

2006

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### Recommended Citation

Mike Burstein, *The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights*, 24 BERKELEY J. INT'L LAW. 423 (2006).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol24/iss2/2>

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# The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights

By  
Mike Burstein

## I. INTRODUCTION

What good is a regional court of human rights? While these supranational courts ostensibly exist to apply the human rights norms codified in their governing treaties,<sup>1</sup> very little is known about the specific role that human rights courts play in establishing robust human rights regimes and the external factors that affect a regional court of human rights' ability to function effectively. As a result, the impact that a regional court of human rights can have on the lives of citizens within its jurisdiction remains unclear. The divergent experiences of the European and Inter-American systems illustrate this ambiguity. The European Court of Human Rights (ECHR) has inarguably overseen one of the world's most successful human rights regimes, and it can rightfully claim to have made a meaningful contribution to this progress.<sup>2</sup> However, the European Court of Human Rights is not solely responsible for the development of human rights within Europe, and much of the change can be attributed to the actions of courageous leaders who have shaped regional political discourse over the past forty-five years.<sup>3</sup> Alternatively, the structurally similar Inter-American Court of Hu-

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1. European Convention for the Protection of Human Rights & Fundamental Freedoms, art. 19, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (purpose of European Court of Human Rights is "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto"); Statute of the Inter-American Court of Human Rights art. 1, Oct. 31, 1979, O.A.S. Res. 448, 9th Sess. ("The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.").

2. Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 134 (2001); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 63-66 (2005).

3. See, e.g., Pamela A. Jordan, *Does Membership Have Its Privileges?: Entrance into the*

man Rights has experienced only relatively limited success.<sup>4</sup> To what extent this difference in results is a product of the shortcomings particular to the Inter-American Court and the virtues of the European Court, or rather a consequence of factors exogenous to either institution, is far from certain.

The range of external forces that can constrain or enhance a regional court of human rights' ability to function effectively is overwhelmingly broad, ranging from the structure of the court as defined in its organic treaty to the adequacy of funding a court receives from its member states or outside forces. This paper will examine only the political factors that shape a regional court of human rights' capacity to develop a norm of respecting human rights. As outlined by Professor David Caron, the texts of the governing treaties and procedural rules of any international institution compose the boundaries of a unique "strategic space" in which regional courts of human rights operate.<sup>5</sup> Four primary actors operate within this space: the court, litigating parties, the community of member states, and outsiders (that is, interested parties without a strong legal relationship to the institution).<sup>6</sup> Under this theory, each actor has an independent, but potentially overlapping, set of interests, and the actors are aware of their own interests as well as each other's.<sup>7</sup> This theory also assumes that the actors will operate within the space in a manner logically consistent with advancing and defending their interests.<sup>8</sup> When interests overlap, actors may act in harmony to achieve mutual goals. Conversely, when their interests are at odds, actors will exert political or legal pressure to prevent their opponents from achieving their goals.

This paper will examine regional courts of human rights under the "strategic space theory," and argue that a regional human rights court has an interest in advancing human rights because it increases its political power, but this interest is constrained by both the community of member states' will to enforce (or disregard) the court's judgments and the political dynamics between the defendant-state and the rest of the community. A consequence of the political constraints is that regional courts of human rights are limited in their ability to act as an ad-

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*Council of Europe and Compliance with Human Rights Norms*, 25 HUM. RTS. Q. 660, 686 (2003) (noting that the Council of Europe primarily relies on "the soft power of pressure, shaming, and the threat of expulsion to keep members in line" rather than reliance on the judgment of the ECHR itself); see generally Gideon Sjoberg, Elizabeth A. Gill & Norma Williams, *A Sociology of Human Rights*, 48.1 SOC. PROBS. 11 (2001).

4. See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 514, 543-44 (1997) (discussing the dramatic difference in functions of the Inter-American and the European supranational human rights regimes despite their significant structural similarities); see also Cassel, *supra* note 2, at 134 (noting the marginal impact that the Inter-American system has had on its member states, especially in comparison with the European system); Posner & Yoo, *supra* note 2, at 41-44.

5. See generally David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401 (2006).

6. Although Caron identifies at least five primary actors, this paper will collapse the adjudicators and the administrators into one entity (the court) for the sake of simplicity. See *id.* at 402.

7. See *id.*

8. *Id.*

vocate for human rights norms beyond what the community defines as acceptable levels of observance. This is not to imply that courts are powerless or completely dependent upon the grace of the community of member states, but rather that regional courts of human rights are unable to take aggressive stances towards advancing human rights.

This paper will argue that the balance of power within a strategic space means that while a prototypical regional court of human rights has only a limited ability to change regional norms, it has a strong ability to address deviations from established norms. As a result, the most significant impact of regional courts of human rights will be to play a coordinating role in harmonizing the dominant standards of human rights observance within the community of member states, and, more importantly, prevent regression from these standards. It will also argue that, despite its lack of political dominance, a court *might* be able to develop the political capital to achieve political independence through a conservative long-term strategy. This, in turn, will allow the court to take bolder steps in advancing the community standard of human rights observance.

This paper will begin in Part II by explicitly detailing the theoretical framework that this paper will use to identify the actor's interests. Part III will then identify the actors and their interests. Part IV will explain how these interests interact and overlap to limit the capacity for a court to change regional norms. Part V will conclude by examining how a court is able to work within these limits to protect and potentially advance human rights norms.

## II. THEORETICAL FRAMEWORK

There are two overlapping questions that are central to understanding the political role that courts play within the bounded strategic space: (1) why do courts do what they do, and (2) why do states care what the court does? These questions have been addressed by two different wellsprings of scholarship: political theory of national courts and international relations theory. Due to the supranational character of regional human rights courts, the analytic tools in both intellectual traditions are useful but limited in their applicability to the case at hand. Thus, this paper will dip from both wells in an attempt to understand the court's political role.

Martin Shapiro's political theory of courts was predicated on a "prototypical court" that consisted of four characteristics: "(1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong."<sup>9</sup> Through adjudication, a prototypical court fulfills three political roles. First, the court is an institutionalized dispute-resolution mechanism.<sup>10</sup> This is relatively self-explanatory insofar as the deci-

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9. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1986).

10. *Id.* at 1-17.

sion, if obeyed, will theoretically resolve the immediate conflict between the plaintiff and the defendant by declaring one side to be a winner and the other a loser. Second, the decision itself often serves a law-making function by "filling in the details of statutory or customary law."<sup>11</sup> The third function is one of social control in which the court imposes pre-existing laws upon the litigants.<sup>12</sup> By applying laws that have been established by society as the chosen means of conflict resolution, the court imposes the interest of society at large upon the litigants' dispute.<sup>13</sup>

Shapiro's political theory of courts is limited to national courts because he assumes that the court is "a servant of the regime, imposing its interests on the parties to the litigation."<sup>14</sup> This is not necessarily the case in regional courts of human rights. As will be discussed below, the court's interests cannot be equated to the interests of the regime. In fact, there is reason to believe that the interests of the court and those of the member states are effectively in opposition in many instances. Similarly, it is not necessarily correct to assume that the laws are representative of the regime's interests in the case of regional courts of human rights, especially considering that the states that comprise the regime are the exclusive set of defendants. Nevertheless, Shapiro's theory holds great value as an analytic tool for illustrating the political nature of regional courts of human rights, and this paper will illustrate this role by examining the limits of Shapiro's prototype.

The second question, why do the other actors care what the court does, is simultaneously an underdeveloped yet saturated field. It is underdeveloped insofar as there is little scholarship on the political relationship between regional courts of human rights and other interested parties.<sup>15</sup> Instead, the majority of intellectual firepower has been aimed at determining why nations comply with treaties and customary law.<sup>16</sup> This paper will apply these theories of compliance to the decisions of regional courts of human rights in an attempt to better understand why state parties and the community of member states allow their actions to be governed by these courts' decisions. Clearly, there are differences between a decision from a regional court of human rights, a negotiated treaty, and customary law. Nevertheless, the analytic tools used within the existing theories to examine compliance with treaties and customary law are useful, though not perfect, in understanding the political character of member states' relationships to regional courts of human rights.

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11. *Id.* at 28-37.

12. *Id.* at 18-28.

13. *Id.* at 25-26.

14. *Id.* at 26.

15. *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (identifying the characteristics of effective supranational adjudication, which includes but is not limited to regional human rights adjudication).

16. *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

International relations and international law theories are conventionally divided into two camps, rational and constructivist. Unsurprisingly, each school of thought has limitations. The three main rational approaches, realist, institutionalist, and liberal theories, focus primarily on the actor's self-interests. A state's interest is generally defined in terms of political power or a strategic goal such as improving its reputation, furthering its ideological ends, avoiding conflict, or coercing another state to change its behavior. The calculus in determining whether a means is appropriate to employ in pursuit of a strategic goal is essentially an estimation of the possible negative consequences of taking an action (for example, marginalization from the international community, economic sanction, or increased difficulty in future negotiations), balanced against the magnitude and probability of the positive consequences of taking that action. The preferred means of achieving a goal is the one that maximizes the magnitude and likelihood of positive outcomes and minimizes the negatives. Realist approaches will assume that the international institutions exist only to serve state interests, and any compliance with international law is coincidental at best because obeying the law has no positive value independent of the consequences of compliance.<sup>17</sup> Alternatively, institutionalist approaches will argue that the institutions resolve inefficiencies in the otherwise anarchic international arena, and thus can act in the state's interests by playing a coordination or communication function.<sup>18</sup> Finally, liberal approaches reject unitary state actors and argue that compliance is effectively dependent on interest group politics within a nation.<sup>19</sup> In sum, all three of these theories share the presumption that states act rationally in pursuit of their interests.

In contrast, social constructivist theories of compliance "assume that ideas, not just tangible goals or interests, influence decision making. Ideas, such as international human rights norms, help shape the behavior of political actors and the structures in which they associate."<sup>20</sup> For example, Harold Koh proposes that the interactions of transnational public and private actors establish patterns of behavior within states, and that these patterns become habitual, theoretically creating a norm of compliance with international laws or institutions.<sup>21</sup> A nation may choose to act against its interests, as defined by rational models, because their culture and belief structure demands it and because this culture/belief structure has been shaped by repeated acts of compliance with the norm in ques-

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17. See, e.g., Posner & Yoo, *supra* note 2 (arguing that international institutions should not be independent of the controlling parties because then they may not represent state interests).

18. See, e.g., Guzman, *supra* note 16 (arguing that states comply with international law and institutions because they reduce transaction costs); Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

19. See, e.g., Helfer & Slaughter, *supra* note 15 (arguing in part that supranational adjudication is dependent upon the court's ability to align itself with domestic interest groups).

20. Jordan, *supra* note 3, at 664-65.

21. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 194-206 (1996).

tion.<sup>22</sup> Thus, transnational legal theory suggests that regional courts of human rights can play a significant role in developing norms within states because they regularly interact with states and attempt to elicit their compliance with international laws. One of the overriding problems with such constructivist theories is their limited ability to predict when one idea (for example, the right to a fair trial) will override other recognized interests of the state (for example, limiting access to politically sensitive evidence).<sup>23</sup> Although this often becomes apparent *post hoc*, this paper will assume that when a state refrains from acting in its interests, it is because the norm represented within the law, or at least the norm of compliance with international law, has been integrated into the fabric of the nation's society.

Thus, actors within a strategic space will have a set of interests, and will behave in a manner consistent with realizing these interests. An actor may also be influenced by the human rights norms codified within the court's governing treaty, and thus may be compelled to act in ways that either reinforce or undermine these interests. When an actor's compliance contravenes its own interests, the actor either acted irrationally or the action that would have advanced its own interest was unacceptable because it conflicted with established norms of state behavior.<sup>24</sup> Finally, an actor may have an apathetic outlook towards the normative significance of human rights, but will comply unequivocally because compliance is in line with the state's interest.

### III.

#### THE ACTORS AND THEIR STRATEGIC INTERESTS

##### A. The Court

The most obvious actor is the court itself. As Professor Caron has noted, the court is an amalgamation of adjudicators and administrators.<sup>25</sup> On an individual level, the court's employees have an interest in the institution's prestige and power because their personal success is tied to that of the court.<sup>26</sup> In this

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22. In the words of Alexander Wendt, "what stops the United States from conquering the Bahamas, instrumental factors, or a belief that this would be wrong?" Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, 55.4 INT'L. ORG. 1019, 1024-25 (2001). Likewise, even if the use of nuclear weapons in Iraq were favorable in a cost-benefit analysis, the "nuclear taboo" would prevent a nation from doing so because the norm of non-use has been internalized. *Id.*

23. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1958-62 (2002) (noting that the difficulty in determining which norms will be internalized in Koh's model and that Franck's model does not address why or when the 'compliance pull' of a legitimate international law will override conflicting state interests); Guzman, *supra* note 16, at 1836.

24. For example, there is a normative reason why the United States does not invade the Bahamas.

25. Caron, *supra* note 5 at 404.

26. *Id.* at 415 ("The logic of this group [the adjudicators] may be viewed as one of self interest expressed in the ability to be retained as an adjudicator, hired within another institution as an adjudicator, or maintain and increase their reputations . . . . The logic of the secretariat is similar to that of the adjudicators.").

regard, the adjudicators' and administrators' interests are in line with a larger institutional interest in garnering political power and control over the other actors.<sup>27</sup> It is worth noting that the community of member states controls the judicial nomination and selection processes.<sup>28</sup> Therefore, it is possible that any given judge may be willing to act against the interests of the court if the judge believes, due to patriotic norms or out of a rational expectation of reward at the end of his or her term, that the interests of his or her nation deserve more consideration than those of the court. Although this is possible, this paper will presume that instances such as these are in the minority, and that the majority of adjudications are preformed in a manner supportive of the institution. This logic does not apply to the administrators because the judges in both the Inter-American Court of Human Rights and the European Court of Human Rights elect chief administrators.<sup>29</sup> The presumption that the aggregate and default preference of adjudicators is to support the court suggests that the administrators are chosen for their ability to advance the institution. Therefore, judges, administrators, and the court as a whole presumptively pursue the same strategic goals.<sup>30</sup>

How the court pursues its goals is less obvious. Within the strategic space model, political power manifests in three discrete powers: the power to act independently of constraints imposed by the other actors, the power to affect the boundaries of the space by creating and defining the binding treaties, and the power to control other actors' ability to act. The court's authority to issue binding decisions provides the legal basis for a court to order specific acts of the member states. Likewise, when the court issues a decision, it is also acting in a law-making fashion and is thus able to define the boundaries of the strategic space. These powers of binding decisions and law making are limited by the political constraints imposed upon the court by other actors. For example, compliance with any given decision may not be in a defendant-state's interest. Also, the community of member states might react to a court's overreaching in either capacity by retaliating via cutting the court's budget or amending the treaty or procedural rules.

Because it is within the court's interest to develop its capacity to issue binding decisions, a probable goal of any regional court is to develop a norm of obedience within its community of member states.<sup>31</sup> Although Harold Koh

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27. *Id.*

28. Statute of the Inter-American Court of Human Rights, *supra* note 1, arts. 6-9; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 22. Statute of the Inter-American Court of Human Rights art. 1, Oct. 31, 1979, O.A.S. Res. 448, 9th Sess. ("The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.")

29. Rules of Procedure of the Inter-American Court of Human Rights (entered into force Jan. 1, 1997), <http://www.cidh.org/Basicos/basic16.htm>; European Court of Human Rights, Rules of the Court, Rules 8-18 (Oct. 2005), <http://www.echr.coe.int/eng>.

30. However, as Professor Caron notes in the introduction to this issue, the administrators and adjudicators may be in conflict over control of the court. Caron, *supra* note 5 at 415.

31. Richard S. Kay characterized this as when the treaty and the court become genuine sys-



does not provide a method for predicting when, or if, a given externally imposed norm will become dominant in a nation state, he did outline four stages within the norm integration process: interaction with the norm promoting agent, interpretation of the norm, internalization of the norm (in which "agents of internalization" attempt to coerce domestic agents to obey the norm in specific instances), and eventual obedience to the norm.<sup>32</sup> In short, the court will reach its goal of political independence by repeatedly issuing judgments that increase interaction and interpretation with which states comply, thereby establishing a norm of obedience.

This also relates to the court's jurisdiction, which, in theory, is bound by the text of the treaty, but is effectively limited to the extent of the court's political reach. Each time a court accepts a case, it is claiming that a specific fact pattern falls within the strategic space, thus opening the door to rule upon similar subject matter in the future.<sup>33</sup> As Professor Jenny S. Martinez noted, "over time, the habit of obedience to judicial decisions becomes ingrained, allowing them [the courts] to issue decisions that are more controversial and still achieve a comparable level of compliance."<sup>34</sup> Thus, compliance by member states begets greater compliance, and increases the court's ability to expand its jurisdiction and shape its strategic space.

However, the court can also expand its jurisdiction on the basis of the power of its reasoning through incrementalism, which is to "edg[e] principles forward while deciding for those most likely to oppose them in practice."<sup>35</sup> In other words, a decision in which a court finds for a defendant-state may include loaded language that the court will rely upon in a later case. Each iteration chips away at the limits on the court's judicial authority.<sup>36</sup> The recent decision by the ECHR in *Bekos and Koutropoulos v. Greece* illustrates this approach. At issue was whether Greece was liable for degrading treatment on the basis of the victims' race or ethnic origin.<sup>37</sup> The court found that the Greek police had arrested the victims, two Romani men, and had treated them inhumanely,<sup>38</sup> but dismissed the allegation that the treatment was racially motivated because the plaintiffs did not meet the necessary "beyond a reasonable doubt" standard of proof.<sup>39</sup> In so holding, the European Court of Human Rights noted that it "has

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tems of law and "any doubts we may have about a particular exercise of legal authority are swamped by our prior, and more basic, adherence to the legitimacy of that authority." Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217, 218 (1993).

32. Koh, *supra* note 16, at 643.

33. Helfer & Slaughter, *supra* note 15, at 314-18 (identifying the strategy of expanding political power through incremental rulings).

34. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 448 (2003).

35. Helfer & Slaughter, *supra* note 15, at 315-18.

36. *Id.*

37. *Bekos and Koutropoulos v. Greece*, App. no. 15250/02, ¶¶ 63-68 (2005), available at <http://echr.coe.int/eng>.

38. *Id.* ¶¶ 42-55.

39. *Id.* ¶¶ 63-68.

not excluded the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and—if they fail to do so—find a violation of Article 14 of the Convention on that basis.”<sup>40</sup> In other words, the high “beyond a reasonable doubt” standard remains, but the court implied that it is not bound to maintaining this standard in similar situations in the future. Each time the court reasserts its ability to deviate or change the standard, it is creating case law which legitimates any potential future decision to do so. However, by not actually changing or deviating from the established standard, the court does not provide a strong reason for a member state to reject the decision. In sum, the ECHR expanded its power through its law making ability by defining its own power, but still made a politically convenient decision that will elicit the consent of the member states. Although this is a very slow means of expanding political power, the risks of extending a court’s power in this way are relatively low and there are sizable potential benefits from reliance on this strategy, as discussed *infra*.

Finally, it is important to recognize that noncompliance is just as detrimental to developing a court’s political power as compliance is essential. When a court issues a decision that is ignored, a state’s noncompliance could signal that the court lacks authority on a particular subject matter, and it may even initiate a norm of noncompliance for either the state or the community.<sup>41</sup> Acts of noncompliance do not occur in a void, but are dependent on a court’s history of ruling on the issue at hand.<sup>42</sup> Thus, an act of noncompliance by a member state will be seen as less legitimate if other member states have complied in similar situations; conversely, an act of noncompliance will be most legitimate when the court is expanding its jurisdiction.<sup>43</sup> However, if the court avoids handing down judgments that push the boundaries of what member states will accept and enforce, the court is establishing a norm of noninterference in ongoing violations.<sup>44</sup> Because a court faces a Hobson’s choice when presented with a novel fact pattern, a court, in its selection of cases, walks a fine line between maintaining the court’s political authority through the issuance of judgments that it can reasonably expect to be enforced by member states, and pushing the upper limit of its power by selecting cases that will nudge member states into fuller compliance with human rights norms without undermining its efforts by overreaching.

### B. The Parties

Part of what makes regional courts of human rights unique is the relation-

40. *Id.* ¶ 65.

41. Helfer & Slaughter, *supra* note 15, at 283 (observing that other states pay attention to the precedential value of a nation’s decision to comply).

42. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL L. REV. 899, 952 (2005).

43. *Id.* at 952.

44. This is presuming that Harold Koh’s theory cuts both ways, which I believe it does. See Koh, *supra* note 16.

ship between the parties. In cases before a court of human rights, the defendants are exclusively states that are members to the court's organic treaty.<sup>45</sup> The plaintiffs are either the victims of an alleged human rights violation or institutional bodies acting as proxies for the interests of the victims.<sup>46</sup> Thus, a prototypical case before a regional court of human rights is one in which an individual sues his/her government.

The primary interest of each party before a regional court of human rights is to obtain a favorable ruling.<sup>47</sup> Although the specific subject matter may vary, victory and defeat for either side of the litigation will normally have similar consequences due to the specialized nature of regional courts of human rights. In the case of a victory by a plaintiff-victim, the court will issue a ruling defining a specific set of facts to be true, and holding that these facts compose a violation of the governing treaty according to the court's interpretation of the treaty. The consequence of this will be a prohibition against member governments acting in such a manner in the future. Contrariwise, in finding for the defendant-state, the court is either rejecting the plaintiff's facts, or granting member states the authority to treat their citizens in the manner alleged by the victim-plaintiffs.<sup>48</sup>

The central issue in litigation before a regional court of human rights is the determination of acceptable and unacceptable state behavior. The political consequences are three-fold. First, for the reasons discussed above, the court has a strong incentive to exert its political authority and rule against the government if compliance is probable. Second, unlike most international courts, failure to comply with decisions of regional courts of human rights does not carry a threat of retaliation from the plaintiff party.<sup>49</sup> The plaintiff-victim is unable to take any action as a result of noncompliance, such as the political retaliation or economic and military sanctions that a plaintiff-state could use to force compliance

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45. Organization of American States, American Convention on Human Rights, art. 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>. (Only the States, Parties and the Commission shall have the right to submit a case to the Court); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, arts. 33-34 (permitting inter-state cases and allowing individuals to bring a case against another member state, respectively). However, the vast majority of cases before the ECHR are brought under Article 34. See John Cary Sims, *Compliance Without Remands: The Experience Under the European Convention on Human Rights*, 36 ARIZ. ST. L.J. 639, 641 (2004).

46. The Inter-American Court of Human Rights only allows the Commission and member states to be parties before the Court, but the new Rules of Procedure effective on January 1, 1997 allow the individual victim to play a significant role in the litigation. See Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 29, art. 23; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 34 (allowing individuals to bring a case against another member state).

47. See Caron, *supra* note 5 at 417-18.

48. Martin Shapiro would argue that the court is also imposing the interests of the regime upon the context. In this case, the court may be doing so, or it may be imposing its own interests, independent of the regime of member states. See *infra* Part IV.

49. Arguably, this is not significantly different from many instances in other forms of international litigation insofar as the differences in power between a global or regional power and a less-developed nation may make any threat of retaliation meaningless.

in other international adjudication mechanisms.<sup>50</sup> Third, and perhaps most importantly, because the parties are a state and a citizen, human rights are an intentional limitation on the traditionally recognized right of a government to (1) act in its own interest, and (2) define what is best for its people.<sup>51</sup> Therefore, a judgment by a court of human rights is an order by an international institution that can define the balance of power between the government and the citizenry.<sup>52</sup>

Because a ruling can severely constrain a government's dominion over its citizens, this paper will presume that obeying such a decision is contrary to any defendant-state's immediate interests.<sup>53</sup> The fact that a regime takes such an action in the first place demonstrates that the government believes that the action is in its interest.<sup>54</sup> Additionally, the regime's defense of the action suggests a desire to retain the legal authority to act in a similar manner in future.<sup>55</sup>

This is not to imply that all nations who fight for increased governmental power do not support human rights. For example, many cases within the European system of human rights are "along the thinly marked border between the legitimate exercise of public authority on behalf of the community and the irreducible claims of individual liberty."<sup>56</sup> Alternatively, the state may lack the capacity to fulfill its obligations under the treaty (for example, fair trials are expensive and resource-intensive).<sup>57</sup> In either instance, the government may support the principles that are laid out in the treaty, but vigorously disagree with the court's interpretation of how these obligations should be implemented. By virtue of the fact that the court does not adopt the state's rationale, this paper

50. Hathaway, *supra* note 23, at 1956 (noting that economic and military sanctions "are so costly, they are rarely administered and tend to be intermittent and ad hoc, and hence unlikely to serve as legitimate, effective deterrents") (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

51. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, at 871-76 (1990) (making an argument that human rights have effectively changed the notion of sovereignty to one of legitimacy in terms of representing, though not necessarily democratically, its citizenry); see also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 64 (2003) (describing a dichotomy of "sovereign nation, local culture, and political legitimacy" as codified in a nation's constitution versus "international, indeed universal, values that are thought to transcend the particularism of the nation").

52. See, e.g., Reisman, *supra* note 51, at 871-76.

53. Hathaway, *supra* note 23, at 1938 (arguing that human rights treaties are contrary to a state's interests).

54. *Id.*

55. Yoo & Posner, *supra* note 2, at 14-22.

56. Farer, *supra* note 4, at 512. However, the European member states have their own history of openly violating human rights. See, e.g., Bekos & Koutropoulos v. Greece, App. No. 15250/02 (2005), at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=5073229&skin=hudoc-en&action=html&table=1132746FF1FE2A468ACBCBD1763D4D8149&key=46072&highlight=Koutropoulos%20%7C%20Greece> (last visited Dec. 19, 2005) (finding the Greek state responsible for the inhumane and degrading treatment of two Romani men by the police force and the subsequent failure to conduct an effective official investigation).

57. David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U.L. REV. 879, 884 (2003).

will assume that a government will find adverse decisions to be contrary to its interests. Such decisions create a tension between the state's desire to govern as it sees fit, and its obligation to human rights.

### C. The Community of Member States

Given that the community of member states consented to abide by the treaty and are the sole enforcers of its provisions, the generalized interest of the community would appear to suggest strong support for the principles within the treaty at first glance.<sup>58</sup> Logically, if a state has committed to the idea of living up to and enforcing the principles in a human rights treaty, then it makes sense to assume that the state also enforces similar laws domestically.<sup>59</sup> This is not necessarily the case. States that sign regional treaties of human rights are marginally more likely to violate human rights than similar non-ratifying states.<sup>60</sup> In fact, a government's human rights record actually regresses post-ratification in some cases.<sup>61</sup> This suggests that some states may join regional human rights regimes for reasons beyond protecting human rights on a regional level.<sup>62</sup>

Some authors have suggested that states join human rights treaty regimes out of a desire to be perceived as a nation that supports the norms in the treaty rather than any sincere willingness to see the treaty enforced.<sup>63</sup> This is because the benefits of ratifying a human rights treaty with a strong enforcement mechanism extend beyond human rights. Submission to the jurisdiction of a human rights regime is correlated with regime stability, a willingness to observe a re-

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58. In the case of the European Court of Human Rights, the Committee of Ministers is explicitly charged with "executing the judgments of the court." See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 1, art. 46.2. The Inter-American system differs slightly by empowering domestic courts to execute the portion of the IACHR's judgments that stipulates compensatory damages. Other enforcement actions such as policy changes or governmental reform are purely the responsibility of the defendant-state. Organization of American States, American Convention on Human Rights, art. 68.2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."). Although the treaty does not explicitly empower other member states to enforce its decisions, Article 65 enables the Court to inform the OAS General Assembly of noncompliance, and the OAS is free to adopt whatever political measures it deems appropriate, and is thus the *de facto* enforcer. See Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 349-55 (1995); Thomas Buergerthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 241 (1982).

59. Hathaway, *supra* note 23, at 1962-63 (noting that strict realist theories would predict no change domestically because some realists view treaties as nothing more than "cheap talk").

60. *Id.* at 2015-17; see also Todd Landman, *Measuring Human Rights: Principle, Practice, and Policy*, 26 HUM. RTS. Q. 906, 915 (2004) ("Using the notions of principle and practice for global analysis shows that regimes frequently make formal commitments to human rights treaties but continue to violate human rights.").

61. Hathaway, *supra* note 23, at 2015-17.

62. See Moore, *supra* note 57, at 889-901 (outlining a rational choice model of human rights compliance in which states ratify and comply with human rights treaties to increase economic investment); see also Hathaway, *supra* note 23, at 2015-17.

63. See Moore, *supra* note 57, at 889-901; see also Hathaway, *supra* note 23, at 2015-17.

strained form of government, and the promise of an independent judiciary.<sup>64</sup> All of these characteristics indicate that investments within a nation with such a government are secure and will not be expropriated.<sup>65</sup> Additionally, committing to a human rights regime offers political rewards by further integrating the state into international society, thus mitigating the dangers associated with political marginalization from the international community.<sup>66</sup> Finally, these political and economic benefits are particularly significant in the regional context because states' proximity to each other necessitates an increased level of interaction and trust.<sup>67</sup>

The most obvious means of obtaining these rewards is to make a concrete commitment to human rights both internationally and domestically. However, complying with human rights norms is politically costly because it constricts governmental power and economically costly because enforcement and regulation is not cheap. Thus, nations who are not ideologically committed to human rights will seek to reap the benefits of being perceived as human rights compliant without incurring the costs of doing so. Some countries will attempt to avoid these costs by finding more cost-effective means of presenting a "human rights compliant" image—such as ratifying human rights treaties but then minimizing cost by only marginally complying.<sup>68</sup>

This is not to say that submitting to the jurisdiction of a regional court of human rights is without its costs by any means. If a state has joined a regional human rights treaty, so long as individual victims (or effective proxies) can bring suit before the court, the state will be subject to a potentially effective means of monitoring its compliance with the treaty.<sup>69</sup> However, it is an imperfect monitoring mechanism, and thus many violations will go unrecorded.<sup>70</sup> Additionally, the glacial pace of litigation before a regional court of human rights allows states to achieve short-term goals by violating human rights, and then apologizing for it years later when the case finally reaches a regional court

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64. Moore, *supra* note 57, at 882-88; Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 84-93 (2002); Jack Donnelly, *Human Rights, Democracy, and Development*, 21 HUM. RTS. Q. 608, 610 (1999) ("[C]ivil and political rights, by providing accountability and transparency, can help to channel economic growth into national development rather than private enrichment.").

65. Moore, *supra* note 57, at 882-88; Farber, *supra* note 64, at 84-93. This is not to say that making a commitment to human rights is the only means of communicating a willingness to protect investments or that the regime is stable, but it is an indicator.

66. Hathaway, *supra* note 23, at 2015 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

67. *Id.* ("[I]n the regional context, the need to be an accepted member in what Chayes and Chayes term the 'complex web of international arrangements' is particularly strong, as membership brings with it an array of economic and political benefits, and exclusion poses dangers.").

68. Moore, *supra* note 59, at 882-88; Farber, *supra* note 64, at 84-93.

69. Moore, *supra* note 59, at 882-88; Farber, *supra* note 64, at 84-93. The Inter-American Court of Human Rights only allows the Commission and member states to be parties before the court, but the new Rules of Procedure effective on January 1, 1997 allow the individual victim to play a significant role in the litigation. See Rules of Procedure of the Inter-American Court of Human Rights, *supra* note 29, art. 23.

70. See Hathaway, *supra* note 23, at 2017.

of human rights.<sup>71</sup> Although there is a cost in such apologies, the temporal distance between the violation and adjudication of the case can ameliorate some of the costs of compliance.

Thus, the costs are potentially high, but those costs come in the intermediate to long term. Considering the transitory nature of many governmental regimes, a ratifying government may rationally expect future administrations to be forced to bear most of the costs of membership. These nations usually remain committed to the treaty because governments that inherit a commitment to a regional court of human rights are constrained in their ability to withdraw from the regime because of the signal that it would send to their citizens and to the community as a whole.

This suggests a continuum of political agendas within the community of member states. On one hand, there are the nations that have an ideological commitment to the values within the treaty; on the other is the class of member states who wish to reap the benefits of the appearance of a pro-human rights stance, but have no desire to enforce the norms domestically.<sup>72</sup> Because of their willingness to be perceived as pro-human rights, these nations may further signal their commitment by supporting the enforcement of decisions against other parties, but even the threat of enforcement is politically costly, so the viability of such a strategy is context dependent.<sup>73</sup> Likewise, these states can be expected not to openly undermine adverse decisions from the court because this would undermine their credibility as a trustworthy member of the treaty.<sup>74</sup>

#### *D. The Outsiders*

The final category of actors is the “outsiders,” those who have an investment in the outcome of any given proceedings but have no role within the court.<sup>75</sup> Prominent examples are UN bodies, international human rights advocates, states that may potentially join the jurisdiction of the human rights court, and international investment agencies.<sup>76</sup> Although these actors have no official role in the court, they can play a prominent role in eliciting compliance with a court’s decisions.<sup>77</sup> The range of interests and political agendas of this category is exceptionally diverse, ranging from the economic incentives of investment agencies, to economic and political incentives for compliance from extra-regional states, to domestic activism by human rights organizations.<sup>78</sup>

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71. See *id.* at 2010-14.

72. See Moore, *supra* note 57, at 903; Hathaway, *supra* note 23, at 2015-18. It is worth mentioning that this second class of member states may nevertheless desire to see the court impose the norms on the other member states.

73. Moore, *supra* note 57, at 906

74. Moore, *supra* note 57, at 905; Hathaway, *supra* note 23, at 2016.

75. See Caron, *supra* note 5, at 416.

76. *Id.* The same logic holds true for both public and private investment. See Moore, *supra* note 57.

77. See Helfer & Slaughter, *supra* note 15, at 311-12, 331-36; Koh, *supra* note 16, 646-49.

78. For example, distribution of U.S. humanitarian aid is directly linked to a nation’s actions

Both liberal and transnational theories of legal process place a premium on the role of subnational entities in eliciting compliance with international court decisions and norm internalization.<sup>79</sup> Unfortunately, neither theory can predict when either the norm will be internalized or when the subnational actors aligned with an international institution will force a nation to comply.<sup>80</sup> Considering the cacophony of voices in the outsider category, it is important to recognize their potential to affect specific decisions and influence the dynamics within the strategic space, but it is impossible to account for all the instances in which they may be relevant.

#### IV. THE ROLE OF THE COURT

Regional courts of human rights are in an inherently delicate position. They advance their interests by eliciting state compliance with their judgments, but have minimal power to elicit such compliance. Instead, courts must rely on a combination of the defendant-states' willingness to comply, the threat of political sanctions from other members of the community, their own powers of persuasion, and the political capacity of entities outside of the strategic space to elicit compliance. In sum, courts possess little power inherent to their position vis-à-vis the community of member states and even defendant-states. Nevertheless, the European Court of Human Rights unquestionably has significant political power over its jurisdiction, and there is a growing body of evidence that suggests the Inter-American Court is strengthening over time.<sup>81</sup> This suggests that the regional courts of human rights may mature to politically powerful institutions despite structural handicaps. This section will illustrate how a regional court of human rights can erode the political and structural limitations imposed by its community of member states, and thus positively impact a community's observance of human rights on a long-term basis.

##### *A. The Balance of Power Overwhelmingly Favors the Community*

According to Martin Shapiro, when a court imposes preexisting rules, the court is imposing the interests of the politically powerful who created the laws pertaining to the dispute.<sup>82</sup> In the words of Shapiro, this is because

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in combating human trafficking. See, e.g., Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7104 (2003).

79. Helfer & Slaughter, *supra* note 15, at 311-12, 331-36; Koh, *supra* note 16, 646-49.

80. See, e.g., Hathaway, *supra* note 23, at 1953-54 ("[liberalism] can be reduced to the unenlightening truism that if a country acts in a particular way, it must be because domestic politics made it do so"); Guzman, *supra* note 16, at 1835 (noting that transnational legal processes fail to explain how repeated interaction with transnational actors supplants pre-existing norms, or the dominant norm of acting in the state's interests).

81. See Posner & Yoo, *supra* note 2, at 63-66 (noting the direct impact of the European Court of Human Rights on changing state's behavior); Pasqualucci, *supra* note 58, at 349-53 (discussing the developing powers of the Inter-American Court of Human Rights).

82. Shapiro, *supra* note 19, at 26.



[t]he law must come from somewhere. Whether its origin is in custom or in the systematizing of earlier judgments, in the fiat of the rulers, or in some legitimated process of legislation, its very nature as a general rule applicable to future situations imports some element of social concern beyond the particular concerns of the particular disputants.<sup>83</sup>

In arguing that the law is manifest of a state's interests and independent of the interests of the two disputants, Shapiro assumes that the law at issue is an accurate reflection of the regime's interests.<sup>84</sup> Although reasonable in most instances, this is not necessarily the case in a regional court of human rights because of the diversity of interests and motivations of member-states within the community. This theoretically could result in the court imposing limits upon the community that are contrary to the community's wishes. In reality, however, this will rarely happen. This section will argue that the balance of power between the court and the community of member states forces the court to approximate the "servant of the regime" in Shapiro's prototype.

The primary reason courts will attempt to mimic the interests of the community is to avoid any potential backlash resulting from perceived judicial overreaching. The consequences of a court miscalculating the limits of member states' willingness to apply a progressive interpretation of a treaty could lead to political retributions such as reduced funding, less enforcement support from the community in the future, the reappointing of judges, public statements that undermine the court, or any one of a list of mechanisms available to the community to constrain what they view as "judicial activism."<sup>85</sup> In fact, the community of member states can easily counteract any attempts at judicial expansion if they so choose. A series of negative public statements by politically powerful states would be one of the clearest means of undermining the court, as it would encourage a tolerance of defendant-states' noncompliance.<sup>86</sup> Such actions would set a clear precedent that the court has no authority to adjudicate the issues in question and undermine the court's (potentially long running) attempts at developing a habit of obedience on the issue.<sup>87</sup> Regardless of whether the community uses this tactic or relies on more subtle means of admonishing the court, the costs of judicial overreach are sufficiently high to encourage a conservative approach to applying treaty norms.

This places great pressure on a court to determine the community's interpretation of the law and apply it in such a way that the court stays within the bounds imposed upon it by the community. The European Court of Human Rights has explicitly addressed this issue with the advent of the "margin of ap-

83. *Id.* at 25-26.

84. *Id.* at 26 (Shapiro explicitly assumes that a court is "a servant of the regime, imposing its interests on the parties to the litigation.").

85. Helfer & Slaughter, *supra* note 42, at 945-53; see, e.g., Clare Dyer, *Law Lord Hits Back at Politicians After Attacks on Judges*, *The Guardian* (London), Sept. 15, 2005 (reporting that British Conservative leader Michael Howard characterized some rulings by the European Court of Human Rights as "judicial activism").

86. Helfer & Slaughter, *supra* note 42, at 952.

87. *Id.*

preciation" doctrine. The margin of appreciation doctrine is essentially the court's practice of deferring to states when the court feels that there is insufficient consensus amongst the member states to rule against a state and, conversely, the practice of citing to consensus as a justification for rulings against a state.<sup>88</sup> In other words, the doctrine allows a regional court of human rights to explicitly poll the states for guidance rather than applying the law independently.<sup>89</sup> As a result of its *ad hoc* nature, "the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."<sup>90</sup>

The extra-legality of the margin of appreciation doctrine has raised some eyebrows.<sup>91</sup> This doctrine is not mentioned anywhere in the European Convention itself or in the Convention's *travaux préparatoires*.<sup>92</sup> It is a completely court-created device that simultaneously allows the court to enforce deviations from community standards while deferring judgment in controversial issues that lack a clear consensus. As a result, the court is not independently applying the treaty to the merits of each case, but rather gauging the political winds of the community in deciding whether a fact pattern qualifies as a violation of the treaty.<sup>93</sup> While some have decried this practice of selective justice because of its political nature, the margin of appreciation doctrine is in many ways less a doctrine than a simple fact of the political realities that limit the court's authority. In the words of one scholar, "the margin of appreciation is the natural product of the distribution of powers between the Convention institutions and the national authorities, who share the responsibility for enforcement."<sup>94</sup> Because the doctrine of the margin of appreciation is a natural extension of how the strategic space is designed, the court must have a clear awareness of the community's consensus opinion in any given case if it is to avoid the dangers of overreaching and reap the advantages of compliance.

Given the less-than-transparent motives of the member states, the challenge to the court lies in obtaining that clear awareness of the community's consensus. As previously mentioned, any given state will fall somewhere along a continuum bound by two poles: the prototypical norm-advancer and the prototypical signaler state.<sup>95</sup> The norm-advancer supports a broad application of the treaty in general, and the signaler is apathetic to enforcing human rights, if not privately

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88. See Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115-16 (2004).

89. Helfer & Slaughter, *supra* note 42, at 953-54 (describing the margin of appreciation doctrine as acknowledging "the virtues of deferring to domestic actors and considering the broader political climate in which national governments will receive their decisions").

90. Rasmussen v. Denmark, 87 Eur. Ct. H.R. (ser. A) 15 (1984).

91. Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 627-34 (2001).

92. *Id.*

93. See, e.g., *id.*; Brauch, *supra* note 88, at 137-38.

94. Gross & Aoláin, *supra* note 91, at 626.

95. See *supra* Part III.C.

hostile, to interference in its domestic affairs by the court. The location of any given state on this continuum will depend on the issue at hand. Each state's willingness to enforce a court's ruling will also vary per case depending on the relationship between the defendant-state and any potential enforcer-states.<sup>96</sup>

Similarly, each state will have varying degrees of political capacity to enforce a judgment if they wish to do so.<sup>97</sup> For example, when considering a case involving defendant-state X, the European Court may place more relevance on the will of Germany and France to enforce a decision adverse to state X than the willingness of Liechtenstein and Andorra to enforce. This is not to say that regional courts of human rights are extensions of political hegemonies. Politically powerful states may be either uninterested in an issue, unwilling to use political capital against a specific state, or even mildly hostile to the decision. Thus, a context may arise when a regional court of human rights can expect sufficient enforcement support from a wide base of less hegemonic states to rule against a defendant-state. The point is that, prior to issuing a judgment, a regional court of human rights must estimate the relative will to enforce based upon how important the case might be to the individual member states, their relative political power, and the community's aggregated willingness and ability to enforce a judgment against a particular defendant-state.

While in some cases the community's preferred ruling is clear and the court's ruling is therefore predetermined by the will of the community, in any other circumstance it is in the best interest of a court to take a conservative stance towards interpreting the treaty.<sup>98</sup> Along with the costs of overreaching, the court must consider political costs of creating a situation in which the community must enforce one of its judgments. Just as the determination of the general consensus is something of a guessing game for the court, it is likely a similar problem for the defendant-state. Thus, if a court is unsure as to the general will, the defendant-state may feel sufficiently bold to test the supposed consensus. This will elicit either enforcement pressure or tolerance from the other community members—or, given the split interests, probably a little of both. Clearly, tolerance of noncompliance is counterproductive for the court's purposes, but so is over-reliance on enforcement, or the threat thereof, by other member states.<sup>99</sup> This is because political or economic coercion is costly to the enforcer-state, and over-reliance on enforcement will generate tension between the court and its most supportive member states.<sup>100</sup> In overly relying on coer-

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96. See Helfer & Slaughter, *supra* note 42, at 947-48 (noting that uneven distributions of power among states within a community can circumscribe international adjudication in multiple ways).

97. See *id.*

98. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 851-53 (1999).

99. Hathaway, *supra* note 23, at 1956 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995)).

100. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 629 (2004).

cion, especially in questionable cases, a court may be straining its relationship with the member states that sincerely support it.

Thus, when issuing an adverse decision, a court is limited in its ability to press beyond the consensus norms of the community states. Even in the case of close calls, it is in a court's advantage to have a conservative strategy to avoid causing friction between states. If this were the extent of the court's powers, the court would be able to do little more than prevent the erosion of established human rights norms, and thus be relegated to merely enforcing the status quo. Fortunately, regional courts of human rights have other mechanisms available to them that are not within the exclusive control of their communities, thereby allowing courts to affect communal change by eroding the barriers to its authority.

### *B. The Role of the Court*

As illustrated above, the relationship between the court and the community leaves little room for regional courts of human rights to advance the cause of human rights. This is because a court is able to operate most effectively while enforcing the aggregate will of its regime. Because a regional court of human rights cannot impose its interpretation of a treaty upon the community, the most a court can do is eliminate deviations from the community norm.<sup>101</sup> However, a court's most significant contribution to human rights within the community is the increased efficiency with which deviations from the consensus standard can be eliminated. By consolidating the "enforcement will" of the community and providing access to individual victims of human rights violations, the court can have a large impact on human rights within the community by eliminating harmful deviations from the standard that would otherwise go unaddressed.

On one hand, the interests of the regime act as a ceiling insofar as a court cannot rule more progressively than what the community dictates. On the other, the presence of a court also provides the community with a floor insofar as deviations below the community standard are intolerable. Arguably, community standards acting as both a floor and a ceiling is a truism, but the contribution of a court is important in that it provides a centralized mechanism for bringing back into compliance recalcitrant states that have slipped below the community standards, either as a result of backsliding or a failure to keep up with the rest of the community's progress. For example, in *Dudgeon v. United Kingdom*, the European Court of Human Rights found an anti-sodomy law in violation of the plaintiff's right to private life.<sup>102</sup> Although the United Kingdom argued that the Court's own precedent explicitly allowed the regulation of sexual relations in furtherance of protecting public morals, the court did not directly address the United Kingdom's arguments or its prior rulings.<sup>103</sup> Instead, the court relied upon the fact that numerous states had abolished anti-sodomy laws since it last

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101. Helfer & Slaughter, *supra* note 15, at 316.

102. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

103. *Id.*

addressed similar laws, and found that, in light of the change in the larger community standard, the United Kingdom was in violation of the plaintiff's right to a private life.<sup>104</sup>

In cases such as *Dudgeon*, a court of human rights is serving two specific coordination functions.<sup>105</sup> First, it is coordinating the aggregate political will of the community to impose its standards on deviant states, such as the United Kingdom in the example above.<sup>106</sup> Presuming that all of the member states that had abolished their anti-sodomy laws wanted to force the United Kingdom to abolish its as well, the transaction costs of coordinating the diplomatic effort would have been prohibitive without the assistance of the ECHR.<sup>107</sup> Second, the court acts as a centralized monitor of adherence to a treaty, which primarily benefits the plaintiff. Without this mechanism, the cost for individual to attempt to persuade other member states to pressure the United Kingdom to eliminate the discriminatory law would be comically prohibitive. In this capacity, the court makes it possible for citizens to utilize the collective political enforcement mechanisms that would otherwise be inaccessible to them. The monitoring function jointly performed by plaintiffs and the court will eliminate ongoing violations and prevent regressions. Thus, a court can fill in holes in the floor of the community's standards, including when the community's standards become more progressive, thus raising the floor.

Even though the court is unable to directly challenge community standards and has very little capacity to address ongoing and openly tolerated injustices, both human rights and the court strongly benefit in the long-term from this dependent role. Each time a court is able to issue a judgment that definitively speaks with the voice of the community, not only will the victim-plaintiff benefit in that instance, but also the court's power will increase because each act of subordination by domestic politicians brings member nations closer to a norm of compliance with the court.<sup>108</sup> Similarly, each time the legal system or an activist group relies upon a ruling, that ruling will be incrementally further integrated into the states' domestic legal or civil societies.<sup>109</sup> Theoretically, the norm of obedience to the court will eventually become part of the culture and compliance will become automatic.<sup>110</sup> Richard S. Kay characterized this circumstance as the moment that the regional human rights treaties become "genuine systems of law" and "any doubts we may have about a particular exercise of legal authority are swamped by our prior, and more basic, adherence to the legitimacy of that

104. *Id.* ¶¶ 23-24.

105. Guzman, *supra* note 16, at 1829 (noting that international organizations generally are created to coordinate international interactions, which increases the probability that states will submit to the treaty).

106. Benvenisti, *supra* note 98, at 851-52; Goodman & Jinks, *supra* note 100, at 692-93.

107. Goodman & Jinks, *supra* note 100, at 692-93 (the creation of a formal body to criticize state performance eliminates transaction costs in individual members coercing recalcitrant states).

108. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656-57 (1997); see generally Koh, *supra* note 16.

109. *Id.*

110. *Id.*

authority.”<sup>111</sup>

In light of the ECHR’s continued use of the margin of appreciation, reaching this level of integration takes a very long time, even in favorable conditions. It may even be impossible.<sup>112</sup> It is difficult to predict how much time and effort is going to be expended before a norm becomes part of a society, or even what characteristics make a norm or country more amenable to compliance.<sup>113</sup> However, this “tradeoff of predictive value for explanatory value” does illustrate the true value of enforcing the regime’s will. As the norm of obedience develops, the courts will develop greater powers to push the boundaries of its strategic space and perhaps even begin defining the interests of the community. Until then, a court of human rights must play the more submissive role of coordination and centralization, and be content with providing justice on the individual level and preventing regression from community norms.

## V. CONCLUSION

This paper began by asking what good is a court of human rights. By examining the limits on a court as an actor within a bounded strategic space, the paper has attempted to illustrate that a court will be as good as its community will allow it to be. This raises questions as to the wisdom of establishing a court of human rights in regions without a history of respect for human rights or international institutions. Without the strong dedication of regional powers willing to provide the threat of enforcement, the court will have little power to advance human rights. This does not necessarily doom the court to failure because the role of the court is a dynamic one that will vary as the relationship between the actors within the strategic space changes. Theoretically, this threat could also come from actors within the “others” realm, such as extra-territorial hegemons. However, in the absence of an internal or external will to enforce the judgments, the utility of a regional court of human rights may only become apparent decades down the road, presuming it is able to survive for that long. Nevertheless, once a court can establish patterns of compliance, it can reap rewards for both individuals and the community.

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111. Kay, *supra* note 31, at 218.

112. Guzman, *supra* note 16, at 1836.

113. Hathaway, *supra* note 23, at 1962.