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Towards a More Perfect European Human Rights Standard: A New Argument Against a United Kingdom Bill of Rights

I. INTRODUCTION

For the American concerned with European developments in human rights, perhaps no better time exists than the present to consider that community's movement towards a bill of rights.¹ Among the diplomatic and academic struggles which have attended Europe's most recent post-war forays into bill-of-rights thinking² has been the United Kingdom's reluctance to either sign or fully embrace certain European human rights instruments.³ This reluctance is rooted in domestic soil. While politicians and professors have debated the merits of a bill of rights,⁴ the United Kingdom has failed to adopt such a

1. 1991 was recently celebrated as the two-hundredth anniversary of the United States Bill of Rights. Now in its 202nd year, our Bill of Rights is celebrated as a precious document whose protections are an American citizen's greatest entitlement. *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("What more precious 'privilege' of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights?"). For thoughtful discussions of the Bill of Rights and that document's impact upon American culture, law, and politics, see *LEARNED HAND, THE BILL OF RIGHTS* (1958); *BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971).

2. A concerted international movement to both enumerate and protect fundamental human rights developed in the years following World War II and subsequent revelations regarding Nazi war crimes. See J.A. Andrews, *The European Jurisprudence of Human Rights*, 43 MD. L. REV. 463, 474-75 (1984); Roger Myers, *A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 3, 83 n.432, 84 n.439 (1990); see also *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 117 (1978) (Fitzmaurice, J., separate opinion) (recognizing that the European Convention was drafted in response to the horrors of World War II).

3. See *infra* text accompanying notes 18-25.

4. For a detailed discussion of the recent history of the bill of rights debate within the United Kingdom, see MICHAEL ZANDER, *A BILL OF RIGHTS?* 1-26 (3d ed., Sweet & Maxwell Ltd. 1985). Concerning this debate, one commentator has dryly observed that "[a]lthough the debate on 'A Bill of Rights for the United Kingdom' staggers on, with an occasional flurry of interest giving it new life, the prospects for such legislation do seem remote. Parliamentary and governmental interest . . . have since 1979 lain elsewhere." B.H., Book Note, 37 N. IR. LEGAL Q. 209, 210 (1986) (reviewing ZANDER, *supra*). Both scholarship and polemics mark this debate. See generally *DO WE NEED A BILL OF RIGHTS?* (Colin M. Campbell ed., 1980); *JOSEPH JACONELLI, ENACTING A BILL OF RIGHTS: THE LEGAL PROBLEMS* (1980) (containing arguments for and against a bill of rights) [hereinafter JACONELLI I];

bill.⁵ This failure constitutes perhaps the primary obstacle to the United Kingdom's participation in European efforts towards a unified outlook on human rights.

To the extent the United Kingdom's national doings influence its actions abroad, an analysis of the United Kingdom's position regarding a European bill of rights necessarily implicates an analysis of its view regarding similar domestic legislation. However, the more consequential—and far more overlooked—analysis concerns how European Convention⁶ processes for ensuring personal liberties influence the manner in which the United Kingdom pursues its domestic human rights agenda. In developing this latter analysis, this comment argues that the United Kingdom should maintain its position against a domestic bill of rights in order to better facilitate the development of case law under the European Convention and, hence, aid the generation of a more comprehensive, uniform European standard of human rights.

Section II of this comment provides a brief background discussion of the United Kingdom's position on human rights. Section III analyzes how the current United Kingdom position affects and enhances the creation of a clear human rights jurisprudence applicable on a continent-wide basis through the mechanisms of the European Convention. Section IV discusses the future of a European Community bill of rights and the United Kingdom's contribution to that future. In conclusion, this comment proposes that the United Kingdom not adopt a bill of human rights. Refusing to do so will, in the long run, become a substantial factor in unifying European perspectives on human rights through aligning the United Kingdom with its European counterparts and facilitating the European Convention process for administering and defining a European human rights standard.

and Joseph Jaconelli, *The European Convention on Human Rights—The Text of a British Bill of Rights?*, 1976 PUB. L. 226 (same) [hereinafter Jaconelli II].

5. Recent proposals made within the United Kingdom for an entrenched, domestic bill of rights have met objections similar to those made during the Constitutional Convention and ratification debates against the inclusion of a bill of rights within the U.S. Constitution. For a detailed treatment of such objections to a U.K. bill of rights, see ZANDER, *supra* note 4, at 27-82. Compare THE FEDERALIST NO. 84 (Alexander Hamilton); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (Murray Dry ed., 1981).

6. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention].

II. BACKGROUND

The United Kingdom's approach to international human rights—careful assessment, reservation, and hesitation to over-enumerate fundamental rights—is consistent with its rejection of a national bill of rights. Having at length considered such a bill,⁷ the United Kingdom has continued its traditional creation of constitutional rights through the common law and specific legislation rather than through a general proclamation.⁸

In 1950, the United Kingdom signed the European Convention for the Protection of Human Rights.⁹ This document differs from the earlier Universal Declaration of Human Rights,¹⁰ which the United Kingdom also signed, in two important respects. First, the Universal Declaration sought only to *proclaim* or *recognize* fundamental rights rather than bind signatory states,¹¹ but the European Convention clearly seeks

7. See *supra* note 4 and accompanying text.

8. For a discussion of how constitutional rights are created within the United Kingdom, see 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 406-597 (4th ed. 1936); 3 *MODERN LEGAL SYSTEMS CYCLOPEDIA* 3.230.10-12, .15-24, at §§ 1.3(A), 1.4 (Kenneth R. Redden ed., 1990).

9. See European Convention, *supra* note 6.

10. The European Convention was preceded two years earlier by the Universal Declaration of Human Rights, which was adopted without dissent by the United Nations General Assembly. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

11. As the Preamble to the Universal Declaration states:

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard for achievement for all peoples and all nations, to the end that every individual and every organ of society, . . . shall strive . . . to promote respect for these rights and freedoms and by *progressive measures, national and international*, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction.

Universal Declaration, *supra* note 10, at 71 (third and fourth emphases added). But see Myers, *supra* note 2, at 86-87 ("[A]lthough the [Universal] Declaration was originally non-binding on member states, it has assumed the status of mandatory customary international law, having been reaffirmed without opposition countless times within the United Nations, incorporated into several national constitutions, and in practice invoked as if legally binding.") (footnotes omitted) (emphasis added). Myers suggests that his view gained wide acceptance by the 1960s. *Id.* Others share a more guarded view of the Universal Declaration's international legal force. See, e.g., JACONELLI I, *supra* note 4, at 247 (Universal Declaration "not conceived as imposing legal obligations and has, at most, the character of customary international law").

to legally bind its signatories.¹² Second, the European Convention provides a mechanism to secure compliance with its provisions. This enforcement mechanism takes the form of two judicial bodies, the European Commission of Human Rights¹³ and the European Court of Human Rights.¹⁴

In 1961, the Council of Europe¹⁵ introduced the European Social Charter,¹⁶ an international instrument intended to secure social and economic rights.¹⁷ The United Kingdom led the opposition to the European Social Charter, which was eventually ratified in 1965.¹⁸ One year later, the United Nations opened for signature two additional human rights documents: the International Covenant on Civil and Political Rights¹⁹ and

12. Article 1 of the European Convention on Human Rights states the following: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." European Convention, *supra* note 6, art. 1.

13. See *infra* part III.A.1.

14. See *infra* part III.A.2.

15. The Council of Europe is an international human rights body based in Strasbourg, France. Its 23 member states are also signatory states, or "High Contracting Parties," to the European Convention, the Council of Europe's premier human rights document. In addition to the United Kingdom, the Council's member states include Austria, Belgium, Cyprus, Denmark, Finland, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 68 (1987). As of spring, 1990, several Eastern European states were applying to become parties to the European Convention as a precondition to membership in the Council of Europe. Stephan Breitenmoser & Gunter E. Wilms, *Human Rights v. Extradition: The Soering Case*, 11 MICH. J. INT'L L. 845, 845 n.2 (1990).

16. European Social Charter, opened for signature Oct. 18, 1961, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965).

17. See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 463 (1990). The European Social Charter also includes an implementation procedure which requires signatory states to report on domestic application of the Charter's provisions. *Id.*

18. See Mary F. Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, 14 FORDHAM INT'L L.J. 639, 646 n.25 (1990-91). For discussions of the history and import of the European Charter, see COUNCIL OF EUROPE, THE EUROPEAN SOCIAL CHARTER: ORIGINS, OPERATION, RESULTS (1981); DAVID HARRIS, THE EUROPEAN SOCIAL CHARTER (1984). See also Dominick, *supra*, at 658-67 (comparing European Community's European Social Charter with the Commission of European Communities' Community Charter); Mark Gould, *The European Social Charter and Community Law—A Comment*, 14 EUR. L. REV. 223 (1989) (arguing that the Charter has very limited significance as a source of Community law when compared to other documents in a "hierarchy des sources" for such law); Alan J. Riley, *The European Social Charter and Community Law*, 14 EUR. L. REV. 80 (1989) (arguing that the Charter is a significant part of Community law).

19. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999

the International Covenant on Economic and Social Rights.²⁰ Like the European Convention, both Covenants placed legal obligations upon ratifying states to honor the rights enumerated therein.²¹ However, like its approach to the European Social Charter, the United Kingdom stalled its acceptance of these rights-creating instruments, ratifying them only shortly before they entered into force in 1976.²²

In 1989, the United Kingdom proffered the sole dissent to the European Council's adoption of the Community Charter of Fundamental Social Rights of Workers.²³ Unlike the European Convention, which protects primarily civil and political rights, the Community Charter's thirty articles enumerate ten fundamental social and economic rights of both workers and citizens.²⁴ Originally submitted to the Council of Ministers of the European Communities by the Commission of the European Communities, the Community Charter has been characterized as the Commission's "second major step in ten years toward a [European] Community bill of rights."²⁵ Rather than adopt such a measure, the United Kingdom has preferred to take a lone diplomatic position among its European peers, resisting

U.N.T.S. 171 (entered into force Mar. 23, 1976).

20. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

21. Article 2 of the International Covenant on Civil and Political Rights provides: "Each [Contracting State] . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ." International Covenant on Civil and Political Rights, *supra* note 19, art. 2, 999 U.N.T.S. at 173. This Covenant sets forth an unqualified duty to "ensure" Covenant rights. In contrast, the International Covenant on Economic and Social Rights is more tentative, requiring only that states work towards greater rights in those areas. Article 2(1) of the Covenant states the following: "Each [Contracting State] undertakes to take steps, individually and through international assistance and co-operation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." International Covenant on Economic, Social, and Cultural Rights, *supra* note 20, art. 2(1), 993 U.N.T.S. at 5.

22. See *supra* notes 19-20 and accompanying text.

23. See Dominick, *supra* note 18, at 640 n.2. The European Council is the European Community's ruling body. Based in Brussels, Belgium, the European Community is a union of the following twelve member states: Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. Each of the European Community member states belong to the larger Council of Europe, which includes 23 member states. See *supra* note 15.

24. See COMMISSION OF THE EUROPEAN COMMUNITIES, THE EUROPEAN FILE: COMMUNITY CHARTER OF FUNDAMENTAL SOCIAL RIGHTS FOR WORKERS (May 1990).

25. See Dominick, *supra* note 18, at 639.

further efforts to generally define and enforce a binding European catalogue of fundamental rights, especially social and economic rights.

The United Kingdom's refusal to adopt a domestic bill of rights,²⁶ coupled with its expressed resistance to similar international documents, creates the temptation to view the United Kingdom as antagonistic to human rights. However, such a view is unwarranted. Ratification of the European Convention demonstrates a commitment to a substantive human rights program. An inquiry centering on the European Convention as a rights-creating mechanism will more ably explain that commitment. This is true because out of all the international instruments signed by the United Kingdom, the European Convention has exercised—and continues to exercise—the most substantial influence upon that nation's human rights policy and jurisprudence. As the following section argues, when that influence is measured against the United Kingdom's current position against a domestic bill of rights, the need for a domestic bill becomes subordinate to the greater need to develop European Convention law which will further increase the Convention's normative influence upon the United Kingdom.

III. THE UNITED KINGDOM AND THE EUROPEAN CONVENTION: THE CREATION OF HUMAN RIGHTS JURISPRUDENCE

A. *European Convention Adjudicative Provisions*

The European Convention created a sophisticated mechanism for enforcing human rights.²⁷ Two judicial tribunals

26. The United Kingdom's present failure to ensure its populace fundamental rights through the medium of a bill of rights has produced two results. First, no comprehensive statement of rights, and thus no equally comprehensive catalogue of remedies, exists for those who would seek to enforce human rights in the United Kingdom courts. Second, although the United Kingdom has, by virtue of the European Convention, agreed to secure certain rights to those within its borders, see *supra* note 12 and accompanying text, no judicial machinery now exists to enforce many of those rights in domestic courts. Those seeking to enforce Convention rights must engage European Convention processes and thus adjudicate their claims in Strasbourg, France, the seat of the adjudicative machinery currently in effect under the European Convention. See *infra* part III.A.

27. One commentator has noted that "the judicial machinery established pursuant to the European Convention on Human Rights is considered the most advanced and effective system for the protection of human rights in the world." John P. Groarke, Comment, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition*

exercise adjudicative authority under the convention: the European Commission of Human Rights and the European Court of Human Rights.²⁸

1. *European Commission of Human Rights*

The European Commission of Human Rights is a twenty-three member panel with a representative from each signatory to the European Convention.²⁹ A state or individual who has suffered a human rights violation may petition the European Commission for redress of a signatory state's violation of the European Convention,³⁰ provided that the party first exhausts all remedies within its national legal system.³¹ After investigating a complaint's factual allegations,³² the Commission attempts to arrange a settlement between the parties.³³ If this attempt fails, the Commission makes a preliminary determination on the merits of the complaint in the form of a report stating whether the defendant state has violated the European Convention.³⁴ Within three months of the report, either the Commission or any of the named *state* parties may bring the case before the European Court of Human Rights.³⁵ In cases

Treaty, 136 U. PA. L. REV. 1515, 1544 (1988).

28. European Convention, *supra* note 6, art. 19, 213 U.N.T.S. at 234.

29. *Id.* art. 20. For a detailed explanation of how the European Commission of Human Rights operates, see J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d ed. 1987); P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d ed. 1990).

30. European Convention, *supra* note 6, art. 25, 213 U.N.T.S. at 236. See Rosalyn Higgins, *The European Convention on Human Rights*, in 2 *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 495, 505-06 (T. Meron ed., 1984).

31. European Convention, *supra* note 6, art. 26, 213 U.N.T.S. at 238. Exhaustion of legal remedies is a chief requirement for claims brought under the European Convention.

32. The Commission's factual determination is accompanied by a written opinion issued to each party, the Committee of Ministers of the Council of Europe, and the Secretary-General of the Council of Europe. The opinion is also published. See European Convention, *supra* note 6, art. 30, 213 U.N.T.S. at 240.

33. *Id.* art. 28, 213 U.N.T.S. at 238-40; see Higgins, *supra* note 30, at 506; see also European Convention, *supra* note 6, art. 47, 213 U.N.T.S. at 246 (The Court "may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement.").

34. European Convention, *supra* note 6, art. 31, 213 U.N.T.S. at 240; see Higgins, *supra* note 30, at 506-07.

35. European Convention, *supra* note 6, arts. 32, 44, 47, & 48, 213 U.N.T.S. at 240-42, 246; see Higgins, *supra* note 30, at 507. The European Convention contains no provision allowing individual petitioners themselves to bring cases before the European Court of Human Rights. Although an individual may initiate Convention

where no such action is taken, the Committee of Ministers of the Council of Europe decides whether the European Convention has been violated.³⁶ Signatory states "undertake to regard as binding" decisions reached by the Committee of Ministers.³⁷

2. *European Court of Human Rights*

Like the Commission, the European Court of Human Rights³⁸ is comprised of twenty-three elected judges, one from each member state of the Council of Europe.³⁹ When a case is properly presented to the Court, seven members, who comprise a chamber, hear the case.⁴⁰ Any decision reached thereafter is final⁴¹ and binding upon member states.⁴² Following a judgment by the Court, the Committee of Ministers supervises its execution.⁴³

The European Convention empowers the Court to hear cases raising questions of interpretation regarding Convention provisions.⁴⁴ As will be discussed, this interpretive role provides the foundation upon which a singular corpus—and perhaps theory—of European human rights law can begin to be built.

judicial processes by bringing a petition before the European Commission of Human Rights, only the Commission or a state named in the petition has power to bring the case before the Court. Presumably the Commission protects individual claimants' interests through its power to refer cases to the Court if a named state party refuses to do so.

36. European Convention, *supra* note 6, art. 32, 213 U.N.T.S. at 240. Any violation must be found by a two-thirds majority of the Committee.

37. *Id.* art. 32(4).

38. For a detailed analysis of the duties and functions of the European Court of Human Rights, see sources cited *supra* note 29.

39. European Convention, *supra* note 6, arts. 38, 39, 213 U.N.T.S. at 242-44; see *supra* note 15 and accompanying text.

40. European Convention, *supra* note 6, art. 43, 213 U.N.T.S. at 244.

41. *Id.* art. 52, 213 U.N.T.S. at 248.

42. *Id.* art. 53 (Member states "undertake to abide by the decision of the Court in any case to which they are parties.").

43. *Id.* art. 54.

44. Article 45 of the European Convention provides: "The jurisdiction of the Court shall extend to *all* cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48." *Id.* art. 45, 213 U.N.T.S. at 246 (emphasis added).

*B. The Interpretive Role of the European Court
of Human Rights: Creating a New European
Jurisprudence of Human Rights*

The non-binding character of the Universal Declaration and the two European Covenants allowed each state to determine for itself how to achieve the human rights aspirations of these documents.⁴⁵ Although such freedom also exists under the European Convention, it is more limited. Because the Convention provides an enforcement mechanism, it binds signatories not merely with aspirational pronouncements, but also with case law. Thus, the European Convention has been characterized as "a *law-making treaty* the object of which is to oblige the parties to apply certain rules of international law and, if necessary, to *add or modify their national law for this purpose*."⁴⁶ As a result, the European Convention assumes a *sui generis* character.⁴⁷ That is, as a law-making force, the Convention transcends the "traditional boundaries between international and domestic law,"⁴⁸ thereby establishing "a new legal order designed to substitute for the particular systems of individual states a common European order."⁴⁹ Thus, signatory states are subject to a common law supreme to their own national law within the sphere of human rights. As the final⁵⁰ arbiter of states' duties under the European Convention, the European Court of Human Rights assumes the ultimate role of

45. See ANDREW Z. DRZEMCZEWSKI, *EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY* 21-22 (1983):

[A]lthough the duty to bring domestic law into line with international contractual obligations certainly exists, international law is silent with regard to the means by which this object is to be achieved. Such conformity is a matter of domestic concern, normally determined by constitutional provisions and practice of each state.

46. Arnold D. McNair, *The European Convention of 1950 for the Protection of Human Rights and Fundamental Freedoms*, in *THE EXPANSION OF INTERNATIONAL LAW* 9, 27 (81st Lionel Cohen Lecture, The Hebrew University of Jerusalem, 1962) (emphases added).

47. DRZEMCZEWSKI, *supra* note 45, at 23 (citing A.H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 231 (1977)).

48. Andrews, *supra* note 2, at 466.

49. DRZEMCZEWSKI, *supra* note 45, at 23 (citing A.H. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 231 (1977)).

50. The European Commission of Human Rights is considered the *chief* arbiter of whether state action violates the Convention. See *supra* part III.A.1. However, ultimate questions of interpretation are left strictly within the province of the Court.

defining normative standards among member states for those classes of rights enumerated in the European Convention.⁵¹

Thus, initially it appears that the Court is uniquely poised to shape, if not ultimately determine, the path of human rights law among the European Convention's member states.⁵² Even among nonmember nations, the Court's decisions can be expected to influence developing attitudes towards human rights.

Of course, for the Court to play such a vital role in the evolution of European human rights law, its decisions must be legally compelling. Signatory states regularly accept and abide by decisions reached through European adjudicative processes. In numerous cases, decisions by either the Commission or the Court have prompted remedial action by the defendant state, often amidst significant political pressure to act otherwise, and sometimes even before the Court announces its decision. Three such instances involving the United Kingdom will be considered in the following pages.

1. *The Golder Case*

In the *Golder Case*⁵³ the Court held that certain British prison regulations violated the European Convention. The series of regulations under review in *Golder* allowed prison authorities to control communications between prisoners and outside legal counsel. The applicant, Mr. Sidney Golder, was an inmate accused of being involved in an altercation that injured a prison guard.⁵⁴ Some time later, Golder attempted to write both a representative in Parliament and a Chief Constable.⁵⁵ However, pursuant to the Prison Rules then in force, the prison governor prevented Golder from doing so.⁵⁶ Additionally,

51. Certain classes of rights, primarily economic, are not protected by the European Convention. Cf. Universal Declaration, *supra* note 10, arts. 22-25, at 83 (proclaiming economic rights).

52. See *infra* part III.C.2.

53. 18 Eur. Ct. H.R. (ser. A) (1975). The *Golder Case* was the first individual application from the United Kingdom to reach the European Court of Human Rights.

54. 18 Eur. Ct. H.R. (ser. A) at 8-9.

55. *Id.* at 8.

56. Regarding the Prison Rules, the Court made the following finding:

In England the matter of contacts of convicted prisoners with persons outside their place of detention is governed by the Prison Act 1952, as amended, and subordinate legislation made under that Act.

Section 47, sub-section I, of the Prison Act provides that "the Secretary of State [Home Secretary] may make rules for the regulation and

Britain's Home Secretary denied Golder permission to consult an attorney.⁵⁷ In response, Golder submitted to the Commission a complaint alleging violations of European Convention Articles 6(1)⁵⁸ and 8.⁵⁹

Upon review, the Commission reported that the Prison Rules improperly denied Mr. Golder the rights of access to the courts and to legal counsel.⁶⁰ Building upon the Commission's report, the Court interpreted the Articles in question to confer these rights on prisoners, and found that the restrictions violated Golder's rights.⁶¹ In response to the Court's holding, the British government promptly removed the offending regulations and substituted new regulations in their place.⁶²

2. Ireland v. United Kingdom

*Ireland v. United Kingdom*⁶³ provides a second example of how European Convention judicial processes have prompted remedial action. In this case both the European Commission and the Court of Human Rights considered Ireland's claims that the United Kingdom had subjected Irish citizens to "inhu-

management of prisoners . . . and for the . . . treatment . . . discipline and control of persons required to be detained"

The rules made by the Home Secretary in the exercise of this power are the Prison Rules 1964, which were laid before Parliament and have the status of [statutory law].

Id. at 9 (emphasis added). Rules 33(2) and 34(8) prohibited inmates from communicating with "any outside person" unless granted leave by the Home Secretary. *Id.* at 10.

57. *Id.*

58. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." European Convention, *supra* note 6, art. 6(1), 213 U.N.T.S. 228; see 18 Eur. Ct. H.R. (ser. A) at 13 ("[T]he 'right' which Golder wished, rightly or wrongly, to invoke against [the guard who identified him] was a 'civil right' within the meaning of Article 6 § 1.").

59. Article 8 provides: "(1) Everyone has the right to respect for his . . . correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary . . . [to] national security, public safety [or certain other enumerated state interests]." European Convention, *supra* note 6, art. 8, 213 U.N.T.S. at 230.

60. 18 Eur. Ct. H.R. (ser. A) at 20.

61. *Id.*

62. RICHARD B. LILlich & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 583 (1979). But see Eric Leigh, *Prison Rules Negate Spirit of Court Ruling*, THE TIMES (London), Aug. 21, 1975, at 2, cited in LILlich & NEWMAN, *supra*, at 585.

63. 25 Eur. Ct. H.R. (ser. A) (1978).

man or degrading treatment" in violation of Article 3 of the European Convention.⁶⁴ The Irish government alleged that United Kingdom Security Forces subjected suspected members of the Irish Republican Army to a series of degrading interrogation techniques.⁶⁵ The British government claimed the techniques were warranted given the existence of a public emergency in Northern Ireland at the time of interrogation.⁶⁶ In fact, both the Commission and the Court found a state of emergency existed,⁶⁷ but they still condemned the techniques.⁶⁸

Ireland brought its complaint against the United Kingdom in 1971.⁶⁹ In December 1975, after the Commission commenced fact-finding and earnest consideration of the matter, but before it rendered an opinion, the British government abandoned its use of the offending interrogation techniques.⁷⁰ At least one commentator has suggested the United Kingdom acted remedially, anticipating adverse findings by the European Commission.⁷¹ Moreover, following the Commission's published findings in 1976, Ireland secured from the British government an unconditional declaration that such interrogation techniques would never be used again.⁷² The unqualified nature of such an act speaks well of the Commission's influence on a politically significant decision.

3. *The Soering Case*

Perhaps the most significant recent case illustrating the normative force of the Court of Human Rights is the *Soering*

64. *Id.* at 60-72. Article 3 of the European Convention provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, *supra* note 6, art. 3, 213 U.N.T.S. at 224.

65. These techniques included forcing suspects to stand for an extended time against a wall while resting their weight on their fingers and toes, covering their heads with black hoods, subjecting them to a high-volume hissing noise, and depriving them of adequate sleep, food, and water. 25 Eur. Ct. H.R. (ser. A) at 41.

66. *Id.* at 77-78. See European Convention, *supra* note 6, art. 15, 213 U.N.T.S. at 232-34 (State derogation from European Convention is permitted in some instances of "public emergency," but only "to the extent strictly required by the exigencies of the situation.").

67. 25 Eur. Ct. H.R. (ser. A) at 78.

68. *Id.* at 94-95; Republic of Ireland v. United Kingdom, App. No. 5310/71, 28 Eur. Comm'n H.R. Dec. & Rep. 278, 285 (1978).

69. See LILlich & NEWMAN, *supra* note 62, at 589.

70. 25 Eur. Ct. H.R. (ser. A) at 82.

71. See Higgins, *supra* note 30, at 509.

72. See *Britain on the Dock*, ECONOMIST, Apr. 30, 1977, at 14, cited in LILlich & NEWMAN, *supra* note 62, at 615-16.

*Case.*⁷³ In *Soering*, the Court considered whether the extradition of a capital murder suspect from the United Kingdom to Virginia would violate European Convention proscriptions against "torture"⁷⁴ or "inhuman or degrading treatment or punishment,"⁷⁵ given conditions existing for death row prisoners in the United States.⁷⁶

Soering was a German national attending college in Virginia. When his girlfriend's parents were murdered in March 1985, Soering and his girlfriend fled Virginia.⁷⁷ In April 1986, Soering was arrested in England.⁷⁸ Following Soering's arrest, the United States government requested extradition pursuant to an existing extradition treaty.⁷⁹ Soering began judicial proceedings under the European Convention to block extradition, alleging that his extradition to the United States would violate Article 3 of the European Convention.⁸⁰ Virginia was seeking the death penalty, which might subject him to adverse conditions on Virginia's death row.⁸¹

The Court first determined that exposure to the "death row phenomenon" would violate Article 3.⁸² The Court then held that Article 3 imposes a duty upon contracting states to refuse extradition in cases that present a substantial risk of an Article 3 violation.⁸³ In response to the Court's ruling, the United

73. 161 Eur. Ct. H.R. (ser. A) (1989).

74. European Convention, *supra* note 6, art. 3, 213 U.N.T.S. at 224.

75. *Id.*

76. 161 Eur. Ct. H.R. (ser. A) at 26-28.

77. *Id.* at 11.

78. *Id.*

79. *Id.* at 12. See Extradition Treaty, June 8, 1972, U.S.-U.K.-N.Ir., 28 U.S.T. 227, 229, 1049 U.N.T.S. 167, 169 (specifying that Contracting Parties agree to extradite "any person" accused or convicted of specific offenses "committed within the jurisdiction of the other Party").

80. 161 Eur. Ct. H.R. (ser. A) at 15.

81. *Id.* at 30-31. The Court considered evidence provided by Mr. Soering regarding the "death row phenomenon," including "evidence of extreme stress, psychological deterioration and risk of homosexual abuse and physical attack undergone by prisoners on death row." *Id.* at 25, 27.

82. *Id.* at 44-45.

83. The Court stated:

Extradition in such circumstances . . . would plainly be contrary to the spirit and intendment of [Article 3], and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.

Id. at 35.

Kingdom refused to extradite Soering to the United States until the capital murder charges against him were dropped.⁸⁴

Each of the preceding decisions—*Golder, Ireland v. United Kingdom*, and *Soering*—demonstrates the extent to which the European Convention's binding authority is recognized within the United Kingdom.⁸⁵ Each case also demonstrates the degree to which judicial processes set forth under the Convention constitute an effective mechanism to protect human rights.⁸⁶ Finally, these cases suggest the dynamic potential of the Court's power to interpret the Convention. The Court is uniquely positioned to create charismatic, forward-moving human rights case law for its member nations. The deference which the United Kingdom accords the Court's decisions suggests its willingness to view the Convention machinery as properly creating a European "common law" of human rights. Such a process corresponds to, and complements, the United Kingdom's traditional rights-creating mechanisms.

84. Soering remained in British custody until his extradition to the United States in January 1990, after American authorities removed the death penalty charges then pending against him. Regina C. Donnelly, Comment, *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 340 n.6 (1990); see NEWMAN & WEISSBRODT, *supra* note 17, at 477 n.6.

85. Another example is the Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) (1979). *Sunday Times* involved one of the most politically charged rights—freedom of expression. The Sunday Times began publishing a series of articles about the deformative effects of thalidomide upon children. However, the United Kingdom's highest judicial authority, the House of Lords, enjoined the Times from publishing further articles, reasoning that to do otherwise would cause the public to form biases about certain issues surrounding then-pending civil negligence litigation against the drug's manufacturer, and thus constitute contempt. *Id.* at 20. Ultimately, the case was laid before the European Court of Human Rights, which ruled that the House of Lords' injunction breached the paper's right to free expression under Article 10 of the Convention. *Id.* at 45. In response—and amidst a great deal of political tumult—Parliament enacted legislation effectively overruling the House of Lords' decision. Contempt of Court Act, 1981, ch. 49, § 5; see MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW 96-116 (1990) (discussing *Sunday Times* and the Court's influence upon U.K. law); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 552-54 (1988) (same).

86. See also DRZEMCZEWSKI, *supra* note 45, at 186-87 (citing cases brought under the European Convention involving the United Kingdom and which have resulted in substantive changes in both United Kingdom law and social policy); Tyrer Case, 26 Eur. Ct. H.R. (ser. A) at 8-10 (1978) (In response to a Commission report, the Isle of Mann amended its law to lessen the degree of corporal punishment administered.); Reed v. United Kingdom, App No. 7245/32, 3 Eur. H.R. Rep. 136 (1979) (agreement to alter regulations concerning prisoners' rights to complain of prison treatment) (friendly settlement).

C. *Domestic Human Rights Aims in the European Context*

The previous analysis illustrates the European Convention's substantive capacity to enforce its provisions within the United Kingdom. One response to the exercise of that capacity emphasizes the negative international public relations aspect of adverse Court rulings. For example, in an oblique 1985 reference to judgments such as *Ireland v. United Kingdom* and *Golder*, Lord Scarman of the House of Lords referred to these types of decisions as "embarrassments" to the United Kingdom among the international and European communities.⁸⁷ Insofar as these decisions considered United Kingdom law as having failed at various points to secure rights set forth in the European Convention, Lord Scarman called for "urgent remedial action" granting the Convention the force of statute within the United Kingdom.⁸⁸

Lord Scarman's concern is focused primarily on political opinion. This concern, although important, is misplaced given the instant context. On balance, the positive aspects of the Court's decisions outweigh any potentially negative public relations effects. Indeed, in *Soering*, the Court was careful to emphasize the United Kingdom's good faith and propriety in seeking review of the case.⁸⁹ Clearly, such qualities hardly present occasion for embarrassment. Rather, as the following analysis suggests, the positive results emanating from the United Kingdom's particular status—that of not possessing an entrenched bill of rights—arguably work to advance the specific aims set forth in the European Convention.

87. Leslie Scarman, *Foreword to ZANDER, supra note 4, at v; see also* Jaconelli II, *supra* note 4 (discussing issue of airing the United Kingdom's dirty laundry abroad).

88. Leslie Scarman, *Foreword to ZANDER, supra note 4, at v.* Lord Scarman preceded his 1985 call to arms in 1974 when he presented his well-known "Hamlyn Lectures" on a bill of human rights for the United Kingdom. See ZANDER, *supra* note 4, at 8-10.

89. The Court stated:

This finding in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by themselves referring the case to the Court for a judicial ruling.

Soering Case, 161 Eur. Ct. H.R. (ser. A) at 45 (1989).

1. *Aims of the European Convention on Human Rights*

The European Convention's fundamental human rights aspirations are stated in the Convention's Preamble, which emphasizes a profound belief in the necessity of maintaining "a common understanding and observance of the Human Rights upon which [fundamental freedoms] depend."⁹⁰ The Preamble thus views the Convention as a tool for ensuring "the collective enforcement of certain of the Rights stated in the Universal Declaration."⁹¹

Acting on such proclamations, both the Commission and the Court have expounded the Convention's distinctive, pre-eminent mission of creating a common, European public order. In *Austria v. Italy*,⁹² the Commission reported that the Convention's purpose was "to establish a common public order of the free democracies of Europe."⁹³ This view was further developed in the Commission's report in *Ireland v. United Kingdom*.⁹⁴ Professor Sperduti noted in his concurring opinion that by ratifying the Convention, member states "each accepted an obligation towards all the others together."⁹⁵ That obligation necessarily implicates "the ties of solidarity which the State Parties intended to create between themselves with a view to establishing a European public order."⁹⁶ Building upon the Commission's report, the Court in *Ireland v. United Kingdom* emphasized the Convention's role in uniting member states under a single, enforceable catalogue of fundamental rights.⁹⁷

90. European Convention, *supra* note 6, pmbl., 213 U.N.T.S. at 222.

91. *Id.*

92. 1961 Y.B. Eur. Conv. on H.R. 112 (Eur. Comm'n on H.R.). *Austria v. Italy* is also known as the *Pfunders* case. See VAN DIJK & VAN HOOFF, *supra* note 29, at 635.

93. 1961 Y.B. Eur. Conv. on H.R. at 138. As the Commission explained, it follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under Article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe.

Id. at 140 (emphasis added).

94. App. No. 5310/71, 1976 Y.B. Eur. Conv. on H.R. 516 (Eur. Comm'n. on H.R. 1976).

95. *Id.* at 497 (separate opinion regarding interpretation of Article 1 of European Convention), quoted in DRZEMCZEWSKI, *supra* note 45, at 25.

96. *Id.* (second emphasis added).

97. 25 Eur. Ct. H.R. (ser. A) at 4, 90-91 (1978). The Court stated: "Unlike

The unique "law-making" role of the European Court of Human Rights⁹⁸ and the binding authority of the Convention combine to establish a singular means for the realization of the fundamental human rights aspirations set forth in the Convention's Preamble across a broad, European context. Besides binding parties named in its judgments, the European Court of Human Rights also creates case law that enunciates human rights standards for all Council of Europe nations. "Judgments of the . . . Court often have important consequences for the laws and practices of member states which are not parties to the particular case under review."⁹⁹ The Court's influence is also felt outside the Council of Europe:

[Court decisions] also have strong persuasive authority with the younger Inter-American Commission and Court of Human Rights and the U.N. Human Rights Committee.

The twelve member states of the Council of Europe that also belong to the European Economic Community, or Common Market, have made adherence to the Convention a virtual condition of membership of the European Community The European Court of Justice, which sits in Luxembourg, [also] has regard for the Convention and United States law when interpreting Community law.¹⁰⁰

2. *The "supreme court" function of the European Court of Human Rights*

As interpreter of Convention provisions, the European Court of Human Rights gives final expression to the Convention's binding authority. The Court's status and ability to define and ensure compliance with European Convention norms is analogous to the role of the U.S. Supreme Court in American constitutional law. In *Marckx v. Belgium*,¹⁰¹ the European Court likened its authority to the constitutional courts of specific Council of Europe member states.¹⁰² The U.S. Supreme Court, like the European constitutional courts,

international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the preamble, benefit from a 'collective enforcement.' " *Id.* at 90.

98. See *supra* part III.B.

99. Lester, *supra* note 85, at 540.

100. *Id.*

101. 30 Eur. Ct. H.R. (ser. A) (1979).

102. *Id.* at 36-37.

functions as the final judicial arbiter of constitutional law.¹⁰³ The European Convention places its Court in a nearly identical posture.

However, one striking practical difference exists between the two Courts: the respective number of decisions each Court hears and decides. In its short history the European Court of Human Rights has decided approximately 151 cases.¹⁰⁴ In contrast, between 1985 and 1989 the U.S. Supreme Court currently decided an average of 164 decisions per year.¹⁰⁵ This allows the European Court more time to consider each case. A second, related difference between the two tribunals is the scope of their jurisdiction. The European Court's authority of review extends to less than half the number of jurisdictions overseen by the Supreme Court.¹⁰⁶

Viewed against the background of U.K. law, these differences suggest two reasons why litigating European Convention-based human rights before European Convention tribunals is desirable.¹⁰⁷ First, parties seeking redress have access to the full weight of the Convention process to litigate the merits of the claim. Meritorious demands, once vindicated, are endorsed by a demonstrably compelling legal authority. In addition, since that authority is supreme, its ruling is non-appealable,¹⁰⁸ pri-

103. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); see U.S. CONST. art. III, §§ 1-2.

104. See NEWMAN & WEISSBRODT, *supra* note 17, at 465. The authors suggest the European Court of Human Rights has decided few cases because the vast majority of applications submitted to the Commission (about 96%) fail to meet the Convention's rigid admissibility requirements. *Id.* at 464; see European Convention, *supra* note 6, arts. 24-27, 213 U.N.T.S. at 236-38. However, the Commission's narrow reading of these requirements "has increased state confidence in the Convention over its more than thirty-five year existence." NEWMAN & WEISSBRODT, *supra* note 17, at 464. As of January 1, 1989, the European Commission had decided 286 cases, 180 of which it referred to the Court. *Id.* at 464-65.

105. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 103 (1990).

106. Jurisdiction of the European Court of Human Rights includes the 23 Council of Europe member nations. See *supra* note 15 and accompanying text. The U.S. Supreme Court has jurisdiction over matters arising within all fifty states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands and Guam, in addition to its federal jurisdiction.

107. Because the United Kingdom has not adopted the European Convention into its domestic law, individuals seeking to invoke Convention provisions *per se* must do so in Strasbourg rather than before a domestic tribunal; hence, engaging the Convention's judicial machinery is not only desirable but also necessary for cases in which U.K. law is either defective or silent concerning a given remedy for violations of rights protected by the Convention.

108. In many cases, it may be more efficient for claims to invoke European

mary recourse to a forum of last resort may present significant economic advantages for each party to a dispute.¹⁰⁹

Second, these cases provide the Court with a prime opportunity to develop the normative standards of the Convention.¹¹⁰ These standards may then be applied with greater success across the European Community, in accord with the Convention's stated desire to create unity and establish a European public order. Benefits to the United Kingdom would ensue from a more refined standard upon which to base its domestic human rights policy.

"It is primarily in the Court's judgments that a European jurisprudence of human rights is being developed."¹¹¹ But the system is young and "has compiled its body of jurisprudence slowly."¹¹² Although Convention tribunals have a compelling authority and impact, their jurisprudence needs cultivating.

Convention processes rather than engage a domestic tribunal. Cases like *Soering*, which compel a definitive explication of Convention provisions, will almost certainly be appealed to the Convention tribunals anyway.

109. *But see* Andrews, *supra* note 2, at 487. Andrews characterizes the process as "expensive, complicated, and protracted." *Id.* Because Article 26 requires that all local remedies be exhausted before the European Commission may consider a given claim, European Convention, *supra* note 6, art. 26, 213 U.N.T.S. at 213, Andrews suggests that "[i]ncorporation [of the European Convention into domestic United Kingdom law] may be the most efficient and effective approach to protection of human rights in the long run." Andrews, *supra* note 2, at 487. The exhaustion requirement apparently functions as a check to assure that claims brought before the Commission are meritorious, and also to assure that a given member state has had an opportunity to comply with its duties under the Convention.

Although the rule is indeed a hurdle, it is far from insurmountable. It would appear, too, to be less so in the absence of a domestic bill of rights. Ironically, a fully-developed domestic catalogue of rights would necessarily compel an equally mature catalogue of corresponding remedies. As a result, the more extensive the inventory of remedies at home, the fewer opportunities petitioners would possess to bring claims before the European Convention Tribunals.

At any rate, the economic cost of seeking relief from the European Court is outweighed by the certain advantages of unifying European human rights law by restricting recourse to a single, supreme court.

110. Indeed, individual petitions comprise the bulk of this opportunity:

It seems that the right of access of private suitors has been crucial to bringing the system of European Human Rights Law alive. Between 1953 and 1983, there were only 18 state petitions filed with the Commission, but there were 10,709 private claims. Of the 100 decisions and judgments rendered by the European Court of Human Rights from its inaugural sitting on April 20, 1959 until 1985, 98 were cases where individuals were the original petitioners.

JANIS & KAY, *supra* note 85, at 93 (citation omitted).

111. *See* Andrews, *supra* note 2, at 473.

112. *See* NEWMAN & WEISSBRODT, *supra* note 17, at 464.

The Convention's powerful, sublime aims warrant such development. Likewise, the Convention's member states will increasingly gain in understanding of and ability to ensure domestic liberties as the Convention develops a sophisticated corpus of case law. In view of these concerns, this comment suggests that, for now, the United Kingdom should subordinate chiefly political concerns to the greater and more compelling aim of establishing a developed, concrete jurisprudence of human rights on a decidedly European scale.

IV. CONCLUSION

An important, distinctively twentieth-century trend among European nations has been the move towards enumerating fundamental human rights. The United Kingdom has been conservative in its embrace of this trend, especially in its approach towards recent European Community efforts to create a bill of rights. Underlying the United Kingdom's conservative image in this area is its refusal to install its own domestic bill of rights.

Although the United Kingdom has long been bound by the European Convention on Human Rights, its lack of an entrenched rights bill requires those with Convention-based claims against the United Kingdom to invoke the processes of the European Commission and eventually the European Court of Human Rights. Domestic remedies for human rights violations are scattered and incomplete, but the European Convention enforcement mechanisms have proven successful in protecting human rights within the United Kingdom. The current position of the United Kingdom is to avoid a hortatory proclamation of rights. Instead, specific rights are developed one at a time employing the traditional processes of legislation and common-law interpretation. The European Convention's character as a *sui generis*, law-making authority corresponds appropriately with such processes.

Ultimately, the long-term task of building a truly viable European human rights standard will be served by emphasizing the European Convention process: direct recourse to the European Commission of Human Rights and its companion European Court of Human Rights. The goal of a unified European human rights standard requires a single adjudication process. Two competing systems—one national, the other international—are undesirable because only a single system can provide a definitive interpretation of the European Convention's human rights norms. With the prospect of a truly

united Europe, efficiency in adjudicating human rights issues becomes a more important factor in the analysis of whether the United Kingdom should adopt a bill of rights.

Assuming that furthering human rights *per se* within the Council of Europe nations is the primary goal of any human rights initiative, factors such as the United Kingdom's "embarrassment" due to adverse rulings from the Court are irrelevant to the more compelling, more encompassing goal of effecting human rights throughout Europe. The relevant consideration is how the United Kingdom can benefit the entire European human rights process. Adopting a bill of rights could detract from the overall efficiency of the adjudicative process by interposing a new set of rights requiring judicial interpretation to achieve their aims. To both promote European Convention aims and judicial efficiency through uniformity, this comment suggests that the United Kingdom continue to maintain its posture against a domestic bill of rights.

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