IN DEFENCE OF EXPANSIVE INTERPRETATION IN THE EUROPEAN COURT OF HUMAN RIGHTS

Shai Dothan*

Abstract

The European Court of Human Rights 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.

Keywords

Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights, treaty interpretation, human rights

1 Introduction

In the course of interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms (the *Convention*),¹ the European Court of Human

* Senior Researcher, Tel Aviv University, at the Global Trust Research Project directed by Professor Eyal Benvenisti and funded by an ERC Advanced Grant; Adjunct Professor, Hebrew University of Jerusalem, Faculty of Law; PhD, LLM, LLB, Tel Aviv University, Faculty of Law. I thank Patrick Barry, Or Bassok, Eyal Benvenisti, Lisa Bernstein, Avinoam Cohen, and Olga Frishman for many instructive conversations and comments. I thank the participants of the University of Cambridge Conference on Interpretation in International Law, the Northwestern University Legal Scholarship Workshop, and the University of Chicago Legal Scholarship Workshop.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

Rights (ECtHR) 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 criticised these aspects of the Court's operation. They argue that even though the Court has special expertise in protecting human rights (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 ECtHR is not democratically accountable, its expansion of treaty obligations undertaken in the guise of interpretation might well have the effect of thwarting the democratic decisions of signatory states.

This article suggests that while there are many situations in which the Court's tendency towards expansive interpretation might indeed be inconsistent with democratic decisions of signatory states, there are two important contexts in which its approach might 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 ECtHR will sometimes be able to engage in expansive interpretation, while either retaining, or perhaps enhancing, its normative legitimacy.

² For the argument that the ECtHR should not digress from the will of the state parties see Judge Borrego Borrego's concurring opinion in the case of *Stec and Others v United Kingdom* [2006] VI Eur Court HR 1162 (*Stec*). For an analysis of arguments favouring restrictive interpretation by the ECtHR raised by the British delegation before the ECtHR in the case of *Golder v United Kingdom* (1975) I Eur Court HR, Ser A (*Golder*), and by the dissenting judges in this judgment, especially Judge Fitzmaurice; see E Bates, *The Evolution of the European Convention on Human Rights—From its Inception to the Creation of a Permanent Court of Human Rights* (2010) 293–301. For a strongly worded attack on the ECtHR by the media, arguing that it is not representative and not accountable to the European public, see J Slack, 'Social Ties Keep Rapists in Britain', *Mail Online*, 21 September 2011, <<http://www.dailymail.co.uk/debate/article-2039657/Akindoyin-Akinshipe-Social-ties-rapists-Britain.html>> [accessed 19 December 2013]:

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.

Part 2 describes the general doctrinal methods of treaty interpretation and the expansive interpretation methods used by the ECtHR. Part 3 explores the legitimacy of the ECtHR'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 4 explores the approaches to legitimacy in contexts where a state does not represent the will of its citizens. Part 5 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 6 presents a case study of the attempts by the ECtHR to expansively interpret the right to equality that appears in the Convention. By this expansive interpretation the ECtHR 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 7 concludes and offers more general implications of the argument.

2 Expansive Treaty Interpretation

2.1 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 (*Vienna Convention*) 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

³ F Jacobs, 'Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 *ICLQ* 318, 318–19.

⁴ I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984) 124.

⁵ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Arts 31–3.

⁶ H Briggs, 'United States Ratification of the Vienna Treaty Convention' (1979) 73 *AJIL* 470, 471–2. See, for example, *Golder* (1975) 18 Eur Court HR, Ser A, para 29: stating that that the ECtHR will

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 favoured the textual approach to interpretation and placed the text of the treaty as the most important source of interpretation.⁸ However, other provisions that call attention to subsequent practice and agreements of the parties⁹ and to the preparatory work for the treaty¹⁰ 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 that is the only one that interprets the treaty in good faith and in accordance with its 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 principle of effectiveness, but in fact it will give the treaty a greater effect rather than a lesser effect.¹⁵ A

apply Articles 31–3 of the Vienna Convention before it entered into force because they reflect accepted principles of international law.

⁷ Vienna Convention, Article 31(1).

⁸ A Watts, *The International Law Commission 1949–1998*, vol 2 (1999) 687; Jacobs, above n 3, 326; Sinclair, above n 4, 115.

⁹ Vienna Convention, Articles 31(3)(a–b).

¹⁰ Vienna Convention, Article 32, which states that these supplementary means might be used to confirm the meaning reached by the application of Article 31 or to determine the meaning when Article 31 leaves the meaning or obscure or leads to an absurd or unreasonable result.

¹¹ Jacobs, above n 3, 326–7.

¹² Sinclair, above n 4, 116.

¹³ M 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' (1996) 11 *Am U J Int L & Policy* 559, 568–9.

¹⁴ Watts, above n 8, 684.

¹⁵ H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *BYIL* 48, 70; Y Dinstein, *International Treaties* (1974) (Hebrew) 133–5. The International Law Commission made a deliberate decision not to refer to the principle of

restrictive interpreter will adopt the former interpretation. This interpreter will protect states' sovereignty by preventing any limitations on states' actions that they did not 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 preferred expansive interpretation over restrictive interpretation.¹⁷ The next subpart will investigate the methods of interpretation used by the ECtHR and will argue that this Court also adopted an expansive interpretation of treaties.

2.2 Treaty Interpretation by the ECtHR

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

The Convention might 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

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, above n 8, 684.

¹⁶ Lauterpacht, above n 15, 58; I Shearer, *Starke's International Law* (11th edn, 1994) 436–7.

¹⁷ Lauterpacht, above n 15, 67; A Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 534 (arguing that restrictive interpretation is almost never used in international law).

¹⁸ E Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 *Int Org* 669, 671.

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 might also refer violations committed by other state parties to the ECtHR, even when the referring state was not harmed by the violation, according to Article 33 of the Convention. However, this method of referral is almost never used. See D Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2009) 42 *Creighton LR* 361, 372 (suggesting that more than 95% of the cases result from individual applications).

that sets norms to protect human rights, rather than a treaty that serves as a contract between two states.²¹ The ECtHR explicitly decided that because of the law-making nature of the Convention it should be interpreted in a way that realises 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 ECtHR might not be shared by international courts that interpret other types of treaties.²³

The ECtHR relied on the principle of effectiveness to make many interpretive choices that constitute expansive interpretation:²⁴ it rejected formalistic interpretation in favour of interpretation that fulfils 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

²¹ F Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M Delmas-Marty (ed), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (1992) 283, 288.

²² *Wemhoff v Germany* (1968) 2 Eur Court HR, Ser A, para 8; *Soering v United Kingdom* (1989) 14 Eur Court HR, Ser A, para 87 (*Soering*). See also *Ireland v United Kingdom* (1978) 1 Eur Court HR, Ser A, para 239; *Golder* (1975) 1 Eur Court HR, Ser A, para 57; D Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights* (1995) 7; F Matscher, 'Methods of Interpretation of the Convention', in R Macdonald F Matscher & H Petzold (eds), *The European System For The Protection Of Human Rights* (1993) 63, 66.

²³ See P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *HRLJ* 57, 64–5: 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. Nevertheless, the International Law Commission deliberately did not make the distinction between different types of treaties in the Vienna Convention, despite the views of scholars that the nature of the treaty might affect its interpretation, see Watts, above n 8, 684.

²⁴ See generally P Van Dijk & G Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998) 74–6; G Merrills, *The Development Of International Law by the European Court of Human Rights* (2nd edn, 1993) 98–124.

²⁵ *Golder* (1975) 1 Eur Court HR, Ser A, para 5 of 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 did not write any letters since he was informed his letters will be stopped. *Minelli v Switzerland* (1983) 4 Eur Court HR, Ser A: 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 was not for the limitation period. The ECtHR decided this violates his presumption of innocence protected by Art 6(2) of the Convention, even if there is no formal decision that the accused is guilty.

²⁶ *Soering* (1989) 14 Eur Court HR, Ser A: case deciding that extraditing the applicant to the United States, where he might be detained for a long time awaiting a death penalty, would violate Art 3 of the Convention. This was the decision even though the text of Art 3 prevents only subjecting

enjoyment of the rights protected in the Convention;²⁷ it read 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 recognising 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,

a person 'to torture or to inhuman or degrading treatment or punishment' and not extraditing him to a state where he might be subject to these conditions.

²⁷ See *Artico v Italy* (1980) 4 Eur Court HR, Ser A, deciding that the right to free legal representation guaranteed in Art 6(3)(c) of 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 v Ireland* (1979) 3 Eur Court HR, Ser A, 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 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 v Belgium* (1979) 2 Eur Court HR, Ser A: deciding that Art 8 of the Convention protecting the right to private and family life does not 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)* [2003] IV Eur Court HR 311, para 325; Van Dijk & Van Hoof, above n 24, 74.

²⁹ See *X and Y v Netherlands* (1985) 4 Eur Court HR, Ser A: 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 ECtHR decided that the state's legal system did not adopt the necessary measures to protect the applicant's right to private life from infringements by other individuals.

³⁰ *Klass and Others v Germany* (1978) 45 Eur Court HR, Ser A, para 42; Merrills, above n 24, 116.

³¹ Merrills, above n 24, 116–9.

³² See *Van der Mussele v Belgium* (1983) 13 Eur Court HR (ser A), para 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 Van Dijk & Van Hoof, above n 24, 76.

³⁴ See *Fairfield and Others v United Kingdom* [2005] VI Eur Court HR 4: stating that relatives of a deceased victim can bring cases concerning the violations of her right to life under Article 2 of the Convention.

³⁵ See *Al-Skeini and Others v United Kingdom* [2011] 53 Eur Court HR 18: 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 ECtHR in

which let the states choose the means to remedy their violations, to issuing in some cases judgments that required specific actions from states.³⁶

As these interpretive choices demonstrate, the ECtHR has clearly favoured expansive interpretation over restrictive interpretation. Nevertheless, there are limits to the willingness of the ECtHR to expand the obligations of the states. The ECtHR is limited by the text of the Convention. The ECtHR 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 ECtHR 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 ECtHR 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 does not impair the essence of the protected right.³⁸

The interpretation of the Convention did not remain static. In fact, the ECtHR 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 ECtHR interpreted the

favour of an expansion of states' extraterritorial jurisdiction. For a strategic analysis of this case as reflecting the ECtHR's increasing reputation see S Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (2015, in press). For an analysis based on the decreasing salience and the increasingly negative attitude towards foreign military intervention in European public opinion see S Dothan, 'How International Courts Enhance their Legitimacy' (2013) 14 *Theo Inq L* 455, 475–6.

³⁶ The ECtHR 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* [2005] V Eur Court HR 1. See J Jackson, 'Broniowski v Poland: A Recipe for Increased Legitimacy of the European Court of Human Rights as a Supranational Constitutional Court' (2006) 39 *Conn LR* 759, 783–4, describing the incremental shift in the ECtHR judgments towards demanding specific actions from the states.

³⁷ Merrills, above n 24, 119–22.

³⁸ *Mathieu-Mohin and Clerfayt v Belgium* (1987) 1 Eur Court HR, Ser A, para 52; *Lithgow and Others v United Kingdom* (1986) 8 Eur Court HR, Ser A, para 194; *Ashingdane v United Kingdom* (1985) 8 Eur Court HR, Ser A, para 57; *James and Others v United Kingdom* (1986) 2 Eur Court HR, Ser A, para 50. For an analysis of ECtHR's use of the principle of proportionality, see K Starmer, *European Human Rights Law—The Human Rights Act 1998 and the European Convention on Human Rights* (1999) 169–76; M Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights', in S Macdonald, F Matscher & H Petzold (eds), *The European System for the Protection of Human Rights* (1993) 125.

³⁹ *Tyrer v United Kingdom* (1978) 2 Eur Court HR, Ser A.

Convention as granting protection to these rights.⁴⁰ Over time, the ECtHR incrementally increased its demands on states and the protection of human rights.⁴¹ The ECtHR often used teleological interpretation to expand states' obligations.⁴² While expansive interpretation might be achieved by other interpretive approaches, the teleological method allowed the ECtHR 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

3 Why and When States' Treaty Obligations Do Not Represent Their Interests

If states represent their citizens, there is good reason for the ECtHR to respect the choices states made when they signed the European Convention, and to adopt a restrictive interpretation.⁴⁴ Even if the ECtHR 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

⁴⁰ *Christine Goodwin v United Kingdom* [2002] VI Eur Court HR 588, para 74; L Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell ILJ* 133.

⁴¹ S Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12 *Chi JIL* 115; Mahoney, above n 23, 66–8.

⁴² Ost, above n 21, 292.

⁴³ Dothan, above n 41, 131; Dinstein, above n 15, 133, tying together the teleological approach to treaty interpretation and the principle of effectiveness.

⁴⁴ J L Dunoff & J P Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict' (1999) 93 *AJIL* 394, 399. V M Padmanabhan, 'The Human Rights Justification for Consent' (2013) 35 *U Pa JIL* 1, 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 ECtHR 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 S Dothan, 'Three Interpretive Constraints on the European Court of Human Rights', in M Kanetake & A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (2014, in press).

⁴⁶ The problem of a court that does not 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

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 might 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 do not usually create a risk of harmful externalities to individuals to whom the state is not accountable. This argument also rings especially true for the ECtHR, which deals with the behaviour of democratic states, where some measure of deliberative democracy exists.⁴⁷ However, this argument only applies if the Convention accurately represents the preferences of the states at the time the ECtHR interprets it.

The Convention would not represent the preferences of the states at the time the ECtHR interprets it if the states could not foresee the relevant changing circumstances when they ratified the Convention. Over the years, conditions might have changed, and the states would have preferred to agree to different terms than the original Convention. However, 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 regime by making the rights of individuals 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

their normative legitimacy, even if their expertise ensures they will make good legal decisions. See O Bassok & Y Dotan, 'Solving the Counter-majoritarian Difficulty' (2013) 11 *Int J Const L* 13, 14–5.

⁴⁷ Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *EJIL* 907, 919–21, using similar arguments to justify the margin of appreciation doctrine, which checks the ECtHR's ability to engage in expansive interpretation.

⁴⁸ E Posner & C Sunstein, 'The Law of Other States' (2006) 59 *Stan LR* 131, 165–6.

⁴⁹ Bates, above n 2, 92–3, 95, 100.

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 their views and may deserve a disproportionate power if their preferences are especially strong. Nevertheless, the need to reach unanimity gave the recalcitrant states a disproportional power that 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 did not 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 might 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, as 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 does not 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. However, 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

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 J Kraus & S Walt, 'In Defense of the Incorporation Strategy' (Working Paper No 99-4, Legal Studies Working Papers, University of Virginia Law School, June 1999) 11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=170011> [accessed 1 July 2014]. L Bernstein, 'The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study' (1999) 66 *U Chi LR* 710, 716: 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 finalise 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: Statute of the Council of Europe, 5 May 1949, 8 UNTS 103, Arts 15(a), 20(d). The paper focuses on protocols that were already approved by the committee for signature by the states.

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 Convention system. This type of protocol must thus 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 behaviour and holdout problems by states as is the Convention itself. For 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 separate treaties from the Convention. They will only obligate the states that ratified them.⁵³ The additional protocols will enter into force and apply to the states that ratified them according to the conditions that these states set. States usually agree that the protocols 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 behaviour 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 the human rights mentioned in the protocol. To the extent that states accurately represent their citizens, this choice should be respected. If the ECtHR 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 might be justified by coordination problems between the states, certain types of expansive interpretation cannot be similarly justified. Part 6 will demonstrate that the ECtHR 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

⁵² Dothan, above n 41, 136.

⁵³ D Gomien, D Harris & L Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996) 18.

ratified it. This use of expansive interpretation cannot be justified by problems of inter-state coordination. Nevertheless, 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.

4 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. However, the democratic process does not always function properly. The preferences of some groups might be systematically ignored by the state, while other groups might 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. Nevertheless, these mechanisms might also fail sometimes. For example, even a relatively independent judiciary might 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 to not ratify protocols to the Convention, expanding states' obligations beyond what they agreed to explicitly should not endanger the Court's normative legitimacy. In any case, the ECtHR should not be allowed to contradict the text of the Convention because that would exceed its mandate. Nonetheless, there should be no constraints for the ECtHR 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

⁵⁴ See J H Ely, *Democracy And Distrust—A Theory Of Judicial Review* (1980) 181–3: arguing that judicial review is justified by the need to correct democratic failures.

⁵⁵ See F B Cross & B J Nelson, 'Strategic Institutional Effects on Supreme Court Decision making' (2001) 95 *Northwestern U LR* 1437, 1450, discussing the institutional ways to manipulate the behaviour of the US Supreme Court; J Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *S Ca LR* 353: arguing that while individual U.S. judges are independent the judiciary is dependent on the executive.

⁵⁶ E Benvenisti, 'Exit and Voice in the Age of Globalization' (1999) 98 *Mich LR* 167, 184–6.

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.

4.1 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 might be sound arguments against allowing the members of these groups to vote,⁵⁸ their rights might not be adequately protected by the democratic process.⁵⁹ It is therefore commendable that the ECtHR was willing to fight for the political and other rights of foreigners and prisoners, even against substantial political resistance. As an example, the ECtHR was willing to face the ire of the British public when it demanded the abolition of the blanket ban on prisoner voting⁶⁰ and when it prevented the deportation of aliens, even those suspected or convicted of serious crimes.⁶¹ However, as will be argued

⁵⁷ See above n 44–7.

⁵⁸ R Ziegler, 'Legal Outlier, Again? US Felon Suffrage, Comparative and International Human Rights Perspectives' (2011) 29 *Boston U ILJ* 197, 203–10: presenting and rebutting the arguments against allowing prisoners to vote.

⁵⁹ Ely, above n 54, 161: describing the special need to protect the rights of aliens as they cannot vote.

⁶⁰ In *Hirst v United Kingdom (No 2)* [2005] IX Eur Court HR 681, the ECtHR decided that a blanket ban on prisoners' right to vote violated Article 3 of Protocol 1 of the Convention. Five years later, the ECtHR issued *Greens and MT v United Kingdom* [2010] IV Eur Court HR 1826, 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 *Scoppola v Italy (No 3)* [2012] IV Eur Court HR 868, 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 ECtHR in the United Kingdom. See E Voeten, 'Public Opinion and the Legitimacy of International Courts' 14 *Theo Inq L* (2013) 411, 418–9. The ECtHR 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, 26 March 2013, issued by the Registrar of the Court (2013) ECtHR 91.

⁶¹ An example of an alien suspected of serious crimes whose deportation was delayed is the extremist Muslim cleric Othman Abu Qatada. The ECtHR prevented one of the attempts to deport him to Jordan, where he was due to stand trial for terrorist attacks, because the trial might be illegitimate, since it would rely on confessions of third parties who were tortured. Abu

below, even citizens whose preferences should definitely not be excluded from the democratic process might be misrepresented sometimes.

4.2 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'. Nevertheless, even if free elections are held periodically and no citizen is disenfranchised, individuals who belong to certain minority groups might possess much less political power than other individuals. The famous 'Footnote Four' in the US Supreme Court's *Carolene Products* case⁶² 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, which 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 might 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 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 fulfil this task, states do not adequately represent their minorities.⁶⁵

Qatada was deported only in July 2013 after an eight-year legal struggle. See *Othman (Abu Qatada) v United Kingdom* [2012] I Eur Court HR 917. See also Voeten, above n 60, 418: arguing that this was one of the main causes for the debate on the ECtHR 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 had to the United Kingdom. See *A A v United Kingdom* [2011] IV Eur Court HR 1345. For criticism of this judgment, see Slack, above n 2.

⁶² *United States v Carolene Products Co*, 304 US 144 (1938).

⁶³ Ely, above n 54, 76–84.

⁶⁴ *Ibid*, 151.

⁶⁵ E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *NYUJILP* 843, 849: arguing, based on this analysis, that the ECtHR should not grant a margin of

4.3 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 disproportionately 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 behaviour 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 might not accurately represent the interests of all their citizens.

5 Harmful State Responses to Expansive Interpretation

The ECtHR might enjoy special expertise in protecting human rights and adopt good legal solutions to questions of the rights of individuals. This paper argues

appreciation to European states in issues that impinge on the rights of minorities if national judicial mechanisms do not guarantee their rights.

⁶⁶ B A Ackerman, 'Beyond *Carolene Products*' (1985) 98 *Harvard LR* 713, 724, 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 E Benvenisti, 'Judicial Review and Democratic Failures: Minimizing Asymmetric Information Through Adjudication' (2010) 32 *Tel Aviv U LR* 277, 280 (Hebrew).

⁶⁸ Benvenisti, above n 56, 170–5.

⁶⁹ M Olson, *The Logic of Collective Action* (1965) 33–4.

⁷⁰ S Lohmann, 'An Information Rationale for the Power of Special Interests' (1998) 92 *Am Pol Sci R* 809, 812.

⁷¹ On the power of exit see A Hirschman, *Exit, Voice, And Loyalty—Responses To Decline In Firms, Organizations, And States* (1970) 55.

that the ECtHR's decisions to interpret states' obligations expansively might often be legitimate, because the state's treaty obligations do not always represent the true will either of the states or of their citizens. Nonetheless, even if expansive interpretation is both just and legitimate, it might still lead to harmful consequences.

States might be deterred from joining additional protocols if the ECtHR interprets the protocols that states ratified expansively.⁷² States might calculate that when they ratify a protocol they cannot foresee how the ECtHR would interpret it and how far their obligations would expand. In response, they might choose to limit their obligations by not joining protocols whose content, interpreted restrictively, they actually view as serving their interests. While the ECtHR might still be able to interpret the current obligations of these states expansively, the constraints of the text would limit it and might 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 assumed would not be further expanded.

If expansive interpretation gives states an incentive not to join protocols they actually view as beneficial, the ECtHR might have to react strategically to the states' potential unwillingness to sign protocols, in order to reach the goal of protecting human rights. The ECtHR might consider that even if granting certain rights lies within its discretion and is substantively justified and normatively legitimate, it might be more prudent not to grant these rights, in order not to render states unwilling to ratify future protocols. This strategic calculation might seem problematic, since the Court that undertakes it does not 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. Nevertheless, 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 ECtHR were to digress from what it views as the correct legal

⁷² Dunoff & Trachtman, above n 44, 399.

⁷³ For the argument that the ECtHR acts strategically and considers the possible responses of states to its judgments see Dothan, above n 41; Dothan, above n 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 behaviour: see L Epstein, J Knight & A Martin 'The Political (Science) Context of Judging' (2003) 47 *St Louis U LJ* 783, 798. This model was applied to other international courts. See e.g. H Schulz, 'The Political

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.

6 Case Study: The Prohibition on Discrimination

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

Article 14 of the 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 non-discrimination in the use of rights or interests not protected by the Convention.⁷⁵ In the 1968 *Belgian Linguistic* case, the ECtHR 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 might be violated when taken in conjunction with Article 14. Therefore, if the state protects a certain right granted in the Convention in a way that does not violate another Convention article in itself, since this policy lies within the state's legitimate discretion, the state might 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

Foundations of Decision Making by the European Court of Justice' (2005) 99 *ASIL Proc* 132, 133: arguing that the Court of Justice of the European Union 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, criticising them and exiting or changing treaties that shape the court's jurisdiction. See T Ginsburg, 'Bounded Discretion in International Judicial Lawmaking' (2005) 45 *Va JIL* 631, 656–68; J Cogan, 'Competition and Control in International Adjudication' (2008) 48 *Va JIL* 411, 420–6. International courts might change their judgments to preempt such responses: see Dothan, above n 35.

⁷⁴ Article 14 reads:

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 *Haas v Netherlands* [2004] I Eur Court HR 13, para 41; C Ovey & R White, *Jacobs & White The European Convention On Human Rights* (4th edn, 2006) 413.

⁷⁶ *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium*

fall within the ambit of another Convention right was reiterated in many later judgments of the ECtHR.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 that it does not require affirmative action to correct discrimination,⁸⁰ and that it does not imply that the ECtHR 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 ECtHR 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 of Protocol 1, which protects the right to property.⁸² The case concerned a pension regime that allegedly

(1968) 3 Eur Court HR, Ser A., 33–5. 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*, above n 75, 415.

⁷⁷ *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 Eur Court HR, Ser A, para 71.

⁷⁸ <

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG>> [accessed 1 July 2014].

⁷⁹ See the Explanatory Report on Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, ETS No 177, paras 21–2.

⁸⁰ *Ibid*, para 16.

⁸¹ *Ibid*, para 29.

⁸² *Stec* [2006] VI Eur Court HR 1162.

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 beneficiaries, fell within the ambit of Article 1 of Protocol 1, in contrast to some of its past judgments.⁸³ 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 14,⁸⁴ 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.⁸⁵

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.⁸⁶ Judge Borrego 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 behaviour. However, states might 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 might be abused by the democratic process. Other social benefits are enjoyed by the majority of the population. These benefits might be 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 might not therefore contradict the interests of these states' citizens. Consequently, this expansive interpretation might 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

⁸³ Grand Chamber Decision as to the admissibility of the Applications nos 65731/01 and 65900/01 by *Stec and Others v United Kingdom*, para 53–6.

⁸⁴ *Stec*, above n 82.

⁸⁵ *Ibid.*

⁸⁶ R O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 *Leg Stud* 211, 216.

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 immunise in many cases was termed 'indirect discrimination'—a situation in which apparently neutral criteria are applied to all individuals, but these criteria disfavour 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 ECtHR was therefore traditionally reluctant to find cases of indirect discrimination as a violation.⁸⁷

In the Chamber judgment in the case of *D H and Others v the Czech Republic*, the ECtHR continues its policy of rejecting claims of indirect discrimination.⁸⁸ Although the case discloses evidence that children of the Roma (Gypsy) minority are disproportionately 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.⁸⁹ 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 recognised 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.⁹⁰ The ECtHR's recognition of indirect discrimination as a violation was repeated and affirmed in other cases.⁹¹

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

⁸⁷ Ibid, 220.

⁸⁸ *D H and Others v Czech Republic* [2007] IV Eur Court HR 922.

⁸⁹ Ibid, paras 52–3.

⁹⁰ *D H and Others v Czech Republic* [2011] IV Eur Court HR 922, para 184 (*D H*).

⁹¹ O'Connell, above n 86, 221.

is what made its practices digress from the state's margin of appreciation.⁹² The Court specifically identifies the Roma as a 'disadvantaged and vulnerable minority', a fact that justifies special protection of their rights.⁹³ The Grand Chamber judgment therefore seems to derive the normative legitimacy necessary to override the permitted discretion of the state exactly from the political weakness of the Roma, their being a discrete and insular minority.

The right to equality might be especially amenable for expansive interpretation that is normatively legitimate. By preventing discrimination, disadvantaged groups gain the 'virtual representation' discussed above. 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 ECtHR 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 ECtHR goes against the intention of states that deliberately did not assume the obligation of recognising a general right to equality only when the state does not represent the interests of its citizens.

Yet even if the ECtHR's expansive interpretation is both correct and normatively legitimate, it might 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.⁹⁴ 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 would be unfounded, since the commentary on the Protocol specifically states it would not apply to obligations under other international instruments. However, the ECtHR's past actions of expansive interpretation might 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

⁹² *D H* [2011] IV Eur Court HR 922, para 207.

⁹³ *Ibid*, paras 181–2.

⁹⁴ See the Seventeenth Report of the UK Parliament Joint Committee on Human Rights, paras 31–2 <<http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9906.htm>> [accessed 11 November 2013].

the Protocol. The United Kingdom government therefore favoured a cautious approach that would make it more difficult for the ECtHR to extend its 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 ECtHR.⁹⁵

7 Conclusion

The lessons learnt from this paper about the normative legitimacy of the ECtHR's decisions might be limited in scope to only a part of its judgments. This paper argues that sometimes states are subject to strategic behaviour by other states, and consequently states' treaty commitments do not represent their interests. Furthermore, sometimes states might not properly represent their citizens, and consequently the states' treaty commitments do not represent the wishes of their citizens. However, at other times states are not subject to strategic behaviour 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.⁹⁶ In fact, some authors argue that the ECtHR does grant greater deference to the states when their democratic processes seem to operate properly.⁹⁷

But the lessons learnt from this article might also have wider implications, even beyond the ECtHR. By suggesting that expansive interpretation is often legitimate, the arguments raised here might legitimise decisions of other international courts as well. For example, some authors argued that the International Court of Justice and its predecessor, the Permanent Court of International Justice,

⁹⁵ Ibid.

⁹⁶ Benvenisti, above n 65, 849–50.

⁹⁷ A von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *ICON* 1023, 1042. See also *Stec* [2006] VI Eur Court HR 1162, para 52: pointing to the great deference to the states in cases regarding sexual inequality relative to cases regarding social and economic policy. A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012) 27–31: arguing that the ECtHR considers so-called 'second order reasons' about the quality of states' decision-making when it ratchets the margin of appreciation allotted to the state.

have clearly forsaken the method of restrictive treaty interpretation and favoured expansive interpretation.⁹⁸ This article argues that this practice might often be legitimate, because states' strictly construed treaty obligations sometimes misrepresent the views of the states or of their citizens.

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

⁹⁸ Lauterpacht, above n 15, 51, 67.