additional protocols are prepared by the Committee of Ministers of the Council of Europe. The decision of the committee to finalize an additional protocol for signature requires a two thirds majority of the representatives casting a vote on the committee and a majority of the representative entitled to seat on the committee, *see* Statute of the Council of Europe (5/5/1949) Art. 15.a., 20.d. *See also* http://www.coe.int/T/CM/aboutCM_en.asp#P68_3143. The paper will focus on protocols that were already approved by the committee for signature by the states.

convention system. This type of protocol must therefore be ratified by all the states that are members to the Convention. Because the acceptance of such protocols must be unanimous, they are subject to strategic behavior and holdout problems by states as is the Convention itself. As an example, Russia strategically withheld its ratification of protocol 14 for many years and, by remaining the only state not to ratify this protocol, prevented all other states from making a change they commonly agreed to.[52]

The second type of protocol allows specific states to agree among themselves to protect certain human rights to a greater extent than they are protected by the Convention. These additional protocols constitute essentially separate treaties from the Convention—they will only obligate the states that ratified them.[53] The additional protocol will enter into force and apply to the states that ratified it according to the conditions that these state set. States usually agree that the protocol will enter into force when a certain number of states, for example five states, submitted their ratification.

If states decide not to take on another obligation by ratifying an additional protocol, this choice probably reflects their current preferences. Even if the protocol is not yet in force, the state that wishes to assume the obligations within it only needs to coordinate a small number of states to ratify the protocol for it to enter into force. Moreover, if an additional protocol has already entered into force, any state can decide to ratify it without being susceptible to strategic behavior by the other states. Therefore, if a state decides not to ratify an additional protocol that already entered into force, it makes a clear choice not to take on the obligations to protect human rights mentioned in the protocol. To the extent that states accurately represent their citizens, this choice should be respected; if the ECHR fails to respect this choice, it damages its normative legitimacy by digressing from the will of the citizens in that state.

In conclusion, while certain types of expansive interpretation may be justified by coordination problems between the states, certain types of expansive interpretation cannot be similarly justified. Part VI will demonstrate that the ECHR expanded states' obligations even when they could easily agree to take on these obligations by ratifying protocol 12 that is already in force for the states that ratified it. This use of expansive interpretation cannot be justified by problems of inter-state coordination. However, it does not necessarily pose a threat to the court's normative legitimacy if states sometimes fail to adequately represent their citizens—an argument that the next part will advance.

IV. WHY AND WHEN STATES DO NOT REPRESENT ALL INDIVIDUALS' INTERESTS

In democratic states, the democratic process is meant to ensure that the state represents its citizens and is accountable to them. But the democratic process doesn't always function properly. The preferences of some groups may be systematically ignored by the state, while other groups

[52] *See* Dothan, *supra* note 41 at 136.

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

may exert a disproportional and unjustified influence on the state. Certain mechanisms to amend these democratic failures, such as granting the national judiciary the power of judicial review,[54] exist in many democratic countries. Yet these mechanisms as well may sometimes fail. For example, even a relatively independent judiciary may yield to substantial political pressures.[55] Furthermore, the state's decision to ratify or not to ratify treaties is often not subject to substantial public deliberation and the process of treaty negotiation is usually not accessible to wide social groups, which increases the risk that certain interest groups will capture this process and shape the treaty obligations of their state to suit their own interests.[56]

If states do not represent their citizens, or other individuals affected by their decision to ratify or not to ratify protocols to the Convention, then expanding states' obligations beyond what they agreed to explicitly should not endanger the court's normative legitimacy. In any case, the ECHR should not be allowed to contradict the text of the treaty because that would exceed its mandate. Yet it should not be constrained not to apply expansive interpretation, because deference to the wishes of the states by restrictive interpretation is justified only to the extent that states properly represent their citizens.[57] To the extent that states do not represent their citizens the court should be able to use expansive interpretation. The next sub-chapters present several situations in which states do not represent the people influenced by their ratification decisions.

A. INDIVIDUALS WHO CANNOT VOTE

Some individuals are completely excluded from taking part in the democratic process. The main groups in this condition in European states are foreigners and prisoners. Foreigners are not citizens in their state of residence and usually cannot vote, although their interests are very much affected by the decision of the national government. In several European states prisoners are disenfranchised, either for the duration of their sentence or for longer periods. While, in some circumstances, there may be sound arguments against allowing the members of these groups to vote,[58] their rights may not be adequately protected by the democratic process.[59] It is therefore commendable that the ECHR was willing to fight for the political and other rights of foreigners and prisoners, even against substantial political resistance. As an example, the ECHR was

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[54] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST – A THEORY OF JUDICIAL REVIEW 181-183 (1980) (arguing that judicial review is justified by the need to correct democratic failures).

[55] *See e.g.* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1450 (2001). (discussing the institutional ways to manipulate the behavior of the U.S. Supreme Court).; John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999). (arguing that while individual U.S. judges are independent the judiciary is dependent on the executive).

[56] Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 184-186 (1999).

[57] *See supra* notes 44-47 and the text near them.

[58] *See* Reuven (Ruvi) Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage, Comparative and International Human Rights Perspectives*, 29 B. UNI. INT. L. J. 197, 203-210 (2011). (presenting and rebutting the arguments against allowing prisoners to vote).

[59] *See* ELY, *supra* note 54 at 161 (describing the special need to protect the rights of aliens as they cannot vote).

willing to face the ire of the British public when it demanded that a blanket ban on prisoner voting would be abolished[60] and when it prevented the deportation of aliens, even those suspected or convicted of serious crimes.[61] Yet as the next sub-parts will argue even citizens whose preferences should definitely not be excluded from the democratic process may be sometimes misrepresented.

B. DISCRETE AND INSULAR MINORITIES

Democracy is based on the idea that every person within the state has an equal share of political power, reflected in the rule of "one person, one vote". Yet even if free elections are held periodically and no citizen is disenfranchised, individuals who belong to certain minority groups may possess much less political power than other individuals. The famous footnote 4 in the US Supreme Court's *Carolene Products case*[62] defines such groups as "discrete and insular minorities". These are minorities who are subject to special prejudice—for example because of their religion, race or ethnicity—that prevents them from taking a fair part in the political process. If members of this minority cannot form coalitions with other groups and take over government, their interests will not be fully represented.

The protection of discrete and insular minorities must ensure that even if they have no real influence on the actions of government, the majority may not infringe on their interests. This is accomplished by preventing the majority from discriminating between its own members and members of the minority. If the same rights are guaranteed to all citizens, even discrete and insular minorities enjoy "virtual representation"—their interests are inextricably tied to those of

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[60] In Hirst v. The United Kingdom (No. 2), judgment of 6 October 2005, 2005-IX EUR. Ct. H.R. 187 the ECHR decided that a blanket ban on prisoners right to vote violated article 3 of Protocol 1 to the convention. Five years later the ECHR issued Greens and MT v. United Kingdom, judgment of 23 November 2010, Reports of Judgments and Decisions 2010., a so called "Pilot Judgment" that allowed the United Kingdom six months to amend its laws to conform with the Hirst Judgment. This period was later extended in Case of Scoppola v. Italy (No. 3), judgment of 22 May 2012, App. No. 126/05. in which the United Kingdom participated as a third party. This series of cases drew intensive criticism from British public officials and damaged the support for the ECHR in United Kingdom, see Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 THEO. INQ. L. 411, 418-419 (2013). The ECHR recently decided to adjourn the consideration of 2,354 applications regarding the right to vote in the United Kingdom until 30 September 2013, *See* Press Release, issued by the Registrar of the Court, ECHR 091 (2013), 26.03.2013.

[61] An example of an alien suspected of serious crimes whose deportation was delayed is the extremist Muslim cleric Othman Abu Qatada. The ECHR prevented one of the attempts to deport him to Jordan, where he was due to stand trial for terrorist attacks, because the trial may be illegitimate since it would rely on confessions of third parties who were tortured. Othman was deported only on July 2013 after an eight year legal struggle. see Case of Othman (Abu Qatada) v. The United Kingdom, judgment of 17 January 2012, Reports of Judgments and Decisions 2012. See also Voeten, *supra* note 60 at 418 (arguing that this was one of the main causes for the debate on the ECHR in the United Kingdom). An example of an alien convicted of a serious crime whose deportation was prevented is A. A. a Nigerian who was convicted of rape when he was 15. His deportation was prevented because it would damage his right to private life, due to the connections he formed to the United Kingdom. See Case of A. A. v. The United Kingdom, judgment of 20 September 2011. For criticism of this judgment see James Slack, supra note 2.

[62] United States v. Carolene Products Co., 304 U.S. 144 (1938).

the majority, and the majority is thereby forced to represent their interests.[63] Some authors argue that national courts who use the power of judicial review can guarantee this form of indirect political influence to discrete and insular minorities.[64] But to the extent that national courts do not fulfill this task, states do not adequately represent their minorities.[65]

C. SMALL INTERESTS GROUPS

Not every small group is a discrete and insular minority, and even if the group is discrete and insular, it is not necessarily politically powerless and prevented from taking part in the political process by the prejudice of other groups.[66] In fact, sometimes small groups yield vast political power and can use it to their advantage and to the disadvantage of the majority.[67] The main traits that can make some small groups disproportionally powerful and endowed with a great ability to shape the treaty obligations of their states are:[68] small groups can more easily avoid free-riding by their members because each member of the group can expect greater gains from their cooperation[69] and because the members can more easily monitor each other—giving them greater ability to coordinate their voting practices and to form potent political movements; small groups can more easily collect and disseminate information among their members—allowing them to track the behavior of their public representatives;[70] and small groups can more easily exit their states or shift their business to other countries—providing them with a powerful threat against their representatives.[71] If states are captured by such interest groups, their decisions to take on treaty obligations may not accurately represent the interests of all their citizens.

V. HARMFUL STATE RESPONSES TO EXPANSIVE INTERPRETATION

The ECHR may enjoy special expertise in protecting human rights and adopt good legal solutions to questions of the rights of individuals. This paper argues that the ECHR's decisions to interpret states' obligations expansively may often be legitimate, because the state's treaty

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[63] ELY, *supra* note 54 at 76-84.
[64] *Id* at 151.
[65] *See* Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. INT'L L. POL. 843, 849 (1999) (arguing, based on this analysis that the ECHR should not grant a margin of appreciation to European states in issues that impinge of the rights of minorities if national judicial mechanisms do not guarantee their rights).
[66] *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (arguing that sometimes groups that are anonymous (not easily distinguishable) and diffuse (spread within the society) are more politically disadvantaged than discrete and insular groups, which can more easily prevent free riding among their members).
[67] *See* Eyal Benvenisti, *Judicial Review and Democratic Failures: Minimizing Asymmetric information Through Adjudication*, 32 TEL AVIV UNI. L. REV. 277, 280 (Hebrew).
[68] Benvenisti, *supra* note 56 at 170-175.
[69] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 33-34 (1965).
[70] *See* Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AMER. POL. SCI. REV. 809, 812 (1998).
[71] On the power of exit *see* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY – RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 55 (1970).

obligations do not always present the true will either of the states or of their citizens. Yet even if expansive interpretation is both just and legitimate, it may still lead to harmful consequences.

States may be deterred from joining additional protocols if the ECHR interprets expansively the protocols that states ratified.[72] States may calculate that when they ratify a protocol they cannot foresee how the ECHR would interpret it and how far their obligations would expand. In response, they may choose to limit their obligations by not joining protocols whose content, interpreted restrictively, they actually view as serving their interests. While the ECHR may still be able to interpret the current obligations of these states expansively, the constraints of the text would limit it and may prevent it from granting individuals the same rights that states would be willing to grant them by ratifying new protocols, if states were certain that the obligations they assume would not be further expanded.

If expansive interpretation gives states an incentive not to join protocols they actually view as beneficial, the ECHR may have to react strategically to the states' potential unwillingness to sign protocols, in order to reach the goal of protecting human rights. The ECHR may consider that even if granting certain rights lies within its discretion and is substantively justified and normatively legitimate, it may be more prudent not to grant these rights, in order not to render states unwilling to ratify future protocols. This strategic calculation may seem problematic, since the court that undertakes it doesn't make a clear moral or legal decision that uses its expertise in protecting rights; instead, it complements its legal decision by engaging in political calculations. Yet international courts have to consider political considerations and make compromises to suit them all the time. Scholars argued that international courts change the content of their decisions by compromising on what they view as the perfect legal result to prevent backlash or harmful responses against the court.[73] If the ECHR were to digress from what it views as the correct legal answer in order not to give states counter-productive incentives its decision would not be less legitimate than that of an international court that avoids making certain decisions in order not to provoke states to harm the court itself.

VI. CASE STUDY – THE PROHIBITION ON DISCRIMINATION

[72] *See* Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian law Violations in Internal Conflict*, 93 AMER. J. INT'L L. 394, 399 (1999).

[73] For the argument that the ECHR acts strategically and considers the possible responses of states to its judgments *see* Dothan, *supra* note 41; DOTHAN, *supra* note 35. The more general argument that courts, or individual judges, consider the responses of other political actors and change their judgments accordingly is known as the strategic model of judicial behavior, *see* Lee Epstein, Jack Knight & Andrew D. Martin, *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L. J. 783, 798 (2003). This model was applied to other international courts, *see e.g.* Heiner Schulz, *The Political Foundations of Decision Making by the European Court of Justice*, 99 ASIL PROCEEDINGS 132, 133 (2005) (arguing that the European Court of Justice seeks not to issue judgments that states would fail to comply with to avoid damaging its legitimacy). States can damage international courts' interests in many ways besides noncompliance, such as: lowering their budget, criticizing them and exiting or changing treaties that shape the court's jurisdiction. *See* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 656-668 (2005).; Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 420-426 (2008). International courts may change their judgments to preempt such responses, *see* DOTHAN, supra note 35.

This Part demonstrates the ECHR's use of expansive interpretation to interpret the right to non-discrimination, highlighting the potential normative considerations described in this paper.

Article 14 to the European Convention protects the rights of individuals to enjoy their convention rights without discrimination.[74] The text of article 14 clearly grants a right to equality only in the enjoyment of other convention rights, and does not form a general right to nondiscrimination in the use of rights or interests not protected by the Convention.[75] In the 1968 *Belgian Linguistic case* the ECHR confirmed the idea that article 14 does not have an independent existence from other articles, but it stressed that even if another article was not violated independently, it may be violated when taken in conjunction with article 14. That is, if the state protects a certain right granted in the Convention in a way that doesn't violate another convention article in itself, since this policy lies within the state's legitimate discretion, the state may still protect that right unequally and thus violate the relevant substantive article in conjunction with article 14.[76] The condition that the right violated by discrimination must fall within the ambit of another convention right was reiterated in many later judgments of the ECHR.[77]

Several European states decided to expand their obligations to treat individuals equally by drafting protocol 12, which protects a general right to equality. The protocol was open to signature in 2000, and after the first ten states ratified it, in April 2005, it entered into force. As of June 2013, only 18 states ratified the protocol.[78] Any other state that wants to expand its obligations to include the obligations protected by the protocol needs only to ratify it.

The commentary on protocol 12 defines the additional obligations of states that ratified it and in the process circumscribes the obligations of states that did not ratify it. The two main additions to the obligations of states that ratified the protocol are: preventing discrimination in the enjoyment of any right granted by national law (even if it is not protected by the Convention), and preventing discrimination even in the use of discretionary power by a public authority.[79] The commentary also explains the limits of the obligations under protocol 12, stating

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[74] Article 14 reads:"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status".

[75] *See* Case of Haas v. the Netherlands, judgment of 13 January 2004, Reports of Judgments and Decisions 2004-I at par. 41; CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE THE EUROPEAN CONVENTION ON HUMAN RIGHTS 413 (4th edition, 2006).

[76] Case "relating to certain aspects of the laws on the use of languages in education in Belgium" judgment of 23 July 1968 EUR. Ct. H.R. (ser. A) 6 at 33-35 (The court also determines there, however, that not every distinction between individuals constitutes discrimination, only a distinction that has "no objective and reasonable justification" would violate the article). *See* OVEY & WHITE at 415.

[77] *See* Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985 EUR. Ct. H.R. (ser. A) 94, par. 71.

[78] http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=07/06/2013&CL=ENG

[79] *See* the Explanatory Report on protocol 12, available at http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm , par. 21-22.

that it does not require affirmative action to correct discrimination,[80] and that it does not imply that the ECHR has jurisdiction to rule on the discriminatory provision of rights granted by other international instruments (such as other human rights treaties).[81]

During the past decade the ECHR interpreted article 14 to the Convention expansively and as a result subjected even the states that did not ratify protocol 12 to obligations that appear in this protocol.

The requirement that any violation of article 14 would fall within the ambit of another convention right was effectively undermined in the *Stec case* by a substantial expansion of the ambit of article 1 to protocol 1, which protects the right to property. The case concerned a pension regime that allegedly discriminated between men and women. In an admissibility decision, the court considered that social security payments, whether funded by general taxation or directly by the benefiters, fell within the ambit of article 1 to Protocol 1, in contrast to some of its past judgments.[82] This expansion of the ambit of Protocol 1 allowed the court to examine whether discrimination in the protection of pension rights violated article 14. The final judgment in the case did not find a violation of article 14,[83] but the expansive interpretation used by the court rendered the ambit requirement meaningless with regard to certain social rights. Judge Borrego Borrego wrote a concurring opinion to the judgment in which he decried this interpretation as contrary to the intentions of the parties, because it implies that the general obligation not to discriminate in protocol 12 is applied to states who did not sign it.[84]

Scholars noted that the move towards extending the ambit of article 14 to substantive provisions in the field of social rights has been persistent and occurred over several other cases. It had improved the protection against discrimination in a field which is not protected enough in the Convention and its protocols, which grant only limited social rights.[85] Judge Borrego's argument that this expansive interpretation contradicts the states' will is accurate, since any state can join protocol 12 and assume these obligations without being subject to strategic behavior. Yet states may often fail to represent their citizens, especially in the field of social rights. Some individuals in society rely primarily on welfare provisions by the state and constitute a typical discrete and insular minority, whose rights may be abused by the democratic process. Other social benefits are enjoyed by the majority of the population. These benefits may manipulated by small interest groups with superior organization and political influence. The court's willingness to impose in some cases a general right to equality with regard to social rights on states that did not willingly assume this obligation may therefore not contradict the interests of these states'

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[80] *See id* at par. 16.
[81] *See id* at par. 29.
[82] Grand Chamber Decision as to the Admissibility of Applications nos. 65731/01 and 65900/01 by Stec and Others v. the United Kingdom, par. 53-56.
[83] Case of Stec and Others v. the United Kingdom, judgment of 12 April 2006, Reports of Judgments and Decisions 2006-VI.
[84] *Id.*
[85] *See* Rory O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR*, 29 LEG. STUD. 211, 216 (2009).

citizens. This expansive interpretation may consequently be normatively legitimate, because the state's decision not to ratify protocol 12 does not represent its citizens' interests and wishes.

Besides the ambit requirement, the main limitation on the obligations of states not to discriminate against individuals is the margin of appreciation granted to the states. The margin of appreciation doctrine allows the states to exercise their discretion when making policy decisions, as long as their decision does not unreasonably violate the rights of individuals. One of the policies that the margin of appreciation seems to immunize in many cases was termed "indirect discrimination"—a situation in which apparently neutral criteria are applied to all individuals, but these criteria disfavor some individuals. In such cases, no intention to discriminate is discovered, but if the court wishes to find discrimination, it would have to rely on factual evidence and pass judgment on the state's policy. This would encroach on the state's discretion. The ECHR was therefore traditionally reluctant to find cases of indirect discrimination as a violation.[86]

In the Chamber judgment in the *case of D.H. and others v. the Czech Republic*, the ECHR continues in its policy of rejecting claims of indirect discrimination. Although the case discloses evidence that children of the Roma (Gypsy) minority are disproportionally more likely than other children to be sent to special schools—which teach an inferior curriculum—the court decided that it cannot prove discrimination exists.[87] The court therefore left the educational policies of the states within the states' permitted discretion.

The applicants requested that this case be referred to the Grand Chamber. The Grand Chamber overruled the Chamber's judgment and decided that the policies of the Czech Republic were discriminatory. Accordingly, the court found that the Czech Republic violated article 14 when taken in conjunction with article 2 of protocol 2, protecting the right to education. Notably, the court recognized that indirect discrimination can violate the provisions of the Convention. This allowed the court to rely on statistical evidence to find that Roma are being discriminated against, even if no intent to do so was proven.[88] The ECHR's recognition of indirect discrimination as a violation was repeated and affirmed in other cases.[89]

Most importantly for the purpose of this paper, the Grand Chamber decided in its judgment that the state did not create the necessary safeguards that appropriately take into account the special needs of the Roma as a disadvantaged class. The failure of the state to respect the special needs of the Roma minority is what made its practices digress from the state's margin of appreciation.[90] The court specifically identifies the Roma as a "disadvantaged and vulnerable minority", a fact that justifies special protection of their rights.[91] The Grand Chamber judgment therefore seems to derive the normative legitimacy necessary to override the permitted discretion

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[86] *Id* at 220.
[87] Case of D.H. and Others v. The Czech Republic, judgment of 7 February 2006, par. 52-53.
[88] Case of D.H. and Others v. The Czech Republic, judgment of 11 November 2011, Reports of Judgments and Decisions 2007-IV, at par. 184
[89] *See* O'Connell, supra note 85 at 221.
[90] *See* par. 207 to the Grand Chamber judgment.
[91] *See* par. 181-182 to the Grand Chamber judgment.

of the state exactly from the political weakness of the Roma—their being a discrete and insular minority.

The right to equality may be especially amenable for expansive interpretation that is normatively legitimate. By preventing discrimination, disadvantaged groups gain the "virtual representation" discussed above.[92] Because the rights of the powerless are set as equal to the rights of the powerful, powerful groups cannot ignore the interests of powerless groups and are forced to protect the rights of the powerless to the same extent they protect their own rights. The ECHR devotes special attention to the protection from discrimination of groups that lack political influence and sometimes, as in the *D.H. case*, even admits that it does so. This ensures that the ECHR goes against the intention of states that deliberately did not assume the obligation of recognizing a general right to equality only when the state does not represent the interests of its citizens.

Yet even if the ECHR's expansive interpretation is both correct and normatively legitimate it may still lead to bad results by giving states an incentive not to assume further obligations from fear they would be interpreted expansively. In other words, it is possible that more states would be willing to ratify protocol 12 if they knew that it would be interpreted restrictively. Some evidence that this concern is real comes from the response of the United Kingdom government to the British Parliament Joint Committee on Human Rights. The government specifically mentioned as a reason for the United Kingdom's decision not to ratify protocol 12 the fear that its obligation not to discriminate would extend to the protection of rights under other international human rights instruments. If protocol 12 were to be interpreted restrictively, this fear is unfounded, since the commentary on the protocol specifically states it would not apply to obligations under other international instruments. However, the ECHR's past actions of expansive interpretation may have given rise to the suspicion that, should the United Kingdom ratify protocol 12, its obligations would also be expansively interpreted and digress from the limitations mentioned in the commentary to the protocol. The United Kingdom government therefore favored a cautious approach that would make it more difficult for the ECHR to extend it obligations than if it would have ratified the protocol. The government's representative specifically stated to the parliamentary committee that the government intends to wait and see the way the case law on the matter develops before it gives further power to the ECHR.[93]

VII. CONCLUSION

The lessons learnt from this paper about the normative legitimacy of the ECHR's decisions may be limited in scope to only a part of its judgments. This paper argues that sometimes states are subject to strategic behavior by other states and consequently states' treaty commitments do not represent their interests. Furthermore, sometimes states may not properly represent their

[92] *See supra* note 63 and the text near it.
[93] *See* http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9906.htm par. 31-32.

citizens and consequently the states' treaty commitments do not represent the wishes of their citizens. Yet at other times states are not subject to strategic behavior and democratic mechanisms within the states function well and ensure proper representation of their citizens. In these cases, the decisions of the states should be protected from at least some forms of expansive interpretation; otherwise the court's normative legitimacy would be damaged. A possible solution is to grant states a greater margin of appreciation in cases where democratic processes seem to function well, thus protecting these cases from expansive interpretation.[94] In fact, some authors argue that the ECHR does grant greater deference to the states when their democratic processes seem to operate properly.[95]

But the lessons learnt from this paper may also have wider implications, even beyond the ECHR. By suggesting that expansive interpretation is often legitimate, the arguments raised here may legitimize decisions of other international courts as well. For example, some authors argued that the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), have clearly forsaken the method of restrictive treaty interpretation and favored expansive interpretation.[96] This paper argues that this practice may often be legitimate because state's strictly construed treaty obligations often misrepresent the views of the states or of their citizens.

The paper also cautions, however, that states may respond to this expansive interpretation by not joining treaties that actually concur with their interests. International courts should be aware of this danger and may sometimes try to address it strategically when they make their decisions.

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[94] *See* Benvenisti, *supra* note 65 at 849-850.

[95] *See* 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). *See also* the *Stec case*, *supra* note 83 , par. 52 (pointing to the great deference to the states in cases regarding sexual inequality relative to cases regarding social and economic policy).; ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 27-31 (2012) (arguing that the ECHR considers so called "second order reasons" about the quality of state's decision making when it ratchets the margin of appreciation allotted to the state).

[96] Lauterpacht, *supra* note 15 at 51, 67.