YALE LAW SCHOOL

GLOBAL CONSTITUTIONALISM 2012

A Part of the Gruber Progam for Global Justice and Women's Rights

Law's Borders

Targeting, Detention, and Punishment: Problems in the Relationship of War and Crime

(Dis)uniformity of Rights in Federations and Unions

Dialogues on the European Convention of Human Rights, 2012

Constitutional Pluralism and Constitutional Conflicts

International Investment Law and Arbitration Amidst Global Change

Law's Future(s): The Sustainability of Transnational, National, and International Courts

Editor
Judith Resnik

The Peace Palace, International Court of Justice, The Hague, the Netherlands.
Architect: Louis M. Cordonnier.
Design modified and construction supervised by J.A.G. van der Steur, 1913.
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Yale's Global Constitutionalism Seminar

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and in celebration of

Andrew Carnegie's Vision for International Justice

SESSIONS

Envisioning Peace in the 21st Century

Andrew Carnegie's Legacy in an Age of Insecurity: Justice of War/Justice in War

The Continuing Relevance of Andrew Carnegie's Legacy

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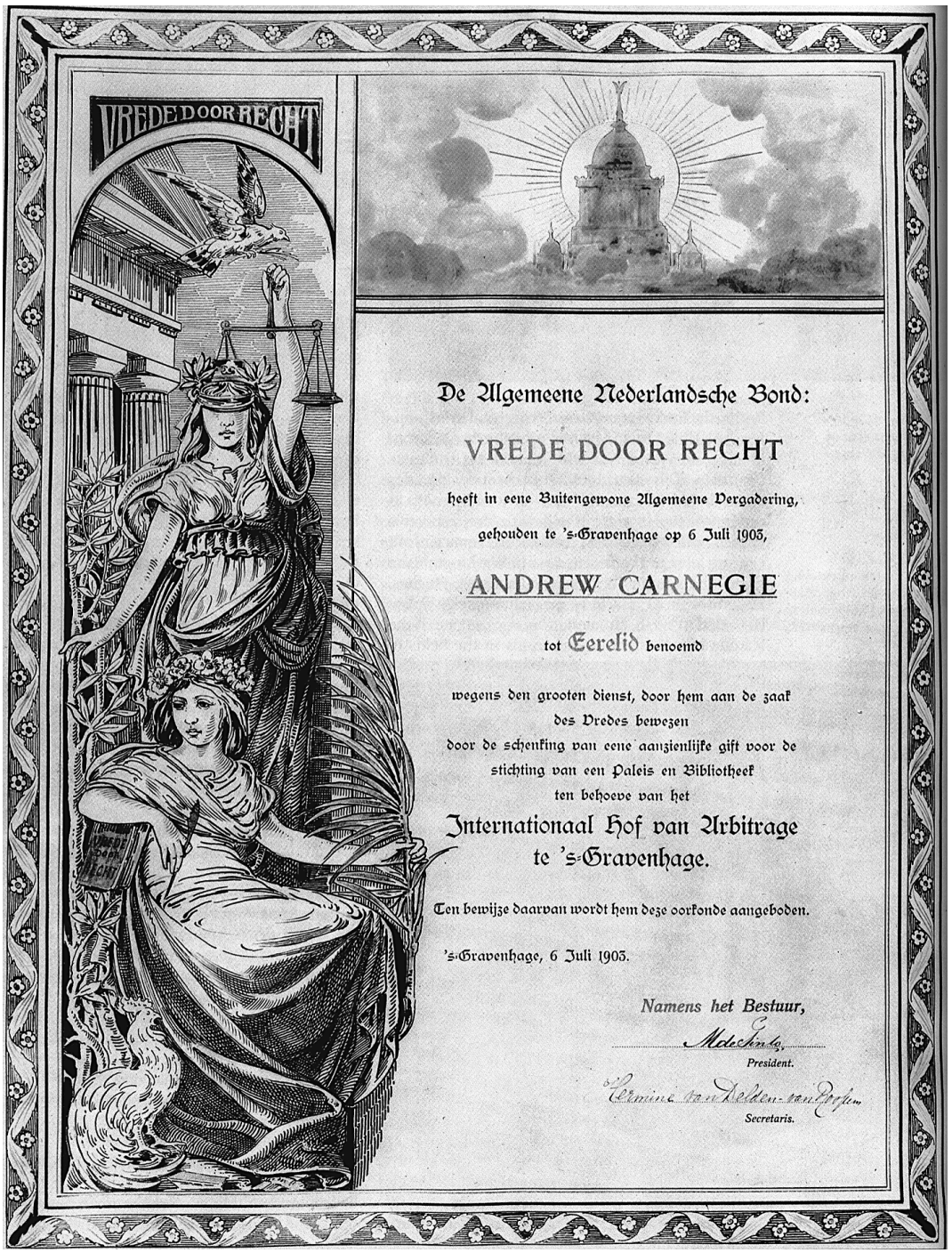

Certificate awarding Andrew Carnegie honorary membership in the Dutch Society Vrede door Recht (Peace through Justice), July 6, 1903.
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Gruber Program for Global Justice and Women's Rights

The Gruber Program for Global Justice and Women's Rights has supported the Yale Global Constitutionalism Seminar since The Gruber Foundation was established at Yale University in 2011. The Seminar originated at Yale Law School in 1996 and is now an integral part of the Gruber Program.

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Law's Borders

Judith Resnik, Editor

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PREFACE

Yale's Global Constitutionalism Seminar began in 1996. We thus continue the discussions and traditions launched under the leadership of Paul Gewirtz, Anthony Kronman, Robert Post, Bruce Ackerman, and Jed Rubenfeld and through the administrative abilities of Pascale Mathieu.

This year, we move from New Haven, Connecticut, to The Hague. We do so to honor the one hundredth anniversary of the founding of Carnegie Corporation of New York and to celebrate its sibling institution, the Carnegie Foundation, and its superintendence of the Peace Palace. Thus our travel recognizes the global aspirations of Andrew Carnegie who, in the early part of the twentieth century, supported the construction of an international institution in the hopes that its name would forecast the trajectory of the decades to come.

Our topic, *Law's Borders*, fits our venue. Our first subject is the relationship between the law of war and the law of crime, in a session co-chaired by John Fabian Witt and Aharon Barak. The readings raise fundamental questions about what roles courts play in affecting the contours and the content of war. The issues range from what law does or might say about practices such as "targeting" (killing) individuals that a country perceives to be its enemies, to whether rules governing the detention of opponents and the punishment of actions during war ought to resemble the legal regime governing the detention and the prosecution of criminals. Underlying is the question of whether war and crime are the only models or whether other models can be developed to respond to aggression and violence.

Thereafter, we turn to another set of boundaries, those that during times of peace delineate one jurisdiction from another, both within federations and unions and beyond. The chapters that follow engage the role played by the law of one polity in the courts of another. Given that we meet in Europe, we have excerpted both the April 2012 "Brighton Declaration," issued by the member states of Europe and addressing the relationships among member states, their courts, and the European Court for Human Rights (ECtHR), and the response by that court's president, Sir Nicolas Bratza. These discussions provide the backdrop for the chapters that follow.

We then take up specific examples of conflicts, tensions, redundancies, and coordination among courts, in part through debates about who has the authority to determine the voting rights of prisoners and access to abortions, examined in the chapter that Reva Siegel and I co-authored on *(Dis)uniformity of*

Rights in Federations and Unions. Questions of authority are likewise addressed in the chapter *Constitutional Pluralism and Constitutional Conflicts* by Alec Stone Sweet and Miguel Maduro.

Both segments examine ways in which federated legal orders authorize or prohibit variation in the recognition of rights. Courts have developed methods ranging from inquiries into consensus, efforts to categorize certain kinds of rules about human activity as belonging to a particular level of authority (described as competencies, subsidiarity, or federalism), and doctrines such as the margin of appreciation and proportionality. Questions emerge about the degree to which such methods guide or explain the judgments made. Constitutional pluralism takes up these questions in the context of direct conflicts of legal rules within affiliated jurisdictions and offers examples of one court concluding that another's judgment is not binding upon it. Both chapters explore the functions that such doctrines serve and the arguments (such as sovereignty, democratic self-creation, constitutional fidelity, and fundamental rights) made for their use. Central to these discussions are the values served by the redundancy and multiplicity of normative authorities, the utilities of dialogue, and the role of judges in shaping the boundaries of authority.

The next segment reflects on the diverse institutions that have emerged during the twentieth century to generate transnational norms, regulate transnational actors, and mediate conflicts. The Permanent Court of Arbitration is seated at the Peace Palace. The 1903 donative transfer for that building explained, "the establishment of a Permanent Court of Arbitration by the treaty of 29th of July, 1899, is the most important step forward of a worldwide humanitarian character which has ever been taken by the joint Powers, as it must ultimately banish war, and further . . . that the cause of the Peace Conference will greatly benefit by the erection of a Court-House and Library for the Permanent Court of Arbitration." The readings on arbitration, provided by Michael Reisman, bring the modern institution of international arbitration to the fore.

Institutionalism is also a central motif in the closing session, on *Law's Future(s*): *The Sustainability and Viability of Transnational, International, and National Courts*. These materials continue the critical examination of transnational institutions, as they explore the plausibility and desirability of international law. Once again, we return to the complexity of inter-jurisdictional judicial authority and the functions of sovereignty in and beyond nation-states. Discussants—Robert Badinter, Stephen Breyer, Sabino Cassesse, Dieter Grimm, Brenda Hale, joined by Sam Muller—offer diverse vantage points from which to view the present and consider the options in the decades to come.

As editor, I take special pleasure in being able to thank those who made this volume possible. The readings for each of the sessions were selected and edited by the colleagues mentioned above, who gave generously of their time. As in the past, we have all received great help from other Seminar participants, who sent us suggestions of cases and materials. Moreover, our librarians, and especially Camilla Tubbs, enabled us to identify and gather sources that would otherwise be unavailable. As is our custom, the materials in this volume have been relentlessly pruned, and most footnotes and citations have been omitted. In somewhat of a departure from custom, we have included a few relevant photographs.

An important "but for" is that, without our student editors, the volume would not exist. We are the beneficiaries of the work of remarkably able students, including the Executive Editor, Travis Pantin; the Senior Editors, Blake Emerson and Andrea Scoseria Katz, and those joining the group this year, Julia Brower, Kevin Lamb, and Clare Ryan. These student-colleagues have been tireless in shepherding the volume to completion. In addition to their thorough research, editing, attention to detail, and management, we received thoughtful and insightful guidance from them.

A discussion of the content of this volume would not be complete without additional words about the context that brought us to The Hague. Yale's Global Constitutionalism Seminar is enriched because, with the encouragement of Vartan Gregorian and Stephen Breyer, we are joining in the program sponsored by colleagues at Carnegie Corporation to mark and explore the legacy of Andrew Carnegie and the twenty-first century implications of the aspirations for peace to which Andrew Carnegie devoted his life. Moreover, given Andrew Carnegie's insistence that the Peace Palace house both an open library and a court, we understand our work as continuing his insistence of the interdependence of knowledge and justice. Further, the invitation to The Hague has brought us into collaboration with The Hague Institute for the Internationalisation of Law (HiiL).

Our host, Steven van Hoogstraten, General Director of the Carnegie Foundation, has generously made space and time for us to join him at The Hague during a time of year that is not otherwise ideal. Stephen Del Rosso, Program Director for International Peace & Security at Carnegie Corporation, and Jeanne D'Onofrio, Chief of Staff and Operations of Carnegie, worked with us in coupling Carnegie's conference plans and ours, to make the interlocking events possible. Sam Muller, Director of HiiL, has likewise been indefatigable in guiding the melding of our seminar and the Carnegie conference. Miguel Maduro helped in the planning, and we are grateful that President José Manuel Barroso of the European Commission joins us to discuss Europe's challenges.

The person meriting yet additional thanks is Renee DeMatteo, who is Yale Law School's Senior Conference and Events Services Manager and whose insights, attention, and kindness guided each stage of the planning. Renee is the other "but for"; without her work, we would not be able to meet together at The Hague.

Finally, ideas, actions, commitments, and concerns make their way into the world because they are shared and because they are supported. We have the pleasure of thanking Carnegie Corporation of New York for its partnership this year, as well as thanking Peter and Patricia Gruber for their continuing sponsorship of Yale's Global Constitutionalism Seminar, which is a part of the Gruber Program for Global Justice and Women's Rights at Yale Law School. Peter and Patricia Gruber, like Andrew Carnegie before them, have a vision for the globe that aspires to a world more fair, humane, and just than that which we currently inhabit.

Judith Resnik
Arthur Liman Professor of Law, Yale Law School
June, 2012

TARGETING, DETENTION, AND PUNISHMENT: PROBLEMS IN THE RELATIONSHIP OF WAR AND CRIME

DISCUSSION LEADERS

JOHN FABIAN WITT AND AHARON BARAK

I. TARGETING, DETENTION, AND PUNISHMENT: PROBLEMS IN THE RELATIONSHIP OF WAR AND CRIME

DISCUSSION LEADERS:
JOHN FABIAN WITT AND AHARON BARAK

What Counts as Armed Conflict and Who Is In it?

The Meaning of Armed Conflict

Who Is a Combatant?

Targeted Killings

The Legal Culture of Targeting

Extra-Legal Killing or Armed Conflict?

The Power to Detain

Is There a Duty to Capture if You Can?

The Vast Powers of Detention

New Legal Limits?

Is There a Detention/Targeting Tradeoff?

Punishing

The Enlightenment Immunity from Criminal Laws

The Return of Criminalization

The Critique of Criminalization

Proportionality

Coda: The Role of the Judge in Terrible Decisions?

The laws of armed conflict rest on a sharp distinction between the domains of war and crime. Beginning in the seventeenth and eighteenth centuries, the condition of war was defined by its setting aside of justice. Security crises in the twenty-first century, however, have thrust these domains back together along multiple dimensions. This chapter's materials pursue the implications of the reintegration of war and crime in our time.

The readings begin with two preliminary questions. First, what counts as an armed conflict? In a world in which powerful states have an extraordinary technological capacity to kill, enormous pressure has been placed on this seemingly innocent question. Second, who is a combatant? Even after the threshold decision on armed conflicts has been made, many of the powers that armed conflict authorizes are held only in relation to those who have certain kinds of participatory relationships to the armed conflict. Moreover, as Carl Schmitt suggests in a provocative excerpt contained herein, the boundary between the lawful combatant and the unprivileged belligerent reveals the instability of the conventional categories of the laws of armed conflict.

Once these threshold questions have been aired, the chapter turns to the rise of targeting law and asks whether the targeted killings that are now a mainstay of antiterrorism efforts constitute acts of war, or crimes. Additional questions have arisen recently about the role of judges in reviewing decisions about military targeting, including how to review the administrative law systems for governing targeting decisions that some states—including Israel and the United States—have developed.

Like targeting, the traditional war power of detention has also come under pressure in twenty-first-century armed conflict. The International Committee of the Red Cross and others have urged with increased force in recent years that reasonableness and necessity restraints—the kinds of restraints long characteristic of the use of force by domestic criminal law agencies—should apply equally to armed conflicts, especially in the kinds of asymmetric conflicts typical of the past decade. Such critics assert a duty to capture (when feasible) even those persons who may lawfully be targeted. United States officials and courts have yet to embrace such a duty. But they do assert wide authority to detain in situations of armed conflict, even as the European Court of Human Rights has begun to place new limits on the detention of individuals suspected of terror.

Our discussion of detention concludes with a short treatment of one of the most dismaying possibilities to arise in debates over the laws of armed conflict in recent years: Do human rights norms or other forms of law governing the detention of suspected terrorists produce incentives for states to shift away from

detention and toward targeted killings? More generally, the possibility of a trade-off between detention law and targeting raises a particular form of a more general problem about the role of judges in the law of armed conflict. Structurally, courts can inevitably be only partial regulators of vast and complex systems of state authority in such settings (and in policing and detention more generally). Risks of unintended consequences and hydraulic effects abound.

The past few decades have also witnessed the reintroduction of crime into the domain of war. Enlightenment jurists such as the Swiss publicist Emmerich de Vattel founded the modern laws of war on the sharp separation of war and crime. Since at least Nuremberg in 1945 and 1946, a new generation of international criminal courts has brought crime and punishment back into war. But the eighteenth-century critique of integrating war and crime persists in the form of sharp anxiety that the criminalization of acts of war makes difficult the reestablishment of the peace that Vattel and others took to be the principal aim of humanitarian law.

Lacing all these issues are questions of fact and of judgment. How are decisions made about who to target, detain, and punish? What information comes from what sources, with what oversight, what structures, and what institutional arrangements? Are these arenas for courts? And if so, under what analytic frameworks?

Last, but not least, the chapter's materials take up the problem of proportionality in the conduct of war. Few areas have witnessed as dramatic a sea change as that of proportionality in armed conflict. As recently as the middle of the twentieth century, the necessity doctrine was well understood as a license for state violence vastly more destructive than was permitted to states outside of the war setting. Twenty-first-century humanitarian law, by contrast, aims to place far tighter limits on unintended harm to civilians. Modern proportionality, like targeting, detention, and punishment, raises deep questions about the role of courts in the regulation of armed conflict.

WHAT COUNTS AS ARMED CONFLICT AND WHO IS IN IT?

The Meaning of Armed Conflict

Prosecutor v. Tadić

Decision on the Defence Motion for Interlocutory
Appeal on Jurisdiction
International Criminal Tribunal for the Former Yugoslavia
Case No. IT-94-1-I (Oct. 2, 1995)

66. Appellant . . . asserts . . . that there did not exist a legally cognizable armed conflict—either internal or international—at the time and place that the alleged offences were committed. . . .

67. International humanitarian law governs the conduct of both internal and international armed conflicts. . . . [T]he temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated.

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. . . .

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that

the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. . . .

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

International Law Association

Final Report on the Meaning of Armed Conflict in International Law[*]

[A]rmed conflict is to be distinguished from "incidents"; "border clashes"; "internal disturbances and tensions such as riots, isolated and sporadic acts of violence"; "banditry, unorganised and short lived insurrections or terrorist activities" and "civil unrest, [and] single acts of terrorism." The distinction between these situations and armed conflict is achieved by reliance on the criteria of organisation and intensity. . . .

The criterion of organisation: . . . armed conflicts involve two or more organized armed groups. Violence perpetrated by the assassin or terrorist acting essentially alone or . . . disorganized mob violence . . . is not armed conflict. . . .

The Trial Chambers of the [International Criminal Tribunal for the Former Yugoslavia] have relied on several indicative factors outlined in detail above to determine whether the organisation criterion is fulfilled. . . . None of the factors in itself is central. Factors relevant to assessing organisation include command structure; exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; recruitment of new members; existence of communications infrastructure; and

[*]Excerpted from *Final Report on the Meaning of Armed Conflict in International Law*, INT'L LAW ASSOC. 28-30 (2010), http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87.

space to rest. As a practical matter opposing groups will in most cases control enough territory to organize. Control of territory is an affirmative requirement for the application of Additional Protocol II. . . .

The criterion of intensity: . . . hostilities must reach a certain level of intensity to qualify as an armed conflict.

Factors relevant to assessing intensity include for example the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of the Security Council or other actors to broker cease-fire efforts. Isolated acts of violence do not constitute armed conflict. The intensity criterion requires more than, for example, a minor exchange of fire or an insignificant border clash. None of the factors identified above is necessarily determinate in itself. A lower level with respect to any one may satisfy the criterion of intensity if the level of another factor is high.

The jurisprudence of the ICTY indicates that the requirement of intensity will normally have a temporal aspect in the case of non-international armed conflicts . . . . [I]n order to constitute a noninternational armed conflict there must be a certain level of armed violence over a protracted period. The two concepts, intensity and protraction, are linked and a lesser level of duration may satisfy the criterion if the intensity level is high. . . .

Who Is a Combatant?

Carl Schmitt

THEORY OF THE PARTISAN[*]

[T]he distinction of partisans—as irregular fighters who are not equal to regular troops—has been in principle retained to this day. The partisan in this sense does not have the rights and privileges of combatants; he is a criminal in

[*]Excerpted from CARL SCHMITT, THE THEORY OF THE PARTISAN: A COMMENT/REMARK ON THE CONCEPT OF THE POLITICAL 16, 25, 34, 36–37 (A.C. Goodson, trans., Michigan State University Press, 2004) (1963).

common law, and may be rendered harmless by summary punishments and repressive measures. . . .

The traditional European containment of war between states has proceeded since the eighteenth century from determinate concepts which, though interrupted by the French Revolution, were all the more effectively confirmed by the restoration work of the Congress of Vienna. These ideas of a contained war and a just enmity stemming from the age of monarchy can only then be legalized bilaterally when the warring states on both sides hold fast to them, both within their own states and between them, that is, when their domestic as well as their interstate concepts of regularity and irregularity, legality and illegality, are in alignment or at least structurally homogeneous to some extent. . . .

[I]t was Lenin who recognized the inevitability of violence and of bloody revolutionary civil war as well as state war, and so affirmed partisan war . . . .

The war of absolute enmity knows no containment. The consistent realization of absolute enmity provides its meaning and its justice. The only question therefore is this: is there an absolute enemy and who is it *in concreto*? For Lenin the answer was unequivocal, and his superiority among all other socialists and Marxists consisted in his seriousness about absolute enmity. His concrete absolute enemy was the class enemy, the bourgeois, the western capitalist and his social order in every country in which they ruled. . . . [Lenin's] comprehension of the partisan rested on the fact that the modern partisan had become the irregular proper and, in his vocation as the executor proper of enmity, thus, the most powerful negation of the existing capitalist order.

The partisan's irregularity refers today not only to a military "line" or formation, as it did in the eighteenth century, when the partisan was just a "lightly armed troop," nor to the proud uniform of the regular troop. The irregularity of class struggle calls not just the military line but the whole edifice of political and social order into question. The alliances of philosophy with the partisan, established by Lenin, unleashed unexpected new, explosive forces. It produced nothing less than the demolition of the whole Eurocentric world, which Napoleon had tried to save and the Congress of Vienna had hoped to restore.

International Committee of the Red Cross

Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law[*]

I. The concept of civilian in international armed conflict: For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

II. The concept of civilian in non-international armed conflict: For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In noninternational armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

III. Private contractors and civilian employees: Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

IV. Direct participation in hostilities as a specific act: The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.

V. Constitutive elements of direct participation in hostilities: In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); 3. the act

[*]Excerpted from *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian La*w, 9 INT'L REV. RED CROSS 991 (2008).

must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

VI. Beginning and end of direct participation in hostilities: Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.

VII. Temporal scope of the loss of protection: Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

VIII. Precautions and presumptions in situations of doubt: All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.

IX. Restraints on the use of force in direct attack: In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

X. Consequences of regaining civilian protection: International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

Public Committee Against Torture v. Government

Israel Supreme Court
Case No. HCJ 769/02 (2006)

President (Emeritus) A. Barak:

32. [W]e have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians "unless and for such time as they take a direct part in hostilities."

33. [C]ivilians lose the protection of customary international law dealing with hostilities of international character if they "take . . . part in hostilities." What is the meaning of that provision? The accepted view is that "hostilities" are acts which by nature and objective are intended to cause damage to the army. . . .

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict, if "they take a direct part in hostilities." . . . It seems accepted in the international literature that an agreed upon definition of the term "direct" in the context under discussion does not exist. . . . In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement. . . . [A] civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it is a civilian taking "an active part" in the hostilities. However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities. Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities.

35. [T]he following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army . . . ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them . . . . The function determines the direct part of the part taken in the hostilities. . . .

36. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. . . . However, if they do so of their

own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities.

37. [I]n our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take a "direct part." The same goes for the person who decided upon the act, and the person who planned it. . . .

39. [T]here is no choice but to proceed from case to case. . . . On the one hand, a civilian taking part in hostilities one single time, or sporadically, who later detaches himself from that activity, is entitled to protection from attack. . . . On the other hand, a civilian who has joined a terrorist organization which has become his "home," and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attach "for such time" as he is committing the chain of acts.

TARGETED KILLINGS

The Legal Culture of Targeting

Aharon Barak

Human Rights in Times of Terror—A Judicial Point of View[*]

[J]udges in modern democracies have a major role to play in protecting democracy. We should protect it both from terrorism and from the means the state wishes to use to fight terrorism. Judges are, of course, tested daily in their protection of democracy, but judges meet their supreme test when they face situations of war and terrorism. The protection of human rights of every individual is a duty much more formidable in situations of war or terrorism than in times of peace and security. If we fail in our role in times of war and terrorism, we will be unable to fulfill our role in times of peace and tranquility. It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a

[*]Excerpted from Aharon Barak, *Human Rights in Times of Terror—A Judicial Point of View*, 28 LEGAL STUD. 493 (2008).

period of peace. It is self-deception to believe that we can limit judicial rulings so that they will be valid only during wartime, and that we can decide that things will change in peacetime. The line between war and peace is thin; what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction in the long term. We should assume that whatever we decide when terrorism is threatening our security will linger many years after the terrorism is over. Indeed, we judges must act with coherence and consistency. A wrong decision in a time of war and terrorism plots a point that will cause the judicial curve to deviate after the crisis passes. . . .

What is the scope of judicial review in time of terror? The answer to this question should vary according to the essence of the concrete question raised. At one end of the spectrum stands the question 'What is the law on the battle against terror?' That question is within the realm of the judicial branch. The court is not permitted to liberate itself from the burden of that authority. The question which the court should ask itself is not whether the executive branch's understanding of the law is a reasonable understanding. The question should be is it the correct understanding. We have not accepted the *Chevron* doctrine. At the other end of the spectrum is the decision, made on the basis of the knowledge of the military professionals, to execute a military operation. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself only if a reasonable military commander could have made the decision which was made. If the answer is yes, the Court will not exchange the military commander's security discretion within the security discretion of the Court. Judicial review regarding the military means to be taken is the regular review of reasonableness. True, 'military discretion' and 'state security' are not magic words which prevent judicial review. However, the question is not what I would decide in the given circumstances, rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security.

Between the two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. One of those legal aspects is the decision about proportionality. By proportionality I mean the legal concepts that require that any limitation of human rights—whether by statute or by an administrative regulation—should fulfill the following requirements: (a) there should be a rational connection between the goal to be achieved and the means used, (b) there are no less restrictive means to achieve that goal, and (c) the benefit to the public interest achieved by the means is proportional to the harm caused to the human rights. Many judgments I gave

dealing with the battle on terror were dealing with proportionality. Thus, in occupied territories, the military cannot take possession of land, if the harm to the local population does not fulfill the requirements of proportionality. Similarly, under customary international law the state cannot harm civilians while fighting terror if such harm does not fulfill the proportionality requirement. In a recent case, I dealt with targeted killings. It was decided that the state cannot target a terrorist who takes direct part in terrorist activities if the collateral damage to civilians will be disproportionate.

Jack Goldsmith

POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11[*]

A targeting decision is the commander's decision, but lawyers like Mark Martins[**] are involved at every step. They first of all ensure compliance with international law, which demands that fire be directed to military and not civilian targets (a tricky issue when the enemy wears civilian clothes or hides in a hospital or a mosque); that it be calculated to not cause "unnecessary suffering"; and that the anticipated collateral damage to civilian life or property not be "excessive" when compared to the expected military gain of the attack (a difficult subjective judgment call). . . . The operational lawyer must also ensure that the attack is consistent with other domestic laws . . . and with the rules of engagement and scores of other regulations, directives, and executive orders that apply on the modern battlefield. Making these decisions in battle requires the lawyer to be well trained as a warrior, and to have a thorough and realistic understanding of battle situations, intelligence gathering techniques, and communications and weapons systems. "Soldier First, Lawyer Always" is the Army JAG Corps motto.

In theory the military lawyer can veto a targeting decision at many points in the targeting process. "Lawyers will be very clear if there is a 'no kidding' red line that you are about to walk over," says [David] Petraeus [currently director of

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[*]Excerpted from JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012). [Editor's Note: The author, a professor at Harvard Law School, was Assistant Attorney General, Office of Legal Counsel, in the United States Department of Justice from 2003 to 2004.]

[**][Editor's Note: As of 2012, Mark Martins was serving as the Brigadier General and Chief Prosecutor of the U.S. Office of Military Commissions at Washington D.C. and Guantánamo Bay, Cuba.]

the U.S. Central Intelligence Agency and former commander of U.S. forces in Afghanistan]. "They will generally be firm and reminding you of that." Commanders heed such advice, but in fact they rarely approach a red line because lawyers have exercised much of their influence before the battle begins. Petraeus and his subordinate commanders had trained with lawyers for decades, and together with lawyers had already folded legal considerations into the rules of engagement and other battlefield directives.

When Petraeus led the 101st Airborne Division in the battle of Najaf, Iraq, in the Spring of 2003, one of his battalions fighting toward the city center in tanks and armored personnel carriers was getting hammered by the Feyadeen Saddam using rocket propelled grenades, small arms, and howitzers from civilian strongholds within and around the shrine of Imam Ali, one of the holiest sites in Shia Islam. . . . "[O]perational lawyers . . . were there in each headquarters down to brigade level to provide sound advice and supervise training on rules of engagement," he recalls. Another factor kept the battalion far from any legal lines. Petraeus could have considered an attack on the holy shrine itself, which was shielding the enemy . . . . He didn't need a lawyer, however, to tell him this was a bad idea. "I didn't want a single round, not even a ricochet, to hit the dome," he says. . . .

Law and lawyers also help commanders in targeting and related decisions by acquainting them with the accumulated wisdom the past. "Law embodies and summarizes human experience and wisdom about right action in a particular context," says Martins. The international laws of war contain principles that, along with their precedents of application, reflect centuries of experience and learning. When the commander wants to take a militarily efficient action and . . . a law or regulation that suggests another course, the commander is forced to consider how others have thought in his shoes or might view his action from a different perspective . . . . When this process works, [Martins says], "legal advice does not constrain policy, but rather confirms it by forcing you to think about every aspect of the decision . . . ."

The military lawyer's value, and thus influence, come not just from the identification of and advice about laws, but also from advice on nonlegal matters. Lawyers help you come to grips with the issues involved in a targeting decision, not all of which are legal issues, explains Petraeus. He is speaking of the military lawyer's role as "counsellor" or, as some put it, "*consigliere*." Lawyers are trained to think clearly, critically, and analytically, to find weakness in evidence or in causal inferences, and to consider the broader implications and effects of a decision. They are typically more attuned to the context, appearance, and political and moral implications of particular actions. . . . Lawyers also have a slew of

precedents at their fingertips—not all of them legal precedents—to help commanders understand by analogy some of the hidden dangers behind the situation at hand. . . . This is why Petraeus uses lawyers "for a lot of other things" besides legal advice. It is yet another reason why they are so influential. . . .

Surrounded by law and under the gaze of many potential retroactive critics, it is entirely rational for soldiers up and down the chain of command to hesitate before acting. Such hesitation can be costly. In October 2001, a Predator drone identified a convoy believed to carry Taliban leader Mullah Omar and followed him to a building that looked like a mosque. . . . When Franks got the go-ahead, he ordered a strike on a vehicle outside the building rather than on the building itself. He did so in part on the advice of a military lawyer who expressed caution because of the probable presence of civilians inside the building. Omar escaped. This pattern of lawyer-induced hesitancy to strike top al Qaeda or Taliban leaders would repeat itself ten times in the first month of the war in Afghanistan . . . .

[E]ven General Petraeus, who and admires and relies heavily on lawyers, cautions that they can be "'surprise, surprise,' overly legalistic" . . . .

Amichai Cohen

Legal Operational Advice in the Israeli Defense Forces[*]

[T]he . . . "International Law Department" (ILD) in the Military's Advocate General (MAG) branch of the Israeli Defense Forces (IDF) . . . is entrusted with advising the military with regards to the requirements of international law. . . .

[A] major surge in ILD's lawyers' involvement in operational decisions took place at the beginning of the second intifada in September 2000. . . . In September 2000 the IDF began to view the conflict as something similar to war, albeit in a civilian setting. IDF commanders had very little experience as to the IHL limits under this kind of conflict. In order to receive some legal instructions, the IDF commanders turned to the ILD for advice. For example, one of the most controversial decisions taken at the beginning of the second intifada was the

[*]Excerpted from Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367 (2011)

initiation of a policy of targeted killings. When asked for an opinion regarding the legality of this policy prior to its adoption, the ILD advised that although targeted killings were permissible, several conditions had to be met prior to their undertaken. These included: the need to assure that there is no viable arrest opportunity; the need to follow the rule of proportionality; and ministerial level approval (usually by the Minister of Defense). This opinion, while important, was still in the traditional mold of ILD pre-action advice. Since some of these requirements were difficult to apply, the ILD was asked to send representatives to the command center where specific orders were given, and to grant their approval to operations. The ILD did indeed dispatch such representatives, and implemented "operational legal advice" was implemented, though at first without realizing its greater potential. . . .

There are two basic principles that run through official descriptions of the role of ILD lawyers and their self-perception. These principles are independence and the advisory role. Independence means that the legal advice given is based on independent legal analysis and not on the wishes of the commander. The advisory role means that the lawyer advises the military commander as to the legal limits of a course of action, but he is not the final decision maker. . . .

At least in the IDF, neither of the principles noted above (independence of the unit and its advisory role) [is] fully observed. . . . MAG lawyers involved in operational advice consistently report that even if a commander decided to ignore their advice, they (or their superiors in the MAG) were always able to prevail upon his superior commander to countermand whatever decisions he might wish to take. MAG lawyers also admit to issuing direct threats to military commanders, warning them with prosecution if they take a specific route of action. . . .

The principle of independence is also more problematic than it seems. Military officers do not apparently threaten lawyers or force them to change their opinions. On the contrary, reports speak of some courageous young lawyers who stood up to over-eager commanders, and halted some dangerous and illegal operations. But . . . the main problem with [International Humanitarian Law] is that many of its norms are ambiguous. In fact, it has been designed specifically as a system which leaves much room for interpretation. The result rests on external pressures and institutional structures. Senior military commanders and other external bodies like the Ministry of Justice are aware of this characteristic of IHL, and exploit it to promote their positions. . . .

MAG lawyers are part of an institution which considers one of its major tasks to be assisting commanders to win wars. When faced with . . . "gray areas," MAG lawyers try to be responsive to the military. . . . In this respect, the fact that

legal advisors sit in command centers is actually a double-edged sword. On the one hand, they are close to events, and can give immediate advice. On the other hand, their proximity to the decision makers increases the sense that they are part of the military machinery and therefore less likely to give "independent" advice.

Extra-Legal Killing or Armed Conflict?

Philip Alston
Study on Targeted Killings[*]

1. A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. In recent years, a few States have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States. . . . .

3. The result . . . has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks—human rights law, the laws of war, and the law applicable to the use of inter-state force. Even where the laws of war are clearly applicable, there has been a tendency to expand who may permissibly be targeted and under what conditions. Moreover, the States concerned have often failed to specify the legal justification for their policies, to disclose the safeguards in place to ensure that targeted killings are in fact legal and accurate, or to provide accountability mechanisms for violations. Most troublingly, they have refused to disclose who has been killed, for what reason, and with what collateral consequences. The result has been the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum. . . .

28. Whether or not a specific targeted killing is legal depends on the context in which it is conducted: whether in armed conflict, outside armed conflict, or in relation to the interstate use of force. . . .

[*]Excerpted from Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/ADD.6 (May 28, 2010) (by Philip Alston).

In the Context of Armed Conflict

[30.] *Under the rules of [International Humanitarian Law (IHL)]*: Targeted killing is only lawful when the target is a "combatant" or "fighter" or, in the case of a civilian, only for such time as the person "directly participates in hostilities." In addition, the killing must be militarily necessary, the use of force must be proportionate so that any anticipated military advantage is considered in light of the expected harm to civilians in the vicinity, and everything feasible must be done to prevent mistakes and minimize harm to civilians. These standards apply regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists. Reprisal or punitive attacks on civilians are prohibited. . . .

Outside the Context of Armed Conflict

[32.] *Under human rights law*: A State killing is legal only if it is required to protect life (making lethal force proportionate) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force necessary). The proportionality requirement limits the permissible level of force based on the threat posed by the suspect to others. The necessity requirement imposes an obligation to minimize the level of force used, regardless of the amount that would be proportionate, through, for example, the use of warnings, restraint and capture.

33. This means that under human rights law, a targeted killing in the sense of an intentional, premeditated and deliberate killing by law enforcement officials cannot be legal because, unlike in armed conflict, it is never permissible for killing to be the *sole objective* of an operation. Thus, for example, a "shoot-to-kill" policy violates human rights law. . . .

58. [S]tates are permitted to directly attack only civilians who "directly participate in hostilities" (DPH). Because there is no commonly accepted definition of DPH, it has been left open to States' own interpretation—which States have preferred not to make public—to determine what constitutes DPH.

59. There are three key controversies over DPH. First, there is dispute over the kind of conduct that constitutes "direct participation" and makes an individual subject to attack. Second, there is disagreement over the extent to which "membership" in an organized armed group may be used as a factor in determining whether a person is directly participating in hostilities. Third, there is controversy over how long direct participation lasts.

60. It is not easy to arrive at a definition of direct participation that protects civilians and at the same time does not "reward" an enemy that may fail to distinguish between civilians and lawful military targets, that may deliberately hide among civilian populations and put them at risk, or that may force civilians to engage in hostilities. The key, however, is to recognize that regardless of the enemy's tactics, in order to protect the vast majority of civilians, direct participation may only include conduct close to that of a fighter, or conduct that directly supports combat. More attenuated acts, such as providing financial support, advocacy, or other non-combat aid, does not constitute direct participation.

One example of an approach taken by a nation-state comes from the Attorney General of the United States, who recently spoke on the American policy of targeted killings:

Eric Holder
Speech at Northwestern University Law School[*]

[W]e are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

[T]his does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. . . . [I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto—the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway—and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

[*]Excerpted from Eric Holder, Attorney Gen., Dep't of Justice, Speech at Northwestern University Law School (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful—and therefore would not violate the Executive Order banning assassination or criminal statutes.

THE POWER TO DETAIN

Is There a Duty to Capture If You Can?

One of the most pressing questions to emerge out of the targeted killings campaign is whether and when there might be a duty to capture rather than kill in armed conflict situations. The duty to capture is familiar from peacetime policing contexts. But it also now appears in the settings that have become commonplace in twenty-first-century armed conflict. The U.S. Department of Justice, for example, is said to take the position that the United States may target an enemy combatant or enemy civilian directly participating in hostilities even when that civilian is also a United States citizen, but only when capture is not feasible. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011. Similarly, the International Committee of the Red Cross (ICRC) has recently interpreted international humanitarian law to include an obligation to capture civilians directly participating in hostilities.

International Committee of the Red Cross

Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law[*]

[T]he principle of military necessity is generally recognized to permit "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources." Complementing

[*]Excerpted from *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 9 INT'L REV. RED CROSS 991 (2008).

and implicit in the principle of military necessity is the principle of humanity, which "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."

[I]n classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of [International Humanitarian Law]. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population. Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force. Further, large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group would probably have to be regarded as directly participating in hostilities. In most cases, however, it would be reasonably possible for the armed forces to remove the physical obstacle posed by these civilians through means less harmful than a direct military attack on them.

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of

military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.

The Vast Powers of Detention

Karl S. Chang

Enemy Status and Military Detention in the War Against al-Qaeda[*]

[U]nder the law of war, belligerents . . . may lawfully detain any enemy person whom they regard as militarily necessary to detain . . . .

First, belligerents may detain any person who has taken part in hostilities. The ability of states under the law of war to detain any person who has participated in hostilities is shown in the purpose of war detention, which is to prevent "further participation" in the war. Thus, anyone who has participated may be detained to prevent further participation.

In addition, belligerents can detain all members of enemy armed forces, regardless of whether individual members have participated in hostilities. Belligerents can capture former members of enemy armed forces. Belligerents can detain enemies who are armed. Belligerents can detain persons who materially support enemy forces in the fighting. Belligerents can detain all military-age inhabitants of an area during a mass uprising, known as a *levée en masse*. Belligerents can detain enemy persons present on their home territory at the outbreak of hostilities. Belligerents can detain enemy civilians who are "important" to the enemy, including senior government officials. Belligerents can detain enemy civilians for security reasons, regardless of whether they have participated in the armed conflict. The law of war guarantees humane treatment and requires that such detentions be non-punitive. In certain circumstances, the law of war requires periodic review of the necessity of continued detention. However, the law of war does not require the release of captured enemy persons whom belligerents view as necessary to continue to detain.

[*]*Excepted from* Karl S. Chang, *Enemy Status and Military Detention in the War Against al-Qaeda*, 47 TEX. INT'L L.J. 1 (2012). [Editor's note: As of 2012, the author was Associate General Counsel (International Affairs) in the U.S. Department Defense, Office of General Counsel.]

The law of war has left military detention authority broad for humanitarian reasons. In peacetime, detention without criminal trial is a severe deprivation of liberty. However, in war, detention is one of the more humane measures a belligerent can impose upon his enemy. The law of war has permissive rules on the use of deadly force compared to the civilian context. Peaceful civilians may be killed incidentally so long as their deaths are not excessive in relation to the military advantage to be gained by the attack. Under the law of war, there are circumstances in which a military commander may attack a military objective knowing that peaceful civilians will die. In contrast, "merely a temporary detention which is devoid of all penal character," is humane. Detention under the law of war can be far safer than the battlefield, as the hundreds of thousands of German and Italian prisoners of war who were interned in the United States during World War II and their counterparts fighting in Europe might attest. Moreover, by speeding the end of hostilities, military detention lessens the use of deadly force.

Al-Bihani v. Obama

United States Court of Appeals, District of Columbia Circuit
590 F.3d. 866 (2010)

[Janice Rogers] BROWN, Circuit Judge:

Ghaleb Nassar Al-Bihani appeals the denial of his petition for a writ of habeas corpus and seeks reversal or remand. He claims his detention is unauthorized by statute and the procedures of his habeas proceeding were constitutionally infirm. We reject these claims and affirm the denial of his petition.

Al-Bihani, a Yemeni citizen, has been held at the U.S. naval base detention facility in Guantanamo Bay, Cuba since 2002. . . .

Al-Bihani challenges the statutory legitimacy of his detention by advancing a number of arguments based upon the international laws of war. He first argues that relying on "support," or even "substantial support" of Al Qaeda or the Taliban as an independent basis for detention violates international law. . . .

Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the [Authorization for Use of Military Force (AUMF) enacted by the U.S. Congress in October 2001] and

other statutes are limited by the international laws of war. This premise is mistaken. There is no indication . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war power under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts. . . . Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers. Therefore . . . we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles. The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw.

Under those sources, Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," or the modified definition offered by the government that requires that an individual "substantially support" enemy forces. The statutes authorizing the use of force and detention not only grant the government the power to craft a workable legal standard to identify individuals it can detain, but also cabin the application of these definitions. The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." The Supreme Court in *Hamdi v. Rumseld*, 524 U.S. 507 (2004), ruled that "necessary and appropriate force" includes the power to detain combatants subject to such force. The 2006 MCA authorized the trial of an individual who "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." In 2009, Congress enacted a new version of the [Military Commissions Act (MCA)] with a new definition that authorized the trial of "unprivileged enemy belligerents," a class of persons that includes those who "purposefully and materially supported hostilities against the United States or its coalition partners."

[W]ith the government's detention authority established as an initial matter, we turn to the argument that Al-Bihani must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended. . . .

[T]he determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war. . . .

In addition to writing the decision for the panel, on which Judges Brett Kavanaugh and Stephen Williams also sat, Judge Brown filed an unusual additional opinion, concurring separately to add criticism of the Supreme Court's decisions in *Boumediene v. Bush*. (2008), and *Hamdi v. Rumsfeld* (2004). She described the Court as having given lower courts

> the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. . . .
>
> War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules to be written. Falling back on the comfort of prior practices supplies only illusory comfort.

Judge Williams wrote a separate concurrence that, given the detainee's concessions, the court had "no need to discuss the constitutionality of the district court's factfinding process" and the standard of proof required. Similarly, when the circuit denied rehearing en banc, the opinion by Chief Judge Sentelle concluded that the discussion by the majority about the "role of international law-of-war principles in interpreting" the AUMF was "not necessary" to the disposition. *Al-Bihani v. Obama* (D.C. Cir. 2010), cert. denied, June 12, 2012.

Judge Brown again wrote separately to argue that her discussion was not dictum and to foreclose the "possibility . . . that domestic statutes are in fact subordinate to an over-arching international legal order. . . . The idea that international norms hang over domestic law as a corrective force to be implemented by courts is not only alien to our caselaw, but an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers."

Judge Kavanaugh wrote to agree, that "[i]nternational-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President's authority under the AUMF" and then explained "at great length" his reasons for that view. Arguing that federal courts had no "common law"-making powers and that Congress had not in the AUMF imposed limits based on international law on the President's powers, Judge Kavanaugh concluded that federal judges lacked "legitimate authority to interfere with the American war effort by ordering the President to comply with international-law principles that are not incorporated in statutes, regulations, or self-executing treaties." Judge Williams wrote again, to agree that international law did not create independent judicially enforceable limits but to disagree in part with Judge Kavanaugh by stating that international law could be used to "affect a court's statutory interpretation." Thereafter, the Supreme Court denied certiorari.

The question of the quality of information and the role of district court factfinding returned in *Latif v. Obama* (D.C. Cir. 2011), cert. denied, June 12, 2012, which is a heavily redacted opinion. The majority, written by Judge Brown, overruled a district court order granting habeas relief based on inadequate evidence to detain Mr. Latif. Judge Brown found that government records—including those made through intelligence reports made during the conflict—were entitled to the "presumption of regularity" and that Mr. Latif could not prove the inaccuracy of those records. Judge Tatel's dissent argued that the district court should be affirmed:

> The government's "primary" piece of evidence is a single report. After carefully laying out the parties' arguments about the Report's internal and external indicia of reliability, the district court found it "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban." According to the district court, "there is a serious question as to whether the [Report] accurately reflects [redacted] the incriminating facts in the [Report] are not corroborated, and Latif has presented a plausible alternative story to explain his travel." The government concedes that its case for lawfully detaining Latif "turn[s]" on the Report. This, then, represents a first among the Guantanamo habeas appeals in this circuit: never before have we reviewed a habeas grant to a Guantanamo detainee where all concede that if the district court's fact findings are sustained, then detention is unlawful.
>
> But rather than apply ordinary and highly deferential clear error review to the district court's findings of fact, as this circuit has

done when district courts have found the government's primary evidence *reliable*, the court, now facing a finding that such evidence is *unreliable*, moves the goal posts. According to the court, because the Report is a government-produced document, the district court was required to presume it accurate unless Latif could rebut that presumption. In imposing this new presumption and then proceeding to *find* that it has not been rebutted, the court denies Latif the "meaningful opportunity" to contest the lawfulness of his detention guaranteed by *Boumediene.*

Convention Relative to the Protection of Civilians in Time of War (Fourth Geneva Convention)

Aug. 12, 1949, 75 U.N.T.S 287

Article 42

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Article 43

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts

or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Article 44

In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.

New Legal Limits?

A and Others v. U.K.
European Court of Human Rights (Grand Chamber)
App. No. 3455/05 (2009)

10. The Government [of the United Kingdom] contended that the events of 11 September 2001 demonstrated that international terrorists, notably those associated with al'Qaeda, had the intention and capacity to mount attacks against civilian targets on an unprecedented scale. . . . In the Government's assessment, the United Kingdom, because of its close links with the United States, was a particular target. They considered that there was an emergency of a most serious kind threatening the life of the nation. Moreover, they considered that the threat came principally, but not exclusively, from a number of foreign nationals present in the United Kingdom, who were providing a support network for Islamist terrorist operations linked to al'Qaeda. . . .

[Article 5.1 of the Convention provides that "[n]o one shall be deprived of his liberty" except in six enumerated exceptions. Article 5.1(f) lists as one of those exceptions "the lawful arrest or detention of a person . . . against whom action is being taken with a view to deportation or extradition." The problem for the United Kingdom was that a number of the foreign nationals the Government believed provided support for terrorism "could not be deported because of the risk that they would suffer treatment contrary to Article 3 of the Convention in their countries of origin."]

11. On 11 November 2001 the Secretary of State made a Derogation Order under section 14 of the Human Rights Act 1998 in which he set out the terms of a

proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15 of the [European Convention on Human Rights]. . . . The derogation notice provided as follows:

> [T]here exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.
>
> As a result, a public emergency, within the meaning of Article 15(1) of the Convention, exists in the United Kingdom.
>
> As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ("SIAC"), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.
>
> [A]s indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a

> view to deportation" within the meaning of Article 5(1)(f) of the Convention. . . . To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice."

[The Court first took up the applicants' challenge to their detention under Article 3 of the Convention, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment," and Article 13 of the Convention, which provides that "[e]veryone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority."]

128. [W]here a person is deprived of his liberty, the State must ensure that he is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention. . . .

129. [T]hree of the applicants were held approximately three years and three months while the others were held for shorter periods. During a large part of that detention, the applicants could not have foreseen when, if ever, they would be released. . . .

130. [T]he uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. . . .

131. It cannot, however, be said that the applicants were without any prospect or hope of release. In particular, they were able to bring proceedings to challenge the legality of the detention scheme under the 2001 Act and were successful before SIAC, on 30 July 2002, and the House of Lords on 16 December 2004. In addition, each applicant was able to bring an individual challenge to the decision to certify him and SIAC was required by statute to review the continuing case for detention every six months. The Court does not, therefore, consider that the applicants' situation was comparable to an irreducible life sentence . . . capable of giving rise to an issue under Article 3. . . .

[The Court then turned to the Article 5 question and the derogation:]

161. The Court must first ascertain whether the applicants' detention was permissible under Article 5 § 1(f), because if that subparagraph does provide a defence to the complaints under Article 5 § 1, it will not be necessary to determine whether or not the derogation was valid. . . .

170. In the circumstances of the present case it cannot be said [that nine of the eleven] applicants were persons "against whom action [was] being taken with a view to deportation or extradition." Their detention did not, therefore, fall within the exception to the right to liberty set out in paragraph 5 § 1(f) of the Convention. This is a conclusion which was also, expressly or impliedly, reached by a majority of the members of the House of Lords. . . .

[Having concluded that the detention did not fall within the deportation exception to Article 5, the Court went on to inquire into "whether the United Kingdom validly derogated from its obligations under Article 5 § 1 of the Convention." Derogations are permitted by Article 15 of the Convention, which provides that "[i]n time of war or other public emergency threatening the life of the nation," a state party "may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."]

175. The applicants argued that there had been no public emergency threatening the life of the British nation, for three main reasons: first, the emergency was neither actual nor imminent; secondly, it was not of a temporary nature; and, thirdly, the practice of other States, none of which had derogated from the Convention, together with the informed views of other national and international bodies, suggested that the existence of a public emergency had not been established. . . .

177. [A]lthough when the derogation was made no al'Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was "imminent," in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. . . .

181. On this first question, the Court accordingly shares the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation. . . .

184. When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were "strictly required." . . . [W]here a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation [and] that it was fully justified by the special circumstances . . . .

186. [T]he 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament [to focus the Act on non-nationals] . . . had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad. . . .

188. [T]he Government has not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al'Qaeda. . . .

189. [T]he Government [argued] that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals. In this connection, again the Court has not been provided with any evidence which could persuade it to overturn the conclusion of the House of Lords that the difference in treatment was unjustified. Indeed, . . . the national courts . . . which saw both the open and the closed material, were not convinced that the threat from non-nationals was more serious than that from nationals.

190. In conclusion, therefore, . . . the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows there has been a violation of Article 5 § 1 in respect of the first, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh applicants. . . .

[The Court awarded damages to nine of the applicants, ranging from EUR 1,700 to EUR 3,900.]

Al-Jedda v. United Kingdom

European Court of Human Rights (Grand Chamber)
App. No. 27021/0 (2011)

9. [T]he applicant was born in Iraq in 1957. . . . He moved to the United Kingdom in 1992, where he made a claim for asylum and was granted indefinite leave to remain. He was granted British nationality in June 2000.

10. [O]n 10 October 2004 United States soldiers, apparently acting on information provided by the British intelligence services, arrested the applicant at his sister's house in Baghdad. He was taken to Basrah in a British military aircraft and then to the Sha'aibah Divisional Temporary Detention Facility in Basrah City, a detention centre run by British forces. He was held in internment there until 30 December 2007.

11. The applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq. He was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces. No criminal charges were brought against him. . . .

14. On 14 December 2007 the Secretary of State signed an order depriving the applicant of British citizenship, on the ground that it was conducive to the public good. The Secretary of State claimed, inter alia*,* that the applicant had connections with violent Islamist groups, in Iraq and elsewhere, and had been responsible for recruiting terrorists outside Iraq and facilitating their travel and the smuggling of bomb parts into Iraq.

15. The applicant was released from internment on 30 December 2007 and travelled to Turkey. He appealed against the deprivation of British citizenship. On 7 April 2009 the Special Immigration Appeals Commission dismissed the appeal, having heard both open and closed evidence, during a hearing where the applicant was represented by special advocates. The Special Immigration Appeals Commission . . . was satisfied on the balance of probabilities that the Secretary of State had proved that the applicant had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to

conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad. . . .

98. The applicant was detained in a British military facility for over three years, between 10 October 2004 and 30 December 2007. His continuing internment was authorised and reviewed, initially by British senior military personnel and subsequently also by representatives of the Iraqi and United Kingdom Governments and by non-British military personnel, on the basis of intelligence material which was never disclosed to him. He was able to make written submissions to the reviewing authorities but there was no provision for an oral hearing. . . .

99. [A]rticle 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. . . . No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of [the six listed] grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention . . . .

100. [T]he list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time. The Government . . . argues that there was no violation of Article 5 § 1 because the United Kingdom's duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. . . .

101. [T]he key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment. . . .

105. [T]he language used in this Resolution [does not] indicate[] unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments . . . . In paragraph 10 the Security Council decides that the Multi-National Force shall have authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed," which inter alia set out the Multi-National Force's tasks. Internment is listed in Secretary of State Powell's letter, as an example of the "broad range of tasks" which the Multi-National Force stood ready to undertake. . . . Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is d. It is clear that the Convention forms part of international law . . . . In the absence of clear provision to the contrary, the presumption must be that the Security Council

intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law. . . .

109. [N]either Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. . . .

110. In these circumstances, where the provisions of the Article 5 § 1 were not displaced and none of the grounds for detention set out in sub paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1.

[The Court awarded Al-Jedda EUR 25,000, plus EUR 40,000 for costs and expenses.]

The U.S. Constitutional Limitations on Military Detention

The United States Supreme Court has placed limitations of the detention of individuals classified as "enemy combatants." In *Hamdi v. Rumsfeld* (2004), the Court held that a U.S. citizen detained on U.S. soil as an enemy "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." In *Boumediene v. Bush* (2008), the Court held that non-citizens detained as enemy combatants at Guantánamo Bay, Cuba, enjoyed the privilege of the writ of habeas corpus, which the Court found the Military Commissions Act of 2006 had abridged. The Court then concluded that review procedures, established by the Detainee Treatment Act of 2005, did not provide an adequate substitute for habeas corpus. That Act had granted the Deputy Defence Secretary complete discretion to grant or deny detainee requests to convene tribunals to review new evidence, and had precluded federal courts from considering new evidence when reviewing the decisions of military commissions. The implications of *Boumediene* for those in detention have been the subject of a series of decisions in the D.C. Circuit, as *Al-Bihani*, above, illustrates.

Ryan Goodman

The Detention of Civilians in Armed Conflict[*]

In the armed conflict between the United States and Al Qaeda, the legality of the government's detention scheme has been mired in confusion. . . .

First, policymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who directly participate in hostilities ("unlawful combatants") and civilians who have not directly participated but nevertheless pose a security threat. Congress and the Bush administration acted to detain the latter. They did so, however, by eschewing legal authority that clearly supports such detentions and by resorting, instead, to excessively broad definitions of combatancy to reach the same individuals. Second, opponents, in response, . . . criticized the government for expansive definitions of combatancy without acknowledging the existing legal authority to detain the same individuals regardless of nomenclature. . . .

[M]aintaining the position that detention is permissible only for direct participants (and members of armed forces) exerts pressure on U.S. authorities to develop expansive definitions of direct participation. [A] broad definition of direct participation—or "combatancy"—leads to unintended consequences in the targeting context. Chief among them is that it may, in effect, expand the range of civilians who lose their immunity from attack. . . .

Finally, the conflation of targeting and detention powers may result in self-fulfilling consequences in terms of who can be subject to lethal force. Opponents have suggested that if the government can detain particular civilians (indirect participants), it could also shoot them on sight. In other words, these opponents have asserted that detention and targeting authority are coextensive. If opponents lose their one claim (and indirect participants are thus subject to detention), they will have unintentionally lent support to the result that such individuals are now legitimate military targets.

Is There a Detention/Targeting Tradeoff?

As Goodman suggests, a number of commentators have expressed concern that the U.S. approach to detention may have unwittingly created pressure to put

[*]Excerpted from Ryan Goodman, Editorial Comment, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009). This article is reproduced with permission from the January 2009 issue of the American Journal of International Law

new emphasis on targeted killings. A *New York Times* article observed that some believe that the Obama administration "has avoided the complications of detention by deciding, in effect, to take no prisoners alive." See Jo Becker & Scott Shane, *Secret Kill List Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012. Obama officials deny any such policy. The President's chief counterterrorism aid, John Brennan, asserts that the administration's "unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible." John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Address at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (April 30, 2012). But American officials conceded that the dramatic increases in targeted killings combined with the decreases in detentions and the declining detainee population at Guantánamo have given a contrary impression. As Gabriella Blum and Philip Heyman at Harvard Law School put it, "there is a danger of over-using targeted killings . . . [because] the killing of a terrorist often proves a simpler operation than protracted legal battles over detention, trial, extradition, and release." Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 146, 166 (2010).

Benjamin Wittes

Detention and Trial: The Case for Candor After Guantánamo[*]

[T]he desire to keep detention to a minimum probably creates perverse incentives for rendition and targeted killing, a practice that has escalated in recent years. . . .

It is a dubious victory indeed for human rights if U.S. forces are now killing people that they used to capture. But dead people do not file habeas lawsuits either—and strangely, perhaps, they do not attract the same kind of sustained political attention that prisoners do. . . . Though it yields a suboptimal outcome from the point of view of both intelligence gathering and human rights, these days a kill is, in legal terms, a far cleaner outcome than capture.

I do not mean to suggest that U.S. forces have made anything so crude as a decision to take no prisoners—or that as a matter of policy we are now killing

[*]Excerpted from BENJAMIN WITTES, DETENTION AND TRIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO 23–26 (2011).

people that we used to capture because of the legal and political difficulties associated with detaining them. . . . Still, rules create incentives, and the increasing prevalence of kill operations rather than captures is probably not altogether unrelated to the fundamental change in the incentive structure facing our fighters and covert operatives. . . .

In 2002, the United States had fairly liberal interrogation rules that in some instances at least bordered on torture, if they did not quite cross that line. The premise was that they facilitated intelligence collection; it also was assumed that detention posed no great legal problem. Today, however, the interrogation options are notably narrower and substantial hurdles encumber long-term detention. I suspect that those facts bear some relation, albeit not a dominant one, to our apparent willingness to kill enemies rather than risk forces to capture them. They certainly should, in my judgment any way. It's one thing to risk forces to capture someone if the fruits of interrogation are likely to be valuable and one can secure one's interest in incapacitating that person by means other than killing him. It's quite another thing to risk forces in order to buy nothing more than a long-term habeas battle.

It's worth dwelling at least momentarily on the costs of this shift, invisible though they may be. The first of them is a moral cost, and it is, at one level, obvious. Creating incentives to kill people or to encourage their detention by proxy forces under worse conditions to avoid the burden of managing their detention under the humanitarian and legal standards that American values demand elevates the appearance of humane treatment over the fact of it. Taking that approach involves a kind of moral preening that has less to do with human rights than it does with public relations. Its attraction for the U.S. government, which has to think about its human rights reputation as well as the real consequences of its policies for human rights, is understandable. Its attraction for international human rights organizations, which presumably would prefer real improvements in human rights to optical illusions, is far less clear.

A more subtle aspect of the moral cost is the reversal of a half-century's worth of settled understanding in international law of the relative evils of capturing and killing an enemy. The laws of war traditionally have made holding people in detention reasonably easy precisely to promote their capture . . . . The law, in other words, while unapologetically preserving the right of combatants to target each other without warning, has also traditionally sought to both ensure the availability of detention as an alternative to violence and, once surrender has taken place, to make its use mandatory.

The past few years have turned those presumptions on their heads. We have made detention difficult—shrouding it in shame and attaching it to due process requirements imported from other areas of law—with the predictable result that we have shifted the cost-benefit balance toward greater operational lethality. That is not a trade-off about which we should feel sanguine. It's an erosion of the venerable principle of proportionality in warfare—that a county should not use more force than is necessary to accomplish its military objectives—undertaken to flatter our consciences and to indulge the pretense that we are getting out of the detention business.

PUNISHING

The Enlightenment Immunity from Criminal Laws

John Fabian Witt

The Enlightenment Separation of War from Crime[*]

For centuries, Christian thinking about war proceeded along lines sketched out by Christian theorists of just and unjust war. In the medieval orthodoxy of St. Augustine and those who followed him, war was justified when waged by a commonwealth or prince to avenge an injury. Conduct in war, in turn, was justified when it was necessary to success in a just war. The trick, however, was that there could only be one just side in a war. The violent acts of the unjustified side were unlawful. Rather than legitimate acts of war, they were illegal acts of violence: assault and murder, trespass and theft. Unjust wars were a kind of crime.

For men like eighteenth-century Swiss jurist Emmerich de Vattel, however, the premises of the Christian just war theory seemed badly flawed. When opposing armies were each equally convinced of their own righteousness, the medieval theory of just wars risked plunging warfare into uncontrollable cycles of destruction. Departing from the just war tradition, Vattel thus announced what he called "the first rule" of the modern law of nations. "Regular war," he wrote, "is to be accounted just on both sides." Wars would not *really* be just on

[*]Excerpted from JOHN FABIAN WITT, LINCOLN'S CODE: THE LAW OF WAR IN AMERICAN HISTORY 17-18 (2012).

both sides, to be sure. God would know which side was just. But in the fallen world of flawed and partial men, wars would be *accounted* that way in order to create a manageable regime for policing the conduct of the contending armies. With justice thus set aside, Vattel hoped to bring an end to the otherwise endless and destructive contests over which of the belligerents—if any—fought on the side of the angels. "If people wish to introduce any order, any regularity, into so violent an operation as that of arms, or to set any bounds to the calamities of which it is productive, and leave a door constantly open for the return of peace," Vattel wrote, they would have to abandon their claims to justice.

At its heart, Vattel's conception of humanity introduced a way of separating means and ends, a way of preventing pursuit of war's purposes from obliterating regulation of its means. The moral neutrality of Vattel's approach allowed him to crystallize the limited war spirit of the age into legal rules. He insisted that "quarter is to be given to those who lay down their arms." Whole categories of people were to be exempt from the rigors of war. "Women, children, feeble old men, and sick persons" were to be protected. Soldiers were to spare men of the church, scholars, "and other persons whose mode of life is very remote from military affairs." Peasants no longer took any part in war and consequently no longer had anything "to fear from the sword of the enemy." All of these people were "protected, as far as possible, from the calamities of war." Military commanders and kings were sheltered from war's effects, too. Vattel's law of nations prohibited assassination, poisoning, and other forms of "treacherous murder." Even firing on an enemy's headquarters was condemned by Vattel's gentle rules. All of these were the voluntary conventions to which states at war submitted. "Humanity," Vattel summarized, obliged states "to prefer the gentlest methods" over the righteous pursuit of natural justice.

Vattel's settlement meant in essence that setting aside the criminal law would be the founding move of the modern laws of war. It would be the distinctive trait of modern humanitarian regulations, distinguishing it from the law of the early modern period and the Middle Ages. Privileged combatants are immune from criminal prosecution for acts of war because all sides in war are accounted as just. Humanity and justice, in this account, diverge not by accident or chance, but by design. In the middle of the nineteenth century, however, the sharp separation of the laws of war began to give way in the face of a reintroduction of the idea of crime. The first known tribunals in the modern era for the adjudication and punishment of violations of the laws of war arose in Mexico during that country's war with the United States from 1846 to 1848.

Further tribunals followed in the American Civil War. Still, decades later the idea of the war crime in international armed conflict remained an anomalous one, sitting uneasily in the structure of the laws of war. Consider the treatment by two of the great European jurists a century and more ago:

Johann Caspar Bluntschli

Amnesties*

§ 710. The peace agreement usually entails an amnesty, if special caveats do not justify an exception. This means that generally no more claims are allowed for damages and inconveniences caused by members of one of the warring parties to members of the other warring party during the war.

1. The amnesty is necessary to allow the atmosphere of peace to solidify. Would the dispute be allowed to continue, there would be the constant danger that the parties would return to arms and the war would start anew. Even if the claims were directed against individuals in the first instance, the state for which they fought would stand behind them. The less the conduct of war confirms to regular legal norms, and the more violent it is, the easier this leads to legal conflicts, and the more often claims will be brought. This conflict and these claims the amnesty attempts to lay to rest through forgetting/oblivion. In many peace agreements this [amnesty] is expressly mentioned, in others it is silently taken for granted. For example: Congress of Vienna Final Accord of 1815, Article XI. . . .

The prospect of a future amnesty is however, from the perspective of legal security, very problematic. Private persons have thus almost no other legal protection but the one which military discipline and military courts offer. The sentences of military courts, however, are annulled by the amnesty. Usually the amnesty also includes other individuals beyond soldiers who have committed crimes through their membership in one of the warring parties.

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*Excerpted from JOHANN CASPAR BLUNTSCHLI, THE MODERN INTERNATIONAL LAW OF CIVILIZED STATES (1868) (Translation by Philip Nielsen for John Witt).

It was Bluntschli who first published the term "war crime" (*Kriegsverbrechen*). He probably developed the idea in his exchanges with the American jurist Francis Lieber, who had used the term in private correspondence as early as 1865. But the idea of the war crime seemed an awkward one at best. In the aftermath of the American Civil War, for example, the attorney general of the United States, James Speed, insisted that there was no such thing as a war crime, at least not technically. Strictly speaking, Speed contended, there were only offenses and not crimes against the law of nations. Forty years later, the Whewell Professor of Law at Cambridge, Lassa Oppenheim, expressed continuing puzzlement at the concept of the war crime.

Lassa Oppenheim
Conceptualizing the War Crime*

§ 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as members of armed forces who have done no wrong, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders. It must, however, be emphasized that the term war crime is used not in the moral sense of the term crime, but only in a technical legal sense, on account of the fact that perpetrators of these acts may be punished by the enemy. For, although among the acts called war crimes are many which are crimes in the moral sense of the term, such, for instance, as the abuse of a flag of truce or assassination of enemy soldiers; there are others which may be highly praiseworthy and patriotic acts, such as taking part in a levy *en masse* on territory occupied by the enemy. But because every belligerent may, and actually must, in the interest of his own safety punish these acts, they are termed war crimes, whatever may be the motive, the purpose, and the moral character of the respective act. . . .

§ 253. Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.

*Excerpted from LASSA OPPENHEIM, INTERNATIONAL LAW (1912).

Both Bluntschli and Oppenheim sought to preserve much of the domain of the laws of armed conflict as crime-free. That was the function of Bluntschli's amnesties. For Oppenheim, it explained his insistence that the concept of the war crime only had application to those acts of soldiers that were committed without the authority of their government. So long as a soldier acted within the scope of the authority granted to him by his own state, or acted pursuant to a lawful order, the concept of crime had no application.

The Return of Criminalization

Since Nuremberg, and accelerating in recent years, the concept of crime has returned to the domain of war. The following two cases suggest just how far the reintroduction of the crime concept has gone, both in eschewing the legal limits on the idea of the war crime articulated by jurists like Bluntschli and Oppenheim a century ago, and in discarding the international relations logic of publicists such as Vattel.

Prosecutor v. Erdemovic

International Criminal Tribunal for the Former Yugoslavia
Case No. IT-96-22 (Oct. 7 1997)

JUDGEMENT

3. [O]n 16 April 1993, the Security Council of the United Nations, acting pursuant to Chapter VII of the United Nations Charter, adopted resolution 819, in which it demanded that all parties to the conflict in the Republic of Bosnia and Herzegovina treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act. . . .

On or about 6 July 1995, the Bosnian Serb army commenced an attack on the UN "safe area" of Srebrenica. . . .

Between 11 and 13 July 1995, Bosnian Serb military personnel summarily executed an unknown number of Bosnian Muslims in Potoari and in Srebrenica. . . .

Between 13 July 1995 and approximately 22 July 1995, thousands of Bosnian Muslim men were summarily executed by members of the Bosnian Serb army and Bosnian Serb police. . . .

12. On or about 16 July 1995, DRAZEN ERDEMOVIC, did shoot and kill and did participate with other members of his unit and soldiers from another brigade in the shooting and killing of unarmed Bosnian Muslim men at the Pilica collective farm. These summary executions resulted in the deaths of hundreds of Bosnian Muslim male civilians. At his initial appearance on 31 May 1996, the Appellant pleaded guilty to the count of a crime against humanity. The Appellant added this explanation to his guilty plea:

> Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you are sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me. That is all I wish to add.

By three votes (Judges McDonald, Li and Vohrah) to two (Judges Cassese and Stephen) FINDS that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.

JOINT SEPARATE OPINION OF JUDGE MCDONALD AND JUDGE VOHRAH

32. [T]he issue may be stated . . . specifically as follows: In law, may duress afford a complete defence to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons? . . .

75. [W]e must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered. Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of domestic crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war . . . ? If national law denies recognition of duress as a defence in respect of the killing of innocent persons,

international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude. . . .

76. It might be urged that although the civil law jurisdictions allow duress as a defence to murder, there is no evidence that crimes such as murder and terrorism are any more prevalent in these societies than in common law jurisdictions. We are not persuaded by this argument. We are concerned primarily with armed conflict in which civilian lives, the lives of the most vulnerable, are at great risk. Historical records, past and recent, concerned with armed conflict give countless examples of threats being brought to bear upon combatants by their superiors when confronted with any show of reluctance or refusal on the part of the combatants to carry out orders to perform acts which are in clear breach of international humanitarian law. It cannot be denied that in an armed conflict, the frequency of situations in which persons are forced under duress to commit crimes and the magnitude of the crimes they are forced to commit are far greater than in any peacetime domestic environment.

77. Practical policy considerations compel the legislatures of most common law jurisdictions to withhold the defence of duress not only from murder but from a vast array of offences without engaging in a complex and tortuous investigation into the relationship between law and morality. . . . [T]he common law in England denies recognition of duress as a defence not only for murder but also for certain serious forms of treason. In Malaysia, duress is not available as a defence in respect not only of murder but also of a multitude of offences against the State which are punishable by death. In the states of Australia which have criminal codes, the statutory provisions contain a list of excepted offences, with the Criminal Code of Tasmania having the longest, making the defence unavailable to persons charged with murder, attempted murder, treason, piracy, offences deemed to be piracy, causing grievous bodily harm, rape, forcible abduction, robbery with violence, robbery and arson. Legislatures which have denied duress as a defence to specific crimes are therefore content to leave the interest of justice to be satisfied by mitigation of sentence.

78. We do not think our reference to considerations of policy are improper. It would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy. There is the view that international law should distance itself from social policy and this view has been articulated by the International Court of Justice in the *South West Africa Cases*, where it is stated that "[l]aw exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline." We are of the opinion that this separation of law from social policy is inapposite in relation to the application of international

humanitarian law to crimes occur[r]ing during times of war. It is clear to us that whatever is the distinction between the international legal order and municipal legal orders in general, the distinction is imperfect in respect of the criminal law which, both at the international and the municipal level, is directed towards consistent aims. At the municipal level, criminal law and criminal policy are closely intertwined. There is no reason why this should be any different in international criminal law. . . .

84. Secondly, as we have confined the scope of our inquiry to the question whether duress affords a complete defence to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons.

SEPARATE AND DISSENTING OPINION OF JUDGE CASSESE

11. I . . . respectfully disagree with the conclusions of the majority of the Appeals Chamber concerning duress, as set out in the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah . . . :

> (i) after finding that *no specific international rule* has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the *general rule* on duress [i.e., permitting a duress defense to criminal charges] should apply—subject, of course, to the necessary requirements . . . .
>
> (ii) instead of this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of "practical policy considerations" and has concluded by upholding "policy considerations" substantially based on English law. I submit that this examination is *extraneous to the task of our Tribunal*. This International Tribunal is called upon to apply international law, in particular our Statute and

> principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. In addition, it should refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common law countries, while disregarding those of civil-law countries or other systems of law. What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*. . . .

16. [T]he relevant case-law is almost unanimous in requiring four strict conditions to be met for duress to be upheld as a defence, namely:

> (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
>
> (ii) there was no adequate means of averting such evil;
>
> (iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;
>
> (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced. . . .

42. The third criterion—proportionality (meaning that the remedy should not be disproportionate to the evil or that the lesser of two evils should be chosen)—will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps . . . it will *never* be satisfied where the accused is saving his own life *at the expense of* his victim . . . [H]ow can a judge satisfy himself that the death of one person is a lesser evil that the death of another? Conversely, however, where . . . there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does—then duress may succeed as a defence. . . . The important point, however—and this is the fundamental source of my disagreement with the majority—is that this question should be for the Trial Chamber to decide with all the facts before it. The defence should not be cut off absolutely and *a priori* from invoking the excuse of duress by a ruling of this International Tribunal . . . . This is altogether too dogmatic and, moreover, it is a stance unsupported by international law . . . .

46. Furthermore, a trial court adjudicating a plea of duress might also want to take into account another factor, namely whether and to what extent the person assertedly acting under duress willed the commission of the offence. For this purpose the court might enquire whether the person allegedly acting under duress *confessed at the earliest possible opportunity to the act he had committed and denounced it to the relevant authorities*. If the person at issue refrained from so doing, the inference might be warranted that he acquiesced in, and thus willed, the act which he perpetrated under duress.

Prosecutor v. Kallon

Decision on Challenge to Jurisdiction: Lomé Accord Amnesty
Special Court for Sierra Leone (Appeals Chamber)
Case No. SCSL-04-15-060-I, II (Mar. 14, 2004).

[In *Kallon*, the defendant's application to stay the prosecution contended that "the Government of Sierra Leone is bound to observe the amnesty granted under Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomé Agreement") and that "the Special Court should not assert jurisdiction over crimes committed prior to July 1999 when amnesty was granted by virtue of the Lomé Agreement." The Prosecution argued in response that "the Lomé Agreement, being an agreement between two national bodies, is limited in effect to domestic law" and moreover that "given the gravity of the crimes charged, discretion should not be exercised to grant a stay of proceedings."]

3. [O]n 23 March 1991 forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party rule of the All Peoples' Congress (APC). That was believed to be the beginning of the armed conflict in Sierra Leone which lasted until 7 July 1999 when the parties to the conflict signed the Lomé Agreement. . . .

5. Among other things, the parties to the Lomé Agreement stated that they were moved "by the imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation."

7. [A]t the centre of these proceedings is Article 9 of the Lomé Agreement which provides [inter alia] as follows:

ARTICLE IX PARDON AND AMNESTY

> 2. [A]fter the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
>
> 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the [Revolutionary United Front of Sierra Leone], ex-[Armed Forces Revolutionary Council], ex-[Sierra Leone Army] or [Civil Defense Forces] in respect of anything done by them in pursuit of their objectives as members of those organisations since March 1991, up to the signing of the present Agreement. . . .

12. On 16 January 2002, after a successful negotiation between the Secretary-General and the Government of Sierra Leone, an agreement was entered into by the United Nations and the Government of Sierra Leone whereby the Special Court for Sierra Leone was established ("Agreement").

13. The Special Court was established for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. . . .

67. The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.

68. A crime against international law has been defined as "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act would probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state." In *[In] re List and Others* [(1948)], the US Military

Tribunal at Nuremberg defined an international crime as: "such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances." However, not every activity that is seen as an international crime is susceptible to universal jurisdiction.

69. The question is whether the crimes within the competence of the Court are crimes susceptible to universal jurisdiction. The crimes mentioned in Articles 2-4 of the Statute are international crimes and crimes against humanity. . . .

70. One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes. In *Attorney General of the Government of Israel v. Eichmann* (1961) the Supreme Court of Israel declared:

> Under the universality principle, each and every state has jurisdiction to try particular offences. The abhorrent crimes defined in this Law are not crimes under Israeli law alone. These crimes which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself **(***delicta juris gentium*)." Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal. . . .

71. After reviewing international practice in regard to the effectiveness or otherwise of amnesty granted by a State and the inconsistency in state practice as regards the prohibition of amnesty for crimes against humanity, Cassese conceptualised the status of international practice thus:

> There is not yet any general obligation for States to refrain from amnesty laws on these crimes. Consequently, if a State passes any such law, it does not breach a customary rule. Nonetheless if a court of another State having in custody persons accused of international crimes decide to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in

> particular to the principle of respect for the sovereignty of other States. [citing A. Cassese, *International Criminal Law* 315 (2003)]

The opinion stated above is gratefully adopted. . . .

86. The Lomé Agreement is not a treaty or an agreement in the nature of a treaty. The rights and obligations it created are to be regulated by the domestic laws of Sierra Leone. In the result, whether it is binding on the Government of Sierra Leone or not does not affect the liability of the accused to be prosecuted in an international tribunal for international crimes such as those contained in Articles 2 to 4 of the Statute of the Court. . . .

88. Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction.

In the wake of the *Kallon* decision, some commentators criticized the Special Court's decision on the ground that "the Appeals Chamber did not demonstrate that war crimes in noninternational armed conflict are subject to universal jurisdiction." Simon M. Meisenberg, *The Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court of Sierra Leone*, 86 INT'L REV. RED CROSS 856 (2004). Universal jurisdiction "applies to grave breaches of the Geneva Conventions and of Additional Protocol I," but "[t]here are no similar treaty provisions concerning the prosecution or extradition of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II." *Id*. On this view, the Special Court ought to have decided the case on the basis of whether the amnesty arrangement in Article IX of the Lomé Agreement violated international law and was therefore invalid. Concern about the relationship between criminal proceedings and peace have continued apace in the years since. Parallel concerns are raised in civil proceedings, as exemplified by *Sejdić v. Bosnia and Herzegovina* (Eur. Ct. H.R., 2009), excerpted in Chapter III: *(Dis)Uniformity of Rights in Federations and Unions*.

International Criminal Court, Interim Premises, The Hague, the Netherlands, circa 2006 (using the former offices of the Dutch telecom company KPN).

Courtroom, International Criminal Court, The Hague, the Netherlands, circa 2006.

The Critique of Criminalization

Some commentators have worried that the International Criminal Court (ICC) improperly brings criminal categories to bear on cases of armed conflict. Stephen D. Krasner at Stanford University, for example, argues that "[t]he fundamental problem with the International Criminal Court is . . . that courts are the wrong instrument for dealing with large-scale war, devastation, destruction and crimes against humanity. Judicial procedures are designed to judge the guilt or innocence of individuals, but developing stable democratic societies and limiting the loss of human life require prudent political calculations, not judicial findings." Stephen D. Krasner, *A World Court That Could Backfire*, N.Y. TIMES, Jan. 15, 2001. Such critics adopt the view of the eighteenth-century jurists who sought to separate crime from war and thought that doing so was critical to the reestablishment of peace. The following three excerpts offer examples of situations in which observers have levelled this critique in recent months and years. Related concerns come from Mark Osiel, *After International Law: Non-Juridical Responses to Mass Atrocity* (2011), excerpted in Chapter VI: *Law's Future(s)*. Below, we provide excerpts of a few such discussions, followed by Professor Reisman's analysis, which suggests a framework for thinking about the problems raised.

Michael Ignatieff
We're So Exceptional[*]

The current president of the [International Criminal] Court, Song Sang-Hyun, a South Korean judge, has cited the Security Council's unanimous referral of Muammar Qaddafi to the ICC for prosecution in 2011 as evidence that the Court has regained the US support it lost in the Clinton and Bush administrations. . . . [B]ut critics have argued . . . that when the Court's actual indictment came down in June 2011, it closed off the last exit for the dictator and guaranteed that he would go down fighting, as in fact he did. The unresolvable question is whether the ICC indictment played a part, inadvertently or not, in driving the Libyan operation beyond its original UN mandate of protecting civilians into full-scale "regime change," although a coherent new regime has yet to emerge. . . .

[*]Excerpted from Michael Ignatieff, *We're So Exceptional*, N.Y. REV. BOOKS, April 5, 2012, at 6-8.

No indictment of President Bashir Assad of Syria for the vile carnage in Homs and elsewhere is on the horizon, given Russian and Chinese refusal to authorize a Security Council referral. We have to question, therefore, whether the ICC has actually gained the support of the great powers that it thought it had achieved, once and for all, in the Libyan case.

Creating an international court was supposed to rescue the possibility of universal justice from the revenge frenzies, political compromises, and local partialities of national justice. International justice turns out to be as much the prisoner of international politics as national justice is of national politics. Indeed, given the stakes, international justice may be more partial, that is, more politicized, than national justice.

Abigail H. Moy

International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity[*]

On October 13, 2005, the International Criminal Court ("ICC") unsealed the arrest warrants for five senior leaders of the Lord's Resistance Army ("LRA"), a rebel group known for its long insurgency against Ugandan President Yoweri Museveni. . . .

[R]eactions to this decision have been mixed. . . .

[M]any organizations expressed concern for the ICC's failure to take broader action against human rights violations perpetrated on the other side of the conflict, by the [Uganda People's Defence Force] and Ugandan government officials. . . .

Some mediators also disapproved of the arrest warrants, arguing that they undermined peace efforts by alienating rebel forces and precluding the protection offered by the Ugandan government's Amnesty Act of 2000. The Amnesty Act was intended to provide an incentive for defection from the LRA; it guaranteed blanket amnesty for all rebels, regardless of rank, who voluntarily surrendered

[*]Excerpted from Abigail H. Moy, *International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity,* 19 HARV. HUM. RTS. J. 267 (2006).

themselves. With amnesty as a negotiating tool, Ugandan minister Betty Bigombe, backed by the United States, Britain, the Netherlands, Norway, and the Catholic Church, had organized a face-to-face meeting between senior government officials and LRA leaders in 2004. She came close to brokering a ceasefire agreement before her efforts were foiled at the last minute. After the release of the arrest warrants, the still-active Bigombe complained that the ICC "rushed too much." She felt that rescinding the amnesty option deprived her of a crucial bargaining chip and sent a conflicting message that would undermine the LRA's trust in future negotiations. Archbishop Odama of the Gulu Catholic Archdiocese added, "[tlhis is like a blow to the peace process. The process of confidence-building has been moving well, but now the LRA will look at whoever gets in contact with them as an agent of the ICC."

[S]ince the ICC referral, a number of former rebels and a high-ranking LRA brigadier have turned themselves in under the much-neglected Amnesty Act of 2000, which had produced few converts until that point. Rather than impede the pursuit of peace, some have argued that ICC involvement has increased the pressure on LRA members to defect. . . .

Ian Paisley

Peace and the Price of Justice[*]

An African proverb states, "Peace is costly but it is worth the expense." . . . [T]he I.C.C. was intended as an instrument for delivering peace. In this respect it has not been a success. It will continue to falter because its current methods go against the experience of many places in Africa and around the world where peace has been delivered through political negotiations and reconciliation efforts, not the imposition of international justice. . . .

[I]n places where there is no functioning government, or the government is hostage to one section of society, or where there is no viable reconciliation process, the international community has a duty to ensure that the court is the guardian of justice.

But the pursuit of justice should not replace or undermine ongoing national reconciliation efforts. The foremost challenge facing the I.C.C. is to

[*]Excerpted from Ian Paisely, *Peace and the Price of Justice*, INT'L HERALD TRIB., Mar. 17, 2012, at 6.

determine whether its intervention will help or hinder the cause of peace. The wheels of justice must be allowed to turn at their own pace, but that they must not impede the peace process.

In Kenya, where one the court's most high-profile cases is taking place, the I.C.C. has focused on bringing to trial those accused of inciting post-election violence in 2007-8. This risks fueling divisions in a country where tribal loyalties and factionalism still dominate politics. Kenya, often seen as a great African success story, is now heading toward a dangerous impasse. The court's determination to bring to trial several defendants accused of fomenting violence has enabled Prime Minister Raila Odinga to call for the arrest of his main political opponent, Deputy Prime Minister Uhuru Kenyatta, son of the country's founding president, who now faces I.C.C. charges. . . .

Proponents of the I.C.C. say there cannot be peace without justice. Yet experience teaches us that this is not always the case. Reconciliation is not an easy option, but it does allow people to move forward with the hope of unity, and the potential for justice in the future. . . .

Logo of the International Criminal Court, circa 1998.
Image reproduced courtesy of the International Criminal Court and provided courtesy of its Public Information and Documentation Section.

W. Michael Reisman

Institutions and Practices for Restoring and Maintaining Public Order[*]

[C]ommon to all legal systems is a set of fundamental sanctioning goals for the protection, restoration, and improvement of public order. While these fundamental goals have been expressed in many versions, they may be synthesized into seven specific goal programs:

(1) *Preventing* discrete public order violations that are about to occur;

(2) *Suspending* public order violations that are occurring;

(3) *Deterring*, in general, potential public order violations in the future;

(4) *Restoring* public order after it has been violated;

(5) *Correcting* the behavior that generates public order violations;

(6) *Rehabilitating* victims who have suffered the brunt of public order violations; and

(7) *Reconstructing* in a larger social sense to remove conditions that appear likely to generate public order violations. . . .

A wide range of international institutions and practices are currently used in different combinations for accomplishing the goals discussed above. [T]here are eight institutional practices and arrangements that are particularly important:

(1) human rights law, the law of state responsibility, and the developing law of liability without fault;

(2) international criminal tribunals;

(3) universalization of the jurisdiction of national courts for certain delicts, called international crimes;

(4) nonrecognition or the general refusal to recognize and to allow violators the beneficial consequences of actions deemed unlawful;

[*]Excerpted from W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995).

(5) incentives in the form of foreign aid or other rewards;

(6) commissions of inquiry or truth commissions;

(7) compensation commissions; and

(8) amnesties.

These practices and institutional arrangements are not interchangeable. Each deals with a different aspect of the problem and may not be appropriate for all circumstances. . . . Some may provide high returns for certain goals in particular cases, but may also prove very costly for alternative goals in other instances. For example, major cash payments or other concessions may prevent an imminent violation or secure the release of hostages, but will have high costs for deterrence in the future, as other actors may calculate that they too can extort concessions from the community by threatening to violate public order. On the one hand, international criminal tribunals may serve to deter violations in future cases, but may increase the costs of suspending ongoing violations if violators conclude that continued resistance is preferable to facing a judgment by the tribunal. On the other hand, amnesties may facilitate suspension of ongoing violations, but amnesties also undermine deterrence, the law of state responsibility, and human rights. Prospective violators may conclude that if they do not prevail, they can negotiate an amnesty.

Criminal tribunals involve the identification of perpetrators of violations of the law, confirmation of the norms that apply, and the imposition of penalties. Depending on the nature and goals of incarceration, criminal tribunals may be corrective. Although the international community often demands criminal tribunals when there are serious breaches of public order, tribunals only indirectly perform sanctioning goals. . . . In contrast, the focus of compensation tribunals or commissions shifts from the perpetrator of the crime to the victim of the crime . . . . [C]omissions of inquiry, now often referred to as "truth commissions," involve . . . investigation and publication of violations of international norms. . . .

Amnesties have been singled out recently as a technique for reestablishing internal public order after its violent disruption within a nation-state. Their compatibility with sanctioning goals will depend on their design and other contextual features. Amnesties are especially useful tools for prison administrators and political negotiators. For the administrator of a prison, the authority to grant amnesty on a discretionary basis is a technique of internal control; many prisoners will behave well if they think that there is a high probability that they will be rewarded with a shortened sentence or complete

amnesty. For the political negotiator, whether in a domestic or transnational conflict, the capacity to offer amnesty is also an indispensable tool. If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms. . . .

However . . . [a]cts of kindness or grace to current violators may have very high, long-term costs: potential violators may assume that . . . when the time comes for settlement, they, too, can strike a bargain in which they will be forgiven. . . .

[T]he varied circumstances of the international community are such that, rather than a single institution, a toolbox of different institutions should be on hand. These tools may be adapted and used in particular circumstances to fulfill, in the most optimal fashion possible, the fundamental goals of international law: the protection and reestablishment of public order. In circumstances in which the international community is prepared to defeat an adversary, an international tribunal, applying an approximation of the domestic criminal law model, is an effective strategy. In circumstances in which the international community is unwilling to make such an investment . . . it is preferable to emphasize techniques that reestablish public order as quickly as possible . . . .

PROPORTIONALITY

Alongside the reintroduction of a modern concept of crime into the legal regulation of war, discussions of recent armed conflicts have been affected by a dramatic transformation in the legal culture of proportionality. The following materials begin with the first of the 1977 additional protocols to the Geneva Conventions, which sets out the modern proportionality idea. We then review some of the radically different views articulated by jurists and soldiers in the nineteenth century before coming back to the present through an application of modern proportionality by Justice Barak in Israel.

One question to ask throughout is this: What is the logic of proportionality in modern international humanitarian law? What premises does it rest on? As we have seen, the Enlightenment jurists who aimed put the criminal laws outside the domain of war did so in part to remove ultimate questions about right and wrong and just versus unjust wars from the regulation of combat. Modern proportionality

law seems to aim to do the same by removing the ultimate objectives of the belligerent parties from the calculation of proportionality. The ends, under this approach, do not justify the means. But does it make sense to evaluate conduct in war without reference to ends? The nineteenth-century Americans, whose perspectives are excerpted later, objected to setting aside a war's objectives in evaluating its conduct. Moreover, they insisted that limiting the conduct of militaries risked exacerbating the humanitarian toll of armed conflict.

Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

June 8, 1977, 1125 U.N.T.S. 3

Article 51. Protection of the civilian population

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. . . .

Article 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . ;

(ii) take all feasible precautions . . . with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one . . . or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

This modern proportionality rule in customary international law, which the Additional Protocol codifies, looks radically different from the constraints on incidental injury to civilians in past generations. Consider the following from the American Civil War.

Francis Lieber

Instructions for the Government of Armies of the United States in the Field[*]

(1863)

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult. . . .

29. [T]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

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[*]Excerpted from FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, ORIGINALLY ISSUED AS GENERAL ORDERS NO. 100, ADJUTANT GENERAL'S OFFICE 1863 at 7-11 (1898).

Correspondence Between Mayor and Councilmen of Atlanta, Georgia, and William Tecumseh Sherman, Major General, Union Army*
(1864)

[Mayor Calhoun's letter to Sherman:]

We, the undersigned, mayor and two of the council for the city of Atlanta, for the time being the only legal organ of the people of the said city to express their wants and wishes, ask leave most earnestly, but respectfully, to petition you to reconsider the order requiring them to leave Atlanta. . . .

[W]e are satisfied that the amount of it will involve in the aggregate consequences appalling and heart-rending. . . .

Respectfully submitted: James. M Calhoun, *Mayor*. E.E. Rawson, *Councilman*. S.C. Wells, *Councilman*.

[Sherman's response:]

GENTLEMEN: [M]y orders . . . were not designed to meet the humanities of the case, but to prepare for the future struggles in which millions of good people outside of Atlanta have a deep interest. We must have peace, not only at Atlanta but in all America. To secure this we must stop the war that now desolates our once happy and favored country. To stop war we must defeat the rebel armies that are arrayed against the laws and Constitution that all must respect and obey. To defeat those armies we must prepare the way to reach them in their recesses, provided with the arms and instruments which enable us to accomplish our purpose. . . . I cannot discuss this subject with you fairly, because I cannot impart to you what I propose to do, but I assert that my military plans make it necessary for the inhabitants to go away, and I can only renew my offer of services to make their exodus in any direction as easy and comfortable as possible.

You cannot qualify war in harsher terms than I will. War is cruelty and you cannot refine it, and those who brought war into our country deserve all the curses and maledictions a people can pour out. I know I had no hand in making this war, and I know I will make more sacrifices to-day than any of you to secure peace. But you cannot have peace and a division of our country. . . .

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*Excerpted from 2 WILLIAM T. SHERMAN, MEMOIRS OF GEN W. T. SHERMAN 124-27 (4th ed. 1891).

You might as well appeal against the thunder-storm as against these terrible hardships of war. They are inevitable, and the only way the people of Atlanta can hope once more to live in peace and quiet at home, is to stop the war . . . .

[I] want peace, and believe it can now only be reached through union and war, and I will ever conduct war with a view to perfect an early success.

But, my dear sirs, when that peace does come, you may call on me for anything. Then will I share with you the last cracker, and watch with you to shield your homes and families against danger from every quarter.

Now you must go, and take with you the old and feeble, feed and nurse them and build for them in more quiet places proper habitations to shield them against the weather until the mad passions of men cool down and allow the Union and peace once more to settle over your old homes at Atlanta.

Yours, in haste, W. T. SHERMAN, *Major-General* commanding.

Public Committee Against Torture v. Government

Israel Supreme Court
Case No. HCJ 769/02 (2006)

President (Emeritus) A. Barak:

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

1. In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five

years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls "the policy of targeted frustration" of terrorism. . . . During the second *intifada*, . . . preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. . . .

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. . . . This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character—in other words, one that crosses the borders of the state. . . .

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the *area* is the international law dealing with armed conflicts. . . . [T]he fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict. Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character.

22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations. One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success. . . . The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. . . .

42. [T]he principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate. Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. . . .

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to military advantage. . . . In other words, attack is proportionate if the benefit stemming from the attainment of the military objective is proportionate to the damage caused to innocent civilians harmed by it. This is a values based test. It is based upon a balancing between conflicting values and interests. . . .

46. [P]roportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *strico senso* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage cause to nearby innocent civilians. . . . Performing that balance is difficult. [O]ne must proceed case by case. . . . Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed. The hard cases are those which are in the space between extreme examples. There, a meticulous examination of every case is required; it is required that military advantage be direct and anticipated. Indeed, in international law, as in internal law, the ends do not justify the means. . . .

60. The *Order Nisi* given at the request of petitioners was as follows:

> "to obligate respondents . . . to appear and explain why the 'targeted killing' policy . . . should not be annulled, and . . . to obligate respondents . . . to appear and explain why they should not refrain from carrying out executions of wanted persons according to said policy."

The examination of the "targeted killing" . . . has shown that the question . . . is complex. The result of that examination is not that such strikes are always permissible or that they are always forbidden. . . . Harming [civilians "for such

time as they take a direct part in hostilities"], even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not. . . .

61. [T]he saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent." Those sayings are regrettable. They reflect neither the existing law nor the desirable law. It is when the cannons roar that we especially need the laws. Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes." In this case, the law was determined by customary international law regarding conflicts of an international character. Indeed, the State's struggle against terrorism is not conducted "outside" of the law. It is conducted "inside" the law, with tools that the law places at the disposal of democratic states.

In the Cohen excerpt, above, he observed that the Israeli targeted killings case "further promoted the involvement of [International Law Department (ILD)] lawyers in the process of approving targeted killings." According to Cohen, "[r]eports regarding the execution of the policy show, that following this decision, there were many cases in which the ILD consulted lawyers in matters regarding targeted killing operations." Indeed, according to Cohen, "the interventionist tendency of the Israeli Supreme Court in operational matters" has played an important role in shaping the role of operational lawyers in the Israeli defense forces: "Commanders are acutely aware that many of their decisions can be petitioned to the ISC, even in real-time."

CODA: THE ROLE OF THE JUDGE IN TERRIBLE DECISIONS?

One issue lurking behind the laws of armed conflict poses an acute question for the role of judges. In situations of crisis many citizens of liberal states expect statesmen to do things in the name of security and the state, even if sometimes those things violate the law. What posture is the judge to take in such moments? The closing pages of Michael Walzer's celebrated *Just and Unjust Wars* puts the problem in terms that are alternatively bleak and hopeful.

Michael Walzer
The Dishonoring of Arthur Harris*

[Arthur] Harris, who directed [Britain's] strategic bombing of Germany from February 1942 until the end of the war . . . was . . . the determined advocate of terrorism, resisting every attempt to use his planes for other purposes. Now, terror bombing is a criminal activity, and after the immediate threat posed by Hitler's early victories had passed, it was an entirely indefensible activity. Hence Harris' case isn't really an example of the dirty hands problem. He and Churchill, who was ultimately responsible for military policy, faced no moral dilemma: they should have simply stopped the bombing campaign. But we can take it as an example, nonetheless, for it apparently had that form in the minds of British leaders, even Churchill himself at the end. . . .

He had done what his government thought necessary, but what he had done was ugly, and there seems to have been a conscious decision not to celebrate the exploits of Bomber Command or to honor its leader. "From this work," writes Angus Calder, "Churchill and his colleagues at last recoiled. After the strategic air offensive officially ended in mid-April [1945], Bomber Command was slighted and snubbed; and Harris, unlike other well-know commanders, was not rewarded with a peerage." In such circumstances, not to honor was to dishonor, and that is exactly how Harris regarded the government's action (or omission). He waited a while for his reward and then, resentfully, left England for his native Rhodesia. The men he led were similarly treated, though the snub was not so personal. In Westminster Abbey, there is a plaque honoring those pilots of Fighter Command who died during the war, listing them all by name. But the bomber pilots, though

*Excerpted from MICHAEL WALZER, JUST AND UNJUST WARS 323-25 (1977).

they suffered far heavier casualties, have no plaques. Their names are unrecorded. . . .

[H]arris and his men have a legitimate complaint: they did what they were told to do and what their leaders thought was necessary and right, but they are dishonored for doing it, and it is suddenly suggested . . . that what was necessary and right was also wrong. Harris felt that he was being made a scapegoat, and it is surely true that if blame is to be distributed for the bombing, Churchill deserves a full share. But Churchill's success in dissociating himself from the policy of terrorism is not of great importance; there is always a remedy for that in retrospective criticism. What is important is that his dissociation was part of a national dissociation—a deliberate policy that has moral significance and value.

And yet, the policy seems cruel. Stated in general terms, it amounts of this: that a nation fighting a just war, when it is desperate and survival itself is at risk, must use unscrupulous or morally ignorant soldiers; and as soon as their usefulness is past, it must disown them. . . . For it is very rare, as Machiavelli wrote in the Discourses, "that a good man should be found willing to employ wicked means," even when such means are morally required. And then we must look for people who are not good, and use them, and dishonor them. Perhaps there is some better way of doing that than the way Churchill chose. It would have been better if he had explained to his countrymen the moral costs of their survival and if he had praised the courage and endurance of the fliers of Bomber Command even while insisting that it would not possible to take pride in what they had done (an impossibility that many of them must have felt). But Churchill did not do that; he never admitted that the bombing constituted a wrong. In the absence of such an admission, the refusal to honor Harris at least went some small distance towards re-establishing commitment to the rules of war and the rights they protect. And that, I think, is the deepest meaning of all assignments of responsibility.

A Note on "Bomber Harris"

The story of Arthur "Bomber" Harris is somewhat more complex than Walzer suggests. Harris's biographer surveys the evidence and concludes that Harris had probably been offered a peerage but turned it down, partly on the grounds that he believed his men to have been snubbed in the awarding of medals and distinctions after the end of the war. It is clear that Harris himself felt that his wartime efforts were underappreciated by Churchill and others, and his departure from the Air Ministry in 1946 was publicly viewed as a firing, even though it was

followed by an honorary promotion to Marshall of the Royal Air Force. See HENRY PROBERT, BOMBER HARRIS: HIS LIFE AND TIMES 351, 360-61 (2001).

Walzer's observations are not aimed principally at judges, but they raise deep questions about the ways in which judges assert jurisdiction over certain of the actions of states at war, for judges are now part of the process of honoring and dishonoring that Walzer describes.

Justice Robert Jackson of the U.S. Supreme Court made a point much like Walzer's in his dissent in the 1944 *Korematsu* case. Jackson, who had been Franklin Roosevelt's wartime Attorney General and later served as the chief prosecutor at the International Military Tribunal at Nuremberg, pleaded for his colleagues to protect the integrity of the law from the vicissitudes of wartime by retreating from the effort to exercise authority over military orders in situations of emergency. Even if the Japanese internment system was permissible as a military matter, Jackson wrote, and even if the Court decided not to order that it be shut down, it did not follow that the system was necessarily legal and thus entitled to the blessing of the judiciary:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

DIALOGUES ON THE EUROPEAN CONVENTION OF HUMAN RIGHTS, 2012

THE BRIGHTON DECLARATION

PRESIDENT BRATZA'S COMMENTARY IN RESPONSE

These materials, edited by Alec Stone Sweet, serve as background for the chapters that follow.

The Brighton Declaration

High Level Conference on the Future of the European Court of Human Rights (April 19-20, 2012)*

The High Level Conference meeting at Brighton on 19 and 20 April 2012 at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe ("the Conference") declares as follows:

[1.] The States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") reaffirm their deep and abiding commitment to the Convention, and to the fulfilment of their obligation under the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.

2. The States Parties also reaffirm their attachment to the right of individual application to the European Court of Human Rights ("the Court") as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention. The Court has made an extraordinary contribution to the protection of human rights in Europe for over 50 years.

3. The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court. . . .

7. The full implementation of the Convention at national level requires States Parties to take effective measures to prevent violations. All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention. National courts and tribunals should take into account the Convention and the case law of the Court. Collectively, these measures should reduce the number of violations of the Convention. They would also reduce the

*Excerpted from High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, (Apr. 19, 2012), *available at* http://www.coe.int/en/20120419-brighton-declaration.

number of well-founded applications presented to the Court, thereby helping to ease its workload.

8. The Council of Europe plays a crucial role in assisting and encouraging national implementation of the Convention, as part of its wider work in the field of human rights, democracy and the rule of law. . . .

10. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level.

11. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

12. The Conference therefore:

> a. Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
>
> b. Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and invites the Committee of Ministers to adopt the necessary amending instrument by the end of 2013, while recalling the States Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention;

> c. Welcomes and encourages open dialogues between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention, including particularly dialogues between the Court and:
>
> > i. The highest courts of the States Parties;
> >
> > ii. The Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court's case law; and
> >
> > iii. Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court;
>
> d. Notes that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it . . . .

13. The right of individual application is a cornerstone of the Convention system. The right to present an application to the Court should be practically realisable, and States Parties must ensure that they do not hinder in any way the effective exercise of this right. . . .

21. The authority and credibility of the Court depend in large part on the quality of its judges and the judgments they deliver.

22. The high calibre of judges elected to the Court depends on the quality of the candidates that are proposed to the Parliamentary Assembly for election. The States Parties' role in proposing candidates of the highest possible quality is therefore of fundamental importance to the continued success of the Court, as is a high-quality Registry, with lawyers chosen for their legal capability and their

knowledge of the law and practice of States Parties, which provides invaluable support to the judges of the Court.

23. Judgments of the Court need to be clear and consistent. This promotes legal certainty. It helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application. Clarity and consistency are particularly important when the Court addresses issues of general principle. Consistency in the application of the Convention does not require that States Parties implement the Convention uniformly. The Court has indicated that it is considering an amendment to the Rules of Court making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case law. . . .

25. The Conference therefore: . . .

> c. Welcomes the steps that the Court is taking to maintain and enhance the high quality of its judgments and in particular to ensure that the clarity and consistency of judgments are increased even further; welcomes the Court's long-standing recognition that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases; and in particular, invites the Court to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation; . . .

26. Each State Party has undertaken to abide by the final judgments of the Court in any case to which they are a party. Through its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including by the implementation of general measures to resolve wider systemic issues.

27. The Committee of Ministers must therefore effectively and fairly consider whether the measures taken by a State Party have resolved a violation. The Committee of Ministers should be able to take effective measures in respect of a State Party that fails to comply with its obligations under Article 46 of the Convention. The Committee of Ministers should pay particular attention to violations disclosing a systemic issue at national level, and should ensure that States Parties quickly and effectively implement pilot judgments. . . .

30. This Declaration addresses the immediate issues faced by the Court. It is however also vital to secure the future effectiveness of the Convention system.

To achieve this, a process is needed to anticipate the challenges ahead and develop a vision for the future of the Convention, so that future decisions are taken in a timely and coherent manner.

31. As part of this process, it may be necessary to evaluate the fundamental role and nature of the Court. The longer-term vision must secure the viability of the Court's key role in the system for protecting and promoting human rights in Europe. The right of individual application remains a cornerstone of the Convention system. Future reforms must enhance the ability of the Convention system to address serious violations promptly and effectively.

32. Effective implementation of the Convention at national level will permit the Court in the longer term to take on a more focused and targeted role. The Convention system must support States in fulfilling their primary responsibility to implement the Convention at national level.

33. In response to more effective implementation at the national level, the Court should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems, and important questions of interpretation and application of the Convention, and hence would need to remedy fewer violations itself and consequently deliver fewer judgments. . . .

35. The Conference therefore: . . .

c. Invites the Committee of Ministers, in the context of the fulfilment of its mandate under the Declarations adopted by the Interlaken and Izmir Conferences, to consider the future of the Convention system, this consideration encompassing future challenges to the enjoyment of the rights and freedoms guaranteed by the Convention and the way in which the Court can best fulfil its twin role of acting as a safeguard for individuals whose rights and freedoms are not secured at the national level and authoritatively interpreting the Convention . . . .

e. Envisages that the Committee of Ministers will, as part of this task, carry out a comprehensive analysis of potential options for the future role and function of the Court, including analysis of how the Convention system in essentially its current form could be preserved, and consideration of more profound changes to how applications are resolved by the Convention system with the aim of reducing the number of cases that have to be addressed by the Court.

Nicolas Bratza

Speech at High Level Conference on the Future of the European Court of Human Rights (April 19, 2012)[*]

[A]t a time when human rights and the Convention are increasingly held responsible in certain quarters for much that is wrong in society, it is worth recalling the collective resolve of member States of the Council of Europe to maintain and reinforce the system which they have set up. We should not lose sight of what that system is intended to do, that is to monitor compliance with the minimum standards necessary for a democratic society operating within the rule of law; nor should we forget the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms. It is no ordinary treaty. It is not an aspirational instrument. It sets out rights and freedoms that are binding on the Contracting Parties.

The Declaration also reaffirms the attachment of the States Parties to the right of individual petition and recognizes the Court's extraordinary contribution to the protection of human rights in Europe for over 50 years. In setting up a Court to guarantee their compliance with the engagements enshrined in the Convention, the member States of the Council of Europe agreed to the operation of a fully judicial mechanism functioning within the rule of law. The principal characteristic of a court in a system governed by the rule of law is its independence. In order to fulfil its role the European Court must not only be independent; it must also be seen to be independent. That is why we are, I have to say, uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it.

I would respectfully submit that these elements must be borne in mind in any discussion of proposals for reform. Convention amendment must be consistent with the object and purpose of the treaty and must satisfy rule of law principles, notably that of judicial independence. . . . Having said that, there is much in this Declaration with which the Court is in complete agreement. I refer in particular to the emphasis placed on steps to be taken by the States themselves,

[*]Excerpted from, Nicolas Bratza, President of the European Court of Human Rights, Speech at High Level Conference on the Future of the European Court of Human Rights, (Apr. 19 2012), *available at* http://www.coe.int/20120419-nicolas-bratza.

the recognition of the shared responsibility for the system requiring national authorities to take effective measures to prevent violations and to provide remedies. . . . It also rightly underlines the important role of the Council of Europe in providing assistance.

Let us be clear: the main issue confronting the Court has been, and continues to be, the sheer quantity of cases. Failure to implement the Convention properly at national level is a primary source of the accumulation of meritorious cases which constitute the most serious problem that the Court has to cope with. It is also a regrettable fact that over 30,000 of the pending cases relate to repetitive violations of the Convention, in other words cases where Contracting Parties have failed to take effective steps to remedy the underlying systemic problem previously identified by the Court. . . .

As to subsidiarity, the Court has clearly recognised that the Convention system requires a shared responsibility which involves establishing a mutually respectful relationship between Strasbourg and national courts and paying due deference to democratic processes. However, the application of the principle is contingent on proper Convention implementation at domestic level and can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.

The doctrine of margin of appreciation is a complex one about which there has been much debate. We do not dispute its importance as a valuable tool devised by the Court itself to assist it in defining the scope of its review. It is a variable notion which is not susceptible of precise definition. . . .

The Court has discussed the idea that superior national courts should be enabled to seek an advisory opinion from Strasbourg and distributed a reflection paper on it; it is not opposed to such a procedure in principle, although there remain unanswered questions about how it would work in practice.

[B]efore concluding, I would wish to reiterate the Court's unequivocal support for the rapid accession of the European Union to the Convention. . . .

[T]he introduction by the Convention of the right of individual petition before an international body changed the face of international law in a way that most people would hope and believe was lasting. We do not have to look very far outside Europe today to understand the continuing relevance of the principle that States which breach the fundamental rights of those within their jurisdiction should not be able to do so with impunity.

It is nevertheless not surprising that Governments and indeed public opinion in the different countries find some of the Court's judgments difficult to accept. It is in the nature of the protection of fundamental rights and the rule of law that sometimes minority interests have to be secured against the view of the majority. I would plead that this should not lead governments to overlook the very real concrete benefits which the Court's decisions have brought for their own countries on the internal plane. At the same time I am confident that they understand the value of the wider influence of the Convention system across the European continent and indeed further afield. It is surely not controversial to maintain that all European partners are best served by the consolidation of democracy and the rule of law throughout the continent. The political stability and good governance which are essential for economic growth are dependent on strong democratic institutions operating within an effective rule of law framework. . . .

[T]he Convention and its enforcement mechanism remain a unique and precious model of international justice, whose value in the Europe of the 21st century as a guarantee of democracy and the rule of law throughout the wider Europe is difficult to overstate. While much has changed in the past 50 years, the need for the Convention and for a strong and independent Court is as pressing now as at any time in its history.

(DIS)UNIFORMITY OF RIGHTS IN FEDERATIONS AND UNIONS

DISCUSSION LEADERS

JUDITH RESNIK AND REVA SIEGEL

III. (DIS)UNIFORMITY OF RIGHTS IN FEDERATIONS AND UNIONS

DISCUSSION LEADERS:
JUDITH RESNIK AND REVA SIEGEL

Uniformity, Disuniformity, Sovereignty, and the Import of Rights

Democratic Sovereignty and Individual Rights: The Examples of Enfranchisement and Reproduction

Disenfranchisement

Counting, Consensus, and Categorizing

Health and Life

These materials explore legal systems that embrace, simultaneously, two commitments. The first is to subunits—"member states," "states," "länder," "provinces," and the like—which are recognized as having self-constituted identities and degrees of autonomy. That form of authority is sometimes described as "sovereignty," albeit often partial or delineated because of a subunit's participation in a larger legal system. The second commitment is to individuals, who are understood to possess certain foundational rights (sometimes called constitutional or human rights) that are protected wherever they live within the larger jurisdiction. Our focus is on how courts deal with the conflicts generated by the intersection of these two commitments.

When and why do jurisdictions that deem some rights to be fundamental nonetheless permit subunits to provide less than full protection or recognition of those rights? What political utilities are served by rights vindicated (or not) through multi-layered systems? What are the harms? How do judges assess the relative importance of state sovereignty claims and of individuals' assertions of foundational rights?

Some analyses celebrate variation in norms, explained as reflecting the potential for development of rights over time, the utility of building consensus and of exploring differences, and the desirability of renegotiating over time the meaning of membership in a federation or union. Other analyses criticize variation either for undervaluing the importance of stated and foundational rights (such as individual liberty, dignity, and equality) or for producing unduly diffuse legal regimes of unnecessary complexity.

Examples of legal multiplicity expanded during the twentieth century through the creation of federations, unions, and supra-national institutions. When reasoning about when a rule sourced at the subunit or the larger unit ought to prevail, courts have cited terms such as "subsidiarity," "competency," "comity," "doctrines of deference," "federalism," "independent and adequate state grounds," and "the margin of appreciation."

When conflicts emerge about foundational commitments, courts regularly turn to foundational texts to supply direction but, as is familiar, provisions are often indeterminate. Complexities arise about characterizing and categorizing relevant powers and rights. Courts are thus constantly making interpretive judgments and seek to structure their deliberations.

For example, judges look to variances in practices within and outside their jurisdictions. That method requires a series of choices about how to characterize rights and the relevant legal rules and jurisdictions. What "counts"—

constitutional provisions, or statutory rules and practices as well? Which jurisdictions matter—other internal subunits, or jurisdictions across the globe? What is the import of a state being an "outlier"? Might tolerance for difference vary across systems, such that either the United States or Europe might be more open (or closed) to difference with respect to particular kinds of rights?

Below, we explore the explicit and implicit concerns that inform judicial determination of rights in multi-level jurisdictions. We have provided materials laden with concerns about democracy and about rights. We seek to understand how determinations of rights can generate a shared identity and create occasions for the assertion of distinctive identities of subunits. We are especially interested in the dynamic logic of rights and sovereignty claims and judgments. On one view, courts that can identify the "right answer" or "balance" can settle the issue. On another, sometimes referred to as "pluralism," "experimentalism," or "democratic constitutionalism," settlements may be temporary or illusive. Debate (characterized as "conflict" or "dialogue") continues, and the ongoing conversation may promote, rather than undermine, the authority of "law."[*]

To ground the inquiries, we look at two arenas—suffrage, and the regulation of abortion—chosen because of their changing contours and political saliency. Each is the locus of rights and sovereignty claims that have evolved through conflict over time. At the founding of both the United States and of the nation-states that today compose Europe, voting was not the entitlement it is today; exclusion of large classes—such as women—was routine. Identitarian claims are similarly dynamic. When the Human Rights Act became effective in the United Kingdom in 2000, few would have predicted that Britain would stake its sovereign authority on a decision about whether prisoners could vote. Likewise, a half century ago, the regulation of abortion was not imagined as the site of constitutional rights nor as constitutive of sovereign identity. The cases and commentary make plain that the stakes—including the stakes for voting and abortion—are not foreordained, essential, or inevitable, but rather are generated through social and political movements that mark certain rights as central to the identity of individuals or nation-states at particular historical moments.

One final note by way of introduction. We well appreciate the differences in governing law, in the underlying constitutional documents and the distinctive historical experiences of jurisdictions (beyond those referenced here), in the kinds of remedies available for noncompliance, and in the forms of implementation and oversight provided by constitutional or supra-national courts. Variation exists not

[*] *See e.g.* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

only in the enforcement powers of courts but also in the mechanisms for overriding judicial decisions. But our view is that puzzles and challenges across legal systems are recurring; by using the specific examples, we aim not to delve into the particulars of doctrines on voting, reproduction, or the "margin of appreciation," but rather to explore the function of conflict over rights within federations and unions.

UNIFORMITY, DISUNIFORMITY, SOVEREIGNTY, AND THE IMPORT OF RIGHTS

Andreas Auer

The Constitutional Scheme of Federalism[*]

How can one explain the difficulties in defining federalism? Mainly because there are as many federalisms as there are federal states, each one considering its own specificities as being absolutely essential to the very concept of federalism. . . . [Yet, three] basic principles or guidelines can be distinguished and must be combined in order to reveal the existence of a federal state experience: autonomy, superposition and participation.

Autonomy means that the constituent units of a federal state structure enjoy more than just some delegated competences. They are autonomous in many ways: they have their own institutions and organs; they have their own laws and regulations; they have a constitution; they have legislators, governments and judges; they have at least some financial autonomy, meaning that they may raise taxes and decide freely upon their affectation. Constituent units thus have their own legal order. Being autonomous, they are just like sovereign states, without being sovereign states . . . because their sovereignty is limited by the second principle, the principle of superposition.

Superposition means that the powers of constituent units and the way they make use of these powers are subordinate to the requirements of a superior legal order, i.e. the one formed by the federal unit. Laws and decisions of the federal unit are, and must be, binding for the constituent units. Federalism is not a supermarket where one may buy whatever one wants to. American and Swiss constitutional history shows that theories of 'nullification' or 'interposition,' allowing constituent units to oppose their sovereignty to the application of a federal measure they dislike, amount to the very negation of federalism. Nothing

[*]Excerpted from Andreas Auer, *The Constitutional Scheme of Federalism*, 12 J. EUR. PUB. POL'Y 419 (2005).

prevails, in law, over the simple rule that federal regulations must be, in case of conflict, superior to state regulations. Another question is, of course, who is entitled to have the final word about questions where competences are contested between constituent and central units.

Participation basically means that the legal orders of the central unit and the legal orders of the constituent units are not strangers to each other. They are, on the contrary, so closely intertwined and connected as to appear to form but one legal order. Participation between two superposed legal levels is probably the most decisive feature of federal government (interlocking federalism). But it is essential to recognize that participation must go both ways, bottom-up and top-down.

On the one hand, the constituent units have the possibility and, indeed, the obligation to participate in the process of defining, of enacting, and of implementing federal rules and policies: the existence of a second chamber representing directly the constituent units, the power to initiate legislation, the right to be consulted before the enactment of a federal regulation or the conclusion of an international treaty, the possibility to apply to the constitutional court, and, most important, the obligation to implement and to enforce federal rules. By these means, and many more, the constituent units become directly involved in the process of defining and implementing the will and the policy of the federal unit.

On the other hand, the federal unit has also to contribute in some way to the adoption or the implementation of the laws and regulations of the constituent units. It cannot remain completely indifferent to the exercise of state autonomy. The central unit must not only recognize the existence and the autonomy of the constituent units. It also has to guarantee, on the international as well as on the national level of government, full respect and enforcement of the regular exercise, by the constituent units, of their powers and regulations. In other words, the federal unit has to somehow become involved in the process of formulating and implementing the will of the constituent units.

[W]ithout the constituent units, the federal unit cannot exist. Without the latter, the former cannot be autonomous. Both have to work together, through a set of specific procedures, in order to accomplish their respective goals.

Robert Cover

The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation[*]

While both the state and federal courts are subject to the appellate jurisdiction of the Supreme Court of the United States on matters of federal law, the independence of each of the state systems from one another and of all from the federal system has remained real and significant. The possibilities of concurrency are thus both "vertical" (state-federal) and "horizontal" (state-state).

Two different emphases are possible in understanding this jurisdictional array. The first treats the complex patterns of concurrency as both an accident of history and an unavoidable, perhaps unfortunate incident of the formal logic of our system of states. . . . [But instead] of viewing the persistence of concurrency as a dysfunctional relic, one may hypothesize that it is a product of an institutional evolution. The persistence of the anomaly over time requires a search for a strong functional explanation. . . .

The jurisdictional array that I have identified as the traditional and constant American structure of courts is a form of redundancy that I shall call complex concurrency. This structure exemplifies at least one of three important characteristics: strategic choice [i.e., forum shopping], synchronic redundancy [i.e., simultaneous adjudication in multiple forums], and diachronic or sequential redundancy [i.e., recourse to the courts of another system after one system has adjudicated and reached a result]. . . .

The uses of jurisdictional redundancy [can] be sought by examining the kinds of problems associated with systematic political authority. . . . I have singled out [three areas] for discussion here: Interest, Ideology, and Innovation. These terms are a shorthand for three general problems: (a) the self-interest of incumbent elites in a regime; (b) the more or less unconsciously held values and ways of seeing the world, reflected in the governing elites, which tend to serve and justify in general and long run terms the social order which the elites dominate; and (c) the consciously determined policies of the authoritative elites, especially insofar as they depart from traditional, common cultural norms and expectations.

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[*]Excerpted from Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). *See also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

The proposition that I begin with is that different polities with differing constituencies, peopled by distinct governing elites, indeed will differ from one another in some measure with respect to all three areas. . . .

[T]o the extent that the jurisdictional alternatives differ with respect to the supposed salient social determinants of ideology, complex concurrency constitutes a strategy for coping with ideological impasse. If outcomes are confirmed by the courts of two or more different systems which vary with respect to supposed social determinants of knowledge and mind, this result would suggest some common epistemological ground with respect to the issue presented and with respect to its resolution. For a series of jurisdictional alternatives to present a plausible network of redundancy sufficient to "correct" ideological bias requires that those alternative forums arise out of widely varied political bases with attendant variations in the constituencies to which they speak. In terms of the American judicial systems . . . [m]ost state court trial judges are drawn from local, provincial elites, while federal district court judges are more likely to be drawn from a national elite. Levels of education, bonds of loyalty, status, and even economic class may differ radically from one group to the other. . . .

I have mentioned that the adjudicatory process entails both dispute resolution and norm articulation elements. Ideological distrust entails related challenges to both dimensions of adjudication. It implies skepticism about the reliability of a range of adjudicatory acts and orientations: ethical and practical judgment, capacity for critical or empathetic orientation to parties and witnesses, and appreciation for consequences. Thus, in its most blatant form, a system may be challenged because its judges cannot be expected to understand—to empathize with—"our" kind of people. They will literally not comprehend "us" without an act of translation, will not believe even when they understand what is foreign to them in the experience of "our" people, and will not appreciate the consequences to "us" of "their" standards.

[There is a value] to the display of nonconfirming results in different tribunals. . . . If there is a chasm rendering the social reality of one group in our nation problematic to another, and if that problem of perception and apprehension is to arise in the work of adjudication, there is much to be said for making it explicit. . . . [W]hen we see the alternative forums reaching nonconfirming, inconsistent results, we are watching the impasse between the toned-down versions of social reality and right conduct held by at least locally significant groups in the society. . . .

If there were a unitary source for norm articulation over a given domain, the costs of error or lack of wisdom in any norm articulation would be suffered

throughout the domain. . . . The multiplicity of centers means an innovation is more likely to be tried and correspondingly less likely to be wholly embraced. The two effects dampen both momentum and inertia. Assuming a general readiness to take risks, the array of multiple norm articulation sources, some of which will not go so far in innovation, will then mitigate the damages suffered through risky experiments. . . . It justifies, at least in some areas, the existence of a system of polycentric norm articulation. Such a system is a prerequisite for, but does not itself justify, jurisdictional redundancy. . . .

If the several legislative authorities articulate the same norm, the norm is, if anything, clarified and intensified. . . . There are several ways in which the iteration of a norm operates to reinforce it. It first removes what might be called jurisdictional doubt. If the norm is found almost everywhere, then it is a safer inference that the norm will be applied even when it is unclear what norm articulation source operates over a given domain. Second, the fact that a variety of norm articulators have independently arrived at a given conclusion about some conduct reduces the likelihood that the conclusion is a product of local error or prejudice, ideology, or interest. If a large number of jurisdictions arrive *independently* at the conclusion that a certain kind of conduct is wrong or detrimental, then the conclusion is more apt to reflect the problematic character of the conduct than the problematic character of the norm articulation process. Finally, the meaning of the norm will be clarified by reiterating independently the "central core" conduct, which all jurisdictions include within the prohibition, while leaving less clear signals for the penumbral areas with respect to which controversy exists. It will be clearer that there is in fact an unproblematic core area of conduct to which the norm will be applied. . . . A unitary system may, over time, clarify by repetition as well. Density of contemporaneous utterances of equal authority then is simply a horizontal array performing a function similar to that of a body of precedent over time. . . .

[I]f there is disagreement as to what the Constitution requires, federal courts may [differ]. . . . In all such transition cases, civil or criminal, it is important to see the nature of the plight of the litigant. She appeals to "law" against law. It may be an appeal to law which one of several alternative forums calls no law. But so long as such a forum is only one of several, there is room, for awhile at least, for recognition of the truly open, tentative, and transitional status of norms which do not yet command common acquiescence among all relevant authoritative courts. Openness about such transitional norms might be useful in many ways. It might lead, for example, to compromise either upon the underlying claim or upon a third "neutral" forum. . . .

[Many challenges exist.] First, since the substantive battlefields upon which conflicts of interest, ideology, and innovation are fought change over time, it is not to be expected that effective coordination rules will be substance-neutral emanations of formal structure alone. Rather, the areas of relatively unrestrained redundancy will change with the salient social conflicts. . . .

Second, the political pressure for open avenues of redundancy comes about when effects are not random. Thus, to the extent that the redundant forum simply provides an avenue for forum shopping with no systematic differences arising from interest, ideology, or innovation, there will not be an identifiable and cohesive group prejudiced by the presence or absence of the alternative forum. When the forum becomes an issue to an identifiable group, it is because that group thinks that there is more than mere randomly distributed error at stake. This means that the very fact that significant groups have conflicting systematic preferences for a forum or type of forum as to some issue is a strong argument for relatively unrestrained redundancy.

[F]or some time the jurisdictional structure of "our federalism" has struck me as comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference. It seems unfashionable to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict. Unquestionably, my perverse perspective may be carried too far. I, ultimately, do not want to deny that there is value in repose and order. But the inner logic of "our federalism" seems to me to point more insistently to the social value of institutions in conflict with one another. It is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts. It is that view of federalism that we ought to embrace.

"Unreasonably" Wrong? Codifying Doctrines of Deference

To sharpen the questions of what kinds of deference are due by which institutions of government to certain decisions of states or member states, we offer a few examples of rules, codified by the U.S. Congress, to allocate authority between state and federal courts. An "anti-injunction" act instructs federal courts not to enjoin state court proceedings except under specified circumstances. Another statute directs federal courts not to interfere with state taxation processes when a "plain, speedy and efficient remedy" is available in state courts. A sequence of cases establish principles about deference (comity) to ongoing state

criminal proceedings, yet instruct federal judges generally not to defer or "abstain" from making decisions when state courts have parallel civil cases pending.

Some of these standards facilitate the kind of open airing of conflicts over legal norms that Robert Cover celebrates and, in 1977, termed "dialectical federalism." Not all share Cover's views of the virtues of dialectical federalism. In 1997, Congress formulated new rules for post-conviction remedies that directed federal judges, when ruling on petitions from state prisoners for habeas corpus relief, to silence their own adjudication by according state court judgments substantial deference. Specifically, 28 U.S.C. § 2254 authorizes persons in custody "in violation of the Constitution or laws or treaties of the United States" to bring claims to federal courts. Yet federal judges are told that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

These provisions have prompted many decisions debating when a constitutional right was "clearly established" and what interpretations of its scope are "unreasonable." Writing for the majority in *Harrington v. Richter* (2011), Justice Kennedy interpreted these provisions to mean that:

> [Section 2254(d)] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. [It] reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. . . . [A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in

> justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.
>
> The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."

The Supreme Court has held that even when state courts issue summary dispositions without reasons for denials of petitions, federal judges must accord the form of deference outlined in the statute—that "precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id*. Some commentators see this approach as permitting prisoners to remain in prison for life or be executed despite the underenforcement or nonenforcement of federal constitutional rights, such as to effective assistance of counsel and disclosure by prosecutors of exculpatory material evidence.

Under what circumstances should interests in the finality of criminal judgments override state court judgments that fail to protect individual federal constitutional rights? From what standpoint would one know that federal rights have been overridden? Does the idea of "fairmindedness" (the Court's term) suggest that, in federations, different judges can reach opposite conclusions—yet both be fairminded? Should dispute about the content of a right counsel deference and if so, should the degree of deference vary depending on whether a contested judgment is made by a legislature, a prosecutor, or another court?

Below, we turn to another formulation of a doctrine of deference, the European "margin of appreciation." At first glance, the U.S. test of "unreasonable" applications could be read as radically different, in that it entails a judgment that a state court has not been completely compliant with federal constitutional law, and then another judgment that the departure was or was not also "unreasonable." Yet could the U.S. approach be interpreted as giving a "margin" to state court interpretation and thereby tolerating deviance unless outside the pale of plausible understandings of individual rights? Given the differences between the U.S. federation and the European Union and the Council of Europe, ought subunits be given different degrees of deference?

DEMOCRATIC SOVEREIGNTY AND INDIVIDUAL RIGHTS: THE EXAMPLES OF ENFRANCHISEMENT AND REPRODUCTION

Disenfranchisement

One way to underscore the intensity that the clashes between sovereignty and transnational individual rights have produced is to rehearse what transpired after the European Court of Human Rights (ECtHR) decided the 2005 *Hirst* case, excerpted below, on prisoner disenfranchisement. *Hirst* held that a blanket ban on voting by prisoners was impermissible under the European Convention. How does the Court determine that the United Kingdom violated Convention rights? What sources of law does the Court consider, and from where? Does the Court rely on a standard when counting and comparing? Should it, or should the Court's approach vary with the right in question?

Hirst v. United Kingdom

European Court of Human Rights (Grand Chamber)
App. No. 74025/01 (2005)

12. On 11 February 1980 the applicant pleaded guilty to manslaughter on the ground of diminished responsibility. His guilty plea was accepted on the basis of medical evidence that he was a man with a severe personality disorder to such a degree that he was amoral. He was sentenced to a term of discretionary life imprisonment.

13. The applicant's tariff (that part of the sentence relating to retribution and deterrence) expired on 25 June 1994. His continued detention was based on . . . the Parole Board considering that he continued to present a risk of serious harm to the public.

14. The applicant, who is barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, issued proceedings in the High Court under section 4 of the Human Rights Act 1998, seeking a declaration that this provision was incompatible with the European Convention on Human Rights. . . .

16. In the Divisional Court judgment dated 4 April 2001, Lord Justice Kennedy . . . cited the Secretary of State's reasons, given in the proceedings, for maintaining the current policy:

> "By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative."
>
> [L]ord Justice Kennedy concluded:
>
> "[W]hat Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and 'the free expression of the opinion of the people in the choice of the legislature.' If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. . . .
>
> The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this Court to defer to the legislature. . . ."

21. [S]ection 3 of the Representation of the People Act 1983 ("the 1983 Act") provides:

> "(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence . . . is legally incapable of voting at any parliamentary or local election."

22. [T]he substance of [this provision] dated back to the Forfeiture Act 1870 . . . which in turn reflected earlier rules of law relating to the forfeiture of certain rights by a convicted "felon" (the so-called "civic death" of the times of King Edward III). . . .

33. According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, "the former Yugoslav Republic of Macedonia," Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden,

Switzerland and Ukraine), in thirteen countries all prisoners were barred from voting or unable to vote (Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey and the United Kingdom), while in twelve countries prisoners' right to vote could be limited in some other way (Austria, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania and Spain).

34. [I]n Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence in penitentiaries are not entitled to vote; nor are prisoners in Liechtenstein. . . .

35. In 1992 the Canadian Supreme Court unanimously struck down a legislative provision barring all prisoners from voting [*Sauvé v. Canada (no. 1)*]. Amendments were introduced limiting the ban to prisoners serving a sentence of two years or more. The Federal Court of Appeal upheld the provision. However, following the decision of the Divisional Court in the present case, the Supreme Court on 31 October 2002 in *Sauvé v. the Attorney General of Canada (no. 2)* held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional as it infringed Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, which provides:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. . . .
>
> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

36. The majority opinion . . . found that the Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives. . . .

38. On 1 April 1999, in *August and Another v. Electoral Commission and Others*, the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. .

. . [T]he South African Constitution [sets out] the right of every adult citizen to vote in elections for legislative bodies . . . in unqualified terms . . . :

> "The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."

40. [T]he applicant [in the present case] . . . relied on Article 3 of Protocol No. 1 which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

41. The Chamber found that the exclusion from voting imposed on convicted prisoners in detention was disproportionate. It had regard to the fact that it stripped a large group of people of the vote; that it applied automatically irrespective of the length of the sentence or the gravity of the offence; and that the results were arbitrary and anomalous, depending on the timing of elections. It further noted that, in so far as the disqualification from voting was to be seen as part of a prisoner's punishment, there was no logical justification for the disqualification to continue in the case of the present applicant, who had completed that part of his sentence relating to punishment and deterrence. . . . :

> "The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote. The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. It cannot accept however that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. . . ."

55. [T]he Latvian Government were concerned that the Chamber's judgment would have a horizontal effect on other countries which imposed a blanket ban on convicted prisoners voting in elections. They submitted that . . . States should be afforded a wide margin of appreciation, in particular taking into account the historical and political evolution of the country and that the Court was not competent to replace the view of a democratic country with its own view as to what was in the best interests of democracy. In their view, the Chamber had failed to pay enough attention to . . . the general sense of combating criminality and in avoiding the situation whereby those who had committed serious offences could participate in decision-making that might result in bringing to power individuals or groups that were in some way related to criminal structures. . . .

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium* (1987)). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference. . . .

59. [I]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion . . . . Universal suffrage has become the basic principle.

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. . . . [The] Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision.

62. [F]or example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned. . . .

69. [T]he Court . . . begin[s] by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. . . .

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1 . . . does not therefore exclude . . . restrictions on electoral rights . . . for example, [on individuals who have] seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (see . . . *Glimmerveen and Hagenbeek v. the Netherlands* (1979)[, in which] the [European] Commission [of Human Rights] declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision. As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness. . . .

74. [T]he Court notes that, at the time of the passage of the latest legislation, the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment. . . . The measure is meant to act as an incentive for citizen-like conduct.

75. [T]he Court finds no reason in the circumstances of this application to exclude these aims as untenable or incompatible *per se* with the right guaranteed under Article 3 of Protocol No. 1.

76. The Court notes that the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period representing retribution and deterrence) had expired.

77. The Government have argued that the measure was proportionate, pointing out, *inter alia*, that it only affected some 48,000 prisoners (not the 70,000 . . . in the Chamber judgment which omitted . . . that prisoners on remand were no longer under any ban) and submitting that the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and did not apply to those detained on remand, for contempt of court or for default in payment of fines. . . . [W]hile it is true that there are categories of detained persons unaffected by the bar, it nonetheless concerns a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. . . .

79. As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. . . .

82. Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. . . . Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. . . .

84. In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable

margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1. . . .

CONCURRING OPINION OF JUDGE CAFLISCH

2. [T]here must . . . be limits to [restrictions on the right to vote, to elect and to stand for election]; and it is up to this Court, rather than the Contracting Parties, to determine whether a given restriction is compatible with the individual right to vote, to elect and to stand for election. To make this determination, the Court will rely on the legitimate aim pursued by the measure of exclusion and on the proportionality of the latter. . . .

3. [The respondent State and the Latvian government] criticised the Chamber for having drawn its own conclusions instead of relying on national traditions or the views of the national courts. [However, although c]ontracting States' margin of appreciation in matters relating to Article 3 may indeed, as has been contended, be relatively wide . . . the determination of its limits cannot be virtually abandoned to the State concerned and must be subject to "European control."

7. [I]t might have been useful if the Court, in addition to finding a violation of Article 3 of Protocol No. 1, had indicated some of the parameters to be respected by democratic States when limiting the right to participate in votes or elections. These parameters should, in my view, include the following elements.

(a) The measures of disenfranchisement that may be taken must be prescribed by law.

(b) The latter cannot be a blanket law: it may not, simply, disenfranchise the author of every offence punished by a prison term. It must, in other words, be restricted to major crimes, as rightly pointed out by the Venice Commission in its Code of Good Practice in Electoral Matters.[*] It cannot simply be assumed that whoever serves a sentence has breached the social contract.

[*] [Editors' Note: The Venice Commission's Guidelines on Elections state, "The five principles underlying Europe's electoral heritage are *universal, equal, free, secret and direct suffrage*." While deprivations of voting and electoral rights are permissible according to the Commission, "[t]he proportionality principle must be observed," such that "conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them." Furthermore, any deprivations must be "based on mental incapacity or a criminal conviction for a serious offence." Eur. Comm'n for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, 51st Sess., Op. No. 190/2002, *available at* http://www.venice.coe.int/docs/2002/CDL(2002)139-e.pdf.]

(c) The legislation in question must provide that disenfranchisement, as a complementary punishment, is a matter to be decided by the judge, not the executive. This element, too, will be found in the Code of Good Practice adopted by the Venice Commission.

(d) Finally—and this may be the essential point for the present case—in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner's release, the disenfranchisement must remain confined to the punitive part and not be extended to the remainder of the sentence. . . .

8. Two out of the above four elements are contained in the Code of Good Practice of the Venice Commission: I say this not because I consider that Code to be binding but because, in the subject matter considered here, these elements make eminent sense.

JOINT CONCURRING OPINION OF JUDGES TULKENS AND ZAGREBELSKY

[T]he same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence. In our view this, in addition to the failure to take into consideration the nature and gravity of the offence, demonstrates that the real reason for the ban is the fact that the person is in prison.

This is not an acceptable reason. There are no practical grounds for denying prisoners the right to vote (remand prisoners do vote) and prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention, except for the right to liberty. As to the right to vote, there is no room in the Convention for the old idea of "civic death" that lies behind the ban on convicted prisoners' voting.

We would conclude, therefore, that the failure of the United Kingdom legal system to take into consideration the gravity and nature of the offence of which the prisoner has been convicted is only one of the aspects to be taken into account. . . . The lack of a rational basis . . . is a sufficient reason for finding a violation of the Convention, without there being any need to conduct a detailed examination of the question of proportionality.

[W]e note that the discussion about proportionality has led the Court to evaluate not only the law and its consequences, but also the parliamentary debate. This is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other. This is a difficult and slippery

terrain for the Court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be allowed to the Contracting States.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, COSTA, LORENZEN, KOVLER AND JEBENS

2. [L]ike the majority, we will limit our examination to [two conditions for restriction on the individual rights granted by Article 3 of Protocol 1: that any such conditions must pursue a legitimate aim, and that the means employed must not be disproportionate. Thus, we implicitly accept] that the United Kingdom legislation does not in itself impair the very essence of the right to vote and deprive it of its effectiveness, as was found in *Aziz v. Cyprus* (2004), where an ethnic minority of the Cypriot population was barred from voting. . . .

6. We do not dispute that it is an important task for the Court to ensure that the rights guaranteed by the Convention system comply with "present-day conditions," and that accordingly a "dynamic and evolutive" approach may in certain situations be justified. However, it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An "evolutive" or "dynamic" interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case. . . .

According to the information available to the Court, some eighteen countries out of the forty-five Contracting States have no restrictions on prisoners' right to vote. On the other hand, in some thirteen States prisoners are not able to vote either because of a ban in their legislation or *de facto* because appropriate arrangements have not been made. It is essential to note that in at least four of those States the disenfranchisement has its basis in a recently adopted Constitution (Russia, Armenia, Hungary and Georgia). In at least thirteen other countries more or less far-reaching restrictions on prisoners' right to vote are prescribed in domestic legislation, and in four of those States the restrictions have a constitutional basis (Luxembourg, Austria, Turkey and Malta). The finding of the majority will create legislative problems not only for States with a general ban such as exists in the United Kingdom. As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention, the judgment in the present case implies that all States with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention.

[L]egislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote. In fact, the majority of member States know such restrictions, although some have blanket and some limited restrictions. Thus, the legislation in the United Kingdom cannot be claimed to be in disharmony with a common European standard. . . .

8. [W]e do not rule out the possibility that restrictions may be disproportionate in respect of minor offences and/or very short sentences. . . .

DISSENTING OPINION OF JUDGE COSTA

5. [O]nce I had . . . accepted that the States have a wide margin of appreciation to decide on the aims of any restriction, limitation or even outright ban on the right to vote (and/or the right to stand for election), how could I, without being inconsistent, reduce that margin when it came to assessing the proportionality of the measure restricting universal suffrage (a concept which, of course, remains the democratic ideal)?

6. How would I be able to approve of the *Py v. France* judgment of 11 January 2005 (which I am all the more at liberty to cite in that I did not sit in the case)? In that judgment, the Court unanimously . . . held that the minimum ten-year-residence qualifying period for being eligible to vote in elections to Congress in New Caledonia did not impair the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, and that there had been no violation of that provision. How, then, could I approve of that judgment and at the same time agree with the judgment in the present case when it states in paragraph 82: "while . . . the margin of appreciation is wide, it is not all-embracing," which in practice means that a prisoner sentenced to a discretionary life sentence would have the right to vote under Article 3 of Protocol No. 1 (but when would the right become effective?). Are there not two "standards"?

7. It might perhaps be objected that the *Py* judgment took into account "local requirements," within the meaning of Article 56 § 3 of the Convention. That is true. But what of the decision in *Hilbe v. Lichtenstein* (1999)? In holding that a Lichtenstein national who was resident in Switzerland did not have the right to vote in Liechtenstein parliamentary elections . . . the Court noted: "the Contracting States have a wide margin of appreciation to make the right to vote subject to conditions."

9. [T]he point is that one must avoid confusing *the ideal* to be attained and which I support—which is to make every effort to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious

crimes, and to prepare for their reintegration into society and citizenship—and the *reality* of *Hirst (no. 2)*, which on the one hand theoretically asserts a wide margin of appreciation for the States as to the conditions in which a subjective right (derived from judicial interpretation!) may be exercised, but goes on to hold that there has been a violation of that right, thereby depriving the State of all margin and all means of appreciation.

Joint Committee on Human Rights

Enhancing Parliament's Role in Relation to Human Rights Judgments[*]

116. It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK* (2005). The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable.

118. [T]he Government, in its recent correspondence with us and the Committee of Ministers has been keen to emphasise that the ongoing breach of the Convention cannot affect the legality of the forthcoming election. In his recent letter, the Human Rights Minister said:

> Whilst the Government is bound under Article 46 of the ECHR to implement decisions of the European Court of Human Rights, such decisions do not have the effect of striking down the national law to which they relate. The UK is a dualist legal system in which international law obligations must be translated into domestic law via Parliament. Therefore, whilst the Government accepts that the Court in *Hirst v UK (No 2)* found that section 3 of the Representation of the People Act 1983 is not compliant with its international law obligations under the Convention, the domestic law continues in force. Similarly, this decision does not have any impact on the continuing validity of our current body of domestic election law.

[*]Excerpted from JOINT COMMITTEE ON HUMAN RIGHTS, ENHANCING PARLIAMENT'S ROLE IN RELATION TO HUMAN RIGHTS JUDGMENTS, 2009-10, HC 455, at 35-37 (March 26, 2010) (U.K.).

119. The Government's analysis is legally accurate. The continuing breach of international law identified in *Hirst* will not affect the legality of the forthcoming election for the purposes of domestic law. However, without reform the election will happen in a way which will inevitably breach the Convention rights of at least part of the prison population. This is in breach of the Government's international obligation to secure for everyone within its jurisdiction the full enjoyment of those rights. We consider that the Government's determination to draw clear distinctions between domestic legality and the ongoing breach of Convention rights shows a disappointing disregard for our international law obligations.

As is likely familiar, the United Kingdom did not thereafter amend its legislation, and other applicants returned to the ECtHR to seek relief. In November of 2010, the ECtHR issued its judgment in *Greens and M.T.*, responding to applicants who:

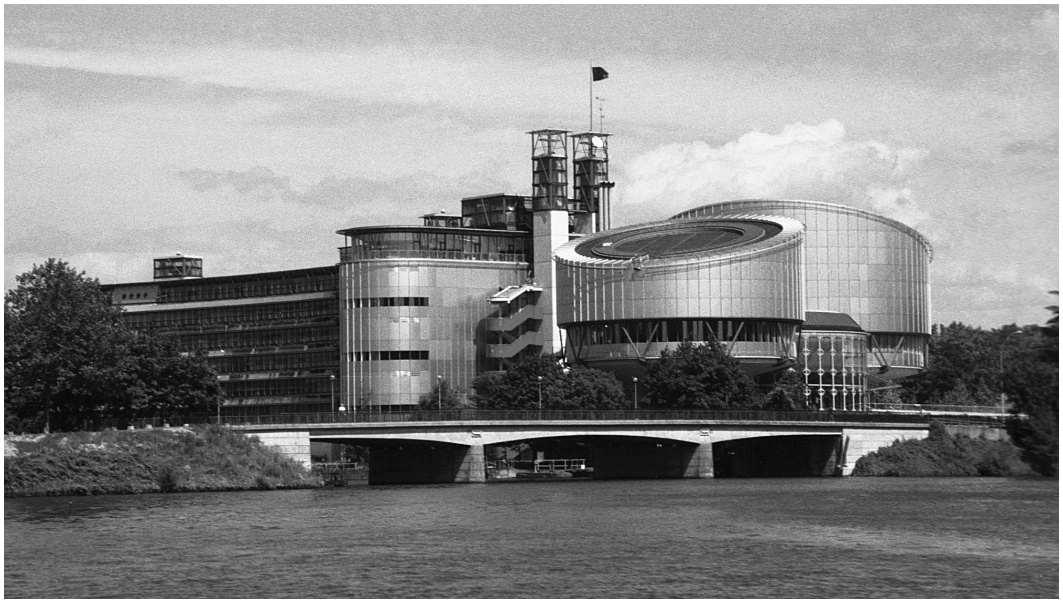
> complained that as convicted prisoners in detention they had been subject to a blanket ban on voting in elections and had accordingly been prevented from voting in elections to the European Parliament in June 2009 and in the general election of May 2010 and would potentially be banned from voting in the elections to the Scottish Parliament of May 2011.

The Court held that, "notwithstanding the wide margin of appreciation afforded to the respondent State by its judgment in *Hirst*," the United Kingdom was in violation of voting rights guaranteed by Article 3 of Protocol No. 1 to the Convention and that, under Article 46 of the Convention, the contracting parties had obligations "to abide by the final judgment of the Court in any case to which they are parties." The Court directed further that "in light of the lengthy delay in implementing that decision and the significant number of repetitive applications," the United Kingdom had to:

> (a) bring forward, within six months of the date upon which the present judgment becomes final, legislative proposals intended to amend [its felon disenfranchisement laws] in a manner which is Convention-compliant; and (b) enact the required legislation within any such period as may be determined by the Committee of Ministers.

As part of the remedy, the applicants in *Greens* were each awarded 5,000 Euros (£4,350) in costs and expenses for their loss.

Greens was met with considerable outcries. As the *Telegraph* reported in April of 2011, one MP stated that, "Britain must stand firm against this growing abuse of power by unaccountable judges." The Prime Minister was quoted as saying that it made him "physically ill to contemplate giving the vote to prisoners. They should lose some rights including the right to vote." Further, "Lord Neuberger, the Master of the Rolls and the country's second most senior judge, said the domestic courts would not interfere if Parliament chose to reject the controversial decision. He said any outcome was a 'political decision' and if the Government chose to ignore a Strasbourg ruling there would be 'nothing objectionable' in British law." Tom Whitehead, *European Court Gives Cameron Ultimatum on Prisoner Votes*, TELEGRAPH (London), Apr. 13, 2011.



European Court of Human Rights, Strasbourg, France, 1984.
Architect: Richard Rogers and Claude Bucher.
Photograph by Sandro Weltin. Reproduced courtesy of the Council of Europe.

Lord Irvine of Lairg

A British Interpretation of Convention Rights[*]

The hostility towards human rights and the Human Rights Act 1998 ("the HRA") within some sections of the press, and their very mixed record of reporting on these issues, impels me, for the avoidance of any possible misunderstanding, to reaffirm my unswerving support both for the international system of human rights protection that the European Convention on Human Rights ("the ECHR") provides and for the provisions of the HRA under which our own Judges protect those rights in domestic law.

This Lecture will invite our Supreme Court to re-assess all its previous statements about the stance it should adopt in relation to the jurisprudence of the ECHR. My objectives are:

(a) to ensure that the Supreme Court develops the jurisdiction under the HRA that Parliament intended;

(b) that, in so doing, it should have considered and respectful regard for decisions of the ECHR, but neither be bound nor hamstrung by that case-law in determining Convention rights domestically;

(c) that, ultimately, it should decide the cases before it for itself;

(d) that if, in so doing, it departs from a decision or body of jurisprudence of the ECHR it should do so on the basis that the resolution of the resultant conflict must take effect at State, not judicial, level; and

(e) by so proceeding, enhance public respect for our British HRA and the development and protection of human rights by our own Courts in Britain.

Section 2(1) of the HRA directs the domestic Courts how they are to treat decisions of the Strasbourg Court when interpreting and giving effect to the 'Convention rights' domestically . . . [and] provides:

[*]Excerpted from Lord Irvine of Lairg, A British Interpretation of Convention Rights (Dec. 14, 2011), *available at* http://www.ucl.ac.uk/laws/judicial-institute/docs/Lord_Irvine_Convention_Rights_dec_2012.pdf. [Editor's note: This speech, given on December 14, 2011 at the Bingham Centre and hosted by the Judicial Institute at University College London was the "first time" that Lord Irvine, "architect of the Human Rights Act," had "publically commented on his intent behind section 2 and its subsequent interpretation."]

> (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any . . . judgment . . . of the European Court of Human Rights . . . .

[W]hat precisely is it that our domestic Courts are doing when adjudicating under the HRA? Are they merely seeking to predict and mimic what the decision of the Strasbourg Court would be if presented with the facts of the case before them—in effect, are they simply agents or delegates of the ECHR? Or are they doing something quite different (and more profound)—interpreting and explaining the content and meaning of the Convention rights within the sovereign legal systems of the United Kingdom?

[T]he starting point is the language. 'Take account of' is not the same as 'follow,' 'give effect to' or 'be bound by.' Parliament, if it had wished, could have used any of these formulations.

It did not. The meaning of the provision is clear. The Judges are not bound to follow the Strasbourg Court: they must decide the case for themselves. . . .

[P]arliament, if it deems it necessary, can legislate in a manner which is inconsistent with the Courts' view of what the Convention rights require. If Parliament expresses its will in clear terms then the domestic Courts remain bound to give effect to its intention. . . .

[P]arliament's endorsement of [section 2] means that it is simply untenable to suggest that the Judges are *entitled* to treat themselves as bound by decisions of the Strasbourg Court. It is Parliament, and not the Strasbourg Court, which is supreme. . . .

[S]ection 2 of the HRA means that the domestic Court *always has a choice*. Further, not only is the domestic Court *entitled* to make the choice, its statutory duty under s[ection] 2 *obliges* it to confront the question whether or not the relevant decision of the ECHR is sound in principle and should be given effect domestically. Simply put, the domestic Court must decide the case for itself.

A more nuanced approach, which allows for some possibility of the domestic Court declining to follow Strasbourg in certain (relatively narrowly defined) circumstances, is provided in the judgment of Lord Neuberger (on behalf of a unanimous nine Justice Supreme Court) in *Pinnock v Manchester City Council*:

> *This court is not bound to follow every decision of the European court*. Not only would it be impractical to do so: it would

> sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law . . . Of course, *we should usually follow* a clear and constant line of decisions by the European court: . . . But we are not actually bound to do so *or (in theory, at least)* to follow a decision of the Grand Chamber. . . .

There is no magic in the mantra 'clear and constant line of jurisprudence.' The phrase has no statutory warrant in the HRA and is not a term of art. . . . [The] obligation is 'to take into account.' This does not change, irrespective of how many times the Strasbourg Court may repeat itself. . . .

[The need to comply with international law is not to the contrary.] A Judge's concern for the UK's foreign policy and its standing in international relations can never justify disregarding the clear statutory direction which s.2 of the HRA provides. . . .

Parliament contemplated that the domestic Courts would not follow Strasbourg in all cases. In doing so it implicitly approved the domestic Courts reaching an outcome which might result in non-compliance with the UK's Treaty obligations. The Judges should not abstain from deciding the case for themselves simply because it *may* cause difficulties for the UK on the international law plane.

[T]reaty obligations only bind the State as an actor in public international law. They are not directly incorporated in, or enforceable under, our domestic legal system. Absent the HRA, no claim could be brought in our Courts because an individual alleges that his Convention rights have been breached. Treaty obligations bind the UK only because the UK *qua* State has consented to it. If the UK does not comply with its obligations then the consequences which *may* follow are a matter of international relations, and inter-State diplomacy. . . .

[I]t is not the Courts' function under the HRA to determine cases of high Constitutional importance, with far-reaching consequences for our democracy and the citizens of the UK, on the basis of their view of the importance of the UK's standing as a good global citizen. That is an issue far better left to the Foreign and Commonwealth Office and Parliament. . . .

[T]he ECHR may (or may not) hold that UK domestic law is not compliant with the requirements of the Convention. At this stage, the UK *qua* State may either determine what steps are necessary to remedy the identified breach of its Treaty obligations or, in what would probably be a very rare case,

decide that the UK's pressing national interest means that the judgment of the ECHR should not be implemented. . . .

[M]any of our Judges have all too easily slipped into the mind-set that the domestic Courts, even the Supreme Court, are effectively subordinate (in a vertical relationship) to the ECHR. . . .

Moreover, there are major advantages in our domestic Courts' adopting a more critical approach to the Strasbourg jurisprudence.

It is our own Judges who are embedded in our culture and society and so are best placed to strike the types of balance between the often competing rights and interests which adjudication under the HRA requires. Put shortly, more often than not we should trust our own judges to reach a 'better' answer.

In terms of fostering a 'dialogue' with Strasbourg about the development of its own case-law, the standing of our Courts is likely to be enhanced if their position is more rather than less assertive. A Court which subordinates itself to follow another's rulings cannot enter into a dialogue with its superior in any meaningful sense. Importantly, this will influence Strasbourg's approach to decisions of our Supreme Court. If Strasbourg always proceeds secure in the knowledge that our Judges will inevitably "roll-over," we should not be at all surprised if we find ourselves being "rolled over" with increasing regularity. An appropriately critical, but respectful, approach on the part of our own Courts will have positive influence in encouraging Strasbourg to observe the appropriate limitations inherent in its own role, and to respect the State's margin of appreciation.

This approach would enhance our Courts' own institutional prestige and credibility domestically, both with the man in the street and Parliament. The domestic Court must act, and be seen to act, as an autonomous institution which determines cases of high Constitutional import according to *its* interpretation of our fundamental values and national interest. It would be damaging for our Courts' own legitimacy and credibility if they are perceived as merely agents or delegates of the ECHR and Council of Europe ("CoE"). A perception that our Judges regard it as their primary duty to give effect to the policy preferences of the Strasbourg Court should not be allowed to take root, since this would gravely undermine, not enhance, respect for domestic and international human rights principles in the UK. This risk can be obviated by holding fast to the obvious intention of s. 2(1). . . .

[I] now turn to the . . . different question: where there is no Strasbourg decision in point may our Courts "leap beyond" the existing Strasbourg jurisprudence and decide the case for themselves? . . .

First, there is no legislative warrant for our Courts abdicating their Constitutional role in determining the content of the relevant Convention right under domestic law. A policy of 'wait and see' what Strasbourg may or may not do, if and when an appropriate case comes before it, simply will not do. Under s. 2 it is the *duty* of the domestic Court to decide the matter for itself.

Second, the realities of life and litigation mean that our domestic Courts are inevitably called upon to consider issues in circumstances and contexts where the Strasbourg case-law will not provide any definitive answer or assistance. Sitting on our hands in such a case is most certainly not what Parliament intended.

Third, it is this type of case—where the Strasbourg case-law does not offer any clear answer—that gives our Courts the greatest scope to enter into a productive dialogue with the ECHR, and thus shape its jurisprudence. It is through our own Judges grappling with the difficult issues which human rights adjudication poses and cogently stating their reasoning that there is the most potential to influence the approach which the Strasbourg Court ultimately adopts. . . .

[T]he UK Courts have no power to bind any other CoE member state, and the Strasbourg Court is of course not bound by their decisions. The domestic Courts do not interpret the content of the ECHR as an international Treaty; they interpret the Convention rights under domestic law. . . .

[S]ection 2 of the HRA means that it is our Judges' duty to decide the cases for themselves and explain clearly to the litigants, Parliament and the wider public why they are doing so. This, no more and certainly no less, is their Constitutional duty.

Might the Court in *Hirst* have anticipated the resistance that its judgment would provoke? If so, should that have factored into its decision in any respect? When, if ever, should judges, as part of their role, take into account predictions about the impact of their decisions? In the service of what concerns? Building or preserving the court's legitimacy? Deferring to arguments about political

stability or national claims of identity? When, if ever, would such concerns support the view that either *Sejdić*, excerpted below, or *Hirst* should come out differently?

Sejdić v. Bosnia and Herzegovina

European Court of Human Rights (Grand Chamber)
App. No. 27996/06 (2009)

6. The Constitution of Bosnia and Herzegovina is an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Peace Agreement"), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Since it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy. . . .

7. In the Preamble to the Constitution, Bosniacs, Croats and Serbs are described as "constituent peoples."

9. [T]he applicants [Mr Dervo Sejdić and Mr Jakob Finci] describe themselves to be of Roma and Jewish origin respectively. Since they do not declare affiliation with any of the "constituent peoples," they are ineligible to stand for election to the House of Peoples (the second chamber of the State parliament) and the Presidency. . . .

26. [T]hey relied on Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12[.] [Article 14 provides]:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." . . .

44. [W]here a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible. . . .

45. [T]his exclusion rule pursued at least one aim . . . broadly compatible with the general objectives of the Convention, . . . namely the restoration of peace. . . . The nature of the conflict was such that the approval of the "constituent peoples" (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace.

This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations . . . .

47. [T]the Court observes significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement. . . .

48. [T]here exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. . . .

49. Thus, the Court concludes that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1. . . .

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE MIJOVIĆ, JOINED BY JUDGE HAJIYEV

[I]s it up to the European Court of Human Rights to determine when the time for change has arrived? I would hesitate to give a firm and definite answer to these questions. "Identity through citizenship" would be a desirable change, but ethnic distinction, in the Court's case-law, is considered unnecessary and therefore discriminatory where the same result (legitimate aim) could be achieved through a measure that does not rely on a racial or ethnic differentiation, or on the application of criteria other than those based on birth. . . .

[T]he law of most, if not all, member States of the Council of Europe provides for certain distinctions based on nationality with regard to certain rights and the Court's case-law allows a certain margin of appreciation to national authorities in assessing whether and to what extent differences justify a different treatment in law. . . . For the sake of the Court's case-law, it would have been very interesting to see how far the Court would have interpreted the margin of appreciation left to the State in this case.

DISSENTING OPINION OF JUDGE BONELLO

[I] believe the present judgment . . . has divorced Bosnia and Herzegovina from the realities of its own recent past. . . .

I also question the Court's finding that the situation in Bosnia and Herzegovina has now changed and that the previous delicate tri-partite

equilibrium need no longer prevail. . . . [A] judicial institution so remote from the focus of dissention can hardly be the best judge of this. . . .

Strasbourg has, over the years, approved quite effortlessly the restriction of electoral rights (to vote in or stand for elections) based on the widest imaginable spectrum of justifications: from absence of language proficiency to being in detention or having previously been convicted of a serious crime; from a lack of "four years' continuous residence" to nationality and citizenship requirements; from being a member of parliament in another State to having double nationality; from age requirements to being below 40 years old in senate elections; from posing a threat to the stability of the democratic order to taking the oath of office in a particular language; from being a public officer to being a local civil servant; from the requirement that would-be candidates cannot stand for election unless endorsed by a certain number of voters' signatures to the condition of taking an oath of allegiance to the monarch.

All these circumstances have been considered sufficiently compelling by Strasbourg to justify the withdrawal of the right to vote or to stand for election. But a clear and present danger of destabilising the national equilibrium has not. The Court has not found a hazard of civil war, the avoidance of carnage or the safeguard of territorial cohesion to have sufficient social value to justify some limitation on the rights of the two applicants.

I do not identify with this. I cannot endorse a Court that sows ideals and harvests massacre.

Counting, Consensus, and Categorizing

In determining the scope of Convention rights, the *Hirst* decision surveyed jurisdictions and counted and characterized national laws, as does the *A, B and C* decision, excerpted below. The practice of counting, found in both European and American judgments, may seem straightforward, yet it entails a sequence of decisions.

First, what is the point of counting? Does it reflect a court's effort to understand the state of the law? Might counting establish the content of an evolutive norm, reflected in many subunits' law? Or is counting in the service of other system goods, such as deference to decision makers within subunits (be they majoritarian or judicial), or respect for value pluralism? Or does counting justify

and legitimate potentially controversial decisions and so serve to preserve court authority? In practice, does counting insulate courts from criticism and backlash?

Does counting determine whether to intervene, or when? Does the answer vary depending on the supra-national entity's own understanding of whether it is seeking a progressive integration and homogenization, or providing an umbrella for divergent norms that valorize experimentation? How might answers to these questions guide a court, once it decides that a rule is shared or is an outlier?

Second, how do courts decide *what* to count? Courts have to determine how to characterize a particular right, and then decide what categories of legal rules relating to the claim are relevant. In *Hirst*, for example, which limits on voting were seen as illuminating? Which irrelevant? Or, in the context of restrictions on abortion, should judges survey laws providing health related exceptions from abortion bans, or survey laws recognizing abortion rights? Or should the focus instead be on privacy, equality, or citizenship? What kinds of individual interests come to be characterized as relevant, and how are they weighted? What kinds of legal rules—constitutions, statutes, administrative regulations, applied practices—are to be tallied?

Third, what jurisdictions are subject to the count? Should judges survey subunits within the larger federation or union only, or those outside itself as well? And need all rules be discussed? Should the *Hirst* Court, which considered the Canadian rule, also have discussed the United States, which has approved prisoner disenfranchisement?

How would answers to these questions identify whether a rule is shared or an outlier? And then guide judges about what to do?

Roderick M. Hills

Counting States[*]

[S]tate counting involves two common elements: judicial use of state law to inform the content of federal constitutional doctrine, and judicial evaluation of states' laws collectively rather than singly to determine a state "consensus." When counting states, the Court treats the States as one large decision-making body whose members reach a single consensus. . . .

[*]Excerpted from Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17 (2009).

[F]irst, the Court could be using the state legislatures' consensus as a source of national law. Alternatively, the Court could be using the state legislatures' consensus as a limit on national law. In the first case, the Court would count the States' laws to determine the States' consensus position on an issue and then enforce that position against outlier states. In the second case, the Court would determine the States' consensus to place an outside limit on the judiciary's enforcement of its own view of the constitutional norm. In effect, the second version of state counting uses the States' consensus as a sort of collective veto over judicial review, not as an independent source of federal constitutional norms. . . .

[S]uppressing outlying states as an end in itself is not a coherent constitutional goal in a federal regime. The whole point of federalism is based on the premise that there is no harm in legal diversity as such. If a single state passed a statute, for instance, punishing a certain crime by ordering the offender to undergo intensive therapy and perform community service, it would not be sensible to strike down the law as "cruel and unusual" just because no other state had enacted such a reform. In a federal regime, merely being unusual (absent cruelty) is a virtue, not a vice.

It is more helpful and coherent to think of state laws as forming a *limit* on the Court's interpretation. . . . [Thus, c]ounting states . . . is intended to function as a constraint on the judiciary, not on outlier states.

This judiciary-limiting character of state law explains why the Court does not require a more robust showing of state consensus. If the only purpose of the state counting exercise is to demonstrate the negative point that no clear consensus exists among the States that is inconsistent with the Court's point of view, then it is sufficient for the Court to show that its holding has not been rejected by a majority of the States. The Court need not show that the judicial position has actually been endorsed by a majority of the States because the States' consensus is not intended to supply the content of the federal norm. State counting merely provides assurance against a national popular backlash against the Court. Put differently, where there is no consensus one way or the other, the Court uses the indecision of the States as an opening for the Court to impose its own values on the nation.

Likewise, once one understands that state counting functions in practice as a purely negative, judiciary-limiting device, the Court's notorious casualness in how it tallies states becomes less mystifying. If the only point of the tally is to ensure that the Court's position has not been rejected by a majority of states, it is unnecessary to determine why the States have not rejected the judicial position. It

suffices that, for whatever reason, most states have not adopted a position inconsistent with the Court's view. That these state legislatures might not perceive themselves as fixing a national standard of decency is immaterial, because the Court is not relying on them to define such a constitutional standard—it is relying on them only to demonstrate that it is not trampling on any well-defined majority opinion. . . .

There are certain parallels between this Court-restraining function of state counting in due process cases and what Professor Larry Sager calls "cool federalism."[31] Professor Sager describes cool federalism as the practice of allowing "maverick" states to "invent" new governmental norms that are then gradually "propagated" to other states and are eventually "consolidated" as federal norms by Congress or the federal courts once they have won sufficiently widespread support among the States. The period of state experimentation, according to Professor Sager, provides information to national decision makers about how the "maverick" norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies.

To the extent that the Court tallies states to assure itself that its decision will not offend a national majority, . . . the States become the Court's pollsters. Counting states helps the Court ensure that it will not experience de novo the widespread popular backlash it has incurred in the past for getting ahead of public opinion. But it is important to note the thinness of the information the Court obtains from state counting: The Court simply assures itself that the public is sufficiently divided on a controversial issue that the Court can weigh in without risking a popular backlash so great that it would have to reverse itself later. Such state counting, in other words, yields very little information about the actual merits of the position that the Court decides to endorse. Moreover, state counting as a device for restraining courts does very little to foster maverick states' experiments because a bare majority of state legislatures has the power to stop the Court from imposing a uniform constitutional rule on the nation. Novel state policies that arguably impinge on the federal judiciary's theories of liberty or equality—like covenant marriage—would need an additional and more robust restraint on judicial review. . . .

[I]f one assumes that the only function of federalism is to protect outlying states' experiments, then state counting will not seem to be consistent with the spirit of federalism. But American federalism has more justification than

[31] Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1386 (2005).

protection of regulatory diversity. Since the Anti-Federalists' attack on the proposed U.S. Constitution as a device for serving the interests of mercantile elites, supporters of state power have argued that state governments—whose officials are generally elected from small electoral districts—are more responsive to voters, more egalitarian, and less dominated by cultural and financial elites than the federal government. Uniting the States as a single force to counterbalance the federal government, therefore, is a venerable theme in American federalism. The Court's device of counting states is essentially a judicially crafted version of this populist idea.

John L. Murray

Consensus: Concordance, or Hegemony of the Majority?[*]

The role of consensus within the system of the European Convention on Human Rights is a doctrine which has been described as "one of the Court's favourite, as well as controversial, interpretive tools." [T]he very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy.

How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights? Is resort to consensus consistent with respect for diversity among the democratic and sovereign States which are Contracting Parties to the Convention? Or an undesirable *renvoi* to national systems whose mechanisms for the protection of human rights may be seen as lacking? Alternatively, is it the only valid reference point in the evaluation of the societies of those States? . . .

United States death penalty case-law may be characterised as an ongoing tug-of-war between two competing theories of adjudication that have a resonance for the Convention system. The theory espoused by one camp accords a high level of deference to State legislatures, strongly favours judicial restraint, and requires an overwhelming degree of convergence, based on domestic indicia, in order to determine a consensus, and that such consensus is well-established rather than of recent origin. According to this theory, overwhelming consensus regarding

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[*]Excerpted from John L. Murray, *Consensus: Concordance, or Hegemony of the Majority*, *in* DIALOGUE BETWEEN JUDGES, EUROPEAN COURT OF HUMAN RIGHTS, COUNCIL OF EUROPE (2008), *available at* http://www.echr.coe.int/NR/rdonlyres/D6DA05DA-8B1D-41C6-BC38-36CA6F864E6A/0/DIALOGUE_2008_EN.pdf.

imposition of the death penalty in a given circumstance, when discerned, will not only inform but *dictate* the court's decision.

The other theory, in according the court a role as a moral arbiter using its own independent judgment, tempers its deference to State legislatures and also takes a more relaxed approach to consensus, not only with the possibility of a more moderate consensus being utilised to buttress a principled judgment and a more flexible approach to the determination of consensus, with recent international developments of relevance, but also permitting the court to deviate from national consensus when its independent judgment warrants such departure.

[C]onvention jurisprudence has been characterised as containing a persistent tension between what are perceived as its two major interpretative poles: consensus and "moral truth." This pull between the two poles is, however, to some extent masked by the seemingly inconsistent application of the consensus doctrine. . . .

Indeed, in *Hirst*, . . . the sources used to determine consensus attracted considerable disagreement. In that case, Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in a joint dissenting opinion took issue with a majority decision which referred extensively to two recent judgments of the Supreme Court of Canada and the Constitutional Court of South Africa but which, they noted, "unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States." Was this simply a case, in Justice Scalia's words, of the Court looking over the crowd and picking out its friends?

Hirst also provides an example of the Court's differing approaches to cases where no consensus may be discerned. In that case, the Court held that "even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue," ultimately finding that the ban constituted a disproportionate infringement . . . .

This may be compared with the case of *Vo v. France* (2004), decided the previous year, in which the Grand Chamber held that, as "there is no European consensus on the scientific and legal definition of the beginning of life," "the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere."

However, in *Christine Goodwin v. the United Kingdom* in 2002 regarding transsexuals' right to marry, the Court found that such a right existed despite the absence of a European consensus on the issue, given the existence of a

"continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."

[F]irstly, is the Court relying on consensus as a determinative factor in many of its decisions or is consensus simply a mask for engaging in the process of a substantive analysis of the matter in issue?

Secondly, if the latter is the case, why is the doctrine of consensus invoked at all? [Professor Letsas has] said that Convention case-law "shows that the Court is primarily interested in evolution towards the moral truth of the ECHR rights, not in the evolution towards some commonly accepted standard, regardless of its content."

Judith Resnik

Categorical Federalism: Jurisdiction, Gender, and the Globe[*]

"The Constitution requires a distinction between what is truly national and what is truly local." These words were used by the Chief Justice of the United States Supreme Court in 2000 to explain why a statute described by Congress as providing a "civil rights remedy" for victims of gender-biased assaults unconstitutionally trenched on lawmaking arenas belonging to the states. Neither the phrase "truly local" nor "truly national" appears in the United States Constitution. Indeed, the Court's reliance on the modifier "truly" suggested that calling something local or national did not suffice to capture the constitutional distinction claimed—that the Violence Against Women Act (VAWA) impermissibly addressed activities definitional of and reserved to state governance.

This Essay considers the mode of analysis for which the phrases "truly national" and "truly local" are touchstones. Categorical federalism is the term I offer for this form of reasoning. Categorical federalism's method first assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about "the family," "crime," or "civil rights" as if laws were univocal and human interaction similarly one-dimensional. Second, categorical federalism relies on such identification to locate authority in state or national governments

[*]Excerpted from Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

and then uses the identification as if to explain why power to regulate resides within one or another governmental structure. Third, categorical federalism has a presumption of exclusive control—to wit, if it is family law, it belongs only to the states. Categories are thus constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres.

Categorical federalism has appeal, particularly in a world as full of vivid changes as the one we inhabit. Proponents of categorical federalism argue that its virtue lies in its democracy-enhancing features. The Court's interventions, in the name of federalism, are supposed to engender responsibility on the part of government officials by promoting transparent lines of accountability. Categorical federalism posits and promises clearly delineated allocations of power by suggesting, comfortingly, that these delineations flow "naturally" through the United States's history from a topic to a geographically located government. . . . [Federal judges cast] their project as empirical rather than interpretive, a historical exercise aimed at describing and implementing agreements forged in 1789. . . .

But the search for meaning from 1789 cannot work because "the federal" had yet to be made. The issue then, and now, is what meaning and purposes to give to federal and state governments. In a world increasingly conscious that "the local" and "the national" are ideas as well as places, the quaint tidiness of categorical federalism ought to prompt skepticism. . . .

Given this context, categorical federalism ought to be understood as a political claim, advancing an argument that certain forms of human interactions should be governed by a particular locality, be it a nation-state or its subdivisions. Return then to the Chief Justice's locution—"truly national," "truly local"—and reread it to betray anxiety as well as insistence, as an effort to make meaningful a division that is not only elusive but increasingly inaccurate. Categorical federalism's attempt to buffer the states from the nation, and this nation from the globe, is faulty as a method and wrong as an aspiration.

Below, I sketch the empirical case against categorical federalism by showing that the very areas characterized in the VAWA litigation as "local"—family life and criminal law—have long been subjected to federal lawmaking. Decades of federal constitutional family law create substantive rights anchored in the Fourteenth Amendment for parents and children, just as decades of federal legislation—addressing welfare, pension, tax, bankruptcy, and immigration—have defined membership in and relationships within groupings denominated "families" by the national government.

The normative critique of categorical federalism stems from the political injuries caused by equating family life with state law. Categorical federalism is not only fictive but harmful, for it deflects attention from the many political and legal judgments made by the nation's judiciary, executive, and Congress as they regulate the lives of current and former householders. Federal actors ought not to be sheltered from accounting for their work in shaping the meaning of gendered family roles. And just as it cloaks the exercise of national powers from view, categorical federalism also provides a false sense of security from transnational lawmaking. . . .

[C]ategories are endemic, in law as elsewhere, but what fills categories and their contours varies with context. Return to the issue of violence against women: If a man raped a woman and proclaims he did so because he likes to inflict such pain on women, what should law call that action? Should the description vary if the man and woman have been (or are) married instead of strangers? If they were employer and employee? Opponents in a war? Should the legal import vary if the man assaults the woman as she is about to leave the house on her way to school, work, or another shelter? . . . [D]ecisions to categorize are purposeful, consequentialist, and situational. . . .

[L]aws may be about both family and equality, about both economic capacity and violence [and] governance cannot accurately be described as residing at a single site. State, federal, and transnational laws are all likely to be relevant. And . . . any assignment of dominion can be transitory. One level of government may preside over a given set of problems for a given period rather than forever. Were one to use this lens, the assignment of regulatory authority would become a self-conscious act of power, exercised with an awareness that a sequence of interpretive judgments, made in real time and revisable in the future, undergirds any current designation of where power to regulate what activities rests. . . .

[E]xploration is needed of the rich veins of federalism beyond the boundaries of contemporary legal discourse, fixated on a bipolar vision of states acting singularly and of a predatory federal government. The contemporary debate about whether to prefer, a priori, the states or the federal government for certain forms of lawmaking misses dynamic interaction across levels of governance. In practice, federalism is a web of connections formed by transborder responses (such as interstate agreements and compacts) and through shared efforts by national organizations of state officials, localities, and private interests. . . .

Health and Life

Recall in *Hirst* the interpretive practices on which the Court relied to determine that disenfranchisement of prisoners violated Convention rights. Should the same approaches determine the scope of rights that the Convention protects in cases arising from laws criminalizing abortion? How might the various rights at stake be categorized? Given the facts detailed below, is *A, B and C* about life, health, liberty, autonomy and/or respect for private and family life?

Voting rules directly implicate sovereignty and democracy. Should the importance of those concerns have counselled the Court to afford more deference to suffrage legislation than to abortion legislation? Note that, in *A, B and C*, the Court observes that "there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law." Yet the Court permitted the Irish law to stand, albeit with additional procedural safeguards as applied to some women. Why is the Court in *A, B and C* more deferential than it was in *Hirst*?

A, B and C v. Ireland

European Court of Human Rights (Grand Chamber)
App. No. 25579/05 (2010)

[Applicants A, B and C are women over 18 years of age who reside in Ireland. A and B, both Irish nationals, complained under Article 8 about the Irish Government's prohibition of abortion for health and well-being reasons. C, a Lithuanian national, complained under Article 8 that the Government had failed to implement the constitutional right to an abortion in Ireland in the case of a risk to the woman's life.]

13. [O]n 28 February 2005 the first applicant [A] traveled to England for an abortion as she believed that she was not entitled to an abortion in Ireland. She was 9½ weeks pregnant.

14. She had become pregnant unintentionally, believing her partner to be infertile. At the time she was unmarried, unemployed and living in poverty. She had four young children [of whom she did not have custody]. . . . She considered that a further child at that moment of her life (with its attendant risk of post-natal

depression and to her sobriety) would jeopardise her health and the successful reunification of her family. She decided to travel to England to have an abortion.

15. [She borrowed funds at a high interest rate and travelled] in secrecy, without alerting the social workers and without missing a contact visit with her children. . . .

18. [O]n 17 January 2005 the second applicant [B] travelled to England for an abortion believing that she was not entitled to an abortion in Ireland. She was 7 weeks pregnant.

19. The second applicant became pregnant unintentionally. She had taken the "morning-after pill" and was advised by two different doctors that there was a substantial risk of an ectopic pregnancy (a condition which cannot be diagnosed until 6-10 weeks of pregnancy) . . . .

21. [O]n her return to Ireland she started passing blood clots and two weeks later, being unsure of the legality of having travelled for an abortion, sought follow-up care in a clinic in Dublin affiliated to the English clinic. . . .

22. On 3 March 2005 the third applicant [C] had an abortion in England believing that she could not establish her right to an abortion in Ireland. She was in her first trimester of pregnancy at the time.

23. Prior to that, she had been treated for 3 years with chemotherapy for a rare form of cancer. . . . [Her doctors advised] that, if she did become pregnant, it would be dangerous for the foetus if she were to have chemotherapy during the first trimester.

24. The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests for cancer, contraindicated during pregnancy. . . . She alleged that, as a result of the chilling effect of the Irish legal framework, she received insufficient information as to the impact of the pregnancy on her health and life and of her prior tests for cancer on the foetus.

25. Given the uncertainty about the risks involved, the third applicant travelled to England for an abortion. . . .

26. On returning to Ireland after the abortion, the third applicant suffered complications of an incomplete abortion, including prolonged bleeding and infection. She alleges that doctors provided inadequate medical care. . . .

[Section 58 of the Offences Against the Person Act 1861 makes having or administering an abortion punishable by life in prison.]

36. [A] referendum was held in 1983, resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against). . . .

55. [F]ollowing [two] amendments [adopted by popular referendum in November 1992], Article 40.3[.3] of the Constitution reads as follows:

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.
>
> This subsection shall not limit freedom to travel between the State and another state.
>
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state." . . .

212. [T]he Court recalls that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development. It concerns subjects such as gender identification, sexual orientation and sexual life, a person's physical and psychological integrity as well as decisions both to have and not to have a child or to become genetic parents.

213. The Court has also previously found . . . that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasising that Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.

214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second

applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. . . .

217. To determine whether this interference entailed a violation of Article 8, the Court must examine . . . whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" specified in Article 8 of the Convention. . . .

221. [With respect to whether the interference was "prescribed by law"] [t]he Court considers that the domestic legal provisions . . . were clearly accessible [and] that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons.

222. [With respect to whether the interference pursued a legitimate aim] [t]he Court recalls that, in the *Open Door* (1992) case, it found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum. The impugned restriction in that case was found to pursue the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect. . . .

223. However, the first and second applicants maintained that the will of the Irish people had changed since the 1983 referendum so that the legitimate aim accepted by the Court in its *Open Door* judgment was no longer a valid one. The Court recalls that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals including on the question of when life begins. 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 the requirements of morals" in their country, as well as on the necessity of a restriction intended to meet them.

224. [I]t is true that, since [1983], the population of Ireland has not been requested to vote in a referendum proposing any broader abortion rights in Ireland. In fact, in 1992 and 2002 the Irish people refused in referenda to restrict the existing grounds for lawful abortion in Ireland, on the one hand, and accorded in those referenda the right to travel abroad for an abortion and to have information about that option, on the other.

225. [T]he rejection by a further referendum of the Lisbon Treaty in 2008 is also important in this context. While it could not be said that this rejection was entirely due to concerns about maintaining Irish abortion laws, the Report commissioned by the Government found that the rejection was "heavily influenced by low levels of knowledge and specific misperceptions" as to the impact of the Treaty on Irish abortion laws. As with the Maastricht Treaty in 1992, a special Protocol to the Lisbon Treaty was granted confirming that nothing in the Treaty would affect, *inter alia*, the constitutional protection of the right to life of the unborn and a further referendum in 2009 allowed the ratification of the Lisbon Treaty.

226. [T]he Court does not consider that the limited opinion polls on which the first and second applicants relied are sufficiently indicative of a change in the views of the Irish people . . . . Accordingly, the Court finds that the impugned restrictions in the present case, albeit different from those at issue in the *Open Door* case, were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then. . . .

229. [With respect to whether the interference was "necessary in a democratic society"] the Court must examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation. . . .

232. [T]he Court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. . . .

233. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection

accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.

234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.

The existence of a consensus has long played a role in the development and evolution of Convention protections . . . , the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions. . . .

235. In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained. Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion.

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. Of central importance is the finding in [*Vo v. France* (2004)] that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that,

even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention.

238. It is indeed the case that this margin of appreciation is not unlimited. . . . A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations. However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

239. From the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons, the option of lawfully travelling to another State to do so. . . .

241. Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn. . . .

243. [T]he third applicant's complaint concerns the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy. . . .

253. [T]he ground upon which a woman can seek a lawful abortion in Ireland is expressed in broad terms . . . [N]o criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application. . . .

[The absence of medical guidelines and of a framework to resolve differences of opinion among doctors or between the woman and her doctor constituted a further cause of uncertainty.]

254. Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. . . .

258. [T]he Court does not consider that the constitutional courts are the appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to set down on a case by case basis the legal criteria by which the relevant risk to a woman's life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk. However, the constitutional courts themselves have underlined that this should not be their role. . . .

259. In addition, it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable. . . .

263. [C]onsequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland. . . .

FOR THESE REASONS, THE COURT

4. *Holds* by eleven votes to six that there has been no violation of Article 8 of the Convention . . . as regards the first and second applicants;

5. *Holds* unanimously that there has been a violation of Article 8 of the Convention . . . as regards the third applicant [for failing to provide] an accessible

and effective procedure by which [she could have] established whether she qualified for a lawful abortion in Ireland [under its constitution].

CONCURRING OPINION OF JUDGE LÓPEZ GUERRA, JOINED BY JUDGE CASADEVALL

5. [I]t cannot be excluded that in other cases, in which there are grave dangers to the health or the well-being of the woman wishing to have an abortion, the State's prohibition of abortion could be considered disproportionate and beyond its margin of appreciation. In such cases, this would result in a violation of Article 8 of the Convention, since the latter protects the right to personal autonomy as well as to physical and psychological integrity.

CONCURRING OPINION OF JUDGE FINLAY GEOGHEGAN

9. [T]he Court had no facts in relation to the existence or otherwise of a public interest in the protection or recognition of a right to life of the unborn in the majority Contracting States which permit abortion on broader grounds than in Ireland. Unless there exists in each Contracting State an analogous public interest in the protection of the right to life of the unborn to that in Ireland, it is difficult to understand how the Contracting States could be engaged in striking an analogous balance to that required to be struck by the Irish State. The consensus to be relevant must be on the striking of the balance which in turn, on the facts of these cases, depends on the existence in each Contracting State of a public interest in the protection of the right to life of the unborn. No such public interests were identified.

10. Accordingly, it appears to me that it follows from the existing case law of the Court, (and using consensus in the sense used therein) that the consensus identified in the judgment amongst a majority of Contracting States on abortion legislation is not a relevant consensus with the potentiality to narrow the breadth of the margin of appreciation to be accorded to the Irish State in striking a balance between the competing interests. If however, contrary to the views expressed, the consensus is relevant, then I agree with the subsequent reasoning and conclusion of the Court that it does not narrow the broad margin of appreciation to be accorded to the Irish State.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS, FURA, HIRVELÄ, MALINVERNI AND POALELUNGI

2. [L]et us make clear, from the outset, that the Court was not called upon in this case to answer the difficult question of "when life begins." This was not

the issue before the Court, and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins—before birth or not—the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States—and we will come back to this below—to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus. . . .

5. [A]ccording to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the "harmonising" role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonising role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced—in accordance with the Convention—against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonising role, preferring not to become the first European body to "legislate" on a matter still undecided at European level.

6. Yet in the case before us a European consensus (and, indeed, a strong one) exists. We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned; the argument used is that the fact that the applicants had the right "to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland" suffices to justify the prohibition of abortion in the country for health and well-being reasons,

"based as it is on the profound moral views of the Irish people as to the nature of life."

7. We strongly disagree with this finding. Quite apart from the fact, as we have emphasised above, that such an approach shifts the focus of this case away from the core issue, which is the balancing of the right to life of the foetus against the right to health and well-being of the mother, and not the question of when life begins or the margin of appreciation afforded to States on the latter issue, the majority bases its reasoning on two disputable premises: first, that the fact that Irish law allows abortion for those who can travel abroad suffices to satisfy the requirements of the Convention concerning applicants' right to respect for their private life; and, second, that the fact that the Irish people have profound moral views as to the nature of life impacts on the European consensus and overrides it, allowing the State to enjoy a wide margin of appreciation.

8. On the first premise, the Court's argument seems to be circular. The applicants' complaints concern their inability to have an abortion in their country of residence and they consider, rightly, that travelling abroad to have an abortion is a process which is not only financially costly but also entails a number of practical difficulties well illustrated in their observations. Hence, the position taken by the Court on the matter does not truly address the real issue of unjustified interference in the applicants' private life as a result of the prohibition of abortion in Ireland.

9. As to the second premise, it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views." Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand.

10. Finally, a word on the sanctions which can be imposed for abortions performed in Ireland in situations going beyond the permissible limits laid down by Irish (case-)law. Although the applicants were not themselves subjected to the severe sanctions provided for by Irish law—since they went abroad to have an abortion—the fact remains that the severity of the (rather archaic) law is striking; this might also be seen as an element to be taken into account when applying the proportionality test in this case.

11. From the foregoing analysis it is clear that in the circumstances of the case there has been a violation of Article 8 with regard to the first two applicants.

Return to the puzzle presented by *Hirst* and *A, B and C* about member state variation and Convention rights. How does one explain the Court's judgment in *A, B and C*, given the Court's finding "that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law," that at least thirty states in Europe allow "abortion on request," that forty states allow abortion on "health and well-being grounds," that only three states have more restrictive access to abortion services than Ireland?

Is *A, B and C* to be read as abortion exceptionalism? As Ireland exceptionalism? When thinking about these issues, review the excerpts below. Siegel charts the development and continuing evolution of constitutional law governing women's access to abortions, while Mullally details the development and evolution of Ireland's positions on abortion. Observe the dynamic dimensions of each. What gaps and silences in *A, B and C* do these accounts illuminate?

Reva B. Siegel

The Constitutionalization of Abortion[*]

This chapter . . . asks how abortion was constitutionalized. . . .

Constitutional decisions on abortion began in an era when a transnational women's movement was beginning to contest the terms of women's citizenship, eliciting diverse forms of reaction, both supportive and resisting. As I show, the woman question haunts the abortion decisions, where it is initially addressed by indirection, and over time comes to occupy a more visible role, whether as an express concern of doctrine, *or* as a problematic nested inside of the growing body of law articulating a constitutional obligation to protect unborn life.

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[*]Excerpted from Reva B. Siegel, *The Constitutionalization of Abortion*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & András Sajó eds., 2012).

The body of constitutional law on abortion that has grown up since the 1970s is concerned with the propriety, necessity, and feasibility of controlling women's agency in decisions concerning motherhood. Some courts have insisted that government should respect women's decisions about motherhood, while many others have insisted that protecting unborn life requires government to control women's decisions about motherhood. Over the decades a growing number of courts have allowed government to protect life by persuading (rather than coercing) women to assume the role of motherhood. Across Europe, a growing number of jurisdictions are now giving women the final word in decisions about abortion—on the constitutional ground that it is the best way to protect unborn life. These remarkable developments suggest deep conflict about whether law should and can control women's agency in decisions about motherhood. . . .

[S]ome jurisdictions require government to respect women's dignity in making decisions about abortion, and consequently require legislators to provide women control, for all or some period of pregnancy, over the decision whether to become a mother. Many jurisdictions require constitutional protection for unborn life, criminalizing abortion while permitting exceptions on an indications basis to protect women's physical or emotional welfare, but not their autonomy. Yet other jurisdictions protect unborn life through counseling regimes that are result-open; these jurisdictions begin by recognizing women's autonomy for the putatively instrumental reason that it is the best method of managing the modern female citizen, and then come to embrace protecting women's dignity as a concurrent constitutional aim of depenalizing abortion. . . .

[Of these three models, the first to emerge] constitutionalizes the regulation of abortion with attention to women's autonomy and welfare. It is associated with periodic legislation which coordinates values of decisional autonomy and protecting life by giving women control over the abortion decision for an initial period of the pregnancy only, thereafter allowing restrictions on abortion except on limited indications (*e.g.* for life or health). . . .

[O]ther jurisdictions follow the German tradition in constitutionalizing a duty to protect life; these jurisdictions require action in furtherance of the duty to protect, and typically require or authorize legislatures to criminalize abortion with certain exceptions or indications determined by a committee of doctors or some decision maker other than the pregnant woman. . . . Constitutionalization in this form has tended to incorporate gender-conventional, role-based views of women's citizenship—for example that the burdens of pregnancy are naturally assumed by women, or by women who have consented to sex, except when such burdens

exceed what is normally to be expected of women, at which point women may be exempt from penal sanction for aborting a pregnancy. . . .

Yet other jurisdictions begin from a constitutional duty to protect [unborn] life, and, like Germany, have begun to explore approaches for vindicating the duty to protect life that do not involve the threat of criminal prosecution. These jurisdictions constitutionally justify depenalization of abortion, coupled with abortion-dissuasive, result-open counseling, as more effective in protecting the unborn than the threat of criminal punishment. The justifications for life-protective counseling, as well as its form, are evolving over time, in ways that progressively incorporate values of women's autonomy. At a minimum, these jurisdictions recognize women as the type of modern citizens who possess autonomy of a kind that law must take into consideration if it hopes to affect their conduct; some go further and are beginning to embrace protecting women's dignity as a concurrent constitutional aim. . . .

[A]fter decades of conflict, a constitutional framework is emerging in Europe that allows legislators to vindicate the duty to protect unborn life by providing women dissuasive counseling and the ability to make their own decisions about abortion. Constitutionalization in this form values women as mothers first, yet addresses women as the kind of citizens who are autonomous in making decisions about motherhood, and may even warrant respect as such. The spread of constitutionalization in this form attests to passionate conflict over abortion and women's family roles; it also suggests increasing acceptance of claims the women's movement has advanced in the last forty years, however controverted they remain. Jurisdictions that permit result-open counseling in satisfaction of the duty to protect unborn life express evolving understandings of women as citizens, in terms that reflect community ambivalence and assuage community division, while continuing to engender change.

Siobhán Mullally

Debating Reproductive Rights in Ireland[*]

Women's reproductive rights in Ireland have long been a contested terrain. As in many postcolonial states, the demarcation of gender roles in Ireland has always been intertwined with debates on national identity. . . . The overwhelming

[*]Excerpted from Siobhán Mullally, *Debating Reproductive Rights in Ireland*, 27 HUM. RTS. Q. 78 (2005).

push to define Ireland as "not-England" led to a search for distinguishing marks of identity. The Roman Catholic religion, adhered to by a majority of the Irish people, became one of these distinguishing identity markers. . . . When abortion came to the forefront as a political issue in the early 1980s, it was debated less on its own terms and more in terms of the consequences that freedom of choice would have for Ireland's inherited religious-cultural traditions. The Catholic Right in Ireland, concerned with preserving the conservative ethos that permeates the Irish Constitution, has portrayed feminism and human rights discourse not only as a threat to Ireland's "pro-life" and "pro-family" traditions, but also as a threat to Ireland's sovereignty. . . .

[I]n 1983, the Irish Constitution was amended to recognize, under Article 40(3)(3), the "right to life of the unborn." Under the 1861 Offences Against the Person Act, abortion was a criminal offense. However, prior to 1983, there was no explicit constitutional prohibition on abortion. The move to introduce a constitutional amendment banning abortion followed the Supreme Court's . . . *McGee v. Attorney General* (1973) [that] concluded that the right to have access to contraceptives was protected as part of the personal right to marital privacy. Anti-abortion activists feared that a right to privacy, broadly interpreted, might be invoked by Irish courts to strike down legislation criminalizing abortion. For example, the *Roe v. Wade* (1973) decision in the United States was preceded by *Griswold v. Connecticut* (1965), a case similar to *McGee v. Attorney General*. To guard against a comparable development in Ireland, the Pro-Life Amendment Campaign (PLAC) was launched in 1981.

[T]he amendment campaign and the bitter debates that ensued have been described as a "second partitioning" of the state. Although PLAC was careful to employ secular language in its campaign, it clearly drew on a conservative Catholic ethos to support its claim of the absolute inviolability of fetal life. Recognizing this, each of Ireland's Protestant Churches issued statements opposing the proposal for a "pro-life" amendment. The antiamendment campaign argued that an absolute constitutional prohibition on abortion would deny non-Catholics equal rights to citizenship in Ireland and would perpetuate politics of exclusion. PLAC, however, continued to represent abortion as a "violent colonial tool" threatening the integrity of the Irish nation. Ultimately, the pro-life campaign prevailed. Significantly, however, the enacted amendment does recognize the need for "due regard to the equal right to life of the mother." . . .

In *S.P.U.C. v. Grogan and Others* (1989), the Society for the Protection of the Unborn Child (SPUC) applied to the High Court for an injunction to prevent student groups from distributing information on abortion services available in the UK. The High Court requested a ruling from the European Court of Justice (ECJ)

as to: (a) whether abortion was a "service" within the meaning of the Treaty of Rome and; (b) whether student groups have a right under Community law to distribute information concerning abortion services available in other member states. At the ECJ, Advocate General Van Gerven concluded that in the absence of a uniform European conception of morals, state authorities were better placed to assess the requirements of public morals than were European institutions. . . .

The ECJ departed from [that] Opinion . . . . The ECJ defined abortion, "solely in terms of the possible commerce and profit resulting from it." Questions relating to fundamental rights were dismissed as raising nonjusticiable moral rather than legal arguments. The ECJ concluded that the termination of a pregnancy in accordance with the law of the state in which it was carried out constituted a service within the meaning of the Treaty of Rome. However, the ruling was only a partial victory. Although the Court was willing to address concerns relating to trade in services, it refused to address reproductive health as a question of human rights. . . .

Although the ECJ's ruling in the *Grogan* case was limited in scope, its potentially liberalizing impact on Ireland's abortion law complicated national debates regarding European integration. As a constitutional referendum on the Treaty of the European Union (the Maastricht Treaty) loomed, the abortion debate became further entwined with debates on national sovereignty. The ECJ's ruling in the *Grogan* case coincided with ongoing negotiations on the Maastricht Treaty. Concerned with the possibility of a backlash from anti-abortion groups, the Irish government added a protocol to the Maastricht Treaty, without consulting Parliament. The Protocol (No. 17) sought to protect Ireland's constitutional prohibition on abortion from any change that might be required as a result of European Union membership.

Before the constitutional referendum on the Maastricht Treaty was to take place, however, a young woman's body became the subject of further contestation between pro-choice and anti-abortion groups. In *Attorney General v. X* (1992), the Supreme Court of Ireland recognized a limited right to reproductive health. This case involved a fourteen year old girl who became pregnant as a result of a rape. The Attorney General, acting on information provided by the Director of Public Prosecutions secured an injunction restraining X from leaving Ireland for a period of nine months. Effectively, X was imprisoned within the state. The *X* case provoked a huge outcry at national and international levels. . . . The international media reported Ireland to be "backward," "barbarous," "punitive," "priest-ridden" . . . . Embarrassed by this potentially damaging attention, the government undertook to pay all legal expenses arising from X's appeal to the Supreme Court. The Supreme Court lifted the injunction, reversing the High Court's ruling on the

substantive question of abortion. Pointing out the state's duty to have "due regard" for the life of the mother, the Supreme Court concluded that abortion was lawful in Ireland where there was a "real and substantial risk" to the life, as distinct from the health, of the mother. . . . In this case, medical evidence had been submitted to show the young woman's suicidal state of mind and the resulting threat to her life. In the Court's view, her right to terminate her pregnancy was therefore protected by the Article 40(3)(3) as amended in the Constitution. At the time that it was adopted, supporters of this amendment intended that it would absolutely prohibit abortion in Ireland. After the Supreme Court's ruling in *Attorney General v. X*, the amendment had been turned on its head to provide equal protection to the life of the mother.

The Supreme Court's judgment on the substantive issue of abortion was welcomed by the women's movement. However, its ruling on the right to travel raised widespread concern. . . .

[B]efore a further referendum on abortion could take place, European human rights law asserted its voice in the national debate. On 29 October 1992, the European Court of Human Rights (ECHR) ruled on the challenge brought against Ireland by the *Open Door Counselling* & *Dublin Well Woman* centres. Both Centers had been forced to close their nondirective pregnancy counseling services, following injunctions taken against them by SPUC. They now complained that this constraint on the provision of information violated their rights to privacy and to freedom of expression under the European Convention. . . . In a judgment clearly attempting to prevent encroachment upon contracting states' margin of appreciation, the ECHR concluded that Ireland's prohibition on abortion information fell within the scope of permissible restrictions on the right to freedom of expression. The ECHR found that the prohibition was prescribed by law and pursued a legitimate public aim, namely, the protection of public morals. However, the ECHR concluded that Ireland had not satisfied the requirement of proportionality. The absolute nature of the injunction against the applicants proved fatal, and the ECHR ruled that Ireland had violated Article 10 of the European Convention, protecting the right to freedom of expression. . . . [T]he ECHR held that it was unnecessary to consider the scope of the right to privacy. . . .

Less than one month after the ECHR's ruling in *Open Door Counselling and Others v. Ireland*, a further constitutional referendum on abortion was held. On 25 November 1992, the Irish people were asked to vote on three possible constitutional amendments. The first amendment proposed to roll back the Supreme Court's judgment in the *X* case and to prohibit abortion arising from a risk to a woman's life posed by a threatened suicide. The second and third

amendments sought to protect the right to travel and to provide and obtain information on abortion. The first amendment was defeated. The second and third proposed amendments were passed, thereby providing constitutional protection for the right to travel and to information. . . .

Observe how, over the last several decades, Ireland's national position on abortion was forged through transnational interactions, and now, in law and in practice, relies in part on cross-border travel. What difference does this account make for your views of the Court's judgment in *A, B and C*? The Court's reasoning?

Do your views about *A, B and C* have implications for your understanding of *Hirst*?

CONSTITUTIONAL PLURALISM AND CONSTITUTIONAL CONFLICTS

DISCUSSION LEADERS

ALEC STONE SWEET AND MIGUEL MADURO

IV. CONSTITUTIONAL PLURALISM AND CONSTITUTIONAL CONFLICTS

DISCUSSION LEADERS:
ALEC STONE SWEET AND MIGUEL POIARES MADURO

Dialogues and Distinctions

Conceptualizing the Exchanges

The materials for this session address the following question: what do judges, when adjudicating a particular issue, do—and what ought judges to do—when confronted with competing rules? This question differs from classic conflicts of norms in two ways: first, each constitutional order claims final authority to adjudicate the matter; second, each constitutional order has previously expressed an openness to the claims of the other legal order and is in a position to be affected, but also to affect, the other.

The label, "constitutional pluralism," has now become the standard for describing this situation (of competing claims of final authority over a particular legal issue). Constitutional pluralism also entails a variety of related theoretical and normative perspectives, which attempt to make sense of contemporary reality and to legitimate the openness that pluralism brings into the law.

As the materials demonstrate, it is rare for courts to explicitly acknowledge the issue of constitutional pluralism. Yet the cases also demonstrate the enormously important, practical effects of pluralism, not only on the relationships between legal orders (and their respective courts) but also within a legal order. Constitutional courts may still portray the national constitution as the sole source of ultimate authority but, at the same time, judges now routinely labor to minimize the risks of conflict with supra-national or international order claiming competing authority. As the Czech Constitutional Court case excerpted below demonstrates, constitutional pluralism also affects the relationship between different courts within a state.

Constitutional pluralism is, therefore, not simply about the relationship between different constitutional courts or their respective constitutional orders. It is also about what changes develop in domestic constitutional law by reason of constitutional pluralism.

The materials highlight three forms of interaction between constitutional orders in a context of constitutional pluralism: evasion, confrontation, and accommodation. In the first, a court attempts to avoid the constitutional conflict by deploying techniques of evasion, for example, through distinguishing the facts of a case or the scope of the applicable rules. In the second, a court recognizes the conflict and claims ultimate authority to resolve it. In the third, a court develops various forms of accommodation, ranging from assuming an equivalence between the competing constitutional rules to constructing the national constitution so as to require reception from the external source. The materials also reflect the fact that many courts do not use one approach exclusively but, instead, choose a mix of different approaches. Moreover, within Europe, states do not take the same

approach, resulting in asymmetrical vertical relationships with supra-national courts.

Hence, questions emerge. How are categories of competence constructed? What values are argued as the basis for insisting on distinctive answers, and with what costs? What explains the variations in employing different strategies to deal with the risks of constitutional conflicts? How does constitutional pluralism compare with the approaches described in Chapter III on *(Dis)Uniformity of Rights*? What other judicial techniques exist to deal with such conflicts? And what guides judges in deciding how to respond?

These questions highlight the relationship between constitutional pluralism and the evolving nature and legitimacy of the judicial role. Approaches to constitutional pluralism also implicate differing views on the role of constitutional courts in a particular political community. The orthodox view is that a constitutional court is under a duty to defend the hierarchical superiority of the constitution with respect to any other set of legal norms, and that all other national courts are required to respect the constitutional court's efforts to do so. Yet as national courts—and not just constitutional courts—have gradually incorporated the European Convention on Human Rights (ECHR), and accepted the supremacy of European Union law, this orthodoxy is challenged. As discussed in the readings, for some national courts, the ECHR is the "real" constitution, when it comes to rights adjudication. In such situations some judges appear to conceive of themselves as embedded in two political communities.

How do and how should judges balance these competing commitments? To what extent should they defer to the political process of their own national community in making such accommodations? When should judges address this issue directly and why do judges rely on ambiguity as they respond to these tough questions. Further, as the German Constitutional Court Judgment in the *Lisbon Treaty Case* (also discussed in Chapter VI on *Law's Futures(s)*) demonstrates, taking a position of conflict towards a foreign constitutional claim may lead a court to determine the meaning of the national political processes. Similarly, deference showed towards an external constitutional claim may serve to strengthen the power of the domestic courts with respect to the domestic political process.

DIALOGUES AND DISTINCTIONS

Miguel Poiares Maduro

Three Claims of Constitutional Pluralism[*]

The starting point of constitutional pluralism is empirical. Constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts that are not hierarchically regulated. More broadly, it refers to the expansion of relevant legal sources, the multiplication of competing legal sites and jurisdictional orders, and the existence of competing claims of final authority. In EU law, where the current movement started, constitutional pluralism also mapped what is usually described as a discursive practice between the European Court of Justice and national constitutional courts, aimed at reducing the risks of constitutional conflicts and accommodating their respective claims of final authority.

I would summarize the core empirical claim of constitutional pluralism as follows: constitutional pluralism is what best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them. . . . [W]e can conceive of the EU and national legal orders as autonomous but part of the same European legal system. For those practising law in Europe, this European legal system implies a commitment to both legal orders and imposes an obligation to accommodate and integrate their respective claims. . . .

The empirical thesis assumes that both the European Court of Justice and national constitutional courts are aware of their competing constitutional claims and act accordingly, by accommodating their respective claims so as to minimize the risks of constitutional conflicts. The most well known example of this regards the fundamental rights jurisprudence of the national constitutional courts and the European Court of Justice. . . .

The current reality is better understood as one where EU and national legal orders can be construed as normatively autonomous but also institutionally bonded by the adherence of their respective actors to both legal orders. The latter bond is institutionally operated but founded on a normative commitment to

[*]Excerpted from Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, *in* CONSTITUTIONAL PLURALISM IN EUROPE AND BEYOND 67 (Matej Avbelj & Jan Komárek eds., 2012).

European constitutionalism that has important consequences. In particular, it requires a coherent and integrated construction of the European legal system by all those different actors.

Empirically, the open question remains open. The examples of a discursive practice among courts acknowledging this situation abound. This does not involve courts using the language of constitutional pluralism. Constitutional pluralism does not require courts to talk about constitutional pluralism in their decisions. It does not even require for courts to engage expressly with other courts. Those that say that courts do not endorse constitutional pluralism, because they neither talk about constitutional pluralism nor cite decisions of other courts, miss the point. The fact that courts continue to narrate the law according to the internal viewpoint of their legal order does not mean that such viewpoint has not been altered by reason of constitutional pluralism. The primary example is how many national courts have interpreted their constitutions so as to incorporate the demands arising from the supremacy claim of EU law without formally accepting, in most cases, such supremacy. The narrative is still the national constitution but the script has changed. What constitutional pluralism claims, in this respect, is that judicial actors have changed the internal perspective of their legal order in order to accommodate the claims of the other legal order. As such, the new internal perspective is informed by constitutional pluralism. . . .

While the empirical thesis of constitutional pluralism limits itself to stat[ing] that the question of final authority remains open, the normative claim is that the question of final authority ought to be left open. Heterarchy is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of final authority. This normative thesis implies, in practice, another: that those competing constitutional claims are of equal legitimacy or, at least, cannot be balanced against each other in general terms. . . .

The thicker normative claim of constitutional pluralism is that, in the current state of affairs, it provides a closer approximation to the ideals of constitutionalism than either national constitutionalism or a form of EU constitutionalism modelled after state constitutionalism. In this way, the pragmatic concern that has dominated earlier writings on constitutional pluralism is turned upside down. Constitutional pluralism is not simply a remedy for the risks of constitutional conflicts of authority; it's the best representation of the ideals of constitutionalism for the current context of increased pluralism and deterritorialization of power. . . .

To understand, however, both the promise and challenges of constitutional pluralism it is important to note that the paradoxes of constitutionalism embody

two opposing pulls of modern constitutionalism. One, towards pluralism, linked to the values of freedom, diversity and private autonomy. The other, towards unity or hierarchy, linked with the ideals of equality, the rule of law and universality. Modern constitutionalism success has been founded on its capacity to reconcile both at the level of the state.

These opposing pulls are reflected in a tension between the political project of pluralism endorsed by constitutionalism and its legal emphasis on hierarchy and primacy. They are, however, mutually dependent. Pluralism is ordered through democracy and in order to fulfil the idea of self-government requires a unified and closed political space. This entails, in turn, an ultimate source of political authority. State constitutionalism in its modern form made that political authority reside in the people. The people are both the site and source of pluralism and the unified entity upon which rests ultimate political authority. This is also linked to a conception of constitutionalism as providing a comprehensive social ordering. . . .

The most powerful challenge to constitutional pluralism departs therefore from the association made between the values of constitutionalism and the existence of an ultimate source of political authority expressed, in legal terms, in the absolute primacy of the Constitution. These links are considered essential to protecting the constitutional values of the rule of law, equality and universalism.

This challenge comes in two very different forms, however. A set of authors argues that the incompatibility between certain constitutional values and pluralism requires abandoning pluralism altogether and returning to either monism or dualism. Another set of authors argues that the solution is to be found, instead, in radically departing from constitutionalism as we know it. . . .

The problem occurs when, as in the postnational context we currently live in, it is difficult to continue to talk about unified and closed political spaces subject to an ultimate source of political authority. We can still do it in conceptual terms by artificially closing and insulating national polities under a self-referential notion of political authority that extends so far as the legal hierarchy and claim of supremacy of the constitutional order itself claims to extend. But this is a purely circular reasoning. More importantly, trust in political integrity will gradually erode as the purported coherence and universality of any particular legal order is increasingly challenged, in practice, by its interaction with other legal orders.

In this respect, constitutional pluralism does nothing more than adapt constitutionalism to the changing nature of the political authority and the political

space. The challenge is to adapt it while protecting political integrity and the correspondent ideals of coherence and universality of the legal order.

Wojciech Sadurski

'Solange, Chapter 3': Constitutional Courts in Central Europe—Democracy—European Union[*]

One of the most important themes in the grand narrative of the emergence of EU law as the supreme law of EU-land, prevailing over national legal systems, is (what may be called generically) a *Solange* story: a story about national constitutional courts resisting a straightforward surrender of national legal sovereignties, and insisting on their own role as guardians of any further transfer of powers from the national to the European level. This resistance is based on their distrust both of the democratic legitimacy at the above-national level, and of the EU's ability to provide a degree of protection of the principles of the rule of law and human rights, at least equivalent to that of the most elevated standards of the relevant national communities.

The story, as developed here, borrows of course its name from two judgments of the German Constitutional Court. *Solange I*, in 1974, established that since European law had not yet reached a level of protection of fundamental rights equivalent to that provided by national constitutional law, as well as a similar level of democratic legitimacy for its law-making powers, the court would keep reviewing secondary Community law according to the standards of the national constitution. *Solange II*, in 1986, expressed in turn a satisfaction that such a level had been reached by Community law, and 'as long as' (*solange*) the European Communities, primarily through the case-law of the European Court of Justice, kept ensuring an effective protection of fundamental rights, the Federal Constitution Court would no longer carry out a review of secondary Community legislation, according to national-constitutional standards (though it would retain the power to review the general regime of fundamental rights protection afforded by the EC). These developments have been replicated in several other countries where a number of constitutional courts have adopted a stance not unlike that of the German Court.

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[*]Excerpted from Wojciech Sadursky, *'Solange, Chapter 3': Constitutional Courts in Central Europe—Democracy—European Union,* 17 EUR. L.J. 1 (2008).

[T]he *Solange* story was well suited to be taken up in Central and Eastern Europe [CEE] after accession, for two powerful reasons. First, in nearly all post-communist European states, constitutional courts established themselves as powerful, influential, activist players, dictating the rules of the political game for other political actors, and were certainly not burdened with any self-doubt as to their legitimacy in striking down laws under very vague constitutional terms. While the powers of the constitutional courts in CEE largely resemble (and often exceed) those of their Western European counterparts, the other branches of CEE states are weaker, more chaotic, disorganised and inefficient compared to those in Western Europe. The relative positions of constitutional courts are therefore probably much weightier than is the case in the 'older Europe.' Accession to the EU provided these courts with yet another opportunity to reinforce their own powers—an opportunity not to be missed: they could easily (taking their cue from West European courts, and thus abiding by the 'follow the well tried model' type of legitimacy) assert a right to establish and enforce criteria of democracy, rule of law and human rights protection, which would inform the relationship between the European and national constitutional orders. Such a power would further increase their position vis-à-vis the political branches in their countries, by delineating those aspects of the supremacy of European law which they deemed unacceptable, or by dictating the need to carry out constitutional amendments if certain dimensions of supremacy were to be accepted, etc.

The second reason why the *Solange* story almost begged for a recurrence in CEE stemmed from the strong sovereignty concerns which were felt and expressed in CEE states prior to accession, and persisted after joining the EU. . . .

[T]he reasons for the willingness by constitutional courts of a number of the new Member States to replay the *Solange* story in their own states after accession to the EU are almost entirely related to their domestic, both political and legal, context: they have less to do with the EU and more with purely local matters. But here is a delightful (or disturbing, depending on one's perspective) paradox. One of the main rationales for CEE states joining the EU was about consolidating democracy and the protection of human rights. . . .

So it would be truly ironic if the constitutional courts were now to build democracy-based arguments against the supremacy of EU law in new Member States. It would be perhaps even perverse if the courts of the very countries which entered the EU, inter alia, to consolidate their democracy and human rights protection, were to erect barriers against a smooth integration within the EU legal framework on the basis of their uncertainty as to the outcome, both in terms of democratic—and rights—protection, of such an integration (i.e. of the supremacy of EU law over national constitutional laws).

The EU is thus perceived both as a source for the promotion of democracy and as a threat to democracy (through a transfer of powers to European institutions, whose democratic legitimacy is put in doubt). . . .

[T]he initial concerns put forward by the German or the Italian courts back in the 1970s ('Chapter 1' of *Solange*) were eventually dispelled, based on the fact that the protection of rights by the EU had reached a satisfactory level ('Chapter 2'). Thus, the CEE constitutional courts entering the scene as the subsequent authors of the same serial novel, with a claim that they now have to protect their citizens from the erosion of their rights protection (an erosion resulting, as the argument goes, from the supremacy of EU law over national constitutional orders), appear like a return to Chapter 1, while we have already been through Chapter 2. This is the double irony.

And yet, despite the apparent improbability—due to the double irony just noted—of 'Chapter 3,' it is now being written, and its co-authors are the three by far most activist and powerful constitutional courts in CEE: that of the Czech Republic, Hungary and Poland. These are respectable, eminent authors, with strong audiences and sympathetic reviewers, and they are likely to be followed by others. Their contribution to the majestic narrative of *Solange* is rather complex and somewhat confusing. They speak with different voices and their concerns are not exactly the same, but the cumulative effect of their respective discourses leads to the conclusion that the *Solange* story, begun some 30 years ago, is alive and well, and that the last chapter has not yet been written.

In a reference made to the European Court of Justice, Case C-399/09, *Landtová* (2009), the Czech Supreme Administrative Court had asked the Court of Justice to decide whether special pension increments that the Czech Constitutional Court had ordered to be paid to Czech citizens but not to Slovak citizens (all of whom were affected by the dissolution of Czechoslovakia in 1992) were compatible with EU law. In its *Landtová* judgment, issued in June of 2011, the ECJ, while not declaring the granting of the special pension increments in themselves contrary to EU law, stated that they could not be granted if done in a discriminating manner as between Czech and Slovak nationals. This judgment was applied by the Czech Administrative Court. On appeal to the Czech Constitutional Court, that Court declared, for the first time, that a decision of the ECJ was *ultra vires* and, therefore, non-binding.

Jan Komarek

Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution[*]

When the Czech Constitutional Court (CCC) declared [in No. Pl. ÚS 5/12] the Court of Justice of the European Union's [CJEU] judgment in C-399 *Landtová* (2009) "*ultra vires*," one of my colleagues commented: "giving *Solange* into their hands was like to let children play with matches." I am afraid it is the adequate description of the decision, which is difficult to explain in legal terms and which in my view has much more to do with the psychology of the Court and its individual judges, although other domestic actors, the Supreme Administrative Court and the Government, also played an important role.

[F]rom the point of view of EU law it was an ordinary case, decided by the Fourth Chamber, concerning the interpretation of Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community ("the Regulation"). Only at a closer look one could reveal an interesting dimension to it: the Czech Supreme Administrative Court (the SAC) was challenging the CCC's case law concerning special pension increments that the CCC ordered to be paid to the Czech citizens, who were affected by the dissolution of Czechoslovakia in 1992. . . .

The SAC . . . initiated a protracted conflict with the CCC. . . . The SAC argued, among other things, that the special increment was incompatible with E.U. law. . . .

The CCC rejected these arguments . . . without having asked preliminary reference to the CJEU . . . . [T]he CCC stated that its interpretation of the regulation shall prevail in the case regardless of the outcome of the CJEU's ruling, so to await its results violated the rights to a fair trial of the petitioner in question.

On the reference from the SAC, the CJEU ruled that while the special increment did not violate the Regulation as such, "the documents before the Court show[ed] incontrovertibly that the [CCC's] judgment discriminate[d], on the ground of nationality, between Czech nationals and the nationals of other Member States."

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[*]Excerpted from Jan Komarek, *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, VERFASSUNGSBLOG (Feb. 22, 2012), http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution.

[T]he reaction of the Czech authorities, however, was not to the CCC's pleasing. First, with a specific reference to the CJEU's ruling the Parliament adopted an act which prospectively excluded the possibility of paying the special increment to everyone.

For the SAC the response of the CJEU was somewhat precarious. While the CJEU confirmed that it was right in considering the special increment unlawful, the former did not exclude that it can be granted to Mrs. Landtová. In the concrete case at hand the SAC was therefore supposed (or at least not prevented by EU law) to grant the increment to Mrs. Landtová.

Instead, the SAC came up with a different interpretation: because the CCC created the special increment in violation of EU law—and in particular the violation of its duty to refer preliminary question to the CJEU, its case law cannot be binding on the SAC, the SAC argued. . . . The SAC challenges the CCC even further, stating it of course did not undermine the CCC's role as the final arbiter of constitutionality. But the only possibility for the CCC, the SAC stressed, would be to find that the relevant provisions of EU law violated the material core of the constitution. The SAC therefore provoked the CCC to call revolution, if it wanted to stick to case law.

[I] did not expect the CCC would do so. It did.

The fact that a constitutional court of a Member State of the EU declared a judgment of the CJEU "*ultra vires*" is not something I would automatically condemn. I have always found presumptuous the writings that stressed the post-communist Member States' courts' need to "learn," or which reacted to some of their judgments, which did not correspond to the CJEU's orthodoxy, with suspicions concerning the competence of the respective judges, who were said to have "misunderstood" what it entailed to be the EU. The way in which the CCC justified its move, however, is most insulting—not only to the CJEU, whose accommodating gesture was returned by the CCC with a slap in the face, but to anybody who cares about the constitutional arrangements in the EU in general, and the Czech Republic's place therein in particular.

[T]he CCC found the very application of the Regulation inappropriate. In its view, "the provisions of Annex III are from the point of view of EU law of declaratory nature only, they are not constitutive; the key consideration for the application of the Regulation is the nature of the legal relationships concerned, which must contain the so called foreign element." This foreign element was lacking, according to the CCC, since "the periods of employment during the

existence of Czechoslovakia cannot be viewed, retroactively, as periods of employment abroad."

The key passage of the judgment, trying to explain why the CCC considered the CJEU's ruling *ultra vires* is the following:

> Not to distinguish legal arrangements following from the dissolution of a state with a single social security system from the arrangements concerning the consequences for social security systems of the free movement of persons in the European Communities, or the European Union, amounts to the failure to respect the European history, it means to compare the incomparable. For this reason it is not possible to apply European law, ie. the regulation, to the Czech citizens' claims stemming from social security. Following the principle explicitly stated in its judgment it is not possible to do otherwise than to find in relation to the consequences of the [CJEU's judgment in the *Landtová* Case] for similar cases that in its [the CJEU's] case the situation where an act of an institution of the EU exceeded the competences transferred to the EU by virtue of Article 10a of the Czech Constitution occurred, that an act ultra vires was occurred.

First, the CCC's assertion that "the provisions of Annex III are from the point of view of EU law of declaratory nature only" is plainly wrong. . . .

Such a misunderstanding could be perhaps understandable, if it did not lead to the finding of *ultra vires* ruling on the part of the CJEU. While the CCC ornamentally refers to the BVerfG's (the German Constitutional Court) rulings concerning the possibilities of its intervention, everybody who has ever had a look at these decisions would know that they are quite different—if only because the BVerfG suggested that it would firstly send a preliminary reference to the CJEU before finding its ruling *ultra vires*. As one of my colleagues commented on this, well-behaving people firstly try to talk to each other before pressing the trigger. Not the CCC.

Well, the CCC wanted to invent its own way of talking to the CJEU; instead of submitting a preliminary reference the Court sent a letter to the CJEU, where it wanted to explain its case law, as it saw that it was not be properly defended by the Government. The Registry, however, sent the letter back to the CCC, explaining that "according to what is established practice, the members of the CJEU do not exchange correspondence with third parties concerning the cases submitted to the CJEU."

[O]ne possibility I proposed . . . was to await the change in the CCC's composition, which is due in the course of this and the following year and try to postpone decisions in cases that deal with the same problem until this change. Some people suggest that the SAC should either simply ignore the CCC or to send another reference to the CJEU asking it on the effect of the CCC's finding that the former's ruling was ultra vires (what could the CJEU say?) It remains to be seen what (if anything) the reaction of the EU will be.

Following the Czech Constitutional Court's judgment in Pl. ÚS 5/12, the Czech Supreme Administrative Court has referred the case to the European Court of Justice. One of the questions submitted to the ECJ (whose decision was pending as of June 2012) is:

> Does EU law prevent a national court, which is the supreme court in the field of administrative law and against the decisions of which there are no remedies, to be bound, in conformity with national law, by the determinations of law provided by the Constitutional Court, if it appears that these determinations are not in conformity with the law of the EU, as interpreted by the Court of Justice of the EU?

Le Palais, Court of Justice of the European Communities, City of Luxembourg, Luxembourg, 1973.

Architects: Jean-Paul Conzemius, François Jamagne, and Michel Vander Elst. Photograph reproduced courtesy of the Court of Justice of the European Communities (now the Court of Justice of the European Union).

Interior of the Great Courtroom of the Court of Justice of the European Union, 2008.

Photograph: G. Fessy, © Court of Justice of the European Union.

Lisbon Treaty Case
German Constitutional Court
2 BvE 2/08 (2009)

208. The standard of review of the Act Approving the Treaty of Lisbon is determined by the right to vote as a right that is equivalent to a fundamental right. The right to vote establishes a right to democratic self-determination, to free and equal participation in the state authority exercised in Germany and to compliance with the principle of democracy including the respect of the constituent power of the people. . . .

216. The principle of democracy is not amenable to weighing with other legal interests; it is inviolable. . . . The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood but guarantees it. . . .

219. [T]he empowerment to embark on European integration permits a different shaping of political opinion-forming than the one that is determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inalienable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law.

220. The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action. . . .

231. The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational competences comes, however, from the Member States of such an institution. They therefore permanently remain the masters of the Treaties. . . .

233. The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently

establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence. Also a far-reaching process of independence of political rule for the European Union brought about by granting it steadily increased competences and by gradually overcoming existing unanimity requirements or rules of state equality that have been decisive so far can, from the perspective of German constitutional law, only take place as a result of the freedom of action of the self-determined people. According to the constitution, such steps of integration must be factually limited by the act of transfer and must, in principle, be revocable. For this reason, withdrawal from the European union of integration (*Integrationsverband*) may, regardless of a commitment for an unlimited period under an agreement, not be prevented by other Member States or the autonomous authority of the Union. This is not a secession from a state union (*Staatsverband*), which is problematical under international law, but merely the withdrawal from a *Staatenverbund* which is founded on the principle of the reversible self-commitment. . . .

235. What corresponds to the non-transferable identity of the constitution, which is not amenable to integration in this respect, is the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties. Within the boundaries of its competences, the Federal Constitutional Court is to review, if necessary, whether these principles are adhered to. . . .

[F]or borderline cases of what is still constitutionally admissible, the German legislature must, if necessary, make arrangements with its laws that accompany approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop. . . .

264. An unacceptable structural democratic deficit under Article 23 in conjunction with Article 79.3 of the Basic Law would exist if the extent of competences, the political freedom of action, and the degree of independent formation of opinion on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for instance the legislative competences, which are essential for democratic self-determination, were exercised mainly on the level of the Union. If an imbalance between character and the extent of the sovereign powers exercised and the degree of democratic legitimisation arises in the course of the development of the European integration, it is for the Federal Republic of Germany due to its responsibility for integration, to work towards a change, and if the worst comes to the worst, even to refuse to further participate in the European Union. . . .

295. Mere participation of the citizens in political rule which would take the place of the representative self-government of the people cannot be a substitute for the legitimising connection of elections and other votes and of a government that relies on it: The Treaty of Lisbon does not lead to a new level of development of democracy. The elements of participative democracy, such as the precept of providing, in a suitable manner, the citizens of the Union and "representative" associations with the possibility of making their views heard, as well [as] the elements of associative and direct democracy, can only have a complementary and not a central function when it comes to legitimising European public authority. . . .

298. As regards its competences and its exercising these competences, the European Union, as a supranational organisation, must comply as before with the principle of conferral that is exercised in a restricted and controlled manner. Especially after the failure of the project of a Constitution for Europe, the Treaty of Lisbon has shown sufficiently clearly that this principle remains valid. The Member States remain the masters of the Treaties. In spite of a further expansion of competences, the principle of conferral is retained. . . .

339. The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, an institution conferred under an international agreement, i.e. a derived institution which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This connection of derivation is not altered by the fact that the institution of the primacy of application is not explicitly provided for in the Treaties but has been obtained in the early phase of European integration in the case-law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that at any rate if the mandatory order to apply the law is evidently lacking, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. This establishment must also be made if within or outside the sovereign powers conferred, these powers are exercised with effect on Germany in such a way that a violation of the constitutional identity, which is inalienable pursuant to Article 79.3 of the Basic Law and which is also respected by European law under the Treaties, namely Article 4.2 sentence 1 TEU Lisbon, is the consequence.

Lisbon Treaty II
Czech Constitutional Court
Pl. ÚS 29/09 (2009)

110. [T]he petitioners state that, "unfortunately the Constitution does not precisely define the essential requirements for a democratic state governed by the rule of law." According to the petitioners the Constitutional Court "has already addressed that principle several times . . . it too has not given a complete, comprehensive, and conclusive interpretation, that would in future be resistant to immediate political pressures and ad hoc interpretations influenced by cases at issue at a particular time." . . . [T]he petitioners ask the Constitutional Court to set "the substantive limits on the transfer of powers," and . . . they attempt to formulate these themselves, evidently inspired by the decision of the German Constitutional Court dated 30 June 2009. . . .

111. However, the Constitutional Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create such a catalogue of non-transferrable powers and authoritatively determine "substantive limits on the transfer of powers," as the petitioners request. It points out that it already stated in [its *Lisbon Treaty I* (2008) judgment], that "these limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion." Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have been made on the political level. . . .

113. The Constitutional Court believes that it is specific cases that can provide it a relevant framework, in which it is possible, case by case, to interpret more precisely the meaning of the term "sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens." . . . The attempt to define the term "sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens" once and [for] all (as the petitioners, supported by the President, request) would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures. . . .

135. [As regards the question of democratic deficits of decision-making procedures in the European Union,] the Constitutional Court does not overlook the tendency toward the strengthening of the position of the parliaments of the Member States in decision-making procedures at the European Union level, of which the Treaty of Lisbon is an example. . . .

136. Finally, the Constitutional Court adds that it is precisely the essence of the transfer of powers of the authorities of the Czech Republic that, rather than Parliament (or other authorities of the Czech Republic), it is the international organization to which these powers were transferred that exercises them. . . .

138. The Advocate-General of the European Court of Justice, [Miguel] Poiares Maduro, has recently stated a similar opinion:

> Democracy has a number of forms, especially in the European Community. At the level of the Community, democratic legitimacy has two main sources: it is either ensured in the Council, where it comes from the European nations through the positions taken by their governments, under the control of their national parliaments, or it is ensured by the Parliament, which is a European body with direct representation, and the Commission, which is directly answerable to the Parliament. Direct democratic representation is indisputably a relevant measure of European democracy, but it is not the only one. European democracy also involves a delicate balance between national and European dimensions of democracy, without either one necessarily outweighing the other. . . .

139. [I]n other words, the democratic processes on the Union and domestic levels mutually supplement and are dependent on each other. . . .

140. For similar reasons, one cannot see a conflict between Article 14(2) of the TEU, which governs the number of the members of the European Parliament, with the principle of equality set forth in Article 1 of the Charter, as the petitioners claim. . . . As pointed out above, the European Parliament is not the exclusive source of democratic legitimacy for decisions adopted on the level of the European Union. That is derived from a combination of structures existing both on the domestic and on the European level, and one cannot insist on a requirement of absolute equality among voters in the individual Member States. . . .

148. Insofar as the president argues with this definition of sovereignty by claiming that "the concept of shared sovereignty has been used relatively frequently recently, but only in non-rigorous debate," and according to the president this concept is "a contradiction on terms" because, as the president believes, "not only does our legal order not know the term 'shared sovereignty,' but neither does the law of the European Union," the Constitutional Court considers it appropriate to point out the text of the memorandum attached to the Czech Republic's application to join the European Union:

> The Czech nation has only recently reacquired full state sovereignty. However, the government of the Czech Republic has irrevocably reached [the same] conclusion as that reached in the past by today's Member States, that in modern European evolution, the exchange of part of one's own state sovereignty for a share in a supra-state sovereignty and shared responsibility is unaviodable, both for the prosperity of one's own country, and for all of Europe. . . .

150. [T]he Constitutional Court also stated in [the *Lisbon Treaty I*] judgment:

> – it generally recognizes the functionality of the EU institutional framework to ensure review of the scope of exercise of transferred powers; however, its position may change in the future if it appears that this framework is demonstrably non-functional. . . .
>
> – the Constitutional Court of the Czech Republic will (may)—although in view of the foregoing principles—function as an *ultima ratio* and may review whether an act by Union bodies exceeded the powers that the Czech Republic transferred to the European Union pursuant to Article 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences.

M. v. Germany

European Court of Human Rights (Fifth Section)
App. No. 19359/04 (2010)

1. The case originated in an application against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr M. . . .

2. The applicant alleged a breach of Article 5 § 1 of the Convention on account of his continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at

the time of his offence and conviction. He further claimed that the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence. . . .

6. The applicant was born in 1957 and is currently in Schwalmstadt Prison. . . .

9. On 5 October 1977 the Kassel Regional Court, applying the criminal law relating to young offenders, convicted the applicant of attempted murder, robbery committed jointly with others, dangerous assault and blackmail and sentenced him to six years' imprisonment. . . . Having regard to a report submitted by expert D., the court found that the applicant suffered from a pathological mental disorder, with the result that his criminal responsibility was diminished.

10. On 8 March 1979 the Wiesbaden Regional Court convicted the applicant of dangerous assault, sentenced him to one year and nine months' imprisonment and ordered his subsequent placement in a psychiatric hospital under Article 63 of the Criminal Code. The applicant had injured a prison guard by throwing a heavy metal box at his head and stabbing him with a screwdriver after having been reprimanded. As confirmed by expert D., the applicant suffered from a serious pathological mental disorder, with the result that his criminal responsibility was diminished.

11. On 9 January 1981 the Marburg Regional Court, on appeal, convicted the applicant of assault of a disabled fellow prisoner following a discussion as to whether or not the cell window should remain open. . . . [It] upheld the order for the applicant's placement in a psychiatric hospital. In the proceedings, an expert found that there were no longer any signs that the applicant suffered from a pathological brain disorder. . . .

12. On 17 November 1986 the Marburg Regional Court convicted the applicant of attempted murder and robbery and sentenced him to five years' imprisonment. It further ordered his placement in preventive detention (*Sicherungsverwahrung*) under Article 66 § 1 of the Criminal Code. It found that when the conditions of his detention in the psychiatric hospital where he had been detained since October 1984 had been relaxed, the applicant had on 26 July 1985 robbed and attempted to murder a woman who had volunteered to spend a day with him in a city away from the hospital. Having regard to the report of a neurological and psychiatric expert, W., the court found that the applicant still suffered from a serious mental disorder which could, however, no longer be qualified as pathological and did not have to be treated medically. He therefore

had not acted with diminished criminal responsibility, however, he had a strong propensity to commit offences which seriously damaged his victims' physical integrity. It was to be expected that he would commit further spontaneous acts of violence and he was dangerous to the public. Therefore, his preventive detention was necessary. . . .

26. On 26 November 2001 the applicant, represented by counsel, lodged a complaint with the Federal Constitutional Court against the decisions ordering his continued preventive detention even on completion of the ten-year period. . . .

27. On 5 February 2004 a panel of eight judges of the Federal Constitutional Court, having held a hearing at which it also consulted psychiatric experts and several prison governors, dismissed the applicant's constitutional complaint as ill-founded. In its thoroughly reasoned leading judgment (running to 84 pages) it held that Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, was compatible with the Basic Law.

28. The Federal Constitutional Court held that preventive detention based on Article 67d § 3 of the Criminal Code restricted the right to liberty as protected by Article 2 § 2 of the Basic Law in a proportionate manner. . . .

30. Preventive detention did not serve to avenge past offences but to prevent future ones. Therefore, the *Länder* had to ensure that a detainee was able to have his or her detention conditions improved to the full extent compatible with prison requirements.

31. The Federal Constitutional Court further held that Article 67d § 3 of the Criminal Code, taken in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, did not violate Article 103 § 2 of the Basic Law. The absolute ban on the retrospective application of criminal laws imposed by that Article did not cover the measures of correction and prevention, such as preventive detention, provided for in the Criminal Code. . . .

37. Weighing the interests involved, the Federal Constitutional Court concluded that the legislator's duty to protect members of the public against interference with their life, health and sexual integrity outweighed the detainee's reliance on the continued application of the ten-year limit. As Article 67d § 3 of the Criminal Code was framed as an exception to the rule and in the light of the procedural guarantees which attached to it, its retrospective application was not disproportionate.

38. The Federal Constitutional Court further found that a person's human dignity as enshrined in Article 1 § 1 of the Basic Law did not impose a constitutional requirement that there be a fixed maximum period for a convicted person's preventive detention. . . .

69. According to the information and material before the Court, the member States of the Council of Europe have chosen different ways of shielding the public from convicted offenders who acted with full criminal responsibility at the time of the offence (as did the applicant at the relevant time) and who risk committing further serious offences on release from detention and therefore present a danger to the public.

70. Apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to re-offend. . . . .

73. In many other Convention States, there is no system of preventive detention and offenders' dangerousness is taken into account both in the determination and in the execution of their sentence. On the one hand, prison sentences are increased in the light of offenders' dangerousness, notably in cases of recidivism. In this respect it is to be noted that, unlike the courts in the majority of the Convention States, the sentencing courts in the United Kingdom expressly distinguish between the punitive and the preventive part of a life sentence. The retributive or tariff period is fixed to reflect the punishment of the offender. Once the retributive part of the sentence has been served, a prisoner is considered as being in custody serving the preventive part of his sentence and may be released on probation if he poses no threat. . . .

92. The Court is called upon to determine whether the applicant, during his preventive detention for a period exceeding ten years, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1. It will examine first whether the applicant's initial placement in preventive detention as such falls under any of the permissible grounds for detention listed in Article 5 § 1. If it does not, the more specific question whether the abolition of the maximum duration of ten years for a first period of preventive detention affected the compatibility with Article 5 § 1 of the applicant's continued detention on expiry of that period need not be answered. . . .

98. The Court notes that according to the Government, the sentencing court had ordered the applicant's preventive detention without reference to any

time-limit and that it was for the courts responsible for the execution of sentences to determine the duration of the applicant's preventive detention. . . .

99. The Court is not convinced by that argument. It is true that the sentencing court ordered the applicant's preventive detention in 1986 without fixing its duration. However, the sentencing courts never fix the duration, by virtue of the applicable provisions of the Criminal; as the Government themselves submitted, the sentencing courts have jurisdiction only to determine whether or not to order preventive detention as such in respect of an offender. . . .

100. The Court observes that the order for the applicant's preventive detention was made by the sentencing court in 1986. . . . Without that change in the law, the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the applicant's preventive detention. Therefore, the Court finds that there was not a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continued deprivation of liberty beyond the period of ten years in preventive detention, which was made possible only by the subsequent change in the law in 1998. . . .

102. The Court shall further examine whether the applicant's preventive detention beyond the ten-year point was justified under any of the other sub-paragraphs of Article 5 § 1. It notes in this connection that the domestic courts did not address that issue because they were not required to do so under the provisions of the German Basic Law. It considers that sub-paragraphs (b), (d) and (f) are clearly not relevant. Under sub-paragraph (c), second alternative, of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence." In the present case the applicant's continued detention was justified by the courts responsible for the execution of sentences with reference to the risk that the applicant could commit further serious offences—similar to those of which he had previously been convicted—if released. These potential further offences are not, however, sufficiently concrete and specific, as required by the Court's case-law . . . as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of Article 5 § 1 (c). This finding is confirmed by an interpretation of paragraph 1 (c) in the light of Article 5 as a whole. Pursuant to paragraph 3 of Article 5, everyone detained in accordance with the provisions of paragraph 1 (c) of that Article must be brought promptly before a judge and tried within a reasonable time or be released pending trial. However, persons kept in preventive detention are not to be brought promptly before a judge and tried for potential future offences. . . . .

104. The Court further observes that the present application raises an issue in terms of the lawfulness of the applicant's detention. It reiterates that national law must be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness. It has serious doubts whether the applicant, at the relevant time, could have foreseen to a degree that was reasonable in the circumstances that his offence could entail his preventive detention for an unlimited period of time. It doubts, in particular, whether he could have foreseen that the applicable legal provisions would be amended with immediate effect after he had committed his crime. However, in view of the above finding that the applicant's preventive detention beyond the ten-year period was not justified under any of the sub-paragraphs of Article 5 § 1, it is not necessary to decide this question.

105. Consequently, there has been a violation of Article 5 § 1 of the Convention.

106. The applicant further complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which reads:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

107. The Government contested this allegation. . . .

122. The Court shall thus examine, in the light of the foregoing principles, whether the extension of the applicant's preventive detention from a maximum of ten years to an unlimited period of time violated the prohibition of retrospective penalties under Article 7 § 1, second sentence.

123. The Court observes that at the time the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for ten years at the most. Based on the subsequent amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with

section 1a (3) of the Introductory Act to the Criminal Code, which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence—and at a time when he had already served more than six years in preventive detention.

124. The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a "penalty" within the meaning of the second sentence of Article 7 § 1. . . .

129. The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights and the CPT that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support. The achievement of the objective of crime prevention would require, as stated convincingly by the CPT, "a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option." The Court considers that persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible. The Court does not lose sight of the fact that "[w]orking with this group of inmates is bound to be one of the hardest challenges facing prison staff." However, in view of the indefinite duration of preventive detention, particular endeavours are necessary in order to support these detainees who, as a rule, will be unable to make progress towards release by their own efforts. It finds that there is currently an absence of additional and substantial measures—other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes—to secure the prevention of offences by the persons concerned. . . .

131. As regards the procedures involved in the making and implementation of orders for preventive detention, the Court observes that preventive detention is ordered by the (criminal) sentencing courts. Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure.

132. Finally, as to the severity of preventive detention—which is not in itself decisive—the Court observes that this measure entails detention which,

following the change in the law in 1998, no longer has any maximum duration. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences, a condition which may be difficult to fulfil (see to that effect also the Commissioner for Human Rights' finding that it was "impossible to predict with full certainty whether a person will actually re-offend"). Therefore, the Court cannot but find that this measure appears to be among the most severe—if not the most severe—which may be imposed under the German Criminal Code. It notes in this connection that the applicant faced more far-reaching detriment as a result of his continued preventive detention—which to date has been more than three times the length of his prison sentence—than as a result of the prison sentence itself.

133. In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention.

137. In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention. . . .

For These Reasons, The Court Unanimously

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 7 § 1 of the Convention;

3. *Holds* . . . that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 50,000 (fifty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be paid into his lawyer's fiduciary bank account. . . .

Mork v. Germany

European Court of Human Rights (Fifth Section)
App. Nos. 31047/04 & 13386/08 (2011)

5. The applicant was born in 1955 and is currently detained in Aachen Prison.

6. Between 1978 and 1981 the applicant was convicted, among other offences, of numerous counts of joint burglary committed in companies and shops and was imprisoned from March 1980 until February 1985.

7. In 1986 the Dortmund Regional Court convicted the applicant of trafficking in drugs (hashish and cocaine) and sentenced him to eight years' imprisonment. The applicant was in pre-trial detention and served his sentence from August 1985 until June 1993.

8. In December 1996 the applicant was arrested and placed in pre-trial detention on suspicion of drug trafficking; he has remained in prison since then. . . .

9. In a judgment dated 9 February 1998 the Aachen Regional Court convicted the applicant of unauthorised importing of drugs and of drug trafficking committed in 1996 and involving some 280 kilos of hashish. It sentenced him to eight years and six months' imprisonment. It decided not to order the applicant's preventive detention under Article 66 of the Criminal Code as it was not convinced that the applicant was dangerous to the public owing to a disposition to commit serious offence. . . .

11. In a judgment dated 14 November 2001 a different chamber of the Aachen Regional Court ordered the applicant's (first) indefinite preventive detention pursuant to Article 66 § 1 of the Criminal Code. Having consulted a psychiatric expert and having regard to the applicant's personality and his previous convictions, the court considered that the applicant had a disposition to commit serious offences, was likely to commit further serious drug offences and was thus dangerous to the public. . . .

13. On 24 June 2002 the applicant, without being represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court against the two judgments of the Regional Court and the judgment and the decision of the Federal Court of Justice. He complained, in particular, that preventive detention was incompatible with his right to liberty under Article 5 § 1 of the Convention, which did not cover such a preventive measure. It further violated the prohibition of retrospective punishment under the Basic Law and Article 7 of the Convention because it was incompatible with the principle of legal certainty and because his preventive detention had been ordered without a maximum duration of ten years, which had been the maximum penalty at the time he committed his offences. Furthermore, his right to a fair trial had been breached in that the domestic courts had not subsequently respected the deal struck with the Regional Court that he

would not further contest the court's finding of facts in exchange for the court not ordering his preventive detention.

14. On 11 March 2004 the Federal Constitutional Court declined to consider the applicant's constitutional complaint. . . .

28. On 4 May 2011 the Federal Constitutional Court delivered a leading judgment concerning the retrospective prolongation of the complainants' preventive detention beyond the former ten-year maximum period and about the retrospective order of the complainants' preventive detention respectively. The Federal Constitutional Court held that all provisions on the retrospective prolongation of preventive detention and on the retrospective order of such detention were incompatible with the Basic Law as they failed to comply with the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty.

29. The Federal Constitutional Court further held that all provisions of the Criminal Code on the imposition and duration of preventive detention at issue were incompatible with the fundamental right to liberty of the persons in preventive detention because those provisions did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (*Abstandsgebot*). These provisions included, in particular, Article 66 of the Criminal Code in its version in force since 27 December 2003.

30. The Federal Constitutional Court ordered that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation and until 31 May 2013 at the most. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively, the courts dealing with the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their person or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder. As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of "persons of unsound mind" in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court's case-law. If the above pre-conditions were not met, those detainees had to be released no later than 31 December 2011. The other provisions on the imposition and duration of preventive detention could only be further applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was only respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

31. In its judgment, the Federal Constitutional Court stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to an international and European dialogue between the courts, but was, on the contrary, its normative basis in view of the fact that the Constitution was to be interpreted in a manner that was open to public international law (*völkerrechtsfreundliche Auslegung*). In its reasoning, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention made by this Court in its judgment in the case of *M. v. Germany* (2010). . . .

48. The Court refers to the fundamental principles laid down in its case-law on Article 5 § 1 of the Convention, which have been summarised in relation to applications concerning preventive detention in its judgment of 17 December 2009 in the case of *M. v. Germany* and in its judgment of 21 October 2010 in the case of *Grosskopf v. Germany*.

49. It reiterates, in particular, that for the purposes of sub-paragraph (a) of Article 5 § 1, the word "conviction" has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium* (1982) and *M. v. Germany*). Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time: There must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Stafford v. the United Kingdom* (2002); *Kafkaris v. Cyprus* (2008); and *M. v. Germany*). However, with the passage of time, the causal link between the initial conviction and a further deprivation of liberty gradually becomes less strong and might eventually be broken if a position were reached in which a decision not to release was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives (see *M. v. Germany*). . . .

51. In determining whether the applicant was deprived of his liberty in compliance with Article 5 § 1 during that preventive detention, the Court refers to its findings in its recent judgment of 17 December 2009 in the case of *M. v. Germany*. . . .

52. Having regard to these findings in its judgment in the application of *M. v. Germany*, from which it sees no reason to depart, the Court considers that the preventive detention under Article 66 of the Criminal Code of the applicant in the present case was based on his "conviction," for the purposes of Article 5 § 1 (a), by the Aachen Regional Court on 14 November 2001. However, the Court

emphasises that unlike the applicant in the *M. v. Germany* case, the applicant in the present case was not in preventive detention for a period beyond the statutory ten-year maximum period, applicable at the time of his offence, at the time of the domestic court decisions here at issue.

53. [B]oth the order for the applicant's preventive detention by the sentencing Aachen Regional Court in November 2001 and the decision of the Bochum Regional Court, responsible for the execution of sentences, of July 2007, confirmed on appeal, not to release the applicant, were based on the same grounds, namely to prevent the applicant from committing further serious drug offences, similar to those he had previously committed, on release. There is nothing to indicate that the assessment, that the applicant was likely to reoffend in that manner, which the domestic courts had reached after having consulted a psychiatric and psychotherapeutic expert on that point, was unreasonable in terms of the objectives of the initial preventive detention order by the sentencing court.

54. The applicant's preventive detention was also lawful in that it was based on a foreseeable application of Article 66 § 1 and Article 67c § 1 of the Criminal Code. The Court takes note, in this connection, of the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level.

55. The Court further observes that the Federal Constitutional Court, in its said judgment, considered, inter alia, Article 66 of the Criminal Code in its version in force since 27 December 2003 not to comply with the right to liberty of the persons concerned. It understands that the applicant's preventive detention, when reviewed in the future, will be prolonged only subject to the strict test of proportionality as set out in the Federal Constitutional Court's judgment. It notes, however, that the applicant's preventive detention here at issue was ordered and executed on the basis of a previous version of Article 66 of the Criminal Code. In any event, Article 66 of the Criminal Code in its version in force since 27 December 2003 was not declared void with retrospective effect, but remained applicable and thus a valid legal basis under domestic law, in particular, for the time preceding the Federal Constitutional Court's judgment. Therefore, the lawfulness of the applicant's preventive detention at issue for the purposes of Article 5 § 1 (a) is not called into question.

56. There has accordingly been no violation of Article 5 § 1 of the Convention.

For most of the past fifty years, Italian courts did not apply the European Convention on Human Rights (ECHR) directly. In the past decade, the Italian Supreme Court (*Cassazione*) began treating the Convention as binding and directly applicable when the ECHR establishes precise legal obligations that do not depend upon national implementing measures to be enforced.

On October 24, 2007, and following a string of findings by the European Court of Human Rights, the Italian Constitutional Court, for the first time, declared a national law (on compensation for expropriation) unconstitutional on grounds that it violated the ECHR (Protocol No. 1, right to private property). The Italian Court's ruling requires national judges to interpret national law, as far as is possible, in conformity with the ECHR; when such interpretation proves impossible, judges are to refer the matter to the Constitutional Court for a ruling on constitutionality.

In its decision, the Court distinguished EU law—which is now directly applicable by judges under certain circumstances—and the ECHR, whose relationship to the Italian Constitution is to be mediated by the Court, principally under Article 117 of the Constitution, requiring national law to be compatible with treaty law. The Court may void a national legal provision found to be in conflict with the ECHR, but it may also refuse to do so if it finds that the duty to respect Article 117 is outweighed by other values found in the Italian Constitution. Some ordinary courts have proceeded as if the ECHR were directly applicable and precluded application of conflicting national law, and done so without a reference to the Constitutional Court.

Italian Constitutional Court

No. 348-2007 (2007)

[4.7] The arguments set out above do not imply that the ECHR, as interpreted by the Strasbourg Court, acquires the force of constitutional law and is therefore immune to assessments by this court of its constitutional legitimacy. It is precisely because the provisions in question supplement a constitutional principle, whilst always retaining a lower status, that it is necessary that they respect the Constitution. The special nature of these provisions, which are different from both

EC and treaty law, means that the examination of constitutionality cannot be limited to the possible violation of fundamental principles and rights or of supreme principles, but must extend to any contrast between "interposed rules" and the Constitution.

The requirement that the provisions which supplement the constitutional principle themselves respect the Constitution is absolute and non-derogable in order to avoid falling into the paradox of a legislative provision being declared unconstitutional on the basis of another interposed provision, which in turn breaches the Constitution. In all questions flowing from claims of incompatibility between interposed rules and internal ordinary legislation, it is necessary to establish at the same time that both respect the Constitution, and more specifically that the interposed rule is compatible with the Constitution, as well as the constitutionality of the contested provision in the light of the interposed rules.

Where an interposed source is found to be in breach of a provision of the Constitution, this court has a duty to declare the inability of the Constitution to supplement that principle, providing, according to established procedures, for its removal from the Italian legal order.

Since, as mentioned above, the provisions of the ECHR live through the interpretation given to them by the European Court, the examination of constitutionality must give consideration to the norm as a product of interpretation, and not the provisions considered in themselves. It must also be emphasised that the judgments of the Strasbourg Court are not unconditionally binding for the purposes of the verification of the constitutionality of national laws. Such controls must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by Article 117(1) of the Constitution, and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution.

In summary, the complete effectiveness of interposed rules is conditional on their compatibility with the Italian constitutional order, which cannot be modified by external sources, especially if these are not created by international organisations in relation to which limitations on sovereignty have been accepted such as those provided for in Article 11 of the Constitution.

CONCEPTUALIZING THE EXCHANGES

Ricardo Lorenzetti

Global Governance: Dialogue Between Courts[*]

When Argentina approved the American Convention on Human Rights (Pact of San Jose, Costa Rica) in 1984, it recognized "the competence of the Inter-American Commission on Human Rights and on the jurisdiction of the Inter-American Court of Human Rights."

In *"Giroldi, Horacio David,"* decided on April 7th, 1995, the Court unanimously held that the Constitution includes not only the treaties on human rights, but also the case-law of international tribunals, since the interpretations of those tribunals indicate the conditions under which the international instruments are "in force." The Court pointed out that, "the cited jurisprudence should serve as a guide for the interpretation of the convention in the manner in which the Argentine State recognizes the competence of the Inter-American court in all cases relative to its interpretation and application of the American Convention."

[I] would like to present a case on "constitutional pluralism" that arose in the trial of a "crime against humanity," which will illustrate the relationship between the Inter-American Court of Human Rights and the Argentinean Supreme Court.

The first case I would like to talk about is "*Arancibia Clavel, Enrique Lautaro*" decided on August 24th, 2004. The facts of the case: Arancibia Clavel was accused of being involved in the car-bombing which killed the Chilean General Carlos Prats and his wife, in Buenos Aires in 1974. An Argentine federal tribunal sentenced him to life imprisonment for his participation in a criminal association. The National Court of Criminal Cassation partially reversed the lower court ruling and declared that the conviction for criminal association was barred by statutory limitations. The Supreme Court reversed the judgment and held that the conduct of Mr. Arancibia Clavel had to be considered as a *crime against humanity* and as such, it was not time-barred. According to the Court, these constitute crimes against humanity since the group of which Arancibia Clavel formed part had as its purpose the persecution of Pinochet's political opponents by means of homicides, forced disappearances and torture with the acquiescence

[*]Excerpted from Ricardo Lorenzetti, President of the Supreme Court of Argentina, Presentation at the International Summit of High Courts, Global Governance: Dialogue Between Courts (Nov. 1-3, 2010), *available at* http://www.summitofhighcourts.com/docs/papers/argentina.pdf.

of government officials. To support that assertion, the judges cited the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention on the Forced Disappearance of Persons, and some decisions of the Inter-American Court of Human Rights. In addition, the Court stated that crimes against humanity were against the law of nations as stipulated in article 118 of the National Constitution. Having established that these are crimes against humanity, the majority went on to say that the applicable law governing the statute of limitations is the 1968 United Nation's Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had acquired constitutional hierarchy by law No. 25.778. . . .

The second important case is "*Simón, Julio Héctor*," decided on June 14th, 2005. Julio Héctor Simón, a former officer of the Federal Police, was indicted for the crimes against humanity of illegal arrest, torture and forced disappearance of José Poblete Roa and his wife, and for the appropriation of their daughter Claudia. . . . The defense of Julio Simón argued that they benefited from the immunity from prosecution established in the so-called "due obedience law" and "full-stop law."

The Supreme Court, by a majority of 7-1, confirmed the lower-court decisions and held that the amnesty laws were null and void and unconstitutional. . . . In light of the fact that the full stop and due obedience laws were passed to "forget" past human rights abuses, they are in stark contradiction with the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights. The majority also based its decision on the rulings of the Inter-American Court of Human Rights, in particular, the *Barrios Altos v. Perú* (2001) case, in which the Court held that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

[T]aken these cases into account, we can identify a plurality of sources: the Rome Statute of the International Criminal Court; the Convention on the Prevention and Punishment of the Crime of Genocide; the United Nation's Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the International Covenant on Civil and Political Rights; the law of nations; the Inter-American Convention on the Forced Disappearance of Persons; the decisions of the Inter-American Court of Human

Rights; the National Constitution; some previous cases of the Supreme Court; the American Convention on Human Rights.

This is a nice picture of what "constitutional pluralism" really means: the Court needs to decide the case with different sources of law, coming from different levels: national and international; and, in many situations, they are in a non hierarchical order.

In other times, the rationality of the legal system was "a priori" and was defined by the Congress. In our times, the rationality is "a posteriori," set by the judge, and case by case.

All in all, dialogue between sources of law, in front of a case, is the real challenge of the judicial decision.

Inter-American Court of Human Rights, San Jos., Costa Rica, circa 1960; expanded in 2004.

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Víctor Abramovich

From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System[*]

The Inter-American System of Human Rights (ISHR), during the last decade, has influenced the process of internalization amongst the legal systems in various countries in Latin America. During this period, more countries have accepted the jurisdiction of the Inter-American court (such as Mexico and Brazil) and have given the American Convention constitutional status, or higher, compared to the laws of their judicial systems. Lawyers, judges, legal practitioners, officials and social activists have learned much about the workings of the ISHR and have begun to use it in a manner that is no longer extraordinary or selective. In addition, they have begun to cite its decisions and ground arguments in its precedents both in the local courts and in the public policy debates. This led to the gradual application of ISHR jurisprudence in constitutional courts and national supreme courts, and most recently, although to a lesser degree, in the formulation of some state policies. This process of incorporating international human rights law at the national level led to important institutional changes.

For example, the legal standards developed by the jurisprudence of the Inter-American Commission (IACHR or Commission) and of the Inter-American Court (IACHR Court or Court) about the invalidity of the amnesty laws pardoning gross violations of human rights, gave legal support to the transparency of trials against those charged with crimes against humanity, in Peru and Argentina. . . .

This process, however, is not linear. It encounters problems and obstacles and has also suffered some setbacks. The ISHR, furthermore, finds itself in a period of intense debates that seek to define its thematic priorities and logic of intervention, in a new regional political environment of deficient and exclusionary democracies, different from the political landscape in which it was born and took its first steps, with the South American dictatorships in the 1970s and the Central American armed conflicts of the 1980s. . . .

The ISHR . . . interprets certain procedural rules that define the criteria for its intervention in such a way that the autonomy of the states is respected. . . .

[*]Excerpted from Víctor Abramovich, *From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System*, 6 SUR INT'L J. HUM. RTS. 7 (2009).

The first rule, of "prior exhaustion of domestic remedies," although it is procedural in nature, is a key factor in understanding the working dynamic of the Inter-American system and especially its subsidiary role. By requiring that parties exhaust all remedies available in the state's national judicial system, it gives each state the opportunity to resolve conflicts and remedy violations before the matter is considered in the international arena. . . .

The second rule, known as the "fourth recourse," functions as a kind of deference to national judicial systems, because it allows them the autonomy to interpret local norms and decide individual cases, subject to the exclusive condition that they respect procedural due process guarantees established in the Convention. . . .

A focal point of the ISHR's new agenda is to address issues relating to the functioning of judicial systems, which have an impact on or connection with the promotion of human rights. This includes procedural due process guarantees of the accused in criminal proceedings, as well as the right of certain victims, harmed by structural problems relating to the impunity of crimes committed by the state (by police and prison officials), to have equal access to the justice system. . . .

The ISHR's jurisprudence has had a considerable impact on the jurisprudence of the national courts that apply the norms of international human rights law. . . . This *globalization of human rights standards*, while not attaining the same level of development through the entire region and while subject to the precariousness of the national systems, has undoubtedly had a positive effect on the transformation of these same judicial systems, and has generated greater attention amongst the state authorities in regard to the ISHR's developments. . . .

The influence of the ISHR, however, does not limit itself to the impact of its jurisprudence on the jurisprudence of local courts. Another important avenue for strengthening democratic institutions in the states stems from the ISHR's ability to influence the general direction of some public policies, and in the formulation, implementation, evaluation and oversight of those same policies. It is thus common that individual decisions adopted in one case generally impose upon states the obligation to formulate policies to redress the situation giving rise to the petition, and the duty to address the structural problems that are at the root of the conflict analyzed in the case.

The imposition of these positive obligations is generally preceded by a review of the legal standards, implemented policies, or lack of action (omission) of the state. These obligations may include changes in existing policies, legal

reforms, the implementation of participatory processes to develop new public policies and often the reversal of certain patterns of behavior that characterize the actions of certain state institutions that promote violence. This includes police violence, abuse and torture in prisons, the inaction of the state when confronted with domestic violence, policies of forced displacement of the population in the context of armed conflicts, and massive displacement of indigenous peoples from their ancestral lands.

Furthermore, in the context of individual cases, the ISHR, especially the Commission, promotes friendly settlements or negotiations between the petitioners and the states, where the latter will often agree to implement these institutional reforms or create mechanisms to consult with civil society in the formulation of policy. Consequently, in the context of amicable solutions, some states have changed their laws. . . .

The IACHR also makes recommendations about public policy in its country reports. In these reports, it analyzes specific situations where violations have taken place and makes recommendations to guide state policies based on legal standards. . . .

Finally, the Inter-American Court of Human Rights may issue advisory opinions, which are used to examine specific problems that go beyond the contentious cases, and set the scope of state obligations deriving from the Convention and other human rights treaties applicable at the regional level, such as the legal status of migrant workers, and the human rights of children and adolescents. In these advisory opinions, the Court has sometimes tried to establish legal frameworks for policy development. For example, Advisory Opinion 18 seeks to define a set of principles that should orient states' immigration policies, in particular the recognition that undocumented immigrants should enjoy certain basic social rights. In Advisory Opinion 17, the Court seeks to influence policies aimed at imposing limits on criminal provisions directed at children. . . .

The authority of the decisions and of the jurisprudence of the System depends in part on their social legitimacy and on the existence of a community of engaged actors who monitor and disseminate their decisions and standards. It does not exert its influence through coercive mechanisms, which it lacks, but through a power to persuade that it should build upon and preserve. . . .

Many countries in Latin American ratified human rights treaties and joined the ISHR as they transitioned to a democratic regime, as a kind of antidote to reduce the risk of a return to authoritarianism, tying their legal and political systems to the "mast" of international protection. Subjecting human rights issues

to international scrutiny was a functional decision made in furtherance of institutional consolidation during the transition period, as it served to fortify fundamental human rights protection in a political system hamstrung by military actors with veto powers, and still powerful authoritarian pressures. . . .

While in the last decade countries in the region have made considerable progress incorporating international human rights law into their national legal system, the Court's jurisprudence is seen as a guide, even an "indispensable guide" for the interpretation of the American Convention by local judges, the process is not linear and there are dissident voices.

Recent decisions of appellate courts in the Dominican Republic and Venezuela have downplayed the forcefulness of the Court's decisions and sought to give national courts the power to review its decisions (a legality test), to assess the compatibility of the international organ's decision with the country's constitution. This is an on-going debate amongst the continent's different judicial systems, where resistance to the incorporation of international human rights law in national legal systems still carries considerable weight, and many argue for greater national autonomy in this area.

Alec Stone Sweet

Trustee Courts and the Evolution of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO[*]

The European Court of Human Rights [ECTHR] performs three governance functions. It renders justice to individual applicants beyond the state (a justice function); it supervises the rights-regarding activities of all national officials, including judges (a monitoring function); and it determines the content of Convention rights (a law-making function). . . .

In the European Convention on Human Rights [ECHR] (as in all national constitutions adopted in Europe since the end of WWII), important fundamental rights are "qualified" by limitation clauses. States may limit the enjoyment of rights associated with privacy and family life (Article 8), conscience and religion (Article 9), expression (Article 10), and assembly and association (Article 11)

[*] *Excepted from* Alec Stone Sweet, *Trustee Courts and the Evolution of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO* (Working Paper 2012).

when "necessary" to achieve certain purposes. In the standard formula, states may "interfere with" or "restrict" the "exercise" of a Convention right, but only when such interferences are "prescribed by law," and "are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." The ECTHR has developed a version of the proportionality framework to test "necessity."

The ECTHR typically uses necessity analysis to determine how much discretion—the size of the "margin of appreciation"—states possess when they act under limitation clauses. If the Court finds that a state measure under review is "necessary" to achieve its goals under one of the headings, the state will maintain its regulatory autonomy. If the Court finds that a national law or other general measure is the source of a violation, then the state will be subject to repetitive petitions and findings of violation until it changes its law. Most important for our purposes, the Court uses necessity analysis to determine when the scope of a right deserves expansion. . . . The Court will typically raise the standard of protection in a given domain when a sufficient number of states have withdrawn public interest justifications for restricting the right. Put differently, the margin of appreciation afforded states to strike an appropriate balance will shrink as state consensus on higher standards emerges. . . .

In order to assess how the Court determines if a new consensus among states has emerged, we examined rulings rendered between January 1, 1999 and January 28, 2010, focusing on individual petitions pleading a right contained in Articles 8-1. . . . Since the entry into force of Protocol No. 11, Grand Chambers have issued 246 rulings on the merits, finding violations in 179 cases (73%). Individuals pleaded one or more rights contained in Articles 8-11 in 91 of these rulings, 54 (59%) of which found violations.

In 26 (29%) of the 91 cases involving Articles 8-11, Grand Chambers used one or more techniques of gauging state consensus within necessity analysis. In these cases, the crucial moment occurs when the Court assesses the level of state consensus. Cases are won or lost, and precedents are reassessed, at this point in the ruling. As a result, petitioners, the defendant state, and third-parties (NGOs and states filing as *amici*) collect and report evidence of state practice to the Court; and the Court often undertakes its own investigations. This evidence can take the form of: (1) a count of states that restrict (or no longer limit) a right in a particular way, through of a survey of relevant national legislation, case law, and administrative practice; (2) EU law and Council of Europe positions, as evidence of European consensus; and (3) international conventions to which states are parties. The ECTHR may also treat, as pertinent to the analysis, the rulings

outside the regime, such as Canada and South Africa, and the Inter-American Court of Human Rights. The Court often blends evidence from these various sources to arrive at a conclusion. It is important to stress that sections process the vast bulk of these cases and they to routinely engage in "consensus analysis" when evaluating the "necessity" of state measures.

To illustrate, consider the response to discrimination against homosexuals. In the 1980s, the Court found that laws criminalizing homosexual acts violated Article 8 (privacy), decisions that opened the door to the review of *all* national law that denied homosexuals equal rights. The Court has taken an activist and majoritarian stance, steadily raised protection in this field, as social mores have evolved. In 1999, a section held that the UK's prohibition against gays and lesbians serving in the military violated Article 8; the judges rejected the claim that the ban was necessary to preserve morale in the armed forces, stressing that the UK's position was a distinctly minoritarian one. The UK, after further inquiry, rescinded the ban. In 2010, a section found a violation of Article 11 (assembly), 13 (access to justice), and 14 (non-discrimination) in three cases involving the recurrent refusal of Russian authorities to permit "Gay pride" parades. Russia claimed a wide "margin of appreciation" when "homosexual behavior" spilled from the private into the public domain, which the section rejected on the grounds of solid state consensus to the contrary. In 2008, a Grand Chamber held that France could not withhold authorization from a lesbian woman attempting to adopt a child, although the judges could count only 10 states permitting the practice. Since the Grand Chamber stressed that the French Council of State had based its decision on the woman's homosexuality, the ruling could be considered to be an application of settled case law. The oracular nature of the ruling, however, was obvious, and France changed its law.

Majoritarian activism also applies to negative cases. If the Court finds that state consensus on extending the scope of rights protection has not emerged, or has not yet been consolidated, it will balk at extending the scope of a right. In a 2010 case, for example, a Grand Chamber decided an Article 8 case involving same-sex marriage in these terms:

> The Court [finds] that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, [thus] States … enjoy a margin of appreciation in the timing of the introduction of legislative changes.

The finding of non-violation indicates that laggard states will not be able to maintain the *status quo*. In 2011, the Court rejected a challenge to Austria's ban on *in vitro* fertilization using donated genetic material. A section declared that although "there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging, but not yet consolidated, 'consensus.'" In these and many other rulings, states may have survived a challenge, but they have been put on notice that change is coming.

In sum, consensus analysis, staged within the necessity test of the proportionality framework, often determines how Convention rights will evolve. The Court treats rights as both substantively and temporally incomplete norms, to be constructed dynamically as social mores evolve. Although the Court regularly overturns precedent to raise standards of rights protection under the Convention, the Court has never reversed a precedent in order to reduce the level of protection. Once national regulatory autonomy has been lost in a given field, states have never regained it.

Alec Stone Sweet

A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe[*]

A cosmopolitan legal order [CLO] is a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship. In Europe, a CLO has emerged with the incorporation of the European Convention on Human Rights [ECHR] into national law. The system is governed by a decentralized sovereign: a community of courts whose activities are coordinated through the rulings of the European Court of Human Rights [ECTHR]. While imperfect and still maturing, the regime meets significant criteria of effectiveness. It routinely succeeds in raising national standards of rights protection; it has been crucial to the success of transitions to constitutional democracy in post-authoritarian states; and it has steadily developed capacity to render justice to fall people that come under its jurisdiction, even those who live, and whose rights are violated, outside the territory of the Convention. . . .

[*]Excerpted from Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53 (2012).

By *rights cosmopolitanism*, I mean the recognition of a legal duty to provide justice under the cosmopolitan constitution. A CLO is a legal system in which all public officials bear an obligation to respect the fundamental rights of every person within their jurisdiction. . . . The ECHR occupies a central strategic position in the CLO, given that individuals have an unfettered right to petition the Court once national remedies have been exhausted.

Constitutional pluralism is a structural characteristic of a legal system. Within the domestic constitutional order, the term refers to a situation in which two or more sources of judicially-enforceable rights co-exist. In many national legal systems, three such sources—national constitutional rights, EU rights, and the ECHR—overlap. Individuals have a choice of which source to plead, and judges have a choice of which right to enforce. These choices have consequences, as when national judges prefer to apply European rights, rather than their own constitution law, as a means of raising standards of protection.

The term, *constitutional pluralism*, also refers to systemic features of the CLO. The fact that ECHR maps onto rights found in national systems undergirds the notion of a multi-level constitutionalism: no act taken by any public authority, at any level of governance, can be considered lawful if it violates a fundamental right. . . . The structure of authority within this presupposed constitution is pluralistic, in that the system is comprised of discrete hierarchies, national and Treaty-based, each of which has a claim to autonomy and legitimacy. In Europe today, judges intensively interact with one another across jurisdictional boundaries with reference to questions of rights adjudication that they collectively confront.

[The] construction of a pluralistic, constitutional system [is] a momentous outcome given legacies of the past. In Europe, traditional models of the juridical state are grounded not in notions of legal pluralism, but *sovereignty*. These models depict the legal system as hierarchically organized, with one organ positioned to defend the integrity of the hierarchy of norms that constitutes it. This organ is considered to be the repository of *centralized sovereignty*, to the extent that it possesses a monopoly on the authority to resolve certain legal questions. In the archetypal cases, a constitutional court (under rights-based constitutionalism) or a parliament (under a regime of legislative sovereignty) are considered to possess the ultimate authority to resolve issues involving the validity of, or conflict among, legal norms within the system.

A CLO is a legal system in which fundamental rights are enforced by a "decentralized sovereign" . . . . The regime is not hierarchically constructed with one jurisdiction positioned to render a "final word" on questions of legal validity

at each level of governance. From an internal perspective given by the Convention, the European Court is the authoritative interpreter of Convention rights. The Court, however, does not possess the authority to invalidate national measures that conflict with the Convention. If and how the Court's rulings are "implemented" in the national legal order depends entirely on the decision-making of national officials under national rules. What makes the system "constitutional" is an overarching normative structure: the code of rights that officials are under a legal duty to enforce; and a set of shared techniques that judges, in particular, have developed to adjudicate rights. . . . In Europe, states have pooled and then distributed sovereignty in such a way as to create a layered set of "nodes" of judicial authority to protect rights. Each of these nodes is autonomous; yet the cosmopolitan order exists only in so far as national judges credit their roles in a common project. . . .

In the CLO, overlapping competences count as a good in so far as individuals (a) have multiple points of access to the decentralized sovereign, and (b) healthy competition among nodes of authority serves to upgrade, rather than reduce, a collective commitment to rights protection.

The CLO in Europe is comprised of three interlocking elements. First, individuals are able to plead fundamental rights, including the Convention, before national judges. Although the ECHR does not require incorporation into the domestic order, all 47 states have now done so, in ways that make it binding on all public authorities and enforceable by national judges. . . . Second, national systems of rights protection are formally linked to a realm of rights adjudication beyond the state: every individual, regardless of citizenship, possesses an unfettered right to petition the European Court, once national remedies have been exhausted. Third, the ECHR comprises an autonomous source of rights doctrine. The Court treats the Convention as a "living" instrument, which is interpreted and applied in order to secure the effectiveness of rights, as society evolves. . . .

[Below] I describe the development of constitutional pluralism within the *domestic* order, a process that removed obstacles to the emergence of the CLO. Most important, it destroyed the constitutional dogmas associated with legislative sovereignty, crucially, the prohibition of judicial review of statutes.

Constitutional pluralism first emerged in Europe with the consolidation of the doctrines of the *direct effect* and *supremacy* of EU law, announced by the European Court of Justice (ECJ) in the 1960s. . . .

Supremacy challenged the prohibition of judicial review in that it required judges to refuse to apply any norm, including statutory provisions, found to be in

conflict with EU law. By 1989, every high court in the EU had accepted supremacy, and the courts of new member states quickly joined them. The result: all judges acquired the power of judicial review of statute, albeit only in areas governed by EU law, authority otherwise denied to most courts under national constitutional law. In systems in which a constitutional court defends the primacy of the constitution and rights, the ECJ's case law fatally undermined the presumed monopoly of the constitutional judge to determine the conditions under which the ordinary (non-constitutional) could refuse to apply relevant statute.

While it may be argued that the supremacy doctrine constituted a sovereignty claim on the part of the ECJ, no national constitutional court has accepted supremacy as the ECJ understands it. The ECJ, in effect, holds that all national judges are agents of the EU legal order, not the national order, whenever they act in domains that fall within the scope of EU law. The ECJ further asserts that it alone possesses the ultimate authority to determine the compatibility of EU law with fundamental rights. National constitutional courts assert that EU law—including the doctrine of supremacy—enters into national law through their own constitution, and does not deprive them of their own "final word" on the constitutionality of EU acts. . . . On the ground, most ordinary courts, including supreme courts, routinely behave as faithful agents of the EU order when they adjudicate EU law. Some go further, overtly leveraging the ECJ in order to expand their own authority and to subvert that of the domestic constitutional order.

[P]rotocol No. 11 confers upon the Court compulsory jurisdiction over individual petitions that claim a violation of Convention rights, after exhausting national remedies. If the Court finds a violation, it may award monetary damages. Unlike a national constitutional court, the Court has no authority to invalidate a national norm that conflicts with the Convention. . . . Under Protocol No. 11, the number of petitions exploded. In 1999, the Registry of the Court received 8,400 complaints, a figure that has increased every year thereafter. In 2010, the Court registered 61,300 applications. Although some 96% of all petitions will be ruled inadmissible for one reason or another, the Court is overloaded. The annual rate of judgments on the merits shows a similar trend. . . . In 1999, it rendered 250 judgments; 1,200 in 2005; and 1,607 in 2010. Under Protocol No. 11, the Strasbourg Court is the most active rights protecting court in the world.

The CLO is a product of Protocol No. 11 and the incorporation of the ECHR into domestic legal orders. [D]omestification of the Convention proceeded via different routes: express constitutional provision (Austria, many post-Communist states); judicial interpretation of constitutional provisions related to treaty law generally (most states in Western Europe); or special statutes (UK,

Ireland, and Scandinavian states). With incorporation, all national courts in the system are capable of enforcing the Convention: individuals can plead the ECHR at national bar against any act of public authority; judges are under a duty to identify statutes that conflict with Convention rights, and to interpret statutes in lights of the ECHR to avoid conflicts whenever possible; and virtually all courts may refuse to apply statutes that conflict with Convention rights, with the notable exception of those in the UK and Ireland.

Incorporation is an inherently constitutional process: it subverted centralized sovereignty at the national level, while provoking dynamics of systemic construction at the transnational level. The Convention quickly developed into a "shadow," or "surrogate," constitution in every state that did not possess its own judicially-enforceable charter of rights (including original signatories, Belgium, France, the Netherlands, Switzerland, and the UK). In the 1990s, Finland, Norway, and Sweden enacted new Bills of Rights, closely modeled on (and invoking) the ECHR, in order to fill gaps in their own constitutions.

In those states that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection. We find this situation in Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-Communist states. The Spanish Constitutional Tribunal, for example, enforces the ECHR as quasi-constitutional norms. The Tribunal will strike down statutes that violate the Convention as *per se* unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court's jurisprudence as a matter of *constitutional* obligation, including case law generated by litigation not involving Spain. If the judiciary ignores the Court's jurisprudence, individuals can appeal directly to the Tribunal for redress. Nonetheless, the Tribunal insists that in the event of an irreconcilable conflict between the ECHR and the Spanish Constitution, the latter will prevail—a common position among constitutional courts. In many post-Communist states, as well, constitutional judges invoke the Strasbourg Court's jurisprudence as authority, in order to enhance the status of fundamental rights—and hence their own positions—in the domestic context.

Strikingly, some states give the Convention constitutional rank (e.g., Albania, Austria, Slovenia); and, in the Netherlands, the ECHR enjoys supra-constitutional status. In Belgium, the Constitutional Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, while the Supreme Court holds that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy *vis à vis* the Constitutional Court.

One could continue in this vein, but the basic point has been made. The incorporation of the ECHR generated constitutional pluralism and inter-judicial competition within the national order; it destroyed doctrines that underpinned centralized sovereignty (e.g., legislative supremacy, the monopoly of constitutional courts over the domain of rights protection); and it enhanced judicial power with respect to legislative and executive power.

Constitutional pluralism expands the discretionary authority of courts. Many judges will now refuse to apply law that conflicts with the Convention; at the same time, they are rapidly abandoning traditional methods of statutory interpretation. Instead of seeking to discern legislative intent, judges increasingly favor the purposive construction of statutes in light of fundamental rights jurisprudence. In systems in which multiple, functionally-differentiated, high courts co-exist (the majority of states), pluralism means that the supreme courts of ordinary jurisdiction may assume the mantle of *de facto* constitutional courts whenever they review the *Conventionality* of statutes. France, which for two centuries famously embraced and propagated the dogmas of the General Will (legislative sovereignty and the prohibition of judicial review), is now a robust example of pluralism. From the point of view of the rights claimant, the Supreme Civil Court (*Cour de Cassation*) and the Council of State (the supreme administrative court) function as the "real" constitutional courts; and litigants and judges treat the Convention as the "real" charter of rights. The outcome is dictated by the fact that individuals have no direct access to the Constitutional Council[28]; and it is the European Court, not the Constitutional Council, that supervises the rights-protecting activities of the civil and administrative courts. Today, three autonomous high courts protect fundamental rights on an on-going basis; and there is no formal means of coordinating rights doctrine, or of resolving conflicts, among these courts. Without revising the constitution or exiting the ECHR, French officials are now locked into a pluralist system of rights protection.

Some of the most powerful states in Western Europe have had the greatest difficulty incorporating the ECHR to permit judges to enforce it against statute. In legal terms, the structural problem concerns the fact that in so-called "dualist" systems—including original signatories, Germany, Ireland, Italy, Sweden, Norway, and the UK—constitutions confer upon treaty law the same rank as statute. In such systems, conflicts between statutes and treaty provisions are expected to be resolved according to the rule, *lex posterior derogat legi prioris*. The rule is anathema to a CLO, since legislation adopted after the transposition of the ECHR into national law would normally be immune from review under the

[28] In 2008, the French Constitution was revised to permit the Supreme Court and the Council of State to refer laws to the Constitutional Council for review, in the context of ongoing litigation.

Convention. What is critical for the emergence of the CLO is that, in these states, the rule has been relaxed or overridden altogether.

In Italy, at least until the late-1960s, "Italian courts refused to apply the Convention . . . considering its provisions to be merely programmatic." In the past decade, courts incorporated the Convention, destroying the *lex posterior* rule and producing a pluralist order. In 2004, the Supreme Court (*Cassazione*) began treating the Convention as directly applicable, while in 2007, the Italian Constitutional Court (ICC) struck down a statute (concerning expropriation) as unconstitutional on the grounds that it violated property rights under the Convention. In its decision, the ICC held that Italian judges are required to interpret national law in light of the ECHR and, where a conflict is unavoidable, to refer the matter to the ICC. Some judges have chosen to ignore this jurisprudence. In 2008, for example, a court of appeal decided on its own authority to refuse to apply a controlling statute on grounds that it was incompatible with the Convention. The situation has given rise to a fierce debate: does the ECHR enjoy supra-legislative but infra-constitutional rank (the ICC's position) or constitutional status (the position of some civil courts and scholars)? This is yet another example of constitutional pluralism in action.

In Germany, overcoming the *lex posterior* rule has been tortuous. . . . In its *Görgülü* decision (2005), the [German Federal Constitutional Court (GFCC)] repudiated the "traditional theory" according to which the Strasbourg's Court's judgments did not bind the domestic organs of government, including the courts. The ruling establishes a strong presumption that judges are to apply the Court's jurisprudence when it is on point, except in "exceptional" circumstances, namely, when "it is the only way to avoid a violation of the fundamental principles contained in the Constitution." As important, the GFCC's ruling expanded the constitutional complaint procedure: individuals can now challenge (as a violation of their constitutional rights) judicial rulings that ignore or fail to properly take into account the European Court's case law. While *Görgülü* significantly bolstered the status of the ECHR within the domestic order, the GFCC also noted that it would settle any conflict between the Basic Law and the ECHR in terms of the former.

In 2011, the GFCC declared that the ECHR and the European Court's case law comprise interpretive "aids for the determination of the contents and scope of the fundamental rights and of rule-of-law principles enshrined in the Basic Law."

Like *Görgülü*, the GFCC's *Preventive Detention* ruling ended a convoluted saga involving a direct conflict between the German courts and the European Court. In 2009, in *M v. Germany*, the Strasbourg Court had held that

German law allowing the further detention of convicted criminals after they had served their prison sentences violated the ECHR. The GFCC had upheld the constitutionality of the relevant statute in 2004, in so far as such detention was deemed necessary to protect public security. When the GFCC appeared reluctant to change its position following the *M* judgment, the European Court issued a series of rulings finding the same violation. In *Prevention Detention*, the GFCC overturned its 2004 ruling, on the grounds that the Strasbourg's court's case law had constituted a significant "change in the legal situation." The Court then went on to ground the Basic Law's "openness" to the Convention in Article 1.2 of the Basic Law (which recognizes human rights as foundational principles). As a result, all organs of the state are under a duty "not only to take into account" the ECHR in their decisions, but "to avoid conflict" between it and national law. "The openness of the Basic Law," the GFCC stated, "expresses an understanding of sovereignty that not only does not oppose international and supranational integration, it presupposes and expects [integration]."

By formally recognizing the overlapping nature of fundamental rights in Europe, the GFCC has taken a cosmopolitan position. In *Görgülü*, the GFCC had already declared that its own rights protecting role is exercised "indirectly in the service" of the Convention, an engagement that both protects Germany from findings of violations and "contributes to promoting a joint European development of fundamental rights." In *Preventive Detention*, the GFCC acknowledged a dialogic relationship with the Strasbourg Court, without abandoning its position on the primacy of the Basic Law: "The fact that the German constitution has the final word is not incompatible with an international and European dialogue between courts, rather it [comprises the dialogue's] normative foundation." In June 2011, two months after *Preventive Detention*, the European Court responded favorably, finding no violation in a related case, *Mork v. Germany* (2011). The Court noted: "In its judgment, the GFCC stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to . . . dialogue between the courts," and that "in its reasoning, [the GFCC] relied on the interpretation . . . of the Convention made by this Court in its judgment in the case of *M. v. Germany*." The outcome illustrates one basic mechanism—dialogue among autonomous courts—through which decentralized sovereignty can increase the effectiveness of the ECHR.

In two states—Ireland and the UK—the *lex posterior* rule has also been relaxed, although no judge is authorized to set aside legislation conflicting with the Convention. . . . In Norway and Sweden, which incorporated the ECHR through human rights statutes in the 1990s, the courts must give primacy to the Convention when in a conflict with legislation. In the past decade, Norwegian

courts in particular have positioned themselves to become active participants in the development of Convention rights.

While the dynamics of incorporation are heavily mediated by constitutional provisions and doctrine, important strategic interests have been catalysts. In the 1990s, incorporation constituted a formal means for post-Communist states to signal their commitment to the massive institutional reforms being demanded by Western states. As a growing scholarly literature has shown, the ECHR has played a crucial role in democratic transitions after 1989. New bills of rights were modeled on the ECHR, with an eye towards future membership in the EU and the Council of Europe; and some states even signed the ECHR prior to ratifying new constitutions (including Albania, Armenia, Azerbaijan, Georgia, Poland, Slovakia, and Ukraine). For the core states of Western Europe, folding the post-Communist states into the ECHR also fulfilled important strategic interests. Protocol No. 11 reconstructed the regime, making it an extraordinarily efficient mechanism for monitoring the functioning of post-Communist states. For Western states, the cost of Protocol No. 11 is enhanced supervision of their own rights-regarding activities, a cost they have thus far been willing to pay. . . .

The Court routinely generates new rights and expands the scope of existing ones, placing even powerful states out of compliance with the Convention. … Most of the original signatories of the Convention assumed that the treaty enshrined minimalism, thereby affording substantial latitude in how states would balance public interests and rights. One might also suppose that a transnational court would have weaker political legitimacy in comparison with national courts. After all, the typical national judge is embedded in a liberal democratic order, and s/he is a native of the legal system in which the rights conflict has taken place. The transnational judge's gaze, in contrast, is an alien presence. Why has this situation not led to a jurisprudence of rights minimalism?

The answer lies in how decentralized sovereignty operates. Three factors deserve emphasis. First, the Court expends great resources to convince its audience that it fully understands the richness and particularity of the dispute, as well as variation in the relevant national law across the regime. In its rulings, the Court carefully traces the process through which individuals exhausted remedies, and it dwells on the arguments briefed by the defendant state and others filing as *amici*. Findings of violation may not convince states, but it is not plausible to argue that the Court has ignored domestic law and context. The practice also helps the Court provide guidance on how violating states should change their laws, which it now does routinely when the source of a violation is a general legal norm or practice.

Second, the Court has developed a doctrinal framework—proportionality analysis (PA)—to adjudicate virtually all Convention rights, and it insists that all national courts use it as well. [H]ow any qualified right is actually enforced will always be contingent upon local law and context, while the state that would infringe a right bears the burden of justifying the necessity of the means chosen. What is common across the national systems that comprise the CLO is not a list of norms defined in a lowest-common denominator manner, but a mode of argumentation, and justification: the proportionality framework.

The Court uses PA, in part, to determine how much discretion—the "margin of appreciation" in the jargon—states should have in infringing a right for public purposes. In practice, the Court combines PA with a simple comparative method for determining when the scope of a Convention right has expanded. Typically, the Court will raise the standard of protection in a given domain of law when a sufficient number of states have withdrawn public interest justifications for restricting the right. The margin of appreciation thus shrinks as consensus on higher standards of rights protection emerges within the regime, shifting the balance in favor of future applicants. …

Third, the incentives facing national judges push them toward implementing the Court's progressive rulings, as well as raising standards on their own. Simplifying a complex topic, there are several basic logics at work. The first is an "avoidance of punishment" rationale: enforcing Convention rights will make the state—in practice, the judiciary—less vulnerable to censure in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second dynamic is embedded in domestic politics. Individuals and NGOs may seek to leverage the ECHR to alter law and policy, and national judges may work to entrench Convention rights in order to enhance their own authority with respect to legislators and executives. Third, as the CLO gains in effectiveness, the interest high courts have in using the Convention, and seeking to influence the evolution of the ECHR, increases. Even for a court that is relatively jealous of its own autonomy, constructive engagement is more likely to constrain the Court than the more costly alternatives: defection and open conflict. With regard to domestic arrangements, exercising power within the CLO may well be more attractive than submitting to the authority of the legislature or constitutional court. Friction among national authorities, and between national courts and the European Court, has been an important catalyst for the regime's progressive development.

A cosmopolitan legal system was instantiated by Protocol No. 11 to the ECHR and the incorporation of the Convention into national legal orders. At the regime level, states have steadily strengthened the supervisory capacities of the

European Court, an organ that, arguably, now functions as a transnational "constitutional" court. Within national systems, elected officials and judges have gradually abandoned centralized sovereignty while institutionalizing complex forms of rights pluralism. . . .

The CLO imperfectly protects rights. The European Court—overloaded and often overwhelmed—is activated, after all, by the inadequacies of national protection. It is obvious that judges, other officials, and the Court itself routinely fail to meet obligations to fulfil the fundamental rights of all persons that come under their jurisdiction. What is important is that they are now positioned to do so. . . .

Last, I have not addressed legitimacy concerns, beyond the implicit assertion that the CLO is both a product and a source of rights-based constitutionalism and jurisgenerativity. If the protection of fundamental rights is a core value of pan-European constitutionalism, then the CLO is good for Europeans. Of course, the principles associated with parliamentary democracy are also core values. The evolution of rights pluralism, however, has undermined the models that officials and scholars have long used to describe, and normatively circumscribe, how state organs, including parliament and the courts, function. Traditional notions of sovereignty, separation of powers, the hierarchy of norms, the monist/dualist dichotomy, representation, and so on, are no longer up to the task. It may be that such notions are in the process of being adapted to cosmopolitan precepts and realities. But it also may be that the discursive battles between the values of rights cosmopolitanism and those of classic statist conceptions of the legal system have barely begun.

INTERNATIONAL INVESTMENT LAW AND ARBITRATION AMIDST GLOBAL CHANGE

DISCUSSION LEADER

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International Investment Law and Arbitration Amidst Global Change[*]

Consensual economic transactions, while not necessarily equally enriching, leave each participant net better off for them; where a common culture obtains, the participants, for all their grumbling, usually appreciate, at some level of consciousness, that the transactions were worthwhile and bear repeating. Transactions involving direct foreign investments should be no exception to this generality, but thanks, perhaps, to factors such as the cultural and linguistic differences of the participants and the turnover of representatives during the longer duration of the investment, direct foreign investments, compared to one-off transactions, seem more prone to conflicts. In the current global era, direct foreign investment outstrips international trade and it is probable that it will continue to be an important wealth-producing factor as the international system evolves into an increasingly science-based and technological global civilization. It is equally probable that direct foreign investment will continue to be conflictive in old and new ways.

From the rise of European imperialism, in particular, direct foreign investment acquired the image (not entirely undeserved) of an exploitative instrument of mercantilism and foreign domination. Later, the staggered introduction of the industrial revolution enabled European transportation and communications companies to carry their technologies to comparatively less developed countries: key parts of direct foreign investment were henceforth dedicated to and often controlled infrastructural development and its management in national economies that had yet to experience industrialization. To many citizens of those states, it seemed that the great corporations and mighty banks and financial institutions of a distant Metropolitan "owned" their electrical grids, their water supply, their railroads, their countries.

Customary international law had established minimum standards for the protection of aliens and their property but in the absence of institutional methods for applying those standards, their mode of implementation was left to the discretion of the states of the investors themselves: euphemistically called "diplomatic protection of nationals," those methods of protection were often as coercive as the investor's state chose to make them. The very method of enforcement of the international law standards rendered international investment law even more controversial.

[*]Excerpted from W. Michael Reisman, International Investment Law and Arbitration Amidst Global Change, Address at The Future of Investment Treaty Arbitration: Challenges and Response, Seoul National University School of Law (May 25, 2012).

The Russian Revolution, installing the command economy as a competing model for accelerated and more equitable national development, reinforced the perception of direct foreign investment as an instrument of exploitation. After the Second World War, as the great European empires were dismantled, many of the new states that emerged from them adopted the command economy model, and, along with it, the image of foreign investment and its international modalities of protection, as an equally sinister but more subtle instrument for neocolonialist exploitation and domination. The most explicit normativization of this view of foreign investment was to be found in the United Nations' General Assembly's Declaration on the Establishment of a New International Economic Order (NIEO) and its Charter of Economic Rights and Duties of States.

Ironically, this burst of economic nationalism in many of the newer states coincided with a demand for *national* economic development. The political imperative for elites in many of these states was to grow their national economies, increase the national wealth, and, through some form of distribution, whether by provision of opportunity, entitlement or some mix of both, to expand the economic and other life opportunities of their citizens. Indeed, for non-democratic elites, the promise and delivery of economic development became a substitute for political legitimacy. No surprise then that in 1986, the General Assembly of the United Nations, which had decreed a "new international order," also resolved not only that "the right of development is an inalienable human right" but that "states have the duty to take steps individually and collectively to formulate international development policies with a view to facilitating the full realization of the right to development."

Alas, development cannot simply be legislated. Efforts to achieve it solely by reliance on indigenous resources, of which Chairman Mao's "Great Leap Forward" was the most extreme example, demonstrated conclusively that, in the contemporary world, a satisfactory rate of development is virtually unachievable without the participation of foreign capital, technology and enterprise. The community of new states, which had advanced, at least terminologically, if not factually from the rubric of "under-developed states" to "developing countries," looked to international organizations for assistance.

The International Bank for Reconstruction and Development (IBRD), the original name of the World Bank, had been established, as a specialized agency of the United Nations, with the task of assembling and then lending the public international funds necessary for the reconstruction of a Europe that had been devastated by the Second World War. The IBRD project succeeded brilliantly. By the late 1950s, Europe's economies had rebounded. But by then, more and more of Europe's former colonial territories, now independent, desperately needed to

develop. They turned for assistance to the international organizations which had midwived them. Because their demand for development capital exceeded the supply of public international funds available to meet that demand, the only available source that could realistically address the shortfall was private direct foreign investment. But, as I noted earlier, foreign investment was being vilified as a neo-imperial tool of exploitation rather than as a potential adjunct tool for national development.

In this impasse, the real significance of the Washington Convention of 1965, by which developed and developing states established the World Bank's "International Centre for the Settlement of Investment Disputes (ICSID)," was its consensus decision: because of the indispensability of private investment to national economic development, an international seal of approval was accorded to private direct foreign investment. A central plank of the consensus was a radically innovative compact according to which the capital exporting states bound themselves to abjure "diplomatic protection" while capital importing states bound themselves to submit to arbitration of disputes with foreign investors—at the instance of the foreign investors themselves. Thus, the powerful governments of capital exporting states were, in theory, removed from the process of forcefully implementing customary international law's standards of protection of aliens and the responsibility for it was assigned to international arbitral tribunals.

It quickly became clear, however, that foreign capital alone was not a magic bullet. The mere introduction of capital would not necessarily produce multipliers with economic benefits for the local economy. An appropriate normative infrastructure, the "rule of law," was also required. In short order, a network of bilateral international agreements and their dispute resolution mechanisms assumed a role in, first, confirming the minimum standards for the governance of foreign investment by host states and, second and equally important, in designating the modalities with the exclusive competence for supervising and implementing them.

There are now close to 3000 investment treaties, including BITs, multilateral treaties and Free Trade Agreements with investment chapters. Although there are variations between them, each validates international investment and seeks to establish an orderly framework for it by creating, in the language of the draft trilateral investment treaty between Korea, China and Japan which was signed last week, "stable, favorable and transparent conditions for investment by investors of one Contracting Party in the territory of the other Contracting Parties."

The trilateral investment treaty thus acknowledges, as do thousands of BITs using similar language, that "stable, favorable and transparent conditions" are comprised of more than natural phenomena, such as climate, ecology, geography and natural and human resources. Critically, "favorable conditions" encompass appropriate internal legal, administrative and regulatory arrangements, conducted through procedures designed to ensure that the arrangements are applied as they are supposed to be applied. This, in turn, requires an effective system of implementation, composed of impartial courts, an efficient and legally restrained bureaucracy and transparency in decision-making. This international minimum standard of governance is now recognized as a necessary control mechanism over governments, whether dealing with their own nationals or aliens. Without these "favorable conditions," the investor may be able to reap short-term profits, but the potential for robust multiplier effects for the host state is limited.

Thus, contemporary international investment law and its instruments and institutions began to play a more particularized and increasingly assertive role in supervising internal arrangements within states parties. BITs, in the aggregate, were raising international law's bar for the way states conducted their internal affairs. Matters went from the *Neer v. Mexico* (Reports of International Arbitral Awards, 1926) standard (a case actually unrelated to foreign investment) of "an outrage . . . bad faith . . . to willful neglect of duty . . . an insufficiency of governmental action" to a more nuanced standard involving a searching inquiry into the administrative actions of the respondent government in a specific case. *Waste Management II* (ISCID, Award of Apr. 30, 2004), which undertook to summarize and synthesize the case law until that time, spoke generally of conduct that was "arbitrary, grossly unfair, unjust or idiosyncratic. . . ."

At this stage in the development of investment law, by a happy confluence of events, the rule of law arrangements, which were both a condition precedent for more direct foreign investment and, to an extent, a consequence of the application of international investment law, were being increasingly demanded by the social and economic strata in many of the investment-recipient states which had benefited from the development which foreign capital, technology and enterprise had helped to stimulate. But ironically, elements in these same, now politically effective strata often mobilize *against* direct foreign investment. The dynamic which accounts for this is complex and seems to be a function of more robust domestic politics as well as a function of the conditions that preceded the introduction of the foreign investment. I am not speaking of indignation at dishonest investments, for the international system has proved quite effective at exposing and sanctioning them, but of indignation at honest investments which become entangled in conflict. Let me explain by sketching two generic stories.

The first story might be entitled "Sellers' Remorse." Before the existence of suspected natural resources in country X was confirmed and made exploitable by the creation of the necessary infrastructure, there was considerable domestic support for attracting a direct foreign investor to enter the market and find and develop them, precisely because domestic investors with the requisite capital and skills did not exist. But as soon as the foreign investor, who had been courted and invited in, succeeded in finding and exploiting the resource, an opposition formed to decry the sale of the national patrimony for "a mess of pottage" and to insist on a renegotiation to secure a "fair" allocation of the benefits of the resource. But that "reallocation," whether achieved by expropriation or escalated tax and royalty rates, undermines the financial planning on which the foreign investor's investment was based. The result was a foreign investment dispute, in which each side believed passionately in the iniquity of the other.

The second story might be called "Post-privatization trauma." Governmental control of the urban water supply (you may substitute electrical supply, rail and air transportation and so on) in State Y was subject to electoral politics. The degree of influence of those politics increased in direct proportion to Y's democratization: politicians trying to get into office or to stay there were under pressure to maintain low prices in response to popular demands and then to make up the inevitable shortfall by provision of state subsidies. In the meanwhile, more and more positions in the national water system were created as political favors and rewards. But subsidies must be paid for by taxes and the very populist imperative that maintained the cost of water at artificially low prices resisted increased tax rates. As the prices cum subsidies proved insufficient to allow for the maintenance and reinvestment in the water system (especially one with a bloated work force), its plant deteriorated and the water which it produced became erratic and its quality less and less potable.

At this point, privatization was presented as a solution and it won popular support. When tenders were issued, however, only foreign investors had the technology and access to capital necessary to reestablish an efficient water supply system. But the foreign investor was subject to the demand of the market rather than populist politics and applied an economic calculus in which price per water unit had to cover the actual cost of the investment, service of loans and still produce a profit for its own investors, all this without the cushion of state subsidies. The increased prices were viewed as price gouging and populist politics quickly mobilized voters against the foreign investment. Successive governments were under pressure to cap prices which undermined the economic viability of the investment. The result, again, was a foreign investment dispute.

The new ingredient in these and many other stories and scenarios is investor-state dispute settlement arbitration (ISDS) . . . .

As all international lawyers can attest, international law is replete with injunctions for high-minded standards. Most of them remain unfulfilled; indeed, some may have been enacted with such an expectation. What has distinguished these new developments in international investment law is that most contemporary international investment agreements allow the qualifying investor itself, acting without the intervention, permission or blessing of its state of nationality, to invoke an international tribunal to review host state action, in terms of, inter alia, whether it has constituted "fair and equitable" treatment. This is a procedural change with far-reaching substantive implications which make international investment law unique in international law.

In his "Early Law and Custom," Sir Henry Maine observed that "so great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." The insight is particularly relevant to this stage of the evolution of international investment law, for the procedural addition—the ascription of a meaningful independent international standing to the investor—has transformed what was heretofore soft, aspirational and only intermittently applied law into predictably effective law which, moreover, restrains governmental action in unprecedented ways. The initiation of the process of enforcement of investor rights is transferred entirely to the investor, a party that is driven only by an economic interest in the outcome. The investor's state's "national interest" (or disinterest) or its quotidian political objectives cease to be factors in deciding to press or abandon its national's claim. With more effective invocations of third party decision, there is more effective application of international investment law.

I would emphasize that the revolution here is not only in the right of the private initiation of claims but in the scope of their content as well. Scope has expanded dramatically. Compare the high thresholds set in *Neer*, which I mentioned earlier, which was very indulgent to the state, with some widely cited current formulations. In *Metalclad v. Mexico* (ISCID, Award of August 30, 2000), the tribunal found that it is "[t]he totality of these circumstances [which] demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly." *Tecmed v. Mexico* (ISCID, Award of May 29, 2003), in a paragraph that has been cited and recited by many other tribunals, set a higher, perhaps unachievable standard:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also the goals underlying such regulations.

Even more far-reaching is the statement in *Occidental v. Ecuador* (2004), where the tribunal said

> The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather whether the legal and business framework meets the requirements of stability and predictability under international law.

Thus, some international investment tribunals seem to be molting into what are essentially international courts of appeal over the administrative actions of the respondent state, appraising not only (i) the adequacy of the entire administrative framework in terms of international law standards but even (ii) the specific applications of national law by the national administration in terms of its legal accuracy under that law.

To be sure, this expanded scope of review of matters which, until now, had been deemed quintessentially domestic, is all of a piece with other developments in international law: for example, the international human rights program. In a broader sense, it is part of the remarkable constriction of the sphere of "domestic jurisdiction" in general international law, which, as the Permanent Court of International Justice famously observed, is a function of the state of international relations at that moment. But, of course, every social change generates resistance, for each new constellation necessarily increases the power of those formerly disenfranchised, while reducing the power of the former incumbents. In the investment law context, these changes are now being resisted by many governments as well as some indigenous interest groups thanks to three coinciding factors.

The first of these factors is the administrative revolution that has taken place within states seeking development. The early ideal of the *Laissez-Faire*

State has yielded to the current model of the Regulatory State. It is now universally appreciated that accommodating an efficient economy to the complex political demands of democratic states, the protection of the most vulnerable strata of the population and the preservation of the environment is a task beyond the powers of the "Invisible Hand." Rather, it requires continuing managerial oversight and episodic adjustments by those governmental agencies in the national regime which are charged with regulating economic activity. So just as the developing state is learning, as did the states that went through this process in the early twentieth century, to manage its political economy through a panoply of regulatory agencies, the international investment law system seems to be subjecting those efforts to greater and greater scrutiny by external decision-makers who apply a set of international standards that was shaped by and reflects the values of the *Laissez-Faire* State.

The second factor is the empowerment in many of the host states of a multi-partite civil society. The force of this factor is amplified by the remarkable extent to which electronic communications enable that new "E-state" to press its own versions of the national interest. Many of those versions are not congruent with the programs pursued by the national government. In some instances, this private political activity works in favor of international investment law, such as where some groups within civil society press their governments to adjust policies and practices so as to more closely approximate its requirements. In other instances, however, non-governmental entities agitate against compliance with particular decisions and even against the regime of international investment law itself.

The third factor is the blurring of the line between capital-importing and capital-exporting states. Many developed states, which had essentially been capital-exporters, are now hosts to significant amounts of foreign investments and expect and wish to attract more; many of those investments are, moreover, of increasing importance to their economic infrastructure. Earlier these states had been champions of an international investment regime which provided protections to their own investors abroad. In that role, they had insisted on international supervision of domestic regulatory competences insofar as they impacted foreign investors. Now, however, with ISDS available *against them*, many of these states are behaving like traditional capital-importing states, jealous of trespasses on their own regulatory competences. The result, reflected in new generations of Model BITs as well as in negotiating positions, is a movement toward a constriction of investor protections and a greater tolerance for governmental actions against foreign investors. As a consequence of the operation of these three factors, the ambitious transformative role of international investment law is now being

resisted in different ways by a surprisingly heterogeneous coalition of states and organized interest groups.

One response, until now only on the part of developing countries, is the recrudescence of the *Calvo* Doctrine in new raiment. Its vehicle is not a formal "*Calvo* Clause," nor an insistence that choice-of-law and choice-of-forum clauses in contracts with foreign investors should prevail over international treaty commitments. Rather, it contends that the only decision institution for investment disputes which is compatible with national sovereignty is a national court. The implications for international investment law of this blanket rejection of ISDS in general are more far-reaching than is generally appreciated.

At issue is more than a mere substitution of a national court for an international tribunal as the agency for the implementation of treaty-based investor protections. Investor-state dispute resolution regimes in BITs have always included as one of the optional forums for application of the treaty, at the election of the investor, national courts. In fact, they are not elected by investor claimants for many of the same reasons that designers of international commercial transactions select international commercial arbitration over adjudication in one of the parties' national courts. But in disputes involving the application of substantive treaty-based protections, there is an additional and distinctive reason. Unless the respondent state hews to an absolute and predictably effective Monism, in the sense of always super-ordinating international treaties over *all* national law (including the national constitution), its courts, even if they are absolutely independent and impartial, will apply national law over international law. Insofar as the injury to the investor arises from later prescribed national legislation, that legislation will prevail over the protections afforded by the BIT. And this, I suspect, is precisely what the latter day proponents of the *Calvo* Clause seek. So the revival of the *Calvo* Clause is not simply a mechanical change of one efficient forum for another: it is really a defeat of the guarantees of treaty-based international investment law.

A state that is both an importer and exporter of direct foreign investment may try to game the system by renouncing ISDS, thus requiring foreign investors whom it hosts to resort to local courts while at the same time expecting its own foreign investors to select BIT-friendly nationalities for their investment vehicles in order to have the benefit of their BIT protections. This nationality shopping by states that do not reciprocate has already generated a backlash, in instruments such as the Energy Charter Treaty. Article 22(2) of the new trilateral investment treaty between China, Japan and Korea effectively blocks such shopping.

But even if the *Calvo* proponents prevail, their victory will prove to be pyrrhic, as will the short-term victories of states that renounce all ISDS. The protections which will no longer be enforceable through treaty-based modalities will persist at customary international law—the only difference will be that the modality of their enforcement will revert to "diplomatic protection of nationals." Governments, which had beneficially been removed from the protection of their national investors, will be drawn back into it, reviving the politicization of the protection of international investment.

In a period in which the down-swings of economic cycles are coinciding with radical structural adjustments, other challenges to international investment law are presenting themselves. In terms of who may qualify as an investor, the shift of significant quantities of investment funds from the traditional private-sectors of capital exporting states to state owned enterprises (SOEs) and to Sovereign Wealth Funds (SWFs) now presents the question of whether these entities qualify as "investors" under investment treaties. Insofar as the function, if not *raison d'être* of international investment law, is to facilitate the movement of long-term investment across borders as a means of increasing economic productivity, the capital of SOEs and SWFs is an important resource, especially as it is often capable of being more "patient" than that of private venture capitalists. Given the language in many BITs and other investment instruments, this may require the production of a new *jurisprudence constante* pending a new generation of BITs. The question of the definition of "investment" is also being raised in acute fashion by defaults on sovereign bonds. The first question is whether they qualify as investments for the purposes of treaty protection. This is usually resolved in the affirmative by the definitions provision in a BIT, although the requisite "investment in . . . " has been debated by scholars and tribunals. The compensation issue may also prove to be acute. Where bonds have been purchased by major financial houses or by vulture funds at deep discounts and, more generally, where the market discounts price for risk, is compensation at face value appropriate? Where bonds have been retailed to small investors, should a different calculation of compensation operate? And should small investors be permitted to act through mass arbitration in circumstances in which each would be incapable of bringing a separate claim? These are questions which are *sub judice* and will shape a new chapter in international investment law.

Some of the causes of tensions within international investment law are part of the very fabric of this sector of law. Governments are different from other actors. Even when they enter the market place, their responsibilities to internal communities and constituencies continue; in all but the most brutally totalitarian of them, governmental power is temporary and often shaky. Even strong governments are beholden to internal constituencies which may have little

appreciation of, or respect for, the international arrangements that their governments have concluded but which later come to be popularly perceived as affecting their own lives and aspirations. Compensation metrics in international investment law have always been somewhat mysterious and they come under intense pressure in circumstances in which awards, which are easily justified in terms of ordinary commercial standards, are not politically feasible and the specter of Versailles is raised. Yet, here, as everywhere else, there is, in Milton Friedman's words, "no free lunch." Redressing compensation quanta in favor of respondent governments which claim "*non possumus*" simply passes the losses through to the ultimate investors, the pension funds of vast numbers of individuals in the developed world or, even, ironically, to SWFs of developing countries. The mere prospect of such a reassignment of losses could well chill the appetite for foreign investment by the very international market which ICSID had sought to mobilize.

The fact that there are stresses within the legal arrangements now collectively referred to as international investment law should occasion no surprise. All law is dialectical in nature and every arrangement, which provides comparative benefits to some and less to others, immediately generates pressure to be adjusted or terminated and replaced with a different value configuration. Some of the adjustments that result from this dialectical process operate within the established constitutive structure of international investment law. Others are truly revolutionary, rejecting the constitutive structure, as a whole, or particular arrangements within it. One cannot, as a result, assume a straight-line projection from the past or an organic extension of the current situation into the future. Without according excessive importance to the economic vicissitudes which the world economy is now experiencing, one can identify five alternative futures. Each constructive future is based on latent tendencies in current trends. Any one could emerge from the current system of international investment law. . . .

One possible future would involve the reinforcement of the trends toward globalization, with English functioning as the *lingua franca*, within a context of a planetary-wide civilization of science and technology. In such a future, more and more direct foreign investment would be made world-wide, on the basis of economic rather than political considerations. The law-making and law-applying functions of international investment law and the national decision processes influencing them, would continue to fall within the jurisdiction of international arbitral tribunals, whether under the aegis of ICSID, the Permanent Court of Arbitration, or ad hoc tribunals operating under UNCITRAL Rules administered by private transnational arbitral associations. This future would witness new generations of BITs, with common provisions affording identical enhanced protections to investors. It would also include the pluralization or

multilateralization of investment treaties, in place of much of the current network of bilateral instruments and an explicit investment role for the World Trade Organization (WTO). It would likely include the installation of an appeal mechanism, perhaps on the model of the WTO's Appellate Body, which would make arbitral applications more uniform.

A future of global integration would include more decisions by international investment tribunals with respect to the quality of governance within states which hosted foreign investment with a view to moving steadily toward a homogenization of national practice in accordance with increasingly robust international standards.

A second possible future would be marked by regional and sub-regional integration rather than the high level of global integration as the central feature of the preceding future. Regional blocks in Europe, North and Central America, in the southern cone of South America, Africa, and Asia would trade and principally invest among themselves. In place of a single *lingua franca*, dominant regional languages would operate. Extra-regional investment might continue but it would be relatively reduced, as compared to the more intense regional and sub-regional investment. New generations of BITs and Free Trade Agreements, instead of running North and South or East and West, as in the recent past, would tend to be between members of the same regional bloc. Instead of international standards, regional standards would emerge, on the model of "regional customary international law." As for the tribunals charged with deciding disputes, they would be increasingly composed of members of a single region, on the model of the Chamber-system of the International Court of Justice.

A third possible future would be characterized by increased protectionism and mercantilism, driven by economic uncertainty and perceived resource scarcities. Protectionism would manifest itself in limitations on outward foreign investment as well as increased restrictions on inward foreign investment. Both limitations would be justified as measures necessary for the protection of national security and other vital national interests.

A recrudescence of mercantilism could be exacerbated by a perception of a critical shortage of key natural resources in a world whose population has grown and the demands of whose members for a better material lifestyle have universalized. Such a future is likely to see a new generation of BITs, marked by enhanced competences assigned to host states, including rights of counterclaim by the host state against foreign investors. In such a future, the amount of general foreign investment would be expected to decline significantly, to be replaced by "diaspora networks."

A fourth possible future would see the return of an effective coalition of developing countries and developed mineral-exporting countries, trying to use their numerical superiority within international organizations to enact international instruments comparable to the Charter of Economic Rights and Duties of States of the New International Economic Order. In this future, states would insist on the right of expropriation for a broad range of self-judging reasons with "appropriate" compensation to be determined exclusively by institutions of the host state. This future would see significant withdrawals from ICSID and its consequent decline as the central institution in international investment dispute resolution (without regard to decline due to endogamous factors such as loss of confidence in its control mechanism). Many BITs would also be denounced. Insofar as mineral extraction industries would still be obliged to pursue natural resources wherever they might be found, the system of international investment law based on the provision of protections for investors and their implementation by international arbitration tribunals would decline, to be replaced by alternative risk-management or risk-abatement methods. Thus political risk insurance might be more widely used with the consequent additional costs of investment passed through to consumers. At the international organizational level, in this future construct, the Multilateral Investment Guarantee Agency (MIGA) and its private counterparts would supersede ICSID in importance.

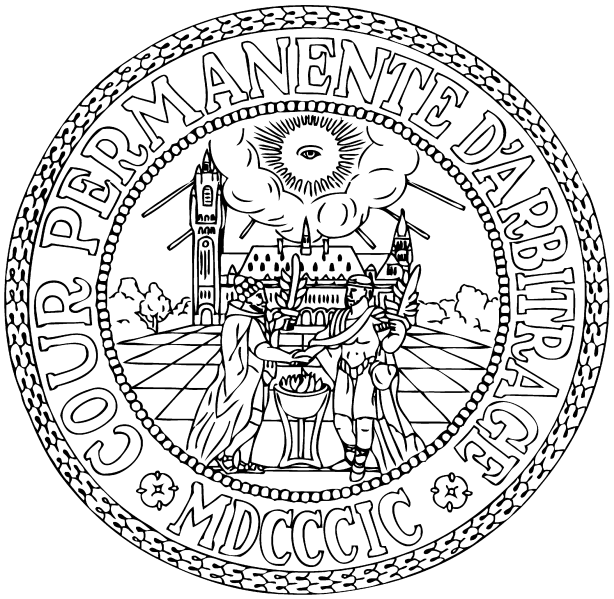
A final possible future would involve a continuation of the present mixed and contradictory system in which international law continues to commit itself to the encouragement and protection of international investment through the maintenance of international standards and some soft supervision of the practices of host states in terms of those standards. In this future, many of the antinomies that are characteristic of contemporary international investment law would continue.

One engages in the intellectual task of the creation of alternative images of futures in order to refine strategies that will increase the likelihood of achieving desirable or utopic futures and decreasing the likelihood of the eventuation of dystopic ones. I consider Future One the most desirable, for its promise of enhanced production and the efficient use of the resources of our planet, a future in which everyone is net better off and in which, moreover, there are procedures for adjustment of arrangements and internationally supervised modes of dispute resolution. The resulting interdependence, one hopes, will also act as a restraint on the use of violence. By contrast, the third and fourth futures are, in my view, undesirable.

In theory, international arbitration tribunals are well-positioned to make ad hoc adjustments in disputes precipitated by changed circumstances but factors

such as the limits on arbitral authority and the ever-present peril of annulment for *excès de pouvoir* constrain their ability to redesign long-term economic arrangements so that an appropriate balance of the benefits and burdens of the transactions can be reestablished. Hence, in navigating through the present toward any of the imagined futures, the emergent future of the international investment system and its role in the growth and maintenance of the global economy will depend more on the statesmanship and wisdom of national leaders.

Traitez de Paix, Bernard Picart, 1726. Frontispiece.
Jean Dumont, Corps universel diplomatique du droit des gens.
Image provided courtesy of the Rare Book Collection, Lillian Goldman Law Library, Yale Law School.



Logo of the Permanent Court of Arbitration (PCA) before October 18, 2007.

Logo of the Permanent Court of Arbitration (PCA) after October 18, 2007.

The Small Hall of Justice in the Peace Palace used by the Permanent Court of Arbitration.

A 1987 meeting of the Iran-United States Claims Tribunal in that Hall.

Photographs reproduced courtesy of the Carnegie Foundation and the Iran-United States Claims Tribunal.

LAW'S FUTURE(S): THE SUSTAINABILITY OF TRANSNATIONAL, NATIONAL, AND INTERNATIONAL COURTS

DISCUSSANTS

ROBERT BADINTER, STEPHEN BREYER, SABINO CASSESE, RONALD DWORKIN, DIETER GRIMM, BRENDA HALE

CO-CHAIRS

SAM MULLER AND JUDITH RESNIK

VI. LAW'S FUTURE(S): THE SUSTAINABILITY OF TRANSATIONAL, NATIONAL, AND INTERNATIONAL COURTS

DISCUSSANTS:
ROBERT BADINTER, STEPHEN BREYER, SABINO CASSESE,
RONALD DWORKIN, DIETER GRIMM, BRENDA HALE

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The Nation State and Supra-National Adjudication

The Growth, Legitimacy, and Relevance of Transnational Institutions

This segment of the readings revisits the tensions and complexities of inter-judicial exchanges, invites reflections on the themes of the preceding materials, and raises questions about the decades to come. Some discussions aim to account for the contemporary allocation of authority among national and supra-national courts. Other excerpts challenge a frame devoted to nation-states and supra-national polities and focus instead on transnational institutions beyond or in lieu of nations and their courts. And yet others question the wisdom of turning to global courts and the relevancy of international law's agendas.

These readings continue the debates raised by the materials on the Brighton Declaration, constitutional pluralism, and (dis)uniformity of rights. Questions are raised again about whether courts identified with one jurisdiction are obliged to comply with judgments flowing from another, and if so, why. The related puzzle is whether the European Union poses unique problems or whether its struggles over authority ought to be assimilated into analyses focused on federations and on the impact of international law on national courts. One can, for example, see links between *Solange* and *Medellín*. Further, echoes of the debate about the U.K.'s relationship to Strasbourg—exemplified here in *Ambrose* and in Chapter III in *Hirst*—can be found in the conflicting opinions in *Medellín* and in the approach taken by the German Constitutional Court's *Lisbon Treaty* decision, aiming to categorize competencies when legitimating authority. Jurists on national courts on both sides of the Atlantic have proved skeptical about the role of supra-national adjudication, just as supra-national courts sometimes seek to avoid or sanction variation through doctrinal approaches such as the margin of appreciation and proportionality to mediate such conflicts. At times, at both the national and supra-national level, the sources of the underlying rules, principles, and claims are identified and debated directly and, at other times, assumed or left ambiguous.

Throughout, concerns are raised about legitimacy and authority, sometimes explored through the frame of democracy, at other times in terms of sovereignty, and elsewhere relying on metrics of efficacy. Some argue that all three—democracy, sovereignty, and efficacy—are dynamic concepts, requiring reformulation in light of global transnational exchanges. In some of the discussion below, commentators recommit to the nation-state, while others believe that locating power either in democratic or sovereign terms misses new forms of authority developing in myriad arrangements in which government and non-governmental entities interact. Some analyses embrace the emergence of a cosmopolitan legal order, to which courts are central. Yet others reject the turn to transnational adjudication and argue that institutions other than courts are the key actors in the decades to come. Worries then emerge about fragmentation, the

uncabined power of elites, and the failures of transnational institutions to deal with problems ranging from famines to mass atrocities.

The challenges of perspective are everywhere. As art theorist Jonathan Crary has explained in *Techniques of the Observer*, "classical models of vision," which had posited that seeing was intrinsically objective, have been abandoned in modernity; all observations are "embedded in a system of conventions and limitations," and we are all situated to see "within a prescribed set of possibilities." From what vantage points, then, ought the present and the future of transnational legal institutions be assessed?

THE NATION STATE AND SUPRA-NATIONAL ADJUDICATION

Dieter Grimm

Defending Sovereign Statehood Against Transforming the European Union into a State[*]

The message of the German Constitutional Court's (*Bundes-verfassungsgericht*) decision on the Lisbon Treaty[1] is that European integration will not be brought to halt by Germany but finds its limits in the German Constitution, the Basic Law. The first aspect of the judgment was received with much relief, the second has brought a mixture of consent and disapproval. However, the judgment does not emerge *ex nihilo*. It is the continuation of a long line of precedents. . . .

Ever since its beginnings, ten years after the establishment of the European Economic Community, the jurisprudence of the Germany Constitution Court in European matters has been determined by a number of basic assumptions. It starts from the premise that the Treaties have not established a European state but a community *sui generis*, later described by the Court as a confederation (*Verbund*) of sovereign nation-states that is supported by these states and has to respect their national identity. It was not sovereignty that has been transferred, but only a number of powers (*Hoheitsrechte*), insufficient to turn

[*] Excerpted from Dieter Grimm, *Comments on the German Constitutional Court's Decision on the Lisbon Treaty: Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 EUR. CONST. L. REV. 353 (2009).

[1] Decision of 30 June 2009 (2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09).

the Community itself into a sovereign entity.[5] The sovereignty retained by the member states is protected by the principle of conferred powers; they enjoy the *Kompetenz-Kompetenz*. It is for them to decide which powers they want to transfer to the Community instead of the Community deciding which powers it wants to take from the states. They are the 'Masters of the Treaties.'

From this premise several conclusions were drawn. National law and Community law are independent legal orders. Community law is neither a part of international law nor of domestic law. It flows from an autonomous source. Community law, therefore, is not valid in Germany of its own accord, but because of Germany's order to apply it domestically ('*Rechtsanwendungsbefehl'*). It derives its legal force within Germany from a domestic act. This act 'opens' the German legal order for law from a source other than the state. As such, Community law differs from international law, which is in need of transformation. The order to apply Community law domestically, in turn, is given wholesale by way of ratification of the European Treaties. This means that secondary Community law that has been enacted in accordance with primary law does not need to be ratified. It takes direct effect within Germany.

In principle the same is true for the supremacy of Community law. The supremacy had been established by the European Court of Justice before the *Bundesverfassungsgericht* first dealt with the relationship between European law and domestic law. The German Constitutional Court rejected the assumption that the supremacy follows directly from Article 24 Basic Law. It likewise rejected the assumption that the supremacy was inherent to Community law, for otherwise it would be unable to fulfil its function. In the German Court's view, the legal validity of Community law is not put into question by a lack of supremacy. The Court nevertheless conceded the supremacy, but derived it, like direct effect, from the national order to apply Community law domestically. This order is regarded as constitutive for the applicability of Community law in Germany.

However, Article 24 Basic Law does not empower the German government to open the German legal order without limits. German state institutions may not permit a transfer of powers by which the identity of the German Basic Law would be affected. Further limits result from the democratic principle of the Basic Law. Since the democratic legitimation of the EU emanates from the peoples of the member states, mediated by their parliaments, these parliaments need sufficiently significant fields of activity of their own in which

[5] BverfGE 22, 293 (296); 37, 271 (279 f.); 73, 339 (374 f.)–1986 (Solange II); 89, 155 (183). In the Maastrich decision one can find the argument that the member states founded the EU to jointly discharge part of their tasks and to that end to jointly exercise their sovereignty (p. 188 f.). But in so doing, they did not transfer their sovereignty to the EU, cf. BVerfGE 75, 223 (242)–1987.

the people can articulate their ideas and interests and thus influence the formation of the political will. As the people exercises its prerogatives mainly by electing representatives, it must be guaranteed that Parliament can decide about Germany's membership in the EU, its existence and further development. In the Court's view, this is only possible if the programme of integration is clearly and predictably regulated in the Treaties. In no case does the Basic Law permit an indefinite authorisation of the EU.

The *Bundesverfassungsgericht* is, however, aware that every transfer of powers to the EU entails a democratic loss on the national level. Due to the openness of the Basic Law to integration, this loss does not amount to a violation of the democratic principle. Yet, the Court requires that the loss on the national level be compensated by adequate democratic legitimation on the European level. This legitimation is mainly provided by the national parliaments, which ratify the transfer of powers and control the national executive that is active on the European level. The growing power of the EU makes it necessary, however, that a legitimation by the European Parliament be added, although it is not deemed capable of replacing the national parliaments since the societal preconditions of democracy are underdeveloped on the European level. In addition, the democratic principle requires that Community powers are exercised by an organ in which the national governments are represented that are subject to democratic control at home.

Transferred powers can only be exercised within the framework of the Treaties. Amendments to the Treaties are reserved for the member states as the 'Masters of the Treaties.' A change of the integration programme by organs of the EU is not covered by the German ratification law. Should the EU claim a power that has not been transferred by Germany, acts based on that power will not be valid in Germany. This would be against the constitutive force of the German order to apply Community law domestically. Furthermore, the position of the member states must not be allowed to erode through interpretation of the Treaties. Thus, the space for an extensive judicial interpretation is limited. Interpretations that are de facto changes to the Treaty are not within the legal power of the Community's institutions. Legal acts based on this kind of interpretations cannot bind the German authorities. . . .

In sum, Community law is, on the one hand, not applicable in Germany without due regard to the Basic Law. On the other hand, not all Community law that is incompatible with the Basic Law is categorically denied applicability in Germany. To the contrary, it is recognised that the authorisation to delegate powers to the Community level entails a deviation from the Basic Law's legal demands. This does not, however, impede the primacy of Community law.

Exceptions are limited to identity infractions of the German Constitution and *ultra vires* acts by the Community institutions. So far there is no case in which a legal act by the Community has been denied applicability. Yet, there are decisions in which the *Bundesverfassungsgericht* protected the primacy of Community law against conflicting decisions by German courts.[34]

The new judgment takes all this jurisprudence on board. Since the *Bundesverfassungsgericht* has ruled that the ratification law, and as a consequence also the Lisbon Treaty, are compatible with the German Basic Law, it can confront the dangers that, in its view, nonetheless threaten the German constitutional order only on the domestic level. This takes place in three ways. First, the Court marks the limits for the German institutions when attempting future extension of Union competences or other structural changes. Second, it prescribes parliamentary co-operation on the national level, even in cases where the European Treaties do not require a national ratification process to extend Union competences. Finally, it confirms the constitutional limits of the applicability of Union law in Germany and insists on its own right to review whether the Union institutions have adhered to these set limits.

Like in the Maastricht judgment, the *Bundesverfassungsgericht* derived the standard of scrutiny from the individual right to vote in Article 38 Basic Law. It was this individual right that allowed citizens to launch the procedure for a constitutional review of the Lisbon Treaty in the first place. The review extends to Article 20 Basic Law because elections are the main mechanism to implement the principle of democracy. The principles laid down in this article are not subject to constitutional amendments, which, in turn, brings the eternity clause of Article 79(3) Basic Law into play. This clause is interpreted as the protection of the Basic Law's very identity. It is from this identity of the Basic Law that the *Bundesverfassungsgericht* connects to the issue of sovereignty, which, however, is not explicitly mentioned in the Constitution. Yet, according to the Court the Basic Law not only presupposes the 'sovereign statehood of Germany,' it also guarantees it. . . .[35]

A certain curtailment of the German Parliament's power to make policy choices is, however, an inevitable consequence of the transfer of powers from the national to the international level, which Article 23 and 24 Basic Law permit . . . . State sovereignty therefore exists only within the limits of the Basic Law's receptiveness for international and European law (*Völkerrechtsfreundlichkeit und Europarechtsfreundlichkeit*).

[34] BVerfGE 75, 223 (1987).
[35] Lisbon Decision, para. 216.

At the same time, Germany's 'sovereign constitutional statehood' (*souveräne Verfassungsstaatlichkeit*) forms the limit of integration. . . . The characteristics of an association of states whose abandonment is prohibited by the Basic Law include that the EU receives its legal foundation from the member states by way of concluding treaties. The EU is not permitted to constitute itself. This has direct implications on the way the EU is endowed with competences. These competences are transferred according to the principle of conferral and may be withdrawn through the same procedure. A transfer of the *Kompetenz-Kompetenz* to the Union is impermissible. If the Union were to rid itself of its legal dependence on the member states and become a self-supporting entity, Germany would have to make use of the exit clause and leave the EU. This possibility must be guaranteed in the Treaty. . . .

These limits may not be undermined by way of treaty interpretation. The 'integration programme' has to be determined by the Treaty. Just as the German government is constitutionally prevented from consenting to blanket empowerments, the effect of such empowerments may not be created by treaty interpretations. Treaty interpretations that tend to maintain the *acquis communautaire* and to guarantee an effective use of the competences (*implied powers*, *effet utile*) must be tolerated. An interpretation that expanded or changed the primary law would, however, violate the principle of conferred powers and could ultimately lead to a disposal in the hands of the EU over its legal foundations. This is why there have to be control or break mechanisms, at least for extreme cases, that are able to prevent the Union from ridding itself of its legal dependency on the member states.

As the EU institutions exhibit a 'tendency to political self-empowerment' it is not sufficient that the ratification laws and domestic accompanying laws to further integration steps maintain the principle of conferral and make sure that the EU does not avail itself of the *Kompetenz-Kompetenz* or violate the integration-resistant identity of the German constitution. Rather, the possibility of an external control by the *Bundesverfassungsgericht* is indispensible in order to determine in concrete cases whether the EU has remained within its contractual boundaries and respected Germany's constitutional identity:

> With progressing integration, the fundamental political and constitutional structures of sovereign member states, which are recognised by Article 4(2) sentence 1 TEU Lisbon, cannot be safeguarded in any other way.

Finally, the *Bundesverfassungsgericht* derives from Article 23(1) Basic Law on the one hand that the European Union, when acting autonomously, has to

follow democratic principles and on the other hand must not erode democratic rule in the member states. As far as European democracy is concerned, the Court sees no need that the nation-state model [be] adopted. The EU's democratic requirements are rather dependent on the 'extent and the weight of supranational power.' If this power increases, the level of democratic legitimacy also has to rise if the increase is to secure German consent. Considering the current development of the EU, the Court finds the level of legitimation sufficient. However, should the development of the EU take a state-like direction, Germany would be forced to demand changes to the Union's democratic legitimacy. If these demands were to be unsuccessful, Germany would have to leave the Union.

With regard to national democracy, the *Bundesverfassungsgericht* derives further limits from the Basic Law regarding the transfer of sovereign powers to the EU, even if the threshold of the constituent power of the German people and the sovereignty of the state have not yet been affected. Germany has to retain sufficient room for shaping the economic, cultural and social circumstances of domestic life. In particular, it must have the decision-making power in areas

> which affect the citizens' circumstances of life, especially the private space of individual responsibility and of personal and social security, which is protected by the fundamental rights, as well as for those political decisions that particularly depend on cultural, historical and language preconditions and which unfold in a discursive manner in a public sphere that is organised by political parties and Parliament. . . .

In subsuming the Lisbon Treaty under these criteria, the *Bundesverfassungsgericht* detects a democratic deficit in the EU in comparison to the level of legitimacy within nation states. . . . This deficit is not balanced out by other provisions in the Lisbon Treaty, such as the citizens' initiative, the double majority voting system in the Council, or the participation rights of the national parliaments: 'The Treaty of Lisbon does not lead to a new level of democratic development.'

[I]t is crucial for the Court's approval of the Treaty of Lisbon that it does not transform the EU into a state and thus leaves Germany's sovereignty untouched. The principle of conferral is seen as the most important protection of the member states' statehood. They remain the 'constitutionally organised primary political area' (*verfasster politischer Primärraum*). The EU is but of additional and secondary importance and limited to those tasks that have been conferred to it. Furthermore, it is obliged to respect the national identity of the

member states and bound by the principles of subsidiarity and proportionality and the early-warning system. . . .

An abandonment of the territory of Germany does not occur through the Lisbon Treaty. The EU has no territorial sovereignty. Similarly, there is no Union specific territory. Neither is the citizenry of the member states transformed into a European citizenry by the Lisbon Treaty. In fact, EU citizenship does not constitute a European people with the right to self-determination about its political community formation. EU citizenship is rather derived from state citizenship and added to it. New rights for EU citizens comprised in the Treaty, such as the citizens' initiative, also do not constitute an 'independent personal subject of legitimation at the European level.' Finally, the extension of EU competences does not lead to an erosion of the statehood of the member states. The German *Bundestag* maintains a sufficiently large sphere for policy choices. . . .

What is new are the domestic provisos, which the Court summarises under the 'integration responsibility' of the German *Bundestag*. They extend the prerogative of the German Parliament to consent to Council decisions beyond the limits set by Article 23 Basic Law. Yet, they were instigated by the new or extended possibilities in the Lisbon Treaty to expand competences and alter the decision-making procedures by Council vote and thus without participation of domestic parliaments. The subsequent power of the *Bundesverfassungsgericht* to review these decisions of the *Bundestag* also comes as a novelty. The most conspicuous innovation, however, lies in the judgment's prospective character. It does not content itself with stating the compatibility of the Lisbon Treaty with the Basic Law, but develops limits to future integration steps that are neither taken nor envisaged by the Lisbon Treaty. . . .

The Basic Law empowers the Federal Republic to transfer sovereign powers in general and from the very beginning in Article 24(1), and with special reference to the European Union in the new Article 23(1). Indeed, if by sovereignty one understands the possession of the entire range of public powers in a specific territory, there would be no longer sovereignty at all. Sovereignty perceived as the quintessence of public power would already be given up with the relinquishment of but one single power. This concept of sovereignty was the predominant one for a long period of time. Since the end of the Second World War and the development of an order of international law, starting with the foundation of the United Nations, it is no longer sustainable. Using the term 'state sovereignty' nowadays always includes a compatibility with the existence of supranational public power. This is clearly expressed in the Lisbon judgment.

It is, however, controversial whether the level of public power that is left to the states, including member states of a supranational organisation, can still be classified as 'sovereign.' The question is whether sovereignty in the post-1945 era has been dissolved into its elements, the various powers, or whether sovereignty can be sustained as a concept even if several autonomous actors exercise sovereign powers on one territory. This controversial question cannot be fully discussed here. It suffices to say that the majority of authors tend to agree with the latter interpretation. They recognise the remaining function of sovereignty in the guarantee of the self-determination of a political unity under the conditions of an increasing transfer of public power to the international level where democratic legitimacy is either weak or completely absent.

If this is accepted the *Bundesverfassungsgericht*'s differenciation between the notions of sovereignty (*Souveränität*) and sovereign powers (*Hoheitsrechten*) is not unsound. Sovereignty is then no longer a question of 'all or nothing,' but of 'more or less.' It remains true that a community without the right to determine its own basic political order cannot be referred to as sovereign. Apart from that, the answer to the question who is sovereign in the context of multi-level governance depends on who decides about the allocation of sovereign powers and how they are allocated in terms of quantity. Sovereign in a multi-level system of governance is the entity that holds the *Kompetenz-Kompetenz* and does not use this power in a way which leaves but a marginal portion for itself. A few scattered powers are not sufficient to constitute sovereignty. . . .

The question discussed here is not whether a federal European state, especially from a democratic perspective, is desirable. Rather, it is whether Germany would be allowed to join such a state if its democratic legitimacy were at the level required by Article 79(3) Basic Law. . . .

Still, Germany's incorporation in a European state would be a step of such magnitude that it could not be done via the routine amendment procedure of the Basic Law. It would mean that the member states of the EU ceased to be the 'Masters of the Treaty.' . . . The EU would emancipate itself from the member states and would become a self-supporting entity. It would gain the right to self-determination about its legal foundations while the member states would by the same token lose this right. The EU would then be permitted to determine which powers it leaves for the member states. Such an abandonment of national sovereignty would indeed require the direct and explicit consent of the people as the ultimate holders of all state authority (Article 20 Basic Law). . . .

That is facilitated by some peculiarities of Union law that are not always sufficiently taken into consideration. It seems particularly noteworthy that the

European treaties have been 'constitutionalised' by the jurisdiction of the European Court of Justice, but, by contrast to state constitutions, do not only contain the basic principles of the Union order and the norms that regulate the EU organs and their competence and procedure. Rather numerous fields that would be ordinary law in the member states are regulated on the Treaty level and consequently participate in the constitutionalisation. The implications of this difference are considerable. What has been regulated on the treaty level no longer needs to be regulated on the statutory level, nor can it be changed by legislation. The executive and judicial actors of the EU are able to impose what they consider to be the right interpretation without the political actors, Council and Parliament, being able to re-programme that interpretation if they consider its results to be harmful.

However, the implications of the constitutionalisation also extend into the area that is open to legislation, and make their presence known in the form of the familiar asymmetry between positive and negative integration. While negative integration, i.e., deregulation on a national level in order to implement the internal market, can be accomplished in the administrative mode, positive integration, i.e., re-regulation at the European level in order to correct market failure, relies on the political mode, lawmaking in the Council and the Parliament, for which the threshold of consensus is considerably higher and the chances of success are correspondingly smaller. In practice, this results in a bias toward liberalisation, which extends its effects even into the weakly communitarised field of social policy. To be sure, the member states continue to be legally free in this area, but in practice they cannot maintain their level of social policy without damaging their national economy.

The tendency toward a creeping evisceration of state legislative authority is promoted by the way in which competences are distributed in the EU. Unlike federal states, the European Treaties do not allocate legislative competencies according to subject-matters, but according to a teleological criterion. The goal, the establishment and the maintenance of the Common Market, has the effect of blurring boundaries. Since every national law can reveal itself to be a hindrance for the four freedoms of the old Article 14(2) EC, divorce law as well as the educational system, penal law as well as monument protection, it depends largely on the Commission's interpretation of Union law and its initiative to enforce it vis-à-vis the member states and on the attitude of the European Court of Justice to what extent national rules are overridden by Union law. Even the member states' discretionary space and the boundary between communitarised and inter-governmental lawmaking is now coming under pressure.

The effects also extend to fundamental rights. The Union and the member states do, to be sure, share a common basis of values. However, among the various guaranteed fundamental rights and freedoms, contradictions do arise. These contradictions tend to be resolved differently on the European level and on the national level. On the state level, economic rights are consistently the ones that are most weakly protected, and national measures to regulate the economy are scrutinised less vigorously by the constitutional courts than limitations on personal rights. On the European level, it is the other way round. Here, the economic rights tend to prevail over personal, communicative, social and cultural guarantees. Where national constitutional law grants the national legislature the most freedom, European law grants it the least.

Therefore, risks to identity and evisceration of competences are not just a threat on the treaty-making level, but also on the treaty application level. The only way to counter them would be treaty revisions. There are admittedly few prospects of such revisions being made. In the last treaty revision process, the problems mentioned here were not even an issue. Since on the European level, the European Court of Justice forms the keystone of the system and has tended to use this position in a Union-friendly way, only the highest national courts, particularly the constitutional courts, can potentially counterbalance it. Admittedly, that alone would not allow them to make use of their power if there were no legal grounds for them to act. However, the *Bundesverfassungsgericht* has provided plausible grounds for how its position and controlling authority result from the very premises of Union law and are demanded by the national constitution. . . .

The view that the Lisbon judgment of the German Constitutional Court has brought European integration to an end can only be maintained if a European federal state is seen as the ultimate goal of integration. The question whether this is something worth striving for is debatable. Even if it were something worth striving for, it would not be something that can be quickly accomplished. However, as long as the EU is a community of states whose identities are to be protected, then their position as 'Masters of the Treaties', *Kompetenz-Kompetenz* and the principle of limited and specific power transfer all have their well-deserved places. Below these tenets, particularly in the secondary lawmaking process, nothing is changing anyway, as the Court's endorsement of the Lisbon Treaty shows. At best, the decision will increase the EU's mindfulness that its legitimacy depends largely on the democracy of the member states and that it should be hesitant to exhaust this capital.

Ambrose v. Harris
United Kingdom Supreme Court
[2011] UKSC 43

[Editor's Note: Three applications were before the Court. This excerpt focuses on one—Ambrose.]

The appellant . . . , John Paul Ambrose, was prosecuted on summary complaint at Oban Sheriff Court on a charge of . . . being drunk in charge of a motor vehicle whilst having consumed a level of alcohol in excess of the prescribed limit. . . .

[T]he appeal court referred the following question to this court:

> "Whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellants rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights, having regard in particular to the decision of the Supreme Court of the United Kingdom in *Cadder v H.M. Advocate* (2010). . . ."

LORD HOPE OF CRAIGHEAD DPSC

1. On 26 October 2010 this court issued its judgment in *Cadder*. It held that the Crown's reliance on admissions made by an accused without legal advice when detained under section 14 of the Criminal Procedure (Scotland) Act 1995 gave rise to a breach of his right to a fair trial, having regard to the decision of the European Court of Human Rights (ECtHR) in *Salduz v Turkey* (2008). This was because the leading and relying on the evidence of the appellant's interview by the police was a violation of his rights under article 6.3(c) read in conjunction with article 6.1 of the European Convention on Human Rights . . . .

15. [A] decision by this court that there is a rule that a person who is suspected of an offence but is not yet in custody has a right of access to a lawyer before being questioned by the police unless there are compelling reasons to restrict that right would have far-reaching consequences. There is no such rule in domestic law. If that is what Strasbourg requires, then it would be difficult for us to avoid holding that to deny such a person access to a lawyer would be a breach of his rights under articles 6(1) and 6(3)(c) of the Convention. But the consequences of such a ruling would be profound, as the answers to police

questioning in such circumstances would always have to be held—in the absence of compelling reasons for restricting access to a lawyer—to be inadmissible. The effect of section 57(2) of the Scotland Act 1998 would be that the Lord Advocate would have no power to lead that evidence. I agree with Lord Matthew Clarke that this would have serious implications for the investigation of crime by the authorities. This suggests that a judgment pointing unequivocally to that conclusion would be required to justify taking that step. If Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so. . . .

17. In *R (Ullah) v Special Adjudicator* (2004), Lord Bingham of Cornhill said that Lord Slynn's observations in that case reflected the fact that the Convention is an international instrument, the correct interpretation of which can be expounded only by the Strasbourg court. From that it followed that a national court should not without strong reason dilute or weaken the effect of the Strasbourg case law. It was its duty to keep pace with it as it evolved over time. There is, on the other hand, no obligation on the national court to do more than that. As Lord Bingham observed, it is open to member states to provide for rights more generous than those guaranteed by the Convention. But such provision should not be the product of interpretation of the Convention by national courts.

18. Lord Kerr of Tonaghmore JSC says that it would be wrong to shelter behind the fact that Strasbourg has not so far spoken and use that as a pretext for refusing to give effect to a right if the right in question is otherwise undeniable. For reasons that I shall explain later, I do not think that it is undeniable that Strasbourg would hold that any questions put to a person by the police from the moment he becomes a suspect constitute interrogation which cannot lawfully be carried out unless he has access to a lawyer, which is the principle that Lord Kerr JSC derives from his consideration of the mainstream jurisprudence. But his suggestion that there is something wrong with what he calls an *Ullah*-type reticence raises an important issue of principle.

19. It is worth recalling that Lord Bingham's observations in *Ullah*'s case were not his first pronouncements on the approach which he believed should be taken to the Convention. In *Brown v Stott* (2003), he said:

> "In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which

> define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* (1930)), but those limits will often call for very careful consideration."

The consistency between this passage and what he said in *Ullah*'s case shows that Lord Bingham saw this as fundamental to a proper understanding of the extent of the jurisdiction given to the domestic courts by Parliament. Lord Kerr JSC doubts whether Lord Bingham intended that his discussion of the issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they had been pronounced upon by Strasbourg. I, for my part, would hesitate to attribute to him an approach to the issue which he did not himself ever express and which, moreover, would be at variance with what he himself actually said. Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation. . . .

25. [T]he domestic law test for the admissibility of the answers that were given to the questions put by the police is whether or not there was unfairness on the part of the police. The fact that the person did not have access to legal advice when being questioned is a circumstance to which the court may have regard in applying the test of fairness, but it is no more than that. There is no rule in domestic law that says that police questioning of a person without access to legal advice who is suspected of an offence but is not in custody must always be regarded as unfair. The question is whether a rule to that effect is to be found, with a sufficient degree of clarity, in the jurisprudence of the Strasbourg court. . . .

47. The question whether the right of access to a lawyer applies at a stage before the person is taken into custody is now before the Strasbourg court in an application by Ismail Abdurahman. . . .

50. The Lord Advocate placed considerable weight in support of his argument on the judgment of the Supreme Court of the United States in *Miranda v Arizona* (U.S. 1966). In that case the Supreme Court held that the prosecution may not use statements, whether incriminatory or exculpatory, stemming from custodial interrogation of a defendant unless it demonstrated the use of procedural safeguards which were sufficient to secure the privilege against self-incrimination. These safeguards require that, unless other fully effective means are devised to inform the accused person of the right to silence and to assure continuous opportunity to exercise it, he must be warned that he has a right to remain silent, that any statement that he does make may be used as evidence against him, that he has the right to consult with an attorney and that, if he cannot afford one, a lawyer will be appointed to represent him. "Custodial interrogation" for the purposes of this rule means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . .

53. It is not unreasonable to think that *Miranda* and subsequent cases that the ruling in that case have given rise to in the United States will influence the thinking of the Strasbourg court as it develops the principles described in *Salduz*. . . .

67. The question in Ambrose's case is whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellant's rights under article 6(1) and 6(3)(c). I would answer this question in the negative. . . . I would hold that Ambrose was charged for the purposes of article 6 when he was cautioned and that the police officer had reason to think that the second and third questions were likely to elicit an incriminating response from him. . . .

68. But I would hold it would be to go further than Strasbourg has gone to hold that the appellant is entitled to a finding that this evidence is inadmissible because, as a rule, access to a lawyer should have been provided to him when he was being subjected to this form of questioning at the roadside. This leaves open the question whether taking all the circumstances into account it was fair to admit the whole or any part of this evidence. There may, perhaps, still be room for

argument on this point. So I would leave the decision as to how that question should be answered to the Appeal Court. . . .

[The concurrence of LORD BROWN OF EATON-UNDER-HEYWOOD JSC is omitted.]

LORD DYSON JSC

88. [I]n *Salduz v Turkey* (2008), the ECtHR decided that article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that, as a rule, access to a lawyer should be provided to a suspect when he is interrogated by the police while he is in detention; and that there will usually be a violation of article 6 if incriminating statements made by a suspect during a police interrogation in such circumstances are relied on to secure a conviction. . . . The central question that arises in the present proceedings is whether the *Salduz* principle also applies to interrogations of a suspect that are conducted before he is placed in detention. . . .

89. Lord Kerr of Tonaghmore JSC says that (i) even if the European court has not clearly decided whether article 6 requires the *Salduz* principle to be applied to statements obtained from a suspect when he is not in detention, that is not a sufficient reason for this court to refuse to do so; (ii) to draw a distinction between evidence obtained before and after a suspect is detained is "not only arbitrary, it is illogical"; and (iii) in any event, an analysis of the Strasbourg jurisprudence clearly shows that it draws no distinction between the two cases. . . .

97. The essential question is at what stage of the proceedings access to a lawyer should be provided in order to ensure that the right to a fair trial is sufficiently "practical and effective" for the purposes of article 6(1). What fairness requires is, to some extent, a matter of judgment. . . . I do not doubt that being interrogated by the police anywhere can be an intimidating experience and that a person may make incriminating statements to the police wherever the interrogation takes place. This can occur in a situation of what the majority of the Canadian Supreme Court described as "psychological detention" in *R v Grant* (2009).

98. On the other hand, the arresting of a suspect and placing him in custody is a highly significant step in a criminal investigation. The suspect cannot now simply walk away from the interrogator. For most suspects, being questioned after arrest and detention is more intimidating than being questioned in their home or at the roadside. The weight of the power of the police is more keenly felt inside than outside the police station. As was said in *Miranda v Arizona* (U.S. 1966),

there is a "compelling atmosphere inherent in the process of in-custody interrogation." No doubt, it is also present to the mind of the suspect that the possibility of "abusive coercion" is greater inside than outside the police station. . . . [I] do not see how it can be said to be arbitrary or illogical to recognise that there is a material difference between the two situations. [O]ne should be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence. . . .

99. So what should this court do in these circumstances? . . . [T]o the extent that the ECtHR has spoken on the question at all, *Zaichenko* [*v. Russia*] given 18 February 2010 contains a clear statement that the *Salduz* principle does not apply to statements made by a suspect during police questioning while the suspect (i) is not in custody or (ii) is not deprived of his freedom of action in any significant way. . . .

105. [T]he domestic court should remind itself that there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention. [W]e should hold that the *Salduz* principle is confined to statements made by suspects who are detained or otherwise deprived of their freedom in any significant way.

LORD MATTHEW CLARKE

115. [I] am in agreement with Lord Hope that the Strasbourg jurisprudence, to date, does not support the defence contention in these references that the ECtHR has gone as far as to say that the right emerges as soon as a suspect is to be questioned by the police in whatever circumstances.

116. As to whether this court should go further than the European court seems to have gone so far, certain important considerations lead me to the conclusion that it should not. The first is the difficulty that can arise in relation to defining precisely at what point in time someone becomes a suspect, as opposed to being a witness or a detained person. The second is that the broader version of the right, contended for by the defence in these cases, could have serious implications for the proper investigation of crime by the authorities. If the police are to be required to ensure that a person who they wish to question about the commission of a crime (in a situation where the circumstances point to the person being a possible suspect) should have access to a lawyer, if he so wishes, then such a requirement could hamper proper and effective investigations in situations which are often dynamic, fast moving and confused. The unfortunately regular street brawls in city and town centres, or disturbances in crowded places like night

clubs, which, on occasions, result in homicide, are simply examples of situations which highlight the problems that might be involved. . . .

LORD KERR OF TONAGHMORE JSC

126. The well known aphorism of Lord Bingham of Cornhill in *R (Ullah) v. Special Adjudicator* (2004) that the "duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less" has been given a characteristically stylish twist by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence* (2011) where he said that the sentence "could as well have ended: 'no less, but certainly no more.'"

[127.] Lord Bingham's formulation [is that] . . . although such case law was not strictly binding, where a clear and constant theme of jurisprudence could be detected, it should be followed because the Convention, being an international instrument, had as the authoritative source of its correct interpretation the Strasbourg court. A refusal to follow this would "dilute or weaken the effect of the Strasbourg case law."

128. I greatly doubt that Lord Bingham contemplated—much less intended—that his discussion of this issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they have been pronounced upon by Strasbourg. I believe that, in the absence of a declaration by the European Court of Human Rights as to the validity of a claim to a Convention right, it is not open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken. There are three reasons for this, the first practical, the second a matter of principle and the third the requirement of statute.

129. It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from the European court. Moreover, as a matter of elementary principle, it is the court's duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available. The great advantage of the Human Rights Act 1998 is that it gives citizens of this country direct access to the rights which the Convention enshrines through their enforcement by the courts of this country. It is therefore the duty of this and every court not only to ascertain "where the jurisprudence of the Strasbourg court clearly shows that it currently stands" but to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the

Strasbourg court does not disclose a clear current view. Finally, section 6 of the Human Rights Act 1998 leaves no alternative to courts when called upon to adjudicate on claims made by litigants to a Convention right. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.

130. [I]f the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so. . . .

131. The true nature of the right under article 6.1, taken in conjunction with article 6(3)(c), can only be ascertained by reference to its underlying purpose. What is its purpose? The accused argue that its purpose is that when a person becomes a suspect, because of the significant change in his status that this entails; because of the potential that then arises for him to incriminate himself or to deal with questions in a way that would create disadvantage for him on a subsequent trial; and because of the importance of these considerations in terms of his liability to conviction, the essential protection that professional advice can provide must be available to him.

132. The right, it is argued, should not be viewed solely as a measure for the protection of the individual's interests. It is in the interests of society as a whole that those whose guilt or innocence may be determined by reference to admissions that they have made in moments of vulnerability are sufficiently protected so as to allow confidence to be reposed in the reliability of those confessions. . . . [T]hese arguments should prevail. If it has taught us nothing else, recent experience of miscarriage of justice cases has surely alerted us to the potentially decisive importance of evidence about suspects' reactions to police questioning, whether it is in what they have said or in what they have failed to say, and to the real risk that convictions based on admissions made without the benefit of legal advice may prove, in the final result, to be wholly unsafe. The role that a lawyer plays when the suspect is participating in what may be a pivotal moment in the process that ultimately determines his or her guilt is critical.

133. Thus understood, the animation of the right under article 6(1) cannot be determined in terms of geography. It does not matter, surely, whether someone

is over the threshold of a police station door or just outside it when the critical questions are asked and answered. And it likewise does not matter whether, at the precise moment that a question is posed, the suspect can be said to be technically in the custody of the police or not. If that were so, the answer to a question which proved to be the sole basis for his conviction would be efficacious to secure that result if posed an instant after he was taken into custody but not so an instant before. That seems to me to be a situation too ludicrous to contemplate, much less countenance.

134. Two supremely relevant, so far as these appeals are concerned, themes run through the jurisprudence of Strasbourg in this area. The first is that, in assessing whether a trial is fair, regard must be had to the entirety of the proceedings including the questioning of the suspect before trial. The second theme is that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.

135. Taken, as they must be, in combination, these features of a fair trial lead inexorably to the conclusion that where an aspect of the proceedings which may be crucial to their outcome is taking place, effective defence by a lawyer is indispensable. When one recognises, as Strasbourg jurisprudence has recognised for quite some time, that the entirety of the trial includes that which has gone before the actual proceedings in court, if what has gone before is going to have a determinative influence on the result of the proceedings, it becomes easy to understand why a lawyer is required at the earlier stage.

136. There is no warrant for the belief that vulnerability descends at the moment that one is taken into custody and that it is absent until that vital moment. The selection of that moment as the first occasion on which legal representation becomes necessary is not only arbitrary, it is illogical. The need to have a lawyer is not to be determined on a geographical or temporal basis but according to the significance of what is taking place when the later to be relied on admissions are made. . . .

167. Quite apart from these considerations, however, I believe that one must be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence in any wholesale way. The implications of that decision must be considered in the context of police practice in the United States of America. Nothing that has been put before this court establishes that it is common practice in America to ask incriminating questions of persons suspected of a crime other than in custody. Indeed, it is my understanding that as soon as a person is identified as a suspect,

police are trained that they should not ask that person any questions until he or she has been given the *Miranda* warnings.

168. Custody was identified in *Miranda*'s case as one of the features necessary to activate the need for legal representation but custody has been held to mean either that the suspect was under arrest or that his freedom of movement was restrained to an extent "associated with a formal arrest": see *Stansbury v California*, 511 US 318 (1994); *New York v Quarles* 467 U.S. 649, 655 (1984). So it is clear that the rule that custody is required before entitlement to legal representation arises is not inflexible or static and that its underlying rationale is closely associated with the question whether the person questioned feels under constraint to respond.

Brenda Hale

Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?*[*]

My title comes . . . from the short opinion of the late lamented Lord Rodger of Earlsferry in *Secretary of State for the Home Department v AF (No 3)* [(2009)]. This was all about the minimum requirements for a fair hearing in control order cases where the Secretary of State declined to allow some of the material upon which the order was based to be disclosed to the controlled person. In the earlier case of *Secretary of State for the Home Department v MB* [(2007)], the House of Lords had performed heroic feats of interpretation under section 3 of the Human Rights Act 1998 and read the Prevention of Terrorism Act 2005 to mean precisely the opposite of what Parliament had intended: thus, if the Secretary of State was unwilling to make the disclosure necessary to enable the controlled person to have a fair hearing, the Court was unable to confirm the order. But the majority of us thought that disclosure of the closed material to a special advocate would in many, perhaps most, cases enable the controlled person to have a fair hearing.

When *MB* was decided, it was not entirely clear what test the Strasbourg Court would apply to the extent of disclosure required for a hearing to be fair. They had recognised that considerations of national security might justify some modification to what would otherwise be required for a fair trial, provided that

[*]Excerpted from Brenda Hale, Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?*, Nottingham Human Rights Lecture (Dec. 1, 2011).

'any difficulties caused to the defence by a limitation on its rights [were] sufficiently counterbalanced by the procedures followed by the judicial authorities.' There was a distinct hint that special advocates might be enough. But by the time that *AF (No 3)* reached us, the Grand Chamber had decided the case of *A and others v United Kingdom* [(2009)].

. . . They held that the necessary secrecy had to be 'counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.' The special advocate could not perform his function of testing the evidence and putting forward arguments on behalf of the detainee properly 'unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.' Where 'the open material consisted purely of general assertions and [the decision] was based solely or to a decisive degree on closed material the procedural requirements of Article 5(4) would not be satisfied.'

Although *A v United Kingdom* was concerned with detention, and the control order cases were not, the House of Lords in *AF (No 3)* considered it inevitable that Strasbourg would take the same view of the procedural requirements for confirming control orders. Strangely enough, and despite some provocation from the Bench, the government did not challenge our bold interpretation of the legislation and invite us to make a declaration of incompatibility instead. So we adopted the Strasbourg view. As Lord Rodger put it, 'Even though we are dealing with rights under a United Kingdom statute, in reality we have no choice. *Argentoratum locutum, iudicium finitum*—Strasbourg has spoken, the case is closed.' I do not think that he wholly approved of that conclusion.

But was he right? Does Strasbourg have the last word? The Lord Chief Justice and the President of the Supreme Court have recently expressed slightly different views on this issue. One thought that it did not, at least in the courts of this country, and the other thought that it did, in the end at least. And should we mind if it does?

These are hot topics at the moment. Strasbourg-bashing has become very popular. In his Kingsland Memorial Lecture on Wednesday, 23 November 2011, Michael Howard, the former leader of the Conservative party, attacked the Strasbourg Court for descending into the minutiae of the Convention rights and denying member states their proper margin of appreciation to interpret and apply the Convention in the light of local conditions. But he also attacked the United Kingdom courts for going beyond the Strasbourg case law in extending the interpretation of the Convention. In his FA Mann lecture on Tuesday, 8

November 2011, Jonathan Sumption QC, soon to be a Justice of the Supreme Court of the United Kingdom, also attacked the Strasbourg Court for its detailed development of the general principles in the Convention, for deciding not only whether the member states had proper institutional safeguards for those rights but also whether it agreed with the findings of those institutions, and for attempting to apply the rights in a uniform manner throughout the 47 member states, despite the fact that 'the consensus necessary to support it at this level of detail does not exist.' It is one thing to have common European values but another thing to have the same laws on such contentious issues as, for example, abortion. Given that this is such a hot political topic at the moment, it is perhaps odd that a lecture preaching that judges should stay out of political questions should have entered so publicly into the political arena. For what the United Kingdom as a member state should choose to do about what the politicians see as the over-activism of the Strasbourg Court is a completely different question from what the judges in this country should do with the jurisprudence of the Strasbourg Court.

I want to talk about the questions of law for the courts. First, what should the approach of the United Kingdom courts, and particularly our highest court, be to the Strasbourg case law? And secondly, what should be the approach of the Strasbourg Court towards the decisions of the highest courts in the member states? . . .

If you come and listen to a human rights case being argued in the Supreme Court, you will be struck by the amount of time counsel spend referring to and discussing the Strasbourg case law. They treat it as if it were the case law of our domestic courts. This is odd, because the Strasbourg case law is not like ours. It is not binding upon anyone, even upon them. They have no concepts of *ratio decidendi* and *stare decisis*. Their decisions are, at best, an indication of the broad approach which Strasbourg will take to a particular problem. Over the years, they have built up a considerable body of doctrine, but it is developing all the time. They are always saying things like 'in principle' or 'as a rule' which is not the sort of thing which we often say. . . .

The reason, I suppose, why counsel spend so much time with the Strasbourg case law is the so-called 'mirror principle,' enunciated by Lord Bingham in the famous case of *Ullah*: 'It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.' With this are usually coupled the words of Lord Brown in *Al Skeini*: 'no less

but certainly no more.' And that was undoubtedly the approach of our Deputy President, Lord Hope, in *Ambrose v Harris*, a recent devolution reference from Scotland. Sir Stephen Sedley has commented that 'the logic of this is entirely intelligible; it avoids judicial legislation and prevents member states from getting out of step with one another.' Although he also points out that 'it carries the risk that, in trying to stay level, we shall fall behind.'

There are a number of well known objections to the 'mirror principle,' most of them voiced by people who take the opposite view from Mr Howard and want the United Kingdom to develop its own home grown human rights jurisprudence. First, although the Human Rights Act defines the Convention rights in the language used by the Convention, it is clear that it has created new rights in United Kingdom law and not simply given the people within the jurisdiction of the United Kingdom the rights which Strasbourg would give them. . . .

Secondly, the Human Rights Act does not require us to follow the Strasbourg jurisprudence, but it does require us to 'take it into account' (section 2(1)). The courts have given this a purposive interpretation. As the purpose of the Human Rights Act was avowedly to 'bring rights home' and avoid the need for people to take their cases to Strasbourg, we should take into account their jurisprudence with a view to finding out whether or not the claimant would win in Strasbourg. If it is clear that she would do so, then we should find her a remedy. Hence the view that if there is a 'clear and constant' line of Strasbourg jurisprudence indicating that the claimant should win, then we should follow it. But this does not apply to stray chamber decisions, particularly if we find them hard to understand or difficult to reconcile with others.

And, of course, this does not necessarily mean the reverse. There is nothing in the Act, or in its purposes, to say that we should deliberately go no further than Strasbourg has gone, or that we should refrain from devising what we think is the right result in a case where Strasbourg has not yet spoken. There is nothing in the Act to support the reluctance . . . to seek such guidance as we can from the jurisprudence of foreign courts with comparable human rights instruments (Canada is the best example), especially on subjects where we do not know what Strasbourg would say. Thus, Lord Kerr, dissenting in *Ambrose v Harris*, thought it our duty to work out the answer to a new question on first principles, albeit derived from the Strasbourg jurisprudence.

A third objection to the mirror principle is that there are plenty of indications in the Parliamentary history that another of the objects of the Human

Rights Act was to enable us to develop our own distinctive United Kingdom approach to the Convention rights. . . .

A fourth reason to doubt the 'mirror principle' is that the reason given for it, in *Ullah* and elsewhere, does not make much sense. The thinking goes back to *Brown v Stott* [(2003)]. Lord Bingham had counselled against implying new rights into the Convention: '. . . the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.'

But that consideration is not one for the national courts to bother about. It may or may not be desirable that the interpretation of the ECHR should be uniform throughout the member states. But anything we decide here is not likely to have any effect in other member states. They probably pay about as much attention to how we interpret the Convention rights as we pay to how they do, which is hardly any attention at all. There is no reason why either Strasbourg or the other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law. Indeed, there is good reason to think that they do not.

Lastly, I have heard it argued that our considerable respect for the Strasbourg jurisprudence is getting in the way of our regarding the Convention as a properly British Bill of Rights, of taking its guarantees as a starting point and working out the proper balance between the competing interests for ourselves. It might even be suggested that if we had paid less attention to the Strasbourg jurisprudence, we would not have given human rights such a bad name in certain quarters, because we could be seen to be having regard to British values, British mores, and British legal principles.

So we are damned in some quarters whatever we do, whether we follow Strasbourg or whether we do not. But I think we can find several examples of our trying to follow our own, rather than a pan-European, line.

First, there are those cases where we have definitely gone further than Strasbourg had gone at the time and probably further than Strasbourg would still go. . . .[*]

[*][Editor's Note: The cases referenced are *EM (Lebanon) v. Secretary of State for the Home Department,* [2008] UKHL 74, *R (Limbuela) v Secretary of State for the Home Department,* [2005] UKHL 66, and *G (Adoption: Unmarried Couple)* [2008] UKHL 38.]

Then there are those cases where there may have been an interference with a qualified Convention right, but it is the result of recent legislation, when Parliament was well aware of the arguments, so we have taken a British line. The most obvious example is the *Countryside Alliance* case. . . . [T]he opponents of the [Hunting] Act argued that it was contrary to Articles 8, 11 and 14 of the ECHR and Article 1 of the First Protocol to the ECHR. And as a last desperate throw, they argued that it was contrary to two of the fundamental rights of European Economic Community law, free movement of goods and free supply of services between member states of the [European Union (EU)]. Mostly, we held that the ban did not interfere with these rights at all. But, if it did, it was justified. And this was for very British reasons. . . . As Lord Bingham explained, . . . [f]or the supporters of the ban, 'it was felt to be morally offensive to inflict suffering on foxes (and hares and mink) for sport.' He went on, '. . . the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.' This reasoning convinced Strasbourg that the judgment was within our margin of appreciation. One can imagine that in other European countries, an interference with the time-hallowed right to hunt over other people's land or shoot tiny song birds for sport would not have been justified.

The test for justification for any interference with the EU rights on grounds of public policy is even stricter. Lord Bingham relied on the well-known *Omega* case (2004) from Germany. This was about the laser gun games. The German police had banned the use of laser guns against human targets. This was found justified in Germany (though we do not find it offensive here) because the simulated killing of human beings for fun infringed the fundamental value of human dignity enshrined in the German Constitution. Here, Parliament had concluded that the prevention of cruelty to animals in the pursuit of sport was a fundamental British value.

In similar vein was our controversial decision in the *Animal Defenders International* [(2008)] case, which was about our very comprehensive ban on any kind of political advertising. The appellants wanted to show an advertisement on TV showing a child chained and caged in the way that chimpanzees and other primates may be chained and caged. Their object was to campaign for a change in the law, which is caught by section 321(3)(b) of the Communications Act 2003. This was clearly an interference with freedom of speech, indeed freedom of political speech, which is the most important of the kinds of speech protected by Article 10 of the ECHR. It would certainly not be tolerated in the United States of America. But, as I pointed out. 'In the United Kingdom, and elsewhere in Europe,

we do not want our government or its policies to be decided by the highest spenders. . . . We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.'

A fair balance had to be struck between freedom of speech and the protection of our democracy, based upon the equal value of everyone, rich and poor. Parliament had struck that balance recently and its view should be respected (notwithstanding a decision of a chamber of the Strasbourg Court which pointed the other way).

You can see these cases as examples of our bowing—or surrendering—to the recent judgment of Parliament as to how the balance between the competing private rights and public interest should be struck. But I would also see them as striking the balance in a very British way. Another example of striking the balance in a very British way, this time despite the reluctance of the national Parliament to do so, is the Northern Ireland case of *Re G* [(2008)]. The claimants were an unmarried opposite sex couple who wished jointly to adopt the woman's 10-year-old daughter. English law and Scottish law have both now permitted joint adoptions by unmarried couples, whether of the same or opposite sexes. But Northern Ireland retained the old law, which restricts joint adoptions to married couples (and even failed to include civil partners when the Civil Partnership Act 2004 was passed). Single people, whether or not they are in a stable opposite or same sex relationship, can adopt alone but the child will not become their partner's child or a member of their partner's family. . . .

We decided, not without some hesitation on my part, that the ban was contrary to Article 14 of the ECHR, which prohibits unjustified discrimination in the enjoyment of the Convention rights, in this case, the right to respect for the family life which the child, her mother and her step-father enjoyed together. While there may often be good reasons not to allow an unmarried couple to adopt, it is difficult to find good reasons for a blanket ban. It is, as Lord Hoffmann put it, to turn a reasonable generalisation into an irrebuttable presumption. Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children. There could well be cases, especially where the child was already living with the couple and had no contact at all with the other half of her birth family, where adoption by them both would be better for the child than the status quo.

This was a case on which Strasbourg had not yet spoken. The Court had recently held, in a change of mind, that refusing to allow adoption by a gay or lesbian person was incompatible with Article 14. But here, the issue was whether

a ban on joint adoptions by unmarried couples, whether of the same or opposite sexes, was incompatible. Two of us were by no means sure that Strasbourg would find that it was: the European Convention on Adoption was still restricted to married couples and in the Republic of Ireland the married family was protected by the Constitution. It seemed unlikely to me that Strasbourg would oblige the Irish to allow unmarried couples to adopt. But, we were in the United Kingdom. Our paramount principle is the welfare of the child. The blanket ban could not be reconciled with that principle. So we declared it unlawful for the courts in Northern Ireland to refuse to accept an adoption application on the sole ground that the applicants were not married to one another. We could do that, rather than making a declaration of incompatibility, because the law was contained in delegated legislation.

That case led me to change my own position a little on our relationship with the legislature. . . . [I]n *Animal Defenders International* (2008), I declared that 'I do not believe that, when Parliament gave us these novel and important powers . . . it was giving us the power to leap ahead of Strasbourg in our interpretation of the Convention rights.' It is tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law and leaping ahead of Strasbourg in telling Parliament that it has got things wrong. It is in the latter context that most of the strongly *Ullah*-type statements have been made. Yet, the concept of the 'Convention rights,' upon which all our powers and duties under the Human Rights Act depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive or assessing the legislation. I now think that it is more a question of respect for the balances recently struck by the legislature than a question of the extent of our powers. One reason for this is that an aggrieved complainant can always go to Strasbourg if she disagrees with our assessment, but the United Kingdom cannot.

But all these cases were about the justifications for interferences with qualified rights, on questions which Strasbourg might very well hold to be within our margin of appreciation—indeed, where arguably they should do so even if they sometimes might not. We cannot then decline to decide the case on the basis that Strasbourg has not yet spoken. We have to make the best judgment we can about the balance between the competing interests. It does seem, from the materials quoted earlier, that Parliament intended us to do our best to interpret the Convention rights in accordance with British conditions and British values. . . .

But what about the reverse situation, where we think that Strasbourg has gone too far, and failed to take proper account of our legal traditions here? Jury trial does not sit comfortably with all the requirements of Article 6. But, neither

does the continental inquisitorial practice, in which the defendant may not get an opportunity to challenge everything which is in the dossier compiled against him. The Criminal Justice Act 2003 provides for the admissibility of hearsay evidence in certain circumstances, including when the person making a witness statement has since died. In *Al-Khawaja* (2011), a Chamber of the Strasbourg Court held that it was a breach of Article 6 where this was the sole and decisive evidence against the defendant—even though there was ample corroboration for what the deceased victim had said. So when the same problem came up before the Supreme Court in *Horncastle* [(2009)], the Court went to a great deal of trouble to explain to Strasbourg why we thought they were wrong and that a fair trial could still be had in those circumstances. The object was to persuade the Grand Chamber to hear the *Al-Khawaja* case and to reach a different conclusion. [The Grand Chamber did take the case and adopted a more nuanced stance in December 2011.] . . .

. . . [If the Strasbourg Court had maintained its stance, what would we do when the question next came before us?] We have not so far, at least to my knowledge, ever disagreed with—or failed to apply—a decision of the Grand Chamber which is directly in point or even a 'clear and constant' line of chamber decisions. . . . So there would be three choices. First, we could meekly go along with it and engage in some heroic interpretation of the 2003 [Criminal Justice] Act to make it compatible with the Convention rights. How far section 3(1) of the Human Rights Act allows us to go in that direction is a large topic for another day. But I sense some reluctance among my colleagues to go as far as the boldest cases, including *MB*, have gone in the past. So I think that we would not do that. Second, we could meekly go along with it and make a declaration of incompatibility under section 4. Third, however, we could politely decline to make a declaration of incompatibility on the ground that we do not agree with the Strasbourg decision. *Argentoratum locutum: iudicium non finitum*. . . .

But what of the Strasbourg Court itself? The newly elected President, Sir Nicolas Bratza, has mounted a serious defence of the relationship between us. He points out that last year there were around 1,200 applications to Strasbourg from the UK, the great majority of which were declared inadmissible or struck out. Only 23 resulted in a judgment of the Court and in several of these there was no violation found. He argues that the Strasbourg Court has shown itself receptive to arguments that it has misunderstood national law or given insufficient weight to national traditions or practices; it does pay close regard to the particular requirements of the society in question; even if a violation is found, it tends to leave it to the national authorities to decide how to put it right—the most obvious example being the prisoners' voting case. Nevertheless, he believed that there

were things the Strasbourg Court could do to ensure greater harmony between national courts and Strasbourg. . . .

[I]n his view, there is room for increased dialogue between the courts, both informally and in our judgments. . . . Currently under discussion between the politicians, of course, is whether the . . . [ECHR] should be amended so as to allow the member states some way out when there is a serious disagreement between their national Parliament and the Strasbourg Court, as currently there is here about prisoners' voting rights. That is a matter for the politicians and certainly not my concern as a judge. But, as a judge, I am intrigued and encouraged indeed to know that *Argentoratum locutum, iudicium finitum* is not in fact how the President and his fellow judges view the respective roles of our two courts. I think that there is room for us to develop a distinctively British human rights jurisprudence without overstepping the boundaries which Parliament has set for us. It is just as likely to lead to our respecting the recent judgments of Parliament as it is to our declaring them incompatible. We may look forward to an even more lively dialogue with Strasbourg in future.

Jonathan Sumption

Judicial and Political Decisionmaking: The Uncertain Boundary[*]

The real problem about the Human Rights Convention is not the general principles stated in it, which would be accepted by almost every one. The problem is that the case-law of the Strasbourg Court has derived from them by a process of implication and extension a very large number of derivative sub-principles and rules, addressing the internal arrangements of contracting states in great detail. Many of these sub-principles and rules go well beyond what is required to vindicate the rights expressly conferred by the Convention. In addition, the Strasbourg court has taken it upon itself to decide not only whether contracting states had proper institutional safeguards for the protection of human rights, but whether it agreed with the outcome. . . . The result of this approach has been to shrink the margin of appreciation allowed to contracting states to almost nothing.

[*]Excerpted from *Jonathan Sumption*, Justice, Supreme Court of the United Kingdom, Judicial and Political Decisionmaking: The Uncertain Boundary, F.A. Mann Lecture (Nov. 9, 2011), *available at* http://www.guardian.co.uk/law/interactive/2011/nov/09/jonathan-sumption-speech-politicisation-judges.

One of the most striking features of modern human rights theory is its claim to universal validity. The European Convention has been construed as attributing rights to humans simply by virtue of their humanity, irrespective of their membership [in] any particular legal or national community. In this spirit, the Strasbourg Court endeavours not only to interpret the Convention but to apply it in a uniform manner throughout the 47 states which subscribe to it. This approach conflicts with some very basic principles on which human societies are organised. National communities are diverse, even within a region such as Europe with a strong common identity. Their collective values are the product of their particular culture and history. Rights are necessarily claims against the claimant's own community, and in a democracy they depend for their legitimacy on a measure of recognition by that community. A principled objection to extreme exercises of state power, such as military government, torture or imprisonment without trial is no doubt common to every state party to the Convention. But the Strasbourg Court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life. These include many matters which are governed by no compelling moral considerations one way or the other. The problem about this is that the application of a common legal standard . . . breaks down when it is sought to apply it to all collective activity or political and administrative decision-making. The consensus necessary to support it at this level of detail simply does not exist.

Extremes apart, political communities may and do legitimately differ on what rights should be recognised. Even where they recognise the same rights, they frequently differ on what those rights imply or how effect should be given to them. . . . [Human rights issues] are issues between different groups of citizens, whose resolution by democratic processes will not necessarily lead to the same answer everywhere. Yet in the course of its admittedly obscure judgment in *A, B and C v. Ireland* the Grand Chamber of the European Court of Human Rights appears to have thought that because the great majority of European states have since the 1970s given qualified primacy to the health and wellbeing of the mother over the interests of the unborn child, it was not necessarily open to Ireland to take a different view. It is clear from this judgment, so far as anything is, that if the Strasbourg Court had found a European consensus about when life can be said to begin, they would have declared abortion in the interest of the health and well-being of the mother to be a human right and imposed it on Ireland. As it was, the only reason why Ireland's highly restrictive abortion laws were judged compatible with the Convention was that they did not prevent Irish women from travelling to England for an abortion.

Luzius Wildhaber

A Constitutional Future for the European Court of Human Rights?[*]

[To the extent that] the national authorities are in a position to apply Convention case-law to the questions before [them], then much, if not all, of the Strasbourg Court's work is done. This is ultimately the objective underlying the system: to ensure that persons throughout the Convention community are able fully to assert their Convention rights within the domestic legal system.

Another way of putting this is that fulfilment of the procedural obligation leaves room for the operation of what we call the margin of appreciation, for those Articles in respect of which a margin of appreciation is capable of existing and therefore excluding Articles 2 [right to life] and 3 [prohibition of torture]. This area of discretion is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. It reflects on the one hand the practical matter of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction covers 43 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. Thus the Court has observed that it must be cautious in taking on the role of first instance tribunal of fact. Nor is it the Court's task to substitute its own assessment of the facts for that of the domestic courts. Though the Court is not bound by the findings of domestic courts, it requires cogent findings of fact to depart from findings of fact reached by those courts.

But the margin of appreciation also embraces an element of deference to decisions taken by democratic institutions—a deference deriving from the primordial place of democracy within the Convention system. It is not the role of the European Court systematically to second-guess democratic legislatures. What it has to do is to exercise an international supervision in specific cases to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they interfere with a given category of individual interests. The balancing exercise between such competing interests is most appropriately carried out by the national authorities. There must however be a balancing exercise and this implies the existence of procedures which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest concerned. In that sense the area of discretion accorded to States, the margin of

[*]Excerpted from Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161 (2002).

appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. The margin of appreciation recognises that where appropriate procedures are in place a range of solutions compatible with human rights may be available to the national authorities. The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide an Europe-wide framework for domestic human rights protection.

Medellín v. Texas

United States Supreme Court
552 U.S. 491 (2008)

Chief Justice ROBERTS delivered the opinion of the Court, in which Justices SCALIA, KENNEDY, THOMAS, and ALITO joined. Justice STEVENS filed an opinion concurring in the judgment. Justice BREYER filed a dissenting opinion, in which Justices SOUTER and GINSBURG joined.

[T]he International Court of Justice (ICJ), located in the Hague, is a tribunal established pursuant to the United Nations Charter to adjudicate disputes between member states. In the *Case Concerning Avena and Other Mexican Nationals* (2004) (*Avena*), that tribunal considered a claim brought by Mexico against the United States. The ICJ held that, based on violations of the Vienna Convention, 51 named Mexican nationals were entitled to review and reconsideration of their state court convictions and sentences in the United States. This was so regardless of any forfeiture of the right to raise Vienna Convention claims because of a failure to comply with generally applicable state rules governing challenges to criminal convictions.

In *Sanchez–Llamas v. Oregon* (2006)—issued after *Avena* but involving individuals who were not named in the *Avena* judgment—we held that, contrary to the ICJ's determination, the Vienna Convention did not preclude the application of state default rules. After the *Avena* decision, President George W. Bush determined, through a Memorandum to the Attorney General (Feb. 28, 2005), (Memorandum or President's Memorandum), that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision."

Petitioner José Ernesto Medellín, who had been convicted and sentenced in Texas state court for murder, is one of the 51 Mexican nationals named in the *Avena* decision. Relying on the ICJ's decision and the President's Memorandum, Medellín filed an application for a writ of habeas corpus in state court. The Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ under state law, given Medellín's failure to raise his Vienna Convention claim in a timely manner under state law. We granted certiorari to decide two questions. First, is the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States? Second, does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules? We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions. We therefore affirm the decision below. . . .

In 1969, the United States, upon the advice and consent of the Senate, ratified the Vienna Convention on Consular Relations (Vienna Convention or Convention) (1970), and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol or Protocol), (1970). The preamble to the Convention provides that its purpose is to "contribute to the development of friendly relations among nations." Toward that end, Article 36 of the Convention was drafted to "facilitat[e] the exercise of consular functions." It provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his righ[t]" to request assistance from the consul of his own state.

The Optional Protocol provides a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convention. Under the Protocol, such disputes "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] TTT by any party to the dispute being a Party to the present Protocol."

The ICJ is "the principal judicial organ of the United Nations." United Nations Charter (1945). It was established in 1945 pursuant to the United Nations Charter. The ICJ Statute—annexed to the U.N. Charter—provides the organizational framework and governing procedures for cases brought before the ICJ.

Under Article 94(1) of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which

it is a party." The ICJ's jurisdiction in any particular case, however, is dependent upon the consent of the parties. The ICJ Statute delineates two ways in which a nation may consent to ICJ jurisdiction: It may consent generally to jurisdiction on any question arising under a treaty or general international law, or it may consent specifically to jurisdiction over a particular category of cases or disputes pursuant to a separate treaty. The United States originally consented to the general jurisdiction of the ICJ when it filed a declaration recognizing compulsory jurisdiction under Art. 36(2) in 1946. The United States withdrew from general ICJ jurisdiction in 1985. By ratifying the Optional Protocol to the Vienna Convention, the United States consented to the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention. On March 7, 2005, subsequent to the ICJ's judgment in *Avena*, the United States gave notice of withdrawal from the Optional Protocol to the Vienna Convention. . . .

Petitioner José Ernesto Medellín, a Mexican national, has lived in the United States since preschool. A member of the "Black and Whites" gang, Medellín was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers. . . .

Medellín was arrested at approximately 4 a.m. on June 29, 1993. A few hours later, between 5:54 and 7:23 a.m., Medellín was given *Miranda* warnings; he then signed a written waiver and gave a detailed written confession. Local law enforcement officers did not, however, inform Medellín of his Vienna Convention right to notify the Mexican consulate of his detention. Medellín was convicted of capital murder and sentenced to death; his conviction and sentence were affirmed on appeal.

Medellín first raised his Vienna Convention claim in his first application for state postconviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review. The trial court also rejected the Vienna Convention claim on the merits, finding that Medellín had "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment."[1] The Texas Court of Criminal Appeals affirmed.

Medellín then filed a habeas petition in Federal District Court. The District Court denied relief, holding that Medellín's Vienna Convention claim was procedurally defaulted and that Medellín had failed to show prejudice arising from the Vienna Convention violation. . . .

[1] The requirement of Article 36(1)(b) of the Vienna Convention that the detaining state notify the detainee's consulate "without delay" is satisfied, according to the ICJ, where notice is provided within three working days. . . .

[T]he ICJ [then] issued its decision in *Avena*. . . . In the ICJ's determination, the United States was obligated *"*to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals.*"* The ICJ indicated that such review was required without regard to state procedural default rules. . . .

Before we heard oral argument, however, President George W. Bush issued his Memorandum to the United States Attorney General, providing:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Medellín, relying on the President's Memorandum and the ICJ's decision in *Avena*, filed a second application for habeas relief in state court . . . .

The Texas Court of Criminal Appeals subsequently dismissed Medellín's second state habeas application . . . .

Medellín first contends that the ICJ's judgment in *Avena* constitutes a "binding" obligation on the state and federal courts of the United States. He argues that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are already the 'Law of the Land' by which all state and federal courts in this country are 'bound.'" Accordingly, Medellín argues, *Avena* is a binding federal rule of decision that pre-empts contrary state limitations on successive habeas petitions.

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. . . .

A treaty is, of course, "primarily a compact between independent nations." *Head Money Cases* (1884). It ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." . . . . Only "[i]f the treaty contains stipulations which are self-executing, that

is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment." *Whitney* [*v Robertson*] (U.S. 1888).[3]

Medellín and his amici nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the "relevant obligation" to give the *Avena* judgment binding effect in the domestic courts of the United States.[4] Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law. . . .

As a signatory to the Optional Protocol, the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ. The Protocol provides: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Of course, submitting to jurisdiction and agreeing to be bound are two different things. . . .

The most natural reading of the Optional Protocol is as a bare grant of jurisdiction. It provides only that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol." The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.

The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party." (emphasis added). The Executive Branch contends [here] that the phrase "undertakes to comply" is not "an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members," but rather "a

[3] Even when treaties are self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."

[4] [W]e thus assume, without deciding, that Article 36 grants foreign nationals "an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification."

commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision."

We agree with this construction of Article 94. The Article is not a directive to domestic courts. . . .

The remainder of Article 94 confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts.[6] Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state. . . .

The dissent faults our analysis because it "looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)." Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue. That is after all what the Senate looks to in deciding whether to approve the treaty. . . .

As against this time-honored textual approach, the dissent proposes a multifactor, judgment-by-judgment analysis that would "jettiso[n] relative predictability for the open-ended rough-and-tumble of factors." The dissent's novel approach to deciding which (or, more accurately, when) treaties give rise to directly enforceable federal law is arrestingly indeterminate. . . .

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. The dissent's understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.

The dissent's approach risks the United States' involvement in international agreements. It is hard to believe that the United States would enter

[6] Article 94(2) provides in full: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary. Senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United States' efforts to negotiate and sign international agreements.

In this case, the dissent—for a grab bag of no less than seven reasons—would tell us that this particular ICJ judgment is federal law. That is no sort of guidance. . . . The dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.

Our conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the "postratification understanding" of signatory nations. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellín nor his amici have identified a single nation that treats ICJ judgments as binding in domestic courts.[10] In determining that the Vienna Convention did not require certain relief in United States courts in *Sanchez–Llamas*, we found it pertinent that the requested relief would not be available under the treaty in any other signatory country. So too here the lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts . . . .

Moreover, the consequences of Medellín's argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment and quarrel with its reasoning or result. . . . Medellín's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate . . . .

Even the dissent flinches at reading the relevant treaties to give rise to self-executing ICJ judgments in all cases. It admits that "Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for

[10] The best that the ICJ experts as *amici curiae* can come up with is the contention that local Moroccan courts have referred to ICJ judgments as "dispositive." Even the ICJ experts do not cite a case so holding, and Moroccan practice is at best inconsistent, for at least one local Moroccan court has held that ICJ judgments are not binding as a matter of municipal law.

enforcement by other branches." Our point precisely. But the lesson to draw from that insight is hardly that the judiciary should decide which judgments are politically sensitive and which are not. . . .

[A] judgment is binding only if there is a rule of law that makes it so. . . .

Our prior decisions identified by the dissent as holding a number of treaties to be self-executing, stand only for the unremarkable proposition that some international agreements are self-executing and others are not. . . .

Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with Medellín that, as a general matter, "an agreement to abide by the result" of an international adjudication—or what he really means, an agreement to give the result of such adjudication domestic legal effect—can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. The point is that the particular treaty obligations on which Medellín relies do not of their own force create domestic law.

The dissent worries that our decision casts doubt on some 70–odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. . . . And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent) through implementing legislation, as it regularly has. . . .

In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. See, e.g., 22 U.S.C. § 1650a(a) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [Convention on the Settlement of Investment Disputes] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States"); 9 U.S.C. §§ 201–208 ("The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter," § 201). . . .

Nothing in the text, background, negotiating and drafting history, or practice among signatory nations [to the Vienna Convention] suggests that the

President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections."

[J]ustice STEVENS, concurring in the judgment.

There is a great deal of wisdom in Justice Breyer's dissent. I agree that the text and history of the Supremacy Clause, as well as this Court's treaty-related cases, do not support a presumption against self-execution. I also endorse the proposition that the Vienna Convention on Consular Relations "is itself self-executing and judicially enforceable." Moreover, I think this case presents a closer question than the Court's opinion allows. In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice (ICJ) in [*Avena*]. . . .

[A]bsent a presumption one way or the other, the best reading of the words "undertakes to comply" is, in my judgment, one that contemplates future action by the political branches. I agree with the dissenters that "Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches." . . . But this concern counsels in favor of reading any ambiguity in Article 94(1) as leaving the choice of whether to comply with ICJ judgments, and in what manner, "to the political, not the judicial department."[3]

[E]ven though the ICJ's judgment in *Avena* is not "the supreme Law of the Land," U.S. Const., Art. VI, cl. 2, no one disputes that it constitutes an international law obligation on the part of the United States. By issuing a memorandum declaring that state courts should give effect to the judgment in *Avena*, the President made a commendable attempt to induce the States to discharge the Nation's obligation. I agree with the Texas judges and the majority of this Court that the President's memorandum is not binding law. Nonetheless, the fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment.

Under the express terms of the Supremacy Clause, the United States' obligation to "undertak[e] to comply" with the ICJ's decision falls on each of the

[3] Congress' implementation options are broader than the dissent suggests. In addition to legislating judgment-by-judgment, enforcing all judgments indiscriminately, and devising "legislative bright lines," Congress could, for example, make ICJ judgments enforceable upon the expiration of a waiting period that gives the political branches an opportunity to intervene.

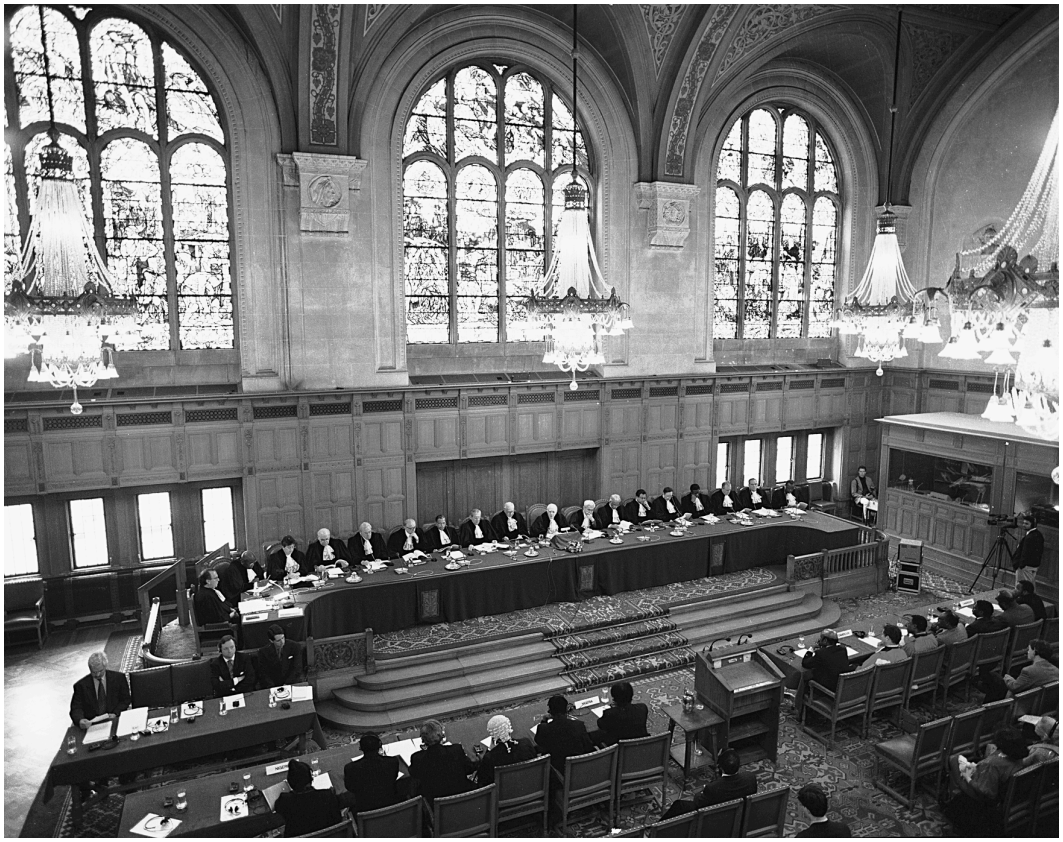
States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.

[T]he cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced Jose Ernesto Medellín. It is a cost that the State of Oklahoma unhesitatingly assumed.[4]

On the other hand, the costs of refusing to respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' "plainly compelling" interests in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.

The Court's judgment, which I join, does not foreclose further appropriate action by the State of Texas.

[4] In *Avena*, the ICJ expressed "great concern" that Oklahoma had set the date of execution for one of the Mexican nationals involved in the judgment, Osbaldo Torres, for May 18, 2004. Responding to *Avena*, the Oklahoma Court of Criminal Appeals stayed Torres' execution and ordered an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification. On the same day, the Governor of Oklahoma commuted Torres' death sentence to life without the possibility of parole, stressing that (1) the United States signed the Vienna Convention, (2) that treaty is "important in protecting the rights of American citizens abroad," (3) the ICJ ruled that Torres' rights had been violated, and (4) the U.S. State Department urged his office to give careful consideration to the United States' treaty obligations. . . . After the evidentiary hearing, the Oklahoma Court of Criminal Appeals held that Torres had failed to establish prejudice with respect to the guilt phase of his trial, and that any prejudice with respect to the sentencing phase had been mooted by the commutation order. *Torres v. Oklahoma* (2005).



A Sitting of the International Court of Justice in the Great Hall, the Peace Palace, March 8, 1996.

Photograph by D-VORM.NL, Leidschendam, the Netherlands. Photograph reproduced courtesy of the Carnegie Foundation.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting. . . .[*]

In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words "undertak[e] to comply," for example, do not tell us whether an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our

[*][Editor's Note: Not reproduced are Appendix A, "Examples of Supreme Court decisions considering a treaty provision to be self-executing," and Appendix B, "United States Treaties in force containing provisions for the submission of treaty-based disputes to the International Court of Justice."]

own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation.

Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land." In 1796, for example, the Court decided the case of *Ware v. Hylton*. A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that required debtors to repay money owed to British creditors into a Virginia state fund. The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that "'the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all *bona fide* debts, theretofore contracted;'" and that provision, the creditor argued, effectively nullified the state law. The Court . . . agreed with the British creditor . . . and found that the American debtor remained liable for the debt.

The key fact relevant here is that Congress had not enacted a specific statute enforcing the treaty provision at issue. Hence the Court had to decide whether the provision was (to put the matter in present terms) "self-executing." Justice Iredell, a member of North Carolina's Ratifying Convention, addressed the matter specifically, setting forth views on which Justice Story later relied to explain the Founders' reasons for drafting the Supremacy Clause. . . .

Justice Iredell pointed out that some Treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were "executed," taking effect automatically upon ratification. Other provisions were "executory," in the sense that they were "to be carried into execution" by each signatory nation "in the manner which the Constitution of that nation prescribes." Before adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law only if Congress on the American side, or Parliament on the British side, had written them into domestic law. . . .

But, Justice Iredell adds, after the Constitution's adoption, while further parliamentary action remained necessary in Britain (where the "practice" of the need for an "act of parliament" in respect to "any thing of a legislative nature" had "been constantly observed"), further legislative action in respect to the treaty's debt-collection provision was no longer necessary in the United States.

The ratification of the Constitution with its Supremacy Clause means that treaty provisions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well. . . .

Some 30 years later, the Court returned to the "self-execution" problem. In *Foster* [*v. Neilson* (1829)], the Court examined a provision in an 1819 treaty with Spain ceding Florida to the United States; the provision said that "'grants of land made'" by Spain before January 24, 1818, "'shall be ratified and confirmed'" to the grantee. Chief Justice Marshall, writing for the Court, noted that, as a general matter, one might expect a signatory nation to execute a treaty through a formal exercise of its domestic sovereign authority (e.g., through an act of the legislature). But in the United States "a different principle" applies. The Supremacy Clause means that, here, a treaty is "the law of the land . . . to be regarded in Courts of justice as equivalent to an act of the legislature" and "operates of itself without the aid of any legislative provision" unless it specifically contemplates execution by the legislature and thereby "addresses itself to the political, not the judicial department." The Court decided that the treaty provision in question was not self-executing; in its view, the words "shall be ratified" demonstrated that the provision foresaw further legislative action.

The Court, however, changed its mind about the result in *Foster* four years later, after being shown a less legislatively oriented, less tentative, but equally authentic Spanish-language version of the treaty. And by 1840, instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that "it would be a bold proposition" to assert "that an act of Congress must be first passed" in order to give a treaty effect as "a supreme law of the land." *Lessee of Pollard's Heirs v. Kibbe* (1840) (Baldwin, J., concurring).

Since *Foster* and *Pollard*, this Court has frequently held or assumed that particular treaty provisions are self-executing, automatically binding the States without more. As far as I can tell, the Court has held to the contrary only in two cases: *Foster,* which was later reversed, and *Cameron Septic Tank Co. v. Knoxville* (1913), where specific congressional actions indicated that Congress thought further legislation necessary. . . .

Of particular relevance to the present case, the Court has held that the United States may be obligated by treaty to comply with the judgment of an international tribunal interpreting that treaty, despite the absence of any congressional enactment specifically requiring such compliance. . . .

All of these cases make clear that self-executing treaty provisions are not uncommon or peculiar creatures of our domestic law; that they cover a wide range of subjects; that the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States; and that the Clause answers the self-execution question differently than does the law in many other nations. . . .

The case law provides no simple magic answer to the question whether a particular treaty provision is self-executing. But the case law does make clear that, insofar as today's majority looks for language about "self-execution" in the treaty itself and insofar as it erects "clear statement" presumptions designed to help find an answer, it is misguided. . . .

Indeed, the majority does not point to a single ratified United States treaty that contains the kind of "clea[r]" or "plai[n]" textual indication for which the majority searches. . . . Justice Stevens' reliance upon one ratified and one un-ratified treaty to make the point that a treaty could speak clearly on the matter of self-execution . . . does suggest that there are a few such treaties. But that simply highlights how few of them actually do speak clearly on the matter. And that is not because the United States never, or hardly ever, has entered into a treaty with self-executing provisions. . . . Rather, it is because the issue whether further legislative action is required before a treaty provision takes domestic effect in a signatory nation is often a matter of how that Nation's domestic law regards the provision's legal status. And that domestic status-determining law differs markedly from one nation to another. . . .

[G]iven the differences among nations, why would drafters write treaty language stating that a provision about, say, alien property inheritance, is self-executing? How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another? Why would such a difference matter sufficiently for drafters to try to secure language that would prevent, for example, Britain's following treaty ratification with a further law while (perhaps unnecessarily) insisting that the United States apply a treaty provision without further domestic legislation? Above all, what does the absence of specific language about "self-execution" prove? It may reflect the drafters' awareness of national differences. It may reflect the practical fact that drafters, favoring speedy, effective implementation, conclude they should best leave national legal practices alone. It may reflect the fact that achieving international agreement on this point is simply a game not worth the candle.

In a word, for present purposes, the absence or presence of language in a treaty about a provision's self-execution proves nothing at all. At best the Court is

hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.

The case law also suggests practical, context-specific criteria that this Court has previously used to help determine whether, for Supremacy Clause purposes, a treaty provision is self-executing. . . . Instead text and history, along with subject matter and related characteristics will help our courts determine whether, as Chief Justice Marshall put it, the treaty provision "addresses itself to the political . . . department[s]" for further action or to "the judicial department" for direct enforcement.

In making this determination, this Court has found the provision's subject matter of particular importance. Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. Alternatively, does it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts.

One might also ask whether the treaty provision confers specific, detailed individual legal rights. Does it set forth definite standards that judges can readily enforce? Other things being equal, where rights are specific and readily enforceable, the treaty provision more likely "addresses" the judiciary.

Alternatively, would direct enforcement require the courts to create a new cause of action? Would such enforcement engender constitutional controversy? Would it create constitutionally undesirable conflict with the other branches? In such circumstances, it is not likely that the provision contemplates direct judicial enforcement.

Such questions, drawn from case law stretching back 200 years, do not create a simple test, let alone a magic formula. But they do help to constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado. And such an approach is all that we need to find an answer to the legal question now before us.

Applying the approach just described, I would find the relevant treaty provisions self-executing as applied to the ICJ judgment before us (giving that judgment domestic legal effect) for the following reasons, taken together.

First, the language of the relevant treaties strongly supports direct judicial enforceability, at least of judgments of the kind at issue here. The Optional Protocol bears the title "Compulsory Settlement of Disputes," thereby emphasizing the mandatory and binding nature of the procedures it sets forth. The body of the Protocol says specifically that "any party" that has consented to the ICJ's "compulsory jurisdiction" may bring a "dispute" before the court against any other such party. And the Protocol contrasts proceedings of the compulsory kind with an alternative "conciliation procedure," the recommendations of which a party may decide "not" to "accep[t]." Thus, the Optional Protocol's basic objective is not just to provide a forum for settlement but to provide a forum for compulsory settlement.

Moreover, in accepting Article 94(1) of the Charter, "[e]ach Member . . . undertakes to comply with the decision" of the ICJ "in any case to which it is a party." And the ICJ Statute (part of the U.N. Charter) makes clear that, a decision of the ICJ between parties that have consented to the ICJ's compulsory jurisdiction has "*binding force* . . . between the parties and in respect of that particular case." Enforcement of a court's judgment that has "binding force" involves quintessential judicial activity. . . .

And even if I agreed with Justice Stevens that the language is perfectly ambiguous (which I do not), I could not agree that "the best reading . . . is . . . one that contemplates future action by the political branches." The consequence of such a reading is to place the fate of an international promise made by the United States in the hands of a single State. And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause. . . .

The upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation. In this Nation, the Supremacy Clause, as long and consistently interpreted, indicates that ICJ decisions rendered pursuant to provisions for binding adjudication must be domestically legally binding and enforceable in domestic courts at least sometimes. And for purposes of this argument, that conclusion is all that I need. The remainder of the discussion will explain why, if ICJ judgments sometimes bind domestic courts, then they have that effect here.

Second, the Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable. The Convention provision is about an individual's "rights," namely, his right upon being arrested to be informed of his separate right to contact his nation's consul. The provision language is precise. The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure; it consequently concerns the kind of matter with which judges are familiar. The provisions contain judicially enforceable standards. . . .

Third, logic suggests that a treaty provision providing for "final" and "binding" judgments that "settl[e]" treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing. Imagine that two parties to a contract agree to binding arbitration about whether a contract provision's word "grain" includes rye. They would expect that, if the arbitrator decides that the word "grain" does include rye, the arbitrator will then simply read the relevant provision as if it said "grain including rye." They would also expect the arbitrator to issue a binding award that embodies whatever relief would be appropriate under that circumstance. . . .

[W]hat sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (i.e., that Congress must enact specific legislation to enforce it)?

I am not aware of any satisfactory answer to these questions. It is no answer to point to the fact that in *Sanchez-Llamas v. Oregon*, this Court interpreted the relevant Convention provisions differently from the ICJ in *Avena*. This Court's *Sanchez-Llamas* interpretation binds our courts with respect to individuals whose rights were not espoused by a state party in *Avena*. Moreover, as the Court itself recognizes . . . and as the President recognizes, the question here is the very different question of applying the ICJ's *Avena* judgment to the very parties whose interests Mexico and the United States espoused in the ICJ *Avena* proceeding. It is in respect to these individuals that the United States has promised the ICJ decision will have binding force. . . .

[T]his case does not implicate the general interpretive question answered in *Sanchez-Llamas*: whether the Vienna Convention displaces state procedural rules. We are instead confronted with the discrete question of Texas' obligation to comply with a binding judgment issued by a tribunal with undisputed jurisdiction to adjudicate the rights of the individuals named therein. "It is inherent in international adjudication that an international tribunal may reject one country's

legal position in favor of another's—and the United States explicitly accepted this possibility when it ratified the Optional Protocol."

Fourth, the majority's very different approach has seriously negative practical implications. The United States has entered into at least 70 treaties that contain provisions for ICJ dispute settlement similar to the Protocol before us. Many of these treaties contain provisions similar to those this Court has previously found self-executing—provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth. If the Optional Protocol here, taken together with the U.N. Charter and its annexed ICJ Statute, is insufficient to warrant enforcement of the ICJ judgment before us, it is difficult to see how one could reach a different conclusion in any of these other instances. And the consequence is to undermine longstanding efforts in those treaties to create an effective international system for interpreting and applying many, often commercial, self-executing treaty provisions. I thus doubt that the majority is right when it says, "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments." In respect to the 70 treaties that currently refer disputes to the ICJ's binding adjudicatory authority, some multilateral, some bilateral, that is just what the majority has done.

Nor can the majority look to congressional legislation for a quick fix. Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches: for example, those touching upon military hostilities, naval activity, handling of nuclear material, and so forth. Nor is Congress likely to have the time available, let alone the will, to legislate judgment-by-judgment enforcement of, say, the ICJ's (or other international tribunals') resolution of non-politically-sensitive commercial disputes. . . .

Fifth, other factors, related to the particular judgment here at issue, make that judgment well suited to direct judicial enforcement. The specific issue before the ICJ concerned "'review and reconsideration'" of the "possible prejudice" caused in each of the 51 affected cases by an arresting State's failure to provide the defendant with rights guaranteed by the Vienna Convention. This review will call for an understanding of how criminal procedure works, including whether, and how, a notification failure may work prejudice. As the ICJ itself recognized, "it is the judicial process that is suited to this task." Courts frequently work with criminal procedure and related prejudice. Legislatures do not. Judicial standards are readily available for working in this technical area. Legislative standards are not readily available. Judges typically determine such matters, deciding, for

example, whether further hearings are necessary, after reviewing a record in an individual case. Congress does not normally legislate in respect to individual cases. Indeed, to repeat what I said above, what kind of special legislation does the majority believe Congress ought to consider?

Sixth, to find the United States' treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in nonjudicial activity; and it does not require us to create a new cause of action. The only question before us concerns the application of the ICJ judgment as binding law applicable to the parties in a particular criminal proceeding that Texas law creates independently of the treaty. [T]he question before us does not involve the creation of a private right of action . . . .

Seventh, neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision. To the contrary, the President favors enforcement of this judgment. Thus, insofar as foreign policy impact, the interrelation of treaty provisions, or any other matter within the President's special treaty, military, and foreign affairs responsibilities might prove relevant, such factors favor, rather than militate against, enforcement of the judgment before us. . . .

For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction. . . .

A determination that the ICJ judgment is enforceable does not quite end the matter, for the judgment itself requires us to make one further decision. It directs the United States to provide further judicial review of the 51 cases of Mexican nationals "by means of its own choosing." [I] believe the judgment addresses itself to the Judicial Branch. This Court consequently must "choose" the means. . . . [I] believe that the proper forum for review would be the Texas-court proceedings that would follow a remand of this case. . . .

The majority's two holdings taken together produce practical anomalies. They unnecessarily complicate the President's foreign affairs task insofar as, for example, they increase the likelihood of Security Council *Avena* enforcement proceedings, of worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the "rule of law" principles that we preach. The holdings also encumber Congress with a task (postratification legislation) that, in respect to many decisions of international tribunals, it may not want and which it may find difficult to execute. At the same time, insofar as today's holdings make it more difficult to enforce the judgments of international tribunals, including technical non-politically-controversial judgments, those holdings weaken that rule of law for which our Constitution stands.

In sum, a strong line of precedent, likely reflecting the views of the Founders, indicates that the treaty provisions before us and the judgment of the International Court of Justice address themselves to the Judicial Branch and consequently are self-executing. In reaching a contrary conclusion, the Court has failed to take proper account of that precedent and, as a result, the Nation may well break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary.

On August 5, 2008, in a per curiam opinion, the Supreme Court denied Medellín's request that his execution be stayed to enable Congress or the Texas legislature to respond to the ICJ's ruling. See 554 U.S. 759 (2008). Four individual dissents, filed by Justices Stevens, Souter, Ginsburg and Breyer, argued that time should be permitted to gather further information from the Executive, as well as to allow Congress to respond in light of a pending bill, the *Avena* Case Implementation Act of 2008. Justice Breyer also noted that Mexico had returned to the ICJ to seek the U.S.'s compliance. The Court's denial of the stay was issued at approximately 9:45 p.m. At 9:57 p.m, Texas executed José Ernesto Medellín, then aged 33.

Logo of the International Court of Justice, developed from the 1922 design by Johannes Cornelis Wienecke for the logo of the Permanent Court of International Justice.
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Armin von Bogdandy & Ingo Venzke

In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification[*]

Court judgments are epitomes of sovereign rule in many grand theoretical sketches. How may such judicial power be justified nowadays? Many domestic courts decide in the name of the people and thus invoke the authority of the democratic sovereign literally at the very beginning of their decisions. International courts, to the contrary, do not say in whose name they speak the law.

[*] Excerpted from Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012).

This void sparks our driving question: how does the power of international courts relate to the principle of democracy? In other words, how can the rule of international courts be justified in accordance with basic premises of democratic theory?

International courts form part of institutional designs that are geared towards helping to solve some of the most pressing global problems. They are part of strategies that pursue shared aims, seek to overcome obstacles of cooperation, and try to mend failures of collective action. Like few other institutions, they stand in the service of international law's promise of contributing to global justice. And yet, every new institution gives rise to new concerns. We wish to investigate their democratic justification in particular and are concerned that international courts might fall victim to their own success. This inquiry does not exhaust the broader issue of international courts' legitimacy. Above all it should be noted that the international legal system is far from perfect and sometimes judicial action, even if it does not wholly live up to democratic principles, is better than no action at all. At times it may deliver what everyone wants and yet fails to achieve by other means. And yet, the question persists.

We understand international judicial practice as an exercise of public authority and thereby wish to convey the idea that international courts' practice can neither be sufficiently justified on the traditional basis of state consent, nor by a functionalist narrative that exclusively clings to the goals or values they are supposed to serve. Nor can they draw sufficient legitimacy from the fact that they form part of the legitimation of public authority exercised by other institutions, be it states or international bureaucracies. As autonomous actors wielding public authority—this is our principal contention—their actions require a genuine mode of justification that lives up to basic tenets of democratic theory. In Martti Koskenniemi's fitting words "[i]t is high time that 'international adjudication' were made the object of critical analysis instead of religious faith."[5]

Our investigation is part of the general question of legitimate governance beyond the nation state and specifically triggered by the observation that, at times, international jurisprudence has shown quite drastic consequences for the possibilities of democratic self-determination. Many international courts have grown to be powerful institutions. An example from the vibrant field of international investment arbitration serves as a case in point. International investment protection is inter alia based on Bilateral Investment Treaties (BITs),

[5]Martti Koskenniemi, "The Ideology of International Adjudication and the 1907 Hague Conference," *in* Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, the Second Peace Conference* (2008), at 127, 152.

whose vague obligations are not only applied by arbitral tribunals in singular cases, but also creatively formed and fostered in the practice of adjudication. As a matter of fact, this is not only a collateral side-effect of judicial practice but from the outset it was part of a deliberate plan. The *International Centre for Settlement of Investment Disputes* (ICSID) can be traced back to the political advocacy of then General Counsel of the World Bank, Aron Broches, who, faced with failed international negotiations about the applicable material law, advanced the programmatic formula "procedure before substance." The substance, he argued, would follow in the practice of adjudication. And so it did, as judge-made law and deeply imbued with the functional logic pervading the investment protection regime. In the wake of its economic crises, Argentina felt the painful squeeze and had to realize how narrow its room of manoeuvre had become for maintaining public order without running the risk of having to pay significant damages to foreign investors. Also Germany might have to pay 1.4 billion Euro for the elections in its city state Hamburg. This, at least, is the amount that the Swedish energy company Vattenfall claimed for the losses it has to bear due to the higher ecological standards that the new government advocated during the electoral campaign. Democracy in the city state now has a price.

We wish to state clearly at the outset that our investigation does not aim at marking decisions of international courts as illegitimate, let alone illegal. We take a number of very different international courts into consideration and any concrete normative assessment would need specific and detailed analysis. Our aim is rather to develop a meaningful conceptual framework for debating the issue. Moreover, we do not at all share the view that international authority is in principle undemocratic the moment it does not respond to the input of democratic states. Such strands of critique miss the mark because international action is also a mechanism for overcoming the democratic deficit that results from the projection of one state's power onto the people of another domestic polity. Dismantling international authority usually does not amount to a convincing solution.

This contribution follows a critical intention but is much more forward-looking. We briefly recall the demand for international compulsory jurisdiction as part of progressive legal politics and then unfold an understanding of international judicial practice as public authority, highlighting how a powerful judiciary withdraws the law from the grasp of political-legislative bodies—the most important source of democratic legitimation. A constitutionalist reading of international adjudication, we contend, is unconvincing and cannot justify the decoupling of law and parliamentary politics. Processes of fragmentation further add to the problem. In a third step, we turn to strategies in response. Adjustments in the judicial procedure and increased politicization are common avenues for reacting to the problems we identified. Furthermore, elections traditionally

respond to the exercise of public authority, and systemic interpretation as well as a dialogue between courts may bear the potential of easing concerns that spring from processes of fragmentation. Even if all strategies were spelled out in closer detail and were met to full satisfaction, it still seems that international courts may not always be in a position to carry the whole burden of justifying their authority. Domestic constitutional organs then step in and decide from their angle about the effect of international decisions in the municipal legal order. They contest and accommodate public authority in a normative pluriverse. Our critique ultimately shows that the normative vanishing point for the future development of the international judiciary should be the idea of a transnational and possibly cosmopolitan citizenship. . . .

Our piece has identified problems in the democratic legitimation of international decisions and has shown that those problems are not easy to solve. No solutions are readily available to ease all concerns. Strategies in response to persistent problems must be spelled out in further detail and it remains to be seen how they stand the test of practice and which legitimatory effect they will actually be able to achieve. In view of this ambivalence, our conviction that the increasing authority of international courts constitutes a grand achievement is paralleled by a sense of discomfort springing from the thought that, as of now, international courts may not always satisfy well-founded expectations of legitimation. The resulting tension may be relaxed by holding up the political and legal responsibility that municipal constitutional organs retain in deciding about the effect of international decisions and by bearing in mind how they, in turn, can feed back into developments on the international level.

It is important to note then that international decisions generally have no direct effect in municipal legal orders and that their implementation is mediated by the municipal legal system. In the present state of international law, the possibility should exist that decisions about the effect of international norms or judicial decisions be made on the basis of the municipal legal order, at least in liberal democracies and to the extent that the international norm or decision severely conflicts with domestic constitutional principles. This approach frees the international legal order from legitimatory burdens that it may not always be in a position to shoulder. The interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This approach does not provide an obstacle to the further development of international law. Quite to the contrary, relieving international law from some of the burdens of legitimation may actually subserve its development. To clarify: the more incisive international decisions would be, the more they immediately

impacted capacities for individual or collective self-determination, the higher would be demands for their democratic justification. It is thus important that the consequences of non-compliance are rather clear. Unmistakably then, the mere disregard of an international decision[] cannot justify military sanctions. The remaining weakness of international courts with regard to the enforcement of their decisions might in fact turn out to reduce legitimatory concerns.

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not only control the effects of international decisions within their legal order. We suggest that they do so with explicit reasons. They can thus formulate standards for their assessments and may inspire further developments in the international legal order. It should be added that non-compliance triggers argumentative burdens. Domestic organs should consider the consequences of their decisions for the international legal order. Non-compliance may indeed damage broader processes of legalization and could place stress on constitutional principles such as the rule of law and a general openness towards international law.

In an overall assessment in line with the Kantian tradition, the contemporary power of international courts amounts to a great achievement even if it does not fulfil all aspirations and remains critically entrenched in processes of fragmentation. Above all, it is probably one of the most important effects of the rise of an international judiciary that it has contributed to the legalization and transformation of international discourses. In principle, this corresponds to the Kantian quest for an international order of peace and offers empirical support for this thread of thinking. This assessment holds true even if international courts have so far not unambiguously turned out to work towards a more just world. It also prevails in spite of the fact that not all interests are protected by compulsory jurisdiction.

And yet, developments in international adjudication demand a moment of contemplation and reconsideration that centres on the legitimatory foundations and their limits; not least so as to prevent international courts from falling victim to their own success. We have tried to elucidate legitimatory problems with regard to their practice, building our investigation on an understanding of international judicial decisions as an exercise of public authority. With this qualification we first of all wished to express the needs of justification and then carved out a number of concrete propositions; namely, expanding roles for the public to play in judicial elections and in judicial proceedings, extending complementary political procedures, clearly marking the goal of systemic integration in judicial interpretation as well as in the dialogue between courts, and

stressing the responsibility that municipal constitutional organs retain in implementing international decisions.

Now, in whose name do international courts decide? International jurisprudence appears to be predominantly based on international agreements and intergovernmental interaction. International courts then decide in the name of states as subjects of the international legal order. In view of democratic principles for the justification of international public authority, this seems to be increasingly unsatisfactory. There are a number of ways in which the democratic legitimation of international decisions may be improved. In the Kantian tradition, and this is the best one we have, there is philosophically only one answer to the question: starting point of democratic justifications are the individuals whose freedom shape the judgments, however indirect and mediated this may be. In this vein, international adjudication in the postnational constellation should be guided by the idea of world citizenship. . . .

THE GROWTH, LEGITIMACY, AND RELEVANCE OF TRANSNATIONAL INSTITUTIONS

Sabino Cassese
The Global Polity[*]

[W]ho runs the world? The customary answer to this question is that the world is run by national governments (states), by common agreement, in different territories. States have different degrees of influence, and therefore power is not balanced; they establish links among themselves, giving rise to international law.

This answer overlooks two important facts. The first is that states have gone through a complex process of aggregation and disaggregation over time; the second is that they have been joined, during the last twenty years, by a growing number of non-state bodies.

If we examine the trends in the numbers of polities in Europe over the course of the last thousand years or so, we see that there has been a process of aggregation. In two centuries they halved (from 1000 in the 14th century to 500 in

[*]Excerpted from SABINO CASSESE, THE GLOBAL POLITY (2012).

the 16th), and then diminished by a further 30% in the two hundred years that followed, leaving some 350 by the end of the 18th century.[2] By the early 20th century there were only 25 such polities in existence. The British historian Mark Greengrass has summarized this process in his claim that "'swallowing' and 'being swallowed up' were fundamental features of Europe's political past."[3]

If, however, we ask the same question of the 20th and 21st centuries, we are immediately struck by the extent to which the opposite process of disaggregation has occurred. In half a century, the number of polities in existence has increased fourfold. In 1945, there were 50 (the 50 states that attended the San Francisco Conference, at which the United Nations Charter was drafted); by 2010, there were approximately 200.[4]

Moreover, from the middle of the 20th century onwards, national governments have increasingly been accompanied by other actors, such as multinational corporations, international governmental organizations (IGOs) and non-governmental organizations (NGOs), that challenge the capacity of the states to lead. In this neo-medieval system, an important role is played by the approximately 2000 existing global regulatory regimes. Among them, "[f]ive main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine. . . ."[7]

International governmental organizations[8] are—as a rule—established by national governments: states integrate in larger bodies that incorporate diversified "local" legal orders. But IGOs sometimes reproduce themselves (many IGOs,

[2] It should be noted that during this 400-year period, these political bodies were progressively integrated within larger, hierarchically organized institutions (empires).

[3] M. Greengrass, Introduction: Conquest and Coalescence, in M. Greengrass (ed.), *Conquest and Coalescence: The Shaping of the State in Early Modern Europe*, London, Edward Arnold, 1991, 2.

[4] For example, there are 192 members of the United Nations (UN); 183 members of the International Labour Organization (ILO); and 153 members of the World Trade Organization (WTO).

[7] B. Kingsbury, N. Krisch, R. Stewart, "The Emergence of Global Administrative Law", in *Law and Contemporary Problems*, 2005, vol. 68, Summer-autumn, n. 3-4, 20. . . .

[8] Including minor organizations, IGOs numbered 7530 in 2006 (in 1981, 1039; in 1960, 154; in 1951, 123). To give one example of their growth in size: There were 75,282 United Nations officials in 2007 compared to only 52,107 in 1997.

such as the Codex Alimentarius Commission, are established by other IGOs). Moreover, they are not mere agents of the States, from which they have become increasingly autonomous. On the contrary, they have a role in guiding and constraining state behaviour: they conclude treaties and make rules; they create standards; they help transform the internal structure of national governments; and they establish rules that are directly binding on private parties. Many global regulators were established as mission-oriented bodies, but subsequently evolved in a sector- or field-oriented direction (for example, the un refugee agency (UNHCR) was established to protect refugees, but has expanded its remit to deal with issues relating to displaced persons in general).

An example of an intergovernmental network of national regulators is the Basel Committee on Banking Supervision, which includes representatives of 27 national banking supervisory authorities (usually the central banks).

A remarkable model of hybrid public-private global organization is provided by the international organization for standardization (ISO), whose members are the national bodies "most representative of standardization in their countries." Therefore, the ISO is a "non-governmental organization that forms a bridge between the public and private sectors," within which some bodies are entirely private, while others are part of the governmental structure of their countries or have some form of governmental mandate. Another example of hybrid private-public organization is the Internet Corporation for Assigned Names and Numbers (ICANN). It is a non-profit partnership, established in 1998 under California law. Its structure conforms to a "multi-stakeholder" or "multi-organizational" model, characterized by the existence of multifarious entities and institutions.[13] Nevertheless, it differs from the ISO in that it displays a particular form of hybridization: it is composed of private entities, but it performs a public function; in other words, it has a private "façade," but the substance of its activities is public in nature.

The International Chamber of Commerce (ICC) is, on the other hand, a perfect example of an entirely private global regulator. It brings together only private bodies and its main tasks involve the promotion of "international trade, services and investment." Furthermore, the enforcement of its standards is completely entrusted to the chamber itself, without any interference from public or national authorities. The ICC, however, collaborates with several states and

[13] These entities are the "board of directors"; three "supporting organisations" that deal with IP addresses (ASO), domain names (GNSO) and country code top-level domains (CCNSO); four "advisory committees"; a "Technical liaison group"; and the president and the chief executive.

governmental organizations, by concluding agreements and providing recommendations.

To these global institutions must be added the large—and increasing—number of international NGOs (of which there were 61,345 in 2006; 14,752 in 1981; 1,422 in 1960; and only 955 in 1951) and numerous different epistemic communities (for example, those of environmentalists, of physicists, of biologists).

Such global regulatory regimes operate in so many areas that it can now be said that almost every human activity is subject to some form of global regulation. Global regulatory regimes cover fields as diverse as forest preservation, the control of fishing, water regulation, environmental protection, standardization and food safety, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, regulation and finance of public works, trade standards, regulation of finance, insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health.

There are significant differences between regulatory regimes. Some merely provide a framework for state action, others establish guidelines in order to guide domestic agencies, and others still impact upon civil society at a national level. Some regulatory regimes create their own enforcement mechanisms, while others rely on national or regional authorities for implementation. To settle disputes, some regulatory regimes have judicial bodies, while others resort to different forms of dispute resolution, such as negotiation, conciliation or mediation. Many areas are covered by more than one regulatory regime (leading to an overlapping of regulators).

Global regulatory regimes are established because a growing number of issues and problems cannot be addressed or resolved by national governments alone. These issues themselves are global in nature, and as such are beyond the power of individual governments to regulate: internet governance, environmental control, the Olympic Games, and the recent economic crisis provide example[s] . . . .

[I]t is important to identify [the global political organization's] particular characteristics. . . .

In what follows, I will set out the main features of this global polity, and subsequently analyse the most important ones.

a. There is no single global and comprehensive legal order and no global government, but rather several global regulatory regimes, without one hierarchically superior regulatory system (the United Nations Organization is more comprehensive than others, but it is less developed, as—for example—it lacks an efficient dispute settlement mechanism open to private parties). The global polity is the empire of "ad-hoc-cracy": global regulatory regimes do not follow a common pattern; they are not uniform because they have to balance, area by area, national diversity and global standards.

This system has been nicely encapsulated in the formula "governance without government."[26] It is also possible to interpret this as a global composite constitution, with many "feudal lords," either territorial and general (national governments), or functional and specialised (IGOs). National governments retain the monopoly over the use of force, but surrender their sovereignty. Like the "feudal anarchy," the global polity is not "systematic," unitary and centralized and therefore does not fit into the state paradigm.

Genetically, the global polity is the result of a piecemeal approach. National governments have promoted—or at least allowed—the development of their competitors (global regulatory regimes that exercise public power, and frequently constrain the behaviour of states). It would have been impossible to establish one single and unitary legal order, because this would have replaced national governments with a cosmopolitan government.

b. Vertically, there is continuity and no clear dividing line between the global and the national levels. National governments are at once principals (because they establish and control global institutions) and agents of IGOs (insofar as they implement international regimes). Global organizations are subject to the control of national governments even as they supervise them. Global institutions have also in many cases established direct links with national civil societies. The global legal space, therefore, is neither hierarchical, nor layered, but rather "marbled": global, transnational, supranational and national are intermixed.

c. Horizontally, the diverse global regulatory regimes are self-contained (leading to the fragmentation of the global legal space), but they establish mutual interconnections and linkages; together, they constitute an enormous

[26] GOVERNANCE WITHOUT GOVERNMENT. ORDER AND CHANGE IN WORLD POLITICS (J. N. Rosenau & E.O. Ezempiel eds., 1992).

conglomeration of interdependent legal orders. This interconnection has been called a "regime complex": "[. . .] a collective of partially overlapping and non-hierarchical regimes."

d. The public-private divide is blurred and does not follow the domestic paradigm of government regulating business.

e. Compliance, while compelled in national legal orders through enforcement and the legal exercise of power ("*covenants, without the sword, are but words*" (Hobbes)), in the global space is "induced."

Global bodies use surrogates to implement their standards. One such surrogate, noted above, is that of the "regime complex," linking one regime to another: trade and labour, trade and human rights, environment and human rights (for example, allowing the imposition of trade penalties for non-implementation of labour or environmental standards). Another possibility is retaliation, authorizing control-led self-enforcement: it induces one party (one state) to obey to the law because of the threat that another party (another state) will be authorized by a third party (the WTO dispute settlement body) to react. Still another option is to introduce incentives for compliance: for example, to provide additional rights as a "prize" for fulfilling obligations. Implementation and enforcement may also be left to national governments acting as instruments of global institutions.

f. Global regulatory regimes impose the rule of law and democratic principles on national governments. A body of administrative law principles has developed in the global space: due process, the right to be informed and consulted, the right to a hearing, the duty to give reasons, the right to a judge; both procedural fairness and judicial review are influenced by the new context and thus open to change. Some democratic principles (free elections, freedom of association, free speech) are imposed by global actors (such as the European Union) on national governments.

g. There is no representative democracy at the global level; but a surrogate, deliberative democracy emerges through participation in the decision making processes.

The existence of the global polity raises many analytic and normative questions. The most salient of the former are: do global rules bind national administrations and private individuals within states, or do global administrations only have the power to make recommendations? is there a core of command-and-control (i.e. regulatory instruments that rely on public orders, which must be

obeyed and enforced with recourse to police power) in the global administrative system? are disputes settled through judicial (or quasi-judicial) procedures, or are they mainly settled through negotiation?

The most important normative questions are: should there be direct or indirect democratic legitimation of the global polity? Should global administrative bodies (agents) be accountable to governments (principals)? Should it be possible to participate in the administrative process and obtain a review of the decisions? Should participation and review mechanisms be made available to only national administrations or also to private parties?

Sam Muller
The Hague Institute for the Internationalisation of Law
Why Law Scenarios to 2030?[*]

[T]hese alternate scenarios may vary in probability and none of them are an actual prediction of the future. Rather, they are plausible accounts of possible futures that may not be intuitive or self-evident and that allow strategic thinkers to assess the possible implications for their respective legal strategies. . . .

Our research indicates that there are two broad legal trends that have the greatest impact on the global legal environment.

A growing patchwork of international law, institutions and transnational cooperation.

Globalisation is driving the increased interconnectedness of legal systems. More and more societal challenges require international cooperation. The increase of international trade goes hand in hand with the internationalisation of contract law, torts, business law, intellectual property law, and tax law. Because national laws are not harmonised, conflicts and gaps between national laws are increasingly evident. These conflicts exert pressure on governments towards convergence and harmonisation. The international movement of humans, capital technology, and crime drives national law towards more internationally formulated rules and enforcement mechanisms. Although one can describe this as a global trend, it is not happening in the same way, with the same depth, in the

[*]Excerpted from The Hague Institute for the Internationalisation of Law, WHY LAW SCENARIOS 2030? (2012).

same areas across the world. And most importantly, it is not clear whether this trend will continue, slow down, or even reverse.

The internationalisation trend thus requires careful elaboration and nuance. Three important clarifications must be made.

First, legal globalisation does not mean that a coherent corpus of global law is evolving. Legal globalisation is a patchwork both with regard to the legal areas involved and to the extent of internationalisation. For example, most economic cooperation is located on the regional level.

The EU is probably the most far-reaching instance, but other environments, like the North American Free Trade Agreement (NAFTA), the Asia Pacific Economic Cooperation (APEC), the Economic Cooperation Organisation (ECO), and the Common Market for Eastern and Southern Africa (COMESA) also create economic cooperation and laws that support that. There are also examples of even smaller, sub-regional economic cooperation organisations, such as the East African Community (EAC), which falls under COMESA and which explicitly strives for a federal union and a common currency between its members.

There are also differing views of what should be regulated if one regulates economic cooperation. For example, within the context of APEC, soft law has been created on the protection of personal data within transnational corporations and on transparency standards. These legal environments for competition law are connected—some loosely, others more explicitly—with the global legal environment on competition law of the WTO. The patchwork pattern of the environment also extends to the legal areas involved.

The growing patchwork of international law and international legal institutions thus demonstrates a variety of shapes. Furthermore, the pace with which this development is unfolding also varies substantially. The pace of the internationalisation of competition law differs from that of criminal law. Whereas competition law is rapidly internationalising, criminal law is still predominantly national in nature. Decisions of regional courts, like the European Court of Human Rights, do sometimes accelerate the process. Some legal areas have a long history of internationalisation, such as sea law, the regulation of air traffic, and humanitarian law. Other legal areas, like family law and civil procedure, lag behind. In short: the trend towards internationalisation of law is diverse.

Second, legal globalisation does not imply voluntarism or a consciously built structure. Instead, incidents, crises, and the continuous manifestation of new

problems are the primary drivers of the process. National lawmakers all over the world are continuously confronted with political and legal problems that cannot be dealt with, without the cooperation of other national lawmakers or international bodies like the UN or the IMF. Migration, transnational criminal networks, terrorism, illicit trade, financial markets, and tax tourism by transnational corporations, all force governments to find solutions on a transnational level. The trend towards internationalisation can be best described as 'muddling through.' There is no executive director. Not all actors have access to these processes, which run through many small decisions made by national legal actors (either legislators or courts), regional and international organisations, legal professionals, and informal networks of policy makers and experts.

Thirdly, we do not know whether the internationalization trend will continue. Conflict, crisis, and transnational challenges may push governments and other actors towards more cooperation. But it can also drive fragmentation. And internationalization creates its own resistance. The volume of anti-European Union sentiment has grown a lot louder as the euro-crisis continues. Similarly, criticism of the European Court of Human Rights has also never been so widespread. In the area of the environment we have seen examples of 'going local,' turning away from what is perceived to be excessive internationalism.

The growth of private legal regimes for rule making, enforcement and dispute resolution

Both national and international law have traditionally firmly rested on public authority. Even though norms are established and enforced differently in different legal systems, state institutions usually play a major role in these processes. Nevertheless, we increasingly see examples of rulemaking and enforcement by private actors, who sometimes operate completely outside of the public legal environment.

These private governance mechanisms appear in different shapes. A business sector, sometimes together with NGOs, can set standards, guidelines, or rules concerning governance or liabilities. These standards may concern the environment, health, work conditions, social security or other aspects of corporate social responsibility (CSR). The alcohol industry within the EU has set standards on advertising and sales to minors. The timber industry—with the Forest Stewardship Council—set standards on sustainable logging and the sale of timber. Accounting standards and other industry-made standards or rules in the financial sector have become more prevalent since the recent global financial crisis. The now somewhat embattled Kimberly Certification process is an interesting

example of a joint effort by governments, the business community, and civil society to regulate the precious stones industry.

Standards also create interesting forms of enforcement. Transparency International measures corruption perceptions in 183 countries (2011) and the likelihood that large companies in 19 specific sectors use bribes. This information is published on their website. In this case existing standards (here, on corruption) are measured and monitored by an NGO. Sometimes an industry creates a standard contract or agreement. The Model Mine Development Agreement, developed in consultation with mining companies, governments, and civil society within the context of the International Bar Association, is a prime example. An example of a different kind is seen in the leading position taken by Microsoft which, in the course of civil procedures taking place as part of fighting Internet crime, has performed raids—accompanied by United States marshals—on alleged criminals in a scheme to infect computers and steal personal data.

Another facet of this trend is the growing use of alternative dispute resolution mechanisms instead of court systems. The eBay/PayPal resolution centre solves around 60 million disagreements between buyers and sellers every year (in 16 different languages!). An example of a more mixed approach is the OECD Guidelines for Multinational Enterprises. This 'code of responsible business conduct' was adopted by the OECD member states, but was drafted with wide participation of businesses and civil society. In the EU, a Common Frame of Reference for European Private Law was drafted and freely made available on the web. This was not a government initiative; instead it sprang forth from European legal scholars. It has now become a point of reference for legislators and courts in the EU. A final example is privacy, where companies like Google, Apple, Vodafone, and Facebook hold vast amounts of user-data that can be misused. Public regulators have only a limited ability to regulate here, so there is often little choice but to encourage and stimulate self-regulation among these private actors.

This broad trend also requires some elaboration to prevent misunderstanding. First, the rise of private regimes does not mean that these are isolated from legal regimes created by public authorities. Sometimes the creation of transnational law starts as a private initiative and is later adopted by public authorities. Sometimes a legal obligation is created by public authorities that requires (trans)national corporations to develop private regimes. For example, child labour law or an anti-corruption law may force corporations to verify whether their supply chains are free from child labour or corruption. In order to fulfil its obligations, the corporation or an industry then builds its own private regime that regulates its supply chain. Secondly, here too, we see wide diversity. The trend could relate to rules, standards, or guidelines. The term 'soft law' is

used loosely and it is important to understand what actually happens; in their actual effect, guidelines can sometimes be 'hard' as law. Private rule making may or may not include enforcement. The practice varies significantly per industrial sector, per topic, per state and per region. But there is no doubt about the broader trend: the global legal environment contains an increased amount of rules and procedures that do not fall within the classic parameters of public law. Will this trend continue? . . .

[W]e use scenarios to force us to explore what may happen if things develop in a different way than we expect. . . .

Will we witness continued internationalisation of rules and institutions or will this trend stagnate or even reverse? Will private governance mechanisms and private legal regimes further expand and become predominant, or will state-connected institutions and legal regimes retain their position?

Taken together, these contingencies allow four scenarios, in short catchwords:

International—Public (Global Constitution)
International—Private (Legal Internet)
National—Public (Legal Borders)
National—Private (Legal Tribes)

Regarding the names we have given each of the scenarios, rather than take them for their literal meaning, one ought to bear in mind that they use metaphors meant to convey the central feature of each respective scenarios. Thus, *Global Constitution* does not imply there will actually be a single world constitution, rather that in this scenario [there will be a] global legal environment; in *Legal Internet*, the name does not mean that this scenario is about the Internet, rather it implies that that the global legal environment in this world is characterised as a decentralised transnational network involving a big range of actors. Similarly, *Legal Tribes* does not denote a world that is composed of tribes, rather it hints to a reality whereby the global legal environment is composed of many relatively small 'communities,' with relatively little contact and coordination and a weaker role for the state.

Scenarios are simplifications—they serve as analytical tools not as precise descriptions of reality—and they are 'what ifs,' not predictions. The Law Scenarios to 2030 present wind tunnels of four different global legal environments—worked out in the extreme—in which the national lawmaker can

test how his legal system holds together and with the help of which he can develop strategies to address undesirable effects or strengthen desired ones.

In each of the scenarios we explore four legal-systemic questions. [W]hat is the main ordering? Who makes the rules? How are those rules enforced? How are conflicts resolved?

Jan Klabbers

The Idea(s) of International Law[*]

[T]he trends identified by perusing future scenarios do indeed suggest that difficult times lie ahead. A rapid population increase of near-Malthusian proportions is expected, crime will become ever more rampant, the environment is spinning out of control and, if the last three decades are anything to go by, public solutions are frowned upon and lightly replaced by confidence in the market, with performances being monitored by means of the hard currency of indicators. Those markets themselves, however, prove uncontrollable. Crisis is the global keyword, and goes hand in hand with privatisation even to the extent that yesterday's citizen is being replaced by today's consumer, whose political affiliations are being replaced by brand loyalties. Those brands, in turn, are just that—labels placed on products produced anonymously by others, sometimes even in sweatshops by children who should be out playing. The politics of symbolism takes over, and the leading symbol is that of greed. . . .

Intellectually, international law is still based on late nineteenth century conceptions, which were necessary at the time to facilitate an emerging global capitalist economy. It is still taught as a system of law that applies between states (with the occasional nod to individual human rights, or to international organisations and some tut-tutting about terrorist groups); as a system made up of rules expressly consented to or, alternatively, rules that happen to be to the teacher's liking, dressed up in Latin garb; and as a system devoid of sanctions . . . . Globalisation seems to have bypassed the discipline of international law completely, and to the extent that international law covers the global economy, it does so in support of the major players rather than the poor

[*]Excerpted from Jan Klabbers, *The Idea(s) of International Law*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF LAW 69 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura Kistemaker eds., 2011).

and dispossessed. International law, in other words, is strongly biased, favouring the rich over the poor, and facilitating rather than regulating global capitalism.

Much of international law relates to economic issues. Sometimes it does so directly, for instance in the form of rules on trade between states, or rules on investment protection. Much of it is less visible though. The emergence of the legal concept of the continental shelf, *e.g.*, owes much to economic incentives: as soon as oil and gas were to be found, states recognised an interest in acquiring such a shelf, and developed the law to facilitate it. Much the same applies to the time-honoured freedom of the seas, or the far younger rules on air traffic.

Over the last couple of decades, moreover, within the international legal framework two sub-disciplines have emerged which both address the protection of capital. International trade law already arose in the 1970s, but came to full blossom with the creation of the WTO and in particular its strong dispute settlement mechanism. More recently, investment protection law has established itself as an important branch of international law, characterised by a multitude of treaties and the mushrooming of arbitration and similar proceedings.

And yet, amidst all this attention for the global economy and the protection of investments and market access, it is useful to note that some topics have been cast aside or are still mostly left to domestic law. There is, for example, little or no attention for development in international law—how to overcome the structural causes of poverty—unless one would regard foreign investment as the road to development (this, however, is plausible only within a neo-liberal political philosophy). Likewise, economic, social and cultural rights are still the stepchildren of the human rights revolution, if only because they involve the sort of political choices that insistence on civil and political rights manages deftly to avoid. Global finance is by and large unregulated, as the recent banking crisis underlined yet again. Alternatively, to the extent that it is regulated, it is done on the legally subliminal level through standards established by the leading participants themselves, far from the public view.

The domestication of international affairs applies to taxation. Despite the existence of many, many treaties to avoid double taxation, international law has been reluctant to embrace international taxation as part of international law. . . . The results are twofold. To the extent that companies are taxed, they can pick and choose in the absence of a harmonised regime which jurisdictions serve their interests best. Here, the absence of global regulation facilitates free movement and free choice. Starkly though, the opposite happens when individuals are concerned: they cannot normally relocate to places of low taxation (also because this will immediately affect the level of public services) but, instead, can count

themselves lucky if they don't have to pay taxes twice. . . . Here then, the absence of a global regime tends to affect free movement negatively.

It is not just taxation which is left to national regulation—the same applies to migration. Migration law is typically absent from the textbooks on international law and left to domestic law, which again means that states are at liberty to erect barriers for foreigners to enter, and can exclude people at will.

Labour law too is not often treated as part of international law. Much is left to the International Labour Organisation which . . . is essentially a device to facilitate global corporatism. Universal rules concerning labour standards or working hours or the acceptable age for children and the elderly to start and stop working are few and far between, not to mention anything about acceptable minimum wages. Again then, as with taxation and migration issues, the system allows for, and even stimulates, a race to the bottom.

Tellingly, international law has not even occupied itself with competition other than between states. The behaviour of private companies is left without regulation, and any form of control is left to domestic authorities (these include the EU, for present purposes) and their own ideas on what would constitute a proper market, and reasonable company size and company behaviour. Tellingly, the WTO has no powers in the field of competition law, allowing companies to move freely and even affect each other's markets.

The problem with all these issues is not so much that there is no regulation on the international level, as regulation as such is no guarantee for good and desirable rules. The problem is rather that there is not even much recognition that it could be useful or desirable for international law to address these issues. And this applies *a fortiori* to global poverty. It may be the case that poverty cannot be tackled by any direct legal measures, in that typically it results not from agents' activities but from economic structures, but at the very least international law could and should recognize that it helps create those structures and helps keep them intact. . . .

The net effects of such activities are, at minimum, twofold. First, it means that domestic procedures with respect to treaty-making have eroded. Parliaments have often fought long and hard to receive some influence on the making of foreign policy, if only to prevent their position from being eroded by means of the conclusion of treaties. As a result, many parliaments have some formal role to play when it comes to the conclusion of treaties. However, they have no formal role to play when it comes to the conclusion of other kinds of instruments. Hence,

the possibility of concluding a non-legally binding agreement will often involve the circumvention of a domestic parliament, and thereby undermine democracy.

Second, it means that the power of law (the culture of law, if one so wishes) is also being eroded. The seeming possibility of choosing which norm system or normative order is most suitable for the circumstances at hand means that law has become, and will increasingly become, an option among options. Where earlier generations still respected, or even celebrated, the law as a human artefact in its own right, the law now has to compete with politics, morality, and even brute and untrammelled force for its place in the sun. . . .

Of course, there is no action without reaction . . . One such response is to press for stronger sanctions elsewhere in the system. Many have advocated a bigger role for the International Criminal Court. Surprisingly, while states are increasingly left off the hook, individuals are increasingly thought suitable subjects for punishment, even those (or especially those, perhaps) who exercise little or no political power. In much the same way that water flows wherever it can, so too is responsibility assigned where the chances of actually holding someone responsible are greatest, rather than on the basis of their perceived guilt.

While non-compliance procedures have mushroomed, so too have calls for greater involvement of domestic courts in the application of international law. Those domestic courts themselves have responded in a lukewarm fashion, sometimes creating sophisticated but untenable distinctions between the existence of an international obligation and the authoritative interpretation thereof (as the US Supreme Court did in *Medellín* (2008)), and sometimes simply ignoring the international setting altogether (like the ECJ in *Kadi* (2008)). . . .

What now is the discipline of international law to do? First, it should come to the realisation that international law ultimately, and in particular by regulating the global economy, affects the life of people, not just of states and other actors. That does not mean (as is often supposed) that individuals should be considered as subjects of international law; it might be perfectly possible to respect each and every individual without giving them a formal status, in much the same way that the US can respect the lives of people in other countries without pronouncing them subjects of US law. International lawyers should realise that world poverty and malnutrition are a product (or at least a side-effect) of international law, as is unequal development. To the extent that the domestication of tax law, migration law and labour law help sustain a 'race to the bottom,' it would be useful for international lawyers to make sure that those fields do not remain as neglected as they now are, if only for the discipline's own sake: the fragmentation of international law may entail that the discipline as such will end up shattered,

replaced by fragmented specialists in, say, maritime law, or trade law, or indeed tax law. The best way to combat fragmentation may be not so much the desperate search for uniformity, but rather to ensure that all aspects of life are part of the same broader fabric—only in this way can the fabric itself survive.

International lawyers (at least those working as independent academics) should stop providing states with the arguments to kill off their very discipline. Arguments that agreements can be binding yet remain non-legal rest on very flimsy, and eventually untenable, theoretical assumptions and, what is more, only produce similar orders devoid of the guarantees that come with law. [I]f one takes the idea of nonlegally binding agreements seriously, one would need to develop a set of rules to deal with the creation of such agreements, their effects, implementation and application, and their termination. Such a system of rules can only mirror the law of treaties, so, in the end, there is no real difference, except for democracy and legal protection being eroded. Much the same applies to the creation of compliance procedures: if taken seriously, these will come to look like courts in all but name. The big loser here is the idea of law, to be replaced by some kind of unclear, untransparent functionality that only serves the interests of those in positions of power.

Finally, one lesson to learn is that while the law is a great invention, not everything can be captured in terms of standards and tribunals. Deontology begets deontology. Increased sets of standards will lead to increased accountability mechanisms, but not necessarily to greater accountability of public power. Instead, there is every reason to believe that this will lead to increased distrust. The only remedy may well reside in a new faith in the classic Aristotelian insight that what matters is not just the standards applicable to our political leaders, but also their individual character traits.

Jean L. Cohen

Whose Sovereignty? Empire Versus International Law[*]

[T]alk of legal and constitutional pluralism, societal constitutionalism, transnational governmental networks, cosmopolitan human rights law enforced by "humanitarian intervention," and so on are all attempts to conceptualize the new global legal order that is allegedly emerging before our eyes. The general claim is

[*]Excerpted from Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L AFF. 1 (2004).

that the world is witnessing a move to cosmopolitan law, which we will not perceive or be able to influence if we do not abandon the discourse of sovereignty. The debates from this perspective are around how to conceptualize the juridification of the new world order. Despite their differences, what seems obvious to those seeking to foster legal cosmopolitanism is that sovereignty talk and the old forms of public international law based on the sovereignty paradigm have to go.

[I]f one shifts to a political perspective, the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire. . . . Like the theorists of cosmopolitan law, proponents of this view also insist that the discourses of state sovereignty and public international law have become irrelevant. But they claim that what is replacing the system of states is not a pluralistic, cooperative world political system under a new, impartial global *rule of law*, but rather a project of imperial world domination. From this perspective, governance, soft law, self-regulation, societal constitutionalism, transgovernmental networks, human rights talk, and the very concept of "humanitarian intervention" are simply the discourses and deformalized mechanisms by which empire aims to rule (and to legitimate its rule) rather than ways to limit and orient power by law.

I agree that we are in the presence of something new. But I am not convinced that one should abandon the discourse of sovereignty in order to perceive and conceptualize these shifts. Nor am I convinced that the step from an international to a cosmopolitan legal world order without the sovereign state has been or should be taken. The two doubts are connected: I argue that if we drop the concept of sovereignty and buy into the idea that the state has been disaggregated, and that international treaty organizations are upstaged by transnational governance, we will misconstrue the nature of contemporary international society and the political choices facing us. If we assume that a constitutional, cosmopolitan legal order already exists, which has replaced or should replace international law and its core principles of sovereign equality, territorial integrity, nonintervention, and domestic jurisdiction with cosmopolitan right, and if we construe the evolving doctrine of "humanitarian intervention" as the enforcement of that right, we risk becoming apologists for imperial projects. Under current conditions, this path leads to the political instrumentalization of "law" (cosmopolitan right) and the moralization of politics rather than to a global rule of law. I will argue that we face the following political choice today: We can either opt for strengthening international law by updating it, making explicit the particular conception of sovereignty on which it is now based and showing that this is compatible with cosmopolitan principles inherent in human rights norms;

or we can abandon the principle of sovereign equality and the present rules of international law for the sake of human rights, thus relinquishing an important barrier to the proliferation of imperial projects and regional attempts at *Grossraum* ordering (direct annexation or other forms of control of neighboring smaller polities) by twenty-first-century great powers, who invoke (and instrumentalize) cosmopolitan right as they proceed. Clearly I opt for the former over the latter.

The first project entails acknowledging the existence and value of a dualistic world order whose core remains the international society of states embedded within (suitably reformed) international institutions and international law, but that also has important cosmopolitan elements and cosmopolitan legal principles (human rights norms) upon which the discourse of transnationalism and governance relies, if inadequately. On this approach (my own), legal cosmopolitanism is potentially linked to a project radically distinct from empire and pure power politics—namely, the democratization of international relations and the updating of international law. *This requires the strengthening of supranational institutions, formal legal reform, and the creation of a global rule of law that protects both the sovereign equality of states based on a revised conception of sovereignty and human rights.* . . . Cosmopolitan right can supplement—but not replace—sovereignty-based public international law. . . .

There are two versions of the thesis that a decentered cosmopolitan world order has emerged that renders the discourse of sovereignty irrelevant: one focuses on political institutions and the other on legal developments. Both maintain that a transition has occurred away from the international society of states and international law to a decentered form of global governance and cosmopolitan law. And both cite the individualization of international law, the invocation of *jus cogens*, which signals the obligatory character of key human rights norms based on consensus, not state consent, and the emergence of transnational loci of decision and rule making as evidence for this shift. . . .

Transgovernmental networks involve collaborative work by the same officials who are judging, regulating, and legislating domestically. Examples of horizontal regulatory governmental networks are the G-7 and the G-20 organizations, the regular meetings of national finance ministers, as well as the IMF Board of Governors. . . . Such regulatory networks engage in information exchange, enforcement cooperation, and harmonization of practices. . . .

Examples of vertical networks include the relationship between the European Court of Justice (ECJ), the International Criminal Court (ICC), and the courts of their respective member states. In each case, primary responsibility for

adjudication and enforcing decisions devolves upon the judges within the member states (of the European Union or the United Nations), thus differing from the traditional model of international law adjudication, which assumed that a tribunal such as the International Court of Justice (ICJ) would hand down a judgment applicable to "states," leaving it up to states to enforce or ignore. There are also vertical regulatory networks, in the EU, for example, which link antitrust authority of the European Commission and national antitrust regulators.

This new world order is a world full of law, but to perceive the nature of the new global law, proponents of the disaggregated state argue that we need a concept of legalization that drops the idea that law is produced or enforced by a sovereign. Accordingly, one must also finally relinquish the myth of formalism, accept the legal realist critique, shift to an external sociological perspective, and acknowledge a wide range of norms and regulations in the global system as law. Instead of a bright line between legalized and nonlegalized institutions in the global order, there is a continuum between legal and nonlegal obligations and a broad spectrum of norms that ranges from soft to hard law. The point is that as sovereignty breaks down, as the state becomes disaggregated transnationally, and as global transgovernmental (and nongovernmental) networks produce more and more norms to regulate their own interaction, "the dynamic of a politically oriented law will no longer tolerate formalism." Indeed, compared with interstate cooperation and the slow collective action (and inaction) by formal international institutions such as the UN, coordinated action by networks of regulators, judges, and other government officials is fast, flexible, and effective. . . .

To parry qualms that this transformation of international relations amounts to global technocracy and governance by unaccountable regulators and judges (given the paucity of legislative networks to date), this analysis comes replete with a set of fundamental norms that should acquire "constitutional" status in the disaggregated world order. . . . Once these norms are in place, a fully disaggregated world order could dispense entirely with the anachronistic discourse and rules of sovereignty and replace the old international law and slow international institutions with decentered, efficient cosmopolitan governance and law making.

This brings me to the second version of the thesis that we have entered a postsovereign, decentered world order—namely, the claim that a cosmopolitan legal system regulating global politics actually exists and that it is already constitutionalized. . . .

Indeed, from this perspective it is the legal system itself, and not external political, administrative, or corporate economic actors, that determines what the

law is. A legal system cannot be understood in terms of the implementation of political programs or sovereign will; it must be seen as autonomous and in charge of the codification of the code: legal/illegal. Courts, in short, are at the core of any legal system, and they must decide whether the law has been violated in any particular instance and resolve any controversy over the legal status (validity) of norms. Accordingly, legality is not a matter of more or less, nor can legalization be understood in terms of a continuum. From the internal perspective concerned with validity, oriented by the code "legal/illegal," a legal order must be construed as a closed, gapless normative system. . . .

Relying on H.L.A. Hart's criteria, this approach points to several indicia of global constitutionalism. The transnational judicial networks described above are construed as a "heterarchical" organization of courts, which provide *global remedies* and are at the center of global political constitutionalism. These involve various levels of communication, ranging from the citation of decisions of foreign courts by national courts, to organized meetings of supreme court justices, such as those held triennially (since 1995) by the Organization of Supreme Courts of the Americas, to the most advanced forms of judicial cooperation involving partnership between national courts and a supernational tribunal, such as the ECJ and more recently the ICC. The proliferation of supranational courts must be seen as providing *global* remedies for violations of *cosmopolitan law* despite the fact that they originate in treaty organizations. Even national courts can double as elements of this cosmopolitan legal system, insofar as they participate in the interpretation and judgment of violations of global law. Thus, despite the fact that states are the primary agents responsible for delivering on individual rights, what they enforce are cosmopolitan legal norms, and their failure to do so may expose them to "cosmopolitan justice."

[T]hus, there exists a closed, autopoietic (self-creating) global legal system. . . .

There are several problems on the empirical level. First, the existence of a global, networked, constitutionalized political order, even an incomplete one, is vastly overstated. States have yielded some powers to supra- and transnational organizations, transgovernmental networking is an important new phenomenon, there is a good deal of nonstate governance and rule making, and certainly there are trends in a cosmopolitan direction, especially regarding human rights . . . .

But it is not clear that these constitutional elements are the sign of a cosmopolitan legal order that has *replaced* instead of *supplemented* international law based on the consent of states, which remain sovereign, albeit in an altered way. To legal cosmopolitans, these developments indicate that we are in a

transitional phase. . . . But it is not the case that all of the constitutive principles of the new international order can be so characterized—several of them point in the opposite direction. Indeed, it is unclear just which version of international society and which model of sovereignty is being replaced. The legal cosmopolitans speak as if the move is from Westphalian sovereignty to a cosmopolitan legal order, but this is a conceptual sleight of hand: the former, if it ever existed, disappeared long ago. Certainly one would be hard pressed to construe the principle of the sovereign equality of states or the strictures of nonintervention and nonaggression, articulated in the UN Charter, as either Westphalian or as indicating the disaggregation and irrelevance of sovereignty.

Moreover, it is important to acknowledge that such principles as sovereign equality, nonaggression, nonintervention, and self-determination are, in key respects, *new* [rather than] remnants of the traditional Westphalian international order or of the conception of sovereignty that prevailed within it. The latter involved a legal arrangement, *jus publicum europaeum*, that attributed Westphalian sovereignty and equal recognition only to European states, and gave these states the right to acquire colonies and the right to go to war for any reason. . . .

The new version of sovereign equality articulated by the UN Charter is ascribed to *all member states*, and since the 1960 General Assembly Resolution (1514 and 1541), *colonialism* has been explicitly rejected. This shift allowed for the emergence in principle of an egalitarian international system with a single norm of nonintervention applying to all states. . . . To be sure, the Charter also articulates the principle of collective security, eliminating the *jus ad bellum*, and it gives the Security Council wide authority to decide when to use force to parry threats to peace and security. . . . This is the cosmopolitan dimension of the Charter. Nevertheless, sovereignty, reconstituted and revised as sovereign equality, entailing the principles of domestic jurisdiction and nonaggression, remains the default position in the Charter, the collective enforcement provisions and the recent *jus cogens* status of human rights norms notwithstanding.

These principles should thus be seen as part of a project to "democratize," not to "abolish sovereignty." Of course, the conception of what are the prerogatives of sovereignty has changed. . . . There has, to be sure, been a partial disaggregation of sovereignty in the sense that some functions once considered the prerogatives of the sovereign state are now placed in the hands (authority) of supranational bodies: courts, the Security Council, and some transnational regulatory bodies. But the overly strong and misleading disaggregation thesis described above is not helpful: representative government (internal and external) has not been replaced by governance, and the unity and sovereignty of the state

remain intact, as does the importance of public international law and institutions despite the emergence of transnational governmental networks.

I argue that the core of the world political system remains the "international society of states," although it has undergone important transformations. The global political system is dualistic, composed of sovereign states and international law along with non-state actors, new legal subjects, and consensual, cosmopolitan elements. Segmental differentiation persists alongside the new functional differentiation. There can be collisions between the principles expressed in each aspect of the global political order. It is hardly news that the principles of human rights can clash with the principles of nonintervention and "domestic jurisdiction." What is needed today is the articulation of new legal rules that anticipate and regulate these clashes. . . .

[T]he theory and practice of modern constitutionalism demonstrates that limited sovereignty is not an oxymoron, and that sovereignty, constitutionalism, and the rule of law are not incompatible. It also shows that functions or prerogatives once ascribed to the unitary sovereign can be divided and/or ascribed to other bodies (such as the EU or the UN) without the abolition of sovereignty or the disaggregation of the state.

[T]he concept of sovereignty is a reminder not only of the political context of law but also of the ultimate dependence of political power and political regimes on a valid, public, normative legal order for their authority. Sovereignty is thus a dynamic principle of the mutual constitution and mutual containment of law and politics. From a purely juridical perspective, sovereignty refers to a valid, public legal order that allocates authority and jurisdictional competence. . . .

The paradox of a multilayered global political order that enunciates sovereign equality and human rights can be a productive one. . . . The core intuition that makes the paradox productive rather than destructive is the idea that rights and democracy (popular sovereignty) are coequivalent—democracy without constitutionalism is as unacceptable today as is constitutionalism without democracy. The parallel intuition regarding external sovereignty is that we must sever political autonomy from the idea of comprehensive jurisdiction and realize that the apparent antinomy between sovereignty and human rights or between state sovereignty and multiple sources of international law is based on an anachronistic conception of the former as absolute. . . .

Let me be very clear here. I am most certainly *not* arguing that external sovereignty be made contingent upon a particular internal political arrangement, such as constitutional democracy, or that a "human right to popular sovereignty"

renders unilateral military intervention to protect this right acceptable. To construe popular sovereignty or democracy as a human right is to make a category mistake: it collapses political into moral categories, reducing the citizen to "person" and confusing collective political action of a citizenry with the citizen's legal standing. Yes, citizenship involves basic individual rights, such as the right to vote, but it also has a political meaning and an identity component that cannot be reduced to the dimension of individual rights. To argue for making the international legal principle of sovereignty contingent on the "human right" of popular sovereignty as an individual right is sophistry. Popular sovereignty is a regulative principle, not an individual right. The relation between internal sovereignty, citizenship, constitutional democracy, and external sovereignty I outlined above must be understood differently—namely, as constituting a regulative principle, a normative set of meanings to which we should aspire, not a recipe to justify abolishing the principle of sovereign equality. . . .

Constitutionalization of the global political system is a work in progress, not a fait accompli. The dualistic model I have in mind would involve the articulation of public power and public law on multiple levels of the world political system. It would seek to harmonize the core principles of international relations today—sovereign equality and human rights—not abandon one in favor of the other. At issue is a shift of the culture of sovereignty from one of impunity to one of accountability and responsibility of states in light of their obligation to protect. This entails reformulating, not abandoning, the default position of sovereignty and its correlate, the principle of nonintervention, in the international system . . . .

Mark Osiel

After International Law: Non-Juridical Responses to Mass Atrocity[*]

Some of the most prominent efforts to restrain and redress mass atrocities in our time, heartening from almost any view of global justice, are largely non-legal and extra-judicial in character. They rely scarcely at all on the application of binding international rules by international courts; they bear only the most equivocal, attenuated, often-tangential relation to international law, and in fact sometimes sit quite uneasily with it. Why is this so, and what does it mean for

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assessing the proper place of international law—and its alternatives—in the world's response to mass atrocity?

Consider, in this regard, the following recent initiatives:

1) Under the rubric of voluntary 'corporate social responsibility,' managers of multinational corporations find themselves increasingly pressed to tread much more cautiously in countries whose rulers covertly employ forced migration and involuntary labour to assist foreigners' construction projects.

2) Fearing the opprobrium of global opinion, military leaders in democratic states are impelled to unprecedented efforts at reducing innocent civilian casualties in war, in ways that the international law of war crimes does not itself require.

3) Without fully affirming its legal status, diplomats everywhere earnestly proclaim their countries' 'responsibility to protect' the denizens of distant societies from mass atrocity by local despots.

4) Inspired by a growing global expectation of 'effective remedies' for mass atrocity victims, national legislators in many countries engage in anguished deliberations over how best to provide such persons with some form of civil compensation or administrative redress.

5) Heads of state in Turkey suffer worldwide chastisement in parliamentary resolutions for failing to acknowledge and apologise for their distant predecessors' policies of genocide, despite the absence of any legal duty to issue such proclamations. Similarly, Japanese leaders have increasingly become targets of official condemnation by regional neighbors, victimised by Japan's crimes of WWII.

These initiatives give rise to a number of questions. To what extent and for what reasons have they evaded or eluded juridicisation? What influence, if any, does international law nonetheless exercise upon their workings, if only at the margins? And what influence in turn have these initiatives had, or may likely have, upon law? When does the particular initiative serve to buttress the commitments of international law, to resist such law, and when does it simply stand aloof, charting a different but compatible path? If we compare and contrast the five efforts, what overall patterns emerge and can such patterns be explained by any existing or imaginable theory of international law's place in the world?

The non-juridical aspects of these responses present a puzzle, if not an outright embarrassment, for anyone concerned with strengthening the response to

mass atrocity by international law and international tribunals. The mainstream view within the field, and among lawyers and rights advocates more generally, is that atrocity responses should be governed by law and undertaken to a substantial degree by legal institutions, often international ones. Yet much of the most promising and intriguing action today lies elsewhere.

To imply that there is a problem here might be to succumb to a certain 'legalism'—our professional tendency to view the delivery of justice as properly the monopoly of the state and its law, or of only those international institutions to which states formally delegate law-making authority. Such 'legalism' in responses to mass atrocity has been subject to trenchant criticism. More generously, we might see the 'problem' of international law's relative absence from these initiatives as simply a legitimate expression of our desire to lend a helpful hand, with (what we consider to be) relevant expertise, to such morally salutary developments. And since the non-legal initiatives seek to coerce conduct, they necessarily raise questions about the legitimacy of limiting freedom without the accompanying protections of formality, neutrality, and accountability which law may uniquely provide. International lawyers are not the only people vexed by the curious conundrum. Many of their creators and proponents view such initiatives—however successful in certain respects—as unstable, precarious, in need of support and consolidation by international law, through the forms of institutionalisation it alone can provide, they believe. . . .

In their central aim and overall import, the new non-juridical initiatives sketched above at first seem congruent with the major progress of recent years in holding perpetrators of mass atrocity accountable for their crimes. That progress takes a decidedly juridical form, in the creation of several criminal tribunals (international and hybrid national-international), in the significant number of high-profile cases they have processed, and in their judicial development of legal doctrines imposing clearer, more stringent demands upon those who employ force in service of their political aims. The creation of an International Criminal Court, in particular, reflects a great emboldening of international law's moral agenda in this area.

National courts as well, increasingly applying rules of international law, have been integral to the legalising turn. The upshot has been a growing 'juridification' of the world's response to mass atrocity, in the sense of a collective insistence on extricating the terms of that response from the influence of 'politics,' in a word, an influence perceived as almost invariably corrupting. It should not pass without brief observation here, at least, that many millions of people throughout the world now look to these developments with great hope and yearning.

All these considerations make the conspicuously non-juridical aspect of the initiatives mentioned above that much more perplexing, and worthy of reflection. We must ask: are these concerted efforts to improve the world's response to mass atrocity likely to continue in their nonjuridical form? Or do they show signs of likely assimilation to the more prominent forces of legalisation just noted? If they will persist in standing significantly apart from these forces, do they merely represent curious contingencies, anomalous outliers to deeper trends and abiding tendencies, disclosing no general significance—practical or theoretical? Or do they hint at serious and even inherent limits to the process of juridification, suggesting places where it cannot and will never successfully go? If so, then study of these conscientious initiatives should help identify the likely future contours of international juridification itself. This in turn will educate us lawyers about where and how we might most effectively press forward and make a valuable contribution—and where we may not. . . .

Despite some significant differences between them, the organised initiatives examined all find their chief inspiration and institutional footing in social forces and political processes—domestic and transnational—largely insusceptible by nature to international juridification. That these efforts have operated in ways exogenous to the field of international law is not a contingent fortuity, but an ineluctable fact. It would be misguided, even counter-productive at key points, to insist on somehow rendering them into international legal form. We international lawyers should resist the temptation to take on board these salubrious responses to mass atrocity, according them juridical recognition and endorsement, in hopes of bolstering their prospects. These efforts will and should remain mostly beyond our professional ken, notwithstanding the revealing and occasionally fruitful interactions between it and them. . . .

[D]ifferences between the legal and extra-legal responses to mass atrocity ultimately prove more salient, sometimes strikingly so, than the congruencies, limiting the scope of effective interchange and frictionless reciprocal endorsement. Our instances of response to atrocity often find effective expression, take organisational form; in ways that international law fails even conceptually to cognise, much less practically advance. These pragmatic and theoretical 'failures,' if they may be so described, owe to reasons that no measure of good intentions and professional ingenuity on our part, as international lawyers, can hope—or should therefore seek—to overcome. What might these reasons be? . . .

[P]owerful states have no interest in, and effectively prevent, juridification from going further, on this view, since that process is a means of 'moralising' the resolution of questions which states prefer to leave to the play of power. Such

considerations loom vaguely in the background within most of our case studies, to be sure. . . .

A second hypothesis would be that international law's stance toward these salubrious initiatives may be limited not so much by external geopolitical constraints on its sphere of operation as by its own normative commitments, particularly its implicit liberalism, i.e., the moral and political theory underlying much of Western legality. For instance, an official apology for mass atrocity (or other extensive human rights abuse), delivered on behalf of an entire national population, for the misconduct of unelected prior leaders who ruled long ago, over an altogether distinct governmental entity (e.g., the Ottoman Empire vs. modern Turkey), sits uneasily with most understandings of liberalism. So does the extensive public provision of 'reparations' to beneficiaries bearing only the most indirect relation to immediate victims of atrocity. Yet mass atrocity often calls forth both such remedies today, in many countries.

In such situations, we have more reason to be concerned about the undesirability of extending international law's reach in requiring such practices than with the practical impossibility of so doing—the preoccupation of avowed 'realists' in the study of international politics. We might understandably wish to see international law take no position at all on such contentious issues, steer clear altogether. For the question of just how liberal a national society we truly wish to inhabit—in principled but uncompromising ways that might foreclose such 'collectivised' atrocity responses—is likely best resolved by elected representatives more sensitive to domestic public sentiment than us international humanitarian lawyers, with our promiscuous proclivity for pronouncing and propagating (what we consider to be) universalistic moral truths.

A related possibility is that there exists a category of normative claims—Kant calls them 'imperfect duties'—that properly influence our conduct in non-justifiable ways. These duties are imperfect in that they are not clear enough about whom they bind, and in which concrete ways, to warrant legal liability for infraction. The 'responsibility to protect' potential victims of mass atrocity in other countries is surely a plausible candidate, at least, for such characterisation. So are, in differing measure, some of the other initiatives here examined. . . .

We must also consider the possibility that obstacles to further juridification of the world's response to mass atrocity turn out to be quite different . . . , disclosing no overarching pattern, belying efforts at generalisation and theorisation. . . .

In recent years international law has devoted great efforts to reduce, if not quite eliminate, the distorting influences of power politics in how the world responds to mass atrocity. This effort has not failed, exactly. In fact, the aspiration for a body of international criminal law that is morally meaningful and relatively determinate has been so broadly achieved in recent years that the central and harder questions we must now ask of this field are quite different from those of the last century. The proper place of political considerations, of democratic opinion especially, in determining official response to such crimes must be reassessed and, in key respects, revalorised.

The prospect of liability before courts of law, national or international, remains and will remain far less significant than the influence of such political forces, broadly speaking, in restraining and redressing mass atrocity. There is no reason why such political pressures should necessarily find full expression through formal legal mechanisms. This is true even as the pressures at issue work to give additional effect to aims unequivocally embraced by international law as well. . . .

The most compelling objection to international juridification, here as in other areas, has always been its apparent 'democracy deficit,' the relative unaccountability of international decision-makers to those affected by their decisions at the national level, i.e., those who are asked to entrust international legal institutions with governance authority over them. [Other initiatives] offer an alluring counterpoint . . . for they hold out the prospect of greater accountability to the world community—for both those perpetrating mass atrocity and those claiming authority to redress it—through forms of normative ordering that avoid the delegation of coercive legal powers beyond the nation-state. For that reason these organised efforts may offer the provisional basis for an alternative model of international response to atrocity, or at least a necessary supplement to more juridicised approaches—where and whenever the latter give out. This is, at least, a possibility requiring investigation and reflection herein. . . .

Thus, mass atrocity—because of its surpassing moral exigency—will enthusiastically call forth voluntary initiatives at first requiring no complex global legal apparatus. Over time their limited efficacy will reveal, however, the unavoidable need to put the world's response to such recurrent crises on stronger institutional footing, an objective which juridification surely advances. Beginning, then, with an International Criminal Court, prosecuting only the world's most grievous wrongdoings, the empire of international law will expand willy-nilly. By demonstrating its increasing efficacy, it will move into territory where staunchly liberal societies like the U.S. may not wish to follow. Whether initiatives like those here explored seriously risk our descent along such a slippery slope to

serfdom is a question over which reasonable readers may differ. It will occasionally press itself upon our consideration, from an ever-present backdrop where it hovers gloweringly. . . .

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