ABSTRACT. This paper argues that the European Court of Human Rights could serve as a model for an international court of human rights to be built upon the United Nations Committee on Human Rights. It argues that the concerns states might have over the surrender of a significant portion of their national sovereignty might be lessened if such an international court were to incorporate the margin of appreciation doctrine employed by the European Court of Human Rights. This doctrine is intended to respect the customs and traditions of sovereign states in dealing with human rights issues, while maintaining that some rights such as the right not to be tortured will be considered as basic and will stand independently of the customs and traditions of sovereign states.


In this paper I shall address the question of whether the European Court of Human Rights (ECHR) could serve as a model for an international court of justice built perhaps upon the foundations of the United Nations Committee on Human Rights. I do not discuss the problems involved in establishing regional courts of justice but instead proceed directly to the more difficult but potentially more rewarding case of a truly universal court. A comprehensive paper would have included a discussion of the ECHR of Justice but this court, although it deals with human rights issues, has a more complex jurisdiction including economic issues as they relate to the European Union. Also, a more comprehensive paper would have included a discussion of the United Nations Commission on Human Rights, but the UN Commission is concerned with gross violations such as genocide. This paper focuses upon the right of an individual person to appeal to a supranational body, to a court or a court like entity, for remedies for rights violations, and it addresses the question of what limits, if any, states parties may place upon the human rights of individuals within their jurisdiction.

The ECHR is a treaty-based institution established by members of the European Council under the European Convention for the Protection of
Human Rights and Fundamental Freedoms which was adopted in 1950. The Court began operation in 1953 as a part-time court with a Commission which screened prospective cases in terms of eligibility. In 1998 the Commission was abolished as part of a major restructuring of the Court which now operates on a full-time basis. In the beginning the Court dealt with several hundred cases a year, but now it handles several thousand cases a year. What makes the Court remarkable is that individual persons after exhausting the legal remedies available in a particular state which is a member of the European Council can appeal to the ECHR, and all member states are legally bound to accept the verdict of the European Court and where necessary to revise their legal systems in the light of the Court’s findings. The Court is the result of a “quiet revolution” affecting the sovereignty of member states of the European Council, and it has enjoyed an almost universal acceptance of its verdicts.

Part of the reason for its success, I believe, is that the Court has allowed a limited amount of national discretion to member states in the form of the so-called margin of appreciation doctrine. Over the years the margin of appreciation doctrine has become less important than it was in the earlier, more tentative years of the Court, but by now it is firmly grounded in the precedents of the Court, and there is no reason to suppose that it will ever be entirely abandoned. While the Court has grown less deferential to the legal decisions of member states when a state operates at “the margin of its powers,” the presumption continues that a state knows its domestic situation better than the Court could know it. I find the margin of appreciation doctrine to be of some potential value for a future international court of human rights. For example, in the case of *Open Door and Dublin Well Women v. Ireland* (1992) the Court did not attempt to directly overthrow the anti-abortion laws of Ireland, which could have led Ireland to withdraw from the European Council, but it did determine that Irish women who became pregnant could be given information about abortion and could be permitted to travel to other countries to obtain abortions. Freedom to obtain information and to travel are important rights; and it might be useful for a future international court to consider the example set in this case by the ECHR. Critics have complained that the ECHR has succeeded in just the region where it is least needed, but this, I think, ignores some of divisions among member states of the European Council, divisions which will become more pronounced as cases arise involving new member states from Eastern Europe.

The margin of appreciation doctrine is not mentioned in the Convention or in its legislative history, but it has a dual historical origin in classical martial law doctrine and in administrative law doctrine. Where
the Convention is concerned the margin of appreciation doctrine can be said to have developed from Article 15 which provides that “in time of war or other public emergency threatening the life of a nation any high contracting party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with other obligations under international law.”¹ However, the margin of appreciation doctrine has come to be applied to situations not involving emergencies. Some critics have complained that the doctrine has been used to circumvent the express requirements of the Convention, while its defenders regard it as an essential element in the Court’s success in defending human rights.

The margin of appreciation doctrine is sometimes said to be ambiguous: the idea of a margin implies a definite limit at which a line may be drawn, while appreciation may involve a subtle awareness of how to weigh the variables in deciding when a limit has been reached. Critics have complained that Court decisions utilizing margin doctrine have been unacceptably ad hoc. Let us consider two cases where, according to Howard Charles Yourow, an eminent scholar of the Court, the Court apparently made opposed applications of margin doctrine. The cases in question are Handyside v. United Kingdom (1976) and Dudgeon (1981).² In the Handyside case the United Kingdom was permitted to ban the publication of an allegedly pornographic book, The Little Red School, on the ground that, since there was no European consensus on how pornography should be dealt with, the UK should be permitted to exercise its national discretion and to prohibit the publication of this work. In the Dudgeon case the Court found against the UK on the ground that there has emerged a European consensus on the treatment of homosexuals and that in seizing Dudgeon’s personal papers and diaries and in interrogating him about his sexual life the police had violated his privacy rights. This raises the interesting question of whether consensus and not national discretion is uppermost in the mind of the Court. If consensus is what really matters and if, as the Court points out, consensus is something that evolves, we can readily imagine some future case, let us call it The Little Red School, in which the Court decides differently from the initial case. Or, if the Two European consensus comes to involve a retreat from principles currently agreed upon where

the rights of homosexuals are concerned, perhaps a case raising the same issues as the Dudgeon case might be decided differently. Ronald Dworkin, who sees United States constitutional law as a progressive working out of the implications of certain basic constitutional and moral principles such as equality, acknowledges, however, that there have been good chapters and bad chapters in the history of US constitutional law; and while in the European experience there has apparently been steady progress in the development of a European consensus on human rights issues, there is, of course, no guarantee that bad chapters will not be written. Thus, it is conceivable that we might find the margin of appreciation doctrine protecting a state party which champions certain human rights, only for this doctrine to be overridden by a European consensus in retreat from the protection of these rights (thus, for example, an individual citizen might bring suit against a public museum for the display of art which she finds offensive and after losing where the municipal legal system is concerned might find her suit upheld by a European Court in retreat from the free expression of ideas). This possibility may help explain why Yourow in the last sentence of his *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* expresses concern that national discretion and international supervision may not always go “hand in hand” and that the security of the applicant and of rights and freedoms in this “evolving symbiosis” has become more, not less, problematic. I found this sentence surprising, and even ominous, because overall Yourow had seemed to approve of the direction in which the Court was moving.3

Obviously we need to know more about the methodology the Court uses in its decision making. Yourow distinguishes five methods which the Court uses in applying the Convention: the plain meaning of the text, the history of the text, the autonomy of the Convention and the Court, the dynamic method, and the teleological method.4 The so-called plain meaning of the text may, I think, turn out to be just one of many interpretations of a text, and the history of the text is cashed by Yourow in terms of the intentions of the authors of the Convention which he considers to be of secondary importance. The autonomous method simply acknowledges that the Court may decide cases by treating Convention provisions independently from the requirements of the municipal law of states parties. That leaves us with the dynamic method and the teleological method. Court rulings have referred to the Convention as a “living instrument” which can only mean

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that it admits of different applications in changing circumstances including the emergence of a new consensus on some human rights issues. The teleological method takes into account the goal or purpose of the Convention (which presumably may differ from the intentions of its authors). The Convention states that the protection of democracy and of human rights is its objective, and in the so-called Personal Freedoms Articles (Articles 8–11) limitations on certain freedoms are allowed if they serve to protect a democratic society.\(^5\) I shall have more to say later about the dynamic and teleological methodologies.

There is a seeming paradox: politically speaking, there is no chance of creating an international court of human rights, but we already have an international body which is acting more and more like an international court of human rights. I refer, of course, to the United Nations Committee on Human Rights. There are some important resemblances and differences between the UN Committee on Human Rights and the ECHR. Historically speaking, the United Nations Universal Declaration of Human Rights was in some respects a model for the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in turn influenced the two Covenants adopted by the United Nations: the Covenant of Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights, both of which were concluded in 1966 (for present purposes I shall discuss only the Covenant of Civil and Political Rights since this is the only Covenant ratified by the US). Decisions by the ECHR are frequently cited by the UN Committee on Human Rights, so much so that some commentators complain of a Eurocentric bias in Committee findings. However, the Covenant makes fewer references to democratic society than the Convention does. There is such a reference in Article 21 which provides for the right of peaceful assembly; and Article 25, although it does not contain the word “democracy,” provides for the right of citizens to vote and to participate fully in the conduct of public affairs. However, it is noteworthy that although the Covenant speaks of limitations on some rights, such as the right of association, permitting restrictions which duplicate those found in the Personal Freedoms Articles (Articles 8–11) of the Convention, for the protection of public order and the protection of public health and morals, there is no rationale for these restrictions as being necessary for a democratic society such as we find in the Convention Articles. Also, and this, I think, is very important: the drafters of the Covenant deliberately omitted reference to a democratic society from Article 18 which guarantees the right to freedom of thought, conscience, and religion.

What on balance are we to make of all this? Some commentators believe there are enough references to democracy in the Covenant to conclude that the entire document has a pro-democracy slant, but this, I think, is overstated. I see this document as more nuanced than that, and it is important to remember that the drafters were seeking a viable instrument which would be acceptable to member states of the UN. They were not philosophers seeking to resolve the contentious issue of the relationship between democracy and human rights, but they were lawyers and politicians who understood that the protection of the rights to freedom of thought, conscience, and religion should be secured even in non-democratic societies. The Covenant departs from the Convention in two other important respects: no rights are said to be exceptionless or in the word of the ECHR “absolute” (in a decision banning torture), and substantively there are rights not found in the Convention. Article 1 provides for the right of self-determination, and Article 27 protects the rights of ethnic, religious, and cultural minorities to enjoy their own culture. However, the European Convention for the Protection of National Minorities, which was adopted by the Council of Europe in 1995, closely parallels Article 27, which shows a fruitful, if at times belated, interaction of the Council of Europe and the UN on human rights issues.6

There is one important difference between the Convention and the Covenant, and it concerns the question of sanctions. The European Council’s member states are required by treaty provisions to accept the findings of the European Court, and although there is no explicit mention of sanctions, states parties found to be in violation of Court decisions could be expelled from the European Council; but, the UN Committee has no such powers. International tribunals lack a “direct coercion mechanism,”7 which I take to be a euphemism for a police or military means of enforcing either appearance or compliance. Instead such tribunals must rely upon states parties’ perceptions of their self-interest in securing judicial settlements of their disputes, the court’s legitimacy, the strength and importance of legal rules pertaining to a given dispute, and the general force of normative obligations. The UN Committee has even less power than other international tribunals, if it can be counted as a tribunal at all, and the Committee itself complains that its “views” or findings are not binding upon the parties appearing before it.8

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Even if we were to decide that the Committee is not an international tribunal, it is still far removed from being merely an observer of the human rights scene on a par, for example, with Amnesty International or the Human Rights Watch. The First Optional Protocol to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a state party of any of the rights set forth in the Covenant, but no communication shall be received by the Committee if it concerns a state party to the Covenant which is not a party to the First Optional Protocol. I think this gives the Committee an extraordinary authority, namely to consider complaints by individuals against a state which is a party both to the Covenant and to the First Optional Protocol. The Committee is competent, i.e., authorized, to consider such communications and to call these communications to the attention of the state party alleged to have committed a violation of any provisions of the Covenant and to request a response; to hold secret hearings; and to report its findings to the state party and to the individual involved. The results of the Committee’s findings will be included in its annual report.9

However, since the views or findings of the Committee are non-binding, states parties may choose not to respond or to delay responding. It took Uruguay, for example, years and a change of government before it responded to allegations of the abuse of political prisoners. Of course, it would be desirable if the First Optional Protocol were amended to declare, as the European Convention does where the ECHR is concerned, that the findings of the Committee are binding, but the Committee is not altogether powerless. I should be inclined to place considerable emphasis upon what Laurence Helfer and Anne-Marie Slaughter call the general force of normative obligations,10 and I would cash this, at least in part, as involving what Alfred Rubin describes as membership in the “comity.”11 Presumably no state would want to be a member in bad standing where standing affects as it must, at least in the long run, a state’s own self-interest. More specifically, a state would not want to be denied the right of participating in various international bodies or organizations.

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There are two important differences between the ECHR and the UN Committee concerning their method of reading their respective instruments. Unlike the European Court, the UN Committee does not employ either a dynamic methodology or a teleological methodology. There is no conception of the Covenant as a living document to be adapted to changes in an international consensus concerning human rights, although arguably some of the additional protocols to the Covenant reflect such changes, e.g., in the rights of children. The ECHR has been criticized for not providing a factual basis for its claims concerning changes in the European consensus, and perhaps the addition of protocols to the Covenant can be seen as an attempt to provide a better way of acknowledging changes in the international consensus regarding human rights. Whether the Covenant is read as pro-democracy as a whole or only in part, it should not be seen as actively promoting the cause of democracy at the expense of cultural, religious, or political diversity. Actually there is only one provision in the Covenant which is explicitly teleological: any report of the abolition of the death penalty in a member state would be welcomed as “a sign of progress” where the respect for human life is concerned. According to Helfer and Slaughter, the Committee in its interpretation of the Covenant does not aim at “raising the bar” for standards respecting human rights, something which the ECHR acknowledges doing where its interpretation of the European Convention is concerned. Helfer and Slaughter distinguish between what they regard as the Committee’s rightful function of articulating global human rights standards and an aggressive effort to “raise the global baseline in accordance with rights-enhancing reforms.”

I find this distinction between articulating global standards and raising the global baseline for human rights to be unsatisfactory because both activities can be seen as being teleological. I think that articulating global standards may be just another way of raising the global baseline. I should prefer to make a distinction between the protection of rights already agreed upon and the aggressive promotion of human rights on a global scale with little if any room left for national discretion. The first is teleological only in the sense that actions are purposeful, but the second is teleological in the sense of raising the global baseline for human rights, which states parties are expected to do through various rights enhancing reforms.

Why is the distinction I propose important? Terry Nardin distinguishes between associative and teleological models of international organization. The first model allows states with different and opposed ideologies

to cooperate for limited purposes, eg., entering into trade agreements, while the second model aims at imposing a single ideology upon the entire world. Nardin and I favor the first model, and I think its relevance is if anything greater now than it was during the cold war. It is not an essential part of the protection of human rights already guaranteed under international law, as in the Covenant and its Protocols, that we initiate a human rights jihad aimed at the promotion of human rights under all circumstances (and, in fact, any human rights jihad we might initiate would probably be directed against our enemies while we would ignore or downplay human rights abuses by our allies). Nardin remarked in his book that the heavens need not fall if some provision for human rights is accepted, and I think what he had in mind was the protection of human rights where this protection is treaty based.

Do I in effect advocate doing little or nothing? No. First, I should like to have the UN Committee remind signatory states parties that they must honor their commitments to respect the human rights specified in the Covenant and its protocols. Let the days of “sign and forget” be ended, and let states parties know that publicity and shame can be potent weapons in the hands of the Committee. Also, the Committee should try to persuade more signatories to the Covenant to sign on to the First Optional Protocol. Second, I should urge the UN Committee to recognize something like a margin of appreciation doctrine. Such recognition might serve to alleviate reasonable concerns among states interested in signing the First Optional Protocol. However, just as the ECHR has done, the UN Committee should serve notice that there are limits to what will be permitted in the name of national discretion. European states that are parties to the Convention are committed to the position that some rights are not derogable even in emergency conditions, and that there are strict limits on the restrictions a state may impose on other rights, such as the so-called personal freedoms. Yourow believes that at times the ECHR seemed to be approaching a hierarchy of rights with private rights ranking above public rights, but he acknowledges that this task has not been completed.14 However, the idea that some rights such as the right not to be tortured are not derogable is itself hierarchical. Here we may note an interesting exchange between the UN Committee and Iran in which the Committee emphatically rejected Iran’s claim that the flogging of prisoners is admissible as a customary practice in Iran.15 Although the UN Committee has not characterized any

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rights as “absolute,” it is clear that the UN Committee has zero tolerance for all forms of torture.

I will conclude by briefly considering the question of whether the UN Committee on Human Rights can further the development of an international consensus concerning human rights without “raising the bar” where the standards for human rights are concerned. The answer, I think, is “yes,” provided the Committee emphasizes compliance with standards already accepted by the signatories to various treaties. Two points should be noted here: (1) The ECHR has sometimes been criticized for being too deferential to states parties where the knowledge of actual conditions prevailing in various states is concerned. By way of contrast, the UN Committee relies in part on the rapporteur system, whereby independent investigators are assigned to report on human rights problems in particular states or regions which they visit. (2) As Helfer and Slaughter have suggested, it is important to develop a sense of collegiality among international lawyers and judges, for example, by holding conferences in which questions of legal procedure and substance are discussed. Such conferences might be especially useful in easing or anticipating tensions between the UN Committee and states parties.16

One final note concerns the methodology of how to approach human rights. One way, which I have followed in this essay, is to think of human rights as treaty-based and court-protected. Another way of approaching human rights is to attempt to derive them from the natural law, or from jus cogens, or from some version of the social contract. The two ways are by no means mutually exclusive, but the problem of derivation is one with no resolution in sight, so perhaps it is better to focus upon how institutions already in place have provided significant if imperfect protections for human rights. However we decide the question of whether international law is a legal system, it does seem to constitute a rule governed practice, and an examination of the rules which pertain to human rights might help, among other things, to answer the philosophical question of what would count as an acceptable analysis of human rights.

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