

NOTE

KILLING FOR ART: THE COUNCIL OF EUROPE AND THE NEED FOR A BAN ON THE SLAUGHTER OF ANIMALS FOR ARTISTIC EXPRESSION

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“The time will come when public opinion will no longer tolerate amusements based on the mistreatment and killing of animals. The time will come, but when?”

—Albert Schweitzer

I. INTRODUCTION

A young girl peers through the translucent containers at the goldfish swimming gracefully inside.¹ She laughs joyously at the fish and stares up with glee at her father. “You like them, sweetie?” her father asks, and the young girl smiles and nods. A teenage boy suddenly pushes her aside and slams his hand on a button on one of the containers. A whirling sound of metal violently thrashing through flesh is overpowered by the young girl’s shrieks as she watches the goldfish being liquefied. It is February 2000, and the girl is visiting the Trapholt Art Museum in Kolding, Denmark, with her father. The exhibit they are visiting features live goldfish swimming in blenders and gives visitors the opportunity to press the button on each blender in order to liquefy—and slaughter—the goldfish.² The exhibit was designed by Chilean artist Marco Evaristi to drive people to “do battle with their conscience.”³ The director of the museum was fined for cruelty to animals for hosting the exhibit, but the fine was overturned after a court ruled the fish were killed “humanely.”⁴

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1. The following account is fictional, but based on an exhibit at the Trapholt Art Museum in Kolding, Denmark. See, e.g., *Cruelty Trial Over Goldfish Blender Art*, HERALD SUN (Melbourne), May 14, 2003, at 33 [hereinafter *Cruelty Trial*].

2. *Id.*

3. *Id.*

4. *Liquidising Goldfish 'Not a Crime'*, BBC News (May 19, 2003), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3040891.stm>.

On another continent a few years later, an emaciated dog lay on a floor, too weak to lift his head to observe the passersby.⁵ His leash is inches too short to allow him to reach a bowl of food nearby and written across the walls above, in dog food, is the phrase “Eres Lo Que Lees,” (Spanish for “You Are What You Read”).⁶ This dog, Natividad, is part of an art exhibit by artist Guillermo Vargas that was featured in Códice Gallery, a Nicaraguan art gallery, in 2007.⁷ Natividad, a stray dog, was taken from the streets of Managua, Nicaragua so that Vargas could send a message about the “hypocrisy of paying attention to one dog while thousands of stray dogs starve and die of illness on the streets.”⁸ The controversial exhibit led to an outburst of blog posts, emails, and Internet petitions, all alerting the public to the exhibit in Nicaragua and denouncing Vargas’s cruel use of the dog in his exhibit.⁹ While the reports surrounding the artist’s treatment of the dog, particularly whether the dog lived or died, were conflicting, it is certain that Vargas received no legal sanctions for the incident, as Nicaragua does not have animal cruelty laws, and thus Natividad, as well as all other animals in Nicaragua, are left wholly unprotected.¹⁰

The use of animals by humans for artistic expression is not uncommon.¹¹ In recent years, a number of similar incidents have occurred, and although some individuals responsible for these acts have been taken to court for animal cruelty, there have been no reported convictions for killing animals for artistic expression.¹² While domestic animal cruelty statutes may be broadly interpreted

5. See, e.g., Jennie Yabroff, *Art Aimed to Shock*, NEWSWEEK, May 5, 2008, at 49; Wayne Pacelle, *Art, Examined*, HUMANE SOC’Y U.S. (Apr. 25, 2008), <http://hsus.typepad.com/wayne/2008/04/street-dog-art.html>.

6. Ben Swan, *Off-Leash: Suffering for the Sake of ‘Art’*, SANTA FE NEW MEXICAN, Apr. 27, 2008, at E4.

7. See *id.*

8. According to *The Santa Fe New Mexican*, the city’s daily newspaper, Vargas was quoted as expressing that this was the purpose of his exhibit. See *id.*

9. See, e.g., Belisa Vranich, *The Starving Dog Artist: A Diagnosis*, HUFFINGTON POST (Apr. 20, 2008), http://www.huffingtonpost.com/belisa-vranich/the-starving-dog-artist-a_b_97512.html.

10. After the incident, the Humane Society of the United States commented on these conflicting reports surrounding the fate of Natividad and lamented that “the lack of animal cruelty laws in Nicaragua means that no charges can be sought for the [incident].” See *Starving Dog as “Art,”* HUMANE SOC’Y U.S. (Apr. 23, 2008), http://www.hsus.org/about_us/humane_society_international_hsi/cruelty_issues_around_the_world/starving_dog_as_art_42308.html.

11. See *infra* Part IV.B.

12. In my research, I did not find any convictions for the slaughter of animals for artistic expression. See *infra* note 151 and accompanying text.

to prohibit activity of this nature,¹³ the international landscape is barren when it comes to prohibiting the slaughter of animals purely for artistic expression.

This Note explores both the animal welfare and freedom of expression issues implicated by the slaughter of animals for artistic expression and argues that an international convention should be passed to fill this gap in animal protection laws. Section II addresses the role of the Council of Europe (the Council), an international organization consisting of many European member countries.¹⁴ This Section also considers the Council's ability to effect change in Europe. Section III outlines the role of the European Court of Human Rights (ECHR) and describes the extent of freedom of expression in Europe, established by the ECHR's interpretation of Article 10 of the European Convention on Human Rights (the Convention), which guarantees the freedom of expression to citizens of states that are a party to the Convention. Section IV briefly describes the state of animal welfare law, focusing on the Council's stance on animal welfare issues. Finally, Section V examines whether the Council's previous conventions prohibit the use of animals for artistic expression and argues that a convention barring the use of animals in art would promote the values of the Council and positively impact the European Community. Section V also evaluates the merits of the potential claim that a convention of this sort would violate artists' rights to freedom of expression under Article 10 of the Convention. This Note concludes that the Council should create a new convention to specifically prohibit the slaughter of animals for artistic expression and more generally regulate the use of animals in art.

II. THE COUNCIL OF EUROPE

The Council of Europe is the oldest international organization in the world and was created by the Statute of the Council of

13. Animal Welfare Act, 7 U.S.C. §§ 2131–56 (1990); *Exhibited Animals Protection Act 1986* (NSW) (Ausl.). It is important to note that these domestic animal cruelty statutes have never been enforced to prohibit the slaughter of animals for art, though countless animal advocacy organizations have tried—as was the case in Denmark.

14. Founded in 1949, the Council of Europe is composed of forty-seven member countries and aims to promote human rights across Europe. *Who We Are*, COUNCIL OF EUR., <http://www.coe.int/aboutcoe/index.asp?page=quisommesnous&l=en> (last visited Mar. 28, 2011).

Europe,¹⁵ or the Treaty of London, in 1949.¹⁶ Signed initially by ten Western European nations,¹⁷ the Council now has forty-seven member countries.¹⁸ While the Council has never been granted legislative power, it has given important political recommendations to its member states.¹⁹ Most notable is the Council's creation of the Convention,²⁰ reflective of the Council's objective of "achiev[ing] a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."²¹

The Council is composed of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities, and the Secretary General.²² The Committee of Ministers is the Council's decision-making body and has forty-seven Foreign Ministers, one for each member state.²³ The Parliamentary Assembly, which is the deliberative body of the Council and the "driving force of the Council of Europe," consists of 636 members—318 representatives and 318 substitutes from the forty-seven

15. Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103 [hereinafter COE Statute].

16. "[U]nlike the European Union, which was established primarily to promote pan-European economic unity, the Council of Europe focuses on promotion and protection of political, social, and cultural rights." Anne Lawton, *Regulating Genetic Destiny: A Comparative Study of Legal Constraints in Europe and the United States*, 11 EMORY INT'L L. REV. 365, 367 n.5 (1997).

17. The founding states of the Council of Europe (the Council) are Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. *47 Countries, One Europe*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> (last visited Mar. 28, 2011).

18. The remaining member states, in order of accession, are Greece, Turkey, Iceland, Germany, Austria, Cyprus, Switzerland, Malta, Portugal, Spain, Liechtenstein, San Marino, Finland, Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, Romania, Andorra, Latvia, Albania, Moldova, the Former Yugoslav Republic of Macedonia, Ukraine, Russia, Croatia, Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia, Monaco, and Montenegro. Currently, the Council has one applicant country: Belarus. *See id.*

19. *See* GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 4 (1993).

20. The European Convention on Human Rights (the Convention) has served as an important source of European Community Law. In addition to this Convention, "the Council of Europe has produced a number of international instruments to which its members have adhered or on the basis of which they have enacted legislation." *Id.* at 4.

21. COE Statute, *supra* note 15, art. 1(a).

22. *See How We Work*, COUNCIL OF EUR., <http://www.coe.int/aboutcoe/index.asp?page=CommentTravaillonsNous&l=en> (last visited Mar. 28, 2011).

23. *See About the Committee of Ministers*, COUNCIL OF EUR., http://www.coe.int/t/cm/aboutcm_en.asp? (last visited Mar. 28, 2011).

national parliaments.²⁴ The population of a member state determines the number of representatives from each state in the Parliamentary Assembly.²⁵ The Congress of Local and Regional Authorities represents Europe's regions and municipalities, and it has the ability to consult with both the Committee of Ministers and the Parliamentary Assembly to ensure that local and regional voices are heard.²⁶ Finally, based on the recommendation of the Committee of Ministers, the Parliamentary Assembly appoints the Secretary General for a term of five years.²⁷ The Secretary General, assisted by the Deputy Secretary General, heads the Secretariat of the Council.²⁸

The Council's greatest influence over its European member states lies in its ability to draft conventions or agreements.²⁹ Article 15 of the Statute of the Council of Europe directs that the Committee of Ministers may, on recommendation of the Parliamentary Assembly or *sua sponte*, consider actions that are required to further the aims of the Council.³⁰ If the Committee of Ministers concludes a convention or agreement, the Secretary General submits it to all member states for ratification.³¹ Article 15(ii) stipulates that "within one year of such submission or, where this is impossible owing to exceptional circumstances, within eighteen months, the question of ratification of the convention or agreement shall be brought before the competent authority or authorities in [each

24. See COUNCIL OF EUR., THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, available at <http://assembly.coe.int/Communication/Brochure/Bro01-e.pdf>.

25. See *id.*

26. See Council of Eur., Comm. of Ministers, *Statutory Resolution Relating to the Cong. of Local and Reg'l Auths. of Europe*, art. 2 (2000), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/Resol20001.htm>. Created in 1994 by Statutory Resolution (2000) 1 of the Committee of Ministers of the Council of Europe, the Congress of Local and Regional Authorities of Europe is a consultative body intended to represent "voice of Europe's regions and municipalities in the Council of Europe." *Congress of Local and Regional Authorities*, COUNCIL OF EUR. OFFICE IN MONTENEGRO, http://www.coe.co.me/eng/tdoc_cg/council_of_europe/coe_institutions/?conid=179 (last visited Mar. 28, 2011).

27. See, e.g., Council of Eur., Comm. of Ministers, *Regulations Relating to the Appointment of the Secretary General, Deputy Secretary General, and Secretary General of the Assembly Having the Rank of Deputy Secretary General* (1956), available at http://www.coe.int/t/cm/WCD/basictexts_en.asp (hyperlink listed under "Other Rules"); *Role of the Secretary General*, COUNCIL OF EUR., http://www.coe.int/t/secretarygeneral/sg/Role_en.asp (last visited Mar. 28, 2010).

28. See *Role of the Secretary General*, *supra* note 27.

29. See Statute of the Council of Europe, *supra* note 15, art. 15.

30. *Id.* For information about the types of actions the Committee of Ministers may take, see *About the Committee of Ministers*, *supra* note 23.

31. See Council of Eur., Comm. of Ministers, *Resolution on the Statute of the Council of Europe*, art. 15(i) (1949), available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm>.

member's] country."³² Accordingly, if a member state decides to ratify the convention or agreement, it becomes binding on that state; otherwise, the convention or agreement is not binding.³³

Conventions and agreements concluded by the Council typically become legal obligations when its members enact legislation in order to adhere to the convention or agreement.³⁴ Additionally, the European Union may sign Council of Europe conventions or agreements and then subsequently pass directives, regulations, and decisions in accordance with the Council's conclusion.³⁵ For instance, in 2004, the European Union signed the revised European Convention for the Protection of Animals during International Transport, a convention drafted and ratified by the Council of Europe.³⁶ That the European Union sometimes looks to Council of Europe conventions and agreements for guidance demonstrates the power of the Council.

Membership in the Council of Europe is open to all European states that seek European integration and "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."³⁷ Furthermore, it is not necessary for a state to be a member of the Council of Europe to become a party to one of the Council's conventions or agreements.³⁸

32. *Id.* art. 15(ii).

33. *Id.* art. 15(iv).

34. *See, e.g.*, BERMANN ET AL., *supra* note 19, at 4.

35. Paige M. Tomaselli, *International Comparative Animal Cruelty Laws*, ANIMAL LEGAL AND HIST. CTR. (2003), <http://www.animallaw.info/articles/ddusicacl.htm>. In fact, "[l]egislation within European countries and EU directives and regulations have usually been preceded by recommendations from Council of Europe committees." Donald M. Broom, *Introduction—Concepts of Animal Protection and Welfare Including Obligations and Rights*, in ANIMAL WELFARE 21 (Council of Europe ed., 2006).

36. Press Release, European Comm'n, *EU Signs Council of Europe Convention on International Animal Transport* (June 21, 2004), available at http://ec.europa.eu/food/animal/live-animals/i04_773_en.pdf. The European Union has also signed onto the Council of Europe's conventions with regard to pets, farm animals, slaughter, and animal experimentation. *Council of Europe Background*, WORLD ANIMAL.NET, <http://www.worldanimal.net/component/content/article/13-animal-protection-law/48-council-of-europe-background> (last visited Mar. 28, 2011).

37. COE Statute, *supra* note 15, art. 3. Although it is not explicitly expressed in the statute, to become a member of the Council of Europe, a state must guarantee democracy. *See, e.g.*, Eur. Parl. Ass., *Resolution 1636 on the Indicators for Media in a Democracy* (2008), available at <http://assembly.coe.int/Documents/AdoptedText/ta08/ERES1636.htm>.

38. *See, e.g.*, *About Conventions in the Council of Europe Treaty Series*, COUNCIL OF EUR., <http://conventions.coe.int/general/v3IntroConvENG.asp> (last visited Mar. 28, 2011).

III. FREEDOM OF EXPRESSION IN EUROPE

A. *The European Convention on Human Rights and the European Court of Human Rights*

Signed in the wake of the atrocities of World War II on November 4, 1950, the Convention intends to protect individual rights and fundamental freedoms.³⁹ Since the Council of Europe's inception, all its members are required to accede to the European Convention on Human Rights⁴⁰ and the majority of the states that are party to the Convention have passed national legislation designed to implement the provisions of the Convention.⁴¹ Regardless, any national law that conflicts with the Convention is considered invalid and the judgments of the ECHR are deemed binding, as the Convention operates under the common law system.⁴²

The ECHR, a human rights tribunal created by the Convention, fulfills the objectives of the Convention and is open to any individual who believes his or her rights under the Convention have been violated.⁴³ In practice, the ECHR exercises the power of judicial review and functions as a supervisor of the national courts. The ECHR generally grants great deference to national courts because it recognizes their ability to better understand the unique needs of the states in which they sit.⁴⁴

B. *Article 10's Guarantee of Freedom of Expression and Its Limits*

Article 10 of the Convention guarantees the right to freedom of expression in states that are parties to it.⁴⁵ In judgments interpreting this right, the ECHR repeatedly acknowledges the importance of freedom of expression to democratic societies, stating as follows:

39. Convention on the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Human Rights Convention], available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>, amended by Protocol No. 11, May 11, 1994, E.T.S. No. 155 (entered into force Nov. 1, 1998), Protocol No. 14, May 13, 2004, C.E.T.S. No. 194 (entered into force June 1, 2010).

40. Eur. Parl. Ass., *Resolution 1031 on the Honouring of Commitments Entered into by Member States when Joining the Council of Europe* (1994), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta94/ERES1031.htm>.

41. DIR. GEN. OF HUMAN RIGHTS, COUNCIL OF EUR., FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2d ed. 2004) [hereinafter GUIDE TO IMPLEMENTATION].

42. *Id.*

43. See Human Rights Convention, *supra* note 39, art. 34.

44. See GUIDE TO IMPLEMENTATION, *supra* note 41, at 6.

45. Human Rights Convention, *supra* note 39, art. 10.

[F]reedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment . . . [s]uch are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."⁴⁶

When an individual alleges before the ECHR that a state restriction has infringed on his or her right to freedom of expression, the state must justify the interference.⁴⁷ In evaluating whether the interference is warranted, the ECHR often considers the type of expression, the manner in which it has been expressed, and the intended audience.⁴⁸

More specifically, Article 10 of the Convention states as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴⁹

The first paragraph of Article 10 identifies three different components of the right to freedom of expression, including: (1) the freedom to hold opinions; (2) the freedom to impart information and ideas; and (3) the freedom to receive information and ideas.⁵⁰ The second paragraph sets forth the circumstances under which a state may limit the freedom of expression, stipulating that there are three requirements the state must meet before a regulation restricting the freedom of expression is upheld.⁵¹

First, the interference must be prescribed by law, which means that the interference typically must result from the enforcement of a national law adopted by the state's legislature.⁵² The ECHR has

46. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 26 (1986).

47. *See, e.g.*, DIR. GEN. OF HUMAN RIGHTS, COUNCIL OF EUR., FREEDOM OF EXPRESSION IN EUROPE: CASE LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8-10 (2002) [hereinafter FREEDOM OF EXPRESSION].

48. *See* GUIDE TO IMPLEMENTATION, *supra* note 41, at 7.

49. Human Rights Convention, *supra* note 39, art. 10.

50. *Id.*

51. *Id.*

52. *See* GUIDE TO IMPLEMENTATION, *supra* note 41, at 30.

also recognized that “common-law rules or principles of international law . . . constitute a legal basis for the interference with the freedom of expression.”⁵³ Furthermore, to be “prescribed by law,” the law must be accessible and foreseeable,⁵⁴ which often requires the law to be sufficiently precise, or that its scope and manner should be reasonably clear.⁵⁵ Second, the interference must be aimed at protecting one or more of the interests enumerated in the second paragraph of Article 10, such as the prevention of disorder or the protection of morals.⁵⁶ Third, the interference must be necessary in a democratic society.⁵⁷ The ECHR has determined that this requirement of necessity entails that the state must demonstrate a “pressing social need” for the restriction in question.⁵⁸ This requirement also incorporates the principle of proportionality; hence the restriction imposed must be proportionate to the interest that the state seeks to achieve.⁵⁹ In evaluating whether the challenged measure is necessary to a democratic society, the ECHR grants states a “margin of appreciation,” which is the “measure of discretion states are permitted in their observance of rights.”⁶⁰

In sum, the requirements provided in Article 10(2) serve to restrict government interference in the following three ways:

[T]he ends the restriction must serve (it must be for the protection of the public); the form any interference with [the freedom of expression] must take (it must be pursuant to a valid law); and the nature and scope of the interference (it must be “necessary” and proportionate to the harm sought to be averted).⁶¹

Finally, the burden to prove these three conditions rests with the state allegedly interfering with the individual’s right to freedom of expression.⁶²

53. *See id.* at 31.

54. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 31 (1979).

55. THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11–12 (1997) [hereinafter EXCEPTIONS].

56. GUIDE TO IMPLEMENTATION, *supra* note 41, at 34–35.

57. *Id.* at 35.

58. *Id.*

59. *Id.*

60. *See* EXCEPTIONS, *supra* note 55, at 16.

61. *See* Jilan Kamal, Note, *Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)*, 46 COLUM. J. TRANSNAT’L L. 667, 678 (2008). While this Note addresses Article 9(2), its reasoning may be analogized to Article 10, which contains a similar limitations clause.

62. GUIDE TO IMPLEMENTATION, *supra* note 41, at 30.

C. *The ECHR's Approach to the Freedom of Artistic Expression*

In interpreting the term “expression” as protected pursuant to Article 10, the ECHR has held that “words, written or spoken . . . pictures, images and actions intended to express an idea or to present information” are all protected by the Convention.⁶³ Furthermore, the ECHR explicitly states that the protection of freedom of expression extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”⁶⁴ Thus, the ECHR has interpreted the freedom of artistic expression, including the freedom to create, exhibit, and—when relevant—perform art, as an essential component of the freedom of expression.⁶⁵ In *Müller and Others v. Switzerland*,⁶⁶ the ECHR indicated that Article 10’s protection of freedom of expression extends to the protection of artistic expression because the article refers to “broadcasting, television or cinema enterprises”—media whose activities extend to art.⁶⁷ Furthermore, Article 19(2) of the International Convention on Civil and Political Rights specifically includes within the right of freedom of expression information and ideas “in the form of art,”⁶⁸ which the ECHR considered indicative that freedom of expression as used in Article 10 includes the protection of artistic expression.⁶⁹

The ECHR has ruled a number of times on the legality of a state’s restriction on freedom of expression. The following sub-sections examine this case law.

1. ECHR Strikes Down Restriction or Interference as Not Necessary in a Democratic Society

In *Lingens v. Austria*, the ECHR deemed a measure taken by the state to be in violation of Article 10.⁷⁰ Lingens, the publisher of a

63. *Id.* at 15.

64. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 26 (1986).

65. See GUIDE TO IMPLEMENTATION, *supra* note 41, at 9.

66. *Müller v. Switzerland*, 13 Eur. Ct. H.R. 212 (1991).

67. *Id.* at 225.

68. International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171. The International Covenant on Civil and Political Rights (ICCPR) is a human rights treaty that was adopted by the United Nations General Assembly in 1966. The ICCPR obligates a state to provide basic civil and political rights to citizens of that state. See, e.g., FAQ: *The Covenant on Civil and Political Rights (ICCPR)*, ACLU, <http://www.aclu.org/human-rights/faq-covenant-civil-political-rights-iccpr> (last visited Mar. 28, 2011).

69. *Müller*, 13 Eur. Ct. H.R. at 225.

70. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 28 (1986).

magazine, was convicted of criminal defamation through the press for printing two articles critical of the Austrian Chancellor.⁷¹ Although the ECHR acknowledged that the measure was prescribed by law and in pursuit of a legitimate aim, the ECHR concluded that this conviction was a violation of Article 10 because it was not necessary in a democratic society.⁷² In so holding, the ECHR noted that the penalty was “disproportionate to the legitimate aim pursued”: protecting the reputation of others.⁷³ The ECHR placed great weight on the utility of freedom of political debate, stating that “freedom of the press . . . affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.”⁷⁴

In *Otto-Preminger Institute v. Austria*, the ECHR held that Austria’s seizure and forfeiture of a film critical of Christianity before it was publicly shown violated Article 10 of the Convention.⁷⁵ Austria had seized the film by preventing it from being shown at a scheduled screening; Austria’s “prohibition to show the film” in the country constituted Austria’s forfeiture of the film.⁷⁶ The applicant for ECHR relief, Otto-Preminger Institute (“OPI”), which is a private association with the objective of promoting creativity, communication, and entertainment through the audiovisual media, had sought to show a film that satirized Christianity called “Das Liebeskonzil.”⁷⁷ In advertisements for the film, OPI announced that the film was prohibited from being viewed by individuals under seventeen years of age.⁷⁸

The ECHR acknowledged that artistic expression is covered by freedom of expression within the meaning of Article 10 of the Convention⁷⁹ and that the government interfered with the right to freedom of expression by seizing and forfeiting the film.⁸⁰ To be valid, then, the interference had to be justified under the second paragraph of Article 10.⁸¹ The ECHR quickly decided that the measures challenged were prescribed by law and that they protected the rights of others—namely, the preservation of religious peace—

71. *Id.* at 26.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Otto-Preminger Inst. v. Austria*, 19 Eur. H.R. Rep. 34, 37, 43 (1994).

76. *Id.* at 44.

77. *Id.* at 37.

78. *Id.* at 37, 59.

79. *Id.* at 44.

80. *Id.* at 45.

81. *Id.*

thus, the aims pursued were legitimate as set forth by Article 10(2).⁸²

The majority of the ECHR's opinion focused on whether the seizure and subsequent forfeiture of the film "overstepped" Austria's "margin of appreciation."⁸³ The ECHR emphasized that unlike *Müller*,⁸⁴ the film "addressed a specially interested public" and imposed an age restriction, thus small children were unlikely to attend.⁸⁵ Further, the public was warned about the contents of the film.⁸⁶ The ECHR thus concluded that the seizure of the film was not necessary because satirical texts or films normally cannot be "completely prohibited even if some restrictions . . . may be possible."⁸⁷ To completely ban a film is ordinarily seen as a disproportionate restriction "except where there are very stringent reasons for such an act."⁸⁸ Similarly, the ECHR concluded that the film's forfeiture by Austria was a further interference with the applicant's freedom of expression.⁸⁹

In *Wingrove v. United Kingdom*,⁹⁰ the ECHR revisited the question presented by *Otto* when it considered whether the British Board of Film Classification's (the Board) rejection for classification of a film entitled "Visions of Ecstasy" violated Article 10. The Board's rejection effectively barred the film from being "lawfully . . . sold, hired out or otherwise supplied to the general public."⁹¹ The film reportedly mixed "religious ecstasy and sexual passion" through its portrayal of a sixteenth-century Carmelite nun named St. Teresa of Avila engaging in sexual acts with her own psyche and Jesus Christ. The Board rejected the application for classification on the grounds that the film was blasphemous under the criminal law of England, noting that "[t]he question is not one of the *matter* expressed, but its *manner*, i.e. 'the tone, style and spirit', in which it is presented."⁹² Ultimately, the Board determined that the video was "subject to the law of blasphemy" because "the manner of its

82. *Id.* at 45-46.

83. *Id.* at 48.

84. *Müller v. Switzerland*, 13 Eur. Ct. H.R. 212 (1991).

85. *Otto-Preminger Inst. v. Austria*, 19 Eur. H.R. Rep. 34, 48 (1994).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 49.

90. *Wingrove v. United Kingdom*, 24 Eur. Ct. H.R. 1 (1997).

91. *Id.* at 7.

92. *Id.*

presentation [wa]s bound to give rise to outrage at the unacceptable treatment of a sacred subject,” Christ.⁹³

In analyzing whether the denial of the application constituted a violation of Article 10, the ECHR quickly affirmed that the denial interfered with the applicant’s freedom of expression, the interference was prescribed by law, and it was in pursuit of a legitimate aim.⁹⁴ Yet, the ECHR concluded that it was not *necessary* for the Board to refuse the classification certificate.⁹⁵ The ECHR noted that “[a]n important element of the Commission’s examination of this type of case is whether the offending material is on open display to the general public.”⁹⁶ For instance, the ECHR has found that the conviction of the owner of a specialized shop for discretely “showing . . . obscene homosexual films at the back of [the] shop” was a “disproportionate interference with his freedom of expression, in violation of Article 10 of the Convention, because there was no danger of adults being confronted unwillingly with the film . . . [n]or was there any question of minors having access to it.”⁹⁷ The ECHR also noted that the distribution of this film would be more limited than the film at issue in *Otto* and less likely to attract public attention.⁹⁸ In particular, the ECHR pointed out that it was unlikely that “members of the public could unintentionally find themselves viewing the video in the same way as they might walk into an art gallery or cinema, or browse through magazines.”⁹⁹ The ECHR determined that although some Christians might feel offended simply by hearing about the film, this was not a sufficiently compelling reason to prohibit its sale. The ECHR thus held that the Board’s refusal to grant a classification certificate violated Article 10.¹⁰⁰

In *Vereinigung Bildender Künstler v. Austria*, the ECHR faced the issue of whether an injunction issued by the Austrian courts, prohibiting the applicant from continuing to display a painting at exhibitions, violated Article 10 of the Convention.¹⁰¹ The painting in question, entitled “Apocalypse,” depicted various public figures

93. *Id.*

94. *Id.* at 17–19.

95. *Id.* at 22 (emphasis added).

96. *Id.* at 21.

97. *Id.* at 21 n.29 (internal citation omitted).

98. *Id.* at 22.

99. *Id.*

100. *Id.*

101. *Vereinigung Bildender Künstler v. Austria*, 47 Eur. H.R. Rep. 189, 194 (2008).

in sexual positions.¹⁰² One of the figures depicted was Mr. Meischberger, a former general secretary of the Austrian Freedom Party (FPÖ), who challenged his portrayal in the painting.¹⁰³ According to the ECHR, "Mr. Meischberger was shown gripping the ejaculating penis of Mr. Haider while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa."¹⁰⁴

The ECHR held that denying the applicant association the right to exhibit the painting violated Article 10.¹⁰⁵ Although the injunction was prescribed by law and pursued the legitimate aim of protecting the rights of others, the ECHR concluded that the measure was not necessary in a democratic society because it was disproportionate to the pursued aim, particularly because the injunction was unlimited in duration and the satirical nature of the painting warranted additional protection.¹⁰⁶

2. The ECHR Upholds Restriction or Interference as Necessary in a Democratic Society

In *Handyside v. United Kingdom*,¹⁰⁷ an English publisher was charged with possessing obscene reference books that targeted children aged twelve years and up and discussed topics such as masturbation, orgasms, contraceptives, pornography, homosexuality, and abortion.¹⁰⁸ The publisher challenged both the fine he received and the seizure of the books by law enforcement on the grounds that these actions violated his freedom of expression guaranteed by Article 10 of the Convention.¹⁰⁹ After acknowledging that the law prescribed the challenged measures, the ECHR considered whether the publisher's conviction pursued the legitimate aim of the protection of morals in a democratic society.¹¹⁰ The ECHR examined the background of the book and noted that because topics like marriage were largely ignored, the book appeared to be extremely one-sided and thus would "tend to undermine, for a very considerable proportion of children, many of the influences . . . which might otherwise provide the restraint

102. *Id.* at 191.

103. *Id.* at 192.

104. *Id.*

105. *Id.* at 196.

106. *Id.* at 198.

107. *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 737 (1979).

108. *Id.* at 743.

109. *Id.* at 752.

110. *Id.* at 753.

and sense of responsibility for oneself which found inadequate expression in the book.”¹¹¹ The ECHR concluded that because the banned book had the “tendency to ‘deprave and corrupt’” young children, the conviction of the publisher was in pursuit of a legitimate aim—“the protection of the morals of the young.”¹¹²

In *Müller and Others v. Switzerland*, the ECHR agreed with the Swiss courts that the conviction of the applicants for the publication of obscene items (for producing and exhibiting sexually offensive paintings) was not contrary to Article 10.¹¹³ The ECHR found that the Swiss courts were reasonable in determining that the paintings were “liable [to] grossly offend the sense of sexual propriety of persons of ordinary sensitivity” because they placed sexual activity in the foreground and depicted “in a crude manner sexual relations, particularly between men and animals.”¹¹⁴ Stressing that there is no “uniform European conception of morals,” the ECHR indicated that deference must be granted to state authorities because they “are in principle in a better position than the international judge to give an opinion on the exact content of [the Article 10] requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”¹¹⁵ In so holding, the ECHR effectively upheld the Swiss courts’ conclusion that although the paintings were likely not sexually arousing to a person of “ordinary sensitivity,” they were repugnant and “morally offensive to the vast majority of the population”¹¹⁶ and thus the conviction, prescribed by Swiss law, pursued the legitimate aim of protecting morals and was necessary in a democratic society.¹¹⁷ Similarly, the ECHR held that the confiscation of the paintings did not violate Article 10, as the applicants could apply to have the paintings returned and the Swiss courts are granted great deference, or a “margin of appreciation.”¹¹⁸

In *Murphy v. Ireland*,¹¹⁹ the pastor associated with an Irish religious organization appealed a radio station’s refusal to broadcast an advertisement for the screening of a religious video pursuant to a law that directed that “no advertisement shall be broadcast which is

111. *Id.* at 746–47.

112. *Id.* at 756–57.

113. *Müller v. Switzerland*, 13 Eur. Ct. H.R. 212, 232 (1991).

114. *Id.* at 229.

115. *Id.* at 228–29.

116. *Id.* at 215.

117. *Id.* at 229.

118. *Id.* at 231–32.

119. *Murphy v. Ireland*, 2003-IX Eur. Ct. H.R. 7.

directed towards any religious or political end.”¹²⁰ The ECHR concluded that this refusal to broadcast was clearly an interference with the applicant’s freedom of expression, but held that the interference was not a violation of Article 10 because the measure was prescribed by law, pursued the legitimate aim of “ensur[ing] respect for the religious doctrines and beliefs of others,” and the measure was accordingly necessary in a democratic society.¹²¹

In concluding that the measure was necessary in a democratic society, the ECHR initially noted that “a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.”¹²² The ECHR explained that the states are given greater deference when morals or religion are liable to be offended because:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the “necessity” of a “restriction” intended to protect from such material those whose deepest feelings and convictions would be seriously offended.¹²³

The ECHR also noted that the medium of expression must be taken into account when considering the proportionality of an interference, indicating that the audiovisual media generally has a more powerful impact than other media, such as print.¹²⁴ The ECHR afforded great weight to the ban’s limit to this media, particularly advertising. In addition, the ECHR considered that Ireland had been plagued by religious strife in the past.¹²⁵ Ultimately, the ECHR concluded that Ireland demonstrated “‘relevant and sufficient’ reasons justifying the interference with the applicant’s freedom of expression.”¹²⁶

In addition to the relevant case law, it is important to be aware of the rules that guide the interpretation of treaties, including the Convention. These rules of treaty interpretation are set forth in the “treaty governing treaties,” known as the Vienna Convention

120. *Id.* at 13.

121. *Murphy v. Ireland*, App. No. 44179/98, 38 Eur. H.R. Rep. 212, 233 (2004).

122. *Murphy*, 2003-IX Eur. Ct. H.R. at 27.

123. *Id.*

124. *Id.*

125. *Id.* at 29.

126. *Id.* at 31.

on the Law of Treaties (VCLT).¹²⁷ The VCLT applies to written agreements between states, and because the International Court of Justice¹²⁸ recognizes it as a codification of customary international law, most of its provisions apply to states even if they are not parties to the VCLT.¹²⁹ The VCLT provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹³⁰ Furthermore, the VCLT directs that in addition to examining the text of the treaty, which includes its preamble and annexes, one may examine any subsequent agreements relating to the treaty, any subsequent practice in the treaty’s application, and any rules of international law that are applicable to interpret the treaty.¹³¹ Additionally, Article 32 of the VCLT directs that one may look to “preparatory work of the treaty and the circumstances of its conclusion” when application of Article 31 results in ambiguities or absurdities.¹³²

IV. THE STATE OF ANIMAL WELFARE

A. *Animal Welfare From a Global Perspective*

The use of animals by humans goes far back into prehistory, yet the legal protection of animals is relatively recent.¹³³ Nevertheless, humans have long recognized the kinship of humans and animals and the immorality of animal cruelty.¹³⁴ During the last century

127. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

128. The International Court of Justice is the international tribunal that was created by the Charter of the United Nations. See U.N. Charter art. 92., e.g., <http://www.icj-cij.org/documents/index.php?p1=4>.

129. See Kurt Mundorff, *Other Peoples’ Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(E)*, 50 HARV. INT’L L.J. 61, 68 (2009).

130. VCLT, *supra* note 127, art. 31(1).

131. *Id.* art. 31(2)–(3).

132. *Id.* art. 32.

133. SIMON BROOMAN & DEBBIE LEGGE, *LAW RELATING TO ANIMALS* 31 (1997).

134. In the fifth century B.C., at a time when Greece was the pinnacle of human achievement and culture, Empedocles, a Greek philosopher, subtly supported humane treatment of animals when he wrote about the interconnectedness of all living things. See LES BROWN, *CRUELTY TO ANIMALS: A MORAL DEBATE* 9 (1988). Another Greek philosopher, Pythagoras, “taught not only the immortality of the soul but also its transmigration into various animal bodies.” *Id.* In more recent history, Humphry Primatt wrote *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals* in 1776, which focused on the suffering of animals at the hands of humans. *Id.* at 10. Primatt also discussed the kinship of living things and stated that “members of the ‘higher orders’ of society who did nothing to change the situation of widespread cruelty to animals were as reprehensible as the ‘lower orders’ who were ‘cruel from mere insensibility.’” *Id.* Around the same time, Jeremy Bentham expressed a similar sentiment when he famously asked, “the question is not, Can they

and the past decade in particular, a vast amount of animal protection legislation was passed and a plethora of animal rights organizations were created in response to the increased awareness of widespread abuse of animals.¹³⁵ Historically, humans treated animals cruelly in a number of contexts, most commonly for entertainment, food, and commercial gain.¹³⁶ Despite the efforts of animal protection groups that have sprung up in the United States and all over the world in recent years, animal cruelty has persisted well into this century in all of these contexts.¹³⁷

Even if one is not opposed to the slaughter of animals for artistic expression out of compassion for animals, this type of animal abuse is an important issue for humans for two reasons. First, the abuse of animals may lead to human desensitization to violence,¹³⁸ which explains the correlation between the killing of animals and the killing of humans. The relationship between the two has been studied closely over the past few decades. As early as 1963, anthropologist Margaret Mead wrote the following:

It would . . . seem wise to include a more carefully planned handling of behavior toward living creatures in our school curricu-

reason: nor, Can they talk? But, Can they suffer?" *Id.* Peter Singer, an Australian philosopher, applied Bentham's theories of utilitarianism to encourage the more humane treatment of animals in his book *Animal Liberation*, published in 1975. See generally PETER SINGER, *ANIMAL LIBERATION* (1995) (discussing Bentham's views on morality and animal rights).

135. In the United States, for instance, the latter half of the twentieth century—following the Second World War—was marked by the foundation of the Animal Welfare Institute (1951), the Humane Society of the United States (1954), the Animal Legal Defense Fund (1978), the Committee to End Animal Suffering in Experiments (1979), People for the Ethical Treatment of Animals (1980), and Farm Sanctuary (1986). Bernard Unti & Andrew N. Rowan, *A Social History of Postwar Animal Protection*, in *THE STATE OF ANIMALS*: 2001, at 21, 34–37 (Deborah J. Salem & Andrew N. Rowan eds., 2001). The latter half of the twentieth century was also marked by the passage of the Humane Slaughter Act (1958), the Endangered Species Act (1966), and the Laboratory Animal Welfare Act (1966), among many others. *Id.*

136. Animals have also been treated cruelly in the name of fashion and for religious ritual or belief. See BROWN, *supra* note 134, at 6–9. For the purposes of this Note, however, it is unnecessary to address all of the contexts in which the treatment of animals has been especially cruel.

137. In the realm of entertainment, animals continue to be treated cruelly. See BROWN, *supra* note 134, at 12–24 (discussing bullfighting, the slaughter of animals for human consumption, and animal experimentation); *Michael Vick Sentenced to 23 Months in Jail for Role in Dogfighting Conspiracy*, FOX NEWS (Dec. 10, 2007), <http://www.foxnews.com/story/0,2933,316319,00.html> (addressing dog-fighting). See generally Laura Ireland, Comment, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned "Hunting"*, 8 ANIMAL L. 223 (2002) (discussing recreational hunts).

138. See Jennifer Dillard, Note, *Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL'Y 391, 396 (2008).

lum . . . and alert all child therapists to watch for any record of killing or torturing a living thing. It may well be that this could prove a diagnostic sign and that such children, diagnosed early, could be helped instead of being allowed to embark on a long career of episodic violence and murder.¹³⁹

Mead's conclusion may not be perfectly applicable to the slaughter of animals for art, largely because adults typically kill these animals,¹⁴⁰ yet this does not negate that the slaughter of animals for art may lead to desensitization of animal suffering in children and the public at large. Another source, *Animal Cruelty: Pathway to Violence Against People*, provides a number of case studies of serial killers who were cruel to animals before they began harming people.¹⁴¹ In the foreword, Randall Lockwood notes the tendency of serial killers to kill animals before committing homicide, and explains as follows:

Many of these men, as we would have expected, had early histories of cruelty to animals. Less expected, but particularly disturbing to me, is the large number of men in this study who had witnessed acts of serious violence against animals and did or felt nothing.¹⁴²

Lockwood goes on to note that we must reexamine the societal and cultural norms that allow people to ignore instances of animal cruelty, if only because violence against animals has proven to be a gateway to violence against humans.¹⁴³

Second, the slaughter of animals for artistic expression discourages respect for the environment, which undermines one of the primary purposes of the other Council conventions.¹⁴⁴

139. Paul G. Irwin, *Overview*, in *THE STATE OF ANIMALS*, *supra* note 135, at 1, 16.

140. Consider that all of the artists used as examples of those who have killed animals for art are adults. See *supra* Part I; *infra* Part IV.B. Guillermo Vargas was purportedly thirty-two years old at the time his "starving dog" exhibit was featured in Nicaragua. Gerard Couzens, *Outrage at 'Starvation' of a Stray Dog for Art*, *OBSERVER*, Mar. 30, 2008, available at <http://www.guardian.co.uk/artanddesign/2008/mar/30/art.spain>. Nathalia Edenmont was born in 1970. *Nathalia Edenmont*, ARTNET, <http://www.artnet.com/artist/424171205/nathalia-edenmont.html> (last visited Mar. 28, 2011). Marco Evaristti was born in 1963. *Marco Evaristti*, ARTNET, <http://www.artnet.com/artist/425435266/marco-evaristti.html> (last visited Mar. 28, 2011). Vincent Gothard was twenty-five years old when he was charged with animal cruelty. *Cruelty to Mice*, *SUNDAY NEWS*, Apr. 7, 1996, at 15. Adel Abdessemed was born in 1971. *Adel Abdessemed*, ARTNET, http://www.artnet.com/Galleries/Artists_detail.asp?G=&gid=424299430&which=&aid=424893688&ViewArtistBy=online&rta=http://www.artnet.com (last visited Mar. 28, 2011).

141. See generally LINDA MERZ-PEREZ & KATHLEEN M. HEIDE, *ANIMAL CRUELTY: PATHWAY TO VIOLENCE AGAINST PEOPLE* (2004).

142. *Id.* at xi.

143. See *id.*

144. See *infra* text accompanying notes 204–06.

B. *The Slaughter of Animals for Artistic Expression*

The slaying of animals for use in art is not nearly as widespread as the exploitation of animals in other contexts, such as factory farming or for scientific experimentation. Nevertheless, there have been a number of incidents in which animals have been killed for art in recent years.¹⁴⁵ Nathalia Edenmont, for instance, is an artist who is known for killing animals to use in her photographs.¹⁴⁶ Edenmont has showcased exhibits like “Still Life” and “Still About Life,” both of which feature photographs of animal body parts combined with other things.¹⁴⁷ The animals she has killed for art include rabbits and mice,¹⁴⁸ and Edenmont’s work has received between \$20,000 and \$40,000 per print.¹⁴⁹

145. Animal cruelty of this sort is a relatively new phenomenon and if it is to be analogized to a traditional type of animal abuse, it seems most akin to the use of animals in sports and entertainment. More specifically, the use of animals for art is comparable to the use of animals in circuses, which has drawn a great deal of criticism from the animal rights community in recent years. There are no international conventions regulating the use of animals in circuses, yet individual countries have implemented such legislation. In the United Kingdom, for instance, circuses are regulated under the Performing Animals Act. The act requires that anyone exhibiting or training a performing animal to acquire a license. In the statute, exhibiting an animal is defined as exhibiting “at any entertainment to which the public are admitted, whether on payment of money or otherwise.” Performing Animals (Regulation) Act, 1925, 15 & 16 Geo. 5, c. 38, § 5(1) (Eng.). Unfortunately, this act merely requires trainers and exhibitors to be licensed and it is rarely enforced. In other countries in Europe, there is virtually no legislation covering the use of animals in circuses: “In countries such as Italy, Spain, Portugal and Greece, animal welfare laws are still, to all intents and purposes, non-existent.” WILLIAM JOHNSON, *THE ROSE-TINTED MENAGERIE* 155 (1990), available at <http://www.iridescent-publishing.com/rtmcont.htm>. In a few countries, there is progressive legislation covering performing animals. *Id.* at 156. Finland and Norway, for instance, have significant restrictions on the types of animals that may be used in circuses. *Id.* The large disparity in the treatment of performing animals in countries throughout Europe has prompted some animal protection groups to push for uniform legislation covering the treatment of these animals in the European states. *Id.* “The wide discrepancy in animal welfare legislation in Europe has prompted Eurogroup for Animal Welfare, a coalition of organizations representing each of the twelve member states of the EEC, to seek the introduction of uniform minimum standards throughout the EEC. *Id.* “One of their avowed priorities is to press for tighter legislative control of ‘animals in exhibition situations’, a wide category covering not only zoos, dolphinariums and safari parks, but also circuses, films, television and advertising.” *Id.*

146. See Adelina Chia, *She Kills for Art; Artist Nathalia Upsets Animal-Rights Activists by Using Animals in Her Work*, STRAITS TIMES (Sing.), Mar. 4, 2008.

147. See *id.*

148. Edenmont has also used dead chickens and lobsters in her artwork, but says that she bought these animals dead. See *id.*

149. See *id.* In 2003, the Swedish Veterinary Association reported Edenmont to the authorities for failing to have a veterinarian present when killing the animals she photographs. Edenmont won the case. See *id.*

The incident in which individuals killed goldfish in blenders, described at the beginning of this Note,¹⁵⁰ presents another example of the slaughter of animals for art. This incident was widely publicized in Denmark in 2003 when Peter Meyer, the museum director of the Trapholt Art Museum, was acquitted in a case charging him with cruelty to animals.¹⁵¹ Meyer was charged with animal cruelty for allowing the artist to display his exhibit, which featured live goldfish in blenders and gave visitors the opportunity to liquefy the goldfish simply by pressing a button.¹⁵² Two goldfish died when visitors pressed the button and Meyer was taken to court after refusing to pay a _269 fine for failing to respect an injunction to cut the blenders' electricity so visitors would not be able to kill the fish.¹⁵³ He was acquitted "after a technician employed by the blender manufacturer and a veterinarian both testified that the fish did not experience any suffering due to the blenders' high speed, and said they were 'killed painlessly.'"¹⁵⁴

Videos featuring animals murdered by humans have even been posted as art on websites like YouTube.com. For instance, in 2008, the European Commissioner for External Relations, Benita Ferrero-Waldner, was criticized for sponsoring an exhibit by a Honduran artist in Berlaymont.¹⁵⁵ The criticism stemmed from the fact that the Honduran artist had previously recorded himself torturing and executing animals and posted the six-minute "piece of video art" on YouTube.¹⁵⁶ The film shows two to three people, one of whom shoots what appears to be a dog.¹⁵⁷ "After killing the animal, they remove the bullets from its body with some pliers . . . viewers can see three hooded figures executing another animal

150. See *supra* Part I.

151. Peter Meyer, *a Museum Director at the Trapholt Modern Art Museum, Has Been Acquitted in a Case that Charged Cruelty to Animals*, ART BUS. NEWS, July 1, 2003, at 56(1) [hereinafter *Peter Meyer Acquittal*].

152. *Id.*

153. *Id.* The director, allegedly refusing to pay the fine because he believed in artistic freedom, stated to the court, "[i]t's a question of principle. An artist has the right to create works which defy our concept of what is right and what is wrong." *Cruelty Trial*, *supra* note 1.

154. *Peter Meyer Acquittal*, *supra* note 151, at 56(1).

155. Berlaymont is the building in Brussels, Belgium where the European Commission is headquartered. See, e.g., *Brussels Job Day 2010 – Thousands of Job Seekers to Meet Employers at EU Headquarters*, RIGHT VISION NEWS, Oct. 2, 2010.

156. *Honduran Artist Sponsored by Ferrero-Waldner Executes Animals for "Video Art"*, EUR. TRIB. INDEP. J. (2006).

157. *Id.*

which cannot be seen. The artist then shows gruesome images of the guts and blood of the animal.”¹⁵⁸

The United States has also been home to cruelty of these sorts. In 1996, Vincent Gothard, a fine arts student at the University of Florida, received negative publicity for an art project in which he killed animals.¹⁵⁹ Gothard dipped forty live mice into resin and then cut them into blocks once the resin hardened.¹⁶⁰

Similarly, in 2008, the San Francisco Art Institute cancelled an exhibit that included “video clips of animals being bludgeoned to death.”¹⁶¹ The exhibit, entitled “Don’t Trust Me,” was done by Parisian artist Adel Abdessemed, and included “a series of video loops of animals being bludgeoned to death with a sledgehammer in front of a brick wall.”¹⁶² The video featured the slaughter of a pig, goat, deer, ox, horse, and sheep.¹⁶³ According to officials for the San Francisco Art Institute, the artist recorded the videos at a Mexican farm that routinely slaughters animals in the manner depicted and thus he intended to send a message to society through his art.¹⁶⁴

All of these examples demonstrate that the slaughter of animals as a method of artistic expression is not limited to one culture or geographic area. Unfortunately, this form of animal cruelty does not appear to be directly addressed in any Council conventions, compelling the conclusion that to effectively combat—or at least regulate—this form of animal cruelty, a new convention must be passed.¹⁶⁵

C. *The Council of Europe on Animal Welfare*

For approximately two decades, the Council of Europe passed a flurry of conventions focused on animal protection.¹⁶⁶ First, the Council concluded the European Convention for the Protection of

158. *Id.*

159. *Cruelty to Mice*, *supra* note 140.

160. *Id.* Gothard was charged with cruelty to animals and if convicted, he faced up to five years in prison and a \$14,812 fine. It is unclear whether the case ever went to trial and if so, what the outcome was.

161. Ilana DeBare, *Art Institute Halts Exhibition Showing Killing of Animals*, S.F. CHRON., March 30, 2008, at B-1.

162. *Id.*

163. *Id.*

164. *Id.*

165. *See infra* Part IV.C.

166. *See infra* text accompanying notes 166–71.

Animals during International Transport in 1971.¹⁶⁷ The European Convention for the Protection of Animals Kept for Farming Purposes followed in 1978.¹⁶⁸ In 1982, the Council passed both the European Convention for the Protection of Animals for Slaughter¹⁶⁹ and the Convention on the Conservation of European Wildlife and Natural Habitats.¹⁷⁰ The European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes entered into force in 1991,¹⁷¹ followed by the European Convention for the Protection of Pet Animals in 1992.¹⁷²

The European Convention for the Protection of Pet Animals (“the Convention for the Protection of Pet Animals”) establishes broad rules on keeping, breeding, training, trading, commercial boarding, animal sanctuaries, advertising, entertainment, exhibitions, competitions, surgical operations, killing, reduction of numbers, information, and education programs.¹⁷³ The Convention for the Protection of Pet Animals applies to “pet animals,” which it states covers animals that “shar[e] man’s companionship and in

167. European Convention for the Protection of Animals during International Transport, Dec. 13, 1968, 788 U.N.T.S. 662. This Convention was amended in 1989 to enable the EEC to, through signing, become a party to the Convention. Essentially, this Convention establishes “compulsory norms for space, ventilation and hygiene, transportation means, food and water, loading and unloading of animals and veterinary assistance for the international transport of animals.” *Summary of the European Convention for the Protection of Animals During International Transport*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/en/Summaries/Html/065.htm> (last visited Mar. 28, 2011).

168. European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, 1138 U.N.T.S. 315. This Convention focuses on the treatment of animals used in the farm factory industry and guarantees unnecessary injury or suffering to these animals.

169. European Convention for the Protection of Animals for Slaughter, May 10, 1979, 1284 U.N.T.S. 193 [hereinafter *Convention for Slaughter*]. This Convention sets guidelines for the slaughter of animals in Europe with the objective of making these methods more humane.

170. Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, 1284 U.N.T.S. 209 [hereinafter *Convention on Conservation*]. This Convention was established to guarantee the conservation of wild flora and fauna species, as well as their habitats.

171. European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes, Mar. 18, 1986, 1704 U.N.T.S. 3 [hereinafter *Convention for Experimental Purposes*]. This Convention was concluded in order to reduce the number of experiments conducted in Europe and thus the number of animals used for these experiments.

172. European Convention for the Protection of Pet Animals, Nov. 13, 1987, 1704 U.N.T.S. 107 [hereinafter *Convention for Pet Animals*]. The objective of the European Convention for the Protection of Pet Animals is to ensure the welfare of pet animals kept “for private enjoyment and companionship.” *Id.* art. 1(1).

173. Andreas Steiger, *Pet Animals: Housing, Breeding and Welfare*, in *ANIMAL WELFARE*, *supra* note 35, at 111, 121.

particular liv[e] in his household; [are] intended for this purpose; [are] kept to be bred for this purpose; [and are] stray animals and the first generation born of stray animals.”¹⁷⁴ The convention further provides that “[e]xcluded from this definition are, for instance, animals . . . kept in zoos and circuses for exhibition.”¹⁷⁵ Finally, in the Explanatory Report, the Committee of Experts for the Protection of Animals (CAHPA), which drew up the Convention for the Protection of Pet Animals, indicated that the convention was drafted with the intent to control the trade of animals and the animal populations.¹⁷⁶ The Convention for the Protection of Pet Animals has been ratified by the following states: Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Lithuania, Luxembourg, Norway, Portugal, Romania, Sweden, Switzerland, and Turkey, and it has been signed but not ratified by Italy and the Netherlands.¹⁷⁷

V. THE SLAUGHTER OF ANIMALS FOR ART SHOULD BE PROHIBITED BY THE COUNCIL

The Council, which imposes moral rather than legal obligations on its member states, is the prime vehicle for a convention urging states to bar the cruel treatment of animals for art because of its stance on animal welfare issues and its ability to influence nearly fifty European states, including all member states of the European Union.¹⁷⁸

174. *Explanatory Report to the Convention for Pet Animals*, art. 1(15)(a)–(d), COUNCIL OF EUR., <http://conventions.coe.int/treaty/en/Reports/Html/125.htm> (last visited Mar. 28, 2011).

175. *Id.* art. 1(15).

176. *Id.* art. 1(i)–(ii).

177. *See Ratification Status of the European Convention for the Protection of Pet Animals*, COUNCIL OF EUR., <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=125&CM=&DF=&CL=ENG> (last updated Mar. 29, 2011).

178. The Council of Europe’s membership includes: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom. *See 47 Countries, One Europe*, COUNCIL OF EUR., <http://www.coe.int/aboutCoe/index.asp?page=47paysleurope&l=en> (last visited Mar. 28, 2011). The European Union’s members include: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *See Member States of the EU*, EUROPA, http://europa.eu/abc/european_countries/index_en.htm (last visited Mar. 28, 2011).

A. *The Council's Conventions Do Not Adequately Address This Issue*

The first treaty extending protection to animals, the Convention for the Protection of Animals during International Transport, does not cover those animals killed for art because its protection extends only to animals being carried in international transport, typically animals transported in bulk and destined for slaughter.¹⁷⁹ The Convention for the Protection of Animals Kept for Farming Purposes similarly does not address the protection of animals killed for slaughter, as its title and text make clear that the treaty applies to the treatment of animals for farming purposes only.¹⁸⁰ Indeed, the Explanatory Report indicates that the convention “is concerned only with the protection of animals kept for farming purposes,” and that “[t]he protection of animals kept for other purposes, for instance, as pets, for racing or other sports, for exhibition, or for experimental or industrial purposes, as well as the protection of wild living animals, fall outside the scope of the Convention as does the slaughtering of animals.”¹⁸¹ Likewise, the protection afforded by the Convention for the Protection of Animals for Slaughter does not extend to animals killed for artistic expression, as it applies only to animals in slaughterhouses unless a contracting party under the treaty extends it to slaughter outside slaughterhouses,¹⁸² which are defined as “any premises under health control, intended for the professional slaughter of animals to produce meat for consumption or for any other reason.”¹⁸³ The Convention on the Conservation of European Wildlife and Natural Habitats also does not apply to those animals killed for artistic purposes, as it protects wildlife and the conservation of natural habitats and is largely focused on minimizing pollution.¹⁸⁴ Thus, animals killed for artistic expression undoubtedly fall far outside the scope of this convention. Similarly, those animals slaughtered for art are not included in the European Convention for the Protection of Vertebrate Animals used for Experimental and other Sci-

179. See *Explanatory Report to the European Convention for the Protection of Animals During International Transport*, COUNCIL OF EUR., <http://conventions.coe.int/treaty/en/Reports/Html/065.htm> (last visited Mar. 28, 2011).

180. See *Explanatory Report to the European Convention on the Protection of Animals Kept for Farming Purposes*, COUNCIL OF EUR., <http://conventions.coe.int/treaty/en/Reports/Html/087.htm> (last visited Mar. 28, 2011).

181. *Id.*

182. See *Explanatory Report to the European Convention for the Protection of Animals for Slaughter*, COUNCIL OF EUR., <http://conventions.coe.int/treaty/en/Reports/Html/102.htm> (last visited Mar. 28, 2011).

183. Convention for Slaughter, *supra* note 169, at 194.

184. See Convention on Conservation, *supra* note 170, at 211.

entific Purposes, which covers only those animals "used or intended for use in any experimental or other scientific procedure."¹⁸⁵

The Convention for the Protection of Pet Animals (referred to as the "Pet Animals Convention" in this subsection) is thus the sole Council convention that may prohibit the slaughter of animals for artistic expression. Yet, neither the text of the treaty itself nor the treaty as interpreted addresses this issue.¹⁸⁶

Looking first to the language of the Pet Animals Convention, its scope is relatively narrow, purporting to only offer protection to pet animals, which are defined as "any animal kept or intended to be kept by man in particular in his household for private enjoyment and companionship."¹⁸⁷ The Pet Animals Convention establishes that this definition is to include "pet animals kept by a person or legal entity in any household or in any establishment for trading, for commercial breeding and boarding, and in animal sanctuaries" and "where appropriate, stray animals."¹⁸⁸ Article 2 mentions that the Pet Animals Convention does not prevent states from applying the provisions to animals not expressly mentioned in the convention.¹⁸⁹ The incorporation of a statement of this nature in the convention suggests that the Pet Animals Convention is only meant to apply to those animals explicitly mentioned therein—unless the individual contracting parties decide to affirmatively apply the convention's provisions to other pet animals. Because many of the animals killed for art in Europe, such as mice, rabbits, and goldfish, are not referred to in the convention, it is highly unlikely that they are intended to be protected by the Pet Animals Convention.

The improbability of the Pet Animals Convention extending to protect the animals commonly killed for art in Europe is further supported by the fact that the convention specifically excludes "animals kept for the production of food, wool, skin or fur or for other farming purposes, those kept in zoos and circuses for exhibition

185. Convention for Experimental Purposes, *supra* note 171, at 5.

186. See, e.g., Convention for Pet Animals, *supra* note 172, art. 3 (stating that "[n]obody shall cause a pet animal unnecessary pain, suffering or distress").

187. *Id.* The Explanatory Report defines a pet animal as "animals sharing man's companionship and in particular living in his household," "[animals] intended for this purpose," "[animals] kept to breed animals for this purpose," and "stray animals and the first generation of animals born of stray animals." *Explanatory Report to the Convention for Pet Animals*, *supra* note 174, art. 1(15)(a)–(d).

188. Convention for Pet Animals, *supra* note 172, art. 2.

189. *Id.*

and those kept for experimental or other scientific purposes.”¹⁹⁰ The use of animals for art is most akin to the use of animals for exhibition purposes, as the term “exhibition purposes” denotes the use of animals in public displays, which necessarily includes the use of animals in art exhibits.¹⁹¹ Moreover, the Preamble to the Pet Animals Convention indicates that it aims to target the “keeping,” “breeding,” and “trading” of pet animals in order to ensure that the animals are “kept in conditions that promote their health and well-being.”¹⁹² The Preamble also lists several reasons for the creation of the Pet Animals Convention, including the risks caused by animal overpopulation and the goal of responsible pet ownership.¹⁹³ The information in the Preamble¹⁹⁴ indicates that the Council designed the Pet Animals Convention to address the problems of unregulated breeding and keeping of pet animals—neither of which includes the protection of animals killed for art.¹⁹⁵

The animals killed for art in recent years in European countries that are party to the Pet Animals Convention include rabbits, mice, and goldfish, among others.¹⁹⁶ While many might determine that rabbits, fish, and even mice fall into the category of “pet animals,” the legislative history behind the convention seems to make it clear that the Pet Animals Convention was only intended to protect the quintessential pet animals, such as cats and dogs. For instance, the Resolution on the Breeding of Pet Animals (Resolution), adopted by the Multilateral Consultation of Parties to the Convention in March 1995,¹⁹⁷ reiterates that the convention is focused on standards of breeding as a way to promote animal welfare.¹⁹⁸ The Resolution only mentions dogs and cats specifically, and does so

190. *Explanatory Report to the Convention for Pet Animals*, *supra* note 174, art. 1(15).

191. Merriam-Webster defines “exhibition” as “a public showing (as of works of art, objects of manufacture, or athletic skill).” MERRIAM-WEBSTER DICTIONARY 438 (11th ed. 2005).

192. Convention for Pet Animals, *supra* note 172, pmb1.

193. *See id.*

194. *Id.*

195. *See id.*

196. *See supra* Parts I, IV.B.

197. The Convention for Pet Animals stipulates the following:

The Parties shall, within five years from the entry into force of the Convention and every five years thereafter, and, in any case, whenever a majority of the representatives of the Parties so request, hold multilateral consultations within the Council of Europe to examine the application of the Convention and the advisability of revising it or extending any of its provisions.

Convention for Pet Animals, *supra* note 172, art. 15(1).

198. *See* Council of Eur., Comm. of Ministers, *Resolution on the Breeding of Pet Animals* (1995).

extensively, indicating that the Pet Animals Convention is principally aimed at the protection of dogs and cats, particularly dogs and cats kept as pet animals.¹⁹⁹

Even the traditional U.S. definition of pet animals, or companion animals, does not include those animals that are slaughtered for art. The Humane Society of the United States, one of the most prominent animal welfare advocacy organizations in the world, interprets companion animals as including dogs, cats, birds, and reptiles.²⁰⁰ The U.S. interpretation of pet animals, then, may lend support to the notion the Pet Animals Convention is not meant to protect those animals commonly killed for art. Finally, it is perhaps telling that the Committee of Experts on the Protection of Animals, the committee responsible for the drawing up of the Council conventions designed to protect animals, was abolished in 1987—just before it began researching the welfare of exhibition animals.²⁰¹ This suggests that all of the Council's conventions up until that time did not adequately address the plight of exhibition animals, the category of animals most akin to animals killed for artistic expression.

If the Pet Animals Convention were, however, interpreted to include the protection of the animals being killed for art, Article 9 would prohibit the slaughter of animals for art, as it explicitly bans the use of pet animals in entertainment—especially when the pet animals' health and welfare are put at risk.²⁰² Undoubtedly, the slaughter of such animals, if the Pet Animals Convention's construction of "pet animals" included animals killed for art, would place their health at risk and thus violate the convention. If pet animals included those animals killed for art, Article 11 would also be violated by the slaughter of these animals due to its general prohibition on surgical procedures "which are mainly carried out for aesthetic reasons or for the personal convenience of the owner."²⁰³

Assuming, however, that the conventions do not prohibit the slaughter of animals for artistic expression, this hole in the law is

199. *Id.*

200. See Humane Society of the United States, *THE STATE OF THE ANIMALS 2001*, at 76 (Deborah J. Salem & Andrew N. Rowan eds., 2001).

201. Egbert Ausems, *The Council of Europe and Animal Welfare*, in *ANIMAL WELFARE*, *supra* note 35, at 233, 250–52.

202. Convention for Pet Animals, *supra* note 172, art. 9. Article 9 directs that "[p]et animals shall not be used in advertising, entertainment, exhibitions, competitions and similar events," but it lists a few exceptions to this general rule: for instance, if the organizer creates conditions to ensure that the pet animals are protected in accordance with the Convention and "pet animals' health and welfare are not put at risk." *Id.*

203. *Explanatory Report to the Convention for Pet Animals*, *supra* note 174, art. 10.

troubling largely because the use of animals for art undermines the intent of the other animal protection conventions. First, the slaying of animals for art may lead to the desensitization of humans to animal cruelty and suffering, which may result in violence against humans.²⁰⁴ Another disturbing effect of the slaughter of animals for artistic expression is that the use of animals in this manner may discourage respect for the environment, which undermines one of the primary purposes of the other conventions.²⁰⁵ The other animal protection conventions are largely concerned with protecting the natural environment.²⁰⁶ To allow this large gap to remain in the Council's animal protection conventions will continue to frustrate one of the primary purposes of the treaties.²⁰⁷

B. *Proposal for a New Council Convention Covering Animals Killed for Artistic Expression*

To fill this gap in the law, the Council should create a new convention that prohibits the slaughter of animals for artistic expression and more generally regulates the use of animals in art.²⁰⁸ The Council of Europe is the appropriate vehicle for a European convention addressing the slaughter of animals for artistic expression because of its geographical reach²⁰⁹ and its stance on animal protection issues, as evidenced by the number of existing conventions in furtherance of animal welfare.²¹⁰

204. See *supra* text accompanying notes 138–143.

205. See Aulsems, *supra* note 201, at 233 (asking “[b]ut how can younger generations be persuaded to safeguard nature and wildlife if they do not first learn to respect the animals around them”).

206. See *id.*

207. See, e.g., *id.*

208. Ideally, a convention of this nature would more generally regulate the use of animals for exhibition purposes. Although a broader convention would naturally be more difficult to ratify, it would result in more sweeping protections for animals and thus more effectively promote respect for the environment, one of the fundamental aims of these animal protection conventions. See *id.*

209. The Council of Europe is geographically larger than the European Union as it has many more member countries than the European Union, thus concluding an agreement or convention about the improvement of animal rights would potentially have a great impact on the welfare of animals in Europe. See *Member States of the EU, supra* note 178.

210. Unlike the Council of Europe, the European Union would not be an appropriate vehicle for a convention addressing the slaughter of animals for artistic expression. The European Union was formed “with the objective of safeguarding peace and promoting economic and social progress in Europe,” and it is principally concerned with promoting the economic well-being of its member states via European integration. *European Union Welfare Legislation*, WORLD ANIMAL.NET, <http://worldanimal.net/resources/animal-protection-law-resources/49-european-union-welfare-legislation> (last visited Mar. 28, 2011). Those treaties that mention animals typically treat them as “goods” or “agricultural prod-

A treaty prohibiting the slaughter of animals for artistic expression would positively impact those states that decide to implement the convention because it would address the defects of the current state of animal protection legislation in these states. First, it would minimize the desensitization effect described earlier.²¹¹ Studies focusing on the relationship between violence in the media and aggressive behavior have found that "interpersonal violence in our societies has been *boosted* by the long-term effects of many persons' childhood exposure to a steady diet of dramatic media violence."²¹² Studies such as this one suggest that similar to exposure to violence in the media, exposure to violence in artwork will lead to an increase in interpersonal violence. Second, a convention prohibiting the slaughter of animals for artistic expression would minimize speciesism, the notion that human beings are morally superior to animals, a concept used by those who exploit animals to justify the cruel, inhumane treatment of animals.²¹³ Third, and relatedly, a convention of this sort would promote respect for nature by declaring that animals may not be killed solely for aesthetic purposes. Most importantly, such a convention would address the problem of animal suffering. The following is the proposed language for a convention prohibiting the slaughter of animals for artistic expression:

No animal shall be used as a means of artistic expression in a way that is detrimental to its health and welfare, especially by causing it injury, unnecessary pain, suffering, distress, or death. An animal shall not be used for artistic expression unless the animal's health and welfare is not put at risk.

A convention of this nature would reduce the incidence of the slaughter of animals for artistic expression in Europe, which would further the goals of the Council's animal protection conventions, foster respect for the environment, reduce the desensitization of humans to animal abuse and violence in general, and most importantly, defend animals against this cruel and unnecessary form of abuse.

ucts," not as sentient beings. *See id.* "Thus, any measures to protect animals [a]re secondary to the primary purpose of the legislation." *Id.*

211. *See supra* text accompanying notes 135–40.

212. AGGRESSIVE BEHAVIOR: CURRENT PERSPECTIVES 155 (L. Rowell Huesmann ed., 1994).

213. *See SINGER, supra* note 134, at 6.

C. *The Prohibition of the Slaughter of Animals for Artistic Expression
Would Not Violate the Right to Freedom of Expression
Under Article 10*

Article 10 of the Convention guarantees the right to freedom of expression to the citizens of those states that are parties to the Convention.²¹⁴ The right to freedom of expression is generally justified by the value of public debate in democratic societies and the importance of personal expression.²¹⁵ In the landmark freedom of expression case, *Lingens v. Austria*,²¹⁶ the ECHR articulated the dual justifications for the right to freedom of expression when it stated that freedom of expression “constitutes one of the essential foundations of a democratic society” (the public interest justification) and “one of the basic conditions for its progress and for each individual’s self-fulfilment” (the personal interest justification).²¹⁷ Yet, the right to freedom of expression is not absolute. According to the second paragraph of Article 10, the right may be limited upon the satisfaction of three conditions: (1) the restriction or interference with the right to freedom of expression is prescribed by law; (2) the restriction or interference is in pursuance of one of the enumerated legitimate aims; and (3) the restriction or interference is necessary in a democratic society.²¹⁸ In considering the necessity of the restriction, the ECHR “assesses the proportionality of a restriction on freedom of expression to the aim pursued” and has held that “[a]ny interference disproportionate to the legitimate aim pursued will not be deemed ‘necessary in a democratic society’ and will thus contravene Article 10 of the Convention.”²¹⁹ The vast majority of cases addressing alleged Article 10 violations hinge on this last requirement.²²⁰

214. Human Rights Convention, *supra* note 39, art. 10.

215. See MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW* 158 (1st ed. 1995).

216. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 14, 26 (1986).

217. JANIS, *supra* note 215, at 158.

218. Human Rights Convention, *supra* note 39, art. 10(2).

219. FREEDOM OF EXPRESSION, *supra* note 47, at 9.

220. See, e.g., HELEEN BOSMA, *FREEDOM OF EXPRESSION IN ENGLAND AND UNDER THE ECHR: IN SEARCH OF A COMMON GROUND* 131 (2000) (“[T]he Court is not very critical in reviewing whether the restriction is prescribed by law and whether the legitimate aim put forward by the national authorities to justify the restriction is in fact served. The review of the court regarding the substance of a case centres around the requirement that the interference should be ‘necessary in a democratic society.’”).

1. The Proposed Convention Would Be Deemed Prescribed by Law

If a convention prohibiting the slaughter of animals solely for artistic expression was passed, the freedom of expression restrictions challenged (as a result of national legislation implementing the convention) would be deemed prescribed by law as long as the legal provision was accessible to the citizen and "sufficiently precise to enable the citizen reasonably to foresee the consequences which a given action may entail."²²¹ The ECHR has held that the accessibility requirement entails that the citizen "must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case."²²² If the challenged legal provisions were published and therefore available to the citizen, in all likelihood the ECHR would deem the provisions accessible to the citizen.²²³ Further, the legal provision would be sufficiently precise such that restrictions on the freedom of expression would be reasonably foreseeable as long as the law was specific and did not confer broad discretionary power without indicating the scope of the discretion.²²⁴

2. The Proposed Convention Would Be Deemed to Be in Pursuit of a Legitimate Aim

The ECHR almost always concludes that a state's restriction or interference with freedom of expression is in pursuit of one of the legitimate aims listed in the second paragraph of Article 10.²²⁵ If a provision prohibiting the killing of animals for artistic expression were challenged, the ECHR would therefore be likely to quickly dispense of the issue of whether the provision is in pursuit of a legitimate aim, in favor of the state.²²⁶ Consistent with the ECHR's great deference to states with regard to the identification of morals,²²⁷ the ECHR would be highly likely to deem a prohibition on the slaughter of animals for artistic expression to be in the pur-

221. EXCEPTIONS, *supra* note 55, at 9.

222. *Id.* at 10 (internal citation omitted).

223. *Cf. Silver v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 33 (1983) (holding that the challenged provision was not prescribed by law due to its inaccessibility to the citizen, as the provisions were unpublished and unavailable to those who challenged the law).

224. *See* EXCEPTIONS, *supra* note 55, at 13.

225. *See, e.g., BOSMA*, *supra* note 220, at 10–11 ("The requirement that the restriction be 'prescribed by law' is rarely a matter of dispute in the case law of the Court also. The European Court of Human Rights also tends to accept a State's claim that one of the legitimate aims is served by a restriction.").

226. *See id.*

227. *Murphy v. Ireland*, 2003-IX Eur. Ct. H.R. 7, 27.

suit of the legitimate aim of protecting the health or morals of its citizens.

3. Necessary in a Democratic Society

Like essentially all Article 10 cases that come before the ECHR, a challenge to a law prohibiting the slaughter of animals for artistic expression would hinge on the ECHR's determination of whether the restriction is necessary in a democratic society.²²⁸ To satisfy this third requirement, the ECHR typically examines whether the restriction or interference is "proportionate to the legitimate aim pursued," whether it "serves a pressing social need," and whether "the reasons for its justification are relevant and sufficient."²²⁹ Case law of the ECHR has demonstrated that "necessary" is somewhere between "indispensable" and "admissible" or "desirable."²³⁰

The relevant case law²³¹ also demonstrates that the ECHR would uphold a prohibition on the slaughter of animals for artistic expression as necessary in a democratic society to protect morals.²³² Unlike *Lingens*, which turned on the utility of political expression, a challenge to a ban on the killing of animals for artistic expression may be deemed necessary in a democratic society because artistic expression is afforded less protection.²³³ Similarly, a case of this nature would be distinguished from *Otto* because public access to the film banned in *Otto* was limited—there was an age limit to see the film, the public was warned about the contents of the film, and the ECHR saw no "stringent reasons" for the complete ban on the film.²³⁴ Likewise, in *Wingrove*, the ECHR concluded that prohibiting the showing of the film at issue violated Article 10 because of the public's limited access to the film and that it was far less likely than the film at issue in *Otto* to attract public attention.²³⁵ It is highly telling that in its opinion, the ECHR noted that it was unlikely that "members of the public could unintentionally find themselves viewing the video in the same way as they might walk into an art gallery."²³⁶ Finally, a case of this nature would be distinguished from *Vereinigung Bildender Künstler*,

228. See EXCEPTIONS, *supra* note 55, at 14.

229. BOSMA, *supra* note 220, at 136 n.22.

230. See EXCEPTIONS, *supra* note 55, at 14.

231. See *supra* Part III.B.2.

232. See *supra* Part III.B.2.

233. See JANIS, *supra* note 215, at 212.

234. *Otto-Preminger Inst. v. Austria*, 19 Eur. H.R. Rep. 34, 37, 43 (1994).

235. *Wingrove v. United Kingdom*, 24 Eur. Ct. H.R. 1, 21–22 (1997).

236. *Id.* at 22.

in which the ECHR placed great emphasis on the fact that the injunction was unlimited in nature, because the restriction would be narrowly tailored—targeting only the slaughter of animals for artistic expression.²³⁷ The artists would still have the opportunity to send messages about dogs starving on the streets, for instance; they simply would be prohibited from killing an animal to do so.

A case of this nature would be much more akin to the cases in which the challenged measure was not a violation of Article 10. For instance, a case of this sort would be similar to *Müller*, in which the ECHR held that Switzerland's interference with the right to freedom of expression by banning and seizing paintings depicting sexually offensive acts was necessary in a democratic society.²³⁸ In *Müller*, the ECHR was particularly swayed by the details of the exhibit featuring the banned paintings, stating as follows:

[I]t must be emphasised that – as the Swiss courts found both at the cantonal level at first instance and on appeal and at the federal level – the paintings in question depict in a crude manner sexual relations, particularly between men and animals. They were painted on the spot – in accordance with the aims of the exhibition, which was meant to be spontaneous – and the general public had free access to them, as the organisers had not imposed any admission charge or any age limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to – and sought to attract – the public at large.²³⁹

Like *Handyside*, then, the ECHR was particularly swayed by the unfettered access of children to the exhibit.²⁴⁰ Additionally, the ECHR focused on the lack of a “uniform European conception of morals”²⁴¹ and that the state is uniquely situated to ascertain the necessity of a measure in its society, concluding:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.²⁴²

Handyside, too, focused on the “great variation in different countries on the requirements of morality,” thus warranting the ECHR's deference to the conclusion of the United Kingdom's legislature in

237. *Vereinigung Bildender Künstler v. Austria*, 47 Eur. H.R. Rep. 189, 197–98 (2008).

238. *Müller v. Switzerland*, 13 Eur. Ct. H.R. 212, 228–29 (1991).

239. *Id.* at 229.

240. See GUIDE TO IMPLEMENTATION, *supra* note 41, at 48.

241. *Müller*, 13 Eur. Ct. H.R. at 228.

242. *Id.* at 229.

that case.²⁴³ In *Müller*, the ECHR applied the same rationale. Together, the two cases stand for the proposition that Article 10's protection of artistic expression is not as strong as the protection accorded political speech, evidenced by the ECHR's substantial deference to the Swiss courts' determination.²⁴⁴

In *Murphy*, the ECHR explicitly acknowledged that greater deference is given to states when morals or religions are at issue because of the potential of seriously offending deeply held personal convictions.²⁴⁵ Furthermore, the ECHR recognized that the scope of the ban—limited to audiovisual media—warranted finding that the interference was proportionate and thus not overly burdensome on the freedom of expression.²⁴⁶ Similarly, a ban of the sort proposed in this Note would be strictly limited to the slaughter of animals for artistic expression. Like the religious messages at issue in *Murphy*, which had the potential to deeply offend those who held different religious beliefs from the applicant, exhibitions featuring animals slaughtered for art has the potential to profoundly offend members of the public, particularly those supportive of animal welfare, sensitive to life, or keenly respectful of nature. Taking into account all of the relevant case law, it becomes clear that the ECHR would likely deem a prohibition on the slaughter of animals for art necessary to protect the morals of the challenged state's citizens.

VI. CONCLUSION

To fill in the gaps its animal protection laws and promote respect for nature and the value of all life, the Council must create a convention prohibiting the slaughter of animals for artistic expression. Those who defend the slaughter of animals for this purpose may claim that it is hypocritical to oppose the slaying of animals for art, yet embrace their slaughter for things like food and clothing. This argument is not without merit, yet it assumes that prohibitions on other forms of animal exploitation are not within the law's reach. Rather, a ban on the slaughter of animals in this context could be a stepping stone to a ban on the slaughter of animals in general. After all, as the French philosopher Rousseau acknowledged over

243. See, e.g., JANIS, *supra* note 215, at 177–78.

244. See, e.g., *id.* at 211–12 (internal citations omitted) (“The actual character of the protection extended to artistic expression, however, may be different from that accorded political speech. Public regulation of such work typically stems from a desire to suppress material that offends social standards of decency, often standards relating to the proper scope of public discussion or depiction of sexual activity.”).

245. *Murphy v. Ireland*, App. No. 44179/98, 38 Eur. H.R. Rep. 212, 234 (2004).

246. *Id.* at 232.

two centuries ago, the sentience of animals, "being common to both [humans] and [animals], ought to entitle the latter at least to the privilege of not being wantonly ill-treated by the former."²⁴⁷ Ideally, it will not be long until our morals and Rousseau's conception of natural rights are embodied in animal welfare conventions and laws throughout the world.

247. JEAN JACQUES ROUSSEAU, DISCOURSE ON INEQUALITY 14 (Kessinger Publishing 2004) (1754).